AN CHÚIRT UACHTARACH
THE SUPREME COURT

Record No.: 2022/142
[2024] IESC 53

Charleton J.
Woulfe J.
Hogan J.
Murray J.
Collins J.

BETWEEN/

DEIRDRE LITTLE

APPLICANT/APPELLANT

-AND-

THE CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICE AND

MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Mr. Justice Brian Murray delivered on the 19th day of November 2024

(Costs)

FACTS AND ISSUES

Background

1. These proceedings arose from the appellant's application for domiciliary care allowance ('*DCA'*), the payment of which is regulated by s. 186C of the Social Welfare Act 2005, as amended ('*the 2005 Act'*). DCA is provided to carers of children where *inter alia* a child has '*a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age'.* The appeal revolved around the proper construction of s. 317(1)(a) of the 2005 Act as applied to the appellant's application for DCA. That provision allows a social welfare appeals officer to revise any decision of an appeals officer '*where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given'.*

2. The question before this Court was whether the power of revision conferred by s. 317(1)(a) operated (as the respondents contended) only where the '*new evidence or new facts'* referred to in s. 317(1)(a) relied upon by an applicant disclosed an entitlement to the relief *at the time of the decision it is sought to revise* or whether (as the appellant contended) an assessment that was made by the HSE of the appellant's child three years after an application for DCA could be relied upon for this purpose. In the High Court Owens J. found that the construction of s. 317(1)(a) urged by the respondents was the correct one. In his judgment ([2023] IESC 25) Woulfe J. (with whom all members of the Court agreed) explained why he believed that Owens J. was correct in the

conclusion he had reached as to the proper construction of s.317(1)(a). The appeal was thus dismissed.

3. The original decision of Owens J. was delivered *ex tempore* and following a two-day hearing. Having regard to that decision, the respondents applied for their costs. The appellant urged that no order should be made against her for costs. Her counsel, while accepting that the respondents had been '*entirely successful'* in the proceedings within the meaning of s. 169 of the Legal Services Regulation Act 2015 ('*LSRA*'), submitted that the Court should exercise its discretion to depart from the general rule provided for in that section that the party who was thus successful should obtain their costs. While accepting that the appellant had a personal interest in the subject of the litigation, and that hers was not a test case, he pointed to her personal and financial circumstances as disclosed by the evidence. She is separated, and her (then) nine-year-old son had a disability. She had a small mortgage and was not entitled to help from the Housing Assistance Payment scheme ('*HAP*') or social welfare regarding her mortgage. Because of her son's special needs, she was unable to work.

4. Counsel for the respondents submitted that these circumstances of financial hardship were not factors to which the Court was entitled to have regard under s. 169 of the LRSA in deciding whether or not to award costs. Owens J. agreed with the respondents' submissions in that regard. He said as follows:

> '*I am inclined to agree in relation to it, very reluctantly. If I could have avoided it I would have made no order for costs. I am going to make an order for costs, I am going to limit it to one day though because it is my fault in relation to it*

that this thing has dragged on for more than one day, into a second day and into a third day and it is unreasonable because judges are not available for whatever reason that things get progressed out.'

5. When the appellant petitioned this Court for leave to appeal the substantive decision of Owens J., she also sought to appeal this decision on costs. In granting leave to appeal ([2023] IESCDET 26), the panel was clear that the substantive issue raised by the appellant was one '*of general public importance'* and that because the language of the section was replicated in at least one other provision of the 2005 Act (s. 301), it could affect many other cases. It also granted leave on the question of costs, saying that it would not be minded to grant leave were that the only issue presented. Referring to s. 169 of the LSRA, it commented as follows:

'*when a court is invited to depart from the default rule in section 169(1), the issue of whether and/or to what extent it may (or ought) to have regard to the financial circumstances of an unsuccessful party and/or the effect on such party of the making of an adverse costs order is indeed a matter of general public importance.'*

6. Because the appellant had failed in her appeal on the substantive issue, this question was stark. It is also, self-evidently, important. Moreover, as this appeal has developed, this question cannot be addressed without understanding how costs in a case in which the claimant has been unsuccessful, but in which the court itself has admitted the case to appeal because of its '*general public importance'*, should now be treated.

7. Undoubtedly mindful of this, the respondents have accepted that the costs order made against the appellant by the High Court should now be set aside, and that in relation to both the costs of the High Court and before this Court, no order as to costs should be made. That concession reflects a sensible, sensitive and pragmatic approach to the costs of this appeal which, it should be said, often characterises the stance of the State and State authorities before this Court on the question of costs of appeals in which they have been successful. However, the appellant has sought at least a partial order for costs of the appeal in her favour and it is not possible to address that application without a consideration of the overall context in which (and factors by reference to which) the costs of a case of this kind fall to be awarded to either party. It is an appropriate time to do so.

The issues

8. This Court has delivered a series of judgments and rulings in the course of the last decade outlining why, in particular cases, unsuccessful claimants in public law proceedings have not had costs awarded against them and, less usually, why costs have been ordered in their favour. However, the last judgment of this Court that reviews and explains in any overall way the considerations relevant to the exercise of the jurisdiction to exempt a party who has lost proceedings from the cost consequences that normally follow that defeat and/or to award costs in their favour, is *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 IR 775 ('*Dunne'*).

9. In the period since that judgment was delivered, there have been a number of developments relevant to the legal context in which decisions as to where the costs of

legal proceedings should lie, fall to be made. Most obviously, the principles governing the award of such costs, and the criteria to be taken into account in doing so, have, for the first time, been expressed comprehensively in primary legislation (ss. 168 and 169 of the LSRA). Moreover, following the Thirty-Third Amendment to the Constitution, this Court has been vested with a new jurisdiction, being now dependent upon the decision of the Court itself that an appeal raises matters of general public importance, or is one in which the interests of justice require that the Court accept an appeal. Perhaps as a consequence of this – and while noting that of their nature decisions dealing with costs tend to be brief and case specific – a number of rulings have been delivered by the Court declining to order costs against applicants in public law cases of importance, the outcomes in which may be difficult to reconcile with the decision to award full costs of the High Court and Supreme Court against the applicant in *Dunne*. In *Friends of the Irish Environment CLG v. The Legal Aid Board* [2023] IECA 190 ('*Friends*') the conjoined consideration in *Dunne* of two separate questions (whether costs should be awarded against an unsuccessful applicant in public law proceedings and whether that applicant should obtain an order for some or all of his or own costs) and the resulting suggestion that these fell to be considered by reference to the same criteria, was questioned by the Court of Appeal. Moreover, decisions of both the High Court and of the Court of Appeal have highlighted situations which the judges deciding those cases felt merited not awarding costs against an unsuccessful applicant, which may not have been contemplated when *Dunne* was decided. And finally, the Oireachtas has legislated so as to ensure that applicants in certain types of proceedings (including proceedings by way of judicial review) may not, if they are unsuccessful in those proceedings, have costs ordered against them (s. 50B Planning and Development Act 2000; Environment (Miscellaneous Provisions) Act 2011). A question arises as to

whether the legislative policy implemented by these provisions should be reflected in how the courts approach costs in other public law challenges.

10. Following the delivery by the Court of its judgment in the substantive appeal in this case, the appellant filed submissions in which she urged that account should be taken of the economic hardship that an order for costs would entail for an unsuccessful litigant. The respondents, while agreeing in their written submissions not to seek costs against the appellant, contended that asserted financial hardship alone could not, in the light of the provisions of ss. 168 and 169 of the LSRA justify a departure from the normal rule that the successful party to legal proceedings should obtain an award of their costs. At most, the respondents say, they are a factor to be considered in conjunction with other relevant considerations such as those identified in the LSRA itself (to which I will return).

11. The Court thereupon requested the parties to deliver further submissions addressed to the following four specific questions:

1. Should the Court modify its approach to the costs of unsuccessful claimants in the light of the Thirty-Third Amendment to the Constitution and/or the enactment of ss. 168 and 169 of the LSRA, where the Court has determined that the claims of those parties present a matter of general public importance?

2. If so, should any such modification apply to all legal proceedings, or does the fact that an applicant is bringing a challenge to the legality of State action merit a different approach to such cases? Is the exemption granted by the State from

a costs award against unsuccessful parties to environmental claims relevant to this issue?

3. Is the decision of this Court in *Dunne v. Minister for the Environment* still good law?

4. If not, are any modifications to the principles in that decision necessitated by some or all of the foregoing limited to cases before this Court in which leave to appeal has been granted, or do they also apply in the High Court and the Court of Appeal where an applicant challenges the legality of Government action?

II THE LEGAL BACKGROUND

The development of the costs jurisdiction

12. The parties having delivered additional submissions in accordance with that direction, these four questions raised by the Court define the issues I will address in this judgment. Necessary to an understanding of each is the identification of the precise legal basis on which the courts today award costs, the extent to which that jurisdiction demands that costs should be awarded in favour of the party who has succeeded in a suit, and the parameters of a court's discretion to depart from any such rule. Today, these questions fall to be analysed first and foremost against the terms of the LSRA. However, the LSRA falls to be considered in the light (a) of the general regime governing the awarding of costs in legal proceedings immediately before its enactment and (b) of the particular approach to the costs of public interest actions that was current at that time.

13. A careful consideration of the history of the costs jurisdiction of the Irish courts prior to the coming into effect of the LSRA shows both a surprising doubt around the precise source of the power to award costs, and a notable discordance between practice, and the terms of the governing legal provisions. Each depended on the status and effect of s. 53 of the Supreme Court of Judicature Act (Ireland) 1877 ('*the 1877 Act'*). That provision, in turn, was a product of the divergent powers of the courts of equity and of common law to award costs, those jurisdictions of course being vested by the 1877 Act in a unitary court system. While the courts of equity had enjoyed an '*untrammelled'* power in the award of costs, to the point that even a successful plaintiff could be deprived of their costs (*Whitmore v. O'Reilly* [1906] 2 IR 357 at p. 394 (per Palles CB)),

the Common Law Courts had no inherent power to award costs to any party. A series of statutes[1] conferred that power in various actions to the extent that by the time of the 1877 Act the general rule in those courts was that the successful party got his ordinary taxed costs – in other words that the costs followed the event – and that the party who was successful had them as a matter of right (*Garnett v. Bradley* (1878) 3 App. Cas. 944, 962, per Lord Blackburn). However, as pointed out in that case *'[c[osts in Courts of Common Law were not by Common Law at all, they were entirely and absolutely creatures of statute'*. And '*the event'* as developed by the courts in interpreting these statutes did not, simply, mean that the party who obtained relief from the court obtained all of their costs: '*[b]efore the Judicature Acts the costs at common law followed the event in this sense, that, while the party who had on the whole succeeded in the action got the general costs of the action and of any issues on which he had succeeded, the costs of any issue on which the other party had succeeded were recovered by him'* (*Reid, Hewitt and Company v. Joseph* [1918] AC 717, 723 (per Lord Finlay LC)).

14. The object of s. 53 of the 1877 Act was to formulate in a single provision a reconciliation of these varying approaches to the awarding of costs: as Palles CB put it '*a new rule had to be framed to fit the new and single jurisdiction which was brought into being by the Judicature Act'* (*Whitmore v. O'Reilly* at pp. 394-395). That new provision had, for present purposes, two key elements. First, the section provided that subject to the provisions of the Act and Rules of Court, '*the costs of and incident to every proceeding in the High Court of Justice and Court of Appeal shall be in the discretion of the Court'.* Second, it stated that '*the costs of every action question and*

[1] These are traced by M. Keane '*From Gloucester to Judicature: Tracing the Roots of the Indemnity Rule on Costs'* (2014) 51 Ir. Jur. 149.

issue tried by a jury shall follow the event, unless, upon application made, the judge at the trial or the Court shall for special cause shown and mentioned in the order otherwise direct'. The Rules of the Supreme Court 1905 (which reproduced the terms of s. 53 of the 1877 Act) re-enacted the pre-Judicature Act understanding of '*the event'* by providing that '*when issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in and fact shall, unless otherwise ordered follow the event'.* It would appear that because the '*event'* was tied exclusively to jury actions in s. 53 of the 1877 Act – reflecting its origin in the common law jurisdiction - this rule was similarly concerned only with such cases (see *Reid Hewitt and Company v. Joseph* at p. 722). But outside this specific situation, costs were a matter for the discretion of the court and, as Palles CB explained in *Whitmore v. O'Reilly* the jurisdiction as to costs in non-jury matters was – reflecting the pre-existing position in the Chancery Courts –very wide and allowed a Judge to deprive a successful plaintiff of his costs (p. 396). Of course, that general discretion was in practice presumptively exercised in favour of the winning party, but for non-jury actions this was not prescribed, and the jurisdiction of the courts in respect of the costs of those proceedings was thus considerably more flexible.

15. The Courts of Justice Act 1924 made express provision for costs where a civil action, question or issue was tried by a jury (as with the 1877 Act, they followed '*the event'* - s. 94). Otherwise, costs were to be regulated by Rules of Court and where there was no rule the jurisdiction over same was to be '*exercised as nearly as possible in the same manner in which it might have been exercised by the respective courts from which such jurisdiction shall have been transferred'* – s. 22). Shortly after the enactment of that statute the former Supreme Court confirmed that the courts established thereby did not

have an inherent jurisdiction to award costs and therefore only had the power expressly granted by statute to that end (*Quinn and White v. Stokes and ors.* [1931] IR 558). The submissions of counsel and judgment of Kenny J. in *The People (Attorney General) v. Bell* [1969] IR 24 ('*Bell*') suggests that as late as the 1960s it was widely assumed that that power resided in s. 53 of the 1877 Act. It is thus unsurprising that the Rules of the Superior Courts adopted following the establishment of the present courts mirrored the approach to costs initiated by that provision. Those Rules were made pursuant to s. 14(2) of the Courts (Supplemental Provisions) Act 1961 ('*the 1961 Act'*) which stated that the jurisdiction of *inter alia* the High Court and Supreme Court should be exercised '*so far as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by rules of court …'*. The provisions in the 1962 Rules as to costs were repeated in Order 99 of the Rules of the Superior Courts 1986. The applicable rules insofar as relevant here were defined by three provisions. First, that (subject to the provisions of statute and except as otherwise provided for in the Rules themselves) '*[t]he costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts'* (R. 1(1)). Second, that the costs of every '*action, question, or issue* ***tried by a jury*** *shall follow the event'* unless the court, for special cause, otherwise directed (R. 1(3) (emphasis added)). Third, O. 99 R. 1(4) provided:

> **'***the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event'*

16. In this way, the substance of the court's jurisdiction over costs remained the same from 1877 until 2019. However, while the essential principles remained unchanged, the

actual legal basis for the jurisdiction was the subject of some controversy. In *Bell*, the question before this Court was whether the Central Criminal Court had the power to award costs in favour of an accused person who had been acquitted before that Court. That required this Court to identify the source of the costs jurisdiction. The High Court (Kenny J.) had rooted the authority to grant costs in *inter alia* s. 53 of the 1877 Act. Walsh J., however, delivering the judgment of this Court was of the view that the 1877 Act had, since the Courts of Justice Act 1924, '*been of historical interest only, to be consulted for the purpose of ascertaining the extent of such jurisdiction as was exercised by the courts set up under that statute and as was transferred … to the courts set up in 1924.'* The power to award costs, he observed, instead derived from s. 14(2) of the 1961 Act the effect of which, he said, was '*to give the High Court a statutory basis for its jurisdiction to impose liability to costs where rules to this effect have been made for the High Court by the rule-making authority'*.

17. It is not necessary for the purposes of determining this appeal to decide whether this analysis was correct. It should, however, be said that there are two ways of looking at the matter. The Court in *Bell* does not appear to have been referred to the judgments in *Little v. Dublin United Tramways Company* [1929] IR 642 in which Kennedy CJ (dissenting) concluded that s. 53 of the 1877 Act was '*in force and operation'* insofar as it was not inconsistent with the 1924 Act (at p. 653) and in which the other judges (Fitzgibbon J. at p. 661, Murnaghan J. at p.670) proceeded on the express basis that s. 53 of the 1877 Act continued to govern the costs of a jury action. Section 53 of the 1877 Act had (and has) never been repealed, is not necessarily on its face inconsistent with any provision of the Courts of Justice Act 1924 and was amended by s. 3 of the Courts of Justice Act 1936 (that provision being itself repealed by the 1961 Act) – strongly

suggesting of course that the Oireachtas then understood the provision to have full force and effect. Section 53 of the 1877 Act, in fact, has been relied upon in this Court twice in the recent past (*Moorview Developments Ltd. and ors. v. First Active plc and ors.* [2018] IESC 33, [2019] 1 IR 417, and *W.L. Construction Ltd. v. Chawke and ors.* [2019] IESC 74). The proposition that s. 14(2) of the 1961 Act conferred by law the authority to award costs might also be questioned: on its face this provision only created a rule making power which *included* the power to make rules governing costs. The conclusion that the Oireachtas at the same time conferred on the courts a power to order costs but did so obliquely and entirely contingently, postponing the crystallisation of that power to the coming into effect of Rules (rather than allowing the Rules Committee to give effect to a pre-existing and expressly conferred jurisdiction) is not necessarily a self-evident one. However, it does reflect to some extent the analysis of the Court in *Quinn and White v. Stokes and ors*, when it concluded that the power of the Circuit Court to award costs was similarly dependent on the adoption of Rules pursuant to the Courts of Justice Act 1924. And, of course, whichever approach one adopts, the costs of trials in jury actions continued to be governed by a specific statutory provision, s. 94 of the 1924 Act (which has not been repealed).

18. But whether or not the analysis in *Bell* was correct, and thus whether or not s. 53 of the 1877 Act remained (and remains) in force, the important point was as stated by Denham J. in *Medical Council v. PAO* [2004] IESC 22, [2004] 2 IR 12 at para. 16: '*the jurisdiction as to costs is to be found in the rules and if it was not in the rules then the prior position applies. The prior position was that the courts had a discretion on the issue of costs.'* Murray CJ in *Dunne* expressed his understanding of the law in similar terms (at para. 17).

'*Costs follow the event*'

19. As is clear from what I have earlier said, those Rules had three elements – costs were in the discretion of the court, costs followed the event in jury cases unless the court for special cause ordered otherwise, and the costs of '*issues'* followed the event. Although not so stated on the face of O. 99 R. 1(4), the third of these was, at least originally, also limited to the costs of a case heard before a jury. That meant that there was nowhere in the applicable statutory regime (whether that be just Order 99, or s. 53 of the 1877 Act, if it were still in force) any provision of general application to the effect that the costs of an action '*followed the event'.* In those cases in respect of which there was such a stipulation (jury actions) the end point was that, properly understood, '*the event'* was '*the entire litigation'* subject to cases in which more than one distinct issue of law or fact were raised in which case the word '*event'* fell to be construed distributively. The relationship between these provisions where a plaintiff had succeeded in only part of his case was explained by Palles CB in *Kennedy v. Healy* [1897] 2 IR 258, as follows (at pp. 262-263):

> *'... it is settled ... that "event" must, in a case such as the present, be construed distributively. I also think it clear that the expression "action" must also be construed distributively. The event, not of the entire action, but of part of the action, has been in favour of the plaintiff; the event of the other part of the action has been in favour of the defendant; and as the costs of the action are directed by statute to follow the event, the only costs by this enactment given to the plaintiff are the costs, not of the entire action, but of so much of the action as*

related to money received for his use; and the defendant is, under the same enactment, entitled to so much of the costs of the action as relate to the other causes of action.'

20. Thus, where the plaintiff prevailed on the main issues in the action and the defendant succeeded on others, the position was that the plaintiff should have the costs of the action, less the costs of the issues found for the defendant (see Wylie, *The Judicature Acts (Ireland)* 1905 at p. 873): the reference to '*the event'* meant not that the party succeeding in the action as a whole was entitled to the whole of his costs of the action, but that each party was entitled to the costs of '*any separate issue found in his favour'* (*McCormick v. Harland and Wolff* [1952] NI 118 at p. 148 per Black LJ). This contributed to its own set of categorisations and distinctions. Thus, '*issue'* was defined by reference to whether it had a direct and definite event in defeating the claim to judgment in whole or in part (*Reid, Hewitt and Company v. Joseph* at p. 742). Where there were different causes of action in the one statement of claim, the plaintiff was entitled only to the costs of the cause of action on which he had succeeded, the defendant being entitled to the costs of the causes of action on which the plaintiff had failed (*Fisher v. Rooney and the 'Nation' Newspaper* (1901) 35 ILTR 225). However, this reference to '*issues'* was not the same, the cases suggest, as '*questions'*: '*[t]he fact that several questions are left to the jury does not necessarily mean that several 'events' must arise out of those questions'* (*Nabney v. Belfast Co-operative Society Ltd.* (1933) 67 ILTR 211 per Andrews LJ). It is hard not to think that the later proliferation of proceedings by way of judicial review laid the ground for further confusion and dispute, as the difficulties considered in both *Veolia Water UK plc v. Fingal County Council*

(No. 2) [2006] IEHC 240, [2007] 2 IR 81 ('*Veolia*') and *Chubb European Group v. Health Insurance Authority* [2020] IECA 183, [2022] 2 IR 734 perhaps show.

21. Of course, when the Supreme Court of Judicature Act (Ireland) 1877 became law, a swathe of the jurisdiction of the Common Law Courts comprised jury actions (hence the specific reference in that Act to costs following the event in such cases). It might be thought that the provisions as to costs failed to keep pace as various types of action were, by law, taken away from juries and came to be determined by judges alone. Yet, while there was *no* provision in the Rules and none in s. 53 of the 1877 Act (if it were still in force) that stated that costs of an action - *other* than one heard before a jury - followed the event unless for special cause, at least by the middle of the last century, it was widely understood that the principle guiding all decisions as to the award of costs was '*the event'*. And the general understanding seems to have been (at least until the early part of the last decade) that the event was obtaining *any* relief, in which case all of the costs – at least presumptively – followed.

22. The decision in *Veolia* (where the High Court decided that in complex cases where the winning party had not succeeded on all issues the court could order the costs of those issues on which it had failed against that party) demonstrates that many of the distinctions that had worried the late nineteenth and early twentieth century case law had by the second half of the twentieth century gotten lost in the fog of time. That may be because by then so much practice in the Superior Courts revolved around personal injury actions (which of course were, until the abolition of juries in such actions in the 1980s, governed by O. 99 R. 1(3)) and - barring cases in which lodgements had been made - in many of which there was in truth but one issue.

23. So, and although it might have been contended that O. 99 R. 1(1), when put in its actual legal context, envisaged a far broader discretion in actions that were not tried before a jury, practice was – firmly – that the party who had '*won'* a legal action would obtain all of their costs, and indeed that a party who prevailed on a discrete application within an action could expect a similar outcome (see Delaney and McGrath *Civil Procedure* (5th Ed. 2023) at para. 24-11). While the potential injustice that such a rule could entail in some cases had been observed in the authorities (*Reaney v. Interlink Ireland Ltd.* [2018] IESC 13 at para. 10, [2022] 1 IR 213 at p. 224 per O'Donnell J. (as he then was)), *Veolia* was viewed as grafting a relatively narrow exception on to what Hogan J. has described as the '*winner takes all'* approach (*ADM Londis plc v. Ranzett Ltd.* [2014] IEHC 660 at para. 32) enabling a power in '*complex'* cases to split costs if it were possible to conclude that the issues could, indeed, be '*split'*, and if the raising of the unsuccessful issue could have affected the overall costs '*in a material extent'* (see most recently *Sherwin v. An Bord Pleanála* [2024] IESC 32 at para. 9). Some of the cases located the '*costs follow the event'* rule in O. 99 R. 1(3)[2] (although in fact this was concerned only with jury actions). Mostly, it was placed in O. 99 R. 1(4)[3] (in all likelihood also concerned only with jury actions). That construction of O. 99 R. 1(4) appears to have been based on the view that it meant that there was an '*event'* – the outcome of the case overall – which governed the cost of every issue of fact and law in that case, when actually O. 99 R. 1(4) was properly understood to mean the opposite. It meant that the party who succeeded on an issue got the costs of the issue. The provision was most certainly not positing a rule that the winner of an '*action'* should

[2] *ACC Bank plc v. Johnston* [2011] IEHC 500 at para. 2.2.

[3] In *Dunne*, for example, Murray CJ described O. 99 R. 1(4) as providing that '*costs shall follow the event unless the Court otherwise orders'* (at para. 17) and see *Collins v. Minister for Finance [2014] IEHC 79* at para. 4 and *Minister for Justice, Equality and Law Reform v. McPhillips* [2015] IESC 47, [2015] 3 IR 274 at p. 289

get the costs of that '*action'* – as a comparison with O. 99 R. 1(3) makes clear (R. 1(4) did *not* use the noun '*action'*, it referred only to '*issue'*). It may well be that the interpretation was pragmatic and that it was believed that fairness required that the court exercise its discretion in non-jury actions to obtain the same costs outcome as was expressly mandated in jury matters. Whatever the basis for the practice, the fact was that under the Rules of the Superior Courts and/or s. 53 of the 1877 Act (if it was still in force), the courts enjoyed a far more generous discretion in awarding or not awarding costs in non-jury cases than was acknowledged in the cases.

24. In any case, by the time of the enactment of the LSRA, the courts were inclining to more flexible and pragmatic analysis of their costs power, using formulae that equated '*the event'* to a broader conclusion as to which party was '*really the winner'*, or '*who, as a matter of substance and reality, had won?'* or '*[h]ad the plaintiff won anything of value which he could not have won without fighting the action through to a finish'* (*Roache v. News Group Newspapers Ltd. and ors.* ('*Roache*') [1998] EMLR 161 at p. 162 per Bingham MR). That formulation in *Roache* was cited with approval by McKechnie J. in *Godsil v. Ireland* [2015] IESC 103, [2015] 4 IR 535 (at para. 54) ('*Godsil'*) who identified the same approach as having been adopted in *Mangan v. Independent Newspapers (Ireland) Ltd.* [2003] IESC 5, [2003] 1 IR 442, *Fyffes plc v. DCC plc* [2006] IEHC 32, [2009] 2 IR 417 and *Grimes v. Punchestown Developments Co. Ltd.* [2002] 4 IR 515. *Godsil v. Ireland* was concerned not with the awarding of costs following the determination of the plaintiff's claim that provisions precluding an undischarged bankrupt from membership of Dáil Éireann were invalid having regard to the provisions of the Constitution, but with how costs should be addressed when that case became moot following the repeal of the sections in question. That said, the

judgment of McKechnie J. (with which all members of the Court agreed) frames the modern law at the point of enactment of the LSRA. What he described as '*the costs follow the event'* rule was rooted by him in O. 99 R. 1(3) and (4), and related to two principles: the equity that a person who institutes or defends proceedings to establish rights, assert entitlements or defend unmeritorious claims to that effect should be entitled to an expectation that they will, if successful, not have to suffer costs in so doing, and the need to dissuade and punish '*exploitative conduct and unprincipled parties'*.

25. That rule, he explained, could be departed from on the basis of a discretion, to be judicially exercised '*on a reasoned basis, clearly explained, and one rationally connected to the facts of the case'*. While the circumstances in which the rule would be disapplied could not be rigidly defined or prescriptively described, there were categories disclosed by the case law in which this had occurred – cases in which the party that might otherwise be entitled to their costs had misconducted themselves, test cases, and '*a variety of other proceedings said to involve public interest challenges'*.

26. I think it fair to say that since that decision, those categories have been expanding and becoming more defined – at least insofar as cases against the State or State authorities are concerned. In *Lee v. Revenue Commissioners* [2021] IECA 114 it was held that no order for costs should be made against an unsuccessful appellant in proceedings which turned on the statutory definition of the jurisdiction of the Appeal Commissioners. In finding the legislation to be unclear, and in deciding that no costs should be ordered against the unsuccessful appellant, the following principle was suggested (at para. 19):

'*There will be cases involving a State party which arise because and only because of an avoidable lack of clarity in the drafting of legislation. In some cases, that lack of clarity gives rise to litigation which is of systemic importance within a particular sector and on which there are substantial arguments on each side, the resolution of which is important to other citizens not merely in cases of exactly the same kind but in the general operation and administration of the legislation in question. In some such circumstances the court may exercise its discretion in respect of costs so that the State, which is at the same time in a position to avoid that uncertainty in the drafting of its legislation and the single greatest beneficiary of the litigation, should not through one of its agencies recover the costs of that case from the party who has been compelled to pursue it.*'

Public interest proceedings

27. The phrase used by McKechnie J. in *Godsil* – '*public interest challenges'* – appears in some of the cases, as does the term '*public interest proceedings'* or '*public interest litigation'*. Sometimes judges describe the systemic importance of an action by reference to whether it is a '*test case*', not in the sense of whether it is the lead action for an identified cohort of pending cases, but whether it might affect many other persons (see *F. v. Ireland* Unreported Supreme Court 27 July 1995). One can also see a trend in some of the cases to limit the concept of a '*public interest challenge'* to circumstances in which litigation is initiated by a person who has, themselves, no personal or special interest in its outcome.

28. It is a notable feature of the development of the law around costs in public interest litigation thus understood that the first reserved judgments on this issue in Ireland concerned not attempts by unsuccessful claimants to avoid an adverse costs order, but instead arose from applications for orders for costs notwithstanding the failure of their actions (see *F. v. Ireland, Sheil v. Minister for Education* Unreported High Court 10 May 1999 (Laffoy J.) and *McEvoy v. Meath County Council* [2003] IEHC 31, [2003] 1 IR 208). This is not, I suspect, because the courts jumped right in at the deep end: experience and anecdote would suggest that the likelihood is that judges regularly declined to make orders against unsuccessful claimants in public law litigation or major constitutional challenges, doing so *ex tempore* and without much ado. That practice, I think, tells a story of its own. It was only at the point when it became necessary to decide whether and if so when unsuccessful claimants could actually obtain their costs, that reserved judgments began to emerge. However, both questions (the exemption from costs of, and the award of costs to, the unsuccessful plaintiff or applicant in public law proceedings) came together in *Dunne*.

29. There, the plaintiff had failed both in the High Court and before this Court in his challenge to the validity, having regard to the provisions of the Constitution, of s. 8 of the National Monuments (Amendment) Act 2004. His objective was to prevent the construction of a motorway but asserted that he was not acting to obtain any personal advantage. The High Court having ordered costs in his favour, the question of costs fell to be considered by this Court in the context of an appeal by the defendants against the High Court order for costs, and the plaintiff's application (a) for the costs of the appeal or (b) for no order as to costs. The defendants' appeal was allowed, and both applications of the plaintiff refused, the plaintiff being thus ordered to pay the costs of

both the High Court proceedings and the appeal. That said, it followed from the decision of the Court that there were cases in which, by reason of the public interest involved, a plaintiff would be exempted from the usual consequence of their losing a case and/or appeal, - that costs would be ordered against them.

30. The principles derived from that case were recently summarised by me in my judgment in *Friends* at para. 10, as follows:

(i) There is no fixed rule or principle determining the ambit of the discretion of the court to depart from the position provided for in O. 99 of the Rules of the Superior Courts (as they then stood) that costs should *'follow the event'* and, in particular, there was no overriding principle which determines that the discretion must be exercised in favour of an unsuccessful plaintiff in specified circumstances or in a particular class of case.

(ii) However, the normal rule is that if the issues in the case have been decided in favour of one party, that generally means that the successful party is entitled to his or her costs.

(iii) The fact that a plaintiff was not seeking a private personal advantage and that the issues in a case were of special and general public importance were factors that may be taken into account, along with all other circumstances of the case, in deciding whether there is sufficient reason to exercise a discretion to depart from the general rule that costs follow the event.

(iv) However, the fact that the plaintiff may have been acting in the public interest in bringing the case and had no personal interest in the outcome, and that the case raised an issue of general public importance were not determining factors in a category of public interest litigation.

(v) Instead, the appropriate course of action is to assess each case according to its own context, facts and circumstances. Murray CJ explained the reason for adopting this approach by reference to what he described as *'the rule of law'* that costs normally follow the event (para. 26):

> *'As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.*'

(vi) It is neither possible nor desirable to attempt to list or define all of the factors which warrant a departure from the normal rule as to costs. It is invariably a combination of factors that merit such a departure, and the matter falls to be addressed on a case-by-case basis.

31. As was observed in the judgment in *Friends,* the Court in *Dunne* did not differentiate in its analysis between cases in which an unsuccessful plaintiff should be absolved from the cost consequences that would normally follow from their having failed to prevail in their litigation, and cases in which such a plaintiff would, notwithstanding that they had been unsuccessful in their actions, obtain an order for costs of some kind in their favour. A year before the decision in *Dunne*, however, the Court had, in *Curtin v. Dáil Éireann* [2006] IESC 27, directed recovery by the unsuccessful plaintiff of 50% of his costs. *Curtin* was a case of immense constitutional significance, in which the plaintiff (a then-sitting Circuit Court judge) had challenged the processes pursuant to which it was sought to remove him from office pursuant to Article 35.4 of the Constitution, as well as seeking declarations of invalidity of certain legislative provisions which had been enacted in connection with that process. His was the first case in which the meaning of that provision, and the proper procedures to be followed in operating it, fell to be considered by the courts.

32. The circumstances in which costs would be awarded in favour of the unsuccessful claimant in public interest litigation was the subject of some closer analysis in a decision of a Divisional Court, *Collins v. Minister for Finance* [2014] IEHC 79 ('*Collins'*) which proceeded to identify a range of considerations to be taken into account in the exercise of that jurisdiction. I will return to *Collins*, and indeed some of the more recent cases applying it, later. What is relevant here is that both strands of authority viewed the raising of issues of special and general public importance in differing types of challenge to State action as factors '*to be taken into account'* in deciding whether to exempt a plaintiff from the cost consequences of an adverse

outcome, or to award costs in their favour notwithstanding that adverse outcome (see *Dunne* at para. 18 and *Collins* at para. 19). What, without question, emerges from all of these decisions is that cases against the State or its agencies, and cases against private persons are not alike for these purposes, and are not treated as if they were (a point most recently made in *MD (A Minor suing by his Father and Next Friend MD) v. Board of Management of a Secondary School (No. 2)* [2024] IESC 18 and *Crofton Buildings Management CLG and anor. v. An Bord Pleanála and anor.* [2024] IESC 21 at paras. 8 and 9).

Public interest proceedings prior to the LSRA: some conclusions.

33. The conditions governing the exercise of a discretion to use a power in a particular way, are products of the reason the power is conferred in the first place. Thus, in the case of public interest proceedings, the court must undertake the decision whether to exempt an unsuccessful party from the cost consequences of their defeat keeping in view the purpose of the general approach whereby the party who wins obtains their costs – that is that in some cases it will be unjust to force a person to pay for their own litigious victory, and that there should be a deterrent against abuse. The first of these is less pressing in the case of parties operating with the benefit of the resources of the State than it is with respect to private parties in particular when the State itself obtains a benefit at a systemic level from its victory. The second can be accommodated within the general criteria that govern the exercise of that discretion. Both must, as Simons J. explained in the course of his judgment in *Corcoran v. Commissioner of An Garda Síochána* (‘*Corcoran*’) [2021] IEHC 11, be balanced against the supervening objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from

pursuing litigation of a type which – although ultimately unsuccessful – nonetheless serves an identified public interest (at para. 20). This is acknowledged in the significant body of case law since *Dunne* from this Court, the Court of Appeal and the High Court, addressing the circumstances in which an unsuccessful party to public interest proceedings will be exempted from an adverse costs order. Some of these come in the form of reserved judgments, some are presented as formal and reserved '*rulings*', and some are *ex tempore* rulings. All cases are different and given that all involve the exercise of a factually sensitive discretion, a detailed analysis of one for the purposes of deciding another is sometimes not helpful. The outcomes of the cases are, moreover, not always easily reconcilable. I will not, therefore, conduct here an extensive analysis of all possibly relevant authorities. Two particular features of the cases, however, are of importance to the analysis that follows.

34. First, the decisions suggest a particular category of litigation in which the courts will look more favourably in the exercise of their discretion to both exempt an unsuccessful claimant from the normal cost consequences of their defeat, and – albeit quite exceptionally – award costs in favour of such a claimant. However described, the concept is important to this judgment having regard to the issues identified by the Court (particularly Issues 2 and 4), and is necessarily connected for the purposes of my analysis here with the notion of '*a matter of general public importance'*, this being language appearing in Article 34.5.3° and Article 34.5.4° of the Constitution. That phrase bears the meaning in this judgment that it bears in those provisions, to imply a point of law that is stateable, and usually enjoying an importance beyond the parameters of the litigation in which it is raised. Noting this, where I refer in this judgment to ***'public interest proceedings',*** I mean *civil* litigation that has the following elements:

(a) It involves a claim against the State, or an organ or agency of the State (including a statutory body). Normally, the proceedings themselves will be initiated against the State or such organ agency or body but, if unusually, such a claim may arise by way of defence or counterclaim in proceedings brought by the State.

(b) It seeks relief in public law, whether in the form of a challenge to the validity, legality or compatibility having regard to the Constitution, European Law, the European Convention on Human Rights or the general principles of administrative law, of an enactment, measure, act, omission or decision of a body of the kind specified in (a), whether by way of plenary action, proceedings by way of judicial review, or statutory appeal.

(c) It raises directly a point of law of general public importance.

(d) Although – as I have noted – there are decisions using this term to refer exclusively to proceedings brought solely for the purpose of vindicating a right or interest of the public generally, and not the advancement of the personal interests of the litigant, when I use these and cognate phrases in the course of this judgment, I am not so limiting them.

35. Second, in respect of proceedings thus defined, I think that some general principles can be deduced from the experience afforded by the case law:

(i) It is a necessary, but not sufficient, condition to the exercise of the power not to award costs against an unsuccessful claimant in such proceedings that the proceedings involve a point of law of general public importance (*Pervaiz v. The Minister for Justice and Equality and ors.* [2020] IESC 73 at para. 7). Built into that requirement is that the issue, if not novel, is sufficiently unclear or, if clear, there is a substantial question of whether it is appropriate to decide if it should be changed.

(ii) It is a relevant, but not necessary, consideration that the proceedings are brought by the party in question in circumstances in which they obtain no personal advantage from the outcome of the proceedings, but in that regard it is relevant whether '*the subject matter of the litigation is likely to have a significant effect on the category of persons affected by the legal issues'* (*ELG v. HSE (No. 2)* [2022] IESC 26 at para. 11).

(iii) Before the Court can consider exercising this discretion, the point of law must be stateable, and it is only in unusual circumstances that costs would not be ordered against an unsuccessful applicant where the case is other than one of real substance on the merits. The strength of the case for an exemption from costs is in proportion to the strength of the underlying claim.

(iv) A point of law may be of general importance, yet at the same time discrete in its application. The strength of the case for an exemption from costs is also in proportion to the systemic importance of the point. This reflects the fact that the State may often be the net beneficiary of a clarification of the law in an area

of systemic importance, while the party who instituted the proceedings may not secure any equivalent advantage for themselves had they won. It may in an individual case be just that, in those circumstances, the respondent should bear its own costs as the price of obtaining clarification of the law.

(v) Even a case that is weak, although stateable, and although brought by the plaintiff or applicant in the advancement or protection of their own interests, may merit an exemption from an order for costs where the point arises from avoidably unclear legislation. This is a particular situation, which should be viewed as an expression of the court's disapproval that persons affected by obviously unclear laws should have to bear the risk of litigation costs in order to secure a clarification that ought never to have been necessary (*Lee v. Revenue Commissioners*).

(vi) Similarly, where a case is a '*test case'* in the true sense of the term (that is one or more pathfinder cases selected from a larger cohort of pending claims for the purposes of determining issues of law that will govern all actions) the Court may decide not to award costs against the claimant whose case is selected to go forward on this basis (*O'Keefe v. Hickey and ors.* [2009] IESC 39; *Cork County Council v. Shackleton* [2007] IEHC 334, [2011] 1 IR 485).

(vii) Necessarily, in exercising this discretion, the Court should have regard to whether a given case falls into a category where the subject matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issue (*Corcoran* at para. 20).

36. These are, by their very nature, factors that are generally relevant to the exercise of the discretion. There will be cases in which other considerations come to the fore. This should not, therefore, be understood as an exhaustive list of relevant factors. Equally clearly, the weighting of these factors in any given case will vary and will be a matter for the court called upon to exercise its power to award costs. At the most general of levels, however, there is a sliding scale guided by the importance of the issues, the number of other cases in which those issues are likely to arise and the strength of the claimant's case, the application of that scale being influenced in any given situation by the nature of the claimant's interest in the action. A citizen pursuing a challenge on an issue of systemic constitutional importance in which they have no personal interest, and which raises substantial issues, will have to surmount a lesser burden in resisting an order for costs than a similarly positioned litigant who proceeds to litigate an issue which affects their personal or proprietary interests (*Friends* at para. 27).

III THE PRESENT LAW

The power to award costs today

37. The power to award costs is expressed in ss. 168 and 169 of the LSRA and the amended provisions of O. 99 of the Rules of the Superior Courts introduced to give effect to those sections. Relevant parts of these provisions are set forth in the Appendix to this judgment. The provisions of the LSRA took effect in October 2019, and the amended version of O. 99 in December of that year. The LSRA neither repealed nor amended s. 14(2) of the Courts (Supplemental Provisions) Act 1961, and indeed the LSRA did not itself purport to give the power to the Superior Courts Rules Committee to promulgate Rules of Court generally governing costs.[4] Noting that as the law presently stands the courts have no inherent jurisdiction to award costs, this means that there are two principal candidates for the legal source of the cost awarding power: s. 14(2) of the 1961 Act and ss. 168 and 169 of the LSRA. If *Bell* is wrongly decided, s. 14(2) can be removed from that list, and s. 53 of the 1877 Act put in its place. And, as I have already observed, s. 94 of the Courts of Justice Act 1924 has never been repealed, and thus arguably continues to provide a basis for the award of costs in a jury action, albeit in a context in which its relationship with ss. 168 and 169 of the Courts of Justice Act 1924 is unclear. This is patently unsatisfactory and unfortunate: the source of a power as centrally important to the day-to-day administration of justice in the State as the jurisdiction of the courts to award costs should be absolutely clear.

[4] Although it assumed that Rules of Court would be made addressing particular aspects of the cost regime such as scales of fees (s. 143), the forms of bills of costs (s. 152(1)) and the forms of documents used in the adjudication process (ss. 154((1)(c), and 163(3)).

38. While it might be argued that s. 168(1) assumes a pre-existing power of the courts over costs, and that the purpose of it and the immediately succeeding section is to describe and condition that power, I am of the view that these provisions are best viewed as both regulating and conferring *a* cost awarding power. Thus, s. 168(1)(a) ('*a court may … order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings'*) confers a jurisdiction, the incidents of which are described in s. 168(2)(a)-(e). While the discretion conferred by s. 168(1)(a) (and O. 99 R. 1(1)) is general – and wide – it is conditioned by s. 169(1) in one critical respect. That condition demands that where a party is '*entirely successful in civil proceedings'* that party is '*entitled'* to their costs '*unless the court orders otherwise'*. The power to order '*otherwise'* must be exercised '*having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties'*, a non-exhaustive list of the factors to be taken into account being thereafter iterated. One of these is '*whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings'*.

39. Outside the situation of the party who has been '*entirely successful in civil proceedings'* (and this would include cases where a party has been '*partially successful'* or where the court is dealing with an application for costs other than those '*of the proceedings'* – language which at least suggests the costs of the *entire* proceedings as opposed to a step in the action), the court must have regard to s. 169(1) and that, I infer, means both the '*entirely successful'* principle and the factors to which regard should be had in disapplying it identified in that provision.

40. In this case, the appellant has accepted that the respondents were '*entirely successful'* in the proceedings, and to that extent it is not necessary to decide here whether and if so when it is appropriate to '*split'* the costs of issues where neither party has entirely succeeded. However, while the marginal note to s. 169(1) refers to '*the event'*, the fact that the Oireachtas has chosen not to use that term in the body of the provisions (which has dominated the statute book, the Rules of Court and the discourse of practice since at least the Common Law Procedure Amendment Act (Ireland) 1853) suggests the choice of language was intended at the very least to bring clarity to the pre-existing law. What is, however, critically important here is (a) that the Rules continue to stress that costs are at the discretion of the court, (b) that the legislation prescribes in different circumstances factors to be taken into account in exercising that discretion and (c) that the only sharp constraint on that discretion is the strong mandate imposed by s. 169 that a party who has been entirely successful in civil proceedings '*is entitled'* to obtain an order for costs as against the party who has not been successful, unless the court otherwise orders, that power in turn being conditioned by the language of s. 169(1) itself. The overall effect was described in the course of my judgment in *Higgins v. Irish Aviation Authority* ('*Higgins*') [2020] IECA 277 (at para. 10), as follows:

> '*whether a party is 'entirely successful' is primarily relevant to where the burden lies within a process of deciding how costs should be allocated. If a party is 'entirely successful' all of the costs follow unless the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s. 169(1). If 'partially successful' the costs of that part on which the party has succeeded may be awarded in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s. 168(1)(a) and O.99 R. 2(1)*

a party who is 'partially successful' may still succeed in obtaining all of his costs, in an appropriate case.'

41. On this analysis, the LSRA may have altered the effect of s. 14(2) of the 1961 Act. If that provision was once the sole source of the general power to award costs, it no longer confers that power. Instead, the effect of the LSRA is to render s. 14(2) an entirely enabling provision, merely allowing the making of Rules of Court further regulating the power to award costs subject, of course, to those Rules not being inconsistent with ss. 168 or 169. That, I think it fair to say, is how the provision most naturally reads. Although not an issue here, if s. 53 remains in force it has at the very least been qualified by the provisions of LSRA (see *McLoughlin v. Minister for the Public Service* [1985] IR 631) – although the continued efficacy of the provision, if so found, would lend considerable support to the view clearly adopted by the Superior Court Rules Committee that the discretion of the court in relation to costs remains very broad.

The discretion vested in the Court by s. 168 and 169 LSRA and O. 99 R. 1(1).

42. By the time of the enactment of the LSRA, the power of the Court to exempt a party from the cost consequences that would normally follow their defeat in public interest proceedings as I have defined them, and indeed the power to award costs in favour of such a party, represented a firmly established feature of the discretion of the Court as provided for in the 1962 and 1986 version of O. 99 Rule 1(1). It is not the only example of the Court's discretion not to award costs being exercised in a particular way for certain categories of case: in *MD v. ND* [2015] IESC 66, for example, the majority of this Court proposed that in matrimonial proceedings in which the court ordered a

roughly equal division of available financial resources, '*the starting point or default position should be that the court should make no order as to costs'* (at para. 2.2).

43. It is reasonable to assume that had the Oireachtas intended to recondition the long-standing and firmly established discretion of the courts in connection with the ordering of costs, and to render impermissible factors hitherto brought to bear on the exercise of that discretion, it would have done so either by express language, or by necessary implication from that which was so expressed. The reference in s. 169(1) to '*the particular nature and circumstances of the case*' reflects the gist of the case law before the enactment of the LSRA (*Fox v. Minister for Justice and Equality* [2021] IESC 67). It thus preserves the power of the Court to deprive a state defendant that has been entirely successful in their defence of an action of all or part of an order for costs to which they would otherwise have been '*entitled'* having regard to the importance of the issues in the case (and see *Corcoran* at para. 19). The same logic dictates that it preserves the power to direct that those costs be awarded against the successful defendant in an appropriate case.

The Thirty-Third Amendment to the Constitution and costs in this Court

44. As the Chief Justice stressed in the course of his judgment in *Odum and ors. v. Minister for Justice and ors.* [2023] IESC 3, the Thirty-Third Amendment to the Constitution, while creating a new Court of Appeal, did not invest in that Court a new jurisdiction, instead transferring to the new Court the pre-existing jurisdiction of this Court. This Court, however, obtained a novel jurisdiction to entertain appeals directly from the High Court or from the Court of Appeal. While the power to hear and determine

appeals from the High Court requires some exceptionality, both jurisdictions are defined by the precondition that the Court be satisfied that the decision against which it is sought to appeal (a) involves '*a matter of general public importance'* and/or (b) that the '*interests of justice'* warrant an appeal.

45. The intent of the first of these criteria (which represent by far the greater number of admitted appeals) is, self-evidently, to enable the Court to determine appeals in cases presenting an issue that transcends the particular case. Thus, the Court has explained that not merely must a point be stateable before it can be so categorised, but that it should normally have the capacity to be applicable to cases other than that specifically under consideration (*Quinn Insurance Ltd. v. PricewaterhouseCoopers* [2017] IESC 73, [2017] 3 IR 812). The Constitution so provides – also self-evidently – for the very reason that it is of public importance that the question be finally determined by this Court. This has already caused the Court to relax rules on mootness, as the decision in *Odum* shows, and (albeit most exceptionally) has influenced its decision to proceed to determine issues of public importance notwithstanding that those issues had not been (because they were not pleaded) determined in the decision appealed against (*Concerned Residents of Treascon v. An Bord Pleanála* [2024] IESC 28).

46. In cases as between private parties (and indeed in dealing with the costs of private parties who are respondents or notice parties to public interest proceedings), there are compelling reasons for this Court to treat the issue of costs in accordance with the norm envisaged by s. 169 of the LSRA: in that situation the private defendant can point to a presumptive '*entitlement'* to their costs, and it will in many cases be unfair to that defendant, having incurred expenses in negotiating proceedings which it has prevailed,

to deny it the right envisaged by s. 169. That is reflected in the rulings that have been delivered by the Court since the Thirty-Third Amendment (see, for example, *Smith v. Cunningham* [2023] IESC 33 at para. 11). The same conclusion has been reached in private law proceedings to which State bodies or bodies controlled by the State were a party (*University College Cork v. The Electricity Supply Board* [2021] IESC 47; *Minister for Communications, Energy and Natural Resources and anor. v. Michael Wymes* ('*Wymes*') [2021] IESC 63).

47. The experience of the Court in cases in which the State or statutory agencies are defendants and in which the issues in the appeal lie within the realm of public law, has been markedly different. In a striking number of rulings on costs in which plaintiffs or applicants failed in their appeals, the Court has made either no order for costs (*Fox v. Minister for Justice and Equality*; *Sobhy v. The Chief Appeals Officer and ors.* [2022] IESC 16 ('*Sobhy*'); *An Taisce v. An Bord Pleanála and ors.* ('*An Taisce*') [2022] IESC 18; *Right to Know CLG v. Commissioner for Environmental Information* ('*Right to Know*') [2022] IESC 28; *Mallon v. The Minister for Justice and ors.* [2024] IESC 27) or an order for the payment of reduced costs (*Pervaiz v. Minister for Justice and Equality and ors*.). In some of those cases in which no order as to costs was made, the successful party did not resist the making of no order against the unsuccessful party. There have also been some cases in which costs have been ordered in favour of an unsuccessful claimant, to which I will return later.

IV COSTS IN PUBLIC INTEREST LITIGATION BEFORE THIS COURT

A starting point

48. The Court can articulate, amplify and explain the factors relevant to the exercise of its discretion under ss. 168 and 169. What it cannot do is, under the guise of reframing its discretion, change the law outside the parameters set by the Oireachtas. It cannot be ignored (as evidenced by the provisions dealing with the costs of certain environmental litigation to which I have referred earlier) that when the Oireachtas wished to release an identified category of litigants from the obligation to pay costs it has done so expressly, nor can the Court disregard in framing its discretion, the fact that the Oireachtas has specified that a wholly successful party – without distinction – is '*entitled'* to their costs.

49. It follows that the Court cannot declare any blanket rule that any category of litigant (before this Court or elsewhere) can expect not to face the consequence of the order for costs that normally attaches to their defeat in a case. Only the Oireachtas can do this. Insofar as this is the true *ratio decidendi* of *Dunne* (as I think it is), there is no basis for departing from it. However, while this means that the courts can – outside the very specific context of a particular application for a pre-emptive costs order – never provide absolute certainty to a would-be litigant as to whether they will or will not, if unsuccessful in their appeal or in other proceedings, be released from the obligation to pay costs, the decision in *MD v. ND* shows that the Court is entitled to prescribe a starting point for the exercise of its discretion not to award costs in particular types of case (although *MD v. ND* predated the coming into effect of s. 169 LRSA, it continues

to define the practice in the type of matrimonial proceedings with which that decision was concerned). It is also entitled to provide some direction as to the factors to which the Court will have regard when deciding whether to depart from that starting point. This provides some concrete guidance to those contemplating the bringing of such proceedings, it allows the parties at the conclusion of an appeal to reach an informed agreement as to how costs should be addressed, and it should simplify, and thus reduce the cost of, the process of deciding how costs should be addressed in this Court.

50. When the current practice in this Court is measured against the purpose behind the jurisdiction vested in it by the Thirty-Third Amendment to the Constitution, the reason for the principle that costs will normally be awarded in favour of a party who has been entirely successful in legal proceedings, the experience of the Court in the decade in which its new jurisdiction has been functioning and the general criteria that have evolved in the case law governing the exemption of an unsuccessful applicant or plaintiff in public interest proceedings, it is my view that the Court should now prescribe a clear starting point in relation to the exercise by this Court of its discretion not to award costs against an unsuccessful plaintiff or applicant in such proceedings. That position should be that where the Court has agreed to grant leave to appeal in the proceedings because they involve a matter of general public importance within the meaning of Article 34.5.3° or Article 34.5.4° of the Constitution *and* where the Court has not in its decision on the substantive appeal expressed, having regard to the course of the full appeal in the matter, its conclusion that the issue was *not* one of general public importance, that costs of the appeal will not be awarded against such a party *unless* the opposing party brings the matter back to the Court and asks that it rule on the question of costs. Noting that in that event the LSRA still requires that the

unsuccessful claimant bear the onus of satisfying the Court to exercise its discretion not to award costs in favour of the entirely successful State party, the Court will award costs only if it is satisfied either (a) that the issue in the appeal was not in fact one of general public importance, or (b) that the Court should having regard to particular features of the case of the kind referred to at para. 53 of this judgment nonetheless order that the costs be borne by the unsuccessful party.

51. The reason I have so concluded is that while the Court when granting leave to appeal is necessarily making a decision based upon relatively limited information, if (as is usually the case) the Court in hearing the substantive appeal does not differ from the conclusion that an appeal presents a matter of general public importance, experience now shows that where the case falls within the description '*public interest proceedings'* as I have defined it, it will fall into a category in which the Court has, in the majority of cases, concluded that it is appropriate to exempt the plaintiff or applicant from an adverse order for costs.

52. Thus, the appeal will be – by definition – one in which the successful party is operating with the benefit of the resources of the State. Many such appeals – not of course all – will arise in a context in which the issue of law is of systemic importance or in which the State party has derived a benefit from the clarification the decision has brought to the law (and for this reason the equities will point strongly to no order for costs being made in cases in which it was the State that sought and was granted leave to appeal to this Court on the basis that proceedings involved a matter of general public importance). In these circumstances, it is appropriate that the starting point be that each party will bear their own costs.

53. Of course, the successful party must, not least of all having regard to the provisions of LSRA, retain the right to contend that some or all of the costs of the case should be awarded against the unsuccessful party. Many of the more recent cases in this Court make the point that the fact that a case involves a matter of public importance is not a proper basis on which, in itself, to release an unsuccessful party from the obligation to pay costs because then all cases admitted to the Court would come within the test (see in particular *Wymes* at paras. 6-7, *Sobhy* at paras. 12-13 and *Right to Know* at paras. 8-9). Thus, this starting position does *not* mean that this is the consequence in every such case. Apart from the fact that it will arise only in public interest proceedings to which the State or a State body is a party, even if the point in the case is one of general public importance and the State party obtains some benefit from the clarification to the law resulting from the proceedings, there is a large area of possible objection to such a course of action: that the case was an obviously weak one; that the point was ultimately found to be covered by well-established authority; that the nature of the private advantage at stake for the unsuccessful party in the action is such that it would be unjust not to award costs (for example if the proceedings were brought for a commercial purpose); that the conduct of the unsuccessful party is such that costs should be awarded against it; that the point of law in issue is so discrete and particular to the case of the unsuccessful party that the threshold for exempting them from costs is not met. Whatever the specific objection may be, it seems to me to be both reasonable and to represent an efficient use of everyone's resources where, if the appeal arises from public interest proceedings and presents an issue of general public importance, it becomes a matter for the State or State authority in question to seek a ruling on costs. When the State has been '*entirely successful'* in the case and seeks such a ruling, s. 169 demands

that the onus remains with the claimant to establish that the discretion of the Court should be exercised against costs being awarded in favour of the successful party. However, it will henceforth do so in a context in which it has already been established that the case is within a category in which the Court has the power not to direct costs against the unsuccessful party, and the issue is only whether having regard to the particular circumstances of the case that power should in fact be exercised in its favour.

54. I think it fair to say that, at least in my experience (an experience borne out by the various more recent authorities to which I have referred) the State and State agencies tend as a matter of practice to adopt a commendably pragmatic and sensible attitude to the costs of appeals before this Court where those proceedings have been found to involve a point of law of general public importance, and that in many such cases it is agreed that no order should be made. That, indeed, was the position in this case. The approach I propose here will formalise that taken in many such appeals in more recent years. It should be viewed as the confirmation of the widespread practice adopted in the Court in recent years, rather than as representing any new principle of law, while maintaining fully intact the discretion vested in the Court by the provisions of ss. 168 and 169 of the LSRA and respecting the '*entirely successful'* principle provided for in that legislation.

Costs of the proceedings in the High Court and/or the Court of Appeal

55. The question of how the costs of proceedings before the High Court and/or the Court of Appeal in a case which has been appealed to this Court fall to be addressed will depend on a range of issues but must be governed by the same principle as applies to

the disposition of any appeal to this Court. If those proceedings involved no more than a hearing directed to the issue of law on which this Court has granted leave on the basis they present a point of law of general public importance, and if the Court has not departed from that view following the full hearing, then logically, if only by way of starting point no order as to the costs of those proceedings is being made in this Court, the same position should apply to those costs. However, it goes without saying that in many cases this will not carry seamlessly through. Proceedings in the other courts may have involved issues that were not before this Court and, where that is the case, the treatment of those costs will have to be determined having regard to how the Court that disposed of those issues determined they should be treated. The just disposition of the costs of the proceedings as a whole may be affected by other matters that were not before, or for that matter even evident to this Court when hearing the appeal.

56. Nonetheless, I see no reason not to apply the starting position to the costs of the entire action, to the end that matters of the kind I have just described can be raised before the Court by the State defendants, should they believe it appropriate so to do.

Hardship to the unsuccessful party

57. In her first submissions on costs, the appellant placed particular emphasis on a statement by Geoghegan J. in *MN v. SM (Damages – Costs)* [2005] IESC 17 at p. 3, [2005] 4 IR 461 at p. 477:

> '*In most instances of course the normal rule … will apply. But in cases where that may be perceived to cause a hardship, the court must exercise its discretion*

and the manner in which it exercises that discretion will differ from case to case.'

58. From there, the appellant referred to a number of decisions of the Court of Appeal and of the High Court as authority for the proposition that the Court had the power to depart from the normal rule as to costs in *inter alia* exceptional circumstances where '*real economic hardship'* would be caused (*Barlow v. Minister for Communications* [2023] IECA 193; *Friends, Browne v. Minister for Agriculture* [2022] IECA 41; *AB v. HSE* [2022] IEHC 589; *Roche v. Teaching Council* [2021] IEHC 753; *Higgins*; and *EPA v. Deegan* [2019] IEHC 778).

59. In private law civil proceedings as between private parties, the suggestion that the unsuccessful party can plead poverty as against the party who has wholly prevailed in the litigation as the basis for avoiding an order for costs to which the latter is otherwise '*entitled'*, appears to me to present significant challenges. This has been recognised in some decisions of the Court of Appeal (*Smith v. Cisco Systems Interworking (Ireland) Ltd.* [2023] IECA 238; *James v. Watters* [2023] IECA 144; and *McFadden v. Muckno Hotels Ltd.* [2020] IECA 153). Certainly, I would be doubtful that, alone, this factor would justify the Court in exercising its discretion against the winning party in such a case. It is telling that of the cases cited by the appellant, *MN v. SM* was the only authority in which that suggestion was made in the context of proceedings between two private parties. But that was a wholly exceptional case in which in the substantive appeal an award of damages made in the High Court of €600,000 for personal injuries consequent upon acts of sexual abuse by the defendant, was reduced to €350,000. The appeal presented an obvious dilemma: on the one hand it seems unfair to penalise the

plaintiff for an award by the High Court that was excessive, and for which he bore no responsibility, by forcing him to bear the costs of the defendant's successful appeal. To make an order for costs against the defendant by reason of the fact that he was still being ordered to pay a substantial sum by way of damages seems equally unfair. The intermediate situation – no order as to the costs of the appeal – causes hardship to both. I do not think that the case sustains the conclusion that hardship of the kind invoked in this appeal – essentially that the already difficult financial circumstances in which the appellant finds herself will be exacerbated by an order for costs – is, on its own, a legitimate basis in and of itself for not ordering costs in favour of a wholly successful party. There, the hardship referred to by Geoghegan J. was specific, directly related to the litigation and was potentially faced by each party insofar as one would, if costs were awarded against him, have his award even further reduced, while if costs were ordered in favour of the plaintiff, the defendant would have faced a legal liability in costs as the price of having succeeded in his appeal. The obvious solution was to adopt the intermediate solution, which is what the Court did.

60. However, it is equally clear from the factors I have earlier observed as relevant to the exercise of the discretion not to order costs against an unsuccessful party in public interest proceedings, that there is a potentially important question to be put in the balance in determining whether to exercise that discretion in favour of the unsuccessful party that overlaps with the question of hardship. That is the question of whether the case falls into a category in which the subject matter of the litigation is such that costs are likely to have a significant deterrent effect on the group of persons affected by the legal issue. This is of particular relevance to persons such as the appellant in this case whose claim arises because of the importance to her of the DCA benefit, and whose

circumstances might well be said, were costs to be awarded against her, to have acted as a real deterrent to other similarly positioned persons who wished to agitate significant questions around the proper interpretation of the social welfare code. However, it is to be stressed – and this is a point to which I return later – this is only one of a number of factors relevant to the exercise of this discretion. Another is the strength of her specific case, and the reason she decided to proceed with it. I will return to these factors when I later consider the application of the principles I outline here, to the facts of this case.

The relevance of the costs regime in environmental claims

61. The question of whether the statutory provisions in s. 50B of the Planning and Development Act 2000, as amended, and the Environmental (Miscellaneous Provisions) Act 2011 – which was raised by the Court – are relevant to the question of how costs operate in non-environmental public interest proceedings arise in two, opposing, ways. On the one hand, it shows that the Oireachtas adopts the view that in some circumstances the costs of at least some public law proceedings are '*prohibitively expensive'*. Moreover, the effect of this legislation is to exempt claimants in a category of public interest proceedings from the risk of costs, raising the question as to whether there is a sufficient justification for treating other claimants in such proceedings, differently. But as against this, the legislation shows that and how the Oireachtas can exempt certain categories of litigant from adverse costs orders where it concludes that this is appropriate. Ultimately, I am not convinced that this regime affects the calculus in deciding how the general discretion under the costs provisions of LSRA falls to be exercised.

Awarding costs in favour of the unsuccessful party

62. The cases since the decision in *Dunne* have consistently applied a far stricter test in awarding costs to an unsuccessful litigant in public interest litigation than to the decision whether to exempt such a litigant from an adverse costs order: as Charleton J. put it in *Minister for Justice v. McPhillips* [2015] IESC 47 orders of this kind are '*a genuine rarity'* (at para. 50). It would be very surprising were the position otherwise. Where the making of an award of costs in favour of such a party is proposed, the Court should do so only in cases of real substance, in which there is a clear and significant public interest on a matter of fundamental importance served by the clarification brought to the law by the suit. The decision of the Divisional Court in *Collins* identified four types of case in which orders of this kind had been made, and to these I would add a fifth – if obvious – one:

(i) Proceedings where the constitutional issues litigated were '*fundamental*' and '*touched on sensitive aspects of the human condition*'. Examples include *Norris v. Attorney General* [1984] IR 36, *Roche v. Roche* [2010] IESC 10 and *Fleming v. Ireland* [2013] IESC 19, [2013] 2 IR 417.

(ii) Constitutional cases of '*conspicuous novelty*', often where the issue concerned aspects of the separation of powers between branches of government, including for example, *Horgan v. An Taoiseach* [2003] IEHC 64, [2003] 2 IR 468, and *Curtin*.

(iii) Cases in which the issue was one of '*far reaching importance in an area of the law with general application*.' Examples given by the Court included the constitutionality of the Judicial Separation and Family Law Reform Act 1989 in *TF v. Ireland* (1995), and aspects of the State's duty to provide for free primary education under Article 42.4 in *O'Shiel v. Minister for Education* [1999] IEHC 146, [1999] 2 IR 321.

(iv) Cases in which the courts have emphasised that the decision clarified an otherwise '*obscure or unexplored area*', such as *Curtin*.

(v) Cases in which although a claimant may have lost their action and failed to prevail on the ultimate argument, the claimant won a significant issue in the appeal.

63. The more recent decisions of this Court have agreed with the suggestion that the cases in which costs will be awarded in favour of a successful claimant have tended to be those in which '*foundational issues of constitutional or European law'* have been raised (see in particular *Mallon v. Minister for Justice and ors.* [2024] IESC 27 at para. 6). *Collins* was itself such a case (involving a challenge to the legality of certain ministerial orders made pursuant to the Credit Institutions (Financial Support) Act 2008). I think that a case would have to be quite extraordinary to merit an award of costs against the successful State party, and *not* come within one of these categories. Even then, cases in which the Court has ordered *full* costs of all levels of the court system have been very few and far between, the Court instead tending to award at most a conservative proportion of the costs of one Court.

64. This is borne out by the decisions of this Court since then. Cases in which the Court has refused to direct costs in favour of an unsuccessful claimant include *Sobhy* (where the question was whether social welfare benefits could be claimed by a person who had paid PRSI but did not have valid immigration permission: it was found not to be of the importance required to merit such an order); *An Taisce* (where the applicant was refused costs where it had unsuccessfully raised issues of very general importance relating to environmental impacts); and *Right to Know* (where the Court declined to order costs in favour of the unsuccessful claimant in an appeal which raised the question of whether the President of Ireland was subject to the Access to Information on the Environment Regulations: the case was not a lead case, the issues were not novel and it did not involve constitutional rights or touch on sensitive aspects of the human condition).

65. In contrast, decisions in which costs have been awarded have tended to come within the categorisation suggested in *Collins.* In *Fox v. Minister for Justice and Equality*, the applicant was awarded 50% of the costs of proceedings before the High Court and the Court of Appeal, in circumstances in which he had raised novel and important issues around the scope of the obligations on the State to investigate certain deaths under Article 2 of the European Convention on Human Rights. In *PMcD v. Governor of X Prison* [2021] IESC 71 the unsuccessful applicant was awarded 50% of his costs before the High Court in a case in which he sought to assert constitutional rights in the context of a hunger strike undertaken by him while he was in prison, because the arguments that had succeeded on appeal had not been made in the High Court, and because the case had begun in emergency circumstances: the Court stressed that the outcome of the case had been of considerable benefit to the prison authorities and had raised issues of

importance as to the legal relationship between prison authorities and prisoners, as well as issues more generally relevant to the existence of a duty of care. In *ELG v. HSE (No. 2)*, 40% of the costs of the appeal were awarded in favour of an unsuccessful appellant in a case in which the matter of general public importance related to whether a child assessed as needing services but who was without a disability, was entitled to a service statement under the Disability Act 2005.

V COSTS IN PUBLIC INTEREST LITIGATION BEFORE THE HIGH COURT AND COURT OF APPEAL

66. This judgment is concerned only with the correct approach to be adopted to the costs of public interest challenges in cases which this Court has determined raise a point of law of general public importance. For the reasons I have explained, the costs of such proceedings – whether in the High Court or Court of Appeal, or both – should, presumptively, be addressed on the same basis.

67. The position insofar as the jurisdiction of those courts to make orders in public interest challenges remains as it was: in particular the starting position I suggest where this Court has granted leave to appeal a decision because it presents a question of law of general public importance is a pragmatic and procedural solution and is – of its nature – applicable only in proceedings before this Court. The High Court and Court of Appeal should approach costs in such proceedings as before. That said, the factors relevant to the exercise of the power to absolve an unsuccessful plaintiff or applicant from the cost consequences that usually follow the failure of their challenge merit restatement.

68. First, those Courts enjoy a discretion not to award costs against an unsuccessful plaintiff or applicant in a public interest proceeding. These are civil proceedings against the State, or an organ or agency of the State (including a statutory body) in which the plaintiff or applicant seeks relief in public law, whether in the form of a challenge to the validity, legality or compatibility having regard to the Constitution, European Law, the European Convention on Human Rights or the general principles of administrative

law, in respect of an enactment, measure, act, omission or decision of a body of the defendant or respondent whether by way of plenary action, proceedings by way of judicial review, or statutory appeal, and which present the various other features I have outlined at paragraph **[34]** of this judgment.

69. Second, in determining whether to exercise that discretion in favour of such a litigant, the Court must have regard to all the facts and circumstances. I have identified some relevant considerations at paragraph **[35]** of this judgment: these are as pertinent to the exercise by the High Court and Court of Appeal of its jurisdiction, as they are in the exercise by this Court of its jurisdiction to award costs.

70. Third, because this is essentially a balancing exercise, there are case specific factors which may cause the Court to exercise its discretion to order costs, even in proceedings in which many of these criteria are met. These include that the case was an obviously weak one, that the point was ultimately found to be covered by well-established authority, that the nature of the private advantage at stake for the unsuccessful party in the action is such that it would be unjust not to award costs (for example if the proceedings were brought for a commercial purpose), that the conduct of the unsuccessful party is such that costs should be awarded against it, or that the point of law in issue is so discrete and particular to the case of the unsuccessful party that it is not appropriate to exempt the claimant from the order that usually follows complete defeat.

71. Fourth, while the courts retain a power to order costs in public interest litigation in favour of an unsuccessful party, the cases in which that power should be exercised are

very rare. It would be only in the most exceptional of circumstances that they would not comprise cases where the constitutional issues litigated were '*fundamental*' and '*touched on sensitive aspects of the human condition*,' cases of '*conspicuous novelty*', cases in which the issue was one of '*far reaching importance in an area of the law with general application*', in which the courts have clarified an otherwise '*obscure or unexplored area*', or cases in which the claimant, although ultimately unsuccessful, prevailed on a discrete issue in the case which was itself significant. Even where a case falls within one or more of these categories, the Court must have regard to the factors I have identified in the preceding paragraph in determining whether to award costs in such circumstances.

VI APPLICATION TO THIS APPEAL

72. At different points in the course of this appeal, three points emerged that were relevant to how the discretion of the Court in awarding or not awarding costs should be exercised: (a) whether the Court should have declined to order costs as against the appellant, having regard to the fact that these were public interest proceedings as I have defined them; (b) whether it should have taken into account in the exercise of that discretion the hardship that the appellant asserted would follow for her if a costs order were made against her; and (c) whether the Court should, again by reason of the fact that these were public interest proceedings, make an order for the recovery by the appellant of some of the costs of the proceedings.

73. The concession by the State that it does not seek costs against the appellant means that the Court does not have to consider the first and second of these issues insofar as they apply to the appellant's case. However, while that concession was commendable in all of the circumstances, while the appellant's claim was a public interest proceeding as I have defined it, while the case was stateable, while there may be other litigants affected by it, and while a case can be made that the award of costs in this case would have discouraged other litigants who also faced financial hardship from bringing like challenges, the appellant's claim to be absolved from the cost consequences that would normally attend the dismissal of her claim faced three significant and related difficulties. First, as I think clear from the comprehensive analysis in the judgment of Woulfe J., this was not a strong case. Second, the Court never received a clear explanation of why the appellant chose to proceed with this case instead of simply recommencing the process of application for DCA. Third, the information provided to

the Court as to the appellant's financial circumstances was, at best, very general. Even with the starting position I have suggested, litigants must understand that having regard to the provisions of the LSRA, the decision not to award costs in cases of this kind is a departure from the norm. If a party insists on proceeding with an action which is found to have been weak in law, the equity of their case to have that discretion exercised in their favour will be correspondingly diminished. On balance, having regard to the nature of the appellant's claim, the very particular personal context in which it was brought and the fact that a point has now been clarified from which many others may benefit in the future, I would not have awarded costs against the appellant here. However, the weakness of the underlying point, meant that this was not a clear case.

74. In contending that some of the costs of the proceedings should be awarded in her favour, the appellant emphasises six features of her case: (a) the question of the proper scope of the revision power conferred on appeals officers by s. 317 of the 2005 Act was of general importance and in the public interest, and was so described in the Determination granting leave; (b) the question of the scope of the review jurisdiction under s. 317 was not a well-established one; (c) the subject matter of the proceedings was likely to affect a large number of persons; (d) the appellant would face hardship if faced with an adverse costs order; (e) because the very purpose of the legislation in issue is to benefit persons in financial need, a potentially ruinous adverse costs order would have a deterrent effect on such persons in future proceedings regarding social welfare legislation; and (f) the issues in the case fell within the sphere of sensitive personal rights.

75. The State, in response, stresses five features of the appeal: (a) the 2005 Act contains provisions which afford multiple opportunities to challenge decisions made under the Act without the risk of an adverse costs order; (b) it was open to the appellant at all material times to submit a new application for DCA for her son so that his entitlement as of the date of that new application could be assessed; (c) the precise issue of law raised in the appeal had been the subject of a detailed and correctly reasoned judgment in *LL v. Chief Appeals Officer* [2021] IEHC 191; (d) the Oireachtas in the LSRA conditioned the discretion of the Court by reference to '*the particular nature and circumstances of the case*', not the financial circumstances of the person who brought the case or hardship they will experience if an adverse costs order is made against them and; (e) even if financial circumstances are relevant, financial circumstances *alone* are not.

76. The correct resolution of these conflicting considerations follows from the analysis I have proposed earlier in this judgment. This is not a case in which the Court can or should award costs in favour of the appellant. Leaving aside what I have said about the strength of the case, the appeal revolved around the application to the 2005 Act of well-established principles of statutory interpretation. It did not raise an issue of constitutional or European law, it did not involve an issue that could be described as '*foundational'*, it was a case pursued in the appellant's personal interest and while a point of general importance, it did not present a legal question of such significance (or argument of such strength) that the taxpayer should fairly bear the appellant's own costs.

VII CONCLUSIONS ON THE ISSUES

Issue One

77. This Court should now adopt a starting position in the exercise of its discretion whether to award costs against an unsuccessful claimant in public interest proceedings as I have defined them at paragraph **[34]** of this judgment. In such proceedings the starting position should apply to cases in which the Court has granted leave to appeal on the basis that proceedings disclose a matter of general public importance, and where the Court, following the hearing of the full appeal, has not differed from the view of the Panel granting leave that the appeal discloses such an issue. In such cases, the starting position should be that the Court will exercise its discretion not to order costs of the proceedings against that unsuccessful plaintiff or applicant. In such cases, the defendant/respondent may request the Court to order otherwise. The factors on the basis of which the Court will exercise its discretion to make an order for costs are set out at paragraphs **[35]** and **[53]** of this judgment in the case of the costs of the appeal. Presumptively, the same principles should apply to the costs incurred before the case reached this Court in the High Court and, where applicable, Court of Appeal. However, if the proceedings in the other courts involved issues that were not before this Court, or there are particular features of the earlier conduct of the case relevant to the allocation of costs, different cost orders as between the various courts may apply.

78. This position reflects the usual practice of the Court over the ten years since the commencement of the Thirty-Third Amendment of the Constitution Act 2013, in 2014. It is intended to reflect that practice, not to change it, and to enable such costs to be

disposed of in a cost-efficient way. This does not affect the costs of proceedings of private party defendants or respondents, and neither alters nor constrains the discretion of the Court as provided for in the provisions of O. 99 and ss. 168 and 169 of the LSRA.

Issue Two

79. The approach I have resolved is applicable only to public interest proceedings as I have defined them in this judgment (paragraph **[34]**). It is not affected by the statutory exemptions from orders for costs granted in respect of certain environmental law claims.

Issue Three

80. There is no need for this Court to reverse the decision in *Dunne*. The *ratio decidendi* of that case was that the Court has a general discretion with regard to costs, and that while that discretion must be exercised in a judicial way, there should be no *a priori* categorisation of cases in which the Court will, as a matter of law, exercise its discretion to depart from the general approach that a successful party will usually obtain its costs. This judgment prescribes a starting position in the exercise of the Court's discretion not to award costs against an unsuccessful claimant in a particular category of cases which keeps that discretion intact, while providing greater guidance to the factors relevant to its exercise.

81. In the course of this judgment, I also outline the circumstances in which, as well as not awarding costs against an unsuccessful litigant in public interest proceedings, the Court

may order some or all of the costs of those proceedings in favour of such a party. The criteria relevant to that exercise are outlined at paragraphs **[62]** and **[63]** of this judgment. The cases in which this will occur are most rare and will usually involve foundational questions of constitutional or European law.

Issue Four

82. The starting position prescribed here is applicable only to appeals before this Court, although it carries through to the costs of a case for which this Court has granted leave to appeal incurred before the High Court and Court of Appeal. Nonetheless, the High Court and Court of Appeal continue to have a power to both exempt an unsuccessful litigant in public interest proceedings from the cost consequences of their defeat, and (most exceptionally) to award some or all of the costs of such an action to such a party. The criteria relevant to the exercise of those respective discretions are similar to those applicable when this Court determines whether to make such an order in respect of appeals and are as outlined at paragraphs **[35]** and **[53]**, and paragraphs **[62]** and **[63]** respectively.

83. Having regard to the concession made by the State, an Order should be made setting aside the Order for costs made against the appellant by Owens J.

APPENDIX

Order 99 Rules 2 and 3, Rules of the Superior Courts:

2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

(4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.

(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.

3.(1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.

(2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs.

Section 168(1) and (2) and Section 169(1) of the Legal Services Regulation Act 2015:

168. (1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or

(b) where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to the proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust.

(2) Without prejudice to *subsection (1)*, the order may include an order that a party shall pay—

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment.

169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

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

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

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

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