**THE HIGH COURT**

[2021] IEHC 539

**[2021 No. 3515 P.]**

**BETWEEN**

**RORY MASON**

**PLAINTIFF**

**AND**

**ILTB LIMITED T/A GILLEN MARKETS AND DERMOT BROWNE**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Butler delivered on the 29th day of July, 2021**

1. This ruling primarily concerns two issues arising in consequence of my earlier judgment of 8th July, 2021 [2021] IEHC 477. The first of these is the question of the costs of the interlocutory application which is determined by my earlier judgment and the second is the form of order or orders that the court should now make. The parties have made helpful written submissions on these issues and also on what directions, if any, should now be made to progress the hearing of the substantive action. In light of the detailed submissions made by both parties I do not regard it as necessary to hold a further hearing in relation to these consequential orders.

**Costs**

2. The plaintiff has been successful in obtaining interlocutory relief to prevent steps being taken to progress an investigation into matters referred to in a letter from the defendants' solicitor dated 26th April, 2021 and to prevent his dismissal on the grounds referred to in that letter. Consequently, the plaintiff argues that as he has been successful in the *"event"* or in the outcome of the interlocutory hearing, he is entitled to an order for his costs. The defendants submit that, as there were key facts in dispute between the parties which were not resolved in the interlocutory judgment and which cannot be resolved until all evidence has been heard at the substantive trial, the costs should either be reserved or made costs in the cause.

3. Both parties agree that the applicable legal principles are to found in the Legal Services Regulation Act, 2015 and O. 99 of the Rules of the Superior Courts and, indeed, both point to this Court's judgment in *Thompson v. Tennant* (No. 2) [2020] IEHC 693 as regards the application of those principles in the case of interlocutory injunction. In essence, O. 99, r. 2(3) requires the court to make an order in respect of the costs of any interlocutory application *"save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application".* Order 99, rule 3(1) requires the court, in considering whether to award costs in respect any *"step in any proceedings"* to have regard to the matters set out in s. 169(1) of the 2015 Act. Section 169(1) gives statutory effect to the principle that costs should follow the event unless the court orders otherwise. The section contains a list of the type of matters that a court should have regard to when considering whether or not the default position of costs following the event should apply. No specific argument was directed by the parties, and especially the defendants who are facing an application for costs against them, to any of these matters and, consequently, the court's analysis proceeds from the proposition that costs should normally follow the event unless the court is satisfied that it is not possible at this stage

to justly make an adjudication as to who should bear liability for costs. The defendants' submissions have focused on this issue.

4. The defendants rely on the judgment of Clarke J. (as he then was) in *ACC v. Hanrahan* [2014] IESC 40 which is one of a number of cases dealing with the costs of interlocutory injunctions in circumstances where a fair question has been found to arise on asserted but disputed facts which have not been determined at the interlocutory stage and which will be revisited at the substantive trial. Other cases in the same vein include *AIB v Diamond* [2011] IEHC 505; *Tekenable Ltd v. Morrissey* [2012] IEHC 391; and *Glaxo Group Ltd v. Rowex Ltd* [2015] IEHC 467. It remains to be determined whether the costs provisions of the 2015 Act will have any material impact on this line of authority. Although no argument was addressed by the parties to this issue, I have assumed that this will probably not be the case as the principle that costs should be awarded in respect of interlocutory applications save where it is not possible to *"justly"* make that adjudication was introduced in 2008 and the case law in question expressly considered whether an order for costs could be justly made where a fair question to be tried had been found to exist on the basis of asserted but disputed facts.

5. At para. 8 of their submissions, the defendants identify three key factual issues which they say can only be determined at trial as being:-

   (a) Whether the plaintiff engaged in misconduct in respect of the plaintiff's payment to himself of €14,000;

   (b) What occurred at the meeting on 23rd April, 2021;

   (c) Whether the plaintiff's employment was terminated at the meeting of 23rd April, 2021.

   I am not sure that items (b) and (c) are really separate issues since any decision on whether the plaintiff's employment was terminated at the meeting of 23rd April will depend on what occurred at the meeting of 23rd April. However, I accept that both the nature of the disputed transaction and the events of the meeting of 23rd April 2021 remain very much in issue between the parties.

6. At para. 12 of their submissions, the defendants refer to the two issues on which the court found the plaintiff to have raised a strong case, the second of these being that a decision was made to suspend the plaintiff without notice to him. The first of these is actually mischaracterised by the defendants as being that the defendants' solicitors' letter of 26th April, 2021 amounted to a decision arrived at by the defendants as to the plaintiff's conduct. The issue was never whether the defendants' solicitors' letter of 26th April, 2021 amounted to a decision but, rather, whether the fact that the defendants gave their solicitors instructions in those terms meant that they had already reached a conclusion on the central issue underlying the dispute between the parties, namely the circumstances and/or legality of the €14,000 payment to the plaintiff. At para. 13, the defendants say that significant factual and legal disputes remain in respect of those issues

and, consequently, they submit, at para. 15, that this is *"one of those cases"* where a different picture may emerge at trial as opposed to a case that turns on the adequacy of damages or the balance of convenience which will not be addressed again at trial.

7. Insofar as the defendants' argument might be taken as suggesting that a just adjudication on the costs of an interlocutory injunction can only be made when the interlocutory judgment is confined to issues that arise exclusively at the interlocutory stage (e.g. adequacy of damages or balance of convenience) I must, with respect, disagree. The logical consequence of such a position would be that if the defendant disputes whether a fair question arises, then almost inevitably the costs of the injunction would end up being reserved to the substantive trial. If there is no dispute between the parties as to the threshold issue, it will certainly be easier for a court to make a decision on costs based on the outcome of an injunction hearing in which the central issues have been the adequacy of damages or the balance of convenience. However, to suggest that once there is a significant disagreement, including a factual disagreement on whether the threshold standard is met, then a costs adjudication cannot be justly made, would mean that a defendant, by placing these matters in issue, could ensure that a plaintiff who successfully obtains an interlocutory injunction would be almost automatically denied the costs of doing so.

8. Consequently, I think the court has to focus quite closely on what exactly is disputed as between the parties, whether that dispute is truly a factual one and the extent to which that dispute has had a material bearing on the outcome of the interlocutory injunction. It is, I think, also relevant to bear in mind that, in this case, the threshold standard was not simply that the plaintiff establish a fair question to be tried but, rather, that the plaintiff establish a strong case which will probably succeed at trial (i.e. the *Maha Lingham* standard). It is, I think, easier for a court to accept that a fair question has been raised on asserted but disputed facts than it is for the court to find the existence of a strong case which will probably succeed where all the factual elements of the claim are materially disputed by the defendant. Therefore, it is necessary to be exact about what the issue or issues in the substantive proceedings are likely to be and whether assumptions have had to be made in the plaintiff's favour in relation to those issues which at trial may well transpire not to have been well founded.

9. In my view it is relevant to the question of costs that the fundamental disagreement between the parties – the circumstances and/or legality of the €14,000 payment - is not in fact central to the aspects of the plaintiff's case which the court has found constitute a strong case. To a very large extent the rights and wrongs of the underlying dispute between the parties are separate from the questions raised in the litigation as to whether the steps taken by the defendants consequent on that dispute are lawful or have been taken in a manner which deprived the plaintiff of natural justice and fair procedures. A similar observation can be made in respect of the meeting of 23rd April, 2021. Whilst it is clearly relevant to the legal and contractual status of the parties to determine whether the plaintiff was in fact dismissed at that meeting, it will not actually be determinative of the two issues which the court has found to constitute a strong case. A strong case was

found to exist on the grounds that the first defendant was purporting to establish an investigation into a matter on which it had already reached conclusions (and instructed its solicitor on the basis of those conclusions) and because a decision to suspend the plaintiff was taken at a board meeting when no notice had been given to the plaintiff that the board was considering his suspension. It is legally possible both that an investigation might find the plaintiff to have acted unlawfully as regards the €14,000 while a court might find the defendants to have acted unlawfully in the manner in which that investigation was established and pursued. Obviously, both of these matters remain to be determined, but for present purposes it is significant to note that they are not mutually exclusive. As the Court's decision to grant an interlocutory injunction was based on the strength of the case made as to a breach of fair procedures on the defendants' part, the fact that the circumstances of the payment, and indeed the meeting of 23rd April 2021, remain in dispute between the parties does not preclude a just adjudication on the costs of the interlocutory application.

10. Further, both of the matters found to constitute a strong case are grounded on documentary evidence emanating from the defendants, namely the letter of 26th April, 2021, from the defendants' solicitor, the agenda for the board meeting of 28th April, 2021 prepared by the second defendant and the minutes of that board meeting dated 28th April, 2021. Although I understood the defendants to argue that the plaintiff was not actually suspended (which appears factually correct), I had much greater difficulty in understanding the defendants' argument that no decision to suspend the plaintiff had been taken in light of the minutes of the board meeting referred to. In the defendants' written submissions for the purpose of the interlocutory hearing, it appeared to be acknowledged that *"the company evidenced a decision to suspend the plaintiff pending an investigation into this matter"* (assuming that "evidenced" means provided evidence of a decision which had been made) but had not acted on this decision, although at a later point in the same submission, the defendants state *"there has been no decision to suspend the plaintiff from his duties".* If, despite the minutes of the board meeting, there is some basis for contending that no such decision was taken, the defendants did not place any evidence before the court to support it.

11. In fact, the central focus of the defendants' argument at the hearing of the interlocutory injunction was that the investigation now proposed by the first defendant and to be carried out by an independent expert, would be of such a standard that all of the plaintiff's entitlements to natural justice would be fully respected. Thus, as I understood the defendants' argument, it was primarily a legal one, based on *Rowland v. An Post* [2017] 1 IR 355 to the effect that, as employer, the defendants should be allowed investigate the serious allegation against the plaintiff and that it should not be assumed that the proposed investigation did not meet with all legal requirements. I did not understand the argument to be primarily a factual one, nor that the defendants were in some way disputing the fact of or the contents of the letter of 26th April, 2021 nor the board minutes of 28th April, 2021 nor the agenda circulated in advance of that meeting. Consequently, the determination as to whether the plaintiff's arguments based on those documents give rise to a strong case is not really one which will be revisited at the trial of

the action. Whilst there is a large measure of factual disagreement between the parties regarding the underlying issues – and their respective position on these matters was ventilated in some detail the interlocutory hearing – these were not central to the legal issues arising on nor the determination made as to the interlocutory application.

12. In those circumstances, I do not share the view of the defendants that this is "*one of those cases"* in which findings have been made on the basis of asserted but disputed facts which will be fully revisited at the trial of the action. I do, however, accept the defendants' argument that the order for costs that I propose making in the plaintiff's favour should be stayed pending the outcome of the substantive action both because of the ongoing working relationship between the parties and the fact of ongoing litigation, or perhaps more accurately because of both of those matters in conjunction with each other. I say this because it could never be a general principle that an employee who litigates successfully to maintain his employment should be deprived of his legal costs because of the existence of an on-going employment relationship between the parties. However, the combination of factors in this case make it appropriate at very least that the order for costs that I am now making in the plaintiff's favour should be available for the purposes of set off to the defendants should they succeed at trial.

**Form of Orders**

13. The plaintiff requests the court to make widespread orders in terms of paras. 1, 3, 4, 6, 8 and 9 of his notice of motion and an order restraining the defendants from implementing or giving effect to the board resolution of 28th April, 2021 or the decision made on that date to suspend the plaintiff. As noted in my earlier judgment, the notice of motion does not specifically refer to the suspension of the plaintiff as no notice of the intended suspension had been given to the plaintiff at the time the proceedings were issued.

14. The defendants request that the orders to be made by the court should be restricted to those related exclusively to the impugned process arising out of the matters raised with the plaintiff. As set out in my earlier judgment, I agreed in principle with this submission but noted that difficulties arise in this particular case. The defendants have also indicated that they intend to appeal the interlocutory judgment. The defendants are, of course, fully entitled to bring any appeal they wish to the Court of Appeal and they may well be successful in doing so. However, the orders which the court must now make must reflect the judgment which has been given and cannot be circumscribed because either party wishes to appeal or, indeed, because such an appeal might succeed. If an appeal is brought then it will be a matter for the Court of Appeal to determine how best matters might be arranged between the parties pending the full trial.

15. Both parties made submissions as regards the plaintiff's return to work. The defendants point out that the plaintiff neither attended work nor attempted to do so following the hearing of the injunction and did not, in fact, attempt to return to work until Friday, 9th July, 2021, being the day after judgment was delivered. Issue was taken with the fact that contact was made by the plaintiff's solicitor with the defendants' solicitor rather than directly by the plaintiff with the first defendant company. The plaintiff, on the other hand, complains that that initial request made on 9th July, 2021 envisaging a return to work the

following Monday, 12th July, 2021 was not facilitated and that the defendants only agreed to the plaintiff's return to work on 13th July, 2021 to take effect from 19th July, 2021. The plaintiff makes some play of this stating that it is a matter of significant concern and disquiet and requests an order as contemplated in para. 52 of the judgment specifically to facilitate the plaintiff's return to work.

16. The court regards the attitude taken by both sides on this issue to be unduly sensitive. Firstly, I do not think that the mere fact that the defendants had not acquiesced in or facilitated a return to work on 12th July which had only been requested the previous working day (the 9th July being a Friday) evidences any bad faith or lack of co-operation on the defendants' behalf. It appears from the plaintiff's submissions that the confirmation he sought that the defendants would facilitate the plaintiff's return to work was received on the 13th July, which was the second working day after the request was first made. Similarly, given that the parties have now already engaged in extensive litigation, I regard it as overly sensitive of the defendants to object to correspondence having issued from the plaintiff's solicitor rather than the plaintiff himself. As the first defendant is a corporate entity and the plaintiff is the managing director of that company, it is a little unclear precisely who the defendants are saying the plaintiff should have contacted in order to arrange his return to work. On the assumption that the plaintiff did in fact return to work on the 19th July and that that return was facilitated by the first defendant as was indicated on 13th July, 2021, I do not propose making any formal order in that regard but I will grant the parties liberty to apply lest any difficulty arise in respect of the plaintiff's return to or remaining at work pending the substantive hearing of this matter.

17. That said, I will make an order in terms of para. 3 of the plaintiff's notice of motion restraining the defendants from proceeding with any investigation of and concerning the plaintiff pertaining to any of the matters set forth in the correspondence sent on behalf of the first defendant by its solicitors on 26th April, 2021; an order restraining the defendants from implementing or giving effect to the board resolution of 28th April, 2021 or the decision made on that date to suspend the plaintiff and an order restraining the defendants from publishing any matter of or concerning the plaintiff pertaining in any way to alleged wrongdoing referred to in the letter sent on behalf of the first defendant and dated 26th April, 2021. Obviously, all orders relating to the defendants will also apply to the servants and agents of either defendant. I do not propose making a general injunction restraining the defendants from taking any steps directed at the termination of the plaintiff's employment with the first named defendant but I will make an order restraining the defendants from taking any steps directed at the termination of the plaintiff's employment with the first defendant arising out of the matters set out in the correspondence from the first defendants' solicitors dated 26th April, 2021.

**Directions**

18. The plaintiff, in his submissions, includes a suggested timetable for the exchange of pleadings to commence with delivery of a statement of claim by 30th July, 2021. In their submissions the defendants take issue, with some justification, with the fact that a

statement of claim has not been delivered to date in circumstances where the plaintiff has now obtained an interlocutory injunction restraining the defendants from acting. It is clearly unsatisfactory that the plaintiff should have the benefit of such an injunction on a continuing basis without actively progressing the substantive trial to which the interlocutory injunction relates. The defendants submit that its statement of claim must be delivered without delay and further direction should be deferred until the scope of that pleading is known. In circumstances where the defendants, being the parties most prejudiced by any delay, are not actively seeking further directions beyond the delivery of a statement of claim, I do not propose to make those directions at this stage. I will, however, direct that, unless the plaintiff's statement of claim is delivered by close of business on Friday 6th August 2021 the injunction hereby granted will lapse. The date suggested by the plaintiff was 30th July but given the proximity of this judgment to that date and the serious consequences of failing to comply with this direction I want to ensure that the plaintiff has a full week to ensure that the statement of claim is delivered. I would, thereafter, urge the parties to adhere to a timetable along the lines of that set out at para. 8 of the plaintiff's submissions, but I will not make a formal direction in that regard bearing in mind that the defendants have not yet seen the plaintiff's statement of claim and, therefore, cannot at this point know the extent to which they might wish to engage in the steps provided for in those directions nor the time it might take them to do so.