UNAPPROVED

FOR ELECTRONIC DELIVERY.

THE COURT OF APPEAL

CIVIL

Neutral Citation: [2023] IECA 193

Record No: 2019/345

High Court Record No:2006/2687 P

Edwards J.

Collins J.

Power J.

PAUL BARLOW, WOODSTOWN BAY SHELLFISH LIMITED,

MICHAEL CROWLEY, RIVERBANK MUSSELS LIMITED, GERARD KELLY,

FRESCO SEAFOODS LIMITED, TARDRUM FISHERIES LIMITED,

ALEX McCARTHY and HALCOME MERCHANTS (IRELAND) LIMITED

TRADING AS ALEX McCARTHY SHELLFISH

Appellants

AND

THE MINISTER FOR COMMUNICATIONS, MARINE & NATURAL RESOURCES,

THE REGISTRAR GENERAL OF FISHING BOATS, IRELAND AND THE

ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice John Edwards delivered on the 31st of July 2023.

Introduction

1. On the 21st of July 2022, Edwards J. delivered a judgment (bearing neutral citation [2022] IECA 179) with which both Collins and Power JJ. concurred, on the substantive issues in this appeal ("the principal judgment"). The appeal was against a judgment of the High Court dated the 22nd of March 2019 (delivered by Meenan J) and the Order arising therefrom on the 31st of May 2019 (and perfected on the 26th of June 2019), on foot of which the appellants' claims (as plaintiffs) against the respondents (as defendants) for injunctive relief (both prohibitory and mandatory), various declarations, and for damages under various headings were dismissed.

2. The appellants were involved in the commercial fishing, harvesting and sale of ground or bottom mussels. Their claims for damages were substantially (although not exclusively) based upon alleged loss and damage suffered by them through the allegedly negligent mismanagement by the defendants their servants or agents, of stocks of ground or bottom mussel seed, a finite natural resource, within the territorial waters of the State.

3. While the action as originally framed by the appellants had sought numerous reliefs other than, and in addition to, the primary claim ultimately pressed, i.e, the claim for damages for negligence and breach of duty arising from the respondents' alleged mismanagement of the seed mussel resource, the appeal against the High Court's dismissal was largely confined to contesting the High Court's dismissal of that aspect of their claims. Whilst it is true that the appeal also embraced a subsidiary claim alleging error on the High Court judge's part in failing to fashion a bespoke remedy for the appellants to allow for vindication of various of their constitutional rights, including the right to earn a livelihood, and property rights, said to have been breached by the respondents' mismanagement of the mussel seed resource, the issues around the claims for damages for negligence and breach of duty dominated the appeal.

4. This Court ultimately dismissed the appellants' appeal on all grounds. In so far as the main controversy was concerned, while the Court disagreed with the High Court's assessment that the expert evidence adduced at trial had failed to sufficiently demonstrate mismanagement of the mussel seed resource, we considered that that did not go to the heart of the matter, and the appeal could not be disposed of on that basis alone, because ultimately we were in agreement with the High Court judge that in the circumstances obtaining in this case, the dealings between the parties did not give rise to a relationship of sufficient proximity to impute the duty of care being contended for.

5. The respondents now seek their full costs of the appeal as against the appellants, contending in essence that they were entirely successful in the appeal, and that costs should follow the event.

6. The appellants in turn oppose the respondents' application for costs, and in turn ask the Court to award them, on a discretionary basis, their costs against the respondents, or such proportion thereof as the Court may consider it appropriate to award, in the particular circumstances of the case.

Submissions by Counsel for the Appellants

7. We were referred to both subsections (1) and (2) s.169 of the Legal Services Regulation Act, 2015 ("the Act of 2015), which provide:

> "(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—
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> (a) conduct before and during the proceedings,
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> (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
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> (c) the manner in which the parties conducted all or any part of their cases,

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

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

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

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

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."

8. At the outset, counsel for the appellants asserted that it cannot be said that the respondents were entirely successful in the appeal, in circumstances where this Court had rejected the High Court's assessment that the expert evidence adduced at trial had failed to sufficiently demonstrate mismanagement of the mussel seed resource. At paras. 85 and 194 of the principal judgment it was held that the High Court judge had failed to make clear that there was a very large measure of agreement between the experts on the issue of whether or not there had been mismanagement of the mussel seed resource, notwithstanding some relatively minor disagreements on what would have been the most appropriate way to have managed it. It was the shared view of the experts that the resource had been mismanaged, and the High Court judge had erred in forming a mistaken contrary overall impression. While it was true that the finding in the principal judgment that mismanagement had been demonstrated did not ultimately avail the appellants, because the Court had gone on to agree with the High Court's further conclusion that there was insufficient proximity of relationship between the parties to impute the duty of care being contended by the appellants, the Court

had none the less rejected a significant part of the foundation underpinning the High Court's decision to dismiss.

9. Counsel for the appellants also submitted (correctly) that while the principal judgment ultimately arrived at the same substantive conclusion as the High Court judge had arrived at, namely that no private law duty of care was owed by the respondents to the appellants in the circumstances of the case, the High Court's approach to the duty of care issue was criticised by this Court, as was its focus on the ownership of the resource.

10. In the circumstances, counsel for the appellant submitted, the respondents had no entitlement to be awarded the costs of the appeal in reliance on s.169(1) of the Act of 2015.

11. It was further argued that even if this Court were to conclude that the respondents had been entirely successful in resisting the appeal, we would be justified in exercising our discretion to order that the respondents ought not to be entitled to an award of any costs, or alternatively a full award of costs, against the appellants having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties.

12. Our attention was drawn to s.169(1)(b) and it was submitted that it had been reasonable for the appellants to raise, pursue or contest one or more issues in the proceedings. The point was made that this had been a material factor which had led the High Court (whose costs order was not appealed) to award the appellants 25% of their taxed costs and 100% of the costs of the transcripts against the respondents: see the High Court's costs ruling at [2019] IEHC 417. It was submitted that it might be said that the appellants were less successful before the High Court than they were before this Court concerning the merits of their claims, and that this Court should, adopting a similar approach to costs to that adopted by the High Court, also regard it as having been reasonable for the appellants to raise, pursue or contest one or more issues on the appeal.

13. Counsel for the appellants, in referencing the High Court's costs ruling, drew attention to Meenan J's citation of cases such as *Collins v. the Minister for Finance* [2014] IEHC 79 and *Dunne v Minister for the Environment, Heritage and Local Government & Ors* [2008] 2 IR 775 as setting out the principles that should be applied in circumstances where, though unsuccessful, parties are awarded their costs. She identified with specificity that there are a category of cases involving constitutional challenges which raise issues of special and general public importance which are not brought for personal advantage. While the instant case was accepted as not falling into this category, Meenan J had gone on to say that there were yet other claims for commercial loss which did, and, in reaching its decision, the Court applied well-established principles of law. There are, however, other categories of cases in which special circumstances can arise, citing as an example *Kerins v. McGuinness & Ors* [2017] IEHC 217 where, notwithstanding that the plaintiff had lost her action, the Divisional High Court had nonetheless awarded her two-thirds of her taxed costs, being satisfied, firstly, that the applicant raised issues of special and general public importance and of some novelty and that the institution of the proceedings was a proportionate reaction on the part of the applicant to the situation arising from what took place before the Public Accounts Committee.

14. The High Court judge concluded that, against a background where the defendants had permitted unlawful fishing for mussel seed in the territorial waters of the State for many years, and where this illegal fishing, permitted by the State, did have adverse commercial consequences for the plaintiffs, the appellants' proceedings were a "proportionate reaction" to the unlawful situation created by the State. We are asked to take a similar view.

15. It was also argued on behalf of the appellants that the appeal had involved issues of public importance. In that context we were referred to the judgment of Murray J in *Lee v The Revenue Commissioners* [2021] IECA 114, wherein he stated that, notwithstanding the

enactment of s.169 of the Act of 2015, the Court retains an exceptional jurisdiction to exempt a litigant from the consequences of the general rule (as now provided for in s.169 of the Act of 2015, and heretofore understood as requiring that costs should normally follow the event) where proceedings were of general public importance.

16. As Murray J noted, the essential factors guiding this exceptional jurisdiction were summarised by Simons J. in *Corcoran v. Commissioner of An Garda Siochana* [2021] IEHC 11 at para. 20. There is a balancing exercise involved in reconciling the objective of ensuring that litigants are not deterred from pursuing litigation which serves a public interest with the aim of not encouraging unmeritorious litigation. Simons J had said:

> *"In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights."*

17. At paragraphs 7 to 12 inclusive of his judgment in *Lee,* Murray J had considered the jurisprudence relating to *public interest* cases in which the court absolved the losing party from the cost consequences that usually follow the failure of their litigation. He noted that they may cover a wide terrain. While at one point it had been considered that this exceptional jurisdiction was not available to a claimant whose case was brought in part to obtain a personal advantage, the law had moved on somewhat from that, allowing (in some instances) costs orders to be made in favour of losing parties who brought litigation in order to advance a personal interest; alternatively no order as to costs. He concluded that:

"There is, in practical terms, a sliding scale guided by the importance of the issues, the number of other cases in which those issues are likely to arise and the strength of the claimant's case, the application of that scale being influenced in any given situation by the nature of the claimant's interest in the action A citizen pursuing a challenge on an issue of systemic constitutional importance in which they have no personal interest and which raises substantial issues will have to surmount a lesser burden in obtaining their costs than a similarly positioned litigant who proceeds to litigate an issue which affects their personal or proprietary interests. A litigant in the latter category may be exempted from costs in a case where a claimant in the former situation obtains some or all of them. Each may find themselves bearing costs if their claim turns out to be insubstantial or if it revolves around legal issues that are discrete (rather than general) in their application."

18. Counsel for the appellants in the present case, while accepting that where a litigant seeks to achieve a private advantage by pursuing a case that also raises a significant issue of general importance, acknowledged that it may well weigh against a full award of costs in that party's favour, or it may diminish the percentage that would be given to an unsuccessful litigant. However, she submitted, an outright refusal of an award of costs in favour of an unsuccessful litigant solely on that account would not be justified. Rather, it is a factor that is to be weighed in the balance when the Court is considering whether or not costs might be awarded to a litigant who has been unsuccessful.

19. Counsel for the appellants submitted that it is of significance that the present proceedings started out with a public interest objective, in that an injunction was sought in 2006 aimed at stopping foreign registered (mostly Northern Ireland based) mussel seed vessels from entering into and fishing aggressively in Irish territorial waters. The *Barlow II* proceedings emerged from these proceedings, which subsequently had to be reconfigured in

light of the disposal of certain issues in *Barlow II*, and what followed from *Barlow II*. Notwithstanding that reconfiguration, issues of general application and public importance were raised and litigated in the present litigation albeit that they were issues which, had they been decided in the appellants' favour, would also have inured to their private advantage.

20. Counsel submitted that in the context of this appeal there has been careful consideration of the parameters of the duty of care for public bodies when exercising public functions, in particular, as the Court has put it, in the context of denial of benefits that might otherwise have been received. There was, it was submitted, a very important elaboration of the relationship between public and private duties and, in particular, at paras. 214 and 215 of the Court of Appeal's judgment where the Court had clarified its position on whether or not there could be a private law liability in the absence of *ultra vires* and in the absence of a lack of public law invalidity. Counsel submitted that this was an important evolution of the principles in previous cases. There had been analysis of how to go about assessing a duty of care in circumstances where the State owns the resources at issue, and the Court of Appeal's departure from the approach taken by the High Court would, it was submitted, have repercussions for many other cases where the State is managing State owned resources. Counsel suggested it was relevant to all other areas of fishing, and further potentially relevant to the Broadband spectrum, or other areas where the State is regulating assets that it enjoys itself. There had also been clarification, it was said, of the constitutional right to property.

21. Counsel submitted that the issues that she had identified were significant, and that they do fall within the category of issues where courts have been prepared to depart from the generally applicable rule that costs should follow the event.

22. Returning to the judgment of this Court in the *Lee* case, Murray J had further noted that Clarke J. in his costs judgment in *Cork County Council v. Shackleton* [2007] IEHC 334, introduced a further variable into the exercise (of assessing whether an unsuccessful litigant

who had raised issues of general application and/or public importance, but who also sought to gain a private advantage, should receive all or any of their costs) namely that in some cases to which the State or one of its agencies is a party and which have been necessitated by the complexity or difficulty of legislation, it may be appropriate not to direct costs in favour of that State party and against the other litigant, even where that litigant is unsuccessful in its claim.

23. At paras 4.2 and 4.3 of his costs judgment in the *Shackleton* case, Clarke J explained the principle in issue in these terms (later cited with approval by Murray CJ (Denham, Hardiman, Geoghegan and Fennelly JJ. concurring) in *O'Keeffe v. Hickey*. [2009] IESC 39):

> *"[4.2] … . Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case.*
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> *[4.3] However it seems to me that different considerations may apply, at least in some cases, where one of the parties is a public authority. To take a case at the other end of the spectrum from the purely private litigation which I have just considered, one can envisage circumstances where a court was faced with difficult questions of construction in relation to legislation of widespread and general application which was introduced by a particular ministry (sic) and in circumstances where that ministry is a necessary and proper party to the proceedings under consideration. An analogous situation might arise where Ireland was a necessary party. In those circumstances it seems to me that it is open to the Court to weigh in the balance in*

considering costs the fact (if it be so and to the extent that it is so) that the litigation may have been necessitated by the complexity or difficulty of legislation for which, of course, either the Minister concerned or Ireland, was in substance responsible."

24. Counsel for the appellants pointed to the fact that the High Court had acknowledged in clear terms in its substantive judgment at para. 75 that while the law precluded the granting of any remedy to the plaintiffs, the fact remained that for many years the State had permitted vessels registered in Northern Ireland unlawfully to fish for mussel seed in Irish territorial waters to the detriment of the domestic ground mussel industry. Thus, it could not be said that the appellants were well served by the State. In the appeal too, it was said, this Court had indicated (at para. 209) that it was not without sympathy for the appellants.

25. In addition, counsel urged upon us that it was striking what had been proven by the appellants. They had, she maintained, proven unlawful management of the resource in the *Barlow II* proceedings before the Supreme Court; and before this Court they had proven, as a matter of fact, that there was mismanagement of the resource. The litigation, it was submitted, had therefore been necessitated by circumstances for which either the Minister concerned or Ireland, was in substance responsible, and we were urged to take this into account.

26. We were also asked to take account of the hardship that any Costs order against the appellants would cause. Reliance in that context was placed upon *MN v SM* [2005] IESC 17, [2005] IESC 30. Further, in considering the public interest issue we were asked to bear in mind the chilling effect that a refusal to depart from the general rule might have on future public interest litigation. Counsel for the appellants sought to emphasise that the court has a broad discretion, and in support of this we were referred to *Bupa Ireland Limited and another v. Health Insurance Authority* [2014] 2 I.R 67, where Cooke J had observed that the objective was to do justice between the parties.

27. Finally, our attention was directed to examples of cases in which there had been departures from the general rule, including costs rulings. The cases referenced (although the reported/otherwise published judgments do not in every case deal with costs) included *Horgan v An Taoiseach* [2003] 2 I.R. 468 where the unsuccessful plaintiff was awarded 50% of his costs; *Curtin v Dáil Éireann* [2006] IESC 7 where unsuccessful party was awarded 50% of his costs; *Fleming v Ireland* [2013] IESC 19 where unsuccessful appellants were awarded 50% of their costs; *Collins v. Minister for Finance* [2014] IEHC 79 where 75% of costs were recovered by the plaintiff; *P.C. v Minister for Social Protection* [2016] IEHC 343 and [2017] IESC 63 where the unsuccessful party was granted two thirds of his costs; *Costello v Ireland* [2022] IESC 44 where the unsuccessful plaintiff was awarded 50% of his costs; *Sherry v Minister for Education* [2021] IEHC 224 where the unsuccessful applicant recovered 65% of his costs related to the substantive hearing, and 50% of his costs in respect of the related interlocutory motions; *Heneghan v Minister for Housing and ors* [2021] IEHC 816, where no order for costs was made; and *Delaney v Personal Injuries Assessment Board* [2022] IEHC 460 where the unsuccessful applicant was granted 60% of her costs.

Submissions by Counsel for the Respondents

28. Counsel for the respondent submitted that it was wrong to say that this court found that the appellants had succeeded in some respect. This was the original *Barlow I* case, and it was a claim for damages. While the appellants had succeeded in the *Barlow II* litigation, which did involve a public law dispute, this was not that litigation. The appellants had returned to *Barlow I* after *Barlow II* and had reactivated the present litigation which, the respondents contended, was solely concerned with seeking to obtain a private law advantage.

29. Moreover, insofar as the conduct of the litigation was concerned the Notice of Appeal contained thirteen grounds which were then reduced to seven by the time of the hearing. The Statement of Claim had had four iterations in the High Court. By the time counsel for the

appellants opened the appeal before this Court the issues had resolved down to a claim for damages in negligence. They had failed 100% in that.

30. It was submitted by counsel for the respondents that none of the cases instanced by his opponent in which the courts had departed from the normal rule was of any benefit to the appellants. It was contended that they were all distinguishable on their facts. Moreover, while *Lee* was authority for the proposition that a court may depart from the general rule in certain circumstances, and at paragraph 20 of his judgment in that case Murray J had set forth six grounds for his decision to make no order as to costs, only one of those grounds was potentially relevant in these proceedings, namely that there was an issue of law which was not straightforward and on which there were two legitimate views.

31. It was submitted that in respect of hardship there was no evidence of this before us. The appellants as plaintiffs had received full costs in the *Barlow II* litigation, and 25% of the High Court costs in the present case. It was submitted that, having lost in the High Court, and notwithstanding that having received 25% of their costs, the appellants have no entitlement to costs in regard to the appeal in circumstances where their appeal was been dismissed in full.

32. While accepting that there had been criticism of the State's management of the resource at issue in this Court 's judgment counsel for the respondents submitted that the appellants had nonetheless been required to operate "within the parameters of the law", and it was their decision to pursue a claim even though it was legally misconceived. While there had been other issues in the litigation apart from the claim for damages for mismanagement of the seed mussel resource, these had been abandoned or conceded on the day of the appeal.

33. Counsel for the respondents accepted that there was criticism of the High Court judgment in the judgment of this Court but maintained that the fact of there having been such criticism was insufficient to justify this court in departing from the general rule. While it was accepted that the issue of mismanagement was a matter of some complexity, counsel for the

respondents disputed its importance in so far as people other than the appellants were concerned. The respondents' position was that the appellants had wholly failed in their appeal and in those circumstances the court should follow the usual course and determine that costs follow the event.

Decision

34. Having considered the submissions of both parties, I am satisfied that in the circumstances of this case there are grounds for invoking the exceptional jurisdiction spoken of by Murray J in *Lee v The Revenue Commissioners* (previously cited), and for departing from the general rule provided for in s.169(1) of the Act of 2015. While it is true that if the only metric to be applied to whether the respondents were entirely successful, or not, was whether the appeal was said to have been allowed, or alternatively, dismissed then according to that narrow metric the respondents were 100% successful. However, it is not the case that the High Court's judgment remains undisturbed in terms of its substance. This Court's judgment rejected the High Court's assessment that the expert evidence adduced at trial had failed to sufficiently demonstrate mismanagement of the mussel seed resource, and characterised how that court treated of that issue in its judgment as creating *"a misleading overall impression of the evidence"*. Further, the High Court's approach to the duty of care issue was criticised by this Court, as was its focus on the ownership of the resource.

35. While acknowledging that by the time of the commencement of the appeal hearing in this matter the issues had narrowed to a claim for damages for mismanagement of the mussel seed resource, and that this claim was being pressed by the appellants primarily in the hope of securing a private commercial advantage, I accept that there was nonetheless a significant residual public interest dimension to the litigation, in as much as the case raised complex issues of law in the vexed and still somewhat uncertain area concerning when, if ever, it may be fair, just and reasonable to impose a duty of care on a public authority towards private

individuals or entities in regard to the performance of, or omission to perform, a public obligation in furtherance of what is fundamentally the public interest.

36. Mindful of the considerations identified by Simons J in *Corcoran v Commissioner of An Garda Siochána* (previously cited), I consider that the legal issues which we have identified and which were raised in the proceedings were of general importance; that they were novel in as much as they sought (albeit unsuccessfully) to expand the circumstantial boundaries within which a duty of care, such as that contended for as being owed by the respondents to the appellants, might be imputed to a public authority; that the appellants' case, although ultimately unsuccessful, was far from unarguable. In that regard it was certainly stateable, based on *Ward v McMaster* [1988] IR 337, and *Glencar Exploration Plc & Anor v Mayo County Council (No1)* [1993] 2 IR 237, although perhaps in light of more recent jurisprudence, and in particular *Cromane Seafoods Ltd v Minister for Agriculture, Fisheries and Food* [2017] I.R. 119, an independent legally qualified observer assessing its prospects of success at the outset might have regarded it as being at best a challenging case to sustain, such that securing success would be something of an uphill battle.

37. Simons J's fourth consideration in *Corcoran* was whether "*whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues."* I accept that an award of costs against them may cause some hardship, or at least represent a not insignificant burden to the appellants. While undoubtedly the appellants were motivated in part by the hope of securing a private commercial advantage, I am satisfied that they were also motivated in part by public interest. In that regard I do consider it relevant that an award of full costs against them could potentially have the chilling effect spoken of by Simons J. Moreover, I also consider it relevant that it cannot be said that the appellants have been well served by the State, albeit that they have no remedy in damages. I accept the proposition urged upon us that the

litigation was, if not necessitated, then certainly prompted, by the appellants' exposure to adverse circumstances, namely declining mussel seed yields due to mismanagement of the mussel seed resource, for which either the Minister concerned or Ireland, was in substance responsible, and I consider that the Court is entitled to take this into account in the context of allocating costs. I also consider that the Court is entitled to take into account in that context that the appellants undertook significant capital investment, encouraged by the State.

38. Further, while undoubtedly the issues in this case were very much concerned with the appellants' private commercial interests, it remains to be considered whether the issues in the appeal touched upon sensitive personal rights. One aspect of the appeal had concerned a claim that in application of the so-called *Blehein* principles (see *Blehein v The Minister for Health* [2018] IESC 40) the court should fashion a bespoke remedy to vindicate the personal rights of the appellants which were said to have been breached, including the appellants' property rights and, it was claimed, their right to earn a livelihood. The Court found that these rights were not engaged, and accordingly I consider that the fifth of Simon's J's list of potential concerns is also not engaged in the circumstances of the present costs issue.

39. Approaching the matter ultimately from the perspective of what the justice of the case requires, as commended by Cooke J in *Bupa Ireland Limited and another v. Health Insurance Authority* (previously cited), I have concluded that the appellants should be awarded costs limited to one third ($33^1/_3$ %) of their costs of the appeal against the appellants, either as agreed or as may be adjudicated in default of agreement, and that the respondents' application for costs in relation to the appeal should be refused.

Collins J and Power J, respectively, have indicated their agreement with this judgment in circumstances where it is being delivered electronically.