



**THE COURT OF APPEAL
CIVIL**

Neutral Citation Number [2020] IECA 183

Record Nos. 2019/185

2019/186

**Whelan J.
Power J.
Murray J.**

BETWEEN:

CHUBB EUROPEAN GROUP SE

APPELLANT

- AND -

THE HEALTH INSURANCE AUTHORITY

RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 8th day of July 2020

Context

1. This judgment is addressed to the proper allocation of the costs incurred before this Court and the High Court in two actions, the appeals in which were disposed of in a single judgment ([2020] IECA 91). Both sets of proceedings arose from an enforcement notice served by the respondent ('HIA') pursuant s.18B of the Health Insurance Act 1994 as amended ('the Act'). The first action (2017/185 MCA) comprised a statutory application brought by the appellant ('Chubb') pursuant to s.18C of the Act seeking the cancellation of the directions specified in that notice. The second proceedings (2017/353 JR) sought judicial review of certain decisions of HIA relating to the notice. The High Court (Burns J.) refused Chubb relief in both actions and ordered the costs of each against it. In its appeal in the statutory application, Chubb prevailed on one point and obtained cancellation of the direction in the enforcement notice. Chubb failed in its appeal in the judicial review proceedings.
2. Both parties have now delivered submissions directed to the costs of each proceeding. In summary, Chubb says that having prevailed in the statutory application, it should recover its costs of those proceedings in both this Court and the High Court. It says that in the judicial review proceedings, no order as to costs should be made. In that regard it notes comments in my earlier judgment that in the absence of a clear determination as to the scope of an appeal under the relevant provisions of the Act, it was understandable that the judicial review proceedings would have been instituted. Chubb also says that it prevailed on some of the arguments advanced in those proceedings, and that in any

event the overall costs of the litigation were not increased by those proceedings to any material extent.

3. As regards the statutory application, HIA says that it should be entitled to all its costs of the High Court and to 75% of its costs in this Court. It adopts this position on the basis that (it says) the argument on which Chubb prevailed in this Court was not made in the Court below being instead a 'recast' version of an argument that was advanced there. HIA contends that it succeeded on '*the core issues between the parties*'. It relies upon features of Chubb's conduct and of the arguments advanced by it which, HIA suggests, are relevant to the costs of the proceedings. HIA further says that it should be awarded the costs of the judicial review proceedings in both the High Court and this Court on the basis that Chubb's appeal in those proceedings was dismissed and that, as it contends, those proceedings '*should never have been brought*'.

The applicable costs regime

4. When these proceedings were heard in the High Court, and at the time this appeal was initiated, the legal regime governing the awarding of costs was defined by the general discretion of the Court in connection with costs as it appeared in the former O.99, r.1(1), the reference in O.99, r.1(3) to the costs of every '*action, question and issue tried*' following the event, the obligation imposed upon this Court by O.99, r.1(3A) in determining an appeal to have regard to the number and extent of the issues raised and whether it was reasonable for the parties to raise them, together with the direction in r.1(4) that the costs of every issue of fact or law raised on a claim or counterclaim should, unless otherwise ordered, '*follow the event*'. These various provisions fell to be applied in the light of the decision of Clarke J. (as he then was) in *Veolia Water UK plc v. Fingal County Council (No.2)* [2006] IEHC 240, [2007] 2 IR 81, as explained in *MD v. ND* [2015] IESC 66, [2016] 2 IR 438 ('*Veolia*' and '*MD*' respectively).
5. By the time the appeal was heard, the legislative basis for the awarding of costs had changed, now appearing across the provisions of ss.168 and 169 of the Legal Services and Regulation Act 2015 ('the 2015 Act') and a recast O. 99 introduced by the Rules of the Superior Courts (Costs) Order 2019 SI 584/2019. The relevant sections of the 2015 Act came into force on 7 October 2019 and the new provisions of O.99 took effect from 3 December 2019. The appeal was heard on 17 December with the consequence - I assume - that most, if not all, of the costs thereof were already incurred when the recast O.99 took effect.
6. Chubb refers in its submission only to the provisions of O. 99 as it stood before 3 December and to that extent relies exclusively on the pre-existing law. HIA presents its submissions in respect of the costs of both the High Court and this Court by reference to s.169 of the 2015 Act but, it would appear from its reference to O.99, r.1(3A) and 1(4), on the basis of the pre-December 2019 Rules of Court. Neither party has explained why the regime upon which it relies applies to either or both of the costs in the High Court and this Court.

7. In an appropriate case an issue may arise as to when precisely the provisions of the 2015 Act are engaged in respect of (a) the costs of proceedings initiated before the legislation was brought into force, (b) the costs of a specific application to Court (including the trial hereof) pending at the time of the coming into effect of the legislation, (c) the costs of High Court proceedings heard and determined prior to the coming into effect of the legislation, and (d) the costs of an appeal initiated – but not heard – prior to the coming into effect of the 2015 Act. The provisions of ss. 26 and 27 of the Interpretation Act 2005, and the issue of when provisions addressing the awarding of costs are procedural and when they are substantive, may be relevant to that question (and see *Sweetman v. Shell E&P Ireland Ltd.* [2016] IESC 58, [2016] 1 IR 742). Insofar as concerns the prospect of an appeal court determining the proper order for costs of a High Court action that has been heard and determined by reference to a statutory regime that was not in force at the time that action was heard and when the allocation of costs was decided by the High Court Judge, a question might also present itself as to whether the Court should or can avoid such an interpretation of the legislation having regard to the decision of the Supreme Court in *Buckley v. Attorney General* [1950] IR 67.
8. It is not possible to determine any of these issues in the absence of argument from the parties. In circumstances where, as I explain here, I do not believe the application of the differing regimes would, in this particular case produce a materially different result I think it proper to proceed to determine the issue of costs by reference to both regimes without proceeding to require further argument on this question.

Relevant principles pre-October 2019

9. The judgment of Clarke J. (as he then was) in *Veolia* envisages three different scenarios relevant to the allocation of the costs of the full trial of an action.
10. As analysed by Clarke J. the first is a case where an ‘event’ can be identified and in which all costs of the case follow that event. This is the default position even where the party who succeeds on the ‘event’ has not prevailed on every issue in the case or succeeded in every argument it has advanced (see *Veolia* at para. 2.5 and 2.8 and MD at para. 9). For these purposes, Clarke J. related success on the event to the securing of a ‘*substantive or procedural entitlement which could not be obtained without the hearing concerned*’ (*Veolia* at para. 2.8). A party who has thus succeeded on the ‘event’ so understood should normally obtain their costs, even if not successful ‘*on every point*’ for two principal reasons. As a matter of both fairness and of principle, where a party has had to institute legal proceedings in order to obtain relief, the starting point should be that he recovers all of the legal costs in securing that benefit (*Godsil v. Ireland* [2015] IESC 103, [2015] 4 IR 535 at para. 20). Moreover, in many cases the splitting of costs as between different issues and arguments in a case is likely to create satellite applications around costs which will not usually represent an economical use of the time and cost of either the parties or the Court.
11. The second situation arising from *Veolia* is where an ‘event’ is identified, but where the party who has prevailed on that event has not been successful on an identifiable issue or issues which have materially increased the costs of the case. In that circumstance the

successful party may obtain his costs but may suffer two deductions – one in respect of his own costs in presenting that issue, and the other requiring him to set off against such costs as are ordered in his favour, the costs of his opponent in meeting it (see *Veolia* at para. 2.10 and *O'Mahony v. O'Connor* [2005] IEHC 248, [2005] 3 IR 167). Both *Veolia* and *MD* make it clear that an order splitting costs in this way is very much the exception where the winner of an event has been identified and, in particular, should only be made where (a) the proceedings involve multiple issues and therefore are (as variously suggested in the judgment) '*complex*' (at paras. 1.4, 2.2, and 2.14) and/or not '*straightforward*' (para. 2.14), (b) where the raising of the issues on which the otherwise successful party failed to prevail could have effected the overall costs of the litigation '*in a material extent*' (*Veolia* para. 2.14) and (c) where the Court can readily separate and identify the costs so arising.

12. The justification for this second scenario lies not merely in meeting the justice of the case, but also in discouraging parties from raising additional unmeritorious issues (see *Veolia* at para. 2.12). Because the power to split the costs in this way arises only where distinct issues can be identified and '*it is clear*' that the duration of the proceedings has been lengthened by their being argued, the issues of cost and convenience to which I have referred in the context of the first scenario should not, where it is properly applied, arise. What is important for present purposes is that in this second scenario the logic of the analysis in *Veolia* may prompt a situation in which a party who succeeds '*on the event*' nonetheless ends up with costs being ordered against it. At first glance, this appears counter-intuitive. However, once it is understood that this will only occur where the relief has been granted on the basis of a ground that has occupied very little of the time at hearing, and where the issues on which the bulk of the parties' attention has been focussed have been resolved in favour of the party unsuccessfully resisting that claim for relief, it makes sense.
13. Finally, in this regard it should be noted that even where proceedings have been lengthened by the unsuccessful agitation of issues by the party obtaining relief, the Court might in an appropriate case determine to simply withhold costs from the successful party in respect of the issues on which it failed, rather than to also deduct the costs of its opponent (see for an example of this *Fyffes plc. v. DCC plc* [2006] IEHC 32). As the law has developed, this must be the exception rather than the rule. It is not an appropriate approach to adopt where those issues have been a focus of significant attention in the case, and have occupied a substantial part of the hearing.
14. The third scenario arises where the Court cannot identify with confidence which party has succeeded on the '*event*'. This will arise where '*there are two equally valid ways of looking at which party might be said to have been successful*' (*Veolia* at para. 3.9). Where this happens, the appropriate course of action is for the Court to base its award of costs on an assessment of how much of the hearing might be attributable to the issues on which each party succeeded with the costs attributable to the presentation of the general background to the case being allocated proportionately across the range of issues to which that background applies (*Veolia* at para. 3.9).

15. This means that there may be cases in which the costs outcome differs very significantly depending upon whether the court decides that there is an 'event'. When a winning party on an event is identified, that party will – irrespective of the number of issues on which it prevails – obtain all of the costs of presenting of what Clarke J. described as '*the general legal and background issues that were applicable to all ... grounds*' (*Veolia* at para. 3.12). However, where it is deemed that it is not possible to determine the 'event', the same costs of the same hearing are liable to be allocated quite differently with those '*general legal and background*' costs being distributed across the various issues to which they were applicable.
16. The effect is demonstrated by the various outcomes hypothesised by Clarke J. in the final part of his judgment (at paras. 3.9 to 3.12). There (having determined that the Court could not say that either party had succeeded on the event) he considered the costs that would have been awarded had either party been held to have prevailed on the event. The differences are striking. In respect of the same costs of the same issues, he held that no order should be made as to costs if it could not be said who had won the event, but that had it been held that the applicant had won '*the event*' it should be awarded the costs of a two-day hearing, but that if the respondent were determined to have succeeded on '*the event*' it would have been entitled to the cost of a four-day hearing.
17. In this regard, I think it important to emphasise that while in interlocutory applications (in respect of which O.99 made no reference to an 'event') it is by no means uncommon for a situation to arise in which it is not possible to decide who won the event (*James Elliott Construction Ltd. and anor. v. Lagan* [2016] IEHC 444 at para. 13), the circumstances in which it is not possible to determine who won '*the event*' after a final hearing must be wholly exceptional. *Veolia* was such a case because it concerned the trial of a preliminary issue and to some extent the reason the Court was not confident it could identify a '*winner*' arose from the fact that the preliminary issue had been directed at the instigation of the respondent on the basis that it would dispose of the entire case. As a result of the outcome of the trial this did not happen (see *Veolia* at para. 3.3). Furthermore, there were two issues being tried – whether the proceedings were brought in time (which the respondent won) and whether time should be extended (which the applicant won, in part) (see [2006] 1 IEHC 137, [2007] 1 IR 690 at para. 2).
18. However, given that a party succeeded on an 'event' as that term was used in the old version of the Rules when it prevailed on one or more of the causes of action in the suit (see *Kennedy v. Healy* [1897] 2 IR 258 at 262-263 and *ACC Bank plc v. Johnston* [2011] IEHC 500), the circumstances in which a case runs to final determination and there is no '*winner*' so defined will be very rare indeed. Certainly, in a case where the applicant has obtained an order of the kind in issue in this case, I do not believe it can be said that it has not won '*the event*' because it sought that relief by reference to a variety of arguments on which it was unsuccessful, even if those arguments were of a more fundamental kind than those on which it ultimately prevailed in the action and even though those arguments occupied a greater part of the hearing than that on which it did prevail.

Relevant principles post-December 2019

19. I have included in an Appendix to this judgment the relevant provisions of O.99 as it stands since December 3 2019, as well as the relevant parts of s.168 and 169 of the Legal Services Regulation Act 2015. Reading these in conjunction with each other, it seems to me that 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)).
 - (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)).
20. Insofar as there might be said to be any difference potentially relevant to this application between the new and old regimes, they appear to me to lie in two features of the 2015 Act. First, Clarke J. in *Veolia* – at least on one view – limited his explanation of the power of the Court to reduce the costs of the party who prevailed on the '*event*' by reference to the costs incurred by the other party in addressing issues on which the former did not succeed to cases that were '*complex*'. No such express limitation appears on the face of the legislation. Second, whereas under the pre-existing law, costs presumptively followed the event the *prima facie* entitlement to costs is now limited to the party who is '*entirely successful*'. Given that the law was that the term '*event*' fell to be construed

distributively so that there could be a number of events in a single case (*Kennedy v. Healy*), winning the 'event' and being 'entirely successful' may well not mean the same thing (although it will be observed that the phrase 'costs to follow the event' appears in the marginal note to, but not the text of, s.169).

The costs of the judicial review proceedings

21. Chubb obtained no relief in either the High Court, or on appeal, in the Judicial Review proceedings. HIA is *prima facie* entitled to the costs of those proceedings in their entirety under both the pre- and post- 2015 regimes. However, Chubb advances two reasons why – it says – the costs of the Judicial Review proceedings should not be ordered against it.
22. First, it notes comments in my judgment that it may have been understandable that the judicial review proceedings were instituted. Specifically, the judgment observed (at para. 137):

'In a context in which the case law consistently reserves the scope of a statutory application in the nature of an appeal to the particular legislative context in which it appears, it is understandable that – at least absent a definitive determination in the context of the precise scheme in issue – prudent legal advisors will seek to protect to the greatest extent possible their client's rights by instituting parallel judicial review proceedings. However, the grounds in issue here were all capable of being addressed within the statutory application and, even if that was not the case, it would not have been correct for the Court to have duplicated consideration of issues addressed in the statutory application, in the judicial review proceedings.'

23. The reference was, obviously, directed to those issues on which there might have been a doubt as to the scope of the statutory application. While it may well have been understandable that Chubb issued separate Judicial Review proceedings in respect of some of the arguments it wished to make (in particular the arguments as to legitimate expectations and its claims that certain matters were not taken into account in the decision making process leading to the issue of the enforcement notice), it lost on these issues and the issue on which it did prevail (the failure of the notice to specify a contravention on its face) was clearly a matter that could be (and was) addressed within the statutory application. In those circumstances, the comments in the judgment do not affect the general principle that costs follow the event.
24. The second contention is that the judicial review proceedings did not add to the length of the proceedings as a whole. The fact is that Chubb decided to proceed to litigate certain issues within the framework of the judicial review proceedings, and it is clear from my review of the transcript that it treated the cases separately – in fact spending one full day opening the pleadings and affidavits attributable to the judicial review action. It persisted in this course of action even though HIA had made it clear that insofar as it was concerned *all* issues could be addressed within the statutory application. Had it in fact been the case that the actions were presented as an indivisible unit directed to the appropriate statutory remedy of cancellation, Chubb's position would have some merit. That is not what occurred, at least in the High Court. However, because issues

overlapped as between the two proceedings, I think it proper to consider broadly some of the categories of cost incurred in the judicial review action.

25. The first element of the work done relates to the pleadings, affidavits and written legal submissions in respect of those proceedings. While these may have been repetitious to a significant degree of the papers exchanged in the statutory application, the material Chubb chose to deliver still had to be addressed by HIA, and it is clearly entitled to its costs of so doing. The same point stands to be made in relation to any inter partes correspondence etc. in dealing largely with that action.
26. The second arises from the hearing before the High Court. While it is certainly the case that the opening of the statutory application (which proceeded throughout day 1 and up to a late point on day 2) referred to some of the issues that presented themselves in the judicial review proceedings, in broad terms that period can be assigned to the statutory application. The opening of the judicial review proceedings proceeded over the remaining time on day 2 and all of day 3. In responding to both cases on day 4, counsel for HIA did not distinguish on the merits between the two cases, but between her agitation of the issue of whether a separate judicial review should have been brought at all, her consideration of the merits of those arguments that were advanced in the judicial review proceedings but not the statutory application, and the addressing of the issues in the judicial review proceedings in reply, I think that an overall attribution to the judicial review proceedings of one and a half days in dealing exclusively with the issues they presented, is reasonable. If costs of the hearing are ordered on that basis, I do not believe that Chubb can have any legitimate complaint that there has been duplication, the costs of the remaining three days being attributable to, and falling to be addressed by reference to, the statutory application.
27. The third aspect is the filing of the various papers for the appeal specific to the judicial review, comprising the notices of appeal, and written submissions together with any inter-partes correspondence or dealings attributable largely to the judicial review proceedings. HIA is entitled to these costs because, once again, the papers that Chubb chose to file had to be responded to.
28. The fourth component is the hearing of the appeal. Partly because the appeal presented a significant number of different questions that were heard in a comparatively short and focussed presentation with no clear differentiation between the two actions, I do not believe it right to order costs of the appeal hearing in anything more than one action. The issues by that point were enmeshed and dealt with without distinction between the two actions. Logically, they fall to be addressed within the statutory application.

The 'event' and the statutory application

29. It is clear that in the statutory application, Chubb did prevail on the event. It instituted proceedings seeking the cancellation of the directions in the enforcement notice, and it secured an order to that effect. Without the proceedings it would not have obtained that outcome. The starting point, therefore, is that it should recover the costs of the

proceedings. However, it must have subtracted from such award made in its favour, the costs of HIA in meeting those parts of the claim in relation to which Chubb failed.

30. This is the appropriate approach here because there is no doubt that the case was 'complex' in the sense in which that term was used by Clarke J. in *Veolia* involving as it did multiple and defined legal issues. Insofar as 'complexity' was a precondition to the exercise of the jurisdiction envisaged in *Veolia* (and in fact Clarke J. never says unequivocally that it is) this arises not (as Chubb suggests) only where there have been 'numerous interlocutory steps involving discrete issues of law in respect of one or more of which' Chubb was successful, but where the proceedings present multiple issues and to that extent cannot be described as 'straightforward'. Similarly, in this case there can be no doubt but that insofar as Chubb did not prevail on the greater number of those issues, it added materially to the time and cost of the proceedings by substantially basing its case on issues in relation to which it failed. The case, therefore, falls squarely within the second scenario to which I have earlier referred.
31. In calculating the costs attributable to the issues on which Chubb prevailed the exercise is – at least in this case – properly undertaken by seeking to allocate time as between the various issues (see *McAleenan v. AIG (Europe) Ltd.* [2010] IEHC 279). In that regard, it is necessary to take account not merely of the time spent in Court, but also to the legal submissions and affidavits. The exercise falls to be conducted adopting 'a relatively broad brush approach' (MD at para. 17). It is not possible to achieve a mathematically perfect allocation of time, effort and cost.
32. Taking these factors into account, they lead me to the conclusion that although Chubb has prevailed in winning the event, in the unusual circumstances that present themselves here, this is a case in which HIA should recover from Chubb 1/3rd of its costs in the High Court and in this Court. I reach this conclusion for the following reasons.
33. The time spent at hearing addressing the actual issue in relation to which Chubb prevailed was very limited. In that regard, I am particularly cognisant that that issue obtained relatively brief mention in both the papers before the High Court and the oral submissions to that Court. However, contrary to the contention advanced by HIA, it was addressed in the written submissions to the High Court in both the statutory application (at paras.70 to 73) and the Judicial Review proceedings (at paras. 89 to 94). The transcript of the oral hearing before the High Court at two points (day one page 81 and day 5 page 37) clearly records the argument being advanced and, as I read it, being responded to (day 4 page 100 to 101). The issue was closely related to the argument advanced before the High Court that HIA was required to specify in its enforcement notice persons ordinarily resident in the State who were insured by it and, it was (and remains) the understanding of this Court (as Chubb submitted in its legal submissions on the appeal) that both were addressed together by the trial Judge at para. 53 of her judgment. On appeal, the latter issue was not pursued, and the former was given more prominence in both legal submissions and oral submissions. However, it did not occupy a noticeable proportion of the time at hearing before the High Court.

34. Nonetheless, this question was successfully agitated on appeal. To do this it was necessary to outline the legal and factual background to the points in question. Even if Chubb had not argued the various points it did around ordinary residence and legitimate expectation and even if it had limited its case to the proposition that the enforcement notice was bad on its face because it failed to record a contravention, a Court hearing that case would still have had to understand the legislative context, and the dealings between the parties leading to the issuing of the enforcement notice. However, these issues were relatively net and would not have required anything like the comprehensive analysis of the purpose and intent of the legislative scheme that was ultimately conducted.
35. At the same time, the issues on which HIA prevailed arose directly or indirectly from what I described in my earlier judgment as the question lying at the heart of the proceedings. Central to Chubb's position throughout was the contention that students who were undertaking courses of education in the State of more than one year's duration were not and could not for that reason alone be '*ordinarily resident*' here. This argument was presented in various different ways in the course of the proceedings (and in different ways in the High Court and this Court) : that HIA could only determine on an individualised basis whether a given party was '*ordinarily resident*', that ordinary residence is backward looking, that the approach adopted by HIA was contrary to the policy of the Act, and that HIA unconstitutionally engaged in a legislative function in applying its interpretation of '*ordinary residence*' to a class of persons. These various propositions were directed to a single end – that students undertaking courses of some duration were not ordinarily resident where they undertook those courses – and the arguments advanced by Chubb in relation to each was rejected.
36. I think that a reasonable division of material and time directed to the presentation of the overall legal and factual background to the case, the issues on which Chubb prevailed, and the issues which were argued before but decided by this Court (see *Christian v. Dublin City Council* [2012] IEHC 309) would be reflected in an order in favour of Chubb of 1/3rd. of its costs. However, in this case while Chubb may have won the event in the narrow sense of obtaining relief which it could only have secured by bringing the proceedings, HIA prevailed on the issues which occupied the remaining 2/3rd of that time and cost. For reasons I have explained earlier, it should recover these. While noting that the costs of one party for a case may not always correspond to those of the other to the same dispute, I see no reason here not to apply a straightforward set-off and to order that HIA recover 1/3rd of its costs in both actions.

The new costs regime

37. Chubb, not having been '*entirely successful*' in its proceedings has no entitlement under s.169(1) of the 2015 Act to its costs. The Court has, however, the power under s.168(2)(a) to make an order in its favour to the extent that it was '*partially successful*' in the proceedings, just as it has the power to make an order on the same basis in favour of HIA. That power extends to awarding '*costs relating to the successful element*' of the proceedings. The difference between the two provisions is important: the party who prevails entirely has a right to costs unless there is a reason not to order them. A party

who only succeeds partially may obtain an order for costs in respect of the successful aspect of its claim if, having regard *inter alia* to the criteria specified in s.169(2), it is appropriate to award them. Issues will arise in other cases as to what exactly '*entirely successful*' means. Depending on the precise construction placed on that phrase, the pre-existing position that a party who won '*the event*' but succeeds in respect of only some of the issues addressed in support of the relief it obtains is presumptively entitled to all its costs, may have been changed by the Act.

38. In this case, it is in my view appropriate that Chubb obtain the costs attributable to that part of the proceeding in which it succeeded, and the same applies to HIA. In determining the costs so attributable, I do not see that the Act limits the power of the Court to award only those costs directly attributable to those issues and in determining the level of such costs I believe that the allowance to Chubb of the costs of the presentation of the background issues is appropriate.
39. HIA has presented a number of arguments as to why, having regard to the factors enumerated in s.169(1), costs should be addressed in the manner contended for by it.
40. First, it is said that the Court should have regard to the conduct of the applicant prior to the proceedings. HIA complains that Chubb '*refused to accept the Respondent's interpretation as regulator of the term 'ordinarily resident in the State'*'. It refers to the risk that Chubb was acting unlawfully, and stresses that it indicated that it was only too willing to act as a *legitimus contradictor* in declaratory proceedings on the basis of a full indemnity. In the same context, HIA complains that Chubb has continued to offer the MediCover Policy for sale to non-EEA students since the Enforcement Notice was served.
41. I think this overstates the import of the reference to '*conduct before ... proceedings*' in s.169(1)(a). While, clearly, the legislature was directing the court to something other than the '*conduct of the proceedings*' referred to in the preceding paragraph, the pre-existing law enabling the withholding of costs on this basis has involved improper behaviour proximately related to the action itself (see for example *Mahon v. Keena* [2009] IESC 78). There is nothing in the provision to suggest that its effect is to invest the court with a general power to grant or with-hold costs in order to enforce either a regulatory regime or the criminal law. HIA never took the steps one would expect had it seriously believed that Chubb's proceedings were either unstateable or an abuse of the process of the Court and to my mind it would be of deep concern if any State body was encouraged in the view that the refusal of persons subject to its jurisdiction to unquestioningly accept its construction of the law (whether '*as regulator*' or otherwise) was of itself a form of misconduct. In any event, in this case the Court does not have the information necessary to embark upon that exercise – the characterisation of Chubb's conduct in deciding to adhere to the definition of ordinary residence postulated by it in these proceedings is dependant *inter alia* on the legal advice it was given, to which clearly the court is not entirely privy. At the end of the day, Chubb adopted a position on the meaning of '*ordinary residence*' and challenged the enforcement notice accordingly.

Having lost on the issue, it must pay HIA's costs on that question. I do not see any reason to put the matter further than that.

42. Secondly, HIA identifies a variety of respects in which it says Chubb's position was without merit and/or in which it changed its position in the course of the hearing of the matter. These contentions are, in my view, addressed within the framework of the costs I have suggested should be awarded against Chubb.
43. Thus, and in conclusion, the appropriate order in respect of the costs of these proceedings is as follows:
- (a) HIA will recover as against Chubb all of the costs of the judicial review proceedings *except* the costs of the hearing of the appeal in those proceedings.
 - (b) For the purposes of determining the costs of the High Court hearing of the judicial review proceedings, those proceedings shall be treated as having lasted one and a half days.
 - (c) For the avoidance of doubt, I am making no order as to the costs of the hearing of the appeal of the judicial review proceedings because those proceedings were so enmeshed with the statutory application that they are properly and fairly treated for the purposes of the hearing as a single appeal. However, again for the avoidance of doubt, HIA is entitled to recover the costs of the appeal of the judicial review proceedings excluding the hearing costs (including solicitor's instruction fees and counsel's brief fees) and comprising the costs attending response to the notice of appeal and legal submissions.
 - (d) HIA shall recover from Chubb one third of its costs of the High Court proceedings and of the appeal in the statutory application.
44. The parties have identified one amendment to para. 119 of my judgment, which contained a typographical error. It should read (the underlined word being inserted into the text of the judgment):

'The exemption in s.2(1)(d)(i) is not framed by reference to the entering into or effecting of the policy. Instead, a contract of insurance is outside the general definition and within the exception if its purpose is to reimburse persons who are not ordinarily resident in the State.'

Whelan J. and Power J. agree with this judgment and the order I propose.

APPENDIX

Rules of the Superior Courts Order 99 Rules 2 and 3

2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:
 - (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
 - (2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.
 - (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.
 - (4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.
 - (5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.
3.
 - (1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.
 - (2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs.

Legal Services Regulations Act 2015 s.168(1) and (2) and s.169(1):

168. (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) where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to the proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust.

- (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) Nothing in this Part shall be construed as—
 - (a) restricting any right of action for the tort of maintenance, or
 - (b) restricting any right of a trustee, mortgagee or other person, existing on the day on which this section commences, to be paid costs out of a particular estate or fund to which he or she would be entitled under any rule of law or equity
- 169 (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.