

APPROVED

[2023] IEHC 650



THE HIGH COURT

2020 1299 P

BETWEEN

THOMAS MCALISTER

PLAINTIFF

AND

CHURCHES ESTATE AGENTS LTD

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 November 2023

INTRODUCTION

1. This judgment is delivered in respect of an application for an order directing the interim payment of legal costs. More specifically, the successful party in these proceedings seeks to have the unsuccessful party pay an amount “*on account*” in respect of legal costs, pending the formal adjudication of same pursuant to Part 10 of the Legal Services Regulation Act 2015. The application is made pursuant to Order 99, rule 2(5) of the Rules of the Superior Courts (as recast). The moving party also relies on High Court Practice Direction HC 71.

NO REDACTION REQUIRED

JURISDICTION TO DIRECT INTERIM PAYMENT

2. The High Court's jurisdiction to award legal costs has been placed on a statutory footing by Part 11 of the Legal Services Regulation Act 2015. Section 168 of the Act provides that a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties. The statutory provisions are complemented by Order 99 of the Rules of the Superior Courts. Order 99 has been recast, with effect from 3 December 2019, to reflect the commencement of the relevant provisions of the Legal Services Regulation Act 2015.
3. In the ordinary course, the High Court confines its role to determining the incidence of costs, i.e. by identifying whether the costs of one party are to be paid, in whole or in part, by another party. Thereafter, the role of quantifying or measuring the amount of those costs is carried out by the Office of the Chief Legal Costs Adjudicator pursuant to Part 10 of the Legal Services Regulation Act 2015. This is subject to a right of review before the High Court.
4. There is no express provision made under the Legal Services Regulation Act 2015 for the payment of costs on an *interim basis* pending the completion of the adjudication process. The High Court has, however, occasionally relied on a general power under Order 99 to direct an interim payment in respect of legal costs pending the completion of the adjudication process (or its precursor, the taxation of costs). In some instances, this has been made contingent on the delivery of a formal bill of costs to the paying party.
5. The rule relied upon is now to be found, under the recast Order 99, at rule 2(5) as follows:

“An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.”

6. At first blush, the rule *might* be understood as doing no more than indicating that a costs order, which has been made in the context of extant proceedings, may be made executable with immediate effect. This is in contradistinction to the default position whereby interlocutory costs orders will only become executable once the proceedings have been concluded. This ensures that no party is allowed to recover costs until *after* the net costs position at the conclusion of the proceedings is known.
7. This “*wait and see*” approach avoids the risk that a party, who had been required to pay out pursuant to an interlocutory costs order, may not be able to recover against that party in respect of subsequent costs orders going the other way. For example, a party against whom an interlocutory costs order had been made in respect of say, a motion for discovery, may ultimately be awarded the costs of the trial of the action. The interlocutory costs order can then be set off against this much larger costs order, leaving that party to recover the balance against the other side. This netting off of various costs orders at the conclusion of the proceedings is generally regarded as a fairer approach than requiring each individual costs award to be paid out as it arises.
8. On one reading, the rule does no more than to allow a court to depart from the default position, i.e. by allowing an interlocutory costs order to be executed notwithstanding that the proceedings have not yet concluded. In practice, however, Order 99, rule 2(5) (as recast) and its precursor, Order 99, rule 5(1), have been given a much broader interpretation and have been construed as

allowing the court to direct the making of interim payments pending adjudication or taxation. See, for example, *A.X. v. B.X.* [2023] IECA 109 (at paragraph 17).

9. The position, prior to the Legal Services Regulation Act 2015, had been addressed in a Practice Direction issued by the then President of the High Court, Kelly P., as follows:

“In view of long delays in the taxation of costs, the attention of practitioners is drawn to the provisions of Order 99, rule 1B (5) (*recte*, rule 5(1)).

I direct that in all cases where there is no dispute as to the liability for the payment of costs and in any other case which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs. Such orders may be made on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid.”

10. Practice Direction HC71 came into effect on 24 April 2017. This practice direction was issued in circumstances where there was only one Taxing Master in post to assess legal costs and where the taxation process had been disrupted pending the resolution of the appeal against the decision of the Court of Appeal in *Sheehan v. Corr* [2016] IECA 168.
11. There must be a question mark as to the continued relevance of the practice direction in circumstances where the new costs regime under the Legal Services Regulation Act 2015 came into effect on 7 October 2019, and the long delays previously experienced in respect of taxation do not arise in respect of the new adjudication process.

CASE LAW ON INTERIM PAYMENTS

12. The following principles may be derived from the case law on Order 99, rule 2(5) (as recast) and its precursor, Order 99, rule 5(1).
13. The making of an order directing an interim payment is discretionary not mandatory. The type of factors which might point in favour of the making of a direction include whether there has already been unreasonable delay in the proceedings. Thus, in *Fitzpatrick v. Behan* [2021] IECA 23, the Court of Appeal had regard to the fact that the instant appeal proceedings had significantly contributed to the delay in the payment of three separate bills of costs in respect of earlier proceedings which had been outstanding for some time. Similarly, in *A.X. v. B.X.* [2023] IECA 109, the Court of Appeal directed a payment “*on account*” having regard to the lengthy history of the prolonged taxation of costs process in previous judicial separation proceedings between the same parties.
14. The nature of the proceedings may also be relevant. Empirically, an interim payment is less likely to be directed in commercial proceedings than, say, in personal injuries proceedings. This may reflect the fact that the costs dynamics in personal injuries proceedings are very different: often a plaintiff’s legal representatives will be acting on a “*no foal, no fee*” basis and the defendant will be a well-resourced insurance company.
15. The function of the court under Order 99, rule 2(5) is different from that under Order 99, rule 7(2) where the court has discretion to direct that a sum in gross be paid in lieu of adjudicated costs. In deciding whether or not to direct an interim payment, the court is not quantifying or measuring costs. In the absence of detailed submissions and sight of a bill of costs, the court should be careful not to pre-empt the adjudication process by stating definitive views on the

appropriate level of fees. Thus, for example, in *Heeney v. DePuy International Ltd* [2017] IEHC 355, the High Court (Barr J.) deliberately refrained from giving any indication as to what instruction fee, or what brief fee, might have been properly claimable, in circumstances where the court had very limited information before it and where there had been extremely limited argument as to whether the level of fees marked may or may not have been justifiable.

16. The court must, however, seek to avoid directing an interim payment in an amount in excess of the overall sum likely to be recovered on adjudication. Put otherwise, the court should guard against overpayment. This is so notwithstanding that the interim payment will normally be made conditional on the payee's solicitor giving an undertaking to refund any overpayment in the event that a lesser amount is ultimately recovered on adjudication. As stated in *Heeney v. DePuy International Ltd* [2017] IEHC 355, the court should seek to avoid a situation arising whereby the paying party would be left chasing the other side's solicitor personally.
17. The court must also be conscious of the fact that if the paying party fails to make the interim payment in the time specified in the court order, then he or she will be liable to a process of execution. It would be unjust to require a party to pay what is, to most people, an enormous sum of money if same is likely to be in excess of their ultimate liability. On the facts of the present case, for example, an interim payment is sought in an amount of €92,000. It would be cold comfort to the paying party that they would, ultimately, be entitled to recover any overpayment.
18. It follows from the foregoing that, where minded to direct an interim payment, the court must make some assessment of what the overall sum recoverable on

adjudication is likely to be. In a straightforward case, the court may be able to draw on its own experience in making this assessment. In a more complex case, however, the court may require, at the very least, a bill of costs in short form. In *Microstrain Ltd v. Delany* [2021] IEHC 136, the High Court (Allen J.) declined to direct an interim payment in circumstances where he regarded the evidence on quantum as insufficient. The moving party had sought an interim payment in the amount of €225,000. No indication had been given, however, of whether the fees had been invoiced or paid. Nor was any indication given of how much of the global sum claimed was in respect of the solicitors and how much was in respect of counsel.

19. The court should be careful to ensure that the making of an interim payment order does not delay the adjudication process. A successful party who has secured a substantial interim payment may have little incentive to pursue adjudication thereafter. The bringing of a matter to adjudication is essentially in the hands of the payee. Until a formal bill of costs is provided by the payee, the paying party will not be in a position to refer the matter to adjudication. As observed in *Heeney v. DePuy International Ltd* [2017] IEHC 355, it would be unfair to direct that the paying party should make a substantial payment on account, without there being some incentive for the payee to ensure that the matter is brought on for taxation within a reasonable period. Barr J. thus made the payment on account contingent on the receipt by the paying party of a formal bill of costs from the other side's solicitor.
20. Any application for an interim payment must be made prior to final orders being made in the proceedings. In *Da Silva v. Rosas Construtores S.A.* [2017] IEHC 365, the High Court (Keane J.) refused a belated application for an

interim payment in circumstances where the court was *functus officio* and the parties did not have liberty to apply. In *Atkinson v. Minister for Health and Children* [2022] IEHC 174, the High Court (Owens J.) refused an application for an interim payment in circumstances where the moving party had settled the underlying action on terms which did not reserve to the court any function in enforcing that settlement.

DISCUSSION AND DECISION

21. The within proceedings are commercial proceedings relating to the proposed purchase of two public houses. The proceedings were instituted in February 2020. The plaintiff made an unsuccessful application for a Mareva injunction: *McAlister v. Churches Estate Agents* [2020] IEHC 684. Thereafter, the exchange of pleadings and the discovery process were completed promptly. The action was set down for hearing in June 2022 and duly allocated a trial date for May 2023. The case was ultimately assigned to me for hearing. In the days before the hearing, the defendant's solicitors sent an "*open letter*" to the plaintiff's side offering to compromise the proceedings in an amount of €80,000 together with adjudicated costs. The action was ultimately compromised on the third day of the hearing. An order was made on consent on 18 May 2023 which included, *inter alia*, the following:

"IT IS FURTHER ORDERED that the Defendant do pay the Plaintiff's High Court costs up to Tuesday the 16th day of May 2023 such costs to be adjudicated in default of agreement between the parties"

22. Counsel on behalf of the plaintiff had flagged to the court that his side would be seeking an order directing an interim payment. The matter was adjourned from time to time to allow the plaintiff to provide an indication of the amount of legal

fees being claimed. The plaintiff ultimately submitted a fee estimate. The overall sum claimed is €188,493.98 (inclusive of VAT). The solicitors' instruction fee is in the sum of €98,750 (exclusive of VAT). The brief fees for senior and junior counsel are €25,000 and €15,000 respectively (exclusive of VAT). There is no evidence as to whether these fees have been invoiced or paid.

23. Counsel on behalf of the plaintiff, while careful to acknowledge it was ultimately a matter for the court, submitted that an interim payment of half this amount would be appropriate, i.e. €94,000 (inclusive of VAT).
24. The overall level of fees is significant and is almost equivalent to the notional monetary value of the case. The total amount claimed in the amended statement of claim had been €195,000 and the case seems to have been settled for a sum less than that.
25. For the reasons which follow, this is not an appropriate case in which to exercise the discretion to direct an interim payment of costs. The principal objective in directing an interim payment is to mitigate against unreasonable delay. An interim payment ensures that a successful party, who has been put to the expense of pursuing or defending proceedings, does not have to endure unreasonable delay in recovering their legal costs (or a proportion thereof) from the unsuccessful party. An interim payment may well be appropriate where the unsuccessful party has already caused unreasonable delay and it might be anticipated that there will be further delay in the adjudication process.
26. No such considerations arise in the present case. This is not a case where the unsuccessful party has dragged out proceedings unreasonably. As appears from the chronology above, the action had been set down for hearing within two and a half years of its commencement. This period might have been even shorter but

for the plaintiff's unsuccessful application for a Mareva injunction. This case is thus distinguishable from the recent case law of the Court of Appeal cited under the previous heading. In those cases, the unsuccessful party had pursued an appeal, and, importantly, had been found to have previously caused delay in the recovery of legal costs. There is nothing in the conduct of the unsuccessful party in the present proceedings to suggest that it will seek to delay the adjudication process.

27. The past delays in the process of measuring costs, which had prompted the Practice Direction in 2017, no longer occur. The process of measuring costs has since been transferred to the newly created Office of the Chief Legal Costs Adjudicator. There is nothing to suggest that there would be any unreasonable delay in measuring the costs in the present case once the adjudication process is initiated. The Chief Legal Costs Adjudicator is required, pursuant to Section 146 of the Legal Services Regulation Act 2015, to prepare an annual report of the activities of the Office. The most recent annual report published is for the year 2021. The annual report states that the waiting time for a first return date for an adjudication on costs had been reduced to seven weeks by 31 December 2021.
28. It is not apparent that the plaintiff has taken any steps to initiate the adjudication process notwithstanding that the costs order was perfected some six months ago on 31 May 2023. Indeed, it seems that the plaintiff has not even taken the basic step of preparing a formal bill of costs in the form prescribed under Order 99 (as recast). The fee estimate submitted in support of the application for an interim payment does not meet the criteria for a bill of costs. It would be unfair to direct the payment of what is a significant sum in such circumstances. A party who invites the court to direct the making of an interim payment will be expected to

demonstrate that they have, at the very least, taken steps preliminary to the initiation of the adjudication process. The paying party cannot initiate the adjudication process in the absence of a bill of costs from the other side.

29. Some weight must also be attached to the fact that these are commercial proceedings. This is not the type of case in which interim payments are typically ordered. The case law discussed above suggests, empirically, that an interim payment will normally only be ordered in cases involving impecunious litigants or private law proceedings between family members. There is nothing before the court to suggest that the present proceedings were taken on a “*no foal, no fee*” basis nor that the plaintiff has been unable to discharge his legal fees.

CONCLUSION AND FORM OF ORDER

30. For the reasons explained, an application for an order directing the interim payment of legal costs is refused.

Appearances

John M. Fitzgerald SC and Eavanna Fitzgerald for the plaintiff instructed by Murphys Solicitors (Dun Laoghaire)

Aaron Shearer for the defendant instructed by Rowley Law Solicitors