

# THE HIGH COURT

[2023] IEHC 654  
Record No. 2023/243 SP

**BETWEEN**

**THOMAS (OTHERWISE TOM) BRACKEN, JOSEPH BRACKEN (A MINOR  
SUING BY THEIR MOTHER AND NEXT FRIEND MIRIAM BRACKEN)**

**PLAINTIFFS**

**AND**

**FINTAN HINCH AND GERALDINE CLAFFEY**

**DEFENDANTS**

**Judgment of Mr. Justice Brian O'Moore delivered the 23rd day of November 2023**

1. In a judgment delivered on the 21<sup>st</sup> July, 2023 I refused the plaintiffs' application for interlocutory relief against the defendants. I also made an order striking out the proceedings against the second defendant, Ms. Claffey, on the basis that it was bound to fail and therefore constituted an abuse of process. My judgment in respect of these applications bears the neutral citation [2023] IEHC 456.
2. The current judgment deals with two further applications in the proceedings. The first of these is an application made by the first defendant, Mr. Hinch, that the proceedings against him are struck out as being bound to fail and therefore constituting an abuse of process. There is no opposition on the part of the plaintiffs to this application, and I will therefore make an order in those terms.

3. The second application, or more accurately a set of applications, relates to the costs of the proceedings.

4. As far as Ms. Claffey is concerned, she seeks an order for the costs of the proceedings against Ms. Bracken on a legal practitioner and client basis. The reason for seeking costs on such a basis is reflective of the judgment of Kelly J. in *Geaney v Elan Corporation plc* [2005] IEHC 111. In that case, Kelly J. concluded: -

“In addition, I propose to make an Order for the Plaintiff’s costs of this application, to include all reserved costs and those costs will have to be paid by the Defendant on a solicitor and client basis. I see no reason why the Plaintiff should find himself out of pocket as a result of having to bring this application which has occupied the time of the court over the last two days and during last week also. So the costs of this motion will be awarded to the Plaintiff, to include all reserved costs and to be taxed on a solicitor and client basis.”

5. The rationale for this order was that it would “indicate the court’s displeasure at the way in which the defendant” had approached its obligation to make discovery.

6. An order of this sort should not lightly be made and inevitably it will only arise in very rare circumstances. I am satisfied that, for the reasons set out in my substantive judgment of July of this year, this is a case in which an order of this sort should be made. The motivation of Ms. Bracken in bringing these proceedings, the serious and deliberate misleading of this court at the *ex parte* stage, and the attempt to seek orders which would have had the effect of undermining a previous order of this court to which the minor plaintiffs did not object (despite having had the opportunity to do so) together (and individually) constitute behaviour of a scandalous sort. To paraphrase Kelly J. (as he then was) it is difficult to understand why Ms. Claffey should have to put his hand in his pocket to pay the costs of defending these proceedings.

7. A more involved application with regard to costs was made on behalf of Mr. Hinch.. Relying upon the judgment of Herbert J. in *O'Connor v Markey* [2007] 2 IR 194, it was submitted that not only should he be entitled to her costs of defending the proceedings but also that these costs would be “set off ... against the legacies bequeathed to the unsuccessful plaintiffs”; see para. 12 of *O'Connor v Markey*.

8. One can certainly see the logic of the argument presented by counsel for Mr. Hinch. These proceedings were brought for the ostensible purpose of protecting the inheritance that was due to go to the two infant plaintiffs. The proceedings failed. On the face of it, it would appear somewhat unfair that the infant plaintiffs are able to take their bequest in any event, possibly unaffected by the costs to the estate occasioned by the expense to which Mr. Hinch was put in defending the proceedings in her capacity as personal representative.

9. However, as counsel for Mr. Hinch volunteered, an order of this sort would go against the general approach in respect of the awarding of costs against persons represented by next friends. The universal rule, set out in a line of authorities recently summarised by Egan J in *C.D. v B.B.* [2022] IEHC 381, is that an award of costs will be made against the next friend only and not against infant plaintiffs. Ultimately, it was suggested by counsel, the argument based on *O'Connor v Markey* leads to “something of a cul-de-sac”. I agree with this assessment. Notwithstanding the fact that it would be preferable that the bequest to the infant plaintiffs (rather than the residue of the estate) represent the asset out of which Mr. Hinch’s costs are paid, nonetheless I do not think that the circumstances of this case justify a departure from the general rule that it is the next friend (rather than the persons represented by that individual) who should properly be exposed to an award of costs should proceedings fail (if such a departure is ever possible). In this action, there is no evidence whatsoever put before me to the effect that the next friend (Miriam Bracken) is not of sufficient assets to meet an award of costs against her. While Mr. Hinch may well be entitled to recover from

the relevant estate his costs of defending these proceedings (given that they were taken against him in her capacity as personal representative of the estate of the late Larry Bracken), he is clearly entitled to recover his costs of the proceedings as against Miriam Bracken. As the position of Ms. Claffey is indistinguishable, in this regard, from the position of Mr. Hinch I will award Mr. Hinch his costs against Miriam Bracken on a legal practitioner and client basis. In particular, I do so to mark my displeasure at the conduct of these proceedings by Ms. Bracken, as set out in my earlier judgment and as summarised in an earlier portion of this ruling. The following orders will therefore be made: -

- (a) The proceedings will be struck out against Mr. Hinch;
- (b) Mr. Hinch will be awarded his costs of the proceedings against Miriam Bracken, on a legal practitioner and client basis;
- (c) Ms. Claffey will be awarded her costs of the proceedings against Ms. Miriam Bracken, again on a legal practitioner and client basis.

**10.** The parties will be granted liberty to apply in respect of anything arising from this ruling. Hopefully, this will not be necessary..