THE HIGH COURT

[2022] IEHC 544

[RECORD NO. 2021 5055 P]

BETWEEN

GARY KEVILLE TRANSPORT LTD

PLAINTIFF

AND

MSC (MEDITERRANEAN SHIPPING COMPANY)] LIMITED

AND

MSC (MEDITERRANEAN SHIPPING COMPANY) SA

DEFENDANTS

JUDGMENT of Mr. Justice Dignam delivered on the 21ST day of September 2022.

INTRODUCTION

1. This judgment follows on my earlier judgment in this case ([2022] IEHC 130) and should be read therewith. In my earlier judgment I refused the plaintiff's application for an interlocutory injunction and the question of the liability for costs in respect of that application now falls to resolved. The parties made detailed oral and written submissions on the question of costs.

2. I do not propose to set out the background facts as they are set out at length in my earlier judgment.

3. In summary, the plaintiff ("GKT") applied for an interlocutory injunction restraining the defendants ("MSC") from *"exercising any embargo on the Plaintiff delivering and/or collecting the Defendants' containers from any depot within Ireland and in particular to revoke and/or cease any instruction or business practice which has the consequence of prohibiting the Plaintiff company from transporting collecting and/or carrying the Defendants containers".*

4. I concluded that GKT had established a fair question to be tried on a narrow aspect of one of the grounds advanced but was satisfied that damages would be an adequate remedy and that the balance of justice or convenience was against the grant of an injunction. I therefore refused the relief.

5. MSC seek their costs on the basis that it succeeded in opposing the application. GKT advanced the position that I should either (i) make no order as to costs, (ii) reserve the question of costs, (iii) make the costs costs in the cause, (iv) make a partial costs order, or (v) award costs but with a set off in respect of the points on which MSC did not succeed. As a fall-back GKT suggested that if MSC were awarded their costs there should be a stay on that order pending determination of the proceedings and, similarly, that if I decided to make an order in terms of option (iv) of (v) I should also place a stay on the order pending the determination of the proceedings.

LEGAL FRAMEWORK AS TO COSTS

6. The legal framework in respect of costs is provided by section 168 and 169 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts.

7. Section 168 of the 2015 Act provides, *inter alia*:

> *"(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –*
>
> *order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or*
>
> *…*
>
> *(2) Without prejudice to subsection (1), the order may include an order that a party shall pay –*
>
> *(a) a portion of another party's costs,*

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e)interest on costs from or until a specified date, including a date before the judgment."

8. Section 169 of the 2015 Act provides, *inter alia*:

"(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 of the parties was or were unreasonable in refusing to engage in the settlement discussions or remediation…"

9. Order 99 of the Rules of the Superior Courts provides, *inter alia*:

"(2) Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

…

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.

(3) (1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in s. 169(1) of the 2015 Act, where applicable."

10. The parties also referred the Court to a number of other passages and other cases. I deal with these when considering the arguments advanced by the parties.

SUBMISSIONS AND CONCLUSIONS

11. Both parties agreed that the correct general approach was that MSC as the successful party in respect of the outcome were entitled to their costs, or at least that the Court should lean towards awarding them their costs (*Daly v Ardstone Capital Limited [2020] IEHC 345*), unless the Court, having had regard to the matters contained in section 169(1)(a)-(g), ordered otherwise.

12. During the course of the hearing, each of the parties pointed to matters referable to some of the factors contained in section 169(1)(a) – (g) to either support the case that MSC should be awarded its costs or that the Court should in the particular circumstances depart from the rule or general approach that costs should follow the event.

13. I am satisfied for the following reasons that the appropriate order is an order for MSC's costs with a stay pending conclusion of the proceedings.

14. GKT points to a number of factors which it says warrants a departure from the agreed starting point that MSC is entitled to its costs, or which supports the court dealing with the costs in one of the ways set out in paragraph 5 above. I deal with these in a slightly different order to that set out in paragraph 5.

Costs should be reserved

15. GKT's submission that the costs should be reserved must be considered in the context of the requirement in Order 99 rule 2(3) that the Court must, upon determining any interlocutory application, make an award of costs save where it is not possible justly to adjudicate upon liability for costs (Order 99 r.2(2); *Daly v Ardstone Capital Ltd [2020] IEHC 355, para 15*). The basis for the submission that the costs should be reserved were that (i) five matters canvassed during the interlocutory hearing required further evidence, argument, or development at the full trial and, (ii) the Defence had not been delivered.

16. In respect of the first point it was submitted that the Court had held that the points sought to be made by GKT in respect of the law of bailment and the claim that GKT may have a lien on MSC's containers required further argument and development; that GKT had not pushed its point in respect of the abuse of a dominant position and accepted that it required further evidence; and that the Court had held that the allegation of defamation and MSC's allegation that GKT had not come to court with clean hands required further evidence.

17. I do not believe that any of these mean that the Court can not justly adjudicate on the liability for costs. In respect of the question of bailment and liens, it is the case that GKT suggested that the law relating to these matters might be relevant to an analysis of MSC's freedom to act in relation to its containers in certain circumstances and I noted in paragraph 64 of my judgment that GKT referred in its submissions to a lien and the law of bailment as being of relevance but that this had not been developed yet. In general, a plaintiff can not reserve its evidence or arguments on

individual points at the interlocutory stage and then seek to avail of the need for further evidence or argument to ground a claim that the costs of that interlocutory application should be reserved. While there was some very slight development of the lien point in Mr. Keville's second affidavit where he says, "*Whilst I am advised issues such as bailment, quantum meruit and the exercise of a lien are matters of law, I say that it is industry practice for a haulier to exercise a lien over a container and/or contents of a container in its possession pending payment for its services.*" However, as noted above, this affidavit was admitted on the express basis that its contents were disputed by MSC. Indeed, Mr. Douglas on behalf of MSC had previously said in this affidavit that "*…I am not aware of a single instance where a haulier has seen fit to withhold the return of the First Named Defendant's equipment (or any other shipping company's equipment) against the payment of charges unilaterally imposed and without any contractual basis.*" I could therefore not have made a finding whether or not it is industry practice for hauliers to exercise such a lien as against shipping companies.

18. This is brought into sharper focus in respect of the claim that MSC were abusing their dominant position. This formed part of GKT's claim for an injunction from the beginning. However, at the hearing, GKT, through Counsel, while not making a formal concession, very fairly indicated that this aspect of the case would really be a matter for the trial. In GKT's written submissions it is stated "*This cause of action will be advanced further by expert evidence at trial, in terms of the precise market and the relative share of same enjoyed by the Defendants.*" GKT can not raise a core point in pleadings and in the grounding affidavit, then indicate that it was not pushing the matter because it "*will be advanced further by expert evidence at the trial"* and rely on that fact to suggest that the costs of the interlocutory application should be reserved. In any event, I decided on the basis of the pleadings and the evidence to date that GKT had not established a fair question to be tried in respect of the alleged abuse of a dominant position. It must also be recalled that GKT, while not pushing the point, did not withdraw it for the purpose of the interlocutory application. It seems to me that where one party does not withdraw a particular part of the case at the interlocutory stage but does not actively push it, it can not be the case that they can then argue that the costs should be reserved on the basis that the issue remains to be argued and decided.

19. In relation to the second limb for saying that the costs should be reserved – that a Defence has not been delivered - there is absolutely no basis in the circumstances of

this case for the Court to conclude that the absence of a Defence should somehow lead to the costs being reserved. The essence of this point by GKT was that the absence of the Defence meant that the issues were not crystallised and it was therefore unclear how matters would turn out. There may be a logic to this at the level of principle but the Court can not disregard that the reason why a Defence had not been delivered at the time of the hearing was that there was a very significant delay on the part of GKT in delivering its Statement of Claim – it was only delivered on the 21st December 2021 – and an affidavit of verification in respect of the defamation aspect of its claim had, even at the time of the hearing of the interlocutory hearing, still not been delivered. It seems to me that GKT can not call in aid the non-delivery of a Defence when that has been brought about by GKT's own delay.

20. Thus, I am satisfied that I can adjudicate justly on the liability for costs and that the costs should not be reserved.

21. GKT's submissions that the Court should make no order as to costs, make the costs costs in the cause, make a partial costs order, or award costs with a set off in respect of the points on which MSC did not succeed were very helpfully structured by reference to the matters set out in section 169(1)(a) – (g) of the 2015 Act. GKT's position is that (a), (b), (c) and (g) are relevant.

Section 169(1)(b)

22. Section 169(1)(b) requires the court to have regard to whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. GKT relies on this to argue that there should be no Order as to costs or that there should be a partial costs order or that there should be a set off in respect of the points on which MSC did not succeed.

23. There are two limbs to GKT's reliance on section 169(1)(b) to make these arguments. Firstly, it says that it raised five causes of action upon which it claimed there was a serious question to be tried and that it succeeded on a number of these; and secondly it points to the fact that it succeeded and MSC failed on a number of other contested matters.

GKT established a serious question to be tried

24. In respect of the first limb, GKT raised five causes of action: (a) Unlawful interference with GKT's commercial activities; (b) Interference with economic interest; (c) Defamation; (d) Abuse of a dominant position; and (e) Breach of GKT's property rights and right to a good name. It was submitted that GKT had succeeded on three of these: (a), (b) and (e); and that these were the core part of GKT's case at this stage. I am not at all convinced that this strictly arithmetic approach is correct in a short matter which only took a little over a day - I return to this below – but it also seems to me that GKT's characterisation of it having won three of the five issues is somewhat artificial. It does not really reflect either the case that was made or the manner in which I dealt with the arguments. I held at paragraph 88 of my judgment that (e) (Breach of GKT's property rights and right to its good name) in fact simply stated the constitutional rights which underly the causes of action referred to in (a) – (d). I said:

> *"[I]t seems to me that in the circumstances of this case (e) is not a separate cause of action but refers to the constitutional rights which underly the causes of action referred to in (a)-(d): for example, GKT's constitutional right to a good name is vindicated by the tort of defamation at (c); in relation to the breach of property rights GKT did not identify with any particularity what property rights were engaged or how they were engaged other than to refer generally to aspects of the law relating to liens and bailment. To the extent that it can be argued that GKT has property rights in its business dealings with its customers they are vindicated by the other causes of action such as the alleged unlawful interference with its commercial activities and economic interests at (a) and (b). I have therefore not considered (e) as a standalone cause of action."*

25. Furthermore, there is a very large degree of overlap between (a) and (b). These were in fact dealt with together by GKT in its submissions and in my judgment (paragraph 99). It may be that any differences between the two will be explored at the full trial and that they will be treated separately at that stage but that was not the case in this application and it was not necessary for me to treat them separately in my judgment.

26. Thus, even if the arithmetic approach to this first limb suggested by GKT is adopted, at its height GKT succeeded in respect of two causes of action and lost in respect of two and in fact it is more accurate to say that it succeeded in respect of one ((a) and (b) being taken together as one) and lost in respect of two.

GKT succeeded on contested matters

27. The second limb of GKT's argument for no costs order, a partial costs order or a set off is that the Court had to resolve three contested issues: whether the injunction that was sought was a mandatory or prohibitory injunction (and what the correct threshold test is), whether GKT had established an arguable case, and whether GKT had come with clean hands; and GKT had succeeded on all three points.

28. It seems to me as a matter of general principle that it is beyond dispute that where a party succeeds on an issue it must follow that it was reasonable to raise, pursue or contest that issue. It does not necessarily follow however that just because a party was unsuccessful on an issue that it was unreasonable to raise, pursue or contest it. Thus, it is not sufficient for the purpose of section 169(1)(b) for a party to have been unsuccessful on a point; the Court must assess the reasonableness of the point having been raised, pursued or contested even if unsuccessful.

Mandatory vs. prohibitory injunction

29. MSC had contended that the injunction that was being sought was a mandatory rather than prohibitory injunction and that the appropriate test was therefore the *Maha Lingham* strong case test. I held that it was a prohibitory injunction (paragraph 83) but I did hold that there were some potential consequences of the injunction sought which were suggestive of it being a mandatory injunction (paragraph 80). I also held that those potential consequences fell to be considered when assessing the balance of justice (paragraph 84). In my view, therefore, it could not be said to have been unreasonable for MSC to raise the argument that the injunction that was sought was a mandatory injunction.

Arguable case

30. As discussed above, whether or not GKT had established an arguable case was fully contested. GKT succeeded in establishing that it had an arguable case in respect

of some of the causes of action raised and MSC succeeded in respect of others. It was of course reasonable for each party to raise the points on which they were successful but, as noted above, the mere fact that a party loses on a particular point does not necessarily mean that it was unreasonable to raise that point. MSC failed in its case that GKT did not have an arguable case in respect of the unlawful interference with GKT's commercial activities and interference with economic interest, but does it follow that it was unreasonable of MSC to contest these issues such as to disentitle them to costs or to lean against them getting the costs? In my view it was not. It is important to note in this regard that I was "*just about*" satisfied, given the very low bar for the test (*O'Gara v Ulster Bank Ireland DAC [2019] IEHC 213*) that GKT had established a fair question to be tried on this point (paragraph 117). It seems to me that in circumstances where GKT just about satisfied the very low bar that MSC was not unreasonable to have contested this issue. I must also have regard to the fact that GKT raised causes of action on which it was not successful. Were they unreasonably raised, pursued or contested? I am not at all satisfied that it was reasonable to ground the application for an interlocutory injunction on the claim of defamation. I held that even if GKT had established that it had a fair case that it had been defamed that could not lead to an interlocutory injunction because the alleged wrong had already occurred and there was no evidence of a danger of it recurring. It was also not reasonable to rely on the claim of an abuse of a dominant position given the pleadings to date and given the evidence to date. However, Counsel for GKT took the responsible position at the hearing to indicate that the point was not being pushed and was more a matter for the trial of the action. While the issue was not withdrawn and it had to be engaged with in the written submissions, nonetheless, this approach by Counsel meant that the issue did not take up an inordinate amount of time at the hearing. Thus, I do not place very much weight on the unreasonableness of this point being raised.

Clean hands

31. MSC had also submitted that GKT did not come to court with clean hands and was therefore not entitled to the relief sought. While I did hold that the conduct of GKT complained of, and forming the basis for MSC's argument that I should refuse any relief in equity, did not have the level of turpitude required for it to have that effect, it could not be said that it was unreasonable of MSC to have raised this point in circumstances where the conduct did give rise to legitimate concerns and where I held that it was relevant to the consideration of the balance of justice as set out in my earlier judgment.

32. In relying on these points to urge the Court to make a partial costs order or to set off any costs in respect of points on which GKT was successful against MSC's costs, GKT also relies on the principles set down in *Veolia*, *Daly v Ardstone* and *Chubb*. The interaction between section 169(1)(b) (the reasonableness of the points raised) and the *Veolia* line of authorities may have to be considered in an appropriate case but was not the subject of argument in this case. I have therefore proceeded on the basis that the *Veolia* principles apply in principle.

33. I do not propose to quote directly from the judgment of Clarke J in *Veolia* as the relevant principles are captured in *Daly v Ardstone* and *Chubb* which were opened to the Court. In paragraph 9 of his judgment in *Daly v Ardstone* Murray J stated:

> *"These various provisions fell to be applied in the light of the decision of Clarke J. (as he then was) in Veolia Water UK plc v. Fingal County Council (No.2) [2006] IEHC 240, [2007] 2 IR 81. That case decided four things of relevance to this application. First, that in an interlocutory application of any significance in the litigation, the starting point is that the successful party should obtain their costs (at para. 2.6). Second, that a party is successful for this purpose even though they may not have 'succeeded on every point' because it can in that situation be said that in that situation the application 'will have been justified by the result' (at para.2.8). Third, that in some cases where a party does not succeed on every issue, it may be appropriate that the Court reduce the costs of the successful party to subtract from the award in its favour the costs attributable to the issues on which its opponent succeeded. This is the proper course of action where a case is not straightforward and where it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful (at para. 2.8). Fourth, that there will be cases in which there are a multiplicity of issues and in which each party has prevailed on an equal number of those issues, so that it can be concluded that there is in truth no real winner, and thus that no order for costs should be made in favour of either (see para. 3.9)".*

34. Murray J also considered *Veolia* in *Chubb* in the context of an allocation of the costs of the full trial of an action and set out the rationale for the principles contained in the quote above.

35. One of the issues in *Daly v Ardstone* was which costs regime applied and, to the extent that there is any dispute about whether the *Veolia* principles apply to the instant case, GKT relied on *Chubb* where, at paragraph 20, Murray J held:

> *"Insofar as there might be said to be any difference potentially relevant to this application between the new and old regimes, they appear to me to lie in two features of the 2015 Act. First, Clarke J. in Veolia – at least on one view – limited his explanation of the power of the Court to reduce the costs of the party who prevailed on the 'event' by reference to the costs incurred by the other party in addressing issues on which the former did not succeed to cases that were 'complex'. No such express limitation appears on the face of the legislation. Second, whereas under the pre-existing law, costs presumptively followed the event the prima facie entitlement to costs is now limited to the party who is 'entirely successful'. Given that the law was that the term 'event' fell to be construed distributively so that there could be a number of events in a single case (Kennedy v. Healy), winning the 'event' and being 'entirely successful' may well not mean the same thing (although it will be observed that the phrase 'costs to follow the event' appears in the marginal note to, but not the text of, s.169)"*

36. It is clear, GKT submits, from this passage that the *Veolia* principles apply under the new regime in respect of costs. GKT also submitted that it also "*simplifies*" the position because the court does not have to be satisfied that the case is a complex case before applying the *Veolia* principles.

37. Finally, GKT relies on paragraph 5 of Murray J's judgment in *Daly v Ardstone* in which he said:

> *"Although this application was at hearing for less than a day, the parties exchanged detailed legal submissions addressing each of the separate respects in which an order for further and better discovery was sought. It is thus possible to identify a number of distinct issues that fell for determination by the Court, to clearly isolate the matters on which the plaintiff prevailed, and those on which the defendant succeeded, and to decide with reasonable accuracy the time and resources directed to those questions. Furthermore, while these various questions came before the Court on foot of a single application for further and better discovery, each*

of these issues presented a distinct claim for relief in the form of an application for further and better discovery of particular categories of documents."

38. The substance of GKT's case is that it is "*possible to identify a number of distinct issues that fell for determination by the Court, to clearly isolate the matters on which the plaintiff prevailed, and those on which the defendant succeeded, and to decide with reasonable accuracy the time and resources directed to those questions*."

39. In my view, these principles do not require or justify a departure from the starting point that MSC should be awarded its costs in the circumstances of this case.

40. It is clear from *Daly v Ardstone* that the starting point is that a successful party should obtain their costs and that this is the case even though they did not succeed on every point.

41. In this case MSC is the successful party even though it did not succeed on every point or issue that was in dispute so the starting point is that MSC should obtain their costs. I then must consider whether there were a multiplicity of issues in which each party has prevailed on an equal number of those issues *"so that it can be concluded that there is in truth no real winner"* and that no order for costs should be made in favour of either (the fourth scenario in the quote above from *Daly v Ardstone*) or whether the costs of the parties were increased by virtue of MSC, the successful party, having raised additional issues upon which it was not successful (the third scenario).

42. In relation to the first of these, I do not accept that there were a multiplicity of issues and that the parties have prevailed on an equal number of those issues. There was in fact one core issue – whether an interlocutory injunction in the terms sought should be granted. All issues and arguments in the case were directed towards that core issue and MSC succeeded on that core issue. There is no basis for a suggestion that MSC was not the real winner. There may be cases where individual issues may be of such significance or take up such an amount of time in the proceedings or where they may ground different reliefs that such an approach may be appropriate; but in circumstances where all issues took approximately a day (leaving aside the dispute

about the admissibility of GKT's second affidavit) and, crucially, where they were all directed towards whether GKT had satisfied the long-established test for an injunction and whether the Court should exercise its discretion to grant an injunction, it does not seem to me that there could be said to have been a '*multiplicity of issues upon which the parties enjoyed equal success.'*

43. The third scenario in *Veolia*, set out in *Daly v Ardstone* by Murray J, retains the overall principle that costs should follow the event but allows of the possibility that the successful party's costs may be reduced by the amount of the costs attributable to the issues upon which the successful party failed. Murray J describes this as being "*the proper course of action where a case is not straightforward and where it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful*." In my view, this case could not be described as "*not straightforward*." Furthermore, it does not seem to me that the costs were "*increased by virtue*" of MSC having raised the issues upon which it was unsuccessful. The substantive part of the case was concluded in just over a day. If the issue about the admissibility of that affidavit had not arisen the case would almost certainly have finished within a day. I have already held that MSC was fully entitled to challenge the admissibility of the affidavit in the circumstances. Where all of the other issues would have concluded within a day, there is no basis for finding that the costs of the proceedings were materially increased by the issues upon which MSC was not successful. It must also be borne in mind that in this context the measurement of success/failure is not always black and white. While, for example, MSC did not succeed in persuading the Court that the injunction was a mandatory injunction or that GKT's conduct amounted to it coming to court without clean hands such as to disentitle it to relief, nonetheless the Court found it necessary and appropriate to consider these matters when weighing the balance of justice. Furthermore, while MSC failed to persuade the Court that GKT had not established an arguable case, it must be borne in mind that GKT had established such a case on a narrow basis.

44. In *Daly v Ardstone* the Court noted that the hearing took less than a day but nonetheless made an Order on the basis that it was possible for the court to identify a number of distinct issues that fell for determination and to clearly isolate the matters on which the plaintiff prevailed and those on which the defendant had succeeded, and to decide with reasonable accuracy the time and resources directed to those questions. However, the fundamental difference between *Daly v Ardstone* and this

case is that the former concerned an application for further and better discovery and, while the various questions came before the Court on foot of a single application, "*each of these issues presented a distinct claim for relief in the form of an application for further and better discovery".* In this case, all of the issues were directed to the one claim for relief. That will not necessarily preclude the court making a discounted or partial costs order if satisfied that one of those issues had materially prolonged the hearing or added to the costs – which would be far more likely in a case in which all of the issues were not dealt within a day – but I am not satisfied that this occurred in this case.

45. Thus, in all of those circumstances, it seems to me that there is no basis in the *Veolia* approach for making no order as to costs or to only award part of the costs to the Defendant, or indeed to set off costs to GKT in respect of issues which it succeeded on against the costs to MSC.

Section 169(1)(a) and (c)

46. As noted above, GKT also refers to section 169(1)(a) and (c). Paragraph (a) refers to the parties' conduct before and during the proceedings and paragraph (c) refers to the manner in which the parties conducted all or any part of their cases. The core of GKT's case in this regard is that GKT had to go to great effort and expense to obtain leave to serve the second-named Defendant out of the jurisdiction and to obtain an order for substituted service and that ultimately the solicitors who were on record for the first-named defendant came on record for the second-named defendant. It seems to me that I can have very little regard to this factor in the particular circumstances of this case. The involvement of the second-named defendant has proven controversial from the beginning. A complaint that has been consistently raised by MSC was that the consent that was given for the original interim order was given on behalf of the first-named defendant but that it somehow became an order against both the first-named defendant and the second-named defendant even though, it is claimed, GKT had not made it known to the first-named defendant's solicitors that the second-named defendant was also a party to the proceedings. This was part of the clean hands' argument. In my view, I can not deal with the alleged conduct on the part of MSC without also engaging with the complaints made on behalf of MSC which I declined to do in the context of the injunction.

47. However, even if I operate on the presumption that I should have regard to this conduct on the part of MSC and that those additional costs were incurred as a result of that conduct, I also have to have regard to GKT's conduct and particularly conduct which MSC claims led to additional costs. MSC drew a distinction between section 169(a) and (c), making the point that (a) must be conduct apart from how the case was handled and that (c) relates to the manner in which the case was handled. That seems to me to be a correct distinction but, in circumstances where the conduct complained of can fall within both categories, I think I can safely treat of them together. I do not propose to consider each individual matter raised by MSC. In summary, they rely on the points made in respect of the argument that GKT did not come with clean hands, that GKT did not prosecute the proceedings with expedition, that the undertaking that was offered by GKT not to retain any containers was given very late in the day (in GKT's written submissions), that GKT sought to deny that it was holding the containers to secure payment and attempted to denigrate MSC by suggesting that they had manufactured their concern about the retention of the containers, and the late delivery of the affidavit by the Plaintiff without leave of the court had caused the case to go into a second day thereby increasing the costs.

48. I have made findings in respect of these in my judgment on the injunction application and I do not need to repeat them. In response to MSC's point about the late delivery of the affidavit GKT submitted that it was open to MSC to simply have admitted the affidavit and that it was their refusal to do so which caused the case to go into a second day: in other words, that it was the conduct of MSC in declining to admit the affidavit which caused any increased costs and I should have regard to that fact. I can not accept that. The chronology in relation to the affidavit is set out in my judgment. In my view, MSC were perfectly entitled to object to the admission of the late affidavit in circumstances where it put MSC in the position of having to seek an adjournment of an urgent matter or of being put at the disadvantage of having to deal with the application without having replied to an affidavit.

49. In all of those circumstances, I do not believe that when regard is had to the parties' respective "*conduct*" under section 169(1)(a) and (c) I should exercise my discretion against awarding costs to the defendants.

Section 169(1)(g)

50. GKT also relied on section 169(1)(g) which refers to "*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 of the parties was or were unreasonable in refusing to engage in the settlement discussions or mediation…"

51. GKT argues that after Allen J "*hinted*" at mediation in October 2021 GKT's solicitor wrote an open letter suggesting mediation but there was no reply at all to this between the 28th October and 3rd December. MSC pointed out that there was in fact a settlement meeting and that GKT can not rely on the fact of a mediation not having taken place when a settlement meeting occurred. I think this is correct. The section expressly countenances efforts to settle being taken by way of mediation or settlement discussions and where the latter occurred and where there is no evidence that either party did not bona fide take part I can not conclude that either party was "*unreasonable in refusing to engage in the settlement discussions or mediation*".

Costs in the Cause

52. In relation to the suggestion that the costs should be made costs in the cause GKT referred to *Minihane v Skellig Fish Ltd.* In that case, Noonan J on behalf of the Court of Appeal could not accept that on the facts the "*proposition that an order directing costs to be costs in the cause is outside the range of orders reasonably open to the High Court. One might reasonably have thought that if any party had reason to be disappointed about that order, it was the plaintiff, who had after all succeeded in the application where normally, the costs would follow that event.*" I accept that it could be said that an order making the costs costs in the cause is within the range of orders which is reasonably open to me. However, its effect is, by definition, to deprive MSC, the successful party in this application of their entitlement to their costs. For the reasons discussed above, I do not accept that I should order otherwise than granting MSC their costs including by making them costs in the cause.

53. I will therefore make an Order for the defendants' costs. As indicated above, I will place a stay on the execution of that Order pending conclusion of the proceedings or until further Order. It seems to me that I have a discretion to do so and in exercising that discretion I have had regard to the current general economic circumstances and in particular the high level of energy costs, including the cost of fuel. I did not hear specific evidence as to these general economic conditions, but the courts do not exist in isolation. There was general evidence before the court as to the narrow margins and the costs in the haulage industry and it seems to me that when

these are taken together it is appropriate that the execution of the costs be stayed. The point was made on behalf of MSC in the context of the suggestion that the costs should be reserved, or even that MSC's costs only should be reserved to the trial of the action, that the effect of this could mean that MSC would be denied their costs or at least greatly delayed in establishing their entitlement to costs by GKT not prosecuting the proceedings and, it was suggested, the indications are that GKT has no intention of prosecuting the case. The same general point could, of course, be made in respect of a stay on the Order for costs. It seems to me that this risk is mitigated somewhat by the stay being placed on the execution of the costs order rather than on entry and execution because the determination of MSC's entitlement to the costs will not be delayed. Furthermore, in circumstances where the stay will operate until determination of the proceedings or until further Order MSC will be entitled to apply have the stay lifted in the event that the proceedings are not prosecuted with appropriate dispatch by GKT. Of course, MSC will have, in any event, the option of applying to strike out the proceedings if there is a delay or failure to prosecute, thereby, if successful, bringing the proceedings to a determination and causing the stay to come an end.

54. I will, therefore, make an order for MSC's costs (one set of costs) to be adjudicated in default of agreement with a stay on execution pending conclusion of the proceedings or further order of the Court.