

# THE HIGH COURT

[2023] IEHC 582

2022 No. 5297P

BETWEEN

**KIERNAN MILLING UNLIMITED COMPANY**

**PLAINTIFF**

**AND**

**PADRAIG KIERNAN trading as P. KIERNAN FARMS also trading as KIERNAN FARMS (AHERLOW) also trading as KIERNAN FARMS (GRANARD).**

**DEFENDANT**

**JUDGMENT of Ms. Justice Eileen Roberts delivered on 24 October 2023**

## **Introduction**

1. On 21 July 2023 this court delivered judgment in these proceedings in relation to two separate motions issued by the plaintiff against the defendants. The first motion was the plaintiff's application for summary judgment in respect of part of the sum claimed in these plenary proceedings. This is described in the underlying judgment and in this judgment as the "**Summary Judgment Motion**". The second motion was an application by the plaintiff for an interlocutory mareva injunction against the defendant in respect of the proceeds of sale of certain properties being marketed for sale by the defendant. That interlocutory motion is described in the underlying judgment and in this judgment as the "**Mareva Motion**".
2. This court refused both applications. The court directed in the context of the Mareva Motion that the defendant should confirm to the court his proposed undertaking in the terms of paras 19 and 25 of the defendant's affidavit, sworn 14 February 2023, to the effect that the sums identified would be held by the defendant's solicitors pending the

determination of these proceedings. That undertaking was made an order of court on 28 July 2023, and it remains in place pending the determination of these proceedings.

3. The present judgment relates to the costs of both motions, on which the court heard submissions from counsel for the parties on 4 October 2023.
4. Counsel for the parties were in agreement on the legal principles governing the awarding of costs, being those principles set out in sections 168 and 169 of the Legal Services Regulation Act, 2015 (the “**2015 Act**”) and in Order 99 of the Rules of the Superior Courts 1986 (as amended) (“**RSC**”). Counsel disagreed however on the outcome of the application of those principles to the awarding of the costs of each motion in this case.
5. Although the statutory provisions are well known, I propose in the interests of completeness, to set them out. I will then outline the arguments on their application to both motions which is contended for by each party and will, finally, confirm how this court proposes to deal with the legal costs of the Summary Judgment Motion and the Mareva Motion.

#### **The relevant legal principles**

6. Part 11 of the 2015 Act deals with legal costs in civil proceedings. The relevant provisions provide, in material part, as follows:

*“168. (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—*

*(a) 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*

*(b) where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to*

*the proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust.*

*(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.*

*169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—*

*(a) conduct before and during the proceedings,*

*(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*

*(c) the manner in which the parties conducted all or any part of their cases,*

*(d) whether a successful party exaggerated his or her claim,*

*(e) whether a party made a payment into court and the date of that payment,*

*(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*

*(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.*

*(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.”*

**7. Order 99 of the RSC provides, in material part, that:**

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

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

*(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 step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.”*

### **The plaintiff’s submissions**

**8.** The plaintiff argues that:

- (a) the costs of the Summary Judgment Motion should be ordered to be costs in the cause; and
- (b) the costs of the Mareva Motion should be reserved to the trial of the action.

**9. The Summary Judgment Motion.** The plaintiff accepts that it did not recover summary judgment against the defendant in the sum of €3.4 million, as claimed. The plaintiff argues however, that this should not result in the award of costs against it at interlocutory stage. Counsel for the plaintiff, quoting from *Delaney and McGrath on Civil Procedure, 4<sup>th</sup> ed.* [2018] at para 27-122, argued that an application for summary judgment is an integral part of the summary summons procedure where the threshold for being granted leave to defend is relatively low and where the plaintiff may well succeed at the full hearing. Therefore, he says that the best course of action in most cases is to make the costs of the application for summary judgment, costs in the cause.

**10.** The plaintiff relied on dicta of Clarke J (as he then was) in the Supreme Court decision in *ACC Bank PLC v Hanrahan* [2014] IESC 40, where the court considered the proper approach “*at the level of principle*” to an award of costs in respect of a motion for summary judgment which results in the case being remitted to plenary hearing. Particular reliance was placed on the following comments (at para 3.6 onwards):

*“...it may well not be just that a defendant should get the costs of a summary judgment motion (even if it was clear, on the basis of the affidavit evidence, that the*

*matter would have to go to plenary hearing) if, with the benefit of hindsight after trial, it was clear that the facts asserted as providing a defence were not correct.*

*3.7 For those reasons it seems to me that, certainly in cases where a material part of the defence put forward is based on an assertion of facts which are contested by the plaintiff, there will be many cases where it will not be possible to justly determine the costs of a summary judgment motion for a trial judge may be in a much better position to reach a judgment on such matters in the light of the ultimate outcome of the case on the facts.*

*3.8 There are, however, other factors which can properly be taken into account in my view. Part of the reason for the introduction of new costs regimes such as those contained within O.99, r.1(4A), is to discourage parties from bringing unreasonable applications or resisting reasonable ones. It is true, of course, as the authors of Delaney and McGrath point out, that a motion for summary judgment is, as they put it, "an integral part of the summary summons procedure". But there will be motions for summary judgment, and these motions come into that category, which take on something of a life of their own and require a separate allocation of court time and a consequent incurrence by the parties of significant additional costs. It seems to me that it is in accordance of the principle behind the rule that the Court should retain, in an appropriate case, an entitlement to impose some or all of the burden of the costs of the motion for summary judgment on an unsuccessful plaintiff if the Court is satisfied that the plaintiff acted unreasonably in the way in which the motion was approached including any unreasonable failure to agree to a matter going to plenary hearing in the light of affidavits filed. In such a case a plaintiff who acts unreasonably in that manner must be at risk that any additional costs incurred by virtue of a lengthy and*

*disputed summary judgment application (which becomes a centre of costs in itself) may be awarded against them.*

*3.9 In summary, it seems to me, for those reasons, that the principle is that, in the majority of cases, the costs of a summary judgment motion as a result of which the proceedings are remitted to plenary hearing should either be reserved or become costs in the cause. Costs in the cause may be the appropriate measure unless it may be the case that the judge adjudicating on the summary judgment motion feels that it is possible that the detail in which the trial judge determines the ultimate issues in the case could have a bearing on the justice of where the costs should lie. In those circumstances a reservation of the costs may be more appropriate”*

**11.** The court went on to state in *Hanrahan* (in para 4.1) that “*..the proper question to be asked is as to whether it can be said that ACC acted in a manifestly unreasonable way in failing to agree that the matter should go to plenary hearing, at least when all of the replying affidavits had been filed, thus leading to a lengthy and costly hearing on the question of whether summary judgment should be granted.*” The court found that there was no basis on the evidence to suggest that ACC acted unreasonably and held (at para 4.2) that “*It is true that ACC failed to secure summary judgment. However, that failure falls quite a distance short of establishing that ACC acted so unreasonably in putting forward argument on the matter that costs should be awarded against them. It seems to me to follow that the trial judge was incorrect to award costs against ACC and that the trial judge should, instead, have ordered that the costs be costs in the cause.*”

**12.** Relying on this decision, the plaintiff argues that in the present case the court was presented with two factually diverse versions of the alleged variation to the settlement agreement and the impact this variation had on pausing the payments due under the

settlement agreement. The plaintiff says that crucially, the fact that money is due and owing to the plaintiff was not contested - rather what was at issue was the question as to *when* the payment fell due. The plaintiff says argument regarding the nature of the variation to the settlement agreement has not been properly tested, given the low threshold the defendant had to reach, and it may be determined at the trial that the monies were in fact due and owing at the time of the hearing of the application for summary judgment. For those reasons the plaintiff submits that the costs of the Summary Judgment Motion should be costs in the cause.

**13. The Mareva Motion.** Counsel for the plaintiff says that although this court did not grant a Mareva injunction against the defendant, it cannot be said that the defendant was “*entirely successful*” in that application. He referred to the direction made by this court requiring the defendant to confirm his undertaking to hold the proceeds of sale pending trial. He submits that this was an “event” for the purposes of this court considering the question of costs. The plaintiff says that while it did not obtain the precise reliefs sought, it did obtain a direction in its favour dealing with the significant issue in contention in the application. Counsel argued that the necessity for a proper undertaking was heavily canvassed during the hearing and the plaintiff’s position was that it had to bring the Mareva application because an appropriate undertaking had not been offered, despite negotiations on this point. In simple terms, the plaintiff says that had the undertaking it ultimately received been offered in a timely manner by the defendant it would never have been necessary for the plaintiff to issue the Mareva Motion. Because the plaintiff succeeded on this important issue, the plaintiff says that the most appropriate order is to reserve the costs of the Mareva Motion to the trial of the action.



**The defendant's submissions**

- 14.** The defendant submits that as he defended both applications, he is entitled to the costs of both applications on the usual basis that costs should follow the event. He argues that he had no choice but to incur legal costs in respect of the applications brought by the plaintiff, and that having successfully defended both, the costs should follow in each case.
- 15.** Specifically in relation to the Summary Judgment Motion, the defendant says that notwithstanding the plenary nature of these proceedings, the plaintiff applied for final judgment by way of motion and sought a final determination on that issue. Counsel for the defendant argues that the lack of a clear-cut factual basis to obtain summary judgment was tacitly acknowledged by issuing a plenary summons. He says it was always inappropriate to press for final judgment summarily in this case given the undoubted variation to the settlement agreement. Counsel says that the jurisprudence relating to the award of costs where summary proceedings are remitted to plenary hearing must be distinguished from the present case in which plenary proceedings issued from the outset.
- 16.** The defendant also argues that he was entirely successful in the Mareva Motion and that the undertaking directed by this court does not change that. Reliance was placed on dicta by Murray J in *Ryan v Dengrove DAC* [2021] IECA 38 as authority for the proposition that the fact that incidental findings are made which are in favour of the losing party does not mean that the successful party has not been “entirely successful”. Murray J said at paragraph 106 of his judgment in *Dengrove* that “... *A party who is partly successful in proceedings may nonetheless obtain all of its costs if, having regard to the matters iterated in s. 169 of the Legal Services Regulation Act 2015, it is appropriate to do so*”.
- 17.** The defendant also argues that at the time the Mareva Motion was issued on 21 December 2022 there could have been no apprehension by the plaintiff that proceeds would be dissipated as the plaintiff had at that time registered *Lites Pendentes* over those properties,

(although later vacated). Counsel for the defendant says that the plaintiff failed to establish the necessary proofs to obtain Mareva relief – in particular, evidence of an intention to dissipate assets. He rejects the plaintiff’s argument that the outcome of the Mareva Motion gave the plaintiff additional comfort and some “success”. He says that the plaintiff pressed ahead even in the teeth of the averments made by the defendant in his affidavit regarding the retention of sales proceeds.

### Analysis

18. O99 of the RSC is framed in mandatory terms that costs *shall* be determined by the court hearing interlocutory matters save where the court determines it is not possible justly to adjudicate upon liability for costs of the interlocutory application. I propose to deal with the costs of both applications in this judgment, being satisfied that I can fairly and justly do so.
19. In relation to the Summary Judgment Motion, I accept that the trial judge may well find that, with the benefit of hindsight and having tested the evidence, the entire settlement monies had fallen due for payment by the time the Summary Judgment Motion issued. I have to consider whether that possibility means that, even though the defendant successfully resisted summary judgment, I should not award the costs of the Summary Judgment Motion to the defendant. I fully accept that in most cases it is appropriate to reserve the costs of a summary judgment application to the trial judge who, having heard all the evidence, will be better placed to determine whether monies are due and owing. However, there are some particular features of this case which I believe should cause this court to depart from that general position.
20. The Summary Judgment Motion was unusual in two respects. Firstly, the motion arose in the context of plenary proceedings. The plaintiff did not issue summary proceedings for the amount claimed. While I agreed that the plaintiff was entitled to take this course of

action, relying on the line of case law commencing with the decision in *Abbey International Finance Limited v Point Ireland Helicopters Limited* [2012] IEHC 374 / [2012] IR 64, this procedure is different to issuing summary proceedings from the outset. In my view there is a basis to distinguish the present facts from the usual scenario outlined in *Hanrahan* where summary proceedings are remitted to plenary hearing. In such summary proceedings it is indeed an integral part of the process that summary judgment is sought by way of motion. This can be contrasted with what happened in the present case where plenary proceedings issued and a motion was then brought seeking summary judgment for part of the plenary claim. While permissible, this is not a usual or “integral” step in the prosecution of plenary proceedings. Rather, it requires a positive decision to be taken by a plaintiff that it will pursue an application for summary judgment. Essentially it is the converse scenario of the summary summons procedure. Instead of issuing summary proceedings and then being remitted to plenary hearing, the plaintiff issues plenary proceedings and then seeks to circumvent the usual plenary process by seeking immediate summary judgment. In requiring a defendant to defend such a motion, a plaintiff risks the possibility that the defendant will meet what is a relatively low threshold to resist a claim for summary judgment. It is entirely a matter for the plaintiff as to whether to bring such an application. In the present case there was a disputed variation of a settlement agreement (but nonetheless a variation in some terms) and a dispute in relation to the impact of previous *lites* registered. The plaintiff decided to proceed by way of the Summary Judgment Motion in its plenary proceedings knowing that this dispute existed. That was the plaintiff’s choice – the motion was not otherwise part of the standard plenary process.

**21.** Secondly, it is not disputed that the defendant owes money to the plaintiff on foot of a settlement agreement and the quantum of the amount owed by the defendant is known. The question for the trial judge therefore will not simply be whether monies are owed but

rather whether the plaintiff is entitled as at the trial date to recover the entire amount of the settlement in one lump sum. The dispute is really, therefore, one of timing rather than the fact of indebtedness.

**22.** These features are relevant. The trial judge will decide whether monies are due as at the trial date— but this is or at least could be a different question to whether they were due at the date of the Summary Judgment Motion. The question is not whether the settlement has to be paid – as it clearly does at some point. Rather the question is *when* does it have to be paid. If I make the costs of the Summary Judgment Motion costs in the cause this may result in the costs being awarded to the plaintiff simply because by the time the matter is heard at trial the settlement monies have fallen due. This would not however make the Summary Judgment Motion one that could or should necessarily have succeeded at the time it issued. Because the indebtedness itself is not disputed in this case (making this on the facts a reason to distinguish it from the usual summary summons cases), I believe that making costs “costs in the cause” may not result in a fair determination on the costs of the Summary Judgment Motion in this case.

**23.** Furthermore, I believe that if a party decides to take a step in proceedings which is optional or at least not integral to those proceedings, that party should generally face the costs consequences of losing that step.

**24.** For these reasons I determine that the defendant should recover the costs of the Summary Judgment Motion against the plaintiff.

**25.** I turn then to the **Mareva Motion**. The Mareva Motion was a self-contained application for interlocutory relief, and I see no basis on which that relief will be revisited by the trial judge dealing with the substantive plenary claim. For this reason, I do not favour the plaintiff’s suggestion of reserving the costs of the Mareva Motion to the trial judge. I do, however, believe that the plaintiff has raised some meritorious arguments to resist the

award of costs against it for the Mareva Motion, albeit that the plaintiff did not succeed in getting that relief. The evidence available to the court showed that there had been pre-motion correspondence between the parties regarding the terms on which a suitable undertaking might be given by the defendant in respect of the proceeds of the sale of the properties. For reasons which are unclear to me, the defendant was not willing at that time to provide an undertaking in terms that provided sufficient comfort to the plaintiff - including, for example, that it would be irrevocable. The defendant controlled the terms of the undertaking he was prepared to offer. The plaintiff was clear on the amendments it required. The Mareva Motion would not have been necessary, had a suitable undertaking been offered. It does not in my view assist the defendant that he belatedly "offered" such undertaking in his February 2023 affidavit. The plaintiff was unable to rely on that averment until its terms were made an order of court following the hearing. There was therefore some success achieved by the plaintiff in the motion. There was also a mechanism for the defendant to have likely avoided the Mareva Motion. I do not suggest that there is a general duty on parties against whom mareva injunctions are sought to provide undertakings to avoid those applications. That is not the case. But here I have to consider the context and the factual reality that there was and is an admitted indebtedness, and that the defendant was prepared to negotiate an undertaking (and indeed belatedly suggested an acceptable one in his affidavit) but that this was never formally offered to the plaintiff. Had it been, it would have avoided the need for the Mareva Motion or the hearing. Parties should be encouraged to adopt an efficient approach to litigation through the use of costs orders, and this is another factor in my consideration. In all the circumstances I have determined that in the interests of justice I will make no order as to costs for the Mareva Motion. This reflects the points I set out above and balances them against the fact that the defendant successfully resisted that application. A result where

each party is responsible for their own costs of that motion appears to me to be the fairest outcome for the Mareva Motion.

### **Conclusion**

**26.** I order that the defendant recover his costs of the Summary Judgment Motion from the plaintiff. These costs should be adjudicated in default of agreement. I impose a stay on executing this costs order pending the determination of these proceedings.

**27.** I make no order as to costs in relation to the Mareva Motion.