Delany and McGrath 3rd Ed. 2012

Chapter 23 - Costs

Section B. - Rule that Costs Follow the Event

1. General Rule that Costs Follow the Event

23-02

Order 99, rule 1 provides that the costs of any proceedings are in the discretion of the court but rule 1(3)[6] lays down what has been described by Denham J in *Grimes v Punchestown Developments Co. Ltd*[7] as the "normal rule" that costs follow the event unless the court, for special reasons, otherwise directs. This means that "the winning party is to obtain an order for costs to be paid by the other party, unless the court for special cause otherwise directs".[8] As Dyson J explained in *R. v Lord Chancellor, ex p. Child Poverty Action Group*,[9] this rule "ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party". The importance of this general rule was recognised by Clarke J in *Veolia Water UK plc v Fingal County Council (No.2)*:[10]

> [T]he overriding starting position should remain that costs should follow the event. Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings.

23-03

The application of the rule requires identification of the "event" that costs have to follow, i.e. an identification of which party has won the proceedings. Generally, this is straightforward but, as Clarke J noted in *Veolia Water UK plc v Fingal County Council*,[11] "there are certain cases where even a determination as to what the 'event' is, may be a matter of some complexity". In a similar vein, Bingham MR stated in *Roache v News Group Newspapers Ltd*[12] that, in more complex cases, "it is necessary to investigate with some care who is really the winner and who is really the loser or, as it is sometimes put, to identify the event which costs are to follow".

23-04

The rule that costs follow the event applies equally to appeals and, in *S.P.U.C. v Coogan (No.2)*,[13] Finlay CJ stated that it was "necessary for very substantial reasons of an unusual kind to exist before [the Supreme] Court should properly depart from the general principle that costs follow the event on the hearing of appeals before it".

2. Proceedings Raising Multiple Issues

23-05

The traditional approach of the courts was that, in applying the rule that costs follow the event, the event is defined in terms of which party has won the case and not individual issues and, although it was open to a court to do so,[14] it generally refrained from awarding costs according to the relative success of the parties. Thus, even if a plaintiff advanced claims or raised issues in

respect of which he was unsuccessful, he was generally awarded the costs of the full hearing and not just that portion attributable to the issues in respect of which he succeeded.[15] This was the approach adopted even if the proceedings were heard on a modular basis.[16]

23-06

A more sophisticated approach to the award of costs in complex cases which raise multiple issues has emerged more recently which recognises that such cases may have more than one "event". A straightforward example of this approach can be seen in *Fyffes plc v DCC plc*.[17] The plaintiff had been unsuccessful in its claim against the defendants for insider dealing its shares. The proceedings were very complex and had resulted in a very lengthy trial. One of the defences raised by the defendants, that the first defendant had not been dealing in the relevant shares, was rejected by Laffoy J. The defendants applied for all of their costs of the action and the plaintiff contended that they should not be awarded the costs of this issue. Laffoy J considered that the decision of the Supreme Court in *Grimes v Punchestown Developments Co. Ltd*[18] provided support for the proposition that the court was entitled to relieve an unsuccessful plaintiff of some of the costs that would be awarded to a successful defendant on the basis that he had not been successful on substantive issues raised and prosecuted by him as part of his defence.[19] She decided that there were exceptional circumstances which justified a departure from the approach of awarding the defendants all of their costs and she made an order awarding the defendants their costs except for 80% of the costs of making discovery and the costs of 25 hearing days to reflect the failure of the dealing defence.

23-07

In *Veolia Water UK plc v Fingal County Council (No.2)*[20] Clarke J took the opportunity to give detailed guidance as to the principles that should be applied in relation to costs in complex litigation which will often involve numerous interlocutory steps. He noted that litigation as a whole had become more complex and expensive often involving numerous interlocutory steps and that it was increasingly the case that discrete issues were arising in litigation in respect of which it was possible to form a view as to whether the result of the litigation as a whole might not properly provide the sole basis for the award of costs in respect of the matter determined having regard to the fact that not all of the issues canvassed at the hearing may have been determined in favour of the party ultimately succeeding on the substantive issues. Accordingly:

> It seems to me that having regard, in particular, to the very substantial sums of money that may be at stake when a court is considering how to award costs, it is incumbent on the court, at least in complex cases, to at least give consideration as to whether it is necessary to engage in a more detailed analysis of the precise circumstances giving rise to such costs having been incurred before awarding costs. Furthermore, it seems to me to be incumbent on the court to attempt to do justice to the parties by fashioning, where appropriate, orders of costs which do more than simply award costs to the winning side.
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> [21]

23-08

Clarke J reiterated the two fundamental principles which underpin this area, namely that the awarding of costs is always discretionary and that the starting position remains that costs should follow the event. However, it was necessary to identify what the "event" is and, thereby, identify

the winning party:

> In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be, will have been justified by the result. Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that, ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful.[22]

23-09

Where the court was so satisfied, he took the view that it should attempt, as best it could, to reflect that fact in its order for costs:

> Where the matter before the court involved oral evidence and where the evidence of certain witnesses was directed solely towards an issue upon which the party who was, in the overall sense, successful, failed, then it seems to me that, ordinarily, the court should disallow any costs attributable to such witnesses and, indeed, should provide, by way of set-off, for the recovery by the unsuccessful party of the costs attributable to any witnesses which it was forced to call in respect of the same issue. A similar approach should apply to any discrete item of expenditure incurred solely in respect of an issue upon which the otherwise successful party failed.
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> Similarly, where it is clear that the length of the trial of whatever issues were before the court was increased by virtue of the raising of issues upon which the party who was successful in an overall sense, failed, then the court should, again ordinarily, award to the successful party an amount of costs which reflects not only that that party should be refused costs attributable to any such elongated hearing, but should also have to, in effect, pay costs to the unsuccessful party in relation to whatever portion of the hearing the court assesses was attributable to the issue upon which the winning party was unsuccessful.[23]

23-10

In his view such an approach would discourage parties from raising additional issues which had no merit. However, he entered the caveat that this approach might not be appropriate in more straightforward litigation: "the fact that such an additional issue was raised should only affect costs where the raising of the issue could, reasonably, be said to have effected the overall costs of the litigation to a material extent."[24] In the case before him, which involved the trial of a preliminary issue as to whether the applicants had complied with the time limits imposed by Order 84A, Clarke J concluded that both parties could be taken to have succeeded to some extent. In circumstances where an overall assessment of the time attributable to the issues on which each

party was successful was roughly equal, he exercised his discretion to make no order as to costs.

23-11

Subsequently, in *Usk and District Residents Association Ltd v Environmental Protection Agency*,[25] Clarke J reiterated the view that courts should seek to adopt a more nuanced approach in relation to the awarding of costs in complex litigation. Clarke J stated that the overriding starting position must remain that costs should follow the event and that ordinarily parties such as the respondent or notice party who had successfully resisted an applicant's claim should prima facie be entitled to all costs reasonably incurred. However, in his view there may well be a basis for departing from general principles where a party may be said to have significantly added to the costs of the litigation either by raising substantive unmeritorious issues at trial or where interlocutory applications were unreasonably brought or defended in a manner which led to the incurring of significant additional costs. These principles are considered in more detail below in the context of the costs of leave applications in judicial review proceedings.[26]

23-12

The principles which should apply to the award of costs in complex litigation were also considered by Finlay Geoghegan J in *McAleenan v AIG (Europe) Ltd*.[27] She agreed that, on an application for costs by a successful party in complex litigation in the Commercial List, if the other party has been successful on a number of issues which have contributed to the overall complexity and length of the litigation, the court should weigh up in the exercise of its discretion what the appropriate order for costs should be. In her opinion, "[t]he starting point of any consideration will be the successful party's prima facie entitlement to an order for costs and the burden will be on the losing party to satisfy the Court that, on the particular facts of the case, there are factors which warrant a departure from a simple order for costs in favour of the successful party."[28] Finlay Geoghegan J concluded that, having regard to the complexity of the proceedings and the fact that a determination had not been made on certain aspects of the case, it would not be appropriate to make separate orders in favour of the parties on different issues. Instead, the approach she adopted was "to form a view as to the probable percentage contribution of the issues upon which the plaintiff was successful to the overall cost of the proceedings, and offset the plaintiff's entitlement to an order in her favour for such percentage of the costs against an order for the balance of the costs to which the successful defendant is entitled against the plaintiff."[29]

23-13

Where a complex case involves multiple parties, the court will also have to consider whether each of the successful parties should recover its full costs. It is commonly the case in more complex cases that parties will be joined, whether as notice parties, third parties, defendants or otherwise, who are neutral in relation to the reliefs sought or interested only in some of the issues that the court has to determine. In those circumstances, such a party will generally only recover its costs to the extent to which its participation in the proceedings was necessary or reasonable to protect its interests. So, for example, in *Smyth v Railway Procurement Agency*,[30] discussed below, where the plaintiffs brought a nuisance action against the RPA arising out of the operation of the Luas and also raised constitutional issues which necessitated the service of an Order 60 notice on the Attorney General, Laffoy J limited an order for costs in favour of the Attorney General to a specified number of days on the basis that the attendance of the Attorney General was not required throughout the entire hearing and it would, therefore, not be fair or just to award the entirety of his costs of attendance against the plaintiffs.[31]

23-14

Similarly, as Clarke J made clear in *Kalix Fund Ltd v HSBC Institutional Trust Services (Ireland) Ltd*,[32] where directions are made for the trial together of proceedings brought by different parties arising from the same circumstances or otherwise raising common issues, while parties will be entitled to be heard in respect of issues in which they have an interest, it does not follow that each of them will be entitled to their costs. He indicated that a party who "has nothing to add to the argument or factual basis relevant to the issue concerned" would not be entitled to the costs of being present while the issue was, in substance, tried between other parties.[33]

3. Exceptions to the Rule that Costs Follow the Event

23-15

Order 99, rules 1(3) and (4) provide that the costs of every issue of fact or law follow the event unless the court otherwise orders. In *Fyffes plc v DCC plc*[34] Laffoy J articulated the overarching test in this regard as being "whether the requirements of justice indicate that the general rule should be displaced". The circumstances in which it would be appropriate to depart from the rule that costs follow the event were considered by Murray CJ in *Dunne v Minister for the Environment*[35] who explained that:

> The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party has an obvious equitable basis. 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.
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> Where a Court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors, which in the circumstances of the case, warrant such a departure. It would neither be possible or desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue.
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> Accordingly any departure from the general rule is one which must be decided by a Court in the circumstances of each case.[36]

23-16

While a court thus has a wide discretion, to be exercised on the basis of the circumstances of an individual case, not to follow the rule that costs follow the event, it is important to note that this discretion is not untrammelled. First, as Murray CJ made clear in *Dunne*, the court must identify and articulate reasons for doing so. Secondly, the factors identified as justifying the departure from the general rule must relate to the facts of the particular case including the conduct of the

parties and not to any extraneous matters.[37]Thirdly, and perhaps most importantly, the discretion must be exercised judicially by reference to those factors.[38] The position was summarised by Clarke J in *Cork County Council v Shackleton*[39] as follows:

> To state that the court retains a discretion is not to give the court carte blanche. It may well be that it is neither possible nor appropriate to list all of the circumstances in which the discretion concerned might be exercised or all of the factors which might properly be taken into account. Experience has shown that new and different cases may lead to a refinement or expansion in the principles applicable. However, it does seem to me that all discretion needs to be exercised in a reasoned way against the background of having identified appropriate principles by reference to which the court should exercise the discretion concerned.[40]

23-17

It should be noted that the burden is on the party contending that costs should not follow the event to satisfy the court that, in the circumstances of the particular case, there should be a departure from the general rule.[41] As to the nature of the burden that has to be borne in that regard, there are some authorities which suggest that a party advocating a departure from the general rule must establish the existence of "exceptional circumstances"[42] but this threshold would appear to be too high and is not supported by the decisions of the Supreme Court in *Grimes* and *Dunne*. A more accurate summation of what is required would seem to be that of Clarke J in *Veolia Water UK plc v Fingal County Council (No.2)*[43] who held that the general rule could be departed from "by virtue of special or unusual circumstances".[44]

23-18

The more common examples of where a court will depart from the rule that costs follow the event are identified below but these should not be regarded as exhaustive. In *Curtin v Dáil Éireann*[45] Murray CJ emphasised that: "It would neither be possible nor desirable to lay down one definitive rule according to which exceptions are made to the general rule. The discretionary function of the Court to be exercised in the context of each case militates against such a definitive rule of exception".[46]

(a) Improper Conduct by a Party

23-19

A successful party may not be awarded costs if the court takes the view that he or she has acted unreasonably or improperly and may even award costs against a successful party in an appropriate case. This was the course of action adopted by the Supreme Court in *Mahon v Keena*[47] where the court had allowed the appeal of the appellants against the order of the High Court. That order had required them to comply with an order of the Tribunal of Inquiry into Certain Planning Matters and Payments and to appear before that tribunal and answer questions relating to the source of a leaked letter which had been addressed by the tribunal to a potential witness in the course of the confidential phase of its inquiry. The appellants had destroyed any documents in their possession relating to the matter in order to protect journalistic sources and the Supreme Court considered that this deliberate act of destruction of evidence had deprived the tribunal of the possibility of conducting any meaningful inquiry into the source of the leaked letter. The Supreme Court concluded that the appellants' behaviour was such as to deprive them of their normal expectation that the court would

award costs in their favour and ordered that the respondents were entitled to recover the costs of both the High Court and the Supreme Court from the appellants.

23-20

Another example of such a case where improper conduct resulted in a successful litigant being deprived of costs is *Flannery v Dean*.[48] Costello P held that the plaintiff was entitled to an order for the return of her horses which were in the possession of the defendants but he refused to award damages and commented that, if the plaintiff had behaved in a reasonable way, the case need never have come to court. On the issue of costs, he stated that, even though the defendants had lost the legal issue, it would work an injustice to ask them to pay the plaintiff's costs and he made no order for costs in relation to the unsuccessful defendants.[49] It can be seen from this case that a court may decide to make no order for costs in favour of a successful plaintiff if it forms the view that the proceedings were not necessary. In that regard, a relevant factor in the exercise of the court's discretion will be whether the plaintiff gave a defendant an opportunity to deal with the matter complained of and avoid proceedings.[50] However, it should be noted that a party will not be taken to have acted unreasonably so as to be deprived of costs by failing to write a pre-action letter if the court takes the view that the defendant or respondent would not have consented to the relief sought or desisted from the action complained of.[51]

23-21

The conduct of the plaintiff was also instrumental in it failing to recover costs in respect of its claim in *Crofter Properties Ltd v Genport Ltd*.[52] The plaintiff had brought successful ejectment proceedings against the defendant but the latter had also succeeded in its counterclaim against the plaintiff and obtained damages (including exemplary damages) for defamation arising from telephone calls made maliciously by agents of the plaintiff with the intention of causing harm to the defendant. The appeal of the plaintiff against the refusal of the trial judge to award it the costs of its claim was dismissed. Denham J stated that, while the usual order is that costs follow the event, the court has a discretion and that the plaintiff's claim had to be viewed in the light of all the circumstances of the case, which included its behaviour and the extensive proceedings involved in the counterclaim.

23-22

A party may also disentitle himself to costs by reason of his conduct of the proceedings. In *Shelly-Morris v Bus Átha Cliath*,[53] the defendant succeeded in the Supreme Court in having the award of special damages made by the High Court judge set aside, in reducing the general damages for the future by half and in reducing the determination of negligence made against it from 75% to 50% but the plaintiff still recovered an award of damages for injuries she had sustained. Denham J commented that the conduct of the plaintiff and specifically her deliberate exaggeration of her symptoms was an important factor for the court to have regard to in exercising its discretion in relation to the issue of costs.[54] She referred to the English decision of *Molloy v Shell UK Ltd*[55] in which the claimant had made a "grossly and deliberately exaggerated claim" and had been ordered to pay all the defendant's costs by the Court of Appeal even though he had recovered a small award of damages at first instance. The learned judge commented that:

> … it is important that the minority of plaintiffs who are prepared to engage in abuses such as those described be made aware, that, in doing so, they risk

losing all their costs, may be made to pay the other sides costs and raise the possibility of more drastic action.[56]

23-23

On the facts of the case before her, Denham J noted that there had been no appeal brought against the order of costs made by the High Court and said that, in the circumstances, she would not interfere with that order. She also stated that the issue of an abuse of process by the plaintiff had not been specifically argued before the High Court and in view of this and in the light of all the circumstances of the case, she decided not to award the defendant's costs against the plaintiff and made no order as to costs in the Supreme Court. However, she stressed that the issue of costs where claims are seriously exaggerated should be considered in the light of the facts of each case.

23-24

A court may also exercise its discretion not to award a party all or part of its costs where the way in which it has conducted a case has increased its length and thus the costs. In *Bula Ltd v Crowley (No.4)*[57] Denham J emphasised that court time is not infinite and court resources are not unlimited so the time allocated to a case should not be so disproportionate that it reflects unfairly on other litigants. She cautioned that, "while the general rule is that costs follow the event, the circumstances of a case may be relevant to the issue of costs, and these circumstances may include the time allocated to a case". This was the approach adopted by O'Donovan J in *C.O'R. v M.O'R.*.[58] He took the view that the hearing had been unnecessarily prolonged because witnesses had unnecessarily been called to give evidence and time was wasted on matters that were not material to the issues to be decided. Accordingly, he only allowed the successful plaintiff part of her costs.[59]

23-25

In *Phelan v Minister for Justice, Equality and Law Reform*,[60] Herbert J rejected the contention that costs should not be awarded to the successful respondent because of the delay in pursuing the application for costs.

(b) Test Cases

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Where a case is in the nature of a test case so that its outcome will potentially affect the position of persons other than the litigants, particularly if it raises issues as to the constitutionality of legislation or the proper interpretation of the Constitution or of legislation, this may be taken into account by the court in the exercise of its discretion as to costs if the plaintiff or applicant is unsuccessful. In *F. v Ireland*[61] the plaintiff sought but failed to obtain a declaration that certain provisions of the Judicial Separation and Family Law Reform Act 1989 were invalid having regard to the provisions of the Constitution. In the Supreme Court, Hamilton CJ noted that while the case was of considerable importance to the parties involved, it was also of significance to litigants in at least 3,000 other cases in which orders had already been made under the 1989 Act. He said that there was no doubt but that the appeal involved issues of considerable public importance and that it was desirable in the public interest that a decision on the issues involved be reached as quickly as possible. In addition, the Attorney General regarded it as a "test case" and was anxious that the matter be resolved. In these circumstances, Hamilton CJ stated that the court should exercise its

discretion with regard to the issue of costs by awarding the costs of the appeal to the plaintiff/appellant against the Attorney General.[62]

23-27

A similar approach was adopted in *Curtin v Dáil Éireann*.[63] The applicant judge unsuccessfully sought to challenge the procedures adopted by a joint committee of the Houses of the Oireachtas for the purpose of investigating and receiving evidence in relation to alleged misbehaviour on his part and also the constitutionality of s.3A of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997. However, the Supreme Court exercised its discretion to award him half the costs of the proceedings in both the High Court and Supreme Court in circumstances where the court was satisfied that it had had to consider questions which to some extent went beyond the specific issues raised and had provided a guide for the Oireachtas as to the procedures to be followed. Murray CJ stated that, in doing so, the court had clarified for the future the constitutional norms in a core area of constitutional governance and this made the case exceptional and sui generis.

23-28

The circumstances in which it will be appropriate to depart from the general rule that costs follow the event on the basis that a case is a "test case" were considered by Clarke J in *Cork County Council v Shackleton*.[64] In that case, the applicant had succeeded in having an award of an arbitrator, who had ruled in favour of the third party in a planning matter, set aside in circumstances where this third party had raised a public law issue but also had a direct commercial interest in the outcome of the litigation. Clarke J began by identifying what would constitute a test case for this purpose:

> Test cases can arise in very many different circumstances. Where there is doubt about the proper interpretation of the common law, the Constitution, or statute law involving the private relations between parties, and where the circumstances giving rise to those doubts apply in very many cases,then it is almost inevitable, as a matter of practice, that one or a small number of cases which happen to be first tried will clarify the legal issues arising.[65]

23-29

He doubted whether there was any proper basis for departing from the ordinary rule in relation to costs where the proceedings involved only private parties even if the case might properly be described as a test case. However, different considerations might apply where one of the parties was a public authority and where, for example, difficult questions of construction arose in relation to legislation of general application. He was satisfied that the matter before him was much nearer in substance to a case directly involving the party responsible for legislation than to a purely private dispute. In the circumstances, while he felt that it would be going too far to award the unsuccessful third party its costs, he held that the justice of the case would be met by making no order as to costs.

23-30

A good example of a case that raised issues of general importance such that it could properly be regarded as a test case is *Roche v Roche*.[66] Although that case involved a

dispute between a husband and wife, it raised important constitutional and public policy issues as to whether the appellant was entitled to have frozen embryos implanted in her womb against the wishes of the respondent, from whom she was separated. For this reason the Attorney General chose to participate in the proceedings. The appellant was unsuccessful in her claim and the Supreme Court held that it would be equitable and just to depart from the normal rule that costs follow the event and that the Attorney General should bear the costs of both parties in the High Court but it made no order as to the costs of the appeal.

23-31

A case on the other side of the line was *Smyth v Railway Procurement Agency*[67] where the plaintiffs brought a nuisance action against the RPA arising out of the operation of the Luas and also raised constitutional issues which necessitated the service of an Order 60 notice on the Attorney General. The Attorney General was successful on the constitutional issues and Laffoy J held that the plaintiffs had been pursuing their own private law rights and that there was no basis on which the court could properly exercise its discretion not to award the Attorney General his costs.

(c) Public Interest Challenges

23-32

In a number of cases, the courts have drawn a distinction between cases that are instituted in furtherance of the private interests of the plaintiff or applicant and what are characterised as public interest challenges. In *R. v Lord Chancellor, ex p. Child Poverty Action Group*[68] Dyson J explained:

> The essential characteristics of a public law challenge are that it raised public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed, most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own.[69]

23-33

In the case of a public interest challenge, not only may a court decline to make an order that an unsuccessful applicant or plaintiff pay the costs of the successful respondent or defendant, it may go further and order the successful party to pay the costs of the unsuccessful party.

23-34

The principles applicable to the award of costs in the case of public interest challenges were considered by Quirke J in *McEvoy v Meath County Council*.[70] The applicants had unsuccessfully sought relief on the basis that the respondent had failed to have regard to the "strategic planning guidelines for the greater Dublin area" in making and adopting a development plan for County Meath although they failed in their action seeking to have the decision to adopt the plan quashed. Dealing with the issue of costs, Quirke J pointed out that neither of the applicants was seeking to protect some private interest of his own and he was satisfied that they had acted solely by way of furtherance of a valid public interest in the

environment and in the interests of those communities affected by the planning considerations applicable to the greater Dublin area. He therefore concluded that the proceedings had raised public law issues which were of general importance, and that the applicants had no private interest in the outcome of the case which constituted a public interest challenge. The learned judge, thus, decided to exercise his discretion to require the respondents to pay 50% of the applicants' costs of and incidental to the proceedings and 100% of the costs of the daily transcripts.

23-35

The contention that the unsuccessful petitioners and notice parties to an election petition should recover their costs on public interest grounds was also rejected by Kelly J in *Sinnott v Martin*.[71] The learned judge was satisfied that most of the parties were seeking to protect their own private interests by participating in the proceedings and stood to gain a possible advantage depending on the outcome. Interesting and important as the issues in the case were, he concluded that it did not raise public law issues of such importance as to entitle him as a matter of discretion to award costs in favour of the unsuccessful petitioners or other parties claiming costs against the State.[72]

23-36

It is clear from the judgment of Macken J in *Harrington v An Bord Pleanála*[73] that applying the test suggested by Dyson J in *R. v Lord Chancellor, ex p. Child Poverty Action Group*[74] that an applicant should have no private interest in a matter may be problematic in the context of certain statutory schemes of judicial review which require an applicant to establish a "substantial interest" in the subject-matter of the application.[75] She expressed the view that, if such a rigorous rule were applied, it would mean that no person other than designated bodies or analogous persons could ever fall into the category of persons who had no personal private interest in the outcome of the case since they were obliged to demonstrate the requisite statutory interest. She continued as follows:

> I am satisfied therefore that a person bringing these type of proceedings, under the planning code, who while in law must have the statutory substantial interest in the outcome of the matter, but who, at the same raises complex legal issues of general, even perhaps seminal, importance, is not to be precluded from being granted his costs in an appropriate case…[76]

23-37

In that case, she concluded that the applicant should be awarded the costs of his unsuccessful application for leave to bring judicial review proceedings against the respondents and notice parties. However, she reached a different conclusion in relation to the application made by the applicant seeking a certificate for leave to appeal. She held that he was not entitled to such a certificate as there were no issues of exceptional public importance which in the public interest ought to have been the subject of a certificate for leave to appeal. Accordingly, she was satisfied that the normal rule that costs should follow the event should apply to that application and that the applicant should pay the costs of the respondents and notice parties. She made no order in relation to the application for costs.

23-38

In *Dunne v Minister for the Environment, Heritage and Local Government*[77] Laffoy J awarded costs to an unsuccessful plaintiff who had challenged the constitutionality of s.8 of the National Monuments Amendment Act 2004 with a view to seeking to prevent the construction of a motorway proceeding on the basis that he was acting in the public interest in a matter which involved no private personal advantage and that the issues raised were of sufficient general public importance to warrant an order for costs being made in his favour.[78] In the Supreme Court, Murray CJ rejected the contention that an applicant who could satisfy those criteria was, on that basis, entitled to his costs:

> As previously indicated, these elements are relevant factors which may be taken into account in the circumstances of a case as a whole. Because these elements are found to be present it does not necessarily follow that an award of costs must invariably be made in favour of an unsuccessful plaintiff or applicant. Equally, the absence of those elements does not, for that reason alone, exclude a court exercising its discretion to award an unsuccessful applicant his or her costs if, in all the circumstances of the case, the court is satisfied that there are other special circumstances that justify a departure from the normal rule.[79]

23-39

He went on to emphasise the necessity for a court to have regard to the particular circumstances of the case before it and the requirement that the court be satisfied that there were special circumstances which justified departing from the general rule. Murray CJ was satisfied that, in the case before the court, undue weight had been given to the fact that the plaintiff was acting in the public interest in a matter which involved no private personal advantage and that the issues raised were of sufficient general public importance. He added that he found it difficult to see how the earlier proceedings referred to in the judgment of the High Court could have had a material bearing on whether the issues in the particular case could be considered to be of such general public importance as to justify an exceptional departure from the ordinary rule that costs follow the event. In the circumstances, he was satisfied that the Supreme Court was required to review the manner in which the costs had been awarded and exercise its own discretion on the matter. Having done so, he concluded that the issues raised in the proceedings were not of such special and general importance as to warrant a departure from the ordinary rule and that, having regard to all the circumstances of the case, costs should follow the event.[80]

23-40

These guidelines have been applied in a number of subsequent cases which it was contended constituted public interest litigation. In some, it was held that the normal principle that costs should follow the event should apply[81] and in others that there were special circumstances which justified a departure from this principle.[82] It should be noted that the costs of most public interest challenges in relation to planning and environmental matters will now fall to be dealt with in accordance with s.50B of the Planning and Development Act 2000[83] which is discussed below.

(d) Where an Order May Cause Hardship

23-41

It was accepted by Geoghegan J in the course of his judgment in *M.N. v S.M.(Costs)*[84] that

the courts may exercise their discretion not to apply the normal rule that costs follow the event where this may be perceived as causing hardship. However, it should be noted that Geoghegan J stressed that the manner in which a court will exercise its discretion in this regard will vary from case to case and it may be difficult to establish any principles of general application in this context. In the case before the Supreme Court it held that it would not make any order in relation to the costs of an appeal where a defendant succeeded in obtaining a substantial reduction in the amount of damages he was liable to pay in relation to acts of sexual abuse committed over a number of years.

[<< Previous Section](#) | [Next Section >>](#)

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6. Order 99, rule 1.
7. *[2002] 4 IR 515, 522*.
8. Per Morris P in *Cooper-Flynn v RTE [2004] IESC 27, [2004] 2 IR 72, 79*. Where there are a number of defendants against whom the plaintiff succeeds, then the order for costs should be made on a joint and several basis (see *Gillespie v Fitzpatrick [1970] IR 102*).
9. *[1999] 1 WLR 347, 356, [1998] 2 All ER 755, 764*.
10. *[2006] IEHC 240, [2007] 2 IR 81, 85*. See also *Kavanagh v Minister for Justice, Equality and Law Reform [2007] IEHC 389* at 2; *McG. v Director of Public Prosecutions [2009] IEHC 539* at 3; *Mennolly Homes Ltd v Appeal Commissioners [2010] IEHC 56* at 2.
11. *[2006] IEHC 240, [2007] 2 IR 81*.
12. *[1998] EMLR 161, 166*.
13. *[1990] 1 IR 273, 275*.
14. See *Mangan v Independent Newspapers (Ireland) Ltd [2003] 1 IR 442, 446, [2003] 2 ILRM 33, 36* where McCracken J stated that: "It is not uncommon for a trial judge to limit the costs to a specified number of days for reasons to do with the conduct of the trial, or because the successful party may have failed on certain issues."
15. See e.g. *Dakota Packaging Ltd v AHP Manufacturing BV [2004] IESC 102, [2005] 2 IR 54, 95*. Such an approach will be particularly appropriate where a plaintiff has succeeded on the principal issues raised by its claim and the defendant has failed in a counterclaim: *O'Brien's Irish Sandwich Bars Ltd v Byrne [2009] IEHC 30*.
16. See *Short v Ireland [2004] IEHC 235* where a case was heard in a number of distinct segments because of the multi-faceted nature of the proceedings and Peart J held that the most appropriate order to make at the conclusion of the hearing of the first segment was that the costs should be reserved until the hearing of all aspects of the proceedings had been concluded. He stated (at 2) that: "if the plaintiffs were to succeed substantially against any of the defendants, the Court would certainly have the capacity to decide that simply because the issues for determination were divided into distinct segments, ought not to result in a situation where the costs should not follow that event, namely success overall by the plaintiffs."
17. *[2006] IEHC 32, [2009] 2 IR 417*.
18. *[2002] 4 IR 515, 522*.
19. *[2006] IEHC 32, [2009] 2 IR 417, 679*.
20. *[2006] IEHC 240, [2007] 2 IR 81*. See further Galligan *(2007) 14 IPELJ 64*.
21. Ibid. at 84.
22. Ibid. at 86.
23. Ibid. He referred to his previous decisions in *O'Mahony v O'Connor Builders [2005] IEHC 248, [2005] 3 IR 167* and *Arklow Holidays Ltd v An Bord Pleanála [2006] IEHC 15* where this approach had been applied by him.
24. *[2006] IEHC 240, [2007] 2 IR 81, 87–88*.
25. *[2007] IEHC 30*.
26. See Section C5.
27. *[2010] IEHC 279*.
28. Ibid. at [8].
29. Ibid. at [11].
30. *[2010] IEHC 291*.
31. See also *BNY Corporate Trustee Services Ltd v Eurosail — UK 2007 — 3bl Plc [2011] EWCA Civ 277* at [102-105] where Lord Neuberger MR expressed concerns about the attendance during the entirety of the hearing of an appeal of a trustee who had been joined to proceedings but was neutral. He opined that "unless a trustee has good reason to think that its actions will be subject to criticism or there is some other special reason, it should normally be unnecessary for it to make representations or to be represented at a hearing (save for instructing a note-taker), where, as here, its stance on the issues dividing the warring parties, is neutral".
32. *[2009] IEHC 457, [2010] 2 IR 581*.
33. Ibid. at 598.
34. *[2006] IEHC 32, [2009] 2 IR 417, 679*.
35. *[2007] IESC 60, [2008] 2 IR 775*.
36. Ibid. at 783–784. These comments were quoted in *Martin v Legal Aid Board [2007] IEHC 448* at 3; *Dooley v Killarney Town Council [2008] IEHC 434* at 3; *McG. v Minister for Justice, Equality and Law Reform [2009] IEHC 539* at 2–3.
37. *Fyffes plc v DCC plc [2006] IEHC 32, [2009] 2 IR 417, 679*. See also *Phelan v Minister for Justice, Equality and Law*

Reform [2005] IEHC 350 at 7. In *Garibov v Minister for Justice, Equality and Law Reform [2006] IEHC 371* at 14, Herbert J stated that the discretion to award costs must be exercised "with specific reference to the facts of the instant case, not merely following some general rule or private opinion or moved to by such considerations as benevolence and sympathy".

38. *Eircom plc v Director of Telecommunications Regulation [2002] IEHC 72, [2003] 1 ILRM 106, 109*.
39. *[2007] IEHC 334*.
40. Ibid. at 3.
41. *Grimes v Punchestown Developments Co. Ltd [2002] 4 IR 515, 522*. See also *Phelan v Minister for Justice, Equality and Law Reform [2005] IEHC 350* at 3; *Fyffes plc v DCC plc [2006] IEHC 32, [2009] 2 IR 417, 676*; *Kavanagh v Minister for Justice, Equality and Law Reform [2007] IEHC 389* at 3; *McAleenan v AIG (Europe) Ltd [2010] IEHC 279* at 3.
42. In *Phelan v Minister for Justice, Equality and Law Reform [2005] IEHC 350* at 7, Herbert J suggested that an applicant would have to establish "some very exceptional circumstance" in order to persuade a court to deprive a wholly successful party of his costs of the litigation. See to similar effect per Herbert J in *Phelan v Minister for Justice, Equality and Law Reform [2005] IEHC 350* at 7. See also *Fyffes plc v DCC plc [2006] IEHC 32, [2009] 2 IR 417, 682*, where in the context of very substantial commercial litigation, Laffoy J stated that "exceptional circumstances" were required to justify a departure from the general rule.
43. *[2006] IEHC 240, [2007] 2 IR 81, 85*.
44. See also *Curtin v Dáil Éireann [2006] IESC 27* where Murray CJ referred to "special reasons" and *Dunne v Minister for the Environment, Heritage and Local Government [2007] IESC 60, [2008] 2 IR 775* where Murray CJ stated that what was required were "special circumstances".
45. *[2006] IESC 27*.
46. See to similar effect, per Murray CJ in *Dunne v Dún Laoghaire Corporation [2008] 2 IR 775, 783–784*.
47. *[2009] IESC 78*.
48. *[1995] 2 ILRM 393*.
49. See also *Donegal County Council v O'Donnell [1982] IEHC 12* (order made pursuant to s.27 of the Local Government (Planning and Development) Act 1976 but no order made as to costs because of the unsatisfactory way in which the applicant had dealt with the respondent's application for retention).
50. See *Garibov v Minister for Justice, Equality and Law Reform [2006] IEHC 371* at 16.
51. *Re Sanyko Co. Ltd [2006] 1 ILRM 161*.
52. *[2005] 2 ILRM 262*.
53. *[2003] 1 IR 232, [2003] 2 ILRM 12*.
54. Note that in *Smyth v Gilbert [2005] IEHC 275* Budd J awarded costs to a successful plaintiff in a personal injuries action, stating that any deficiency on his part in providing adequate corroborative vouchers and financial records fell well short of deliberate gross exaggeration of the facts. See also *Larkin v Joosub [2006] IEHC 51, [2007] 1 IR 521, [2006] 2 ILRM 279* where Finlay Geoghegan J was satisfied that there was no intention on the part of the plaintiffs to deliberately deceive or mislead the court by exaggerating the extent of their loss and indicated that the failure of the plaintiffs to carry out certain inspections before commencing the proceedings relevant to the quantum of the claim could be relevant to the issue of costs.
55. *[2002] PIQR 56*.
56. *[2003] 1 IR 232, 266, [2003] 2 ILRM 12, 17*.
57. *[2003] 2 IR 430, 466*.
58. *[2000] IEHC 66*.
59. See also *Woodquay Properties Ltd v Leo W. Wilson Associates Ltd [2011] IEHC 23* where Hedigan J disallowed half a day's costs on the basis that the plaintiff had raised an additional head of claim late in the day which, if raised earlier, could have been agreed before the hearing. But see *Kerwin v Aughinish Alumina Ltd Supreme Court, 20 February 2002* where it was held that it was harsh for the trial judge to have awarded the plaintiff the costs of six days of a nine day trial only having regard to the conduct of the defendant and the course that the entire action took.
60. *[2005] IEHC 350*.
61. *Supreme Court, 27 July 1995*.
62. See also *O'Shiel v Minister for Education High Court (Laffoy J) 10 May 1999* (unsuccessful plaintiffs awarded costs of challenge relating to State funding for free primary education because the proceedings had a significance which extended beyond the sectional interests of the plaintiffs). The decision in F. v Ireland was distinguished by the Supreme Court in *O'Connor v Nenagh Urban District Council [2002] IESC 36* where Denham J concluded that while there was an element of public interest involved, in her view it was not a test case, there were not other cases depending on its outcome, and it did not involve issues of "considerable public importance".
63. *[2006] IESC 27*.
64. *[2007] IEHC 334*.
65. Ibid. at [4.2].
66. *[2010] IESC 10*.
67. *[2010] IEHC 291*.
68. *[1999] 1 WLR 347, 353, [1998] 2 All ER 755, 762*.
69. This description was commended by Murray CJ in *Dunne v Minister for the Environment, Heritage and Local Government [2007] IESC 60, [2008] 2 IR 775, 781* as "succinct and useful" although he added that he did not consider it to be a definitive statement of the extent of public interest litigation.
70. *[2003] 1 IR 208*.
71. *[2004] IEHC 136, [2004] 1 IR 121*.
72. See also *McConnell v Dublin City Council [2005] IEHC 21*.
73. *[2006] IEHC 223*.
74. *[1999] 1 WLR 347, [1998] 2 All ER 755*.
75. In this case pursuant to s.50 of the Planning and Development Act 2000. Now see s.50 and 50A of the Planning and

Development Act 2000 (as inserted by the Planning and Development (Strategic Infrastructure) Act 2006).

76. *[2006] IEHC 223* at 9.

77. *[2006] IESC 60, [2008] 2 IR 775*.

78. These principles were applied by Smyth J in *Kavanagh v Minister for Justice, Equality and Law Reform [2007] IEHC 389* although on the facts, he decided that costs should follow the event. Similarly, in *Sweetman v An Bord Pleanála [2007] IEHC 361* Clarke J appeared to accept that there is an identified exception to the ordinary rule that costs should follow the event in cases of a public interest challenge although on the facts, where some material aspects of the issues of general public importance had not been pleaded, he concluded that the unsuccessful applicant should only be awarded half his costs against the respondents.

79. *[2006] IESC 60, [2008] 2 IR 775, 783*.

80. See also *Salafia v Minister for the Environment High Court (Smyth J) 15 March 2006* where Smyth J held that it was not enough for a plaintiff to profess a public interest, commenting that: "The Applicant is entitled to espouse a career or role of interest in the environment or as a professional objector, but in doing so his challenge is not to be equated with a public interest challenge."

81. *Martin v Legal Aid Board [2007] IEHC 448*.

82. *Dooley v Killarney Town Council [2008] IEHC 434*;*McG. v Director of Public Prosecutions [2009] IEHC 450*; *Sweetman v An Bord Pleanála High Court (Birmingham J) 19 January 2010*.

83. As inserted by s.33 of the Planning and Development (Amendment) Act 2010.

84. *[2005] 4 IR 461*.