THE HIGH COURT

[2022] IEHC 545

[Record No. 2021 6296 P]

MERCROFT TAVERNS LIMITED TRADING AS THE MARKET BAR

Plaintiff

V

LAYDEN PROPERTIES GEORGES STREET LIMITED

DEFENDANT

Judgment of Mr. Justice Dignam delivered on the 21ST day of September 2022.

Introduction

1. This is my judgment in relation to the costs of an application by the Plaintiff for an interlocutory injunction in circumstances where the application did not proceed. There was agreement between the parties that the substantive matter would likely not proceed as any ongoing dispute would be referred to arbitration and that I should therefore determine the costs rather than reserving them to the trial.

2. For the reasons set out below, I am satisfied that the appropriate way to deal with the question of costs is to make no order.

3. There is a long history between the parties and, in reaching this view, I have considered all of the evidence and all of the historical background to the dispute but, in fact, the crucial period in respect of the injunction application and this costs application is the few days between Monday 8th November and Friday 12th November (when the application for an interim injunction was made) and between that date and the 16th November, by which date undertakings had been given by both parties. It seems to me that the question of costs can and should be determined by reference to the events between those dates, the 8th November and the 16th November. I will therefore focus on that period, though in order to understand those events some reference has to be made to the background. To both Counsel's credit, they correctly

focused their submissions on that period of time while referring to the historical background as part of the relevant context.

Background/Facts

4. The Defendant is the owner of the well-known George's Street Arcade/South City Markets. Anyone who is familiar with this location in Dublin city centre will know that it has gates at South Great George's Street at one end and Drury Street at the other.

5. The Plaintiff is the current owner of the well-known Market Bar which has its main entrance on Fade Street.

6. By a lease dated the 22nd June 1998 between the Defendant under its previous name, Farrig Limited, and the Plaintiff's predecessor in title, Byrnes (Chatham Street) Limited ("Byrnes"), Byrnes were granted, *inter alia*, a right of way over a portion of the Defendant's premises during business hours for all purposes in connection with the Byrnes' premises, the Market Bar, and outside of business hours for escape purposes only from the Market Bar. There is considerable detail in the affidavits and in the exhibits about fire safety, capacity of the Market Bar, and how this is a third emergency escape route which is only required if the number of patrons in the Market Bar exceeds a certain number. I do not need to engage with all of these details for the purpose of this application. Essentially the lease grants a right of way over a corridor from a corner of the Market Bar out into the main body of the Arcade and along the body of the Arcade to the street.

7. It appears to be common case that the route "*designated*" for the purpose of the "*rights*" was (and has been from the beginning) from the point where the corridor from the Market Bar meets the main body of the Arcade to the Drury Street gate of the Arcade.

8. It seems that in 2003, following the acquisition by the Plaintiff of the Market Bar from Byrnes, it, by agreement with the Defendant, fitted a hydraulic arm gate-opening mechanism to the Drury Street gates which automatically opens the gate upon being triggered by a fire alarm in the Market Bar.

9. The practice, or as it was referred to at the hearing and in some of the materials, the "*protocol*", introduced between the Plaintiff and the Defendant after the installation of this hydraulic arm gate mechanism, was for a padlock to be applied to the Drury Street gates by the Plaintiff each night after the Market Bar was closed and

clear of staff and patrons. Counsel for the Plaintiff explained that under this protocol the day could be conveniently broken down into three sections: (i) daytime between the Arcade opening and the Arcade closing when the gates were fully open (the padlock was removed from the gate by the Defendant upon the Arcade opening in the morning); (ii) evening time when the Arcade was closed and the Market Bar still open (between approximately 6/7pm and approximately 3am) when the Drury Street gate would be closed and secured by the hydraulic arm gate mechanism but not padlocked; and (iii) night-time (between approximately 3am when the Market Bar closes and 8am when the Arcade opens)(when the padlock would be put on the Drury Street gate by the Plaintiff after the Market Bar closed and removed in the morning by the Defendant).

10. As a general comment, there can be no dispute but that both parties have legitimate concerns: the Defendant has to be concerned about security given that there are over forty other tenants in the Arcade, some of whom have open stalls rather than shops; and the Plaintiff has to be concerned that its fire exit routes are available and properly effective and that the rights which are conferred by the lease are effective

11. During the Covid restrictions on licensed premises the Plaintiff's bar was permanently closed and the Defendant's agents applied the padlock to the Drury Street gate each evening when the Arcade was closing. It seems that when the Market Bar reopened when the public health restrictions were lifted the parties reverted to the protocol referred to above.

12. However, serious issues arose between the parties in relation to the gate, the operation of the hydraulic arm opening mechanism and the operation of the protocol. There are stark disputes of fact in relation to many of these issues and I do not propose to resolve them or even to consider them in detail in the context of this costs ruling but, in summary, they revolve around claims by the Defendant that, inter alia, the hydraulic arm gate mechanism repeatedly malfunctioned causing the gate to open and close and that the Plaintiff's staff repeatedly failed to apply the padlock after the Market Bar closed for the night, and claims by the Plaintiff that while false alarms did cause the gate to open this never occurred outside Market Bar business hours and that the application of the padlock while the Market Bar was still open presented a danger because it frustrated the fire escape and caused damage to the Drury Street gate. This is just a flavour of some of the disputes between the parties.

13. Mr. McFadden, on behalf of the Plaintiff, deposes to the fact that in June 2020 he noticed that there was a padlock on the gate while the Market Bar was open and that

it was agreed that the Defendant would not padlock the Drury Street gate when the Market Bar was open and that the Plaintiff would be given a key to apply the padlock at the end of each night. Then, Mr. McFadden states, he noticed a padlock on the gate between the 3rd and 5th December 2020, before the Market Bar reopened (licensed premises having been closed again due to public health restrictions), and he raised this with the Defendant. It seems it was agreed that the parties "*could revert to the old agreement from earlier in 2020*".

14. The "*agreement*" that was reached in June 2020 and December 2020, while not described in these terms by Mr. McFadden, was, in effect, a reversion to the protocol that the gates would be padlocked by the Plaintiff's staff following closing, opened by the Arcade staff in the morning, and secured by the hydraulic arm mechanism only (no padlock) between Arcade closing and Market Bar closing, at which time the padlock would be applied again, ie. the protocol which had been in place between the parties for approximately seventeen years at that stage. I am not sure I understand the reference to an agreement that the Plaintiff would be "*given a key*" as it had previously been the arrangement/protocol that the Plaintiff would have a key and would apply the padlock at the end of the night.

15. The protocol seems to have operated between December 2020 and November 2021. We then reach the crucial period leading directly to the injunction application.

16. On the 8th November 2021 the padlock was applied to the Drury Street gates by the Defendant while the Market Bar was open. Ms. Layden explains this in her affidavit but there are clear disputes between the parties in this respect. It is not necessary to resolve them for the purpose of dealing with the costs and I therefore do not propose to address them. Mr. McFadden raised his concern about this with one of the Arcade building managers, Mr. Alex Keely, on the 8th November 2021. It is worth noting at this stage that Ms. Layden says in her affidavit (filed in relation to the costs application) that when Mr. McFadden spoke with Mr. Keely, Mr. Keely suggested that Mr. McFadden should speak directly with Ms. Layden and that Mr. McFadden said that he would have no dealings with Ms. Layden. Mr. McFadden does not give an account of this conversation and does not deny Ms. Layden's account. Whether what Ms. Layden says is correct or not, the fact is that Mr. McFadden did not contact Ms. Layden directly either on the 8th November or at any stage prior to the injunction application being moved on the 12th November.

17. The following day, the 9th November 2021, Ms. Layden sent an email on her own behalf and on Mr. Joe Layden's behalf to Mr. McFadden at 13.22pm. This was on foot of Mr. McFadden's conversation with Mr. Keely. Ms. Layden stated:

"Please be reminded that the securing of the Market Bar and the safety of its patrons are entirely your responsibility.

The Georges Street Arcade and the Market Bar are completely separate entities/businesses.

We are satisfied that we secure all our properties and tenants very adequately. Market Bar operations are absolutely nothing to do with us.

The absolute limit of our involvement with you/your company, are the leases which are in place. Please remember that our personnel are not part of your operation in any way."

18. Mr. McFadden did not reply to this email either by email, phone or text. He explains that he "*immediately sought legal and fire safety advice on behalf of the Plaintiff.*"

19. The padlock was applied in the evenings of Tuesday and Wednesday, the 9th and 10th November. There was no contact at all between the parties from the time of the Defendant's email on the Monday until a letter from the Plaintiff's solicitor which was emailed at 16.12pm on Thursday, the 11th November. It demanded the "*immediate removal of all bolts or other restrictions from the said gateway, so as to restore the function of the gateway as a safe escape passageway from the Market Bar premises out through the Market Arcade and out on to the street and an undertaking in writing that no further bolts or other restrictions will be placed on the said gateway or impeding the said emergency fire escape route*". It sought the undertaking by 10am the next day, Friday 12th November, failing which permanent, interim and interlocutory injunctions would be sought "*requiring the removal and prohibiting the placement of any new bolts or other restrictions on the said gateway*" and damages.

20. Ms. Layden emailed the Plaintiff's solicitors at 16.52pm stating, *inter alia*, that the Defendant was actually fulfilling its obligations and that it was the Plaintiff who was in breach and explained how they were allegedly in breach and that they had asked the Fire Officer to visit on site.

21. The Plaintiff's solicitors replied by further letter at 18.34pm in which issue was joined about a number of matters which are not directly relevant to the question of

costs. In relation to the question of the padlock, and in particular the demand for the undertaking contained in the first letter at 16.12pm, this letter stated, inter alia:

> *"4. Your interference with the gate mechanism by placing the bolt on it, prevents the gate from opening in the event of a fire. In doing so you are causing damage to the gate mechanism…This represents a serious risk of harm and/or loss of life in the event of a fire or another emergency whereby people will be caused by your interference with the fire exit to be trapped in the passageway and prevented access to the street.*
>
> *5. We are advised that at present, the lock is not in place but that upon closing the George's Street Arcade this week you have caused a lock to be put in place. We understand that the George's Street Arcade is due to be closed at 7pm this evening.*
>
> *We hereby call upon you*
>
> *To confirm clearly that before 7pm this evening in correspondence that is not marked "without prejudice" that you will refrain from placing a lock on said gate*
>
> *To confirm by 10am tomorrow morning that you will provide an undertaking in writing that no further bolts or restrictions will be placed on the said gateway or impeding the said emergency fire escape route".*

22. Ms. Layden replied to the above email at 19:02pm and stating, inter alia that:

> *"I (sic) response to your letter, I refute most of it and, I have set out the facts in my previous letter. Please read*
>
> *To place no lock on a shopping centre gate- I think it is obvious that would be outside of insurance and so many other obligations.*
>
> *It is for Mercroft to place/attach a fire alarm locking system.*
>
> *We hope they do.*
>
> *Best, as I say to involve the fire experts."*

23. A short time later at 19:24pm, Ms. Layden sent a second email to the Plaintiff's solicitors writing:

> *"I gather that things are as they should be- the gates are locked and the overflow emergency fire gate on a magnetic lock which is the responsibility of Mercroft to manage, while open and lock fully on closing.*
>
> *Perhaps there have been misunderstandings?"*

24. It is common case that the lock was not applied when the Arcade closed at 7pm that evening (Thursday). I am satisfied that this is what was meant by "*things are as they should be.*"

25. The Plaintiff's solicitor emailed a further letter at 22.01pm referring to these two emails. The sending of this third letter was explained on the basis that, notwithstanding that the padlock had not been applied, the Defendant had failed to give an undertaking so the Plaintiff instructed its solicitors to send a further email to seek absolute clarity on whether an undertaking would be given by 10am the following day. A draft undertaking was attached to the covering email and referred to in the letter itself. The letter stated, inter alia:

> *"…We understand from our client, that as of 8pm this evening, the George's Arcade premises was closed as normal, and the gate was also closed without the bolt.*
>
> *Undertaking Required*
>
> *To avoid the necessity of going to Court to get an injunction to prevent the bolt being put in place and to avoid any further confusion or doubt, we hereby enclose a simple undertaking which we call upon you to sign and return by email before 10am on Friday 12 November 2021.*
>
> *This is not simply a matter of securing the Georges Street Arcade with a lock. By placing the bolt on the gate in the manner that was done earlier this week prevented this gate from being used as an emergency exit. The bolting shut of the gate was not merely securing the Arcade but was actively preventing the gate from opening as a fire exit when a fire alarm is triggered. Any placing of a bolt or other additional locking mechanism on the gate would pose a very serious threat to life that you are responsible for.*

The purpose of the undertaking is to give our client comfort that you will refrain from placing the bolt on the gate in this fashion and to allow our client access to it so that mechanism can be repaired to prevent it opening in the event of a false alarm…"

26. The draft undertaking that was furnished for Ms. Layden to sign on behalf of the Defendant was in the following terms:

"I, Gwen Layden, Director of Layden Properties Georges Street Limited, hereby undertake on behalf of Layden Properties Georges Street Limited that no further bolts or other restrictions will be placed on the gateway or impeding the emergency fire escape route situated in the passageway which forms part of the Lease and which runs from the Market Bar kitchen through the George's Street Arcade and out onto Drury Street."

27. Ms. Layden replied at 22:52pm. She referred to a previous dispute between the parties in which she says she was incorrectly pressurised into signing an undertaking by a different solicitor for the Plaintiff which transpired to have no legal basis. She also stated:

"…We have a lease in place.

The Market Bar and Georges Street Arcade are separate businesses.

We are not part of your operation.

Our personal (sic) are not part of your operation.

I will rely on the experts in fire safety to guide me.

Please don't do as last Solicitor for Mercroft did and pressure with these letters ..."

28. That is where matters stood between the parties late on the 11th November and the Plaintiff moved its application for an injunction the following day, Friday, the 12th November 2021. It seems that for one reason or another, presumably to do with court availability, the application was not made until 4.45pm.

29. Mr McFadden states in his grounding affidavit that prior to swearing the affidavit he spoke with the Plaintiff's building manager of the Market Bar on the morning of the 12th November and the manager told him that per the '*old arrangement'* he used a key which was given to the Market Bar by the Defendant's Arcade managers and locked the padlock on the gate at closing time. This was, of course, the arrangement under the protocol.

Injunction Application and Undertakings

12th November 2021

30. By ex parte docket the Plaintiff sought:

> *"…an interim injunction restraining the Defendant, its servants or agents from placing a padlock, bolt or other locking mechanism that cannot be opened in an emergency or interferes in any way with the ability for an automated pedestrian gate situated in the Defendant's premises in George's Arcade, Dublin which forms part of a fire escape route from the Plaintiff's licensed premises known as the Market Bar (known as a Fire Gate).*
>
> *…an interim injunction restraining the Defendant, its servants or agents from interfering with or obstructing the Plaintiff's right of way which it enjoys over the Defendant's property situated at George's Arcade Dublin…"*

31. The ex parte application came before Allen J and, on the basis of the Plaintiff's undertaking as to damages and an undertaking to "*if required by the Defendant … ensure that an automated pedestrian gate situated in the Defendant's premises in George's Arcade Dublin which forms part of a fire escape route from the Plaintiff's licensed premises known as the Market Bar (known as a Fire Gate) is locked between 3.30am and whatever time the Defendant wishes thereafter*" he ordered that the Defendant be "*restrained until after the 16th day of November 2021 or until further Order in the meantime from placing a padlock bolt or other locking mechanism that cannot be opened in an emergency or interferes in any way with the ability for an automated pedestrian gate situated in the Defendant's premises in George's Arcade Dublin which forms part of a fire escape route from the Plaintiff's licensed premises known as the Market Bar (known as a Fire Gate)*." It is important to note that while

the Plaintiff's undertaking that the gate would be locked at closing time was explicitly mentioned in Mr. McFadden's grounding affidavit and was given to Allen J, no such undertaking or commitment had been offered by the Plaintiff at any stage prior to the application being made. Nor was one sought by the Defendant. The intention of the undertaking that was given by the Plaintiff to the Court was that the padlock would be put on the gate by the Plaintiff when the Market Bar was closed, cleaning was completed and staff were off the premises and 3.30am was nominated as a suitable time. This was in essence the protocol that had applied between the parties but there is no reference to the protocol or reverting to the protocol in the correspondence.

Post-12th November

32. On the 15th November 2021 an undertaking was given on behalf of the Defendant in the following terms:

> *"I, Gwen Layden, Director of Layden Properties Georges Street Limited, hereby undertake on behalf of Layden Properties Georges Street Limited that no further bolts or other restrictions will be placed on the pedestrian gateway in George's Street Arcade leading out onto Drury Street or impeding the emergency fire escape route as granted by the Lease."*

33. On the morning of the 16th November, the return date for the application, Mr McFadden signed an undertaking on behalf of the Plaintiff which stated:

> *"I, Niall McFadden, Director of Tavern Mercroft Limited, hereby undertake on behalf of Mercroft Taverns Limited to ensure that at or before 3:30am each day until 11th January 2022 the Fire Gate in Georges Street Arcade leading out onto Drury Street will be locked with an agreed padlock to which both Mercroft Taverns Limited and Layden Properties Georges Street Limited have a key".*

34. The interim order made by Allen J was subsequently vacated on the 16th November on consent of both parties.

35. The interlocutory motion was adjourned to the 11th January 2022 and ultimately the parties agreed that it should only proceed as a dispute about costs on the basis that the substantive issues are very unlikely to be litigated and may, indeed, be

referred to arbitration under an arbitration clause in the lease. There are extensive issues of fact between the parties. However, both parties have asked, and urged, the Court to determine the question of costs at this stage. In those circumstances, it seems to me to be appropriate to do so and I am satisfied that it is possible to justly adjudicate upon the liability for costs. An issue did arise at the conclusion of the hearing when both parties threatened to withdraw their undertakings (in the case of the Defendant) or to allow them to lapse (in the case of the Plaintiff). I return to this below. The Plaintiff has stated that if the Defendant withdraws its undertaking the Plaintiff may have to proceed with its application for an injunction. However, both parties continued to ask and urge me to determine the question of costs (the Plaintiff submitting that the Defendant's threat to withdraw its undertaking should be taken into account when determining the question of costs). In those circumstances I am satisfied to do so and in the event that a court has to subsequently deal with an application for an injunction it will deal with the costs of that application. The Defendant had not filed an affidavit as the interlocutory injunction application had been resolved and Ms. Layden, on behalf of the Defendant, filed one addressing the dispute on costs. I was also provided with a booklet of inter-partes correspondence from the 15th November 2021 to the 23rd February 2022.

The Law in Relation to Costs

36. The parties (in oral and written submissions) referred the Court to: sections 168 and 169 of the Legal Services Regulation Act 2015, Order 99 rules 2 and 3 of the Rules of the Superior Courts, *Irish Bacon Slicers v Weidemark Fleischwaren GMBH & Co [2014] IEHC 293*, *Heffernan v Hibernia College [2020] IECA, Daly v Ardstone Capital Limited (No. 2) [2020] IEHC 345*, and *Construgomes v Dragados Ireland Ltd [2021] IEHC 139*. I also invited the delivery of written submissions and the parties referred to a number of other cases in the written submissions, including *McFadden v Muckno [2020] IECA 110*, *Bronxville v Cayenne Holdings [2022] IEHC 212*, *O'Dea v Dublin City Council [2011] IEHC 100*, *Tekenable v Morrissey [2012] IEHC 391*, and *Cunningham v President of the Circuit Court [2012] IESC 39*.

37. The legal framework in respect of costs is provided by section 168 and 169 of the Legal Services Regulation Act, 2015 ("the 2015 Act") and Order 99 of the Rules of the Superior Courts.

38. Section 168 of the 2015 Act provides, *inter alia*:

"(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –

order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or

…

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay –

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment."

39. Section 169 of the 2015 Act provides, *inter alia*:

"(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 of the parties was or were unreasonable in refusing to engage in the settlement discussions or remediation…"

40. Order 99 of the Rules of the Superior Courts provides, *inter alia*:

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

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

…

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

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

41. In *Irish Bacon Slicers v Weidemark Fleischwaren GMBH* the Defendant's belated undertaking rendered a determination of the Plaintiff's injunction application unnecessary. The Plaintiff applied for its costs and the Defendant resisted the application on the basis that there had been no '*event'* relying on the judgments of Laffoy J in *O'Dea v Dublin City Council* and *Tekenable Limited v Morrissey*. In *O'Dea* Laffoy J had considered whether there had been any *'event'* in circumstances where,

after an interlocutory application had been opened, a compromise was reached between the parties which rendered a determination by the court unnecessary. Laffoy J stated, without wishing to express a definitive view in this regard, that "*what the Rules envisage is a result brought about by a determination of the Court on the issues before the Court, rather than by some supervening event such as an agreement of the parties in which the Court has not been involved*". Peart J did not accept the argument that in interlocutory matters there has to be an '*event'* in the sense of a court determination before the court can award costs and also rejected that there is a rule that costs must follow the event. He held that the court is required simply to exercise its discretion, though this will normally involve the costs following the event. He said:

> *"… It is just in my view, whether or not there can be seen to have been 'an event' for the purpose of Order 99 RSC, that the plaintiff should get its costs.*
>
> *But on that question of whether an event can be seen to have occurred, I want to observe the following in the context of interlocutory matters. It is not at all clear that O.99(1) (4A) – the new rule – requires that on interlocutory applications there must have been an event at all and that costs should follow the event in such interlocutory applications. It is natural and normal that where an interlocutory application is the subject of a court's determination the court would consider that it is right that the costs of the motion should be awarded to the party which was successful on the application. In such circumstances, the costs are following the event, and that will be the just thing for the court to do in most cases. But that is different from saying that on interlocutory applications costs "shall follow the event" (emphasis added), thereby muddying the waters somewhat in circumstances whereas in the present case there was not determination of the motion, but rather there was either a concession by the respondent to the motion, or perhaps an agreed order (save for costs).*
>
> *In my view, the argument that there has been no 'event' in these circumstances and that therefore the Court must or ought to reserve the costs to the hearing is misplaced, and I believe that a careful reading of O.99, rule 1, sub-rules 1, 3, 4 and 4A support this. Sub-rule 2 is not relevant for present purposes. It is clear that r.1(1) provides a general or overarching principle that costs of and incidental to "every proceeding" shall be at the discretion of the Court… But new rule 1(4A) contains no such derogation from the general rule of discretion contained in r.1(1). It simply provides that upon determining any interlocutory application "shall make an award of costs" save where it cannot justly adjudicate upon the costs liability.*

There is no reference to costs having to follow the event. In other words, the Court is required simply to exercise its discretion, and is not constrained by any rule that says that the costs shall follow the event.

…

In these circumstances, it seems to me that while the Court is now required by the introduction of new rule 1(4A) RSC to make an award of costs upon the determination of the application in question, it is not necessary that there has been what in other sub-rules is referred to as an 'event', and that the Court must make an award of costs by reference to the general rule of discretion contained in O.99, r.1(1) RSC.

The absence of any reference in r.1(4A) of any reference to an 'event' makes complete sense. Interlocutory applications are many and varied…The simplest and most common form of interlocutory application is perhaps the application for judgment in default of defence. The vast majority of such motions are disposed of by the plaintiff agreeing a short extension of time for the delivery of the defence. But what if there is no agreement in relation to the costs of the motion? There has been no 'event' as such, but it could not be seriously argued that in such circumstances the Court could not exercise its discretion under r.1(1) and award costs against the party in default of pleading, even though no 'determination' of the issues as such has taken place. That seems to be the intention behind the new rule."

42. In *Heffernan v Hibernia College Unlimited Company [2020] IECA 121* (para. 42) Murray J referred to Peart J's analysis and noted that it followed from the "*tentative view*" of Laffoy J in *O'Dea v Dublin City Council* in relation to the meaning of the term '*event'* and went on to note that the subsequent case of *Godsil v Ireland* makes it clear that it is not necessary for there to be a court determination before there is an '*event'*. Murray J said:

"Peart J proceeded to analyse the provisions of Ord.99, r.1(4A) RSC concluding that for the purposes of that provision it was not necessary in ordering costs of interlocutory proceedings that there be an 'event'. That analysis, it should be noted, appears to have followed from the tentative view of Laffoy J in O'Dea v Dublin City Council [2011] IEHC 100 that as the term 'event' is used in O.99 RSC, it refers to 'a result brought about by a determination of the Court on the issues before the Court, rather than by some supervening event, such as an

agreement of the parties in which the court has not been involved (para. 6.1). Laffoy J's caution in tendering that view proved well-founded: the decision of the Supreme Court in Godsil v Ireland at para. 62 makes it clear that it is not necessary for there to be a court determination before there is an 'event' for these purposes. It may in some circumstances be sufficient that the action in question was that sought by the plaintiff and that it was undertaken in response to the proceedings (see P.T. v Wicklow County Council [2019] IECA 346 at para 18)." [emphasis added]

43. In *Daly v Ardstone Capital Limited [2020] IEHC 345* Murray J identified the principles to be applied to the determination of liability for the costs of interlocutory applications in light of sections 168 and 169 of the 2015 Act and the Rules of the Superior Courts:

"14. Section 169, in introducing a definitive expression into primary legislation of the rule that costs should be awarded to the successful party, has limited that principle to both the costs of civil proceedings as a whole (as opposed to costs of a step in such proceedings and thus of interlocutory applications, McFadden v Muckross Hotels Ltd [2020] IECA 110 at para. 30) and to a party who has been 'entirely successful' in such proceedings (a phrase the effect of which may not in every case be entirely clear). However, in relation to the application with which I am concerned here [a discovery application] *, the combined effect of the new O.99 Rules 2(1) and (3) (replicating respectively the old Order 99 Rules 1(1) and 1(4A)), and of s.168(2)(c) and (d) and s.169(1)(a) and (b) (to which Order 99 Rule 3(1) requires regard to be had in determining the costs of any step in proceedings) to achieve, the same essential consequence as the pre-2015 Act regime.*

15. In particular, these provisions combine to present the following principles insofar as costs of an interlocutory application are concerned:

(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99 R.2(1)).

(b) The Court should, unless it cannot justly do so, make an order for costs upon the disposition of an interlocutory application (O.99 Rule 2(3)).

(c) In so doing, it should 'have regard to' the provisions of s.169(1) (O.99 Rule 3(1)):

(d) Therefore – at least in a case where the party seeking costs has been 'entirely successful' – it should lean towards ordering costs to follow the event (s.169(1)):

(e) In determining whether to order that costs follow the event the Court should have regard to the non-exhaustive list of matters specified in s.169(1)(a)- (g) (O.99 R.3(1)):

(f) Those matters include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s.169(1)(a) and (b)).”

44. While that judgment was given in the context of an interlocutory application which had to be determined by the court, in light of the recognition in *Godsil* and *Heffernan* that a court determination is not necessary for there to be an event, it seems to me that these principles can apply where the "*event*" is in the nature of an action which was sought by a party and was only undertaken by the other party in response to the proceedings.

45. In *Construgomes & Carlos Gomes SA v Dragados Ireland Limited & Ors [2021] IEHC 139* Butler J, having set out Order 99 Rule 2(1) and (2) and Rule 3 and the operative part of section 169(1) of the 2015 Act, said:

“4. Two things are clear from O. 99, r. 2. Firstly, the court retains the discretion it has always had in respect of the making of an order for costs. That discretion, although broad, is not and has never been unlimited. Apart from the possibility of statutory intervention to govern costs in particular types of proceedings (for example, the special costs rules that apply to planning and environmental litigation under s.50B of the Planning and Development Act, 2000 and other similar provisions), the need to provide some certainty to litigants as regards how, and indeed when, the costs of proceedings are likely to be disposed of has long been recognised. Accepting always the discretionary nature of the court's power to award costs, it is nonetheless important that litigants embarking upon what might be costly legal proceedings and the lawyers advising them have some idea where the costs burden of that litigation is likely to fall. This is particularly so in commercial litigation where decisions are made on the prosecution and defence of proceedings in light not only of what the costs of the proceedings might be but also the likelihood of those costs being recovered and the very real possibility that, if a party is not

successful, it will also have to bear the legal costs incurred by the opposing side.

5. The plaintiff's argument that the court now has a somewhat greater discretion as regards the costs of interlocutory matters appears to be based on the fact that O.99 itself no longer cites the "costs follow the event" rule. The original version of O.99, r. 1(4) (SO 15 of 1986) provided that "the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event". This reflected a long-standing default position that costs would be awarded to the victor in litigation to be paid by the losing party, unless there were particular reasons why this should not be so. The burden of establishing that this general rule or principle should not be applied lay on party seeking to take the case outside the scope of the rule (see Denham J in Grimes v Punchestown Developments Company Ltd [2002] 4 IR 515). The current version of O. 99 (SI 584 of 2019) no longer contains an express statement of the principle that costs should follow the event. Instead, s.169(1) of the 2015 Act confers a statutory entitlement to an award of costs to the party who has been entirely successful in civil proceedings against the unsuccessful party unless the court orders otherwise. Section 169(1) also lists a number of factors to which a court might have regard in deciding whether to exercise its discretion in this regard. In circumstances where the current version of O. 99 was re-drafted in 2019 to take account of the commencement of Part 11 of the 2015 Act on 7th October 2019 (SI 502 of 2019), it is hard to construe that change as reflecting an intention to alter the scope of the court's discretion. Instead, it seems the Rules Committee took the view that as the "costs follow the event" principle had now been given statutory expression, a reference in the Rules to the relevant statutory provision would be sufficient to ensure that the principle would continue to apply. As it happens, I am not convinced, even if the scope of the court's discretion had been altered in the subtle way contended for by the plaintiff, that it would have a material bearing on the question of costs in this case."

46. I do not detect any real difference between what Butler J says and what Murray J says in paragraph 14 of *Daly v Ardstone Capital Limited*. Butler J rejected the argument that the court's discretion in respect of costs had been changed by the amended version of Order 99 (introduced by SI 584 of 2019) and held therefore that the position remained (though now given statutory expression in section 169 of the 2015 Act) that the default position is that costs follow the event unless there were particular reasons why this should not be so. Murray J held that at least in the case

where the party seeking costs has been "*entirely successful*" it should lean towards ordering that the costs follow the event and in deciding whether it should not do so it should have regard to the non-exhaustive list of matters specified in section 169(1)(a)-(g).

47. There is one possible difference between the judgment of Murray J and that of Butler J. Murray J stated that section 169 had limited the principle that costs follow the event to the costs of the proceedings as a whole as opposed to costs of a step in the proceedings such as an interlocutory application and referred to Haughton J's judgment in *McFadden v Muckno*. Butler J noted that Haughton J's comments where obiter and expressed her initial view that Order 99 rule 3(1) does have the effect of making section 169(1) and the costs follow the event rule applicable to the costs of interlocutory applications. This point was not argued by either side in this case, and I therefore do not express any view on it. Nor do I believe it necessary to resolve this issue in light of my conclusions.

Submissions of the Parties

48. The Plaintiff submits that there were two "*events*" – the securing of the interim injunction and the provision of the undertaking by the Defendant – and that the Plaintiff had succeeded in both. It was submitted that the facts of the case were more akin to those in *Irish Bacon Slicers* than those in *McFadden v Muckno* and that it was the failure of the Defendant to give the undertaking or to engage in any meaningful way "*by the deadline set that resulted in the granting of the interim injunction, and the pursuit of the interlocutory injunction.*" The Defendant only furnished the undertaking not to apply the padlock on Monday the 15th November 2021 which was after the interim injunction had been obtained and after the motion seeking interlocutory relief had been issued. Thus, the Plaintiff contends that the event was the obtaining of the undertaking from the Defendant and that the Court should therefore consider the various factors as set out in section 169(1), i.e. that costs should be awarded to the Plaintiff as following the event unless, having considered the matters in section 169(1)(a)-(g), the court considers it appropriate to order otherwise. The Plaintiff submits that a consideration of those factors supports the costs being awarded to the Plaintiff. It was also submitted that the provision of the undertaking rendered the necessity for a hearing of the interlocutory motion moot and if the court were to determine that the proceedings are now moot, it was the actions of the Defendant which rendered them moot and so, following the dicta of Clarke J in *Cunningham v President of the Circuit Court* the Court should lean in favour of making a costs order against the Defendant.

49. The Defendant submits that it should be awarded the costs of the proceedings or, as a fall-back, that there should be no Order as to costs on a number of alternative bases: (i) the fire exit in question is only required if the number of patrons exceed 450 and so the Plaintiff could have restricted the numbers admitted to the bar and sued for damages, so damages were an adequate remedy and injunctive proceedings should not have been issued; (ii) the Plaintiff, prior to the institution of the proceedings, did not offer to the Defendant either the option to observe the previous protocol or the undertaking that was given by the Plaintiff and that the undertaking which was given by the Plaintiff rendered the proceedings moot; (iii) the Court was not asked to "*determine*" any "*event*" and in the circumstances the proper order is no order as to costs (*O'Dea v Dublin City Council*, *Tekenable v Morrissey*, *Irish Bacon Slicers*, and *McFadden v Muckno*); and (iv) the Defendant offered that each side would bear its own costs.

Discussion and Conclusion

50. I am satisfied that whether the matter is approached on the basis that there was an event or not the appropriate way to deal with the costs of the injunction application is to make no order as to costs.

51. There was, of course, no court determination but it is clear from Murray J's judgment in *Heffernan v Hibernia College* (para. 42 quoted above) that it is not necessary for there to be a court determination before there is an *'event'* for the purposes of determining liability for costs.

52. The Plaintiff submits that there were two events - the securing of the interim injunction and the provision of the undertaking by the Defendant - and that the Plaintiff had succeeded in both and the costs should therefore follow those events.

53. The grant of an interim injunction cannot in itself be an event such as to ground an order for costs in circumstances where it is secured ex parte. If a Plaintiff is ultimately successful and obtains an award of costs that will generally include the costs of the interim injunction (which will normally have been reserved) but the grant of an interim injunction cannot in itself be seen as an event which goes to the question of whether the Plaintiff should get the costs of the proceedings or of the interlocutory application. In any event, for the reasons discussed in the next paragraph, in respect of the interlocutory application and of the undertaking given by the Defendant, the Plaintiff was not entirely successful even in respect of the interim injunction.

54. The second *'event'* upon which the Plaintiff relies is that it obtained the undertaking which it sought prior to the proceedings and in that sense was successful. There is clearly authority to support the general proposition that a party who seeks an undertaking and that undertaking is only given after the application for injunctive relief has been made should get the costs of the application. However, regard must be had to what actually occurred in the particular case. I have to confess to having a concern about whether there can even be said to have been a proper event, even as described by Murray J in *Heffernan*, but even if we assume that there was, in my view the Plaintiff cannot be said to have *been 'entirely successful'*. The undertaking that was sought in the pre-litigation correspondence was drafted by the Plaintiff's side and was unlimited in its terms. It did not refer to any reciprocal agreement, commitments or undertakings by the Plaintiff and did not refer at all to the old system or protocol. Yet in his grounding affidavit sworn on behalf of the Plaintiff, Mr. McFadden stated that if the interim injunction was granted the Plaintiff would operate the same protocol or "*old working arrangement*" and when Allen J inquired whether the Plaintiff would be willing to undertake to lock the padlock at 3.30am each night, the Plaintiff provided that undertaking. There had been no reference to the Plaintiff agreeing or being willing to do so in the pre-litigation correspondence. The Defendant only gave its undertaking after the Plaintiff's undertaking had been given to the Court. The Plaintiff then gave a written undertaking after the Defendant had given its undertaking. Thus, it is suggested by the Plaintiff that its undertaking does not affect the fact that the Plaintiff was successful in obtaining an undertaking from the Defendant in the terms which had been sought before the proceedings were instituted. It seems to me that this is entirely artificial. The Plaintiff's written undertaking given on the 16th November was in in the same terms as the undertaking which it had earlier given to the Court and it was only after this undertaking had been given to the Court the previous Friday that the Defendant gave its undertaking (in the context of the interim injunction). In those circumstances the Plaintiff was not entirely successful in what it describes as the '*event'*.

55. The Plaintiff submits in the alternative that the proceedings were rendered moot by the Defendant giving its undertaking and on the basis of *Cunningham v President of the Circuit Court* the costs should be awarded against the Defendant. Similarly, the Defendant submits that in fact the proceedings were rendered moot by the unilateral action of the Plaintiff in giving its undertaking. In my view, both of these arguments are misconceived and artificial. The undertakings given by both parties were given in a particular context and neither one can truly be said to have been unilateral actions. The Defendant's undertaking was given following the Plaintiff having given its undertaking to the Court (which had not been previously offered to the Defendant).

The Defendant for its part had never sought a reciprocal undertaking in the terms given by the Plaintiff to Court prior to the Plaintiff's application to Court so can not rely on that undertaking to suggest that it rendered the application moot. In my view, it is entirely artificial to suggest that the actions of either party were '*unilateral'*.

56. Even if I was satisfied that the giving of the undertaking by the Defendant was an '*event'* upon which the Plaintiff was entirely successful and that I should therefore lean in favour of granting the Plaintiff its costs or that the Defendant's (or Plaintiff's) action had rendered the application moot, I would still have to consider whether to award the Plaintiff (or the Defendant) the costs by reference to the matters in section 169(1)(a) – (g).

57. There are a number of features of the events leading up to the making of the application for the interlocutory injunction which weigh against the costs being awarded to either party. I will consider the position of the Plaintiff first.

58. As discussed above, the undertaking that was sought from the Defendant by the Plaintiff prior to the institution of the proceedings makes no reference to the protocol or to the Plaintiff being willing or agreeing to put the padlock on the gate at the Market Bar closing time. Indeed, inexplicably there is no reference at all to the protocol or such a willingness in any of the three letters that were sent on behalf of the Plaintiff on the 11th November. I have already considered this in the context of whether the Plaintiff was entirely successful in the '*event'* but it is also relevant to a consideration of the Plaintiff's (and the Defendant's) conduct before the proceedings and the manner in which the parties conducted their cases (section 169(1)(a) and (c)). There had been a protocol in place between the parties for approximately twenty years. From time to time there were difficulties in respect of the operation of this protocol but by and large it governed the parties' conduct in relation to the gate for a long number of years. Indeed, the protocol was in operation in the days leading up to Monday, the 8th November, when the Defendant put the padlock on the gate in breach of the protocol. However, the pre-litigation correspondence and the undertaking that was sought made absolutely no reference to the reinstatement of the protocol or indeed to the protocol itself. Indeed, there was no reference even to the Plaintiff locking the gate at closing time. Yet the Plaintiff, through Mr. McFadden's affidavit grounding the application, referred to being prepared to "*operate the same protocols, ie. the old working arrangement in respect of locking the gate at the end of business for the Market Bar as it has done in the past*" and was satisfied to give an undertaking in those terms when it was suggested by Allen J.

59. Ms. Layden says on affidavit that had the suggestion that the parties revert to the protocol been made to the Defendant at any time prior to the issuing of the proceedings this would have been accepted by the Defendant. This has not been disputed by the Plaintiff. Whether I accept this as correct or not it seems to me that I must have regard to the fact that the basis upon which the injunction was granted (or sought if one has regard to the contents of the affidavit of Mr. Fadden and the undertaking given by the Plaintiff to the Court) was not suggested or offered to the Plaintiff in advance of the application being made. It is essential when a party is seeking an undertaking that they are absolutely clear what is being sought and a central part of that is to make clear what commitments or obligations they are prepared or proposing to adopt. Otherwise, the party from whom the undertaking is sought can not make an informed decision as to whether to give the undertaking or not.

60. Secondly, in respect of the Plaintiff, it seems to me that the application by the Plaintiff on Friday the 12th November was precipitous. As recounted in the background section above, the padlock was put on the gate when the Arcade closed on Tuesday and Wednesday, the 9th and 10th November. I return to this below in the context of the consideration of the Defendant's conduct. However, it was not placed on the gate on the Thursday evening. As set out above, the Plaintiff's solicitor wrote to the Defendant at 16.12pm on Thursday, 12th November, seeking the removal of the padlock and the provision of an undertaking by the Defendant by 10am next morning. Ms. Layden replied taking issue with some of what was said in the Plaintiff's solicitor's letter. The Plaintiff's solicitor then replied at 18.34pm calling for confirmation that the lock would not be put on the gate at closing time (7pm) and for an undertaking by 10am the next morning. Of course, the demand for confirmation that the lock would not be placed on the gate must be seen against the background of it having been put on the gate for each of the previous three evenings. However, Ms Layden replied at 19.02pm and again at 19.24pm. In the later email she stated "*I gather that things are as they should be - the gates are locked and the overflow emergency fire gate on a magnetic lock which is the responsibility of Mercroft to manage, while open and lock fully on closing. Perhaps there have been misunderstandings?*" The Plaintiff's solicitors sent a further letter at 22.01pm in which they noted that as of 8pm the gate was closed without the padlock/bolt but demanding an undertaking in specific terms by 10am the following day.

61. Thus, the position on Friday, the 12th November, was that the padlock had not been placed on the gate after the Arcade closed the previous evening and there was an apparent acknowledgement by the Defendant that this was "*as things should be*".

In those circumstances, it seems to me that it was precipitous of the Plaintiff to apply for the injunction on that day.

62. Of course, whether or not a particular step is premature will depend on the facts of the case.

63. Of significance, in addition to those two basic facts, was that there had been no warning of litigation given on either the Tuesday or Wednesday and no request that the parties revert to the protocol and when the demand and warnings came late on Thursday, the Defendant, did not apply the padlock and acknowledged that things were as they should be. It seems to me that given these facts it was precipitous to move for an injunction without allowing for an adequate opportunity for further engagement and possibly for the Defendant to take legal advice. I wish to emphasise that I am not necessarily suggesting that these actions were sufficient to address the Plaintiff's concerns for a longer period but in circumstances where a very short period was given for the undertaking and where the concerns were met in the short term the injunction should not have been applied for on the Friday.

64. The Court's assessment may have been very different if the concern about a risk of interference with the emergency exit by the possible application of the padlock meant that the Market Bar could not open. In other words, if uncertainty about whether a lock would be applied in the absence of an undertaking meant the Market Bar had to remain closed then the Plaintiff ***might*** have been justified in moving on the Friday notwithstanding that the padlock had not been applied the previous evening and that Ms. Layden had apparently given an acknowledgement that this is how things should be. However, it was not the case that the Bar could not open. The exit provided by the Arcade and the gate onto Drury Street is described as a "*third emergency escape route"* and is only required when numbers on the premises exceed 450 people. Thus, the Plaintiff had the option of opening the bar and admitting a limit of 450 people if the gate was locked and then suing for damages. This may not have been anything other than a short-term solution but it means that the Plaintiff had the option of not applying for an injunction on the Friday. This would have allowed an opportunity for the parties to engage in light of the lock not having been applied the previous night and Ms. Layden acknowledging that this was as things should be and would have allowed the Defendant to take advice and the Plaintiff would still have been able to open the bar in a manner which did not pose a risk to the patrons or staff and did not pose a risk to its licence. In all of those circumstances, it seems to me that moving the application on the Friday was precipitous and I have to have regard to that under section 169(1)(a) and (c).

65. The Plaintiff relies heavily on *Irish Bacon Slicers*, drawing parallels between the facts of both cases. The Plaintiff submitted that in this case, as in *Irish Bacon Slicers,* (a) the undertaking which was obtained was in like form and substance to the undertaking which was sought in the notice of motion (I addressed this above in the discussion in relation to the provision of undertakings by both sides) and (b) the Defendant refused to give any undertaking prior to the proceedings. In my view there is very little similarity between the two cases. In *Irish Bacon Slicers* the Defendant threatened on the 14th June 2013 to present a winding-up petition in respect of the Plaintiff company on the basis of an alleged debt. On the 19th June 2013 solicitors for the plaintiff company replied, denying the debt and seeking an undertaking by later that day that the threat of a petition would not be followed through. No undertaking was forthcoming and the Plaintiff instituted proceedings and obtained an interim injunction restraining the presentation of a petition. There followed an exchange of affidavits with the Plaintiff having to deal with the replying affidavits of the Defendant. Ultimately when the matter was called on for hearing on the 23rd July 2013 (5 weeks later) the Defendant gave an undertaking in terms of the Plaintiff's Notice of Motion. The only relevant similarity between this and the instant case is the very short time period initially given for receipt of the undertaking. However, this does not appear to have been raised as an issue in *Irish Bacon Slicers*. More importantly, that undertaking was sought from a party who was already engaged with the issues, having already instructed solicitors to write to the Plaintiff demanding payment of the debt and threatening a winding-up petition. In this case there was no such prior engagement. The cases are also distinguishable in that it was only five weeks after the interim injunction was obtained, during which the defendant put in replying affidavits which had the effect of adding to the costs, that the Defendant gave the undertaking.

66. Similarly, in *Bronxville v Cayenne Holdings* there were interactions between the parties over an extended period of time (both before and after the institution of proceedings) before the defendants took a position which had the effect of rendering a determination by the court unnecessary. In his judgment Sanfey J concluded:

> *"50. The first named defendant accepted on 20th December 2019 a course of action which had been advocated by the plaintiff from the outset, and which it had up to that point consistently rejected. This acceptance indicated to the plaintiff that its apprehension of eviction or further action against it by the landlord was no longer necessary. The parties thereafter proceeded in the manner envisaged by the lease, culminating in an accepted arbitrator's evaluation of the correct amount of rent.*
>
> *51. In the circumstances, it is difficult to come to any conclusion other than that the plaintiff has "won the day", and that the eventual acceptance by the*

first named defendant of the contractual process it had repeatedly denied is the "event" which costs must follow..."

67. This is in contrast to the very compressed period of time in question in this case and the absence of any engagement prior to the solicitor's emailed letter of 16.12pm on the Thursday.

68. Thirdly in respect of the conduct of the Plaintiff, in my view, the Plaintiff's conduct in not contacting Ms Layden directly at any stage before the application (but particularly before their solicitors wrote on the afternoon of the 11th November) is also significant in its own right. Mr McFadden spoke with Mr Keely on Monday, the 8th November and Mr Keely suggested that Mr McFadden speak directly with Ms Layden so she could deal with it straightaway. Ms. Layden deposes that Mr McFadden said that he will have no dealings with Ms Layden. Of course, as Ms. Layden was not a party to the conversation, this was based on a report of that conversation. Mr McFadden does not address whether he said this. In the written submissions filed on behalf of the Plaintiff it is stated that Mr. McFadden "*declined to [*speak with Ms. Layden*] and instead requested a manager from the Plaintiff to speak with the manager from the defendant to sort the matter out…"*. Whether Mr. McFadden said what is attributed to him in Ms Layden's affidavit or not, the fact is that Mr McFadden did not contact or speak with Ms. Layden (and declined to do so). This is surprising as there is evidence in the papers of Mr McFadden and Ms Layden previously having direct contact by text, including, for example, in December 2020 when the issue about the padlock being placed on the gate previously arose, and by email in 2021 when Mr McFadden thanked Ms. Layden for all her support over the previous year and went on to deal with an issue which had arisen between the parties in relation to another unit in the arcade. The absence of contact is also surprising given that the two businesses are adjoining each other, and that their businesses are interwoven through their landlord and tenant relationship. The only explanation that has been given for Mr McFadden not contacting Ms Layden following her email on the 9th November seems to be the one given in the Plaintiff's written submissions, i.e. that the Defendant's email of the 9th May made *"it very clear that there was to be no interaction with members of staff of the Defendant and that the email did not suggest that the directors should discuss the issues directly."* Leaving aside the fact that this explanation is not contained in Mr. McFadden's affidavit, there is nothing in the contents of the email, which is quoted in full at paragraph 17 above, to the effect or which makes it clear that "*there was to be no interaction with members of staff of the Defendant*". It is correct to say that it did not suggest that the directors should discuss the issues directly (and I return to this below) but equally there is nothing in the email to preclude such discussions. It seems to me that where two entities have a business relationship, particularly where their

respective businesses are physically and legally interconnected and where they have a history of previously contacting each other directly about various issues, the failure, without reasonable explanation, of one to contact the other before engaging solicitors, is a factor which can and must be taken into account in determining the question of costs.

69. As noted above, the Defendant also seeks its costs of the interlocutory injunction application (though its fall-back position is that there should be no Order as to costs). It seems to me that when the factors in section 169(a)-(g) are considered they weigh against costs being awarded to the Defendant.

70. The Defendant's conduct must be seen in the context of the Defendant's ultimate position as expressed in Ms. Layden's email of 19.24pm on the 11th November that the non-application of the padlock after the Arcade had closed that evening was "*as things should be*". This can only be interpreted as a reference to the protocol which had been in place for a long number of years at that stage and an acknowledgement that the padlock should not be on the gate between the Arcade closing and the Market Bar closing.

71. That being the case, the manner and terms in which the Defendant engaged with the Plaintiff after Mr. McFadden had raised his concern about the padlock being attached on the evening of the 8th November was inadequate. There was no request or invitation in Ms. Layden's email of the 9th November for Mr. Fadden to contact her or to discuss the matter. It does seem to me that the primary obligation to make contact was on the Plaintiff – Ms. Layden had contacted the Defendant after Mr. McFadden spoke with Mr. Keely and therefore the ball was in the Plaintiff's court – but I do not think that it is sufficient for the Defendant to simply email the Plaintiff and then sit back.

72. This is particularly so where the Defendant applied the padlock again on the Tuesday and Wednesday evenings notwithstanding being aware of the Plaintiff's concerns about it. Whether or not the Defendant was entitled to attach the lock may ultimately have been a matter for the full hearing but from the point of view of a costs dispute it seems to me that the Court can properly have regard to the fact that the padlock was applied in the teeth of the Plaintiff having raised its concerns on the Monday and in the context of the terms of the Defendant's email of the 9th November.

73. It is also significant that the Defendant did not raise or refer to the pre-existing protocol in Ms. Layden's emails of the 11th November (other than implicitly in the

reference to things "*being as they should be*"). As discussed above, neither the correspondence from the Plaintiff's solicitor nor the undertakings that were sought made any reference to that protocol or even to a commitment on the part of the Plaintiff that it would put the padlock in place each night after closing. One would have expected the Defendant to raise this issue in reply. It may be that if the Defendant had asked about the protocol or had asked whether the Plaintiff was proposing to apply the padlock at closing that the Plaintiff would have clarified its intentions. Again, the primary obligation is on the Plaintiff to have clearly stated what undertaking they were seeking from the Defendant and to have clearly stated what reciprocal commitments they were willing to give. But nonetheless it is of some significance that the Defendant did not raise any queries in this regard which may have had the effect of bringing some clarity to the position which in turn may have avoided the bringing of the injunction application.

74. As discussed above, the effect of the conduct of the Plaintiff in not contacting the Defendant either directly or through solicitors until late afternoon on the Thursday was to severely limit the ability of the Defendant to seek legal advice. This is significant given the terms of the undertaking sought and the absence of any reference to the protocol or to an agreement on the part of the Plaintiff to padlock the gate upon closing each night in that the Plaintiff appeared to be asking for something new. However, I must also have regard to the fact that the Defendant did not in fact seek time from the Plaintiff to get legal advice and that there was no evidence before me of the Defendant having attempted to seek legal advice either on the evening of the 11th or the morning of the 12th November. Indeed, the point was made by the Plaintiff that the interim order was not granted until late afternoon (5pm) on the 12th November and that there is no evidence that the Defendant sought such advice during the day on the Friday. Thus, it can not be said on behalf of the Defendant that if it had more time or sufficient notice it would have been able to procure legal advice.

75. Taking all of these into account it seems to me that, subject to the issue discussed in the next paragraph, the appropriate way to deal with the costs is to make no Order.

76. At the conclusion of the hearing, counsel for the Defendant indicated that the Defendant would be withdrawing its undertaking. Following discussion, that position was reversed and counsel indicated that the undertaking was to be continued subject to the Plaintiff continuing its undertaking. The Plaintiff, in its written submissions filed after the hearing (on the direction of the Court), submitted that in determining the question of costs the Court should consider the threat by the Defendant to withdraw the undertaking particularly as the matter was dealt with as a costs dispute on the

basis of the undertaking having been given and the Plaintiff never having threatened to withdraw the undertaking previously.

77. I accept that as a matter of principle the Court can and should have regard to any such change in position or a threat to withdraw an undertaking. However, such consideration can not disregard the factual context in which that occurs in a particular case.

78. In this case, that threatened withdrawal of the Defendant's undertaking occurred following an indication by the Plaintiff that its undertaking was expiring and would not be renewed. It was this that led to the indication that the Defendant's undertaking would be withdrawn. That context can not be ignored. It is true to say that the Defendant's undertaking was stated in unlimited terms whereas the Plaintiff's undertaking was always stated in temporary terms. Nonetheless, as discussed in detail above, the Plaintiff gave its undertaking to Allen J in the context of securing an interim injunction and the Defendant only gave its undertaking after that.

79. When this issue arose at the hearing, counsel for the Plaintiff took instructions from a representative of the Plaintiff who was in court and explained that it was the Plaintiff's intention to apply the padlock each night but the reason the Plaintiff's undertaking would not be renewed was that if the padlock was not applied some night through error, for example, the Plaintiff would be in breach of the undertaking and the Plaintiff did not want to find itself in breach of an undertaking given to the Court. It is appropriate that the Plaintiff treats undertakings as serious matters but I find this explanation unconvincing. If the Plaintiff is going to apply the padlock each night, then there should be no difficulty in continuing an undertaking to do so and ensuring that it happens. Errors can and do occur and in the event that there is a "*breach*" of an undertaking through error or inadvertence or accident the Court will always consider the circumstances. More importantly, it seems to me that it was understandable that the Defendant would have reacted to the indication that the Plaintiff would not be renewing its undertaking by saying that it would be withdrawing the undertaking given by it.

80. In all of those circumstances, I am not satisfied that I should determine the questions of costs any differently than as set out above.

81. Both parties indicated that the undertakings given by them would remain in place.

82. The Plaintiff also submitted that the matter should be listed for mention on the date that judgment is delivered to ascertain whether it will be necessary for there to be a hearing for an interlocutory motion. I do not propose to list the matter for that specific purpose. The Court dealt with this costs application and adjudicated on the costs on the basis that the injunction application would not be proceeding. Both parties agreed that it should be dealt with in this matter. I was also specifically asked to determine the question of costs on the basis that the case would most likely not be proceeding to trial as the dispute would most likely be referred to arbitration under an arbitration clause in the lease. If there is a change of circumstance such as by a withdrawal of the undertaking it will be matter for the parties to decide how to deal with the matter – either by way of an application in the proceedings or in an arbitration – and if the matter is to be dealt with in court the parties have liberty to apply in the Chancery list.

Costs of the Costs Hearing

83. It was agreed at the hearing that I would also determine liability for the costs of the costs hearing. Both parties seek their costs of that hearing. I am also satisfied that the appropriate way to deal with these costs is to make no order. The Plaintiff sought its costs and was unsuccessful and I see no basis in section 169 of the 2015 Act or otherwise upon which to exercise my discretion in favour of awarding the costs of that unsuccessful application to the Plaintiff.

84. Relevant to the determination of the costs of the hearing is the fact that the Defendant did state that its fallback position was that there should be no Order. More importantly, in a letter dated the 21st March 2022 the Defendant's solicitors stated that its legal costs should be borne by the Plaintiff but also indicated that the Defendant was prepared to agree to each side bearing its own costs. Thus, there could be a view that the Defendant succeeded in the costs dispute.

85. However, the Court can not disregard the fact that the Defendant did seek its costs, made detailed submissions, and did not succeed. It can not be said that the Defendant was entirely successful.

86. I am also satisfied that in considering the matters in section 169(1)(a) – (g) I am entitled to have regard to the ongoing relationship between the parties and the ongoing need for them to work together. Indeed, it was expressly submitted to me on behalf of the Defendant in relation to the costs application itself that I could have regard to this factor in determining what to do in relation to the costs of the injunction application and I am satisfied that the discretion of the Court and the non-exhaustive

list of matters specified in section 169(1)(a)-(g) are broad enough to allow the court to have regard to this factor. It seems to me that where the Plaintiff was not successful in the costs dispute and where the Defendant was not entirely successful in that dispute either and where there must be a strong possibility that an order for the costs of the costs hearing in favour of the Defendant would exacerbate the tensions which are already evident in the relationship between the parties it is appropriate that I would make no order for the costs of the costs hearing.