

THE HIGH COURT

[2021] IEHC 791

[Record No. 2014/10908 P]

BETWEEN

JEAN CONNORS

PLAINTIFF

AND

DANIEL KINSELLA

FIRST NAMED DEFENDANT

AND

**DAVID TARRANT (PRACTISING UNDER THE STYLE AND TITLE OF TARRANT AND
TARRANT SOLICITORS)**

SECOND NAMED DEFENDANT

AND

**ANDREW TARRANT (PRACTISING UNDER THE STYLE AND TITLE OF TARRANT AND
TARRANT SOLICITORS)**

THIRD NAMED DEFENDANT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 15th day of December, 2021

1. On 8th November, 2021, I delivered a judgment in relation to an application by the plaintiff for an interlocutory injunction against the first named defendant in respect of certain works carried out by him at a property known as 10 Casement Park, Bray, Co. Wicklow ("the property"). That judgment ('the substantive judgment') is reported at [2021] IEHC 696, and should be read in conjunction with the present judgment which concerns the costs of the application and the terms of the order to be made.
2. At the conclusion of the substantive judgment, I invited "brief written submissions" in this regard. The submissions I received were most certainly not "brief", but in fairness did address issues which were of some complexity, and which perhaps required to be addressed at more length than originally anticipated.
3. In the substantive application, I refused the relief sought. The first named defendant accordingly argues that it is appropriate for the court to determine the issue of costs "...because this injunction application was a discrete, stand-alone application, the merits of which are not impacted whatsoever by the ultimate result of the substantive proceedings" [Written submissions, para. 3.3]. The plaintiff, on the other hand, "...urges this Honourable Court to reserve the costs of the interlocutory injunction application or in the alternative to make them costs in the cause". The plaintiff also submits that "...the Court should reject the First Named Defendant's application to have costs [awarded] against her personally" [Written submissions, para. 3].
4. There are other issues between the parties. If an order for costs is to be made in favour of the first named defendant, an issue arises as to whether such an order can or should be made against the plaintiff personally. The first named defendant also seeks an inquiry as to damages, given that the court has decided that the interim order made against him on 4th October, 2019 should be discharged, and leave to deliver an amended defence.

Where the burden of costs should fall

5. There is no dispute between the parties as to the regime which governs the award of costs in relation to the application. The appropriate legal principles are to be found in

O.99 of the Rules of the Superior Courts, and s.169 of the Legal Services Regulation Act 2015 ("the 2015 Act"). In summary, O.99, r.2(3) requires the court to make an order in respect of the costs of any interlocutory application "save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application". Order 99, r.3(1) requires the court, in considering whether to award costs in respect of any "step in any proceedings" to have regard to the matters set out in s.169(1) of the 2015 Act. That subsection gives statutory effect to the principle that costs should follow the event unless the court orders otherwise, and contains a list of the type of matters to which a court should have regard when considering whether or not the default position of costs following the event should apply.

6. The plaintiff maintains that a key issue between the parties was whether or not a fair issue to be tried – or in the case of the mandatory reliefs sought, a strong case likely to succeed at trial – had been made out in relation to "the underlying claim of duress/undue influence" [written submissions para. 12] in the proceedings generally. As the plaintiff put it at para. 15 of her written submissions:

"The issue of duress/undue influence is a material factual dispute which has had a key bearing on the outcome of the interlocutory injunction. It will – it has to be – revisited at the plenary hearing. As such, it is submitted that for that reason alone, it is not possible justly to adjudicate upon liability for costs at this juncture."

7. The plaintiff also submitted that the attitude of the non-party siblings of the plaintiff and first named defendant was "relevant to an important aspect of the balance of convenience...", and this attitude would "evidently be revisited at the hearing of the action". [Paragraph 20 written submissions]. In these circumstances, it was suggested that it would not be appropriate for the court at this stage to award costs if part of the factual basis for the court's findings would ultimately be considered by the trial judge.
8. It was also submitted that the "overall justice of the case" should take into account that the plaintiff acts as administrator for the benefit of the estate of the late Frances Kinsella and that she successfully applied to O'Hanlon J for interim orders, the costs of which application were reserved. The plaintiff relies on the criterion set out at s.169(1)(b) of the Act, and maintains that it was reasonable for her to "raise, pursue or contest" the application, particularly as the court was satisfied, notwithstanding a submission to the contrary from the first named defendant, that the plaintiff had established a fair case to be tried in light of the decision of Simons J to refuse the first named defendant's application to strike out the proceedings as frivolous and vexatious and/or as an abuse of process. The plaintiff submits that it was not "reasonable" for the first named defendant to contest this point in revised submissions and at the hearing.
9. The first named defendant contends that, where the interlocutory application concerns an issue which has no relevance to the issues to be tried at the hearing of the action, the court can and should deal with the costs in accordance with O.99, r.2(3). It is submitted that the decision of Barrett J. in *Glaxo Group Limited v. Rowex Limited* [2015] 1 IR 185 at

210, in which the court summarised the relevant factors as set out in the case law in relation to the costs of interlocutory injunctions, was instructive in this regard:

- "(x) *The prospect of a court being in a position to make an award of costs in relation to an application for interlocutory injunctive relief is less likely than in the case of other forms of interlocutory applications (Haughey, O'Dea, Tekenable, Hanrahan).*
- (xi) *A distinction falls to be drawn between (a) cases where the decision on an interlocutory injunction application turns on issues in respect of which a different picture may emerge at trial and (b) cases where the application turns on matters such as adequacy of damages or balance of convenience which will not be addressed again at the trial. In the former category of cases, a risk of injustice may arise in determining costs at the stage of the interlocutory injunction application; in the latter the same risk may not arise. (Haughey, Diamond, Hanrahan).*
- (xii) *Factors making an application for an interlocutory injunction less susceptible to a determination as to liability for costs include (a) that there may be matters which can only be resolved by the court of trial on oral evidence at plenary hearing of the action, and (b) matters may come to light by way of discovery or new evidence not available to the parties at the time of the interlocutory application which would bring about a result which seemed unlikely or improbable at the time that application was heard. (O'Dea, Dubcap)."*

10. The first named defendant contends that the present matter is such as was contemplated by Barrett J at para. (xi)(b) above, *i.e.* an application where the issues of balance of convenience and adequacy of damages were crucial to the court's determination, and are such as will not be addressed again at the trial; the interlocutory application "did not turn on the merits of the Plaintiff's underlying case... [para. 3.10(ii) written submissions]". It was submitted that, in these circumstances, it would be appropriate for this Court to determine the issue of costs for the present application, and there was no reason to depart from the normal rule that costs should follow the event.

Personal liability of administrator

11. Without prejudice to her position that the costs should be reserved or made costs in the cause, the plaintiff "disputes in the strongest possible terms" the contention by the first named defendant that a costs order be made against her personally, as opposed to in her capacity as administrator of the estate of Frances Kinsella.
12. The plaintiff refers to the consideration of the case law by this court in *Crowley v. Murphy* [2021] IEHC 645, and submits that the court should follow the dicta expressed by the Supreme Court in *Bonis Morelli: Vella v. Morelli* [1968] IR 11, in which Budd J expressed the view that in circumstances "where the case is a proper one for investigation and the litigation was conducted *bona fide*, there arises a situation in which some sort of special order concerning costs may properly be made...".

13. The plaintiff submits that in circumstances where she alleges the transfer of the deceased's property to the first named defendant should be set aside, that as the circumstances surrounding the transfer of property the subject of the within proceedings is in issue, she should not be deterred from having the transfer investigated by the court in her capacity as Administrator of the deceased's estate. The plaintiff further relies upon *Muckian v Hoey* [2017] IEHC 47, in which Keane J. expanded upon the principles set down in *Morelli* noting:

"...Administrators, executors or trustees should not be unduly deterred from seeking to have genuine problems or issues in the administration of any estate or trust judicially resolved because of the risk of a personal liability for the costs of the appropriate litigation." [Emphasis added]

14. The plaintiff submits that this is not a case, as characterised by Herbert J. in *O'Connor v Markey* [2007] 2 IR 194, which amounts to "contentious litigation between beneficiaries which did not in any way touch upon the capacity of the testator or the state in which he had left his testamentary papers". It is asserted that the capacity of the late Frances Kinsella and indeed the question of whether there was duress or undue influence exerted on her is "crucial to the case being made by the Plaintiff in her capacity as Administrator".
15. The plaintiff, in asserting that the present proceedings were brought and *conducted bona fide*, relies on the judgment of Meenan J. in *McGrath v The Solicitors Disciplinary Tribunal* [2020] IEHC 238, an appeal by a sibling of the plaintiff against a finding by the Solicitors Disciplinary Tribunal in relation to her handling of the estate, which is the subject of the present proceedings. Meenan J. held at para. 7 that "...the complaints made by the appellants against the respondent Solicitor should be resolved by civil proceedings and there is no evidence to support the allegations of misconduct made against the respondent Solicitor...".
16. The plaintiff also seeks costs from the first named defendant in relation to the matter being part heard before Keane J. on 3 March, 2021 which, according to the plaintiff, was adjourned on an application by the plaintiff in order to consider a replying affidavit furnished by the first named defendant on 2nd March 2021.
17. The defendant submits that an Order for costs should be made against the Administrator in a personal capacity. It is submitted that "the Plaintiff is conducting these proceedings on the mistaken assumption that the costs of the proceedings will have to be met by the Estate, which has a net value of zero. In other words the Plaintiff sees this litigation as 'a shot to nothing'".
18. It is submitted that the rule in *Vella v Morelli* does not apply in circumstances where the litigation is brought by an administrator (who is also beneficiary) who makes a claim adverse to other beneficiaries. In *O'Connor v Markey*, Herbert J. sought to differentiate between the litigation envisaged by Budd J. in *Vella v Morelli*, and litigation which has "all the hallmarks of contentious litigation between beneficiaries which [does] not in any way

touch upon the capacity of the testator or the state in which he left his testamentary papers". The defendant submits that the present litigation falls into this category.

19. The defendant refers to the decision of *Cawley v Lillis* [2012] IEHC 70 in which Laffoy J. held that the principle in *Vella v Morelli* did not apply to the case before her, which concerned a dispute regarding the beneficial ownership of assets which had been jointly held by the deceased and defendant, as it was "not concerned with execution of a testamentary document".
20. To that end, the defendant relies heavily on the dicta of Herbert J. in *O'Connor v Markey*:
 - "7. *By contrast, the instant application bore all the hallmarks of contentious litigation between beneficiaries which did not in any way touch upon the capacity of the testator or the state in which he had left his testamentary papers. The present application arose in the course of the administration of the estate, was not a probate action, but neither was it an ordinary administration suit. To all intents and purposes it was a hostile lis inter partes between two beneficiaries under the will. It related to the conduct of the testator's business by the first defendant while the testator was still alive and to the issue of whether the first defendant was or was not obliged to pay the particular debts as they arose, so that they would not become a burden upon and payable out of the estate on the death of the testator. The special administrator was in reality only a nominal plaintiff to enable the opinion of the court to be obtained by way of a special summons for directions in the course of the administration. The many issues of fact and of law were litigated as a proceeding inter partes between the first defendant and the second defendant on their own evidence, and the evidence of witnesses called by each of them.*
 - 8 *... In my judgment the instant case falls within the 'third class of cases' identified by Kekewich J. in In re Buckton; Buckton v. Buckton [1907] 2 Ch. 406 where the judge held as follows at pp. 414 to 415:-*

'...There is yet a third class of case differing in form and substance from the first, and in substance though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and usually takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the court...'

9. *In the instant case the plaintiff made the application, but, I am satisfied that this was essentially in a nominal capacity only and does not in any material way alter the situation. The claim made by the first defendant, who is the principal beneficiary under the will, that he was not obliged to discharge the debts in issue in the application, was totally adverse to the second defendant who is also, but to a much lesser extent, a beneficiary under the will and, whose residuary bequest would be substantially or entirely consumed by the payment of these debts should they fall to be paid out of the testamentary estate. If there was any issue of community importance in this case, it was that persons in the position of the first defendant should not be permitted to resile from their contractual and fiduciary obligations, particularly when this inures to their own betterment and to the detriment of others, including other beneficiaries under the same will. In my judgment, it would be neither fair nor reasonable that the first defendant, having failed in his claim in this application, should be awarded costs out of the estate or exempted from paying the costs of the special administrator and of the successful second defendant, both of whom he caused to be involved in this litigation."*

21. The plaintiff submits that she is protected from a personal award of costs pursuant to the rule in *Vella v Morelli*:

"... the case is a proper one for investigation and the litigation was conducted bona fide...persons, having real and genuine grounds for believing, or even having genuine suspicions, that a purported will is not valid, should be able to have the circumstances surrounding the execution of that will investigated by the court without being completely deterred from taking that course by reason of a fear that, however genuine their case may be, they will have to bear the burden of what may be heavy cost". [Budd J. at p.34]

22. While the application of this principle may have seemed limited to specific circumstances, Keane J. was prepared to envisage a broader application of the principle:

*"Nor do I accept that there is any absolute or inflexible modern rule whereby an administratrix is entitled to her costs of an administration out of the estate unless a finding of misconduct, expressed as such, is made against her. I do accept that there is an obvious public interest in the application of a general principle whereby, once there is a reasonable ground for litigation by an administrator, executor or trustee, and once that litigation is conducted bona fide, that party should have an order for his or her costs out of the estate or trust though unsuccessful in the action. The public interest concerned is a broader manifestation of that identified by Budd J. in the narrower context of the circumstances surrounding the execution of wills in *In bonis Morelli: Vella v Morelli* [1968] I.R. 11 (at 34). That is to say, it is the wider public or community interest in the proper administration of estates and trusts generally. Administrators, executors or trustees should not be unduly deterred from seeking to have genuine problems or issues in the administration of*

any estate or trust judicially resolved because of the risk of a personal liability for the costs of the appropriate litigation."

23. There are obvious justifications for the existence of the rule in *Vella v Morelli*, and in light of the dicta of Keane J. quoted above, it may be that the rule exists in a broader context, not just limited to the validity and execution of a will. However, in *O'Connor v Markey* [2007] 2 IR 194, a case concerning a dispute between two beneficiaries under a will regarding the payment of outstanding debts which arose during the administration of the estate, Herbert J. noted that *Vella v Morelli* and the principles contained therein were concerned with "the state in which the deceased himself or herself had left his or her testamentary papers' or with the testamentary capacity of the deceased". Herbert J. went on to say that that application "bore all the hallmarks of contentious litigation between beneficiaries which did not in any way touch upon the capacity of the testator or the state in which he left his testamentary papers. The present application arose in the course of the administration of the estate, was not a probate action, but neither was it an ordinary administration suit. To all intents and purposes, it was a hostile *lis inter partes* between two beneficiaries under the will. It related to the conduct of the testator's business by the first defendant while the testator was still alive...."
24. In *Muckian v Hoey*, Keane J. at para. 13, noted that "an application which bears all of the hallmarks of a hostile *lis inter partes* – whether between beneficiaries under a will, under a trust or on an intestacy – may, depending on all of the circumstances, attract the unvarnished application of the usual rule that costs follow the event". Indeed, more recently, in *Shannon v Shannon* [2019] IEHC 604, MacGrath J. summarised the rule in *Buckton v Buckton* [1907] 2 Ch. 406 which divided administrative actions into three categories for the purposes of determining the question of costs and noted that where an application is made by a beneficiary who makes a claim adverse to other beneficiaries, that "...would be the subject of an action commenced by writ and would strictly fall within the description of litigation... once convinced I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the successful party to pay the costs" [Kekewich J. in *Buckton*: see para. 20 above].

Conclusions

25. It seems to me that the expressions of principle by Keane J in *Muckian v. Hoey* quoted at para. 22 above are correct. As MacGrath J pointed out in *Shannon v. Shannon*, "...the rules in relation to costs, both in O.99 and as discussed and developed in [*Elliott v. Stamp* [2008] 3 IR 387] and *O'Connor* are designed to achieve a just result". There may be situations in which an administrator embarks on litigation *bona fide* for the benefit of the estate, and on reasonable grounds; where such litigation is unsuccessful, the public interest in the administration of estates and interests which requires that administrators "...may not be unduly deterred from seeking to have genuine problems or issues in the administration of any estate or trust judicially resolved because of the risk of a personal liability for the costs of the appropriate litigation...", may give rise to a situation in which a

court takes the view that it should depart from the principle that costs follow the event, and fashion an order which is more consistent with the requirements of justice.

26. The issue which this Court has to decide is whether this extension of the principle in *Vella v. Morelli* should be applied to the costs of the interlocutory application in the present case, or whether, as the first named defendant urges, the court should simply order that costs follow the event. In my view, the following matters are particularly relevant to the court's consideration: -

- The plaintiff is the administrator of the deceased's estate, with all the duties and obligations which come with that role;
- the plaintiff is also a beneficiary of the intestate estate of the deceased;
- the estate has no assets;
- the proceedings seek to have set aside a transfer by the deceased during her lifetime of the property to the first named defendant;
- as such, the proceedings cannot be regarded as a probate case or an administration suit, however those terms may be defined;
- the plaintiff obtained interim relief from O'Hanlon J;
- the plaintiff, a practising solicitor, furnished the usual undertaking as to damages in support of the interlocutory application;
- in correspondence with the first named defendant's solicitor, the plaintiff confirmed that the undertaking was given by her in her capacity as administrator, i.e. not in a personal capacity, and that the court had been informed in the course of the interim application that the net value of the estate was "€0.00...";
- this court held that the plaintiff had established a fair issue to be tried in the proceedings;
- however, the court also found that the balance of convenience "decisively favours the first named defendant...in circumstances where the first named defendant owns the property, is carrying out development works which have been authorised by planning permission, and which works are not likely to devalue the property, the very harm for which the plaintiff contends..." [para. 75].

27. The plaintiff argues that the interlocutory application cannot be considered separately from the proceedings as a whole, and that "...the issue of duress/undue influence is a material factual dispute which has had a key bearing on the outcome of the interlocutory injunction". I cannot agree. What was particularly noteworthy about the present application was that the reliefs sought did not correspond to the reliefs sought in the proceedings, and certainly bore no relationship to the core allegation against the first

named defendant of duress and undue influence allegedly brought to bear on the deceased. In my view, the first named defendant is correct in maintaining that this was a “discrete, stand-alone application, the merits of which are not impacted whatsoever by the ultimate result of the substantive proceedings...”. If the plaintiff is successful at trial, allowing the first named defendant to carry out a development for which the local authority granted planning permission and which it is satisfied will enhance the value of the property will not in any way inhibit or damage the interests of the deceased’s estate; even if it did, damages would clearly be an adequate remedy.

28. Two years have elapsed since the interim relief was sought; that time would have been better spent getting the proceedings on for trial. The plaintiff is under a duty to administer the estate appropriately, and in an efficient and cost-effective manner. In my view, the application for interlocutory relief should not have been made. This is particularly so in circumstances where the undertaking proffered to the court was worthless.
29. I am obliged to make an award of costs in respect of an interlocutory application, save “where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application”. I do not consider that, in the present case, it is not possible to adjudicate upon liability for the costs of the application. In my view, this is clearly a matter in which costs should follow the event, and I will make an order to this effect.
30. The plaintiff argues that any such order should not be made against her personally. I was not altogether clear as to whether it was being contended that no order should be made against her at all, or that any such order be restricted to recovery of funds by way of some theoretical indemnity from the estate, which seems unlikely to occur unless the plaintiff is successful in the proceedings.
31. As I have indicated above, I accept that there may be circumstances in which justice requires that an administrator who prosecutes ultimately unsuccessful proceedings should not be penalised by an order against her personally for costs. It might be that such an administrator would be deemed entitled to an indemnity from the estate, or that the costs be made a charge on the administrator’s share of any real estate devised to her; in this regard, see *In Re Knapman; Knapman v. Wreford* (1890) 18 Ch. D. 300, followed by Herbert J in *O’Connor v. Markey*. There may be other ways in which an order may be made which would spare an unsuccessful administrator the burden of liability for costs, while providing for the rights of the party entitled to such costs.
32. In the present case, the difficulty is that there are no assets in the estate, and the undertaking furnished by the plaintiff is of no value. The plaintiff may win her case at trial, in which case the property would become the property of the estate; however, it is not possible or appropriate for the court at this stage to speculate as to how likely that is, nor does the court have any information as to the value of the property.
33. The requirement to do justice when ordering costs applies as much to the interests of the first named defendant as of the plaintiff. He has been put to the cost of defending what

the court has found to be an unmeritorious application. The proceedings are clearly a “hostile *lis inter partes*”, as Herbert J put it in *O’Connor v. Markey*. If no order is made against the plaintiff, the first named defendant will be left to bear the burden of the costs he incurred in defending the application.

34. In all the circumstances, it seems to me that the order for the costs of the interlocutory application which I propose to make in favour of the first named defendant must be made against the plaintiff personally, without qualification or restriction. It does seem to me however to be appropriate to place a stay on the execution of the costs order until the determination of the proceedings, the result of which may influence the manner in which the costs order is to be executed. The plaintiff also sought a stay on any order discharging the interim orders pending a possible appeal. In all the circumstances, I do not consider such a stay appropriate.
35. The first named defendant seeks an inquiry as to damages on foot of the plaintiff’s undertaking in this regard as set out in her grounding affidavit. It seems to me to be appropriate to order an inquiry, as the interim injunction was granted expressly on the basis of the plaintiff’s undertaking as to damages. Happily, both parties are agreed that the inquiry should be adjourned to the trial of the action, and I will make an order to that effect. It goes without saying that the first named defendant must particularise his claim for damages, and furnish all appropriate vouching documentation, well in advance of the trial.
36. The first named defendant seeks leave to deliver an amended defence. As the plaintiff indicates that she has no objection to this, I will grant leave accordingly. The plaintiff in her submissions has helpfully apprised the court of the steps taken as regards discovery, and has indicated that it may be necessary to apply to court for directions as regards progressing the proceedings, and seeks liberty to do so. To the extent that liberty is necessary in this regard, it will be included in the order.
37. Lastly, the parties indicated in their submissions that there have been attempts to resolve the unfortunate differences between the parties, so far without success. I trust that the parties will keep the possibility of settlement under review, given the cost and complexity of the litigation, even aside from the personal toll it must be taking on the participants.