

**THE HIGH COURT  
CIRCUIT APPEAL**

**[2019 87 C.A.]**

**MIDLANDS CIRCUIT**

**COUNTY OF LAOIS**

**IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012-2015**

**AND**

**IN THE MATTER OF MARK FAY (A DEBTOR)**

**JUDGMENT on costs of Mr. Justice Denis McDonald delivered on 8th May, 2020**

1. This judgment deals with the costs of this appeal from the Circuit Court. The substantive appeal was the subject of a judgment delivered by me on 6th April ([2020] IEHC 163). For the reasons discussed in that judgment, I ultimately determined that I should dismiss the appeal brought by the objecting creditor, Pepper Finance Corporation (Ireland) DAC ("*Pepper*") from the decision of the learned Circuit Court judge. Instead, I affirmed the order made by the Circuit Court confirming the coming into effect of a personal insolvency arrangement proposed on behalf of the above named debtor, Mr. Mark Fay, by his personal insolvency practitioner, Ms. Judy Mooney ("*The practitioner*").
2. Following delivery of judgment electronically on 6th April, 2020, I invited submissions from the practitioner and from Pepper in relation to the issue of costs. When no submissions were received within the timeframe envisaged in my judgment of 6th April, 2020, the registrar wrote to the parties that I was proposing to proceed on the basis that there should be no order as to costs. Following that communication from the registrar, written submissions were delivered on behalf of the practitioner in which she formally sought an order for costs. It was stressed in those submissions, that under the Legal Aid Board "*Abhaile*" scheme, the practitioner is under an obligation to seek costs of any application in which an objection by an objecting creditor is overruled by the court. At the same time, those submissions acknowledged that, in the particular circumstances of this case, it might be more appropriate to make no order as to costs.
3. In circumstances where the practitioner (albeit belatedly) applied for the costs of the appeal, I invited submissions from Pepper. Thereafter, very helpful and comprehensive written submissions were delivered on behalf of Pepper which have been of considerable assistance to me in relation to the issue. In those submissions, Pepper urged that the court should make no order as to costs.
4. In its submissions, Pepper, as a preliminary matter, emphasised that the order to be made by the court should reflect the uncontested application made in the course of the hearing of the appeal to substitute Pepper as the objecting creditor in place of Cooperatieve Rabobank U.A. That application was uncontested and both parties proceeded on the basis that the court would formally make an order at the conclusion of the proceedings giving effect to the agreed position. If such an order has not already been perfected, then it will be incorporated in the final order to be made on foot of this judgment and on foot of the judgment of 6th April, 2020.

5. Insofar as the costs of the appeal are concerned, Pepper understandably emphasises the very particular facts of this case which are addressed in detail in my judgment of 6th April. The striking feature of this case was the issue which arose in relation to the quality of the evidence placed before the court by the practitioner. While the issue arose principally in relation to affidavits sworn by the debtor, I must keep in mind that the practitioner was the moving party and she, therefore, bears ultimate responsibility for the evidence which she chose to place before the court.
6. While I have determined the appeal against Pepper, I fully acknowledge that there were manifestly legitimate concerns expressed on behalf of Pepper in relation to the quality of the evidence and there were also understandable questions raised in relation to apparent inconsistencies between aspects of the averments made by the debtor on affidavit. In these circumstances, I believe that Pepper is correct to draw attention to the observation made by me in *Forde Egan (A Debtor)* [2020] IEHC 102, at para. 22, in relation to appeals where the objecting creditor makes submissions which concentrate on addressing genuine concerns in relation to the quality of the evidence available. In my judgment in that case, I indicated that, in many cases (and particularly in cases where issues arise on the evidence) it can be of considerable assistance to the court to have submissions from an objecting creditor in order for the court to properly consider whether the relevant conditions for the grant of relief under s. 115A of the Personal Insolvency Act, 2012 (as amended) have been satisfied in an individual case.
7. In the present case, there can be no doubt but that there were significant issues which required to be debated, not least the issue which arose in relation to the quality and acceptability of the evidence which was placed before the court by the practitioner. As noted in para. 4.13 of the written submissions of counsel for Pepper, the court could not have affirmed the order of the Circuit Court in this case on the basis of the evidence as it existed on 16th October, 2019 when the hearing of the appeal first commenced. That evidence was plainly defective.
8. It is of particular concern that the appeal hearing was opened by the legal team for the practitioner without drawing attention to the very serious defects which existed in the evidence (as described in my judgment of 6th April). Notwithstanding that the defects had been specifically highlighted in correspondence from Pepper's solicitors, Messrs. Sherwin O'Riordan, sent in advance of the appeal hearing in October, 2019, it was left to Pepper to raise the issue before the court. As emphasised by me in my judgment of 6th April, the defects in the evidence should have been brought to the attention of the court immediately by the legal team for the practitioner. Rather than proceeding with the hearing of the appeal, the issue should have been disclosed to the court and an application made to put back the hearing of the appeal pending a full investigation being made with a view to providing a comprehensive explanation to the court.
9. The court greatly appreciates the role played by Pepper in the appeal in this case. In my view, it was crucially important that the defects in the evidence were brought to the attention of the court. The raising of the issue led to the uncovering of a substantial

number of cases in which a similarly serious defect existed. The issue raised was genuinely of systematic importance.

10. As far as the substantive issues are concerned, I appreciate that, ultimately, I held against Pepper in relation to them. However, I can well understand why Pepper raised those issues and the submissions made by Pepper were of considerable assistance to me in resolving the question as to whether the conditions for relief under s. 115A were satisfied in this case.
11. In the circumstances described in paras. 7 to 10 above, I believe, having regard to the approach taken by me previously in *Forde Egan*, that this is not a case where I should award costs in favour of the practitioner. It seems to me that the appropriate and just order to make in this case is that there should be no order as to costs.
12. In the very helpful submissions delivered on behalf of Pepper, the relevant principles which apply under s. 169 of the Legal Services Regulation Act, 2015 ("*the 2015 Act*") were also debated. I do not believe that it is necessary, in this case, to resolve the question as to whether s. 169(1) applies in relation to the costs of a hearing under the 2012 Act. Section 115A(14) of the 2012 Act (as amended) contains a specific provision in relation to the costs of an application under s.115A. I believe that any question as to the interplay (if any) as between s. 115A(14) of the 2012 Act and s. 169 of the 2015 Act should be reserved for another day following full argument.
13. For present purposes, it is sufficient to note that, even if s. 169(1) of the 2015 Act applied, I have no doubt but that the appropriate approach to take would be to hold that there should be no order as to costs. While s. 169(1) proceeds on the basis that a party who is entirely successful in civil proceedings should be entitled to an award of costs, the court is empowered by the statute to have regard to factors such as the conduct of the parties, the manner in which they conducted their case, and whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. In my view, when these considerations are taken into account, it would be wholly inappropriate to make an order for costs in favour of the practitioner in respect of the appeal.
14. In this context, I am particularly concerned by the failure of the legal team for the practitioner to draw attention to the defects in the evidence before the court at the outset of the hearing of the appeal notwithstanding that they had been made aware of the defects in advance of the hearing by the solicitors for Pepper. Instead, they proceeded with the appeal on the basis of evidence which they knew, at that point, to be defective. In my view, that conduct was manifestly unacceptable and, in the event that s. 169 (1) of the 2015 Act applies, is sufficient to warrant the refusal of the application for costs in this case, notwithstanding that the practitioner succeeded on the appeal.

#### **Conclusion**

15. For the reasons discussed above, I will make no order as to the costs of the appeal. The only orders that will require to be made in these proceedings are (a) an order substituting

Pepper as objecting creditor in lieu of Cooperatieve Rabobank U.A. and (b) an order dismissing the appeal and affirming the order made by the learned Circuit Court judge.