THE PRICE OF LITIGATION: LEGAL COSTS AND THIRD-PARTY FUNDING

Delivered by Mr Justice Brian Murray at the Second Annual Conference of the Corporate Enforcement Authority held at The Honourable Society of the King's Inns on 17 October 2024.

1. What I want to look at in this lecture is mundane, but for litigants and lawyers pressing – the legal principles around two critical points at which the law intersects with the financing of litigation: the allocation of legal costs as between the parties to a case, and the assignment of legal claims. While in one sense, the issues these present are disconnected, I have selected them because aspects of both remain curiously unclear because each are the subject of widespread misconception. As it happens, both jurisdictions go back to the same legal root of title: the Supreme Court of Judicature Act (Ireland) 1877 ('Judicature Act').

2. The phrase costs follow the event is (or, at least, until recently was) probably one of the most frequently uttered statements in the courts in this jurisdiction. Yet, you rarely hear it defined. In my experience, most lawyers apply a 'know it when you see it' approach to the term. Obviously, it means that whoever 'won' a case got their costs, but what does it mean to 'win' a case? Win all of the case? Win most of the case? Get any of the relief you claimed, get most of the relief, and so forth. Very often in practice it had an entirely circular meaning: you won the event if you won enough of the case to get your costs. There is case law that comes close to saying this. Related to that question of definition is a strong and deeply embedded body of legal authority to the effect that Irish law adopted what Mr. Justice Hogan referred to in one case as 'the winner takes all' principle: once you got any relief in a case, you got all of the costs.

3. This is an asymmetric rule. If the plaintiff gets all of the costs because it gets some relief, why does the defendant not get any of its costs if it has

succeeded in defeating most of the case against it. The conventional explanation for this – that the plaintiff had to come to court to get relief and, therefore, it should get all of the costs it incurred in doing so – is not convincing: the same theory can be harnessed to say that the defendant had to come to court to defeat claims that means they should get at least some of the costs associated with doing so. Indeed, the present Chief Justice has observed in the course of his judgment in Reaney & Ors. v. Interlink Ireland Ltd. that the winner takes all approach creates for a plaintiff 'an almost perverse incentive to bring pressure to bear on a defendant by mounting as broad and expansive a claim as possible'. It creates a real risk of significant injustice in the context of complex commercial litigation not merely because such cases frequently involve multiple issues but because of the suffocating cost of discovery in modern litigation. Discovery is framed by reference to pleaded claims. To then have to bear the cost of that exercise, and to pay the cost the plaintiff incurred in digesting the discovery, in a context in which most of the discovery directed proves irrelevant to the basis on which the plaintiff succeeded, seems quite unjust.

4. So, there is an obvious value to find out where all of this comes from. The jurisdiction to award costs appears to be now rooted at least in part in s. 168 of the Legal Services Regulation Act 2015 ('the 2015 Act'). The very fact I have to make that tentative qualification – 'appears to be' and 'at least in part' – shows that even the basics of this critical part of the courts' day-to-day business are not as clear as they should be. To interpret that Act, as with any act, the words are the first point of inquiry, but the regime it was intended to replace is usually relevant to that exercise. What that regime was is long and bizarrely complicated. Here, I am going to summarise it in a few paragraphs, before turning to the law as it stands today. I do so with the necessary proviso that any short summary of a long story risks inaccuracy on the details.

5. Everything starts with the great nineteenth century reforms embodied in the Judicature Acts enabling the administration of law and equity by the same courts. That amalgamation created a real problem as to how costs were going to

be provided for in the new courts, because common law courts and the courts of equity had fundamentally different costs rules. Common law courts had no inherent power to award costs and only enjoyed that power when granted by legislation. A series of statutes starting in the late 13th century gradually brought about a state of affairs whereby by the 18th century the common law courts were required to award costs of a suit in favour of the party that had succeeded, with the courts' discretion – in cases where they had one – being very limited. Courts of equity in contrast had an inherent power to award costs and that power was exercised on a wide and flexible basis.

6. When it was decided to marry the separate jurisdictions of law and equity in a single court, a choice had to be made as to which of these regimes was to be applied. The result was, inevitably, a compromise between the two jurisdictions. In Ireland, this was provided for in s. 53 of the Judicature Act and subsequent rules. These defined the law for the next one hundred and forty years. The effect of s. 53 was that the court had full discretion as to costs where the action was tried without a jury (which would have largely been equity suits) but where the case was tried with a jury (as was the case for all common law claims) costs followed the event unless there was good cause for refusing them. And 'the event' had a very involved meaning. It was not that the winner took all: it meant that the party who won got the general costs of the action, but where the action involved separate issues, the costs of any one issue went to the party who succeeded on that issue. The courts developed a sophisticated definition of issues for these purposes.

7. The next great reforms to the Irish Judicial system occurred on independence with the Courts of Justice Act 1924. Very shortly after that, the Supreme Court was called upon to address the costs power. In 1931, it confirmed that the Courts under the new system had no inherent power to award costs, and that they only enjoyed that power when vested by legislation. And for the next forty years, everyone assumed that the power to award costs derived from the provision to which I have referred – s. 53 of the Judicature Act. So, when the

Rules of Court were prescribed for the new Courts established in 1961, they followed the precise model of s. 53 – costs in the discretion of the Court, costs following the event in jury actions, and the winner paying the costs of any issues it lost. Those Rules remained the governing code until 2019: they were never changed substantively when repeated in the 1986 Rules.

8. Then, in 1969 in a case called The People (Attorney General) v. Bell, the Supreme Court reached what was perhaps a surprising conclusion. The issue in that case was whether a person acquitted before the Central Criminal Court could obtain their costs from the prosecution. That required the Supreme Court to go back to the basics and decide where exactly the power to make any order for costs lay. It decided that upon the passing of the Courts of Justice Act 1924, s. 53 of the Judicature Act had ceased to have effect. I am not going to comment on the status of that finding, save to observe that it has been often overlooked with the Supreme Court itself subsequently applying s. 53 as the legal basis for particular orders for costs.

9. But having so decided, the court had to locate the power to award costs somewhere, and it settled upon s. 14(2) of the Courts (Supplemental Provisions) Act 1961. That provision looks more like a standard and simple power to create rules governing practice and procedure including costs, but the consequence was that from 1962 until 2019 the law seems to have been that the provisions governing costs in Ireland appeared in the Rules of the Superior Courts ('RSC') and nowhere else. And those rules were threefold and only threefold: the court has a discretion in the award of costs, in jury actions costs follow the event unless for special cause the court otherwise orders and otherwise the costs of issues – not actions – followed the event. In other words, the essential position reflected in the Judicature Acts.

10. One can speculate how and why practice moved from those specific rules to the general conclusion that costs in all cases 'followed the event' with the apparently broadly defined discretion granted by Order 99, rule 1(a) being

conditioned in practice accordingly. It may be because so much work in the civil courts was, until the 1980s, jury work. But move it did, and the position was consistently stated and restated in each of the Superior Courts, including, of course, the Supreme Court, that the strong presumption was that costs followed the event, and that the court would exercise its discretion accordingly. And the received wisdom was, generally, that this meant that the winner takes all: in point of fact the provisions dealing with issues strongly suggested otherwise.

11. The potential injustice that this rule could entail led Clarke J. (as he then was) in Veolia v. Fingal County Council to decide that where a party won some issues and lost some issues, the costs could be split, and indeed costs of the issues on which they had won awarded in their favour, and costs of the issues on which they had lost be awarded against them. Thereafter, the courts have given Veolia a restrictive interpretation, limiting the capacity for issue splitting to complex cases in which it can be clearly identified that the costs were increased by reason of the inclusion of costs on which the plaintiff or applicant lost.

12. Sections 168 and 169 of the 2015 Act have now altered the basis on which costs will be awarded in civil proceedings, and these have been supplemented by new provisions of Order 99 of the RSC intended to give effect to those provisions. All of them came into force between October and December 2019. There has not yet been a comprehensive decision of any of the Superior Courts addressing whether – and if so to what extent – these provisions changed the pre-existing law. This is in part because inevitably it takes time for changes of this kind to a fundamental aspect of our procedure to seep through the system, and partly because there was an initial reluctance to apply the new provisions, so as to potentially change the law to proceedings which had commenced prior to the coming into effect of the 2015 Act. However, a point has come at which the courts will have to grapple with what exactly those provisions mean.

13. Here, I have to be a little circumspect: at any point in time, the Supreme Court has pending before it applications for costs and I do not wish to pre-empt what I or my colleagues might ultimately have to say about the effect of these provisions having regard to the arguments made before us in a given case. However, I have delivered two judgments in the Court of Appeal dealing with aspects of the provisions, and what I say here does not affect any pending proceedings of which I am aware. So, I would suggest – subject to all of these qualifications – the following.

14. First, s. 168 of the 2015 Act states that the courts 'may' award costs in any given case. The provision must now be viewed as conferring the statutory jurisdiction previously found to have been located in s. 14(2) of the 1961 Act, with the 1961 Act merely allowing the Rules Committee to fill in the details of that power. It cannot, however, do so in a manner that is other than consistent with the 2015 Act. The 2015 Act is now the primary source of the power to award costs with – depending on whether Bell was correctly decided – s. 53 of the 1877 Act (which has never been repealed) remaining in operation insofar as it is not inconsistent with the 2015 Act. Either way, the rooting of the power in a new statute, in and of itself constitutes a very significant change to the pre-existing law and suggests to me that what was being introduced was different in at least some respects from what had gone before. And while there are suggestions in various cases that it was not the intention of the Oireachtas to make fundamental changes to the existing rules, I do not think that this can be stated quite so confidently. Apart from everything else, as evident from what I have just said, the pre-existing rules were not all that clear.

15. Second, s. 169(1) of the 2015 Act states that a party that has been 'entirely successful' in proceedings is 'entitled' to their costs subject to the power of the courts to order otherwise for stated reason and by reference to criteria stated in

the section itself. I have seen suggestions that this means that a party who won the event, to use the previous parlance, gets their costs. This is not quite so clear to me.

16. The language throughout ss. 168 and 169 is strikingly similar to that used in the Civil Procedure Rules in the United Kingdom. Those Rules were introduced as part of the Woolf reforms to Civil Justice, and were – according to Lord Woolf himself – intended to put an end to the position where the winner always took all: as he explained in PPL v. AEI, too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation since it discourages litigants from being selective as to the points they wish to make. In fact, the Irish Act is clearer than the English rules, because it uses the phrase 'entirely successful' to describe when the entitlement to costs arises, while the Civil Procedure Rules merely refer to the 'successful' party. That this was a very deliberate choice of language is clear from the fact that s. 168(2)(d) states that a party who is 'partially successful' may, at the Court's discretion obtain the costs on which they partially succeeded.

17. Third, we are going to have to define for these purposes what is meant by 'partially successful' and 'entirely successful'. There, apart from identifying the fact that that is a significant issue around the 2015 Act, I need to be even more circumspect. However, I would observe that it is hard to see how in private law proceedings a party who agitates more than one cause of action and fails in some of those causes of action has been 'entirely successful' unless the causes of action have the same essential elements: this indeed was the approach adopted by Clarke J. (as he then was) in ACC Bank plc v. Johnston. Similarly, in public law proceedings it is hard to see how a party who seeks a variety of different state side orders and declarations can be said to have been entirely successful if they only prevail on some of them.

18. Fourth, under s. 168 of the 2015 Act, a party who has been 'partially successful' may still obtain their costs. But that is wholly discretionary and does not follow as a matter of entitlement. And the strong sense of the provision is that what an unsuccessful party ought to be awarded is only the costs of the part of the case on which they have been successful. That is going to present a difficult issue: if a plaintiff has been only partially successful then that means that the defendant has also been partially successful. What, we will have to decide, happens then? I think it is often overlooked that in Veolia, the applicant did not only fail to get costs of some of the issues, but no order for costs of any kind was made in its favour because the costs it would have got for the parts on which it succeeded were negated by the costs that would have been awarded against it for the bits on which it failed.

19. Voltaire's famous statement about litigation has also been somewhat overused. He said that he had only been ruined twice: once when he lost a lawsuit and once when he won one. The courts do not have it in their power to avoid the general consequence that a person who sues and loses will face a liability for costs, and cannot do anything for a party who sues, recovers costs but is unable to execute them (which, I think, was Voltaire's problem). Third party funding of litigation enables the transfer of that risk. This is a controversial issue, which has been considered at a policy level by a number of agencies, most recently by the Law Reform Commission. The Supreme Court in the Persona Digital case has clarified the position on important features of the law in this regard. Maintenance, it has made clear, is the support of litigation by a person with no legitimate interest in the suit, while champerty – a specific instance of maintenance – occurs when the person maintaining the litigation stipulates for a fixed percentage of the proceeds of the action. The court explained that both remain prohibited under Irish law, and effectively shifted to the legislature the task of ascertaining whether and if so how, those rules should be changed. At a very high level, this was essentially because the legitimisation of maintenance and champerty raises issues of policy more appropriately addressed by the legislature, in particular how those who fund the litigation of others should be regulated. The court was especially concerned at the implications of introducing an unregulated market in litigation, and this would have been the consequence of outright and blunt abolition by

judicial decision of the common law rules on maintenance and champerty. However, some of the judgments also flagged the possible tension between the prohibition on third-party funding on the one hand, and the provision by the Courts of an effective right of access to justice, on the other. Clarke J. said that if no action was taken by the legislature to regulate the area, the courts might have no option but to intervene to provide a remedy. Clarke J. took up the same theme in SPV Osseus v. HSBC International Trust Services (Ireland) Ltd.: the courts might have to go down the route of a judicially created remedy.

20. The issue in SPV Osseus was not maintenance or champerty properly so called, but a close relative: the question of whether and if so when litigation could be assigned? So, here we are back to the type of problem with which I started, and which arose in the context of legal costs. Assignments of choses in action (and a legal claim is a chose in action) were prohibited at common law but allowed in Equity. When the jurisdictions were amalgamated, a common rule had to be established, and this was done by s. 28(6) of the Judicature Act which allowed assignments subject to certain conditions.

21. In SPV Osseus, the Supreme Court decided that litigation could only be assigned to a person with what it described as 'a commercial interest' in the subject matter of the suit. It did not purport to decide what, exactly, that meant. In that case, the assignee was a special purpose vehicle set up for the sole purpose of taking the assignment as part of the court approved bankruptcy arrangements of Madoff Investments. The Supreme Court felt that what O'Donnell J. (as he then was) described as the out and out assignment of a legal claim to a third party was if anything more offensive to public policy than maintenance per se, because it involved the commodification of litigation with the plaintiff being completely removed from the suit. There, the fatal difficulty with the assignment was that it envisaged onward assignment.

22. The limits of this principle fell for consideration by the court earlier this year in McCool v. Honeywell. There, the plaintiff took an assignment from a company in which he was the director and principal shareholder of a claim the company had arising from a commercial contract it had entered into. The defendants said that this assignment was unlawful, because the purpose was to avoid the so-called rule in Battle v. Irish Art Promotions ('Battle'), which prevents a shareholder or director in a company from representing it in court. That objection was found by the Supreme Court to be misconceived: the so-called rule in Battle is not in itself a rule at all. What the court decided in Battle was that it would not create a new exception to a wider and different rule of general application. The rule is that a party may only appear in legal proceedings either through a lawyer or where they are themselves a party. Battle decided (a) that to allow a director or shareholder to represent a company would breach that rule and (b) that to create a new exception for a director would be inconsistent with the principle of separate legal personality. Where a claim was assigned, the actual rule was not engaged at all. The assignee was the new plaintiff and could represent himself. The fact that this was the sole objective of the assignment was not relevant: if it was an otherwise proper assignment the claim was now the property of the former shareholder and director, and he was entitled to represent himself. The consequences of the assignment were to transfer to the shareholder and director not merely the benefits, but also the burdens of the litigation – in particular, the burden of a personal exposure to costs, which he would not have faced had the claim remained vested in the company.

23. We were not concerned with whether – apart from the fact that the effect of the assignment was to avoid the consequence of the so-called rule in Battle – the assignment was, in fact, otherwise valid. I noted a number of possible difficulties with assignments of that kind, most particularly if they were sham transactions, or if they breached the various provisions and rules of company law intended to prevent a company from gratuitously disposing of its assets. Outside those situations, motive is not usually a basis for vitiating an assignment: there are many cases in which it has been found that assignments of debts taken for an ulterior purpose are entirely valid. But, in that connection, we looked in a little

more detail at when an assignment would be unenforceable because it was trafficking in litigation.

24. The end point is, I think, that the rules may have greater flexibility built into them than a narrow reading of the decision in SPV Osseus might suggest. Noting the over-riding consideration that these rules are concerned only with assignments of a bare cause of action, and not with the transfer of property (including debts) which necessarily carry with them the right to sue to recover that property, three points I think need to be stressed.

25. First, quite different considerations may apply in the context of assignments made in the context of at least some insolvency procedures. This reflects the fact that a cause of action will upon insolvency vest in the liquidator and that the liquidator's power of sale of the property that has thus vested in him, is provided for by statute.

26. Second, the law does not require that the 'commercial interest' on the part of the assignee required before there can be a valid assignment of a cause of action have to be a proprietary interest. So, even though a director or shareholder in a company does not own its assets and therefore does not have any proprietary interest in a cause of action vested in the company – the basis of course of the rule in Foss v. Harbottle – a shareholder has a sufficient 'commercial interest' in the suit to take an assignment of the action. Here, it became evident that the law is very confused and unclear: the commercial interest must be sufficiently substantial to be genuine so a 1% shareholder cannot assert an interest in 100% of a substantial suit of the company. Where the company is insolvent or where the assignment would render it insolvent, and aside entirely from issues of company law, the commercial interest in the suit is that of the creditors not the

shareholder. In the course of my judgment in McCool, I said that this all left the law unhappily imprecise. This only underscores the need for legislative reform. In the absence of legislative intervention, the courts will have to formulate a more prescriptive test of what is or is not a commercial interest.

27. Third, and finally, we may need to revisit the concept of a commercial interest for the purposes of differentiating valid from invalid assignments. In the neighbouring jurisdiction, the trend has been consistently one of liberalisation. There have been cases in which there has been what one of the texts calls a 'shared pain' between assignor and assignee such as where the loss and damage sustained by the assignor was also suffered by the assignee, a contention which has enabled assignments of causes of actions in one man companies from company to controller where both were involved in the allegedly wrongful acts, where the assignee was established as a special purpose vehicle to carry a claim but was owned by the same persons as the assignor or, conversely, where individuals assigned their claims to a new entity of which they were the owners. Indeed, some of the English cases suggest a more attenuated relationship between a company assignor and shareholder assignee requiring only an identity of interest rather than substantial commercial connection with the claim. In circumstances where a right to sue is a property entitlement, and presumptively with any property there is a right of disposal, we will in due course need to look carefully at the strength of the legal and policy arguments as to why it cannot be effectively assigned.

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