THE HIGH COURT

[2024] IEHC 308

[Record No. 2023/2159P]

BETWEEN:

JACQUELINE BYRNE, PATRICIA HYSLOP

and KATHLEEN KERRIGAN

PLAINTIFFS

-AND-

ANNE GRANT ARNOLD

DEFENDANT

JUDGMENT of Mr Justice Kennedy delivered 5 June 2024

1. On 19 March 2024, I delivered judgment ("the Judgment") on two interlocutory motions in proceedings relating to an intestate estate, granting orders to restrain the dissipation of part of the proceeds of sale of the family home and dismissing an application to strike out the claim. This judgment concerns the costs of those applications, including whether a failure to comply with section 14 of the Mediation Act 2017 is relevant to costs. I propose to consider the mediation point before dealing with other costs issues, having first set out the legal principles.

The Law

The 2015 Act

2. Section 168 of the Legal Services Regulation Act 2015 ("the 2015 Act") deals with the jurisdiction to award costs:

> "*(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—*
>
> *(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, or*
>
> *(b) ...*
>
> *(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.*"

3. Section 169 confirms the presumption that costs generally follow the event and identifies factors relevant to the judicial discretion:

> "*(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—*
>
> *(a) conduct before and during the proceedings,*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
>
> *(c) the manner in which the parties conducted all or any part of their cases,*

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(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."

Order 99

4. Order 99, rule 2(3) of the Rules of the Superior Courts ("the RSC") provides:

"*The High 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.*"

5. The general principles that apply to the awarding of legal costs were helpfully summarised by Murray J. in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183 as follows:

"*…the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:*

(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) In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s.169(1) (O.9, r.3(1)) [*sic*].

(c) In a case where the party seeking costs has been 'entirely successful in those proceedings', the party so succeeding 'is entitled' to an award of

costs against the unsuccessful party unless the court orders otherwise (s.169(1)).

(d) In determining whether to 'order otherwise' the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s.169(1)).

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise 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)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is 'partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a))."

6. The courts have considered the appropriateness of awarding costs when the courts have yet to determine the merits. In *ACC Bank plc v Hanrahan* [2014] 1 IR 1, Clarke J. noted that, whereas some motions are very much "*events*" in themselves, being finally decided at interlocutory stage, others raise issues which will be dealt with on an "arguable case" basis and will be revisited at trial. He stated at p. 6:

"*[10] …different considerations may apply in cases where the interlocutory application will, to use language which I used in Allied Irish Banks v. Diamond [2011] IEHC 505 and which Laffoy J. cited in Tekenable Limited v. Morrissey & ors [2012] IEHC 391 'turn on aspects of the merits of the case which are based on the facts'. It is true that both of those cases concerned the costs of an interlocutory injunction. One of the issues which, of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has*

established a fair issue to be tried and, indeed, whether the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on those questions is dependent on facts which will not be determined at the interlocutory stage save for the purposes of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence.

[11] However, the point made in Allied Irish Banks v. Diamond [2011] IEHC 505, [2012] 3 IR 549 is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the court at the interlocutory state [*sic*]*, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts as finally determined by the court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage, for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie. It is not necessarily just that a plaintiff who secures an interlocutory injunction on the basis of putting up false facts should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted.*"

7. Likewise, in *Glaxo Group Ltd v Rowex Ltd* [2015] 1 IR 185, at p. 209, Barrett J. explained that the question as to whether to award or reserve costs turns greatly on whether a different picture may emerge at trial, noting:

"*A distinction falls to be drawn between (a) cases where the decision on an interlocutory injunction application turns on issues in respect of which a different picture may emerge at trial and (b) cases where the application turns on matters*

such as adequacy of damages or balance of convenience which will not be addressed again at the trial."

8. In *Hafeez v. CPM Consulting* [2020] IEHC 583 and *Paddy Burke (Builders) Limited (In liquidation and in receivership) v Tullyvaraga Management Company Ltd* [2020] IEHC 199, Keane J. and McDonald J. did not award the costs of an interlocutory injunction outright because of the risk of a different picture emerging at trial.

9. The Mediation Act 2017 ("the 2017 Act") provides as follows:

"*14. (1) A practising solicitor shall, prior to issuing proceedings on behalf of a client—*

(a) advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings,

(b) provide the client with information in respect of mediation services, including the names and addresses of persons who provide mediation services,

(c) provide the client with information about—

(i) the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and

(ii) the benefits of mediation,

(d) advise the client that mediation is voluntary and may not be an appropriate means of resolving the dispute where the safety of the client and/or their children is at risk, and

(e) inform the client of the matters referred to in subsections (2) and (3) and sections 10 and 11.

(2) If a practising solicitor is acting on behalf of a client who intends to institute proceedings, the originating document by which proceedings are instituted shall be accompanied by a statutory declaration made by the solicitor evidencing (if such be the case) that the solicitor has performed the obligations imposed on him or her under subsection (1) in relation to the client and the proceedings to which the declaration relates.

(3) If the originating document referred to in subsection (2) is not accompanied by a statutory declaration made in accordance with that subsection, the court

concerned shall adjourn the proceedings for such period as it considers reasonable in the circumstances to enable the practising solicitor concerned to comply with subsection (1) and provide the court with such declaration or, if the solicitor has already complied with subsection (1), provide the court with such declaration.

…

21. In awarding costs in respect of proceedings referred to in section 16, a court may, where it considers it just, have regard to—

(a) any unreasonable refusal or failure by a party to the proceedings to consider using mediation, and

(b) any unreasonable refusal or failure by a party to the proceedings to attend mediation,

following an invitation to do so under section 16 (1)".

10. The legislation implemented recommendations contained in the Law Reform Commission's report on *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010). In that report, the Law Reform Commission observed:

"*1.12… parties to specific types of disputes should nearly always be encouraged to consider mediation or conciliation...disputes which are most amenable to resolution through mediation and conciliation include: appropriate family law disputes; appropriate employment law disputes; property disputes and, in particular, boundary disputes; probate disputes and, in particular, section 117 applications under the Succession Act 1965; appropriate medical negligence claims; and commercial and consumer disputes.*

1.14 … not all cases are suitable for resolution by ADR, just as the court based adversarial process is not suitable for all cases. The decision to use ADR should be made on the basis of a range of factors including how best to serve the specific interests of the parties and how best to ensure that justice is accessible, efficient, and effective for the parties involved."

11. The courts have similarly endorsed the desirability of exploring alternatives to litigation where appropriate. For example, O'Donnell J. (as he then was), in *Galway City Council v Samuel Kingston Construction Limited* [2010] 3 IR 95, at pp. 98-99,

encouraged the search for other methods of dispute resolution. Likewise, Hogan J. commented in *Lyons v Financial Services Ombudsman* [2011] IEHC 454, at para. 37, that "*mediation is a thousand times preferable than litigation*".

Potential Cost Consequences of Failure to Comply with the Mediation Act

12. Section 14 of the 2017 Act requires every solicitor issuing proceedings on behalf of a client to advise their client in the terms mandated by the provision and to swear and file a statutory declaration confirming that they have done so. The statutory requirements were not met on this occasion. Early in the hearing, because this appeared an obvious case for mediation, I asked as to whether the statutory declaration had been filed. Surprisingly, no such declaration had been filed nor was it suggested that the advice expressly required by section 14 had been provided. These steps should have been completed before proceedings issued. The limited exceptions do not apply here, so the statutory declaration should have accompanied the Plenary Summons.

13. I was concerned by the omission, because the 2017 Act obliges the Court to adjourn proceedings in the event of any failure to meet the requirement. In order to comply with the statutory requirement without subjecting the parties to the delay and expense involved in a wasted hearing (including a costs order at the Plaintiffs' expense as the party in default), I rose to allow the advices to be provided in accordance with section 14 (but litigants should note that the courts will not necessarily extend such latitude in future if such situations were to recur). Following that adjournment, the Plaintiffs' counsel confirmed that the statutory requirement had been complied with and the Plaintiffs had indicated their willingness in principle to mediate. However, the two sides had different views as to rules of engagement. I encouraged both sides to

reflect further on the possibility of mediation, but I decided to proceed with the hearing, on the basis that the parties could progress mediation thereafter if appropriate.

14. I invited submissions as to whether the section 14 issue was relevant to any costs award in respect of the motions. The Plaintiffs submitted that it was not because: (a) the proceedings were urgent given potential limitation issues and the risk of dissipation, a concern heightened by the Defendant's failure to engage as she sought to sell the disputed home; (b) there was no reality to mediating given the Defendant's attitude. Any attempt at mediation at that point would have been rebuffed; (c) the Defendant had not proposed mediation either - it was more incumbent on her to do so, as she had the disputed assets; (d) the mediation requirement was inapplicable given the urgency, the Defendant's attitude and the necessity, reflected in the Judgment, for the Plaintiffs to issue proceedings and seek a Mareva injunction; (e) any mediation at the outset would have taken place without disclosure regarding the disclaimers. The Plaintiffs could only determine the strengths of their case following discovery; (f) the 9 May 2023 Order of Mr. Justice O'Moore did not impose any requirements as to mediation; and (g) section 14 has no bearing on costs. Section 169(1)(g) of the 2015 Act only applies where the Court has invited the parties to mediate or negotiate.

15. The Defendant submitted that the failure to provide the declaration suggested that, prior to initiating the proceedings, no consideration was given to the possibility of referring this difficult family dispute to mediation as required by law.

16. As appears from many recent authorities including the decisions of Dignam J. in *Gary Keville Transport Limited v MSC (Mediterranean Shipping Company) Limited* [2022] IEHC 544 and the Court of Appeal in *Mascarenhas v Karim* [2022] IECA 48, an unreasonable refusal to engage in mediation or negotiations may, depending on the circumstances, be a relevant factor when determining the appropriate order for costs.

Section 21 of the 2017 Act provides that the Court, in awarding costs, can have regard to "*any unreasonable refusal*" or failure by any party to consider using mediation or to attend mediation following an invitation from the Court to do so pursuant to section 16. There is no suggestion here of an unreasonable refusal to attend mediation. Nor was there an invitation pursuant to section 16, so section 21 is not engaged. The issue here is the breach of statutory procedures prior to launch of proceedings (which might or might not have led to mediation).

17. The requirements of section 14 are not unreasonable or burdensome. In my view, prior to its enactment, lawyers acting in their client's best interests should already have explained to their clients the relevant options, including their respective advantages, disadvantages, risks, costs and benefits (just as a doctor should explain any practical alternatives to surgery). Lawyers already needed to consider with the client what alternatives to litigation might be realistic, such as negotiation or mediation.

18. Section 14 does not oblige plaintiffs to mediate. Nor does it oblige their lawyers to tell them to do so. In some cases, litigation may be deemed necessary to protect the client's position. Section 14 does not prevent solicitors from warning the client if they consider that mediation may be inappropriate, premature or unlikely to succeed in the particular circumstances. However, a plaintiff's solicitor must advise the client to consider mediation. The statutory duty is to explain the option, facilitating an informed decision by the client, allowing them to consider alternatives to litigation (since ultimately it is the client who must decide how to proceed). While the solicitor must inform the client of the possibility of mediation and its benefits as mandated by section 14, the solicitor is entitled (and, in my view, obliged) to supplement that advice where appropriate with any countervailing views as to the feasibility of mediation in the circumstances. Risks or downsides must also be considered. The client's strategy

should assess the potential advantages and disadvantages of its options, including negotiating or mediating (and the timing of any initiative). Clients may conclude that mediation is not appropriate in particular circumstances or at particular points. Section 14 facilitates an informed choice.

19. For obvious reasons, the Oireachtas seldom interferes in lawyer/client relationships. Section 14 protects clients by ensuring that they are fully informed as to options which may, *inter alia*, reduce their exposure to cost and risk. The provision also advances the public interest, discouraging unnecessary recourse to the courts (and legal expense) and promoting alternatives which may lead to outcomes which can be in the interests of all parties. The provision thus facilitates the earlier, cheaper, resolution of disputes. The public interest is demonstrated by the fact that the Oireachtas has imposed the extraordinary requirement of a statutory declaration by the Plaintiff's solicitor confirming compliance and the stipulation that litigation subject to the provision (i.e. most civil claims) cannot proceed without the declaration.

20. The public interest in encouraging alternatives to litigation was also referenced by Irvine J. (as she then was) in *Atlantic Shellfish Limited v Cork County Council* [2015] 2 IR 575. Referencing a provision in the Rules of the Superior Courts which predates section 14 at p. 584, she noted the:

> "*evolving State and judicial policy which seeks to encourage the increased use of ADR wherever possible with the objective of improving the management and conduct of time consuming and costly disputes, while at the same time reducing the demands of such litigation on scarce judicial resources*".

21. Twomey J. also noted the public interest considerations in *Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform* [2022] IEHC 219 ("*Word Perfect*"). When considering whether the Court should have regard to an unreasonable failure to engage in mediation, Twomey J. commented:

> "*…as noted by the Supreme Court in Tracey v. Burton, there is more at stake than just the financial interests of the parties (as to how much costs are paid). There is also the public interest in ensuring that court resources are not unnecessarily wasted, particularly where an offer of mediation might have led to a saving of those resources*".

22. These proceedings should not have been issued until the statutory requirements had been met. This is not simply a matter between the Plaintiffs and their solicitors, since compliance with section 14 is in the public interest, as well as the interest of the individual clients. While the matter was initially urgent, compliance would not have unduly delayed the process. The issue could have been addressed while proceedings were being drafted. Accordingly, I do not accept that the urgency justifies the default. Conceivably, rare situations could arise in which applications must be made so urgently that it is truly impossible to furnish mediation advice prior to launching proceedings. If that were so, then the advice should be given at the earliest opportunity. However, no attempt was made to address the requirement during the months which elapsed before the hearing of the application. No satisfactory explanation was proffered for the intervening inaction.

23. The assessment that the Defendant would not have engaged with mediation may be correct. Tactically, there might have been reasons for the Plaintiffs to conclude that they should not propose mediation at that point. However, neither of these points address or excuse the failure to follow the section 14 requirements, steps designed to ensure that all plaintiffs are fully advised before embarking on litigation. The possibility (or even the likelihood) that the litigants might have decided that the time was not right for mediation does not release the Plaintiff's solicitor from the duty to comply with section 14. Nor does the possibility that a mediation would have failed.

24. There are two further reasons that the Court should be concerned about any failure to comply with the statutory obligation. It may well be that the Plaintiffs would have been unlikely to propose mediation prior to issuing proceedings and that the Defendant would have rebuffed any such overture in any event. Accordingly, the chances of the parties actually engaging at that point may have been low. However, the chances were not zero. Even if there was a 5% chance of such engagement at the outset, then the Plaintiffs should have been encouraged to at least consider an option which, if successfully pursued, could offer significant benefits for the parties and for the Courts, prior to significant costs being incurred. Secondly, there is a benefit to providing such advice at the outset. Even if the time is not right at that point for the plaintiff to propose mediation or for the defendant to engage, a seed is planted. Most cases eventually settle before trial – even if the suggestion of negotiation or mediation at an early stage does not bear fruit immediately it may ultimately help the parties engage sooner than would otherwise be the case.

25. A further benefit of the statutory provision is that it overcomes some parties' reluctance to "show weakness" by making the first move. In my view, sophisticated litigators are less inclined to consider a nuanced willingness to negotiate or mediate as a sign of weakness. If all parties refused to make the first move, then no dispute would ever settle. However, if there is any such nervousness, then section 14 offers an ideal basis for an overture which can legitimately be presented as compliance with statutory and professional requirements. This should counter any such sensitivity.

26. I am equally unconvinced by the Plaintiffs' other submissions that the Court should disregard the issue:

a. I accept that the proceedings were urgent given the risk of dissipation and the Defendant's failure to engage. However, there was time to comply with section 14 while proceedings were being drafted.

b. The limitation issues do not explain the lacuna. Whether this case is statute barred will depend on the fraud extension. The limitation risk would not have changed if the Plaintiffs' solicitors had taken a short time to advise their clients in accordance with section 14 – no imminent deadline was identified.

c. The Plaintiffs may be right in concluding that there was little reality to mediating before issuing proceedings, given the Defendant's failure to engage. However, that does not affect the section 14 obligations.

d. The suggestion that the Defendant did not propose mediation is irrelevant, as is the suggestion that she should have taken the initiative as she had the disputed assets. The statutory duty rests with the Plaintiffs' solicitors.

e. Any submission that section 14 of the 2017 Act was inapplicable is inconsistent with the words of the provision. The urgency, the non-responsiveness of the Defendant and the necessity for the Plaintiffs to seek a Mareva injunction do not change the position.

f. I disagree with the suggestion that section 14 did not apply because any mediation at that stage would have taken place without knowing the full picture regarding the disclaimers and because the Plaintiffs could only fully assess their strengths after discovery. The Plaintiffs did not need discovery given their own familiarity with the factual position nor need that issue have delayed the negotiations. In any event, I expect that if there had been a mediation, the Plaintiffs would have requested sight of the disclaimers and copies would have been informally provided. It would have been difficult for the Defendant to

credibly resist such a request. Accordingly, although formal discovery would come later if the litigation proceeded, I expect that the documents produced as exhibits to the affidavits would have been forthcoming in any mediation.

g. In any case, there will always be "known unknowns", which can influence the timing of any negotiation or mediation. Sometimes, in order to assess their legal position, parties may genuinely need to await the close of pleadings, the exchange of discovery or of witness statements or expert reports, the opening of the case or the cross examination of each side's witnesses. Such points may or may not be legitimate reasons to refrain from prematurely committing to mediation in particular cases or at particular points. *IEGP Management CLG v Cosgrave* [2023] IECA 128 is an example of a case in which mediation was deemed premature or inappropriate at a particular point. Whether mediation is premature will depend on the circumstances, but it would be wrong to rule out negotiations or mediations early in proceedings solely because the parties have only limited visibility of their strengths and weaknesses. That could be said in almost every case. The counterargument is that rejecting or delaying opportunities to negotiate or mediate could also have unpredictable costs, risks and adverse consequences. Most negotiated settlements involve a leap in the dark to some degree. Litigants, like businesspeople, must sometimes reach a decision based on the best available information, knowing that the outcome at trial could be better (or worse) but that there are also costs and risks associated with delaying such engagement. In some cases - but perhaps not as many as might be thought - waiting for more information may be prudent. The essential dynamic is that earlier negotiations offer greater potential cost savings, but each side may be less informed as to the

merits (and their position may improve – or disimprove – if they delay in engaging). Other factors may affect the optimum timing in particular situations. Clients and lawyers must balance such competing factors when deciding whether and when to mediate. However, even if mediation would be premature, the Plaintiff's solicitors must still comply with section 14.

h. The Plaintiffs' written submissions suggested that no issue arose because the Court did not direct that the Plaintiffs should be advised as to mediation when it dealt with the Plaintiffs' original application for *ex parte* relief. I agree that section 169(1)(g) of the 2015 Act and section 21 of the 2017 Act do not apply, but I am not satisfied that that resolves the issue, nor can the High Court's direction be taken as excusing the breach of section 14. The Court was dealing with the busy Chancery List and concerned with the immediate interim application. There is no suggestion that its attention was drawn to the breach of section 14 (although, if the Plaintiffs' legal team had themselves been aware of the issue, then they would have been bound to draw the Court's attention to the issue). The fact that the issue was not identified earlier in the proceedings is the Plaintiffs' responsibility and does not excuse the noncompliance. Indeed, such a submission is inconsistent with the terms of section 14. If the issue had been raised, the Court would have insisted on immediate compliance before the matter progressed. It would have had no jurisdiction to do otherwise.

27. The Plaintiffs submitted that the Court should disregard the issue when dealing with costs because section 14 of the 2017 Act was a matter between solicitor and client, the Court has no supervisory jurisdiction in that context and compliance with the provision is not relevant to the judicial discretion as to costs. Furthermore, section

169(1)(g) only applies where the parties unreasonably refused to entertain the Court's invitation to mediate.

28. I agree that Section 169(1)(g) is inapplicable. However, I consider that the Courts should take some account of a material breach of section 14 and that I should thus have regard to the failure to comply with the statutory precondition to issuing proceedings, a provision introduced as a public interest measure to avoid unnecessary litigation and to avoid unnecessary recourse to the courts. Such a default is a relevant consideration when exercising the statutory discretion as to costs. I am entitled to have regard to the breach of the legislation either in the exercise of the Court's inherent jurisdiction or as an element of Section 169(a) (conduct before and during the proceedings) or (c) (the manner in which the parties conducted all or any part of their cases). I consider that the situation in this case is similar to the *Word Perfect* scenario, in which Twomey J. concluded that, although s. 169(1)(g) did not apply, the Court could take into account the party's conduct before and during the proceedings pursuant to ss. 169(1)(a) and (c) of the 2015 Act.

29. As I have noted, if such a failure to comply with section 14 were to occur in future, the Court may adjourn a hearing (at the Plaintiffs' expense) and stay the proceedings until the obligations had been discharged. Significant cost sanctions will be likely in any event. I did consider whether a deduction of the order of 10-15% might be appropriate. However, I propose to make a relatively modest reduction to any cost order in the Plaintiffs' favour on this occasion. Courts may be less lenient in future.

Negotiations

30. When exercising my discretion, I am entitled to have regard to any proposals to settle the proceedings or the applications. However, there was no proposal from the

Defendant which was sufficiently concrete and unqualified to justify a departure from the normal approach to costs, so I do not intend to make any deduction on that ground.

Delay in delivering the Statement of Claim

31. A further issue concerned the Plaintiffs' admitted failure to deliver the Statement of Claim within the time prescribed by the Rules of the Superior Courts (or, indeed, by the time of the hearing before me). No satisfactory explanation was offered for this delay. As Supreme Court decisions such as *Merck Sharpe & Dohme Corporation v Clonmel Healthcare Limited* [2020] 2 IR 1 and *Charleton v Scriven* [2019] IESC 28 make clear, the fact that interlocutory injunction applications (or appeals) are pending generally need not and should not delay the substantive action.

32. Although the Plaintiffs suggested that they considered it appropriate to await the outcome of the strike-out application, that explanation was unconvincing because: (a) they repeatedly and robustly submitted that the application was doomed to fail, so it is difficult to see why they should feel reluctant to progress their claim until it was resolved - in general, a confident plaintiff will deliver its Statement of Claim without delay; (b) when such motions are dealt with, it is desirable that the plaintiff's claim is properly pleaded to assist the Court in its determination as to whether or not it is bound to fail; and (c) parties should not unilaterally take it upon themselves to disregard their obligations under the RSC (which do not mandate such delay).

33. It is relevant that my task in dealing with the two applications was complicated by the non-delivery of a Statement of Claim, all the more so because the Plaintiffs' position on key issues (including whether their claim was derived from their mother's or their father's estate) shifted during the dispute. This concerned me when deliberating on whether the Plaintiffs had demonstrated an arguable case.

Defendant's objections to any cost award on injunction application

34. The Defendant submitted that the Plaintiffs only obtained a limited order that still permitted the Defendant to invest the monies in Irish property as she had wished. Because the Defendant had successfully resisted broader reliefs sought by the Plaintiffs, she had won "the event", as the order allows her to invest the funds in property, as she had been seeking to do, or, in the alternative, honours were shared. I agree that the Plaintiffs' demands went beyond their reasonable expectations in terms of interlocutory relief. However, the Plaintiffs, rather than the Defendant, largely succeeded on both applications, and they are presumptively entitled to their costs.

35. The Defendant's other main submission was that it would be appropriate to reserve costs for both motions because the factual matrix developed and interrogated at trial could affect the determination as to who should bear the costs. The Plaintiffs' claim was found merely to be arguable, and there were issues and conflicts with regard to the evidence on both sides. Such conflicts will need to be resolved at trial. If the Court determines that the disclaimers were properly executed (in the case of the Second Plaintiff, with her authority) or that the claims are statute barred, it would arguably be appropriate for the Defendant to obtain the costs of these motions. I disagree. I accept that, particularly when the evidence is finely balanced on the low "arguable case" threshold, it may be fair to reserve the costs of an interlocutory application. However, the Plaintiffs' application resulted from the Defendant's extraordinary failure to engage. Accordingly, even if the Defendant were to succeed in the ultimate defence of these proceedings, she would remain the party primarily responsible for the applications. Unless there were to be a general rule to reserve the costs of all successful interlocutory injunctions (and I think such a general rule would be going too far), costs can and should be awarded in respect of this application irrespective of the result at trial. Likewise,

once the position as to the disclaimers was clarified, the strike-out application to the proceedings had little chance of success. Accordingly, the Defendant should bear those costs, irrespective of the outcome at trial.

Conclusion

36. Apart from the section 14 and the Statement of Claim issues, several section 169 factors weigh in the Plaintiffs' favour. They succeeded on both applications and are presumptively entitled to their costs, both in respect of interlocutory applications and because the Court is in a position to adjudicate "*justly*". The question is whether I should depart from the presumptive award in response to the two matters identified for consideration in that regard.

37. I consider that the Plaintiffs are entitled to their costs on the motions and that any reduction by reference to the two factors should be limited. For the reasons outlined, I will award the Plaintiffs' 95% of the "party and party" costs on each application. As proposed by the Plaintiffs, there will be a stay on the costs order pending the determination of these proceedings. The 5% reduction is intended to reflect the Plaintiffs' defaults, primarily with regard to section 14, but also in delivering their Statement of Claim.

38. The terms of the interlocutory injunction should be:

> "*a mandatory injunction restraining the Defendant and any other person on notice of the making of this order to hold at least €135,000 of the proceeds of the sale of 37 Casino Road, Marino, Dublin 3 – Folio DN428128 of the County of Dublin on escrow or agreed joint deposit account pending the determination of the proceedings, save that, in the alternative, the Defendant has liberty to invest in Irish real estate with an unencumbered value of no less than €135,000 on the undertaking of the Defendant and her solicitor (Mrs Gallogly) to the Court that they will notify the Plaintiffs' solicitors (Messrs Dermot McNamara & Company)*

of such investment within 14 days of its completion confirming the undertaking to the Court by the Defendant that she will not take any step with the object or intention of reducing that level of equity to less than €135,000 by, for example, further borrowings or failing to make the required payments."

39. Finally, to return to the subject of mediation, I would still encourage the parties in this case to consider mediation or negotiation. Without ascribing blame to either side, it seems to me that the current lack of engagement may be partly due to a mutual misunderstanding of each side's position, with megaphone diplomacy shedding more heat than light. While I make no direction, I do consider that each side and their advisors would be wise to reflect at this stage on the possibility of a mediation or similar process (without preconditions) before even more significant costs are incurred.

40. Indeed, in most disputes, prudent litigants - plaintiffs or defendants - and their advisors, will reflect upon the alternatives before proceedings are issued. This is particularly important in family, business and partnership disputes, but it is always wise for parties and their advisors to consider the alternatives before assuming the costs and risks of litigation. Section 14 simply underscores the importance of good professional practice in this regard.