THE HIGH COURT

[2023] IEHC 657

[Record No. 2017/3007P]

BETWEEN

TOM KAVANAGH

PLAINTIFF

AND

HARRY HILLIARD AND URSULA HILLIARD

DEFENDANTS

JUDGMENT of Mr Justice Kennedy delivered on the 24th day of November 2023

1. By Notice of Motion dated 12 February 2021 the defendants sought an order pursuant to O. 99, r. 2(5) of the Rules of the Superior Courts that the Plaintiff make an interim cost payment on foot of an order of costs dated 20 February 2020 (the "February 2020 Order").

Background

2. The February 2020 Order was made by Ms Justice Pilkington, following her dismissal of the Plaintiff's application for interlocutory orders against the Defendants, including injunctive reliefs. The Court ordered the Plaintiff to pay the costs of the application. It refused to order a stay on the costs order. The Plaintiff failed to respond to correspondence attempting to agree the costs figure and the Defendants issued the present application on 12 February 2021.

It then emerged that the Plaintiff had taken steps to lodge an appeal (by post) on 3 June 2020. The appeal was limited to the question of costs. However, the Court of Appeal had no record of receiving the Notice of Appeal. It is not clear why the Plaintiff failed to identify the issue in the eight months which followed. Nor is it clear why his solicitors failed to reference the appeal when the Defendants' solicitors wrote to them with a view to agreeing the costs figure. It does not appear that the Plaintiff took any steps to progress its costs appeal during that period - if he had done so then the confusion about the filing of the appeal would have come to light.

3. In any event, leave was granted to extend the time for filing the appeal and the parties agreed that this motion should be adjourned pending the determination of that appeal. This was clearly appropriate since the relevant Practice Direction envisages that interim orders should only be made where the costs liability is undisputed. The Court of Appeal dismissed the appeal on 3 July 2023, enabling the Defendants to proceed with this application for an interim payment on foot of the February 2020 Order.

The Evidence

4. The grounding affidavit sworn by the Defendants' solicitor explained the background to the Plaintiff's unsuccessful injunction application and the resulting costs order. The Plaintiff is a receiver appointed by Havbell DAC ("Havbell"), the mortgagee over properties owned by the Defendants. The defence of the application took considerable time and effort. Ten affidavits were exchanged, five on each side. There were complex legal issues regarding the validity of the Plaintiff's appointment and the nature of the remedies sought. Senior and junior counsel were involved on each side. The application for injunctions and other interlocutory relief was heard by Ms Justice Pilkington on 31 October 2018 and 1 November 2018. In a reserved judgment, the Court dismissed the Plaintiff's application in its entirety and, following a further costs hearing, ordered the Plaintiff to pay the costs to the Defendants, to be adjudicated in

default of agreement. The Court also rejected the application for a stay on the costs order. By letter dated 4 March 2020 the Defendants' solicitor sent a Bill of Costs to the Plaintiff's solicitor. The Plaintiff's solicitor failed to respond to that correspondence and the Defendants' solicitor sent the matter to his costs accountant for the purpose of adjudication.

5. The grounding affidavit explained that an interim costs payment was required due to the likely delay in having the costs adjudicated. It stated that there was no dispute as to the Plaintiff's liability (the Defendants at that stage were unaware of any appeal against the February 2020 Order) and that the Plaintiff's solicitors had not responded to the draft Bill of Costs. The Defendants' solicitor furnished a personal undertaking to the Court confirming that, in the event of adjudication realising a smaller sum than the payment on account, he would repay such overpayment to the Plaintiff.

The Draft Bill of Costs

6. The draft Bill of Costs noted the legal work involved in the defence of the interlocutory applications, including: (a) the documentation which had to be reviewed and analysed (such as the mortgage and loan documents and account statements); (b) the consultations and correspondence with both clients and counsel; (c) the drafting, review and consideration and preparation of the High Court affidavits; and (d) the attendance before the High Court on at least sixteen different occasions. A professional fee of €45,000 was claimed and, in the aggregate, counsel's fees in excess of €48,000 for senior and junior counsel, together with disbursements, including court fees. The total claimed was €104,865.47.

7. While the Plaintiff reserved his position for adjudication, there has been no suggestion or submission on the Plaintiff's part, in correspondence or in submissions, that the figure claimed in the draft Bill of Costs was excessive or unreasonable. However, the parties agreed

that it was not appropriate that the Court should express any view as to the likely outcome of adjudication. Nothing in this decision should be construed as so doing.

8. There was no replying affidavit on the Plaintiff's part. However, from the correspondence which the parties placed before the Court, it appears that:

a. Following the dismissal of the Plaintiff's costs appeal, this application was relisted before Mr Justice Sanfey on 19 October 2023.

b. A letter from the Defendants' solicitors to the Plaintiff's solicitors dated 31 October 2023 stated that:

> "*On 19 October 2023 the plaintiff's counsel informed the court that he required to take his clients' instructions in regard to their consent to ringfencing this costs application outside of the bankruptcy proceedings which are currently ongoing. You might kindly note that the court directed that this matter be dealt with in correspondence between the parties in advance of the next return date, which is 02 November 2023. To date we have not heard from you, and you might kindly revert to us as soon as possible*".

c. By letter dated 1 November 2023, the day before the return date, the Plaintiff's solicitors wrote to the Defendants' solicitors, indicating that Havbell was:

> "*willing to agree to setting off the costs order obtained in these proceedings by means of reduction of the judgment debt. We confirm Mr Kavanagh is also in agreement with this approach. For the avoidance of doubt, we do not concede that there is a contractual or equitable right of setoff available to your clients. However, given that your clients have invoked a set off in the bankruptcy proceedings, we are happy to accommodate that approach and have secured the necessary consents of Mr Kavanagh and Havbell DAC to give effect to your client's request*".

In this letter the Plaintiff's solicitor also requested a full Bill of Costs to include the costs incurred before the Court of Appeal and indicated that they would endeavour to agree those fees, failing which they would be adjudicated. This letter, on the eve of the

relisting of the motion for an interim payment, appears to be the first substantive engagement on the Plaintiff's part with the draft bill of costs which was furnished in March 2020. The letter added that:

> "*If, despite our acceptance of your request for a setoff, you insist on pursuing the payment out application in advance of the bankruptcy hearing on 4 December next, then we would ask you to confirm whether the Hilliards have discharged any of the legal costs to date and, if so, identify how much has been paid and request that you would provide the appropriate invoices in relation to the same*".

d. The Defendants' solicitors' letter dated 2 November 2023 responded that:

> "*On the last occasion the above matter was before the court, Mr Justice Sanfey directed the parties as follows;*
> *(1) The defendants were to indicate their position regarding the setoff of the costs orders in these proceedings against a debt to Havbell DAC. As you are aware from the corrected affidavits sworn on behalf of the defendants and already received by you, the defendants have corrected that averment in Ms Hilliard's earlier affidavit in the bankruptcy proceedings. Therefore for the avoidance of doubt, they do not consent to the setoff of the costs orders against the debt to Havbell DAC. We agree with your view that, in any event, there was actually no right of setoff at play, especially given the fact that there was no mutuality of debts in that the costs orders were obtained against Mr Kavanagh whereas summary judgment was obtained against the defendant by Havbell DAC….*
> *(3) The plaintiff was to confirm what its position is regarding the defendant's pay out application which is listed for mention before the court today. Unfortunately, that has not been done. We are still none the wiser as to whether the plaintiff is consenting or opposing that application*."

e. By letter dated 8 November 2023 the Defendants' solicitors wrote to the Plaintiff's solicitors noting that the previous Thursday:

> "*His Honour Judge Sanfey directed that the plaintiffs, your clients, would engage with our clients regarding its attitude to the pay-out motion currently before the court in circumstances where we have provided undertakings to the court. The said undertaking is in relation to any part payment out of High Court costs by your client,*

that we are happy to accept fifty percent of the bill of costs to be paid out immediately to be held on client account and not to be disposed of in any way pending agreement or taxation with regard to the balance of the fees due arising from this action. Equally, we are in agreement to withhold those funds until resolution or taxation decides the matter completely in relation to costs."

The Law

9. The Defendants cited the Practice Direction HC71, which was issued by the then President of the High Court on 28 March 2017 in the following terms:

"*In view of long delays in the taxation of costs, the attention of practitioners is drawn to the provisions of Order 99, rule 1B(5).*
I direct that in all cases where there is no dispute as to the liability for the payment of costs and in any other case which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs. Such orders may be made on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid."

10. The relevant rule is now O. 99, r. 2(5). which provides that:

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

(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded."

11. Section 168(1) of the Legal Services Regulation Act 2015 (the "LSRA") provides that:

"*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 –*

(a) 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".

12. The jurisdiction to direct such interim payments in respect of costs was considered by the High Court in a decision of Mr Justice Barr in *John Heeney v Depuy International Limited*

& Anor. [2017] IEHC 355 ("*Heeney*"), dated 28 June 2017. Those proceedings were settled on 15 July 2015 on the eve of trial with the defendant agreeing to pay damages of €250,000 and also committing to pay the plaintiff's costs. On 5 February 2016, the plaintiff's solicitor furnished a short form bill of costs claiming €663,421 inclusive of VAT. At paras. 21-24, Mr Justice Barr helpfully outlined the Court's approach to such applications:

> "*21. The practice direction issued by the President of the High Court dated 28 March, 2017, was designed to deal with the fact that the plaintiff's solicitor may experience considerable cash flow difficulties due to delays in having Bill of Costs taxed before the Taxing Master. To that end, provision was made for a party, who had obtained an order for costs, to apply to the court for a direction that the defendant should make a payment on account in respect of such costs. It is important to realise that when the court is considering such an application, it only has very limited information before it. In the present case, I have been furnished with the short form Bill of Costs submitted by the plaintiff on 05 February, 2016, the response thereto issued by letter from the defendants' Legal Costs Accountant dated 20 February, 2017, and a series of letters and fee notes submitted by the plaintiff's counsel indicating the level of fees marked and in very brief terms, the factors which it is alleged justify the level of fees marked by them.*
>
> *22. In these circumstances, where the court has very limited information before it and where there has been extremely limited arguments as to why the level of fees marked by the plaintiff's legal advisers may or may not be justifiable, it would be inappropriate for the court to give any indication as to what level of fees should be properly payable to the plaintiff's legal advisers. Were the court to do so, it would risk doing a substantial injustice either to the legal advisers who have claimed the fees, or to the defendant who must ultimately pay the fees. It is for the Taxing Master, having heard detailed evidence and submissions in respect of the items of cost which remain in dispute between the parties, to determine what the appropriate fees should be.*
>
> *23. In these circumstances, I am satisfied that it would be wrong of this Court to indicate in any way what fee might be allowable to the plaintiff's legal advisers in this case. On this application, the court is not measuring what fees might be ultimately allowed to the plaintiff's solicitor and counsel. Nor is the court deciding whether it was reasonable for the plaintiff to engage the services of a second senior counsel and a second junior counsel. All the court can do, is try to come to a conclusion as to what sum would*

represent a reasonably substantial payment on account in respect of costs, while at the same time not exposing the defendant to a risk of a serious overpayment in respect of such costs. The court appreciates that the plaintiff's solicitor has given the necessary undertaking, but the court is of the view that it should avoid a situation arising, whereby the defendant would be left chasing the plaintiff's solicitor personally, in the event that there was a substantial overpayment of costs by the defendant at the pre-taxation stage.

24. The court is deliberately not going to give any indication as to what instruction fee, or what brief fee, may be properly claimable, due to the fear that such indication may be referred to in the taxation hearing. It would be wrong to give any such indication without hearing substantial evidence and argument on the issues raised. Instead, the court is merely going to direct the payment of a global sum by way of payment on account. I would stress that this is merely a payment on account. It is not an indication as to what fees may ultimately be recoverable by the plaintiff. In this case, I have reached the decision that the appropriate amount that should be paid by way of payment on account is the sum of €200,000."

13. Mr Justice Barr also noted that the taxation process is largely in the hands of the plaintiff's solicitor and observed at para. 25 that:

"*It would be unfair to direct that the defendant should make a substantial payment on account, without there being some incentive to the plaintiff's solicitor to ensure that the matter is brought on for taxation within a reasonable period. Bearing this in mind, I give the following directions in relation to the time for making the payment on account: -*

(a) the defendant is to make a payment on account of €200,000, within 21 days from receipt by the defendant of a formal or final Bill of Costs from the plaintiff's solicitor."

The Defendants' Submissions

14. The Defendants submitted that an interim payment was appropriate. The liability for the costs could not be disputed since the appeal had been resolved. A solicitor's undertaking had been provided to the Court, as anticipated in the Practice Direction. The injunction application had been complex, involving ten affidavits, a two-day hearing, complex issues and

a reserved decision. Payment of at least 50% of the amount claimed would be appropriate, although they were confident that they would get significantly more on taxation.

The Plaintiff's Submissions

15. The Plaintiff did not contest liability for costs or the appropriateness of a payment on account. Although no replying affidavit had been filed on his behalf, his counsel raised three main submissions, which were focussed on the amount and terms of any payment:

a. Bankruptcy proceedings are pending, together with proposals for possible personal insolvency plans. Although those proceedings are separate from these proceedings, the lender, Havbell, which had appointed the Plaintiff as receiver, would be a major creditor (if not the major creditor) in such contexts. The Plaintiff was concerned that it would be unfair from Havbell's perspective if he was required to make an interim payment in circumstances in which, due to the Defendants' insolvency, Havbell was unlikely to be able to recover the monies owing to it under the mortgage. The Plaintiff submitted that any interim payment should be preserved from dissipation pending the resolution of the bankruptcy proceedings.

b. The Plaintiff also referred to communications between the parties concerning the possibility of setting off his costs liability to the Defendants against the Defendants' liability to Havbell and/or a proposal that any interim payment should be ringfenced pending the conclusion of the insolvency proceedings. However, it is clear that there was no right of set-off (different parties were involved) and the Plaintiff did not suggest that any binding agreement had been reached either as to the set-off or as to "ringfencing", nor would the correspondence support any such contention. The Plaintiff accepted that the highest he could put these exchanges was as possibly giving rise to some form of estoppel, but it was not suggested that the Plaintiff had been prejudiced

or had altered his position in respect of the inchoate exchanges in question, so the basis for an estoppel is not obvious. The Plaintiff submitted that in exercising its discretion the Court should nevertheless be cognisant of the exchanges with regard to possible set-off and that any interim payment should be "ringfenced", by being held in a solicitor's client account, pending the imminent bankruptcy hearings, to avoid being "dissipated".

c. The Plaintiff submitted that the amount of any order should be one-third (approx. €35,000) and that that no payment should be required until a formal Bill of Costs had been furnished.

The Legal Rationale for Interim Payments on account of Costs Orders

16. It is worth reflecting on the rationale for cost orders and interim payment orders. Ireland's system of civil justice is adversarial. It depends on parties making their respective cases. When dealing with cases of any complexity or with significant consequences, parties would be extremely unwise to proceed without appropriate legal representation. It is also in the public interest that both sides are properly represented. This ensures that the necessary evidence and legal submissions are put before the Court, helping to ensure the just resolution of the matter. However, legal representation can involve significant expense. It would be unfair for a successful party to be exposed to the entirety of the legal costs which they necessarily incurred as a result of positions adopted by the other side, positions rejected by the Court.

17. Accordingly, and subject to exceptions and the Court's overriding discretion, the longstanding rule in Ireland and many other Common Law countries is that costs normally follow the event. This rule is reflected in Irish legislation and in jurisprudence. A party put to the expense of bringing or defending proceedings or applications who has been successful in doing so will usually be awarded their costs. This will generally fall short of a full indemnity but generally represents the greater part of the costs actually incurred.

18. In accordance with the legislation and the Rules of the Superior Courts, cost orders are not only made on the final resolution of proceedings but also at appropriate stages during proceedings, with the default position being that costs should generally follow the event on the conclusion of an interlocutory application unless there are reasons for an alternative approach, in which case such reasons should be articulated by the Court. Such costs awards, both during and at the conclusion of proceedings, serve important public interest objectives by ensuring that a better resourced party cannot unfairly wear down an opponent by unmeritorious legal manoeuvres. Therefore, it was entirely appropriate that costs should be awarded to the Defendants, without a stay, on foot of the dismissal of the injunction application. The Court of Appeal confirmed the High Court's determination.

19. Interim cost payments are similarly in the public interest, ensuring that where, as here, there is an undisputed liability for legal costs, the parties which are entitled to their costs and their lawyers should not be out of pocket for an extended period, perhaps for several years, pending the determination of the proceedings and the costs adjudication process. As Mr Justice Barr noted in *Heeney,* cashflow difficulties could arise and it would be difficult for less well-resourced parties to secure legal representation without such a mechanism. As noted above, proper representation for both sides is in the public interest and in the interests of the administration of justice. It is also equitable that there should be an interim payment, where liability for costs is undisputed rather than placing the entire cost and burden of funding such legal costs (pending adjudication) on the party which has been vindicated in respect of the relevant issue (or on their lawyers). Given the restricted availability of civil legal aid it would be difficult to ensure appropriate legal representation and equality of arms on any other basis. While many Irish lawyers help clients vindicate their legal rights on the basis that their fee will only be payable in the event that their client wins, it would be unreasonable to expect clients or their legal representatives to be out of pocket for an extended period when the costs liability

is undisputed. Cost orders and interim payment orders also serve the public interest by disincentivising parties from bringing unmeritorious proceedings or applications.

20. Such interim cost orders may also have a practical benefit in that they may help to facilitate agreement of the amounts due, reducing the number of cases for adjudication.

21. In this case the injunction application commenced in 2017 and was resolved in the Defendants' favour in February 2020. While some fees have already been paid to the Defendants lawyers as have, presumably, the stamp duty and Court fees claimed, amounting to €46,319 in the aggregate, it is unfair that the lawyers for the successful litigants should continue to wait for the bulk of their remuneration (or that their clients should have to wait to be reimbursed for the legal costs which they were forced to incur in that regard), in circumstances in which the liability of those legal costs is undisputed and it is only the precise figure which needs to be determined.

22. As a particularly unfortunate illustration of the difficulties which may arise due to delays in this regard, it should be noted that, regrettably, the Defendants' senior counsel has died since the February 2020 Order. While the complications and unnecessary distress in terms of the administration of his estate as a result of long outstanding fees can be comprehended, there is also a tangible impact on the financial position of any lawyer forced to wait for years before being paid fees to which they are properly entitled. In the absence of interim cost orders, it might be impossible for parties to obtain legal representation even when, as was the case in respect of the injunction application in this case, they have the right of the particular issue.

23. The public interest in ensuring that parties can secure legal representation is reflected in the Common Law's recognition of solicitors' liens and in legislation such as the Legal Practitioners (Ireland) Act 1876 ("the 1876 Act") and the LSRA and in the decisions of the Irish Courts (and of courts in other jurisdictions). The interim payment jurisdiction must be seen as primarily directed at this public interest consideration (although it also reflects the

secondary consideration that, once a party has established its entitlement to legal costs, it would be unjust to expect it (or its lawyers) to be out of pocket for the entirety of those undisputed costs while the precise amount remains to be determined. That consideration is particularly acute in this case as a result of the delay since the February 2020 Order.

24. In terms of countervailing policy considerations, Mr Justice Barr noted the desirability of avoiding a situation in which the interim payment was greater than the amount likely to be recovered on adjudication. Although that situation is covered by the solicitor's undertaking it would be preferable to avoid having to call on that undertaking. A further consideration is that too high an interim payment might disincentivise the recipient from completing the adjudication process. Accordingly, there is a balance to be struck.

Findings

Proposal to "ringfence" interim payment

25. From Havbell's and the Receiver's perspective, it may be disappointing that the Receiver should be required to pay the Defendants' legal costs for the injunction proceedings, since his claim against the Defendants may not be recoverable due to the latter's likely insolvency. However, it would not be appropriate to have regard to such a collateral consideration as the pending bankruptcy proceedings when determining the entitlements as between the parties to these proceedings (which do not include Havbell). There was no suggestion of a garnishee application by Havbell or any entitlement to bring such an application. The bankruptcy proceedings were not before the Court (and nor was Havbell). This application is a matter between the Plaintiff and the Defendants. Havbell's position is not relevant to the assessment. There is no right of set-off, and the alleged debt to Havbell would not be an appropriate ground to refuse to direct the Plaintiff to make an interim payment on foot of the costs order made 45 months ago.

26. Havbell and the Plaintiff are both sophisticated and experienced institutional and professional parties. They understand the cost consequences of litigation. The Plaintiff sought interlocutory relief in the full knowledge of the costs risk. The Defendants were put to effort and expense defending the application. The application was dismissed by the High Court after a two-day hearing. Costs were awarded against the Plaintiff. Although a stay on the cost order was refused the Plaintiff's appeal has delayed the payment of any of the costs due to the Defendants on foot of the February 2020 Order. Even leaving aside the fact that it is not a party to these proceedings, Havbell can have no legitimate complaint about a direction for an immediate interim costs payment on foot of the February 2020 Order.

27. The Court is not convinced that such interim payments should be "ringfenced" from "dissipation" pending the resolution of the insolvency proceedings. Although it was submitted that it would be unfortunate from Havbell's perspective if the interim payment was spent prior to the defendants being adjudicated bankrupt, counsel for the Plaintiff accepted the Court's observation that, but for the appeal, the interim payment would probably have been made several years ago and the Plaintiff could have had no complaint. It is difficult to see why the Plaintiff should be placed in a better position as a result of an unmeritorious appeal.

Reference to "dissipation" risk

28. Nor, for the avoidance of doubt, does the Court agree that it is fair to characterise as "dissipation" an interim payment to pay or reimburse legal fees incurred by the Defendants in successfully resisting the Plaintiff's injunction application. The Courts do not regard the proper payment of reasonable fees for necessarily incurred legal services as "dissipation". For example, in the context of injunctions to avoid dissipation of a party's assets, the courts typically allow for legitimate expenditure, including legal expenses. Otherwise, such orders would impact on the defendants' ability to defend themselves and could limit equality of arms

and access to justice. Accordingly, it is wrong to describe the payment (or reimbursement) of legitimate and undisputed legal costs as "dissipation".

29. The February 2020 Order unequivocally confirmed the Court's intention that costs should be paid without a stay. In the event, the unsuccessful Plaintiff has enjoyed an additional 45-month honeymoon. It would be unfair for this to continue. An interim payment is warranted. Nor is there any reality to the Plaintiff's submission that the monies should be retained in his solicitor's client account, a suggestion at odds with the logic of the Practice Direction.

Agreed Undertakings

30. The Court would have been disinclined to require the provision of any undertaking from the Defendants beyond the solicitor's undertaking mandated in the practice direction and duly offered in the grounding affidavit (confirming that any overpayment will be repaid if the adjudication realises a sum smaller than the interim payment). However, with a view to securing the Plaintiff's agreement to an "early" hearing of the present application (in advance of the insolvency proceedings), the Defendants' solicitor agreed to offer an additional undertaking that the monies would be held in the solicitor's client account and not distributed, reduced or dissipated for six months from the date of the making of this order, save by consent of the parties or otherwise by order of the Court. The Court would not itself necessarily have imposed such a requirement and also considers that the appropriateness of the Plaintiff demanding such concessions in return for the early scheduling of a hearing is questionable to say the least. However, the Defendants had committed to provide such an undertaking and were not seeking to resile from it. Accordingly, the Court proposes to direct an interim payment on foot of the undertakings which the Defendants have volunteered.

31. In the circumstances the Court considered it would be unreasonable to expect the Defendants to offer undertakings which went far beyond the requirements of the Practice

Direction without corresponding commitments of constructive engagement from the Plaintiff. Having taken express instructions from his client with the Court's encouragement, the Plaintiff's solicitors offered his personal undertaking to the Court to take all reasonable steps on behalf of the Plaintiff to agree the Defendants' costs as soon as possible. To this end, the Plaintiff's solicitor helpfully committed, with his client's approval, that, within one week, he would write to the Defendants' solicitor responding with a good faith counterproposal to the draft Bill of Costs sent to him on 4 March 2020 (and it is to be hoped that the parties will simultaneously engage to resolve the appeal costs). With a view to trying to narrow the issues requiring adjudication, any such good faith counterproposal should be broken down by reference to professional fees, fees for junior and senior counsel and disbursements, with a view to agreeing individual components of the Bill of Costs if possible. While it is to be hoped that such constructive engagement will reduce the need for adjudication, it was agreed that any such good faith counterproposal would be entirely without prejudice to the Plaintiff's position to the extent that any of the cost issues ultimately require adjudication (and this was a reasonable stipulation on the Plaintiff's part in circumstances in which, as he noted, he had not yet received advice from a costs draftsman, although he had of course received the draft Bill of Costs nearly 4 years ago and he would presumably have a very good sense of the likely costs range as a result of the costs incurred on his own side).

32. In directing the interim costs payment on foot of the agreed undertakings, the Court should make clear that it is not reaching any view either way as to the potential impact of the pending bankruptcy and related proceedings. Nor is the Court making a determination either way in respect of any entitlement on the part of the Defendants' legal advisors including, without limitation, any entitlement to assert a lien or to make an application pursuant to the 1876 Act. However, in the light of the reservations outlined above, the Court doubts that there

would be any basis to require the Defendants to extend the undertaking in the event that the bankruptcy and related proceedings take more than 6 months to resolve.

Interim Payment Figure

33. As regards the amount of any interim payment, the Court would respectfully adopt the observation of Mr Justice Barr that it is not the function of this Court to anticipate or pre-empt the outcome of the adjudication. Accordingly, the interim payment order should not be taken as an indication as to the likely outcome of that process. It was suggested in submissions that the amount directed by Mr Justice Barr approximated one-third of the figure claimed and might be a guide in that regard. However, the *Heeney* decision did not articulate a general one-third rule of thumb (like that which formerly applied to security for costs orders). Nor is there any basis in the Rules of the Superior Court for such an approach. In this case, the Defendant suggested that 50% of the amount sought in the Bill of Costs might be appropriate, whereas the Plaintiff advocated approximately one-third. There was no suggestion that the Plaintiff disputed the reasonableness of the Defendants' figures, but he did of course reserve his rights to do so on adjudication.

34. The circumstances here are very different to *Heeney*. That case involved the settlement of complicated medico-legal product liability litigation. The figure claimed for legal costs was substantial - a multiple of the settlement figure. Furthermore, the case was one of a number of similar claims which had been brought to trial, which could be relevant to the determination of the appropriate costs in individual cases. In this case, a significantly lower (albeit still substantial) figure has been sought for the costs of what was clearly an extremely protracted and hard-fought injunction application. By the nature of an interlocutory application, all parties and the Court may have a better sense of the costs incurred on each side than would be the position in a case such as *Heeney*. The assessment of the other side's costs of bringing a

complex case like *Heeney* to trial is particularly complicated. There may well be significant variability between the extent of the work required on each side, depending on the facts of the case, far more so than on a typical interlocutory application. Accordingly, this Court may have greater sense of the likely costs of a hotly contested interlocutory application than the Court in *Heeney* could have enjoyed in respect of the costs of bringing the entire claim on for trial.

35. It is also notable that in *Heeney* the application for an interim payment was resolved relatively quickly after the settlement. In this case, there has already been a three-year delay for reasons beyond the Defendants' control and the adjudication process has not commenced. In future cases, Court might consider that such delays militated in favour of an increased interim payment, but the Court has disregarded this factor in determining the amount on this occasion, although it is also relevant to the determination of the costs of this application, a point which will be addressed below.

36. Normally, it would be reasonable to require the Defendants to produce a final Bill of Costs before directing the making of the interim payment, as in *Heeney*, but such a stipulation would not be appropriate in this case. As a result of the unsuccessful appeal, there have been no payments to the Defendants pursuant to the February 2020 Order. It is not appropriate that this delay should continue, since the Plaintiff's liability for the costs is beyond dispute, with only the quantum to be determined. The correct approach, as suggested by Mr Justice Barr in *Heeney,* is to identify a figure representing a reasonably substantial payment on account, while avoiding the risk of a serious overpayment. In the circumstances, and disavowing any determination as to the amount which may ultimately be awarded on adjudication, the Court deems that a payment on account of the figure of the order of €55,000 would be appropriate on foot of the 20 February 2020 Order. However, such a figure would make no allowance for the cost of the successful defence of the appeal to the Court of Appeal, which were also awarded to the Defendants. Although the Notice of Motion was focused purely on the High Court costs

(the Defendants being unaware that an appeal was being pursued at that point), it would be unfair to put the parties to the delay and expense involved in a further interim payment application in that respect– Mr Rooney's reference to Matryoshka dolls is entirely apposite in this context. In the absence of any figure in respect of the costs of the appeal, the Court's provisional view is that it would be appropriate to increase the proposed interim payment to €67,750, so as to include an allowance for the appeal costs which were awarded to the successful Defendants. Obviously, the figure would be entirely subject to adjudication in the absence of agreement between the parties– the Defendants would seek a further payment if they recovered more on adjudication in the aggregate whereas the Plaintiff would be protected by the undertaking if the aggregate recovery on adjudication was less than the undertaking. This combined figure would, in the Court's provisional view, meet the *Heeney* test in terms of avoiding the risk of a significant overpayment in respect of the combined High Court and Court of Appeal costs. However, the Court would stress once again that the interim payment is not an indication as to what figure may be recoverable on adjudication in respect of either costs award; it is merely a payment on account and there will be a repayment by the Defendants' solicitor if the outcome of the adjudication so requires. If either party objects to the provisional suggestion that the amount of the interim payment should be increased to encompass the Court of Appeal as well as the High Court costs (or believes that the allowance for the appeal costs should be different from the provisional figure suggested by the Court) then the Court would be willing to list the matter next Tuesday to allow both parties to make further submissions before the Order is finalised.

Costs of Application for Interim Payment

37. In advance of circulating this judgment but having heard extensive submissions from the parties on the terms of any order and associated undertakings, the Court informed the parties

that it intended to direct an interim payment and the parties agreed that it was expedient for them to make submissions in respect of the costs of this application for an interim payment to obviate the need for an additional hearing.

Key Legal Provisions Relating to Costs of Interlocutory Applications

38. Section 168 of the LSRA empowers the Court to award the costs of or incidental to the proceedings at any stage in those proceedings. Section 168(2) makes clear that such an order may include the costs relating to particular steps in the proceedings.

39. Section 169(1) and (2) of the LSRA provides as follows:

> "*(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—*
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> *(a) conduct before and during the proceedings,*
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> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
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> *(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.*
>
> *(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.*"

40. Order 99, rule 3 of the Rules of the Superior Courts requires the High Court to make an award of costs upon determining any interlocutory application, save where it is not possible to justly adjudicate upon liability for costs on the basis of the interlocutory application.

41. Order 99, rule 7 empowers the Court to direct the payment of a gross sum by way of costs in lieu of adjudication.

The Defendants' Submissions on the Costs of the Interim Payment Application

42. The Defendants applied for the costs of the application on the basis that they had been substantially successful and that costs should follow the event in the normal way. It had been necessary to bring this motion to elicit the interim payment. There had been no engagement from the Plaintiff nor any counterproposals in response to the March 2020 draft Bill or the motion, until the motion was recently relisted following the dismissal of the appeal. It only became clear during the hearing that the Plaintiff accepted that he had no basis to oppose an interim payment order in principle and that his submissions would be focussed on the payment amount and terms. Accordingly, the Defendants had to prepare for the hearing on the basis that the application was opposed in its entirety. Judicial encouragement and the repeated listing of the motion was required to elicit the Plaintiff's limited engagement in recent weeks and, even then, the Plaintiff was making unrealistic proposals, such as that the monies should be held in his solicitor's client account or limited to €35,000 (being approx. one-third). The Defendants also submitted that in view of the obstacles placed in their way to prevent their enforcing the February 2020 Order, it was also appropriate for the Court to exercise its jurisdiction, pursuant to Order 99, rule 7, to measure the costs of the application for an interim payment and that, in view of the delays and the number of times this application had been before the Court (it being listed 15 times before this Court since the motion issued in February 2021), the appropriate figure would be €7,500 plus VAT.

The Plaintiff's Submissions on the Costs of the Interim Payment Application

43. Mr Rooney opposed the Defendants' costs application. He noted that section 169 of the LSRA required the Court to have regard to the conduct of the parties in the litigation when determining the appropriate costs order. He criticised the Defendants for issuing this application without first writing to the Plaintiff to seek a payment on account or to signal their intention to issue an application. He suggested that a warning letter was good practice before commencing proceedings or initiating applications and would have focussed the Plaintiff's attention and led to the earlier identification of the problem with the appeal without the motion being issued. He noted that the delay in progressing matters since the February 2020 Order largely reflected the time required for the resolution of the appeal. Once the appeal had been disposed of, the only complication that delayed matters was the possibility of a set-off, an issue raised by the Defendants rather than the Plaintiff. He referenced judgments criticising the Defendants in the independent (but related) proceedings issued by Havbell against the Defendants (to which the Plaintiff in these proceedings was not a party) and suggested that the criticism of the Defendants in those judgments was relevant to the current determination. He also noted that although the Statement of Claim had been delivered on 25 October 2018, no defence had yet been delivered. The Plaintiff noted that the Court could have regard to whether an offer had been made to settle the issue and that, in this case, an offer had been made by the Plaintiff but there had been no counterproposal. The Plaintiff denied that it had ever contested liability or the obligation to make an interim payment, contending that it had not stood in the Defendants' way at any point (presumably these submissions were directed at the period following the dismissal of the appeal). The Plaintiff had teased out terms as to appropriate undertakings and was entitled to do so, putting forward submissions as to the appropriate terms and amount. The Plaintiff queried whether it was fair or reasonable that engaging with and

making submissions in response to such a payment on account application should expose him to a further costs order. He argued that it would be unfair to award costs on foot of interim payment applications because the application for an interim payment of costs would, in effect, generate further cost awards, a possibility which he characterised as "*an appalling vista*", an infelicitous expression from a different context. The Plaintiff argued that the respondent to an application for an interim payment could not be expected to "sit on his hands" for fear of another costs order and that a litigant who obtained one costs order should not be able to use an interim payment application to accumulate further cost orders.

Findings in Respect of Costs of Current Application

44. The same principles apply to the costs of the current application as to other interlocutory applications. A litigant required to bring an application for an interim payment will generally be awarded their costs if the application succeeds and they have acted reasonably. Conversely, if the respondent successfully resists the application, it will generally be awarded its costs.

45. In some cases, it is appropriate to reserve the costs of an interlocutory application to the trial but this would be unfair and inappropriate on this occasion. Firstly, there is no reason to expect the trial judge to revisit these costs issues and it would be unrealistic to expect him or her to do so. The trial judge will be more focussed on the substantive issues than the procedural history. Secondly, it would be unfair because the Plaintiff has shown scant interest in progressing to trial. The Plaintiff acknowledged that these proceedings had "*fallen into abeyance*" but this was entirely in his hands. He could have pressed for the delivery of the defence and should have done so if he had any intention of pursuing his claim. He did not need to await the outcome of the appeal. There is no evidence of any ongoing intention to progress

the proceedings. This may be understandable since their initial objective (injunctive relief) failed, whereas Havbell's separate proceedings may have made more headway. Since it is doubtful whether the Plaintiff will bring these proceedings to trial in any reasonable timescale, reserving the costs would be tantamount to refusing to award them. This would be unfair since the Defendants were forced to bring this application to enforce the February 2020 Order.

46. The parties' conduct in the litigation and in the application does not justify a departure from the normal rule that the costs of the motion should follow the event:

a. In February 2020, the High Court ordered the Plaintiff to pay the costs and refused a stay. The Plaintiff decided to appeal the costs order but took no step to progress that appeal after seeking to lodge it (the failure to lodge the appeal was only identified when this motion was issued in February 2021, a year after the High Court directed the Plaintiff to pay the Defendants' costs). Normally, a letter before action (or motion) is good practice and its omission may be relevant to costs. On this occasion, however, in view of the Plaintiff's inaction and the failure of his solicitor to respond to correspondence, the Court considers that the Defendants acted reasonably when issuing the motion. The suggestion that, having ignored other correspondence, the Plaintiff would have responded to an explicit warning of an imminent application is entirely unsatisfactory. The High Court had directed the payment of costs and refused a stay. The Plaintiff's solicitor should have engaged with their counterpart's correspondence and should not have required the threat of a motion to do so.

b. Likewise, the Plaintiff must bear the responsibility for failing to identify the problem with the appeal. He was entitled to appeal the costs order but it is regrettable that no step was taken to progress that appeal until this application was issued, a lacuna which extended the delay in resolving the costs issues.

c. Nor does the Plaintiff's approach to the application or to the possibility of negotiation provide a basis to depart from the normal follow-the-event rule. Other than in very recent correspondence, the Plaintiff's solicitors made no meaningful attempt to seek the detail of the Defendants' costs or to engage with the issue. Indeed, it appears even from the recent correspondence that the Plaintiff's belated and limited engagement was only in response to repeated judicial exhortation, which should not have been required. In any event, the Plaintiff's proposals were too little and too late to obviate the need for the hearing of this application. There is no evidence of any attempt by the Plaintiff to compromise the motion on terms which would have so obviated the need for the hearing of the application. Many of the Plaintiff's proposals appeared unrealistic, such as the figure he was proposing or the suggestion that the payment should be held in his own solicitor's client account. The Court is not persuaded that it was the Plaintiff, rather than the Defendants, who sought to resolve the application. It appears from the correspondence that the Defendants were more proactive, up to and including the offer in their solicitor's letter dated 8 November 2023. If the Plaintiff had accepted that offer, it would have obviated the need for the contested hearing of this application.

d. The Court does not consider that it should have regard to judgments in the separate litigation between Havbell and the Defendants for the purpose of determining whether the Plaintiff should pay the Defendants the costs of their application in these proceedings. If the parties' past conduct is relevant, then the judgment of Ms Justice Pilkington appears more pertinent. The Court was critical of the tactics adopted by the Plaintiff. Significantly, the Court's express indication that it would

welcome submissions with a view to securing an expedited hearing of the substantive claim appears to have been ignored.

e. The Court is not convinced that the Plaintiff was entitled to demand undertakings before agreeing that this motion could precede before the bankruptcy hearing, but the Court has disregarded that issue for the purpose of determining the costs of this motion since the parties reached agreement in that respect.

47. The Court does not accept the submissions that: (a) an application for interim payment of costs would inappropriately generate further cost awards; (b) the Plaintiff had no option as to how he responded to the application; or (c) the Court's approach should be different to its approach to other interlocutory applications. As with any other application, the respondent to an interim payment application has options to reduce the exposure to a further costs order. For example, the Plaintiff could have: (a) moved more effectively and expeditiously to agree the costs so as to obviate the need for adjudication entirely; (b) negotiated arrangements to deal with the application by consent; or (c) volunteered an interim payment subject to adjudication (perhaps coupled with a Calderbank offer) thus obviating the need for this application. Accordingly, the Court rejects the suggestion that the Plaintiff is being penalised for responding to the motion or that the Defendants are engaged in some form of cost "harvesting" (although, that term was not used by the Plaintiff). When a reasonable interlocutory application is brought – such as this one – the respondent can minimise his costs exposure by engaging with the application. If the respondent fails to engage sufficiently to resolve the application appropriately, costs may be awarded against him if the Court rejects his position. The converse is also true - if the application had failed and the interim payment had been refused or only granted on the Plaintiff's terms then he would have sought the costs of the motion. A party which makes a reasonable and timely proposal to settle the costs liability under the original order or in respect of the terms and amount of an interim payment, will be less likely to face a

further liability in respect of the costs of an interim payment application. Unfortunately, the Plaintiff did not adopt that course.

48. The Defendants were substantially successful, and the costs should follow the event in the normal way. It was necessary and appropriate for them to bring the motion. In view of the history of these proceedings and the delays to date, the Court is satisfied that it should measure the costs of this application. In the absence of a draft Bill of Costs but in recognition of the number of times the application has been before the Court and the considerable time spent on submissions, the Court will direct the payment of €6,000 plus VAT.

Conclusion

49. On foot of the undertakings which the Plaintiff's solicitor and the Defendant's solicitor have provided to the Court, the Court is minded to direct the Plaintiff to make an interim payment within seven days of the aggregate sum of €67,750 on account of both the costs awarded to the Defendants in the 20 February 2020 Order and the costs awarded to them on the dismissal of the Plaintiff's appeal from that order. If the parties wish to avail of the invitation in paragraph 36 of this judgment to make oral submissions in respect of whether the interim payment should also take cognisance of the award of the appeal costs or as to the amount of any such allowance then they should inform the Registrar accordingly by 1pm on Monday 27 November 2023, failing which the order will be perfected in the terms outlined above. The Court will also direct the Plaintiff to pay the Defendant the sum of €6,000 plus VAT in respect of the costs of this application (in lieu of adjudication). In view of the range of issues arising the Court will give the parties liberty to apply if any further direction is required.