



**THE COURT OF APPEAL  
CIVIL**

**Unapproved  
No Redactions Needed**

**Costello J.  
Pilkington J.  
Butler J.**

**Neutral Citation No. [2024] IECA 82**

**Court of Appeal Record No. 2022/111**

**High Court Record No. 2019/115Sp**

**BETWEEN/**

**PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY**

**PLAINTIFF/APPELLANT**

**- AND -**

**JOHN FOX**

**DEFENDANT/RESPONDENT**

**-AND-**

**Court of Appeal Record No. 2022/112**

**High Court Record No. 2019/129Sp**

**BETWEEN/**

**PROMONTORIA (OYSTER) DESIGNATED ACTIVITY COMPANY**

**PLAINTIFF/APPELLANT**

**- AND -**

**TOMAS LYNN**

**DEFENDANT/RESPONDENT**

**JUDGMENT of Ms. Justice Pilkington delivered on the 18<sup>th</sup> day of April 2024**

1. This judgment is in respect of costs only.
  
2. It arises following this Court's judgment<sup>1</sup> in which it upheld two appeals brought by Promontoria (Oyster) Designated Activity Company ('Promontoria') in respect of a single issue; whether Promontoria could rely upon its registered liens as security for further advances to a debtor, where those advances took place after 31 December 2009, pursuant to the provisions of s.73 of the Registration of Deeds and Title Act 2006.
  
3. The issue before this Court was therefore a discrete one. Whilst the litigation between the parties involves well charging proceedings instituted by Promontoria against the respective respondents, this discrete issue was considered separately within those proceedings by the High Court<sup>2</sup>. Thus the judgments of both Courts only deal with this issue and I will refer to each proceeding as '*Fox*' and '*Lynn*' respectively.
  
4. Before this Court both appeals in *Fox* and *Lynn* were heard together; the issue before the Court being identical in both. The same counsel represented both respondents.
  
5. At the conclusion of my principal judgment, I indicated my provisional view that Promontoria, having been entirely successful, should be entitled to the costs of both appeals, on the basis that they cannot recover more than one set of costs. In addition, the Court invited

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<sup>1</sup> [2023] IECA 76

<sup>2</sup> Both by Simons J. [2022] IEHC 97 (*Fox*) and [2022] IEHC 99 (*Lynn*)

written submissions from the respective parties should they wish to contend for an alternative order.

6. Submissions have been received on behalf of Mr Fox. Mr Fox advances his entitlement to certain specific categories of costs within the High Court proceedings and also asks that this Court make no order for costs in respect of his unsuccessful appeal.

7. No submissions have been received on behalf of Mr Lynn.

8. Submissions have also been received by Promontoria dealing separately with the *Fox* and *Lynn* proceedings before the High Court and as a single action on appeal.

9. In considering the issue of certain High Court costs that are sought within the *Fox* proceedings, it is apparent that the parties (on behalf of both Mr. Fox and Promontoria) have advanced their written submissions on the premise that this Court will deal with all outstanding issues in this litigation. That is not the case. This Court is only considering costs in respect of the discrete issue that arose before the High Court and this Court. The remainder of the well charging proceedings remain extant.

### **High Court Costs**

#### **Order of the High Court - *Fox***

10. In *Fox* the Order of the High Court of 4 April 2022 (perfected 6 April 2022) was that the defendant (*Fox*) recovered his costs of the action on the High Court scale “*to include costs of the written submissions and all reserved costs and the costs of the application made*

*on the 21<sup>st</sup> day of March 2022 by Counsel for the Plaintiff such costs to be adjudicated in default of agreement under Part 10 of the Legal Services Regulation Act 2015”.*

**Order of the High Court - Lynn**

11. In *Lynn* the costs order of Simons J. was “*that the Defendant do recover as against the Plaintiff 2/3 of the costs of this action such costs to be adjudicated in default of agreement under Part 10 of the Legal Services Regulation Act 2015*”.

**Fox**

**Submissions by the Respondent in respect of High Court costs**

12. Mr Fox seeks certain specific costs within the High Court proceedings in respect of two specific matters that did not form part of this appeal. They relate to;

**(a) The remittal application**

13. The Respondent in *Fox* seeks costs arising from his unsuccessful application in the High Court for the remittal of those proceedings to the Circuit Court. This Order was refused by the trial judge in a separate judgment<sup>3</sup>.

14. This judgment and order was not appealed. The remittal application formed no part of this Appeal accordingly no part in any costs Order that this Court proposes to make.

**(b) Costs of 21 March 2022**

15. The Respondent also seeks the costs of an additional application before the High Court on 21 March 2022 which is in turn referenced in the Court Order of 4 April 2022 (recited at

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<sup>3</sup> [2020] IEHC 12

para. 10 above). From its terms it appears the matter was listed before the Court on 21 March 2022, it appears to deal with the question of costs and had to be adjourned as the Court had no papers. The Respondent contends that as the High Court awarded him the costs of the application made on the 21<sup>st</sup> day of March 2022, he should have the benefit of it.

**16.** No transcript has been provided in respect of the matters before the Court on 21 March 2022, nor a copy of the ex tempore judgment referred to within the Respondent's submissions. As with the remittal application above, this application formed no part of this Appeal and accordingly no part in any costs Order that this Court proposes to make.

**Submission by Promontoria in respect of High Court costs**

**17.** The Appellant submits that this Court should set aside all costs orders made by the High Court and substitute them with the usual order for costs, to include the costs of the remittal application. The Appellant submits that having succeeded before this Court it is entitled to its High Court costs on the basis that costs follow the event.

**18.** In respect of the hearing on 21 March 2022, Promontoria contends that the Respondent has failed to advance evidence before this Court other than that reflected in Simons J.'s Order of 4 April 2022.

**Submissions re costs in Lynn**

**19.** Promontoria contends that the High Court award in *Lynn* was restricted to 2/3rds of his costs on the basis that, whilst Mr Lynn had succeeded before the High Court, he had not done so on the basis of any legal argument advanced by him, but rather arising from the Court's decision in *Fox*. Again the Appellant submits that having succeeded before this Court it is entitled to its High Court costs on the basis that costs follow the event.

**Submissions on Costs in the Court of Appeal**

***Fox***

20. The Respondent urges that this Court consider making no order as to costs, having regard to what it alleges to be the conduct of Promontoria in respect of the matters before the High Court on 21 March 2022 which he has raised in respect of his entitlement to certain High Court costs and which has already been considered above. He also contends that, arising from the remittal application or rather the Court's refusal to accede to it, the Appellant benefitted from these proceedings being heard before the Court of Appeal. As set out above the remittal application was refused by the High Court and that Order was not appealed.

***Lynn***

21. Within his Notice of Appeal Mr Lynn indicated that he intended to cross appeal in respect of the costs order of the High Court, seeking its full costs rather than the 2/3rds apportionment determined by Simons J. No submissions were made to this Court in respect of this aspect of the cross appeal and in any event the High Court's judgment in favour of Mr Lynn was overturned on appeal.

**Promontoria on Costs in *Fox***

22. Promontoria asks that if this Court is minded to make final Orders in the *Fox* proceedings, then it seeks the remainder of the Orders within its well charging special summons proceedings, specifically the Orders sought at paragraphs A-F (inclusive) within the prayers for relief within the Special Summons.

23. The Appellant submits that in any event, having succeeded before this Court it is entitled to its costs on the basis that costs follow the event.

#### **Promontoria on Costs in Lynn**

24. The Appellant also confirms that if final orders are to be made by this Court then, as in *Fox*, the Appellant also seeks the remainder of the Orders within its well charging special summons proceedings, specifically the Orders sought at paragraphs A- J (inclusive) of the prayer for relief within the Special Summons seeking well charging reliefs.

25. The Appellant submits that in any event, having succeeded before this Court it is entitled to its costs on the basis that costs follow the event.

#### **Discussion and Conclusion**

##### **S.169 of the Legal Services Regulation Act, 2015 (“the 2015 Act”)**

26. The core principles relating to an award of costs are contained in sections 168 and 169 of the 2015 Act, and O. 99 of the Rules of the Superior Courts as recast by S.I. 584 of 2019 (“the Recast” RSC).

27. Under section 169(1) of the 2015 Act a party who is entirely successful in civil proceedings is entitled to an award of costs against the party who was not successful in those proceedings unless the court orders otherwise. The burden rests with the respondent, in these cases Mr Fox and Mr Lynn respectively, to show that this general rule, which is that costs

shall follow the event unless the court otherwise directs, ought not be followed.<sup>4</sup> In deciding whether to make a different order, the Court must have regard to the nature and circumstances of the case, the conduct of the proceedings by the parties and to a list of factors set out in subparagraphs (a) to (g) within that section.

**28.** The Appellant argues that costs follow the event, in both cases before the High Court and on appeal in accordance with s.169.

**29.** In both *Fox* and *Lynn* the Appellant asks that this Court make final Orders in respect of its well charging proceedings within the paragraphs it has identified in the respective special summonses. In essence these reliefs comprise its application for well charging orders. This approach also appears to be endorsed by those acting for Mr Fox. Mr Lynn, in advancing no submission, has expressed no view.

**30.** It is my view that, as this judgment has only dealt with a discrete legal issue, it would not be appropriate for it to give judgment for any final Orders outside the parameters of this Appeal.

**31.** In my view any order as to costs can only be determined in respect of the Appeal from the judgments of Simons J. delivered on 7 March 2022 (*Fox*) and 15 March 2022 (*Lynn*) and not in respect of any other issues that remain to be determined by the High Court within the well charging proceedings.

### **Decision - Court of Appeal – costs – *Fox* and *Lynn***

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<sup>4</sup> *Veolia Water UK Plc. v. Fingal County Council (No. 2)* [2007] 2 IR 81 at 85



**32.** The submissions filed by Mr Fox do not advance any grounds within the matters listed at section 169(1) of the 2015 Act which might persuade this Court to exercise its discretion against the making of the usual or default order for costs in favour of the successful party.

**33.** I can see no basis upon which it can make any Order within *Fox* and *Lynn* other than costs must follow the event in accordance with s. 169 of the 2015 Act.

**34.** It is to the Respondents' mutual benefit that this Court's provisional view reflected that its Order as to costs should be restricted to one set of costs on a joint and several basis on the grounds that this appeal was run as a single action and there was joint representation. This Court was required to adjudicate upon a single issue that arose in the context of well charging proceedings. Arising from the High Court judgments in *Fox* and *Lynn* was an issue common to both respondents.

### **Summary**

**35.** Promontoria is entitled to its costs before the High Court in the *Fox* application leading to the judgment of Simons J. on 7 March 2022, such costs to be adjudicated in default of agreement. This does not include the costs of the remittal application, which formed no part of any issue before this Court.

**36.** In *Lynn* the Order for the costs of the hearing in the High Court must now reflect Promontoria's successful appeal and accordingly he should pay Promontoria's High Court costs, with such costs to be adjudicated in default of agreement.

**37.** Any other outstanding issue(s) that may arise within the High Court proceedings in *Fox* and *Lynn* can be dealt with by way of remittal of these proceedings to the High Court.

**38.** In respect of the costs of this appeal Promontoria is entitled to the costs of one appeal on a joint and several basis against both Mr Fox and Mr Lynn, with such costs to be adjudicated in default of agreement.

**39.** As the remaining issues will require remittal to the High Court for the ultimate determination of the *Fox* and *Lynn* proceedings, this Court will grant a stay on its orders of costs pending final adjudication by the High Court.

### **Stay**

**40.** The remaining issue is an application for a stay, sought only within the *Fox* proceedings. The parties appear to be in agreement as to its terms, subject to this Court. Mr Fox seeks a stay for the time period permitted for an application for leave to appeal to the Supreme Court pursuant to RSC O.58 and in the event an application is made that the stay continue pending the determination of any such application for leave to appeal and the appeal itself (assuming that such leave is granted).

**41.** The Appellant consents to a stay, in the *Fox* proceedings only, for 28 days and in the event that the Respondent lodges a Notice of Appeal seeking leave to appeal to the Supreme Court within that time, the stay should last until such time as the application for leave to appeal is determined.

**42.** In these circumstances the Court, noting that no application has been made for a stay on behalf of Mr Lynn, will grant the respondent Mr Fox a stay on its Orders for 28 days and in the event that this respondent lodges a Notice of Appeal seeking leave to appeal to the Supreme Court within that time, the stay should last until such time as the application for

leave to appeal is determined or, if leave is granted, until the determination of the appeal by the Supreme Court.

**43.** *As this judgment on costs is to be delivered electronically both Costello and Butler JJ have indicated their agreement with it and the orders I have proposed.*