THE HIGH COURT

[2021] IEHC 415

[2020 No. 88 R]

BETWEEN

FERGUS BYRNE

APPLICANT

AND

REVENUE COMMISSIONERS

RESPONDENT

(No. 2)

JUDGMENT of Mr. Justice Twomey delivered on the 17th day of June, 2021

INTRODUCTION

1. One of the apparent ironies of the administration of justice is that the persons who oversee it, the judges, and who most often complain about the high cost of litigation, have very little control over the level of the costs which are incurred in the system.

2. For example, on a regular basis the courts highlight the high cost of litigation in Ireland, see the statement of Clarke C.J. in the Supreme Court case of S*PV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited* [2019] 1 I.R. 1 at pp. 7 and 8:

> "However*, I remain very concerned* that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of *the cost of going to court*. That is a problem to which solutions require to be found. It does seem to me that this is an issue to which the legislature should *give urgent consideration*." (Emphasis added)

3. Of course, it is not just the Supreme Court which complains about the high level of legal costs, since for example, judges from all jurisdictions were represented in the *Review of the Administration of Civil Justice* chaired by Mr. Justice Peter Kelly, and in its Report published in October 2020, it was noted that:

> 'Ireland ranks among the highest-cost jurisdictions internationally for civil litigation' (at p. 267)

and the aim of that Review was to

> *'ensure that litigation costs levels will be reduced' (at p. 267).*

4. Yet, the reason judges have very little control over the high level of costs is because the rate at which legal costs are incurred is set by the legislature (most recently in the Legal Services Regulation Act 2015 (the "2015 Act")) and the actual calculation of legal costs in individual cases is administered by legal costs adjudicators, who are completely independent of the courts.

5. In many ways therefore, absent a change implemented by the legislature, there is very little that judges can do about the high level of legal costs, apart from highlighting it in judgments and reports, as in the aforementioned examples. This is despite the fact that costs are *'an intrinsic part of the administration of justice'* (per Baker J. in *Quinn*

Insurance Ltd v. PricewaterhouseCoopers [2020] IECA 109 at para. 53), which judges are required to administer under Article 34. 1 of the Constitution.

6. However, the recent Court of Appeal judgment in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 indicates that, in light of a recent change to the law on costs contained in the 2015 Act, the courts are in a position, albeit only in certain circumstances, to reduce, if not the rate at which legal costs accrue (since, as noted, this is a task for the law makers), at least the quantum, or amount of time, that is spent pursuing issues on paper (in pleadings, legal correspondence and legal submissions) and at hearings. If less time is spent on paper and at hearings on issues, then it is likely that legal costs will reduce accordingly, and perhaps more importantly scarce court resources will be available for other litigants.

7. As illustrated by the facts of this case, this is achieved by the courts, in line with the *Chubb* principles and the 2015 Act, considering in decisions on costs whether the winning litigant acted reasonably in pursuing *all* the issues she pursued? As noted below, 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?

8. 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. For this reason, this legislative change contained in the 2015 Act to the costs regime, which was noted by the Court of Appeal in *Chubb*, may therefore lead to a more focussed and disciplined approach to litigation, if not for every litigant, at least for those for whom legal costs are a significant issue.

9. Since financial incentives/disincentives can be a very powerful tool in changing human behaviour, this legislative change has the potential therefore to lead to a more efficient use of scarce court resources.

SUMMARY

10. This case highlights the practical effects of the new legal costs regime as provided for by ss. 168 and 169 contained in Part 11 of the 2015 Act. Under the old costs regime, a winning litigant in a straightforward case might not suffer any costs consequences even if he had unreasonably pursued certain issues. This is because under the former costs rule '*costs followed the event'* and under that regime, a more nuanced approach to costs, in which consideration was given to whether the winning litigant who had won the 'event' but had not succeeded on every issue she raised, only applied to complex cases.

11. However, as a result of the coming into force of s. 169(1) of the 2015 Act, this is no longer the case and now, when determining costs for a winning litigant (in all cases, and not just complex cases), the court must consider, *inter alia,* whether the winning litigant acted reasonably in raising all the issues she raised. If not, then the court must consider whether to withhold some of the winning litigant's costs or whether to award certain costs to the losing litigant.

12. This case is an example of this new costs regime in action. The respondent, Revenue, was successful in the Case Stated as is evident from the principal judgment (*Byrne v. Revenue Commissioners* [2021] IEHC 262), since each of the three questions in the Case Stated were answered in the affirmative, as claimed in the proceedings by Revenue, and not in the negative as claimed by Mr. Byrne.

13. Revenue relied on one primary issue and three secondary issues to support its claim that Mr. Byrne was incorrect to pursue the Case Stated. This Court agreed with Revenue in relation to the primary issue and one of the secondary issues and on this basis held that the three questions in the Case Stated should be answered in the affirmative. However, this Court and Mr. Byrne's lawyers also spent time in dealing with the two other secondary issues raised by Revenue, which the Court held were not supportive of Revenue's claim.

14. For the reasons set out below, this Court concludes that a more disciplined approach to the litigation would have led Revenue to rely solely on the primary issue – which this court regards as by far the strongest issue in Revenue's favour (as is clear from the principal judgment) and not to have raised the second and third secondary issues – which this court regards, even allowing for the benefit of hindsight, as containing tenuous claims and so it was unreasonable to have pursued.

15. For this reason, and bearing in mind this new focus, which the legislature requires the courts to consider in relation to litigation costs, this Court concludes, for the reasons set out below, that it will not award Revenue its full costs. Instead this Court will make a modified costs order in its favour for 60% of its costs. Another way to look at this is that Revenue could have achieved the same result by taking a more disciplined and focussed approach to the litigation, which would have reduced the time spent on certain issues on paper and at hearing by about 20% , in which case 20% of the costs would not have been awarded to Mr. Byrne and Revenue would have got 100% of its legal costs. All of this is justifiable on principle, since Mr. Byrne should not be liable for legal costs, which it was not necessary for Revenue to incur, in order to win its case.

THE APPLICABLE LAW AS TO COSTS

16. The provisions contained in s. 168 and s. 169 of the 2015 Act were commenced on 7th October, 2019 (per S.I. No. 502 of 2019). The related provisions on costs contained in O. 99 of the Rules of the Superior Courts (as amended by S.I. No. 584 of 2019) came into force on 3rd December, 2019. The 2015 Act places on a statutory footing the principles to be applied in determining the costs of litigation. The 2015 Act provides that, even where a party has been 'entirely successful' in civil proceedings, the court may depart from the convention that costs follow the event. This is because s. 169(1) makes clear that before awarding costs to such a party, the court must have regard to the '*particular nature and circumstances of the case',* as well as the '*conduct of the proceedings by the parties'* (by reference to a list of non-exhaustive factors cited at s. 169(1)(a) - (g)).

17. The changes introduced in Part 11 of the 2015 Act were discussed in some detail by the Court of Appeal (Whelan J., Power J., Murray J.) in *Chubb European Group SE v. The*

Health Insurance Authority [2020] IECA 183. At para. 19 of the court's judgment, Murray J. summarised the principles applicable to the costs of proceedings under the reformed costs regime and confirmed that the 'gener*al discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and 0. 99, r.2(1))'.*

18. At para. 20 of the court's judgment, Murray J. observed two differences between the pre-2019 costs regime and the post-2019 regime (the reference to 2019 is because the 2015 Act was not commenced until that year). First, prior to the commencement of the 2015 Act, a reduction in costs for a winning party, where that party did not succeed on all of the issues raised by it, was limited to '*complex'* cases (per the decision of Clarke J. (as he then was) in *Veolia Water UK plc v. Fingal County Council (No. 2) [*2007] 2 I.R. 81). Of considerable significance however is the fact that, as Murray J. points out, no such restriction is contained in the 2015 Act.

19. Secondly, whereas previously the norm was that costs followed the 'event', the amended costs regime provides that a party who is '*entirely successful'* is entitled to costs. Murray J. notes that winning the 'event' and being '*entirely successful'* may not be the same thing.

20. Of particular relevance to this case is the statement by Murray J. at para. 37 of the court's judgment that:

> "Issues will arise in other cases as to what exactly '*entirely successful'* means. Depending on the precise construction placed on that phrase, the *pre-existing position* that a party who won '*the event'* but succeeds in respect of only some of the issues addressed in support of the relief it obtains is presumptively entitled to all of its costs, *may have been changed by the [2015] Act*." (Emphasis added)

21. The change to which Murray J. refers, arises from the wording of s. 169(1) of the 2015 Act, which states:

> "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 [….]" (Emphasis added)

22. It follows therefore that, if the legislature requires, as it clearly does, the courts to award costs to a winning litigant *unless the court* decides that it was unreasonable for that litigant to pursue a particular issue, it must logically follow, that for the court to properly discharge this function, the court must consider in every costs application *whether in fact the winning litigant acted reasonably in pursuing all the issues she pursued*. It also logically follows that the court in discharging this function, must consider the issues raised by the winning litigant, not just at the hearing, but from the moment of the

commencement of the dispute to the conclusion of the litigation (since it is the legal costs for all of this period which are being determined by the court).

23. This is the significant change to law applicable to costs introduced by the 2015 Act, since whereas prior to the coming into force of the 2015 Act, this analysis was only done in complex cases, now it must be done in most cases determining legal costs. It seems to this Court that this has the potential to have a significant impact on the manner in which litigation is conducted, since there is now a very clear financial incentive for litigants only to pursue issues which have a reasonable chance of success. To put the matter another way, if an issue which is pursued by a winning litigant had no reasonable chance of success, then not only should the winning litigant not get her legal costs for pursuing it, but it is likely that the losing litigant will be awarded his legal costs for having to fight and win this point. When one considers the previous regime, where '*costs followed the event'*, this change to the law applicable to awarding of costs (as distinct from their calculation) has the potential to make litigation more focussed and therefore it has the potential to reduce, to some degree at least, legal costs in cases (to which, in particular, s. 169(1)(a) and (b) apply).

24. While this Court is unaware of the rationale behind the legislature's introduction of this change, it is possible that it was done in an attempt to get parties to litigation to focus on a small number of key issues between them (rather than taking a 'scattergun approach' to the litigation). Such a focused approach also has the advantage of increasing the chance of settlement, reducing court hearing times, court waiting lists as well, of course, as reducing legal costs - all of which have received considerable publicity in recent years. Indeed, the pressures on court resources and the delays facing litigants in the Irish courts are issues regularly remarked upon not only by the Irish courts but also at a European level - see, for example, *Keaney v. Ireland* [2020] ECHR 292 at para. 28 of the concurring opinion of Judge O'Leary:

> "The case also reflects the *daily reality which faces courts in jurisdictions where the ratio of judges to population is low, where the volume of litigation is substantially greater than the number of judges made available to deal with it, where commensurate resources are lacking and where procedural rules may need an overhaul to protect the courts and other litigants from those who waste tim*e. The European Court of Human Rights, which is often unable to meet its own Article 6 standards on unreasonable delay, is well aware of those realities." (Emphasis added)

25. Indeed, as noted by MacMenamin J. in the Supreme Court case of *Babington v. Minister for Justice & ors.* [2012] IESC 65 at para. 9:

> "Time which is wasted in court is the public's time."

MacMenamin J. also noted in *Tracey v. Burton* [2016] IESC 16 at para. 45 that:

> "Court time is not solely the concern of litigants, or their legal representatives. There is a strong public interest aspect to these issues."

26. Whatever the legislature's rationale in making the change to the costs regime, the legislature now requires the courts to consider in every case in which it has to make a costs determination whether a litigant who has won his litigation nonetheless could have pursued the litigation in a more timely and focused fashion, i.e. whether he raised unsuccessful claims in support of his case for which he should not receive costs (and/or for which the other party should receive costs).

The significance of this change to the costs regime

27. This is a significant change and as noted by Simons J. in *Re Independent News and Media plc* [2021] IEHC 232 at para. 17 this change in the costs regime may encourage discipline in legal proceedings in a time of scarce court resources:

> "It is in the interests of justice to ensure that scarce judicial resources are not dissipated unnecessarily, and a court might legitimately mark its disapproval by withholding costs on this basis. *The prospect of costs being withheld (or even awarded to the other side) for unreasonable litigation conduct encourages discipline in legal proceedings*" (Emphasis added)

28. The rationale for a modified costs order, where a winning litigant does not receive all his costs or has some costs awarded against him, was discussed by Simons J. in *Ryanair v. An Taoiseach* [2020] IEHC 673 at para. 22:

> "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. *The raising of multiple issues has the potential to prolong the hearing of proceedings and to add to the volume of documentation, e.g. in terms of pleadings, affidavits or discovery*. Whereas a party who has successfully defended proceedings taken against it is entitled, in principle, to recover the reasonable costs so incurred, an adjustment may be necessary to reflect the manner in which it conducted that litigation." (Emphasis added)

29. It could be said that the new statutory regime provided for by the 2015 Act simply reflects the well-established principle that part of the function of the court's jurisdiction to award costs is to '*encourage a responsible and efficient approach to litigation'* (see para. 12 of the ruling of the Supreme Court (O'Donnell, McKechnie, Charleton JJ.) in *Permanent TSB plc v. Skoczylas* [2021] IESC 10).

30. Indeed, it seems clear from other Supreme Court judgments that there is an imperative on judges to seek to do what they can to make the legal system more efficient, whether dealing with delay by litigants in progressing litigation (see for example *Comcast International Holdings Incorporated & Ors. v. Minister for Public Enterprise & Ors*. [2012] IESC 50) or as here, dealing with the number of issues pleaded or orally argued, since in either instance the end result is the same - more efficient litigation. Hence the comments

of Clarke J. (as he then was) at para. 3.8 of *Comcast* regarding the importance of courts penalising delay, since otherwise it will continue, are equally applicable, in this Court's view, to penalising litigants who pursue issues with no reasonable chance of success, since otherwise the practice will continue:

> "*If parties feel they can get away with it,* and if that feeling is justified by the response of the courts, *then there is likely to be more delay."* (quoting from his own judgment in *Rodenhuis and Verloop B.V. v. HDS Energy Ltd* [2011] 1 I.R. 611, at pp. 616 and 617) (Emphasis added)

31. Similarly, the comments of Hogan J. in *Quinn v. Faulkner t/a Faulkner's Garage & Anor* [2011] IEHC 103 (regarding the need for the courts to be pro-active regarding undue delay) are, in this Court's view, equally applicable to the need for the courts to be pro-active regarding pleadings and hearings which are not disciplined and focussed. At para. 29 he stated:

> "[…] it must also be acknowledged that experience has also shown that *the courts must also become more pro-active in terms of undue delay*, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common" (Emphasis added)

Costs consequences because issue unreasonably pursued

32. It is also relevant to note in this context that this case is not the first example of the new approach taken by courts since the coming into force of the 2015 Act – see for example the case of *Re Latzur Limited* [2021] IEHC 94. In that case, the applicant '*achieved the end result it set out to achieve, but was unsuccessful on a number of issues'* (para. 8) and Sanfey J. reduced the award of costs to the applicant by 20% from 70% to 50% as a '*mark of disapproval'* for the conduct engaged in by it (para. 16).

Costs consequences because defective evidence presented

33. It is also relevant to note that in *Re Mark Fay (A Debtor)* [2020] IEHC 207, McDonald J. dealt with the failure of the legal team on behalf of the debtor and his personal insolvency practitioner, in an appeal from the Circuit Court, to disclose to the High Court the defects in the debtor's evidence. This failure related to the fact that an exhibit had been attached to an affidavit after it had been sworn and the legal team opened the case on the basis of this evidence, which they knew to be defective. McDonald J. described this issue, at para. 2 of his substantive judgment as:

> *"a very troubling issue (which is of great concern to me*) relating to the manner in which exhibits were added to an affidavit sworn by Mr. Fay subsequent to the date of its swearing." (Emphasis added)

34. Undoubtedly this would have increased the amount of court time involved in dealing with the appeal, *albeit* that the debtor/insolvency practitioner ultimately won that appeal. McDonald J. considered that the issue was of '*systematic importance'*, as it had occurred in a number of other cases. His approach therefore would appear to resonate with the

comments of Clarke J. in *Comcast*, above, that if parties believe that they will get away with a particular practice, then there is no incentive for it to cease.

35. Accordingly, although the insolvency practitioner could be said to have been 'entirely successful' in the appeal, McDonald J. considered that the insolvency practitioner should not be awarded any costs, as a result of the conduct of her legal team in not drawing to the court's attention the defective evidence which had in fact been pointed out to them in correspondence leading up to the hearing. McDonald J. left over to another day the question of the precise interaction between the costs provisions in the Personal Insolvency Act, 2012 (as amended) and s. 169(1) of the 2015 Act. However, at para. 14 he noted that the pursual by the insolvency practitioner of this issue in that manner was unreasonable and so justified her being deprived of her costs under s. 169(1):

> "I am *particularly concerned by the failure of the legal team for the practitioner to draw attention to the defects in the evidence before the court at the outset of the hearing* of the appeal notwithstanding that they had been made aware of the defects in advance of the hearing by the solicitors for Pepper. Instead, they proceede*d with the appeal on the basis of evidence which they knew, at that point, to be defective*. In my view, that conduct was *manifestly unacceptable* and, in the event that s. 169 (1) of the 2015 Act applies, is sufficient to warrant the refusal of the application for costs in this case, notwithstanding that the practitioner succeeded on the appeal." (Emphasis added).

Costs consequences because legal submissions contrary to existing law

36. It is also clear that in determining whether a winning party 'unreasonably pursued a certain issue', this extends to instances where legal argument is made by her lawyers which are not justifiable in light of the state of the applicable law. This is clear from *Re Forde Egan* [2020] IEHC 102 where it is clear that court time was wasted on legal submissions which were inconsistent with the pre-existing case law. That was another case under the Personal Insolvency Act, 2012 (as amended) and it was not necessary to consider the precise interaction between the 2012 Act and s. 169(1) of the 2015 Act. However, McDonald J. noted at para 4, that in considering costs under the 2012 Act:

> "the factors identified in s 169(1) are matters which a court would be fully entitled to take in to account…"

He then went on to conclude at para 28 that:

> "The question which now arises is whether it is appropriate in the specific context of this appeal to make no order as to costs as against the bank. Notwithstanding the very able and ingenious submissions made by counsel on behalf of the bank, I have come to the conclusion that it would not be appropriate, in the particular circumstances of this case, to take that course. I have reached that view in circumstances where, to my mind, *the legal issue raised by the bank was inconsistent with the pre-existing case law* of the court in particular the seminal

decision of Baker J. in J.D. and, to a lesser extent, my own decision in *Ahmed Ali*." (Emphasis added)

On this basis therefore, McDonald J. departed from the normal costs rule in such cases and awarded costs against the bank.

These examples illustrate the financial incentive that there now is for litigants to, *inter alia*, only pursue issues which have a reasonable chance of success, not to present evidence which they know to be defective and not to make legal submissions which are not justified by the existing law, with the consequent saving on court resources.

The practical effect for litigants of the change in the costs regime

37. Under the old costs regime, a litigant who 'threw the kitchen sink' at a run of the mill (i.e. non-complex) High Court case, in the hope that one of the points made would be successful, did so safely in the knowledge that if he won, then he was likely to have all the extensive costs incurred by his lawyers paid by the losing party. It is arguable that there was no incentive on such a litigant to be disciplined or economical, since he was in effect spending other peoples' money (assuming, of course, he won the litigation).

38. However, this change in the costs regime means that even if he thinks he is going to (and he does) win the litigation, he no longer has a 'one-way bet', but rather he and his lawyers need to be economical and focused in how he litigates as he may in fact be spending his own money (rather than his opponent's). This is because the courts are now required to take into account the conduct of a winning party, including whether or not it was reasonable for that party to pursue certain issues. The '*endless indulgence'*, as referenced by Hardiman J. at para. 13 of *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 (in the context of delay in proceedings), to which some litigants may have grown accustomed, has now been displaced and there are likely to be costs implications for litigants (whether plaintiffs or defendants) who are not focused and disciplined in their litigation.

39. One would expect this new costs regime to have a significant effect on 'ordinary' litigants (i.e. those for whom the level of costs is an issue) and to result in the claims raised in litigation becoming more focused, by reducing the number of issues which 'ordinary' plaintiffs and 'ordinary' defendants raise in litigation and, consequently, the length of hearings.

40. Of course, this new costs regime may have no effect on those litigants for whom a costs order is irrelevant, whether because of their considerable wealth or their impecuniosity. In this regard, although the State has considerable resources, this Court does not regard it in the same category as say a multi-millionaire for whom legal costs may be irrelevant because of the sums at stake or the personal importance the millionaire attaches to the litigation. It is anticipated that a State will be like an 'ordinary' litigant, for whom costs orders are always important, since it is the funds of its citizens which are at stake and not the personal funds of an individual. Hence, although the State has considerable resources, this new costs regime may have the effect of altering the manner in which it conducts litigation, which when one considers that the State is the most frequent litigant in the

courts, could lead to a significant saving in court resources. Taking this case as an example, an approach to this litigation influenced by the new costs regime might well have led to a saving in court resources of 20% (as noted hereunder).

Court must consider whether the winning litigant unreasonably pursued issues

41. To take an example of how costs work under the new costs regime, consider the case of a plaintiff, in a non-complex case, who raises ten grounds for her desired relief and loses on nine of the grounds, but wins on one ground so as to justify the court order she sought. Under the old costs regime she could claim to have won the 'event' and, as 'costs follow the event', she might have expected to be entitled to 100% of her legal costs.

42. However, under the new costs regime, that litigant who might allege that she was '*entirely successful'* in that she got the court order she sought is now subject to, *inter alia,* s. 169(1)(b) of the 2015 Act. As already noted, this section requires the court to take account of a number of factors before awarding the winning party his costs.

43. Under s. 169(1), an '*entirely successful'* party is entitled to its costs unless a court considers, *inter alia*, that the successful party unreasonably pursued certain issues (i.e. the section expressly states was it '*reasonable for a party to raise, pursue or contest one or more issues'*). Under this new costs regime therefore, in a straight-forward case, instead of there being no financial disincentive for a litigant to 'throw the kitchen sink' at the litigation, there is now a very clear financial disincentive to such an approach being taken. Instead, under the new costs regime, the parties are incentivised, by the threat of not getting costs orders and/or having costs orders made against them, to be as disciplined as possible in the litigation.

44. In particular, it seems to this Court that litigants are being incentivised by the new costs regime not to raise every single possible issue which could possibly find favour with a judge, but rather to focus on the key and strongest issues in their favour.

45. In the context of one particular type of legal costs, namely discovery costs, Fennelly J. in the Supreme Court case of *Ryanair v. Aer Rianta* [2003] 4 I.R. 264 at 277 outlined why for litigants, seeking to cover everything i.e. seeking perfection in their approach to litigation, can be the enemy of the good:

> "The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy."

46. In the context of litigation costs generally therefore, a litigant should not raise, in support of his litigation, every possible issue which could possibly support his claim in pursuit of the perfect case, since the proper conduct of litigation requires both expedition and economy.

47. It is imperative that limited court resources are used as efficiently as possible and this is why parties must be encouraged and incentivised to focus on the key issues in

proceedings. Indeed, this focus is of benefit to the parties themselves, as noted by Baker J. in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 at para. 42:

> "expedience and the efficient use of court resources is in the interests of the administration of justice generally, and can in many cases benefit the individual interests of the parties by avoiding lengthy and costly actions."

48. Similarly, in *Talbot v. Hermitage Golf Club* [2014] IESC 57 at p. 16, Charleton J. notes that parties are not:

> "entitled to more than what is reasonably and necessarily required for the just disposal of a case."

At p. 16 of *Talbot*, Charleton J. also notes that it is in the interests of the parties themselves that litigation is conducted efficiently:

> "Courts are entitled, and indeed are required, to foster their resources. This is both a matter of public and private interest. Court resources used in litigation are funded by public money. In addition, the parties pay for legal representation. *Litigants should not be faced with cases that are longer or more expensive than they need to be for a fair resolution*." (Emphasis added)

49. In the hypothetical example chosen of a litigant, whether a plaintiff or defendant, who wins on one out of the ten issues he raised, a court is now required to consider whether it was reasonable for the winning litigant to rely on all nine of those grounds upon which he lost.

50. If the court determines that it was not reasonable for those nine grounds to be pursued, then the winning litigant will not receive her full costs and might receive say, 25% of her legal costs on the basis that she did in fact obtain the court order she was seeking in the litigation, *albeit* for only one of the ten reasons that she pursued. The losing defendant might be awarded say 30% of the legal costs, on the basis that while he won nine of the points raised, he nonetheless failed to prevent the court making the order sought . This would leave the 'winning litigant' getting the court order she sought but being subject to an order to pay 5% of the costs of the losing defendant.

51. When it comes to that litigant discharging her legal costs of say €100,000 (for a straight forward High Court matter) to her legal team, she would have to pay this out of her own resources and in addition pay 5% (€5,000) to the losing defendant, even though she had 'won' the litigation. Unless clearly advised of this possibility, this could come as a surprise to a winning litigant but this is the clear effect of the 2015 Act in its apparent aim to '*encourage discipline in legal proceedings'* (to quote Simons J. in *Re Independent News and Medi*a).

52. It is clear therefore that this change in the costs regime could have a very significant effect for costs-conscious litigants (and the State is included in this expression) on how litigation is pursued in future. To use the foregoing example, at a very early stage, the

litigant's lawyers may, in view of the new costs regime, decide that it is prudent to sit down with the litigant to consider with her which of the 10 grounds should be pursued, in light of the risk that if the 'weaker' grounds are pursued, the litigant could well win the litigation, but end up 'losing' on legal costs.

The 'rate' at which litigation costs accrue v. the 'quantum' of those costs

53. As previously noted, the high cost of coming to court is something which the Supreme Court has stated should be given '*urgent consideration'* by the legislature (see p.8 of the judgment of Clarke C.J. in *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited* [2019] 1 I.R. 1).

54. In addition to the Supreme Court, the Civil Justice Review chaired by Mr. Justice Peter Kelly noted the high cost of litigating in its Report of the *Review of the Administration of Civil Justice* (October 2020). At p. 320 of its Report, the Review Group states that '*Ireland is, in comparative terms, a high cost litigation jurisdiction'* and at p. 317 that:

> "The high cost of litigation is a matter of far greater concern to litigants in Ireland than in most other European countries with which we have been compared on this criterion."

55. Like the Supreme Court, the Review Group also called for action to deal with the high cost of litigation. As noted in *Tom McEvaddy Property Ltd v. NAMA* [2021] IEHC 125, the majority view was for the creation of guidelines for the cost of certain listed items, while the minority view called for legislative intervention to create a mandatory scale of fixed costs.

56. In so far as these calls by the Supreme Court and the Civil Justice Review Group relate to the 'rate' at which legal costs accrue in the various courts, it is a matter for the legislature to consider the appropriate response to these calls for urgent reform.

The very limited role of the courts in seeking to reduce costs

57. However, there are two elements to high legal costs, one is the 'rate' at which those costs accrue, which is a matter for the legislature. In this regard, it is important to note that once a court determines that a litigant is entitled to say 50% or 100% of his legal costs, the courts have no role in determining how much in euro terms this amounts to, since this is a matter for the legal costs adjudicator, who determines the rate at which legal costs accrue in accordance with the current law (as set down by the 2015 Act.) Thus, the courts have no role in reducing the rate of these high legal costs, to which both the Supreme Court and the Civil Justice Review Group have referred in recent times.

58. However, the other element to high legal costs is the amount of time, in this respect the 'quantum', which is taken up by the litigation as a result of the issues raised in correspondence, pleadings, submissions and at oral hearings, as distinct from the rate at which that time is charged. It is clear that this 'quantum', in addition to the rate, has an impact on the final figure reached by the legal costs adjudicator.

59. Indeed, in some jurisdictions there is a limit on the amount of time which is allotted for cases, e.g. in the US Supreme Court, a litigant is given only 30 minutes to make his case. In this regard, in this jurisdiction, an attempt has been made to seek to make litigants more focused and disciplined in their legal arguments by limiting the number of words in legal submissions, see for example Practice Direction HC97 which limits the word count for written legal submissions (at 3(c) therein).

60. While the legislature has not, thus far, sought to reduce the 'quantum' of legal costs by imposing time-limits on hearings, it seems to this Court that it has sought, by the provisions of the 2015 Act, to indirectly reduce hearing time (and the number of issues raised on paper) by obliging courts, in their costs determinations, to consider whether a litigant 'unreasonably pursued an issue'. Thus, while the courts have no role in the calculation of the 'rate' at which legal costs accrue, they now have a defined and clear role in ensuring the litigation is conducted in as disciplined a fashion as reasonably possible and in this respect the courts have a role in determining the 'quantum' or the amount of time which it was reasonable to spend seeking the court orders in question.

61. Thus, where parties are aware that by choosing to raise certain issues they may not recover their full costs, even if they are successful in the proceedings, this may cause them to concentrate on the core issues in the dispute and to exercise discipline in arguing or defending the case. Of course, as previously noted, there will always be cases where parties, by reason of immense wealth or impecuniosity, will not be affected by adverse cost orders. However, for the average litigant, the prospect of not recovering full costs is something that is likely to be a matter of great concern, particularly when one is often dealing with tens, if not hundreds, of thousands of euro While the courts now have been granted a role in relation to the 'quantum' of costs, it must be remembered that, unlike a reform of the 'rate' which would apply to *every* litigant, the court's role in relation to the high level of legal costs will remain limited since it will only impact litigants who care about legal costs and it will only impact in those cases where issues are unreasonably pursued (or where some other 'conduct' as referenced by s. 169(1) is engaged in by a party).

Application of new costs regime to the present case

62. In this Court's view, Revenue was entirely successful in these proceedings, for the purposes of s. 169(1) of the 2015 Act, in the sense that three questions were raised in the Case Stated, which Revenue claimed should be answered in the affirmative, and they were so answered. Mr. Byrne lost the litigation since he had claimed that the questions should be answered in the negative and they were not so answered.

63. As is clear from the foregoing analysis, under s. 169(1) this does not mean that Revenue is entitled to 100% of its legal costs. This Court must consider whether Revenue acted reasonably in raising the issues it raised in this litigation.

64. The primary issue in the case, and one which took up the majority of the court time, was whether no reasonable Tax Appeal Commissioner could have concluded that Mr. Byrne should have known of the VAT fraud. Revenue was successful in arguing that this was not

the case. This dealt with questions two and three of the Case Stated, which were duly answered in the affirmative.

65. There were three other issues, which might be termed secondary issues, in the case.

66. The first secondary issue was of some significance, since it directly impacted upon the answer to one of the questions in the Case Stated (question one), but it took up less than 10% of the hearing time. This issue was, apart altogether from whether Mr. Byrne should have known about the VAT fraud, whether there was sufficient evidence to support the Commissioner's finding that there was VAT fraud in the first place? Revenue was successful in arguing that there was sufficient evidence for this finding, and this dealt with question one of the Case Stated, which was duly answered in the affirmative.

67. The next secondary issue raised in the case was a preliminary issue, which was raised by Revenue in order to support its claim that the Court did not have jurisdiction to hear the Case Stated sought by Mr. Byrne in the first place, since it claimed that there was no error on a point of law by the Commissioner. Revenue lost on this point since this Court concluded that it is clear from an analysis of *Mara v. Hummingbird Ltd* [1982] I.L.R.M. 421 that conclusions which are drawn from findings on primary fact are mixed questions of fact and law and therefore fall full square within the jurisdiction of this court on a Case Stated.

68. It is clear from both the wording of s. 169(1) of the 2015 Act and the Supreme Court's ruling in *Kelly v. Minister for Agriculture* [2021] IESC 28 at para. 9 that there may be costs implications for a successful party who raises issues on which they do not ultimately succeed. The Supreme Court (O'Donnell J., McKechnie J., MacMenamin J., Charleton J. and Dunne J.) held as follows:

> "The Court considers that the starting point must be that the appellant succeeded in this appeal. It follows that he has a *prima fac*ie entitlement to recover the costs involved in coming to court to achieve that outcome. *However, it must be recognised that the challenge launched by the appellant was extremely far-reaching and impugned the entirety of the investigative process, and that the appellant's success was on a relatively narrow, though undoubtedly important, point*. This has the significant consequence that the finding of the investigation and the Appeal Board of gross misconduct meriting dismissal remains in place and valid. *Even allowing for the latitude involved in litigation and the clarity of hindsight, it is impossible to consider that, if this case had been reduced to the point upon which the appellant had succeeded, the evidence would have been as extensive, or the hearing in any way as protracted*." (Emphasis added)

Applying this principle, this Court does not believe that it is an exercise in hindsight to conclude that it should have been clear to Revenue from *Mara v. Hummingbird* that just because the parties agree that a commissioner applied the correct legal test does not mean that her conclusions based on the application of that test are somehow exempt from the Case Stated procedure. In this Court's view, even taking account of the latitude

involved in litigation and the clarity of hindsight, in no sense could this argument be described as one which had a reasonable probability of success or, in the terms of s. 169(1), could it have been reasonable for Revenue to pursue it. This court estimates that less than 10% of the court's time was taken up in dealing with this issue.

69. The third and final secondary issue which was raised by Revenue in pursuit of this case was its claim that this Court was not entitled to have regard to the transcript of the hearing before the Commissioner on a Case Stated. Although it is a regular occurrence for there to be a Case Stated before the High Court in relation to a hearing before a Tax Appeal Commissioner, no authority was presented to this court for what appeared to be a novel proposition by Revenue. This Court concluded that in its view it defied logic for Revenue to be entitled to rely on a transcript and for Mr. Byrne to be denied that right and that it also defied logic that a court would be deprived of the best record of the evidence before a Commissioner in a case, when the court is at the same time being asked to conclude that there was sufficient evidence to support the findings on primary fact made by the Commissioner.

70. Again, even taking account of the latitude involved in litigation and the clarity of hindsight, in no sense could this argument be described as one which had a reasonable probability of success, in this Court's view. This Court estimates that less than 10% of the court's time was taken up in dealing with this issue.

71. Based on the foregoing, up to 20% of the court hearing was taken up with issues upon which Revenue were unsuccessful and Mr. Byrne was successful and that this Court believes were unreasonably pursued by Revenue. It is important to emphasise that there is no criticism being levelled at Revenue's legal team in this regard, particularly when one bears in mind the duty of those lawyers to act on the instructions of their client regarding the conduct of the case. In keeping with the approach of the Supreme Court in *Kelly v. Minister for Agriculture*, this Court concludes that if this case had been reduced to the primary issue (i.e. could no reasonable Commissioner have concluded that Mr. Byrne should have known of the VAT fraud) and the first secondary issue (i.e. was there sufficient evidence to support the Commissioner's finding that there was VAT fraud in the first place), upon both of which Revenue succeeded, the hearing would have been shorter.

72. As is clear from *Sony Music Entertainment Ltd v. UPC Communications (Ireland) Ltd* [2017] IECA 96 at para. 24, when a court is faced with a winning party that has lost on issues that took 20% of the time of the hearing, the appropriate order is that Revenue are entitled to an order for 80% of their costs and Mr. Byrne to a cross order for 20%, leaving a net order in favour of Revenue for 60% of their costs.

73. Accordingly, an order for this amount shall be granted in favour of Revenue.