



**THE COURT OF APPEAL
CIVIL**

Neutral Citation Number: [2020] IECA 121

Court of Appeal Record No. 2019/424

High Court Record No. 2019/6068P

**Whelan J.
Haughton J.
Murray J.**

Between:

MICHAEL HEFFERNAN

APPELLANT/PLAINTIFF

AND

HIBERNIA COLLEGE UNLIMITED COMPANY

RESPONDENT/DEFENDANT

JUDGMENT of Mr. Justice Murray delivered on the 29th day of April 2020

Background:

1. This is an appeal against an order for costs made by Twomey J. in favour of the respondent following the appellant's unsuccessful application for interlocutory injunctive relief. It presents the issue of how costs should be properly allocated where, at a late stage of an application for such relief, the defendant offers concessions to the plaintiff which might obviate the need for the Court to adjudicate on the application for an interlocutory injunction. An issue also arises as to how this Court should approach an appeal against such an order where the underlying proceedings have become moot.
2. The proceedings arose from the decision of the respondent (a private third level college) to withdraw the appellant's place on the respondent's Professional Master of Education programme ('the programme'). The programme qualifies successful graduates as post primary teachers.
3. As part of the programme students must complete a placement in schools. In consequence, the provisions of the National Vetting Bureau (Children and Vulnerable Persons) Act 2016 applies, and the respondent must ensure that students enrolled on its programmes of study complete Garda Vetting. To that end, it operates a Garda Vetting Policy and Procedure. Essentially, that policy provides that upon details of prosecutions or convictions having been obtained by the respondent with the consent of the student, the respondent determines if any convictions thus disclosed merit consideration by its Garda Vetting Committee ('GVC'). Where a case is referred to it, the GVC invites submissions

and reaches a decision as to whether it is appropriate that the applicant be admitted to the course.

4. In the case of the appellant, when he enrolled on the programme in April 2017 and was requested to complete Garda vetting, he asked that his place be deferred for a year because he had outstanding criminal charges. That deferral was subsequently extended for an additional year until March 2019, when the appellant advised the respondent that the pending cases had been concluded.
5. The appellant thereupon undertook Garda vetting. The vetting disclosure confirmed that he had been convicted at Fermoy District Court on 22 February 2019 of an offence of driving under the influence of alcohol contrary to s.49 of the Road Traffic Act 1961, as amended. The respondent in purported operation of its policy determined that the appellant should be required to attend before the GVC. The appellant contended both before the GVC, on appeal from its decision and in these proceedings that that referral should not have taken place, as the offence of which he had been convicted did not give rise to concerns around '*children, young people or vulnerable groups*'. This, the appellant contended, was a pre-requisite to the jurisdiction of the GVC.
6. Following a meeting of the GVC on 18 April, the appellant was advised of the withdrawal of his place. The letter so advising him (dated 30 April) explained the decision thus:

'Following our recent meeting that concluded the administrative process in respect of this matter and in light of the fact that a criminal conviction has, at this point in time, been returned on your vetting disclosure, Hibernia College has taken the decision to withdraw your place on the programme.'

7. An appeal brought by the appellant to the respondent's appeal committee was unsuccessful, the appellant being advised of the rejection of each of three grounds of appeal he had advanced, by e-mail dated 22 July 2019. On 25 July the appellant's solicitors wrote to the respondent recording their contention that the decision reached was unlawful having regard to the submissions made to the appeal body, stating that those submissions had been ignored by the appeal committee, and suggesting that proper reasons had not been given. The respondent was requested to confirm that the appellant could continue his studies at Hibernia College, that the decisions of the GVC and appeal body were of no effect and that the appellant was not excluded in taking up his studies the following term. They threatened an application for injunctive relief if these confirmations were not forthcoming.
8. That letter was responded to by the respondent's solicitors on 26 July. They rejected the claims that the decisions of the relevant bodies were unlawful or that there was any urgency justifying interlocutory relief, and requested that the appellant's solicitors provide '*clear and succinct reasons*' as to why injunctive relief was required at that point.

The proceedings:

9. These proceedings were instituted by plenary summons on 31 July 2019, the appellant seeking both public and private law reliefs. Underlying these reliefs were claims that the decision of the respondent to exclude the appellant from its programme was as a matter of public law, unlawful (in that it was unreasonable, unsupported by reasons, *ultra vires* the respondent, and in breach of principles of natural and constitutional justice) and (for reasons that were essentially similar) in breach of contract as a matter of private law.
10. At the same time, the appellant issued an application seeking interlocutory injunctive relief restraining the respondent from upholding or giving effect to the decision of the GVC and appeal committee by terminating the appellant's placement on the programme, and restraining the respondent from excluding him from the programme. In the course of the affidavit he swore to ground that application, the appellant made complaints that the appeal committee had failed to address the grounds raised in the course of the proceeding before it and that it failed to provide reasons for its decision. He reiterated his complaints as to the fairness of the proceedings before the GVC, and his basic objection that the conviction under s.49 of the Road Traffic Act 1961 did not affect his ability to teach or his propriety for a teaching position.
11. The application for injunctive relief was made in a context in which the appellant was to commence a placement at a secondary school during the following academic year. He claimed that this placement was to commence on 9 September. He said that the balance of justice favoured the grant of the relief. He said that the respondent's rules required him to complete the programme within four years, and that if he failed to take part in that placement it would not be possible for him to complete the programme within the prescribed time.
12. On 31 July the appellant applied ex parte to the High Court for a return date for the motion seeking that interlocutory relief. The Court made the matter returnable to 27 August. The appellant's evidence is that the matter was listed for hearing on 27 August. On that date, the respondent applied for time to deliver replying affidavits and the matter was adjourned to 17 September. On 3 September, two affidavits were sworn on behalf of the respondent, and the appellant delivered further affidavits on 6 and 9 September.
13. On 12 September, the respondent's solicitors sent an open letter to the appellant's solicitors. In that letter, the respondent's solicitors asserted their client's position that the appellant was not entitled to, and would not obtain, the relief claimed by him in the proceedings. However, they made, without any admission of liability and without prejudice to the respondent's position on the issues arising from the proceedings, an open offer to resolve the application for interlocutory relief, as follows:

'Please be advised that our Client offers:

- (a) *To set aside the decision of the Garda Vetting Committee of the 30th April 2019;*

- (b) *To convene a fresh sitting of an independent vetting committee to consider the Garda Vetting Disclosure of March 2019*
- (c) *Confirmation that such Garda Vetting Hearing will take place within 2 weeks from the date of this offer;*
- (d) *Confirmation that an independent appeal will be available, if necessary, in line with the College's Appeals Policy;*
- (e) *Confirmation that if this offer is accepted and your client is subsequently successful at Garda Vetting Stage, he will join the Autumn 2019 cohort. In light of changes to course assessments since Spring 2017, please note that your client would be permitted to carry forward the credit for Core Teaching Methodologies Modules in these circumstances.*
- (f) *In accordance with section 13.1.b iii of the Policy of Temporary Suspension of Studies, confirmation that the Registrar and the Head of School agree to grant the following exception to this rule which sets out that normally a student must complete their programme within a maximum of double the standard time allocated to the programme: the period from 17 August 2017 (the date of confirmation of deferral) until the date of acceptance of this offer only will be excluded from the period of 4 years; and*
- (g) *Costs of the injunction to be reserved to the final hearing.*

All of the above is being offered without any admission of liability and entirely without prejudice to the College's position on the issues arising in the proceedings,

This offer will remain open for acceptance by your Client up and until 5pm on Monday 16 September 2019.'

14. Two further affidavits were delivered by the respondent on the afternoon of September 16. The appellant swore an additional affidavit shortly before the hearing on 17 September.

The High Court hearing:

15. The appellant did not formally respond to the open offer presented in the letter of 12 September. Instead, when the matter came before Twomey J. on 17 September it was made clear to the Court that the offer was not being accepted and that the appellant proposed to proceed with his application for an interlocutory injunction. The Court was referred to that offer which, notwithstanding the deadline stipulated in it, was kept open.
16. Thus, counsel for the appellant outlined to the Court the relief claimed by him and the context in which he sought it. He made it clear that he believed that the application would take 'a little time' having regard to the volume of affidavits and relevant correspondence. Counsel for the respondent addressed the Court referring to the chronology, opening to the Court the letter of 12 September, urging the reasonableness of the proposal made,

and asserting (but not explaining in any detail) that in any event damages were an adequate remedy so that the injunctive relief claimed should be refused.

17. Counsel for the appellant responded, condemning what he described as *'a form of bargaining that is unprincipled'*, observing that it was hard to see how the letter of offer was not a concession that the respondent could not stand over the decision of the GVC, and asserting that he wished to proceed with his application for interlocutory injunctive relief. The Court at one point requested that counsel explain why he said that damages were not an adequate remedy. In response, counsel for the appellant expressed confusion as to the precise argument being advanced in that regard by the respondent, and in particular whether it was being suggested that because the claim was properly one brought by way of a private law action for breach of contract it followed that an injunction could not be granted. He stressed his submission that an injunction was an entirely appropriate remedy in the circumstances of the case.
18. Counsel for the respondent replied pointing to the decision in *Campus Oil Limited v. Minister for Industry (No.2)* [1983] I.R. 88 and emphasising that if damages were an adequate remedy that was a basis for refusing the application for an interlocutory injunction *'particularly in the light of the open offer that has been made'*. He emphasised that the appellant was not destitute and the respondent was a mark for damages. Counsel for the respondent made it clear at that point in his submission that he was seeking to have the costs reserved, explaining that these could be adjudicated upon at the trial. He said:

'... this is a situation where it is perfectly open to the [appellant] on any subsequent hearing to make any number of points he may wish to make that he should be awarded the cost of the proceedings at any final hearing, depending on how matters developed. He could make the point that ultimately there was an open offer on the setting aside of the garda vetting ... he can make all those points to say that is a folding of the tent ... That is something the Court needn't – in my submission, oughtn't – to decide, no that is for a later date ...'

19. Counsel for the appellant said in response that he would address the adequacy of damages *'at the conclusion of my application for interlocutory relief'*. The Judge then rose to consider the matter.

The High Court decision:

20. When the Court resumed Twomey J. stated as follows:

*'In this case, Heffernan v. Hibernia College Limited, the [appellant] is seeking an interlocutory mandatory injunction to force the [respondent] to admit him to its placement course for teachers. He does so on the basis that the decision of the Garda Vetting Committee of the [respondent] was unlawful. In an open letter, the [respondent] with the express aim of obviating the need for this interlocutory injunction made an offer to set aside the decision of which the [appellant] complains and convene an independent vetting committee. **It seems to this Court***

that the [appellant] has got a remedy for his complaint and this Court concludes therefore that there is no basis for the injunction, particularly a mandatory injunction. If the Court is wrong in this, it is also the view that based on the submissions that damages would be an adequate remedy so the injunction is being refused.'

(Emphasis Added.)

21. Counsel for the appellant observed that this created something of a difficulty *'in that of course the injunction hasn't been opened'*. He requested that the matter be put in for 2 pm so he could consider how the matter should proceed from there. At 2 pm, he indicated that he was prepared to adopt the course of action suggested in the letter from the respondent's solicitors of 12 September. He asked that the Court reserve the issue of costs – as had been suggested in that letter. He noted that the Court had not considered the merits of the application and had effectively taken a *'hybrid course'*. He explained that significant costs had been incurred in dealing with the matter, that he wished to proceed to trial on the issue of costs and that in those circumstances he requested that the costs be reserved to the trial.
22. Counsel for the respondent thereupon sought his costs: he said that the appellant was seeking to have *'an each-way bet'*. He explained that his clients had made the offer with a view to avoiding the necessity for the Court to be troubled with an interlocutory hearing, that that offer was turned down, that the hearing had proceeded, submissions were heard and the Court had given its ruling refusing the interlocutory relief. Therefore, there had been an event and costs, he submitted, should follow that event.
23. He observed that the only issue was whether damages would be an adequate remedy and whether there was a necessity to press on and grant the injunctive relief which, he said, there was not. In reply, counsel for the appellant submitted that there had been no determination on the merits and that in circumstances where the matter did not proceed before the Court it would not be appropriate to make an award of costs.
24. In ordering costs against the appellant, the Court said as follows:

'The whole purpose of that letter, as I read it on its first page, was to obviate the need for the hearing today and the offer wasn't taken up. The logic of that means that the costs therefore should be awarded to the [respondent] of this hearing because the offer wasn't taken up. So I am going to award costs to the [respondent] from the date of that letter to included today's hearing, just those costs, so effectively just these costs. If it had been accepted, there wouldn't have been any need for this hearing. On that basis it seems logical that the costs should be awarded in order to encourage similar defendants to make similar broad offers to obviate the need for interlocutory injunctions wherever possible. That is why I would award the costs in this instance.'

25. The order drawn by the Court records:

'And it is Ordered that the Defendant do recover against the Appellant the costs of this application from the day of the open letter from the Defendant's solicitors to the Appellant's solicitor dated the 12th day of September 2019 until today's hearing.'

26. It is important to underline that while the trial judge gave two reasons for his substantive decision – the offer made by the respondent, and the Court's view that damages were an adequate remedy - the reason for the order for costs was referenced exclusively to the offer. It is also important that while the Court did not make any reference to the costs incurred by either party in connection with the application for an interlocutory injunction prior to 12 September, the effect of the order is that these costs have now been disposed of. The issue of the costs of the interlocutory application has been determined in its entirety and the only order made was for the recovery of the respondent's costs from 12 September. If there was any doubt about this, I think it necessarily follows from the statement by the trial judge that he was *'going to award costs to the [respondent] from the date of that letter to included today's hearing, just those costs, so effectively **just these costs.**'* (Emphasis Added.)
27. That means that the costs incurred by the appellant in preparing the affidavits, in attending in Court on 31 July, the costs of solicitors and counsel in preparing for and attending for the injunction application as listed for hearing on 27 August, the costs of considering and responding to the respondent's affidavits, and indeed the costs entailed by considering and taking advice upon the respondent's offer of 12 September, were not recoverable by him and are not amenable to determination at any further hearing.
28. Following the hearing, the appellant attended the newly convened GVC and was allowed, following a decision of that body, to continue his studies. No evidence has been adduced before this Court as to the reason the second committee reached a conclusion that thus differed from that of the first committee and, in particular, whether it had received any fresh information prior to that second decision to justify the respondent thus changing its position. However, it is accepted by both parties that this means the proceedings are now moot.

Legal Principles:

29. The relevant principles are clear. At the time of the hearing before the High Court, O.99, r.1(3) RSC provided the general rule that costs should follow the event. The Court was given the power to direct otherwise for special cause, to be mentioned in the order. Order 99 Rule 1(4A) RSC provided that the Court, upon determining any interlocutory application, should make an award of costs save where it was not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. That provision reflected both the preference articulated in the case law pre-dating the introduction of O.99, r.1(4A) RSC that those bringing and defending interlocutory applications should face a costs risk in the event that the Court determines that the stance they adopted was wrong (*Allied Irish Banks v. Diamond* (Unreported, High Court, 7 November 2011) at p. 6 of the transcript of the *ex tempore* judgment of Clarke J.), and the fact that there will be cases in which it is not possible to determine where the proper

burden of the costs of an interlocutory application should lie without the benefit of discovery, a complete marshalling by the parties of relevant evidence and in some cases an oral hearing (*Dubcap Ltd v. Microcorp Ltd (Ex tempore)* Unreported, Supreme Court, 9 December 1997 at p.4).

30. It is also clear that the exercise by the High Court of its discretion in calibrating these various considerations should not be lightly upset by an appellate court: as the Supreme Court has most recently explained in the context of the balancing exercise undertaken by a trial court in making discovery orders '*it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court*' (*Waterford Credit Union v. J&E Davy* [2020] IESC 9 at para. 6.3). The exercise of such restraint by an appellate court has been repeatedly stressed in the context of first instance decisions in respect of costs (see Delaney and McGrath "Civil Procedure" 4th Ed. (Dublin, 2018) at paras. 24.777 – 24.285). However, and at the same time, an appellate court retains jurisdiction to interfere with a costs order where the trial judge has erred in principle, or failed to attach weight to the appropriate factors relevant to the particular decision in hand (*Godsil v. Ireland* [2015] IESC 103; [2015] 4 IR 535 at para. 69).

The decision of the judge that the appellant had a remedy for his complaint:

31. The appellant has made it clear in his notice of appeal that this is an appeal relating to a cost order alone. In that connection, however, he challenges the correctness of the underlying decision of Twomey J. to refuse the application for an interlocutory injunction. Given that both this decision and the proceedings as a whole are now moot this creates a potential difficulty in embarking on any consideration of the merits of Twomey J.'s ruling. I will return to this issue. First, however, I will address the case as it was argued in the appellant's written, and for most of Mr. Callanan SC's oral, submissions.
32. Insofar as the decision in relation to costs falls to be viewed in the light of the correctness or otherwise of the substantive ruling of the trial judge, it must follow that the only aspect of that ruling that need be considered by the Court is Twomey J.'s finding that the appellant had a remedy as a consequence of the offer made by the respondent in its letter of 12 September. As I have already noted, this was the only feature of the substantive decision referred to in the ruling on costs. I do not, therefore, find it necessary to express any view as to the correctness or otherwise of the High Court judge's conclusion that damages were an adequate remedy.
33. In that regard, the finding of the trial judge was in substance that the respondents had offered to the appellant a mechanism which might resolve the complaints that had prompted the application for an injunction in the first place. As events transpired, that proved correct. The course of action offered by the respondent and described by the trial judge as '*a remedy for his complaint*' was less than satisfactory insofar as the appellant was concerned, because part of his case was that he should not have been referred to the vetting committee at all. Had the decision of the second vetting committee also proved adverse, the appellant would have lost time, and could have faced a difficulty in seeking a

fresh interlocutory injunction by reason of the statement of Twomey J. that damages were an adequate remedy.

34. That said, the course of action proposed by the respondent offered a practical solution to the immediate complaint. The respondent was proposing to set aside the decision of its own vetting committee. This may not have met all of the appellant's concerns and objections, but it did address many of them. The appellant now had the benefit of a fresh hearing at which he could make again the case he said was not properly considered by the first committee. He was entitled to participate in the second vetting procedure without prejudice to his objection and had the second vetting committee ruled against him he would have been entitled to renew his application for injunctive relief in the light of the then changed circumstances. It may well have been preferable for the trial judge in the exercise of his ordinary case management powers to have adjourned the application for an injunction until the proceedings of the independent vetting committee had concluded and awarding, if he thought it appropriate so to do, the costs of the day against the appellant. However, in the circumstances, I do not believe it could be said that the decision of the trial judge to refuse the application for an interlocutory injunction because there was now available an alternative vehicle for the agitation of a significant component of the appellant's grievance, and a potential mechanism for resolving all of it, was '*outside the range of any order which could reasonably have been made*' (*Waterford Credit Union v. J&E Davy* at para. 6.3). The power of the Court to grant an interlocutory injunction is ultimately governed by the direction, originally stipulated in the Judicature Acts and now expressed in Order 50 Rule 6(1) RSC, to do so where it is '*just or convenient*'. While the discretion imported by that term is obviously not untrammelled, the proposition that the existence of an alternative remedy precludes the grant of discretionary relief is well and clearly established – particularly in the public law arena in which the appellant contended (correctly or not) that these proceedings lay. While as I have said it might have been preferable for the judge to have adjourned the injunction application, I cannot conclude that he exceeded his discretion in proceeding as he did.

The decision to order costs against the appellant:

35. The fact that the High Court based its substantive decision on the making of an open offer by the respondent on 12 September is significant in terms of the order for costs it could reasonably make. In this regard, the Court must be cognisant of two important considerations. The first is that the Court will quite correctly wish to encourage parties to interlocutory applications to adopt reasonable positions that might obviate the need for the hearing of those applications. Contrary to the submission advanced by the appellant, this is an entirely proper consideration to which a trial Court is entitled to have regard in ordering costs, and indeed was a factor correctly identified in that context by Peart J. in *Irish Bacon Slicers Limited v. Weidemark Fleoishwaren GmbH* [2014] IEHC 293 at p. 7.
36. If the trial judge was entitled to base the substantive decision he reached on the conclusion that the appellant should have proceeded to that second committee hearing, it must follow that he was entitled to reflect this conclusion in the order for costs. He was entitled to reach that view without considering the affidavit evidence or hearing detailed

argument as to the merits of the underlying application for the simple reason that this basis for his decision (as opposed to the conclusion he reached in relation to the adequacy of damages) stood independently of those merits. Further, the fact that the respondent had initially made an offer to reserve the costs did not affect the power of the Court to direct otherwise: the appellant had turned down the offer, and the respondent had (although curiously changing its position in this regard during the hearing) sought its costs. If this Court would not interfere in the substantive decision made by the trial judge in the exercise of his discretion that the course of action offered by the respondent should be exhausted, it is hard to see how it can interfere in the consequent decision made that some costs should be awarded against the appellant for not having treated with that offer. It follows that, in principle, the decision of the trial judge to award some costs against the appellant was properly within his discretion.

The failure of the trial judge to acknowledge the costs incurred by the appellant:

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.* There, the plaintiff brought an application for an interlocutory injunction seeking to restrain the presentation of a winding-up petition, its case being that the debt alleged by the defendant and on the basis of which such a petition would be based, was disputed. Affidavits having been exchanged between the parties when the matter came before the Court the defendant offered an undertaking not to present the petition. 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). Thus, in *Godsil* itself, the plaintiff claimed that a statutory provision preventing an undischarged bankrupt from standing as a candidate for election to the European Parliament was invalid. Within two weeks of the proceedings being instituted, the Government had introduced draft amending legislation removing the statutory prohibition of which the plaintiff complained. Shortly thereafter this was passed by the Houses of Oireachtas and signed into law by the President. The Court determined that the enactment of that legislation in the circumstances which presented themselves there was an 'event' for the purposes of costs.
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.

There the plaintiff, Peart J. held, was entitled to believe the defendant was proposing to bring an application to wind it up on foot of a disputed debt, not having given an undertaking not to do so when requested. In those circumstances, the plaintiff was entitled to proceed to institute proceedings to restrain that course of action. The sequence of events which merited the making of an order for costs have obvious parallels here (at p.10) :

'Almost five weeks passed during which the plaintiff incurred significant additional costs in dealing with the replying affidavits of the defendant 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 plaintiff's motion. This undertaking did not emanate or result from any prior negotiations with the plaintiff's legal team. It was in that sense unsolicited, though obviously it had been requested some five weeks previously. It was precisely the undertaking that had been sought ... at the outset.'

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.
45. I should also say, although perhaps less significantly, that I have difficulty in understanding why the costs order in favour of the respondent was from the date of the letter of 12 September. The respondent itself allowed the appellant until 16 September to decide whether to accept the offer in the letter. That, properly, reflected the fact that the appellant was entitled to some time to consider and take advice on the proposal. The costs ordered against the appellant should have mirrored that and should therefore have run from close of business on Monday 16 September.

The costs of a moot interlocutory appeal:

46. At the conclusion of his oral submissions, counsel for the appellant referred to the decision of the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] IESC 39, [2012] 3 IR 222, urging that having regard to the circumstances in which the

proceedings had become moot, he was entitled to all of his costs of the action. There is, in my view, no basis on which this Court can adjudicate on the costs of the proceedings as a whole in a context where those costs were not the subject of any consideration by the High Court. Indeed, this relief was not sought in the notice of appeal.

47. However, it might be said that *Cunningham* is relevant for another, slightly different, reason. As I have noted, the proceedings are moot. The fact that there is an outstanding issue of costs does not make the proceedings or any aspect of them, other than moot (see *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 IR 274 at para. 109). It follows that it might be said that the Court should not embark upon any consideration of the merits of the decision of Twomey J., but instead ought to determine the costs of the injunction application now in the light of the fact the case is moot.
48. In *Cunningham* the Court formulated the general principles by reference to which costs of moot proceedings should be approached. Essentially, in applying those guidelines the court should address in the first instance why the proceedings have become moot. Where the mootness is attributable to a factor outside the control of the parties, the Court will ordinarily lean in favour of making no order as to costs. Where, however, the mootness is attributable to the unilateral act of one of the parties, the Court will lean in favour of making an order for costs against that party. The Supreme Court in *Cunningham* crafted very particular guidelines to address the appropriate course of action where the mootness arises because a statutory body makes a new decision in the exercise of its legal powers. When this happens, the court should look to see if the new decision resulted from a change in circumstances. Where it did, the Court will lean in favour of making no order as to costs. If, however, the body has simply changed its mind, costs may be awarded against it. Importantly, the onus of establishing that there has been a change of circumstances and not a change of mind lies on the body which has through its decision rendered the proceedings moot.
49. Insofar as the appeal against the decision of Twomey J. is moot because the proceedings in their entirety are moot, and insofar as it might be said that therefore the costs of the injunction should be determined by reference to the *Cunningham* principles rather than by reference to the correctness of his decision, it would follow that the onus now falls on the respondent to establish that the decision of the second vetting committee was other than a simple change of mind, and that it resulted from new circumstances, with the costs of the interlocutory application being visited upon it if it failed to adduce evidence to this effect. The facts of, and evidence adduced in, *P.T. v. Wicklow County Council* afford an example of how and when this can be established in the course of an appeal before this court.
50. However, I think it would be unfair to determine this appeal on that basis. Although counsel for the appellant referred to *Cunningham* at the conclusion of his oral submissions, the case was not made in the notice of appeal or in the appellant's legal submissions that the appellant was entitled to the costs of the injunction simply because

the respondent had through its unilateral action changed its mind and thereby rendered the entire case moot. Similarly, although the respondent in its appeal documents posits that the appeal is moot, it does not lay any evidence before the court from which we could conclude that the decision which rendered the proceedings moot was based on facts or circumstances which would render it inappropriate to order costs against it.

51. I have given careful consideration to whether the Court is, properly speaking, required to address this application by requiring evidence from the parties so as to allow the analysis outlined in *Cunningham* to be conducted. That would involve deciding why the proceedings became moot and whether in fact there were circumstances which justified the second decision, or whether in truth the respondent merely changed its mind. Putting to one side the fact that this would involve requiring the parties to undertake an exercise suggested in the submissions of neither party, it would also involve the incurring by the parties of additional costs solely for the purposes of determining costs.
52. As I explained in my judgment in *P.T. v. Wicklow County Council* at para. 20, the principles in *Cunningham* should not be applied inflexibly, and were clearly intended by the Supreme Court to be operated having regard to the particular features of each case. The situation of cost orders made within an interlocutory application which, by the time the order is appealed has become moot, raises particular issues arising from the very nature of those orders. Because interlocutory orders of the kind in issue here and the cost orders that may attend them are discretionary, an appellate court is in some cases in a position to reach a decision as to the appropriateness of the cost order without delving deeply into the merits of the underlying decision. That, I think, enables a decision to be made on the appeal of a cost order in some interlocutory matters that have since been rendered moot in a manner that is fair to the parties, reduces the cost attending such an appeal while at the same time observing the spirit of rules precluding the court from hearing moot proceedings and respecting the principles outlined in *Cunningham*. This case shows that in at least some circumstances, this can be done.
53. In this case I have adopted the course of action of reviewing the decision of Twomey J. on the merits in a context in which the case the respondent came to Court to meet was not presented by reference to *Cunningham* and in which re-engineering the costs hearing into the framework posited in that decision would have involved further court time and costs. I note that there is authority enabling an appellate court to address an issue of costs in this way in moot proceedings where the parties do not contend otherwise (see *Caldwell v. Mahon Tribunal* [2011] IESC 21, as explained in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 IR 274 at para. 108).
54. Accordingly, in my view, this appeal should be allowed and the order of Twomey J. varied to the extent that (a) an Order should be made that the appellant recover from the respondent the costs of and consequent upon the application for interlocutory relief up to and including close of business on Monday 16 September 2019, and (b) the Order for costs made in favour of the respondent should be limited to the costs incurred in connection with the application of the respondent that the interlocutory injunction not

proceed on the day of Tuesday 17 September. For the avoidance of doubt, it is my view that the appellant is entitled to recover the costs incurred by him in preparing the affidavits, in attending Court on 31 July, the costs of solicitors and counsel in preparing for and attending for the injunction application as listed for hearing on 27 August, the costs of considering and responding to the respondent's affidavits, and costs entailed by considering and taking advice upon the respondent's offer.

55. Whelan J. and Haughton. J. are in agreement with this judgment and the order I propose.