APPROVED **[2021] IEHC 175**

THE HIGH COURT

2018 No. 4100P

BETWEEN

EVERYDAY FINANCE DAC

PLAINTIFF

AND

MARY BURNS
GERALD BURNS

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 26 March 2021

INTRODUCTION

1. This judgment addresses the allocation of the costs of a motion to transfer proceedings from the High Court to the Circuit Court. The motion had been resisted unsuccessfully by the plaintiff. The plaintiff accepts, in principle, that it is liable to pay the costs of the motion, but submits that these costs should be measured on the Circuit Court scale.

2. The determination of the appropriate costs order turns largely on whether it had been "reasonable" for the plaintiff to pursue the proceedings before the High Court, in the sense that the term is used under section 169 of the Legal Services Regulation Act 2015 ("***the LSRA 2015***").

PROCEDURAL HISTORY

3. These proceedings have been taken pursuant to section 74 of the Land and Conveyancing Law Reform Act 2009. The case, as pleaded, is that the first named defendant transferred

certain lands to her son, the second named defendant, at a time when those lands were subject to a charge registered in favour of the plaintiff's predecessor in title. (Everyday Finance DAC was substituted as plaintiff by order dated 11 January 2021).

4. The second named defendant issued a motion seeking to have the proceedings transferred to the Circuit Court. The motion came on for hearing before me on 8 February 2021 and I delivered a reserved judgment on the matter on 22 February 2021, *Everyday Finance DAC v. Burns* [2021] IEHC 105 ("***the principal judgment***").

5. As appears from the final paragraph of the principal judgment, I offered the provisional view that the second named defendant, having succeeded in obtaining an order for transfer to the Circuit Court, would ordinarily be entitled to his costs. If the plaintiff wished to contend for a different form of costs order, then written legal submissions were to be exchanged between the parties in accordance with the timetable directed.

6. Both parties duly filed written legal submissions and the costs application has been determined on the papers.

DISCUSSION

7. Order 99, rule 2(3) of the Rules of the Superior Court indicates that the High Court should endeavour to make a costs order at the time it determines an interlocutory application (save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application). This rule is especially apposite here given that the effect of the order transferring the proceedings to the Circuit Court is that the High Court's involvement in the case has now come to an end.

8. The default position under Order 99 of the Rules of the Superior Courts and Part 11 of the LSRA 2015 is that the successful party is entitled to costs as against the unsuccessful party. The court does, however, retain a discretion to depart from the default position.

The second named defendant, Mr Burns, has been entirely successful in his motion to have the proceedings transferred to the Circuit Court. The default position is that Mr Burns is entitled to recover the costs of the motion as against the unsuccessful party, i.e. the plaintiff.

9. The plaintiff accepts that it is, in principle, liable for the costs of the motion. However, the plaintiff submits that the costs should be confined to costs on the Circuit Court scale. This submission is based on the fact that, in anticipation of the motion to transfer, the plaintiff had suggested that the proceedings should be retained in the High Court but that the costs would be confined to the Circuit Court scale. It is submitted that in exercising its discretion on costs, the High Court should have regard to the reasonableness of the plaintiff's approach.

10. More generally, it is noted that the Court of Appeal judgment on the allocation of jurisdiction, which had been relied upon in the principal judgment in the present proceedings, had been the subject of an application for leave to appeal to the Supreme Court at the time these proceedings had been instituted. The position is put as follows in the written legal submissions (at paragraph 4).

> "The Court of Appeal in *AIB plc v Gannon & Fair [2017] IECA 291* considered the interpretation of Section 11(2) of the 1936 Act. At the time the Plenary Summons herein issued, the decision in *Gannon* was under appeal to the Supreme Court. Whilst it is noted that the Supreme Court found the Court of Appeal had not departed from well-established principles, it is respectfully submitted that it was reasonable for the plaintiff, in its belief that the level of indebtedness should have a bearing on its election of jurisdiction, to issue the proceedings in the High Court."

11. The implication being that it had been reasonable for the plaintiff to institute these proceedings in the High Court given the then state of the case law.

DECISION

12. The considerations to which a court is to have regard in the exercise of its discretion on costs are identified, principally, at section 169 of the LSRA 2015. The overarching considerations are the particular nature and circumstances of the case, and the conduct of the proceedings by the parties. One of the issues which may be relevant in assessing conduct is whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings (section 169(1)(b)).

13. The concept of reasonableness implies something more than simply that a party acted *bona fide* in its conduct of the proceedings. Were it otherwise, and were a party able to resist an application for costs merely by demonstrating that it had conducted the proceedings in good faith, then the utility of the costs regime in vindicating the constitutional right of access to the courts would be undermined. (As to the purpose of costs, see, generally, *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535).

14. The threshold for reasonableness is higher. There must be a factor over and above the conduct of proceedings in good faith which justifies a departure from the default position that the successful party is entitled to its costs. One example of such a factor would be where it had been in the public interest that an issue be pursued, notwithstanding that the issue was ultimately lost. Whereas there is no predetermined category of "public interest" cases which fall outside the full ambit of the principle that costs follow the event, a court may, on a case-by-case analysis, depart from the default position on a reasoned basis, indicating the factors which, in the circumstances of the particular case, warrant such a departure. (See, generally, *Dunne v. Minister for the Environment* [2007] IESC 60; [2008] 2 I.R. 775).

15. The factors called in aid by the plaintiff in the present proceedings are more mundane. The first is the plaintiff's offer that costs be confined to the Circuit Court scale. This

offer did address one of the objections made to the proceedings remaining in the High Court. As explained in the principal judgment, however, costs are not the only consideration on an application to transfer. This court held, by specific reference to the judgment of the Court of Appeal in *Allied Irish Bank v. Gannon* [2017] IECA 291; [2018] 2 I.R. 239, that it had not been "reasonable"—in the sense that that term is used under section 11(2) of the Courts of Justice Act 1936—for the plaintiff to have commenced the action in the High Court. The action does not give rise to any novel issue of law or present complex facts such as might benefit from a hearing before, and a written judgment of, the High Court. There are also practical and logistical reasons as to why the action should be heard before the Circuit Court in Cork.

16. Whereas the plaintiff's offer to confine costs to the Circuit Court scale was no doubt made in good faith, it did not render the commencement of the action in the High Court "reasonable". Nor did it make it "reasonable" for the plaintiff to seek to resist the application to remit the proceedings to the Circuit Court.

17. The second factor relied upon is the supposed uncertainty in the case law at the time these proceedings were instituted before the High Court. It is correct to say that, at that time, there had been an application for leave to appeal pending in respect of the Court of Appeal's judgment in *Allied Irish Bank v. Gannon*. However, the principles governing the transfer or remittal of proceedings are well established, and leave to appeal was ultimately refused by the Supreme Court for precisely that reason. Moreover, even if the plaintiff had been in any doubt as to the legal principles initially, the Supreme Court's determination had been published some two and a half years prior to the hearing of the motion to remit. Notwithstanding this, the plaintiff, as it was perfectly entitled to, contested the motion. Having been unsuccessful, however, the plaintiff cannot rely on any supposed uncertainty in the case law at an earlier time to resist costs.

CONCLUSION AND FORM OF ORDER

18. The plaintiff chose to institute the within proceedings before the High Court notwithstanding that the Circuit Court had concurrent jurisdiction. This court ruled in its principal judgment that it was not "reasonable"—in the sense that that term is used under section 11(2) of the Courts of Justice Act 1936—for the plaintiff to have commenced the action in the High Court.

19. The moving party, the second named defendant, having succeeded in his motion to transfer the action to the Circuit Court is entitled to an order for costs in his favour. There is no proper basis for confining those costs to the Circuit Court scale. The motion had been heard and determined before the High Court, and the second named defendant is entitled to recover the costs so incurred. The costs are to include the costs of the written legal submissions on the costs application. The costs are also to include all reserved costs. The costs are to be adjudicated (measured) by the Office of the Chief Legal Costs Adjudicator in default of agreement.

Appearances

Niamh O'Donnabhain for the plaintiff instructed by OSM Partners
Frederick W. Gilligan for the second named defendant instructed by Hallissey & Partners LLP

Approved Garrett Simons