THE HIGH COURT

COMMERCIAL

[2026] IEHC 523
2026 No. 1317 P
(2026 No. 26 COM)

BETWEEN

PIRAMAL CRITICAL CARE B.V.

PLAINTIFF

AND

BREPCO BIOPHARMA LIMITED

DEFENDANT

Ex tempore JUDGMENT (on costs) of Ms. Justice Eileen Roberts delivered 23 July 2026

Introduction

1. This ex tempore judgment relates to my substantive judgment in this matter delivered on 14 July 2026 (and uses the same definitions as set out in that judgment).

2. I refused injunctive relief to the plaintiff (Piramal) in relation to the March Notice[1] and discharged the interim relief in place.

3. I granted injunctive relief to Piramal in relation to the April Notice[2] in respect of Germany, the UK and Italy.

[1] The March Notice sought to terminate the contractual arrangements between the parties on the basis of a failure to launch the Product in certain countries within a contractual time limit.
[2] The April Notice sought to terminate the contractual arrangements between the parties for all countries on the basis of the alleged insolvency of the defendant.

4. In relation to legal costs, I expressed my provisional view that no order should be made. My rationale was based primarily on the fact that each party had been both successful and unsuccessful in the totality of the injunction applications brought which were pleaded and heard together.

5. I indicated however that I would permit the parties to make submissions to me in the event that they wished to advocate for a different order on costs. In doing so I was mindful that a "no order" forecloses the possibility of the recovery of costs by a party unsuccessful at interlocutory stage whose termination argument is vindicated at trial.

6. The parties made oral submissions to me on Monday 20 July.

7. Counsel for Piramal agreed with the court's provisional view and submitted that the court should make no order as to costs in the circumstances.

8. Counsel for the defendant (Brepco) urged the court to make a different order namely that costs be made costs in the cause of the entire proceedings. The argument was made that the trial judge would have significantly more evidence than I had on whether the plaintiff was "insolvent" within the meaning of the Licence Agreement and thus whether an entitlement to terminate that Agreement (and the related Supply Agreement) had properly arisen. There is no doubt that that is so and indeed my judgment expressly acknowledges this.

Legal and Statutory Background

9. The traditional approach to costs following a decision on an application for an interlocutory injunction was to reserve the costs of that interlocutory application to the trial judge. That approach recognised that evidence available to a trial judge was often entirely different to that available at interlocutory stage so that the trial could well result in an outcome that seemed unlikely or improbable at the time the interlocutory application was heard. That of course remains the practical reality.

10. That traditional approach on the costs of interlocutory applications was altered however in 2008 with the adoption of Order 99, rules 1(1) and 1(4A) as part of a suite of new costs rules. The text of those former provisions is now reproduced as Order 99, rules 2(1) and 2(3).

11. Order 99 rules 2(1) and 2(3) provide that, subject to the provisions of statute (including sections 168 and 169 of the Legal Services Regulation Act 2015) and except as otherwise provided:

"(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively....

(3) The High Court, the Court of Appeal or the Supreme 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."

12. The effect of the change in rules is that the general approach on costs of interlocutory applications is now to deal with those costs at interlocutory stage and to, by exception, reserve decisions on costs to the trial judge only where it is not possible for the court to justly adjudicate upon liability for costs at the interlocutory stage. Order 99 rule 3(1) imports the statutory provisions relating to costs following the event into the consideration of an award of costs including the making of interlocutory orders.

13. There is no special carve out in O. 99 r. 2(3) for the costs of interlocutory injunctions. I accept however that interlocutory injunctions often have particular characteristics which differentiate them from other types of interlocutory orders and this may make it difficult in a given case to justly adjudicate upon costs at the interlocutory stage.

14. Counsel for Brepco referred the court to the Court of Appeal decision in *Yoplait Ireland Limited v Nutricia Ireland Limited* [2025] IECA 210. In that case the High Court granted an interlocutory injunction to Yoplait restraining Nutricia (t/a Danone) from passing off certain of its products as those of Yoplait. The High Court ordered that Yoplait's costs should be costs in the cause. No appeal of that costs order was taken but the Court of Appeal was required to consider the appropriate order it should make on the appeal costs of the unsuccessful appeal of the interlocutory motion. Nutricia argued that the appeal costs should be costs in the cause, or reserved to the trial of the action – primarily because the appeal involved issues that would reappear at trial, making it inappropriate to justly adjudicate costs at an earlier stage.

15. It is clear from the Yoplait judgment that the High Court considered that it could not justly determine the costs of the injunction at interlocutory stage. Mr Justice Barrett noted at para. 9 of his judgment that "*[i]t would be unfair and inappropriate to make a simple order for costs in favour of Yoplait in circumstances where Yoplait may yet (I do* *not know) be found at the trial to have failed to establish one or more limbs of the test for passing off."*

16. In her judgment in the Court of Appeal Ms Justice Hyland decided to make an order that costs be made costs in the cause. She did so in circumstances where she concluded that it would be unjust to determine the costs because "*[t]he issues raised in this appeal will be revisited at the substantive trial.*"

Submissions of the Parties

17. In the present case, counsel for Brepco says exactly the same will happen. The trial judge will determine on the merits if the insolvency threshold was reached. If Brepco succeeds on this point, it follows that it should have been entitled to act on the April Notice and ought not to have been restrained from doing so. Of course the same could be said for Piramal if they succeed on the "failure to launch" argument and ought to have been able to restrain termination by the March Notice.

18. I accept that a plaintiff may secure an interlocutory injunction on the basis of circumstances or arguments which may ultimately be rejected at trial. With the benefit of hindsight and after a full hearing it may transpire that the injunction was granted (or indeed refused) on the basis of facts other than the true facts finally determined by the trial judge.

19. Counsel for Piramal argues that the normal rule of determining costs at interlocutory stage should apply in this case and that it makes sense that neither party should recover costs against the other in circumstances where each succeeded and lost in respect of different interlocutory motions. He says that the undertaking as to damages is the protection for a party who is found to have been wrongly injuncted – and that the question of costs is a separate matter. He referred the court to the decision of Butler J. in *Thompson v Tennant* [2020] IEHC 693 and in particular her remarks at para. 10 that:

"*The fact that the trial court may be in a better position to assess the costs of the interlocutory application after the substantive trial is held does not mean that it is not possible for the court which has determined the interlocutory application to justly adjudicate upon costs.*"

Analysis

20. It is not always easy to decide what to do with interlocutory costs. In fact the arguments made by both sides in this case have some merit. In this particular case there are a number of specific features that are relevant in my view as to how the court should exercise its discretion on costs:

1) There are 2 separate injunctions involved.
2) Each party, in essence, succeeded and failed on one injunction. There is no clear winner.
3) The injunctions were pleaded and run together to the extent that it would not be possible for the court at this point to allocate costs as between each injunction – although it is my preliminary view that the costs are largely equivalent for both injunctions. I appreciate that the original ex parte application related only to the "failure to launch" injunction but it was quickly amended to encompass the "insolvency" injunction and thereafter both matters were addressed in the same affidavits and at the same hearing and in the same court judgment.
4) The court recognises that the trial judge will have to determine on the merits the question not only of insolvency but also of failure to launch. These are 2 separate questions and are independent of each other. The trial judge may decide both issues in favour of one party or may hold differently on each issue in favour of either party.
5) In essence the situation in this case is that success was genuinely split and the substantive contractual issues are yet to be tried. The specific basis for each termination notice (which resulted in the injunction applications) will have to be fully ventilated and determined at trial.

21. The difficulty with Brepco's suggested costs order being one of costs in the cause of the entire proceedings is that the "cause" or the measure of the ultimate success of the proceedings is not straightforward or binary given that two separate termination notices are being separately litigated. Brepco at trial may succeed on failure to launch but not on insolvency (or the other way around). The same situation pertains to Piramal. There is every likelihood that the separate bases of terminating the Licence Agreement could be determined differently from each other. Who then could properly be said to have succeeded on the "cause" such as would justly result in the award of costs for both interlocutory applications.

22. I could simply reserve the costs of both injunctions to the trial judge. Conscious however of the imperative to deal with interlocutory costs where it is possible and just to do so, I propose that the costs of the injunction proceedings should be made costs in the cause of each termination issue rather than costs in the cause of the proceedings as a whole. Therefore I direct that the costs of each interlocutory injunction application should abide the determination at trial of the termination issue to which that application relates.

Orders to be made

23. The costs of the interlocutory application insofar as it concerned the termination under clause 14.2 of the Licence Agreement pursuant to the March Notice shall abide the determination at trial of the validity of that termination.

24. The costs of the interlocutory application insofar as it concerned the termination under clause 14.7.2 of the Licence Agreement pursuant to the April Notice shall abide the determination at trial of the validity of that termination.

25. Liberty to apply.