UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 110

Record Number: 2018/231

High Court Record Number: 2017/4645P

Donnelly J.
Faherty J.
Haughton J.

BETWEEN/

PATRICK MCFADDEN

PLAINTIFF/RESPONDENT

- AND -

MUCKNO HOTELS LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 22nd day of April 2020

Introduction

1. This is an appeal from the order of Costello J. made on 3 May 2018 (perfected on 8 May 2018) whereby Costello J. determined costs in respect of an interlocutory injunction application, and ordered as follows: -

"**IT IS ORDERED** that the Plaintiff do recover from the Defendant the costs of the said application for short service, the costs of the interlocutory injunctions Motion up to the 22nd June, 2017 and the cost of the application this day when taxed and ascertained."

Background

2. The background to the proceedings is that the Appellant employed the Respondent as manager of Glencarn Hotel. By letter dated 2 August 2016 the Appellant through its solicitor Mr. Mallon made allegations against the Respondent, of drinking on the premises which required an explanation/investigation; and by a further letter dated 16 November 2016 the Appellant through its said solicitor, made allegations concerning the payment of musical performers in the hotel and of double booking, which also required an explanation. The Respondent's managerial responsibilities were withdrawn.

3. On 21 November 2016 the appointment by the Appellant of Mr. Michael O'Sullivan, a HR Consultant to investigate was notified to the Respondent. However the investigation was not commenced because the Respondent was on sick leave. The Respondent was certified unfit to work from early October 2016 and remained out until he was considered certified fit on 11 February 2017.

4. Following the Respondent's return to good health, on 23 February 2017 the Appellant's solicitor wrote to the Respondent notifying that he was suspended on full pay "pending the completion of this investigation and the preparation of a report". On 22 March 2017 he was notified the independent person now appointed to investigate was Mr. Oliver Costello B.L. In late March/early April, the investigator interviewed various individuals in the course of the investigation, and on 21 April 2017 met with the Respondent in company with his solicitor. Objection was taken by the Respondent/his solicitor in engaging with any matters arising outside of the allegations made against the Respondent in the letters of 2 August 2016 and 16 November 2016.

5. The investigator's report was completed on 3 May 2017 and found that the Respondent had engaged in behaviour that contravened the Appellant's Disciplinary Code, and that his actions amounted to gross misconduct, and it included a recommendation that the Appellant's Board take such disciplinary decisions as might appear appropriate. A copy of this report was received by the Respondent on 8 May 2017. Objection was taken that a number of findings fell outside the remit of the investigation.

6. The Respondent's salary was due to be paid into his bank account on 3 May 2017, but was not received.

7. By letter of 11 May 2017 the Appellant's solicitors wrote to the Respondent's solicitors indicating that the investigator's report had been considered, that the Appellant accepted its findings of fact, and that the Appellant proposed to take disciplinary action, which might include summary dismissal, and seven days was given for a response and reasons as to why the Respondent should not be dismissed.

8. The Respondent's solicitors Patrick J. Farrell replied on 18 May 2017 in a lengthy letter that will be referred to later in this judgment. In the second paragraph it was indicated that the Respondent's salary had ceased being paid since 3 May and in the third paragraph they sought "immediate payment of the salary due to Mr. McFadden", and stated that unless this was confirmed by close of business on Friday 19 May "we will be advising our client of his entitlement to seek urgent injunctive relief, without further notice to your client." In the remainder of the letter they express their client's concerns in relation to the manner in which the investigation was carried out and the contents of the investigator's report, and ended by indicating that the Respondent "is amenable to considering reasonable proposals *vis á viz* participating in a fair and lawful investigation".

9. In a further important letter of 19 May 2017 Mallon Solicitors responded. Firstly they indicated that "the employer will agree to pay Mr. McFadden's salary pending the determination of the disciplinary process." They then addressed the Respondent's solicitor's contentions in relation to the disciplinary investigation, and in summary they stood over the investigator's report. They ended stating "we are again affording Mr. McFadden a period of seven days to set out his reasons in writing as to why he should not be dismissed" indicating that if there was no response within that time frame "the employer will proceed to take such disciplinary action as it deems appropriate in the circumstances". This was the last correspondence before the proceedings commenced.

The proceedings

10. The Plenary Summons was issued on 23 May 2017 seeking interlocutory injunctions restraining the Appellant from further conducting the disciplinary investigation, from relying on the investigator's report, requiring the Appellant to continue to pay the Respondent's salary, compelling the Appellant to reinstate the Respondent as general manager, and restraining the Appellant from terminating the employment "other than in accordance with his legal and contractual entitlements and his right to fair procedures". The Respondent also sought declarations in similar terms, damages for breach of contract and exemplary damages for damage to his reputation.

11. A Notice of Motion was then issued on 23 May 2017, with leave of the High Court (Gilligan J.) for short service returnable to 26 May 2017, seeking the following interlocutory reliefs: -

(1) "An interlocutory injunction restraining the Defendant, its servants or agents, from further conducting the disciplinary investigation and/or procedure of and against the Plaintiff, as notified to the Plaintiff by the Defendant in their letters of the 2nd August and the 15th November 2016, other than in accordance with its legal and contractual entitlements and his right to fair procedure.

(2) An interlocutory injunction restraining the Defendant, its servants or agents, from relying on the purported findings of the disciplinary investigation into the Plaintiff's alleged conduct and/or the report dated the 3rd May, 2017 regarding the Plaintiff's alleged misconduct.

(3) If necessary an interlocutory injunction requiring the Defendant to pay the Plaintiff his salary pending further Order of this Honourable Court.

(4) If necessary an interlocutory injunction compelling the Defendant to end the Plaintiff's suspension and administrative leave and to reinstate him in his position as general manager pending further Order of this Honourable Court.

(5) If necessary an interlocutory injunction restraining the Defendant from terminating the Plaintiff's employment other than in accordance with his legal and contractual entitlements and his right to fair procedures.

(6) Further and other relief.

(7) Costs."

12. The Motion was grounded on an affidavit of the Respondent sworn on 23 May 2017. This and the Notice of Motion were served electronically on that date. A supplemental affidavit of the Respondent also sworn on 23 May 2017, purely for the purposes of exhibiting the investigator's report of 3 May 2017, was served electronically on 24 May 2017.

13. On 25 May 2017 the Appellant's solicitors wrote to the Respondent's solicitors seeking an adjournment to consider the matter, and in that letter undertook to pay the Respondent's salary and to postpone the disciplinary process pending the adjourned date.

14. On 26 May 2017 the Appellant offered interlocutory undertakings firstly to continue to pay his salary, secondly not to conduct the disciplinary investigation and/or procedure against the Respondent other than in accordance with his legal and contractual entitlements and his right to fair

procedures, and thirdly not to rely on the "purported findings of the disciplinary investigation into the Plaintiff's alleged misconduct and/or the report dated 3 May 2017 regarding the Plaintiff's alleged misconduct."

15. It is accepted that on the basis of that offer senior counsel for the Respondent adjourned the matter on consent to the 29 May 2017. As counsel for the Respondent apparently had difficulties attending court on that day the matter was further adjourned to the 22 June 2017. It also appears to be accepted that what was to happen on 29 May 2017, and subsequently did happen on 22 June 2017, was the giving of these undertakings in court by counsel for the Appellant in the form already offered.

16. In the meantime, a replying affidavit was sworn by Mr. John Deane, a director of the Appellant on 31 May 2017. In this affidavit Mr. Deane in essence refutes the concerns about the investigation expressed in the Respondent's affidavit and his solicitor's correspondence. He avers that the salary payment due on 3 May 2017 was not paid due to an oversight, and that as soon as the Appellant was made aware of the failure by the Respondent's solicitor's letter of 18 May 2017: -

> "14. ….immediate arrangements were made to pay the said salary and it had been paid on the date of the swearing of the Plaintiff's said affidavit being 23rd May 2017 but before the said affidavit was received by the Defendant. In this regard I beg to refer to the said letter dated 18th may 2017 exhibited at "PMcF 10" in the Plaintiff's said Affidavit sworn on 23rd May 2017. I undertake, and have been authorised by the Defendant to so undertake, that the Plaintiff's salary will be paid whilst he remains on administrative leave."

The following two paragraphs are also relevant to this appeal –

> "15. I say and am so advised by legal advisers that the matters which the Plaintiff has laid before the Honourable Court are capable of resolution in the disciplinary procedure which the Plaintiff seeks to prohibit or restrain but notwithstanding I say that the Plaintiff has elected to take a claim in the Honourable Court. I further say that at no time did the Plaintiff request the

> Defendant do what he now seeks to have done through orders of the Honourable Court. Neither did the Plaintiff warn the Defendant that unless certain actions were taken that he would be seeking the assistance of the Honourable Court.
>
> 16. I undertake, and I am so authorised by the Defendant to undertake, that pending the trial of the within action the Defendant will not dismiss the Plaintiff on grounds of misconduct and/or gross misconduct including the findings in the said investigation of the said Mr Oliver Costello."

In paragraph 20, Mr. Deane prayed the court not to grant the Respondent the reliefs sought or any relief, and to grant the Appellant the costs of the Motion.

17. The undertakings were formally recorded in the consent Order of Gilligan J. made on 22 June 2017, and followed the terms of paragraphs 1, 2. 3 and 5 of the Notice of Motion. By that Order the Motion also stood adjourned to 12 October 2017 and by consent the question of costs was reserved.

18. On 29 June 2017 the Appellant terminated the Respondent's contract of employment with notice in accordance with the terms of his contract, and did not seek to rely on the alleged wrongdoing concerned in the subject of findings in the investigation. Following this, the Respondent commenced unfair dismissal proceedings which were pending before the Workplace Relations Commission when the order appealed from was made, and this court was informed that those proceedings are still pending before the WRC at the present time.

The costs hearing

19. The question of costs ultimately did not come to be determined until it was heard before Costello J. on 3 May 2018, when after hearing argument at 2pm, she gave an *ex tempore* judgment granting the Respondent the costs of the application for short service (for the Notice of Motion), of the interlocutory application up to 22 June 2017 and the cost of the application for costs.

20. The Transcript of the judgment records the trial judge's reasoning.

"So, the question is, in order to determine whether the plaintiff is entitles to his costs against the defendant: firstly, did the application require to be brought in the first place? And I'm satisfied that it did. On the 18th of May 2017, the plaintiff's solicitors clearly set out the two matters in dispute, the non-payment of his salary while on administrative leave, and the issues that they had with the conduct of the disciplinary investigation. While the letter did not specify any particular undertakings that were required from the defendant. it was clear that further reliance upon the disciplinary investigation would result in an application being made to Court. So, the first requirement has been satisfied, because on the 19th of May 2017, the defendant's solicitors replied, and they made clear that they were continuing to rely upon the investigation and the report generated as a result of the investigation, and therefore if the plaintiff was to preserve his position, he was required to institute proceedings and to seek the relief from the Court. Then the defendant was given an adequate opportunity to deal with matters other than by way of court proceedings, because it would have been open to the defendant to agree not to rely upon the investigation and the report of Mr. Costello, and instead to proceed, as it did subsequently on the 29th of June 2017 to terminate the plaintiff's employment in accordance with the terms of his contract of employment. So, the second requirement, in my opinion is met: that the defendant was given an adequate opportunity to avoid the necessity of bringing the proceedings."

"The undertakings on the 22nd of June, given by the defendant to the Court, amounted to a success to the plaintiff on foot of this motion. It was not necessary that there be a hearing, and in this regard, it is important to rely upon the decision of the Court of Appeal, Mr. Justice Peart in *Irish Bacon Slicers v Weidemark Fleischwaren GmbH & Co.* On page eight of the judgment Mr. Justice Peart said: -

> 'The defendant has placed considerable reliance on the fact that there was no event, since there has been no court determination of the application in question. The reality, in my view, is that it was only the defendant which prevented this application being determined by the Court and he did so by offering to the Court the very undertaking which he'd been called upon by the plaintiff's solicitors to provide some five weeks previously.'

While the undertakings were not expressly sought in the letter of the 18th of May, the fact that the core issue was whether or not reliance should be placed upon the report emanating from the investigation was clearly established and, in my opinion, relying on *Irish Bacon*, it is clear that the undertakings amounted to a success and it cannot be said that there was no event within the meaning of the rule – the jurisprudence on costs.

The defendant had the opportunity to deal consensually with the matter and it only dealt with it consensually from the 22nd of June 2017, and there's no particular reason why it could not have been dealt with consensually earlier. So, on that basis, the plaintiff is entitled to the costs of the application for short service and for the interlocutory application up to the 22nd of May, and the plaintiff is also entitled to the costs of this application.

MS BOLGER: Sorry, judge, I think that's the 22nd of June, not the 22nd of May.

JUDGE: Sorry, 22nd of June, yes, thank you."

The permanent undertakings

21. Before considering this judgment, it is necessary to refer to two "permanent undertakings" recorded in the perfected Order of Costello J. of 3 May 2018 as follows: -

> "And it appearing that an agreement has been reached between the parties on undertakings to the Court
>
> and the Defendant through its Counsel providing the following permanent undertakings to the Court

1. In terms of paragraph 1 of the Notice of Motion namely not to conduct the disciplinary investigation and/or procedure of and against the Plaintiff, as notified to the Plaintiff by the Defendant in their letters of 2nd August and 15th November 2016, other than in accordance with his legal and contractual entitlements and his right to fair procedures.

2. In terms of paragraph 2 of the Notice of Motion namely not to rely on the purported findings of the disciplinary investigation into the Plaintiff's alleged conduct and/or the report dated the 3rd of May 2017 regarding the Plaintiff's alleged misconduct

By consent IT IS ORDERED that the Action do stand struck out".

22. There is an issue with these permanent undertakings, which Counsel for the Appellant asserts were not in fact agreed or consented to. The Transcript of the proceeding does show that they were only mentioned at the end of the hearing, and after the trial judge had granted a 21 day stay on the Order in relation to costs, starting at line 27: -

"MS. BOLGER: Judge, the entire proceedings are effectively –

JUDGE: I know that.

MS. BOLGER: And in those circumstances if the undertakings that were given in terms of paragraphs 1 and 2 of the Notice of Motion, they survived the proceedings, the others no longer apply –

JUDGE: Yes.

MS. BOLGER: … because of this determination. So the proceedings can be struck out on the basis of the costs award that your lordship has made today, but noting the undertakings

and those undertaking -

JUDGE: In paragraphs 1 and 2 to continue.

MS. BOLGER: In paragraphs 1 and 2.

JUDGE: On that basis, I will strike out the proceedings. The undertakings given on the 22nd of June 2017, that numbers 1 and 2 of the Notice of Motion continue. I'll put a stay on the costs order. It is a 21 day appeal to the Court of Appeal at this point in time? It is 28 day? 28 days. Okay. Well, okay. We'll do it until the Court of Appeal directions hearing, if an appeal is brought.

MS. BOLGER: Judge. I'm just conscious there's a journalist present in court and I am not sure if I made it clear earlier that my client denies all of the allegations as referred to by Ms. Donovan in her submissions. I just want to make that clear on behalf of my client that those allegations of wrongdoing were at all times denied.

MS. DONOVAN: I am very obliged, Judge.

JUDGE: Thank you."

23. From this it does seem that the question of permanent undertakings was raised at the end of the hearing, which counsel for the Appellant informed the court took place on a Monday in a busy court and was only intended to be a costs hearing. The Transcript does not record any express agreement on behalf of the Appellant to the giving of these two permanent undertakings. It would be unusual for permanent undertakings to be given in a costs hearing at the end of an interlocutory matter which had concluded, and it could only happen by agreement. It is far from clear that counsel was aware that this application would be made, or had instructions to give such undertakings, or agreed to the permanent undertakings.

24. The question of whether the permanent undertakings were in fact given, and whether the Order of Costello J. of 3 May 2018 is a correct record in that regard, is not properly before this court. I also

note that if such permanent undertakings were given they could have continuing significance in respect of the unfair dismissal claim pending before the WRC.

25. Of particular note is that the trial judge cannot have had regard to the recorded permanent undertakings when reaching her decision on costs as they were only raised after that decision was made.

26. For the reasons just given I do not consider that it would be just for this court to take into account the record of such permanent undertakings in coming to its decision on this appeal in relation to the costs award in the High Court.

The parties' submissions

27. In written and oral submissions counsel for the Appellant argued that it was not necessary for the Respondent to seek injunctive relief because an undertaking in relation to the Respondent's salary was given on 19 May 2017 and because further undertakings in relation to halting the disciplinary process and non-reliance on the investigation report were not sought in advance of the issue of the Notice of Motion, but were proffered on 25 May 2017 soon after it issued - all of which undertakings became recorded in Court on 22 June 2017. Counsel sought to distinguish *Irish Bacon Slicers* on a number of grounds, but primarily because specific undertakings were sought by the plaintiff in advance, but were not offered or given until the matter came before the court. It was submitted that this court should follow the approach of Laffoy J. in *O'Dea v Dublin City Council* [2011] IEHC 100 where she considered that in interlocutory matters costs should follow where a result is brought about by a *determination* of the court on issues before the court, rather than any supervening event, such as an agreement of the parties in which the court has not been involved. Counsel submitted that the "event" was brought about by acceptance of an offer by the Appellant, rather than any determination of the court. It was submitted that, contrary to what senior counsel for the Respondent had informed the High Court on 12 October 2017, the substantive matter had not "fallen away" in that orders were

sought by the Respondent regarding alleged breach of contractual right to fair procedures, alleged personal injury and alleged reputational damage which survived the termination of the Respondent's contract of employment in June 2017. Counsel for the Appellant submitted that this court should substitute the High Court order on costs in favour of the Respondent with "no orders to costs".

28. Counsel for the Respondent in written and oral submissions argued that the trial judge was correct in her assessment of the pre-trial correspondence, which amounted to a finding of fact which it would be manifestly unjust to require this court to re-examine – reliance was placed for this submission on the judgment of Denham CJ in *Leopardstown v Templeville Developments* [2017] 2 ILRM 393. Counsel relied on the decision in *Irish Bacon Slicers*, on the basis that the substance of the present proceedings had "fallen away" as a result of the undertakings given on 22 June 2017. It was submitted that the undertaking as to payment of salary was only given at the issuance of the motion, and the other undertakings were only given subsequently. Counsel sought to distinguish *O'Dea* on the basis that the application there for an injunction was partially heard before being adjourned and settled between the parties, whereas the present application was never heard in the High Court as undertakings were offered causing the substance of the matter to "fall away". It was submitted that *if* there was no "event" then that came about not by mutual settlement of the parties after engaging the court but by pre-emptive proffering of undertakings by the Appellant which rendered a substantive hearing of the action unnecessary. Counsel relied on the judgment of Peart J. in *Irish Bacon Slicers* quoted by the trial judge. It was submitted that the Respondent had a strong case in the interlocutory application and that all orders sought were likely to be granted. It was submitted that it was necessary for the Respondent to bring the application seeking interlocutory orders, and that the Respondent was afforded sufficient time to engage with the matter to attempt to circumvent bringing the matter before the court.

Costs of interlocutory applications

29. Order 99 of the Rules of the Superior Courts 1986 to 2019 was most recently amended by substitution and is now set out in the Schedule 1 in S.I. 584/2019, which applies with effect from 3 December, 2019. O. 99, r 1 now contains definitions, and O.99 r. 2 now governs the 'Right to Costs' and provides:

> "2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these rules:
>
> (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively" (this reflects the former O99 r.1(1)).
>
> (2) No party shall be entitled to recover costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.
>
> (3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.
>
> (4) An award of costs shall include any sum payable by the party in favour of whom such award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.
>
> (5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded."

Rule 2(3) reflects the wording of the former O.99 r.1(4A) that came into operation on 21 February, 2008 and was considered by Laffoy J. in *O'Dea* [2011] IEHC 100 and *Tekenable* [2012] IEHC 391 and Peart J in *Irish Bacon Slicers Limited* [2014] IEHC 293, and accordingly that jurisprudence continues to be relevant. Order 99 r.1(4A) itself replaced a regime where there was no onus on the court to determine costs on interlocutory applications, and courts tended to reserve the costs of interlocutory injunction applications – even where the application was successful – the reason being

that the issues had yet to be determined and new facts/discovery might lead to a different outcome at full hearing.

30. For the sake of completeness mention should be made of the Legal Services Regulation Act 2015, the statute now referred to in the new O.99. The substituted O.99 was promulgated following on the enactment of the 2015 Act and the introduction of a new system for the assessment of costs by Legal Costs Adjudicators. Section 168 now confers a statutory power on the courts in civil proceedings to award costs at any stage of the proceedings. Section 169(1) provides that an "entirely successful" party in proceedings is entitled to their costs "unless the court otherwise orders" and sets out the matters that the court must consider. This latter provision was not opened to the court; although it is not necessary to decide the point, it would seem to apply to the award of costs at the close of proceedings rather than costs of interlocutory hearings.

31. In *O'Dea v Dublin City Council* [2011] IEHC 100 Laffoy J. had to consider what, if any, order for costs should be made in circumstances where an application for an interlocutory injunction came on for hearing before the court on 16 December 2010, but, having been part-heard was adjourned to the following day and from thence to Tuesday, 21 December 2010 on which date the court was informed that the plaintiff was not proceeding with the application because he had achieved an outcome to what he was seeking from the defendant which he considered satisfactory. The court was also informed that because of the outcome, the plaintiff would not be proceeding with the substantive action.

32. Laffoy J. referred with approval to the decision of Herbert J. in *Garibov v Minister for Justice, Equality and Law Reform and Ors.* [2006] IEHC 371 – a case where the applicants sought leave to seek judicial review in respect of a deportation order, but before that application came on for hearing the deportation order was revoked, rendering judicial review of the deportation order moot. The applicants withdrew the application for leave but argued that they should be entitled to their costs. Herbert J. stated –

> "What is before the court is an application to seek judicial review. Without dealing with the application fully on its merits it would be impossible and, indeed improper for the court to endeavour to predict the outcome of the application. It appears to me that the question which the court must ask in considering its application for costs is, whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review."

Herbert J. considered that it was reasonable for the applicants in the particular circumstances of the case to have sought leave, and he awarded them their costs.

Having referred to *Garibov,* Laffoy J. then states under "Conclusions" –

> "6.1 In applying the principles as to liability for costs set out in the Rules in this case, the first question the Court must consider is whether there has been an 'event' and, if so, what it was. As I understand it, 'event', as envisaged in the Rules is a result which determines the dispute before the Court. Without expressing any definitive view on this point, in my view, what the Rules and the authorities envisage is a result brought about by a determination of the Court on the issues before the Court, rather than by some supervening event, such as an agreement of the parties in which the Court has not been involved. In this case there has been no determination by the Court on the issues which came before it on 16th December 2010. That being the case, the question which arises is what function the Court has in relation to liability for costs. The answer, in my view, is that it has none.
>
> 6.2 Before outlining the reasons for that conclusion, for completeness I would point out that, if the Court had a function in relation to costs where, as here, the 'event' is brought about by the moving party accepting an offer of the respondent, on the basis of the history of the dealings between the parties, in my view, it would be difficult to conclude that the prosecution of the application for an interlocutory injunction was necessary to produce the outcome which

has been achieved for the plaintiff, but, more particularly, that it was necessary to vindicate the legal rights of the plaintiff.

6.4 In order at this juncture to ascertain what the probable outcome of the plaintiff's application would have been, the Court would have to assess this case on the merits and, in doing so, reach a conclusion as to whether the plaintiff would have overcome the first hurdle. I am of the same view as Herbert J. in the *Garibov* case that it would be improper for the Court to attempt to predict what the outcome would have been. The reality is that the parties have rendered the issues which were raised on the application for the interlocutory injunction moot, and it is invidious to expect the Court to speculate at this juncture on what would have been the outcome, if the matter had proceeded."

Laffoy J. went on to point out that even if the plaintiff had been granted an interlocutory injunction it would not have followed as a matter of course, that the plaintiff would have been awarded the costs of the application, if it was "not possible justly to adjudicate upon liability for costs."

At para. 6.7 Laffoy J. stated –

"6.7 When, as in this case, on an application for an interlocutory injunction, there has been a supervening event which renders it unnecessary for the Court to determine the issues on the application, such as an offer made to the moving party by the respondent being accepted, which results not only in the moving party's motion, but also the substantive action, being struck out, it is no function of the Court to determine where liability for costs incurred up to that point lies, when the Court has made no determination on the issues on the application for an interlocutory injunction or on the issues in the substantive action. If the parties had not reached agreement on where liability for costs lies, then, *prima facie*, the proper exercise of the Court's discretion is as was indicated by Supreme Court in the *Callagy* case, namely, as

happened there, that the plaintiff be ordered to pay the costs of the proceedings including the costs of the motion."

33. In *Tekenable Limited v Morrissey & Ors* [2012] IEHC 391 Laffoy J. followed the principles she had enunciated in *O'Dea*. An application for interlocutory injunctions was brought by the plaintiff, a company developing/selling software, against two former employees to restrain breaches of clauses in their contracts imposing obligations on them to respect the complete confidentiality and security of the plaintiff's affairs, including the names of its clients, in circumstances where it appeared that the defendants had solicited business from the plaintiff's clients, including entering into a contract with the Irish Insurance Federation (IIF). Undertakings were sought but not given, and the proceedings were issued and an interlocutory application was pursued. Affidavits were exchanged, and the claims made were contested. It was resolved by undertakings given to the court by the defendants on foot of an agreement between the parties. This did not extend to the IIF contract which the plaintiffs informed the court would be subject of their damages claim. The plaintiff sought costs of the interlocutory application, and the defendants advocated for no order as to costs or alternatively that costs be reserved.

Laffoy J dealt with the matter of costs on the basis that the main proceedings would continue. She differentiated the case from *O'Dea* –

> "22. …first, the substantive proceedings are continuing, and secondly, the interlocutory injunction was disposed of on terms that the defendants gave the undertaking to the Court in the terms scheduled to the order of the Court. The first difference is obviously material to the question whether the Court should adjudicate on the costs of the interlocutory injunction, because it gives the Court the option to reserve the question of adjudication of the costs of the interlocutory application to the trial Judge, which may be a tenable proposition if the trial Judge has to determine the substantive issue."

She concluded: -

> "25. This is a case in which I think it would be inappropriate to adjudicate on the issue of who should bear the burden of the costs of the interlocutory injunction, either by awarding the costs to the plaintiff or by making no order for costs, for a number of reasons. First, the court has not been required to adjudicate and has not adjudicated on whether an interlocutory injunction in the terms sought by the plaintiff would have been granted or refused, if the application had proceeded. In particular, in my view, the fact that the Court made a consent order accepting the undertaking in the terms given by the defendants does not amount to an adjudication on the plaintiff's application such as would allow the Court to form a view as to whether there was an 'event' in consequence of which liability for costs could be attributed. Secondly, because of the supervening agreement between the plaintiff and the defendant scheduled to the Court order of 23rd March 2012, the issues which arose on the interlocutory application, the objective of which was to keep matters in *statu quo* pending the hearing of the substantive action, have become moot and it would serve no purpose and, in my view, it would be inappropriate for the Court to express a view at this juncture as to whether an injunction in the terms sought would have been granted or refused. Thirdly, even if the plaintiff's application had proceeded, given that, like the circumstance which arose in *Allied Irish Banks Plc. & Ors. v. Diamond & Ors* the outcome of the application would have turned, to use the terminology of Clarke J, 'on particular aspects of the merits of the case which are based on the facts', irrespective of whether the Court would have decided to grant or refuse an injunction, it would probably have adopted the approach adumbrated by Clarke J in relation to costs at the end of his judgment."

Accordingly costs were reserved to the trial judge.

34. The Respondent relies on *Irish Bacon Slicers Limited v Weidemark Fleischwaren GmbH & Co.* [2014] IEHC 293, in which Peart J referred to the judgments of Laffoy J. in *O'Dea* and *Tekenable*. Importantly Peart J does not appear to differ from the approach taken by Laffoy J in those cases in

which he notes the results were not brought about by any *determination* of the interlocutory issue – rather in *O'Dea* there was a negotiated settlement, and in *Tekenable* there was no determination but there were undertakings until the trial of the action.

At p.7 he considered that in approaching costs of an interlocutory injunction –

> "It will on occasion be that the Court will hesitate about awarding the costs of an interlocutory injunction to a plaintiff at that stage of the proceedings, even where that plaintiff has prevailed on that application, because it may work an injustice on the defendant in the event that the issues are ultimately determined in the defendant's favour to the extent that the Court might then consider that the particular plaintiff had not been justified in seeking the interlocutory injunctions. The Court must proceed cautiously in this regard and give serious consideration to the question whether it is possible to justly make an award of costs without awaiting the determination of the many issues that may be in dispute in the substantive claim.
>
> It is of course desirable on policy grounds that the parties should not needlessly pursue applications for injunctive interlocutory relief where it is possible to secure an agreed solution short of an injunction order, such as the giving of an undertaking. The fact that the Court is required to make an award of costs where it determines that injunction application, save where it might not be possible to justly do so, should serve to encourage a defendant to give an undertaking to do or not do that which is sought to be restrained by order, especially where it can be anticipated that a court will be satisfied that the relatively low threshold of establishing a fair issue to be tried can be surmounted by the plaintiff, and where either damages can reasonably be seen not to give the plaintiff an adequate remedy, and/or the balance of convenience favours maintaining the status quo and granting the injunction. It is right that there should be costs consequences immediately visited upon a defendant who waits until the injunction hearing itself to proffer an undertaking, thereby removing the need for the plaintiff to proceed to a hearing of his application. The fact that there is no 'event' in the sense of a

court's determination of whether or not an injunction should or should not be granted does not seem to me to be something of which such a defendant should be able to gain advantage by having the question of costs kicked off into the long grass, to be retrieved perhaps a year later, or more, when the substantive action is finally determined. That itself would be unjust to the plaintiff who in a real sense has prevailed on his application."

At p.8 Peart J. then stated –

"The defendant has placed considerable reliance on the fact that there has been no 'event' since there has been no court determination of the application in question. The reality in my view is that it was only the defendant which prevented this application being determined by the court, and he did so by offering to the Court the very undertaking which he had been called upon by the plaintiff's solicitor to provide some five weeks previously. That is when this undertaking should have been given in the circumstances of this case."

Noting that, unlike sub-rules1(3) (relating to costs of jury trials), and sub-rule 1(4) (relating to costs of any issue of fact or law), where costs "shall follow the event", sub-rule 1(4)A did not adopt such wording, he observed -

"But new rule 1(4)A contains no such derogation from the general rule of discretion contained in r.1(1). It simply provides that upon determining any interlocutory application *"shall make an award of costs"* save where it cannot justly adjudicate upon the costs liability. There is no reference to costs having to follow any event. In other words, the Court is required simply to exercise its discretion, and is not constrained by any rule that says that costs shall follow the event."

His reason for awarding the plaintiff the costs appears in the following paragraph:

"In so far as this new rule speaks of *"upon determining any interlocutory application"* and any suggestion that in the present case the Court did not determine the application because

> the defendant proffered an undertaking, it must be pointed out that this is an undertaking proffered to the court and accepted by the court, and consequently is an undertaking the breach of which constitutes a contempt of court. The acceptance of that undertaking by the court determined the application. It brought it to an end – even if all the issues raised on the application were not individually the subject of a determination by the Court."

Peart J. then addressed the facts before him where a request for an undertaking not to issue a Petition to wind up, in default of which an injunction would be sought, was sent on 19 June 2013 and not responded to, leading to a successful application for an interim injunction (20 June) followed by a delay until 23 July (during which affidavits were exchanged and further costs incurred) when the interlocutory hearing was listed, whereupon counsel for the defendant informed the court of the defendant's willingness to give undertakings in the terms of the notice of motion. These did not emanate from any agreement or even negotiations. Peart J concluded:

> "In such circumstances it is obvious in my view that the costs of the Notice of Motion should be awarded to the plaintiff. The motion should never have to have been brought in the first place."

Discussion

35. In my view in his judgment in *Irish Bacon Slicers Limited*, Peart J. was applying the principles which were established by Laffoy J. in *O'Dea* and *Tekenable*, but on the facts before him he considered that the acceptance of the undertakings by the court amounted to a 'determination' of the motion. I agree with counsel for the Appellant that the facts in the present case can be distinguished from those in *Irish Bacon Slicers Limited*. Firstly that was a case with very different facts - the defendant had threatened to petition to wind up the plaintiff company without any justification or basis for so doing (as the debt was disputed), leaving the plaintiff with no option but to issue legal proceedings to protect its position. By comparison and without prejudging the outcome, the

Appellant in the instant case had a basis for its action in proceeding to disciplinary investigation and procedure. Further in *Irish Bacon Slicers Limited* an interim injunction had been granted, whereas in the instant case undertakings were offered, and *accepted*, within days of the issue of the motion seeking interlocutory relief, following which were given to the court, and without any hearing having to be undertaken by the court. More particularly, in *Irish Bacon Slicers Limited* undertakings were sought five weeks before they were eventually given. In the instant case, the undertaking in relation to payment of salary was given on 19 May 2017 before the motion issued, and the other undertakings (which were not requested in correspondence but) reflecting paragraphs 1 and 2 of the Notice of Motion, were given some three days after service, and before the return date. Also no undertakings were given (or insisted upon) in respect of two reliefs sought in the Notice of Motion – at paragraph 4, where an order was sought compelling the Appellant to end the suspension and administrative leave, and at paragraph 5 which sought an injunction restraining termination of the contract of employment other than in accordance with the contract and right to fair procedures. By comparison, in *Irish Bacon Slicers Limited*, the undertakings covered all the reliefs sought and were only given after the exchange of affidavits and in court on the day when the matter came on for hearing, whereupon the defendant informed the court through its counsel that while it was prepared to give the undertakings; they were not offered in advance. Furthermore, in *Irish Bacon Slicers Limited* an undertaking not to present a Petition also stated to the court that it would bring separate High Court proceedings seeking to recover the amount claimed to be due. This meant that there would be no further hearing in the proceedings and there would be no court to which the costs of the interlocutory application could be reserved – the proceedings were effectively rendered moot making it incumbent on the court to decide the liability for costs unless "it [was] not possible justly to adjudicate" upon the issue. In the instant case the undertakings did not in my view render the entire proceedings moot, and indeed when the undertakings were given on 22 June 2017 the question of costs was reserved to a date in October.

36. In my view the circumstances in which the court had to decide the costs of the interlocutory application in *Tekenable* most closely resemble the present case, as undertakings had been given but the main proceedings were still proceeding and would require the court at trial to adjudicate on the substantive claim.

37. The question of costs in the present case fell to be considered by the trial judge, and now fall to be considered by this court, by consideration of the circumstances as they prevailed on 22 June 2017, when the undertakings were recorded but the proceedings were continuing. This was before the Appellant terminated the Respondent's employment.

38. Viewed at that time there had been no *determination* by the High Court of the interlocutory application – for the reasons given earlier the instant case differs in that respect *to Irish Bacon Slicers Limited*, particularly because there the undertakings were proffered at the last moment to the court. Here there was agreement over undertakings, the extent of which fell short of what was sought in the Notice of Motion, as early as May 2017, and from 25 May 2017 it was or should have been apparent that the Respondent would not be required to move the application. As a result the court was not called upon to adjudicate on the opposing positions ultimately taken on affidavit, or to consider the application on its merits.

39. Also there had as of 22 June 2017 been no "event" rendering the proceedings moot or determining the dispute before the court, and the proceedings were continuing. As Peart J observed in *Irish Bacon Slicers Limited*, the wording in O99 r.1(4A) should encourage the giving of undertakings, and the courts favour the giving of undertakings where interlocutory injunctions are sought. I would endorse the observation made at paragraph 95 of the Appellant's submission that "if the giving of undertakings is, as a general proposition, to be considered an event entitling a plaintiff to his costs, then such would have an undesirable chilling effect on the giving of undertakings." Of course where the undertaking comes so late in the day that it is proffered to the court on the day the interlocutory application is due to be heard, as happened in *Irish Bacon Slicers Limited*, I entirely

agree with Peart J that the court should be astute not to let a defendant "gain advantage by having the question of costs kicked off into the long grass." In the present case it was not until the costs hearing on 3 May 2018 that it became apparent to the court that, as the Respondent was pursing the unfair dismissal claim and did not want to pursue the present proceedings further, the action could be struck out. This signalled abandonment by the Respondent of whatever residual claim he might have in the present proceedings, and was an "event", although neither party appears to have sought the costs of the action up to that point in time.

40. The question that remains is that posed by Herbert J. in *Garibov,* namely whether it was reasonable for the Respondent to have brought the application for interlocutory relief, or as Laffoy J. put it in *O'Dea* "whether it was necessary to vindicate the legal rights of the plaintiff". This requires in the first place consideration of the correspondence, and particularly the Respondent's solicitors letter of 18 May 2017, and the Appellant's solicitor's reply of 19 May 2017.

41. The Respondent argues that this court should not revisit the trial judge's findings in relation to the correspondence, and in particular her finding that the Appellant was given adequate opportunity to furnish undertakings, and that the failure to give these promptly, or earlier than they were given, meant that the consensual order of 22 June 2017 based on undertakings was a success for the Respondent.

42. This argument is based on the judgments of the Supreme Court in *Hay v. O'Grady* [1992] IR 210, and in the *Leopardstown Club* case where at paragraph 88 Denham CJ stated –

"In other words, an appellate court should not interfere with a primary finding of fact by a trial court which has heard oral evidence, unless it is so clearly against the weight of the evidence as to be unjust". It is undoubtedly true that where oral evidence has been given in the court below the appellate court will not interfere with a primary finding of fact if supported by credible evidence, and will be slow to interfere with inferences of fact but could do so from circumstantial evidence. In this

regard Denham C.J. in *Leopardstown* approved and applied the principles established in *Hay v. O'Grady* which she summarises at paragraph 82:

> "**[82]** The principles identified by the *Hay v. O'Grady* [1992] I.R. 210 jurisprudence include the following:-
>
> - An appellate court does not proceed by way of a full re-hearing of a case.
> - An appellate court is bound by the findings of fact of a trial judge which are supported by credible evidence.
> - In general, an appellate court proceeds on the findings of fact of a trial judge.
> - The fact that there is contrary evidence does not alter the position.
> - An appellate court should be slow to substitute its own inferences of fact where such depends upon oral evidence, and a different inference has been drawn by the trial judge.
> - The fact that there is some evidence before a trial judge which may lead to a different conclusion does not alter the fundamental principle.
> - A finding of the credibility, or not, of a witness is a primary finding of fact."

43. In the instant case there was no oral evidence, and the costs hearing did not rely on any oral evidence – there was only evidence on affidavit before the trial judge, and precisely the same evidence is before this court. This indeed is accepted by counsel for the Respondent in their submissions but it is nevertheless submitted, albeit that oral evidence is rare in interlocutory applications; *Leopardstown Club* and *Hay v. O'Grady* should still apply. However a hearing at first instance based purely on documents is materially different to one based on oral evidence where the trial judge hears and sees witnesses and can take into account their demeanour, and where this may have a bearing on the context and meaning of the documents put in evidence. In the absence of anything on affidavit putting the context or meaning of documents or communications in issue - It is not logical to apply

in their entirety principles relating to findings of fact, whether primary or inferential, established in *Hay v. O'Grady* and applied in *Leopardstown Club* to a purely documentary hearing.

44. It must be accepted however that even in a documentary only appeal, the appellate court is bound by the trial judge's finding of facts where *there is credible evidence to support them*. This court should therefore review the relevant findings of the trial judge in relation to the correspondence to ascertain whether they were supported by the evidence. Therefore if there is credible evidence for the trial judge's findings then this court should not come to a different conclusion. Further if on a fair reading the correspondence is capable of two or more constructions one of which could reasonably have been adopted by the trial judge then this court should be slow to interfere. But if a finding is not supported by the evidence then this court is entitled to intervene and substitute its own finding of fact.

45. The Respondent's solicitor's letter of 18 May 2017 in the second paragraph points up the cessation of payment of the salary since 3 May 2017 and in the third paragraph expressly calls on the Appellant "to arrange immediate payment of the salary due to Mr. McFadden" and intimates that unless confirmation is received by close of business on Friday 19 May "we will be advising our client of his entitlement to seek urgent injunctive relief, without notice to your client". Two points should be noted about this. Firstly, the Respondent's solicitors were very alive to the need to seek an undertaking before seeking urgent injunctive relief. Secondly, in the first paragraph of the reply from Mallon Solicitors of 19 May 2017 it is stated that "The employer will agree to pay Mr. McFadden's salary pending the determination of the disciplinary process". This agreement in fact goes beyond what was sought, which related only to the salary that was due.

46. Turning to the remainder of the Respondent's solicitor's letter of 18 May 2017, which runs to six pages, the Respondent's solicitor then sets out a series of concerns about the procedures being adopted by the investigator, and the manner in which the investigation was being broadened. Reference is made to the letters of 2 August 2016 and 16 November 2016 as limiting the scope of the

investigation into the allegations therein set out, and to the letter received from the investigator on 20 March 2017 notifying of his appointment and the purpose of his investigation. The writer then refers to a letter sent to the investigator on 28 March 2017 raising queries about the investigation, to which Mr. Costello replied on 3 April 2017. Surprise is expressed at the investigator stating that it was a matter for him as an independent person to indicate how he would conduct the investigations, and that no restrictions or limitations had been placed on him in that regard by the Appellant. The writer then refers to the meeting with the investigator attended by the Respondent, at which copies of Mr. Costello's notes of meetings he had held with other persons were furnished. Surprise is expressed upon review of those notes of the fact that the witnesses spoke about alleged incidents going beyond those specified in the letters of 2 August and 16 November 2016. Mention is made of the Appellant then giving his account, but declining to comment on other matters not core to the subject of the investigation. Concern is then expressed at the investigator's report which it was said made findings going significantly beyond the specific incidents which he was tasked to investigate. Concern is also expressed at the investigator's apparent decision not to interview a person identified by the Appellant, and his decision to interview other individuals. A request is made for correspondence between the Appellant and the investigator identifying these individuals. The letter then states: -

> "Our client's employer cannot take any further steps in the context of the current disciplinary procedure, by reference to what is clearly an unfair and flawed investigation and findings which go significantly beyond the incidents which were to be investigated.
>
> Our client remains suspended from his employment in order to allow your client's investigation to take place. Our client has sought to engage with the investigator appointed by you. However our client cannot be subjected to any disciplinary procedure or any decision adverse to his interests by reference to the outcome of a flawed investigation which went beyond the investigation which you had sought to put in place."

In the closing paragraphs the author states –

"Our client is amenable to considering reasonable proposals *vis á viz* participating in a fair and lawful investigation but this needs to be done in a manner that will ensure that his suspension is brought to an end as soon as is possible and that any further damage to his professional reputation is neutralised.

We look forward to hearing from you."

47. I find that there is no express request in this letter for an undertaking by the Appellant not to continue the disciplinary investigation. On the contrary, the letter expresses a continuing willingness on the part of the Respondent to participate in a fair and lawful investigation.

48. I also find that there is no express request for an undertaking that the Appellant would not rely on the findings or purported findings of the disciplinary investigation or the investigator's report of 3 May 2017.

49. The trial judge acknowledges this where she states "While the letter did not specify any particular undertakings that were required from the defendant…" but she continues by stating "It was clear that further reliance upon the disciplinary investigation would result in an application being made to the Court." In my view this was not at all clear, and there was no evidence in the letter to support this inference or to conclude that failure to give further unspecified undertakings would result in a court application. In making this finding the trial judge fell into error and made a finding that was material to her decision.

50. In Mallon Solicitors' reply of 19 May 2017 they give the undertaking in relation to payment of salary pending determination of the disciplinary process and it is thereafter made clear that the Respondent's solicitor's contentions in the letter of 18 May 2017 are refuted. It is stated that the Appellant did not dictate to the investigator the manner in which he should conduct his investigation, that procedural fairness was observed by Mr. Costello, that his notes of interviews were furnished to the Respondent, and that all steps were taken to ensure that the Respondent had an opportunity to

address in full all matters which had emerged in the course of the interviews. It was noted that the Respondent was interviewed on 21 April 2017 and denied the allegations, and declined to engage in relation to the bulk of the issues raised. It is made plain in the letter that the Appellant is standing over Mr. Costello's report, and accepting his findings in full, and giving the Respondent a further period of seven days in which to set out his reasons in writing as to why he should not be dismissed or why the Appellant should not take appropriate disciplinary action.

51. The response of 19 May 2017 is stamped "received" by Patrick J. Farrell & Co. on behalf of the Respondent on 22 May 2017. There is no evidence that there were any further communications between the Respondent and the Appellant or their respective solicitor. The application for short service was made on the following day. That application was moved in circumstances where, despite the "concerns" expressed in the letter of 18 May 2017, the Respondent failed to seek specific undertakings from the Appellant in relation to continuation of the disciplinary process and the use of Mr. Costello's report/the adoption of his findings. Notwithstanding that the Appellant in the letter of 19 May indicated that it was standing over of the report on findings, it was not given an opportunity to consider giving further specific undertakings in advance of the motion issuing. There should have been a clear and unequivocal request for those undertakings in advance, and this could have been done promptly by email or by telephone.

52. I am not therefore satisfied that it was reasonable or necessary for the Respondent to issue the Notice of Motion on 23 May 2017, or to pursue interlocutory relief to protect his rights. It is notable that in the short time frame afforded to the Appellant after service of the Notice of Motion instructions were forthcoming to offer undertakings, and this was done on 25 May 2017. It was certainly not necessary for the Respondent thereafter to pursue interlocutory relief given that undertakings had been proffered and essentially accepted and that it only remained for counsel to confirm on these undertakings in open court. In my view the trial judge fell into error in concluding that there was "no particular reason" why the Appellant could not have given the undertakings at an earlier point in time.

53. Further while undertakings were given which cover paragraphs 1, 2 and 3 of the Notice of Motion, as noted earlier the Respondent did not seek to pursue the additional interlocutory injunctions sought at paragraphs 4 and 5. This was a choice made by the Respondent.

54. In light of my finding that the application was premature given the failure to seek specific undertakings in advance, in my view it is not necessary or appropriate for this court to enter on consideration of the merits of the claim for interlocutory reliefs, or to pronounce on what the outcome would have been. Thus it is not necessary to consider whether the Respondent could have demonstrated a fair or serious issue to be tried, the relative strengths of the parties positions, whether damages might have been an adequate remedy, the balance of convenience, or the scope of any interlocutory orders that might have been appropriate.

55. I have earlier expressed the view that the termination of the Respondent's employment on 29 June 2017 did not render the balance of the Respondent's claims moot. The termination occurred in accordance with the terms of the contract of employment, by the giving of reasonable notice. Albeit that it was followed by the Respondent's claim before the WRC for unfair dismissal, it did not dispose entirely of the reliefs sought in the General Indorsement of Claim in the plenary summons, and in particular the claims for breach of constitutional rights to fair procedures, the right to earn a livelihood and the right to a good name, and the claim for exemplary damages for damage to reputation. In particular there is authority to support the proposition that the claim for reputational damage would have survived the termination of the Respondent's employment.

56. In the present case the Appellant submits that the appropriate order to be substituted for that of the High Court is "no order as to costs". It is not therefore necessary for this court to consider whether it should go further and order costs in favour of the Appellant. This is a case where there was no determination by the trial judge of the interlocutory application and therefore the requirement in O.99 r.2(3) (formerly r.1(4A)) that the court "shall make an award of costs" does not apply. Instead the general discretion in relation to the costs applies. Having regard to all the circumstances I would

allow this appeal and would substitute the costs order of the High Court in favour of a no order as to costs of the application for leave of short service, of the Notice of Motion seeking interlocutory relief, and of the costs of the hearing on 22 June 2017.

As this judgment is being delivered electronically, Donnelly and Faherty JJ. have indicated their agreement with it.