



THE HIGH COURT

Record no. 2024 HP 5850

[2025] IEHC 70

FRIEDA ROGERSON

Between:

Plaintiff

- and -

JOHN O'DWYER

Defendant

JUDGMENT of Ms Justice Nessa Cahill delivered on 10 February 2025

Overview

1. The question addressed here is whether the costs of an injunction application which the Plaintiff issued and unilaterally decided not to pursue should be reserved or in the alternative should be awarded in favour of the Defendant.
2. The Plaintiff's position, in summary, is that the affidavits disclosed conflicts of fact, which would have precluded the grant of the interlocutory injunctive relief sought, and that the costs of that application would inevitably have been reserved. It is said

that it would be unfair if the costs were awarded against the Plaintiff and the correct order is that costs should be reserved to the trial judge.

3. The Defendant's position is that there was no change in circumstances, concession, or undertaking, and he is entitled to the costs of the abandoned injunction application. It is contended that Order 99, Rule 2(3) is applicable, that the Defendant has been "*entirely successful*" within the meaning of section 169(1) of the Legal Services Regulation Act 2015 ("*the Act of 2015*") and that the Defendant is entitled to recover costs, unless that would be unjust.
4. Three points appear to me to be important here.
5. First, I have a general discretion as to the award of costs and the entirely successful party is presumptively entitled to an award of costs.
6. Second, I cannot speculate or hypothesise as to the likely outcome of the injunction application itself or any application for costs that may have been made in its wake. The Plaintiff made the decision not to pursue the injunction and it would be wholly wasteful and futile (not to mention unsatisfactory) for this Court to attempt to engage in any such exercise.
7. Third, this is not a situation in which the plaintiff has achieved or gained anything by the issue of the injunction application. This case cannot be equated with other cases which were opened to me at the hearing of the motion in which an undertaking was given by the defendant; the case or application became moot; or a settlement was reached. Here, the Plaintiff has not gained any benefit from the issue of the motion and no concession has been made by the Defendant.
8. Having considered these points, and the pleadings, affidavits, written and oral submissions of both sides, I have formed the view that the appropriate and correct order as to the costs of the injunction application which the Plaintiff voluntarily discontinued is that the Plaintiff should discharge the Defendant's costs of that application.
9. The reasons for this decision, and the reasons for rejecting the Plaintiff's contentions to the contrary, are addressed in this judgment.

Background

10. The relevant background is that the Plaintiff is the niece of the Defendant and she and two of her children resided in his home at 24 Baldoyle Road with him from 2011 or 2012 (the precise date appears to be disputed). Her case is that she expended some €224,000 on renovations to the property and also made alterations to allow her to run her pottery business from the premises. The Plaintiff also asserts that she paid all the utility bills throughout her occupation of the property and that she acted as a carer for the Defendant.
11. The Plaintiff's case is that she entered into an agreement with the Defendant to the effect that, in exchange for her financial investments of the property and her care of the Defendant, she should be entitled to reside, and would acquire an interest, in the property and that it would ultimately be bequeathed to her.
12. There is a sharp factual dispute about the amount spent on the property, among many other matters (as summarised in the written submissions delivered on her behalf).
13. On 12 September 2024 the Defendant notified the Plaintiff by text that she was to move out of the property. Her belongings were packed and she was told by a further text message sent by the Defendant on 14 September 2024 that she was required to remove her belongings within the ensuing four weeks.
14. On 8 October 2024 the Plaintiff's solicitor wrote to the Defendant alleging that the eviction was unlawful and threatening to issue an injunction application. The Defendant responded by email on 9 October 2024. The exchange of correspondence indicates a significant dispute between the two parties in respect of many issues and a deeply damaged relationship, with the Defendant making allegations of elder abuse and bullying against the Plaintiff.
15. On 10 October 2024 these proceedings and this injunction application, grounded on an affidavit sworn by the Plaintiff, were issued.
16. In the plenary summons, the Plaintiff's claims include several prayers for injunctions and orders aimed to restore her occupation and the conduct of her pottery business

from the Property. She also seeks certain declarations that she has an interest in the property and she seeks an award of damages.

17. The orders sought by the injunction include orders restraining interference with her occupation and use of the property and permitting her to resume same.
18. On 23 October 2024, the defendant delivered a replying affidavit in which he disputed in strong terms many of the matters alleged by the plaintiff in her grounding affidavit. He also repeats the allegations of mistreatment by the Plaintiff and states that the personal relationship and trust between them have been destroyed.
19. On 13 November 2024, the Plaintiff delivered a second affidavit in support of her application for interlocutory injunctive relief. She in turn disputed many of the facts asserted by the Defendant in his replying affidavit. The Plaintiff in her affidavits also makes assertions that the Defendant has been influenced by other family members.
20. On 19 November 2024, the Defendant delivered a second replying affidavit in which he reiterated that he was opposing the application in full and disputed several further factual matters put forward in the Plaintiff's second affidavit. He makes the point repeatedly that the allegations and issues raised cannot be decided into an interlocutory injunction application. The Defendant also asserts that he is a man of extremely limited financial resources and that he does not believe the Plaintiff has access to sufficient resources to fund the litigation. He states that he has no desire to reside with the Plaintiff in this home.
21. The language of the affidavits filed by both parties, as well as statements from other family members which are exhibited to their affidavits, show the depth of the differences and grievances between them; the scale of the conflicts as to relevant facts; and the extremely high emotions being felt by the Plaintiff, the Defendant and several other family members as a result of these proceedings and the issues that gave rise to them. There is some discussion and dispute in the affidavits regarding the mental capacity of the Defendant and other matters, which are not relevant to the issue I have to decide and which are not addressed in this judgment.
22. After consideration of the affidavits, the Plaintiff formed the view that oral evidence would be required to resolve the conflicts of fact. While the injunction application

had been transferred to the list to fix dates for 29 November 2024, in light of the position being adopted by the Plaintiff, it was adjourned on consent to 5 December 2024. On that date, the Court was informed that there would be a contested costs application and the matter was listed for hearing on 27 January 2025.

23. The Plaintiff delivered her statement of claim on 16 December 2024 and swore her third and final affidavit on 17 December 2024. In that affidavit the Plaintiff joined issue with several matters addressed in the Defendant's second affidavit. She concluded her affidavit by stating the following:

“30. I say and am advised that in light of the contents of the Affidavits exchanged between the parties to date and the clear conflicts of fact arising, and given that the notice of motion seeks, inter alia, an order pursuant to Order 63C Rule 5(1)(xiv) of the Rules of the Superior Courts fixing a timetable for the completion of pleadings, introductory applications and other pre-trial steps, it is therefore appropriate that the parties would seek such direction from this Honourable Court in order that the proceedings be case managed and brought to trial as quickly as possible. I say and am advised that the conflicts of fact arising will need to be resolved by way of oral evidence and that case management now represents the most practical use of the notice of motion herein.”

24. During the course of the hearing of the costs' application, it became apparent that the Plaintiff's claim has become a claim for damages and it is accepted that she is not going to resume any form of occupation of the Property with the Defendant.

Parties' Submissions

25. The position presented in written and oral submissions on behalf of the Plaintiff was that, while she did not accept the Defendant's averments, it had become apparent during the exchange of affidavits that there were multiple conflicts of fact, which could not be resolved in the context of an interlocutory injunction.

26. It was said that the injunction application (in which mandatory relief was sought) would have failed owing to those conflicts of fact and that: (a) it would then have been appropriate to reserve the costs of the injunction application, as it turned on

questions of fact; (b) she should not be punished for not pursuing the injunction in those circumstances; and (c) it is not safe to make an order of costs now when there are factual conflicts which may be determined one way or another at trial. It is said that, if the Plaintiff ultimately succeeds at trial, this will show that she was correct and entitled to bring the injunction application.

27. The Plaintiff disputed that Order 99, rule 2(3) applies, but contended that, even if it did apply, this is a case in which costs cannot fairly be determined, and that the correct outcome of this application is that costs should be reserved.
28. The position of the Defendant is that there has been no change in the facts or circumstances of this matter. There's been no intervening event, no undertaking and no concession since the issue of the injunction application. The Defendant also emphasises in written and oral submissions that the conflicts of fact to which the Plaintiff refers did not arise since the issue of the proceedings. Reliance is placed on the email of 9 October 2024 which was referred to above and the Defendant's counsel asserts that the depth of the conflict and the dispute between the parties was clear from the correspondence before this application was issued.
29. It is asserted that the Defendant's position that he was never going to permit the Plaintiff to reside at his home in the future was unequivocal and was known to the Plaintiff before the issue of these proceedings and the injunction application. It is also contended on behalf of the Defendant that there was never going to be a court order compelling him to permit the Plaintiff to reside at his home. The Defendant's position is that there could never have been any question or possibility of the grant of the mandatory injunction sought by the Plaintiff.
30. It was submitted on behalf of the Defendant that the Plaintiff unilaterally abandoned the application she initiated and that equity and fairness require that there has to be a consequence for a party who sets in train a costly court process and then discontinues it.
31. In terms of the statutory framework, the Defendant's counsel contends that Order 99, Rule 2(3) is applicable on the basis that the Plaintiff has herself determined the injunction in favour of the Defendant. It is said that section 169(1) of the Legal

Services Regulatory Act 2015 is also applicable, on the basis that the Defendant was “*entirely successful*”.

32. Applying these provisions, the Defendant’s case is that costs follow the event, and the costs of this application must be awarded in his favour, unless it would be unjust to do so.

33. In reply, counsel for the Plaintiff contended that the email of 9 October 2024 was regarded as having been sent when the Defendant was under the influence of other persons and that it was only on receipt of the affidavits that the real position could be ascertained.

Relevant facts

34. Before analysing the cases relied upon by the parties (and related cases) the following facts are to be noted:

(a) The Plaintiff is seeking mandatory injunctive relief, the effect of which would have been to require the Defendant to live with her in his home, and she must always have been aware that she would have to show a strong case on the merits.

(b) The Defendant had indicated his views on the Plaintiff’s assertion of rights regarding the property, and on any attempt to resume residence there, in strong terms, in an email sent on 9 October 2024 before the issue of the application. He has not altered that position since.

(c) After two rounds of affidavits had been exchanged, the Plaintiff made the unilateral decision not to pursue the injunction application without any concession or undertaking by the Defendant or any form of settlement or agreement.

35. Against that background, the relevant legislation and cases will now be assessed.

Relevant Legislation

36. Order 99, Rule 2(1) sets out the general, overarching principle that, except where otherwise provided, “*The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*”

37. Order 99, Rule 3(1) is also important here:

“The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.”

38. The “*matters set out in*” section 169(1) of the Legal Services Regulation Act 2015 (“the Act of 2015”) are the following:

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

- a. conduct before and during the proceedings,*
- b. whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
- c. the manner in which the parties conducted all or any part of their cases,*
- d. whether a successful party exaggerated his or her claim,*
- e. whether a party made a payment into court and the date of that payment,*
- f. whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*
- g. where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or*

were unreasonable in refusing to engage in the settlement discussions or in mediation.”

39. It is also relevant to this application to note Order 99, Rule 2(3):

“The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.”

40. The interplay between, and interpretation of, these provisions in the context of interlocutory applications has been addressed in several judgments of the Superior Courts. One point that has never been doubted is that it remains within the general discretion of the Court to decide how to allocate such costs. However, there are some questions, relevant to the application before me, which have been the subject of specific consideration. These topics were the subject of conflicting submissions by the parties to the application before me, and will form the basis for this Judgment:

- (a) The application of section 169(1) to interlocutory orders;
- (b) The allocation of costs when an interlocutory injunction application is not pursued;
- (c) Whether Order 99, Rule 2(3) applies to an interlocutory injunction application which is unilaterally discontinued by the moving party.

Scope of Section 169(1)

41. The first question is whether section 169(1) applies to the costs of an interlocutory application, or only to the costs of substantive proceedings. This is owing to that provision being premised on and directed to “*a party who is entirely successful in civil proceedings*”.

42. Without rehearsing the points that have been made, it now seems relatively settled that, while section 169(1) in its terms is applicable only to the outcome of the proceedings, Order 99, Rule 3(1) applies that provision to the award of “*the costs of any action or step*” and the result is therefore the same. Consequently, the long-

standing presumption that a successful party is entitled to their costs (or “*costs follow the event*”) continues to apply, whether to an interlocutory or a final outcome.

43. This is confirmed by the judgment of the Court of Appeal in *Pembroke Equity Partners Limited v. Corrigan* [2022] IECA 142 (“*Pembroke*”) which clarifies and confirms the scope and contours of the Court’s discretion regarding costs of interlocutory applications generally, and which must therefore guide this Court in exercising that discretion. That case concerned an appeal against a decision of the High Court (Meenan J.) to award to the defendant the costs of a motion for security for costs, in circumstances where the motion was opposed for two years before the plaintiff made an offer of security (albeit in a lesser amount than that sought) 7 days before the hearing, which was accepted by the defendant. The application did not therefore proceed to hearing. The High Court found that the motion was necessary, as, if the motion had not been brought, the offer to lodge security would never have been made. This decision was upheld on appeal.

44. Collins J. (Donnelly and Faherty JJ. concurring) noted that, in dealing with the costs of an interlocutory application, the Court was required to have regard to the matters listed in section 169(1) (by virtue of Order 99, Rule 3(1)); that section 169(1) embodies the general principle that costs follow the event; and that this was the “*overriding start point on any question of contested costs*”, quoting *Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535 (¶23).

45. He also noted

“there is nothing surprising about a broad presumption – and that is all it is – that a party who is “entirely successful” in an interlocutory application should get their costs” (*Pembroke*, ¶27).

Costs of Discontinued Interlocutory Applications

46. The next question that arises on the application before me is whether and how the costs of an interlocutory application which does not proceed should be allocated as between the parties.

47. The Plaintiff relies primarily on the decision of Laffoy J. in *Tekenable Ltd. v. Morrissey* [2012] IEHC 391 (“*Tekenable*”), a decision which must also be read in light of the previous judgment of Laffoy J. in *O’Dea v Dublin City Council* [2011] IEHC 100 (“*O’Dea*”). Both of these cases are referenced by Haughton J. in *McFadden v. Muckno Hotels Limited* [2020] IECA 110 (“*McFadden*”), a judgment on which the Plaintiff also relies.

48. There are six relevant topics that emerge from the cases on this question.

49. First, it is no part of a court’s role to speculate as to, or attempt to predict, the likely outcome of an injunction application which does not proceed. In *O’Dea*, the hearing of an application for an interlocutory injunction commenced but was then adjourned and did not conclude, because the moving party accepted an offer of alternative accommodation from the respondent, rendering the determination of the application (and indeed the proceedings) unnecessary.

50. Laffoy J. noted that, in such circumstances,

“...it would be improper for the Court to attempt to predict what the outcome would have been. The reality is that the parties have rendered the issues which were raised on the application for the interlocutory injunction moot, and it is invidious to expect the Court to speculate at this juncture on what would have been the outcome, if the matter had proceeded.” (¶6.4)

51. The same general principle is stated in *Tekenable* (at ¶25) and in *McFadden* (at ¶54).

52. It is somewhat curious that the Plaintiff relies on this point, while also asking me to proceed on the assumption that the injunction application would have failed; that this would be for reasons related to unresolvable conflicts of fact; and that the costs would then have been reserved. If it is necessary to avoid speculating as to the outcome of an injunction, then it is difficult to see how these assumptions can be made.

53. In deciding this application, I consider that it is imperative that I do avoid being drawn into any speculation as to what have occurred if the injunction had proceeded. The

Plaintiff chose to issue that application and chose to abandon it. These are the relevant facts.

54. The Plaintiff also relies on *Keogh v AV Pound & Company Limited* [2021] IEHC 640 ("*Keogh*") as authority that the court should not speculate as to the outcome of the injunction application.

55. The background was that an employee's suspension was lifted and an employment investigation was terminated, after the employee issued an injunction application. The motion was clearly then moot and both parties asserted a right to an award of costs.

56. Allen J. concluded that the correct costs' order was that whoever ultimately prevailed at trial should be entitled to the costs of the motion, and made the costs "*costs in the cause*".

57. Allen J reasoned that "*I do not believe that the motion can sensibly be said to have been withdrawn*" (¶40) and that, "*The plaintiffs motion not having been argued, it would be inappropriate to speculate as to what the outcome would have been if it had, or even to decide - as the defendant submits I should - whether the plaintiff had raised a fair issue to be tried*" (¶45).

58. The Plaintiff relies on this extract but the ensuing conclusion in *Keogh* is more important here:

"I am satisfied that the principles which are to be applied in the case of actions or appeals which are discontinued or abandoned do not apply to a case, such as this, in which the necessity for interlocutory relief has been overtaken by events." (¶46)

59. This highlights a key distinction between *Keogh* and the application before me: here, there is no intervening event, the application can properly be said to have been withdrawn, and the principles that apply to actions or appeals which are discontinued or abandoned should properly apply.

60. This is the second point that is relevant here, namely that, if a moving party discontinues proceedings, that party is presumptively liable for the costs. In *O’Dea*, Laffoy J. commented,

“If the parties had not reached agreement on where liability for costs lies, then, prima facie, the proper exercise of the Court’s discretion is as was indicated by Supreme Court in the Callagy case, namely, as happened there, that the plaintiff be ordered to pay the costs of the proceedings including the costs of the motion.” (¶6.7).

61. The case cited – *Callagy v. Minister for Education* (Supreme Court, unreported, 23 May 2003) – was authority that, when a party unilaterally decides to discontinue proceedings, that party is liable for the costs of their opponent. Keane C.J. (McGuinness and Fennelly JJ. concurring) referred to the decision of the plaintiff in that case to discontinue the proceedings, noting,

“... while he was perfectly entitled to discontinue the proceedings, in my view it must inevitably follow, as always follows in circumstances such as that, that a plaintiff who elects to begin proceedings and then abandons them for whatever reason must pay the defendants’ costs: If he wants the defendant to pay the costs he must be prepared to go on the full length of the proceedings, obtain the relief that he sought and then invite the court to award costs in the ordinary way as following the event.”

62. This same rule finds expression in section 169(4) of the 2015 Act:

“Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.”

63. In *O’Dea* itself, the Court made no order as to costs on the basis that it could not be said that the outcome arrived at was owing to the proceedings or that the proceedings were necessary. The Court also relied on the plaintiff’s impecuniosity.

64. The policy of awarding costs against a party who discontinues or abandons proceedings is not extended by legislation to abandoned interlocutory applications (and there is no provision akin to Order 99, 3(1) which could be relied on to apply section 169(4) to a “*step*” in proceedings). I am nonetheless satisfied that the same policy can certainly inform the correct approach to take here (as suggested in *Keogh*). In the circumstances of this case, this is highly important and points towards the appropriateness of awarding costs in favour of the Defendant, without even necessitating scrutiny of the application itself.
65. A third point to emerge from the cases is that, even when a motion is not pursued, it may – depending on the facts – be relevant to weigh the reasons why this has occurred and the timing of relevant concessions and decisions.
66. In *McFadden* certain undertakings were given by the defendant before and within three days after the issue of the injunction application, and the plaintiff decided not to proceed with the injunction (although the undertakings did not cover all of the orders sought). The plaintiff’s position was that, if there was no event, that was only because the defendant conceded the undertakings, rendering the hearing unnecessary. It was said that the plaintiff would otherwise have had a strong case and would have been likely to obtain the reliefs sought. The defendant’s position was that the injunction application was unnecessary and the undertakings given had not been sought before the issue of the application.
67. The Court of Appeal (Haughton J. delivering the judgment with which Donnelly and Faherty JJ. concurred) allowed the appeal against the decision of the High Court (Costello J.) to award costs against the defendant, substituting it with “*no order as to costs*” (noting that no application was made for costs to be awarded in favour of the defendant). The Court concluded that the issue of the motion was premature and that it was not reasonable or necessary to issue the motion and that it should have been discontinued sooner.
68. In light of the foregoing, the Court found,
- “it is not necessary or appropriate for this court to enter on consideration of the merits of the claim for interlocutory reliefs, or to pronounce on what the outcome would have been. Thus it is not necessary to consider whether the*

Respondent could have demonstrated a fair or serious issue to be tried, the relative strengths of the parties positions, whether damages might have been an adequate remedy, the balance of convenience, or the scope of any interlocutory orders that might have been appropriate.” (¶54).

69. Haughton J also observed that it “*was a choice*” by the plaintiff (¶53) not to pursue the reliefs that were not covered by the undertakings. This has some resonance here.

70. There is another judgment addressed by Haughton J. in *McFadden* which appears to be a better comparator for this case than *Tekenable*. This is the judgment of Peart J in *Irish Bacon Slicers Limited v Weidemark Fleischwaren GmbH & Co.* [2014] IEHC 293 (“*Irish Bacon Slicers*”).

71. In that case, the defendant gave undertakings at the last minute, on the eve of the hearing of the injunction application, and in precisely the same terms which had been sought by the plaintiff five weeks previously.

72. Peart J noted that courts “*must proceed cautiously*” when determining the allocation of costs of an injunction application before the final determination of the substantive issues in dispute. He also made the following observation, which is of some relevance here:

“It is right that there should be costs consequences immediately visited upon a defendant who waits until the injunction hearing itself to proffer an undertaking, thereby removing the need for the plaintiff to proceed to a hearing of his application. The fact that there is no ‘event’ in the sense of a court’s determination of whether or not an injunction should or should not be granted does not seem to me to be something of which such a defendant should be able to gain advantage by having the question of costs kicked off into the long grass, to be retrieved perhaps a year later, or more, when the substantive action is finally determined. That itself would be unjust to the plaintiff who in a real sense has prevailed on his application.”

73. Peart J concluded, “*The acceptance of that undertaking by the court determined the application. It brought it to an end – even if all the issues raised on the application were not individually the subject of a determination by the Court.*” Peart J found that

the motion should never have needed to be issued and the costs of the motion were awarded against the defendant.

74. This shows a different approach to the question of “*an event*”. Peart J. found there was no event, but that the plaintiff had “*in a real sense*” prevailed and was entitled to an award of costs.

75. A similar approach can also be seen in *Pembroke*, where Collins J. noted the view of the High Court Judge that the plaintiff “*had effectively conceded*” the motion and that this “*vindicated*” the decision to bring the motion, because otherwise the security would not have been obtained (¶31). Collins J. noted, “*Clearly – and correctly – the Judge considered that the defendants had obtained something of value by pursuing the motion*” and that the High Court Judge was entitled to take the view that the defendant had been “*entirely successful*” (¶35).

76. While a consent order was made in that case, which was categorised as “*an event*”, Collins J. noted that, even if there was not such an “*event*”, this would only have been because of the unilateral concession made by the plaintiff:

“If that did not constitute an event (as I consider it clearly did), that was only because of the unilateral action of the Company in belatedly offering to put up security. That rendered a hearing of the motion unnecessary because the High Court was able to make the order sought by the Defendants on consent.” (¶39).

77. Having addressed the judgment of Peart J. in *Irish Bacon Slicers*, Collins J. concluded that “*Here in a “real sense” the Defendants prevailed on their application for security and no error has been established in the costs order made by the High Court.*” (¶43).

78. The same applies here with even more force: it simply cannot be said that the motion needed to be issued, given it has been discontinued without gain to the Plaintiff, and the Defendant has “*in a real sense*” prevailed.

79. The judgment in *Irish Bacon Slicers* is an important illustration that, when an interlocutory motion is entirely conceded by one party, such that the hearing of the motion becomes unnecessary, then the other side has prevailed in real terms, and a

court is entitled to treat that as “success” such as to warrant the award of costs in favour of the successful party. *Pembroke* is also useful confirmation of this position (albeit not in the context of an injunction application).

80. While the about-turn in *Irish Bacon Slicers* did come on the day of the hearing of the application, which does distinguish it from the case before me, I nonetheless consider the same analysis to be properly applicable here, given the exchange of lengthy affidavits that took place before the Plaintiff withdrew the application. I also have regard to the email of 9 October 2024, which, as the Defendant emphasised, put the Plaintiff on notice of the Defendant’s position before the issue of the application. I do consider this to be relevant to an assessment of the reasonableness of the Plaintiff’s conduct in issuing the injunction application.

81. A fourth point – which was strongly emphasised by the Plaintiff’s counsel – is that, in *Tekenable*, one of the reasons for the decision to reserve costs was that,

“... even if the plaintiff’s application had proceeded, given that, like the circumstance which arose in *Allied Irish Banks Plc. & Ors. v. Diamond & Ors* the outcome of the application would have turned, to use the terminology of Clarke J, ‘on particular aspects of the merits of the case which are based on the facts’, irrespective of whether the Court would have decided to grant or refuse an injunction, it would probably have adopted the approach adumbrated by Clarke J in relation to costs at the end of his judgment.” (¶25)

82. The Plaintiff’s counsel contends, based on that finding, that the injunction application in this case would have hinged on factual disputes; that the Court could not therefore have been able to determine the application in the Plaintiff’s favour; and that the Court would have reserved the costs of that application.

83. This is an argument that is certainly open to the Plaintiff on the basis of *Tekenable*. Indeed, there is and can be no doubt that, when an injunction determination hinges on assessments of the facts, “there may well be good grounds for not dealing with the costs at the interlocutory stage, for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie” (*ACC Bank plc v. Hanrahan* [2014] 1 IR 1, ¶11).

84. However, this is not an unswerving rule and it cannot be assumed to dictate how the costs of the Plaintiff's abandoned application would have been awarded. Moreover, while I do not intend to make findings – and wish to avoid making observations – about the merits of the injunction application, it does seem to me that in this particular case the trial judge may not be in a better position to assess the justice of the costs of this application, particularly given the apparent concession now being made by the Plaintiff that she will be limited to a remedy in damages at the trial. In these circumstances, she is accepting that mandatory orders will not be available either now or following the trial, so I do not see how the trial judge could be in a position to more justly decide the appropriate costs of this injunction application seeking such orders on an interlocutory basis.
85. In addition to the foregoing, the facts in *Tekenable* were quite different, as it was the moving party seeking to recover costs, on the premise that the injunction would have been granted, had the defendant not proffered the undertakings in question. The undertakings given and accepted by the plaintiff were less than what was sought by the motion, and this was not a finding the Court could make. A concession had been made by the plaintiff and Laffoy J. could not decide where “*the event*” lay.
86. This is not the situation before me, as even the Plaintiff herself is saying the injunction would have failed. There is no ambiguity as to the outcome and no room for speculation. The Plaintiff wholly withdrew her application. The actual outcome is clear and the result is that the Plaintiff elected not to pursue the injunction.
87. In addition, the very fact that the Plaintiff here is asking the Court to assume she would have lost, and nonetheless asserts that she should not be liable in costs, has to be relevant to the exercise of the Court's discretion and is a factor which did not arise in *Tekenable*.
88. Consequently, I do not believe that it is appropriate to speculate as to what the outcome of the injunction would have been, and even less so to rely on this speculation to deprive the Defendant of an award of costs of the abandoned application
89. It is true that the Plaintiff's application for mandatory orders would have had to meet the high threshold of “*a strong case*”, but this is something the Plaintiff must always

have been aware of. In addition, there are several other potential hurdles which could conceivably have led to the refusal of the relief sought, but I make no comment in this respect, as the Plaintiff's own decision overtook any need to consider such questions.

90. A fifth point, one that is emphasised by the Plaintiff, is that there could have been no cross-examination at the hearing of the injunction application and no final findings could have been made on the factual conflicts raised by this application.

91. The Plaintiff relied on the decision of Keane J to refuse the application to cross-examine a deponent in *McCarthy v. Murphy* [2016] IEHC 391:

“52 As Hardiman J. emphasised in Dunne v. Dún Laoghaire-Rathdown County Council [2003] 1 I.R. 567, in dealing with an interlocutory application the Court is not finally deciding any factual or legal aspect of the controversy before it. In Tejo Ventures International Ltd v. O'Callaghan [2009] IEHC 410, Laffoy J. reiterated that it is no part of a court's function at the interlocutory stage to try to resolve conflicts of evidence on the affidavits before the Court...”

92. The fact that a court hearing an interlocutory application does not finally decide the facts or law of the matter cannot be controversial, but it does not mean an injunction cannot be granted: indeed Keane J did grant the injunction sought in *McCarthy* despite making no final findings of fact or law. The fact that no final findings are made cannot be held up as a reason not to make an award of costs: Order 99, Rule 2(3) squarely contradicts that proposition.

93. Having considered the different propositions advanced on behalf of the Plaintiff to justify her application for costs to be reserved, I am of the view that these propositions, and the authorities relied upon to ground them, do not in fact support an order reserving costs.

94. Apart from the issues identified above, there is also something inherently troubling about the Plaintiff abandoning her injunction application and then asking the Court to assume, not that she would have succeeded, as was contended in *Tekenable*, but rather that she would have failed and – for that reason - that costs of that application

should not be awarded to the Defendant. This does not appear to me to be a sound basis on which to exercise the discretion to award costs.

95. A final point that is assessed in some of the cases is whether there is an “event” when an interlocutory application is not pursued.

96. Given the findings already made, I do not consider that it is strictly necessary to determine this point, but the correct legal framework needs to be understood. The starting point is *O’Dea*. There, Laffoy J was of the view (albeit expressed not to be a definitive view) that an “event” required a determination by the Court of a dispute, but nonetheless did make an award of costs against the plaintiff (*O’Dea*, ¶6.1).

97. Peart J in *Irish Bacon Slicers* similarly noted

“...The fact that there is no “event” in the sense of a court’s determination of whether or not an injunction should or should not be granted does not seem to me to be something of which such a defendant should be able to gain advantage by having the question of costs kicked off into the long grass, to be retrieved perhaps a year later, or more, when the substantive action is finally determined. That itself would be unjust to the plaintiff who in a real sense has prevailed on his application”.

98. In *Pembroke*, Collins J. regarded the consent order of Meenan J. to be an “event”, but concluded that, regardless of whether it was an “event”, it is clear that the defendants prevailed “*in a real sense*” such as to warrant the order of costs in their favour.

99. In *Godsil v. Ireland* [2015] 4 IR 535 (an authority on which the Defendant relied), the Supreme Court put it beyond doubt that an “event” does not require a determination following a contested hearing: “*...a court’s determination on the merits... is not in any way essential, before there can be said to exist an “event” upon which costs can attach*” (McKechnie J, Dunne and Charleton JJ. concurring, ¶62).

100. In this case, the identification of an “event” (if such is required), is not difficult, given the unilateral decision of the Plaintiff not to pursue the injunction application, but the decision here does not depend on that designation.

101. I do not therefore need to decide whether there was an “*event*”, and the discretion conferred on a court to decide the allocation of costs of an abandoned interlocutory application is not trammelled by that question. On the contrary, it is clear from the decided cases addressed above that, even if there is no determination of a motion, this does not justify allowing the party who “*in a real sense*” has lost the motion to avoid a negative costs’ order.
102. It is similarly unnecessary to address the intersection between a party being “*entirely successful*” or winning an “*event*” (noting the observation of Murray J. in *Daly v. Ardstone Capital Limited* [2020] IEHC 345 (“*Daly*”) that the effect of the phrase “*entirely successful*” “*may not in every case be entirely clear*” (¶14) and his suggestion in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183 that “*winning the ‘event’ and being ‘entirely successful’ may well not mean the same thing*” (¶ 20)).
103. In the case before me, there is no question of partial success or other nuanced assessment of the outcome. The Plaintiff capitulated and did not pursue her motion, following receipt of the Defendant’s affidavits and it can only be said that the Defendant succeeded. There is no need to examine the merits of the injunction application or assess the grounds on which it may have been granted or refused. The situation is not complicated.
104. On the contrary, it seems to me that there cannot be any real doubt but that the Defendant has been “*entirely successful*” in resisting the application for injunctive relief and this is a relevant finding for the purpose of section 169(1). Even if that were not the case, I am satisfied that it is properly within my discretion to decide to make an award of costs in this matter and that the just result is that the Defendant has “*in a real sense*” succeeded and is entitled to his costs.
105. I do not consider that any of the factors under section 169(1) justify a different decision, and none were specifically urged on behalf of the Plaintiff (other than the points already addressed above).
106. The final question that arose in the submissions of the parties is whether Order 99, rule 2(3) is applicable here.

Application of Order 99, Rule 2(3)

107. Order 99, Rule 2(3) provides:

“The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.”

108. Given the findings already made, it is apparent that I consider it to be possible to justly determine the costs and it is not therefore strictly necessary to decide whether Order 99, Rule 2(3) does apply.

109. Counsel for the Plaintiff does however contend that this rule does not apply here as there has been no determination of the injunction application (relying on *McFadden*), whereas the Defendant adopts the opposite stance.

110. In *McFadden*, Haughton J. held that

“this is a case where there was no determination by the trial judge of the interlocutory application and therefore the requirement in 0.99 r.2(3) (formerly r.1(4A)) that the court “shall make an award of costs” does not apply. Instead the general discretion in relation to the costs applies” (¶56).

111. In *Pembroke* it was not necessary to decide whether Order 99, Rule 2(3) was applicable, but Collins J. did observe that,

*“Prima facie, it would appear that the order made by the Meenan J on 23 November 2021 determined the application in the fundamental sense of bringing the application to an end by granting the relief sought by the Defendants. However, I recognise that there are a number of decisions of the High Court (Laffoy J) which appear to suggest that Order 99, Rule 3(2) is engaged only where the Court has adjudicated on the issues in dispute: *O’Dea v Dublin City Council* [2011] IEHC 100; *Tekenable Limited v Morrissey* [2012] IEHC 391.” (¶45).*

112. I note in passing that, when summarising the applicable principles in *Daly*, Murray J. referred to *“the disposition of an interlocutory application (0.99 Rule 2(3))”*

(¶15(b)). “Disposition” may more clearly encompass a consent order, unilateral discontinuation or similar outcome to an interlocutory application. However, it remains somewhat unclear as to whether the words used in Rule 2(3) do encompass the costs of an interlocutory application which is discontinued (as here).

113. Even taking the slightly more generous view of the scope of Rule 2(3) that seems to be suggested in *Pembroke*, it may be strained to seek to bring the order I am asked to make within that rule. This is for the simple reason that, unlike the consent order made by Meenan J. in *Pembroke*, I am making no order on the injunctive relief sought by the Plaintiff’s motion.

114. However, this is not material to the decision on the allocation of costs here, as I have formed the view that this is an appropriate case in which to justly adjudicate on the allocation of costs, independently of the mandate stated in Order 99, Rule 2(3).

Concluding comments

115. For the reasons explained in this judgment, I am satisfied that the just and appropriate order as to costs is an order that the Plaintiff be liable for the costs incurred by the Defendant in defending the injunction application.

116. I have reached this conclusion on the basis of an assessment of the facts, pleadings, affidavits, the various submissions made by the parties and the relevant legislative and judicial authorities.

117. The overarching point is that it would be unjust for the Plaintiff to avoid liability for costs, and for the Defendant to have to bear his own costs, in circumstances where the Plaintiff embarked on a costly injunction application and abandoned that application on the basis it was likely to fail, without any intervening event, concession, undertaking or agreement and not having gained any benefit from the application.

118. It is undoubtedly important to encourage the resolution of proceedings and steps within proceedings and to avoid court time and parties’ costs being expended unnecessarily in dealing with applications with limited prospects of success and I have no desire to discourage sound and pragmatic decisions not to pursue

applications of that nature. However, it is far preferable for such applications not to be issued in the first place.

119. Furthermore, once an application is unilaterally discontinued by the moving party, it should be no part of the Court's role to have to expend time speculating as to the possible outcome of that application, or analysing different possible analogies for the purpose of deciding the allocation of costs. Rather, the default outcome should be that, if a party unilaterally abandons, discontinues or withdraws an application to Court, without any concession from, or settlement with, the other side, that party presumptively bears liability for the costs of same, whether an interlocutory application or a final one. On the basis of the facts of this matter, this is the approach I apply here.

120. In making this decision, I am mindful that there may be some perception of potential injustice to the Plaintiff, in the sense that, if her account of the facts is preferred at trial, she may be said to have been vindicated in issuing the injunction application. However, I do not believe the situation is open to that interpretation for several reasons, including that the Plaintiff herself unilaterally decided that the motion should not proceed, and now appears to accept that the remedy open to her if she succeeds at trial, is a remedy in damages and that there is no prospect of resumed occupation of her uncle's house. I do not believe the trial judge would be in any better position to decide the just allocation of costs of this application, whatever the outcome of the substantive case.

121. In light of the findings made in this judgment, my provisional view is that the Plaintiff should bear liability for the costs of this application. I will list the matter before me at 10.30 am on 20 February 2025 for the purpose of hearing any submissions the parties may wish to make, including submissions as to costs, and any case management directions that may be sought.

