APPROVED **[2026] IEHC 436**

P.2026.0000021

Between

GDL MANAGEMENT GROUP PUBLIC LIMITED COMPANY

Plaintiff

and

BERT'S PROPERTIES LIMITED

Defendant

JUDGMENT of Mr Justice Micheál O'Connell delivered on 3 July 2026

Introduction

1. This judgment relates to the costs of an interlocutory motion to restrain the advertisement of a winding-up petition that was withdrawn by the Plaintiff, which instead paid the sum that was the subject of the Defendant's statutory demand, and which now intends to proceed with the substantive action to recover that sum (and more) from the Defendant.

Background

2. The Defendant is a building contractor and claims to be a creditor of the Plaintiff on foot of works done for the Defendant and invoiced on 12 August 2025 (8 invoices) and 29 September 2025 (7 invoices). The Plaintiff is a property company which, through its subsidiary, provides homes for the purpose of the Mortgage to Rent Scheme. In email correspondence in September and October 2025, issues had been raised by the Plaintiff in relation to works carried out, works omitted, and the format and timing of the invoices, and a meeting was held between representatives of the parties on 3 October 2025. In the

course of October 2025, however, the relationship between the parties broke down and an impasse appears to have developed in which the Plaintiff refused to pay any invoices pending completion and certification and the Defendant refused to carry out any further works pending discharge of its invoices.

3. On 7 November 2025, the Defendant issued a demand pursuant to section 570 of the Companies Act 2014 for the sum of €489,338.02. The statutory demand included a threat to issue a petition to wind up the Plaintiff and to advertise such a petition in national daily newspapers. The Plaintiff did not retain solicitors at this stage but wrote to the Defendant on 14 November 2025 outlining the basis on which it contended that the sums due on the invoices were not payable. Solicitors for the Defendant responded by letter dated 18 November 2025 and the Plaintiff responded to those solicitors on 26 November 2025.

4. A petition ("*the Petition*") was presented on 10 December 2025 seeking the winding up of the Plaintiff and asserting a debt in the lesser sum of €405,750.60, noting that two invoices had overstated the sums due and that consequently the statutory demand misstated the amount due. The Petition had a return date of 19 January 2026.

5. After the Plaintiff eventually engaged solicitors on 22 December 2025, those solicitors wrote to the Defendant's solicitors on 2 January 2026, asserting that the debt was contested and threatening proceedings seeking an injunction restraining the advertisement of the petition. They offered that a sum equivalent to the sum claimed (the precise sum was clarified in subsequent correspondence) would be held by their firm pending, in the first instance, a mediation of the dispute, or if that failed, legal proceedings between the parties. After further exchanges, on 6 January 2026, the Defendant's solicitors offered to engage in mediation provided it was conducted on or before 9 January 2026, and following another email from the Plaintiff's solicitors, the

Defendant indicated a willingness to proceed with a mediation in the week ending on 16 January 2026. The Plaintiff's solicitors rejected that timeline and offered mediation on 3 February 2026, but this was not agreed.

6. While these exchanges were taking place, on 6 January 2026, the Plaintiff issued proceedings seeking multiple substantive reliefs including damages for breach of contract and a permanent injunction restraining the advertising or prosecution of the Petition. On 9 January 2026, application was made *ex parte* for short service of a motion to enjoin the advertising or progress of the Petition, grounded on an extensive affidavit setting out a detailed history of the matter and stating, apparently for the first time, that the advertising of the Petition would have particularly serious consequences in circumstances where an initial public offering of the shares in the Plaintiff was imminent. Short service of a motion for interlocutory relief returnable for 15 January 2026 was granted. Reporting restrictions were imposed in respect of the injunction proceedings.

7. On 15 January 2026, the Defendant filed a replying affidavit and gave an undertaking not to advertise the Petition pending the next adjourned date for the injunction motion, which was 22 January 2026. The return date for the Petition was 19 January 2026, and the Petition was listed in the Legal Diary in the ordinary way (no restrictions on reporting or publication of the Petition in the Legal Diary had been ordered). On 19 January 2026, expressing some doubts as to the entitlement of the Court to impose reporting restrictions, the Court (Oisín Quinn J) temporarily imposed reporting restrictions and adjourned the Petition to the same date as the injunction motion, 22 January 2026.

8. Between 15 January 2026 and 22 January 2026, the Defendant moved from adopting a neutral approach to reporting restrictions to rather strongly opposing the Plaintiff's

request that the issue be deferred. Accordingly, the issue of reporting restrictions was listed for hearing at 2pm on 22 January 2026.

9. Shortly before 2pm on 22 January 2026, the Plaintiff's solicitors emailed the Defendant's solicitors advising that the Plaintiff, while maintaining the position that the Petition was an abuse of process, would nevertheless pay the demanded sum (as corrected) and seek to recover it in their substantive proceedings. The matters were then adjourned for one week to allow the payment to be made and to fix a date for the hearing of any applications in respect of costs. That payment was duly made through the parties' solicitors' offices.

10. Both parties claim an order for costs in their favour as a primary position, but it is difficult to identify a rationale for awarding the costs of the injunction motion to the Plaintiff. In truth, the choice is between (a) an order for costs in favour of the Defendant, (b) an order either reserving costs to the trial of the action or making the costs costs in the cause, or (c) some variation of, or intermediate position between, (a) and (b).

Some labelling

11. There are different categories of circumstances in which a motion, or an entire action, might be disposed of without a determination on the merits, and for present purposes, some labelling may assist:

    (a) *Withdrawal*: this covers discontinuance by a plaintiff, or a plaintiff's own unilateral application to strike out, dismiss or otherwise withdraw their action or motion.

    (b) *Concession*: this covers cases where the defendant to the action or respondent to the motion unilaterally and expressly concedes the action or motion.

    (c) *Procedural strike-out*: this covers termination of a plaintiff's action or motion, other than by the plaintiff's own act or application, such as, for example, where an action is dismissed for want of prosecution or where an action or motion is struck out for procedural non-compliance (strike-out and dismissal under Order 19 rule 28 of the RSC would not ordinarily fall into this category, as there would ordinarily be an assessment of the merits).

(d) *Default award*: this is the mirror image of procedural strike-out where the defendant or respondent, for want of appearance or pleading or otherwise, suffers a default order on a motion, or an award or decree in an action, without a contest on the merits.

(e) *Mootness*: where the court of its own motion or on the application of one or both parties is satisfied that events have overtaken the action or motion, such that no purpose is served by deciding it. Mootness may of course be brought about by the act(s) of one or other party or indeed both, and in that respect a case that is ostensibly moot might in substance be labelled as a case of withdrawal or concession for the purpose of allocating liability for costs.

(f) *Compromise*: this covers a variety of situations where the parties agree on an outcome of the proceedings and the orders to be made. In this context, a true compromise will encapsulate agreement on the allocation of costs. While proceedings are occasionally settled on the basis that costs will be left to the court, an agreement of that type is in some respects an incomplete one. For the purpose of this discussion, such cases are better treated as falling into one of the other categories (e.g. mootness or withdrawal) if the court is to have any frame of reference within which to adjudicate on costs. If the case cannot fit into one of those other categories, then the court cannot adjudicate on costs and will make no order.

12. There are of course myriad variations of these categories, such as partial mootness or partial withdrawal, but working with these as headline categories allows for the identification and application of principles at a level of generality, while acknowledging that nuances exist.

Disposal of the Petition and the Injunction motion

13. The parties advised the court that the Petition has been stayed in light of the payment of the demanded sum. It has not been struck out, but it was not suggested that there was any intention to proceed with it; nor could it have been, since the Defendant is no longer a creditor of the Plaintiff and therefore lacks standing to proceed with the Petition. On a superficial assessment, then, the Petition is moot.

14. Turning then to the injunction application and the action subtending it, one may start by noting that the substantive action is not moot, because it will proceed in relation to the underlying question whether the Defendant is liable to the Plaintiff for breach of contract and other civil wrongs (the Plaintiff takes the position that the damages it claims exceed and extinguish the sum demanded in the statutory demand). However, the interlocutory injunction application no longer serves any purpose because the Petition cannot and will not proceed. In that sense, the interlocutory injunction appears, again superficially, likewise to be moot.

15. Of course, the proximate cause of the mootness of the interlocutory injunction application is the Defendant being unable to proceed with the Petition. In turn, the proximate cause of the mootness of the Petition is the act of the Plaintiff in paying the sum demanded. Ultimately, inasmuch as the unilateral decision of the Plaintiff inexorably led to the mooting of the Petition which in turn led to the mooting of the injunction motion, the case must ultimately be treated as one of withdrawal of the motion.

The 2015 Act and the Rules

16. It is unnecessary to set out in full the relevant provisions of the Legal Services Regulation Act 2015 and the Rules of the Superior Courts on the question of costs of actions and motions before the court, but the following points may be noted:

(a) Order 99 rule 2(1) of the Rules confirms in direct language what is implicit in section 169(1) of the 2015 Act namely that (subject to Statute and the Rules), the costs of and incidental to every proceeding shall be at the discretion of the court.

(b) Section 169(1) of the 2015 Act codifies the general principle or presumption that – all else being equal – costs will follow the event, that is to say "*the party who is entirely successful in civil proceedings is entitled to an award of costs unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings.*" While this provision is expressly directed towards actions rather than interlocutory motions, it indirectly applies to interlocutory motions because both section 168 of the 2015 Act and Order 99 rule 3(1) of the Rules require the court to have regard to "*the matters set out in section 169(1)*" of the 2015 Act in considering the awarding of costs "*of any action or step in any proceedings*" (see the discussion in *Pembroke Equity Partners v Corrigan* [2022] IECA 142 at paragraphs 24-29 (per Collins J)).

(c) Order 99 rule 2(3) mandates that the court in 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.*" This requires that the court lean away from reserving costs; although it may be noted that making the costs of an interlocutory motion costs in the cause is considered "*an award of costs*" for the purpose of this sub-rule so as not to require the special justification set out in Order 99 rule 2(3) (see *Meta Platform Ireland Ltd v Data Protection Commission* [2026] IEHC 8 at paragraphs 31-39 (per Cahill J)).

Costs of contested interlocutory motions

17. When considering the allocation of costs of contested and decided interlocutory motions, a distinction may be noted between two types of motions. The first might be described as "self-contained", in the sense that the merits of the issues arising in the motion will not be revisited at trial: examples include motions arising from default of pleadings, motions for discovery and so forth. In these cases, the application of the general principle that costs follow the event is generally straightforward.

18. The second type of motion turns on issues that will remain in play at trial: the classic example is a motion for an interlocutory injunction to maintain a state of affairs that the plaintiff intends, by the substantive action, to preserve on a permanent basis.

19. It is clear from the authorities, both prior to and since the introduction of the rule in Order 99 rule 2(3) (originally in 2008 as Order 99 rule 4A), that, where a motion for an interlocutory injunction is heard and determined in favour of one party or the other and the substantive issues are likely to be revisited at trial, success in achieving or defeating the motion will not necessarily lead to a costs order in favour of the successful party (notwithstanding the general rule that costs follow the event). The relevant authorities include *Dubcap Ltd v Microchip Ltd* (Unreported, Supreme Court, 9 December 1997), *AIB v Diamond* (Unreported, High Court (Clarke J), 7 November 2011) and *ACC Bank plc v Hanrahan* [2014] 1 IR 1 (which applied the principles in the analogous context of an application for summary judgment). In *Diamond*, Clarke J (as he then was) explained the rationale by drawing a distinction:

> "*between cases where the decision on an interlocutory injunction application turns on issues relating to the merits of the proceedings such that a different picture may emerge at the trial, and cases where the application turns on matters such as adequacy of damages or balance of convenience that will not be addressed again at the trial. In the former category of cases, a risk of injustice may arise in determining costs at the stage of the interlocutory injunction application whereas the same risk may not arise where the application does not turn on the merits of the proceedings. So, where the interlocutory application will "turn on aspects of the merits of the case which are based on the facts", it may be appropriate to reserve the question of costs to the trial judge.*"

20. So, the inclination to reserve costs (or make them costs in the cause) by reference to this line of authority – for convenience I will call it "*the Dubcap approach*" below – applies to interlocutory motions, which, broadly speaking, tend to have the following characteristics:

    (a) the merits of the underlying action are in issue in the interlocutory motion (which explains why the most common cases falling into this subset are interlocutory injunctions);

    (b) a determination on those merits has been made on the attenuated factual analysis available to a court in an interlocutory injunction motion (i.e. "a fair question to be tried" or "a strong case" as the case may be);

    (c) it is possible that different conclusions on those merits may emerge at trial following discovery, other pre-trial steps and evidence at trial; and

    (d) such different conclusions on those merits – if hypothetically known to the court deciding the interlocutory motion – could have led to a materially different outcome on the interlocutory motion.

21. In these cases, the court will consider the *Dubcap* approach and assess whether there is a risk of injustice in concluding that one or other party should bear the costs of the application.

22. It must be acknowledged that the preference for deferring the question of costs in this subset of interlocutory motions raises a question of moral hazard: does it create an incentive for litigants to pursue speculative, oppressive or obstructive interlocutory motions (or defending interlocutory motions whose merits are clear and obvious from an early stage)? To a certain extent, the answer must be in the affirmative. However, the court retains its discretion, and the *Dubcap* approach is to be seen as part of the toolkit rather than a rule.

23. Thus, if a motion might be brought that is either unanswerable or hopeless, or appears designed to secure an ulterior or improper purpose such as delay at a critical moment, the court's discretion allows for exceptions to be made. An example where the court declined to apply the *Dubcap* approach in this context may be seen in *Ryanair v Aer Rianta* (Unreported, Supreme Court, 26 October 2001), where the Supreme Court upheld the decision of Kelly J in the High Court awarding costs against a plaintiff who failed in its motion for an interlocutory injunction "*because he considered that this was an application without any foundation in law and that accordingly it was an appropriate case in which to depart from the usual practice*" (per Keane CJ at page 5 of his judgment).

Costs of interlocutory injunction motions that have become moot, or are withdrawn or conceded

24. The issue of costs becomes more complex where interlocutory motions of the type that attract the *Dubcap* approach do not proceed, because they become moot or are withdrawn (typically by the plaintiff) or conceded (typically by the defendant).

25. The lines between, on the one hand, mootness, and on the other, withdrawal or concession, are often blurry, but the judgment of Allen J in *Keogh v AV Pound Co. Ltd* [2021] IEHC 640, provides useful guidance in a context where a question of mootness arose and was not readily resolvable at the interlocutory stage. The plaintiff and his line manager had commenced a personal relationship that was not disclosed to management, and when the matter became known, both were suspended by the defendant, their employer, pending an investigation into the matter and to identify solutions to any issues arising. The plaintiff sought an interlocutory injunction restraining the continuation of the suspension, but before the application came on for hearing, the plaintiff's line manager reached a settlement with the employer which involved her leaving her employment. Arising from this, the defendant concluded that the relationship no longer posed an issue and terminated the suspension and the investigation. The interlocutory application therefore no longer served any purpose, although the plaintiff resolved to proceed with the substantive action in pursuit of a remedy in damages. Allen J concluded that the plaintiff's argument – to the effect that the change in circumstances was a unilateral act of the defendant in lifting the suspension – was misplaced, and he distinguished cases such as *Godsil* and *Cunningham*. He noted that the plaintiff might show that the termination of the suspension and investigation were referable to the interlocutory application, but also that the defendant had contended, to the contrary, that the events were unrelated to the pending motion. It was certainly the case that the dispute as to the cause of the mootness argument on that point could not be resolved at that stage but emphasised that – in contrast to e.g. *Cunningham* – in the case before him there would be a decision on the substantive merits of the dispute.

26. Later in his judgment, having considered a passage from the judgment of Clarke J in *Hanrahan*, which addressed the judgment in *Diamond* and Laffoy J's approval of

Diamond in *Tekenable Limited v Morrissey* [2012] IEHC 391 (discussed further below), Allen J continued as follows (at paragraph 45):

> "*What this boils down to is that while the granting or refusal of an interlocutory injunction might be regarded as an event, it will often be necessary to look beyond the outcome of the motion to decide where responsibility for the costs should justly lie. The plaintiff's motion not having been argued, it would be inappropriate to speculate as to what the outcome would have been if it had, or even to decide – as the defendant submits I should – whether the plaintiff had raised a fair issue to be tried. What can confidently be said, however, is that the outcome of the motion would not have been definitive of the question of costs. It seems to me that irrespective of what the outcome of the motion might have been, the resolution of the core dispute as to the lawfulness of the impugned clause and the defendant's actions was one which would have had to go to trial. If the motion had been fought, the practical effect of the final determination of the matters in dispute might have been that the plaintiff would have secured interlocutory orders which he ought not have had, or might have failed to secure orders which he ought to have had. In my view, similar considerations apply in a case where the necessity for interlocutory orders can be said to have been overtaken by events between the time the application was made and the date on which the motion would otherwise have been heard.*"

27. *Keogh* was a case that involved ostensible mootness, but with a dispute as to whether it was a true case of mootness or a unilateral act equivalent to a concession. If the entire action had been rendered moot, the court – observing the general rule that the merits of the case will not be examined for the purpose of allocating costs – would have been required to examine the cause of the mootness. However, in a context where the merits of the substantive action overlapped with the merits of the injunction application, and those merits would be examined at trial, the court was satisfied not to examine the cause of the mootness. In ruling that costs would be costs in the cause, Allen J effectively ruled out a future examination of the cause of the mootness, because he was satisfied that, as far as costs were concerned, the merits of the substantive case were the best measure of the merits of the interlocutory application: the interlocutory injunction motion sought the very relief that was sought on a permanent basis in the substantive action.

28. To recap, it is clear that the *Dubcap* approach can apply to the allocation of liability for costs in respect of interlocutory motions that proceed to a hearing; but it may also be applied in respect of interlocutory motions that do not proceed on account of external acts or events. Moreover, where (as in *Keogh*) it is disputed whether the external acts or events generate a case of mootness or withdrawal/concession, the application of the *Dubcap* approach may render the resolution of that dispute unnecessary in an appropriate case.

29. What, then, of an interlocutory motion that has indisputably been withdrawn or conceded (including by means of an extraneous act or acts that amount in substance to a withdrawal or concession)?

30. A withdrawal or concession of a <u>substantive</u> action (whether express or through a unilateral extraneous act) will operate as an "event", attracting the default outcome that costs will be awarded against that party (see *Godsil* at paragraph 62). In interlocutory applications falling outside the subset described earlier, where the issues are not going to be revisited at trial, a withdrawal or concession will also operate as an event, generating a presumptive liability for costs.

31. In the context of a withdrawal or concession relating only to the interlocutory motion, where the proceedings are continuing, the withdrawal or concession may have been made for any number of reasons: perhaps an acceptance by the plaintiff that they lack, pending discovery etc, the evidence necessary to show even a fair question to be tried; perhaps an acceptance by the defendant that a fair question has been shown despite its intention, again with the benefit of discovery etc, to disprove the proposition in question at trial; perhaps an acceptance by the plaintiff that the balance of convenience weighs against an injunction (e.g. where damages will be an adequate remedy); perhaps a concern that

collateral effects of prosecuting (or defending) the motion, such as adverse publicity, outweigh the benefits of doing so; perhaps reassurance from the opposing party on a collateral issue that renders the outcome of the interlocutory motion of diminished importance.

32. In at least the first and second of the above examples, where the withdrawal or concession turns on an assessment of likely outcomes on the core issue, if, rather than to withdraw or concede the interlocutory motion, the party in question contested it and lost it, then, provided the decision on the motion brought it into the subset that attracted the *Dubcap* approach and the motion was not a hopeless/overwhelming one or brought for an ulterior purpose, they would usually see the costs reserved or made costs in the cause.

33. Thus, if the unavoidable consequence of withdrawal or concession is an adverse costs order, then a moral hazard arises: the litigant is deterred from withdrawing or conceding because persisting with the motion, even if unsuccessful, is likely to activate the *Dubcap* approach to costs.

34. Of course, an interlocutory motion that falls squarely within the subset that attracts the *Dubcap* approach may be withdrawn or conceded for reasons other than a pure assessment of the merits. Motive in litigation is a complex and often inscrutable thing, hidden in part at least behind the veil of privilege and informed by a host of often difficult-to-measure inputs such as risk appetite. It seems to me that – in the absence of a proven or obvious ulterior purpose – to embark on an analysis of motive, as such, for the purpose of deciding costs in this context is ultimately of limited value.

35. On the other hand, without attempting to draw conclusions on the motive of the party withdrawing or conceding a motion, there is some value – in these cases where the substantive issue will be revisited – in identifying the effects of the withdrawal or

concession, and what, if any, benefits it may have brought in the context of the proceedings. There will certainly be a saving of court time and possibly of costs (although any benefit may be diminished by the lateness of the withdrawal or concession). A withdrawal or concession may also allow the substantive action to progress without the delay of an injunction hearing and possibly a reserved judgment (although one might weigh against this the delay caused by the bringing of the motion).

36. Obviously, any benefits of this kind must be judged in light of the reasonableness of prior conduct (whether in initiating the motion later withdrawn, or in resisting the motion up to the point of concession): as noted earlier, even in the context of a motion that is contested and decided, bringing a hopeless motion or opposing an irresistible one (in particular to procure a collateral benefit) will generally result in a negative costs order being made, and a withdrawal or concession (especially a late one) will likely not prevent that, especially if there has been no significant change in circumstances or on the available evidence.

37. Nevertheless, in a case that would have – if it had been heard and determined – attracted the *Dubcap* approach, it seems to me logical that all of these factors should influence a court in the exercise of its discretion and, in particular, in deciding whether to apply the *Dubcap* approach in the case of a withdrawal or concession.

38. One weakness in affording weight to the logic underpinning the *Dubcap* approach in cases involving withdrawal or concession is the fact that, without a hearing, it might not always be possible to be sure that the motion in question was one that would have attracted the *Dubcap* approach if it had proceeded to a determination. To come to a definitive view on that, in particular to ascertain whether, in the case of an interlocutory injunction, the outcome would have turned on whether a "fair question" or "strong case"

had been shown, or on the balance of convenience, usually involves an analysis of the merits of the motion, which is discouraged. On one view, then, withdrawal or concession deprives the court of the opportunity to examine whether it attracts the *Dubcap* approach, and that might weigh against the party in question. However, I do not think that it warrants ruling out consideration of that approach. Identifying, for the purpose of allocating costs, whether the core issue in the motion is one that would arise again at the trial of the action is not an adjudication on the merits of a withdrawn or conceded motion. Moreover, while the court may be unable, without an adjudication of sorts, to conclude that the motion would have not have turned on the balance of convenience, to exclude the *Dubcap* approach entirely in the context of withdrawn or conceded motions, just because of this difficulty, would be to throw the baby out with the bathwater, given the risk of injustice the approach seeks to minimise. In this regard, I note that, in *Keogh*, Allen J did not let the possibility that the interlocutory injunction might have been refused on the balance of convenience stand in the way of the conclusion he reached.

39. It goes without saying that the *Dubcap* approach is in tension with the general rule that costs follow the event, but it operates in a limited subset of cases and constitutes an additional factor that the court will consider in the exercise of its discretion. If the withdrawn or conceded interlocutory motion can be characterised as one that would – if it had proceeded – have attracted the *Dubcap* approach, then to exclude consideration of that approach entirely risks arbitrary outcomes and creates perverse incentives.

40. In *Tekenable Limited v Morrissey* [2012] IEHC 391, Laffoy J took the *Dubcap* approach into consideration when deciding to reserve to the trial of an action the costs of an interlocutory injunction motion which did not proceed, in a slightly different context from a withdrawal or concession: the parties negotiated a form of undertaking on the eve

of the hearing, which represented a compromise between their respective positions, but without agreeing on the question of costs. She made four points in support of her conclusion. First, she noted that no adjudication was made on the merits of the application, in consequence of which there was no "event" for costs purposes (in this regard, the Supreme Court in *Godsil* concluded that an adjudication on the merits was not necessary to generate an event, so this point no longer carries weight). Second, she noted that the agreement of undertakings mooted the motion such that she could not say who would have succeeded if it had been heard. Third, she held that – even if the motion had proceeded – the *Dubcap* approach would "*probably*" have been applied (she did not mention *Dubcap* itself but cited the judgment of Clarke J in *Diamond* to the same effect). Finally, and perhaps developing that third point, she considered that since the issues disputed in the motion and affidavits remained in dispute, it would be "*wholly inappropriate for the Court to do other than reserve the costs to the trial judge, so as to avoid expressly or by implication adjudicating on any issue on which the Court is not required, and is not in the best position, to adjudicate*." Clearly, the fact that the undertaking was agreed between the parties and represented a partial "win" for both sides, as distinct from a unilateral withdrawal or concession, presents a point of distinction between that case and the present, but the third and fourth points made retain their force.

41. Before leaving this discussion, it is necessary to consider two judgments in which it was held that the principle that costs follow the event should prevail, in the context of concession and withdrawal, respectively, of interlocutory injunction motions, despite the motions in each case engaging a substantive issue that would be revisited at trial.

42. The first of these cases is *Irish Bacon Slicers Limited v Weidemark Fleischwaren GmbH & Co* [2014] IEHC 293. On its facts, it presents as the mirror of the present case. A statutory demand was made by the defendant, which threatened the presentation of a winding-up petition. The plaintiff demanded an undertaking not to present the petition and, when the undertaking was not forthcoming, issued proceedings and brought a motion to restrain the advertisement of the petition, all on the basis that the demanded debt was disputed. On the morning of the hearing of the injunction motion, the defendant gave the undertaking it had declined to give before the proceedings issued and, importantly, advised the court that it would issue separate proceedings to recover the demanded sum. The issue was whether costs should be awarded against the defendant or reserved to the trial of the separate debt collection proceedings. Peart J carried out a detailed analysis of the authorities, including *Tekenable*, and concluded that – even assuming a concession was not an "event" for the purpose of adjudicating on costs (this was before the decision in *Godsil*) – the circumstances of the case warranted an immediate award of costs in favour of the plaintiffs:

> "*It is of course desirable on policy grounds that parties should not needlessly pursue applications for injunctive interlocutory relief where it is possible to secure an agreed solution short of an injunction order, such as the giving of an undertaking. The fact that the Court is required to make an award of costs where it determines the injunction application, save where it might not be possible to justly do so, should serve to encourage a defendant to give an undertaking to do or not do that which is sought to be restrained by order, especially where it can be anticipated that a court will be satisfied that the relatively low threshold of establishing a fair issue to be tried can be surmounted by the plaintiff, and where either damages can reasonably be seen not to give the plaintiff an adequate remedy, and/or that the balance of convenience favours maintaining the status quo and granting the injunction. It is right that there should be costs consequences immediately visited upon a defendant who waits until the injunction hearing itself to proffer an undertaking, thereby removing the need for the plaintiff to proceed to a hearing of his application. The fact that there is no "event" in the sense of a court's determination of whether or not an injunction should or should not be granted does not seem to me to be something of which such a defendant should be able to gain advantage by having the question of costs kicked off into the long grass,*

to be retrieved perhaps a year later, or more, when the substantive action is finally determined. That itself would be unjust to the plaintiff who in a real sense has prevailed on his application.

Moreover, where a defendant faced with these probabilities nevertheless resists the application for an interlocutory injunction in circumstances where he ought to have perhaps considered conceding that the plaintiff would obtain the injunction in any event, he/she can have little complaint in my view if the Court then makes an order for costs against him/her on the basis that costs follow the event, even where the issues to be determined between the parties will have to await a later final determination at the substantive hearing. Nevertheless, I accept that each case will depend on its own facts, and as stated by Laffoy J. there will be cases where the Court will still reserve the question of costs to the hearing where there is a real risk that it is not possible to make a just determination in relation to costs at that stage of the proceedings. But the days are gone when the Court would, almost as a matter of convenience and routine, simply reserve the question of costs to the hearing of the action."

43. It will be noted that Peart J considered – albeit at a very high level – the merits of an interlocutory motion when he measured the reasonableness of the late concession against *inter alia* the capacity of the defendant to have anticipated that the plaintiff would have succeeded in the motion. In this sense there are echoes of the approach taken by Kelly J in *Ryanair*. Peart J was careful also to acknowledge that each case turned on its own facts, and he did not cast doubt on the availability of the approach taken by Laffoy J in *Tekenable*, as a proper exercise of the Court's discretion.

44. More recently, in *Rogerson v O'Dwyer* [2025] IEHC 70, Cahill J made an order for costs of an interlocutory motion against a plaintiff who had issued proceedings for a declaration that she held a beneficial share in certain property owned by the defendant, and then filed a motion seeking to require the defendant to allow her and her two children to remain in occupation of the property, together with the defendant, pending trial. In her last affidavit filed for the motion, the plaintiff conceded on oath that the factual disputes were such that she could not succeed on the motion and proposed that the matter be case managed to trial. On the contested costs hearing, the plaintiff also accepted that the substantive remedy she would seek was a claim for damages and that she would not be seeking

injunctive relief of the type sought on the motion on a permanent basis. Cahill J comprehensively analysed the authorities, to a depth I will not attempt here, and addressed the case before her by reference to six points extracted from the authorities. The fourth of those points (addressed at paragraphs 81 to 89 of the judgment) relates to the interaction between the general principle that the successful party in an interlocutory application will generally be awarded their costs and what I am calling the *Dubcap* approach (Cahill J referred primarily to the *Tekenable* decision since that was somewhat closer to the facts of the case before her, involving as it did an interlocutory hearing that did not proceed). The court acknowledged the availability of the argument, although on the facts of the case before her she considered that other factors outweighed its application:

> "*However, this is not an unswerving rule and it cannot be assumed to dictate how the costs of the Plaintiff's abandoned application would have been awarded. Moreover, while I do not intend to make findings – and wish to avoid making observations – about the merits of the injunction application, it does seem to me that in this particular case the trial judge may not be in a better position to assess the justice of the costs of this application, particularly given the apparent concession now being made by the Plaintiff that she will be limited to a remedy in damages at the trial. In these circumstances, she is accepting that mandatory orders will not be available either now or following the trial, so I do not see how the trial judge could be in a position to more justly decide the appropriate costs of this injunction application seeking such orders on an interlocutory basis.*"

45. She went on to distinguish *Tekenable* by reference to the fact that the undertakings agreed in that case were not precisely those sought by the motion, such that both parties had gained something from the motion, in contrast to *Rogerson* itself where the plaintiff had averred that her application would not succeed, and where the plaintiff must be taken to have known from the outset that she faced the stiffer test of showing a strong case on the *Maha Lingham* test. Again, as in *Bacon Slicers*, the merits of the application, while not concluded upon, were nonetheless within the court's field of vision. Perhaps more

significantly again, the plaintiff admitted that relief to be sought in the substantive proceedings would not include an injunction of the type sought on the interlocutory motion. The importance attached to these factors aligns with the view, supported by decisions such as *Ryanair*, that the *Dubcap* approach is not necessarily the right approach in cases where the unavailability of the relief sought was clear and obvious from the outset.

46. It might also be noted in reference to both *Bacon Slicers* and *Rogerson* that it was the party who conceded and withdrew, respectively, the interlocutory motions in issue, that had first commenced the litigation in question, in *Bacon Slicers* by threatening a winding up petition and in *Rogerson* by issuing a plenary summons.

The present case

47. It is settled that a concession or withdrawal is an event for costs purposes and that the general rule is that costs will follow the event, in relation to interlocutory motions as well as substantive actions. It is also settled that the court has a broad discretion in relation to costs, that must be exercised by reference to all of the relevant facts and principles, and that the costs may not follow the event if particular features of the case dictate a different result (or a postponed result) in the interests of justice. Postponing the allocation of liability for costs is not permissible under Order 99 rule 2(3) unless it is not possible to justly adjudicate on costs at the time of the interlocutory motion. That said, making the costs in the cause is considered to be an adjudication on costs which does not require filtration through the Order 99 rule 2(3) test.

48. In this case, it is relevant to consider two hypothetical future events in the context of a just adjudication on costs:

49. The first is that the Plaintiff establishes that the Defendant was owed no monies or a sum less than the statutory threshold for an effective statutory demand. If it does so, then it will indisputably have been correct to say that the debt was *bona fide* disputed on substantial grounds, and the conclusion follows that the Petition was wrongly presented.

50. The second is that the Plaintiff's claim fails or succeeds only in part so as not to extinguish the Defendant' claimed debt (or reduce it below the statutory threshold). In that scenario, while there may be some scope for argument that the nature and extent of the dispute was such as to render the presentation of the Petition improper, the gravitational pull towards a conclusion that the Petition was properly presented will be strong.

51. Those potential conclusions are at opposite ends of the spectrum and, inasmuch as they go to the merits of the Petition and the decision on costs relating to it, they indirectly relate to the injunction motion and the costs relating to that. If, for example, the injunction motion had proceeded, the *Dubcap* approach would certainly have been considered and as a matter of probability would have been applied (unless one of the factors such as hopelessness or ulterior purposes featured in the assessment). In such case, the costs would have been reserved or made costs in the cause.

52. Is the *de facto* withdrawal of the interlocutory motion by the Plaintiff a sufficient point of distinction in all the circumstances to warrant a costs order against it? On the facts of this case, I do not consider that it is. The withdrawal came late but not perhaps as late as the concession in *Bacon Slicers*, and an argument that a company such as the Plaintiff could have elected to do what it did two months earlier rests for its moral force on an assumption that the Petition was properly presented which remains an open and disputed question that will be re-examined at trial. In addition, I am not in a position to say, having

reviewed the affidavits, that the injunction motion was hopeless such that the Plaintiff can be faulted for not anticipating its outcome from the start. In this regard, while true motive may be elusive, the objective risk generated by publication and/or non-anonymisation of the Petition presents as an extraneous rationale behind the decision taken to pay the demanded debt, which is independent of the merits or otherwise of the motion. Of course, that observation prompts the criticism that, if payment was to be made, it could have been made much sooner and without a motion: however, that seems excessively reductive since that criticism could be made of any party issuing a motion for an injunction to restrain the presentation or advertisement of a petition. Furthermore, unlike in both *Bacon Slicers* and *Rogerson*, where the party ultimately fixed with the costs of the interlocutory motion was the party that brought the dispute to court (as petitioner in the case of *Bacon Slicers*), it was the Defendant who did so here, bringing the Petition which constituted an existential threat to the Plaintiff.

53. These factors combine to outweigh the argument for rejecting the *Dubcap* approach in this case on the ground that the interlocutory motion was in substance withdrawn. If the Plaintiff's position was unmerited, then costs will ultimately be awarded in favour of the Defendant, and the delay in securing a costs order now is a lesser injustice than the risk that the Plaintiff would suffer an immediate and irreversible costs penalty despite having been correct in their position.

54. Accordingly, I am satisfied that the appropriate order here is either to reserve costs or to make the costs costs in the cause. As between these two options, I consider that to reserve costs is the better approach here, because the allocation of costs of the substantive action might not map directly on to the question of costs of the interlocutory motion. In particular if the substantive action extinguished most but not all of the debt the subject

matter of the statutory demand, there may be room for argument about which I cannot usefully hypothesise at this stage.

55. The costs of the Plaintiff's interlocutory motion will therefore be reserved to the trial of the proceedings.