THE SUPREME COURT

[Appeal No: 78/18]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.

Between/

University College Cork – National University of Ireland

Plaintiff/Appellant

and

The Electricity Supply Board

Defendant/Respondent

Ruling of the Court delivered by Mr. Justice Clarke, Chief Justice,

on 23rd July, 2021.

1. Introduction

1.1 There have already been two substantive judgments delivered by this Court in these proceedings in relation both to an appeal brought by UCC (see, *University College Cork v. Electricity Supply Board* [2020] IESC 38) and a cross appeal brought by the ESB (see, *University College Cork v. Electricity Supply Board* [2021] IESC 21). This ruling should be read in conjunction with both of those judgments. Defined terms are used in this ruling in the same way as in those judgments.

1.2 The only issue remaining between the parties arising out of both the appeal and the cross appeal is the question of costs in respect of both the appeal to this Court and in relation to the proceedings to date in the lower courts. A hearing in that regard took place on June 17, 2021 in circumstances where both sides had filed extensive submissions as to the approach to costs for which they respectively argued.

1.3 As noted in both the judgment on the appeal and the judgment on the cross appeal, UCC had succeeded in the High Court in establishing negligence against the ESB arising out of flooding in Cork city in 2009 but had also been found guilty in contributory negligence which the trial judge had assessed at 40%. The trial judge awarded UCC 60% of the costs of what was a very lengthy trial.

1.4 However, the Court of Appeal reversed the decision of the High Court and awarded all costs against UCC. Thus, the costs of all three courts now need to be considered by this Court in light of the judgments in respect of the appeal and the cross appeal. It is first appropriate to set out the position of the parties.

1.5 UCC seeks an order directing the ESB to pay the full costs of the appeals in this Court and in the Court of Appeal as well as the full costs of the proceedings in the

High Court. In the event that this Court is not prepared to award UCC full costs for all three Courts, UCC submits that any disallowances should be minimal in order to reflect the success of its appeal in this Court. For its part, the ESB submits that each party should bear its own costs in respect of both the appeal to this Court and that to the Court of Appeal. In respect of the proceedings in the High Court, the ESB argues that, should it be found liable for any High Court costs, the original decision of the trial judge on costs (from 4 December, 2015) should stand. In the alternative the ESB raised the possibility of the costs in the original High Court proceedings being remitted to that court to consider the proper approach in light of the outcome of the issues remitted back by this Court as a result of both earlier judgments in this matter.

1.6 Many of the issues raised fall within the established case law of this Court concerning costs, but one particular issue was raised by the ESB which suggested that, because these proceedings were in the nature of a test case, and where, to a greater or lesser extent, it might be said that the test for liability of dam operators was refined or evolved, no order for costs should be made against the ESB in respect of the appeal to this Court. This was argued to be an appropriate approach having regard, by analogy it was said, to the position sometimes adopted in respect of unsuccessful plaintiffs in such test cases or cases involving matters of particular public importance. It is appropriate to deal with that issues first.

2. A Test Case?

2.1 There certainly have been some cases where this Court has recognised that a departure from the norm of costs following the event may be appropriate where it can be proper to describe a case as being in the nature of a test case (see, among other cases, *F. v. Ireland and the Attorney General* (Unreported, Supreme Court, Hamilton

C.J., 27th July, 1995), *Grimes v. Punchestown Developments Company Ltd* [2002] IESC 79, 4 I.R. 515, *Curtin v. Clerk of Dáil Éireann and Others* [2006] IESC 27, and D*unne v Min for the Environment and Others* [2007] IESC 60, [2008] 2 IR 775). The question which falls for consideration is as to whether those principles have any application to the position of a defendant such as the ESB in these proceedings.

2.2 Without indicating that the test case principles could never apply in the circumstances of essentially private litigation, the Court is strongly of the view that the principal application of those principles arises in cases where a successful defendant is a public body and where a clarification of the law in an area of particular materiality to that public body might be said to be for its benefit. It should be emphasised that that fact, by itself, will rarely be sufficient to justify departure from the ordinary rule of costs following the event. It is, however, important to emphasise that it would be particularly rare for the "test case" principles to apply in any other circumstances. The logic behind those principles is that a case may become very important from the perspective of a regular public litigant but may only be of much narrower importance from the perspective of the individual plaintiff. There may be circumstances where those factors justify a departure from the ordinary rule. However, it is difficult to envisage a situation where a defendant can put forward a similar argument.

2.3 To consider this point, it is only necessary to reflect on a case such as *Morrissey & anor. v. Health Service Executive & ors* [2020] IESC 6. In that case the plaintiffs brought proceedings which necessarily involved important legal issues concerning the potential liability of the Health Service Executive for negligence alleged against certain laboratories and also concerning the appropriate standard of

care to be applied in screening having regard to the duty of care resting on such parties. Mr. and Mrs. Morrissey succeeded both before the High Court and, on appeal, before this Court on many of those important issues. There is no doubt but that the judgments of this Court clarified the law for the benefit both of the Health Service Executive and the laboratories involved in that and similar litigation. But it would have been unthinkable to suggest that the Morrisseys should not have been entitled to their costs simply because the case might well be described as having been a test case.

2.4 It is true that UCC is not a purely private individual or corporation, but nonetheless its only interest in these proceedings was to seek to obtain compensation for damage caused by flooding, which it alleged was due to the negligence of the ESB. It would appear that there are many other potential claimants, large and small, with similar claims. The fact that there may be a justification for departing from the ordinary rule of costs following the event where a public body successfully defends proceedings, but in so doing gains the benefit of a clarification of an area of the law important to it, provides no basis for the opposite proposition that an essentially private plaintiff should have to forego their costs simply because an unsuccessful public body has had the law clarified. It does not seem to the Court that the argument put forward in this regard by the ESB provides any basis for departing from what would otherwise be the appropriate order in respect of costs.

2.5 It is, therefore, necessary to turn to the application of the well-established principles on the award of costs to the facts of this case.

3. **Analysis**

3.1 There have, in the Court's view, been sufficient statements of principle as to the appropriate approach to dealing with costs in complex cases in the jurisprudence which has followed from the decision of Clarke J. in the High Court in *Veolia Water UK Plc and Others v. Fingal County Council, Respondent (No. 1)* [2006] IEHC 137, [2007] 1 IR 690, [2007] 2 IR 81. It is unnecessary to analyse the position in detail yet again. However, two matters are worth reiterating.

3.2 The first is the rationale for the more nuanced approach advocated in *Veolia*. In the course of debate at the oral hearing, counsel for UCC suggested that the amount at stake in the costs hearing with which the Court was involved was likely to exceed the total amount at stake in at least 95% of all cases before the High Court claiming monetary sums. The Court suspects that counsel's assessment was, if anything, an underestimate. The costs of complex litigation can be very substantial indeed and it is that fact which justifies the Court in giving a more nuanced consideration to a situation where it might be said that a straightforward approach of awarding all of the costs to the party who was ultimately successful might not do justice between the parties.

3.3 On the other hand, there is much merit in the proposition that it will not necessarily do justice to any party if the debate over the appropriate award of costs becomes itself so complex that it adds materially to the overall expense of the proceedings. It is for that reason that the case law establishes that the ordinary rule of costs following the event should only be departed from where it is clear that the pursuit of unmeritorious arguments by an otherwise successful party has materially affected the costs of the proceedings so far as all parties are concerned. It is only in

those circumstances that what might be termed a *Veolia* deviation from the normal rule is appropriate. Allowing an excessively granular approach to the detail of costs is likely to lead to less rather than greater justice, for it will only add to the overall costs burden on parties generally. Permitting such arguments to be made can only increase the already substantial burden on parties to significant litigation.

3.4 However, finally, and arising from those last observations, it is important, therefore, to give significant weight to any assessment of the relevant factors by the trial judge who will, after all, be intimately familiar with the twists and turns of the proceedings and the effect that any argument or evidence may or may not have had on the ultimate outcome.

3.5 In light of that analysis, it is appropriate to turn to the various elements of the costs under consideration. The Court proposes to turn first to the costs of the appeal.

4. <u>The Costs of the Appeal</u>

4.1 There is no doubt but that UCC succeeded on the appeal. The Court of Appeal concluded that the ESB was not guilty of negligence but the majority in this Court came to a different view. The principle of costs following the event would lead, *prima facie*, therefore, to the view that UCC should obtain the costs of the appeal.

4.2 However, the ESB argues that the basis on which UCC ultimately succeeded was one which was, it was said, materially removed from the main thrust of the case made in the High Court. It was said that UCC only succeeded because this Court had adopted a refined or evolved view of the precise duty of care resting on dam operators.

4.3 There is no doubt but that the case as originally formulated on behalf of UCC was widely drawn. However, as this Court pointed out in the judgment on the appeal, there had been no decision of the Irish courts of any materiality on the question of the potential liability in negligence of dam operators. In such circumstances it is inevitable that a plaintiff will have to cast their proceedings in a broad fashion to avoid the real risk that a sustainable claim might not succeed because of the narrowness of the pleading. In saying that, the Court would wish to emphasise that, ordinarily, there is a duty, frequently not greatly respected, on plaintiffs to attempt to specify their case with some realistic degree of particularity. However, the extent to which that may reasonably be expected may need to be considered in light of the clarity that exists at the time the proceedings are commenced in relation to the area of law concerned.

4.4 In addition, it is clear from the case law that the fact that time is spent in litigation on issues which the Court finally dealing with the matter (in this case this Court) did not feel it necessary to finally determine (because the case could be decided on other grounds), cannot be used to reduce the costs to which an otherwise successful party is entitled. It cannot be assumed that there was anything unmeritorious about an aspect of a claim which the Court did not find it necessary to resolve. In that context, it is true that a significant part of the case made by UCC at varying stages was a claim in nuisance or in other areas not involving negligence. However, it was unnecessary for this Court to determine the merits of those aspects of UCC's claim precisely because UCC had succeeded in negligence.

4.5 Taking those factors into account, the Court does not consider it appropriate to make any deduction from the cost to which UCC ought ordinarily be entitled, as the winner, in respect of the costs of the appeal to this Court.

5. <u>The Costs of the Cross Appeal</u>

5.1 Somewhat different considerations apply in respect of the cross appeal which was, as has already been pointed out, the subject of a separate judgment following on from a separate hearing. There is no doubt that the ESB succeeded in maintaining the finding of the High Court to the effect that there was some contributory negligence. However, a significant part of the argument centred on the suggestion that the ESB might be entitled to rely on the negligence which the trial judge found as against UCC's professional advisors by means of the provisions of the 1961 Act, which allow plaintiffs to be fixed with any negligence attributed to a concurrent wrongdoer where the case against that party is now statute-barred. For the reasons set out in the judgment on the cross appeal, the ESB failed in that argument. Furthermore, again for the reasons set out in the judgment on the cross appeal, the Court did not feel that it could, at this stage, reach any conclusion on the appropriate apportionment of liability.

5.2 In those circumstances, the Court is of the view that both parties were partly successful on the cross appeal. The Court is, therefore, of the view that the appropriate order to make in those circumstances is that there should be no order as to costs in respect of the cross appeal.

6. The Costs of the Court of Appeal

6.1 The appropriate way to approach the costs in respect of the hearing before the Court of Appeal is to consider what would have been the appropriate order for that Court to have made in the event that that Court had reached the same conclusions as this Court has done. As has been pointed out earlier, the Court of Appeal judgment was mainly concerned with the appeal rather than the cross appeal because, having concluded that the ESB was not guilty of negligence, the cross appeal fell away.

6.2 In those circumstances, it seems to this Court that the appropriate order to make in respect of the costs before the Court of Appeal is the same as the order made in respect of the costs of the appeal to this Court, being that UCC should recover all of their costs.

7. The Costs in the High Court

7.1 The Court has ultimately concluded that the appropriate way to deal with the costs incurred in the trial before the High Court is to reserve those costs back to the High Court to be considered in light of the final decision reached by that Court arising from the various matters which have been remitted back both by the judgment in respect of the appeal and by the judgment in respect of the cross appeal. The Court understands that the President of the High Court has determined, having consulted with the parties, that the same trial judge should deal with the matters remitted back. That judge will be in the best position to determine the appropriate order for costs in respect of both the initial trial and the trial which will result from the remittal back.

7.2 At this stage, it is not possible to be sure as to how much of the evidence tendered before the High Court at the original trial will ultimately prove to have

related to furthering UCC's case in light of the final decision to be made by the High Court and considering the judgment of this Court. To be of assistance the Court does propose to set out a number of points arising from the argument in this regard on behalf of the parties at the oral hearing.

7.3 Counsel for UCC suggested that it was more appropriate that a *Veolia* type adjustment should result in the costs awarded to an otherwise successful party being reduced by a number of days rather than by a percentage. As noted earlier, the trial judge in this case awarded UCC 60% of their costs. In the course of argument, counsel did concede that *Veolia* itself was authority for the proposition that the otherwise successful party should not only be deducted an appropriate number of days to reflect time spent on issues on issues on which it lost, but that those days should actually be awarded to the unsuccessful party (who had succeeded on those issues) with an appropriate set off. There is no doubt that this is the correct position.

7.4 However, if a court is minded to approach the matter on the basis of days rather than a percentage deduction, then it is also necessary to take into account the fact that the main element of the costs of any party to most litigation (not least complex and, therefore, expensive litigation) involves the instruction fee paid to solicitors and the brief fees paid to barristers. Those fees are adjudicated on the basis of an overall assessment of matters such as the amount of work which has to be put into the case, its complexity and the importance of the issues. In that context it does seem that there may well be cases where the instruction or brief fees which would have been appropriate (and thus adjudicated) would be less if additional issues had not been run by the successful party which the court finds to be unmeritorious. Furthermore, by analogy with the set off in respect of days' costs referred to earlier, it

would be appropriate to regard part of the instruction and brief fees paid to the lawyers representing the unsuccessful party as being attributable to their preparation to run those issues on which they were successful. Thus a simple reduction in days (even including awarding the relevant days to the unsuccessful party and setting them off against the days awarded to the successful party) may not always go far enough to do justice. Those points being made, it does seem to the Court that ultimately a trial judge has a very wide discretion as to the best and most just course of action to adopt in reflecting the fact that the costs of the proceedings as a whole have been materially increased by the successful party raising unmeritorious issues.

7.5 In addition, it would be appropriate for the trial judge to take into account the comments referred to above to the effect that it is not appropriate to make any deduction in respect of time spent on issues which were not ultimately decided. In that context, the issues which are not ultimately decided by this Court qualify in that way so that there should be no deduction from the costs to which UCC might otherwise be entitled by reference to time spent dealing with issues which did not ultimately have to be resolved.

7.6 Finally, it is important to emphasise that the trial judge, on the hearing of the matters remitted back, will also have to deal with the question of the quantification of UCC's losses. That aspect of the hearing is an entirely new matter and it will be for the trial judge to take whatever view is considered appropriate as to the costs of that aspect of the proceedings in light of the conclusions ultimately reached, and having regard to any appropriate concessions made in the course of the process.