

THE HIGH COURT

[2022] IEHC 212

[Record No. 2019/8468 P]

BETWEEN

BRONXVILLE INVESTMENTS LIMITED

PLAINTIFF

AND

CAYENNE HOLDINGS LIMITED, LUKE CARBERRY AND SEAMUS KANE

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 6th day of April, 2022

Introduction

1. This judgment requires the court to determine issues in relation to the costs of an interlocutory application for an injunction. The specific issue on foot of which the plaintiff issued proceedings and an application for injunctive relief has now been resolved between the parties. The plaintiff however now maintains that it is not necessary to prosecute the proceedings any further, as it submits they are effectively rendered moot by the resolution of the interlocutory application. The plaintiff's position therefore is that the proceedings have been resolved in its favour, and that it should be entitled to the costs of the interlocutory application and the proceedings.
2. This application is fully contested by the defendants, whose position it is that, as the plaintiff now effectively wants to withdraw from the proceedings, it should now be subject to the strictures of s.169(4) of the Legal Services Regulation Act 2015, which would render it liable for the costs of the proceedings.
3. The application was complex enough to warrant detailed and lengthy written submissions from both sides prior to an oral hearing, at which the written submissions were ably augmented.

Background

4. The plaintiff company operates a restaurant in a commercial property at 11 O'Connor Square, Tullamore, County Offaly ('the property'). The business is a franchise of the well-known chain of fast food restaurants, 'Eddie Rockets', and the property is held subject to a lease of 30th June, 2014 between (1) Anthony Kane and Shane Carberry as landlord ('the original landlords'), and the plaintiff as tenant for a term of ten years from 1st April, 2014. The "initial rent" under the lease is €25,000 per annum, and the lease provides for a rent review after five years. The fourth schedule to the lease provides for the appointment of an arbitrator to determine the rent if it cannot be agreed by the parties.
5. The second and third named defendants were directors of the plaintiff company on its formation in December 2013. They are in fact the fathers of the original landlords under the lease. The third named defendant sold his shareholding in the plaintiff company on 25th November, 2015, and ceased to act as acting secretary and director of the plaintiff as of that date. The second named defendant sold his shares in the plaintiff company on 5th February, 2019 to Mr. Declan McGuinness, who is now the sole director and shareholder of the plaintiff company.

6. The first named defendant was incorporated on 14th July, 2006, and each of the second and third named defendants have been directors of that company since 10th October, 2007. According to folio 27453F of the Register of Ownership of Freehold Land of County Offaly, the first named defendant became full "owner" of the property on 18th June, 2018.
7. On 21st January, 2019, the third named defendant wrote to the second named defendant, who at the time was still a director of the plaintiff, informing him that the new rent applicable to the property as and from 1st April, 2019 would be €87,500 per annum. This email was forwarded to Mr. McGuinness on 8th February, 2019 – three days after the second named defendant, who was a director of the first named defendant, had ceased to be a director of the plaintiff. There followed a course of correspondence in which Mr. McGuinness, on behalf of the plaintiff, denied the validity of the claim for rent at the new figure, expressing the view that it was neither reflective of open market rent, nor in line with the terms of the lease. The plaintiff's position, as set out by Mr. McGuinness, was that the company would continue to pay the current rent until the rent review process envisaged by the lease – including determination by an arbitrator if necessary – had established the new rent.
8. The third named defendant by letter of 11th April, 2019, furnished examples of rents paid by other companies in the Tullamore area, and alleged that it was agreed with the original landlords "that the rent overall for your occupied space would reflect a rent of on average €55,000.00/annum over the duration of the said lease...". He stated that "...there is no negotiation of rent payable going forward, as it has already been established and agreed".
9. On 16th October, 2019, Mr. McGuinness was informed that the first named defendant was justifying the rent of €87,500 on the basis of a "side letter", the text of which was as follows: -

"Audrey Byrne & Co.

18th November, 2015

Solicitors,

Millennium House,

Church Avenue,

Mullingar,

Co. Westmeath

Re: Anthony Kane & Shane Carberry (Landlord)

Bronxville Investments Ltd (Tenant)

Property: 11 O'Connor Square, Tullamore, Co. Offaly.

SIDE LETTER

Further to meetings that have resulted with a change of shareholdings positions within Bronxville Investments Limited, an understanding on rents payable within was also reached.

This side letter is to confirm that Kane & Carberry have concluded an agreement as landlord with the above named Tenant in regard to future rents payable from date of rent review as defined within existing lease that remains in place between Landlord and Tenant.

From rent review date, being 01.04.2019, it has been agreed that the annual rent will be increased to €85,000 per calendar year, and replaces that which is provided for within lease.

This agreed side letter between both parties now reflects an average annual rent of €55,000.00 per annum from lease start date, and replaces any provisions within lease that relates to ascertaining any further rental amount as set out within the forth [sic] schedule within same.

Signed for the landlord: [Signature of Anthony Kane].

Signed for the tenant: [Signature of Luke Carberry; also illegible signature, thought to be Seamus Kane]."

10. In an affidavit of 4th November, 2019 sworn by Mr. McGuinness on behalf of the plaintiff to ground an application for injunctive relief against the defendants, he avers that at no point was he alerted to the existence of this letter until 16th October, 2019, despite having had detailed correspondence with the third named defendant from January 2019 for several months regarding the landlord's rent claim. He averred that there had been detailed discussions between himself, Mr. Kieran Walsh who at that time was a director and shareholder of the plaintiff, and the second and third named defendants regarding share transfers, the lease and a side-letter of 9th October, 2015 by which an increase in rent of €15,000 had been proposed by the landlord to cover additional items in the lease; however, there had been no discussion of the side letter of 18th November, 2015.
11. In the course of the injunction application, there were affidavits from Mr. Walsh and Ms. Audrey Byrne, principal of the firm to whom the side letter is addressed and who was the plaintiff's solicitor at the time, to the effect that neither of them was aware of the letter's existence until shown it by Mr. McGuinness in late October 2019. Mr. Walsh averred that "...the Plaintiff at no point sanctioned the Purported Side Letter to my knowledge whilst I was a director of the Plaintiff and I say and believe that it was never intended that the terms of such a letter form part of the tenancy agreement between the plaintiff as 'tenant' and the 'Landlord'... [para. 10, affidavit sworn 4th December, 2019].
12. Mr. McGuinness averred in his affidavit of 4th November, 2019 on behalf of the plaintiff that, in a telephone call with the second named defendant on 30th October, 2019, the second named defendant told him that the third named defendant "...was intending to

shut down Eddie Rockets in Tullamore at close of business that night...". Mr. McGuinness avers that he then spoke to the third named defendant, who he avers told him in aggressive and expletive-ridden terms that he would rip all the contents out of the premises, throw them in the street and lock the premises up, and that he wanted the plaintiff 'out of my building'. In his affidavit of 27th November, 2019, the third named defendant averred that he "strongly disputed" Mr. McGuinness's version of this telephone call, and stated "...all that I communicated to Mr. McGuinness in a telephone call was that the terms of the Second side-letter [*i.e.* the letter of 18th November, 2015] should be honoured, and the arrears of rent be discharged. I also indicated to Mr. McGuinness [*sic*] that it was open to the Plaintiff to vacate the Premises of its own volition..." [para. 14].

13. There ensued correspondence between the plaintiff's solicitor and the defendants. By letter of 1st November, 2019 to the first named defendant, the plaintiff's solicitor denied the lawfulness of the letter of 18th November, 2015, and set out that her client was "agreeable to engaging in the rent review process in order to reach a rent that is fair and equal to the 'open market rent'". The letter requested an undertaking not to evict the plaintiff "...to allow for the parties to engage in a lawful rent review process", and indicated that if such undertaking was not furnished, the plaintiff would be "forced to issue proceedings" against the defendants.
14. In a detailed reply of 2nd November, 2019, the third named defendant denied making any threats, and stated that "to be very clear, there has never been a threat of eviction...". However, the third named defendant continued to assert that the letter of 18th November, 2015 was legally binding, and insisted on discharge of all outstanding rent based on the sum of €87,500 which he contended was payable as of 1st April, 2019. In a shorter reply of 1st November, 2019, the third named defendant stated that "we find no benefit for either party to be involved in any arbitration process, as side letter from 2015 already deals with this matter within".

The injunction application

15. The plaintiff issued a plenary summons on 4th November, 2019. The summons sought a wide-range of declarations and injunctions against the defendants, and also sought damages for misrepresentation, breach of contract, breach of duty and conspiracy. On 6th November, 2019, on the application of the plaintiff, this Court (O'Connor J) granted short service of a notice of motion which sought the following relief: -

"An Order by way of prohibitory injunction to restrain the Defendants, their servants and/or agents, employee or other person whomsoever, from committing any further breach of covenant for quiet enjoyment in the tenancy agreement relating to the property known as '11 O'Connor Square, Tullamore, County Offaly' comprised in Folio 27453F (the 'Folio') of the Register of Ownership of Freehold Land of County Offaly and as described in the Schedule hereto (the 'Leased Property') pursuant to the terms of the lease dated 30 June, 2014 between (1) Anthony Kane & Shane Carberry (as 'landlord') and (2) the Plaintiff (as 'tenant') (the 'Lease')."

16. When the matter came before the court on 8th November, 2019, an undertaking of the defendants in the terms of the reliefs sought in the notice of motion was furnished to the court. The defendants further undertook not to change the locks of the property. The court ordered that the defendants should have two weeks to file replying affidavits, and adjourned the matter to 29th November, 2019. On that date, the matter was adjourned to 20th December, 2019 with an order for a further exchange of affidavits.
17. However, on this latter occasion, it appears that the court was informed that the defendants were now willing to engage in arbitration to determine the rent payable. This Court was informed that the arbitration process concluded in or around 26th March, 2021, with the parties having accepted the finding of the arbitrator that €44,725.00 per annum was the open market rental value for the property.
18. The dispute regarding the rent has therefore resolved. However, the question of the costs of the motion and the proceedings requires to be determined.

The position of the parties

19. Both the plaintiff and the defendants proffered detailed written submissions, which were augmented by oral submissions at the hearing. The plaintiff submits that it is entitled to the costs of the motion and the proceedings:

“The outcome, the Defendants retreating from insistence on the terms of an invalid and unlawful side letter and engaging in arbitration in accordance with the terms of the Lease, is entirely consistent with the position adopted and flagged by the Plaintiff to the Defendants from the outset (from the time the Third Defendant commenced demanding exorbitant rent of circa €85,000 in or around January 2019 and thereafter on 16 October 2019, looking to corroborate the rents demanded based on a purported side letter). Accordingly, it is submitted that the Plaintiff has won the ‘event’”. [written submissions, para. 35, emphasis in original]
20. The plaintiff further submits that the action has become moot, and that it was the successful party in the case “...and it is submitted that it would be unjust to deny [the plaintiff] its right to recover costs for having to bring the proceedings by reason of the conduct of the Defendants”. [Paragraph 36 written submissions].
21. The defendants do not accept that the proceedings are moot. They say that the issues of the validity of the letter of 18th November, 2015 or as to whether threats were made to the plaintiff have not been determined. At para. 17 of their written submissions, the defendants state that “...for the avoidance of doubt the Defendants reserve their rights to issue appropriate proceedings in respect to the determination of the validity of the [letters of 9th October, 2015 and 18th November, 2015] if necessary”. They refer to what they characterise as a “fundamental conflict of fact” on the evidence which they maintain remains unresolved, and say that this conflict has not been resolved by the arbitration process. They point out that, in his first affidavit of 27th November, 2019, the third named defendant indicated that he had “offered to enter discussions with the Plaintiff to address all matters in dispute in relation to the premises and the outstanding rent...I have

been advised in relation to mediation and I am agreeable to participate in such mediation and I have instructed my legal representatives to take the necessary steps to facilitate such mediation in an attempt to resolve the matters at issue in the within proceedings..." [para. 27].

22. The net position of the defendants is that the plaintiff should be liable for the costs of the proceedings as it has "opted not to proceed" with them. Alternatively, the defendant submits that there should be no order as to costs.

Legal principles

23. The legal regime which governs liability for costs is to be found in ss. 168 to 169 of the Legal Services Regulation Act 2015 ('the 2015 Act') and the recast O.99 of the Rules of the Superior Courts. Order 99, r.2(1) provides that the costs "of and incidental to every proceeding in the Superior Courts" are in the discretion of the court. In this regard, O.99, r.2(3) requires the court to make an order in respect of the costs of any interlocutory application "save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application". Order 99, r.3(1) requires the court, in considering whether to award costs in respect of any "step in any proceedings" to have regard to the matters set out in s.169(1) of the 2015 Act. That subsection is as follows: -

- "(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including -
- (a) conduct before and during the proceedings,
 - (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
 - (c) the manner in which the parties conducted all or any part of their cases,
 - (d) whether a successful party exaggerated his or her claim,
 - (e) whether a party made a payment into court and the date of that payment,
 - (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
 - (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation."

24. Where a court considers the costs relating to an interlocutory application, it will be necessary to consider the 'event', i.e. the issue determined by the interlocutory application. As Clarke J commented in *Veolia Water UK plc v. Fingal County Council* [2007] 2 IR 81 at para. 2.8: -

"...it seems to me that the starting point of any consideration of costs has to be to identify what the 'event' is and, thereby, identify the winning party. In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular

interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be will have been justified by the result...”

25. The plaintiff relies heavily on the decision of Peart J in *Irish Bacon Slicers Limited v. Weidemark Fleischwaren GmbH* [2014] IEHC 293. This decision, and certain authorities which preceded it, were the subject of detailed deliberation by the Court of Appeal in its decision in *McFadden v. Muckno Hotels Limited* [2020] IECA 110, an authority not canvassed by the parties in the present case. In *McFadden*, the plaintiff was employed by the defendant as manager of a hotel. Allegations were made by the defendant against the plaintiff in respect of his conduct. The defendant commissioned a report by an “investigator”, a barrister deemed to be independent of the parties. The findings of the investigator gave rise to disagreement between the parties, and the defendant indicated that it stood over the findings and proposed, after affording the plaintiff an opportunity “to set out his reasons as to why he should not be dismissed”, to take disciplinary action against the plaintiff if there were no response from him within seven days.
26. The plaintiff issued proceedings seeking injunctions restraining the defendant from further conducting the disciplinary investigation, from relying on the investigator’s report, requiring the defendant to pay the plaintiff’s salary, compelling the defendant to reinstate the plaintiff as general manager, and restraining the defendant from terminating the employment “other than in accordance with his legal and contractual entitlements and his right to fair procedures”. A notice of motion seeking interlocutory injunctions in accordance with the reliefs sought in the plenary summons then issued. Within three days of issue of the motion, the defendant offered interlocutory undertakings to pay the plaintiff’s salary, not to conduct the disciplinary process other than in accordance with the plaintiff’s legal and contractual entitlements and his right to fair procedures, and not to rely on the “purported findings of the disciplinary investigation into the Plaintiff’s alleged misconduct and/or the report [of the investigator] regarding the Plaintiff’s alleged misconduct”.
27. These undertakings were subsequently offered to the court on 22nd June, 2017, and formally recorded in a consent order, which indicates that the costs were reserved. The defendant subsequently terminated the plaintiff’s contract in accordance with its terms, and did not rely on the alleged wrongdoing or the investigator’s report. The plaintiff commenced unfair dismissal proceedings which were still pending at the time of the hearing in the Court of Appeal.
28. The costs were eventually determined by the High Court almost a year after the consent order was made. The court, in an *ex tempore* decision, relied on the decision of Peart J in *Irish Bacon Slicers*, and held that the undertakings, which were offered to the court on 22nd June, 2017 – although they had been offered initially by the defendant on 26th May, 2017 – “...amounted to a success and it cannot be said that there was no event within the

meaning of the rule...the defendant had the opportunity to deal consensually with the matter and it only dealt with it consensually from 22nd June, 2017, and there is no particular reason why it could not have been dealt with earlier..." [p. 9 Court of Appeal judgment]. The plaintiff was accordingly awarded his costs of an application for short service and of the interlocutory application up to 22nd June, 2017.

29. Haughton J, in giving judgment on behalf of the Court of Appeal, referred to ss. 168 and 169 of the 2015 Act and the recast O.99. He then referred to the decision of Laffoy J in *O'Dea v. Dublin County Council* [2011] IEHC 100, quoting inter alia, the following passage: -

"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 the 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".

30. The Court of Appeal then referred to the decision in *Tekenable Limited v. Morrissey & Ors.* [2012] IEHC 391, in which Laffoy J followed the principles she had set out in *O'Dea*. The court held that it would not be an appropriate case in which to adjudicate on who should bear the costs of the interlocutory injunction, 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 defendants 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."

[Paragraph 25 of judgment of Laffoy J, cited at para. 33 of judgment in *McFadden*].

31. It was noted by the court in *McFadden* that Peart J, in *Irish Bacon Slicers*, "...does not appear to differ from the approach taken by Laffoy J in [*O'Dea* and *Tekenable*] in which he notes that 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...". [Pages 19-20, emphasis in original]. The following passage from the judgment of Peart J, cited by the Court of Appeal in *McFadden*, is of particular interest: -

"...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". [Page 7 of judgment; cited at para. 34 *McFadden*].

32. At p.8 Peart J stated as follows: -

"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".

33. In *Irish Bacon Slicers* a request by the plaintiff for an undertaking not to issue a petition to wind-up the plaintiff company, in default of which an injunction would be sought, was sent on 19th June, 2013. There was no response to that request, which provoked a

successful application by the plaintiff for an interim injunction on 20th June followed by a delay until 23rd July during which affidavits were exchanged. The interlocutory hearing was listed on that date, whereupon counsel for the defendant informed the court of the defendant's willingness to give undertakings in terms of the notice of motion. In these circumstances Peart J awarded the costs of the notice of motion to the plaintiff, and expressed the view that "...the motion should never have to have been brought in the first place...".

34. The Court of Appeal, at para. 35 of its judgment in *McFadden*, expressed the view that Peart J, in his judgment in *Irish Bacon Slicers*, "...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 amount to a 'determination' of the motion...". The court went on to express the view that the facts in *McFadden* were to be distinguished from those in *Irish Bacon Slicers*; in particular, "...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...". The Court of Appeal also pointed out that the undertaking not to present a petition in *Irish Bacon Slicers* made it clear that the defendant would bring separate High Court proceedings seeking to recover the amount claimed to be due from the plaintiff, which meant that there would be no further hearing in the proceedings and therefore no court to which the costs of the interlocutory application could be reserved. As the Court of Appeal put it at para. 35 of its judgment, "...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...". The Court of Appeal took the view that the undertakings given in *McFadden* did not render the entire proceedings moot. The court was of the view that the circumstances in which the court had to decide the costs of the interlocutory application in *Tekenable* most closely resembled the facts in *McFadden*. Accordingly, the Court of Appeal allowed the appeal and substituted an order that there be no order as to costs for the short service application, of the notice of motion seeking interlocutory relief, and of the costs of the hearing of 22nd June, 2017, for the order made by the High Court.

Application of principles to the present case

35. In the present case, the plaintiff submits that it has achieved its objective in launching the proceedings in that the defendant ultimately agreed to abide by the terms of the lease, and submitted to the procedures for determination of the rent by arbitration. The plaintiff does not want to prosecute the proceedings any further, notwithstanding that the plenary summons seeks damages against the defendants, but maintains that it should be entitled to its costs in the circumstances, as it maintains that it has, in the words of Clarke J in *Veolia*, "...secured a substantive or procedural entitlement, which could not be obtained without the hearing concerned...". The defendant on the other hand maintains that the plaintiff now wants to abandon the proceedings rather than resolve the various matters of

dispute to which the correspondence between the parties in the affidavits refer, and is thus subject to s.169(4) of the 2015 Act, which is as follows: -

“(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.”

36. It is important to note that the plaintiff contends that it is entitled, not just to the costs of the application for interlocutory relief, but of the proceedings as a whole. It does so on the basis that the proceedings are moot or redundant, given the defendant’s agreement to engage with the arbitration procedure in the lease for determination of the rent. The plaintiff relies on the decision of the Supreme Court in *Godsil v. Ireland* [2015] 4 IR 535. In that case, the plaintiff had commenced proceedings seeking to challenge the statutory prohibition on the eligibility of undischarged bankrupts to run in elections in circumstances where the plaintiff wished to contest the upcoming European Parliamentary Elections. Within a month of the issue of the plenary summons, legislation was passed which provided that an undischarged bankrupt would not, by reason of such status, be ineligible for election to the Dáil or European Parliament. McKechnie J found that the action of the respondents could only reasonably be understood as being in direct response to the proceedings issued by the plaintiff and an explicit acknowledgement and admission of the legal validity of the challenge in those proceedings. He therefore stated that he was satisfied that an “event” existed by which the issue of costs should be determined despite the proceedings being rendered moot, and awarded the applicant her full costs of the proceedings.
37. These principles were applied by Finlay Geoghegan J in the Court of Appeal in *Benloulou v. Minister for Justice and Equality* [2016] IECA 181. In that case, the court took the view that the step taken by the respondent which rendered the application for leave moot could only reasonably be understood as being in direct response to the application for leave, and accordingly considered that there was an “event” which the costs should follow.
38. In *Cunningham v. President of the Circuit Court* [2012] 3 IR 222, Clarke J (as he then was), in giving the judgment of the Supreme Court, referred to his own previous judgment in the High Court in *Telefonica O2 Ireland Limited v. Commission for Communication Regulation* [2011] IEHC 380, and stated: -
- “[24] In summary, and for the reasons set out in [Telefonica], a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot.”

39. The plaintiff alleges that the unilateral action of the defendants in agreeing to submit to the arbitral process in the lease has effectively rendered the proceedings moot, and constitutes an "event" which costs must follow. It is submitted that the plaintiff has achieved fully the objectives set out in its early correspondence with the defendants, and of the subsequent proceedings.
40. It is necessary to examine the conduct of the parties to determine what was the position of the plaintiff in the early correspondence, and what it sought to achieve in that correspondence and in the subsequent proceedings.
41. As regards correspondence, the second named defendant on 8th February, 2019 forwarded to Mr. McGuinness the email to him from the third named defendant of 21st January, 2019, in which the increased rent of €87,500 per annum was first intimated. Over a number of months, the third named defendant maintained that this was the appropriate rent, and issued details of comparable rents which he maintained justified the increase. Mr. McGuinness on behalf of the plaintiff maintained throughout this period that there was no such agreement, and that the appropriate rent would either be agreed or reviewed in accordance with the procedures in the lease. This was the plaintiff's position from the beginning, and was set out unequivocally in emails from Mr. McGuinness to the third named defendant on 18th February, 19th February, 22nd March, and 26th April, 2019.
42. By an email of 16th October, 2019, the third named defendant enclosed the alleged side letter of 18th November, 2015 reproduced at para. 9 above. The email made it clear in unequivocal terms that the defendants considered this letter binding and valid. The letter requested "that all arrears are discharged within fourteen days hereof...[w]e also still afford you the option to vacate by month end".
43. The matter then proceeded in the manner set out at paras. 10 to 14 above. An email of 31st October, 2019 from the third named defendant to the plaintiff made it clear that the defendants were maintaining their stance that the side letter was binding, and that it was indicated that the defendants would "prefer at this stage he [i.e. the plaintiff] vacates the premises". The letter of 1st November, 2019 from the plaintiff's solicitors, to which reference is made at para. 13 above, was then sent requesting "an undertaking that you will not seek to evict my client to allow for the parties to engage in a lawful rent review process". It was clear from the emails of 1st November, 2019 and 2nd November, 2019 from the third named defendant, referred to at para. 14 above, that the defendants had no intention of giving any such undertaking.
44. There is some controversy between the parties as to exactly what was said between Mr. McGuinness and the third named defendant Mr. Kane in a telephone call of 30th October, 2019. I have referred to this call at para. 12 above. I wish to emphasise that, without the benefit of cross-examination on the affidavits, I cannot make any determination of the veracity of the competing averments of Mr. McGuinness and Mr. Kane. Obviously, if Mr. McGuinness's account of this conversation is accurate, he was entitled to view the situation with concern and indeed alarm. However, even taking Mr. Kane's version of the

conversation, as set out in his affidavit of 27th November, 2019 and referred to at para. 12 above, as correct, it is clear that he was forcefully asserting the binding nature of the letter of 18th November, 2015, and demanding either the discharge of arrears of rent on the basis of an annual rent of €87,500 per annum, or that the plaintiff would vacate the premises, a stance consistent with his emails to Mr. McGuinness and subsequently to the plaintiff's solicitor.

45. It was in these circumstances that the plaintiff issued proceedings. The plenary summons seeks twenty-six reliefs; it is, if I may say so, somewhat prolix and repetitive. Seventeen of the twenty-six reliefs are for declarations and injunctions; the other substantive reliefs are for damages. However, all of the declaratory or injunctive reliefs are sought with a view to preventing the defendants from interfering with the plaintiff's rights as tenant of the property, and in particular to prevent the defendants from evicting the plaintiff or changing the locks. The *ex parte* docket presented to the court repeats many of these reliefs, but the order of this Court of 6th November, 2019 gave liberty for short service in the terms set out at para. 15 above.
46. It is in my view very clear that the proceedings, including the interlocutory application, were launched due to the insistence of the defendants that the side letter was valid and binding, and also due to the consequent refusal of the first named defendant, as repeatedly expressed by the third named defendant, to engage in the arbitral process set out in the lease. Even if the telephone conversation of 30th October, 2019 between Mr. McGuinness and Mr. Kane took place in the manner the latter suggests, the plaintiff was entitled to infer that the refusal to engage in the arbitral process and the repeatedly expressed wish that the plaintiff would vacate the property suggested that the first named defendant was actively considering an attempt at eviction of the plaintiff, or some other interference with its rights under the lease such as changing the locks and retaking possession of the property.
47. It should be said that the third named defendant denied, in his email of 2nd November, 2019 to the plaintiff's solicitor, that any threat of eviction was ever intended. That email in particular did not budge from the assertion that the rent based on annual sum of €87,500 was due and owing, and accordingly that the rent review process in the lease was not applicable. In his affidavit of 27th November, 2019, the third named defendant denied that he made any threat to change the locks on the premises, and complained that the plaintiff was not in any event paying the correct rent, as he contended that the "first side letter" of 9th October, 2015 had been disregarded by the plaintiff.
48. However, on 20th December, 2019, the court was informed that the first named defendant was after all prepared to engage in arbitration to determine the rent payable. Although there is no formal order from that date, there is no dispute between the parties that the motion was adjourned to allow this process to take place.
49. It seems to me that the eventual acceptance by the first named defendant of the arbitral process was incompatible with any intention to evict the plaintiff or interfere with its property. It was an acceptance of a contractual process which the plaintiff had been

urging on the first named defendant since Mr. McGuinness's first email in February 2019, despite repeated rejections by the third named defendant of its applicability. It would have been open to the first named defendant to stand its ground. It could perhaps have agreed to continue the undertakings it gave to the court on 8th November, 2019 until the hearing of the action which would determine the disputes between the parties, and in particular the validity or otherwise of the letter of 18th November, 2015 and whether or not it superceded the contractually agreed arbitral process. The plaintiff had indicated its willingness to continue paying the existing rent; it might have been possible to negotiate an increased payment pending the trial. The parties could have agreed an expedited timetable and/or case management which would ensure the earliest possible trial.

50. The first named defendant chose to do none of these things. It accepted on 20th December, 2019 a course of action which had been advocated by the plaintiff from the outset, and which it had up to that point consistently rejected. This acceptance indicated to the plaintiff that its apprehension of eviction or further action against it by the landlord was no longer necessary. The parties thereafter proceeded in the manner envisaged by the lease, culminating in an accepted arbitrator's evaluation of the correct amount of rent.
51. In the circumstances, it is difficult to come to any conclusion other than that the plaintiff has "won the day", and that the eventual acceptance by the first named defendant of the contractual process it had repeatedly denied is the "event" which costs must follow. The facts are in my view closely analogous to those in *Irish Bacon Slicers*, and the portion of the judgment of Peart J quoted by the Court of Appeal in *McFadden* and above at para. 32 seems to me to be particularly appropriate to the circumstances of the present case. The plaintiff has undoubtedly secured a "substantive or procedural entitlement", and must be regarded as having succeeded on the motion, notwithstanding that there was no determination by the court. As Peart J put it "...the acceptance of [the 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" [para. 26]. In my view, the same principle applies to the acceptance by the defendants on 20th December, 2019 of the arbitral procedure.
52. The defendants argue that their "dispute" in relation to the applicability of the letter of 18th November, 2015 has not been resolved by the arbitration. While that may be so, I have noted above at para. 21 the statement of the defendants in their submissions that they "...reserve their rights to issue appropriate proceedings in respect to the determination of the validity of the [letters of 9th October, 2015 and 18th November, 2015] if necessary". While it may be open to the defendants to do this, it seems to me that they have declined the opportunity to resolve this issue in the present proceedings, and must accept the consequences in relation to the costs.

Conclusion

53. For the reasons set out above, it is certainly possible to justly adjudicate upon the liability for the costs of the interlocutory application, and it seems to me that the plaintiff is entitled to those costs. I do not know to what extent such costs are co-extensive with the costs of the proceedings. However, it seems to me that the objective of the proceedings

has been attained, and the proceedings themselves rendered moot by the unilateral act of the defendants in agreeing ultimately to participate in the arbitral process. The plaintiff is entitled to decline to proceed with any cause of action which it might have had for damages if the matter had proceeded to trial.

54. In my view, the plaintiff is entitled to the costs of the proceedings, to the extent that they may exceed the costs of the interlocutory application. I propose to order that the proceedings be discontinued in accordance with O.26, r.1 of the Rules of the Superior Courts; that rule also provides that "any part of the alleged cause of complaint [may] be struck out". I will give liberty to the parties to apply in writing to the court within seven days of delivery of this judgment in the event that either party wishes to address the form of the order.