

APPROVED

[2024] IEHC 560



THE HIGH COURT

2022 1883 P

BETWEEN

DANA POP

PLAINTIFF

AND

DAMIAN FORISTAL
J. RYAN HAULAGE LTD

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 September 2024

INTRODUCTION

1. This ruling addresses the incidence of the legal costs of a discovery motion. The discovery motion was determined by reserved judgment delivered on 27 March 2024, *Pop v. Foristal* [2024] IEHC 179 (“*the principal judgment*”).
2. The principal judgment offered a provisional view in relation to costs as follows:

“As to legal costs, my *provisional* view is that the plaintiff is entitled to recover the costs of the motion as against the defendants. Such costs to be adjudicated in default of agreement. The plaintiff has been entirely successful in resisting the motion. This court is in as good a position as the court of trial to allocate the costs of the motion. The outcome of the motion turned upon the principles governing discovery and not upon any issue which will be revisited by the court of trial. (See, by analogy, *ACC Bank v. Hanrahan*

NO REDACTION REQUIRED

[2014] IESC 40, [2014] 1 I.R. 1 (at paragraph 8)). If either party wishes to contend for a different form of costs order than that proposed, they should serve and file written legal submissions by 19 April 2024.”

3. The parties subsequently filed written submissions on 19 April 2024 and 15 May 2024, respectively. The defendants, having criticised aspects of the principal judgment, ultimately accept that a costs order should be made in favour of the plaintiff. The defendants seek to have a stay imposed on the execution of the costs order. The plaintiff, in her replying submissions, is critical of the fact that the defendants did not address the question of a stay in a more straightforward manner. It is objected that the defendants are seeking to use the costs application to re-argue the substantive issues that the court has already decided:

“In this instance the Defendants’ submissions appear to conflate an application to stay a costs award with an appeal. It appears that the Court is being asked to find that it made procedural errors and the wrong decision regarding the motion and then for those reasons to stay its award of costs.”

4. There is much force in this objection. The defendants’ written submissions do, indeed, imply that the motion was incorrectly decided. The written submissions should have been confined to argument on the allocation of legal costs. The merits of the discovery motion have already been determined by the principal judgment. If and insofar as the defendants consider that the principal judgment is erroneous, they have a remedy by way of an appeal to the Court of Appeal.

DISCUSSION

5. It appears that the only issue actually in dispute between the parties is whether there should be a stay on the execution of the costs order. The normal practice of this court is to impose a stay on the execution (although not necessarily on the adjudication) of interim costs orders pending the hearing and determination of

the proceedings. The logic underlying this approach is that whereas one party has the benefit of a costs order now, costs orders going the other way may be made during the course of the proceedings with the result that a balancing exercise will be required whereby opposing costs orders are set off against each other. Generally, it is preferable that the payment of costs await the resolution of the proceedings, rather than that the parties “*cash in*” interim costs orders from time to time.

6. Of course, exceptions to this general approach will be justified: for example, if there is a doubt as to the solvency of a corporate litigant, it may be preferable to allow an interim costs order to be enforced earlier. There is no suggestion of insolvency in the present case. Indeed, in circumstances where the proceedings arise out of a road traffic accident, it is to be presumed that both sides have the benefit of insurance.
7. The starting point, therefore, is that the court would be minded to impose a stay on the execution of the costs order. The unusual feature of the case is that the defendants—rather than simply write to the other side and seek their consent to such a stay—chose instead to file written submissions which criticise the findings in the principal judgment. It is implied, for example, that the court should have received a copy of a medical report notwithstanding that same had not been exhibited. It is also suggested that the court did not attach proper weight to the supposed delay on the part of the plaintiff in providing further particulars. Notwithstanding these criticisms, the written submissions do not resist a costs order. The only modification sought to the provisional view on costs, which had been offered in the principal judgment, is that a stay should be imposed.

8. It is unfortunate that the request for a stay was not addressed, in the first instance at least, by way of correspondence. Had this been done, it might have avoided the necessity of the parties and the court having to consider detailed written submissions on costs. This will have resulted in the parties incurring additional costs unnecessarily.
9. In the unusual circumstances of the present case, the interests of justice require that the following orders be made. First, a stay will be imposed on the execution of (but not the adjudication of) the costs order. In the absence of any concerns in relation to solvency, payment out pursuant to the costs order should await the determination of the proceedings. The net “*costs*” position will not be known until then. Secondly, the costs order in favour of the plaintiff will extend to include the additional costs incurred by her in preparing written submissions in response to the defendants’ written submissions of 19 April 2024. For the reasons already explained, the question of the stay could have been dealt with in a more straightforward and less costly manner by the defendants. It is appropriate that the plaintiff be entitled to recoup from the defendants the additional costs which the former will have had to incur.
10. For completeness, the criticism of the principal judgment made, although not pressed, in the defendants’ written submissions is not well founded. In particular, any suggestion that the court should of its own volition have adjourned the hearing of a discovery motion, which had been specially fixed, to allow a party to exhibit a medical report which it had commissioned itself, is untenable. It is a matter for the parties to ensure that their proofs are in order.
11. Similarly, the suggestion that the trial judge will be better placed to adjudicate on the costs of the discovery motion is not correct. The position has been

explained as follows by the Supreme Court in *ACC Bank v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1 (at paragraph 8)):

“[...] For example, if there is a dispute over discovery then that dispute will have been resolved before the case comes to trial. Of course, discovered documents may well be relied on at the trial and, indeed, in some cases may turn out to be decisive. But, at least in the vast majority of cases, the fact that the documents, with the benefit of hindsight, have turned out to be either very useful or of very little use, will not add very much, if anything, to an assessment of whether the positions adopted by the parties on a discovery motion were reasonable or appropriate. A judge hearing a discovery motion will, therefore, in almost all cases, be in a better position than the trial judge to decide where the costs of such a motion should lie. Like considerations apply to many other cases such as motions for further and better particulars.”

CONCLUSION AND FORM OF ORDER

12. For the reasons explained in the principal judgment, the order of the Deputy Master of 22 November 2023 will be discharged.
13. The plaintiff is entitled to recover the costs of the application for discovery as against the defendants. The costs include, *inter alia*, the costs of the listings and hearings before the Deputy Master; the costs of the listings and hearing before the High Court; all reserved costs associated with the motion; and the costs of the written submissions filed on 15 May 2024. In default of agreement between the parties, the costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015. There is a stay on the execution of (but not the adjudication of) the costs order pending the hearing and determination of the proceedings by the High Court.

Approved
Gemma S. Mass