THE HIGH COURT

[2023] IEHC 533

[Record No. 2021/6814 P]

LEXINGTON SERVICES LIMITED AND JAMES PATRICK FLANNERY

PLAINTIFF

-AND-

BRIAN CONNELL

DEFENDANT

Judgment of Mr. Justice Dignam delivered on the 27th day of September 2023.

Application

1. This judgment concerns the costs of the plaintiffs' motion for an interlocutory injunction which did not proceed and, therefore, the Court did not determine, in circumstances where the defendant gave an undertaking after the motion had been issued. The plaintiffs seek their costs and the defendant submits that the costs should either be reserved or made costs in the cause or that there should be no order as to costs.

Jurisdiction

2. That the Court has jurisdiction to determine the question of costs, including awarding the costs to one of the parties, notwithstanding that it did not have to determine the underlying motion is clear, though it should only determine the liability for costs if it is satisfied that it can justly adjudicate on the liability. There was in reality no dispute between the parties as to the existence of this jurisdiction though there was a

significant difference between them as to whether I should (or could) exercise that jurisdiction. The defendant placed reliance on the judgment of Laffoy J in *Tekenable Ltd v Morrissey & ors [2012] IEHC 391*. The plaintiffs relied on the more recent judgments of Peart J in *Irish Bacon Slicers Limited v Weidemark Fleischwaren GmbH & Co [2014] IEHC 293* and Murray J in *Heffernan v Hibernia College Unlimited Company [2020] IECA 121.*

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

> *"2. Subject to the provisions of statute (including ss 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.*
>
> *(2) No party shall be entitled to recover any 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.*
>
> *…*
>
> *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 any 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."*

4. Sections 168 and 169 of the Legal Services Regulation Act 2015 and Order 99 of the Rules govern how the courts should deal with costs. Order 99 Rule 3(1) requires the Court, upon determining an interlocutory application, to make an award of costs save where it is not possible justly to adjudicate upon liability for costs. In broad terms the general starting position is that the successful party should obtain their costs. This general starting position is given statutory expression in Order 99 Rule 3(1) and section 169 of the 2015 Act. (There is some debate about whether the default rule in section 169(1) applies to interlocutory applications rather than only the substantive proceedings (see *Construgomes & Carlos Gomes SA v Dragados Ireland Ltd & ors [2021] IEHC 139* and *McFadden v Muckno Hotels Ltd [2020] IECA 110*) but this does not have to be resolved in this case.) As the Court has not made any determination as to the merits of

the underlying application, it would be inappropriate, if not impossible, for the Court to determine the question of costs on the basis of who was "*successful*" in the motion. Thus, where the motion is disposed of other than by way of determination, as in this case, then the Court has to adopt a different approach.

5. In *O'Dea v Dublin City Council [2011] IEHC 100* (referred to by Laffoy J in *Tekenable*), Laffoy J considered whether there had been an "*event*" in circumstances where a compromise was reached between the parties which resolved the interlocutory injunction application and the substantive proceedings. Laffoy J, without wishing to express a definitive view in this regard, stated that "*what the Rules 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.*"

6. She adopted a similar approach in *Tekenable Ltd v Morrissey & ors [2012] IEHC 391* in which she had to consider an application by the plaintiff for the costs of a motion for an interlocutory injunction which was resolved by an undertaking given to the Court by the defendants on foot of an agreement between the parties. Unlike in *O'Dea*, the substantive proceedings were continuing. Laffoy J referred to her judgment in *O'Dea* in which she had pointed out that there were a number of fundamental rubrics embodied in Order 99 rule 1 of the Rules of the Superior Courts, including that costs shall be at the discretion of the Court and that unless the Court ordered otherwise costs shall follow the event. She also noted Rule 1(4A) (which was the predecessor to Rule 2(3)) and that the rule appeared to remove the discretion of the Court to postpone adjudicating on the costs of interlocutory applications except where it is not possible to justly do so and that there is a wide range of interlocutory applications where there would not be the remotest possibility of injustice if the Court adjudicated on costs. She went to say that *"[O]ther situations give rise to genuine concerns that to determine where the burden of costs shall lie in relation to an interlocutory application at the interlocutory stage may perpetrate an injustice. One such situation is at the conclusion of an application for an interlocutory injunction*". She outlined a number of reasons why it had been the practice to reserve the costs of interlocutory injunction applications and noted that they were also the very factors which a court is likely to have regard to in considering whether, having determined the injunction application, it is possible to justly adjudicate at that stage on whom liability for the costs should lie. On the issue of whether to adjudicate on the issue of liability for the costs in that case she held that it would be inappropriate to do so because (i) the Court had not adjudicated on whether the interlocutory injunction sought would have been granted or refused and in particular that the making of the consent

order accepting the agreed undertaking did not amount to an adjudication "*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*"; (ii) the agreement between the parties including the undertaking had rendered the issues on the interlocutory application moot and it would therefore serve no purpose and would be inappropriate for the Court to express a view as to whether the injunction would have been granted or refused; and (iii) even if the injunction application had proceeded it would have turned "*on particular aspects of the merits of the case which are based on the facts*" (*Allied Irish Banks plc v Diamond & Ors*) and it was therefore likely that the costs would have been reserved. She went on to say that "…*there are undoubtedly cases in which the Court will consider it appropriate to exercise its discretion to award costs of an application for an interlocutory injunction which has come to an end either because the defendant has done or has undertaken to the Court to do, what the plaintiff has requested the Court to order the defendant to do, by awarding the costs to the plaintiff against the defendant, because the Court is satisfied that it can justly adjudicate upon liability for costs at the interlocutory stage*."

7. Laffoy J's view, expressed in *O'Dea* and reflected in *Tekenable*, that there had to be a court determination in order for there to be an event upon which the Court could adjudicate on the question of costs was expressed in tentative terms and was revisited by Peart J *in Irish Bacon Slicers Limited v Weidemark Fleischwaren GmbH & Co [2014] IEHC 293* and, more recently, by Murray J in *Heffernan v Hibernia College Unlimited Company [2020] IECA 121.*

8. Peart J held in *Irish Bacon Slicers* that a court determination on the merits of the application is not necessary in order for the Court to adjudicate on the question of costs. He said:

> *"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... It was the failure to provide the undertaking sought, or to respond in any way to the request for that undertaking by the deadline set that resulted in the granting of the interim injunction, and the pursuit of the interlocutory injunction. Given the defendant's readiness to give the undertaking on the 23rd July 2013, it is hard*

to see any force in its arguments now that this was simply pragmatism on its part and that it was not in any way conceding the plaintiffs entitlement to the injunction. It is just in my view, whether or not there can be seen to have been 'an event' for the purpose of Order 99 RSC, that the plaintiff should get its costs.

But on that question of whether an event can be seen to have occurred, I want to observe the following in the context of interlocutory matters. It is not at all clear that 0.99(1)(4A) - the new rule - requires that on interlocutory applications there must have been an event at all and that costs should follow the event in such interlocutory applications. It is natural and normal that where an interlocutory application is the subject of a court's determination the court would consider that it is right that the costs of the motion should be awarded to the party which was successful on the application. In such circumstances, the costs are following the event, and that will be the just thing for the court to do in most cases. But that is different from saying that on interlocutory applications costs "shall follow the event" (emphasis added), thereby muddying the waters somewhat in circumstances where as in the present case there was not determination of the motion, but rather there was either a concession by the respondent to the motion, or perhaps an agreed order (save for costs).

In my view the argument that there has been no 'event' in these circumstances and that therefore the Court must or ought to reserve the costs to the hearing is misplaced, and I believe that a careful reading of O.99, rule 1, sub-rules 1, 3, 4 and 4A support this. Sub-rule 2 is not relevant for present purposes. It is clear that r.1(1) provides a general or overarching principle that costs of and incidental to "every proceeding" shall be at the discretion of the Court. One sees then that under r.1(3), but now subject to rule 4A, a derogation from the general rule of discretion is provided specifically in r.1(3) in respect of matters tried by a jury. That does not apply here. Costs of such matters "shall follow the event". A second derogation from the general rule of discretion is provided in r.1(4) where again subject to sub-rule 4A, it is provided specifically that the costs of any issue of fact or law raised upon a claim or counterclaim "shall follow the event". That does not apply here. But new rule 1(4A) 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 the costs shall follow the event.

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.

In these circumstances, it seems to me that while the Court is now required by the introduction of new rule 1(4A) RSC to make an award of costs upon the determination of the application in question, it is not necessary that there has been what in other sub-rules is referred to as an 'event', and that the Court must make an award of costs by reference to the general rule of discretion contained in O.99, r. 1(1) RSC.

The absence of any reference in r.1(4A) of any reference to an 'event' makes complete sense. Interlocutory applications are many and varied. Interlocutory injunctions are just one of many other more frequent motions of an interlocutory nature brought between the commencement of proceedings and their final determination. The simplest and most common form of interlocutory motion is perhaps the application for judgment in default of defence. The vast majority of such motions are disposed of by the plaintiff agreeing a short extension of time for the delivery of the defence. Invariably also the parties agree that the plaintiff should be awarded its costs of having to bring the motion. But what if there is no agreement in relation to the costs of the motion? There has been no 'event' as such, but it could not be seriously argued that in such circumstances the Court could not exercise its discretion under r.1(1) and award costs against the party in default of pleading, even though no 'determination' of the issues as such has taken place. That seems to be the intention behind the new rule."

9. He also stated:

"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.

Moreover, where a defendant faced with these probabilities nevertheless resists the application for an interlocutory injunction in circumstances where he ought to have perhaps considered conceding that the plaintiff would obtain the injunction in any event, he/she can have little complaint in my view if the Court then makes an order for costs against him/her on the basis that costs follow the event, even where the issues to be determined between the parties will have to await a later final determination at the substantive hearing. Nevertheless, I accept that each case will depend on its own facts, and as stated by Laffoy J. there will be cases where the Court will still reserve the question of costs to the hearing where there is a real risk that it is not possible to make a just determination in relation to costs at that stage of the proceedings.. But the days are gone when the Court would, almost as a matter of convenience and routine, simply reserve the question of costs to the hearing of the action."

10. Peart J concluded:

"It was only at the outset of the hearing when the matter was called in the list that the defendant through its counsel informed the court of the defendant's willingness to give an undertaking to the court in the terms of the plaintiffs' motion. This undertaking did not emanate or result from any prior negotiations with the plaintiffs' legal team. It was in that sense unsolicited, though obviously it had been requested some five weeks previously. It is precisely the undertaking that had been sought by [the applicant's solicitors] at the outset."

11. It is important to note that the facts in *Irish Bacon Slicers* were particularly stark in that the undertaking that was proffered was "*the very undertaking which [the defendant] had been called upon by the plaintiff's solicitor to provide five weeks"* before the issuing of the motion and was proffered unilaterally without any discussions or negotiations between the parties. Nonetheless, the principle that the court has a discretion to award costs even though there was no determination of the underlying application is clear.

12. The fact that Twomey J determined the injunction application is, of course, an important distinction between that case and the current one (and *Irish Bacon Slicers*). Nonetheless, Murray J's, comments paragraphs 37 – 44, are directly relevant. One of the issues in the appeal was that while Twomey J refused the interlocutory injunction on the basis of the open offer made on behalf of the defendant and therefore awarded the costs of the application to the defendant, that offer was only made two days before the hearing and Twomey J did not address the issue of whether the costs of the plaintiff in getting to the point where that remedy was offered for the first time should be awarded in his favour. Murray J held that he should have done so. At paragraphs 37 – 44 Murray J said, inter alia:

> *"37. This leads to a second consideration which falls to be taken into account. A party who has invested significantly in bringing an interlocutory application and who as a consequence obtains a concession from his opponent that would not otherwise have been tendered is entitled in many circumstances to expect that it will recover the costs it has incurred in securing that concession. This is particularly the case if the offer is made at a very late stage in the process (see Irish Bacon Slicers Limited v. Weidemark Fleischwaren GmbH).*
>
> *38. In this case, the offer which the trial judge determined to be dispositive of the application for an injunction was made two working days before the hearing, and after the first listing of the application for an injunction. If the reason the injunction was not being entertained was not consequent upon any appraisal of the merits of that application but simply because of the benefit obtained by the appellant by virtue of the offer, and given in particular that the respondent decided to abandon its suggestion that the costs be reserved to the hearing, the Court ought to have taken account of the cost incurred by the appellant in obtaining that offer. The offer would not have been made but for the proceedings and the application for an injunction. It was made at a very late stage, and after the application for an injunction had been listed for hearing on*

27 August (with the consequence that significant costs had already been incurred by the appellant).

39. Once the trial judge decided to impose a liability in costs upon the appellant for failing to avail of the remedy, and once he decided that the offer in the letter of 12 September negated the need for a hearing on the injunction application, he should have proceeded to decide whether the costs of the appellant in getting to the point where that remedy was offered for the first time should be awarded in his favour. The trial judge did not expressly address this issue in the course of his ruling and, as indeed I have noted, he did not expressly address those costs at all in his order. Had he done so, I believe that the appropriate course of action would have been to order the costs incurred by the appellant in getting to that point.

40. The failure to approach the matter in this way resulted in a significant imbalance in the ultimate costs order: on the one hand the appellant was penalised in costs for not accepting the offer and proceeding with a hearing, but at the same time the appellant recovered none of the costs incurred in bringing the respondent to the point where it (belatedly) made the offer viewed by the trial judge as determinative of the application.

41. The correct approach to this aspect of the costs was that adopted by Peart J. in Irish Bacon Slicers v. Weidemark Fleischwaren GmBH & Co. … In awarding the plaintiff its costs, Peart J. said (at p.7): '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 an 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.'

42. Peart J. proceeded to analyse the provisions of O.99, r.1(4A) RSC concluding that for the purposes of that provision it was not necessary in ordering costs of interlocutory proceedings that there be an 'event'. That analysis, it should be noted, appears to have followed from the tentative view of Laffoy J. in O'Dea v. Dublin City Council [2011] IEHC 100 that as the term

'event' is used in O.99 RSC, it refers to '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' (para. 6.1). Laffoy J.'s caution in tendering that view proved well founded: the decision of the Supreme Court in Godsil v. Ireland at para. 62 makes it clear that it is not necessary for there to be a court determination before there is an 'event' for these purposes. It may in some circumstances be sufficient that the action in question was that sought by the plaintiff and that it was undertaken in response to the proceedings (see P.T. v. Wicklow County Council [2019] IECA 346 at para. 18)...

43. Although decided before Godsil, the approach adopted by Peart J. reflects the overall analysis in that case as appropriately modified to reflect the particular considerations properly brought to bear on an application for the costs of an interlocutory application…

44. There is, of course, an important and obvious point of distinction between Irish Bacon Slicers decision and this case and it is rightly emphasised by the respondent in its submissions. In this case the appellant declined the offer made by the respondent and ran his application before the High Court, and the Court refused the reliefs he sought to obtain. The critical consideration, however, in my view is that the reason the reliefs were refused was the respondent's offer, which was made after substantial costs had been incurred, and at a very late stage. The point of distinction emphasised by the respondent is properly reflected in the decision of Twomey J. to grant costs against the appellant, in effect because he refused to accept the offer and proceeded with its application. The judge, however, erred in ordering those costs but not at the same time making an order against the respondent to reflect the view of the Court that the letter of 12 September afforded a remedy. Thus, the principle reflected in Irish Bacon Slicers that the offering at a late stage of an interlocutory application of a remedy which in the view of the Court meets the needs that animated the application to Court in the first place should, absent good reason to the contrary, be reflected in an order for costs in favour of the party that has incurred costs in obtaining that remedy."

13. The version of the Rules under which both *Irish Bacon Slicers* and *Heffernan* were decided was different to the rules applicable to this case (there is no longer any express

reference in the Rules to costs following the event). I do not believe that this makes any difference in substance to the principle identified in those cases. It is clear that the Court has a discretion to determine the question of costs even though it has not determined the underlying application provided it is satisfied that can do so justly. Some guidance is given in *Irish Bacon Slicers* and *Heffernan* as to matters which might be considered by the Court in exercising that discretion: for example, was the undertaking that was eventually given the same (or sufficiently similar) to the one sought, does the undertaking meet "*the needs that animated the application to court in the first place*", or was the undertaking unilaterally given after proceedings were issued or was it a result of negotiations between the parties? However, it is a broad discretion which must be exercised by reference to all of the circumstances in the case.

Background

14. The parties herein have had business dealings over a number of years and are involved in several sets of legal proceedings both in this and other jurisdictions. Some detail is given in relation to these proceedings in the affidavits exchanged in this motion. It is wholly unnecessary to deal with these other proceedings in any sort of detail for the purpose of this judgment. The parties refer to these other dealings and proceedings and their respective conduct in and of those proceedings to impugn each other and to support their position in this motion by reference to that conduct. The real relevance of those other dealings and proceedings is that it was claimed by the plaintiffs in this motion that a Mr. Basheer (either directly or through a company Dedagda Limited) provided technology consultancy and advisory services to Lexington, its associated companies, and Mr. Flannery, over the course of a number of years in relation to business dealings and various pieces of litigation, some of which involved the defendant. Details of the various matters that it is claimed Mr. Basheer was involved in on behalf of the plaintiffs are set out in paragraph 15 and Appendix 1 of the grounding affidavit. It is claimed that in the course of and for the purpose of this work Mr. Basheer came into possession of sensitive, confidential and legally privileged documents and information relating to the plaintiffs and that he was under a duty of confidentiality on foot of letters of engagement and the common law.

15. One set of proceedings involving the first-named plaintiff and the defendant are proceedings concerning various sections of the Companies Act 2014 and a company called "*West Global Limited*" (in liquidation) between Lexington and Mr. Connell. Again, it

is not necessary to engage in any detail with the substance of these proceedings, which I will refer to as the "*West Global proceedings".*

16. On the 19th October 2001, the defendant swore an affidavit in those proceedings. In that affidavit, he referred to having obtained a laptop from the widow of Mr. Basheer, and exhibited a number of documents which had been taken from the laptop. He said "*I further say that prior to the death of Mr. Bruce Basheer (a former associate of Mr. Flannery's) in December 2019, he provided me with voice recordings of conversations with Mr. Flannery and others and also provided me with documents and emails which Mr. Basheer said are relevant to the claims and allegations being made by Mr. Flannery and Lexington and he further said that I was free to use any or all of the information. In July 2021, I met with his widow and she gave me his old laptop in order to access Mr. Basheer's old emails. Since that time I have analysed the new documents provided by Mr. Basheer's widow and many of the documents exhibited in this affidavit are from that source and are used solely to highlight Mr. Flannery's untruthful statements and to defend myself from the allegations contained in the within application.*" The plaintiffs claim the documents contain "*manifestly confidential and privileged information*." The plaintiffs believe that this is likely to be a very small portion of the confidential and privileged information contained on the laptop.

17. Following the delivery of this affidavit and an alleged incident where a representative of the defendant is alleged to have revealed that the defendant was willing to rely on other documents obtained from the laptop, solicitors on behalf of the plaintiffs wrote to the defendant's solicitors seeking certain undertakings. This led to an exchange of correspondence. This correspondence is at the heart of what the Court has to consider. The letters that were exchanged were lengthy and detailed. I have considered them carefully. However, I do not consider it necessary to set the contents out in detail. The parties set out their respective positions on the underlying dispute about the documents and whether a duty of confidentiality arose. For example, in their initial letter, the plaintiffs' solicitors set out the bases upon which it was claimed Mr. Basheer and the defendant were under a duty of confidentiality (letters of engagement with Mr. Basheer and the common law). They exhibited a sample letter of engagement. In their reply, the defendant's solicitors set out why he says that the sample letter of engagement was not operative and, presumably, why Mr. Basheer was not under a duty of confidentiality and why the defendant was not under such a duty. The plaintiffs' solicitors joined issue with much of this in their subsequent reply and further issue was joined in the defendant's solicitors' subsequent reply. Many of the points made in this (and further, post-motion) correspondence was reflected in a second replying affidavit

filed by the defendant. I obviously can not determine the merits of these points. Rather than quoting at great length from those sections of the correspondence dealing with these matters, I will focus on the undertakings that were sought and offered in this correspondence, and were ultimately accepted.

18. This correspondence was written in the West Global proceedings. This, in itself, is not surprising as the issue had arisen in those proceedings. However, as will be apparent from the contents of the correspondence, the plaintiffs later decided that it was necessary to issue separate proceedings.

19. The first letter was sent by the plaintiffs' solicitors on the 12th November 2021. They sought the following undertakings:

> *"In these circumstances we hereby request Mr. Connell to;*
>
> 1. *clarify how and when he contacted Mr Basheer's widow with a view of gaining possession of Mr. Basheer's laptop and the terms agreed with Mr. Basheer which resulted in her giving possession of the laptop to Mr. Connell;*
>
> 2. *provide an undertaking by return to our client and the Court that he will not seek to use and/or rely on documents located on Mr. Basheer's laptop containing our client's confidential (that is, non-public), commercially sensitive and/or privileged information for any purpose, including, in particular for the purpose of these proceedings and/or any related proceedings involving our respective clients;*
>
> 3. *provide an undertaking that he will not disclose or disseminate to any party copies of documents or data located on Mr. Basheer's laptop containing our client's confidential, commercially sensitive and/or privileged information, that he will delete and/or destroy and/ or return any documents or data relating to:*
>
> *3.1 "3 D Share" (under the ownership of J Two Eight Limited); and*
>
> *3.2 "Beat Your Mark Inc" and/ or "BeatYourMark Group Ltd" (of which Mr. Basheer was a director/ CEO); and*
>
> *4. re-swear his Replying Affidavit dated 19th October 2021 without the application of any reference to the documents which were obtained from Mr. Basheer's laptop. In these circumstances our client will not be delivering a*

replying affidavit on or before 17th November 2021 and reserve its rights to bring this matter to the attention of the Court on the next return date."

20. The defendant's solicitors replied on the 17th November 2021, saying, inter alia:

"…

For the avoidance of any doubt on the matter please note that Mr. Connell will not be withdrawing his affidavit sworn on the 19th October 2021 and if your client decides not to file a replying affidavit prior to the 17th November then our instructions are to apply for directions in relation to a hearing date without further delay.

We note your Clients threat to issue a motion for injunctive relief against Mr. Connell, to prevent him from relying on any documentation from Mr. Basheer's laptop.

However, it is both telling and surprising that in your four-page letter you fail to identify even one document (exhibited by Mr. Connell) that you say is either privileged or confidential.

As you are no doubt aware your client, once again, has absolutely no legal grounds upon which to bring a motion and if you do issue such a motion, our client will defend himself fully and apply for an Order for costs against your client"

21. The solicitors for the plaintiffs then replied on the 19th November 2021:

"…

Finally, we note that your instructions are to apply for directions in relation to a hearing date in the event that our client does not deliver a replying affidavit. It would plainly be inappropriate for this motion to proceed to hearing in the present circumstances and accordingly we are instructed to oppose your application. First, as we have indicated, we are instructed to bring a motion seeking injunctive relief restraining Mr. Connell from relying in these proceedings on Lexington's privileged and commercially-sensitive information, which he obtained improperly. For reasons which require no explanation, that

motion will have to be determined prior to the hearing of these proceedings and by a different judge.

…

As confirmed above, in light of the position adopted by your client we are instructed to proceed to issue an application for appropriate injunctive relief which will be served on your firm and Mrs. Basheer will also be put on notice of that application."

22. It seems that on the 22nd November, Counsel on behalf of the plaintiffs told the Court in the West Global proceedings that it was intended to bring an injunction application and those proceedings were adjourned generally. This was followed by a further email from the plaintiffs' solicitors of the 29th November in which they stated that, having taken instructions, the plaintiffs no longer proposed to issue a motion for injunctive relief solely within the West Global proceedings but instead would be issuing "*separate proceedings against Mr. Connell seeking inter alia an injunction restraining him generally from using any of the aforementioned material, including in respect of the above proceedings, but not limited to those proceedings*." It stated that papers were with counsel and the defendants' solicitors were asked to confirm whether they had authority to accept service. It concluded "*As you know, your client refused to provide the undertakings we requested in our letter dated 12 November and in these circumstances or client has no alternative but to issue the appropriate proceedings seeking the injunctive relief outlined above."* The defendants take issue with how this letter is characterised in the plaintiffs' grounding affidavit. At paragraph 32 of the affidavit Mr. Flannery says *"On 29 November 2021 Lexington's solicitors wrote to Mr. Connell's solicitors indicating its intention to issue these proceedings and seeking clarification as to whether that would affect his refusal to provide the earlier-sought undertakings."* As is clear from the quote from the letter, this does not accurately describe what was contained in the letter but I am satisfied that nothing turns on this. The email clearly informed the defendants that separate proceedings were going to be issued in light of the earlier refusal to give the undertakings sought so the defendants were on notice of same.

23. Indeed, the defendants' solicitors engaged with what was said in this email in a reply of the 2nd December. Firstly, they dealt with an allegation that had previously been made on behalf of the plaintiffs that the defendants had sought out Mr. Basheer's widow

for the purpose of gaining access to the laptop to gain an improper litigation advantage. This was emphatically rejected. The email then went on to say:

> "*Nevertheless, in the interests of avoiding any further unnecessary delay by your client and to help expedite the within proceedings, my client is prepared to offer a non-disclosure undertaking in respect of certain matters outside of the scope of any current disputes involving our respective clients. This undertaking includes the following matters:*
>
> *Documents relating to "3D Shape" including the details of the previously undisclosed and denied commercial relationship with the joint liquidators but excluding the fact of the existence of this relationship which continues to be admissible.*
>
> *Documents relating to the "Beat Your Mark Inc" and its parent company "Beat Your Mark Group Limited".*
>
> *We further note that while your client's Counsel informed the Court of your client's intention to issue a motion for injunctive relief against my client in the context of the within Proceedings, your client has not now decided to institute separate proceedings and that the necessary papers have been prepared and are being finalised by your client's counsel.*
>
> *Our position remains unchanged: we will be seeking a hearing date for the within Proceedings, given your abandonment of the previously threatened injunctive application and the lack of any legal grounds that you have to further impede the hearing of these Proceedings.*
>
> *Finally, should your clients decide to issue separate proceedings against my client despite the clear denials provided above, the absence of any legal grounds, and my client's generous offer to provide non-disclosure undertakings as set out above, we are instructed to accept service on his behalf.*
>
> *Please also note that my client continues to reserve all of his rights in relation to the above matters, including the right to withdraw the offer of proposed non-disclosure undertakings, and will rely on the contents of this letter and previous correspondence to recover his costs and or damages associated in dealing with your clients threatened proceedings."*

24. The plaintiffs' solicitors replied by emailed letter of the 16th December 2021 stating that the undertakings which were offered by the defendants on the 2nd December were "*clearly unsatisfactory in circumstances where they do not address documentation which is clearly relevant to the issues in dispute in the proceedings involving our respective clients, including the within West Global proceedings. Nor do they address your client's retention and use of personal, privileged and confidential information belonging to our clients which is contained on Mr. Basheer's laptop…It is clear that your client has no intention of providing the necessary and entirely reasonable assurances sought by our clients and in these circumstances our clients will imminently issue the appropriate proceedings against your client and proceed to bring a motion seeking inter alia, injunctive relief against your client.*"

25. Proceedings were then issued by Plenary Summons of the 17th December 2021 and the motion was issued on the 20th December 2021.

26. The relief sought in the Plenary Summons was, inter alia:

> *"1. A declaration that the Defendant has caused loss to the Plaintiffs by unlawful means.*
> *2. A declaration that the Defendant has breached his duty of confidentiality to the Plaintiffs.*
> *3. An Order restraining the Defendant, his servants or agents, or any entity under the direction or control of the Defendant, from directly or indirectly disclosing or disseminating documents obtained by the Defendant from a laptop formerly belonging to Mr. Bruce Basheer (the "Laptop") which refer or relate to the Plaintiffs' confidential and/or privileged information, and that of each of them.*
> *4. If necessary, an interlocutory injunction restraining the Defendant, his servants or agents, disclosing or disseminating documents obtained by the Defendant from the Laptop which refer to relate to the Plaintiffs' confidential and/or privileged information, and that of each of them.*
> *5. An Order directing the Defendant to deliver up the Laptop for inspection by the Plaintiffs.*
> *6. An Order directing the Defendant to disclose the identities of any person to whom he has disclosed or disseminated documents which refer or relate to confidential and/or privileged information belonging to the Plaintiffs, and each of*

them, and provide a description of the information so disclosed or disseminated and the circumstances in which the disclosure or dissemination occurred.
7. Damages."

27. The relief sought in the Notice of Motion was:

> "*An interlocutory injunction restraining the Defendant from disclosing or disseminating to any third party the documents described in Appendix 1 hereto*."

28. Appendix 1 described the documents as: "*Documents located on the laptop obtained by the Defendant from Evelyn Dollard in or around July 2021 which were sent to, received from, or copied to any of the following parties:"* It then listed sixty-nine parties under a number of headings*: "Family Members and Companies", "Ireland and the UK", "USA", "Malta", "Andorra", "International Legal Firms", "Financial Institutions", "All Skype Data with any of the above mentioned parties (including messages and recordings."*

29. The motion was returnable for the 14th February 2022. The defendant delivered his replying affidavit on the 11th February 2022. He referred to the above exchange of correspondence and emphasised that in his solicitors' letter of the 2nd December he had offered a non-disclosure undertaking in respect of matters outside the scope of the current disputes and specifically referred to documents relating to "*3D Share*" and "*Beat Your Mark*". However, he emphasised, no reply was received for two weeks until on the 16th December the plaintiffs' solicitors rejected the offer and he stated that *"although a draft response had been prepared by the following morning, Lexington's rush to issue proceedings prevented any meaningful exchange of correspondence on the issue of undertakings. The within proceedings were issued the following afternoon on 17th December 2021."*

30. He then went on at paragraph 6 to say that he had always been prepared and willing to provide an undertaking in the following terms:

> *"6.1 I will provide an undertaking to not disclose or disseminate any documents which refer or relate to the Plaintiff's confidential and/or privileged information from the Laptop with the exception of those documents which have already been*

exhibited in my Affidavit of 19th October 2021 (referred to hereafter for convenience, and without prejudice, as the "Confidential Information").

6.2 I will provide an undertaking to destroy all instances of Confidential Information.

6.3 I will provide an undertaking to disclose the identities of any person to who I have disclosed or disseminated Confidential Information".

31. It seems that when the matter came on for hearing Allen J adjourned it to the 3rd March 2022 to allow further engagement in relation to the undertaking offered in the affidavit.

32. This then led to further extensive and lengthy correspondence. The focus of much of this correspondence and the undertakings being discussed in it were directed towards the proceedings rather than just the interlocutory application. For example, the undertaking offered at paragraph 6.2 of the defendant's affidavit *"to destroy all instances of Confidential Information"* is obviously directed towards the substantive proceedings. Furthermore, there was a significant level of debate about the merits of the parties' respective positions and the correctness of what they were stating and of the merits of the proceedings and the interlocutory application. I have considered the correspondence but I do not believe that it is necessary or fruitful to set it out in full.

33. The plaintiffs' solicitors wrote by emailed letter on the 17th February 2022 (which was written in these current proceedings). They stated that the undertakings offered in the affidavit were insufficient and that they did not address the plaintiffs' concerns. They also made a number of points and then set out the undertakings required by the plaintiffs. Some of these were new and had not been sought before but they were in response to the undertakings which had been offered by the defendant in his affidavit, and which had been directed towards the proceedings rather than just the motion. They did so by operating off the undertakings which Mr. Connell had offered in paragraph 6 of his affidavit and, using tracked changes, inserted amendments to paragraphs 6.1 and 6.3 in red. The proposed changes to those paragraphs (whether additions or deletions) are underlined below for ease of reference. The undertakings sought at that stage were:

"1. An undertaking to not use, disclose or disseminate any documents which contain, refer to or relate to the Plaintiffs' confidential, commercially sensitive, personal and/ or privileged information (to include audio recordings) which was

contained and is contained on Mr. Basheer's ~~from the~~ Laptop and any associated hard drive(s) ~~with the exception of those documents which have already been exhibited in my Affidavit of 19th October~~ (referred to hereafter for convenience, and without prejudice, as the "Confidential Information").~~an undertaking to destroy all instances of the Confidential Information.~~

2. An undertaking to disclose the identities of any person, including any third party, to whom [Mr Connell] has disclosed or disseminated the Confidential Information.

3. An undertaking to deliver up Mr. Basheer's laptop and any associated hard drive(s) to an independent third party appointed by the Plaintiffs for the purpose of (i) identifying all versions of the Confidential Information; (ii) identifying the use and dissemination (if any) of the Confidential Information; and (ii) ensuring the permanent deletion of the confidential Information from the laptop;

4. An undertaking not to retain any copy of the Confidential Information;

5. An undertaking to co-operate to the fullest extent reasonably possible with the independent third party in relation to the deletion process, to include the provision of all passcodes, passwords, and encryption keys as necessary to facilitate the deletion process."

34. In addition to demanding the removal of the exclusion of the documents which had been exhibited by Mr. Connell in his affidavit of the 19th October 2021, the letter also sought that Mr. Connell re-swear his affidavit in the West Global proceedings to remove reference to the disputed documents as had been sought in the earlier correspondence. It also looked for an unconditional apology.

35. The defendant's solicitors replied by letter of the 24th February 2022. Many of the points made in this letter were subsequently reflected in a replying affidavit of the defendant of the 25th February. The points raised were set out at length and included that the undertakings sought in the letter of the 17th February 2022 went beyond the relief sought in the motion. This disregarded the fact that the undertakings then being sought were in response to the offer which had been made by the defendant himself. Points were also made alleging that the plaintiffs, in the pre-litigation correspondence had not engaged with the points raised in the defendant's solicitors' correspondence, failed to reply to the offer of "*non-disclosure"* undertakings offered in the letter of the 2nd

December for a period of two weeks and then rushed to issue proceedings and the motion without given the defendant an opportunity to meaningfully engage.

36. It then went on to offer revised undertakings in the following terms:

> *"1. An undertaking to not use, disclose or disseminate any documents which are contained on the laptop (previously the property of Mr. Basheer) with the exception of those documents which have already been exhibited (referred to hereafter, and without prejudice, as the "Confidential Information").*
>
> *2. An undertaking to disclose the identities of any person, including any third party, to whom Mr. Connell had disclosed or disseminated the Confidential Information.*
>
> *In addition to the above and in consideration to your clients' potential claim of privilege in relation to the document exhibited at TAB18, my client proposes to resubmit this exhibit and to remove the thread containing emails originating from Arthur Cox.*
>
> *3. An undertaking to take whatever steps are necessary to resubmit the document exhibited at TAB18 of Mr. Connell's affidavit sworn on 19th October 2021 and to remove all evidence of the emails contained in the thread which originate from Arthur Cox email addresses. For the avoidance of doubt, all text below "Sent From my iPhone" in the middle of the first page will be removed/redacted from the exhibit.*
>
> *In recognition of your clients' concerns that the contents of the laptop may be disseminated in the future, either accidently or otherwise, which may be damaging to your clients, their agents, their directors, their advisors including legal advisors and associated people such as members of the Flannery family, my client is prepared to offer an additional undertaking as follows:*
>
> *4. An undertaking to destroy all copies of the confidential information including the contents of the laptop's sole hard disk.*
>
> *5. An undertaking to deliver up the laptop including its associated hard disk for a period of not more than 10 days to an independent third party appointed by the Plaintiffs for the purpose of ensuring permanent deletion of Confidential Information from the laptop and its associated hard drive.*

Please confirm your client is agreeable to the above undertakings."

37. The plaintiffs' solicitors replied to this letter on the 1st March 2022. They rejected the defendant's position that there was no necessity for the plaintiffs to issue the proceedings or that the defendant was not afforded an opportunity to address "*new issues and new basis for requiring undertakings."* By way of example, they referred to the fact that the defendant had not indicated at any stage prior to the issuing of the proceedings that he was willing to provide undertakings in respect of the plaintiffs' legally privileged information. They concluded by saying that the plaintiffs were willing to accept the revised undertakings in the defendant's solicitors' letter of the 24th February 2022 subject to further modification (which were marked in red and which are underlined below):

> *"1. An undertaking to not use, disclose or disseminate any documents which are or were contained on the laptop (previously the property of Mr. Basheer) with the exception of those documents which have already been exhibited (referred to hereafter, and without prejudice, as the "Confidential Information").*
>
> *2. An undertaking to disclose the identities of any person, including any third party, to whom Mr. Connell has disclosed or disseminated the Confidential Information and to identify any devices in addition to the laptop used by Mr. Connell to disseminate the Confidential Information.*
>
> *3. An undertaking to take whatever steps are necessary to resubmit the document exhibited TAB 18 of Mr. Connell's affidavit sworn on 19 October 2021 and to remove all evidence of the emails contained in the thread which originate from Arthur Cox email addresses. For the avoidance of doubt, all text below "Sent from my iPhone" in the middle of the first page will be removed/redacted from the exhibit.*
>
> *4. An undertaking to destroy all copies of the Confidential Information retained by Mr. Connell including the contents of the laptop's sole hard drive.*
>
> *5. An undertaking to deliver up the laptop (including its associated hard disk) and any other device used by Mr. Connell identified at undertaking (2) for a period of time of not more than ~~14~~ 21 days to an independent third party appointed by the Plaintiffs and with all reasonable costs borne by Mr. Connell ~~the Plaintiffs~~ for the purpose of (i) verifying, to the extent possible, the identities of the relevant individuals and any third parties identified in undertaking (2)*

above; and (ii) ensuring the permanent deletion of the Confidential Information from the laptop and its associated hard drive and any other relevant devices used by Mr. Connell to hold or disseminate the Confidential Information.

6. An undertaking to co-operate to the fullest extent reasonably possible with the independent third party in relation to the verification and deletion process, to include the provision of all passcodes, passwords and encryption keys as necessary to facilitate the process.

…".

38. The defendant's solicitors replied on the 2nd March 2022 in which they set out modified proposed undertakings. They wrote again on the 11th March 2022, it seems on the basis of a Court direction that they write to set out what undertakings the defendant was prepared to give. They stated in the letter of the 11th March:

"For the avoidance of any doubt on the matter we repeat those undertakings :-

1. An undertaking not to use, disclose or disseminate any documents which are or were contained on the laptop (previously the property of Mr. Basheer with the exception of those documents which have already been exhibited (referred to hereafter, and without prejudice, as the "Confidential Information").

2. An undertaking to disclose the identities of any person, including any third party, to whom Mr. Connell has disclosed or disseminated the Confidential information and to identify any devices in addition to the laptop used by Mr. Connell to disseminate the Confidential Information.

3. An undertaking to take whatever steps necessary to resubmit the document exhibited at TAB18 of Mr. Connell's affidavit sworn on 19 October 2021 and to remove all evidence of the mails in the thread which originate from Arthur Cox email addresses. For the avoidance of doubt, all text below "Sent from my iPhone" in the middle of the first page will be removed/ redacted from the exhibit.

4. An undertaking to destroy all copies of the Confidential Information retained by Mr. Connell including the contents of the laptop's sole hard drive.

5. An undertaking to deliver up the laptop (including its associated hard disk) for a period of time of not more than 21 days to an independent third party

appointed by the Plaintiffs and with all reasonable costs borne by the Plaintiffs for the purpose of ensuring the permanent deletion of the Confidential Information from the laptop and its associated hard.

6. An undertaking to co-operate to the fullest extent to the reasonably possible with an independent third party to the verification and deletion process."

39. There was a dispute in the correspondence about what had been said to the Court on the 11th March 2022 (leading to the direction that the defendant set out what undertakings he was offering) and about discussions between Counsel. It is not necessary to recite this in detail. The plaintiffs' solicitors maintained that it had been indicated on behalf of the defendant that a form of undertaking equivalent to those sought in the Notice of Motion would be provided. This account was rejected on behalf of the defendant.

40. The correspondence between the parties concluded with a letter from the plaintiffs' solicitors of the 23rd March 2022 in which they stated, inter alia:

"As you are aware, our clients' position is that the undertakings which you have offered are insufficient to dispose of the underlying proceedings. In these circumstances, it is necessary for the proceedings to continue.

However, our clients' position is that certain of the undertakings you have offered are sufficient to dispose of our clients' Motion. In this regard, our clients once again request that your client provides an undertaking to the Court equivalent to the reliefs sought in our clients' Notice of Motion. You have failed to confirm that you are instructed to do so but instead have repeated the undertakings you have offered in previous correspondence.

Without prejudice to our clients' position, we confirm that the undertaking offered at number 1 of your letter dated 22nd March 2022 is sufficient to satisfy the reliefs sought in our clients' Motion. Please confirm by return that your client will be in a position to provide this undertaking to the Court on an open basis tomorrow.

For the avoidance of doubt, we continue to reserve all our clients' rights in connection with the Motion in the proceedings, to include our clients'' right to seek costs of the Motion. "

This reference to "*number 1 of the letter of the 22nd March 2022*" must be a mistake and in fact should refer to the letter of the 11th March 2022.

41. I understand that such an undertaking was given when the matter was before the Court and the application for injunctive relief therefore did not proceed. It was given without any admission of liability on the part of the defendant or any concession that the plaintiff would have been entitled to relief.

42. I appreciate that it has been somewhat laborious to set out the different demands and offers and counter-offers which were made by the parties. However, I think it was important to do so in order to understand how the interlocutory application was resolved without the need for a determination of the merits, to understand the parties' respective positions, and to understand the nature of the interactions between the parties. This is important in light of the comments of Peart J in *Irish Bacon Slicers* and Murray J on behalf of the Court of Appeal in *Heffernan*.

43. The offers and counter-offers were directed towards both the motion and the substantive proceedings but ultimately agreement was only reached in respect of the interlocutory application. It may be helpful to summarise those parts of the offers and counter-offers which could be said to relate to the interlocutory application only:

(i) On the 12th November 2021 the plaintiffs' solicitors sought certain information and undertakings that the defendant would not seek to use or rely on confidential, sensitive or privileged documents from Mr. Basheer's laptop for any purpose including for the purpose of the West Global proceedings and he would re-swear his affidavit of the 19th October 2021 in the West Global proceedings without any reference to documents obtained from the laptop;

(ii) On the 17th November 2021, the defendant's solicitors clearly stated that that he would not be withdrawing his affidavit of the 19th October 2021 and offered no undertakings;

(iii) On the 19th November the plaintiffs' solicitors replied to say, inter alia, that in those circumstances, they would proceed with an application for

injunctive relief and then on the 29th November wrote to say that the plaintiffs had decided that it was necessary to bring separate proceedings seeking an injunction to restrain the defendant from using any of the material including in respect of the West Global proceedings;

(iv) On the 2nd December 2021 the defendant's solicitors indicated that the defendant was prepared to offer a "*non-disclosure undertaking in respect of certain matters outside of the scope of any current disputes involving our respective clients"* including documents relating to "*3D Shape*" and "*Beat Your Mark Inc*" and "*Beat Your Mark Group Limited.";*

(v) On 16th December 2021 the plaintiffs' solicitors replied to say this was insufficient because it did not address documentation which is relevant to the disputes between the parties in proceedings including in the West Global proceedings;

(vi) The Plenary Summons and the Notice of Motion were then issued. They are quoted above;

(vii) By replying affidavit, the defendant stated that he was prepared to offer an undertaking, including "*an undertaking to not disclose or disseminate any documents which refer to or relate to the Plaintiff's confidential and/or privileged information from the Laptop with the exception of those documents which have already been exhibited in my Affidavit of 19th October 2021*…";

(viii) By letter of the 17th February 2022 the plaintiffs' solicitors (operating off the undertakings offered in the replying affidavit) sought a version of the undertaking which had been offered by the defendant in his affidavit but to include the documents which had been exhibited in his affidavit of the 19th October 2021, ie without the exception suggested by the defendant. They also expressly repeated the demand that Mr. Connell would re-swear his affidavit in the West Global proceedings;

(ix) By letter of the 24th February 2022 the defendant's solicitor offered the following undertaking, inter alia: "*An undertaking to not use, disclose or disseminate any documents which are contained on the laptop (previously the property of Mr. Basheer) with the exception of those documents which already been exhibited (referred to hereafter, and without prejudice, as the "Confidential Information").*";

(x) The plaintiffs' solicitor replied on the 1st March 2022 seeking the following "*An undertaking to not use, disclose or disseminate any documents which are or were contained on the laptop (previously the property of Mr. Basheer) with the exception of those documents which have already been exhibited (referred to hereafter, and without prejudice, as the "Confidential Information").*"

(xi) The defendant's solicitors in letters of the 2nd March and the 11th March 2022 set out the undertakings that the defendant was prepared to give. These included: *"An undertaking not to use, disclose or disseminate any documents which are or were contained on the laptop (previously the property of Mr. Basheer with the exception of those documents which have already been exhibited (referred to hereafter, and without prejudice, as the "Confidential Information")."*

(xii) The plaintiffs' solicitors accepted the undertaking as offered at number 1 of the letter of the 22nd March 2022 (meaning the 11th March 2022) as being "*sufficient to satisfy the reliefs sought*" in the Notice of Motion without prejudice to the plaintiffs' position and reserving all the plaintiffs' rights in connection to the motion including in relation to costs.

Discussion and conclusion

44. Against that background, I am not satisfied that it is possible to justly adjudicate on the question of the liability for the costs of the motion. I am of this view for the following reasons.

45. Firstly, there is a significant difference between the undertaking that was sought in the pre-motion correspondence and the one that was ultimately given and agreed after a process of discussion, offer and counter-offer between the parties, which is set out in detail above.

46. In *Irish Bacon Slicers*, the fact that the undertaking that was given was in identical terms to the one that was sought was of significance. So also was the fact that the undertaking was ultimately given unilaterally by the defendant and not as part of or as a consequence of a process of discussion or negotiation between the parties.

47. Neither of these, either when taken together or separately, can be considered to be determinative in all cases. As noted above, the exercise of the court's discretion must

have regard to the particular circumstances of the case. Nonetheless, they are relevant factors.

48. In this case, there was an extended process of discussion between the parties. Even more importantly, in the circumstances of this case, the undertaking that was given and accepted differed in a material and fundamental respect from the one that was sought by the plaintiffs. As is clear from the correspondence quoted above, a core part of the demand that was made at the outset (in the letter of the 12th November 2021) was that the defendant would re-swear his affidavit of the 19th October 2021 in the West Global proceedings "*without the inclusion of any reference to the documents which were obtained from Mr. Basheer's laptop*." The first undertaking that was sought in that letter was that the defendant would not seek to use or rely on documents located on Mr. Basheer's laptop *"including, in particular for the purpose* ***of these proceedings*** *and/or any related proceedings involving our respective clients*." By letter of the 19th November 2021 the plaintiffs' solicitors warned that they were instructed *"to bring a motion seeking injunctive relief restraining Mr. Connell from relying* ***in these proceedings*** *on Lexington's privileged and commercially-sensitive information*". In both instances *"these proceedings"* meant the West Global proceedings. The defendant explicitly rejected the demand to re-swear the affidavit of the 19th October 2021. On the 29th November the plaintiffs' solicitors told the defendant that the plaintiffs had decided that it would be more appropriate to issue separate proceedings but still referred to the intention to seek an injunction restraining Mr. Connell from generally using the material "*including in respect of the above proceedin*gs". The "*above proceedings*" were the West Global proceedings. That this was a core part of the plaintiffs' demand is equally clear from the correspondence that was exchanged post the issuing of the motion. In his replying affidavit, the defendant indicated that he was prepared to give an undertaking that he would not disclose or disseminate documents or information from the laptop "*with the exception of those documents which have already been exhibited in my Affidavit of 19th October 2021…".* As will be seen from the passages from the post-motion correspondence quoted above, the plaintiffs initially insisted on the removal of the words *"with the exception of those documents which have already been exhibited in my Affidavit of 19th October"* and the defendant insisted on reinserting them.

49. Thus, a core part of the demand that was originally made was that the defendant would not make use of the documentation including in the West Global proceedings and that he would re-swear his affidavit in those proceedings so as not to exhibit documents which he had obtained from the laptop. There is a separate issue as to whether this was in fact part of the relief sought in the Notice of Motion to which I return below. That demand was rejected by the defendant in the initial exchange of correspondence and in

the post-motion correspondence. It was a theme in the post-motion correspondence. As set out in the extensive quotes from that correspondence set out above, the defendant offered undertakings which excluded from the undertaking the documents which he had already exhibited and the plaintiffs insisted that the exclusion be removed, ie. that the undertaking not to use documents would include the documents which had already been exhibited, and that the defendant would re-swear his affidavit. The plaintiffs ultimately accepted an undertaking that did not include a commitment not to use those documents in the West Global proceedings and did not include re-swearing the affidavit in those proceedings.

50. As mentioned above, while the fact that the undertaking given was the same as the one sought was a central feature of Peart J's decision in *Irish Bacon Slicers*, that can not be a requirement in all cases. A more nuanced consideration was set out in various terms by Murray J in *Heffernan*. At paragraph 37 he said "*A party who has invested significantly in bringing an interlocutory application and who as a consequence obtains a concession from his opponent that would not otherwise have been tendered is entitled in many circumstances to expect that it will recover the costs it has incurred in securing that concession. This is particularly the case if the offer is made at a very late stage in the process…".* At paragraph 39 he said that the trial judge should have decided "*whether the costs of the appellant in getting to the point where that remedy was offered for the first time should be awarded in his favour*" and at paragraph 44 he said *"…the principle reflected in Irish Bacon Slicers that the offering at a late stage of an interlocutory application of a remedy which in the view of the Court meets the needs that animated the application to Court in the first place should, absent good reason to the contrary, be reflected in an order for costs in favour of the party that has incurred costs in obtaining that remedy*."

51. Thus, it is not necessary in all cases that the undertaking given must be the same as the one sought. I do not understand Murray J to mean that once some concession at all is extracted from the defendant or made by the defendant then the plaintiff/applicant would be entitled to its costs. Obviously, an undertaking was obtained from the defendant after the institution of proceedings but it seems to me that where an undertaking which is eventually given or agreed does not include a core or fundamental part of the undertaking that was originally sought the Court could not be satisfied that it could justly adjudicate on the question of liability for the costs in the absence of determining the substantive application. The "*needs that animated the application to Court in the first place"* in this case undoubtedly included the need or demand that the defendant not rely on any of the documents from the laptop in the West Global proceedings, including the ones already exhibited in those proceedings. The plaintiffs

demanded the re-swearing of the affidavit to remove reference to those documents. Ultimately, the defendant refused to do so and the plaintiffs accepted that refusal notwithstanding their initial demands, albeit while reserving their rights

52. It was submitted on behalf of the plaintiffs that the relief sought in the Notice of Motion did not seek to restrain the defendant from relying on those documents in the West Global proceedings and did not seek to compel the defendant to re-swear his affidavit of the 19th October 2021. This turned into a significant point of controversy during the hearing.

53. It is, of course, correct to say that this was not sought in the express terms of the Notice of Motion. The motion sought to restrain the defendant "f*rom disclosing or disseminating to any third party*" certain categories of documents. It did not expressly seek either to compel the defendant to re-swear his affidavit or to restrain the defendant from using the documents in the West Global proceedings. However, I do not believe this avails the plaintiffs. The first thing to note is that if it was not being sought as part of the relief claimed, then there is a fundamental difference between the demand made prior the issuing of the motion and the relief sought in that motion. That, in itself, is a reason to conclude that the Court could not justly adjudicate on the liability for the costs. This is so for two reasons. Firstly, it would give rise to a situation where the defendant would not have been given an opportunity to address the reliefs which were actually being sought prior to the issuing of the motion. In general, there would be a fundamental unfairness in making a party liable for the costs of a motion if he had not been given an opportunity to address the relief that would be sought in that motion. Secondly, though relatedly, it gives rise to uncertainty as to what was in fact being sought. It would be unfair on either basis to determine liability for costs.

54. I am in any event not satisfied that the motion did not seek to preclude the defendant from relying on those documents or at the very least that it would be reasonably understood as seeking that as part of the relief. The Notice of Motion must be read in terms of the pre-motion correspondence and, as discussed above, it was a core part of the demands being made on behalf of the plaintiffs in that correspondence that the defendant would not rely on those documents and would re-swear his affidavit. There is nothing in the grounding affidavit to suggest that this demand was no longer being sought. Furthermore, the suggestion that this was not being sought as part of the reliefs claimed in the Notice of Motion is inconsistent with the position maintained in the exchange of correspondence post the issuing of the motion where the plaintiffs' solicitors sought to insist on the removal of the words "*…with the exception of those documents which have already been exhibited.*"

55. A second factor in the consideration of whether the costs can be determined is that there is far greater specificity or particularity in the motion as to what was being sought compared with the pre-motion correspondence. As discussed above, the motion identifies the categories of documents in respect of which injunctive relief was being sought by reference to the identities of the persons to whom they were sent or from whom they were received. The pre-motion correspondence did not identify the documents in this way. This, in principle, allowed the defendant to consider his position but only after the motion was issued. This is a relevant factor but I do not place great weight on it in circumstances where the defendant did not make any complaint about uncertainty or lack of specificity or particularity in the pre-motion correspondence. Furthermore, the undertaking which was eventually given by the defendant is broader than the relief sought in that it is not limited to documents sent to or received from those identified persons and thus it is difficult to conclude that the specificity or particularity introduced by the Notice of Motion led to the giving of the undertaking.

56. I have also had regard to the fact that no reply to the undertakings that were offered by the defendant on the 2nd December 2012 was sent for a period of two weeks until the 16th December 2021 and then proceedings were issued the very next day and the motion was issued on the 20th December 2012. This meant that the defendant was not given an opportunity to reply to the letter of the 16th December before the proceedings were issued. No explanation was given for the need to institute proceedings with such urgency after a period of two weeks had been allowed to elapse. As against that, the defendant says in his replying affidavit (paragraph 5) that a draft response to the letter of the 16th December had been prepared by the following morning, the 17th December. It is perhaps understandable why the reply was not sent before the proceedings were issued because they were issued that same day. However, the motion was not issued until the 20th December and no explanation has been given as to why the reply which had been prepared was not sent before that.

57. I have also had regard to the conduct of the defendant in considering whether I can justly adjudicate on the question of costs.

58. Firstly, his approach in the exchange of correspondence, particularly, though not exclusively, prior to the issuing of the motion was narrow and technical and was focused almost entirely on the merits of the plaintiffs' claim that the documents were confidential or privileged and had been obtained by Mr. Basheer in circumstances which imposed a duty of confidentiality on him and that the defendant was under such a duty in respect of the documents. One would, of course, expect his solicitors to set out his position and to challenge the position being advanced on behalf of the plaintiffs. However, in this case,

there was no real engagement with the test which would have to be met by the plaintiffs to obtain an injunction. Two examples might illustrate the point. Firstly, as noted above, the plaintiffs' solicitors referred to a duty arising under letters of engagement with Mr. Basheer. In their first letter of the 12th November 2021, they provided one letter of engagement to the defendant's solicitors. The defendant in his reply focused to a very great extent on showing how this letter did not give rise to the duties which it was claimed. This was surprising given that it was expressly provided as an example rather than as the sole letter of engagement and given that it was clear that the plaintiffs were not relying only on the letters of engagement. Furthermore, the defendant's central contention was that this letter of engagement was not operative because it had not been executed by a specified date. He relied on the document itself to make this contention but, of course, he could not have first-hand knowledge of the facts in relation to this letter. Secondly, the offer of the non-disclosure undertaking in respect of three named entities was clearly never going to meet the claimed needs of the plaintiffs. Of course, I am expressing no view on the merits of any of these points. They are matters which still remain to be determined but it seems to me that the defendant deliberately decided to focus his responses on the merits of the parties' positions rather than on the undertakings that were sought and the test for interlocutory injunctive relief.

59. The second example is that the defendant's claim in his replying affidavit that he was always willing to provide an undertaking in the terms set out in paragraph 6 of that affidavit rings somewhat hollow in circumstances where it was open to him to offer those undertakings prior to the institution of the proceedings or the issuing of the motion. He does say that he was willing to do so "*had Lexington requested same*". I do not believe that it is a full answer to say that he was entitled to wait until the plaintiffs asked for exactly what he was prepared to give. It was always open to him to proffer what he considered to be an appropriate undertaking. However, it is primarily a matter for an applicant to identify with sufficient clarity what is being sought. Furthermore, it seems to me that this factor would be of greater significance to the question of costs if the plaintiffs had immediately accepted what the defendant was indicating he was prepared to give. However, this included the words "*with the exception of those documents which have already been exhibited in my affidavit of 19th October 2021…"* and the plaintiffs continued to insist on the removal of these words throughout the exchange of correspondence in the weeks after the delivery of this affidavit but ultimately accepted it.

60. Balancing all of these factors, particularly the fact that the undertaking that was given and accepted was different in a fundamental respect to the one that was sought and given and was agreed following or during a lengthy process of discussion, it seems

to me that it would be inappropriate to determine the costs of the injunction application on the basis of the parties' agreement as to undertakings.

61. It seems to me that it would be equally inappropriate to make no order for costs as to do so amounts to a determination of the parties' entitlements. It seems to me that I should reserve the question of costs. To make the costs costs in the cause would deprive the trial judge of their discretion in relation to costs and I am not satisfied in the particular circumstances of this case that it would be appropriate to do so. I will therefore reserve the costs of the interlocutory injunction to the trial judge.