APPROVED **NO REDACTIONS NEEDED**

THE COURT OF APPEAL

Neutral Citation Number [2023] IECA 189

Record No.: 2022 247

Donnelly J.

Faherty J.

Ní Raifeartaigh J.

BETWEEN/

WORD PERFECT TRANSLATION SERVICES LTD

RESPONDENT

-V-

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

APPELLANT

Judgment of Ms. Justice Donnelly delivered on the 27th day of July, 2023

Introduction

1. This is an appeal by the Minister for Public Expenditure and Reform in respect of a judgment and order of the High Court ([2022] IEHC 219) awarding 50% costs to the Minister after the successful defence of public procurement proceedings brought by Word Perfect Translations Ltd. (hereinafter "Word Perfect"). Word Perfect has brought a cross-appeal seeking a greater reduction in the award of the costs. The primary reason for the reduction in the award of costs by the High Court was that although the Minister succeeded on a preliminary

point that Word Perfect was not an "eligible person" to challenge the tender ("the eligibility point"), the Minister had failed to bring a motion to have a preliminary legal point decided before the trial. In those circumstances, the High Court did not find it necessary to address the three substantive claims raised by Word Perfect which took up most of the time at trial.

2. The case raises issues under s. 169(1) of the Legal Services Regulation Act, 2015 ("the 2015 Act"); primarily whether there is *a requirement* of the parties to conduct litigation in *the most cost-effective manner possible*. This includes the question of whether the 'conduct of the parties' in the sub-section concerning litigation misconduct also involves the failure to conduct the proceedings in the most cost-effective manner. More particularly, it raises the question of whether conducting the proceedings in the most cost-effective manner is the starting point for the exercise of that discretion, as the trial judge considered it to be, or whether it is merely a factor to be considered in the overall exercise of discretion.

Background

3. Word Perfect challenged the legality of a Request for Tenders by the State in respect of the supply of Irish translation services. It did so on three substantive grounds primarily involving principles of EU law. As well as denying each of those substantive points, the Minister made a preliminary objection that Word Perfect was not eligible to bring the challenge because it had not submitted a tender and was not an "eligible person" within the Public Procurement Remedies Regulations (Regulation 4).

4. By judgment ("the principal judgment") of 2 February 2022 ([2022] IEHC 54), the High Court found in favour of the Minister on the ground that Word Perfect was not an eligible person (because it had not submitted a tender) and therefore did not perceive it to be necessary to consider the substantive issues raised on its behalf. That decision was upheld on appeal ([2022] IECA 131).

5. Order 84A of the RSC prescribes the procedure to be adopted in respect of reviews of the award of public contracts. Rule 6(2) provides that where a *contracting authority or notice party* to such proceedings opposes the application on the ground the applicant is not an eligible person, it *may apply to the court for an order dismissing the application by motion on notice*, *grounded on affidavit*, which motion may be made returnable for the return date of the originating notice of motion. No such application was brought by the Minister in the present case.

6. In its submission on the subsequent application for costs, Word Perfect argued that the Minister should have brought a preliminary motion on the eligibility points as this would have saved a huge amount of court time and expense for the parties. Word Perfect submitted there was no dispute concerning the facts relevant to the eligibility dispute; it was clear that the applicant had not submitted a tender. This was not, it submitted, a case in which the facts were in conflict or intertwined with the substantive issues; the eligibility issue was a stand-alone point with no factual conflict (i.e. they had not submitted a tender) and could easily have been dealt with by way of preliminary motion. The High Court accepted this argument and proceeded to make a modified costs order.

The High Court Judgment

7. The trial judge accepted the objective logic of Word Perfect's uncontroverted submissions that the purpose of O. 84A r. 6(2) was to promote and encourage the determination of eligibility as a discrete issue, with the objective of minimising costs and the burden on court resources, so as to avoid the situation where a substantive case is heard unnecessarily. The trial judge referred to the Supreme Court's dictum in *Permanent TSB plc v Skoczylas* [2021] IESC 10, at para 12, that part of the function of making costs orders is to "encourage" an "efficient approach to litigation".

8. The trial judge stated that at a time where there was a "well publicised shortage of judges and a backlog in the courts' system, it is even more important that costs orders encourage such efficiency by ensuring that scarce court resources are only used when necessary… Where this is not the case, there are likely to be negative costs consequences for the parties". He said it was only due to a recent change in legislation, i.e. s.169(1) of the 2015 Act, that the court was "obliged to ask, in every application for costs by a party that has been entirely successful, have the parties conducted the case in the most cost-effective way possible?". He said the existence of this obligation was clear from the wording of s. 169(1) ("shall have regard") and the decisions in *Chubb v The Health Insurance Authority* [2020] IECA 183, and *Somers v Kennedy* [2022] IEHC 78 (Butler J). He also referred to *Ryanair v An Taoiseach* [2020] IEHC 673 (Simons J). He said that s. 169 provided "a powerful financial incentive for litigants to be as efficient as possible with the use of court time" and that it had "the potential to lead to a significant change in the attitude of litigants and their lawyers regarding how they resolve disputes and a significant saving to court resources, in the public interest" (para 4). He said that "it is no longer sufficient for [the winning party] to have been entirely successful in litigation. The party must also have conducted her case in the most cost-effective manner possible, failing which she is unlikely to get her full costs" (para 8). He said the wording of s. 169(1) meant that a court "must consider in every costs application (…) whether (…) the winning party conducted the case in a manner which justifies a lesser award" (para 25).

9. The trial judge referred to mediation as the most obvious way that parties might resolve their dispute in the most cost-effective manner possible, citing *Mascarenhas v Karim* [2022] IECA 48 (failure by party to accept an invitation to mediation led to significant difference in costs which would otherwise have received), although he noted that no mediation issue arose in the present case.

10. In his judgment, the trial judge also referred to *Byrne v Revenue Commissioners (No. 2)* [2021] IEHC 415. In that case, the Revenue Commissioners were awarded 60% of their costs even though they had been successful in the overall litigation because they had unsuccessfully raised issues which took up 20% of court time.

11. While the trial judge noted the Minister's argument that O. 84A was clearly permissive in nature ("*may apply to the Court*"), he said that the key point was not whether the procedure was optional. Rather, the key point, in light of the new costs regime, "is that the court must ask whether the winning litigant had other options in relation to the litigation it pursued". If so, the next key question is "whether it chose the most cost-effective option".

12. The trial judge rejected the argument that this amounted to penalising a winning litigant and referred to the "public interest in seeking to preserve court resources", citing a dictum of McMenamin J in *Tracey t/a Engineering Design and Management v Burton* [2016] IESC 16, para 45. He stated: "Since the effective use of court resources is a matter of public interest, it follows that from the objective perspective of a court, incentivising litigants to adopt the most cost-effective approach to resolving their litigation is a matter of considerable public interest". He referred to various other dicta regarding the efficient use of court time.

13. At para 43 of the judgment, the trial judge said that it was "important to point out at this juncture that there is no criticism by this Court of the fact that the Minister chose not to raise the eligibility issue as a preliminary matter". This is a comment upon which emphasis is placed by the Minister in this appeal, in her argument that there was an express finding that there was no "litigation misconduct".

14. The trial judge said however that how a litigant chooses to run her case has implications for the other parties to the litigation who may have to pay those costs. He cited from *Fyffes plc v DCC plc* [2006] IEHC 32 that "the defendants were entitled to raise any issue they thought fit in the proceedings" but their decision to do so "should not be devoid of consequences".

15. The trial judge viewed it as useful to look at the facts in *Somers* in answering the question of whether the State should have brought a preliminary application. He then said, with reference to the present facts, that the State had a clear choice between bringing a motion on eligibility under O. 84A r. 6(2) or allowing the matter to proceed to hearing on the eligibility issue (circa 20% of the hearing time) at the same time as the substantive claims (circa 80% of the hearing time). He referred to *Gold v Patman & Fotheringham* [1958] 2 ALL ER 497 where Romer L.J. said that "all of this could have been determined by a preliminary point of law (…) I wish litigants would take advantage of the facilities which are afforded of having a preliminary point of law decided". It should be noted that this statement by Romer L.J. is recorded in the report of the case as being said *in arguendo* between counsel and the court.

16. The trial judge stated that the decision of the Minister not to bring a preliminary application has clear financial implications for the other party, as well as on court resources, commenting "This is a matter of considerable public interest in Ireland at present, where we have one of the lowest number of judges in Europe and a considerable backlog in the courts".

17. He concluded that he had "little hesitation" in concluding that this was a case where it was not appropriate to award the winning litigant its full costs even though it had been entirely successful, because of its failure to seek to resolve its dispute in the most cost-effective manner possible.

18. At para 58, he referred to Word Perfect's claim that it should be obliged to pay no more than 20% of the Minister's legal costs. I note that in their cross-appeal, Word Perfect submitted that the trial judge misunderstood what they had said in the High Court. Their argument was that taking the matter in the round including that the Minister had succeeded on the eligibility point (which had taken up less than 15% of the hearing time), a just outcome would be for the Minister to be awarded 20% of her costs. The trial judge next addressed the issue of whether the Minister had been entirely successful. He said it would be "too simplistic" to award the

Minister 20% of her legal costs because to do so would be to ignore the general rule that costs follow the event, i.e. that the State had been entirely successful, and that the default position under the express wording of s. 169(1) is that such a party is entitled to all her costs. Account had to be taken of that.

19. The trial judge noted that in *Ryanair v An Taoiseach*, Simons J. said that the rationale for making a modified costs order is that one side should not have to bear costs which have been incurred unnecessarily by the other side. He said that if the litigation had been fought only on the eligibility point there would have been no need for discovery or for the expert evidence. He held that a fair starting point was for the amount of costs to be awarded to the State to be twice the time spent on necessary issues; 40% of costs.

20. The trial judge then referred to the question of other adverse findings against the parties but noted that there were none here as he did not go on to decide the case. He referred to the Supreme Court decision in *Kelly v Minister for Agriculture* [2021] IESC 28 that some latitude requires to be given to parties to litigation regarding the approach taken by them, when viewing it with the "clarity of hindsight". Taking this factor into account, he raised the Minister's costs from 40% to 45%.

21. Under the heading of "Conduct of Both Parties to be Considered", he said that the onus was on both parties to have the dispute resolved in the most cost-effective manner possible and noted that Word Perfect had not sought to have the eligibility point resolved as a preliminary issue either. In light of this, he found no basis which justified a further reduction in the Minister's legal costs from 45%.

22. Referring to the issue of alternative dispute resolution, the trial judge said it logically follows therefore that to ensure that a case is resolved in the most cost-effective manner possible, consideration should usually be given by both parties to mediation or other forms of

dispute resolution. He did not consider that was an issue in this case as there was no claim that Word Perfect had suggested that the matter could have been resolved by mediation.

23. He then addressed the issue that "The winning party is a defendant who had no choice but to incur legal costs." He said it was implicit in the decision of *Gold v Patman* that the position of a defendant who has generally no choice in being sued is given greater latitude to use whatever arguments are available to him, then say a plaintiff who is, generally speaking, in much more control of the litigation process than a defendant. In the course of his discussion, the trial judge said that in a very general sense Word Perfect was the author of its own misfortune. He said that the fact that the successful party was a defendant was a factor in favour of the Minister's costs being increased. He therefore increased them further from 45% to 50%.

<u>Issues on the Appeal and Cross-Appeal</u>

24. In the Minister's view, the appeal raises the issue of whether a party who participates in, and successfully defends, a unitary trial is entitled to recover costs where, in hindsight the party could have applied to have a particular (successful) point tried as a preliminary issue.

25. The cross-appeal is primarily based upon the simple arithmetical error of the High Court selecting the starting point of 20%. Word Perfect submits that the issue took up less than 15% of the hearing time but virtually none of the time and expense taken up with affidavits, expert evidence and discovery/exhibits. A more appropriate starting figure would have been around 10%.

<u>The Minister's submissions</u>

26. The Minister emphasised the nature of the public procurement proceedings where the Request for Tender was intended to meet "the pressing need for high quality Irish language translation services" throughout the public sector. This was an urgent case and treated so by

the parties and the Courts (including the Court of Appeal). Word Perfect, who may be a small to medium enterprise, are not, the Minister submits, a small player in the area of translation and are aware of litigation rules.

27. The Minister contends that the trial judge has interpreted s. 169(1) as introducing a rule that a successful party can only recover full costs if it has conducted the case in the most cost-effective manner possible, an interpretation which she says is not warranted by the legislative provision and is quite extreme. She contends that the effect of the judgment is that it would effectively *require* motions to be brought in respect of preliminary objections, even where an urgent resolution of the case is required and there is no certainty that the application will succeed.

28. The Minister says that insofar as the trial judge relied upon *Somers v Kennedy*, this was misplaced as the facts were very different. Butler J. described that case as *sui generis*. The Minister points to the passages in the judgment of Butler J. where she said that the court should be slow to second guess the election of procedural mechanisms after the fact.

29. The Minister draws a distinction between the present case and others (*Re Latzur Limited* [2021] IEHC 94; *Byrne v Revenue Commissioners (No. 2)*; *Ryanair v An Taoiseach* [2020] IEHC 673; *Fyffes v DCC*; *Gold v Patman*) where the winning party had lost on some issues, pointing out that as the substantive issues were not ruled on, the Minister did not lose on any issues in the present case.

30. The Minister submits that in those cases, it was only conduct amounting to litigation misconduct that was taken into account in arriving at a modified costs order. She relied on the finding of Simons J. in *Ryanair v An Taoiseach* with reference to the criteria in s. 169(1) paras (a) to (g) as follows: "The criteria provide examples of what might be described as litigation misconduct, such as, for example, the unreasonable pursuit of issues in the proceedings". She contends that the very reason Simons J. refused to depart from the normal rule was because

there had been no litigation misconduct on the part of the Minister, even though Ryanair had prevailed on some issues. The Minister also points to the judgment of the High Court in *Byrne (No. 2)*, saying that the "unreasonable pursuit of issues in the proceedings" was the sort of conduct that might result in a modified costs order. In *Byrne (No. 2)*, the Revenue Commissioners, although overall successful in the case, had raised two secondary issues which the court held were "not supportive of Revenue's claim" and "contain[ed] tenuous claims… (which were) unreasonable to have pursued". The Minister submits that this is a "far cry" from the present case where the Minister did not lose any issues and did not unreasonably raise issues and where there was, on the contrary, no criticism of the manner in which the Minister conducted the litigation. The Minister says that the formula 'litigation misconduct' was used in *E & F v G & H* [2021] IECA 108, per Whelan J., where the trial judge had found that the appellants lacked *bona fides* and there had been no valid basis for them to assert the unsuitability of the respondents to act, under the Powers of Attorney Act, 1996, as attorneys for their mother; the issue had rendered an inquisitorial hearing "lengthy, confrontational and adversarial with ensuing escalation of costs". Finally, the Minister referred to *Chubb*, where Murray J. said that the pre-2015 law enabled the withholding of costs where there was "improper behaviour proximately related to the action itself", citing *Mahon v Keena* [2009] IESC 78.

31. The Minister points out that Order 84A, r. 6(2) RSC is permissive and says the failure to bring a non-mandatory application cannot amount to litigation misconduct. The Minister says that this is no different from a whole host of non-procurement cases where the parties also have the option to raise preliminary issues.

32. The Minister submitted that the High Court judgment is premised on the Minister's conduct but points out that, far from there being a finding of misconduct, the judge explicitly said that he was making "no criticism (…) of the fact that the Minister chose not to raise the

eligibility issue as a preliminary matter". The Minister pointed out that the case was treated at all times with significant urgency by the parties

Word Perfect's submissions

33. Word Perfect first addressed the background to the litigation. Counsel submitted that it was a small company and pointed out that this is a jurisdiction with high litigation costs where the application had to be brought in the High Court. Counsel contended that while this was said to be an urgent case it was not as urgent as portrayed. There was no suggestion that the provision of Irish language interpretation was imperilled.

34. Word Perfect pointed to the purpose of O. 84A, r. 6(2), which was to promote efficiency by bringing these applications early. The order was only directed to the State and it was unrealistic to say that the opposing party should ask for such a motion to be brought. This was suitable for a motion because the facts were agreed; there were no contested facts and no cross-examination on the facts.

35. In referring to the statutory provisions, Word Perfect submitted that s. 168 of the 2015 Act includes the power to order that a party shall pay a portion of another party's costs. Counsel contended that the Minister is inviting the court to adopt a strict and inflexible rule to the effect that a party who succeeds on having a procurement case dismissed on eligibility grounds must be awarded 100% of its costs, notwithstanding that it has failed to raise the eligibility issue by motion. He submitted that this undermines the discretion vested in the court by s. 169(1). He referred to *Chubb* and the comments of Murray J. that the section preserves the general discretion of the court, and that the language of s. 168 is "very wide" and encompasses "significant flexibility". Counsel submitted that the High Court judgment does not introduce any inflexible rule but simply recognises that the efficient conduct of litigation may be relevant to the assessment of costs.

36. Word Perfect submitted that under s. 169(1) the High Court can make a decision that a successful party should not be awarded all its costs. The High Court can then have regard to very broad matters, encapsulated by the phrases "the particular nature and circumstances of the case" and "the conduct of the proceedings", which amount to a broad discretion. Counsel submitted that the section was not prescriptive in its starting point. He submitted that the words "conduct of the proceedings" should not be read as confined to litigation misconduct. He pointed to the list of factors (a) to (g) which may be considered.

37. The issue of deciding costs was not a mini trial, but, counsel submitted, the judge had to look at the big picture. In counsel's submission, the 2015 Act heralded a new era in costs adjudication and it was only right for the court to look at efficiency. This was not a nit-picking analysis but a broad view of what occurred. Counsel submitted that the position was supported by the authorities which had been relied upon by the judge.

38. Counsel submitted that the use of the phrase "most cost-effective manner" was a phrase taken from *Somers v Kennedy*. He submitted that cost effectiveness was an appropriate matter to consider in light of the twin references in s. 169(1) to the "nature and circumstances of the case" and the "conduct of the parties". Cost-effectiveness was a factor which had to be applied in circumstances where a preliminary hearing was available under designated court rules. Counsel also submitted that this issue of cost-effectiveness may possibly be limited to cases of public procurement eligibility and not to others; eligibility being a very net point.

39. Counsel took issue with the submission by the Minister that the cases where the costs of the winning defendant were reduced were confined to cases where the defendants raised unsuccessful issues. He submitted that Finlay Geoghegan J. in the case of *Sony Music Entertainment (Ireland) Limited v UPC Communications Ireland Limited* [2017] IECA 96 at para 23 was taking a net analysis of the situation albeit in a case where some substantive issues had been decided in favour of the losing party. Counsel accepted that the situation was different

here as there was no ruling on the substantive issue, but, he submitted, if one were to use such a net analysis the logical answer is that there be no order as to those substantive issues. That was not what the judge did; his approach was much more generous to the Minister because he took the time spent on the substantive issue and then doubled it and added on to it.

40. In relation to the cross appeal, counsel submitted that the eligibility point took up no more than 15% of the hearing time and none of the costs. A generous starting point was 10% given the bulk of the costs were incurred in the preparation. This was a significant arithmetical error on the part of the trial judge and a fairer outcome would be 20% of the costs.

Appellate Approach to Exercise of Discretion on Costs

41. Word Perfect submitted that s. 168 and s. 169 of the 2015 Act granted to a court a significant discretion in making an award of costs. It relied on *Pembroke Equity Partners Limited v Corrigan* [2022] IECA 142 to submit that as this was an exercise of discretion by the High Court, this Court ought not to interfere with that because the order made was within the range of orders reasonably open to the High Court.

42. In *Pembroke Equity Partners Limited v Corrigan*, this Court held that on an appeal from an order of costs, the Court of Appeal was not at large. It was not a *de novo* assessment of where the costs should fall. Collins J. stated: "this Court is essentially concerned with whether the order under appeal was or was not within the range of orders reasonably open to the Judge to make in the circumstances presented to him. If, applying the appropriate principles, the order was within the range of orders reasonably open to the Judge, then this Court should not interfere with it…"

43. Word Perfect's submission on this heading is inextricably tied to its submission that the judge weighed the failure to raise the eligibility point by way of preliminary motion as one factor in the exercise of discretion and that it is the Minister who is seeking to impose an inflexible rule that a respondent who succeeds on an eligibility point must be granted full costs

despite not raising it by motion. The correctness or otherwise of that submission depends on how the trial judge approached his consideration of the failure to raise the eligibility point by way of preliminary motion. If the trial judge regarded it as a starting point for a full award of costs that an entirely successful litigant conducted the litigation in the most cost-effective manner possible and if that approach is incorrect, then there was a failure to apply the appropriate principles. In those circumstances, no matter what standard of appellate review is applied, this Court would have to address the issue of the appropriate costs order that ought to be made by reference to the appropriate principles.

Discussion and Decision

44. Prior to the 2015 Act, the general rule applicable to an award of costs, pursuant to O. 99, was that "costs follow the event", provided of course that an *event* can be identified. As Clarke J. stated in *Veolia Water UK Plc and Others v Fingal County Council* [2006] IEHC 137, [2007] 2 IR 81, this was the default position even where the party that wins the event has not been successful on every issue or argument raised by them. At para 12, Clarke J. put it as follows:

> "In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point".

45. He went on to say that the proceedings or the relevant application will have been justified by the result. Where the winning party has not succeeded on all issues, "the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful." If the court is so satisfied, then the court "should

attempt to reflect that fact in its order for costs". As stated by Clarke J. at para 18, the approach he formulated was appropriate in complex litigation where the unsuccessful issues affected the costs in a material sense.

46. In his judgment in *Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535, McKechnie J. cogently expressed the importance of the right of the courts to make costs orders and for the rule that costs follow the event when he stated:

> "[19] *Inter partes* litigation for those unaided is, or can be, costly: certainly it carries with it that risk. It is therefore essential in furtherance of the high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself having been brought there, on the other hand, that our legal system makes provision for costs orders. This is also essential as a safeguarding tool so as to regulate litigation, and the conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Whilst the importance of such orders is therefore clearly self-evident, nevertheless some observations in that regard, even at a general level, are still worth noting.
>
> [20] A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so but, it is, with the "costs follow the event" rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process, including over court participation or attendance. If, however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he

successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff."

47. Section 168 of the 2015 Act now provides the statutory basis for the power of a court to award costs. That it is a discretionary power of the court is signified by the use of the word "may". The power may be exercised, on application by a party, at any stage and from time to time in the proceedings. Section 168(2)(a) provides that the order may include an order that a party shall pay a portion of another party's costs. As the Court of Appeal (Whelan J.) stated in *E & F v G & H* [2021] IECA 108, "[the] language of s. 168 is very wide and encompasses significant flexibility. Order 99, rule 2(1) confirms that costs shall be in the discretion of the Court".

48. It is the provisions of s.169(1) that specifically address the situation of a party who is *entirely successful.* As Murray J. observed in *Chubb*, depending on the construction of the phrase *entirely successful*, those provisions may have changed "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". The first point that must be clarified in this appeal is whether the Minister was entirely successful.

49. Word Perfect's position in their written submissions to this Court is that they always maintained that the Minister was not *entirely successful* in the defence of the proceedings because the substantive issues were never adjudicated on. That position is not reflected in the Notice of Appeal. There is no ground of appeal directed to the finding of the trial judge, at para 61, that he could not ignore "that the State had been "*entirely successful*" in the litigation and the fact that the default position under the express wording of s.169(1) is that such a party is entitled to all her costs". On the contrary, the notice of appeal says that "subject to the matters raised in the Cross-Appeal, the Learned Judge did not err in his application of s.169(1)

of the 2015 Act". The cross-appeal relates only to the mathematical calculations by the trial judge. This appeal, therefore, does not concern the meaning of *entirely successful*, it concerns the meaning of s. 169(1) of the 2015 Act. Thus, this judgment proceeds on the basis, having regard to the trial judge's finding, that the Minister was "entirely successful".

50. Since *Chubb*, there have been numerous cases where issues of costs have given rise to strongly contested hearings and lengthy judgments. Some judgments have considered the phrase *entirely successful* and its meaning, while others have focussed on the matters to which a court may have regard when exercising its discretion not to apply the general rule. The courts system may not be in a "brave new world" regarding costs as counsel for Word Perfect described the situation post the 2015 Act, but there is no doubt that litigants have increasingly been addressing arguments to the courts, as is correct and proper, that have drilled ever more deeply into the meaning of the new provisions. That is to be expected with any kind of new (or apparent) change but all relevant parties, be they courts or litigants, must be wary of allowing arguments on costs to become so diffuse that available court resources are depleted and costs mount for litigants. The 2015 Act and the recast O. 99 have set out the principles and in time, with the benefit of the already developing jurisprudence on these provisions, there will be fewer contested costs hearings. In any event, as counsel for Word Perfect properly conceded here, the focus of the trial judge on costs ought to be the big picture rather than a nit-picking of every single item or minute spent by each party in the course of the litigation.

51. In the meantime, this Court must decide if the High Court is correct in stating that "when a court exercises its function of making court orders, it is now obliged to ask, in **every application** for costs by a party that has been **entirely successful**, have the parties conducted the case in the **most cost-effective way possible**" (para 1) (**emphasis** added). The trial judge restated that principle at para 8 when he said "…as is clear from the wording of s. 169 and the case law, in order for a winning party to get 100% of its costs, it is no longer sufficient for that

party to have been entirely successful in litigation. The party **must** also have conducted her case in the **most cost-effective manner possible**, failing which she is unlikely to get her full costs" (**emphasis** added). He also said at para 25: "It must logically follow, that for a court to properly discharge its function under s.169, the court *must consider* in every costs application, where a litigant who has been entirely successful is seeking its costs, whether, inter alia, the parties, including the winning party, conducted the case in a manner which justifies a lesser award" (*emphasis* in original).

52. The Minister points out that the principle identified by the trial judge (that in every case even where a party has been entirely successful the Court must ask whether the parties conducted the case in the most cost-effective ways possible) permeates the judgment and the principle, or a variation of it, is found in multiple paragraphs. The Minister submits that this principle or "rule" impermissibly goes beyond the text of s. 169 and the relevant case-law. Word Perfect on the other hand says that this misinterprets the judgment. The trial judge, it submitted, did not impose this as an inflexible rule and Word Perfect points to the use of the phrase *unlikely to get her costs* in para 8 of the judgment to say that the efficient conduct of litigation may be relevant to costs. Word Perfect did not agree with the Minister's contention that the trial judge had decided that the starting consideration in every case was whether the case had been conducted in the most cost efficient manner. Instead, Word Perfect submitted it was a factor which the trial judge had properly considered in the particular case given the circumstances and the rules of court specific to public procurement cases.

53. A close analysis of both the structure of the High Court judgment and its contents reveals that the trial judge was clearly holding that the court was obliged to ask in every case where costs are at issue "*have the parties conducted the case in the most cost-effective way possible*". The trial judge stated that in the first paragraph of the judgment with regard to an entirely successful party. Curiously, the trial judge's formulation at para 25 was that the court must

consider in every costs application where a litigant who has been entirely successful is seeking costs, whether, *inter alia*, the parties, *including the winning party*, conducted the case in a manner which justifies a lesser award. It is unclear why the non-winning party, who by definition is not an entirely successful party, would have to have its conduct analysed *per se* to justify a *lesser award* of costs to the entirely successful party; of course there may be reason why the judge will seek to look at the conduct of both parties. What is particularly striking however, is that having stated that principle, the next heading in the judgment is "ANALYSING THE CONDUCT OF BOTH PARTIES". It is only on the second sub-heading thereunder - "A reduction in costs amounts to penalising a winning litigant?" **-** that the trial judge raises the Minister's argument that he had been entirely successful. Even more significantly, the trial judge addresses a large number of other issues before he returns to the issue of whether the Minister was entirely successful. He only does so under the heading "THE FACTORS IN DECIDING ON THE LEVEL OF REDUCTION IN LEGAL COSTS". The use of the word "reduction" is of significance. The trial judge ruled under the first sub-heading "Was the winning litigant "entirely successful"?" that the Minister was entirely successful. It is therefore beyond doubt that the trial judge approached the issue of costs from the perspective that the cost-effectiveness of the conduct of the litigation was the starting point for the determination of entitlement to costs. This, he ruled, was the situation *even* for an entirely successful party.

54. Was the trial judge correct to hold that consideration of whether the litigation was conducted in the most-cost-effective manner possible was *the starting point* in considering the costs? At first blush, such a statement of principle may have certain attractions. On its face this may appear logical and clear; every award of costs will be dependent on whether the party has conducted the case in the most cost-effective way possible. Yet it is a very far-reaching proposition that may lead to unintended consequences and possible injustices. Potentially, it

has the effect of requiring a judge in *every case* to engage in an assessment of the litigation choices made by the winning party from a vantage place where hindsight provides the perfect vision. Even Word Perfect has accepted that a judge should not nit-pick but should have an awareness of the broad picture; a variation on the opinion expressed by the authors of "Delaney & McGrath on Civil Procedure" (4th edn, 2018, Round Hall) at page 923 concerning the undesirability of the court engaging in a detailed analysis of whether a party was successful *or* entirely successful. Indeed, Murray J. in *Chubb* also approved of "a relatively broad brush approach" (a term used by the High Court in *McAleenan v AIG (Europa) Ltd* [2010] IEHC 279) when dealing with the allocation of time between issues. Undoubtedly, while some cases may of necessity involve a lookback at those choices, the statement of principle formulated by the trial judge mandates a very significant change of approach to an award of costs, namely that a consideration of what was the most cost-effective manner possible to conduct litigation is the starting point *in every case*.

55. Is such a mandatory requirement driven by the change in legislation as the trial judge suggests? The trial judge relied upon a number of cases in reaching this conclusion. In particular, he said that Murray J. in *Chubb* had identified a key difference between the pre and post 2015 regimes; a reduction in costs for a winning party was not limited to complex cases. He also held that the mandatory nature of the obligation of a court is clear from para 19(e) of the judgment in which Murray J. stated that "the matters to which the court **shall have regard**" when deciding on costs, "include the conduct of the parties before and during the proceedings". (**emphasis** by trial judge)

56. The trial judge also found support in the decision of the High Court in *Somers v Kennedy* where Butler J. refused to award 100% of the costs because of the successful party's failure to conduct the case "**in the most cost-effective manner possible** so that the ultimate burden – no matter who has to bear it – will be as low as possible" (**emphasis** by the trial judge). The trial

judge also relied upon his earlier decision in *Byrne v Revenue Commissioners (No. 2)* in which the Revenue Commissioners were only awarded 60% of their costs where they lost on issues which took up 20% of the time.

57. The trial judge therefore approached his judgment on the basis that s. 169 compelled a court, when faced with a situation where a party had been entirely successful, to consider at *the outset*, whether the litigation had been conducted in the most cost effective manner possible and if it was not, to engage in a step by step analysis so as to identify what, if any, costs the entirely successful litigant was entitled to be awarded. In other words, the trial judge did not have as a starting point that the entirely successful party was entitled to his costs unless it should be ordered otherwise; instead, he held that the court had to commence *an assessment* of whether the litigation had been conducted in the most cost-effective manner possible. In my view, this represents not only an acute turnaround from the pre-existing provision that costs follow the event but also a departure from the wording of the 2015 Act. I will proceed to explain why. First, it is appropriate to look at the case law upon which the judge relied in reaching his conclusion on the principle.

58. The first case the trial judge referred to is the Supreme Court decision in *Permanent TSB PLC v Skoczylas* in which it was said that one of the functions of making costs orders is to "encourage" an "efficient approach to litigation". The Supreme Court was not addressing the provisions of the 2015 Act but was making a general point about the jurisdiction to award costs. The Supreme Court gave examples of litigants who proceed with cases but fail to beat a lodgement or the amount of a *Calderbank* offer and who will therefore be penalised on costs even though they succeeded. Similarly, a litigant who succeeds, but could have brought the claim in a lower court, may be penalised on costs. Those are well known statutory or common law exceptions to the rule that costs follow the event. Therefore, while the Supreme Court observation is of general application, it does not create a self-standing rule that sets the starting

point as being *an assessment* of whether the proceedings were carried out in the most cost-efficient manner.

59. The trial judge stated that the obligation to ask whether the parties conducted the case in the most cost-effective way possible was clear from the wording of s. 169(1) of the 2015 Act and from recent judgments of the High Court and the Court of Appeal. He then referred to *Chubb v The Health Insurance Authority* and also to *Somers v Kennedy*. In the trial judge's view, "[t]he mandatory nature of the obligation of a court is clear from para 19(e) of Murray J.'s judgment in which he states that the "the matters to which the court **shall have regard**" when deciding on costs "include the conduct of the parties before and during the proceedings" (**Emphasis** by the trial judge). He also said that the *Chubb* decision makes clear that s. 169(1)(a) and (b) place an obligation on a court to have regard to the conduct of parties when considering whether to award costs to a party that has been entirely successful.

60. It is appropriate to turn now to the wording of s. 169(1) of the 2015 Act. It provides:

> "(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."

61. Although it is an obvious observation, it is still worthwhile to begin by noting that s. 169(1) does not contain within it an express reference to any requirement to conduct litigation in *the most cost-effective manner possible*. If the trial judge was correct that the 2015 Act was the impetus for the proposition that the starting point for any costs order was to review the winning party's conduct to ensure the litigation was conducted in the most cost-effective manner possible, then one would have thought that such a departure from the generally applicable position that costs follow the event would have been expressly stated. Instead, s. 169(1) commences with the direct statement that "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…".

62. In *Chubb*, Murray J. at para 19 recited what he viewed as the general principles now applicable to the costs of the proceedings as a whole. These are well known but it is useful to repeat them here because it is the order in which he states those principles which is significant and, unfortunately, that significance was not alluded to by the trial judge. Murray J. summarised the principles as follows:

"(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and 0.99, 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) (0.9, 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 (0.99, 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))."

63. Those principles confirm that the general discretion of the court in connection with the ordering of costs is preserved and that the court is required to have regard to s. 169(1) of the 2015 Act. Importantly, Murray J. then stated that it is *the entitlement* of an entirely successful party to succeed in an award of costs unless the court orders otherwise. It is only if the court is determining *whether to order otherwise*, that the court has to have regard to the other factors set out in the first part of s. 169(1) and the sub-sections listed therein. Nowhere in his principles

does Murray J. state that it is mandatory to ask in every application for costs under the section whether the parties have conducted the case in the most cost-effective way possible.

64. In *Chubb*, Murray J. decided that Chubb was not entitled to all its costs. In the first place that was complex litigation in the sense used in *Veolia* involving as it did multiple and defined legal issues. Murray J. said that because Chubb had not succeeded in all its grounds and the HIA had prevailed directly or indirectly on the question lying at the heart of the proceedings. Cost-effectiveness was not directly mentioned by Murray J., but I do not think it can be doubted that cost-effectiveness, in a general sense, is a rationale behind many of the factors identified in s. 169 of the 2015 Act. Thus, cost-effectiveness may be a relevant consideration when deciding on issues such as conduct and I will address that further below.

65. The second case relied upon by the trial judge was *Somers v Kennedy.* It is the phraseology that is found there - *most cost effective manner possible* – that the trial judge adopted as a general principle. In *Somers v Kennedy* [2022] IEHC 78, the High Court (Butler J) acceded to the defendant's application to strike out the plaintiff's proceedings on the grounds that they failed to disclose a reasonable or justiciable cause of action and that, insofar as they were premised on allegations of professional misconduct on the part of the defendant, these were matters within the exclusive remit of the Legal Services Regulatory Authority. This objection had been pleaded by the defendant in his defence and was raised by counsel for the defendant at the opening of the plaintiff's case. The effect of the judgment was that the plaintiff's plenary action which had been listed for hearing for two days did not proceed.

66. The issues in *Somers v Kennedy* arose out of the conduct of a District Court appeal before the Circuit Court. The plaintiff (who was convicted) sought damages from the defendant (the local state solicitor) who prosecuted appeals on behalf of the Director of Public Prosecutions for alleged breach of his duties as a prosecutor. The case was listed for plenary hearing and the plaintiff had issued a *subpoena* (either *duces tecum* or *ad testificandum*) against various

individuals including the former DPP, and the Chief Prosecution Solicitor. All five individuals brought motions to quash each *subpoena*. Counsel for the defendant flagged at the outset that it was his intention to have the case dismissed once the plaintiff had completed his opening.

67. Butler J. considered the case as *sui generis*. She held that the defendant was entirely successful but that was not the end of the matter. She referred to the high costs of litigation in this jurisdiction. She said that plenary actions in the Chancery list were at the higher end of the range as they involve both marshalling of evidence and witness and potentially complex legal argument. She noted that the costs of a preliminary application would usually be lower than the costs of a plenary hearing.

68. Butler J. acknowledged that a court had jurisdiction under O. 25, r. 1 to hear and determine a point of law raised by the pleadings at the trial but said that it did not necessarily follow that full trial costs should be awarded. In a passage on which significant reliance was placed by the Minister, Butler J. said at paras 7 and 8:

> "In my view, where there are various procedural mechanisms open to a litigant to have an issue determined, all else being equal the litigant should avail of the mechanism which adds least expense to the overall cost of the proceedings. **Of course, there may well be circumstances in which all else is not equal and there may be a specific reason why a particular procedural route has been chosen, albeit that it may not be or appear to be the most cost efficient. For example, the procedure that is ostensibly more cost efficient may add a considerable delay to having the proceedings finalised.** The defendant has not suggested that there was any such reason in this case.
>
> **The extent to which different procedural choices will give rise to different levels of legal cost may also be unclear at the time those choices have to be made.** For

example, a defendant may have a legal argument which, if successful, will dispose of some but not all of a plaintiff's case. Unless the determination of the point would significantly reduce the number of witnesses required and consequently the length of the trial, bringing a preliminary application might add to rather than reduce the costs of an action which is going to proceed to trial in any event. Each case will depend on its own circumstances and **obviously a court should be very cautious about second-guessing the procedural decisions lawyers have to make at a time when the outcome of the litigation cannot be known**. …" (**Emphasis** in the Minister's submissions)

69. Butler J. held that in the particular circumstances of that case, the defendant had chosen a route (trial by plenary action) to achieve an outcome that could equally well have been achieved by bringing the type of preliminary application that is frequently brought under Order 19, r. 28 and/or the inherent jurisdiction of the court. She referred to the fact that waiting for the plenary hearing had generated each *subpoena* and the motions to quash. She did not ascribe an ulterior motive to the defendant and said she had no doubt that the defendant wanted the litigation disposed of and was not consciously choosing a method which was not the most cost efficient. The trial judge concluded "[n]evertheless, given the very high cost of litigation, I think it is incumbent on both sides of a case to ensure that it is conducted in the most cost-effective manner possible so that the ultimate costs burden - no matter who has to bear it - will be as low as possible".

70. Word Perfect submitted that the similarities between *Somers v Kennedy* and this case are striking. They submitted that the Minister had a direct choice between bringing an eligibility motion and allowing the case to proceed to a full trial with all of the costs that this involved. They submitted that urgency or a lack of certainty about the outcome of the eligibility motion – which was said by the Minister to justify the course taken – were not persuasive arguments

when it comes to the adjudication on costs in the circumstances of this case where the Minister had previously brought a preliminary application to lift the automatic suspension.

71. Word Perfect did not argue that Butler J. imposed a rule that the *starting point* for consideration of costs was whether the litigation had been carried out in the most cost-effective manner possible. This argument was directed towards the exercise of the discretion by the trial judge. Instead, they submitted that the approach of Butler J. was within the discretion provided in the 2015 Act and in accordance with such authority as *Gold v Patman* and *Fyffes v DCC*.

72. It is necessary first to turn to the ruling of the trial judge in the within proceedings that the consideration of whether the proceedings were conducted in the most cost-effective manner possible is *the starting point* of the exercise of the court's discretion to award costs under s. 168, under s. 169 and O. 99 RSC. I am satisfied that the trial judge erred in so ruling. The starting point must be that an entirely successful party is entitled to an award of costs. A court may order otherwise having regard to the factors outlined in s. 169(1) of the 2015 Act.

73. In the present case, the trial judge commenced his calculation of the costs as if this general rule did not apply. This had the result that the trial judge built upwards to a percentage of costs that he ought to award rather than seeing if there was a reason to *order otherwise* i.e. to see if there was a reason why the entirely successful party ought not to be awarded the full costs of the proceedings. Approaching costs from the starting point that the entirely successful party is entitled to the full costs is consistent with the statute, the rules and with the decision of the Court of Appeal in *Chubb*. While in some, or maybe many, cases, the same conclusion as to the award of costs may be reached irrespective of what starting point is adopted, that may not always be the case. Hence, it is imperative that each court approaches the issue of costs in the manner laid down by the relevant legal provisions. In the absence of the losing party pointing to reasons to reduce the costs award, a court can usually safely proceed to make an award of costs to the entirely successful party. This of course, is without prejudice to the entitlement of

the court to raise of its own motion relevant factors that may cause the court to order otherwise. These may often be factors which the court has identified in its substantive judgment. Provided the reasons are explained by the court in its costs ruling, the court retains a general discretion with respect to the award of costs. The general rule however is that a losing party bears the burden of persuading the court that the entirely successful party is not entitled to an award of costs.

74. The issue remains as to how a court is to address the circumstances where an entirely successful party might have obtained the same relief in a more cost-effective manner. Counsel for Word Perfect confirmed in submissions to the Court that he was not arguing that in order for an entirely successful litigant to benefit from a full award of costs the litigation must have been conducted in the most cost-effective manner possible; it was a factor for consideration. I accept Word Perfect's submission that the reference in para 8 of the judgment to "failing which she is unlikely to get her full costs" supports the contention that the trial judge did not see conducting the litigation in the "most cost-effective manner" as the *only* factor relevant. It was, however, in the trial judge's view, the starting point and a mandatory consideration for a decision on the award of costs. In my view the issue is whether, under the legal provisions, that is a correct statement of how a court should address "conduct" in the various parts of s. 169 where it is to be found. In other words, what is of relevance in considering "litigation conduct" when making an award of costs?

The meaning of "litigation conduct"

75. The Minister focussed on the trial judge's finding that there was a requirement to conduct the litigation in the *most cost-effective* manner possible. The radical nature of this requirement is to be found, the Minister submitted, in paras 73 to 76 of the judgment especially when the trial judge gave "*some latitude* when considering the costs incurred by a winning litigant" (e*mphasis* added). This, the Minister submitted, was especially radical when combined with

the fact that the "benefit of hindsight" only gave an uplift of 5% to the costs that the trial judge allowed. The Minister submitted that the approach of the trial judge was that the courts will consider if there was a cheaper way to do the case. A winning party will get an "uplift" if it was reasonable not to do the case the cheaper way. The Minister points to the fact that the trial judge found no litigation misconduct (in the sense that the courts have previously interpreted that) and the finding by the trial judge that proceeding to trial was "not a completely unreasonable position for the State to take."

76. Word Perfect submitted that the issue is not whether there is litigation misconduct but rather that the court can have regard to *conduct*. Conduct, it submitted, is much broader than litigation misconduct. Word Perfect referred to the difference between the reference to "conduct of the proceedings" in the first part of s. 169(1) and the reference to "the manner in which the parties conducted all or any part of their cases" in s. 169(1)(a).

77. The Minister points to how the Court of Appeal in *Chubb* differentiated "conduct" as it appears in s. 169(1) and s. 169(1)(a) of the 2015 Act. At para 41, Murray J. stated, regarding 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." (**Emphasis** in Minister's submissions).

78. Murray J. went on to opine that 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. It is clear that Murray J. considered that sub-paragraph s. 169(1)(a) was directed specifically towards a form of misconduct but that it meant something different from "conduct of the proceedings" as set out earlier in s. 169(1).

79. In *E & F v G & H,* however, Whelan J. had a different view of the relationship between "conduct of the proceedings" in the first paragraph of s. 169 and to the references to "conduct" in the sub-paragraphs thereafter. Whelan J., at para 72 of her judgment, stated that s. 169 provided for two broad categories of consideration for the court: (i) the nature and circumstances of the case and (ii) the manner in which the proceedings were conducted by the parties. She said that the statutory criteria at (a) to (g) of s. 169(1) were primarily directed to the behaviour of the parties and the conduct of the litigation and that the criteria included examples of what might be characterised as litigation misconduct "and call for an evaluation by the trial judge of the reasonableness or otherwise of conduct and steps taken in the overall context of the litigation in light of the nature of the proceedings.".

80. The approach of the Court of Appeal in *E & F v G & H* places the criteria (a) to (g) of s. 169(1) as a sub-set of the two broad considerations referred to in the first sentence of s. 169(1), rather than ascribing to those criteria a meaning that ordains that the criteria are to be viewed separately to the broad considerations which inform s.169(1). Thus, subsection (a) and (c) which refer to conduct are to be *included* in the meaning of "conduct of the proceedings". These are illustrative of and non-exhaustive examples of the factors to be considered in assessing the nature and circumstances of the case and the conduct of the parties. In my view, that approach more accurately reflects the intention of s. 169(1) when the section is viewed in its totality. I would however also agree with the observations of Simons J. in *Ryanair v An Taoiseach* where he said "[t]he criteria enumerated at subparagraphs (a) to (g) appear to be directed principally to the second of the two categories, that is, the conduct of the proceedings."

81. Simons J. went on to describe the criteria (a) to (g) as examples of litigation misconduct such as, for example "the unreasonable pursuit of issues in the proceedings". Indeed, it is to be noted that in his earlier decision in *Byrne v Revenue Commissioners (No. 2)*, the present trial judge had phrased this slightly differently when he said in relation to the type of conduct justifying a modified costs order that "... another way to put this is for a court to ask in all costs applications by a winning litigant, whether every issue pursued by that litigant had a reasonable chance of success? Where issues which did not have a reasonable chance of success are duly lost by the "winning litigant", this is likely to result in costs being awarded against the winning litigant."

82. It should be noted that both of the cases *Ryanair* and *Byrne (No. 2)* were cases where the winning litigant was not "entirely successful". Nonetheless they are both cases which held that the winning party was entitled to its reasonable costs.

83. Word Perfect submitted that earlier case law bolsters its submission that s. 169(1) permits of a broad discretion which would encompass the type of approach taken by the trial judge in this case. This case law, it submitted, permits the type of modified costs order being made on the basis that the trial judge did in this case. In particular, counsel pointed to *Gold v Patman* where Hodson LJ. stated, at p. 503:

> "…with regard to the costs below, the order is that the defendants obtain judgment against the plaintiff with half their costs. This is a course which the court does not often take, because, when a defendant has an action brought against him he is entitled to raise such defences as are available to him, but I think that in this case there was an opportunity for the defendants to take a clear-cut point of law which depended on the construction of the document and on which this case has ultimately turned, and if that course had been taken a very large expenditure of money would have been saved. On all the issues of fact which were raised by the defendants by calling evidence to prove

> or disprove certain facts, the learned judge in the court below found against them. .For these reasons I think this is a case in which the court is justified in taking an unusual course and not giving the successful party the whole of the fruits of his victory in the court below."

84. It is apparent from the law report that the decision on costs in *Gold v Patman* was delivered *ex tempore*. This Court ought to be slow to give great weight to *an ex tempore* authority from another jurisdiction; especially in light of the time that has passed since the decision was delivered and the absence of any later confirmation of that principle in a reserved judgment. Moreover, it seems to me that the Court of Appeal of England and Wales considered the issue as *sui generis,* in much the same way the High Court had in *Somers v Kennedy*. There will always be cases that are *sui generis*. They can be described as outliers which do not constitute a general trend.

85. Word Perfect placed significance on the fact that in *Fyffes v DCC* Laffoy J. quoted from the decision of the Supreme Court of Victoria in *Byrns v Davie* [1991] 2 VR 568 where Golby J. referred to *Gold v Patman*. Notably, however, Laffoy J. did not expressly adopt the decision in *Gold v Patman*. Instead, after she discussed both those cases, she turned to the Supreme Court decision in *Grimes v Punchestown Developments Co. Ltd* [2002] IESC 79 which had been relied upon by the plaintiff to say that the approach (if not the precise authority) of the Victorian Court had been approved of therein. Laffoy J. held that the Supreme Court in *Grimes* had said that the court's discretion to award costs is "considerably tempered" by the provision in O. 99 r. 1(4) that as a general rule costs follow the event. The general rule could be displaced by reference to the facts of the particular case and not extraneous matters. She held that the facts included the conduct of the parties and that *Grimes* did not preclude the court from considering any matter connected with the case. Laffoy J. considered *Grimes* as authority for the proposition that the "the court is entitled to have regard to the fact that a defendant, who

was successful overall was not successful on substantive issues raised and prosecuted by him on his defence, in the context of an application by the unsuccessful plaintiff to be relieved of some of the costs which would be awarded against him under the general rule…". She then stated that in her view the "test must be whether the requirements of justice indicate that the general rule should be displaced". It was therefore by reference to her application of the decision of the Supreme Court in *Grimes* that Laffoy J. addressed the appropriate award of costs in the case before her.

86. In dealing with those facts however, Laffoy J. stated, with reference to commercial litigation, that only exceptional circumstances would justify the departure from the general rule. In her analysis of the facts, Laffoy J. was particularly concerned with how the defendants on a particular issue had "deliberately ignored the reality". That was the approach which had added considerably to the complexity and to the duration of the case. In my view, Laffoy J. was importing something more into the concept of exceptional circumstances than a course of conduct that was reasonable. Deliberately ignoring the reality of a situation is conduct which is unreasonable.

87. Overall, the foregoing analysis of the case law does not support Word Perfect's contention that the 2015 Act heralded a new understanding of how the courts must address the conduct of the parties when making a decision to award an entirely successful litigant less than its full costs. The Irish case law prior to the 2015 Act permitted the withholding of costs to a winning party on the basis of what can be termed misconduct. In general, a winning party was entitled to its reasonable costs. On the other hand, if there was unreasonable behaviour in the conduct of the proceedings the costs could be modified appropriately. There is nothing on the face of the 2015 Act that supports the contention that it brought about a change in the law that an entirely successful party would only be entitled to a full award of costs provided it had

conducted its case in the most cost-effective manner possible. That goes far beyond the concept of costs reasonably incurred or behaviour that was reasonable in the circumstances.

88. The approach of the Court of Appeal in *E & F v G & H* is authority for the proposition that what s. 169 permits is an evaluation of the reasonableness of the conduct and steps taken in the overall context of the litigation in light of the nature of the proceedings if the court is to make an order for the payment to an entirely successful litigant of an award of costs which is less than the full amount of those costs. I reject Word Perfect's submission that the reference *in E & F v G & H* at para 72 to "steps taken in the overall context of the litigation" is a standalone reference that has no relationship to the concept of litigation misconduct. As can be seen from the full quotation at para 79 above, even such steps must be evaluated from the standpoint of "reasonableness or otherwise". I also refer back to the decision of the Supreme Court (McKechnie J.) in *Godsil* in which he linked the power to award costs in litigation to the "conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue". It is only in circumstances where the litigation was not so conducted that an entirely successful litigant may not be awarded full costs. In my view sub-paragraphs (a) to (g) of s. 169(1) of the 2015 Act are illustrative of situations where issues of fairness, reasonableness and proportionality may arise.

89. Therefore, the trial judge was incorrect in posing the question in terms of whether the litigation had been conducted in the most cost-effective manner possible. Instead, he should have asked whether he was satisfied that the Minister had behaved unreasonably in failing to bring a preliminary motion on the eligibility point.

Did the Minister behave unreasonably?

90. The trial judge expressly stated under its heading "No criticism of the manner in which the State conducted the litigation" that there was "no criticism by this Court of the fact that the State chose not to raise the eligibility issue as a preliminary matter". The High Court said that

there may well be very good tactical, commercial or self-interest reasons why the State, or any litigant, decides to run a case in a particular way which makes sense from its perspective. The Court went on to say that those choices have consequences for costs however and approached costs on the basis, rejected in this judgment, that it must address costs on whether the litigation has been conducted in the most cost-effective way possible.

91. Word Perfect did not contest the appeal on the basis that the behaviour of the Minister was unreasonable. Indeed, the trial judge himself held that the Minister could not be criticised for how the litigation was conducted, which must mean that he considered the Minister's litigation conduct to be reasonable. If he had posed the correct question - was the Minister's conduct of the litigation unreasonable? - it appears that the trial judge's answer would have been "No". Unfortunately, he asked himself the wrong question - "was the Minister's conduct of the litigation the most cost-effective possible?". As explained earlier, while cost-effectiveness is a factor to be considered when assessing the overall reasonableness of a litigant's conduct, it is not the only factor. Accordingly, the trial judge applied an over-reductionist approach to a question which was rather more nuanced. The appeal must be allowed on that basis.

92. It is however important to state that the question of reasonableness of conduct is not to be assessed on what is subjectively considered reasonable by one party. Instead, the court must make an assessment of whether the conduct of the litigation could objectively be considered reasonable. Merely because a party chose to conduct litigation in a particular manner does not make it reasonable. There may well be cases where the failure to bring some type of preliminary application to dismiss a case will be considered unreasonable. *Somers v Kennedy* was one such example. In other public procurement proceedings, it may well be unreasonable not to have pursued an eligibility point by way of preliminary motion. Naturally, a court seeking to assess whether preliminary motions ought to have been pursued must be careful that

it is not doing so with the benefit of hindsight, rather, its assessment should be premised on the reasonableness or otherwise of the decision in the context of the overall litigation and the urgency of the issue.

The Cross Appeal

93. In light of the finding above, the issue on the cross-appeal does not arise and is therefore dismissed.

Conclusion

94. For the reasons set out above, I have concluded as follows:

- The trial judge erred in his conclusion that the starting point for the assessment of the award of costs to an entirely successful litigant was to ask whether the parties have conducted the case in the most cost-effective manner possible.
- Section 169(1) of the 2015 Act provides that the starting point is that an entirely successful party is entitled to costs.
- The courts may order otherwise having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties.
- Section 169(1) subs. (a) to (g) is a non-exhaustive list of the matters that may be considered when assessing the particular nature and circumstances of the case and the conduct of the proceedings by the parties, although given the nature of the items set out in s. 169(1) subs. (a) to (g) these matters appear to address the conduct of the proceedings rather than the nature and circumstances of the case.
- The law prior to the enactment of the 2015 Act provided that the general rule was that costs follow the event but there were occasions where that would not occur. Apart from modular cases under the *Veolia* jurisdiction, the courts could take into account what was generally called litigation misconduct. Even when a party was

entirely successful, if the litigation had been pursued in an unreasonable manner a court was entitled for stated reasons to modify the usual costs order.

- The 2015 Act did not change that position so as to impose a requirement on an entirely successful party seeking its costs to demonstrate that it conducted the litigation in the most cost-effective manner possible. Such a radical change to the law is not to be found within the provisions of the 2015 Act. Instead, the Act continues the position that the parties must conduct litigation fairly, reasonably and proportionately to the issues at stake.
- A failure to move by way of preliminary application on a point that is ultimately successful is a factor that may be taken into account in assessing whether there ought to be a modified costs order. The test to be applied, however, is not one that amounts to the imposition of a rule on a party to conduct the proceedings in the most cost-effective manner possible. The test is whether the approach taken in respect of the preliminary issue was objectively reasonable in all the circumstances of the case.
- It must also be borne in mind that the costs hearing ought not to be an exercise in nit-picking and a broad-brush-stroke approach must be taken. If it is not, there is a danger that costs applications will spiral out of control and have implications for the overall administration of justice. A court, having heard the trial and adjudicated upon the case, will be in an excellent position to make the decision based upon what the court has seen and heard. If necessary, admissible *inter partes* correspondence can be handed into court.

95. For the reasons set out, the appeal is allowed. As the High Court had no criticism of the fact that the Minister chose not to raise the eligibility point by way of preliminary motion, the appropriate order to make is one granting to the Minister her full High Court costs.

96. As the Minister has been entirely successful in this appeal, it would appear the Minister is entitled to the costs of the appeal. Should Word Perfect wish to contend otherwise, it should apply to the Registrar on or before 8 September 2023 to seek a short hearing date on the issue of costs.

As this judgment is being delivered electronically, my colleagues Faherty and Ní Raifeartaigh JJ. have authorised me to record their assent.