THE HIGH COURT

COMMERCIAL

[2023] IEHC 133

Record No. 2021/408JR

BETWEEN

SERE HOLDING LIMTITED

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

AND

IAS MEDICAL LIMITED

NOTICE PARTY

JUDGMENT OF Mr. Justice Twomey delivered on the 14th day of March, 2023

INTRODUCTION

1. The principal judgment in this matter was delivered on 10th February, 2023 *(Sere Holdings Ltd. v. HSE* [2023] IEHC 63 (the "Principal Judgment")) and defined terms which are used in the Principal Judgment are also used herein.

2. This supplementary judgment follows a hearing on 24th February, 2022 and considers, amongst other things:

- whether an unsuccessful challenger (Sere) to a tender process should have to pay the costs, not only of the State agency (the HSE) which organised the tender, but also the costs of the notice party (IAS), which chose to join the proceedings? To put it another way, if Sere is ordered to pay the notice party's costs would this amount to *'doubling the costs'* which Sere has to pay for taking this judicial review (*per* Clarke J. in *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 380 at para. 3.6)?
- whether the costs of the successful party, the HSE, should be reduced due to its alleged failure to consider mediation? This arises, because of this Court's conclusion in the Principal Judgment that litigants, but particularly State agencies, should *consciously* consider the possibility of mediation, alternative dispute resolution or settlement of a dispute in which they are involved.
- whether Sere should be compensated (by paying less costs to the HSE) because the HSE allegedly misled Sere into believing the contract with the winning tenderer (IAS) would not be signed? This caused Sere not to institute proceedings claiming that the tender process was unlawful *before* the contract between the HSE and IAS was signed. As a result, Sere missed the opportunity to have the tender process suspended. Even though this Court held in the Principal Judgment that Sere's claim, that the tender process was unlawful, was without merit, Sere seeks a reduction in the costs it will have to pay to the HSE because it says it was denied the benefit of having the automatic suspension of the tender process. In essence, it seeks this reduction in costs because it was denied the opportunity to prevent IAS from signing the contract until the proceedings were finished (*albeit* on the basis of a claim that this Court found to be without merit).
- whether Sere, having considered this Court's decision in the Principal Judgment on the 'interpretation issue', still wants the Court to prepare a reserved judgment on the 'verification issue'? This issue arose because the effect of this Court's conclusion on the

'interpretation issue' in the Principal Judgment is that IAS *satisfied* the selection criteria for the tender. Accordingly, this Court concluded that it was not going to expend court resources on whether or not the HSE had *verified* that IAS had satisfied the selection criteria. This was despite the fact that Sere had indicated at the end of the hearing that it wanted the Court to deal with the verification issue *even if* the Court's decision meant that IAS had satisfied the selection criteria.

SAVING OF COURT RESOURCES

3. Dealing with this latter issue first, at para. 54 *et seq* of the Principal Judgment, this Court explained that it did not deal in the judgment with whether the HSE verified that IAS satisfied the selection criteria because the effect of the Court's judgment on the 'interpretation issue' is that IAS *satisfied* the selection criteria. Accordingly, this Court queried whether it would be a good use of court resources for a judgment to be prepared on whether the HSE *verified that IAS satisfied* the selection criteria. Accordingly, it decided instead to ask Sere to consider the terms of the Principal Judgment and to confirm to the Court if it remained its position that the Court should issue a reserved judgment on the 'verification issue', now that this Court had decided the 'interpretation issue' against it.

4. Having considered the Principal Judgment, Sere has decided that it does not in fact need a reserved judgment on the verification issue. This is because by letter dated 14th February, 2023, solicitors for Sere notified the HSE that:

> "Given the terms of the Judgment delivered and the concerns **not to increase costs and to save Court resources**, our client does not require the Court to determine the verification issue." (Emphasis added)

5. It is therefore a positive, from the perspective of court resources, to note that those resources, which would have otherwise been expended on preparing a written judgment on the verification issue, have now been saved, for the benefit of other litigants.

IS THE HSE ENTITLED TO ITS FULL COSTS?

6. As regards the costs of the proceedings sought by the HSE, Sere accepted that the HSE was successful in the litigation. However, Sere argued that the HSE should not be entitled to all of its costs.

7. In this regard, it is clear that, for the purposes of s. 169(1) of the Legal Services Regulation Act, 2015, the HSE was *'entirely successful'* in these proceedings as it won the key issue in the case, namely the interpretation issue. As a result of winning this key issue, the verification issue did not have to be decided. Pursuant to s. 169(1) of the 2015 Act, as the HSE was *'entirely successful'* it is *'entitled to an award of costs'* against Sere, unless a court decides to *'order otherwise'* having regard to, amongst other things, the conduct of the parties '*before and during the proceedings'*. Sere makes the following claims regarding the HSE's conduct before and during the proceedings, which it says justifies a reduction in the costs payable to it.

Reduction in costs payable to the HSE as the tender document could have been clearer?

8. First, Sere argues that the tender documentation could have been clearer and so the HSE must bear some responsibility for the resulting litigation instituted by Sere, which, it says, should be reflected in a reduction in the HSE's legal costs. In this regard, Sere refers to para. 41 of the Principal Judgment, where this Court agreed with the HSE that a RWIND tenderer would interpret the tender services as including the transport of organs and organ retrieval teams because:

> "This Court believes that the RWIND tenderers would interpret '*organ retrieval missions'* as meaning to retrieve an organ and implicit in the retrieval of an organ, must be the transfer of the organ" (Sere's emphasis).

At the substantive hearing Sere claimed that the transfer of organs and transfer of the organ retrieval teams was *not* part of the tender services because the tender documentation was not clear in this regard. While it lost on this argument, at the costs hearing, Sere argued that, as para. 41 of the Principal Judgment refers to the transfer of organs only being *'implicit'* in the tender documentation, rather than being explicit, this shows that the tender documentation should have been clearer.

9. However, referring solely to this isolated phrase in the Principal Judgment ignores the other paragraphs of that judgment. The remaining paragraphs of the judgment make clear that this Court had no doubt about the interpretation a RWIND tenderer would take of the tender documentation, i.e. that the tender services *included* the transport of organs and the transport of organ retrieval teams. This interpretation issue was the key issue in this case and this Court had no hesitation in concluding that the tender documentation was sufficiently clear in this regard. It is irrelevant that it could have been clearer, since it is difficult to find any document on any complex matter, such as a tender, that could not be clearer. It is important to remember that litigation is not about the pursuit of perfection and, in this regard, the relevant test is not whether a tender document *could have been clearer*. Rather the relevant test was whether it was *sufficiently clear* (for a RWIND tenderer to reach the interpretation claimed by the parties to the litigation). Accordingly, the fact that the tender documentation, like so many documents, might have been clearer, is not a basis for reducing the costs to which the HSE is entitled.

Reduction in costs payable to the HSE as it could have been clearer in correspondence?

10. The second reason which Sere gives, in its letter of 14th February, 2023, for claiming that the HSE's costs should be reduced is that the HSE '*provided little by way of articulation of its position in its opposition papers'* and that the HSE's solicitors' letter of 29th April, 2021 (the date the proceedings were instituted by Sere) was unclear. This is because in this letter, the HSE, instead of stating that the turnover requirement of a tenderer, to participate in the tender, was the turnover relating to the transport of patients (as claimed by Sere), but also the transport of organs and organ retrieval teams (as claimed by the HSE, at the hearing), it states that:

> "There was no specific requirement defined relating to an identifiable revenue stream **other than the overall turnover of the applicant** and accordingly there are no grounds for the Awarding Authority to seek to eliminate the successful tender on the basis of their financial standing." (Emphasis added)

11. As of the 20th April, 2021 therefore, the position of the HSE, as expressed in this letter, was, in the words of their own counsel, *'not particularly clear'*. This is because, insofar as the HSE is suggesting that the turnover requirement in the tender documentation applies to the overall turnover of the applicant, and not to its turnover derived from the 'tender services' (however they are defined), this is not correct. By 27th August, 2021, at para. 47 of the HSE's Statement of Opposition dated 27th August, 2021, the position of the HSE had changed somewhat as it stated that the tender services were *'not limited exclusively to air ambulance services'*. Then by the time of its legal submissions on 16th September, 2022, the HSE specifically refers to the tender services including '*organ retrieval team transportation'* and '*organ flights'* as well as the transfer of patients (which was the key difference between the HSE and Sere).

12. The fact that the HSE's initial position on the interpretation issue was *'not particularly clear'* is not, of itself, a sufficient reason for this Court to reduce its entitlement to costs. If the

failure by the HSE to articulate its position more clearly at an earlier stage led to a waste of court time or caused Sere to commence the litigation, continue with the litigation or incur costs (which it otherwise would not have), then there would be a basis for a reduction of costs. However, the failure of a winning litigant to articulate its position better earlier in the proceedings is not, *per se*, a sufficient reason to reduce costs. One has to consider the effect, if any, of this failure.

13. In this case, the key issue was the interpretation of the tender documentation. In this regard, Sere's position was clear, namely that the tender services *did not include* the transport of organs and the transport of organ retrieval teams, as it was restricted to the transfer of patients. If the HSE had stated at an earlier stage in more explicit terms that its position was that the tender services consisted of the transfer of patients *and* the transport of organs and organ retrieval teams, there is nothing to suggest from how Sere conducted itself, once this became clear, that it would have made a difference to the costs of these proceedings.

14. In particular, there is no evidence to suggest that if Sere had become aware of the HSE's position sooner, it would have concluded that its own interpretation was wrong and therefore that Sere would not have proceeded with the litigation (or altered its approach to the litigation) and so there would have been a saving in costs. Accordingly, this is not a basis for reducing the HSE's costs.

Reduction of costs because of failure by the HSE to consider mediation?

15. The third reason given by Sere for claiming a reduction in costs relates to the HSE's conduct regarding mediation. This arose in the context of this Court's conclusion in the Principal Judgment that every litigant, but particularly State agencies, should, at least, consider mediation/alternative dispute resolution/settlement discussions. (This Court reached this conclusion in reliance on the Supreme Court case of *Lett & Company Ltd v. Wexford Borough Council & The Minister for Communications* [2012] IESC 14 and the High Court case of

National Museum of Ireland v. Minister for Social Protection [2017] IEHC 198 i.e. because, unlike almost every other litigant, there is nobody in a State agency who will be personally out of pocket if the litigation is won, lost or drawn.) It is claimed by Sere that, when this Court raised this issue with the parties, it was not clear from the HSE's response that the HSE had in fact considered mediation. The HSE's response to the Court is set out at para. 85 of the Principal Judgment and it states:

> "[A]s regards the safeguarding of public funds in the conduct of litigation and my instructions are to simply to say to the Court, in terms of **putting the Court's mind at rest,** that this is a case that **has been considered from the very outset at the very highest levels of HSE** and the **conduct of this case** has been considered at the very highest levels of the HSE." (Emphasis added)

On the basis that this response from the HSE to the Court did not expressly state that the HSE considered mediation, Sere argues that the costs payable by Sere to the HSE should be reduced.

16. However, it is important to note that this Court, in making the point about the resolution of disputes by litigants, did not restrict itself to mediation. The focus of the comments in the Principal Judgment is on the *resolution* of disputes by litigants, howsoever achieved, whether by mediation, alternative dispute resolution or settlement offers. Accordingly, this Court was satisfied from the foregoing submission from counsel for the HSE that the decision by the HSE to proceed with this case (as distinct from making further, or any, attempts to resolve it) was one that was given serious consideration by the HSE. Accordingly, this is not a case where this Court believes it is appropriate to reduce the legal costs of a litigant because of any alleged failures regarding its consideration of mediation or any other form of dispute resolution.

17. Furthermore, while not determinative of this issue, it is relevant to note that at the costs hearing, this Court was provided with affidavit evidence from the HSE that there was 'without prejudice' communication with Sere after the institution of the proceedings. There was also

affidavit evidence provided by the HSE that, in considering a resolution of the dispute, it took into account the savings to the taxpayer (which this Court understood to amount to *circa* €4.5 million over four years) which would accrue from a successful defence of the challenge to the contract between the HSE and IAS. Accordingly, while this Court was satisfied, at the substantive hearing, that the HSE had given consideration to a resolution of the dispute, evidence was nonetheless provided at the costs hearing of the 'without prejudice' correspondence and also of a possible reason why the HSE, having considered this issue, nonetheless proceeded with the litigation.

18. It is also relevant to note that in the Principal Judgment, this Court concluded that all parties to litigation should consider mediation (*albeit* that there was an emphasis on State agencies). At para. 71, it is stated

> "This Court outlined to the parties some of the reasons why it feels there is an onus on *all parties* to litigation to, at least, consider resolving their disputes, without the necessity for court intervention and why this is particularly the case, where one party is a State agency." (Emphasis in the original)

The reason there is an onus on all parties to consider mediation is because mediation or the resolution of a dispute is not a one-way street. For this reason, it is relevant to note that in Sere's application to have the HSE's legal costs reduced, no evidence was provided by Sere of any attempts by it to resolve the dispute by mediation or other means. If a losing litigant is seeking to have the costs of a winning litigant reduced, because of the winning litigant's failure to consider the resolution of the dispute by alternative means, one would expect the losing litigant to produce evidence of its own efforts to do, what, it claims, the other party failed to do. Here, Sere was seeking to penalise the HSE (in costs) for allegedly failing to make any efforts to resolve the dispute, in the absence of any evidence that Sere itself sought to resolve the dispute.

19. Thus, the alleged failure by the HSE to consider mediation is not a basis for a reduction in its costs.

Reduction of costs because Sere was allegedly misled regarding execution of the contract

20. Fourthly, Sere argues that the conduct of the HSE *before* the proceedings were instituted is a relevant factor regarding whether it should be awarded its full costs. In particular, Sere alleges it was misled that the contract with IAS was not going to be signed. Accordingly, Sere says that it did not institute proceedings, in time to have the tender process suspended, which would have prevented the signing of the contract.

21. In support of this claim, Sere refers to the fact that before the contract with IAS was signed by the HSE on the 26th April, 2021, solicitors for Sere contacted the HSE (and its solicitors) to complain about the alleged failure of the winning tenderer, IAS, to comply with the selection criteria.

22. In that letter dated 13th April, 2021, solicitors for Sere wrote to the HSE seeking confirmation as a matter of urgency that no award of the contract would be made and that the tender process would be set aside and commenced afresh.

23. On the following day (14th April, 2021), solicitors for Sere wrote to the HSE by email at 1.22 pm noting that they had not received a response to its letter and seeking confirmation that the standstill period, that was about to expire on the 14th April, was being extended to allow the HSE complete its enquiries. In this email it was stated that if Sere did not hear from the HSE, Sere's solicitors would take immediate steps to protect their client's position, including injunctive relief.

24. Two hours later a follow-up email at 3:26 pm was sent by the solicitors for Sere to the HSE, noting no response to the earlier email and seeking confirmation as to whether the standstill period was being extended.

25. What Sere puts particular emphasis on is that on the same day (14th April), but before the HSE had received the two foregoing emails from Sere seeking, without success, confirmation that the standstill period would be extended, the HSE sent an email (at 12.50 pm) to IAS which states that the standstill period was to be extended:

> "The HSE has received a legal challenge to this tender competition. In accordance with the Procurement Directives and Regulations, **the standstill period due to expire tonight at midnight will be extended** to allow the HSE to deal with this the challenge." (Emphasis added)

26. However, this email is then followed by a curious letter, dated 16th April, 2021, from the HSE to IAS which states:

> "I refer to our email of the 14th in relation to the concerns which arose out of a threat of a legal challenge to the award of the air ambulance contract.
>
> **The reference to extending the standstill period should of course have referred not to extending the formal standstill period**, but rather extending the period during which we would seek to formalise and clarify the full details of the award, as there was understandably a risk this would be significantly delayed in the event of the legal proceedings being issued.
>
> We have reason to believe that the legal threat will be withdrawn and in the meantime we wish to progress the various matters needed to finalise the agreement with you." (Emphasis added)

27. This is a curious letter because there is no evidence in any of the documentation before this Court that the legal threat made by Sere was likely to be withdrawn.

28. While the combination of this email and the letter to IAS is somewhat curious (and one can understand Sere's questioning of the true position at this time, when it got no response

from the HSE) it is important to remember that this was correspondence between IAS and the HSE and so it could not have influenced Sere's decision to institute the proceedings, for which this Court is being asked to determine the costs.

29. In addition, this correspondence had no impact on the key issue in this case, i.e. whether the tender services included the transport of organs and the transport of organ retrieval teams, which issue Sere has lost. Thus, this correspondence, curious though it may be, does not impact upon the costs which should be awarded to the HSE in respect of its successful defence of its interpretation of the tender services.

30. However, connected with the foregoing *failure by the HSE to respond* to Sere regarding the extension of standstill period and the signing of the contract is Sere's claim that it was *actually misled* by the HSE into believing that the contract was not executed, or was not going to be executed. Because it was allegedly misled, Sere submits that it did not institute proceedings prior to the execution of the contract between the HSE and IAS on the 26th April, 2021, which proceedings would have led to the suspension of the tender process and the prevention of the contract being signed, until the determination of the proceedings.

31. In effect therefore, Sere is claiming that it was misled by the HSE into not having the tender process suspended and, as a result, the contract ended up being signed on 26th April, 2021. If Sere had got such a suspension, the contract would only have been capable of being executed after the delivery of this Court's judgment on 10th February, 2023 (or perhaps sometime in 2024/2025, if there were an appeal of the Principal Judgment to the Court of Appeal/Supreme Court).

32. This claim of being misled arises because Ms. Caroline Prunty of *Millar McCall Wylie*, solicitors in Belfast (who were acting for Sere), records in a letter dated 21st April, 2021 (and so before the contract was signed on 26th April, 2021) details of a telephone conversation with Mr. Philip Lee, the HSE's solicitor. (In this letter to Mr. Lee, she refers to her letter of 12th

April, 2021. However, counsel for Sere confirmed that this is a reference to her letter of 13th April, 2021, which sets out Sere's basis for challenging the tender process.) In her letter of 21st April, she states:

> "I refer to our telephone conversation last week when you confirmed you were on record for [the HSE] and that you would write to me formally in respect of my correspondence of 12th April 2021.
>
> **You had indicated that contract was not being awarded currently** and on that basis I have taken no action. I would be grateful if you could please confirm by return that the contract has still not been awarded and shall not be until such time as our correspondence of 12th April 2021 has been dealt with and we have had an opportunity to formally reply." (Emphasis added)

33. Then on the 27th April, 2021 at 5.58 pm (which it must be remembered is the day after the HSE signed the contract), Ms. Prunty writes an email to Mr. Lee in the following terms:

> "Hi Philip, can you urgently confirm if this contract has been awarded? In our call you said it had it was not been awarded and you were writing to me."

By email dated 27th April, 2021 at 6.45 pm, Mr. Lee replies to Ms. Prunty:

> "I will seek information from our client. It is best you do not quote without prejudice discussions in open correspondence if that is okay."

34. From Sere's perspective therefore, when it seeks confirmation (through its solicitor) on the 27th April, 2021 that the contract *will* not be signed by the HSE, what it gets in reply from the HSE (through its solicitor) is not confirmation that the contract *was signed* on the 26th April (as this is what had occurred), but a complaint that a 'without prejudice' conversation (allegedly stating that the contract would not be signed) was put on the record. On the basis of this

conduct, Sere claims that the costs, otherwise due to the HSE for winning on the interpretation point regarding the tender documents, should be reduced.

35. While this exchange does raise some unanswered questions, before considering Sere's claim that costs should be reduced, it is important to note that:

- oral evidence was not provided by Ms. Prunty or Mr. Lee regarding their alleged 'without prejudice' conversation and the meaning of their correspondence or their understanding of the factual position at the time of this correspondence.
- Sere does not make any plea regarding having been misled by the HSE and so it was not part of the pleaded case which had to be considered by this Court,
- counsel for the HSE made submissions which made it clear that the HSE does not accept the submissions made on behalf of Sere, to the effect that the HSE misled Sere regarding the execution of the contract.

In these circumstances, it is not appropriate for this Court to make any findings regarding whether the HSE intentionally or innocently misled Sere into believing that the contract had not been signed or was not going to be signed, in its consideration of Sere's claim that the HSE's costs should be reduced because of this conduct.

Is Sere's loss of opportunity to have tender process suspended relevant to costs?

36. However, even if one assumes that Sere was misled into believing that the contract was not going to be signed, then the effect of this, according to Sere, is that it was induced not to institute proceedings. These proceedings would have had the effect of automatically suspending the tender process and preventing the execution of the contract prior to the finalisation of the proceedings (including any appeal). The question therefore arises: is this loss to Sere, of the opportunity to suspend the tender process (and prevent the signing of the contract for up to four years), relevant to the costs issue now before the Court? It seems to this Court

that it is not relevant to the question of how much costs are payable to the HSE for being *'entirely successful'* in the proceedings, for a number of reasons.

37. First, it is because when the alleged misleading of Sere was first raised by counsel for Sere on day 1 of the hearing, she expressly stated that it had no relevance to the interpretation of the tender services, which was the issue before this Court. Instead, she pointed out that the alleged misleading of Sere regarding the execution of the contract would have relevance to the question of a remedy. This Court agrees that whether the HSE misled Sere or not, as to the signing of the contract, had no impact upon the interpretation issue or the verification issue. Furthermore, since there is no question of a remedy for Sere (since this Court has found against Sere), it follows that the alleged misleading of Sere is not, *per se*, relevant to the proceedings and so to the costs issue.

38. Secondly, even if this Court were to hold (which it is not doing) that the HSE's conduct was below what one might expect of a party to litigation, by finding that the HSE had innocently or deliberately misled Sere, such that Sere missed its opportunity to obtain an automatic suspension of the tender process, this does not alter Sere's position for the better. This is because even if there had been an automatic suspension of the contract, this Court would still have interpreted the tender documentation to conclude that IAS satisfied the selection criteria and so could have been awarded the contract, after the automatic suspension came to an end.

39. This Court cannot see therefore how Sere's position would have been improved if this alleged misleading had not taken place, such as to justify it being compensated, by reducing the costs it has to pay the HSE.

40. Furthermore, the HSE's position, and an innocent third party's position (IAS), would have been disimproved if Sere had managed to suspend the tender process (on the basis of a claim which this Court found to be without merit). This is because, instead of having a contract

in existence since April 2021, IAS might have to wait up to four years to sign this valuable contract with the HSE. What Sere is, in effect, claiming is that it lost the opportunity to damage IAS's commercial opportunities by preventing the execution of that contract for up to four years (on the back of an unmeritorious claim that IAS's contract was unlawful). This Court does not agree that this is a valid basis upon which to reduce the costs due to the HSE.

41. In addition, it is relevant to note that if Sere had got the suspension, the third major loser would have been the taxpayer. This is because the apparent saving to the taxpayer of €4.5 million over four years arising under the new contract would have been lost during the period of up to four years that it might have taken for the proceedings to reach a conclusion.

42. Finally, when considering the costs implications of the alleged misconduct of the HSE in not replying to Sere regarding the extension of the standstill period and the alleged misleading of Sere by the HSE regarding whether the contract with IAS would be signed, it is important not to lose sight of the key issue in this case. That is whether the tender services included the transport of organs and the transport of organ retrieval teams. Sere decided to fight this case on the basis of its interpretation of the tender documentation. All of the foregoing correspondence and the alleged conversation between the HSE's solicitors and Sere's solicitors had no impact upon that key issue and so it has not made any difference to the legal costs in the case. Sere lost on the interpretation point and, on this basis, it seems clear to this Court that there are no grounds for reducing the legal costs payable to the HSE.

43. For all these reasons, the correspondence and the alleged telephone conversation between Sere and the HSE's solicitors do not justify this Court in reducing the HSE's costs.

LAW RELATING TO AWARD OF COSTS TO THE NOTICE PARTY?

44. IAS, as the notice party in these proceedings, is seeking all its costs from Sere, which Sere is resisting. In support of their respective claims, both parties referenced the High Court

decision in *Sanofi Aventis Ireland Ltd. t/a Sanofi Pasteur v. Health Service Executive & anor* [2018] IEHC 719. IAS also placed reliance on the High Court decision in *Arthropharm (Europe) Limited v. The Health Products Regulatory Authority* [2020] IEHC 16 (which was upheld by the Court of Appeal (in *Arthropharm (Europe) Limited v. The Health Products Regulatory Authority* [2022] IECA 109)).

45. In *Arthropharm* costs were awarded in full to the notice party. However, it is important to note that the judgment in *Athtropharm* simply contains an order for costs at the end of a judgment, which itself was a decision on a preliminary matter in a judicial review (i.e. whether the proceedings were out of time). There is no indication from the judgment that the applicant contested the costs order in favour of the notice party. Similarly, it does not appear that the case law, regarding notice party's costs, was opened to the court.

46. In contrast, *Sanofi* was a costs judgment following a public procurement challenge (where coincidentally the respondent was the HSE) which had been lost by the applicant. The relevant case law regarding notice party's costs was considered in detail as the applicant resisted the payment of costs to the notice party. For this reason, this Court places particular reliance on *Sanofi* and the case law considered therein, in reaching its decision in this case.

47. *Sanofi* involved a notice party, GlaxoSmithKline ("Glaxo"), which had commercial interests at stake, like IAS, but which also alleged that its reputation was at stake, like IAS, because of the claims made by the applicant in that case (which Glaxo claimed justified it receiving a costs order).

48. In *Sanofi*, the applicant claimed that the HSE contract for the supply of a vaccine should not be awarded to the notice party/Glaxo, because of alleged safety and efficacy concerns regarding the vaccine. Similarly, in this case, IAS argues that it should be paid its full costs as a notice party because its reputation was at stake because of the claims made by Sere regarding

alleged misrepresentation by IAS to the HSE regarding its financial position and its accreditation as an emergency air ambulance provider.

49. When one considers McDonald J.'s judgment in *Sanofi*, it is clear (from his reliance on Costello J.'s judgment in *Vodafone Ireland Ltd. v. Commission for Communications Regulation* [2015] IEHC 443 at para. 32) that a notice party is not *prima facie* entitled to its costs. As noted by McDonald J. at para. 33 the:

> "[notice party's] entitlement to be joined as a notice party must be distinguished from its entitlement to costs."

In the same paragraph, he held that:

> "In circumstances where the proceedings were fully defended by the [respondent/HSE] there was no need for [the notice party/Glaxo] to replicate that defence."

50. Similarly in this case, as the proceedings were fully and adequately defended by the HSE, it seems clear to this Court that there was no need for IAS to replicate that defence. To put the matter another way, just because IAS chose to supplement (or emphasis) the defence of the HSE does not entitle it to be paid by Sere for so doing.

A notice party protecting its commercial interests is not done at the cost of the applicant

51. In particular, just because IAS had a commercial interest to protect does not mean that it is entitled to have its legal costs paid by the losing party. This is because who pays, and who is paid, legal costs is primarily about 'legal interests', not commercial interests. Indeed, every single day cases are heard in the courts between two parties with a legal interest at stake but where the outcome of the case will have very significant financial consequences for the parties who have no *legal interest* at stake and who nonetheless decide to become party to the proceedings.

52. In this case, Sere claims that the HSE unlawfully entered a contract with a third-party (IAS) and so the legal issue at stake was whether or not the HSE acted lawfully. It so happens that a third party has a financial interest in the outcome and so it chose to join the proceedings, but its legal interests were not at stake.

53. This is because there were the two legal issues in the case – the key one being the interpretation issue, as its resolution meant that the verification issue did not have to be decided. While it was in IAS's *commercial* interests to do everything possible to ensure that the HSE won these two legal issues (since otherwise its contract worth *circa* €9.5 million over a period of up to four years, would be invalidated), *IAS had no legal interests at stake* and for which it would be entitled to legal costs, if it won.

54. This is because IAS was not accused of unlawfully entering the contract, the HSE was. Similarly, it was the HSE, not IAS, which was accused of failing to verify that IAS met the selection criteria. It is important not to lose sight of the fact that these were the legal issues/interests at stake, when it comes to deciding to whom, and in what amount, legal costs have to be paid by the parties to the litigation.

55. Of course, such a third party is perfectly *entitled to seek to join* the proceedings as a notice party, to protect its commercial, as distinct from legal, interests. In this case, despite knowing it had no *entitlement* to legal costs from Sere (if Sere's challenge was dismissed), IAS decided to spend its own money on legal representation throughout the hearing. Presumably this was for very good commercial reasons, i.e. because the contract was of sufficient value to warrant such expenditure. However, it is a very different matter to say that it should be *paid by the losing party for deciding to defend its commercial, as distinct from its legal, interests*.

56. To the extent that IAS decided to provide affidavit evidence and oral and written submissions at the hearing to *support* the HSE in the HSE's defence of its legal interests, this was a matter for IAS. Indeed, IAS may well feel that it was money well spent in light of the

professional manner in which it was represented and the result which was obtained. However, this does not mean that *IAS should be paid by Sere* for doing so. The HSE was perfectly able to claim that its interpretation of the tender services was the correct one (without IAS being party to the proceedings) and to claim that it had verified that IAS had satisfied the selection criteria (without IAS being party to the proceedings).

57. It is also important to remember the proceedings were issued by Sere against the HSE, Sere did not issue proceedings against IAS and Sere did not seek to join IAS as a party. Rather, it was IAS which applied to join the proceedings. When IAS did so, Sere expressly stated that it was not consenting to that application, and it put IAS on notice that it would not be liable for its legal costs.

Awarding a notice party costs '*doubles the costs'* of an applicant seeking judicial review

58. If this Court were to award IAS its full costs, it would have the effect of doubling the costs for Sere of bringing this (unsuccessful) challenge. As noted by McDonald J. at para. 29 of *Sanofi* (in reliance on the judgment of Clarke J. in *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 380):

> "[T]he fact that a notice party has an interest to protect **does not necessarily justify doubling the costs of defending judicial review proceedings** where the case made by both the respondent and the notice party is substantially the same." (Emphasis added)

This reference to avoiding the doubling of costs in judicial review proceedings is particularly relevant at present when High Court costs are so high – see the *Review of the Administration of Civil Justice in Ireland* (October, 2020) at p. 267 chaired by Kelly P., in which it is stated that Ireland '*ranks among the highest-cost jurisdictions internationally'*. The courts should therefore be particularly alive, at this time of high legal costs, to the risk of doubling (or otherwise increasing) the costs for a litigant to access justice.

No fear about the quality of the HSE's defence of the proceedings

59. In *Sanofi*, at para. 32, McDonald J. observed that

> "the affidavit evidence and the legal argument put forward by the HSE was impressive and clearly demonstrated that [Glaxo/the notice party] need have no fear about the quality of the defence of the claim".

In this case, the affidavit evidence and legal argument put forward by the HSE was also impressive and it also clearly demonstrated that IAS need have no fear about the quality of the defence of the claim. It is difficult to see how, in these circumstances, IAS should be entitled to the costs of full representation, which it seeks.

Were there any issues which merited an award of costs to the notice party?

60. In *Sanofi*, Glaxo argued that it was entitled to its costs because its interests in the proceedings went beyond the norm for such a challenge to a tender, as (i) Sanofi challenged the safety and efficacy of Glaxo's 6 in 1 vaccine, which was the subject of the tender, (ii) there was a concern over the need to preserve GlaxoSmithKline's confidentiality regarding the vaccine in meeting the challenge and (iii) it was suggested that Glaxo, by reasons of its long experience as a tenderer, was particularly well placed to assist the court in relation to what a RWIND tenderer would understand what was meant by the tender documents.

61. McDonald J. rejected the claim that the challenge to the safety and efficacy of the vaccine entitled Glaxo to its legal costs.

62. Similarly, he rejected the suggestion that Glaxo should be entitled to its costs because it had particular experience as a tenderer to assist the Court in applying the RWIND tenderer test. However, he concluded that there was a need for Glaxo to file affidavits and address the confidentiality issue, including the negotiation of the redaction protocol in that case. This was not surprising since the confidentiality point at issue, was one for Glaxo, and not for the HSE,

since it was Glaxo's confidential information which was at issue. Accordingly, this confidentiality matter required the legal input of Glaxo and so justified an award of costs relating to same.

No need to participate in proceedings or replicate the HSE's defence

63. However, even in relation to this confidentiality issue, McDonald J. was of the view that it was not necessary for Glaxo '*to fully participate in the proceedings'* and in particular that there was no need for the Glaxo '*to replicate that defence'* of the HSE (at para. 33). In reaching this conclusion, McDonald J. relied upon the decision of Clarke J. in *Telefonica* at para. 3.7, where the point was put quite forcefully, regarding notice parities *not* participating in proceedings unnecessarily. This is because Clarke J. stated, in effect, that a notice party is *obliged* to keep its input (and so legal costs) to a minimum. This may also assist with ensuring that court resources are used efficiently. This is because he held that the notice party must consider whether the issues raised in the proceedings can be dealt with, *without* the notice party having to incur the full costs of litigation. He stated:

> "Even where the notice party has something to add it is, in my view, **incumbent on the notice party** to consider whether their involvement necessarily justifies full representation in all aspects of the case. **If the contribution is factual than it might be done by the filing of an affidavit.** If there is one additional point which can, perhaps, best be made by a notice party, then there **are ways in which the making of that point can be secured without incurring the full costs of the litigation**." (Emphasis added)

Accordingly, McDonald J. refused Glaxo's application for costs, save for the following:

> "I am of opinion that Glaxo is entitled to an order for its party and party costs as against Sanofi solely in respect of the following:
>
> (a) Its costs of the application to be joined as a notice party to the proceedings;

(b) Its costs of the preparation and filing of its affidavit evidence;

(c) Its costs of addressing the confidentiality issue including the negotiation of the redaction protocol;

(d) Its costs of the overnight transcript. In this context, I believe that it was entirely appropriate that it should have an opportunity to review what transpired at the hearing lest anything transpire that would require it to address something of importance that might have been missed by the HSE;

(e) The costs of review of the transcript by solicitor and counsel. For the reasons outlined at (d) above, it seems to me that it is entirely reasonable solicitor and counsel should be retained to view the transcript on a daily basis."

Thus, apart from the relatively minor costs of joining as a notice party and the costs of preparing affidavits (plus the overnight transcript costs, which were provided for in that case, as it was a high value Commercial Court case), there was no costs awarded to the notice party, apart from the costs relating to the Glaxo confidentiality issue.

Conclusion regarding the entitlement of a notice party to costs

64. It seems to this Court that based on the foregoing authorities:

- a notice party is *prima facie* not entitled to costs, even if it is successful in helping the respondent defeat the challenge;
- to the extent that for commercial reasons, a notice party decides to be joined to the proceedings, it will not be paid its legal costs for protecting its commercial interests by the applicant;
- in the absence of compelling reasons, a respondent is well able to protect its own legal interests and a notice party does not need to replicate its defence, be represented at the hearing or fully participate in the proceedings;

- a notice party is obliged to keep its input (and so its legal costs) to a minimum by considering why any factual matters, within its knowledge, which are in dispute, could not be adequately dealt with on affidavit, without incurring the full costs of the litigation;
- in exceptional circumstances, such as relating to matters within the particular knowledge of the notice party (and not available to the respondent), a notice party may be entitled to such costs as are reasonable to deal with that issue.

65. In summary therefore, a notice party is not *per se* entitled to any costs and must provide evidence that its involvement was necessary, in order to justify *any* award of costs.

Award of costs to notice party for joining and preparing affidavits?

66. Applying the foregoing principles to this case, the first question is whether the circumstances of this case are such as to justify Sere being obliged to pay *any* of IAS's legal costs. It seems to this Court that it should be so entitled.

67. This is because one of the issues which this Court had to decide was whether there was an industry-wide definition of the term 'emergency air ambulance emergency'. The affidavit evidence provided on behalf of Sere supported the conclusion that there is an industry-wide definition of this term. This evidence was provided by the author of a textbook on the area. However, affidavit evidence provided on behalf of IAS highlighted for this Court that the evidence, that had been provided on behalf of Sere from that textbook on the topic, was selective. This was because other chapters of the relevant textbook supported a contrary view. Since this degree of specialist knowledge and evidence on this technical area would not have been available to the HSE, it seems clear to this Court that it is appropriate that IAS be granted its costs for its joining as a notice party and for preparing affidavits.

68. In addition, as this was a high value Commercial Court case, the parties provided for overnight transcripts. Accordingly, this Court will also grant IAS its costs for those transcripts and for reviewing them, as was done in *Sanofi.*

Award of additional costs to notice party?

69. However, IAS also argues that there are circumstances which justify it being awarded more than the foregoing costs. In particular, IAS points to the damage to its reputation because of the claims made by Sere that the HSE awarded IAS the contract based on alleged misrepresentations by IAS regarding its turnover and that IAS allegedly misrepresented its accreditation as an operator of emergency air ambulance services.

70. Yet, these and other reputational matters for IAS could have been, and were in fact, dealt with on affidavit (for which IAS is receiving costs) and they did not require full representation at the hearing.

71. For example, in relation to the accreditation issue, the exchange of affidavits led to this matter falling away as an issue prior to the trial, such that, as noted above, only two issues were dealt with at the hearing.

72. In seeking its costs for representation at the hearing, IAS relies on the Court's conclusion at para. 17 of the Principal Judgment that there was not an industry-wide definition of 'emergency air ambulance services'. It points out that this conclusion was, in part, due to the affidavit evidence provided by IAS, which contradicted the affidavit evidence provided on behalf of Sere. This is true. However, IAS are seeking its costs for its full representation at the hearing. Yet, the point which was made by Clarke J. in *Telefonica* is that this evidence could have been provided *directly* to the respondent, or as happened, by the notice party on affidavit, without it being represented at the hearing. Furthermore, in this case, the fact that these factual claims by Sere could be easily disproved by the simple expedient of swearing an affidavit, illustrates that the attendance of IAS's legal team at the hearing was not necessary.

73. In its application for its full costs, IAS also relies on the fact that it needed to deal with claims which were damaging to its reputation. However, as noted above, in *Sanofi,* the applicant challenged the award by the HSE of a contract for vaccines to Glaxo on the grounds that there were safety and efficacy issues with Glaxo's vaccine. Even though there can be fewer matters more important to a pharmaceutical company than the safety and efficacy of its product, McDonald J. did not accept that the addressing of these claims by the notice party (Glaxo) in the proceedings justified an award of legal costs in favour of Glaxo.

74. It seems clear that if these claims had been made directly by *Sanofi* against Glaxo, in say a patent case between those parties, which Glaxo won, then there could be no question that Glaxo would be entitled to its legal costs for defending its *legal interests*. Serious though these claims about Glaxo were in *Sanofi,* it is critical to understand that they arose in the context of a challenge to the HSE's *legal interests,* in awarding a contract to Glaxo, and not Glaxo's legal interests.

75. Similarly, just as Glaxo was, in McDonald J.'s view, able to respond to points affecting its reputation by affidavit evidence, so too IAS was able to, and did, provide affidavit evidence, which contradicted the claims made by Sere, which were damaging to its reputation. In *Sanofi,* Glaxo received its legal costs for providing affidavit evidence to enable the HSE to defend the allegations that the vaccine was not safe and efficacious. Similarly, in this case, it is important to remember that IAS will receive its costs for providing affidavit evidence to defend its reputation (in view of this Court's conclusion above that it get its costs for preparing affidavits). However, just as Glaxo's alleged reputational damage (and Glaxo's defence of it) was not sufficient to justify the award of full costs in *Sanofi,* so too IAS's alleged reputational damage does not justify an award of full legal costs to IAS, beyond the preparation and filing of affidavits.

CONCLUSION

76. This Court will award the HSE its full costs for the reasons set out above. In particular, this Court has concluded that the HSE did *consider* the resolution of the dispute by mediation or other alternative means and so there is no basis for a reduction in the costs for an alleged failure to do so.

77. In addition, the alleged misconduct of the HSE, whether before or during the proceedings, is not sufficient to merit a reduction in the HSE's cost. As noted above, there was no evidence to suggest that the HSE's conduct caused a waste of court time or led Sere to incur additional legal costs, which it would have otherwise not incurred.

78. As regards the notice party, IAS has no *prima facie* entitlement to costs from Sere in respect of IAS's decision to be joined as a party to proceedings, which proceedings concerned the HSE's *legal interests,* and not IAS's legal interests. For the reasons set out above, this Court will not award IAS its full costs in deciding to be fully represented at the hearing, which it did to protect its *commercial, rather than legal, interests*. However, as affidavit evidence, which would not have been within the HSE's knowledge, was provided by IAS, which was relevant to the issues to be decided by this Court, it is appropriate for the notice party to be paid the costs of applying to be joined as a notice party and the costs of preparing and filing affidavits. In addition, since this was a Commercial Court case regarding a contract worth €9.5 million, the parties provided for overnight transcripts and accordingly, it is appropriate to make an order for IAS's costs in respect of those overnight transcripts and for reviewing same.

79. Although not a factor in this Court's decision, it remains to be observed that High Court litigation is expensive enough as matters stand (as noted by the *Kelly* Review), without *'doubling'* (per Clarke J.) the costs of an applicant, such as Sere, which is exercising its right to challenge the award of a public contract. In this regard, it is the prerogative of the HSE, as the party being sued, to decide how to run its case and IAS is not entitled to be paid its costs to

the extent that it chose to supplement or emphasise the factual and legal arguments made by the HSE or otherwise '*replicate that defence'* (per McDonald J.).

80. This is not to say that this Court does not recognise the expertise and skill which IAS's legal team brought to the proceedings. However, IAS's decision to have full representation at the hearing was a commercial decision by IAS to invest in protecting its interest in a contract potentially worth €9.5 million. In particular, Sere should not have to pay double for the defence being made against it. If a notice party decides that, for commercial reasons, it wishes to leave nothing to chance in ensuring that every possible legal and evidential point is made to win the case, that is its decision. However, this Court agrees with counsel for Sere that it cannot see how it can justify saddling Sere with the legal costs of not just one but '*two powerful legal teams'*.