LEGAL COSTS IN IRELAND: WHO PAYS? THE LAWS AND PRINCIPLES

AND

COMPARATIVE CONSIDERATIONS

Thesis submitted in partial fulfilment of the requirements for the degree of

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by

Jevon Alcock (LL.M, Solicitor and Notary Public)

Faculty of Arts, Law and Social Sciences, Anglia Ruskin University

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Supervised by: Mr. Thomas Serby, Dr. Stefan Mandelbaum,
Dr. Aldo Zammit-Borda.

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ABSTRACT

Nature of work; the thesis engages in a qualitative examination of the *costs follow the event* rule by performing a comparative study which is underpinned by a methodological foundation predicated on functional equivalence. It examines where the judiciary exercise their discretion to displace the rule, and it investigates the notional concepts of *winners* and *losers* in complex litigation.

Scope of the work: It examines the genesis and development of the loser pays rule in Ireland and England and Wales and the exceptions that were created in those and other jurisdictions which observed the Supreme Court of Judicature Act model. It considers the *costs follow the event* rule and the American ("*user pays"*) rule which are the two dominant rules.

What was found: The jurisdictions of England and Wales and Ireland have developed myriad exceptions to the loser pays rule, with no apparent synoptic connectivity, in order to temper the harshness of the rule and render fairness and access to justice. The loser and the user pays rules are now more identifiable by their exceptions, rather than by the rules themselves. Rather than casting a dark shadow over their respective exceptions, the rules have shrivelled, owing to the ubiquitous expansion of the multiplicity of these exceptions, which have performed a takeover.

Conclusions drawn from the investigation: Using the Dworkian doughnut analogy, the whole in the centre represents the exercise of judicial discretion, which has expanded, to create an internal pressure. The exceptions, which are contemporaneously expanding, create a separate external pressure. As a result both pressures have circumferentially altered the character of the loser pays rule.

Contribution to knowledge: the investigation makes a prominent contribution to the *Law of Costs*, owing to the: (i) comparative nature of the research; (ii) substantive body of work; (iii) originality of the topic; (iv) forensically in-depth nature of the investigation underpinned by a punctilious examination of pernickety rules; (v) conspicuous absence of publications on the *costs follow the event* rule in Ireland; (vi) cost neutral recommendations; (vii) factors in (i) – (vi) above.

[Costs follow event, exceptions, discretion, and comparative considerations, Ireland]

Table of Contents

Chapter 4: Complex Litigation

Chapter 5: Public Interest & Environmental Litigation

Chapter 6: The Legal Services Regulation Act 2015 & Beyond

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CHAPTER 1

1.1 Introduction

The topic of this research thesis is the "costs follow the event rule." It is observed in those jurisdictions that follow the common law tradition. It is predicated on the loser pays ideology. The overriding rule in civil litigation is that "costs follow the event." This is to say that the costs the successful party are paid for by the unsuccessful one.[1] In the phrase "costs follow the event" the event refers to the successful outcome. One party is the winner while another is characterised as the loser. More often than not however the exercise of identifying the winner can be cumbersome and prolix.[2] In reality the successful party is the one that prevails in overall terms, by obtaining an award of damages, or the payment of monies. Where each party contends that it is the winner in global terms then the party that receives the payment of monies is generally characterised as the overall winner.[3] There are different rules for the allocation of costs in litigation. Under the American model each party meets its own costs. This is sometimes referred to as the "user pays" principle. Under the English rule the vanquished protagonist, pays all or at least a portion, of the costs of the winning party. Hence this rule is sometimes referred to as the "loser pays" or "indemnity rule." One prominent feature of both of these rules is the copious number of exceptions that have been devised. The Common Law Courts and the Courts of Equity originally developed the exceptions. They grew incrementally and they were augmented over time. These various categories of exceptions are sometimes thematically linked. The default preference for the *costs follow the event* rule visits the successful party's costs on the loser. The default setting under the American rule obliges each party to bear their own costs. There are fundamental, practical, financial, and philosophical divisions between the two rules. The first has a default preference for costs shifting while the second abhors it. There are also other rules for allocating costs. One such rule sees the plaintiff bear all of the costs of the litigation if the defendant wins, but,

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1 Theodore Eisenberg and Geoffrey Miller, *The English v The American Rule on Attorney Fees: An Empirical Study of Attorney Fee Clauses in Publicly-Held Company's Contracts*: NYU Law and Economics Research Paper, No.2, 10-52 (2010), Cornel Law Review, vol: 98, 327 – 382.

2 Jevon Alcock, *Legal Costs: Loser Pays,* Continuing Professional Development presentation, materials and lecture paper p 1, 22nd June 2017, Office of the Chief State Solicitor, library, Osmond House Ship Street Little, Dublin 8, D08 V8C5, Ireland.

3 *Multiplex v Cleveland Bridge* [2009] Costs LR 55; applied in *Sycamore Bidco Limited v Breslin* [2013] EWHC 583 (Ch) [11] (HC, 18 March 2013).

each party bears their own costs, if the defendants loses. This rule invariably favours defendants. It is imbued with an intrinsic bias and it operates as a one way shifting costs model. There is also a symmetrical model that appears to favour plaintiffs. In this variant, each party is required to meet their own costs if the plaintiff is unsuccessful. However the defendant pays the plaintiff's costs if the latter succeeds. Under another variant, the plaintiff meets a portion of its costs if it prevails. That party however discharges the costs of the defending party if the defendant prevails.[4] In Austria, Germany, Sweden and Switzerland the rules of civil procedure provide for a proportional allocation of costs that reflect the relative successes and failures of the protagonists.[5] This approach is also prevalent in the arbitration practices of those countries.[6] The costs follow the event rule is imprinted on to the subconscious of the common law litigator. It is followed in the preponderance of jurisdictions in the common law world including England and Wales, Ireland, Canada,[7] Australia, New Zealand. It is also observed in the Caribbean[8] and Africa, particularly in Kenya and Uganda.[9] The rule is aesthetically attractive and it has a clear equitable basis. The American rule has also cultivated exceptions. Under that rule the judiciary may in the exercise their equitable jurisdiction, award costs. The courts in England and Wales and Ireland also enjoy a

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4 Jennifer F. Reinanum, Louis L. Wilde, "Settlement, litigation, and the allocation of litigation costs", Rand Journal of Economics, Vol 17, No.4. (Winter 1986) 557 at 563.

5 Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting,* Law and Contemporary Problems, Vol. 47: No.1, pp. 46-48 [Winter 1984]: Austria Law Concerning Procedure in Civil Litigation (Code of Civil Procedure) of August 1, 1895; Section 43 (1) provides " if each party prevails in part and loses in part, the costs are to be set off against one another or are to be apportioned proportionally"; Germany (Federal Republic) Code of Civil Procedure of January 30, 1877; Section 92 (1) " If each party prevails in part and loses in part, the costs are to be set off against one another or to be apportioned proportionally. If the costs are set off against one another, one half of the court costs is imposed on each party"; Sweden Code of Judicial Procedure of July 18, 1942, Section 4 provides " If in a multi-claim action each party is both winner and loser, either each party shall be required to bear his own expenses, or one of the parties shall be awarded an adjusted compensation for his expenses, or, to the extent that the expenses attributable to different parts of the action are severable, the liability to compensate for expenses shall be determined by the outcome of each part"; Zurich Code of Civil Procedure of June 13, 1976, Section 64 provides " The amount of the court costs is determined as provided by the Act on Court Organization. They are as a rule imposed on a defeated party. If neither party prevails fully, the costs are apportioned proportionately."

6 Michael Búhler, *Awarding Costs in International Commercial Arbitration and Overview*, ASA Bulletin, Vol 22, Issue 2 (2004) pp. 249-279, at 263.

7 *Ibid*, Alcock, p 1; Canada follows the 'world rule' that costs in principle are 'in the cause'; Peter Glenn and Peter Laing, *Costs and Fees in Common Law Canada and Quebe*c, Faculty of Law & Institute of Comparative Law, McGill University, p 1; Art. 477, CCP, Rule 57 (9) British Columbia Rules of Court ('Costs ... shall follow the event unless the court otherwise orders'); Alberta Rules of Court Regulations 390/1968 (amended by 124/2010, effective, November 1, 2010), Rule 10.29 (1); In Quebec the loser pays very little, since the level of costs are kept low, thereby aligning it closer to the American rule.

8 *RBTT Trust Ltd v Flowers* (Belize CA, 9, 19 March 2010), Morrison J (Sosa J and Carey J concurring).

9 *Ngaya v Barclays Bank of Kenya* [2016] eKLR, (HC 8 February 2016) (Mativo J) ; *Orix (K) Limited v Paul Kabeu* [2014} eKLR; *Jasbir Singh v Tarlochan Rai* [2014] eKLR; Civil Procedure Act, section 27, Cap 21. Laws of Kenya; *Candiru v Amandua* [2017] UGHCCD 139 (HC 27 October 2017) (Mubiru J); citing *Ritter v Godrey* (1920) 2 KB 47; *Phonograhic Performance Ltd v Rediffusion Music Ltd* [1999] 2 All ER 299, 313-315; *Anglo – Cyprian Trade Agencies Ltd v Phaphos Wine Industries Ltd* [1951] 1 All ER 873.

discretionary jurisdiction to depart from the costs follow the event rule if the interests of justice so require. There are no preordained factual or legal matrices which fall outside of the scope of that equitable jurisdiction. The burden of displacing the rule, however, will fall on the party who avers that it should be dislodged.[10] Usually, very significant reasons of an unusual nature must subsist before the courts will display any enthusiasm for departing from the general rule.[11]

1.2 Statement of Research Investigation Question(s)

There is one principal overarching research question namely *has the costs follow the event rule become a relic?* This question is of critical importance as it seeks to investigate whether the rule, which appears to have suffered from an irreversible decline in its fortunes, nonetheless remains extant. The hypothesis is that the rule, which is more observed by reference to its exceptions, is either dead or on life support. In order to answer the primary research question, and to prove the hypothesis the investigation will consider a quadtych of subsidiary ones. These questions will when taken as an ensemble bolster the hypothesis that rule has indeed expired or is being maintained in a state of life support. These questions contribute to formulating a definitive answer to the primary question. The thesis predominantly undertakes a macroscopic investigation of the *costs follow the event* rule in Ireland. That jurisdiction was carved out of the jurisdiction of England and Wales, when bifurcation occurred with Irish independence in 1922. The thesis examines the operation of the rule under Irish law, whilst chronicling the distinguishing characteristics and features of the development of the rule in England and Wales. In the latter jurisdiction the rule followed a different evolutionary process. The rule in Ireland observes the myriad exclusions, exceptions and indemnities, but it never experienced the transformation, or indeed *Reformation,* which occurred in England and Wales. The development of the rule in Ireland took a more laboured approach not unlike a meandering river. It never enjoyed the benefit of the key developmental milestone in the form of the Civil Procedure Rules that were introduced in England and Wales. The rule in Ireland can be viewed as being analogous to

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10 *Grimes v Punchestown Development Co. Ltd* [2002] 4 IR 515, 522, Denham J.

11 Jevon Alcock, *Costs follow the event v Costs to follow event,* Continuing Professional Development presentation, materials and lecture paper p 1, 17 December 2014, Office of the Chief State Solicitor, 3/10 Chancery Lane, Dublin 8, D08 E4PK, Ireland; *Society for the Protection of Unborn Children (Ireland) Ltd v Coogan* [1990] 1 IR 273, 275 (Finlay CJ); *Cooper – Flynn v Radio Telefis Éireann* [2004] 2 IR 72.

species of flora or fauna that evolved in a separate *locus.* The thesis performs a macroscopic examination of the loser pays rule in Ireland. Though, strikingly similar to the rule in England and Wales, it is imbued with its own inherent features. Those unique characteristics are apparent on a megascopic examination. Many of them, like the operation of any rule, are jurisdiction specific. In Ireland, section 169 of the Legal Services Regulation Act 2015 introduced provisions which are strikingly similar to those which are contained in the Civil Procedure Rules.[12] These will be considered in greater detail in chapter 6. The thesis produces a body of substantive work that is declaratory of the *Law of Costs* in Ireland.

The first subsidiary research question arises within the rubric of chapter 3. It asks *in the context of Irish Constitutional Law actions – are we turning losers in to winners?* It is important owing to increasing propensity on the part of the courts in Ireland, to make a partial or even a full award of costs, in favour of conquered parties. This arises in certain Irish Constitutional law cases that fall within readily identifiable heterogeneous categories. In such actions, the litigants seek to assert Constitutional rights or impugn the Constitutional validity of legislation. The research will render it possible to engage in a pre-emptive risk analysis, at the pre-litigation phase, with a view to determining with accuracy the likely cost awards, in percentage terms, which the courts deliver.

Disparate factors influence the courts in Ireland to depart from the costs follow the event rule in complex commercial litigation. It is necessary to address the impact of this species of action on the rule. The thesis does this by means of two subsidiary questions. To this end, the second and third supplemental research questions are addressed exclusively in the fourth chapter. They ponder *is it equitable that a party which enjoyed many discrete victories, but ultimately lost, should pay all the winners costs?* And *is it equitable that a party which lost many discrete applications, but which ultimately prevailed, should receive a full award of costs?* Their interconnectivity arises in the context of complex modern litigation. For its part, it tends to be characterised by the proliferation of interlocutory matters (for example discovery applications and appeals). As the numbers of discrete issues proliferate it is open to form a view that the result of the litigation as a whole might not offer the sole determinant for determining costs. Given the complexity of modern litigation, the circumstances where a party, may win many battles, but still lose the war are protean. Trials in complex civil and

[12] CPR 1998, r. 44.3 (2), 44.3.4; 44.3.5 (a)-(d).

commercial matters may take months to dispose of. It is common for parties to exercise their rights of appeal and cross appeal until all appellate jurisdictions have been exhausted. The victorious party that prevails in global terms may lose on the majority of the issues that are ventilated at trial. Conversely, a party which fought many battles during the litigation, and which succeeded on the majority of the points, may feel aggrieved if it is adjudged to be the loser (in overall global terms).

The fourth subsidiary question forms a continuous thread with and is inextricably linked to the overarching primary question. It asks *can the primary rule survive the enactment of the Legal Services Regulation Act 2015 in Ireland*. The hypothesis that the *costs follow the event rule* is dead or on life support pervades the thesis from chapters 1 to 7. It operates as the golden fibre optic cable that unites the work. The primary and fourth subsidiary questions are addressed in chapter 7 at the conclusion of the research investigation. The latter is of importance as it seeks to assess the impact of the latest legislation on the loser pays rule. The most recent statutory intervention may represent the nail in the coffin for the rule. It has been diluted not only by the exercise of judicial discretion but also suffocated by the multiplicity of exceptions and indemnities that have emerged.

1.3 Importance

The *costs follow the event* rule has enjoyed a systemic chokehold on civil litigation in the various tiers of the Irish courts structure for centuries to such an extent that the rule is institutional, endemic and dendritic. It impacts directly on every tier of the civil litigation structure in Ireland. In 2017, 228,000 civil proceedings were instigated in the courts in Ireland. The loser pays rule applies to virtually all civil such cases issued in the District Court,[13] Circuit Court[14] and the High Court,[15] with the exception of certain family law proceedings. The rule is also applied to the cases taken on appeal in the various appellate jurisdictions, including the Court of Appeal and the Supreme Court. In Ireland, 39,659 new civil matters were commenced in 2017 in the High Court, while 53,795 were filed in the Circuit Court and the Supreme Court dealt with 234 appeals.[16] The High Court dealt with 193

[13] The District Court exercises jurisdiction over claims with a monetary value of up to 15,000.

[14] The Circuit Court has jurisdiction to hear claims with a value of up to 75,000 or 60,000 in personal injuries cases.

[15] The High Court enjoys an unlimited financial jurisidiction.

[16] Courts Service Annual Report 2017, p 7; The Courts Service Phoenix House, 15/24 Phoenix Street

specialist Commercial Court matters,[17] in 2017. This form of complex multi-party and big-ticket commercial litigation can result in the courts fashioning costs awards that reflect the relative successes and failures of the parties. In so doing, it can produce an erosion of the loser pays rule. This will be considered in detail in chapter 4. In 2017, in actions for debt collection, the High Court dealt with 3,042 claims for the recovery of liquidated sums while the Circuit Court and District Court dealt with 2,806 and 15,332 claims respectively.[18] Additionally, 301 applications for possession of property were filed in the High Court while 3,055 were filed in the Circuit Court. Further, the High Court dealt with 327 breach of contract cases, in 2017, and the Chancery Division of that court dealt with 2,269 cases, including complex actions that engage with company law, injunctive relief, and administration of estates, trust actions, pensions, and specific performance. Such actions engage with the Chancery Court indemnities and complex civil litigation, which are addressed, in chapters 2 and 4.

The loser pays rule casts a dark shadow over access to justice as the fear of a costs order can dissuade a party from issuing proceedings. However it is in the area of personal injury litigation where the rule inflicts considerable societal damage. It is in this arena in which the rule operates in its most unbridled form, to produce extreme outcomes, which fail to reflect the relative successes and failures of the parties. In negligence actions the courts continue to render *winner takes all* costs awards. This is so, notwithstanding, that a plaintiff who succeeds in recovering general and special damages for physical injuries may lose that part of the claim seeking damages for psychological injuries. There is no attempt, in personal injury actions, to isolate or segregate the unsuccessful part of the claim from the successful one. There is no financial disincentive or penal costs consequences for pursuing unsuccessful strands. In total, 22,417 fresh personal injury actions were commenced in Ireland in 2017, including 8,909 in the High Court (1,080 of which were medical negligence actions), 12,497 in the Circuit Court and 1,011 in the District Court.[19] The preponderance of actions do not survive to a full trial hearing. They are either compromised when a settlement is brokered

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North, Smithfield, Dublin 7.

[17] RSC Ord. 63A, r 1 confers jurisdiction on the Commercial Court to hear claims in contract or tort arising from a business dispute where the monetary value of the claim or counter claim is not less than one million euro. The subject matter of disputes coming before the Commercial Court include determining the construction of business documents; the purchase or sale of commodoties; carriage of goods; insurance or reinsurance; certain matters under the Arbitration Acts 1954-1998, disputes under the Trade Mark Act, 1996, the Copyright and Related Rights Act, 2000 and the Industrial Designs Act, 2001.

[18] There were a total of 21,180 liquidated claims seeking the recovery of debt; *ibid*, Courts Service Annual Report 2017, p 49.

[19] *Ibid* p 48.

between the parties or they are discontinued, or the plaintiffs fail to prosecute them. In personal injury litigation the insurance underwriter ordinarily assumes control, and directs the litigation on behalf of the defendants, who are covered by a policy of insurance. The successful party's costs are invariably agreed on the basis that they will be taxed in default of agreement. The loser pays rule can be characterised as a matryoshka doll, which fits in to the larger access to justice doll, which in turn fits in to an even large one representing the civil justice system, and the administration of justice, which finally fits in to the largest of all matriarchal dolls, namely the rule of law. The laudable pursuit of access to justice should be real and not aspirational. However, there is a requirement to strike a correct balance, which will on the one hand enable litigants to gain access to legal services and the courts, without the fear of an adverse costs order and a system that will visit certain proportional adverse costs consequences on parties that pursue partly or wholly unmeritorious claims.

The thesis examines this notion in greater detail in chapter 6. Costs are the overwhelming driver in litigation and personal injuries litigation is a runaway train. In the 1965 paper "Towards a Just Society" the future president of the High Court in Ireland recognised the need to align the legal system with contemporary user needs, and he called for co-operation in the judicial branch of Government to reduce the cost of litigation through the elimination of cumbersome and costly procedures.[20] The high burden of costs arises from a confluence of factors, including the practices of the legal profession and micro-economic factors, methodologies and other disparate considerations.[21] More than half a century later in 2017, the Minister for Justice and Equality, as part of the programme for Government, charged the President of the High Court with responsibility for leading a group which will conduct a review for the purpose of delivering a more efficient and effective legal system, in Ireland. The group may recommend amendments to Order 99 of the Rules of the Superior Courts (which provides that *costs follow the event*) and the Legal Services Regulation Act 2015, which placed the loser pays rule on a statutory footing. The thesis is concluding contemporaneous to the group issuing a report in April 2019. It is likely that the group will deliver recommendations which seek to reduce the costs of litigation, while improving access to justice, and streamlining practices and procedures, which have operated since the Supreme

[20] Declan Costello, *Towards a Just Society*, Fine Gael policy document, 1965, heading 25 p 29.

[21] Victorian Law Reform Commission; *"The Cost of Access to Courts"*, paper for presentation at conference on "*Confidence in the Courts"*, 9-11 February 2007, p 4.

Court of Judicature (Ireland), Act 1877.[22] In England and Wales the Bach Commission[23] recommended that a minimum standard of access to justice could be secured through a Right to Justice Act. It could provide a statutory right to receive reasonable legal assistance, without imposing costs shifting.[24] Chapter 7 of the thesis renders recommendations with a view to impacting on litigation patterns. The recommendations include amending the Legal Services Regulation Act, 2015 to ensure that costs are fair and reasonable when globally surveyed,[25] amplifying the jurisdictional limits of the small claims court,[26] and providing guidelines which would enable the courts to incarcerate a party for contempt where the claim is fabricated, fraudulent, or wholly dishonest.[27] A minor legislative adjustment to the *costs follow the event* rule would impact on the approximately twenty two thousand personal injuries actions which are initiated annually in Ireland. This figure includes the 8,909 issued in the High Court in 2017 (up from 8,510 in 2016) and the 12,497 Civil Bills that were filed in the Circuit Court, during that period. The annual numbers of such actions remain consistent year on year.[28] A surgical amendment which is targeted at altering the application of the *costs follow the event* rule in personal injury litigation would impact upon approximately 10% of all civil cases which are initiated annually.[29] Taking things one step further, more fundamental amendments to the rule would require revisiting the Supreme Court of Judicature (Ireland) Act, 1877, the Rules of the Superior Courts, and the Legal Services Regulations Act. Any such fundamental amendments would impact on the approximately 225,000 civil law suits that are filed annually in Ireland.

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22 www.justice.ie/en/JELR/Pages/PR17000097 accessed 20 December 2018; Department of Justice and Equality, 51 St. Stephens Green, Dublin 2, D02 HK52, Ireland.

23 The final report of the Bach Commission, September 2017, Fabian Policy Report, www.fabians.org.uk/access-to-justice-thebach-commission/ accessed 1 June 2018; the Commission included Sir Henry Brooke, former Appeal Court judge, in England and Wales.

24 The final report of the Bach Commission, September 2017, Fabian Policy Report, www.fabians.org.uk/access-to-justice-thebach-commission/ pp. 5-7, accessed 1 June 2018

25 Reasonable both in terms of the monetary sum in dispute and the nature of the proceedings.

26 Though not in respect of personal injuries actions, including road traffic, employers liability and occupiers liability litigation which can generate complex issues of legal liability.

27 In *Calderdale and Huddersfield NHS Foundation Trust v Atwal* [2018] EWHC 961, Spencer J.on the application of the NHS Trust sentenced the respondent to three months imprisonment for contempt, and made a costs order of £75,000 against Mr Atwal (who fractured his right index finger causing some sensory disturbance) who the court determined had inflated his medical negligence claim, for £837,000, by grossly exaggerating his symptoms; citing *Homes for Haringey v Fari* [2013] EWHC 3477; *AXA Insurance UK Plc v Rossiter* [2013] EWHC 3805; *Airbus Operations Ltd v Roberts* [2012] EWHC 3631 (Admin).

28 *Ibid* p 48.

29 22,417\228,000= .09832018 x 1000 =9.83201754.

1.4 Relevance

There is no substantive or freestanding right to an award of costs. The *Law of Costs* is adjectival and omnipresent. It forms an integral part of practice and procedure. It plays heavily on the psyche of any protagonist considering issuing or defending legal proceedings. The whole subject of costs brings a separate strategic dimension to litigation. The analysis of costs increasingly occupies centre stage throughout the currency of the litigation. Costs hearings have become an indispensable layer of the litigation sponge. In complex civil and commercial litigation, the judiciary routinely grapple with discrete applications for costs after judgement has been delivered and the parties have had the opportunity to digest the *ratio decidendi* of the judgment. The parties invest considerably in post-judgment costs hearings, which include written submissions and oral advocacy.

Litigation as a whole (including interlocutory steps) has become more elaborate. So much so that much more turns upon the precise order for costs made at the end of the litigation. It is increasingly the case that many relatively discrete issues arise in the course of litigation, which require to be addressed. It may be possible to develop a view as to whether the result in overall terms, might not offer the only basis for awarding costs, in respect of the matters determined. This is especially so having regard to the fact that not all of the issues canvassed at the hearing may be determined in favour of the party which ultimately wins on the substantive points. Forensically well-presented post-judgment costs hearings have emerged as a new phenomenon in civil action. O'Donnell J. sitting on the Supreme Court in Ireland as recently as 2018 summed up this state of affairs.[30] He outlined how the resources of the court have to be marshalled for users in order to deal with such matters. Costs hearings increasingly take on a specialist dimension that requires an intricate knowledge of the *Laws of Costs*. In high profile commercial actions such as *McCambridge v Brennan Bakeries, Sycamore Bidco* and *Walsh and Cassidy v The Council County of Sligo*, the judiciary delivered costs rulings which reflected the complexity of the legal issues and the findings of law and fact.[31] The successful parties in this triptych of cases were awarded forty, sixty and sixty six percent of

[30] *Reaney v Interlink Ireland (T/A as DPD)* [2018] IESC 13 [10] " A casual observer might consider that when liability is determined and damages assessed or appropriate orders made, that the work of a court is substantially concluded. But there is now an almost bewildering array of rules, statutory provisions and court decisions that can come in to play at the conclusion of a case all of which reflect the significant burden of costs."

[31] *McCambridge Limited v Joseph Brennan Bakeries* [2011] IEHC 433 (HC, 7 December 2011) (Peart J). *Sycamore Bidco Limited v Breslin* [2013] EWHC 583 (Ch) (HC, 18 March 2013) (Mann J) [2014] IESC 22.

their respective legal costs. Lawyers for the parties expend considerable time researching and drafting outline written legal submissions. The preparatory work includes undertaking a detailed review of the pleadings, examining trial transcripts, written legal submissions, the evidence adduced, and the oral submissions and legal arguments made during the currency of the hearing. In England Wales the courts appear to have gone one step further by embracing the necessity for fashioning apportioned and proportional costs orders. This is especially so in complex actions. In Ireland the judiciary have not yet reached the point where they are prepared to apportion legal costs. In this way, issues based costs orders have not yet become the staple form of order. The costs hearing is a relatively new beast to emerge in the life cycle of the atypical action. There is ordinarily, a brief hiatus, to enable the parties to digest the judgment before the full blown costs hearing occurs. The proliferation of litigation and the resulting discourse prompted the Civil Justice Council in England and Wales to issue a report in September 2005 in which it observed that arguments in litigation pertaining to the costs of arguments about costs could bring the system of civil justice into disrepute.[32]

[32] Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs* (2005), p 53, "argument about the costs of arguments about costs brings the civil justice system in to disrepute."

1.5 Methodological Foundation

There is a breath taking variety of special courts, specialist tribunals, and various fora for administrative law disputes, especially for those engaging with social security, taxation maritime, patent, trademarks, copyright, and consumer law.[33] Not surprisingly then those discrete jurisdictions apply variations to the general rule on cost allocation. The research excludes administrative mechanisms for the validation of decisions by the bureaucracy in the common law jurisdictions of Ireland and England and Wales. For example, those represented by the Ombudsman, Social Welfare, Revenue and Planning appeals, and other specialist[34] and low cost tribunals.[35] The rationale for their exclusion is based on the fact that these are statutory based schemes, which fall outside, of the scope of the research. Though, costs payable on foot of litigation brought by persons dissatisfied with decisions made under such statutory schemes, would, potentially, fall within the scope of the research. The research will also exclude the various Commissions and Agencies for the validation of employment and other rights (for example, the Employment Appeals Tribunal, other Tribunals[36] and Commissions of Inquiry),[37] the Hepatitis C Compensation Tribunal and Redress Boards (e.g. the Residential Institutions Redress Board), The Magdalene Restorative Justice Scheme. It will also exclude other specific compensation schemes (for example, those for farmers in relation to brucellosis and tuberculosis infection and for thalidomide and other vaccinations, etcetera), and the refugee legal service. The rationale for their exclusion is again predicated on the premise that they are statutory schemes, which fall outside of the scope of the research.

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33 *Ibid*, Pfennigstorf, p 2.

34 Copyright, Designs and Patents Act, 1988 (UK), section 151 provides that "The Copyright Tribunal may order that the costs of a party to proceedings before it shall be paid by such other party, as the Tribunal may direct."; *PRS v BEDA* [1993] EMLR 325, 334 Hoffmann J. characterised such Tribunals as having a "wide discretion, similar to that exercised by a Court"; RSC Ord. 62, CCR Ord. 38; *Phonographic Performance Limited v AEI* [1999] 1 WLR 1507.

35 Trade Marks Act, 1996, section 72 (Ireland) provides that the Controller of Patents, Designs and Trade Marks "may, in any proceedings before him under this Act, order the payment to any part of such costs (if any) as the Controller may consider reasonable and direct how and by what part they are to be paid"; costs are awarded according to an indicative scale which specifies certain standard sums; The Controller makes a global assessment in each/every case when assessing costs, and may elect to depart from the scale, for example, in particularly complex matters. The ceilings provide a safety net and do not reflect the true value of the legal costs incurred; the fees are not designed to indemnify the "winner"; and they fulfil the Controller's policy objective to run a low-cost tribunal.

36 Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 section 6 (1).

37 *Lowry v Mr. Justice Moriarty* [2018] IECA 66 [29], [90] (Ryan P) ; the appellant was only awarded one third of his recoverable costs in respect of his participation in the work of the Tribunal but he was never provided with an indication of the methodology of calculation for the costs reduction or the matters which the Tribunal would have regard to as set out in its General Ruling on costs, so as to enable the appellant to address them; *Goodman International v Mr. Justice Hamilton* [1992] 2 IR 542 [21].

Those special courts and tribunals operate deviations from the loser pays principle. They do not ordinarily observe fee shifting,[38] but appeals or reviews from decisions taken by such bodies could, potentially, fall within the scope of the rule, and therefore within the rubric of the research.

The methodology for the doctoral research is based on a qualitative consideration of primary sources, namely, case law and statutes and secondary sources in the form of published commentary, articles, materials, reports, and treatise in the jurisdictions of Ireland and England and Wales (and other pertinent common law jurisdictions which observe the Supreme Court of Judicature Act model most notably Australia and Canada) and the United States of America, where both the loser and user pays rules are operative. The research employs a qualitative methodology resisting wider engagement in quantitative analysis. It refrains from engaging in any quantitative comparative analysis of litigation volumes or cycles.[39] Many legal writers and jurists who have undertaken qualitative comparative study have favoured the methodology.[40] A successful party enjoys no substantive freestanding entitlement to recover costs and no party can claim a proprietary interest to costs, let alone ground an entitlement to costs as a Constitutional right or Human Right. Costs are always awarded as a matter of judicial discretion. Legislation, case law, statutes, jurisprudence and statutory instruments, the rules of court and practice and procedure, inform the exercise of such discretion. The thesis will utilise black-letter law from a traditional framework[41] with a macroscopic attention to legislation, case law, judicial precedent, and secondary and subordinate legislation, in Ireland. This will imbue the research with an inherent reliability and orthodoxy. There is a strong justification for employing this methodology. It is both transparent and not predisposed to subjective bias. The methodology views law as a legal science and it considers legislation, case law, procedural rules and jurisprudence. The

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38 *British Telecommunications Plc v CMA* [2017] CAT 19; *Merricks v Mastercard Incorporated* [2017] CAT 27 (Costs ruling 23 November 2017), rule 104 conferred "on the Tribunal a general power to award costs which applies to all proceedings before it" [7].

39 *Ibid*, Pfennigstorf, p 2 at 38: David Trubek, *The Costs of Ordinary Litigation,* UCLA Review [Vol. 31:72], 1983: p 79 "A complete analysis of the cost of litigation would examine private and social costs, study the relative cost of litigation and other dispute processing models, and in some way incorporate non-monetary costs and benefits... we are not however, able to deal with all these facets of the problem."

40 *Ibid*, *Pfennigstorf*; William Schwarzer, *Fee shifting offers of Judgment – an approach to reducing the cost of litigation*, Judicature, Vol. 76, No. 3, 147 (1992-1993): Geoffrey Woodroffe, *Loser Pays and Conditional Fee – An English Solution?*, 37 Washburn LJ, 345 (1997-1998).

41 Dawn Watkins and Mandy Burton, *Research Methods in Law* Routledge, 2013, p 29 asserts the term "black letter" refers to research about the law included in legislation and case law. It is defined in Bryan Garner, Black's Law Dictionary, St Paul, MN: Westlaw International, 2009 as: "One or more legal principles that are old, fundamental, and well settled". In addition, the definition notes: "The term refers to the law printed in books set in Gothic type, which is very bold and black."

methodology is also suitable for adaption to any texts, publications, or articles that are derived from the thesis. The research philosophy will be positivistic. It will collate material, commit results in writing, reach conclusions, provide qualitative critique, and utilise deductive reasoning that will imbue the research with legal certainty. It will embrace a comparative approach in seeking to bridge different jurisdictions. The scope of the research inquiry is limited to the common law jurisdictions of England and Wales and Ireland, with recourse to the common law jurisdictions of Australia,[42] Canada and New Zealand - which observed post-Supreme Court of Judicature Act practice and procedure[43] - and the United States of America.[44] Australia and Canada, which adhered to the Supreme Court of Judicature Act template developed principles similar to those in England and Wales and Ireland. This is evidenced by the doctrine of mootness in Canada[45] and the wasted costs jurisdiction in Australia.[46] The research filters out hybrid jurisdictions, for example, South Africa,[47] Sri Lanka[48] and Scotland,[49] whose legal systems originally derived from or were infiltrated by civil law. Additionally it excludes consideration of jurisprudence emanating from jurisdictions in the sub-continent of India.[50] They did not adopt the Supreme Court of Judicature Act architecture and their legal reforms were different from those in England and Wales.[51] This gave rise to a lack of uniformity between their laws, including their practices

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42 Supreme Court Procedure Amendment Act 1853 (SA); An Act to Provide for the Administration of a Uniform System of Law (1876) (Qld); Equity Act 1880 (NSW); Judicature Act 1883 (Vic); Supreme Court Civil Procedure Act 1932 (Tas); Supreme Court Act, 1935 (SA); Supreme Court Act, 1935 (WA); Supreme Court Act, 1970 (NSW); Law Reform (Law and Equity) Act 1972 (NSW).

43 Adherence to the Judicature Act machinery was incremental and Law and Equity were administered in the same court; Professor Shaunnagh Dorsett, *The First Procedural Code in the British Empire: New Zealand 1856*, [2017] UTSLRS 14, para 4, University of Technology Sydney law Research Series.

44 The PhD candidate is enrolled as a solicitor in England and Wales, Ireland and in Northern Ireland, and as Lawyer in New South Wales, Australia. The candidate is permitted under the Trans-Tasman Mutual Recognition Act 1997 and Trans – Tasman Mutual Recognition Admission Regulations 2008 made pursuant to section 274 (f)(ii) of the Lawyers and Conveyancers Act, 2006 (LCA), New Zealand (Consolidated 1 June 2011) to apply for admission as a solicitor of the High Court of New Zealand.

45 *Borowski v Canada* [1989] 1 S.C.R. 342.

46 *Time for Monkeys Enterprises Pty Ltd v Southern Cross Austereo Pty Ltd* [2015] NSWDC 13; *Borros v Swann* [2014] NSWDC 227.

47 Supreme Court Act, 1959 (South Africa).

48 Sri Lanka Judicature Act, 1978, the laws of Sri Lanka are an amalgam of common law, custom, and European law.

49 Neither Scotland nor South Africa adopted the Supreme Court of Judicature Act templates.

50 Bengal Rules 1850; 1859 Indian Code of Civil Procedure; The Rules and Orders of the Supreme Court of Fort William, Bengal, (Samuel Smith & Co., Calcutta, 1850); Professor Shaunnagh Dorsett, *The First Procedural Code in the British Empire: New Zealand 1856*, [2017] UTSLRS 14 (fn 98); [2017] 27 NZULR 690; the "peculiar circumstances of the Supreme Court of Bengal lacked uniformity with the practice of the Courts in England and across the Empire" (fn 102); Whitley Stokes, the Anglo-Indian Codes (Clarendon Press, Oxford, 1888) Vol II; Law Commission of India, The Civil Procedure Code 1908, (27th Report, Government of India, New Delhi, 1964).

51 Shaunnagh Dorsett, *The First Procedural Code in the British Empire: New Zealand 1856* [2017] UTSLRS 14 (fn 102); [2017] 27 NZULR 690.

and procedures, and the laws in other common law jurisdictions. Common law litigation processes and procedures in England and Wales, Ireland, Australia, Canada, and New Zealand enjoy close alignment, notwithstanding that certain rules will be jurisdictions specific, there is nevertheless, a close approximation in terms of how the costs rules developed. These jurisdictions developed a body of litigation, which is underpinned by a doctrine of precedent, albeit with jurisdictional variations. The jurisprudence of the House of Lords, the Privy Council,[52] the Irish and Canadian courts[53] and the courts in the various States of Australia[54] occupy a high level of judicial confidence. Additionally, both Australia, and Ireland enacted written Constitutions that recognise a separation of powers doctrine while Canada enacted a Charter of Fundamental Rights. The research furthermore considers the costs follow the event rule and the American rule of costs allocation to ascertain if the latter offers a suitable alternative. It excludes any consideration of costs rules in those states within the United States of America that trace their origins from the corpus of European civil law, for example Louisiana.[55] It considers the origins, rationale, development and the copious exceptions, which each of the great rules of common law civil litigation have spawned. It examines how they have been eroded to the point that their viability is threatened. It considers their implosion as neither rule appears capable of surviving in an unadulterated form. The Irish courts have a long tradition of considering jurisprudence on costs which emanates from foreign judicial bodies including the House of Lords and Privy Council, and while not binding, many seminal decisions carry a persuasive authority.[56] More recently, in *Moorview Development Ltd v First Active Plc* [57] the Irish High Court made the eponymous *Moorview order,* holding a non-party director liable for costs. Clarke J. found the jurisdiction

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52 *New Zealand Maori Council v Attorney General of New Zealand* (1994) 1 AC 466.

53 *Clarke v Trask* (1901) 1 OLR 207; *Allen v The Board of Education for the City of London* [1965] OJ 537 (d*e novo* hearings); *British Columbia (Minister for Forests) v Okanagan Indian Board* (2003) 114 CCR 2nd 108 (Le Biel J) (exercise of judicial discretion on costs).

54 *Bakarich v Commonwealth Bank of Australia (No.2)* [2012] NSWCA 390 (*de novo* hearings); *Messister v Hutchinson* [1987] 10 NSWLR 525, 528.

55 The laws of the State of Louisiana are distinguishable from other states in the United States of American as the laws were formulated during periods of Spanish and French Imperial acquisition and retrocession, as recorded in the Treaty of San Ildefonso (1October 1800).

56 *Ritter v Godfrey* [1920] 2 KB 47; *Donald Campbell & Co. v Pollak* [1927] AC 732, 811-812; the wasted costs jurisdiction *Myers v Elman* [1940] AC 282; *Ridehalgh v Horsleigh* (1994) Ch 205; *Medcalf v Weatherill* [2002] UK HL 27; doctrine of mootness *Ainsbury v Millington* [1987] 1 All ER 929 (Lord Bridge); amending pleadings *Cropper v Smith* (1883) 26 Ch 700, 710-711 (Bowen LJ) *Gale Superdrug Stores PLC* [1996] 1 WLR 1089 (Millett LJ); *Charlesworth v Relay Roads Limited (in Liquidation)* [1999] EWHC 828 (Neuberger J); *Boodhoo v Attorney General of Trinidad and Tobago* (2004) UKPC 17 (Lord Carswell); offers to settle/lodgments *Jefford v Gee* [1970] 2 QB 130 (Lord Denning M.R); *Calderbank v Calderbank* [1975] 3 All ER 333, 342 (Cairns L); *Cutts v Head* [1984] 1 All ER 597, 601-602 (Oliver LJ).

57 *Moorview Development Ltd*, v *First Active Plc* [2011] IEHC 117, the order was the first of its kind in Ireland as a non party, company director, was held liable for costs.

existed not only under Order 15, rule 13 of the Rules of the Superior Courts,[58] but also in section 53 of the Supreme Court of Judicature (Ireland) Act 1877. In forming this view, future Chief Justice of Ireland had regard to the broad expanse of authorities from England and Wales,[59] the Supreme Court of Queensland,[60] the Federal High Court of Australia,[61] and New Zealand.[62] The provisions in those jurisdictions conferred a broad discretion on costs. The Queensland legislation conferred a power to award costs while the provisions in New Zealand granted a jurisdiction to do so. In England and Wales the courts had power to determine costs. The addition of the words *"by whom"* in that jurisdiction added a layer of statutory intrigue.[63] In 2018, the Irish Supreme Court[64] endorsed the approach taken by Clarke J. whilst clarifying that despite the insight gained by examining the overseas authorities, the appeal was decided on the interpretation of section 53 of the 1877 Act.[65]

Comparative study requires familiarity with judge made law. This in turn produces an in-depth knowledge of the subject and the capacity to identify patterns. There is immense scope for potential exploration within the rubric of the subject area. Consequently, the research will require to be disciplined, in order to keep the research within manageable boundaries. As Farrar observed it is difficult to capture and minimise a complex subject in to meaningful text.[66] The comparative aspect of the research is imbued with its own particular features. It will utilise the functional equivalence methodology, with modifications, in contrast to the legal transplant methodological approach. Zweigert, vented dislike for methodological discourse and preferred inspiration to methodological rigour as the prevailing guide.[67] Other approaches other than functionalism were considered, including comparative legal history, the study of legal transplants, and the comparative study of legal cultures.[68] They were, however, individually discounted, in preference to using functional equivalence as the

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58 *Byrne v John S. O'Connor & Co.* [2006] IESC 30, [2006] 3 IR 379; the Supreme Court held in *Moorview Development Ltd v First Active Plc* [2018] IESC 33 [34], that the principle in that case is not confined to the subrogating insurer.

59 *Aiden Shipping Ltd v Interbulk Ltd* [1986] AC 965.

60 *Forest Pty Ltd v Keen Bay Pty Ltd* [1991] 4 ACSR 107; the Supreme Court of Queensland held that section 58 of the Supreme Court (Qld) Act, 1867 enabled the court to make a costs order against a non – party.

61 *Knight v F.P Special Assets Ltd* [1992] 107 ALR 585.

62 *Carborundum Abrasives Ltd v Bank of New Zealand (No.2)* [1992] 3 NZLR 757; New Zealand Judicature Act 1908, section 51 G, which conferred a jurisdiction to impose costs on a non party.

63 Supreme Court Act, 1981 section 51 (England and Wales).

64 *Moorview Development Ltd v First Active Plc* [2018] IESC 33 (McKechnie J).

65 *Moorview Development Ltd v First Active Plc* [2018] IESC 33 [54].

66 John Farrar, Law Reform and the Law Commission (Sweet & Maxwell, London, 1974), p.x:.

67 Konard Zweigert and Hein Kotz: *An introduction to Comparative Law* (trans Tony Weir, 3rd ed, 1998), 32-47.

68 Ireland returned members of parliament to the Imperial Parliament in Westminster, until 1921.

methodological position for the comparative study. This is because it is most closely aligned to traditional comparative study. The research elected not to utilise a legal transplants methodological approach, which was first propounded by Watson in 1974.[69] While this approach was considered it was discounted because it would not provide the optimum comparative method, not least because the jurisdictions of England and Wales and Ireland shared a system of law over many centuries. The research will focus on case law and statutes, within manageable parameters. It will adopt an objective standpoint and refrain from engaging in subjective bias. The comparative methodology of functional equivalence may use analogical comparison. The research is cognisant of the methodological dichotomy, between genealogical and analogical comparison. The former aims to establish a filial relationship between the objects that are being compared to explain the similarities or otherwise. The latter is concerned with their form and not their genealogical connection. The methodology will take on a comparative aspect and will explore similarities and differences between the black letter law in the common law jurisdictions of England and Wales and Ireland. The black-letter law approach concentrates heavily, if not totally, on the law as a self-supporting set of principles that can be accessed through reading jurisprudence, and by extracting principles from decided cases. They are then constituted in to a coherent framework, which strives for theoretical consistency and rationality.[70] Comparative law just emerged within the last two centuries and there is a subconscious danger of acquiring knowledge of foreign jurisdictions at the risk of overlooking one's own.[71] Consequently, such comparative legal study is difficult to undertake and master not unlike the French law of torts.[72] The thesis is not only a study of the rule in two jurisdictions (namely England and Wales and Ireland) but also a study of the loser pays rule in those common law jurisdictions in a comparative fashion. The research will, firstly, undertake comparisons between those jurisdictions by engaging in *inter* jurisdictional consideration to determine the close filial relationship between the rules in those jurisdictions. They shared a common legal heritage until the later jurisdiction emerged out of the former, in 1922. Secondly, it will examine the rule in those and other selected common law jurisdictions (namely Australia and Canada, which observe

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69 Alan Watson, Legal Transplants: *An approach to Comparative Law*, Edinburgh (2nd ed. 1993, 1st ed. 1974).

70 Mike McConville and Wing Hong Chui, *Research Methods for Law*, Edinburgh University Press, 2007, p 4.

71 Lord Bowen observed "a jurist is a man who knows a little about the law of every country except his own"; Harold Cooke Gutteridge, Comparative *Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd ed., 1949; reprinted 1971 Wildy and Sons, London), p 23.

72 Introduction by the editor to Thijmen Koopmans (ed.), *Constitutional Protection of Equality* (Albertus Sijthoff, Netherlands, 1975), p.3.

the Supreme Court of Judicature Act model) and the United States of America, with a view to analysing the history, origins, rationale, objectives, functions, advantages, disadvantages, frailties and exceptions, to the costs follow the event rule and the American rule. Thirdly, it also considers the loser pays approach and the operation of the user pays rule which is observed in the preponderance of jurisdictions in the United States of America. There are a multiplicity of non-prescriptive justifications for selecting England and Wales and Ireland, as the primary starting point for comparative study. The modern law of costs in England and Wales flows from the Supreme Court of Judicature Act, which was introduced in that jurisdiction in 1873 and 1875. It was embraced in Ireland in 1877. The legislative thrust of that model was embraced in those common law jurisdictions that derive their practices and procedures, and their treatment of costs, from the legislation of 1873.[73] These include Australia,[74] Canada,[75] Ireland[76] and New Zealand.[77] In this way, this distinguishes these from other jurisdictions, which did not follow the reforming legislative architecture. Queensland introduced a Judicature Act in 1876, which saw Common Law and Equity administered in the same courts, while the rules of equity prevail in the event of any incongruity arising.[78] All the states[79] and territories in both continental and non-continental Australia[80] apply the costs follow the event rule,[81] which is enshrined in statute.[82]/[83] While Canada applies the loser pays principle, it has diluted it to some extent by reducing the sums which the successful party can

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73 36&37 VICT., c. 66: 23 *Halsbury's Laws of England* (1st ed); 178.

74 The Judiciary Act, 1803 (Aus) section 26 provides "The High Court and every Justice thereof sitting in Chambers shall have jurisdiction to award costs in all matters brought before the Court, including matters dismissed for want of prosecution"; Judicature Act 1960 (Norfolk Island).

75 The Ontario Judicature Act, 1881; Nova Scotia (as revised in 1886); The Judicature Act Saskatchewan, 1907 and revised statutes, 1909 (effective 15 March, 1911); The Judicature Act of New Brunswick, 1909, and in Alberta through The Judicature Act (Alta.), 1919.

British Columbia Supreme Court Rules 14 – 1 (9) requires the losing party to pay costs to a successful party unless the Court "otherwise orders."

76 Awards of Costs and Access to Justice Research Paper, Law Reform Commission of Saskatchewan, July 2011, p 6; citing Mary V. Capisio, *Award of Attorneys fees by Federal Courts, Federal Agencies and Selected Foreign Findings*, New York: Nova Publishers, 2002.

77 Judicature Act 1908 (NZ), repealed 1 January 2018, Senior Courts Act, 2016 section 182 (4).

78 Queensland Judicature Act 1876; Supreme Court of Judicature (Consolidation) Act 1925 (Imperial).

79 SCR (NSW) Pt 52 A r 11; SCR (WA) 0 66 r 1; SCR (SA) r 101.02.

80 *Hughes v Western Australian Cricket Assoc (Inc) (*1986) 8 ATPR 40-676; *Cretazzo v Lombardi* (1975) 13 SASR 4.

81 *Laguillo v Haden Engineering Pty Ltd* [1978] 1 NSWLR 306; *Boner v Anderson (No.2)* [1993] 50 IR 470, 475; *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* [1991] 25 NSWLR 358, 369-370; *Degman Pty Ltd (in Liq) v Wright (No 2)* [1983] 2 NSWLR 354.

82 Australian Law Reform Commission Report 75 (1995), *Costs Shifting who pays for litigation?* para 2.27; recommendation 8 "in civil proceedings, costs should follow the event."

83 New South Wales, Legal Fees Review Panel Report, *Legal Costs in New South Wales*, December 2015; *"an inquiry examining the current legal costs system."*; New South Wale, Legal Fees Review Panel: *Report on Legal Costs in New South Wales* (2005).

recover.[84] The discourse in Canada has focused on the fundamental divergence in opinion as to what can be considered as an appropriate sum for compensation.[85] All the aforementioned jurisdictions demonstrate a desire to continue with the rule, which has been embedded for centuries. The courts in Australia and Canada, in a not dissimilar fashion to those in England and Wales and Ireland exercise a considerable discretion, when deciding whether to award costs. Additionally, all of these jurisdictions have recognised the chilling effect that the rule can have on public interest litigation and cases of public importance. Consequently the courts have fashioned rules to ensure that justice is accessible for parties which instigate actions with a public interest dimension. The spectre of an adverse costs order can be the greatest block on the door to accessing justice.[86] Chapter 3 will consider how the loser pays principle engages with the concepts of compensation, punishment, indemnity, and deterrence. The chapter will consider *inter alia*, misconduct, or improper conduct on the part of the parties in litigation, which may result in parties, even successful ones, being punished. It will examine those cases where the courts in Ireland have made a full or partial award of costs in favour of losing parties in important Constitutional law actions. Many of these actions engage with the so-called ("tragic") *right to die cases*, or cases of conspicuous novelty, or cases that touch upon sensitive aspects of the human condition. Furthermore, the investigation will consider public interest litigation including the seminal case law with a view to ascertaining how the courts in England and Wales,[87] Ireland,[88] Australia[89] and Canada[90] have created judicial devices to temper the harshness of the costs follow the rule, in public interest and environmental litigation. Koopmans observed that comparative law is still searching for a

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84 *Ibid*, Australian Law Reform Commission Report 75 (1995), costs recoverable in Canada varied between Ontario 60%, British Columbia 50%, Nova Scotia 40%, Alberta 30%-50% while Australia appears to be closer to the practice in England and Wales where the sums recoverable are ordinarily between 60% to 70% and can reach between 60% to 90%.

85 Plaintiffs lawyers view costs as to high and defendants lawyers suggest they are not high enough to deter frivolous claims; Alberta Law Institute, Alberta Rules of Court Project: *Costs and Sanctions, Consultation Memorandum* No.12, 17, February 25, 2005, pp. ix ad 3; Law Reform of Saskatchewan,, *Awards of Costs and Access to Justice,* Research Paper, July 2011, p 5.

86 Australian Law Reform Commission (ALRC Report 75 1995) *Costs Shifting who pays for litigation?*, (Canberra Commonwealth of Australia) para 13.8; *Review of Civil Litigation Costs*: Final Report (London The Stationery Office) at 304; Ontario Law Reform Commission, Report on the Law of Standing (1989).

87 *R (Pretty) v DPP* [2001] UKHL 61; *R (Purdy) v DPP* [2009] EWCA Civ 972.

88 *Fleming v Ireland* [2013] IESC 19.

89 *Richmond Park v Oshlack* (1996) 39 NSWLR 622; *Oshlack v Richmond River Council* [1998] 193 CLR 72 [31]; *Ruddock v Vadarlis* [2001] FCA 1865; *North Australian Aboriginal Legal Aid Service Inc v Bradley (No 2)* [2002] FCA 564 [107]; *Mees v Kemp (No 2)* [2004] FCA 549 [23]; unsuccessful applicant ordered to pay fifty per cent of the first respondent's costs; *Jacomb v Australian Municipal, Administrative, Clerical & Services Union*, [2004] FCA 1600 [10] ; unsuccessful applicant paid three quarters of the respondent's costs in sex discrimination proceedings with some public interest dimension.

90 *Carter v Canada* (*Attorney General)* [2015] SCC 5, Section 24 (b) and section 14 of the Criminal Code infringed section 7 of the Canadian Charter of Rights and Freedoms; *Finney v Barreau du Qúebec* 2004 SCC 36 [2004] 2 SCR 17 [48] ; *Rodriquez v British Columbia* [1993] 3 SCR 519.

defined method that has not yet emerged.[91] While Zweigert and Kotz posited the view that comparatists are still operating in an experimental structure.[92] They were not preoccupied with the similarities or differences between jurisdictions, but more with the quest for finding legal solutions. The discourse around different legal systems and jurisdictions may generate interesting discussion, but harvesting data from foreign jurisdictions does not of itself constitute comparative law.[93] The research seeks to identify not only the differences or similarities of the opposing qualitative characteristics of the costs follow the event rule and the American rule. It also considers broader issues such as whether the rules achieve justice and fairness between the parties, or whether they potentially impede access to justice, and their broader societal impact. Samuel opined that many modern lawyers who engage in comparative study can countenance that this specialist area is no longer simply another positivistic subject, which is characterised by learning the rules of other jurisdictions, within the structures of simplistic functionalism. Comparative study is located within the realm of social sciences in general. It has an interdisciplinary character owing to its methodological and epistemological complexity.[94] The research will avoid what Samuel described as simplistic functionalism. To do so it will employ a modified version of functional equivalence. The indicia characteristics of the different costs rules will be analysed and such analysis will go beyond simply examining the similarities/dissimilarities of the costs models. Zweigert and Kotz opined that generally developed nations respond to the needs of legal business, in the same or strikingly similar ways. This gives rise to a presumption (*'praesumptio similitudinis'*) so that the practical results achieved are similar.[95] The research will also consider the broader impact of the rules in terms of access to justice. The law of costs is a universal concept that transcends any particular legal system.[96] Watkins and Burton assert that employing a traditional 'black-letter' framework is insufficient for comparative lawyers because many of the methodological and epistemological issues underpinning comparative questions are found in the social science strata rather than in one single

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91 Leyden, A.W. Sijthoff, *Constitutional Protection of Equality* (1975), Koopmans (ed) p 8.

92 Konard Zweigert, Hein Kotz, *An Introduction to Comparative Law,* Vol. 1 (Trans. Tony Weir, Oxf. U.P., 2nd ed., 1987), p.29.

93 Konard Zweigert and K Siehr, *'Jhering's Influence on the Development of Comparative Legal Method'* (1971) 19 AJCL 215 at 220.

94 Geoffrey Samuel, *Research Methods in Law* edited by Dawn Watkins and Mandy Burton; Comparative law and its methodology, Routledge, 2013, p 114; see P. Legrand (ed.), Comparer les droits, résolument (Presses Universitaires de France, 2009).

95 Konard Zweigert and Hein Kotz : *An introduction to Comparative Law* (tran Tony Weir, 3rd ed, 1998), p 40.

96 Geoffrey Samuel, *Research Methods in Law* edited by Dawn Watkins and Mandy Burton; Comparative law and its methodology, Routledge, 2013, pp. 103-104; see P. Legrand (ed.), Comparer les droits, résolument (Presses Universitaires de France, 2009).

discipline. And many topics have seen a burgeoning commonality.[97] McConville and Chui however, gave their imprimatur to the proposition, that comparative study can be undertaken in a single discipline, concomitant to what Professor McConville characterises as the accelerated level of globalism in legal life.[98] The thesis employs an advanced legal research methodology that utilises abductive reasoning. This eliminates epistemic uncertainty and it filters out subjective bias. Law has a unique character because it occupies a class all on its own and it is *sui generis*. There are a number of strong if not compelling justifications for pursuing qualitative research. First and foremost, the task of studying law is different to researching the arts and social sciences. The science of law is truly one of a kind. The research pursues a purely qualitative analysis without using an amalgam. This precludes any quantitative analysis component and it eliminates any composite analysis. The study of law is a sufficient *corpus* of knowledge for utilising qualitative research as law occupies a *milieu* that is different to other disciplines. It is solitary and unique in this way. The research and analysis of primary sources in the form of legislation, statutes and secondary and subordinate legislation, in the form of rules of court and statutory instruments, and secondary sources in the form of case law, and jurisprudence, and indeed tertiary sources in the form of reports and commentary, is a substantial foundation for performing qualitative analysis. This reservoir of black letter law holds a sufficient bank of materials for the qualitative research work. The research does not extend beyond the legal discipline and infiltrate other disciplines. Secondly the development and history of the *Law of Costs*, including the practices and procedures, rules of court, and local jurisdiction specific variants has received little international recognition.[99] The subject area is deserving and worthy of qualitative analysis and consideration because of the international backdrop to the research.

The methodology is tailored to the study of the loser pays rule (including practice and procedure) with a megascopic focus on Ireland. It has recourse to leading case law and authorities from jurisdictions which abide by the Supreme Court of Judicature Act, model. This gives the research an international dimension and outreach. The research investigation incorporates core academic and research competencies. It benefits from academic, practical, contextual and experiential knowledge. The research does not engage in a multidisciplinary

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97 Dawn Watkins and Mandy Burton, *Research Methods in Law*, Routledge, 2013, p 104.

98 Mike McConville and Wing Hong Chui, *Research Methods for Law*, Edinburgh University Press, 2007, p 1.

99 Shaunnagh Dorsett *"The First Procedural Code in the British Empire: New Zealand 1856"* [2017] UTSLR 14, [2017] 27 NZULR 690, University of Technology Sydney Law Research Series.

approach which cross cuts with other social sciences nor does not it pursue a purely isolationist approach within the legal discipline. It is neither blinkered nor does it seek to filter out all other matters. The research does not overlook important public or social policy considerations. Consequently chapter 6 chronicles certain public policy considerations that the judiciary cite as justification for punishing parties (even successful ones) which refuse to participate in mediation, or which refuse a reasonable offer to compromise the litigation, or where a protagonist exaggerates a valid claim. The research investigation elected England and Wales and Ireland as the two most appropriate entities for myriad reasons. The loser pays rule has been applied, and has endured, in its purest form in these jurisdictions for centuries. The statutes enacted in Westminster, from the 13th century onwards, also applied to Ireland, which had a similar statutory framework (in terms of the *costs follow the event* rule). Both jurisdictions have legislated to establish a variety of special jurisdictions, and special procedural rules, for various categories of specialised legal disputes, including those relating to social security law taxation, planning, industrial relations, employment and industrial property matters. These include variations (or deviations) from the general rule on cost allocation. Additionally both jurisdictions formulated rules in equity to enable the courts to exercise a discretionary jurisdiction to award costs when statute law was silent. Both jurisdictions also cultivated a prominent number of indemnities and exceptions to the loser principle, including indemnities for trustees and the contested probate litigation exceptions. Both jurisdictions also aspired to achieve greater levels of social justice and the loser pays rules can be tempered in order to achieve access to justice. The former jurisdiction introduced the concept of free legal aid in 1949 contemporaneous to the establishment of the welfare state and the National Health Service. In recent decades both jurisdictions have introduced provisions that have the effect of diluting and perhaps even ultimately destroying the loser pays philosophy. These jurisdictions were, moreover chosen, as they developed the rule in its purest form. The former jurisdiction rendered statutory changes in the form of the Civil Procedure rules. The latter introduced statutory changes in section 169 of the Legal Services Regulation, Act, 2015. It broadly embraces many of the provisions that were introduced in the Civil Procedure Rules.[100] It is furthermore envisaged that legislative changes may be introduced in England and Wales, which would further curtail the application of the costs *follow the event* rule by introducing costs caps in the areas of clinical negligence, personal

[100] The research will address the Civil Procedure Rules in more detail in later chapters particularly in chapter 6.

injury, mercantile and business litigation, and judicial review proceedings.[101] Those potential changes are presently on the back boiler rather than in the pipeline. It is important to consider the two jurisdictions not only for the purposes of historical comparison and development but also for the purpose of determining whether the costs follow the event rule will survive. The jurisdictions are not identical. They do, however, enjoy a very close relationship, perhaps, similar to first cousins who share the same grandparents on both family trees. Both jurisdictions share a common lineage, which neither jurisdiction shares with any other common law jurisdiction. Furthermore, the investigation will help answer the primary research question that asks *has the costs follow the event rule become a relic?* in order to prove the hypothesis that the rule is dead or on life support. *Ex-hypothesi* the prognosis for the rule looks bleak. It is more likely than not that the death of the rule may occur in either or both jurisdictions, incrementally, rather than as a result of one final decisive blow being administered. The principles applied by the courts in the jurisdictions of England and Wales, and Ireland are routinely cited in other jurisdictions that observe the Supreme Court of Judicature Act model. Their judicial reasoning carries great weight. While such precedents are not binding they nonetheless enjoy persuasive authority. The judgments on costs that are generated in England and Wales and Ireland produce a wave that washes up on the shores of other common law countries. The research resists engagement in economic analysis of the loser pays or American ("user pays") rules, or any derivative variants of either. There has been a plethora of studies on economic analysis since the early 1970s, which have generated academic papers.[102] The zenith of which was the doctoral dissertation authored by Professor Avery Katz[103] that led to the award of a doctoral degree from Harvard University. Katz infused his work which applied traditional *Theory of Games and Economic Behaviour,* with legal and economic analysis.[104] He examined *inter alia* the merits of the *cost follow the event* rule and the American rule in the context of litigation funding.[105] The confluence of both disciplines namely Economics and Law has become saturated with multidisciplinary studies.

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101 Rachel Rothwell, Law Society Gazette, 6 February 2017; *"Lord Justice Jackson takes to the road on fixed costs"*, the impact of fixed costs on property and chancery litigation.

102 William Landes *An Economic Analysis of the Courts*, Journal of Law and Economics, Vol 14 (1971) pp. 61-107; John Gould, *The Economics of Legal Conflicts, Journal of Legal Studies,* Vol. 2 (1973) pp. 279-300; Charles Plott, *Legal Fees: A Comparison of the American and English Rules,* Journal of Law, Economics, and Organisation, Vol 3, no. 2 (fall 1987), p 185 at 191, Yale University.

103 Avery Katz is Professor of Law at Columbia Law School and was formerly Assistant Professor of Law at the University of Michigan from 1987 to 1993 while also occupying the seat of Assistant Professor of Economics at the same University during the period from 1986 to 1993.

104 The the relative merits of the English and American rules for funding litigation and economic analysis of vexatious law suits.

105 Grace Shackman; *"Comings and goings"*, University of Michigan Law Schools's, Law Quadrangle Notes, Vol. 31, Iss. 01 (fall 1986) and 33 Law Quadrangle Notes 24 (fall 1988).

Any further research would fail to deliver an original contribution to the subject.

1.6 Research Philosophy

The methodological philosophy underpinning the thesis will be, as a matter of practicability, one of functional equivalence, with modifications. This will enable the research to transcend the legal discipline, in order to consider the effect of the *costs follow the event* rule across different jurisdictions, with local jurisdiction specific variants. The research investigation will utilise black-letter law from a traditional framework. The philosophy will be positivistic. It will capture, retrieve and collate material, commit results in writing, reach conclusions, provide qualitative critique, utilise deductive reasoning that will imbue the research with legal certainty, and it will make recommendations. It will adopt a comparative approach in seeking to bridge different jurisdictions. The scope will be limited to the jurisdictions of England and Wales and Ireland, and those that observe the Judicature Act model and the United States of America. The thesis will also benefit from a Theoretical Overview which considers legal positivism.

1.7 Overview of Dissertation Framework

Chapter 2 will examine the general loser pays rule in civil litigation and it will analyse the historical origins and reasoning, for this rule, in the jurisdictions of Ireland and England and Wales. The bonds of strong filial connections tie these jurisdictions. It will exclude administrative mechanisms for the validation of decisions by the bureaucracy. The reasoning for their exclusion is based on the fact that these are statutory based schemes, and so, they fall outside of the scope of the research. Those special courts, tribunals and systems operate deviations from the normal principle.[106] The methodology will consider not only the *costs*

[106] *Ibid*, Pfennigstorf, p 2, " there is a bewildering variety of special courts, special jurisdictions, and special procedural rules: for various types of administrative law disputes, especially for those relating to social security law and taxation; for maritime matters; for patent, copyright, and other industrial property matters; and, most recently, for various types of consumer transactions. That those special systems also include variations from the general rule on cost allocation should not come as a surprise."

follow the event rule but also the American rule, and the merits and weaknesses of both, with commentaries from England and Wales, Ireland, and the United States, and other sources. The research will address whether the factors posited in favour of the cost-shifting model are valid ones and whether the rule ought to be retained.[107] The origins of the rule flow from the Statute of Gloucester that gave some plaintiffs a right to legal costs in some identifiable real property actions. The loser pays rule was incrementally extended until it became the general rule in all litigation subject to some exceptions.[108] The second chapter will, furthermore address why a different rule emerged in the United States. In so doing it will reflect upon the rationale for and the characteristics of the American rule. It will consider the numerous exceptions, by way of comparative study through a prism of pragmatic functionalism. The thesis intends to adopt an explanatory position by identifying and examining the 'costs follow the event' rule. It will further consider where there has been divergence, or convergence (for example where the harsh application of the rule has been diluted to strengthen access to justice), with a view to achieving optimum legal, societal, business or commercial solutions.

Chapter 3 will consider the circumstances where the courts have displaced the 'costs follow the event' rule (often due to conduct or behaviour). To this end the chapter will consider the rules in *Ritter v Godfrey*[109] where successful defendants may be admonished for precipitating litigation, and the wasted costs jurisdiction, which enables the courts to punish legal practitioners, when certain conditions are satisfied. The third chapter will moreover, consider the different types of actions where the courts have made such awards, which include Irish Constitutional law challenges which raise sensitive issues which impact on the human condition. The research will in chapter 3, pose a discrete subsidiary question, which asks, *in the context of Irish Constitutional Law actions – are we turning losers in to winners?* This question is important owing to increasing predilection on the part of the Irish courts, to make a partial or even a full award of costs in favour of the losing party, thus creating a form of unique *winner pays* approach. This is particularly so in constitutional law actions where the suit falls within readily identifiable categories. Such costs awards undoubtedly informs the motivational calculus of lawyers advising prospective litigants. The research will render it possible to engage in a pre-emptive risk analysis with a view to predicting with accuracy, based on a qualitative analysis of case characteristics, the likely costs orders that the court

107 Lord Woolf, Access to Justice (1995), (interim report to the Lord Chancellor on the civil justice system in England and Wales), p 204.
108 *Ibid*, Woodroffe, p 345.
109 *Ritter v Godfrey* [1920] KB 47.

will render in favour of losing parties. It will answer the question after conducting a detailed analysis of actions were unsuccessful parties received a full or partial award of costs. The fourth chapter will address the disparate factors which influence the courts in England and Wales and Ireland to depart from the costs follow the event rule in complex civil litigation, and it will consider the factual matrices where the courts have departed from the rule, and examine the developing jurisprudence, with particular emphasis on complex commercial litigation. It will examine the Superior Courts Rules in Ireland, which incorporate the costs follow the event principle. Again the chapter will consider jurisprudence emanating from England and Wales and Ireland where the courts have exercised their statutory powers by punishing parties for failing to participate in alternative dispute resolution. The research will consider public policy considerations and judicial reasoning for punishing successful parties.

Chapter 4 engages with two inter related subsidiary questions. They ask is *it equitable that a party which enjoyed many discrete victories, but ultimately lost, should pay all the winners costs?*, and, *is it equitable that a party which lost many discrete applications, but which ultimately prevailed, should receive a full award of costs?* These questions take on an added significance owing to the increasing complexity of modern civil litigation which is characterised by the proliferation of interlocutory applications and by a discovery process that can be both costly and oppressive. The chapter will consider the developing jurisprudence in England and Wales, and Ireland where the courts display a willingness to consider whether the result of the litigation as a whole might not properly provide the sole basis for the award of costs. Given the complexity of modern litigation, which gives rise to myriad discrete hearings, the circumstances where a party, may win many battles, but lose the war are protean. This chapter will address whether there is an automatic rule requiring reduction of a successful party's costs if that party loses on one or more issues. In commercial litigation where each party asserts that a balance is owed in its favour, the party that ends up receiving payment should generally be characterised as the overall winner. In complex litigation an atypical winning party is likely to fail, on one or more of the issues. The chapter will address the salient considerations for determining the identity of the winner.

Chapter 5 will address legal costs principles in litigation motivated by public interest and environmental protection, including the review procedure enunciated by the Aarhus convention, which provides that costs must not be "prohibitively expensive." It will also consider the special costs rule which is legislated for in the Environment (Miscellaneous

Provisions) Act, 2011. In Ireland, that legislation displaces the loser pays rule, which is the traditional default setting, by introducing a special rule that each party should bear their own legal costs. This effectively imports the American rule in to Irish law. The research investigation will also consider emerging case law on the protective costs jurisdiction, and it will evaluate the salient jurisprudence generated by the courts in Ireland and England and Wales. It will examine the protective costs jurisdiction, as originally developed, by the English courts, and determine whether the Irish courts have tapped in to this stream of jurisprudence or whether they have created a form of synthetic protective costs jurisdiction.

Chapter 6 will address the impact of the Legal Services Regulation Act, 2015, which was introduced in Ireland. It contains provisions that are almost identical to those provisions that are contained in the Civil Procedure Rules, in England and Wales. The 2015 legislation puts the costs follow the event rule on a statutory footing, with certain modifications. This chapter will address whether the costs follow the rule has been rendered moribund, in England and Wales, by the introduction of the Civil Procedure rules, as the courts are duty bound to consider all of the circumstances of the case, including the conduct of the parties, before determining liability on costs. The methodological approach used for this chapter will be to consider the relevant provisions of the new legislation. It will do so by undertaking an exposition of the black letter law, and consider the impact, if any, which the legislation has had. It does so by evaluating the emerging case law and considering commentary. The research will engage in qualitative comparative consideration. It will employ a methodology of contrasting judicial developments in England and Wales with those in Ireland for the purpose of critically investigating whether the Irish courts are set to follow the example of their English brethren by readily departing from the loser pays rule. Both the Civil Procedure Rules and also the Legal Services Regulation Act, 2015 mandate the courts to consider all of the circumstances of the case, including the *conduct of the parties.*[110] This embraces conduct before, as well as during the proceedings, and whether it was reasonable for a party to raise, pursue or contest a particular point. It includes circumstances where a prevailing party has exaggerated.[111] The research investigation will consider any judicial dissonance between England and Wales and Ireland for the purpose of identifying whether the courts in the latter jurisdiction follow the path of their brethren in former, and whether English jurisprudence has

[110] CPR, r. 44.3.5; r 44.3.5 (a) "conduct before, as well as during, the proceedings."

[111] CPR, r. 44.3.5 (d); *Molloy v Shell UK Ltd* [2001] EWCA Civ 1272, the court ordered the successful claimant to pay 100% of the defendants legal costs after he exaggerated his claim and grossly deceived doctors.

been applied by the Irish courts.[112] While the provisions of the 2015 legislation differ from those contained in the CPR, they are nonetheless similar in their objectives. Moreover the wording of the Act while not identical is strikingly similar. To this end, they can be viewed through the prism of functional equivalence. Chapter 6 is, well poised, to monitor jurisprudential developments in Ireland, and it is likely to be contemporary and insightful.

1.8 Original Contribution to Knowledge

The Research Proposal originality report disclosed a one per cent similarity with published works. The research examines not only the origins and rationale(s) underpinning the *costs follow the event rule* but also the American rule. It analyses the ubiquitous expansion and acceleration of the multitude of exceptions to both rules. It chronicles how the latter rule has infiltrated the jurisdictions of England and Wales and Ireland, with particular vigour, in the context of public interest litigation and environmental litigation. The research investigation juxtaposes the two dominant costs rules of the common law world that have their genesis on either side of the Atlantic Ocean. While the titular primary research question asks *has the costs follow the event rule become a relic?*, the subsidiary research questions (in chapters 3, 4, and 7) are unique, novel, topical, and global. The answers to those questions render an original contribution to knowledge through comparative research with an international outlook. The work provides a repository of study on the *Law of Costs* in Ireland. The investigation (and methodology) offers a solid template for any prospective doctoral student contemplating comparative study predicated on functional equivalence. The thesis examines the genesis and development of the loser pays rule in Ireland and England and Wales, including the exceptions, in a descriptive fashion. It also chronicles the development of the American rule, in the same manner, and it considers the development of the loser pays rule in the United States. Chapter 6 delivers a contemporary examination of the operative costs rules in the Legal Services Regulation Act, 2015 in Ireland. The research arises against the backdrop of a conspicuous absence of publication on the *costs follow the event rule* in Ireland

[112] *Painting v University of Oxford* [2005] EWCA Civ 61; *Molloy v Shell UK Ltd* [2001] ADR. L.R. 07/06, [18] (Laws LJ), the Court of Appeal ordered the claimant to pay one hundred percent of the defendant's legal costs after he exaggerated his claim and deceived the medical profession; *Ibid,* Alcock, *Costs follow the event v Costs to follow event,* paper, 17 December 2014.

where the subject has an adjectival character. The jurisdiction of England and Wales is well catered for by a number of eminent works. They include *Cook On Costs*[113] and *Friston on Costs*,[114] the latter of which is peerless. The research investigation renders a flag ship original contribution to knowledge on the subject in Ireland. This is achieved through the comparative nature of the original research. Additionally, the forensic specificity of the investigation is underscored by the punctilious examination of the pernickety rules. The thesis which contains in excess of one thousand five hundred foot notes, also fills the paucity of comparative knowledge in the subject area. The study gives the thesis a global perspective, which transcends the Irish jurisdiction. The research seeks to address a prominent vacancy in Ireland by rendering a thesis that is amenable for reduction in to a practitioner- friendly format. There is no such text book on the subject in Ireland, and any publication would be the first since John Hullock's publication in 1792, almost a quarter of a millennia ago. The thesis is ripe to exploit the prominent gap in Ireland. It and any accompanying practitioner format will be at the vanguard of legal knowledge and expertise. The thesis will be synonymous with the subject area and it will benefit from copyright protection.[115] The thesis will render a body of scholarly work, with an international dimension, which extends beyond legal research.

The research identified a neglected subject that was ripe for doctoral investigation. From the outset, the research investigation focused on delivering a substantive body of work with a view to rendering an original contribution to knowledge. It has taken the opportunity to accelerate the work while at the same time resisting the distractions and temptations associated with achieving publications of articles in learned legal journals. The research produced an abundance of materials. There exists a market for delivering professional services including, tailored advice, training and education on discrete topical areas including, but not limited to, solicitor client disputes, bespoke drafting letters/notices, complex multi-party litigation, costs in insolvency, environmental and public interest litigation, Legal Services Regulation Act, compliance, cost auditing, indemnity costs, costs in alternative dispute resolution and mediation, party and party disputes, probate and estate litigation, settlement strategies, and practice and procedure. The delivery of such services would require appropriate levels of professional indemnity insurance coverage. The thesis resists undertaking any economic analysis of the loser pays or American ("user pays") rules. There

113 *Cook on Costs*, 2019, Simon Middleton and Jason Rowky, Lexis Nexis.
114 Mark Friston, *Friston on Costs*, Oxford University Press, 2018.
115 Copyright and Related Rights Act, 2000.

have been a plethora of multidisciplinary studies that have cross-cut the disciplines of law and economics since the early 1970s.[116] The high point, if not the zenith of which, was the doctoral dissertation authored by Professor Avery Katz,[117] which resulted in the award of a doctoral degree from Harvard University. Katz had recourse to legal and economic analysis to study *inter alia* the merits of both the cost *follow the event* and American rules.[118] The interface of Law and Economics has become saturated with academic studies, to the extent that any further analysis would fail to render an original contribution to knowledge in either discipline. It would simply be rotovating over established legal and economic theory and orthodoxy.

[116] William Landes *An Economic Analysis of the Courts*, Journal of Law and Economics, Vol 14 (1971) pp. 61-107; John Gould, *The Economics of Legal Conflicts, Journal of Legal Studies,* Vol. 2 (1973) pp. 279-300; Richard Posner, An Economic Approach to Legal Procedure and Judicial Administration, Journal of Legal Studies, Vol. 2 (1973) pp. 399-458; Charles Plott, *Legal Fees: A Comparison of the American and English Rules,* Journal of Law, Economics, and Organisation, Vol 3, no. 2 (fall 1987), p 185 at 191, Yale University.

[117] Avery Katz is Professor of Law at Columbia Law School.

[118] Grace Shackman; "Comings and goings", University of Michigan Law Schools's, Law Quadrangle Notes, Vol. 31, Iss. 01 (fall 1986) and 33 Law Quadrangle Notes 24 (fall 1988).

1.9 Limitations of Study/Reflexivity

The thesis transmits knowledge on the *costs follow the event* rule, with forensic megascopic focus on Ireland. It delivers critical thinking and real world insights. It is imbued with experiential and contextual knowledge, with comparative analysis up to and including the Legal Services Regulation Act, which was introduced in Ireland, in 2015. The investigation is loyal to, in conformity with, and builds on the original research proposal. The research investigation covers many disparate areas including Roman law, Common Law and Equity, party and party costs, indemnity costs, the American ("user pays") rule, exceptions, the exercise of equitable discretion, the conduct of the parties, disentitling behaviour, Irish Constitutional Law actions and costs in complex litigation. The analysis of complex litigation includes evaluating the "final low of money", "impression and evaluation" and "something of value" tests. The thesis also considers public interest and environment litigation and protective costs orders. The report underpinning the application seeking "Upgrade or Confirmation of Registration from MPhil to PhD",[119] submitted for the plenary hearing in April 2017, was cognisant of the challenges and problems presented by the research in maintaining the appropriate level of discipline, and focus, to ensure that it remained on track. The thesis adheres rigidly to the original Research Proposal Form with little deviation. The report, which was submitted in contemplation of the confirmation of candidature hearing, commented that the research resisted the temptation to deviate in to interesting areas of study, many of which have suffered from neglect. These niche areas include litigation funding, Litigants in Person,[120] *McKenzie friends*,[121] costs in moot cases,[122] the architecture of low costs court/tribunals, and costs capping. The report contemplated that deviation in to such areas would potentially, compromise the research timetable.[123] The thesis elected to afford some limited attention to the doctrine of mootness[124]and the wasted costs jurisdiction. Ignoring them could undermine the work. The research did not, but the thesis does discount,

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119 Regulation 6.12, Anglia Ruskin Research Degree Regulations, 17th edition, September 2016.

120 *London Scottish Society v Chorley* [1884] 12 QBD 452; *Re Coffey* [2013] IESC 11; *ACC Bank plc v Kelly* [2011] IEHC 7.

121 *Ex p Graves (*1891) 8 W.N. (N.S.W) 44; *McKenzie v McKenzie* [1970] 1 P. 33; *O'Toole v Scott & Anor.,* [1965] 2 WLR 1160; *R v Secretary of State for the Home Department, ex p Tarrant;* R *v Wormwood Scrubs Prison Board of Visitors, ex p Anderson* [1984] 1 All ER 799; *Tougher v Toughers's Oil Distributors Limited* [2014] IEHC 254.

122 The *Doctrine of Mootness* chapter 2.

123 Report re: Application seeking Upgrade or Confirmation of Registration from MPhil to PhD, submitted 31 March 2017, p 10.

124 "I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way" ; *Sun Life Assurance Company of Canada v Jervis* [1944] AC, 111, 113.

discrete topics such as late amendments to pleadings, discontinuance of proceedings,[125] third party and non-party costs, champerty and maintenance, no win no fee contracts, and security for costs. Finally, new legislation, rules, statutory instruments, and case law, carry with them the inherent risk that they will supersede any published work. Therefore, the thesis like any publication is vulnerable to the effluxion of time.

1.10 Theoretical Overview

Herbert Hart one of the most high profile proponents of legal positivism in the Anglo English form of legal theory[126] advocated for compensatory justice stemming from the tradition in the law of torts. Hart, who was influenced by the English philosopher Austin,[127] adumbrated a more complex version of positive legal positivism predicated on an established bedrock of primary and secondary rules.[128] He favoured inclusive or incorporationist positivism which recognised morality. This is in contrast to the more restricted forms of legal positivism, which exclude it. Dworkinian liberal theory was critical of the ruling theory of legal positivism, which operates on two limbs. Firstly, the requirement for primary and secondary rules[129] and secondly how they ought to be applied. Instead, Dworkin advanced a theory of adjudication not inconsistent with legal positivism, which draws from many legal theories. While Dworkin attracted many detractors,[130] he remained critical of contemporary positivism, with its principles and policies.[131] Such positivism is vulnerable to accusations of vulgar realism. Rawl's *Theory of Justice*[132] views social justice as fairness variant of the social contract.[133] It recognises that many things are unjust - not only laws, but also decisions. Rawls retains the

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125 *J.T. Stratford Limited v Lindley* [1969] 1 WLR 1547; *Walker v Walker* [2005] EWCA Civ 247; *Shell E& P Ireland Ltd v McGrath* [2007] IECH 144; *Australian Security Commission v Aust – Homes Investments Limited* (1993) FCR 194.

126 H.L.A Hart, The *Concept of Law*: Clarendon Law Series, Oxford University Press, 1961.

127 John Austin, *The Provinence of Jurisprudence Determined* (1832); Herbert L.A Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Oxford Clarendon Press, 1982.

128 *Ibid*, H.L.A Hart, p 32.

129 Ronald Dworkin, "*Is Law a System of Rules?"* The Philosophy of Law, 52 (ed 1977) The University of Chicago and Encyclopaedia Britannia.

130 Norman E. Bowie, reviews *"Taking Rights Seriously"*, Catholic University Law Review, vol 26, issue 4, summer1977, p 908, Bowie concludes that "*Taking Rights Seriously* does not take rights seriously enough," p 923.

131 Ronald Dworkin, *"Taking Rights Seriously"*, Harvard University Press, 1977, Cambridge Massachusetts, p 22.

132 John Rawls, *Theory of Justice*: (1971) Revised Edition (November 1990), Harvard University Press, John Rawls "*A Theory of Justice*", 40 U. Chl. L. Rev. 500 (1973).

133 *Ibid*, Rawls, *Theory of Justic*e, (November 1990), p 6.

idea of the social contract previously espoused by Locke, Rousseau and Hobbes, under the overarching canopy of political liberalism. In an organised society there are secure protections and welfare. Typically there are rules to regulate the citizen and the state. The individual citizen possesses or holds a contract with society.[134] One prominent area of exclusion from the loser pays rule arises in the context of Social Security and Social Welfare Appeals Tribunals. In these forums the ordinary costs rules are suspended. This appears to appease the Rawlsian view of the social contract, which recognises justice and fairness.[135] Dworkin also recognised equal treatment as a fundamental natural right. The American rule for legal costs allocation is underpinned by a sound philosophy of enabling parties to litigate without the spectre of adverse fees. It is progressive as it enables the small man to stand up to the large corporation. One prominent characteristic of civil justice in the United States is the prevalence of jury actions.[136] They tend to produce decisions which often fail to uphold precedent, and which are furthermore, inexplicable. In England, Wales and Ireland a judge who makes a determination based on the law, facts and evidence oversees most cases. The outcomes produce clearly discernible patterns. The judiciary are bound by precedent, both in terms of assessing liability, and in terms of the *quantum* of damages, and costs. Proponents of the "costs follow the event" rule in the United States suggest that it represents some kind of bulwark against the explosion of litigation,[137] where the prevailing party is indemnified. The Ecclesiastical courts viewed costs as a form of deterrence. The concept of judicial discretion, which is sometimes characterised as a doughnut with a hollow centre,[138] became a theatre of conflict between proponents of positivism and Dworkin. The phenomena of discretion proved to be one of the greatest flash points between Hart and Dworkin. The latter had an aversion to the simplistic notions of rules, principles and policies,[139] with their primary and secondary rules.[140] Hart contended that discretion[141] is a special mode of constrained decision-making

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134 John Rawls Theory of Justice: (1971) Revised Edition (November 1990), Harvard University Press, p 10.

135 *Ibid*, Dworkin, *"Taking Rights Seriously"*, chapter 1, Bloomsbury Revelations, reprint (1977) 2013.

136 Civil juries (which are common in the United States) often award costs indirectly by including them in the award of damages, Manitoba Law Reform Commission – *Costs award in Civil Litigation Repor*t #1 September 2015, p 23.

137 Calvin Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 Iowa L. Rev. 75 (1963); William Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U.Colo.L.Rev. 202 (1966); Gerald McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services,* 40 Ford.L.Rev. 761 (1972); Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Studies p 399, 437-438 (1973).

138 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56, U. CHI. L. Rev 1175, 1178-80 (1989); one option is for judges to make rules in order to circumscribe the discretion.

139 Ronald Dworkin, *The Model of Rules,* University of Chicago Law Review, vol 35, "Rules, Principles and Policies" (1967), p 14 at 22.

140 *Ibid,* H.L.A Hart, p 89-96.

that inhabits a tier between arbitrary choice[142] and determinate rules. This he suggested is consistent with the *rule of law*. The Dworkian doughnut analogy offers, no small opportunity, for a comparator with the loser pays rule. The central hole represents judicial discretion. It has expanded immeasurably in recent decades, and no less so, in cases which engage with misconduct and behaviour, the *locus classicus* being *Antonelli v Allen*. In that case the court elected to punish the otherwise successful parties. The exercise of such judicial discretion, as it becomes more expansive, exerts a pressure on the internal circumference of the doughnut. Separately the external exceptions, which typically manifest in the realm of family law, contentious probate, and access to justice, have also witnessed more than incremental expansion, which exert an additional though separate pressure on the external circumference. The expansion of both the internal (discretionary) and the external (exceptions) pressures has altered the anatomy of the loser pays rule. The physical appearance now assumes the form of a pneumatic tube structure. These external exceptions and the internal (discretionary) pressures will be analysed in more detail in chapters 2 and 3. Hart postulated that there is a certain level of discretion within the law of damages. While he never analysed costs, that view point could apply by extension to the exercise of discretion, in relation to legal costs.

Dworkin countenanced the notion of weak discretion where the courts are afforded flexibility to determine, for example the level of rates on property. He was riled by the notion of hard discretion, which operates akin to judicial legislation.[143] It often manifests where judges attempt to reconcile ambiguities, in, or between statutes.[144] Dworkin asserted that discretion was comparable to the hole in a doughnut, which is entirely surrounded by a restrictive belt.[145] The discretion should not be equated with judicial licence. Proponents of legal positivism assert that there are hard cases[146] when a mechanistic application of the rules is insufficient to deliver justice. Dworkin advanced the contrary view.[147] Pound posited that in

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141 H.L.A Hart, *Discretion*, Harvard Law Review, [2013] 652; H.L.A Hart, Law, *Liberty and Morality*, Oxford University Press, 1963.

142 Kenneth Culp Davis, *Discretionary Justice;* A Preliminary Inquiry, Case Western Reserve Law Review, vol 21 Issue 1 (1969) Praeger (August 22, 1980); Discretion is a form of arbitrariness which can be equated to *reductio ad absurdem.*

143 *Ibid*, Dworkin, *"Taking Rights Seriously"*, Harvard University Press, 1977, pp. 80-81.

144 Ronald Dworkin, *Judicial Discretion:* The Journal of Philosophy. Vol 60 No.21, American Philosophical Association, Eastern Division Sixteenth Annual Meeting, 10th October, 1963 pp. 624-638; Jeffrie Murphy and Jules Coleman, Philosophy of Law, *An Introduction to jurisprudence*, Westview Press, 1990, pp. 39-51.

145 Ronald Dworkin, *The Model of Rules*, University of Chicago Law Review, (1967) vol 35: p 14 at 32.

146 Ronald Dworkin, *Hard Cases*, 88 Harv L. Rev 1057; J. Skelley Wright, Beyond Discretionary Justice, 81 Yale L.J. 575 (1972).

147 *Taking Rights Seriously*: Frederick Schauer and Walter Sinnott – Armstrong. Ed. The Philosophy of law: Classic and Contemporary Readings with Commentary, Harcourt Brace and Company, 1991, pp. 74-89.

order to gain confidence a careful limitation should be placed on the types of cases that can have recourse to discretion.[148] He recognised two categories of cases in which the need for judicial discretion comes to the fore. Firstly, there are those cases that are left to the personal discretion of the judge. Secondly then there are those cases where there are no structural guidelines in place to guide the decision.[149] Hart and Austin reinforced the part played by the judiciary in the exercise of judicial discretion. They took the view that the courts cannot postulate that there is an off the peg, one size fits all solutions. Hart asserted that in every legal system there is a large expanse that is left open to the exercise of discretion by the courts for the deliverance of vague standards for resolving statutory equivocations. This may also occur where the courts amplify rules that are adumbrated in a skeletal form in a parental statute.[150] Legislatures abdicated the issue of costs to the judiciary rather than introducing guidelines. The *Law of Costs* is adjectival but pervasive in nature. There is no proprietary right to costs and neither is there any Constitutional right nor a human right to costs. Dworkin contended that when legal positivism fails to find an answer for hard cases, the positivists scramble to find a solution, and the theory of judicial discretion is then invoked to find such a solution.[151] In *Jones v Coxeter*[152] Lord Hardwicke LJ. ordered that costs were to be paid to the plaintiff to enable her to continue with her suit. Her indigence would have precluded her from maintaining the proceedings. The ruling, which was entirely discretionary and not conformable to the rule of law, ensured that the equality of arms disparity between the parties did not preclude the action from proceeding. The outcome seems to satisfy both Hart and Dworkin views of equality, in that a person should not enjoy any less favourable an outcome simply on the basis of their social circumstances. In 1886, Lord Coleridge asserted that the discretion to award costs is not an arbitrary power but a discretionary one which must be exercised judicially and in accordance with legal principles, and not according to a hodgepodge or a jumble of factors.[153] Almost 110 years later Lord Lloyd asserted that in all cost related matters the golden rule is that there are no rules. The vexed issue of costs remains a matter of judicial discretion.[154] White J. who noted that it is inappropriate for the judiciary,

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148 Roscoe Pound, *Discretion, Dispensation and Mitigation:* The Problem of the Individual Special Case, 35 N.Y.U. L. Rev., 925 at 927 (1960); "Discretion … is an idea of morals, belonging to the twilight zone between law and morals."

149 *Ibid*, Pound, p 925 at 929-930.

150 *Ibid*, H.L.A Hart, *The Concept of Law*, pp. 132 – 133.

151 *Ibid*, Dworkin, *The Model of Rules,* p 14 at 45.

152 *Jones v Coxeter* (1742) Atk 40.

153 *Huxley v West London Extension Railway Company* [1886] 17 QBD 373, 376 (Lord Coleridge CJ).

154 *Bolton v Metropolitan District Council v Secretary of State for the Environment* [Practice Note] [1995] 1 WLR 1176, 1178 F, "in all questions to do with costs, the fundamental rule is that there are no rules. Costs are

absent legislation, to reallocate cost burdens, exemplifies the prevailing view in the United States.[155] In "Taking Rights Seriously," Dworkin carefully selected *Riggs v Palmer*,[156] to undermine legal positivism. The defendant, a sixteen-year-old youth, who was the main beneficiary under the terms of his grandfather's will, became aware that his ancestor was minded to alter its terms, and he poisoned him. There was no subsisting federal or state law or statute that invalidated the youth's claim to the estate. Earl J. observed that under the civil law, which evolved from the general principles of natural law and justice, a person could not benefit from an inheritance, after murdering an ancestor. Employing a social purposive rule of statutory interpretation,[157] Earl J. decided that all contracts are amenable to control by the activation of the fundamental maxims of common law. The learned judge also had recourse to the code Napoleon and Roman law[158] in order to underpin his theory. Earl J. found solace in the case of *New York Mutual Life Insurance Company v Armstrong* where a person unrelated to the deceased was known to have taken out a policy of life assurance contingent on the death of the insured deceased person. The beneficiary under the policy was later identified as having assaulted and killed the deceased and the contract of insurance was not surprisingly vitiated. Equally, the laws of countries that followed the civil code or Roman law would disentitle any party to benefit from such illegality, unlawful killing, or wrongdoing. In *Riggs v Palmer* the defendant was deprived of any interest in the will arising from the unlawful killing. The outcome in the case engaged with morality and incorporationist positivism. The case offered Dworkin the perfect launch pad to advance his own theories. The result produced a satisfactory outcome, from a practical and legal perspective, in so far as it adheres to the most basic principle of all, namely that no man should benefit from his crimes. It bolsters the view that judicial practice is predicated on the principles of legal theory. In *Riggs v Palmer* the court ordered that the testator's two daughters should recover that portion of their father's estate that had been bequeathed to his murderous grandson. As a further boon they also received an award for their legal costs. The outcome produced the perfect weapon for Dworkin to undermine legal positivism. The court in the exercise of its discretion, was vulnerable to the accusation that it had engaged in a form of judicial legislation, when it

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always in the discretion of the court, and a practice, however widespread and long standing, must never be allowed to harden in to a rule."

155 *Alyeska Pipeline Svc. Co v Wilderness Society* 421 U.S. 240 (II) (1975).

156 *Riggs v Palmer* (1889) 115 N.Y. 506, Court of Appeals N.Y., (Gray J dissenting).

157 Earl J. citing *New York Mutual Life Insurance Company v Armstrong* (117 U.S. 591) (6 S. Ct. 877, 29 L. Ed. 997) (1886); " No one shall be permitted to profit from his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."

158 Domat, part 2, book 1, tit. 1, § 3; Code Napoleon, § 727; Mackeldy's Roman Law, 530, 550; in the Civil Code of Lower Canada the provisions in the Code Napoleon have been substantially followed.

appeared to formulate a rule where none existed at common law.

1.11 Access to Justice

There are few people who have encountered the expression *justice is open to all – like the Ritz Hotel*,[159] without seeking to analyse the old adage more forensically. In an ideal world the courts like a properly functioning public health service should be open and accessible to all citizenry, free of cost. Even if it were economically possible to devise a model which could make justice accessible this would still leave one major barrier, namely the legal profession. It is the objective of the legal profession to generate income, preferably through the billable hour's model. The capacity to access both legal and ancillary services can be the most salient factor for determining whether the citizenry have access to the courts. The cost of accessing such services will, for many litigants, not only determine the cost of accessing justice but it will impact on the equality of arms argument.[160] In some respects, Access to Justice is analogous to the third Matryoshka doll that fits in to second namely the administration of justice. The loser pays rule can be viewed as the fourth (and smallest) doll. The punitive burden of costs arises from a confluence of complex factors including the conduct of the protagonists in litigation. It also stems from the business practices of the legal profession, micro economic factors, the legal and systems frameworks governing the conduct of litigation, the methodological approaches adopted by courts and cultural considerations.[161]

In *Ryanair Limited v The Revenue Commissioners*, Barrett J. sitting in the High Court in Ireland, identified the impact of the loser pays rule. He observed that the approach for allocating legal costs serves several different interests. It endorses the validity of the prevailing party's position. This in turn propagates a sense of legal and cultural fairness. The default disposition is compensatory because it seeks to make the victorious party whole again. The rule also notionally curtails any appetite or exuberance for excessive litigation. Kritzer, Donahue, and Synder and Hughes observed that the rule has the propensity to

159 "In England, Justice Is Open to All – Like The Ritz Hotel"; quote often attributed to an Irish Judge, Sir James Matthew, (1830-1908) [as cited in the speech of Denham J., 27 September 2005, at the launch of Law Reform Commission Report on Multi-Party Litigation, (LRC 76/2005)].

160 Victorian Law Reform Commission; *"The Cost of Access to Courts"*, paper for presentation at conference on "Confidence *in the Courts"*, 9-11 February 2007, Peter Cashman, p 3.

161 *Ibid*, 4.

produce expeditious settlements. In this way, it is likely to produce efficient litigation,[162] if it exists. The loser pays rule has spawned its own difficulties.[163] The vanquished party's decision to maintain proceedings may be viewed as morally or legally blameworthy. In reality such a party may have been justified in prosecuting a strong but ultimately unsuccessful claim or counter claim.[164] There are no shortages of potential litigants who have been warned of the hazards of embarking on litigation. They are comparable to sea going vessels that have been warned about submerged obstacles along a treacherous coastline. The litigation process can be unpredictable owing to the uncertainties concomitant to providing a definitive costs forecast. Even litigation that at first glance appears to be routine can harbour the potential to bring indigence to the well heeled. It is common case that a cigarette box openly advertises that smoking can kill you. The terms of a solicitor's retainer should convey a similar warning that litigation can cost you. The litigation process seldom produces any clear-cut winners. The victory may be purely transient and pyrrhic. The optimal advice of *caveat litigator* always pertains.[165]

The Bach Commission[166] observed that cuts to civil legal aid have created a two-tier justice system where the impecunious can neither access justice in the form of representation nor advice. The Commission that included Sir Henry Brooke, a former Appeal Court judge, in England and Wales, recommended: that minimum standards of access to justice ought to be observed through a "Right to Justice Act." The legislation could codify existing rights through the creation of a legal framework. It could also create a right to receive reasonable legal assistance without the spectre of costs shifting.[167] The high burden of costs is partly attributable to the methodology adopted by the courts and other disparate considerations.[168]

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162 *Ryanair Limited v The Revenue Commissioners* [2017] IEHC 262, 6 [4] (HC, 5 May 2017).

163 *Ibid;* the loser pays rule is not flawless as for "Most notably, the prospect of having to pay an opponent's legal expenses may unjustly deter litigants of modest or middling means from coming to court with claims/defences which, though *bona fide*, are not clear-cut, thus objectionably tilting accessibility to justice in favour of the well-to-do, as well as yielding a potential related distortion in the course of the law's evolution. It is too an approach that rests on what seems to be the fundamental fallacy that a loser's conduct in commencing or defending an action in court is necessarily blameworthy, as opposed to being often times simply mistaken. Still, regardless of the merits or de-merits of the notion that an entitlement to costs generally arises and, as a matter of principle, ought to arise on the part of the victor in court proceedings, the court accepts that that represents the essence of our law as to costs at this time."

164 *Ibid*, Rowe, *The Legal Theory of Attorney Fee Shifting*, p 655.

165 *Kagalovsky v Wilcox Ventures Limited* [2015] EWHC 1337 (QB) [42] (Turner J); citing *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905 [1] (Ward LJ).

166 The final report of the Bach Commission, September 2017, Fabian Policy Report, www.fabians.org.uk/access-to-justice-thebach-commission/ accessed 1 June 2018

167 *Ibid*, pp. 5-7.

168 *Ibid*, Victorian Law Reform Commission, p 4.

The contraction of legal aid prompted Lord Mishcon's quip that the indigent are covered by legal aid while the wealthy have the counsel of their bank manager. The general expanse of society, cannot afford to entertain the notion of entering the gates of the court, let alone the lobby of the Savoy Hotel.[169] Lord Woolf, after careful analysis, elected to retain the loser pays concept when he averred that when all of the factors were weighed in the balance, those in favour of preserving it were valid.[170]

1.12 Conclusion

Chapter 1 introduces the *loser pays* and American ("user pays") rules. It elucidates the primary Research Investigation Question and the four subsidiary ones. It addresses the *Importance* and *Relevance* of the investigation and establishes the detailed *Methodological Foundation* for the research at paragraphs 1.2, 1.3 and 1.4. It identifies the template for undertaking comparative study that employs a qualitative methodology. The study resists wider engagement in quantitative analysis, whilst using black letter law from a traditional framework. It provides a detailed Overview of the Dissertation Framework, which identifies the contents of chapters' two to seven. It also addresses the *Original Contribution to Knowledge* and *Limitations of Study/Reflexivity*. The research is contextualised under the umbrella of a Theoretical Overview at 1.10 which is viewed through the prism of legal positivism and theory. The Theoretical Overview emphasises the notion of judicial discretion that pervades the thesis. The chapter concludes by examining the theme of access to justice, which neither forms part of the methodological foundation nor the Theoretical Overview, but which nonetheless provides a pervasive omnipresent backdrop.

169 "The poor man is covered by legal aid; the wealthy man has his bank balance and bank manager. All of us who stand between find that our legal system is so expensive in practice that we cannot enter the gates of the courts let alone the doorways of the Savoy Hotel"; Lord Mischon (H.L at col 1558).

170 Lord Woolf, *Access to Justice*, (1995) (Interim report to the Lord Chancellor on the civil justice system in England and Wales) p 204.

CHAPTER 2

2.1 Costs follow the event

The general rule observed in civil litigation, in those common law jurisdictions that embrace the Supreme Court of Judicature machinery, is that "costs follow the event." This is to say that the costs of the successful party are paid for by the unsuccessful one. The requirement or obligation to pay another party's costs may arise in a number of ways. The most common of which are on foot of court order, an arbitral award, or by an agreement brokered, between the parties. Kritzer, who opposes the rule on the basis that it will increase costs, accepts that expenditure in litigation is mostly provocative and reactionary. In any event, efforts in litigation are largely determined by the actions of the other party. The decision by one protagonist with regard to investment levels will necessitate a response from the other.[171] This chapter will examine the historical origins and rationale for the 'loser pays' rule in England and Wales and Ireland, which is pervasive throughout the common law world. It is notably applied in Canada where it is known as the *world rule*,[172] in Australia,[173] and in Caribbean common law jurisdictions.[174] Though the rule has been described as a rule of law, the judiciary generally exhibit an increasing propensity to dilute or even displace it entirely, for myriad reasons. Many of these reasons flow from century's old juridical authority while

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171 Herbert Kritzer, *Risks, Reputations, and Rewards: Contingent fees Legal Practitioner in the United States*, 39 tbl. 24 (2004), pp. 17-18.

172 "All Canadian jurisdictions follow the 'world rule' that costs in principle are 'in the cause'. The loser pays, subject to the discretion of the Court"; Patrick Glenn and Peter M. Laing *Costs and Fees in Common Law Canada and Quebec*, Faculty of Law & Institute of Comparative Law, McGill University, p 1; Art. 477; CCP, Rule 57 (9) British Columbia Rules of Court ('Costs ... shall follow the event unless the court otherwise orders'); The Alberta Rules of Court Regulations 390/1968 (as amended by 124/2010), Rule 10.29 (1) provides " A successful party to an application, a proceeding, or an action is entitled to a cost's award against an unsuccessful party, and the unsuccessful party, must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to the Court's discretion"; *Lee v Horne*, 84 B.C.L.R (2nd) 341 (1993); In Quebec the loser pays very little as costs are kept low level ensuring Quebec aligns to the 'American rule' ; Patrick Glenn, *The Irrelevance of Costs Rules to Litigation Rates: Cost and Fee Allocation in Civil Procedure: A Comparative Study*, Springer (Mathias Riemann editor), p 99.

173 *Oshlack v Richmond River Council* (1998) 193 CLR 72 [67], [134]; *Boner v Anderson (No.2)* [1993] 50 IR 470, 475; *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358, 369-370. *Wentworth v Rogers (No.5)* (1986) 6 NSWLR 534; *Degman Pty Ltd (in Liq) v Wright (No.2)* [1983] 2 NSWLR 354; *Laguillo v Haden Engineering Pty Ltd* [1978] 1 NSWLR 306, 308; NSW Civil Procedure Handbook [r 42.1.50] – [r 42.1.150].

174 CPR (Jamaica): r. 64.6(1) provides: " if the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party"; Rule 63.5 of the Belize Supreme Court (Civil Procedure) Rules, 2005 affirms the common law rule; Rule 63.6 states the general rule (that costs should ordinarily follow the event, rule 63.6 (10), but also makes provision for the Court to make such orders as it thinks fit having regard to all the circumstances of a particular case (Rule 63.6 (2) to (6)).

others have emerged more recently. The rule is operative in the preponderance of jurisdictions outside of the United States.[175] It was embraced in Scotland as recently as the Victorian era, where according to Mackay the continental approach that permitted the vanquished party to elude paying costs by demonstrating a reasonable cause for the litigation, was observed. Scotland did not follow the Supreme Court of Judicature Act model. It elected however to embrace the loser pays rule, except where the prevailing party had engaged in improper conduct.[176] In *BUPA Ireland Ltd v The Health Insurance Authority*, Cooke J. sitting in the High Court in Ireland referred to the loser pays rule as the *primary rule*.[177] It is embedded in the subconscious of every litigator.[178] The financial ramifications of the rule are sufficient to induce a state of anaphylaxis[179] shock in the mind of any party contemplating litigation. This is no less so because costs include all the expenses of litigation which one party has to pay to the other. The term costs is employed in the cyclorama sense to encompass all costs associated with a case. The successful party is entitled to recover those costs that were necessarily incurred in order to obtain a successful outcome.[180] They must clearly be distinguished from fees, disbursements, and other outlays that are paid in to court.

2.1.1. The Event

In the phrase "costs follow the event" the word *event* refers to the outcome.[181] One party is the winner and the other is the loser. However, things are often not quite so straightforward. The successful party is ordinarily, the one to whom the final flow of money goes. However, such an assertion can be a vulgar over simplification. There are some cases where the determination of the event may be a matter which gives rise to some debate. In some complex cases, involving bundles of issues, the opposing parties may form equally legitimate views, from their respective stand points, that each of them has succeeded. From a certain stand

175 Walter Olsonard and David Bernstein, *Loser-Pays: Where next?*, 55 md. L. Rev 1161 (1996).

176 2 A.E. Mackay, *The Practice of the Court of Session* 528-529 (1879).

177 [2013] IEHC, 177, 179 (Cooke J).

178 Jonathon Wood; *Protection Against Adverse Costs Awards in International Arbitratio*n: Vol 74 (2008) pp. 139-147 at 141.

179 A form of exaggerated allergic reaction to a foreign protein or body caused by previous.

180 "Costs include all those expenses of litigation which one party has to pay to the other"; Arthur Goodhart, *Costs*, Yale Law Journal, Vol. XXXVIII, May, 1929 No.7, p 848.

181 The words "the event" refer to the result of the totality of the proceedings when taken as a whole. The "event" is the entire cycle of the litigation from genesis to conclusion. It can be considered distinctively so that it could be preferable to certain discrete issues or motions, or applications. The issue or application need not be germane when viewed as a whole, but it would embrace matters which are pivotal or dispositive, in determining the litigation; *Ngaya v Barclays Bank of Kenya* [2016] eKLR (HC, 8 February 2016) (Mativo J).

point, both parties can be taken to be successful if they finish roughly equal, in terms of the points which they have pleaded and canvassed.[182] Costs can be awarded to encourage or deter certain types of conduct.[183] The costs rules can be used to perform a winnowing function. The loser pays rule compels litigant to make careful assessments of the strengths and weaknesses of their case.[184] The philosophy of the loser pays rule is to compensate the winning party by making an award of costs in its favour rather than seeking to punish the losing party.[185]

The Supreme Court of Judicature (Ireland) Act 1877 provided that costs shall follow the event. Order 99 rules (3) and (4) of the Rules of the Superior Courts in Ireland observed the geomorphology of the expression follow the event.[186] The header of section 169 of the Legal Services Regulation Act, as enacted in Ireland in 2015, provides for *costs to follow event*. The absence of the word '*the*' could be seized upon as confirmation of the dilution of the costs follow the event rule. The removal strips the expression of a definite effect. It is substitute by a generalised expression, which alters its morphological structure. The words "the event" refer to the outcome of the case when viewed in totality. The expression ought to be constructed collectively. This is because it is open to being interpreted as creating the possibility of various *events*. The outcomes of these separate and discrete issues impact on the litigation cycle. An action may generate multiple discrete issues, the costs of any one of which may be awarded to the protagonist that prevails on that discrete issue. The issue need not be germane to the action, as a whole, but it should embrace matters or issues that are pivotal to determining the outcome, or extinguishing a claim, or securing a successful judgment. Section 169 of the Legal Services Regulation Act in Ireland, provides that the prevailing party is entitled to receive an award of costs against the unsuccessful party unless the court is minded to make a different order, when taking in to account the nature and circumstances of the case. Costs are an instrument by which courts can reward or sanction the conduct of the parties and costs considerations should guide litigants in terms of the choices that they elect, and the strategies they pursue.[187] In Ireland Order 99 of the Rules of

182 *Arklow Holdings v An Bord Pleanála* (2006) IEHC 240; *O'Mahony v O'Connor Builders* (2005) IEHC 49.

183 *Skidmore v Blackmore* (1995), 122 D.L.R. (4th), 2 B.C.L.R. (3d) 201 (CA) [28].

184 *Le Clair v Mibrella Inc*, 2011 BCSC 533; citing *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, Hall JA [15].

185 *Allplastics Engineering pty Ltd v Dornoch Ltd* [2006] NSWCA 33, 34.

186 Ord. 99 r. (4) provided that "The costs of every issue of fact or law raised upon a claim or counterclaim, shall unless otherwise directed, follow the event"; SI 584/2019 which came in to force on 3 December 2019 expunged Ord. 99 rr. (3) and (4).

187 *Karpodinis v Kantas*, 2006 BCCA 400 [4].

the Superior Courts has been amended[188] to enable the High and Supreme Court, to make an award of costs, when determining any interlocutory matter, except where it is not possible to adjudicate justly on the issue of costs having heard such an application.[189] In the Commercial Court, in Ireland[190] the initial directions hearing relating to matters being admitted in to that court list are treated as costs in the cause. The costs are awarded to the party that prevails at the trial, unless the court delivers a different order.

2.1.2 Interlocutory and discrete matters

In *Veolia Water U.K. Plc v Fingal County Council (No.2)*[191] Clarke J. sitting in the High Court in Ireland, contended that the courts ought to be prepared to address the costs of contentious interlocutory battles as a discrete event. The future Chief Justice of Ireland propounded that litigation has become more expensive. Consequently, more now revolves around the orders for costs that are made at the conclusion of the proceedings, or in relation to interlocutory matters.[192] In *Usk and District Residents Association v Environmental Protection Agency*[193] the Irish Supreme Court observed that the Commercial Court ought to lean in favour of making an order for costs for each interlocutory matter that may come before it, when such matters are determined. The parties should be encouraged to direct their minds to specific issues that arise at an interlocutory hearing. This should obviate any unnecessary disputes arising in relation to such applications. It is furthermore preferable that an order for costs should be rendered in respect of an interlocutory matter irrespective of which party may ultimately emerge as the conqueror in the overall proceedings. By necessary implication, a party that is unmeritorious in the overall action may nevertheless be correct in filing or resisting an interlocutory application.[194] Barrett J., also sitting in the High Court in Ireland, expounded[195] the principles for making an award of costs on an interlocutory application. He noted that in general the courts ought to make a determination on costs in interlocutory applications, though it may not always be apt to do so.[196] In *Haughey v*

188 RSC (Costs) 2008, SI 12/2008.
189 Ord. 99, r. 1 (4A).
190 SI 2/2004.
191 [2006] IEHC 240.
192 *Ibid*, 243.
193 [2006] IESC (HC 13 January 2006).
194 *Ibid*, 11-12; National Asset Management Agency, Act 2009, section 189 (1) provides for special costs rules for interlocutory applications involving the National Asset Management Agency.
195 *Glaxo Group Limited v Rowex* [2015] IEHC 467.
196 RSC, Ord. 99, r. 1 enables the court in the exercise of its discretion to make an order for costs, while,

Synnott[197] Laffoy J. asserted that the word 'shall'[198] requires the court to adjudicate on the costs in respect of such applications. She observed that it is permissible to reserve costs, only where it is impossible to justly determine the costs of the application.[199] Barrett J. cautioned against the temptations of deciding a costs application on the spot. He asserted that parties make a considerable financial investment in litigation, and as such, they are entitled to a considered and reasoned decision on costs. The same undiluted logic applies following an interlocutory award.[200] In some common law jurisdictions, the courts have power to make, or, reconsider orders for costs, at any time during the currency of the proceedings. More generally the costs will be dealt with at the conclusion of proceedings.[201] Sometimes the costs of interlocutory applications fall to be payable with immediate effect. The rationale for such immediacy is predicated on the notion that the court is required to determine the costs of the interlocutory matter instead of reserving them to the trial.[202] Nonetheless, the court retains a discretion to make or refuse an order for costs in interlocutory matters.[203] The judiciary in Australia display a propensity to award costs in respect of discrete, or separately identifiable controversies. Those discrete points will not however constitute discrete matters, if they are like any other interlocutory application.[204]

2.1.3 The Doctrine of Mootness

Difficulties emerge when there is no watershed *event*. This may arise where some change in circumstances occurs after the proceedings have commenced. This effectively renders the contest academic or moot. In some instances, the underlying cause of action becomes moot,

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sub-rule 1 (4A) provides that in determining any interlocutory application, the court, *shall* make an award of costs unless it is not possible to justly adjudicate upon the liability for costs on that application.

197 *Haughey v Synnott* [2012] IEHC 403.

198 RSC, Ord. 99, r. 1 (4A).

199 Cited Hillary Delaney and Declan McGrath, *Civil Procedure in the Superior Courts*, 3rd ed (2012), paras 23-28.

200 [2015] IEHC 467 [2].

201 UCPR 2005, r. 42.7 (2) (Aus) provide that the costs of any application in proceedings are not payable until the conclusion of the proceedings unless the court otherwise orders.

202 *Solarus Products v Vero Insurance (No 4)* [2013] NSWSC 1012; *Australia Securities and Investments Commission v Rich* (2003) NSWSC 97; enforcement is ordinarily activated at the conclusion of proceedings when more than one party may be the beneficiary of costs orders, so set off can then occur, as one instance of enforcement is preferable; *Richards v Kadian (No 2)* [2005] NSWCA 373 [7].

203 Hillary Delany & Declan McGrath, *Civil Procedure in the Superior Courts* (3rd Ed.) paras 23 – 42.

204 *Fiduciary Ltd v Mornington Research Pty Limited* [2002] NSWSC 432; (2002) 55 NSWLR 1 [11]; *Hamod v State of New South Wales* [2007] NSWSC 707 [5]; *Royal Australian Naval Reserve Rifle Club Inc v Rifle Association Inc* [2010] NSWSC 351, [19]; *Rinehart v Welker (No.3)* [2012] NSWCA 228 [21] (Bathurst CJ., Beazley JA and McColl JA concurring).

not necessarily by any direct agitation on the party of the parties. The mootness may simply be attributable to external events or circumstances. This presents practical and conceptual difficulties for allocating costs. This comes in to sharp focus where there is no apparent event which costs can follow.[205] The courts are loathe to entertain abstract, hypothetical or academic questions which are devoid of any live controversy. If proceedings become moot owing to some external factor, beyond the control of the parties, the judiciary will lean in favour of rendering no costs order. The position is different where the proceedings have become moot by reason of some action taken by one of the protagonists. The courts are more favourable to rendering a costs order in such circumstances. In *Ainsbury v Millington*[206] the House of Lords resolutely refused to entertain an appeal as by the time it came on for hearing the local authority had already determined the joint tenancy and relet the property to a third party. It would have been useless to make an order requiring the respondent to vacate the house to which he could not return. Lord Bridge asserted that it has always been a feature of the judicial system that the courts decide live disputes between the parties before them. They do not pronounce on abstract questions of law when there is no dispute to be resolved.[207] This general policy is enforced in moot cases unless the court exercises its discretion to depart from it. The discretion to determine a case where there is no longer a live controversy between the parties should be exercised with caution, as the courts have a dislike for purely academic or hypothetical appeals. The leading authority in Ireland is *Goold v Collins*[208] which draws heavily from the Supreme Court of Canada in *Borowski v Canada.*[209] The rule is grounded on judicial policy as is the residual discretion on the part of the courts determine an abstract point.[210] In *Irwin v Deasy* [211] the Supreme Court in Ireland held that the definition of the doctrine of mootness as advanced by Hardiman J. in *G v Collins*[212] is a useful starting point. Proceedings can be described as moot where there is no longer any extant legal issue in dispute between the parties. In *Irwin v Deasy* the court concurred with the rationale underlying the approach as set out in the leading Canadian decision,[213] and it held that an appeal is moot when a decision will not have the effect of resolving some live controversy

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205 RSC Ord. 99, r.1.

206 [1987] 1 All ER 929.

207 *Ibid*, 930-931.

208 [2004] IESC 38.

209 [1989] I S.C.R 342.

210 *O'Brien v The Personal Injuries Board (No.2)* [2007] 1 IR 328; *Irwin v. Deasy* [2010] IESC 35; *Okunade v Minister for Justice, Equality and Law Reform* [2013] 1 ILRM 1.

211 [2010] IESC 34 (SC, 14 May 2010).

212 [2005] 1 ILRM 1; citing *O'Brien v The Personal Injuries Assessment Board* (SC, 16 November 2006).

213 *Borowski v Canada (*1989) 1 S.C.R 342; cited with approval in *G v Collins* [2005] 1 ILRM 1 and *PV (A minor suing by his mother and next friend)* [2009] IEHC 321 [5.4] (Clarke J).

affecting or potentially affecting the rights or obligations of the parties. This general policy is observed in moot cases unless the court exercises its discretion to depart from it. Exceptions can and do arise where there is a question of exceptional public importance. The court will have to decide whether a vindicated claim or a supervening external event has precipitated settlement.

In *Garibov v Minister for Justice, Equality and Law Reform,*[214] the applicants sought leave to apply for judicial review seeking various reliefs including an order of certiorari quashing deportation notices. The solicitors for the applicants were informed that the deportation orders had been revoked and their clients had been granted temporary leave to remain. As a result, the applicants elected to withdraw their leave application, and they submitted that they should be awarded the costs of the proceedings, as they had succeeded in their claim. Herbert J. held that it was reasonable for the applicants to have sought leave to apply for judicial review and to have persisted in seeking relief, and in the special circumstances, he awarded them their costs. In *CA v The Minister for Justice* the applicant sought reliefs relative to obtaining permission to be in the state pending the outcome of her application for subsidiary protection and under a different regime for the processing of such applications. By the time the trial commenced no reliefs in respect of these matters were needed as a regime for subsidiary protection had been established. Permission had been granted for her to remain in the state pending the outcome of her application for subsidiary protection.[215] The court asserted that[216] the proper approach in determining the question of costs in cases which have become moot is outlined by Clarke J. The future Chief Justice of Ireland asserted that the court should, absent any significant countervailing factors, lean in favour of making no order, where the case has been rendered moot as a result of factors or occurrences which are outside of the parties' sphere of control.[217] Though he also asserted that the he did not wish to be overly prescriptive on the subject. There has to be a certain degree of flexibility.

In *Cunningham v President of the Circuit Court* the High Court in Ireland, referenced the approach taken in *Telefonica.*[218] where it was held that where there is an underlying change of circumstances, it is necessary to examine the extent to which it can properly be said that the

214 [2006] IEHC 371.
215 [2015] IEHC 432 [30].
216 *Ibid* [31].
217 *Cunningham v President of the Circuit Court* [2012] 3 IR 222 [24].
218 *Telefonica 02 Ireland Ltd v Commission for Communications Regulation* [2011] IEHC 265.

case has become moot by reason of any unilateral act taken by one of the parties. In reality a case may become moot by reason of a change in circumstances which is outside the control of either party. This ought to be factored in to the court's consideration of the justice of the matter in order to determine where the costs of proceedings should lie.[219] In '*Godsil'* the court concluded that the applicant was instrumental in bringing about the change in law which was the *event*. The applicant received an award of costs[220] and the same approach was adopted in judicial review proceedings[221] where an Algerian national was awarded costs. The plaintiff was surrendered to Ireland on foot of a European Arrest Warrant and subsequently tried and acquitted, but found himself, unable to return to France. He instigated proceedings to ascertain the extent to which the executive could facilitate his return, to France. The defendant provided temporary travel documentation[222] rendering the proceedings moot. The principal relief sought was his return to France which was achieved, but the proceedings were critical to achieving it.[223]

2.1.4 Party and Party Costs and Lawyer Client Costs

Litigation costs fall under two distinct headings. Firstly, there are party and party costs and secondly there are solicitor and own client costs. The former refers to those costs that the victorious party ordinarily recovers from the unsuccessful one. The latter encompasses those that a party must pay to its own legal representatives. The victorious party can recover party and party costs from the vanquished adversary but it will remain responsible for discharging its own lawyer client costs. The former are not imposed as punishment, nor do they take the form of a bonus or reward.[224] A dissonance can emerge between these two categories, which are predicated on fundamentally separate propositions. The notion underpinning the first is based on honouring the indemnity principle, so long as the costs were reasonably incurred.[225]

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219 *Cunningham v President of the Circuit Court* [2012] 3 IR 222 [27]; applied in *Viridian Power Ltd v The Commission for Energy Regulation* (HC 28 November 2014) (McGovern J).

220 [2015] IESC 203 [63] (McKechnie J).

221 *Benloulou v Minister for Justice and Equality* [2015] IEHC 767.

222 The plaintiff possessed no passport only an identification card which was not sufficient to allow him to return to France and there was no Algerian Embassy in Ireland.

223 *Ibid* [7]; applying '*Godsil'* [58] – [64]; rejecting *Nearing v Minister for Justice, Equality and Law Reform* [2014] 4 IR 211 [17] (Cooke J).

224 *Harold v Smith* (1860) 5 H&N. 381,385.

225 "It is clear that the basis of party and party costs is one of indemnity": *Tobin and Twomey v Kerry*

Where a party is awarded lawyer and own client costs, then such a party will be permitted to recover all of its costs provided that they are neither unreasonable, nor were unreasonably incurred.[226]

2.1.5 Rationale for indemnity costs

The primeval reason for awarding indemnity costs has as much to do with creating a viable deterrent as it does with ensuring that the prevailing party comes through the litigation intact. Indemnity costs are not limited to those cases where the court wishes to express disapproval for the way in which litigation has been conducted. It may be suitable to grant them where a party is lacking in efficacy or deserving of some moral censure.[227] It may also be appropriate to make such an order where for example there is unreasonable[228] behaviour. This is not simply behaviour which is just wrong or misguided when judged retrospectively,[229] but it has to be something which elevates the behaviour out of the norm.[230] This could manifest where a party litigates for ulterior commercial purposes.[231] It might also be established when a party makes unjustified personal attacks against another.[232] The blind pursuit of a weak claim is unlikely to result in an award of indemnity costs. However the vigorous and unrelenting pursuit of a hopeless one (or one which a party ought to appreciate is hopeless) could result in such an order.[233] Lord Scott conceded in *Four v Le Roux*[234] that the difference between costs at the standard (party and party) rate and those on an indemnity basis is not particularly great.[235] The costs chargeable on a party and party basis are all those which are necessary to enable the protagonist to conduct the litigation. They do not include luxuries,[236] which the prevailing party must bear,[237] though the meaning of luxury can carry an element of subjectivity. In *Governors and Company of the Bank of Ireland v Watts Group PLC,*[238]

Foods Ltd [1999] 1 ILRM 428, 432 (Kelly J).

226 RSC Ord. 99, r 11 (1).

227 *Noorani v Calver* [2009] EWHC 592 (QB), [2009] EWHC 592 (QB) [8].

228 Such behaviour must be unreasonable to a high degree; *Reid Minty v Taylor* [2002] 1 WLR 2800.

229 *Kiam v MGN Limited (No.2)* [2002] 1 WLR 2810 (Simon Brown LJ).

230 *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879 (Waller LJ).

231 *Amoco (UK) Exploration v British America Offshore Limited* [2002] BLR 135.

232 *Clark v Associated Newspapers* (HC 21 September 1998); [1998] EWHC Patents 345.

233 *Wates Construction Limited v HGP Greentree Alchurch Evans Limited* [2006] BLR 45.

234 [2007] UKHL 1.

235 CPR r 44.5(1).

236 *Kelly (infant) v Hoey* (HC, 18 December 1973) (Butler J).

237 *Smith v Buller* (1875) 19 Eq. 473 (Malins VC) ; *Irish Trust Bank v Central Bank of Ireland* [1996-97] ILRM 50; applied in *Tobin and Twomey v Kerry Foods Ltd* [1999] 1 ILRM 428 (3 December 1998).

238 [2017] EWHC 1667 (TCC) [6].

Coulson J. restated the general principles governing indemnity costs as set out in *Elvanite Full Circle Limited v Amec Earth and Environmental (UK) Limited.*[239] He observed that such an award is appropriate in circumstances where the conduct of a party is unreasonable to a high degree. This threshold of unreasonableness is not to be construed as wrong or misguided in hindsight.[240]

If a plaintiff fashions a cause of action in a disproportionately wide manner that requires the defendant to meet it, then there is no injustice in denying the plaintiff the benefit of an assessment on a proportionate basis. In such circumstances, the plaintiff has forfeit its rights to the benefit of the doubt on reasonableness.[241] In a similar vein, Parke J. observed in the Supreme Court in Ireland that if a party is presented with an extremely difficult case on the pleadings, then such a party is not obliged to cut it's cloth to suit the opposing protagonists financial means.[242] Though that said costs awarded on a party and party basis exclude luxurious items. The awarding of indemnity costs enables the court to distance itself from certain conduct or behaviour. It is a useful weapon to admonish a party, which through its behaviour, has undermined the proper administration of justice. This often occurs where there has been some failure in the disclosure or discovery process. In *Murphy (infants) v Fiat* the High Court in Ireland made an indemnity costs order arising from the way the second and fifth defendants failed to comply with their discovery obligations on foot of an order for discovery.[243] The second defendant accepted that it had failed to make discovery of certain documents, which were in its possession, but it contended that such a failure was attributable to inefficiency, stupidity, confusion and incompetence,[244] and it resisted the plaintiffs' applications to have the defence struck out and indemnity costs awarded. The fifth defendant did not make sufficient international enquires and failed to disclose the existence of a number of fires, in cars, including in one case which had come before the domestic courts. The failure to furnish the documentation was tantamount to improper withholding of the kind articulated

239 [2013] EWHC 1643 (TCC).

240 [2017] EWHC 1667 (TCC) [6]; citing *Kiam v MGN Ltd* [2002] 1 WLR 2810.

241 [2017] EWHC 2472 (TCC) [6] ; [2013] EWHC 1643 (TCC) [16] –[17] ; *Digicel (St Lucia) Ltd v Cable and Wireless PLC* [2010] EWHC 888 (Ch); *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 749 (Com Ct).

242 *Irish Trust Bank Limited v Central Bank of Ireland* [1996-97] ILRM 50, 58; *Bula Ltd v Flynn* [2000] IEHC 70 (HC, 7 March 2000) (McGuinness J).

243 [1995] 2 ILRM 509; *Jones v The Monte Video Gas Company* (1880) 5 QB 556, 559, Thesiger LJ.observed that "A, Judge ought to be severe in awarding costs when he finds that expenses have been incurred through a wrongful suppression of material documents."

244 *Murphy (infants) v Fiat &* [1995] 2 ILRM 509, 510.

in *Jones v The Monte Video Gas Company*.[245] The Court of Appeal in England has steadfastly declined to offer guidance as to when it may be appropriate to award indemnity costs.[246] It would therefore be futile to wager as to when the courts may be disposed to make such an award. In *Noorani v Calver (No.2)*[247] The claimant refused two reasonable settlement offers in addition to an unreserved apology. Coulson J. held that the claimant's unreasonable pre-trial conduct alone, took it beyond the scope of normal conduct. This was sufficient for the making of an indemnity costs award. The conscious or deliberate act of abandoning or discontinuance of proceedings does not ordinarily ignite any expectation for indemnity costs. This is particularly the case where the other party can be properly compensated by the making of a standard order.[248] Deliberate misconduct is not a condition precedent but the existence of elevated levels of unreasonable conduct[249] may provide sufficient. This is provided of course that the conduct is inappropriate in the wider sense. Australia also shares a disdain for hopeless cases,[250] or where litigation is instigated, not for the *bona fide* purpose of protecting legal rights, but for some ulterior motive, or to secure an extraneous objective.[251] The courts in that jurisdiction look for evidence of unreasonableness or delinquency. This need not equate with either ethical or moral delinquency. The unreasonable conduct does not need to hit the high water mark of vexatiousness.[252] The predilection to award indemnity costs may be sharpened where an application is made in a high-handed manner.[253] This is particularly so where the application has no chance of succeeding,[254] if the application is unnecessary,[255] or if it is initiated in blatant disregard of the known facts or established case law.[256] Unreasonable conduct can also be established where there is some delinquency on the

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245 *Jones v The Monte Video Gas Company* (1880) 5 QB 556, 559.

246 *Rawlinson and Hunter Trustees SA, R (on the application of) v Central Criminal Court* [2012] EWHC 3218 (Admin) [6] (Sibler J), [2013] 1 Costs LR 122, [2013] Lloyd's Rep FC 176; *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Ham Johnson* [2002] EWCA Civ 879 [12] (Lord Woolf) ; CPR, r. 44.3, Part 44.4, White Book pp. 1334-1343.

247 *Noorani v Calver (No.2) (Costs)* [2009] EWHC 592 QB.

248 *Catalyst Investment Group v Lewisham* [2009] EWHC 16 (Ch) (Barling J).

249 A party's refusal to accept two reasonable offers to compromise proceedings could provide sufficient grounds awarding indemnity costs; *Franks v Sinclair (Costs)* [2006] EWHC 3656 (Ch).

250 *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers, Western Australia Branch (No. 2)* [1993] FAC, 70, (1993) 40 IR 301, 303; *Wates Construction Limited v HGP Greentree Alchurch Evans Limited* [2006] BLR 45.

251 *MCG Group Pty Ltd v Ftrus Pty Ltd (formerly Fortrus Pty Ltd)* [2017] FCA 359, 7.

252 *Rosniak v GIO* [1997] 41 NSWLR 608, 616, (Mason P) ; *Calderbank Offers*, The Hon Justice Margaret Beazley AO, Australian Lawyers Alliance, Hunter Valley Conference (14 – 15 March 2008), p 14, para 45.

253 *Australia Guarantee Corporation Ltd v De Jager* [1984] VicRp 40, [1984] VR 483.

254 *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202, (1998) 81 ALR 397, 401.

255 *Ragata Developments Pty Ltd v Wespac Banking Corporation* (Federal Court, 5 March 1993).

256 *Ibid*, '*Fountain Selected Meats',* 401.

part of the losing party.[257] In some circumstances, the justice of the case may require the making of such an order.[258] The court may also elect to make such an order where some special or unusual factors are present which would justify the court exercising its discretion.[259] The courts exhibit restraint from awarding indemnity costs where a party unsuccessfully advances a losing cause of action, which is constructed on a solid foundation and which harbours no elements of frivolousness, or where parties litigate reasonably.[260] The disgraceful behaviour of a party may be addressed by making an award of indemnity costs.[261]

2.1.6 Roman Law

The costs rules which developed in England and Wales mirrored developments in Roman law which had taken hold centuries earlier. In the reign of Justinian costs were becoming the reality of everyday litigation. Roman law punished those who litigated in bad faith (*poena temere litigantium*) and costs were viewed as a form of penalty. Roman law mandated a losing party to reimburse the successful one for the costs which the winning party has expended in defending frivolous litigation, or in cases taken in bad faith. This requirement, to reimburse the successful party, eventually became the rule for all cases, not just those involving bad faith. Zenon is credited with establishing the rule that, the simple event of losing was sufficient to transfer the burden of paying the winner's costs on to the losing party.[262] This can be viewed as an early form of shifting costs rule that eventually formed part of the Code of Justinian. It was also observed in the western part of the Holy Roman Empire.[263] Roman law incorporated more than a thousand years of jurisprudence that developed at different stages. One of the high water lines in that evolution was the *Corpus Juris Civilis*.[264] Nicholas stated that Roman law provided Europe with most of its legal ideas,

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257 *Oshlack v Richmond River Council* [1998] HAC 11, (1998) 193 CLR 72, 89.

258 *Andrew v Barnes* (1887) 39 Ch D 133, 141; *MCG Group Pty Ltd v Ftrus Pty Ltd (formerly Fortrus Pty Ltd)* [2017] FCA 359, 7.

259 *Preston v Preston* [1982] Fam 17, 39.

260 *Zissis v Lukomski* [2006] EWCA Civ 341.

261 *Wailes v Stapleton Construction & Commercial Services Ltd; Wailes v Unum Ltd* [1997] 2 Lloyd's Rep 112.

262 In 486 A.D., Zenon, the East Roman Emperor imposed on the losing party the necessity to pay the successful party's costs; L. Wenger, Institutes of the Roman Law of Civil Procedure 330-331 (rev. ed. 1940).

263 The decree is located in the Code of Justinian. Code Just. 7.5.1.5; M. von- Bethmann-Hollweg, *Der Romische Civilporzess, Erster Band: Legis Actiones* (1864) note 14, at 232; L. Werner, *Institutes of the Roman Law of Civil Procedure*, (rev. ed.) (1940) at p 334.

264 529-34 AD under Empreror Justinian 1.

and to a greater or less extent a uniform bundle of legal rules.[265] It did not gain traction in England and Wales, nor Ireland, to the extent that it was embraced in continental Europe. Though the impact, which it did have, on the common law should not be under estimated owing to the radial persuasiveness of Roman law on common law perspectives and jurisprudence.[266] The association of Christianity with Roman law and the Canon law impacted on the common law. In 595 Pope St. Gregory the Great, sent St. Augustine to Britain where he established the Episcopal seat at Canterbury in 597.[267] Roman precedents were cited in the common law courts and were applied as dispositive and determinative.[268] Pfenningstorf posited that the loser pays philosophy, which was evident in Roman law, was adopted by the ecclesiastical courts of the Roman Catholic Church.[269] There was a general acceptance of the *winner takes it all.*[270] The requirement to identify winners and losers is not a modern monomaniacal obsession. The concept will be comprehensively revisited and examined in chapter 4, which will consider *inter alia* the various tests including the "simple mechanical test" the "final flow of money test" and the "something of value test."

2.2 Costs at Common Law

The English rules on costs allocation grew incrementally over time by. Those rules were amplified by legislation and through the exercise of the Lord Chancellor's discretion.[271] The early common law resisted costs shifting so the parties discharged their own costs. The categories in which plaintiffs could recover their costs gradually expanded over time. This doctrine prevailed universally with one exception.[272] Costs were not awarded at common law, in their own right. They were simply factored in to the award of damages. The court would inflate damages to incorporate a sum for costs. The costs were intermingled with damages

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265 Barry Nicholas, An Introduction to Roman Law, Oxford, (1961), p 2.

266 Smith, Elements of Law, (2nd ed) 1955 p. 171 at 341; Edward D Re, *"The Roman Contribution to the Common law",* Fordham Law Review, vol.29, issue 3 (1961), pp. 447-494 at 448.

267 Eamon G Hall, an Introduction to Roman Law and its Contribution to the world, The Faculty of Notaries Public in Ireland, Institute of Notarial Studies, (2014), p 10.

268 *Ibid,* p 11; Amos, The History of Principles of Civil Law (1883) p 450.

269 *Ibid,* Pfenningstorf, p 42.

270 *Ibid,* p 70; citing F. Klein, Der ZIVILPROZESS OSTERREICHS 159-60 (1927 & reprint 1970); Bokelmann, 'Rechtswegsperre' durch Prozesskosten, 1973 ZEITSCHRIFT FUR RECHTSPOLITIK, p 164 at 168.

271 *Ibid,* Pfenningstorf, p 43.

272 John Hullock, *Law of Costs,* E. Lynch and P. Wogan et al, Dublin, Ireland (1793); ECCO Print Editions, Online Print Editions, reproduction from Harvard University Law Library; Chap.I, SECT I.(unpaginated) ; "This doctrine prevailed universally as to plaintiffs and with only one exception as to defendants".

from which they became indistinguishable. Additionally, juries that possessed suboptimal legal knowledge delivered many awards for damages. These awards were often disproportionately inadequate and defective. Lord Chief Baron Gilbert asserted that before the Statute of Gloucester the justices would assess the costs of the prevailing plaintiff at a reasonable cost. The practice continued until it was superseded by the introduction of the modern justices of assize.[273] The history of costs is relatively plain and straightforward but a differentiation must be flagged between those costs that were awarded in the common-law courts and those awarded in the Courts of Equity. The former rules on costs, were derivative of, and flowed entirely from statute.[274] There was no freestanding right to costs at common law, which were neither awarded to plaintiffs nor defendants. In theory, an award of damages to the prevailing plaintiff could cover not only the loss sustained by the wrong but also the costs of the proceedings. A defendant who successfully fended off a groundless or vexatious action was unable to recover costs, while any award of damages given to the plaintiff was notionally intended to factor in an amount for costs. The costs follow the event rule is a statutory creation that grew incrementally over time with the passing of further statutes. Before the rule was put on a statutory footing, the courts invariably factored a certain amount of costs in to the damages equation in order to reimburse the successful party for the sum that it had expended on costs. The desire to reimburse is synonymous with the concept of making whole the winning party, or restoring that party, to the position it enjoyed before the litigation was ignited. The courts punished the unsuccessful plaintiff[275] in the form of an arbitrary penalty. This was levied and collected by the court and remitted to the Crown. There was no remedy for successful defendants to claim their costs. In some actions a successful plaintiff might, under the guise of damages, obtain compensation that would also cover the costs. This rule was not observed where damages were awarded in an action for land. The prevailing defendants could only claim costs if it was permissible by statute to do so. The position is encapsulated in the principle *expensarum causa victus victori condemnandus es*t.[276] The law of awarding costs to successful defendants moved at a derisory pace. There was a view that the punishment[277] endured by the unsuccessful plaintiff was sufficient. This offered no solace

273 Gilb H C. P 266.

274 *Ibid*, Goodhart, pp. 851-852.

275 *Ibid*, Hullock, 1; "If the plaintiff failed in his action, he was amerced *pro falso clamore;* if he succeeded, the defendant was in *misericordia* for his unjust detention of the plaintiff's right, but was not liable to the payment of any costs of suit, at least under the title."

276 Pollock and Maitland, History of English Law [(2nd ed. 1911) 597].

277 Amercement was a form of financial penalty common during the Middle Ages.

to the out of pocket defendant.[278] The common law embraced the characteristics of one-way fee from 1278 onwards but it did not finally legislate for two-way fee shifting until 1606.

2.2.1 Statute of Gloucester and beyond

The first statute that granted the plaintiff a right to costs was the Statute of Gloucester,[279] which was enacted in 1278.[280] It was in fact the first to be recorded in roll form.[281] It was a seminal one because it permitted the courts, in the exercise of their discretion, to award costs to successful plaintiffs.[282] In 1975, the United States Supreme Court observed that in 1278, the common law courts in England were permitted to grant legal fees to prevailing plaintiffs.[283] The enactment conferred a right to costs in all cases where damages were recoverable either before or by that statute.[284] The Statute of Marlborough of 1267 did provide for costs and damages. However, it was confined to very narrow causes of action.[285] In 1275 the Statute of Westminster[286] was enacted and the Statute of Westminster II was enacted in 1285. The former sought to codify the law, but both were silent on the issue of costs, and so costs could not be awarded for any causes of action arising under either of them. Damages, however, were given to plaintiffs for the writs of *quare impedit*[287] and *darrein presentment.*[288] Prior to the Statute of Gloucester an unsuccessful plaintiff endured punishment for taking a suit.[289] This was levied in the form of an arbitrary penalty, which was

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278 *Ibid*, Goodhart, p 849 at 853.

279 *Ibid*, p 849 at 852.

280 *Ibid*, p 849 at 852; erroneously identifies 1275 as the year for the Statute of Gloucester.

281 6 Edw.I.c.I.

282 "the demandant shall recover damages in an assize of novel disseisin, in a writ of entry upon novel disseisin, and in writs of mortdauncestor, cozinage, aiel and bezaeil, - and further, that the demandant may recover against the tenant the costs of his writ purchased, together with the damages abovesaid."

283 *Alyeska Pipeline Co. v Wilderness Society*, 421 U.S. 240 (fn 18) (1975) (White J).

284 *Ibid*, Hullock, SECT. II., (unpaginated).

285 The Statute of Marlborough (or Marlbridge); 52 Hen. III, c.6 (1267); enabled the defendant (*feoffee*) to recover costs and damages while also punishing the unsuccessful plaintiff; Costs were given to a defendant by this Statute in cases relating to wardship in chivalry.

286 Statute of Westminster 1275; Statute of Westminster II, 1285 (13 Edw I, St 1).

287 *Quare Impedit*: a form of action brought by a patron against a Bishop who refuses to appoint the proposed nominee as priest.

288 *Darrein Presentment:* a cause of action related to aristocratic privilege for the right to appoint a person to a parish. The privilege known as Advowson was established by the Assize of Clarendon by Henry II in 1166 and abolished in 1833.

289 *Ibid*, Hullock, 1; (unpaginated) "If the plaintiff failed in his action, he was amerced *pro falso clamore;*

collected by the court. There was no remedy open to successful defendants to claim the costs of the action. The statute enabled plaintiffs to seek their costs in a restricted number of actions.[290] While it only referred to the costs of the writ purchased, it was afforded a broad pro-plaintiff construction, by the courts, to include all of the costs of the plaintiff's suit. Though this did not include the costs of travel and time.[291] This introduced the concept of shifting costs, for the first time, in to the common law courts. From then on, statutes that provided for costs were enacted contemporaneous to developments in the ecclesiastical courts. There was a moral imperative on the part of the losing party to pay the costs of the winning party. The loser pays principle possesses a religious fervour of what is just and fair. The statutes enacted in England and Wales mirrored developments in the ecclesiastical courts during this period. The courts at common law were not impervious to developments in ecclesiastical and canon law. Legislation enacted after the Statute of Gloucester increased the level of damages, where damages were recoverable at common law. This permitted plaintiffs to recover not only the increased level damages but also the costs of the suit, even if the statute was silent on costs.[292] The statute did enable the courts to grant costs in certain cases where damages were recoverable, either before or since the introduction of that statute. The principle[293] was augmented to include actions for slander in 1623 and to trespass in 1670. It applied where rights to land were not in dispute and to assault and battery.[294] The ostensible reason being that if a plaintiff would have recovered damages at common law, then such a party would be entitled to costs, under the Statute of Gloucester.[295] In 1487 a statute was enacted which attempted to redress the inherent difficulties experienced by defendants where proceedings were issued in error, or where actions were discontinued. In these circumstances the defendants were permitted their costs.[296] Despite some infrequent and sporadic interventions, by the end of the 15th century, the circumstances under which defendants were entitled to recoup costs were extremely limited. During the period of Elizabethan rule[297] difficulties emerged with the one-way shifting model. While a successful plaintiff would

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if he succeeded, the defendant was in *misericordia* for his unjust detention of the plaintiff's right, but was not liable to the payment of any costs of suit, at least under the title."

290 Statute of Gloucester 1278, 6 Edw. 1, c. 1.

291 "Here is express mention made but of the costs of the writ, but it extendeth to all the legal cost of the suit, but not to the costs and expences of his travel and losse of tim, and therefore costages commeth of the verb conster, and that again of the verb constare, for these costages must constare to the court to be legall costs and expences" (Coke, 2nd Institutes, 288) [sic].

292 *Ibid*, Hullock, Table of Principal Matters, Damages.

293 *Ibid*, Goodhart, p 849 at pp. 852-853.

294 21 JAC. I. c.16, f.6 (1623), 22 & 223 CAR. II, c.9 f. 136 (1670).

295 10 Co. 116. 2 Inft.289. March 29. 61. I Ven 22. I Lill. Abr 467. B 3 Mall. Mod. Ent.248.

296 3 HEN. VII, c.10 (1487).

297 1558-1603.

recover costs a successful defendant would not. It was not until the reign of Henry VIII, in 1531,[298] that successful defendants could, at the court's discretion, recover costs in certain actions. These included actions for trespass, debt, and contract.[299] It also enabled a defendant to recover costs on a general or special verdict after judgment.[300] Early in the reign of Elizabeth I parliament introduced legislation to enable a defendant to claim costs where the plaintiff delayed or discontinued an action, or, where judgment was entered against that party.[301] There was a conspicuous absence of impediments to prevent plaintiffs issuing vexatious and frivolous suits under one-way shifting models. There was no statutory basis that enabled defendants who successfully fended off actions to recover their costs. A plaintiff with an unmeritorious case might elect to proceed to trial, lose the action, and face no adverse costs consequences, instead of discontinue the proceedings, and being responsible for the opposing party's costs. This *lacuna* informed a form of strategic behaviour that witnessed a proliferation in small vexatious and intolerable claims. Parliament reacted in 1601 by passing legislation that provided that the costs awarded to the successful plaintiff could not surpass the sum awarded in damages where that amount awarded in damages was less than forty shillings.[302] The legislation introduced a form of costs capping which proved so successful that it was later extended to the principality of Wales.[303] The principle was extended again in 1623 to include actions in slander.[304] The legislation of 1601[305] provided a deterrent which resulted in plaintiffs commencing their actions in the lower courts. The objective of the enactment was to confine certain types of actions (excluding actions for land or battery) to

298 23 Henry VIII. c. 15 (1531).

299 "if in the actions therein mentioned the plaintiff after appearance of the defendant be non-suited, or any verdict happen to pass by lawful trial against the plaintiff, the defendant shall have judgment to recover his costs against the plaintiff, to be assessed and taxed at the discretion of the court, and shall have such process and execution for the recovery and paying his costs against the plaintiff, as the plaintiff should or might have had against the defendant, in case the judgment had been given for the plaintiff."

300 *Alsop v Cledon*, Cro enz 465 S C.

301 8 Eliz. c. 2. a. ; 4 Anne, c 16, S 25, a defendant was entitled to costs as though he had succeeded in the case when a writ was quashed for error; 13 Car. 2. St 2 c 2, defendants became entitled to costs, in certain circumstances, where judgment was entered against a plaintiff.

302 43 Eliz.C.6.f.2. (1601); " If, upon any action personal to be brought in any her majesty's courts at Westminster, not being for any title or interest of lands nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, in the same court, shall not amount to the sum of forty shillings or above, that in every such case the judges and justices before whom any such action shall be pursued, shall not award to the plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion."

303 11 and 12 W.3.C.9.S.I.the 43 Eliz.

304 The Limitations Act 1623, S 6 provided that if the plaintiff in an action of slander recovered less than 40 shillings in damages, then the plaintiff should be allowed no more costs than were awarded in damages.

305 43 Eliz. c. 6. s. 2.; following the change in law plaintiffs now needed to secure an award exceeding 40 shillings in order to recover a sum of costs that was greater than this sum.

the county and inferior courts. The statutory device restricted recoverable costs and represented an early erosion of the loser pays principle. It introduced a form of curtailed one-way costs shifting. Hullock observed that the objective was to enhance the profits of the courts and to diminish the costs of the defending parties and to undermine vexatious litigation, seeking injuries for just nominal value.[306] The final steps to enable successful defendants to recover costs occurred in 1606.[307] The Statute provided that they could recover costs in all cases in which prevailing plaintiffs would recover them.[308] The underlying policy for this legislation appears to have been aimed at discouraging frivolous or vexatious claims by introducing two way costs shifting. A procession of monarchs, including, Henry VIII, in 1531, James I in 1606 and William III, in 1696[309] introduced variants of the two way costs shifting model during their respective reigns. Elizabeth I did not favour two-way fee shifting, and so she elected instead to deal with the menace of groundless and frivolous litigation by capping costs in certain types of actions. The concept received fresh impetus during the reign of Victoria with the introduction of Lord Denman's Act, of 1840.[310] The Supreme Court of Judicature (Ireland) Act 1877 extended costs capping to Ireland in certain actions.

2.3 Common Law and Equity

The most significant legislative changes to the costs rules[311] were brought about by the Supreme Court of Judicature Act.[312] Order 55[313] of the Act gave effect to the principal Act. The legislation was not intended to displace subsisting enactments nor jurisprudence. Indeed

306 *Ibid*, Hullock, SECT. II. RIGHT TO COSTS, (unpaginated); the Act excluded actions relating to freehold property and battery.

307 4 James. I, c.3 (1606), this " law was extended to other actions not originally specified, although within the mischief of the act, so that in any action wherein the plaintiff might have costs if judgment were given for him, the defendant if successful should have costs against the plaintiff".

308 *Ibid*, Goodhart, p 853; 4 JAC. I, c.3.

309 In 1696 William III enacted laws that sought to punish litigants who brought frivolous and vexatious actions by requiring them to pay the costs of certain actions.

310 3 & 4 Vict. c. 24 (Lord Denman's Act 1840), a plaintiff in an action of tort who recovered less than 40 shillings, was not allowed costs unless the judge certified that the action was really brought to try a right besides the right to recover damages, or that the injury was wilful or malicious.

311 *Ibid*, Goodhart, p 854; 4 JAC. I, c.3.

312 36 & 37 VICT. c. 66 (1873); 38 & 39 VICT. c. 77 (1875).

313 " Subject to the provisions of the Act, the costs of an incidental to all proceedings in the High Court, shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee; mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity; Provided, that where any action or issues tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the Judge before who such action or issues is tried or the Court shall otherwise order."

the annotation in the margin of the Order[314] makes it clear that the equitable rules in relation to costs were not affected. It commences by stating that subject to the provisions of the Act. This can be been viewed as an indication on the part of the parliamentary drafters not to displace any subsisting enactments, including Lord Denman's Act.[315] The legislation re-enacts section 5 of the County Courts Act, 1867.[316] It provides that the costs of and incidental to all proceedings shall be at the discretion of the court, and that costs shall follow the event, unless otherwise ordered. In Ireland, the corresponding section was enacted in 1877.[317] It is found in section 53 of the Irish legislation, which contains differences.[318] These legislative differentiations include express statutory recognition that the Act is subject to all subsisting legislation limiting or affecting costs. This extinguishes any ambiguity as to the legislative purpose of the 1877 Act, which may have been absent from the Supreme Court of Judicature machinery in England and Wales. The 1877 Act also provided that in all actions for libel where the award of damages is under forty shillings the plaintiff shall not be entitled to recover more costs than damages. This effectively extended the position that operated in England and Wales.[319]

2.3.1 Supreme Court of Judicature Act and modern developments

The common law courts observed the loser pays rule, while in the court of Chancery costs were awarded at the discretion of the court. This discretion was exercised in accordance with equitable principles. The new Supreme Court of Judicature Act embraced Chancery practice. It provided that in the event of a conflict between the common law and equity that the latter

314 "Rules of Court of Equity as to particular Costs."

315 William Downes Griffith, S*upreme Court Judicature Acts, 1873, 1875 & 1877: The Appellate Jurisdiction Act, 1876*, 2nd ed (1877), p 448.

316 County Courts Act 1867.

317 Supreme Court of Judicature Act (Ireland) 1877 (14 August).

318 "Subject to the provisions of this Act and of rules of Court, the costs of and incident to every proceeding in the High Court of Justice and Court of Appeal respectively shall be in the discretion of the Court, but nothing herein contained shall deprive a trustee mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted on in Courts of Equity: Provided, that (subject to all existing enactments limiting regulating or affecting the costs payable in any action by reference to the amount recovered therein), the costs of every action question and 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; and any order of a Judge as to such costs may be discharged or varied by a Divisional Court: And provided also, that in all actions for libel where the jury shall give damages under forty shillings, the plaintiff shall not be entitled to more costs than damages."

319 21 Jac. I. c 16 S 16 provided that in actions of slander to be under 40 shillings the plaintiff shall recover no greater costs than damages.

was to prevail. However there was one glaring oversight in the new legislation that emerged within a few years of its introduction. The courts identified a *lacuna* that the legislature had to remedy. In *Re Mill's Estate*[320] the court held that the import of the Judicature Acts machinery and related orders did not confer any new jurisdiction to award costs. The legislation only regulated the manner in which costs were to be dealt with, where there was an existing jurisdiction to award costs.[321] The 1890 Act[322] was intended to remedy this oversight. It conferred full power on the High Court to award costs in all proceedings[323] at its discretion. The Supreme Court of Judicature Act models were adopted in common law jurisdictions that derive their practices and procedures from the Supreme Court of Judicature Act, 1873.[324] These include the various jurisdictions in Australia,[325] Canada[326] and Ireland.[327] In this way this distinguishes these jurisdictions from many other common law jurisdictions. The Act of 1873 resulted in the re-organisation of the courts and the fusion of Common Law and Equity and Admiralty. The law of Admiralty prevails in the event of any incongruity. The judicature model became embedded in Ireland in 1877[328] where it remains operational ever since. In 2011, Clarke J. sitting on the High Court in Ireland[329] made observations in relation to Lord Goff,[330] the Supreme Court of Queensland,[331] the Federal High Court of Australia,[332]

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320 (1886) 34 Ch D 24.

321 *Mill's Estate: Ex parte Commissioners of Works and Public Buildings* (1886) 34 Ch D. 24, the case concerned an application to obtain monies paid in to court relating to lands which formed the subject matter of a compulsory purchase where the legislation under which the lands were procured was silent as regards the payment of costs.

322 The Supreme Court of Judicature Act 1890 (53 & 54 VICT., c.44).

323 Proceedings included the administration of estates.

324 36 & 37 VICT. c. 66: 23 *Halbury's Laws of England* (1st ed); 178.

325 The Judiciary Act, 1803 section 26 provides "The High Court and every Justice thereof sitting in Chambers shall have jurisdiction to award costs in all matters brought before the Court, including matters dismissed for want of prosecution."

326 Ontario Courts of Justice Act, RSO, section 131, 1990, c C43 provides " Subject to the provisions of an Act or rules of court, the costs of an incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid"; Rule 14 – 1 (9) of the British Columbia Supreme Court Rules requires the losing party to pay costs to a successful party unless the Court "otherwise orders."

327 Awards of Costs and Access to Justice Research Paper, Law Reform Commission of Saskatchewan, July 2011, p 6; citing Mary V. Capisio, *Award of Attorneys fees by Federal Courts, Federal Agencies and Selected Foreign Findings*, New York: Nova Publishers, 2002.

328 The Supreme Court of Judicature Act (Ireland) 1877 (40 & 41 VICT., c. 57); The Supreme Court of Judicature (Ireland) Amendment Act, 1878 (41 & 42 VICT., c. 27), The Supreme Court of Judicature (Ireland) Act 1882 (45 & 46 VICT., c.70), The Supreme Court of Judicature (Ireland) Amendment Act, 1888 (51 & 52 VICT., 27).

329 *Moorview Development Ltd v First Active Plc* [2011] IEHC 117.

330 *Aiden Shipping Ltd v Interbulk Ltd* [1986] AC 965.

331 *Forest Pty Ltd v Keen Bay Pty Ltd* [1991] 4 ACSR 107, the Supreme Court of Queensland held that section 58 of the Supreme Court (Qld) Act, 1867 enabled the court to make a costs order against a non – party.

332 *Knight v F.P Special Assets Ltd* [1992] 107 A.L.R 585.

and New Zealand,[333] and the Supreme Court of Judicature (Ireland) Act, 1877.[334] The future Chief Justice noted that the 1877 Act conferred a broad discretion in relation to costs, while the legislation in Queensland granted *power to award* costs while the law in New Zealand granted a *jurisdiction to award* costs. In England and Wales, he noted, the courts had *full power to determine* costs, though the introduction of the words *by whom* added a layer of statutory intrigue.[335] The jurisdiction conferred by the Judicature Act in England and Wales is now exercisable under the Supreme Court Act, 1981. Hoffman LJ. confirmed in *McDonald v Horn*[336] that the jurisdiction to deal with costs is based upon section 51 of the Supreme Court Act, 1981, which with some rearrangement, flows from section 5 of the Supreme Court of Judicature Act 1890. The Act of 1890 in turn provided that the costs of and incidental to all proceedings[337] in the High Court shall be in the discretion of the court, which shall have full power to determine, *by whom* and to who, costs are to be paid. Lord Goff elucidated the purpose of the machinery when he averred that it leaves matters to the authorities to control the exercise of that discretion. It is a matter for the appellate courts to elucidate the principles upon which that discretion may be exercised.[338] The discretion afforded by the section is by no means untrammelled. Such discretion must be exercised in accordance with established principles. In England and Wales the presumptive entitlement to costs is found in the Rules of the Supreme Court, which were superseded by the Civil Procedure Rules.[339] The cost provisions were later superseded on foot of recommendations made by the Subcommittee on Draft Subsidiary Legislation Relating to Civil Justice Reform.[340] The Civil Procedure Rules confer a discretion on the judiciary to decide which party is to pay costs, their amount, and when they should be paid.[341] The courts observe the cardinal rule that the losing party will be ordered to meet the costs of the prevailing one. Though the court may attest a different order.[342] In Ireland the Rules of the Superior Courts entrench the *costs follow the event*

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333 *Carborundum Abrasives Ltd v Bank of New Zealand (No.2)* [1992] 3 N.Z.L.R 757; New Zealand Judicature Act 1908, section 51 G, which conferred a jurisdiction to impose costs on a non-party.

334 *Ibid*, section 53.

335 Supreme Court Act, 1981, England and Wales, section 51 (1).

336 [1995] ICR Hoffman LJ, 685, 693.

337 Proceedings included the administration of estates and trusts.

338 *Aiden Shipping Co. Ltd v Interbulk Ltd* [1986] AC 965, 975.

339 Ord.62, r. 3 (2), as amended; The rules provided that "if the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any party of the costs."

340 LC Paper No. CB (2) 1786/07-08 (02), CJRS 17/2008, Ord. 62 Costs.

341 CPR, r. 44.2

342 CPR, r. 44.2 (a).

rule.[343] It is also observed in the courts of local and limited jurisdiction.[344] The rule amplified over time until it came to encompass all litigation subject to some exceptions.[345] It enjoys an almost monopolistic position in England and Wales and Ireland and in Australia and Canada, with the exception of Quebec. However it has not achieved universal saturation and its advantages and disadvantages will be scrutinised later.

[343] "the costs of every issue of fact or law raised upon a claim or counterclaim shall unless otherwise ordered, follow the event"; Ord. 99, r. 1 (4) RSC; Ord. 63A, r. 28 (as inserted by the RSC (Commercial Proceedings) 2004 SI 2/2004).

[344] Ord. 66 r. 1 CCR substituted by Article 3 of the CCR (Costs) 2008 (SI 353/2008), provides "Save as otherwise provided by Statute, or by these Rules, the granting or withholding of the costs of any party to any proceeding in the Court shall be in the discretion of the Judge or the County Registrar as the case may be"; Ord. 5, r. 1 DCR.

[345] *Ibid*, Woodroffe, p 345.

2.4 Cost shifting

The loser pays rule operates as a shifting costs model. It passes the burden of discharging the successful party's costs on to the losing one. Rowe elucidated the fee shifting terminology for the system under which the vanquished party pays the costs of the prevailing party.[346] Shifting costs models can operate differently and the outcomes can produce markedly different consequences. It is unfortunate that owing to the similarities in name between the English (loser pays) and the American (user pays) rules that the great gulf of difference that flows between them has escaped broader scrutiny. It is not unusual in comparative law to find that practically identical term can conceal fundamental variations in function. The confusion is further compounded by the fact that the subject is so technical and badly arranged in the books.[347] While the English costs follow the event rule produces a shifting costs model, the American rule, in contra distinction does not. The philosophy behind the rule appears to depend on whether one considers it from a plaintiff or defendant's perspective. If we choose to consider the rule from the perspective of a defendant party's mindset, it seems inherently unfair that a defendant should absorb the loss for all of the costs expenditure incurred in defending an unjustified or unwarranted claim, which may be discontinued or ultimately dismissed. If it is viewed from a plaintiff's standpoint, why should honourable plaintiffs have to endure loss because a defendant is dilatory in refusing to acknowledge a liability until compelled to do so by the courts.[348]

2.5 Rationale for the 'loser pays' philosophy

It is necessary to explore the reasoning underpinning the *costs follow the event* philosophy to facilitate an appreciation of how it is applied. Goodhart averred that the rule is predicated on the negative philosophy that some protagonists will resort to any conduct in order to secure their objective unless they are impeded.[349] The rule is so well entrenched in England and

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346 Thomas Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, Duke Law Journal, Vol. 1982: 651 p 653.

347 *Ibid*, Goodhart, pp. 849-850; 4 JAC. I, c.3.

348 *Ibid*, Woodroffe, pp. 345-356.

349 "The English law is essentially practical, and is based on the pessimistic assumption that some litigants

Wales and Ireland that it is unlikely that it could be subverted by the philosophy underpinning costs which is pervasive in the United States, and which is alien to the common law psyche.[350] Lord Halsbury LC. perceived that a successful litigant has an over whelming entitlement to costs.[351] The rule pertains in the preponderance of common law jurisdictions, and its advantages are multifaceted. It operates to dispel speculative litigation, which has become one of the most rancid features of the American legal landscape. It extirpates at the root, any perceived leverage which protagonists with a weak case may have, by threatening to unleash the costs on the unsuccessful one.[352] Fee shifting represents a bold deterrent to any intending party considering embarking on litigation. Goodhart ventilated support for it on this basis alone.[353] Rowe viewed the costs follow the event philosophy as possessing two elements, namely equity and incentives. In terms of the former, it possesses an equitable appeal, including the notion of making the prevailing party whole, while other rationales, like discouraging nuisance litigation, focus on its incentive, or boost effects. The use of punitive fee shifting in spurious litigation, may not only discourage harassing tactics, but it may also satisfy the requirements of justice to witness the user being punished for such strategies. Based on this reasoning the rule is imbued with properties which operate with both positive and negative force, but which are never neutral. Rowe advanced six reasons for sustaining fee shifting. The first of which stems from a sense of simple fairness and the laudable notion that the loser ought to pay a considerable portion of the winning party's costs. This is a major feature underpinning the indemnity rule, although the full indemnity notion has become a little outdated,[354] if not historical. The second flows from the imperative to make the litigant financially whole for the legal wrong suffered. It is inextricably linked with the concept of

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will resort to all possible technicalities and sharp practices to gain their ends if they are not prevented from doing so"; *ibid*, Goodhart, p 872.

350 *Ibid*, Woodroffe, p 345.

351 *Civil Service Co-operative Society v General Steam Navigation Co*. [1903] 2 KB 756.

352 Walter Olsonard and David Bernstein, *Loser Pays: Where Next?*, 55 md. L. Rev, 1996 p 1161.

353 *Ibid*, Goodhart, p 872, *"*It therefore makes adequate provision to see that a plaintiff will not find it profitable to rush in to court with a groundless or trumpery claim on the chance that the defendant will prefer to pay this legal form of blackmail rather than incur the expense of fighting the case … It is true that under the English system a party is still free to raise a number of technical objections, refuse to admit anything, and force his opponent to prove facts which are not in dispute, but if he does so he will have to pay, and pay heavily. Substantial costs make it expensive for the party who adopts such tactics. These costs are an additional weapon of offense for the plaintiff with a just claim to present and a shield to the defendant who has been unfairly brought into court."

354 *Skidmore v Blackmore* (1995) 122 D.L.R (4th). 2 B.C.L.R (3rd) 201 (CA) (Cumming JA) [28] "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursement incurred is now outdated … One of the purposes of the costs provisions … is to encourage conduct that reduces the duration and expense of litigation, and to discourage conduct that has the opposite effect. Thus although it is true that costs are awarded to indemnify the successful litigant for legal fees and disbursements incurred, it is also true that costs are awarded to encourage or to deter certain types of conduct."

compensation, which is a subset of the substantive law of remedies. The third is the punitive aspect of the rule that deters and punishes misconduct in the litigation. The fourth is predicated on the *private attorney general* theory and the philosophical justification of the utility value to the community of advancing a certain type of action, which has some element of public interest. A fifth is the wish to balance the relative (economic) strengths of the parties. This invariably arises when one or either of those parties is a corporation, Government department or agency, thus creating a disparity in the economic standing of the parties, and a state of disequilibrium between a large corporate entity and a diminutive party to the litigation. This fifth factor is a variation of seeking to achieve some form of equality of arms or notional level playing field. The reasons advanced in favour of the rule are protean, and no overwhelming factor emerges. There is compendium of reasons including simple fairness, the requirement for a deterrent, a necessity for some form of punishment, or some type of economic incentive or disincentive, whilst recognising that the cost of litigation is beyond the reach of large swathes of society. The many rationales for retaining the rule appear laudable. They are the very same reasons why the majority of civil society will refrain from retaining legal representation, namely the rational fear of a financial punishment, in the form of an award of costs. These rationales fall under the notion of fairness. This is in turn synonymous with the concept of making the successful party whole (which in turn carries with it a tacit equitable *restitution*). The private attorney general theory imbues an action with characteristics that transcend sectoral interest. The loser pays rule acts as an incentive that informs the motivational calculus of the parties during the currency of litigation. The vanquished party will suffer heavily, in financial terms, under the rule by having to pay the costs of the successful one. Snyder and Hughes posited that the rule will motivate plaintiffs to discontinue when their case appears frail, and where overtures for settlement are rebuffed, where both protagonists envisage that they are likely to incur substantial trial costs.[355]

Some theorists advance an additional reason for the rule on the basis that it is ethically superior. This is predicated on the view that a defendant who has been dragged in to litigation deserves compensation for having to fend off a weak claim. Conversely a plaintiff with a valid claim deserves some measure of damages that includes some acknowledgement of the

[355] Edward Snyder and James Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, Journal of Law Economics & Organization, Vol 6, No.2 (Autumn 1990), Oxford University Press, p 353 at 345-380.

fees paid in pursuing a recalcitrant defendant.[356] Some theorists have lent their imprimatur to Goodhart's assertion that a defendant who is culpable for delay should be penalised financially. The rule is also less likely to discourage another abuse of litigation, namely the use of delay tactics by defendants who are conscious of their impending liability.[357] This ethically superior reasoning for favouring the rule is perhaps a moral endorsement of the rule that was applied by the ecclesiastical courts. The preference for an ethical rule may be a secular manifestation of the religious or moral obligation on the part of the losing party to pay, which has a distinctly religious and moral character. The myriad reasons for the rule include: the moral imperative to reward or at least compensate the winning party; the need to punish the loser; the necessity to provide an economic incentive to compromise actions, or a disincentive to pursue or sustain actions. The strongest rationale underscores the proposition that a successful party should not be at a pecuniary loss. The rule acknowledges the successful party as the winner, legally, morally, and financially. It also operates as a disincentive that can play heavily on the mind of a party, whom is either considering instigating or withdrawing proceedings. A successful party should not be out of pocket for having to fend off an unjust claim, counterclaim, or defence. Perhaps, the deterrent arises in that the unsuccessful party will have to pay the costs of the other party. The loser pays rule therefore delivers a double blow. Rowe observed that the argument advanced in favour of an indemnity against costs is that the prevailing party, which is deemed to have been correct, ought not to suffer any adverse monetary consequences.[358] The loser pays rule notionally provides a clear winner and loser. In reality however the outcomes can be more opaque. The unsuccessful party may succeed on a number of discrete points. A plaintiff may succeed on part of its claim, in a complex construction dispute, and receive a multi-million pound award. A defendant may have filed an elaborate defence and substantial counter-claim. It may moreover have prevailed on a portion of its counter-claim. Both parties have manifestly succeeded on some if not on all of the points in their respective claims and counter-claims. The successful party however will be the one that receives the higher of the two awards. There may be an attempt to imbue some causes of action with a broader public interest dimension. In Ireland some parties seek to invoke Irish Constitutional law provisions, as discrete points, in cases that are ostensibly commercial in character. This tactic is also practised in Australia, where it is known as *tacking on*. By importing Constitutional

356 *Ibid,* Olsonard and Bernstein, p 1162.
357 *Ibid*, p 1163.
358 *Ibid,* Rowe, p 651 at 654.

arguments in to an otherwise commercial case, the parties attempt to characterise the action as one that transcends their own corporate or sectoral interest. A vanquished party which prevailed one or more discrete points may appear justified in pressing a strong but ultimately failed claim. The prevailing party deserves to be restored to its original position but the loser has an argument against costs shifting. Rowe postulated that the problem could be alleviated by payment from public funds.[359] Central Government will however recoil from the notion that it should act as the underwriter of last resort even where public interest points are advanced.

359 *Ibid,* Rowe, p 655.

2.6 Private Attorney General and Relator Actions

At common law it was the exclusive right of the Attorney General to consider the public interest generally. The Attorney General was the proper agent of the state to protect that interest, for example, by asserting a public right.[360] In Ireland the office holder was accorded a statutory function to represent the public in all proceedings that seek to assert or protect such public rights.[361] These may arise in many ways,[362] including seeking an injunction to restrain a public nuisance. This might arise by way of an interference with a right that the public enjoy.[363] It does not extend to protecting an interest from the operation of certain enactments.[364] A private party that seeks relief from a public nuisance, by bringing a relator action, must demonstrate a particular interest or an injury that is peculiar to that party. If criteria are met the proceedings may be brought at the relation of the Attorney General. The permission or *fiat* is given to the *relator*. The law officer nonetheless retains strategic oversight including whether, or not, to institute or settle proceedings. The determination of whether it is proper for the Attorney General to allow a relator action is a discretionary matter. This is not something that is susceptible to judicial control.[365] It may be inappropriate to allow an individual to usurp the right to represent the public interest[366] or to enjoin others.[367] Ultimately, it is the relator who assumes responsibility for costs.[368] The Attornies General in England and Wales and Ireland exercise a right to protect the public interest,[369] and relator actions can be utilised in various circumstances. These include where civil remedies are sought to restrain the commission of a criminal or regulatory offence,[370] or to restrain the breach of byelaws,[371] or to restrain a public nuisance.[372] The roles performed by a relator in England and Wales and Ireland, and by a *private attorney general* in the United States, differ

360 *Gouriet v Union of Post Office Workers* [1978] AC 435, 477 (Lord Wilberforce).
361 Ministers and Secretaries Act, 1924, section 6 (1).
362 An injunction to restrain a public nuisance such as the interference with a public right of way.
363 *Thorson v AG of Canada* (1974) 43 D.L.R (3rd) I.
364 *Thorson v AG of Canada* (1975) 1 SCR 138 citing *Massachusetts v Mellon* (1923) 262 U.S. 447 (p 485).
365 *London County Council v A-G* [1902] AC 165.
366 *Stockport District Waterworks Co v The Mayor of Manchester* (1863) 9 Jurist N.S. 266 (Lord Westbury).
367 *London County Council v A-G* [1902] AC 165, 168-169 (Lord Halsbury LC), 170 (Lord McNaghten); *Ex-p Newton* (1855) 4 E. & B. 869.
368 *Attorney General v Lockermouth Local Board L.R.* 18 Eq. 172, 176 (Jessel MR); cited in *Gouriet v Union of Post Office Workers* [1977] UK HL.
369 *Gouriet v Union of Post Office Workers* [1978] AC 435, 477 (Lord Wilberforce).
370 *A-G v Chaudry* [1917] 1 WLR 1614; an injunction was granted to restrain a defendant from using the building as a hotel without first obtaining a fire safety licence.
371 *A-G v Sharp* [1931] Ch 121; *AG v Premier Line Ltd* [1932] 1 Ch 303.
372 *Boyce v Paddington Borough Council* [1903] 1 Ch 109.

in terms of functions. Both harbour an expectation of recovering costs, should they succeed. The relator is obliged to meet the costs liability of a failed action. In the United States of America, the *private attorney general*, invariably never has to discharge the costs of the opposition. That party operates within the confines of protected globule against fee shifting. The relator however has to endure the ebb and flow of two way fee shifting.

2.7 Costs are discretionary

The starting point for any consideration of costs is the common law. Statutory enactments confer the power to award costs. It remains open to the parties to voluntarily contract as to how costs should be dealt with.[373] The allocation of costs can be addressed within clauses of contractual agreements that are brokered between the parties. The courts in the geographically dispersed common law jurisdictions of England and Wales, Australia, and the United States of America,[374] will give effect to such contractual provisions. The right to recover legal costs can also be predicated on a statutory or contractual entitlement. Costs are invariably a matter for the discretion of the court.[375] Both Dworkian liberal legal theory and legal positivism recognise that the successful litigant has a reasonable expectation of securing an order for costs. Though ultimately, the judiciary are vested with an absolute discretion as to whether to award or refuse costs.[376] Originally, the common law courts applied the rule that costs follow the event, and judges were vested with no discretion. While in the Courts of

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373 Costs can be agreed between parties; in leases, mortgages, clauses in mediation or arbitration agreements, which may make provision for costs payable by a party, including the basis upon which such costs will be payable; such agreements displace the general rule and may stipulate that costs are to be paid on an indemnity basis; *Rail Corp NSW v Leduva Pty Ltd* [2007] NSWSC 800, 18; *Re Adelphi Hotel (Brighton) Ltd* [1953] 2 All ER 498; however if costs are to be paid on such a basis the contractual provisions must be clear and unambiguous; "all costs" entitles the recipient to costs on an indemnity basis; *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 1020 (Com Ct); citing Fisher and Lightwood's Law of Mortgage 13th edn para 55.10; *Fairview Investments Ltd v Sharma* (14 October 1999); *Gomba Holdings UK Ltd v Minories Finance Ltd (No.2)* [1992] BCLC 851; *Bank of Baroda v Panessar* [1987] Ch 335; *Drummond v S & U Stores Ltd* [1981] 1 EGLR 42.

374 *Greco v GSL Enters Inc*, 137 MISC: 2d 714, 715; *Hooper Assoc., Ltd v AGS Computers. Inc*, 74 N.Y. 2D 487, 491 (N.Y. 1989); in *SASOF TR-43 Aviation Ireland Ltd v Eastok Avia FZC, Yanair Ltd*, 2017 N.Y. Slip Op. 31514 (U), Kornreich J., awarded the prevailing party legal fees under a contract which was clear on the matter.

375 *Donald Campbell & Co. v Pollak* [1927] AC 732 HL; *Ritter v Godfrey* (1920) 2 K.B. 47; *Alltrans Express Limited v G.V.A Holdings Ltd* [1984] 1 All ER 685.

376 *Donald Campbell & Co. v Pollak* [1927] AC 732, 811; a successful litigant has "in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs … but the Court has an absolute unfettered discretion to award or not to award them" (Viscount Cave LC), cited in *Morrison v Morrison* [1928] 2 D.L.R 998 (Middleton JA, Latchford CJ, and Order JA).

Chancery, costs were awarded as a matter of judicial discretion. Such discretion had to be exercised according to well-established principles, which developed over centuries.[377] The modern laws of costs can be traced to, and flows from, the Supreme Court of Judicature Acts of 1873[378] and 1877 in Ireland. During the latter part of Victorian reign the courts were reluctant to deprive a successful party of costs unless there were pressing reasons to do so.[379] This approach was exemplified by the Court of Appeal when it stated that a prevailing defendant has, unless there are some special circumstances, a reasonable expectation of securing an order for costs from the plaintiff. The court possesses an absolute and unfettered discretion to award or not to award them. This discretion, like any other, must be exercised judicially. It ought not to be exercised against the winning party except for some reason intrinsic to the case.[380] In *British Columbia (Minister of Forests) v Okanagan Indian Bands* the court stated that the jurisdiction to order costs in proceedings is a venerable one. The common law courts did not have inherent jurisdiction over costs. However starting in the late 13th century they were conferred with the power to order costs in favour of a prevailing party. The Courts of Equity, for their part had an entirely discretionary jurisdiction to order costs, according to matters of conscience.[381] Courts in common law jurisdictions which observe the Supreme Court of Judicature model have conferred cost protection: (i) on an organisation active against bribery and corruption;[382] (ii) in proceedings which sought to protect the habitat of the native koala bear;[383] (iii) to aboriginal people in Canada based on their Constitutionally asserted rights;[384] (iv) to a mother in Ireland seeking to challenge whether a waste facility was operating in compliance with the terms of its licence;[385] (v) and in an action relating to Maori culture and heritage in New Zealand.[386]

In *British Columbia (Minister for Forests) v Okanagan Indian Bands*[387] the Indian Bands challenged the prohibition on logging on their lands over which they asserted an aboriginal

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377 "Discretion is not an arbitery power but a "judicial discretion to be exercised on legal principles, not by chance medley, nor by caprice, nor in temper", *Huxley v Weston London Extension Railway Company* [1886] 17 QBD 373, 376 (Lord Coleridge CJ).

378 36 &37 Vict., c 66.23 *Halsbury's Laws of England* (1st ed); 178.

379 *Jones v Curling* (1884), 13 Q.B.D, 262 (CA); *Civil Service Co-operative Society v General Steam Navigation Co.* (1903) 2 KB 756 (CA); citing Halbury's Laws of England (1st ed), 179.

380 *Donald Campbell & Co. Ltd v Pollak* [1927] AC 732 (CA), 811-812.

381 (2003) 114 CCR 2d 108 [19].

382 *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA CIV 192.

383 *Oshalack v Richmond River Council* (1998) HCA 11.

384 *British Columbia (Minister for Forests) v Okanagan Indian Board* (2003) 114 CCR 2nd 108.

385 *Hunter v Nurendale Limited Trading as Panda Waste* [2013] IEHC 430

386 *New Zealand Maori Council v Attorney-General of New Zealand* [1994] 1 AC 466.

387 *British Columbia (Minister for Forests) v Okanagan Indian Board* (2003) 114 CCR 2nd 108 (Le Biel J); *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 [55].

right of title. They did so on the basis of their constitutionally asserted aboriginal rights. The Canadian Supreme Court, decided on a majority basis, that the respondent should discharge the appellants costs while in *Oshalack v Richmond River Council*[388] the High Court of Australia, restored the refusal of the judge at first instance to make an order for costs in favour of the council. The local authority had been the successful party in those proceedings, which arose out of a planning consent, which impacted on koala bear habitat. The appellant had no vested interest in the litigation other than the preservation of endangered indigenous fauna. It is noteworthy that a significant portion of the populous shared the appellant's views. This imbued the proceedings with a public interest dimension. The case generated significant issues regarding the future application of legislative provisions to endangered species. In *New Zealand Maori Council v AG*[389] the Privy Council noted that whilst the appeal was to be dismissed the applicants had not brought the proceedings out of personal gain. The Committee made no order as to costs.[390]

2.7.1 Equitable Jurisdiction

The role exercised by the Lord Chancellor in relation to costs differed greatly from the common law. The awarding of costs in equity, according to Lord Hardwicke in *Jones v Coxeter*, is totally discretionary and it does not seek to adhere to the rule of law.[391] The Courts of Equity traditionally dealt with costs not arising from any legislative authority but from conscience and *arbitrio boni viri.*[392]*Andrew v Barnes* and *Corporation of Buford v Lenthall* endorsed the viewpoint that the judiciary enjoyed an inherent power to award such costs, which they readily exercised.[393] In *Eircom plc v Director of Telecommunications Regulations*

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388 *Oshalack v Richmond River Council* (1998) HCA 11.

389 *New Zealand Maori Council v A-G of New Zealand* [1994] 1 AC 466, the Privy Council declined to make an order for costs against the unsuccessful appellants as they were not motivated by any sense of private gain in prosecuting the litigation which was brought in " the interests of the taonga which is an important part of the heritage of New Zealand" and the Court of Appeal judgment had left an undesirable lack of clarity in an area of law which required to be examined by the Judicial Committee of the Privy Council.

390 *New Zealand Maori Council v AG* [1994] 1 AC 466, 460 G (Lord Woolf); *R v The Lord Chancellors Department, ex-p, Child Poverty Action Group* [1998] EWHC Admin 151 [42].

391 *Jones v Coexter* (1742) Atk 400 (Lord Hardwicke); Andrews *v Barnes* (1888) 39 Ch D 133, 138; *R* (*Corner House Research*) *v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192, p 17 (Lord Philips MR, Brooke LJ, and Tuckey LJ).

392 *Andrew v Barnes* (1888) 39 Ch D 133, 138, (Fry LJ); cited in *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA, Civ 192, 17.

393 *Ibid, Andrew v Barnes* ; *Corporation of Buford v Lenthall* (1743) 2 Atk 551, 552.

Herbert J. sitting in the High Court in Ireland, held that the discretion under the court rules must be exercised judicially on the facts of each case.[394] The courts in England, Ireland, Australia and the United States enjoy an equitable jurisdiction in exceptional circumstances to shift the costs burden on to the successful party. The courts can exercise two-way shifting if bad faith has been proved and costs always remain discretionary. That discretion is subject to the caveat that the judiciary always remain alert to the possibility, that by reason of some special or unusual circumstances, it may be appropriate to depart from the normal course.[395] The default position for considering an award of costs was elucidated by the former Chief Justice of Ireland, in 2008. Murray CJ. asserted that the loser pays rule has an obvious equitable basis, and as a counter balance the court may displace the rule if the interests of justice require it to do so. There are no preordained categories of litigation that fall outside of the full scope of that discretionary jurisdiction.[396] In some instances, it may be possible to endeavour to loosely group together the exceptions. There will also be cases that straddle a kind of borderline area.[397] The jurisprudence has developed more by reference to the exceptions to the loser pays principle rather than the rule itself. The courts have in particular had to address the conduct of the parties, test cases, and also public interest challenges.[398] As a starting point, parties who bring a case in order to secure their rights are entitled to the reasonable costs of those proceedings. Secondly, parties who successfully defend proceedings are entitled to their costs. Thirdly, the party in whose favour judgment is rendered is entitled to costs, unless the court forms a view that to make an award of costs would not be equitable.[399] The courts will always have discretion to depart from the general rule when there are special or exceptional circumstances.[400] However, it is necessary for very substantial reasons of an unusual kind to exist before the judiciary can ignore the rule in relation to the hearing of appeals.[401]

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394 [2003] 1 ILRM 106; *Hewthorn v Heathcott* [1902] 39 ILTR 248 applied; *Ibid,* Alcock, *Legal Costs: Loser Pays,* p 7.

395 *Veolia Water UK Plc v Fingal County Council* [2006] IEHC 240, 242 (Clarke J).

396 "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 counter point 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 the 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"; *Dunne v Minister for the Environment* [2008] 2 IR 755, 783 – 784.

397 *Godsil v Ireland* [2015] IESC 103 [24] (McKechnie J).

398 *Ibid,* (McKechnie J) [25]; Susan Delaney & Declan McGrath, Civil Procedure in the Superior Courts, Thomson Reuters; 2013; 3rd ed.; paras 725-730.

399 New York Laws, Civil Practice Law & Rules Article 81, S 8101.

400 *O'Keeffe v Hickey* [2009] IESC 39 (SC).

401 *Dunne v Minister for the Environment* [2008] 2 IR 775.

2.8 Underwriting and cost inoculation

Public funding represents something of an oasis in an otherwise oppressive access to justice landscape. Lord Hacking noted that at the start of the 1980s about seventy per cent of families in England and Wales were eligible for legal aid. However by the expiration of that decade that number had dwindled to about half.[402] This stark collapse has continued in recent decades. Lord Browne-Wilkinson observed that the financial burden of litigation is now such that it has become the preserve of the very few. Meanwhile, Government displays no appetite for assuming the burden associated with legal aid. The budgetary monies available are filtered in to criminal legal aid.[403] The corollary of raising the means test has resulted in an extreme position where only the rich or the precariat can access the courts.[404] Paradoxically, a legally aided party may enjoy an advantage under the costs follow the event rule. Such parties can conduct litigation safe in the knowledge that they are inoculated against the harshness of the rule. If a publicly funded party is successful against a privately funded one, the courts inflict the costs follow the event rule, enabling the legally aided party to recover costs. The rule produces one-way shifting by awarding costs to the legally aided party, if that party is successful, but not awarding costs against that party, if it is unsuccessful. In this way the rule fails any form of reciprocity test. Further, a party seeking legal aid can at the outset of the proceedings, make application, to have any financial contribution waived, on the grounds that it would result in financial hardship. Litigation involving legally aided protagonists sits in neither the exclusions nor the exceptions to the loser pays rule. Parties who conduct litigation in special tribunals, or within the recognised exceptions, enjoy a risk averse environment. In the case of the former fee shifting is dislodged, while in the case of the latter, the application of the rule is negated or curtailed, often for reasons of public policy. The resultant outcome produces an overarching matrix where the parties receive immunisation from the severity of loser pays rule. Such *de jure* protection is not dissimilar to the dislodgment of two-way fee shifting in public interest and environmental litigation. Though access to justice potentially confers protections on legally-aided parties, the potential liability for those who are not in

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402 Reports of the Parliamentary debates in Hansard: Official Report, 12 June 1995, cols 1543 – 1591, H.L, col. 1574.

403 Nicholas Browne-Wilkinson, *The UK Access to Justice Report: A Sheep in Woolf's Clothing*, p 182, paper presented to the Australian Institute of Judicial Administration Sixteenth Annual Conference, Melbourne (4- 6 September 1991), and the Supreme Court of New South Wales, Judges Conference Sydney (11 September 1998); Western Australian Law Review, July 1999, Vol. 28, p 181 at 182.

404 *Ibid*, Woodroffe, p 349.

receipt of legal aid is open-ended. In this way legal aid may even contribute to the failure to deliver real justice. This is exemplified where a party that has successfully vindicated its rights, may not benefit from costs shifting. The victorious party's costs are not recoverable from the impecunious one (let alone enforceable). The latter party suffers no detriment.

2.8.1 The Legal Aid Globule

Cost shifting protections neuter the harsh application of the rule. It effectively becomes emasculated in favour of the legally aided party. Such litigants enjoy a form of protective shield against the vagaries of the costs rules. They are, partially protected, at least, from the uncertainties of judicial outcomes. However, the protection afforded to legally funded litigants can produce negative financial consequences. One being the propensity on the part of legally-aided parties to exhaust the appeal(s) process in circumstances where legally aided parties carry a limited financial exposure. There is little or no disincentive against exhausting the appeals process, if only for tactical gain. Certain characteristics of legal aid can act as a green flag to some litigants. It is well settled that a cohort of legal aid litigants will fail, while the prevailing parties who were forced to initiate proceedings in order to vindicate their rights will feel readily aggrieved if they are not reimbursed.[405] A successful party, who is privately funded, will not ordinarily receive an award of costs, against an unsuccessful one, where the latter is in receipt of legal aid. Additionally, the possibility is extinguished entirely when the prevailing party institutes the proceedings, against the legally aid party. Woodroffe averred that costs come in to sharp focus under the loser pays rule, as privately funded parties must plot a careful course before embarking on the choppy and treacherous seas of litigation. Indeed certain categories of private litigants, particularly elderly ones, may on balance elect to make a partial sacrifice, and compromise the proceedings, rather than assuming the unbridled risk of litigating. While the costs follow the event philosophy provides a disincentive to litigants, any such a disincentive clearly evaporates for the legally aided party.[406] The Civil Justice Council did not advocate for the abolition of fee shifting in its 2005 report.[407] In the view of Lord Woolf the decision to engage in litigation, and especially so in

405 *Ibid*, Pfenningstorf, p 64.
406 *Ibid*, Woodroffe, p 348.
407 United Kingdom Civil Justice Council *"Improved Access to Justice – Funding, Options and Proportionate Costs"* (2005), pp. 37-39.

the case of a plaintiff, should not be entirely risk free.[408] He embraced the conventional concern that the cost of engaging in litigation represents one of the most fundamental challenges to the system of civil justice.[409] Litigation in many areas of law, including mercantile and business law has now become the preserve of companies and corporations.[410] This view has been echoed *ex curia* by many judges including the Chief Justice of Canada.[411] The review of the civil justice system commenced in 1999 following reports published by Lord Woolf and Genn posited that it stemmed from the concern about expenditure on legal aid, and the rising cost of the criminal justice system. Genn suggested that the objective underpinning legal aid has been to provide access to justice so that the impecunious can vindicate their rights in a similar fashion to the well resourced.[412] In 1999 the Access to Justice Act, in England and Wales introduced fundamental changes to the system of civil legal aid. In reality, legal aid was substituted by the no win for fee model,[413] and contingency fee arrangements.[414] The solicitor client relationship was no longer based on the common law retainer. The former became financial stakeholders in their clients' cases. Solicitors who enter such arrangements have a proprietary interest in case outcomes. This in turn generates a conflict of interest that undermines the independence of the lawyer client relationship. Indeed firms of solicitors that undertake a substantial amount of work on a conditional fee basis, in their practice, may be an unattractive proposition for insurers, and face a higher professional indemnity insurance premium. For their party underwriters regard such work as carrying inherently higher levels of risk. This is particularly so where a substantial proportion of the work undertaken by a solicitor's practice is conditional fee related. This work does not

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408 *Access to Justice*, (1995) (Interim report to the Lord Chancellor on the civil justice system in England and Wales) p 203.

409 *Ibid*, p 8.

410 Nicholas Browne-Wilkinson, The UK *Access to Justice Report: A Sheep in Woolf's Clothing*, Western Australian Law Review, July 1999, Vol. 28, p 181 at 182.

411 Chief Justice Beverley McLachlin *"The price of justice should not be so dear"*, The Jurist, August 12, 2007.

412 Hazel Genn: *What is Civil Justice For? Reform, ADR*, and Access to Justice, *Y*ale Journal of Law & The Humanities, Vol. 24 [2012], Iss. I, Art. 18, p 399.

413 Conditional Fee: sometimes called a *no win no fee* and is very common in negligence actions. Under the terms of the agreement the instructing solicitor will only get paid if the party wins their case. The losing party does not have to pay their own solicitors legal costs if they lose, but, they are still responsible for paying the legal costs of the successful party. Insurance Companies offer policies for no win no fee arrangements. Some countries prohibit no win no fee arrangements for certain kinds of legal proceedings, for example, in family law and criminal law cases on public policy grounds.

414 Contingency Fee: A method of payment of legal fees represented by a percentage of the award. The solicitor gets paid for the work if their client wins by taking a percentage of the award of damages. This allows clients to receive "legal services" without having to pay money to their lawyer. Law Societies in many jurisdictions prohibit contingency fee arrangements particularly in (contentious) personal injuries cases. In Ireland, in contentious business, a solicitor may not calculate fees or other charges as a percentage or proportion of any award or settlement.

generate a steady flow of income for firms, which are not put in funds at the outset of litigation by their clients. The fate of clients and their solicitors becomes inextricably linked and indivisible. The counter argument is that solicitors and counsel who freely enter in to such contractual arrangements are, effectively financing the litigation, by providing their client's with an avenue for access to justice. One notable downside of this model is that meritorious lower value type claims may be insufficiently profitable to attract the investment of resources by private firms.[415] Scott captured the newfound economic and political mood by suggesting that as government extricates itself from public funding new arrangements are needed to fill the vacuum.[416] The ramifications of costs follow of the event mean that the middle class is weary to engage in litigation faced with the unprotected consequences that may flow from an adverse outcome. The rule provides no deterrent to impecunious litigants, even those intent on pursuing a frivolous claim, who are intent on engaging in Kamakazi type litigation.[417] However the impact of the rule on the middle class can be detrimental, even to those seeking to pursue high merit claims. Few parties proceed with confidence under a rule that generates a primal desire to win at all costs. Corporate and impecunious litigants come within a protective canopy. The former having the financial capacity while the latter circumvent the harsh application of the rule, by virtue of their income levels falling below financial eligibility thresholds. The harsh rigours of the rule has seen the emergence of exceptions, some of which, engage with access to justice and broader public policy considerations. The exceptions to the loser pays rule render greater access to justice, to many parties which embark on litigation in the areas of family law, *sui generis* proceedings, and probate litigation. It is perhaps these exceptions that deliver genuine access to justice.

2.9 Qualified One - Way Costs Shifting (*QOCS*)

The principle of qualified one – way costs shifting, or '*QOCS'*, which was introduced in England and Wales in 2013 has no statutory comparator in Ireland. '*QOCS'* suspends the

415 *Ibid*, Victorian Law Reform Commission, p 7.

416 Ian Scott, *"Adjusting the interests of parties and Courts; Uniformity, Diversion and Proportionality"*, (paper presented at the 22 Australian Institute of Judicial Administration Annual Conference), 17 September 2004, 32.

417 Litigation which is foolhardy and self-defeating.

operation of the costs follow the event rule in certain personal injuries actions[418] with some limited exceptions.[419] It is analogous to the shield which protagonists who conduct litigation within the rubric of legal aid enjoy.[420] Such litigants are buttressed from adverse costs orders.[421] In *Siddiqui v The University of Oxford*, Foskett J. sitting in the High Court in England and Wales noted that the concept as implemented in that jurisdiction[422] falls some way short of the legal aid model.[423] '*QOCS'* does not engage with any access to justice issues beyond the sphere[424] of personal injuries litigation.[425] It can be viewed as an exception to the loser pays rule with certain limitations. The protection is not absolute and it can be vitiated if certain conditions pertain,[426] including dishonesty. There are exceptions to '*QOCS'*, the most prominent of which being mixed claims, which comprise of both personal injuries and non-personal injuries components. In such claims *QOCS* protection is a matter of judicial discretion.[427] In *Jeffreys v The Commissioner for the Police for Metropolis* the entire claim failed and the prevailing defendant requested the court to dis-apply *QOCS* protections. The defendant received a cost award of seventy percent. Freeland J. concluded that the claim was one for the benefit of the claimant other than one for which the section conferring '*QOCS'* protections operated, namely an action in personal injuries.[428] On appeal the vanquished appellant averred that the personal injuries claim and the non-negligence based claims were indivisible. Morris J. determined that the exception to '*QOCS'* was operative by reason of the fact that the personal injury component of the claim and the other claims in tort were divisible. He lamented the absence of any pertinent authorities on the construction of the provisions. [429]Morris J. surmised that the appellant had artificially attempted to argue that the tortious actions were inseparable.[430] He asserted that costs orders can be enforced if the court concludes that the claim being advanced for the claimant's benefits is one other than a claim

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418 CPR, r. 44.13 (1) (a).

419 CPR, r. 44.15 (a)-(c).

420 *Siddiqui v The Chancellor, Masters and Scholars of The University of Oxford* [2018] EWHC 536 (QB).

421 *Brown v The Chief Constable of Greater Manchester* [2018] EWHC 2471 (QB) [59] (Whipple J).

422 *Ibid*, '*Siddiqui'* [2018] EWHC 536 (QB) [8].

423 *Ibid* [5]; *Howe v Motor Insurer's Bureau (No 2)* [2018] 1 WLR 923, 11 (Lewison LJ).

424 *Ibid* [59].

425 It dispenses with the need for claimants to purchase insurance to inoculate themselves against costs shifting.

426 CPR, r. 44.16 (2) (b).

427 *Ibid* [2] [60].

428 The claimant instigated a claim disclosing multiple causes of action, including claims for false imprisonment, assault, battery, malicious prosecutions and misfeasance in public office. He contended that his arrest triggered his subsisting paranoid schizophrenia.

429 *LL v The Lord Chancellor* (HC 9 December 2015) (Foskett J); *Howe v Motor Insurers Bureau* [2016] EWHC 884 (QB).

430 *Jeffreys v The Commissioner of Police for the Metropolis* [2017] EWHC 1505 (QB) [18].

for which '*QOCS'* protection applies.[431] The respondent contended that the claim had the hallmarks of a mixed case and the provisions of CPR 44.16 (2) (b) which operate to deactivate *'QOCS'* safeguards applied. Morris J. determined that the action which included a claim for loss of liberty, distress, fear and upset, was one other than one for which the section conferring '*QOCS'* safeguards operated. The appellant had sought exemplary and aggravated damages which were unrelated entirely to the personal injury aspect of the case.[432] The limitation on the enforcement of CPR 44.14 was inoperative as the exception in CPR 44.16 was enlivened.[433] In the seminal case of '*Siddiqui'* the claimant failed in his personal injuries action. It was common case that '*QOCS'* protections operated in relation to the personal injuries aspect of the claim though not in respect to that part of the claim addressing pure financial loss. The claimant unsuccessfully contended that it would be impossible to attempt to sever any discrete non '*QOCS'* elements from the personal injuries action *simpliciter*. Foskett J. averred that that portion of the claim which addressed itself to pure financial loss was beyond the scope of such protective coverage. The vanquished claimant was ordered to pay one quarter of the prevailing parties' costs which the court surmised still provided legitimate '*QOCS'* protection.[434] The corollary of '*Siddiqui'* is that prospective claimants will require to exercise a high level of circumspection before introducing non personal injury elements in atypical personal injury claims. Such claimants introduce the risk factor of pleading tortious claims which fall outside of the protective coverage conferred by '*QOCS'*.[435] The principle was upheld in *Brown v The Chief Constable of Greater Manchester* by Whipple J. on appeal.[436] The legislature in Ireland has not yet introduced *QOCS* protections in personal injuries actions. In certain proceedings however the parties can seek to suspend cost shifting. In Ireland the Environment (Miscellaneous) Provisions Act, 2011 displaces the loser pays principle. It applies instead the special rule that each party will bear their respective costs in certain types of environmental litigation. In *McCallig v An Bord Pleanála* the applicant was granted leave to apply for an order quashing the decision of the respondent to grant planning permission.[437] The applicant prevailed on the three points

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431 CPR, r. 44.16 (2) (b).

432 *Ibid* [38]; *Thompson v Commissioner of Police for Metropolis* [1998] (QB) 498, 514-517.

433 *Ibid* [38]; White Book Service 2017, Vol 1, p 1375.

434 *Ibid* [18] , [21]

435 CPR, r. 44.16(2) (b).

436 *Brown v The Chief Constable of Greater Manchester* [2018] EWHC 2471 (QB) [59]; *Wagenaar v Weekend Travel Ltd* [2015] 1 WLR 1968 (Vos J).

437 Section 50B Planning and Development Act, 2000 as inserted by section 33 of the Planning and Development (amendment) Act, 2010; The applicant contended that a parcel of her land was erroneously included in the grant of planning permission to the notice party and secondly that there were myriad breaches of

relating to planning and development but lost on the environmental impact assessment issues. Those issues were nonetheless germane to the proceedings. The vanquished respondent which sought to deactivate costs shifting averred that section 50B applied to the entire judicial review proceedings[438] such that that party would enjoy a blanket immunity from any adverse costs award. The respondent sought to have the protective benefit of the section deployed to the totality of the proceedings to create a protective globule or back stop against costs shifting. The submission was not dissimilar to the arguments propounded in '*Siddiqui'.* In that latter case the claimant attempted to gain blanket '*QOCS'* protection for a claim which included a component for pure financial loss. In '*McCallig'* the applicant contended that section 50B (2) only operated in respect of that portion of her challenge which was founded on environmental impact assessment issues. The applicant also sought to characterise the proceedings as being of exceptional public importance, and on this basis, she sought a full award of costs, in respect of all issues. [439] The High Court ruled that the parties should bear their own costs with regard to the environmental matters and it rendered an order for costs in favour of the applicant purely in relation to the planning and development issues. Herbert J. held that section 50B (2) was only operative in respect of that portion of the case which engaged with the environmental impact assessment.[440] The loser pays rule applied to the remaining distinctive parts.[441] The court concluded that the legislature could not have intended that the costs in judicial review applications irrespective of how many points were pleaded or raised must be determined purely by reference to the presence of the environmental issues in the case. Such a methodology would produce a proliferation of judicial review litigation.[442] The circumstances under which a claimant in England and Wales can lose '*QOCS'* protections are not dissimilar to those which can see a party lose the benefit of the special rule in Ireland. The legislative presumption that each side will bear their own costs can be dislodged if the court deems that the claim is vexatious[443] or frivolous, or owing to the manner in which a party conducts itself, or where contempt is present.[444] '*QOCS'* protective immunity is lost if the court determines that there were no reasonable grounds for bringing the case or where the proceedings represented an abuse of process or for conduct

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Directives specified in the legislation.

438 *McCallig v An Bord Pleanála* [2014] IEHC 354 [5].

439 *Ibid* [8] (Herbert J).

440 *Ibid* [8].

441 Planning and Development Act, 2000, section 37(i) (b), Article 22(2) (g).

442 *Ibid* [44].

443 *Ladd v Wright* H.23 EI2. Moore, E25, the common law courts have punished vexatious claims for centuries.

444 Environment (Miscellaneous Provision) Act 2011 section 3(3) (a)-(c).

attributable to the claimant.[445] '*QOCS'* is ripe for usage in equality non-discrimination and equal status type cases in the County Court in England and Wales and in the Workplace Relations Commission and Labour Court in Ireland. The plaintiff friendly '*QOCS'* model can be utilised for public policy reasons[446] to ensure that unsuccessful plaintiffs will not have to discharge the costs of the prevailing defendant. In the United States of America successful plaintiffs ordinarily recover their costs though not in the absence of good faith[447] and for policy reasons successful defendants are virtually never entitled to their costs if they prevail. *Christiansburg Garment v EEOC* is authority for the proposition that the courts can award legal costs against unsuccessful plaintiffs but only if there is a finding that the action was frivolous, baseless, or without foundation.[448] This is analogous to the jurisdiction to award costs against a party for abuse of process in England and Wales[449] and in Ireland.

2.10 Exceptions: Overview

The evolution of the common law witnessed the burgeoning of exceptions. [450] The expansion of such multi-parous exceptions has produced something of a phenomena. There are rationally compelling reasons for exceptions but the arguments propounded in their favour are often not deductively compelling. The defeasibility theory of law suggests that the reasons for exceptions sometimes do not withstand closer scrutiny as they are not founded on any logical basis. D'Almeida examined the basic jurisprudential problem of defeasibility in law[451] within the rubric of the philosophy of criminal law which he accepted has produced confusion.[452] His work which is predicated on the proof based account seeks to devise criteria for adjudicating on whether any set of facts ought to be construed as prosecution or defence facts.[453] D'Almeida viewed the component elements of the offence as requiring P- facts and

445 CPR, r. 44.15 (a)-(c).
446 *Christiansburg Garment v EEOC* 434 U.S 412 (1978) 434 U.S 415-422.
447 *Newman v Peggie Park Enterprises Inc.* 390 U.S 400 (1968).
448 *Christiansburg Garment v EEOC* 434 U.S 412, 422 – 24 (1978).
449 CPR, r. 44.15 (b).
450 Luís Duarte d'Almeida, *Allowing for Exceptions, A Theory of Defences and Defeasibility in Law*, Oxford University Press (2015), p 135.
451 *Ibid*, d'Almeida, p 23 (fn1).
452 *Ibid*, d'Almeida, p 133.
453 They are described as P- or D- facts.

the defence (or by analogy exceptions) as needing D- facts. He posited that in order for the judiciary to render a legally correct decision that it is necessary for P- facts to be proved and furthermore that the court cannot render a correct decision in favour of the prosecution if D- facts have been successfully raised. D'Almeida suggests that positive and negative facts can comprise elements[454] of the same rule. This view is in conformity with the incorporationist approach. [455]D'Almeida posited that the distinction between P- and D- facts may deliver progress when it comes to dealing with salient issues. D'Almeida [456] and Williams[457] contend that there are no underlying exceptions which exist as standalone concepts for the purpose of a judgment unless it is a constituent component of a factual set. The former sought to clarify the notion of exceptions[458] and he elucidated the characteristics not only for those facts which ought to be permitted as exceptions but also for those which should not. MacCormick is credited with formulating the concept of express or implicit exceptions[459] as he traced the defeasibility of legal concepts from HLA. [460] D'Almeida propounded that there is a dichotomy between rules and exceptions and the latter do not enjoy tacit recognition.[461] It is trite that express exceptions can be incorporated in to legislation as negative conditions.[462] D'Almeida noted the Dowrkinian view that exceptions should be clearly elucidated in the absence of which the rule itself can be undermined. [463] Employing the Dworkinian doughnut analogy the implied exceptions are located within the rule or doughnut while the express ones are situated externally. The judiciary can in the exercise of their discretion create implicit exceptions if a literal interpretation would defeat the purpose of the rule. [464] The legislation may be silent with regard to express exceptions in which case they can be characterised as being implicit.[465] The exercise of judicial discretion directed towards any implicit exception

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454 The absence of positive facts can also create a negative condition.

455 Francesca Poggi, review, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* by Lúis Duarte d'Almeida, King's Law Journal, 2017, Vol. 28, No.1, p 157.

456 *Ibid*, d'Almeida, p 130.

457 *Ibid*, Glanville Williams, *"The Logic of Exceptions"* (1988), Cambridge Law Journal, 47, pp.261-96, at 279.

458 *Ibid*, d'Almeida, p 266.

459 Neil MacCormick, *'Defeasibility in Law and Logic'* (Zenon Bankowski, Ian White, Ulrike Hahn eds), Information and the Foundations of Legal Reasoning, (1995), Dordrecht: Kluwer, p 102; Duarte d'Almeida, ibid, p 135.

460 H.L.A Hart *'The Ascription of Responsibility and Rights'*, Proceedings of the Aristotelian Society 49 (1949), 171-94.

461 *Ibid,* d'Almeida, p 133; *Ibid,* Williams, pp.261-96, at 269.

462 Ronald Dworkin, *The Model of Rules* I (1967) reprinted in *'Taking Rights Seriously'*, Harvard University Press, (1977); *Ibid*, d'Almeida, pp. 135, 152.

463 *Ibid,* d'Almeida, p 152.

464 *Ibid,* p 135.

465 *Ibid,* p 135.

occurs within the rule.[466] Williams[467] contended that it is possible to search for exceptions by performing a 'test of policy' and certain exceptions[468] may flow from public policy considerations.[469] The proof based account may assist in ascertaining whether facts ought to be construed as P- or D- facts. The former may manifest in negative form and the converse is also argued.[470] These concepts can be utilised in decision making and in the formulation of questions to ameliorate the process.[471] Poggi diagnosed the limitations of the work which fails to address the interpretative problems associated with exceptions. [472] This occurs in the most pronounced manner where implicit exceptions are (mis-) characterised as epistemic problems.[473] D'Almeida averred that the proof based account may lead to a reconstruction of the reasoning by which the judiciary select facts [474] but he refrains from elucidating those facts. He does not aver that the differences between them are insignificant and so clearer differentiations between those facts would be welcomed.[475] This thesis extends beyond the theoretical conclusions reached by d'Almeida in several respects. He could have examined one rule and the exceptions to it not only to explore his theories but also to infuse his book with a practical application. D'Almeida employed a limited theoretical apparatus and so his conclusions are constrained by those limitations. The blatantly theoretical apparatus[476] produced a descriptive work which focuses on legal analytical philosophy[477] and it offers minimal practical utility value. He focused on the substantive criminal law while the *Law of Costs* is adjectival. There is no substantive free standing right to costs. They always remain a matter of judicial discretion which by implication, sometimes necessitates judicial interpretation, but d'Almeida avoided undertaking any detailed analysis of judicial outcomes.[478] This thesis like his book is descriptive but the former is deductive rather than

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466 *Ibid,* p 135.

467 *Ibid,* Glanville Williams, pp.261-96, at 281; cited by d'Almeida, *ibid,* p 128.

468 The contested probate exceptions.

469 *Ibid*, d'Almeida, p 131.

470 His work goes one step further than the incorporationist approach and it may assist in developing criteria for determining whether any given fact ought to be treated as a prosecution or defence one and by analogical extension, as either a rule or an exception.

471 *Ibid*, d'Almeida, pp. 266-267, it may be possible to assert that no fact should be a P fact relative to some given decision unless such a fact forms part of a greater suite of facts.

472 *Ibid*, Poggi, pp.157-160.

473 *Ibid*, d'Almeida, p 155; *Ibid,* Francesca Poggi, at 160.

474 *Ibid*, d'Almeida, pp. 266-267, " … if the proposed poof-based account is sound, it might point to a richer appreciation and reconstruction of the sort of normative message that law-making authorities may be thought to be communicating to their norm-subjects by selecting which facts are to count as P- or D-facts in different decision-making contexts".

475 *Ibid*, Poggi, pp. 157-160.

476 *Ibid*, Poggi, p 160.

477 *Ibid*, Poggi, p 158.

478 *Edwards (R v Edward)* [1975] QB 27, the Court of Appeal held that it is not for the prosecutor to prove

intuitive[479] and it employs deductive reasoning which gives it certainty. D'Almeida refrained from identifying facts which could constitute exceptions and he relegated the difficulties posed by implicit exceptions[480] by asserting that they do not present interesting theoretical challenges.[481] This thesis does not disparage the implicit exceptions by relegating them to a strata of lesser hierarchical importance. It examines the loser pays rule and its exceptions by considering black letter law from a traditional framework instead of an overtly theoretical structure.[482] This delivers tangible findings and conclusions. The methodology imbues the research with an inherent reliability and orthodoxy which filters out subjective bias. This thesis has recourse to other jurisdictions which observed the Supreme Court of Judicature Act model which introduces a further layer of complexity. The editor's preface[483] to his work contends that it can have application to civil litigation[484] but d'Almeida fails to properly transpose his work from the criminal law milieu. He fails to commit to a particular rule which in turn militates against solid conclusions. The research renders detailed findings with regard to the state of health of the loser pays rule and the exceptions. Finally the thesis has a cross over value as the concept of rules and exceptions are universal ones, and as such, the thesis can pollinate other subject areas. The jurisdictions of England and Wales and Ireland have for centuries derogated from the harsh rigours of the loser pays principle in an effort to curtail its severity. Those and other jurisdictions which observe the Supreme Court of Judicature Act model have devised myriad exceptions to that rule. There is no obvious nexus linking many of these exceptions which militates against them enjoying any pronounced synoptic connectivity. Some of the exceptions broadly fall under the access to justice umbrella, while others, appear to stem from public policy considerations as recognised by d'Almeida and Williams. The Chancery Court and contested probate indemnities/exceptions may result in the unsuccessful parties' costs being discharged out of a fund or estate which in turn depletes the financial pot for the beneficiaries. In these matters and to a lesser extent in family law litigation, there is a common fund, or estate, or matrimonial pot from which costs can be discharged. The factual matrices under which the Chancery Court indemnities can be activated are neither set in stone or unalterable. These indemnities are enlivened if the litigation is instigated for reasons which transcend the private

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that the defendant had no licence to sell intoxicating liquor but it is for the defendant to prove that he had.

479 *Ibid*, Poggi, p 157.

480 *Ibid*, Poggi, p 159; *Ibid*, d'Almeida, p 155.

481 *Ibid*, Poggi, p 159; *Ibid*, d'Almeida, p 155.

482 *Ibid*, Poggi, p 158.

483 The book grew out of the thesis submitted for the award of D.Phil.

484 Timothy Endicott, John Gardner, Leslie Green, Editor's Preface.

sectoral interests of the party initiating the action. This form of indemnity will inoculate a trustee [485] and parties which issue suits for the benefit of the corporation or shareholders. The indemnity operates in a similar fashion to the one which is conferred by the common benefit doctrine in the United States of America.[486] The last twenty years have witnessed a not inconsiderable expansion of this form of indemnity which now embraces litigation pertaining to a pension scheme[487] and the reconfiguration of a life assurance business.[488] There is no requirement that the litigation must ameliorate the financial standing of the fund or corporation as a precursor to the indemnity being invoked.[489] In contested probate litigation the moving party may enjoy inoculation from party and party costs providing that the litigation is *bona fide*[490] and the next of kin acted in a reasonable fashion.[491] This exception can be lost if the litigation is predicated on unreasonable suspicions [492] which sees the loser pays rule revived. The inquisitorial nature of proceedings offers one thematic link between family law, contested probate litigation, and coronial proceedings. The last of which can be characterised as being sui *generis*. The contested probate and family law exceptions appear to be connected in two ways. Firstly they emerged as implied exceptions within the rule and they engage with public policy considerations. Secondly both of them see the court assuming a more prominent fact finding role. This characteristic is more akin to the inquisitorial processes in continental Europe. The (inquisitorial) exception is also present in those special courts and tribunals which apply variants of the loser pays rule.[493] The loser pays rule is ordinarily excluded from inquisitorial tribunals, commissions of inquiry, and other specialist tribunals.[494]/[495] There is no definitive synoptic connectivity linking the myriad exceptions

485 *Re Buckton* [1907] Ch 406.

486 *Sprague v Ticonic National Bank* 307 (U.S) 161 (1939); *Mills v Auto Lite* 396 U.S. 375 (1970).

487 *McDonald v Horn* [1995] 1 All ER 961.

488 *Re Axa Equity Life Assurance Plc (No.1)* [2001] 2 BCLC 447.

489 *Bakery Workers Union v Ratner* 118 U.S. App. D.C. 269, 274 (1964).

490 *Rippington v Cox* [2017] IECA 331 (CA) (Whelan J).

491 *Fairtlough v Fairtlough* (1839) 1 Milw.36; *Williams v Coker* 67 L.T. 626.

492 *Orton v Smith* LR. 3. P. 23.

493 *Ibid*, Pfennigstorf, p 2.

494 Copyright, Designs and Patents Act, 1988 (UK) section 151 provides that "The Copyright Tribunal may order that the costs of a party to proceedings before it shall be paid by such other party, as the Tribunal may direct."; *PRS v BEDA* [1993] EMLR 325, 334 (Hoffmann J); *Phonographic Performance Limited v AEI* [1999] 1 WLR 1507.

495 Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 (Ireland) section 6 (1); private parties appearing before tribunals of inquiry may benefit from costs shifting protections which are analogous to those which are enjoyed by a party in receipt of legal aid. The tribunal may award costs to a party which has properly participated in the process. However the tribunal can make a full or partial disallowance where it is shown that a party has failed to disclose material or did not properly engage. The reason why two way cost shifting is disengaged in such proceedings in Ireland is attributable to the fact that the tribunal is concerned with establishing facts rather than attributing liability or laying blame; *Lowry v Mr. Justice Moriarty* [2018] IECA 66 [29] - [90] the appellant was only awarded one third of his costs. He was never provided with an indication of

which have no single progenitor or common lineage or genealogy.

2.10.1 Chancery Court Indemnities

The High Court Chancery Division tempered the effects of the costs follow the event rule where there is a private fund in being.[496] The modern practice to indemnify parties is related to the right of a *fiduciary* such as a trustee or agent to be indemnified. The concept is not unlike an agent who is indemnified under the law of agency. Lord Denning elucidated the concept in *Wallersteiner v Moir (No.2)* where he held that a minority shareholder bringing an action on behalf of a company against its directors, was an agent. As such, the shareholder was entitled to be indemnified by the corporation against all of the costs and expenses that were reasonably incurred. The indemnity is analogous to the one that a trustee was entitled from *a cestui que trust*.[497] In the matter of *Re Buckton*[498] the court indicated a willingness to broaden the scope of the indemnity to encompass other parties. The classical exposition of the indicia characteristics of the indemnity was set out by Kekewich J. who recognised that trust litigation could be divided into three categories. The first is where proceedings were brought by trustees for the purpose of seeking the guidance of the court as to the construction of the trust instrument or some question arising in the course of its administration. In these circumstances, the costs of all parties are usually treated as necessarily incurred for the benefit of the estate. Consequently they are paid for out of the fund. The second arises where someone other than the trustees makes an application, which raises a point that is analogous to that which arises in the first class. This too would warrant an application by the trustee, and it is treated the same as the first category for costs purposes. The third category arises where a beneficiary is making a hostile claim against the trustees or another beneficiary. Such cases are treated in the same vein as ordinary common law litigation and the costs usually

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the methodology for the calculation of the costs reduction or the matters which the Tribunal would have regard to as set out in its ruling on costs - so as to enable the appellant to address them.

496 The private fund could take the form of assets of a trust; *Re Beddoe: Downes v Cotton* [1893] 1 Ch 547; assets in a pension scheme; the assets of a company in a minority share holders' action (*Wallersteiner v Moir (No.2)* [1975] QB 373; assets in the reorganisation of a life assurance business, *re Axa Equity & Law Life Assurance plc (No.1)* [2001] 2 BCLC 447.

497 [1975] 1 QB 373, 391-392 (Denning MR).

498 [1907] 2 Ch 406.

follow the event.[499] Collins J. confirmed[500] that the principle was extended to members of a pension scheme[501] where they sought to initiate proceedings against their employers, pension trustees, and others concerning the administration of the scheme. The indemnity applies where the party has a limited interest in the fund and is alleging injury to it and seeking restitution.[502] The nature of the indemnity created by the courts operates separate to the costs follow the event rule. It grants an executor, administrator, trustee or mortgagee, who has not unreasonably instituted or resisted proceedings the costs of those proceedings. The subject enjoys the indemnity irrespective out of outcome. This is subject of course to the underlying *proviso* that there was no unreasonable behaviour. The categories now protected by the indemnity shield encompasses actions involving, the assets of a trust,[503] the assets of a company in a minority shareholder action, and the assets of a pension scheme, or the assets involved in the reorganisation of a life or insurance business.[504] The indemnity stems from the role that such persons perform in relation to a private trust instrument, or under corporate law. Scarman LJ. analysed the indemnity as a right that operates separately to the winning party's entitlement to costs. It stems from a combination of matters, including the interests of the corporation and its shareholders. It operates as a complete indemnity, which is comparable to an agent who incurs expenses while acting on behalf of a principal.[505] The reason for the indemnity is attributable to protean factors that seem to converge on the philosophy that a party that performs a role in the best interests of a fund, or scheme, in order to protect or vindicate it, is entitled to be indemnified. In *Wallersteiner v Moir (No.2)* Buckley LJ. posited that the mother or next friend of a child is *prima facie* entitled to an indemnity from the child's estate.[506] Though this will be dependent on whether such a party was reasonable in defending or prosecuting the action. This indemnity is advanced one step further in personal injuries actions when an action is instigated in the name of the mother as next friend. The litigation is often characterised by unrealistic expectations, in circumstances where the mother is unlikely to face any adverse costs order should the litigation fail.

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499 *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406, 413-415.

500 *Trustee Corporation Ltd v Nadir* [2000] EWHC Ch 41 [13].

501 *McDonald v Horn* [1995] 1 All ER 961.

502 The general rule under the Civil Procedure Rules remains that the unsuccessful party will be ordered to pay the costs of the successful party: CPR, r. 44.3(2). A trustee is entitled to an indemnity out of trust property in respect of expenses properly incurred, and this is reflected in the pre-CPR Rules (Ord.62, rr 6(2) and 14(2). and in the Practice Direction : CPR Sched.1, RSC Ord. 85 and *Re Buckton* contemplates that a beneficiary may in some instances be entitled to such an indemnity.

503 *Re Beddoe v Downes Cotton* [1893] 1 Ch 547.

504 *Re Axa Equity Life Assurance Plc (No.1)* [2001] 2 BCLC 447.

505 *Wallersteiner v Moir (No.2)* [1975] QB 373, 407 A-D (A-B); cited in *R (Cornerhouse Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 [21].

506 [1975] QB 373, 404; cited in *"Cornerhouse Research"* [2005] EWCA Civ 192 [20].

2.10.2 Contested probate

One of the most ostentatious exceptions to the loser pays rule developed over the centuries in contested probate litigation. The legislation in Ireland enables parties, even unsuccessful ones, to have their costs borne by the estate. [507] These proceedings are often an affront to beneficiaries who witness the assets of the estate evaporate, through years of probate litigation. One of the rationales for this exception flows from the requirement for the court to conduct an inquiry where there is confusion or uncertainty in relation to testamentary papers. And as such, the proceedings can be viewed as having an inquisitorial aura, as they are not exclusively adversarial by their nature. There is therefore some nexus or connection between this exception and the family law exception, in that, both have an inquisitorial component,[508] not unlike Inquests and Coronial proceedings, which is another established exception. The attraction of costs being met out of the estate gives rise to much unnecessary litigation. The probate exception reflects the necessity for public confidence in wills. It is necessary that testamentary dispositions should be subject to scrutiny.[509] The exception is also observed in the United States of America which ordinarily adopts the user pays rule.[510] There is no shortage of disappointed family members ready to litigate against the estate of a deceased.[511] It is questionable whether contested probate actions should be exempted[512] from the 'costs follow the event' rule. There will be disaffected, jealous, officious, and unhappy persons willing to challenge the terms of a will, from which they have been excluded, or only partly provided for. It may seem unfair to the deserving beneficiaries that their inheritance is depleted before their eyes, in some form of grotesque Dickensian humour.[513] Probate actions

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507 The Succession Act 1965, section 117 (5); Section 168 (1) Legal Services Regulation Act, 2015, (1) (b).

508 *Mitchell v Gard* [1863] 3 SW & TR 275, 277-278; *Kostic v Chaplin* [2007] EWHC 2909 (Ch).

509 *Rippington v Cox* [2017] IECA 331 [54].

510 *Riggs v Palmer* (1889) 115 N.Y. 506.

511 *Jennens v Jennens*, proceedings were commenced against the estate in 1798 and American descendants commenced proceedings circa 1850. The actions were finally abandoned in 1915 when the value of the estate had evaporated owing to expenditure on legal costs. The modern value of the estate would exceed £200 million.

512 CPR, r. 44.3 (3) provides that "The general rule does not apply to the proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division or (b) proceedings in the Court of Appeal from a judgment directions, decision or order given or made in probate proceedings or family proceedings."

513 Charles Dickens, Bleak House, chronicling the fictitious inheritance case of *Jarndyce v Jarndyce* in the Court of Chancery (which meandered on for generations and until the inheritance was consumed by legal costs); referenced in *Midland Bank v Green* [1981] 1 All ER 583, (1981) AC 513 (HL); "The 'Green saga' which bids fair to rival in time and money the story of Jarndyce v Jarndyce"; (1980) Ch 590, 622 (Lord Denning).

diminish the value of the residual estate as, more often than not, both the successful and unsuccessful parties costs are discharged out of the estate, thereby reducing the financial pot.[514] In contested probate litigation the default position that costs follow the event is easily displaced. There is little divergence on the matter in the jurisdictions of England and Wales, Ireland and Australia where the case law dates back over one hundred and fifty years. The courts in England established two principles during the Victorian era that enable the costs of the unsuccessful probate challenge to be paid from the estate. The first such exception arises where the testator is the source or cause of the litigation.[515] The second arises where the circumstances reasonably lead to an investigation regarding the testator's will. In this instance, the costs may require to be paid by those who incurred them.[516] In relation to the first, it is necessary to consider if the testator used language which is difficult to understand or whether the testator, in person, or through his solicitor, created the difficulty. In such instances the costs are normally borne by the estate. The exception does not extend to a case where the testator may have unwittingly or otherwise misled people, or even ignited false hopes. The general basis for the exceptions was elucidated by Sir James Wilde in 1863 who asserted that if the fault lies at the door of the testator, or, where the will is surrounded with confusion or uncertainty, then the costs of ascertaining the testator's intention is defrayed by the estate.[517] In the second exception, the parties instrumental in initiating an enquiry are not entirely in the wrong, even if the action fails. This is of course providing that there were good reasons to justify the action. If a dispute arises between different members of the same family then it is preferable that it should be contained or settled, in order to safeguard the estate from depletion. The cost of probate litigation can overshadow ordinary litigation in terms of costs. This is attributable to the sheer volume of investigatory work involved. The courts have painstakingly made it clear that they are reluctant to plant the notion that unsuccessful litigants may achieve their costs out of the estate, in the absence of a very strong case. The temptation to seek the costs out of the estate can give rise to much unnecessary litigation.[518] If a party's challenge is based on a reasonable belief, which is extinguished by an experts

514 The Succession Act, 1965, section 117 (5); "The costs in the proceedings shall be at the discretion of the court" ; Legal Services Regulation Act 2015, section 168 (1) (1) (b).

515 *Perpetual Trustee Company Ltd v Baker* (1999) NSWCA 244; *Shorter v Hodges* (1988) 14 NSWLR 698; *Moyle v Moyle* (CA NSW, 18 June 1998); *In the will of Millar* [1908] VicLaw Rp 95; *Spiers v English* [1907] P 122; *Roe v Nix* (1893) P55; *Re Severs* (1887) 13 VLR 572; *Davies v Gregory* (1873) 3 P&D 28.

516 *Kostic v Chaplin* [2007] EWHC 2909 Ch; *Perpetual Trustee v Baker* (1999) NSWCA 244 [4] 3 (Giles JA, Brownie AJA, Cole AJA); *Browne v McEnroe* (1890) 11 NSWR Eq. p 134, 146.

517 *Mitchell v Gard* (1863) 3 Sw. &Tr. 275, 277-278 on hearing an application by the next of kin of the deceased, who had unsuccessfully opposed the will in a testamentary suit tried before a jury, for their costs to be paid out of the estate; cited in *Kostic v Chaplin* [2007] EWHC 2909 Ch [8].

518 *Kostic v Chaplin* [2007] EWHC 2909 Ch [17] citing *Re Plant deceased* [1926] P6, 152-153.

report, at a certain point in proceedings, then that party will be at risk on costs from the date of that watershed event. The normal rule will reactivate from the date of such knowledge,[519] and the liability will flow from the date of the fresh enlightenment, which is a key milestone. The courts apply an exception to the exception in order to punish unsuccessful parties who challenge an estate by awarding the costs against such a party whose conduct is factored in to the costs analysis.[520] In Ireland, the legislature recently enacted the Legal Services Regulation Act, 2015 which preserves the position at common law, by empowering the court to order that the costs of the losing party (and the successful one) can be discharged out of the deceased's estate.[521] This statutory provision has the effect of fortifying the position at common law rather than extending it. Lawyers for their part may be inclined to accept instructions when the assets of the estate are considerable. This is particularly so when the aggrieved party, or presumptive litigant, is a family member or beneficiary and the bone of contention revolves around the *quantum* of the legacy. Though contested probate actions have become prevalent in recessionary times, the preponderance of these actions are settled, through different modes of negotiation, including Calderbank letters and counter proposals. Firm of solicitors which do not undertake wills, probate and administration work will accept instructions to challenge estates. This has emerged as a boutique area of litigation requiring specialist knowledge. In *Vella v Morelli*[522] the Irish Supreme Court analysed the special and distinct jurisprudence regarding awarding costs in this form of litigation, which emerged in Ireland, over a number of centuries. The principles underpinning this special jurisdiction, in Ireland, were elucidated by Budd J., who opined that the results arising from the testamentary disposition of property are of fundamental importance to most members of the community. Therefore, it is vital that the circumstances surrounding the execution of such documents should be open to scrutiny and be above suspicion. Any person harbouring a real and genuine ground for believing that a will is not valid should be able to have the circumstances surrounding the execution of it investigated, without being deterred by the fear of a costs order.[523] In *Elliott v Stamp.*[524] Kearns J. reviewed the jurisprudence in relation to costs orders in probate suites flowing from *Vella v Morelli*, for possibly for the first time since the seminal

519 Legal Services Regulation Act, section 168 (2) (b), "costs from or until a specified date, including a date before the proceedings were commenced."

520 *Elliott v Simmonds* [2016] EWHC 962 (Ch); *Rippington v Cox* [2015] IEHC 516 (Noonan J), the unsuccessful plaintiff was a sister of the deceased.

521 Section 168 (1) (b).

522 *Vella v Morelli* [1968] 1 IR 11.

523 *Ibid,* 34-35.

524 *Elliott v Stamp* [2008] 3 IR 387, [2008] IESC 10 (Kearns J, Macken J, Finnegan J); cited in *Reburn deceased* [2012] IEHC 559 [15] (Laffoy J).

decision was revisited.[525] He investigated whether there was a reasonable ground for the litigation and whether it was conducted in a *bona fide* manner. Kearns J. reversed the order for costs that awarded the plaintiff one third of her costs, to be paid for out of the estate. In reversing that order, Kearns J. appreciated that small estates can be wiped out by legal proceedings instigated by dissatisfied parties. He observed that it is beyond doubt that small estates can be entirely dissipated by legal actions instigated by parties whose intention may be to exert the executor into some form of settlement, or to vindictively consume the assets of the estate. In 2017 the Court of Appeal in Ireland traced the development of the principles governing costs in contested probate litigation. They had evolved over a number of centuries in a way that reflected on the importance of wills and the pre-eminent importance attached to ensuring that the circumstances surrounding the execution of testamentary instruments ought to be open to scrutiny. The policy is predicated on extinguishing any fears about the documents that are received in to probate.[526] Whelan J. noted that the rules that developed from the late 1700s did not align with the jurisprudence in other common law jurisdictions. Additionally, she noted that the Supreme Court has in light of Article 34.4.3 entertained appeals relating to costs in probate actions. The majority of the Supreme Court in *Vella v Morelli*[527] concluded that any measures curtailing the exercise of its appellate jurisdiction, regarding costs, are inconsistent with the Constitution. In *Rippington v Cox* the Court of Appeal[528] required to determine an appeal which arose by way of an unsuccessful challenge against the estate of the deceased person. The deceased had bequeathed property to a non-blood relative and the challenge was initially dismissed by the High Court. That court awarded costs an indemnity basis against the unsuccessful plaintiffs. Delivering the judgment of the Court of Appeal, Whelan J. distilled the applicable principles, which may inform the general rule in relation to costs and the exercise of discretion. She observed that where a party is satisfied that issues arise which render it proper to instigate an action, the costs, may generally be paid out of the estate to both parties.[529] The court should enquire whether there were reasonable grounds for instigating the litigation and whether it was conducted in a *bona fide* manner.[530] Furthermore, it should also examine whether the genesis

525 *Ibid.*
526 *Rippington v Cox* [2017] IECA 331 [54].
527 *Vella v Morelli* [1968] 1 IR 1.
528 *Rippington v Cox* [2017] IECA 331.
529 *Fairtlough v Fairtlough* (1839) 1 Milw. 36.
530 *Rippington v Cox* [2017] IECA 331 [55], "Since at least the beginning of the nineteenth century the general principle has been that where both these questions can be answered in the affirmative it is the normal practice of the court irrespective of the value of the estate or the ownership of the property to direct that the general costs be paid out of the estate"; *O'Kelly vBrowne* (1874) I.R. 9 Eq. 353; *Burke v Moore* (1875) IR. 9.

of the litigation flows from any default on the part of a testator. If this is the case then the costs are generally discharged out of the estate.[531] The court should also consider whether there were any issues in relation to the mental or physical state of the testator at the time of the execution of the will, which may entitle an unsuccessful party to costs out of the estate.[532] The court has a discretion to grant costs to the next of kin out of the estate despite the individual unsuccessfully pleaded lack of capacity, undue influence and fraud. The discretion can be exercised so long as there are reasonable grounds for initiating the claim and the next of kin acted reasonably.[533] If a party can demonstrate that a will was executed in circumstances that gives rise to serious suspicions or concerns then the court may in the exercise of its discretion make an award of costs. Providing of course that it is satisfied that the persons who instigated the litigation were acting reasonably.[534] The failure to establish fraud, or undue influence, will not invariably result in an adverse costs order. However, if there are reasonable grounds to question either the testator's capacity or the execution of the will, then an unsuccessful party, may be relieved of their costs.[535] The Court of Appeal reflected on the level of personal invective directed towards the respondents, which was unusual both in terms of its intensity and for the way in which it sought to traduce the good name and reputation of the respondents. If the appellants had not enjoyed the benefit of privilege, then many of the allegations, would have been *prima facie* defamatory. The Court of Appeal opined that it was inappropriate for the protagonists to have used the proceedings as a means of perpetuating vendettas against other parties who had an interest in an estate of a

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Eq. 609; *Derinzy v Turner* (1851) 1 Ir. Ch. R. 341; support the proposition; Miller's *Irish Probate Practice*, 1900, Chapter XXXIX.

531 *Byrne v Hogan* 6 IR. Jur. N.S. 114, a testator concealed the contents of the document such that it appeared that the witnesses were unaware that it was a will; *Williams v Coker* 67 L.T. 626; and the manner of execution may give reasonable grounds for concern.

532 *Daly v Burke*8 IR. Jur. N.S. 73; *Prinsep v Sombre*10 M.P.C. 232; the manner in which a testator gave instructions whether suffering from a physical or mental illness or otherwise; *Fairtlough v Fairtlough* (1839) Milw. 36.

533 *Williams v Coker* 67 L.T. 626.

534 *Orton v Smith* L.R. 3.P. 23; If the next of kin harbour a reasonable ground of suspicion, the Irish courts have traditionally been careful to evaluate their conduct and where the trial judge is satisfied as to the reasonableness of such suspicions and *bona fides,* then a costs order can be made out of the estate, even where a claim has failed at trial.

535 Miller's *Irish Probate Practice*1900 at p 445; *Tippett v Tippett* L.R. 1 P 54; an attesting witnesses, who was a medical expert, was unable to swear as to the full competency of the testator; *Keogh v Wall* 9 IR. Jur.NS 418; *Broadbent v Hughes* 29 L.J.P. 134; *Armstrong v Huddleston* (1837) 1 Moo.P.C. 478; on appeal the lower court's decision on costs was reversed; Lord Broughan stated at 491: "There was doubt, there was difficulty, and there was much suspicion; there were doubts of a nature which further inquiry has cleared up; difficulties which much attention enabled him to overcome; suspicion which required a thorough sifting of the facts which did not ultimately leave a taint to touch the case, but quite enough to make it impossible to come to a right decision without that inquiry, sifting, and thorough examination which the case has undergone."

deceased person.[536] Whelan J. observed that from the time of the death of the testator the respondents, had in a similar fashion to the approach taken by the respondents in *Elliott v Stamp*, initiated steps to ensure that the appellants were furnished with information concerning the deceased and her testamentary capacity. In this regard, a copy of the will was provided to the second named appellant. The Court of Appeal in Ireland noted the disparate negative elements that characterised the appellants' behaviour in how they conducted the litigation. This in turn impacted on the trial judge's dissatisfaction with their conduct, which Whelan J., deemed wholly understandable. The appellants had persisted with expensive litigation in an unproductive fashion in relation to what was a relatively modest estate in financial terms.[537] The appellate court concluded that the exercise of the trial judge's discretion in relation to costs remains reviewable in contested probate actions. It furthermore concluded having regard to all the circumstances of the case, including the jurisprudence, which developed over the centuries, and in the context of the Constitution, that the unsuccessful appellants should meet the respondents costs on a party and party basis.[538]

2.10.3 Sui Generis proceedings

In Ireland there are a broad range of ad-hoc legal aid schemes relating to the liberty and freedom of the individual that provide for the payment of legal representation in certain types of cases. These can be broadly characterised as being *sui generis* in nature. These schemes include the custody issues scheme, which covers applications for bail and judicial review proceedings, which engage with criminal matters.[539] It also includes cases initiated by Government where the liberty or freedom of the individual is at stake, including applications under the Extradition Act, 1965, and applications seeking surrender under the European

536 *Rippington v Cox* [2017] IECA 331 [60] (CA) (Whelan J *Nem Diss*).

537 *Rippington v Cox* [2017] IECA 331 (CA) [62]; "pursued prodigiously expensive litigation in a thoroughly unproductive manner in respect of a relatively small estate."

538 *Rippington v Cox* [2017] IECA 331 [64].

539 The Legal Aid – Custody Issues Scheme which replaced the Attorney General's Scheme provides for payment for legal representation in certain cases which are neither covered by the civil legal aid nor the criminal legal aid scheme. Fees are payable to solicitor and counsel who represent a person who cannot afford to secure legal representation.

Arrest Warrant Act, 2003.[540] The scheme also includes *habeas corpus* applications taken by persons seeking to challenge the legality of their detention. The costs of such legal representation is underwritten from public funds and applicants are inoculated from cost shifting. Their lawyers are guaranteed payment irrespective of the outcome. The provision of public funding in extradition and European Arrest Warrant matters[541] and indeed in international child abduction cases[542] complies with Ireland's international obligations, under treaties and conventions. There is an ever-present overarching international dynamic at play.

2.10.4 Small Claims Procedure

One principal exception to the loser pays principle has emerged in the context of the small claims jurisdiction where the financial amount in dispute falls below a certain financial threshold.[543] The Consumer Council published *Justice out of Reach*, in 1970.[544] It strongly advocated for a special judicial procedure for consumers bringing small claims, for example, in respect of defective goods or services. On a certain analysis, it can be interpreted as a tacit acceptance that the loser pays rule intimidates potential litigants from seeking to vindicate their legal rights.[545] The small claims procedure was initiated in the UK in 1977,[546] and the Consumer Council submitted that legal representation should be prohibited outright under the

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[540] In almost all European Arrest Warrant cases the discretion to award legal costs is made in the applicant's favour; *Minister for Justice Equality and Law Reform v Ollson* [2011] IESC 1, O' Donnell J; Affidavit of Jevon Alcock, para 10; the scheme which derived from assurances given to the Supreme Court in *Application of Woods* [1970] IR 154 was an administrative non-statutory arrangement.

[541] Council Framework Decision 2002/584/J.H.A of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States, O.J. L 190/1 18.7.2002. Article 11.2 of the Framework Decision provides that a requested person has a "right to be assisted by a legal counsel ... in accordance with the national law of the executing Member State." The Framework Decision imposes no obligation to provide legal aid.

[542] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Chapter V, Article 26 provides "each Central Authority shall bear its own costs in applying this convention"; The Central Authority "may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers."

[543] CPR: Part 26 Small Claims, r. 26.6 (financial limits); In England and Wales actions with a financial threshold of £10,000 or less are generally allocated to the small claims track while Personal Injury actions are also allocated to that track if the value of the injury does not exceed £1,000. The procedure deals with faulty goods, faulty services, landlord and tenant disputes for rent arrears, repair and deposit.

[544] *Ibid*, Woodroffe, p 346 (footnote 3); Consumer Council, *Justice Out of Reach* (1970). Consumer's Assoc., Info Unit SRG, TAKING LEGAL ACTION: FINDINGS FROM A SURVEY OF WHICH? MEMBERS, question No.9, (1993) (London) (sending 2,200 questionnaires, of which 575 were returned). The Consumer's Association found that of those people interviewed who considered taking legal action, 36% were concerned about paying the other side's costs.

[545] *Ibid*, Woodroffe, p 346.

[546] Ord. 19, SI 1687/1981.

new procedure. Government opted for an American style user pays rule, which at one and the same time, operates to discourage lawyers, but also permits the parties to engage legal representation, if they wish.[547] The advantages to the procedure were manifest and it was later embraced in Ireland with similar success.[548] The procedure adopts a no costs rule that sees each party pay their own costs. The reason for this departure was to encourage claimants to issue small claims without legal representation.[549] A party lodges the application with a small fee, and if that party succeeds, then the fee is reimbursed. The successful party cannot recover costs concomitant to the proceedings, while the corollary is that the loser does not pay costs. The procedure operates in the County Court in England and Wales and in the District Court in Ireland. It provides a fast and efficient forum for dealing with disputes, without the anxiety of adverse legal costs. It is an alternative method for dealing with small claims in civil proceedings. The courts have jurisdiction to deal with claims for breach of contract, faulty goods, minor damage to property, and claims for non-return of a rent deposit. The parties may elect, if they wish, to retain legal representation. A party contemplating filing a small claim is not intimidated by the prospect of the opposing party retaining legal representation and it is almost unheard of for counsel to appear in such cases. The procedure observes the characteristics of the American model where the prevailing party receive their award and the court filing fee. The process has been utilised effectively in Australia.[550] It has established tribunals, analogous to the Small Claims Court, with jurisdiction to deal with a broad spectrum of civil, commercial, and administrative matters[551] within a limited financial jurisdiction.[552] The power to make costs orders is severely curtailed and so each party ordinarily pays their own costs.[553] The kaleidoscope of matters covered is much broader than the limited categories covered in England and Wales and Ireland. On one analysis the small claims jurisdiction has provided an important forum for access to justice. The extent, however, to which it has succeeded is limited, in that average citizens are likely to appear as

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547 *Ibid*, Woodroffe, p 347 (fn 6).

548 District Court (Small Claims Procedure) Rules 1997 and 1999 (SI 519/2009, SI 17/2014, Ord. 53A).

549 *Ibid*, Woodroffe, pp. 346-347.

550 Consumer Claims Tribunal Act 1987 (NSW);Small Claims Tribunals Act 1973(Vic);Small Claims Tribunals Act 1973(Qld);Magistrates Court Act 1991(SA);Small Claims Tribunals Act 1974(WA); Magistrates Court (Small Claims Division) Act 1989 (Tas); Small Claims Act 1974 (NT); Small Claims Act 1974 (ACT).

551 Tenancy (Residential Tenancies Act, 2010); consumer (Part 6 A Fair Trading Act 1987); home building, financial management; administrative review (including, firearms licences, review of State taxation decisions and guardianship); Anti-Discrimination Act 1977 incl. discrimination, harassment, victimisation, vilification.

552 Consumer Claims Tribunal (NSW) deals with matters up to $10,000.

553 Consumer Claims Tribunal Act 1987 (NSW) s 12; Small Claims Tribunals Act 1973(Vic) s 33;Small Claims Tribunals Act 1973(Qld) s 35;Magistrates Court Act 1991(SA) s38;Small Claims Tribunals Act 1974(WA) s 35; Magistrates Court (Small Claims Division) Act 1989 (Tas) s 28; Small Claims Act 1974 (NT) s 29; Small Claims Act 1974 (ACT) s 29.

defendants, in debt related matters.[554] Baldwin asserts that only about twenty per cent of contested claims were consumer disputes.[555] In Ireland the court is synonymous with landlord and tenant rental deposit disputes.

2.10.5 Inquests and Coronial proceedings

One area in which the legislatures in England and Wales and Ireland were required to legislate to provide for free legal representation is in the area of Coronial law. Legal representation is now available in England and Wales and Ireland for proceedings before the Coroner's Court and Inquests, where the deceased died while in the custody of the State. Both jurisdictions, which are contracting States to the European Convention on Human Rights, enacted legislation guaranteeing Convention rights in domestic law.[556] Those Convention rights include Article 2, which safeguards the right to life and sets out circumstances when deprivation of life may be justified. Both Jurisdictions enacted legislation[557] providing for the payment of public funding to enable a *legitimus contradictor* to vindicate the right to life, of the deceased. Doubtless the legislation resulted after many years of prompting. The view of the judiciary was captured in the Irish Supreme Court in *Magee v Farrell,*[558] which was commenced before the introduction of the 2013 Act. The court held that the right to legal representation does not carry with it a right to state funded legal aid because an inquest is an inquisitorial process. It is a fact-finding exercise and not a method of

554 John Baldwin, *Small Claims in the Country Courts in England and Wales the bargain basement of civil justice?*, (Oxford Clarendon Press, 1997) p 15.

555 *Ibid*, p 15.

556 The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), Rome, 4.XI. 1950); Human Rights Act, 1998 (UK); European Convention on Human Rights Act, 2003 (Ireland).

557 In Ireland, The Courts and Civil Law (Miscellaneous Provisions) Act, 2013 provides for legal aid and legal advice for Inquests; A family member of the deceased may apply to the Coroner for a request to be submitted by the Coroner to the Legal Aid Board for the granting of legal aid or legal advice, or both, to the family member under the Civil Legal Aid, Act, 1995. Family member is given a wide meaning and also includes any other person who is ordinarily a member of the (deceased) person's household. In the UK Section 51 of the Coroners and Justice Act 2009 provides for public funding for advocacy at certain Inquests for "interested persons" which are defined in subsection 2 (a) – (m). Section 51 amends (Schedule 2 of) the Access to Justice Act, 1999 by making provision for Public funding for advocacy at certain inquests. In order to secure state funded representation the person must satisfy the definition of an "interested person" as set out in Section 47 of the 2009 Act, which includes a " spouse, civil partner, partner (whether of different sex or the same sex), parent, child, brother, sister, grandparent, grandchild, child of a brother or sister, stepfather, stepmother, half brother or half sister, a personal representative of the deceased, a beneficiary under a policy of insurance issued on the life of the deceased … " The Act complies with Article 2.1 of the European Convention on Human Rights.

558 *Magee v Farrell* [2009] IESC 60 (Murray CJ, Fennelly J, Finnegan J).

apportioning guilt or establishing civil liability. There is no indictment, no prosecution, no defence, and there is no trial. It is an investigatory process that attempts to establish the facts surrounding a death. The coronial proceedings cannot determine issues of civil or criminal liability. It is not a forum for evidence gathering for present or future proceedings. The Supreme Court over turned the decision of the High Court on appeal asserting that there was no right to state funded legal aid for the family of the deceased. Funding for Inquests is more readily attributable to international obligations emanating from the European Convention on Human Rights.

2.10.6 Matrimonial and Family law

A further prominent qualification to the loser pays presumption manifests in family law.[559] The rule is dislodged in such proceedings in England and Wales.[560] Schwarzer observed that under the rule generally in non-family litigation the losing party meets the costs of the prevailing one subject to certain qualifications.[561] The displacement of the rule in family law proceedings and also in probate actions is justified on the basis that such proceedings are not entirely adversarial. The court is sometimes required to adopt a more interventionist approach or assume an inquisitorial role as it does in wardship proceedings. The courts may elect not to order costs in divorce proceedings where there are ancillary child custody and maintenance orders. There is no operative presumption that the losing party is required to discharge costs.[562] The displacement which is observed in Ireland is a tacit recognition of the fact that

559 CPR, r. 44.2 sub-paragraph (2) (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order; The Family Law Procedural Rule 2010, r. 28.2 sub paragraph (1) expressly disapplies that Rule within family proceedings.

560 CPR, r. 44.2 sub-para (2) (a); The Family Law Procedural Rule 2010.

561 William Schwarzer, *Fee shifting offer of judgment – an approach to reducing the costs of litigation*, Judicature, Volume 76, Number 3, (October – November 1992), p 148.

562 *Re K (A child: Appeal against a costs order within a private law proceeding)* [2014] EWCC B36 (Fam); *R v R (Costs: child cases)* [1997] 2 FLR 95.

in martial breakdown there are often only losers and seldom if ever any real winners.[563] The courts do not wish to characterise certain parental parties as *winners* and others as *losers*. These characterisations are inappropriate for family law.[564] It is undesirable to award costs which may exacerbate the feelings between the parents to the detriment of the child.[565] In England and Wales the family[566] and probate exceptions are provided for in the Civil Procedure Rules.[567] There is a practice not to order costs in cases concerning children. Though the courts in Ireland may have regard to the outcome in child law cases.[568] In *Re K (A child: Appeal against a costs order within private law proceeding)*[569] Brown J. observed that unreasonable conduct which might justify an order for costs is not unreasonableness in relation to the child concerned but unreasonableness in the conduct of the litigation.[570] The justification for displacing the loser pays principle was identified by Wilson J. in *LB of Sutton v Davis (Costs) (No.2)*[571] where the court observed that proceedings surrounding the future of a child are partly inquisitorial. The aspiration is that the child will be the only *winner*.[572] In *Re T* Lord Phillips availed of a rare opportunity to entertain an appeal that related exclusively to costs, and the liability of the local authority to pay for the costs of one of the parties in the care proceedings.[573] The court asserted that in ancillary proceedings each party's liability for costs will be taken in to account when making the substantive award as this discourages parties from running up unnecessary costs.[574] The distilled rationale is that such orders only deplete the funds that are available to meet the needs of the family.[575] In England and Wales the courts will penalise a party including a local or other public authority for the manner in

563 *Child & Family Agency v OA* [2015] IESC 52 (MacMenamin J); *D v D* [2015] IESC 66 [14] (Clarke J).

564 *D v D* [2015] IESC 66 [14] (Clarke J).

565 Citing *B (M) v B (R) (Note)* [1968] 1 WLR 1182, 1185 (Wilmer LJ).

566 The practice in the Family Division of the High Court has also departed from the "costs follow the event" principle in significant respects; *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192, p 8 [23]; *C v FC (Children Proceedings: Costs)* [2004] 1 FLR 362; *Gjkovic v Gjkovic* [1992] Fam 40; *Keller v Keller and Legal Aid Board* [1995] 1 FLR 259.

567 CPR 44.2 (3) (b).

568 *Child & Family Agency v OA* [2015] IESC 52 (SC, 23 June 2015).

569 [2014] EWCC B36 (Fam) citing *R v R (Costs: Child Case)* [1997] 2 FLMR 95.

570 It is not incorrect to discourage unreasonable parents from advancing unreasonable views.

571 [1994] 2 FLR 569; *Re T* [2012] UKSC 36.

572 [1994] 2 FLR 569, 570-571, "Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them."

573 [2012] UKSC 36 (Lord Phillips, Lady Hale, Lord Mance, Lord Dyson, Lord Carnwath).

574 [2012] UKSC 36 [12]; citing *Baker v Rowe* [2009] EWCA Civ 1162, [2010] 1 FCR 413 [20]-[23] (Wilson LJ).

575 *Gojkovic v Gojkovic* [1992] Fam 40, 57 (Butler-Sloss LJ); *R v R (Costs: Child case)* [1997] 2 FLR 95, 97 (Hale J).

which it conducts itself in proceedings. This is particularly so in the context of public child care proceedings. If the local authority causes unnecessary costs to be incurred the justice of the case will require the public body to pay such costs.[576] In private family law proceedings the courts may also punish a party for the manner in which it conducts itself. This may manifest in ordering a party to pay a nominal part of the costs of the opposing one. The courts always retain a residual discretion in cases of exceptional circumstances which might warrant the making of an order for costs. Litigation flowing from the matrimonial relationship can create circumstances when it is just and equitable to depart from the loser pays rule.[577] It is necessary to take a different approach in matrimonial proceedings which engage with the division of assets.[578] Often there is no possibility of either party having further resources.[579] In *D v D*[580] the trial judge in Ireland elected to apply the '*Veolia*'[581] principles, which are ordinarily synonymous with commercial litigation, in a family law proceedings. The courts can tailor a costs order to reflect the overall successes and failures of the parties when taking the corpus of the litigation as a whole. *D v D*[582] engaged with the Judicial Separation and Family Law Reform Act, 1989 and the Family Law Act, 1995. The High Court erroneously embraced the costs follow the event rule. The protagonists had by their unmeritorious actions significantly increased the costs of the proceedings by eighty and twenty per cent respectively. On appeal to the Supreme Court Clarke J. held that the trial judge had erred in principle by not commencing from the general position that the court will make no order for costs in divorce proceedings. The future Chief Justice noted that where there has been unmeritorious activity by one or more of the parties the courts may consider the principles enunciated in '*Veolia*'[583] though they must be applied in a modified form in family law proceedings. Clarke J. reinforced the default position that there should be a costs neutral starting point in such cases as any costs orders could significantly interfere with the overall orders made and deplete the matrimonial pot.[584] The party in whose favour the court makes provision will be in an inferior position in overall terms if that party is ordered to pay costs.

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576 *Re R (Care: Disclosure: Nature of Proceedings)* [2002] 1 FLR 755; *In re X (Emergency Protection Order)* [2006] 2 FLR 701; *Coventry City Council v X, Y and Z (Care: Proceedings: Costs)* [2011] 1 FLR 1045.

577 *Roche v Roche* [2010] IESC 10 (Murray CJ).

578 *D v D* [2015] IESC 66 [2.2].

579 *MK v JPK (No.3)* [2006] IESC 4, [2006] 1 IR 283, 291 [26] (McCracken J).

580 *D v D* [2015] IESC 66.

581 *Veolia Water UK Plc v Fingal County Council (No.2)* [2007] 2 IR 81.

582 *Ibid.*

583 *Veolia Water UK plc v Fingal County Council (No.2)* [2007] 2 IR 81; (1) the loser pays rule should be observed (2) the party which succeeds should receive a full award of costs (3) the court can depart from the rule if the successful party materially added to the cost of the litigation by pursuing arguments which were unmeritorious (4) the court ought to consider whether the costs of the case were increased in overall terms.

584 *D v D* [2015] IESC 66 [2.2].

That party will then indirectly receive less provision than was otherwise intended.[585] Clarke J. noted that twenty per cent of the costs in the High Court were attributable to the unmeritorious issues raised by Ms D on which Mr D prevailed and another twenty per cent would have been incurred generally in any event. The balance of sixty per cent related to the unmeritorious issues raised by Mr D.[586] The court ordered the appellant to pay sixty per cent of the respondent's costs while that party was ordered to pay twenty percent of the appellant's costs.[587] The husband came off worse after the order, which also included the costs of the failed appeal, was adjusted.[588] The default position in family law sees the loser pays rule deactivated but it does not preclude the application of the '*Veolia'* principles which are applied from a costs neutral staring point but costs shifting can occur if the parties behave in an unmeritorious manner. The application of the '*Veolia'* principles does not purport to be a true exception to the default rule in family law litigation. A true exception would see the reactivation of the loser pays rule as the default mode. The application of the '*Veolia'* principles is a qualification to the exception rather than an exception to the exception.[589] A true application of the loser pay rule would deliver an outcome in which the respondent would recover considerably more than forty per cent of the costs. Mostyn J. recognised in *J v J* that the costs can become disproportionate to the value of the matrimonial assets and the absence of a fixed costs regime during the phases of the litigation may accelerate costs. In that case the court lamented the grotesque leaching of costs.[590] The '*Veolia'* principles will be examined in detail in chapter 4 in the context of complex commercial litigation.

2.11 The American rule

585 *Ibid* [2.2].

586 *Ibid* [3.7] [3.9]; *Kavanagh v Ireland* [2007] IEHC 389 (Smyth J); *Mennolly Homes Ltd v Appeal Commissioners* [2010] IEHC 56 (Charleton J); *McAleenan v AIG (Europe) Ltd* [2010] IEHC 279.

587 The parties were to bear 20% of the costs. Mr D was entitled to recover 20% of his costs against Ms D who in turn was entitled to recover 60% of her costs from that party. The net order for costs (after set off) resulted in Ms D being able to recover 40% of the costs which she incurred in the High Court proceedings.

588 *D v D* [3.11].

589 *Ibid* [2.5]; *Internet Services Ltd v Motorola Ltd* [2015] IEHC 445 [6] (Barrett J).

590 *J v J* [2014] EWHC 3654 (fam) [16], [2014] All ER (D) 153 (Nov); £920,000 (or 31.9%) of the matrimonial assets were expended on legal costs.

The costs follow the event rule operates in the preponderance of jurisdictions in the common law world, though not in the continental United States. The American rule developed in the years immediately following independence. It then became embedded in the early 19th century, with the exception of Alaska, which has a long tradition of applying the loser pays principle, even before Statehood.[591] The American rule of costs allocation disfavours the allocation of legal fees and it is lauded as the bedrock of American jurisprudence.[592] Each party meets their own legal costs, absent any statutory or contractual obligation to the contrary,[593] except where the litigation is deemed to be vexatious, or an abuse of process.[594] The courts and more so the federal ones may in the exercise of their equitable powers, award legal fees, when the interests of justice so require. The power to award such fees flows from the original authority that was exercisable by the Lord Chancellor in equity.[595] The federal courts do not hesitate to exercise this inherent equitable jurisdiction whenever the overriding requirements require costs shifting.[596] Thus the default position in the United States remains that legal costs are not ordinarily recoverable by successful litigants absent any statutory authorisation.[597] There is a profound underlying unease with fee shifting. In the late 1960s Chief Justice Warren advanced the rationale for the American rule when he contended that as litigation is at best uncertain, a party ought not to be penalised for simply defending or pursuing a cause of action, and the indigent might be unjustly restricted from initiating proceedings if the sanction for losing includes the opposing parties legal costs.[598] The American rule has been criticised as an unwarranted encumbrance on indigent plaintiffs, whose legal costs are deducted from any damages award.[599] It is trite to say that an award of damages, less such deductions will not make the prevailing party whole again. Even worse those costs may substantially efface the damages award. The American rule stems from the innate belief in the importance of access to the courts in order to facilitate the righting of

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591 Alaska Act of 6 June, 1900, Ch. 786 SS 509-28,31 Stat. 321, 415-81; Alaska R. Civ. P. 82 provides " Except as otherwise provided ... the prevailing party in a civil case shall be awarded attorneys fees calculated under this rule."

592 Edward Sherman, *"From 'Loser Pays' to modified offer of judgment Rules: Reconciling Incentives to settle with Access to Justice"* (1986) 76 Tex. L. Rev. 1863 at 1866.

593 *Hall v Cole*, 412 U.S. 1, 4-5 (1973); citing *Mills v Electric Auto Lite Co.*, 396 U.S. 375: 396 U.S. 391-392, P.p 412 U.S. 4-9.

594 *Arcambel v Wiseman* 3 Dall 306, 1 L Ed 613 (1796), Act of Feb 26 (1853) 10 Stat 161.

595 *Sprague v Ticonic National Bank*,307 U. S. 161,307 U. S. 166 (1939).

596 *Mills v. Electric Auto-Lite Co*.,396 U. S. 375, 392 (1970); *Fleischmann Distilling Corp. v. Maier Brewing Co*., 386 U. S. 714, 386 U. S. 718(1967).

597 *Alyeska Pipeline Co. v Wilderness Society*, 421 U.S. 240 (1975).

598 *Fleischmann Distillery Corp v Maier Brewing Co.* 386 US 714, 87 Sup Ct 404, 1406 (1967).

599 Scott Hamilton, *"The Civil Rights Attorney's fees Awards Act of 1976"*, Wash. & Lee Law Review, 205 (1977) Volume 34, p 205 at 207; William Stoebuck, *"Counsel Fees included in Costs: A Logical Development"* : 38 u. Colo. L. Rev. 202 (1966).

wrongdoings. However it does create a greater incentive than the loser pays rule to initiate litigation with a low chance of success. The costs follow the event rule offers a greater incentive in cases that have a high probability of success.[600] One Law Reform Commission noted that there is no conclusive evidence to endorse such a theory.[601] Legislative intervention to create costs shifting statutes reflected the policy of encouraging public interest ligation in order to vindicate rights.[602] The courts took the view that the power to transfer costs may even be inferred from statutes absent any express reference to fee allocation.[603] Given the philosophies underpinning the American rule the proliferation of fee shifting statutes may be indicative of an inherent malaise. By 1981 one hundred and twenty five federal statutes had been enacted enabling fee shifting.[604] By 1984 nearly two thousand federal statutes[605] and one thousand nine hundred and seventy four local state statutes[606] had been passed with punitive, compensatory and indemnity variants. These statutes enabled the making of costs awards in favour of successful plaintiffs,[607] or certain parties (usually the successful plaintiff),[608] or prevailing plaintiffs or defendants,[609] across a spectrum of fields.[610]

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600 Ronald Braeutigam, Bruce Owen, & John Panzar, *An Economic Analysis of Alternative Fee Shifting Systems*, (1984) 47 Law & Contemp. Probs. 173 at 181.

601 Manitoba Law Reform Commission – *Costs awards in Civil Litigation* Report #1, September 2015, p 24.

602 Henry Cohen; *"Awards of Attorneys Fees in Federal Courts, 'Federal Agencies', in Awards of Attorney Fees by Federal Courts, Federal Agencies and Selected Findings"*, Mary V. Capisio, New Your, Nova Publishers, 2002, pp. 1-134.

603 *Kay Tronic Corp v United States* (93-976), 511 U.S. 809 (1994).

604 John Leubsdorf, *"Toward a History of the American Rule on Attorney Fee Recovery*", Law and Contemporary Problems, 47: 1 (winter 1994) 9-36.

605 Manitoba Law Reform Commission – *Costs awards in Civil Litigation* Report #1 September 2015, Library and Archives Canada Cataloguing Publication, Queen's printer, Winnipeg; *State Attorney Fee Shifting Statutes: Are we Quietly Repealing the American Rule*? (1984) 47 Law & Contemp. Probs. 321 at 322.

606 *Ibid*, Rowe, p 321 at 329, 337; full compensatory (742) 37.6%, punitive (647) 32.8%, public interest (324) 16.4%, and indemnity (207) 10.3%.

607 *Christiansburg Garment Co. v EEOC*, 434 U.S. 412 (1978); Clayton Act, 38 Stat. 731, 15 U.S.C. § 15; Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U.S.C. § 216(b); Packers and Stockyards Act, 42 Stat. 165, 7 U.S.C. § 210(f); Truth in Lending Act, 82 Stat. 157, 15 U.S.C. § 1640(a); and Merchant Marine Act, 1936, 49 Stat. 2015, 46 U.S.C. § 1227.

608 Privacy Act of 1974, 88 Stat. 1897, 5 U.S.C. § 552a (g) (2) (B) (1976 ed.); Fair Housing Act of 1968, 82 Stat. 88, 42 U.S.C. § 3612(c).

609 *Christiansburg Garment Co. v EEOC*, 434 U.S. 412 (1978), P 434 U.S. 416; Section 76(k) of Title VII of the Civil Rights Act of 1964; Securities Exchange Act of 1934, 48 Stat. 889, 897, 15 U.S.C. §§ 78i(e), 78r(a); Trust Indenture Act of 1939, 53 Stat. 1171, 15 U.S.C. § 77*ooo*(e); Federal Water Pollution Control Act, 86 Stat. 889, 33 U.S.C. § 1365(d) (1970 ed., Supp. V); Noise Control Act of 1972, 86 Stat. 1244, 42 U.S.C. § 4911(d) (1970 ed., Supp. V).

610 Civil rights, environment, public health, workers compensation, education, family, employment, insurance, anti-trust, landlord and tenant, and water.

2.11.1 Observance and development

The rule is observed in a number of countries including Japan and China, where the unsuccessful party is expected to pay court fees but not the legal fees of the prevailing party. In Mexico the rule is the norm with some departures in exceptional cases.[611] The historical reasons for the failure of the loser pays rule to gain traction in the newly emerging thirteen colonies is anything but clear. The loser pays rule was not embraced with legislative enthusiasm in the colonies.[612] It did enjoy some recognition prior to independence, but any observance was inconsistent or geographically patchy. It does not appear to have enjoyed widespread observance, let alone application, in the pre-independence colonies. Therefore, it was not carried over in to the newly formed nation, at the birth of independence. Myriad reasons can be advanced as to why the newly emerging states[613] continued to overlook it in the years following independence. The colonies were gradually joined by newly emerging states and by the early 19th century no single dominant form of uniform rule had emerged. Professor Pound asserted that the American law of the nineteenth century was informed by the frontier experience, which greatly impacted upon the development of early American jurisprudence. For all intents and purposes, the starting point of American juridical history commences after the revolution.[614] Frontiersmen in Kentucky would have recoiled at the concept of a scientific law buttressed by procedures. They left an irreversible imprint on the development of procedural and substantive law,[615] which was obstructed and even retarded by the frontier mentality.[616] Resistance to the reception of common law was political and it signified a phase in the opposition by frontiersmen to scientific law. Ultimately it was necessary to maintain the peace even in coarse pioneer settlements, which demanded

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611 Law Reform Commission of Saskatchewan research paper *Awards of Costs and Access to Justice*, July 2011, p 9.

612 The New York Statute of 1818; 3 N.Y. Rev. STATS (1829) provided a statutory basis for the recovery of legal costs however the costs were fixed and capped within statutory parameters.

613 Delaware, Pennsylvania, New Jersey, Georgia (1788), Connecticut (1788), Massachusetts (1788), Maryland (1788), South Carolina (1788), New Hampshire, (1788) Virginia, (1788), New York (1788) North Caroline (1789), Rhode Island (1790), Vermont (1791), Kentucky (1792), Tennessee (1796), Ohio (1803), Louisiana (1812).

614 *Ibid*, Pound, p 114.

615 *Ibid*, p 124.

616 *Ibid*, p 118.

immediate justice, without recourse to complex texts.[617] The courts in the newly developing states were cognisant that a party's financial state would form a significant component of such a party's capacity to access the courts.[618] The revised New York statutes of 1829 contained detailed provisions for dealing with counsel fees but the legislation stipulated the sums that were allowable.[619] Goodhart submitted that, if instead of prescribing a fixed fee in every action, the revised codes had permitted the prevailing party to recover a reasonable counsel fee, then the system of costs would have developed a loser pays mode.[620] In 1913 Warren advanced one proposition for the lack of enthusiasm for the loser pays rule when he observed that in almost every colony, in the seventeenth century, a lawyer was a person of disrepute. In many colonies attorneys were prohibited from receiving fees and there were restrictions in levying fees.[621] The post-revolution watershed witnessed the development of resentment to the citation of foreign authorities. They were viewed as the vestiges of colonial oppression, and as such, the costs follow the event rule was deemed repugnant to the emerging concepts of liberty and equality. The referencing of English precedents in the judgments of the courts antagonised radical elements, as they were perceived it to be sycophantic.[622] Court practice in New Hampshire[623] following independence prohibited the citation of English authorities and precedents. The states of New Jersey, Pennsylvania and Kentucky legislated to prohibit their citation. New York had no state precedent bank to draw from in 1791.[624] New York continues to observe the American rule, which is referred to as the 'pay your own way rule,'[625] but it partly embraced the loser pays rule in order to achieve certain policy objectives.[626] In New York General Business law[627] costs can also be allocated

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617 *Ibid*, p 117; Goodhart did not reference Pound's work in his article published in 1929.

618 *Alyeska Pipeline Co. v Wilderness Society*, 421 U.S. 240, (1975) (White J) fn 18; "As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs."

619 *Ibid*, Goodhart, p 874.

620 *Ibid*, p 873; N.Y. Rev. STAT. (1829) c. 10, S 4 and such statutory fees were deemed to be the proper test for a lawyer – client bill; *Scott v. Elmendorf*, 12 Johns. 315 (N.Y. 1815); *Brooklyn Bank v. Willoughby*, 3 Super. Ct. 569 (N.Y. 1847); *Starin v Mayor, etc. of New York*, 106 N.Y. 82 (1887).

621 Charles Warren, *A History of The American Bar* (1913) (4).

622 *Ibid*, Pound, p 116.

623 Of the presiding justices in the Superior Court in New Hampshire post independence, one held a religious vocation, while another held a qualification in medicine; Chief Justice Samuel Eddy was the first Chief Justice of Rhode Island to issue a published decision in that state in *Stoddard v Martin* (1828) 1 R.I. 1 which cited English common law and precedent; *Gilbert and Sykes* (16 East. 156); *Vescher v Yates* (11 Johns. 31); *Da Costa v Jones* (Cowp. 70).

624 *Ibid*, Pound, p 114.

625 *Mighty Midgets, Inc v Centennial*, 47 N.Y. 2d. 12, 21-22, 389 N.E. 2Nd 1080, 416, N.Y.S. 2D 559 (N.Y. 1979).

626 New York Laws; Civil Practice Law & Rules, (2016) Article 81 – Costs Generally, § 8101 " The party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by Statute, or

on to plaintiffs who instigate a false or frivolous claim. The rural United States developed a preference for judges to deliver off hand opinions without recourse to the decisions rendered by the judiciary in European monarchies.[628] Judicial opinions were delivered *ore tenus*, rendering court decisions unclear. Indeed it became a challenge to understand the current state of the law.[629] Pound posited that the frontier way of life might have contributed to the sporting theory of justice, which runs contrary to the notion of making large pecuniary awards to prevailing parties, including creditors.[630] Further, many juries in rural communities became familiar with the same category of defendant (debtors) habitually appearing before them, and the jurors lived in the same communities as the parties. Judges and juries in the frontier states became familiar with a cohort of defendants habitually appearing before them, many of whom were submerged in debts. The populist folk hero seeking to vindicate his rights combined with agrarian democrats contributed to the development of the American rule. This occurred at a time when antipathy to lawyers was in the full post-independence after glow.[631] Goodhart observed that lawyers were viewed as persons of disrepute and there was no attempt to reward them with legal costs.[632] The post-revolutionary period was hostile to the monarchy, while populist feeling influenced the executive and judicial branches of government. There was no independent bar[633] to resist such populism, while a not insubstantial minority were attracted to the notion of a republic, and some even advocated for the reception of French civil law. The American legal system suffered from profound disadvantages. This was partly attributable to the distances that had to be traversed. The slow modes of communication also militated against centralised decision making. Yet ultimately the courts had to dispense justice in remote rural communities.[634]

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unless the court determines that to so allow would not be equitable under all of the circumstances"; New York General Business Law § 349: 198-b (f)(5); New York State False Claims Act, N.Y.; State Finance Laws §187-194; N.Y. C.P.L.R 8303-a § 8303 empower a court to award costs and reasonable attorneys fees not exceeding $10,000 against a litigant found to have "interposed a frivolous claim or defense" either in a lawsuit to recover damages for personal injury, property damage, or wrongful death or in a lawsuit brought by the individual who committed a crime against the victim of a crime.

627 *Francis v Atlantic Infiniti Ltd*, 2012 N.Y. Slip Op50198 (U).

628 *Ibid*, Pound, p118.

629 *Ibid*, p 117.

630 *Ibid*, p 124.

631 *Ibid*, Pound, p 145.

632 *Ibid*, Goodhart, p 873.

633 " The effects of the opposition to an educated well trained bar and to an independent, experienced, permanent judiciary, are legacies of the Jefferson Brick era of American politics"; Roscoe Pound; The *Spirit of the Common Law,* Marshall Jones Company Publishers, New Hampshire, August 1921, p 118.

634 *Ibid*, Pound, p 134.

2.12 Exceptions to the American rule

During the formative years of the federal court system, Federal Congress enacted legislation enabling the federal courts to award legal fees, in those courts, coming under the rubric of Federal jurisdiction.[635] The district and admiralty courts were outside of the ambit of this jurisdiction. In 1789, the federal courts followed state practice with regard to rates of fees in those distinct categories of cases.[636] In 1793 Congress enacted a general provision governing the awarding of costs to successful parties in the federal courts.[637] In 1796, the Supreme Court held in *Arcambel v Wiseman* that the judiciary would not create a general rule, independent of any statute, allowing awards of legal fees in federal courts. In that case[638] the inclusion of legal fees as damages was overturned on the grounds that it was contrary to the general practice in the United States. The Supreme Court has continually observed this position in the two hundred years that have followed. In 1842, Congress conferred on the Supreme Court authority to prescribe the items and amounts of costs that could be taxed in federal courts. The latter never did so[639] while in 1853, concerns were ventilated in Congress[640] regarding the lack of uniform rules for the regulation of costs between private parties in litigation. There was a glaring diversity in the practices among the courts with the result that unsuccessful litigants were being unfairly saddled with exorbitant fees. The legal costs were often disproportionate to the causes of action, and Congress acted to standardise

635 *Alyeska Pipeline Co. v Wilderness Society*, 421 U.S. 240, 421 U.S. 248 (1975); The Federal Judiciary Act of Sept. 24, 1789, 1 Stat. 73, referenced costs in §§ 9, 11-12, 20-23, but provided specifically that the United States Attorney in each district "shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be."

636 Act of Mar. 1, 1793, § 1, 1 Stat. 332, established set fees for attorneys in the district courts in admiralty and maritime proceedings; which had expired by the end of the century; *The Baltimore*,8 Wall. 377, 75 U.S. 390-392 (1869).

637 "That there be allowed and taxed in the supreme, circuit and district courts of the United States, in favour of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attornies' and counselors' fees, except in the district courts in cases of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states." § 4, 1 Stat. 333. This provision was to be in force for one year but it was continued until 1796 and then for a period of two years, until the end of the next session of Congress, when it expired.

638 3 Dall. 306

639 Act of Aug. 23, 1842, § 7, 5 Stat. 518; "The history of the provision indicates that it was intended to lead to a reduction of fee-bills in federal courts"; Cong. Globe, 27th Cong., 2d Sess., 723 (1842).

640 Senator Bradbury, Cong.Globe App. 32d Cong., 2d Sess., 207 (1853): "There is now no uniform rule either for … the regulation of the costs in actions between private suitors. One system prevails in one district, and a totally different one in another; and in some cases it would be difficult to ascertain that any attention had been paid to any law whatever designed to regulate such proceedings.... The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that, in some cases, those costs have been swelled to an amount exceedingly oppressive to suitors and altogether disproportionate to the magnitude and importance of the causes."

the costs allowable in federal litigation.[641] The judicial branch of Government was reluctant, to reallocate costs burdens absent legislative guidance given the origin and development of the American rule. Congress did create exceptions in order to protect federal rights[642] in certain spheres.[643] In *Fleischmann Distillery Corp v Maier Brewing Co.,* Warren C.J. asserted that the general exceptions to the American rule were developed to achieve equity in situations and not in the context of statutory causes of action. In that case, the court refused the costs application as the statute had not provided for costs.[644] Congress created exceptions to the American rule, though, the absence of such provisions, under for example, the Securities Exchange Act, 1934, does not preclude parties from seeking costs under any of the non - statutory ones. Further, when the courts exercise their discretion under either under one of the legislative or non-legislative exceptions, they do so in the exercise of their equitable jurisdiction.

2.12.1 The Admiralty exception

One of the longest standing exceptions to the American rule arises in admiralty and maritime actions. This exception has an international mercantile shipping dimension and it does not appear to have been created for in the purely domestic sphere. It was formulated before the eighteenth century, and it carried over in to the newly created United States of America. It presents as quite a discrete exception, which is predicated on *bad faith*, and it is peculiar to the law of Admiralty. In *Vaughan v Atkinson*[645] the court held that the petitioner was entitled to his reasonable costs[646] and damages as his employers were callous in their attitude in failing to pay "maintenance and cure"[647] and for failing to investigate his claim.[648] The court

641 H.R.Rep. No. 50, 32d Cong., 1st Sess. (1852).

642 Fair Labor Standards Act 29 U.S.C. 201.

643 *Alyeska Pipeline Co. v Wilderness Society*, 421 U.S. 260 (1975).

644 *Fleischmann Distilling Corp. v Maier Brewing Co*.,386 U. S. 714,386 U. S. (1967); The respondents deliberately infringed patents contrary to the Lanham Act which provides (S. 35) for trademark rights, the District Court awarded the successful party "reasonable attorneys fees" which was reversed by the Court of Appeal as the Act provides for compensatory recovery measured by the defendants profit accruing from such an infringement and damages, which may be trebled in appropriate circumstances; citing *Farmer v Arabian American Oil Co*. 379 U.S. 27, 399 U.S. 235 (1964); I.d., 379 U.S. 236-239; *Oerlichs v Spain* 82, U.S. 15 Wall, 211 (1872) the Supreme Court held that the lower Court erred in allowing counsels fees as part of the damages recoverable.

645 369 U.S. 527 (1962).

646 *Vaughan v Atkinson* 369 U.S. 527 (1962); petitioner was entitled to reasonable counsels fees as damages for failure to pay maintenance while the employee was sick with tuberculosis over a two year period from March 1957 to August 1959 until he was declared fit; 369 U.S. 530-531 (Douglas J).

647 Policy summarised in *Calmar S.S Corp v Taylor*, 303 U.S. 525, 303, US 528.

asserted that admiralty courts are authorised to grant such equitable relief.[649] It held that the plaintiff may be awarded legal fees as an item of compensatory damages.[650] In this class of cases the underlying rationale of fee shifting is punitive. The trigger for awarding the fees is bad faith on the part of the unsuccessful litigant. The admiralty exception is a discrete one, which falls under the broader umbrella and forms a subset of the *bad faith* doctrine. However, its origins are more ancient in their character, and international in their disposition, than a linear application of the bad faith doctrine, which commonly manifests in cases of civil contempt, anti-trust and fraud.[651] In *Vaughan v Atkinson*[652] the petitioner was discharged from the respondent's ship at the end of his voyage and he was issued with a medical certificate to enable him to enter a public hospital for treatment. He was treated for tuberculosis for several weeks as an inpatient, and for over two years as an outpatient, before he was finally declared fit. The petitioner sent his employers an abstract of his medical records and he requested them to pay *maintenance and cure*, while he worked during his convalescence. The District Court awarded him maintenance but it refused to award damages. On appeal, the Supreme Court awarded the petitioner reasonable damages and it reversed any deductions from his earnings. Douglas J. noted the hospital records showed a strong probability of active tuberculosis. The Supreme Court confirmed that admiralty courts are authorised to grant equitable relief,[653] and it confirmed that legal fees[654] might be awarded in such actions,[655] as an item of compensatory damages.[656] The award was analogous to an award of indemnity costs. While the history of admiralty cases is quite antiquated, they fall within the broader application of

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[648] Maintenance and cure provide a seaman with food and lodging.

[649] *Swift & Co. v Compania Caribe*, 339 U.S. 684, 339 U.S. 691-692; where counsels fees had been awarded in equity actions; *Rolax v Atlantic Coast Line R. Co*. 186 F. 2nd 473, 481, where African American's were required to bring a suit against a labour union to prevent discrimination.

[650] *Vaughan v Atkinson* 369 U.S. 527 (1962); counsels fees were applied in *The Apollon*, 9 Wheat. 362, 22 U.S. 379 in an admiralty suit where a party was put to the expense to recover a wrongfully seized vessel; *The Iroquois*, 194 U.S. 240; for failure to give maintenance and cure; The Jones Act, 46 U.S.C. S.688.

[651] *Hawaii v Standard Oil*; 465 U.S. 251, 265-266 (1972), (Marshall J, Burger CJ, Stewart, White and Blackmun JJ concurring); citing *Northern Pacific R. Co. v United States*, 356 U.S. 1, 356 U.S. 4 (1958); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 392 U.S. 147 (1968); *Zenith Radio Corp. v Hazeltine Research, Inc.*, 395 U.S. 100, 395 U.S 130-131 (1969).

[652] 369 U.S. 527 (1962).

[653] *Swift & Co. v Compania Caribe*, 339 U.S. 684, 339 U.S. 691-692; *Rolax v Atlantic Coast Line R. Co*. 186 F. 2nd 473, 481, where African American's were required to bring a suit against a labour union to prevent discrimination.

[654] The petitioner entered in to a 50:50 contingency fee arrangement with his counsel.

[655] *Rolax v Atlantic Line R. Co*., 186 F.2d 473, 481; *Sprague v Ticonic National Bank*, 307 U.S. 161, 307 U.S 164; allowances for counsel and other expenses necessitated by litigation (not included in ordinary taxable costs regulated by statute) as part of a historic equity jurisprudence of the Federal Courts.

[656] *Vaughan v Atkinson* 369 U.S. 527 (1962); counsels fees were applied in *The Apollon*, 9 Wheat. 362, 22 U.S. 379 in an admiralty suit where a party was put to the expense to recover a wrongfully seized vessel; *The Iroquois*, 194 U.S. 240; for failure to give maintenance and cure gave rise to a claim in damages for suffering; The Jones Act, 46 U.S.C. S.688; recovery may also include necessary expenses *Cortes v Baltimore Insular Line* 287 U.S. 367, 287, U.S. 371.

the bad faith doctrine. The reasoning for applying the costs follow the event rule is overtly punitive. It punishes certain conduct in order to achieve a policy objective.[657] It stems from ancient maritime jurisprudence, which is consistent with received law and usage,[658] and it is designed to provide seamen with food and lodging when they become sick or injured in the ships service. It involves the protection of seafarers who are friendless and improvident from being abandoned by their employers in the exercise of a strenuous and dangerous service.[659] Further exceptions arise where litigation is taken with the objective of protecting a common fund, or in cases of civil contempt. These anti-trust or fraud type cases also engage with the concept of *bad faith.*[660]

657 *Calmar S.S Corp v Taylor* 303 U.S 525, 303 U.S. 528.

658 *Harden v Gordon* 11 Fed. Cas. 480, 483.

659 *Harden v Gordon* Fed. Cas. No. 6047 (C.C), Storey J.; *Aguilar v Standard Oil Co.* 318 U.S. 724, 318 U.S. 730.

660 *Hawaii v Standard Oil*; 465 U.S. 251, 265-266 (1972), citing *Northern Pacific R. Co. v. United States*, 356 U. S. 1, 356 U.S. 4 (1958); *Perma Life Mufflers, Inc. v International Parts Corp.*, 392 U. S. 134, 392 U. S. 147(1968) ; *Zenith Radio Corp. v Hazeltine Research, Inc.*,395 U. S. 100, 395 U. S. 130-131 (1969), and the Clayton Act, 15 U.S.C. § 15.

2.12.2 Bad Faith Doctrine

The courts developed a broad concept of *bad faith* which enables the judiciary to shift costs on to the party which is found to have initiated an action or pleaded a case in bad faith, or maliciously, or for oppressive reasons.[661] If a court, therefore, concludes that an action is frivolous or that it was initiated with the intention of harassment, then the plaintiff may be ordered to pay the opposing party's costs.[662] The case of *Toledo Scale Co. v Computing Scale Co*. is instructive of cases within this category. The court held that the defeated party, who sought to instigate fresh proceedings in another jurisdiction to obstruct the execution of a court order, was guilty of contempt from its wilful disobedience of that order, and it was punished, by imposing reasonable legal fees.[663] The circumstances under which the courts will shift fees within this category are variable. The courts may in the exercise of their discretion elect to shift fees on to the losing party where that party intentionally uses dilatory strategies[664] or where the *bad faith* has prolonged the action.[665] The doctrine seeks to punish wrongful tactics and it acts to deter similar future conduct.[666] In *Fleischmann Distillery Corp v Maier Brewing Co.* Warren CJ. asserted that the general exceptions to the American rule were developed to do equity in particular situations and not in the context of statutory causes of action. The court refused the costs application as the statute had not expressly provided for costs.

2.12.3 *Common Benefit exception*

2.16.3 The judiciary in the United States, like in England and Wales, have formulated a common benefit exception, which can be viewed from the standpoint of functional equivalence. It operates as an indemnity to both the loser and user pays rules as it underwrites

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661 *Ibid*, Hamilton, p 205, 206.

662 *Carrion v Yeshiva Univ.* 535 F. 2nd 723 (2d Cir.) (1976); *United States Steel Corp v United States* 519 F. 2d 359 (3d Cir: 1975); *Gazan v Vadsco Sdes Corp;* 6 F. Supp 568 (E.D.N.Y. 1934).

663 *Toledo Scale Co. v Computing Scale C*o., 261 U.S. 399, 261 U.S. 426-428 (1923); attorneys fees, including all costs in both Court may be authorised as part of the fine to be levied where the party attempted to relitigate in another Court.

664 *Bond v Stanton*, 528 F. 2d 688 (7th Cir.) vacated, 45 U.S. 3394 (U.S. Nov. 30, 1976).

665 *Doe v Polker*, 515 F.2d 541 (8th Cir.) cert granted, 96 S. Ct 3320 (1976); the plaintiff was awarded reasonably attorneys fees when the defendants contended that she had no l*ocus standi* to seek the reliefs sought against a municipal operated obstetrics-gynecology clinic, which refused to perform abortions.

666 *Hall v Cole*, 412 U.S 1., 5 (1973).

office holders, and designated persons, who perform certain functions for companies and estates. The indemnity developed in both jurisdictions, from the mid-19th century onwards. In 1881 the United States Supreme Court held that a person jointly interested with others in a common fund who in good faith maintains litigation to save it from depletion and secures its proper allocation, is entitled to reimbursement of costs. Those costs are paid either out of the fund itself, or by proportionate contributions from those who benefit from the litigation.[667] The doctrine was amplified over time and in 1939 the United States Supreme Court[668] awarded a plaintiff the costs of legal fees and litigation expenses for reasons of fairness and justice.[669] The doctrine developed through the courts equitable jurisdiction mirroring developments in England and Wales. Though it was originally limited to actions which resulted in damages or recovery of monetary funds,[670] it was broadened in 1970 to include actions where the reliefs recovered were not purely monetary in nature.[671] It facilitated a petitioner who had benefited shareholders by instigating an action compelling corporate compliance[672] to recover legal costs in return for rendering an important service to the Corporation.[673] The United States species indemnifies a litigant who successfully achieves corporate therapeutics,[674] where no monetary damages are recovered. The doctrine in England and Wales operates to indemnify a party that is motivated by the reorganation of a life insurance business. Both species indemnify a minority shareholder in a genuine action, brought in good faith, where the proceedings transcend that party's own personal interests, and where the result confers a broader benefit on other shareholders. Neither species will indemnify a minority shareholder who instigates proceedings out of narrow or personal interests. In *Sprague v Ticonic National Bank*[675] the plaintiff was awarded legal fees and litigation expenses that are allowed only in exceptional circumstances.[676] The doctrine recognises an equitable right of reimbursement for costs that are incurred in a successful suit, from which others benefit,[677] and which redounds on the successful party.[678] The doctrine is

667 *Trustees v Greenough*, 105 U.S. 527 (1881).
668 *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939).
669 307 U.S. 161 p 167.
670 *Hall v Cole*, 412 U.S. 1, 5-6 (1973); *Trustees v Greenough*, 105 U.S. 527 (1881).
671 *Mills v Electric Auto-Lite*, 396 U.S. 375 (1970).
672 396 U.S. 375 (1970) 396 U.S., 396.
673 396 U.S. 375 (1970) 396 U.S., 393; Harlan J., " The dissemination of misleading proxy solicitations was a deceit practised on the stockbrokers as a group" and the expenses of petitioners lawsuit were incurred for the benefit of the Corporation and the other shareholders; citing *J. l. Case Co. v Borak*, 377 U.S 377 U.S. 432.
674 *Bakery Workers Union v Ratner* 118 U.S. App. D.C. 269, 274, 335 F. 2d 691, 696 (1964).
675 307 U.S. 161 (1939).
676 307 U.S. 161 p 167.
677 *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Central Railway & Banking Co. v Pettus*, 113 U.S. 116 (1885); *Trustee v Greenough*, 105 U.S. 527 (1882).

consistent with spreading the legal costs across all of those who have benefited. The doctrine was originally limited to actions which resulted in the recovery of damages or monetary funds.[679] In *Mills v Electric Auto-Lite*, however, the Supreme Court, held that the benefit need not be purely monetary in nature in order for it to be engaged.[680] The court held that other shareholders had benefited substantially from the petitioner instigating an action compelling corporate compliance with federal securities law.[681] The petitioner had moreover rendered and important service not only to the corporation but also to the shareholders.[682] The fact that the proceedings did not produce, and may never produce a monetary recovery, did not preclude an award of costs. The doctrine was amplified to include the reimbursement of stockbroker's expenses in obtaining a judicial declaration, and it was also availed of where the election of directors was deemed invalid.[683] The doctrine may also be invoked for corporate cleansing and therapeutics.[684]

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678 *Trustees v Greenough*, 105 U.S. 527 (1881); the Supreme Court held that a person jointly interested with others in a common fund who in good faith maintains the necessary litigation to save it form waste and secures its proper allocation is entitled in equity to the reimbursement of his costs, either out of the fund itself, or by proportionate contributions from those who receive the benefit from the situation; *Lindy Bros. Builders, Inc v American Radiator and Standard Sanitary Corp*., 487 F. 2d 161 (3rd Cir. 1973); *Alpine Pharmacy, Inc. v Chas. Pfizer & Co.*, 481 F.2d, 1045 2d (Cir) Cert. Denied, 414 U.S. 1092 (1973).

679 *Hall v Cole*, 412 U.S. 1, 5-6 (1973); *Trustees v Greenough*, 105 U.S. 527 (1882).

680 396 U.S. 375 (1970).

681 396 U.S. 375 (1970) 396 U.S., 396.

682 396 U.S. 375 (1970) 396 U.S., 393, (Harlan J), " The dissemination of misleading proxy solicitations was a deceit practised on the stockbrokers as a group" and the expenses of the petitioners lawsuit were incurred for the benefit of the Corporation and the other shareholders; citing *J. l. Case Co. v Borak*, 377 U.S 377 U.S. 432.

683 *Mills v Electric Auto-Lite Co. 396 U.S. 375 (1970) 396 U.S., 396*, citing *Bosch v Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 101, N.W. 2D 423 (1960), (Black J) dissenting.

684 *Bakery Workers Union v Ratner* 118 U.S. App. D.C. 269, 274, 335 F. 2d 691, 696 (1964).

2.13 Application of the loser pays rule in the United States

The American rule is not universally adhered to in the United States and a number of states have adopted variants of the costs follow the event rule. Alaska was the first to introduce the loser pays rules as a territory in 1900.[685] The rule generated considerable controversy when the state Supreme Court held in favour of a corporate defendant in a case of alleged wrongful dismissal.[686] On appeal to the Alaskan Supreme Court the appellant contended that the charges for legal fees were excessive[687] but the court [688] held they were not unreasonable. The majority ventilated concern about the level of costs on the basis that they might restrict a broad spectrum of the populace from being able to access the judicial system. The court opined that the purpose of the loser pays rule is to partially compensate a prevailing party for the costs incurred on the litigation.[689] The minority in '*Bozarth'* highlighted the conundrum of a losing party being subjected to a financially ruinous award of costs. They cited the dissent of the former Chief Justice in *Sloan v Atlantic Richfield Co.*[690] In *Van Huff v Sohio Petroleum Co*.[691] the appellant challenged the award of legal fees contending that it would be unjust to expect an unemployed party to meet the legal fees of a large corporation.[692] However, the Supreme Court rejected his argument that the costs were excessive. Alaska had to strike the necessary balance between ensuring that the aggrieved citizenry have access to the courts, while at the same time compensating parties, even well-resourced one, which

685 *Ibid*, Olsonard and Bernstein, p 1182.

686 *Bozarth v. Atlantic Richfield Oil Co.* 833 P.2d 2 (Alaska 1992) (Rabinowitz CJ., Burke, Moore J.J concurring) (Mathews and Compton JJ. dissenting); the appellant sought an award of $500,000 in compensatory damages, there were numerous pre-trial motions, and at least twenty one depositions were taken.

687 It was contended that ARCO's lawyers billed for excessive hourly rates; citing *Municipality of Anchorage v Baugh Construction and Engineering Co.*, 722 P 2d 919 (Alaska 1986), the Court reduced the attorneys fees from $200 per hour (in trial work) and $150 per hour (out of trial work) to $120 per hour and $105 per hour respectively.

688 The employer took many depositions not used at trial which increased costs, however, it was allowed such costs as they were taken in good faith; citing *Kaps Transport Inc v Henry*, 572 P.2d 72 (Alaska 1977).

689 *Malvo v J.C. Penney Co.* 512 P. 2d 575, 588 (Alaska 1973) cited.

690 552, P.2d 157, 161-162 (Alaska 1976), Boochever C.J.; the trial courts must "give consideration to the nature of the claim and the need for making Courts available to resolve disputes without the imposition of intolerable burdens."

691 835 P.2d 1181 (1992).

692 Sohio Alaska Petroleum Company ("SAPC") incurred $351,854.55 in attorneys' fees and sought sixty per cent of this amount. Van Huff contended that the attorneys had done unnecessary work and "SAPC" should not get ore than 20% of its costs. The trial Judge (Hunt J.) awarded the prevailing party thirty percent of its costs ($117,251.52).

prevailed in litigation. The loser pays rule was introduced in Oklahoma[693] though not with the same vigour as Alaska.[694] In an attempt to restrict the growth in medical negligence actions, the State of Florida experimented with fee shifting between 1980 and 1985.[695] The Florida medical association and insurance industry lobbied for the costs follow the event rule.[696] The rule was fatally undermined when the state introduced legislation exempting litigants from liability for costs if they did not have the resources to pay them.[697] There was no empirical evidence denoting a direct correlation between the introduction of the rule and the acceleration of medical negligence actions. After the loser pays rule was abolished the number of such actions increased when the American rule was reintroduced in the state. The loser pays rule in Florida succeeded in filtering out unmeritorious cases. Federal and State legislatures[698] introduced many exceptions to the American rule to enable prevailing plaintiffs to obtain an award for their reasonable fees. From the 1960s onwards Federal Congress and state legislatures enacted laws which enabled successful plaintiffs to recover their costs but which prevented a successful defendant from recovering costs. This produced a form of one-way fee shifting. The laws were designed to promote social reforms by encouraging litigation in certain areas of public interest, including civil rights and the environment.[699] The courts invariably made an award of costs in favour of such successful plaintiffs.[700] This form of fee shifting increases rather than decreases a plaintiff's access to justice,[701] not least because plaintiffs are not litigating under the anxiety that they will have to defray the costs of other parties, should they fail. A plaintiff, who may recover costs from the Government for a civil

693 Oklahoma, S.B. 263, 45th Leg., 1st Reg. Sess., 1995 Okla. Sess. Law (enacted); under the statute a defendant can elect whether to make an offer of judgment to the plaintiff. The legislation applies to personal injuries cases in which the plaintiff seeks more than $100,000 or a defendant makes an offer exceeding $100,000, in reality, very few actions would come within the ambit of the legislation; 2014 Oklahoma Statutes Title 12, Civil Procedure (provides for "costs and reasonable attorneys fees") § 12-1141.5 (2014)

694 S.B. 385, 68th Leg., 1st Spec. Sess. 18-138, 1995 Or. laws (as enacted). In Oregon a plaintiff who refuses an offer to settle and later receives an award of less than that sum at trial waives any statutory or contractual entitlement to attorneys' fees. The defendant's entitlement to attorney's fees commences from the date of the rejected offer.

695 Florida Statutes, Annotated, Volume 21A, Section 768.56, effective July 1, 1980; Ch. 80-67; 1980 Fla. Laws 225 (Codified at FLA. STAT. S 786.56 (1980).

696 Marie Gryphon, *"Assessing the effects of a 'Loser Pays' Rule on the American Legal System: An Economic Analysis and Proposal for Reform"*, Rutgers Journal of Law & Public Policy Vol 8:3, Spring 2011, p 589.

697 FLA. STAT. S 768.56 (1980).

698 California Consumer Legal Remedies Act, California Civil Code, Section 1780 (d).

699 Australian Law Reform Commission, ALRC 75, *" Costs Shifting who pays for litigation",* 31 August 1995, Appendix C, page 116; Civil Rights Attorneys Fees Awards 42 USCA 1988 (1982); Equal Access to Justice 28 USCA 2412 (1988).

700 Civil Rights Act of 1964 S 204 (b), 42 U.S.C. S 2000 a-3(b) (1988), Civil Rights Act of 1964 S 706 (k), 42 U.S.C. S 2000 e-5(k) (1988); Clean Water Act Section 505, 33 U.S.C. S 1365 (d) (1988).

701 Gerard Walpin, *American's Failing Civil Justice System; Can we learn from other Countries*, 41 N.Y.L Sch L. Rev., p 647 at 657 (1996-1997).

rights violation, does not have to bear the opposing party's costs should the action fail.[702] Congress copper fastened this form of fee shifting with the introduction of the Civil Rights Attorney Fees Award Act, 1976. It expressly provided for reasonable attorney's fees[703] for prevailing parties who initiated actions in furtherance of Civil Rights statutes. Many loser pays provisions are underpinned by social policy considerations. The objectives are numerous but include providing access to justice for breach of human rights or discrimination, or legal remedies for consumers who purchase motor vehicles, or to prevent tenants from being harassed by their landlords in to terminating legal occupancy. Some fee- shifting statutes do not provide explicit guidance as to what is an appropriate attorney's fee. However, a reasonable legal fee is commonly understood to reflect a reasonable value for the services delivered.[704] The judiciary exercise a broad discretion in determining what constitutes reasonable compensation for legal services.[705] In *Newman v Piggie Park Enterprises, Inc.*[706] the petitioner brought an action under Title II of the Civil Rights Act, 1964 seeking to challenge discrimination in restaurants and a sandwich bar in South Carolina. Title II provided that the successful party is entitled to a reasonable attorney fee at the discretion of the court.[707] The Supreme Court held that a party who succeeds in obtaining an injunction under Title II[708] should ordinarily recover legal fees unless special circumstances would render such an award unjust. The nomenclature of such statutes creates a plaintiff-friendly one-way, fee shifting costs model. Federal Government underwrites the successful plaintiff's attorney's fees. The unsuccessful plaintiff suffers no adverse consequences in terms of any order for costs.[709] Such plaintiffs invariably recovered a full fee-shift if they won. The

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[702] Under section 1988 of title 42 of the United States Code, a plaintiff may recover costs from the government for a civil rights violation but does not have to pay the government's costs if the claim fails; (42 U.S.C. S 1988 (1994)) .

[703] 42 U.S. Code § 1988; the legislation conferred a discretion on the Courts to enable payment of experts reports.

[704] *Diaz v Audi of Am., Inc*., 57 AD3d 828, 829-830 [2d Dept 2008]; *Padilla v Sansivieri,* 31 AD3d 64 [2d Dept 2006] several factors are to be considered other than the time and work expended, including the skill required in the case, complexity of the matter, the lawyers experience, ability and reputation, and the client's benefit from the services and the fee usually charged for similar services.

[705] *Matter of McCann,* 236 A.D.2d 405,654 N.Y.S.2d 578[2d Dept 1997], citing *Matter of Papadogiannis,*196 A.D.2d 871, 872,602 N.Y.S.2d 68[2d Dept 1993]); reasonable attorney's fees are commonly understood to be those fees that represent the reasonable value of the services rendered.

[706] 390 U.S. 400 (1968).

[707] 204 (b); 78 Stat: 244, 42 USC, 2000a-3(b); " In any action commenced pursuant to this sub chapter; the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs, and the United States shall be liable for costs the same as a private person."

[708] Civil Rights Act 1964, § 204 (a), 78 Stat. 244, 42 U.S.C & 2000a-3(a).

[709] Civil Rights Act, 1964 section 706(k) provides: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee …"

defendants were virtually never entitled to costs if they prevailed.[710] This proposition is fortified by *Christiansburg Garment v EEOC* where the *EEOC* held that the District Court could in its discretion award attorney fees to the successful defendant only if there was a finding that the plaintiff's action was frivolous, baseless, or without foundation.[711] The court identified two possible equitable considerations favouring an attorneys' fee award to victorious plaintiff which are absent in the case of defendants. Firstly, the plaintiff is the chosen instrument of Congress to vindicate a policy which is considered to be of the highest priority.[712] Secondly, when a District Court awards counsel fees to a prevailing plaintiff, it is making the award against a violator of federal law. The policy considerations underpinning the award of fees to a successful plaintiff are not operative in the case of a prevailing defendant.[713] The legislation is consistent with a one-way shift in the plaintiff's favour and that party bears no costs anxieties if it should lose. The Warren Supreme Court expressed concerns about the level of cases where the lower courts erroneously employed the private attorney general approach to award legal fees.[714] This contributed in no insignificant way to the cynical view of civil justice that manifested in the 1960s. Galanter argued that the response led to reforms that were designed to limit responsibility and reduce judicial remedies thereby rendering access to justice more difficult in an effort to introduce remedial change. The system was characterised as inflicting damage on fiscal well-being[715] which propagated a perception of businesses being swamped with trivial suits[716] that were settled to obviate legal costs. The costs of which are transferred to the consumer or end users.

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710 *Ibid*, Olsonard and Bernstein, p 1166.

711 434 U.S. 412, 422-24 (1978); A successful defendant seeking counsel fees under § 706(k) must rely on quite different equitable considerations.

712 *Newman v Piggie Park Entertainment, Inc., 390* U.S. 390 U.S. 402 (1968).

713 *Christiansburg Garments v EEOC* 434 U.S. 412 (1978) 434 U.S. 415-422.

714 *Alyeska Pipeline Co. v Wilderness Society*, 421 U.S. 260 (1975).P 421 U.S. 271; citing *Lee v. Southern Home Sites Corp*.,444 F.2d 143 (CA5 1971); *Cooper v Allen*,467 F.2d 836 (CA5 1972); *Knight v. Auciello*,453 F.2d 852 (CA1 1972); *Hoitt v Vitek*,495 F.2d 219 (CA1 1974); *Cornist v. Richland Parish School Board*,495 F.2d 189 (CA5 1974);*Fairley v Patterson*,493 F.2d 598 (CA5 1974); *Fowler v. Schwarzwalder*,498 F.2d 143 (CA8 1974).

715 Hazel Genn, *Judging Civil Justice*, Cambridge University Press, 2010, p 31; citing Marc Galanter, *"A world without trials",* Journal of Dispute Resolution, 7 (2006), 7-34, p 20.

716 *Pearson v Chung*; *Roy L. Pearson, Jn v Soo Chung, et al* (D.C. App. Dec 18, 2008), Judge Pearson issued a law suit seeking $67 million against a dry cleaners for allegedly losing his trousers, to include damages for inconvenience and mental anguish and the legal costs for representing himself.

2.14 Conclusion

Chapter 2 traces the origins of the costs follow the event rule. It examines the rationale for the rule that is observed in England and Wales, Ireland, and the preponderance of the common law world. It follows the progression of the rule from the Statute of Gloucester utilising a flow methodology chronicling key developmental milestones, including the culmination of two way fee shifting. It traces seminal legislative developments in costs including the Supreme Court of Judicature Act, which provides the modern template for many common law jurisdictions. It considers the Supreme Court Act, 1981, which was introduced in England and Wales, and the Legal Services Regulation, Act that entered the statute book in Ireland in 2015. The chapter considers Roman law, Common law and Equity, party and party costs, lawyer and own client costs, indemnity costs, relator actions, and the meaning of the words *the event*, which is a term of art. The chapter introduces the American rule. It considers the multi-parous exceptions to the costs follow the event rule and the exceptions to the American rule which arise in admiralty law and under the common benefit and bad faith doctrines. The laudable notions of access to justice and costs shifting pervade this chapter, which pays homage to the punctilious and pernickety rules that developed over the centuries.

CHAPTER 3

3.1 Introduction

Chapter 3 examines the justice-related test in Ireland, which flows from almost ninety years of common law jurisprudence. It considers the material factors that can displace the loser pays presumption so as to disentitle an otherwise successful party to an award of costs. The decision to displace the rule must be exercised judicially, and taking cognisance of all the relevant factors.[717] In *Fyffes Plc v DCC Plc*[718] Laffoy J. sitting in the High Court in Ireland, took cognisance of the discretionary jurisdiction articulated by Denham J. in *Grimes v Punchestown Developments Co. Ltd*[719] and other settled authorities.[720] She cited the Australian case of *Byrns v Davie*[721] which observed that in the absence of costs being provided for under any rules, they would be a matter of discretion, and unnecessary or unfounded claims can be segregated and penalised.[722] Conversely this chapter also considers the factors that may entitle an otherwise unsuccessful party to a full or partial costs award. In this regard, the chapter examines the rule in *Ritter v Godrey.*[723] It considers the disparate and often unconnected categories of cases where the loser pays principle has been disengaged. This includes cases where there has been some improper conduct, or where a matter of exceptional public interest or importance arises.[724] It will examine how the loser pays rule is applied in cases which engage with issues of conspicuous novelty or where obligations or rights need be clarified,[725] and also those cases where the judiciary need to resolve a novel but critical question.[726] The chapter also considers the special rule that is prevalent in test cases,

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717 *Godsil v Ireland* [2015] IESC 103 [23]; *Dunne v The Minister for the Environment, Heritage and Local Government [*2008] 2 IR 755, 783-784.

718 *Fyffes Plc v DCC Plc* [2006] IEHC 32 (Laffoy J), *[*2009] 2 IR 417, 679; [2007] IESC 36.

719 *Grimes v Punchestown Developments Co. Ltd [*2002] 4 IR 515, 522.

720 *Donald Campbell & Co. v Pollak* [1927] AC 732; *Ritter v Godfrey* [1920] 2 KB 47, 811 (Viscount Cave LC).

721 *Byrns v Davie* [1991] 2 V.R. 568, (Gobbo J) citing *Gold v Patman & Fotheringham Limited* [1958] 2 All ER 497.

722 *Gold v Patman & Fotheringham Limited* [1958] 2 All ER 497, 503, (Sellers J), the prevailing defendant awarded just fifty per cent of its costs.

723 *Ritter v Godfrey* [1920] 2 KB 47.

724 *Flannery v Dean* [1995] 2 ILRM 393; *Shelley-Morris v Bus Atha Cliath* [2003] 1 IR 232; *Donegal County Council v O'Donnell* (HC, 25 June 1982, O'Hanlon J.); *Grimes v Punchestown* [2002] 4 IR 515.

725 *F v Ireland* (27 July 1995); *O'Keefe v Hickey and the Minister for Education and Science* [2009] IESC 39; *O 'Shiel v Minister for Education* [1999] 2 IR 321; aspects of the State's duty under Article 42.4 to provide for free primary education.

726 *Curtin v Dáil Eireann* [2006] IESC 27; aspects of the judicial impeachment power.

in Ireland, and the special considerations that have emerged in Irish Constitutional law actions where the judiciary render partial or full costs awards in favour of unsuccessful litigants. The chapter will consider the leading authorities with particular emphasis on Irish Constitutional law actions, including *Collins v The Minister for Finance* [727] which arose out of the recapitalisation, in 2010, of two credit institutions. It will analyse the distinct themes, falling within certain readily identifiable principles, evaluate these heterogeneous principles, and engage in qualitative analysis of the costs awards which were made in favour of losing parties. These actions include cases which engage with sensitive issues which impact on the human condition, for example cases, human embryos, assisted suicide, homosexuality, cases of conspicuous novelty, and cases which engage with the separation of powers doctrine, including judicial impeachment and neutrality.[728] The chapter will also consider those cases that are imbued with a public interest dimension where the factual matrix transcends the immediate circumstances of the case. The chapter will further consider the circumstances under which the courts in England and Wales, Ireland and Australia, exercise the wasted costs jurisdiction, which is a prominent exception to the rule against ordering non parties to pay costs. The jurisdiction is often used to punish legal professionals for their misconduct. The common law courts[729] applied the rule that costs follow the event. In the courts of Chancery costs were awarded as a matter of discretion, which had to be exercised according to well-founded principles. When a court was animated to depart from the rule, it could only do so on a reasoned basis, and on a basis which was rationally connected to the facts of the case, most notably perhaps, the conduct of the protagonists.[730] In *British Columbia (Minister of Forests) v Okanagan Indian Band* the court stated that the jurisdiction to make an order for costs is a venerable one.[731] In *R (Corner House Research) v Secretary of State for Trade and Industry*[732] the court noted the full power over costs in the court of Chancery,[733] which was

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727 *Collins v The Minister for Finance [*2014] IEHC 79.

728 *Roche v Roche* [2006] IESC 10; *Fleming v Ireland* [2013] IESC 19; *Norris v AG* [1984] IR 36; *Curtin v Dáil Eireann* [2006] IESC 27; *Horgan v An Taoiseach* [2003] IR 468.

729 *Donald Campbell & Co. v Pollak* [1927] AC 732 HL; *Ritter v Godfrey* (1920) 2 KB 47; *Alltrans Express Limited v G.V.A Holdings Ltd* [1984] 1 ALL ER 685.

730 *Godsil v Ireland* [2015] IESC 103 [23]; *Dunne v The Minister for the Environment, Heritage and Local Government* [2008] 2 IR 755, 783-784; *Donald Campbell and Company Limited v Pollak* [1927] AC 732 (CA), 811-812.

731 *Jones v Coexter* (1742) Atk 400, cited in *Andrews v Barnes* (1888) 39 Ch D 133, 138; R (*Corner House Research*) *v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192, 17 (Lord Phillips MR).

732 *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [59], [2005] 1 WLR 2600, [2005] 3 Costs LR 455, [2005] 4 All ER 1, [2005] CP Rep 28, (Brooke LJ, Lord Phillips MR, and Tuckey LJ concurring); citing *Oshlack v Richmond River Council* [1998] HCA 111 (Gaudron and Gummon JJ) [33] ; First Report of the Commissioners and the Judicature (1869-70), vol 25 p 15.

733 *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [59];

absent in the common law courts, which often resulted in an injustice. In *Eircom plc v Director of Telecommunications Regulations* Herbert J. sitting in the High Court in Ireland, held that the power of the courts in Ireland under the Rules of the Superior Courts must be exercised judicially.[734] Costs remain discretionary and any perceived entitlement, is subject to the caveat that the court will be sensitive to the possibility that it may require to depart from the rule.[735] The chapter will consider the leading authorities with particular emphasis on Constitutional law actions, including *Collins v The Minister for Finance* which arose out of the recapitalisation, in 2010, of two credit institutions by the Minister for Finance. It will analyse the distinct themes, which fall within certain readily identifiable principles. It will evaluate these heterogeneous principles, and engage in qualitative analysis of the costs awards made in favour of losing parties, including Constitutional actions. It will focus on those actions which engage with sensitive issues which impact on the human condition, such as actions involving embryos, assisted suicide, homosexuality, cases of conspicuous novelty, and cases which engage with the separation of powers doctrine, including judicial impeachment and neutrality. It will examine the qualitative characteristics of those actions where the courts awarded costs, in whole or in part, to unsuccessful parties. It will having identified, the awards made to those losing parties, provide an accurate tool for future costs forecasting in Constitutional law actions. Particularly those actions where parties seek to impugn legislation by seeking a declaration that it is repugnant to, or violates, rights guaranteed by the Constitution. Finally, the chapter engages with the second (subsidiary) research question which asks *"In the context of Irish Constitutional Law actions are we turning losers in to winners?"* The question is ignited by the costs awards which are rendered in favour of losing parties in certain Irish Constitutional law actions.

3.2. The Justice-Related Test

Taking the Rawlsian proposition the legal concept of fairness can be defined as justice which envisages citizens possessing equal rights, participating in a fair egalitarian system,

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Andrew v Barnes (1888) 39 Ch. D, 133, 138 (Fry LJ); *Jones v Coxeter* (1742) Atk 400; *Corporation of Burford v Lenthall* (1743) 2 Atk 551, 552.

734 [2003] 1 ILRM 106; applying Hewthorn *v Heathcott* [1902] 39 ILTR 248.

735 *Veolia Water UK Plc v Fingal County Council* [2006] IEHC 240, 242 (Clarke J).

and exercising those rights under the umbrella of basic liberties.[736] The concept of fairness envisages, in litigation terms, that protagonists from divergent economic circumstances, whose Constitutional or other public law rights have been breached, have an expectation that the judicial outcomes in terms of the reliefs which they both secure, will be broadly consistent, irrespective of their social standing.[737] Though the matter may be different in a purely private law dispute where the economic strengths and bargaining power of the parties diverge in terms of access to legal services and representation. Franck propounded that rules should be determinate and certain as the contrary produces non-compliance (though he acknowledged that blind adherence to infirm rules can paradoxically undermine those rules).[738] He also posited that rules should be valid, coherent, and consistent and that there must be a rational justification for any exceptions with a clear nexus between the rules and those exceptions.[739] Franck posits that there are 'sophist' and 'idiot' rules and the requirement for determinacy can render an injustice in seeking to enforce those rules which fall within the latter category, which can in turn erode their legitimacy. [740] If on a strict interpretation of such rule the only possible outcome is an unjust one, then that rule is to be treated as *reductio absurdum*.[741] Franck perceived fairness as being comprised of two tectonic plates. Firstly the necessity for legitimacy and secondly that of justice. The first seeks to enforce rules, which must be observed if they are to have any standing, while the second is preoccupied with producing a greater sense of equity or fairness.[742] Fairness is the method by which the unease between legitimacy (which is concerned with procedural fairness) and redistributive justice (or moral fairness) can find an equilibrium when taking cognisance of both tectonic plates.[743] These two plates generate turbulence not unlike the uneasy fusion of the Common Law and Equity which occurred with the Supreme Court of Judicature Act architecture. Equity seeks to alleviate the harsh and rigid application of rules, and in the event of any conflict, it is to prevail. There is a persistent potential for conflict between the two

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736 *Ibid*, Rawls, *A Theory of Justice*, p 14, Rawls *"Justice as Fairness: Political not Metaphysical"*, Philosophy and Public Affairs, 14 (Summer 1985), pp. 223-51, p 5; Iain Scobbie, *Tom Franck's Fairness,* EJIL, Vol. 13, No.4 (2002), pp. 909-925, at 910, "Fairness is relative and subjective … a human, subjective, contingent quality which merely captures in one word a process of discourse, reasoning, and negotiations, leading, if successful, to an agreed formula located at a conceptual intersection between various plausible formulas for allocation."

737 *Ibid*, Rowe, p 651 at 653-654.

738 Thomas Franck, *Fairness in International Law and Institutions*, Oxford University Press (1995), p 30.

739 *Ibid,* Franck, pp. 37-40.

740 *Ibid*, p 77.

741 *Ibid*, p 77.

742 *Ibid*, p 5.

743 *Ibid,* Scobbie, EJIL, at p 910.

tectonic plates namely, legitimacy and justice, which embody different notions of fairness.[744] The importance of the concept of fairness to the loser pays rule cannot be overstated. The rule is a legitimate one which is predicated on reasoning and rationality. It is infused with equitable, moral and religious dimensions and it is ethically superior.[745] The rule also strives to achieve *restitution* which is a substantive legal right. This can be viewed as the equitable application of the rule which seeks to avoid any injustice. Franck asserted that both limbs namely legitimacy and distributive justice must be addressed not only in the decision making process but also in the final decision.[746] The loser pays rule meets the two limb test and thereby achieves fairness as fairness and justice are ingredients of the rule (just like any proper functioning rule). The rule possesses the characteristics of a 'sophist' one with a complex structure and character. It is delicately tempered with exculpatory principles within an engineered artifice.[747] It possesses layers which have an inherent flexibility and it purports to satisfy Franck's requirement for filtering out corrupt, arbitrary or idiosyncratic decision making.[748] The judicial authorities[749] viewed costs as mandating the judiciary to act reasonably and to exercise a reasonable discretion.[750] Franck propounded that equity is not simply an exception or a factor to be considered when mitigating the harsh, rigid, or unfair application of a rule. It can act on its own accord and assume the role of the dominant rule.[751] The prevailing protagonist in litigation has a strong claim to costs[752] but costs are always a matter of discretion.[753] That discretion is not an arbitrary power but a judicial one which must acknowledge legal principles.[754] The courts can only displace the costs equilibrium on a fully reasoned basis.[755] The loser pays rule has produced its own *justice related* test which can operate to deprive an otherwise successful party of costs, and in exceptional circumstances, it can see that party pay all or a portion of the vanquished party's costs. The discretion can be exercised partially, or entirely in favour of, or even against an otherwise

744 *Ibid*, Franck, p 5.
745 *Ibid*, Snyder and Hughes, pp. 345-380, 353.
746 *Ibid*, Franck, p 14.
747 *Ibid*, Franck, p 81-82.
748 *Ibid*, Franck, p 7.
749 *Andrew v Barnes* (1888) 39 Ch D 133, 138; *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA, Civ, 192 [17].
750 *Arbitrio boni viri*; *arbitrium bon viris* "the decision of a good man."
751 *Ibid*, Franck, pp. 65-66; Iain Scobbie, EJIL, Vol. 13, No.4 (2002), pp. 909-925, at 913.
752 *Civil Service Co-operative v General Steam Navigation Co*., [1903] 2 KB 756 (Lord Halsbury LC).
753 *Alltrans Express Ltd v G.V.A Holdings Ltd* [1984] 1 All ER 685.
754 *Huxley v West London Extension Railway Co.*, [1886] 17 QBD 373, 376, "Discretion is not an arbitrary power but a judicial discretion to be exercised on legal principles, not by chance medley, nor by caprice, nor in temper."
755 *Dunne v Minister for the Environment* [2008] 2 IR 755, 783-784 (Murray CJ).

prevailing (plaintiff or defendant) party.[756] The rule is informed by legal, equitable, religious[757] and ethical strands which render varying costs outcomes. The observance of the exceptions and the exercise of discretion represent an entirely legitimate application of the rule, albeit one where the traits of fairness, equity and justice prevail over unjust rigidity. The burden of paying costs falls on the losing party unless the court otherwise orders.[758] There is a heavy onus resting on the shoulders of the party that seeks to disrupt this orthodoxy. [759] A clear and cogent argument will be required in order to dislodge the default positon. In some instance the divergence of authority or even lack of authority on an issue may be a factor that the courts can consider for the purpose of determining whether it may suspend the operation of the rule.[760] The general rule operates both in the original action and on appeal.[761] If a court is minded to depart from such orthodox norms then it can only do so on a reasoned basis, and for reasons that are connected to the case. The judiciary in Canada echoed the approach in England and Wales and Ireland by holding that judicial discretion must be exercised in a principled way, on sound principle.[762] In exercising such discretion the court will have regard to the conduct of a party.[763] The test espoused by the High Court in Ireland, in *Fyffes Plc v DCC Plc* appears to take the form of a *justice-related* one.[764] It is only when the justice of the case demands it, that the rule should be departed from.[765] The courts must not exercise their discretion against a successful party in an arbitrary or capricious mode. The discretion must be exercised judicially and not according to any privately held views or even judicial benevolence or sympathy,[766] but in a principled and reasoned manner. Neither the Rules of the Superior Courts nor the Civil Procedure Rules disturb the judicial discretion. For the purpose of exercising that discretion the judiciary adopt as their starting point, the general rule that the successful party is entitled to an order for costs. If the court elects to exercise such a discretion then it must consider what factors are required to depart from that starting point. The fact that a party may not have won every point, does not of itself, provide the

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756 *Donald Campbell & Co. v Pollak* [1927] AC 732 (CA) 811, 812.

757 *Ibid*, Pfenningstorf p 42.

758 *Waterman v Gerling Australia Insurance Co. Pty Ltd (No.2)* [2005] NSWSC 1111 [10]; *Arian v Nguyen* (2001) 33 MVR 37; divergence of authority on a particular issue may be a relevant factor; *Knight v Clifton* [1971] Ch 700.

759 *Grimes v Punchestown Development Co. Ltd* [2002] 4 IR 515 (Denham J).

760 *Knight v Clifton* [1971] Ch 700.

761 *Ibid, Grimes* [2002] 4 I.R. 515; *S.P.U.C. v Coogan (No.2)* [1990] 1 IR 273.

762 *Rossmo v Vancouver Police Board*, 2003 BCCA 677, [59]; *Brown v Lowe*, 2002 BCCA 7 [147].

763 *Lawrence v Lawrence* 2001 BCCA, 386 [31] –[32];
Smith v City of Westminster, 2004 BCSC 1304, [9].

764 [2009] 2 IR 417, 679.

765 *Godsil v Ireland* [2015] IESC 103 [23].

766 *Williams v Leven* (1974) 2 NSWLR 91, 95.

unsuccessful party with the raw material to construct an argument, that the *winner* should be deprived of some costs.[767] There is no rule which requires that the costs of the successful party should be reduced if the winner fails on one or more issues. The courts must have regard to the fact that *winners* are likely to fail on some points[768] and they may consider any previous conduct of the parties and the mode which they adopted in the action.[769] Courts in jurisdictions that observe the Supreme Court of Judicature Act template neither allow a successful plaintiff nor a successful defendant to recover full costs if undesirable circumstances are present. Laffoy J. averred in '*Fyffes'*[770] that whether the loser pays rule ought to be displaced is determined on the factual matrix of each case and not by extraneous matters. The future justice of the Supreme Court articulated a form of justice-related test, and, in so doing, she had explicit recourse to many prominent common law authorities from the twenthteeth century. Those include *Ritter v Godfrey,*[771] and *Donald Campbell & Co. v Pollak,*[772] which were reported in 1920 and 1927, respectively, and the Australian case of *Byrns v Davie,*[773] reported in 1991, which in turn referenced *Gold v Patman & Fotheringham Ltd,*[774] which was reported in 1958. '*Fyffes'*[775] does not displace the general rule, as the prevailing party obtained an order for costs, albeit a discounted one.[776] This reflects the fact that the successful defendant had failed on one very important substantive point.[777] The court retained costs shifting but the defendant was precluded from recovering the costs of one discrete issue. The operation of the loser pays principle even in a diluted form maintains its sanctity. It rewards the party that succeeds in overall terms while tempering the award with a deduction to reflect the losing party's limited success.[778] It delivers justice and fairness which

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767 *Sycamore Bidco Limited v Breslin* [2013] EWHC 583 (Ch) [12] (Mann J).

768 *Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Com Ct) (Gloster J).

769 *Metropolitan Asylum District v Hill* (1880), 5 App. Cas. 528, HL.

770 *Fyffes Plc v DCC Plc* [2006] IEHC 32.

771 *Ritter v Godrey* [1920] 2 KB 47.

772 *Donald Campbell & Co. v Pollak* [1927] AC 732.

773 *Byrns v Davie* [1991] 2 VR 568.

774 *Gold v Patman & Fotheringham Ltd* [1958] 2 All ER 497.

775 *Fyffes Plc v DCC Plc* [2006] IEHC 32; citing *Donald Campbell & Company v Pollak* [1927] AC 732; *Ritter v Godfrey* [1920] 2 KB 47; *Grimes v Punchestown Developments Co. Ltd* [2002] 4 IR 522 (Denham J, (Hardiman J, and McCracken J, concurring); *Byrns v Davie* [1991] 2 VR 568, which is authority for the proposition that unless otherwise provided for by enactments or rules, the costs of, and incidental to all matters are in the discretion of the court.

776 The successful defendant was awarded the costs of the proceedings except 80% of the costs of making discovery and 25 days trial costs.

777 *Fyffes Plc v DCC Plc* [2006] IEHC 32; citing *Gold v Patman & Fotheringham Limited* [1958] 2 All ER 497, 503, where the prevailing defendant was only awarded half of its costs.

778 The successful defendant defendant was awarded the costs of the proceedings except eighty per cent of the costs of making discovery and the costs of twenty-five trial days.

satisfies Franck. The courts may deliver a costs neutral outcome to achieve *overall justice*.[779] In *Britned Development Ltd v ABB AB* the plaintiff valued its claim at €135 million but it recovered just over ten percent of this.[780] Smith J. opined that the defendant made a commercial offer in the formative stages of the litigation which the plaintiff failed to beat and he concluded that it would be unjust to order the losing defendant to pay any costs.[781]

3.2.1 The Core Principles

The core principles which mandate the unsuccessful party to pay the costs of the victorious one were conveniently summarised by the Irish High Court in *The National Museum of Ireland v The Minister for Social Protection.*[782] The court recognised that special circumstances may exist which justify a departure from the general rule. A prevailing plaintiff is entitled to full costs even if the court awards less that the amount claimed, except of course, where some form of personal misconduct is demonstrated on the part of the victorious party.[783] Clarke J.[784] asserted in *Veolia Water v Fingal County Council (No. 2)* that the overriding starting point persists that costs should follow the event. The parties who are required to initiate a case in order to secure their rights are entitled to the reasonable costs of sustaining those proceedings. The parties that successfully defend those proceedings are, likewise, entitled to the costs of meeting a claim.[785] It may be necessary to abandon this default position where there has been some form of improper conduct on the part of the successful party or where a matter of public interest arises.[786] The courts attempt to strike a

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779 *Britned Development Ltd v ABB AB* [2018] EWHC 3142 (Ch) [28] (Smith J.).

780 *Ibid* [12]; *'Britned'* valued its claim at €135 million but recovered under 10% of this excluding interest.

781 *Ibid* [28] "The costs will lie where they fall."

782 *The National Museum v The Minister for Social Protection* [2017] IEHC 198 (HC 27 March 2017) [5]; The successful party will normally be entitled to the costs of bringing those proceedings. This is the general rule and all other rules are subordinate to, or are informed by it. A successful party has a legitimate entitlement to expect that it will recover the costs of those proceedings. This expectation is an equitable one and should only be departed from where justice demands it. It is possible to depart from the general rule where "*special circumstances*" exist. A decision to depart from the general rule may only be exercised on a reasoned basis stating the reasons for doing so. The parameters of special circumstances are not fixed, however, there must be a difficulty, a complexity or impossibility in following the general rule. The burden in demonstrating such special circumstances, rests on the party seeking to depart from the general rule"; applying *Grimes v Punchestown Developments Company Limited* [2002] 4 IR 515; *Dunne* v *Minister for the Environment* [2008] 2 I.R. 775; *Godsil* v *Ireland* [2015] IESC 103.

783 *Ibid*, Pfenningstof, p 46.

784 The future Chief Justice of Ireland then sitting on the High Court in Ireland.

785 [2007] 2 IR 81, 85.

786 *Flannery v Dean* [1995] 2 ILRM 393; *Shelley-Morris v Bus Atha Cliath* [2003] 1 IR 232, a grossly and deliberately exaggerated claim in a personal injury action could have serious consequences in terms of costs even where some award was made in favour of the plaintiff; *Donegal County Council v O'Donnell* (HC, 25 June

balance between enabling litigants to ventilate issues that they wish to canvass while at the same time not rewarding parties for any unreasonable conduct in how they conduct the proceedings.[787]

3.3 Disentitling behaviour

The common circumstances under which the presumption to costs may be displaced arises where there is some form of disentitling behaviour on the part of the winning party,[788] which does not necessarily require to be tantamount to misconduct within the narrow meaning of the word. It often manifests as conduct on the part of the successful party, which is worthy of rebuke. This disentitling behaviour may include taking litigation calculated to occasion unnecessary expense;[789] unnecessarily protracting proceedings; prevailing on a point not argued before a lower court;[790] pleading points solely for the purpose of increasing the costs; advancing extravagant or extortionate claims;[791] failing to substantiate a claim;[792] or securing relief which the unsuccessful party had previously offered. Jackson LJ. exemplified the reaction of the Court of Appeal, in England and Wales, being swamped by appeals solely on the question of costs, when he captured the judicial mood lamenting the increasing propensity by the first instance courts to depart from the starting point that the unsuccessful party should pay the costs of the successful one.[793] While he acknowledged attempts at achieving perfect justice (with sometimes superficially attractive outcomes), he identified the myriad difficulties which flow from departing from the loser pays principle, including the additional

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1982) (O'Hanlon J); *Grimes v Punchestown* [2002] 4 IR 515.

787 *Cretazzo v Lombardi* (1975) 13 SASR 4, 16.

788 *Oshlack v Richmond River Council*; *GR Vaughan (Holdings) pty Ltd v Vogt* (2006) NSWCA 263.

789 *Lollis v Loulatzis* (No.2) 2008 VSC 35 [29]; *Keddie v Foxall* (1955) VLR 320, 323-4.

790 *Almond Investors Ltd v Kualitree Nursery pty Ltd (No.2)* [2011] NSWCA 318 [8].

791 *Pearman v Baroness Burdett-Coutts*, 3 T.L.R., 719, 720 (1887); the plaintiff advanced an extravagant claim supported by fraudulent statements, and was deprived of a costs award even though he was awarded £50 in damages. The original claim was for £600; *Huxley v. West London Extension Ry.*, 17 Q.B.D. 373, 374 (1886), the plaintiff achieved a a token recovery after making an extravagant claim. "Good cause" was needed to deny costs to the successful plaintiff. The discrepancy between the amount claimed and the amount recovered did not of itself constitute "good cause", which was established when the plaintiff made exaggerated claims of fact which proved to be untrue. The Courts never went so far as to order the plaintiffs to pay the defendants costs in such cases; *Forster v Farquhar* [1893] 1 Q.B. 564. 62 LJQB. 296; the Court may order a successful plaintiff to pay the costs concomitant to a claim for special damages which the successful plaintiff failed to substantiate;

792 *Forster v Farquhar* [1893] 1 Q.B. 564; 62 L.J. Q.B. 296; *Re Isaac* [1897] 1 Ch 251; *Bagshaw v Pimm* [1900] P. 148; 69 L.J. P. 45. The Court has power to order a successful defendant to pay costs which were increased the the defendants improper severing of their defences.

793 CPR, r.44.3 (2) (a).

costs to the parties and other litigants and the uncertainty resulting in swarms of appeals, purely about costs.[794]

In *Oldcorn v Southern Water Services Limited* the claimants succeeded on every issue which fell to be determined, except causation, which was determined in the defendants favour, and so the claimants fell at the last hurdle. McKenna J., took cognisance of the burgeoning body of jurisprudence, where difficult questions arise when neither party is wholly successful.[795] He observed that every case is fact specific, before making an order for costs in favour of the defendants. The outcome in *Oldcorn* mirrors the views expressed by Coulson J. in *Harlequin Property* who characterised *A.E.I Rediffusion, Multiplex Construction*,[796] and *HLB Kidsons v Lloyd's Underwriters*[797] as the *usual suspects* for departing from the general starting point.[798] In *Mahon v McKenna*,[799] the successful appellants engaged in conduct which was strongly disapproved of by the court and they were ordered the pay the respondents costs in both the High Court and on appeal to the Supreme Court. In *McEvoy v Meath County Council*[800] the applicants sought an order quashing the development plan adopted by the local authority on the grounds that the council had failed to have due regard to the strategic planning guidelines for the greater Dublin area. In the High Court in Ireland, the local Authority was ordered to pay the unsuccessful parties costs by reason of the public interest element of the case.[801] The council had contested facts which should have been agreed, which in turn necessitated discovery, and in so doing the council had protracted the proceedings. Quirke J. asserted that he was satisfied that the trial was needlessly elongated owing to the fact that a vast number of documents needed to be examined and considered in order to determine a question which could have been determined by agreement between the parties.[802] The Irish High Court made

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794 *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, [62]; cited in *Oldcorn v Southern Water Services Limited* [2017] EWHC 460 (TCC) [4].

795 *Phonographic Performance Limited v A.I.E Rediffusion Music Ltd* [1999] 1 WLR 1507; *Summit Property Ltd v Pitmans (a firm)* [2001] EWCA Civ 2020; *Straker v Tudor Rose (a firm)* [2007] EWCA Civ 368; *Harlequin Property (SVG) Ltd, v Wilkins Kennedy (a firm)* [2016] EWHC 3233 (TCC).

796 *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC).

797 [2007] EWHC 2699 (Com Ct).

798 *Harlequin Property (SVG) Ltd, v Wilkins Kennedy (a firm)* [2016] EWHC 3233 (TCC), [32].

799 *("Mahon v McKenna")* [2009] IESC 78; the appellants though successful on appeal were obliged to discharge the respondents costs in both courts. Mr McKenna was found to have committed or approved of a deliberate act of destruction, in shredding documents so as to protect journalistic sources which had the effect of depriving the Mahon Tribunal of such evidence in its inquiry as to who was responsible for leaking confidential documents from the Tribunal; *Godsil v Ireland & Anor* v [2015] IESC [26].

800 *McEvoy v Meath County Council (No.2)* [2003] IEHC 31, [2003] IR 208.

801 The proceedings raised issues of general importance and the applicants had no private interest in the outcome.

802 *McEvoy v Meath County Council (No.2)* (HC, 24 January 2003) p 5.

the costs order which was tantamount to a punishment for the local authority which had succeeded in the case.[803] The courts, invariably try to strike a delicate balance between facilitating a party to canvass all of the issues which it wishes to raise, while not rewarding a party, even a successful one, for its unreasonable conduct or behaviour in prolonging the trial unnecessarily. In *Griffin v Bellway Ltd*, Barton J. sitting in the High Court in Ireland, awarded the unsuccessful plaintiff the full costs of the trial after it emerged during the cross examination of one of the defendant's witnesses that the floor on which the plaintiff slipped had been replaced two years after the incident, during renovations, but, before it could be examined by the engineers. The court took a dim view of what occurred noting both legal teams were in the dark.[804] The Civil Procedure Rules in England and Wales preserve the general rule that costs follow the event. Lord Woolf MR. was, however, determined to abandon the notion that *any degree of success*, whatsoever, is sufficient to obtain an order for costs. The introduction of the CPR coincided with the development of the concept of partial costs orders that would be indicative or representative of the levels of success achieved.[805] The rules mandate the judiciary to take cognisance of criteria, including "conduct before" "as well as during proceedings."[806]

3.3.1 The Antonelli factors

In *Antonelli v Allen*[807] Neuberger J. awarded the unsuccessful defendant three quarters of his legal costs to punish the plaintiffs for the way in which they conducted their case. [808] The court took the opportunity to set out certain factors which may be of relevance in considering whether the loser should be awarded some legal costs which include[809]: (i) the reasonableness

803 The court ordered the successful Local Authority to pay 100% of the costs of and associated with the daily transcript of the proceedings and 50% of the applicants' costs of and incidental to the proceedings.

804 HC 27 July 2017.

805 *AED Reddifusion Music Limited v Phonographic Performance Ltd* [1999] 1 WLR 1507 C.A.

806 CPR, r. 44.3(5) (a).

807 The defendant succeeded on a single determinative point but failed on three other substantive points and was awarded seventy-five per cent of the costs.

808 *Antonelli v Allen*, Times, December 8 (2000); [2001] Lloyd's Report, PN 487; *Scholes Windows Ltd v Magnet Ltd (No 2)* [2000] ECDR, 266; 2001 White Book para 44.3.2; CPR, r 44.3.4 (a); CPR, r 44.3(5) (a) (b) (c).

809 *Ibid*, Alcock, *Legal Costs: Loser Pays,* p 11.

of the successful party pursuing the issue[810] on which he was unsuccessful; (ii) the manner in which the successful party took the point and conducted the case generally;[811] (iii) whether it was reasonable for the successful party to have taken the point in the circumstances; (iv) the extra time and costs incurred by running the issue in terms of the pre-hearing preparation and in court during the hearing; (v) the extra time taken up before a judge arguing a particular point;[812] (vi) and the extent to which it was just to deprive the successful party of costs (according weight to the fact that the plaintiff prevailed overall).[813] In *Antonelli* the court awarded the vanquished party three quarters of his legal costs to punish the plaintiffs for the way in which they conducted their case.[814] In *Base Metal Trading Limited v Shamurin*[815] which centred on the falling out of friends who had exploited commercial opportunities on the breakup of the Soviet Union, by exporting metals, Tomlinson J. elected to make no order as to costs, in the substantive proceedings, when the claimants' action was dismissed. He observed that BMTL had to contend with spurious defences which had led to the doubling of its costs which were estimated at £1.75 million excluding vat, and thus, litigants need to be selective in terms of the points which they advance, as the courts discretion to make an award of costs can act as an incentive to encourage responsible behaviour.

3.4 Wasted costs jurisdiction

The High Court in those jurisdictions that observe the Supreme Court of Judicature architecture has the power[816] to make a wasted costs order. This power emanates from the

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810 CPR, r 44.3(5) (b) "whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue", r. 44.3. (5) (b) "the manner in which a party has pursued or defended his case or a particular allegation or issue."

811 *McEvoy v Meath County Council No.2* [2003] I.R. 208; Local Authority's refusal to admit facts.

812 *Veolia* [2006] IEHC 240, 245 (Clarke J); *McCambridge Limited v Joseph Brennan Bakeries,* [2011] IEHC 433; (HC, 7 December 2011).

813 *Sycamore Bidco Limited v Breslin* [2013] EWHC 583 (Ch) [12] (Mann J) citing *Antonelli v Allen,* 8 December 2000; CPR, r. 44.3. (4) (b) "whether a party has succeeded on part of its case, even if he, has not been wholly successful."

814 *Antonelli v Allen* [2001] Lloyd's Report, PN 487.

815 *Base Metal Trading Limited v Shamurin* [2003] EWHC 2419 (Com Ct); [2003] EWHC 2606 [11].

816 RSC Ord. r. 7 " If in any case it shall appear to the Court that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgement or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay any other person, and thereupon may make such order as

inherent jurisdiction of the court.[817] Hullock acknowledged it in his publication and noted that it arises where there is gross negligence, gross ignorance or gross misbehaviour on the part of the solicitor.[818] It is exercisable in common law jurisdictions that adhere to the Supreme Court of Judicature model. It exists not only to ensure that a solicitor's client will not be held liable to his own solicitor for any costs that were improperly incurred in the litigation,[819] but also in order to order a solicitor to compensate the opposing party as in *Myers v Elman.*[820] The jurisdiction is one of the oldest exceptions to the general rule against awarding costs against a non-party.[821] The Senior Courts Act, 1981 in England and Wales, as amended, requires courts, in certain civil proceedings, to inform the regulator when it makes such a wasted costs order.[822] The jurisdiction is is consistent with a two way shifting costs model, albeit, the costs liability is shifted to the solicitor on record for the parties, and as such, it introduces a further layer of complexity in to litigation sponge, with its own inherent dangers.[823] However, the power to make such an order should not be exercised as a compensatory mechanism to compensate a client arising from a failure on the part of a practitioner to that client. The jurisdiction can be characterised as penal in nature. It involves the making of a finding of fault and imposing a financial sanction[824] in order to penalise the solicitor economically,[825] and the liability can in certain circumstances, be extended to the firm.[826] It is also often exercised in a compensatory fashion where the opposing party has incurred legal expenses in meeting proceedings or procedural applications that have served

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the justice of the case may require."

817 "The court has an inherent jurisdiction, in governing the conduct of proceedings before it, to hold to account the behaviour of lawyers whose conduct falls below the minimum professional and ethical standards which must be demanded of all lawyers who appear before the courts"; *Bebenek v Minister for Justice and Equality,* [2018] IEHC 323, [48]; citing *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin).

818 *Fowke v Horadin*, T13 and 14 G 2 Barnes 11; *ibid*, Hullock, chapter x Sect I.

819 Delaney and McGrath, Civil Procedure in the Superior Courts, 3rd ed, paras 23.144 – 23.146; the solicitor may be ordered to pay the opposing party's costs or to reimburse the client's own costs.

820 *Myers v Elman* [1940] AC 282; *CMCS Common Market Commercial Services AVV v Taylor* [2011] EWHC 324 (Ch) [19] (Bingham LJ).

821 *Reg v Greene* (1843) EngR 161; (1843) 4 QB 646 (114 ER 1042); *Re Gardiner, ex p Orgill* (1890) 16 VLR 641; *Gupta v Comer* [1991] 1 QB 629, [1991] 2 WLR 494; *Sinclair-Jones v Kay* [1989] 1 WLR 114; *Bank v Geddis* [2012] NIQB 87.

822 Criminal Justice and Courts Act, 2015, section 67 inserted a new section 7 (A) in to section 51 of the Senior Courts Act, 1981.

823 *Medcalf v Weatherill* [2002] UKHL 27; "once the power to introduce a wasted costs procedure is extended to the opposite party in litigation, that party is provided with a weapon which it is too much to expect he, will not on occasion in an attempt to use to his own advantage in unacceptable ways. It must not be used as a threat to intimidate the lawyers on the other side"; Ibid at para 58; Lord Hobhouse*; Ridehalgh* v *Horsleigh* [1994] Ch 205, 237; *Orchard v SE Electricity* BD [1987] QB 565.

824 *Medcalf v Weatherill* [2002] UKHL 27 [56].

825 *Ibid* [55].

826 *Kelly v Jowett* (2009) 76 NSWLR 405.

no purpose, but on foot of which, such a party may have incurred additional expenditure. In England the standard has been modified by statute as the legislature introduced a more standard definition of wasted costs.[827] It has been broadened in its scope and it now extends to conduct which is *improper*, *unreasonable*, or *negligent*. This could embrace conduct which does not breach the values of professional conduct, but which is reprehensible nonetheless. The leading authority for over half a century was *Myers v Elman*[828] where a solicitor permitted his client to partially seal up a bank passbook, when making disclosure by affidavit. The solicitor did not check to ascertain if the sealed-up part was irrelevant, and on later inspection it's sealed contents proved to be highly damaging to the client's case.[829] Briggs J. observed that in *Myers v Elman* at first instance Singleton J. is reported as having observed that a solicitor is an officer of the court to which he owes a paramount duty, and he assists in the administration of justice. He has a duty to his client, but if he is asked by his client to perform something that is inconsistent with his duty to the court, then he must refrain from doing so, and where necessary, he may need to cease to act.[830] Maugham LJ. saw the court's primary objective in exercising the jurisdiction as being compensatory in nature,[831] while Lord Atkin viewed it as punitive and Lord Wright perceived it as both.[832] In *Medcalf v Weatherill* the House of Lords outlined that a wasted costs order should only be made in the clearest cut of cases as the court drew attention to what it called the constitutional aspect of the wasted costs jurisdiction. In *Medcalf v Mardell*[833] Lord Bingham cited *Harley v McDonald*[834] where the court held that as a general rule allegations of breach of duty relating to the conduct of the case by a solicitor should be confined to questions that are apt for summary

827 Senior Courts Act, 1981, section 51(7) as amended; "wasted costs" means "any costs incurred by a party – (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that *party to pay"*; Courts and Legal Services Act, 1990, section 4; PD Part 48; CPR, r.48.7.

828 [1940] AC 282; *Edwards v Edwards* [1958] 2 WLR 956.

829 Solicitor ordered to pay the opposing party's wasted costs incurred during the intervening period.

830 *CMCS Common Market Commercial Services AVV v Taylor* [2011] EWHC 324 (Ch) [56].

831 "that the jurisdiction of the Court to order a solicitor to pay the cost of proceedings is a punitive power resting on the personal misconduct of the solicitor and precisely similar to the power of striking a solicitor off the rolls or suspending him from practice ... … Mere negligence even of a serious character, will not suffice"; [1940] AC 282, 283.

832 "The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally … … The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice"; [1940] AC 282, 319; citing Abinger CB in *Stephens v Hill* (1842) 10 M & W 28.

833 *Medcalf v Mardell* [2002] 3 All ER 721, 733-734 A-B.

834 *Ibid,* 734 F-J.

disposal by the court.

The factual basis for the exercise of the jurisdiction is likely to be found in facts that are within judicial knowledge because the relevant events took place in court. Wasting the time of the court or an abuse of its processes that results in excessive or unnecessary cost to litigants can be dealt with summarily if the facts are agreed. In *Kennedy v Killeen Corrugated Products Limited*[835] Finnegan P. sitting in the High Court in Ireland, examined *Myers v Elman* and *Edwards v Edwards* and asserted that whether it relates to solicitor and own client costs, or an order that the solicitor personally defray the costs awarded against his client, depends on the solicitor being guilty of misconduct in the sense of a breach of duty to the court, or at least of gross negligence in relation to that duty to the court.[836] Finnegan P. appeared to give his imprimatur to the approach of Lord Wright in *Myers v Elman* which emphasises that the threshold for making a wasted costs order is not the disgraceful or dishonourable conduct standard by reference to professional conduct proceedings but misconduct or negligence.[837] The underlying objective is to compensate where there is a failure in a duty owed to the court, which results in unnecessary costs being incurred, but it also has a punitive streak. Interestingly, much of the case law generated in relation to the wasted costs jurisdiction in Ireland in recent years has arisen against the contextual backdrop of asylum and immigration law. One of the conspicuous features of this litigation is the difficulty on the part of legal representatives in securing continuity of instructions. In *Idris v The Legal Aid Board* [838] the respondent party placed reliance on the judgment of Finnegan P. in *Killeen Corrugated Products Ltd*,[839] and Cooke J. sitting in the High Court in Ireland, agreed with the criterion noting that such a jurisdiction should be exercised sparingly and only in imperative cases,[840] and with reluctance the court did not accede to the application in that case.[841] While in *Jimoh v Refugee Applications Commissioner* [842] Cooke J. added that that the jurisdiction should only be exercised where it is necessary to achieve justice between the parties. He reaffirmed his reasoning in '*Idris'* when he stated that it is a particularly important consideration, in such

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835 *Kennedy v Killeen Corrugated Products Ltd* [2007] 2 IR 561.

836 [2007[2 IR 561 [14].

837 Negligence is to be interpreted on its ordinary meaning and it is not necessary to demonstrate that the conduct meets the standard form for a tortious claim of negligence.

838 [2009] IEHC 596 (HC 10 December 2009) (Cooke J).

839 [2007] 2 IR 561.

840 "this is a particularly important consideration in litigation of the present kind where it is important to the administration of justice and to the standing of the asylum process that legal representation is available to those claiming asylum and that experienced and competent practitioners should be willing to undertake the work"; [2009] IEHC 596, [10].

841 [2009] IEHC 596, [1].

842 HC, 29 April 2010.

cases, that where the administration of justice and the standing of the asylum process requires that legal representation is available, that experienced practitioners should be willing to perform that difficult work.[843] *The Supreme Court in P.O. v Minister for Justice* endorsed *'Jimoh'*[844] where the applicants, without prior notice, sought to make an application for a preliminary reference to the Court of Justice of the European Union, to restrain their deportation pending the hearing of their appeal.[845] Cooke J. made an order for wasted costs in *Munonyedi v Refugee Appeals Tribunal*, where a case, which was called on for hearing had effectively been abandoned a few days previously, as a result of the inability of the solicitor to procure instructions. The solicitor nevertheless proceeded to list the case for hearing during the legal vacation. The court fixed the applicant's solicitor for the costs that were incurred by the respondent, but in a creative twist, the penal consequence of the wasted costs order were avoided.[846] Much of the case law in Ireland and in England and Wales in recent years has arisen against the contextual backdrop of asylum immigration and deportation cases.[847] By way of contrast, in *Wilkins v Barking, Havering and Redbridge University Hospital NHS Trust,*[848] judgment was entered in the claimant's favour in a medical negligence action arising from gall bladder surgery at the respondents' hospital, and a quantum trial had been adjourned on several occasions. The claimant did not keep her solicitors up to date, in relation to her further surgery, which resulted in the trial being adjourned on several occasions. The claimant's solicitors lost contact with their client, but apprised their counterparts that she was not responding to emails. It became apparent after her further surgery in June 2017 that it would take nine months to assess a further prognosis, and so the trial was adjourned, and new directions issued. The respondents sought a wasted cost from October 2017 onwards (the date which the trial had been fixed for) despite their being on notice of the claimant's solicitors' difficulties. Spencer J. observed that it would have been better if those solicitors had notified their counterparts of the prospect of future surgery, but

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843 *Ibid* [21].

844 [2015] IESC 64.

845 However, when the matter was formally listed for hearing, the applicants withdrew their application for a reference and the respondents consequently sought a wasted costs order in respect of the further costs incurred by reason of that application.

846 *Ex Tempore* judgment 16 November 2010; The court made a wasted costs order fixing the applicant's solicitor with the costs which were shown to have been incurred by the respondent after 5 July 2010, less the costs that would otherwise have been incurred in bringing an application to have the proceedings dismissed for failure to prosecute.

847 *Bebenek v Minister for Justice and Equality* [2018] IEHC 323 (Keane J) ; *R (Sathivel) v Secretary of State for Home Department* [2018] EWHC 913 (Admin); *R (Butt) v Secretary of State for Home Department* (2014) EWHC 264 (Admin) [3] ; *R (Hamid) v Secretary of State for Home Department* [2012] EWHC 3070 (Admin).

848 [2017] QBD.

even an experienced solicitor, who had been told that the surgery, would not necessarily have foreseen, that it would hold up progress of the trial window. It was not foreseen that the surgery would impede the trials progress. He, concluded, that the highest that the matter could be put is that the claimant's solicitors had been overly optimistic, and he refused to make the order sought, stating that their behaviour had been neither vexatious nor designed to harass. He opined that the courts only have a jurisdiction to make wasted costs orders in clear-cut cases.[849] In *Sykes v Wright*[850] the Employment Appeal Tribunal for England and Wales, found that the claimant's solicitor failed to properly prepare his client's case, and there had been an element of *buying preparation time*, and employing *diversionary tactics* during the trial. Singh J. held that it was the fault of the claimant's legal representative, whose exasperating and time wasting behaviour, resulted in the respondent being put to extra expense. In dismissing the appeal against costs the court concluded that the lack of preparation from the outset was the primary cause.

It is impossible, from reviewing the authorities in different jurisdictions, to form an overview of the wasted costs jurisdiction, which would greatly benefit from a clearer sense of cohesion. The case law reveals that conduct, perhaps something as simple as a mere mistake, or negligence, or something worse, can warrant the court exercising the wasted costs jurisdiction. In Ireland, England and Wales, and Australia the courts have been drawn to instances where there has been an abuse of process. This could take the form of a hopeless prepared case,[851] or where a party has been guilty of untenable delay,[852] or attempting to revive matters that are *res judicata*,[853] or ignoring the rules.[854] It could also occur as a result of being unprepared for trial or where a hearing date being vacated.[855] The jurisdiction may be enlivened where proceedings should not have been instigated, in the first instance,[856] or where a party attempts to buy preparation time or employs diversionary tactics.[857] The jurisdiction may also be exercised where a party makes an application for a preliminary reference to the European Court of Justice without notice,[858] or where a party applies for a

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849 http://www.associationofcostslawyers.co.uk/%2FNews/solicitors-successfully-defend-wasted-costs-application-after-trial-date-lost accessed 13 November 2017.

850 *Sykes v Wright (Practice and Procedure: Costs)* UK EAT/0270/15/BA.

851 *R (Adil Akram) v Secretary of State for Home Department* [2015] EWHC 1359 (Admin) [2].

852 *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383, [34].

853 *Vasram v AMP Life Ltd* [2002] FCA 1286.

854 *Riv-Oland Marble Co. (Vic) Pty Ltd v Settef SPA* (1989) 63 AJLR 519.

855 *Stafford v Taber* (HC 31 October 1994) NSWCA.

856 *Jimoh v Refugee Applications Commissioner* (HC 29 April 2010).

857 *Sykes v Wright (Practice and Procedure: Costs)* UK EAT/0270/15/BA.

858 *P.O. v Minister for Justice* [2015] IESC 64.

trial absent any client instructions.[859] It may also become exercisable where an application is made *ex parte* for the purpose of challenging a removal order without placing all the relevant matters before the court on affidavit.[860] Lord Wright observed in *Myers v Elman* that it is impossible to enumerate the circumstances that may enliven the exercise of this jurisdiction.[861] The jurisdiction should be confined to matters that are amenable to summary disposal,[862] and not decided in the round, as part of an overall determination of costs, at the end of the proceedings. In Australia, *Time for Monkeys Enterprises Pty Ltd v Southern Cross Austereo Pty Ltd*[863] presented the court with such disparate elements of dysfunctionality, in a defamation case, which would make it difficult for any court, to rebuff an application for wasted costs. The court made an order holding the plaintiff and one director personally liable for the defendant's costs. Gibson DCJ. recounted the calamitous sequence of mishaps on the plaintiff's part which included (i) failing to file the required authorisations;[864] (ii) furnishing a cheque for filing fees which was rejected causing the court office to incur dishonoured cheque fees; (iii) mistakenly filing a notice of discontinuance in the belief that it would bring the proceedings to an end; (iv) serving pleadings which were hopelessly drafted; (v) applying for judgment in default but failing to serve the papers; (vi) and failing to appear at the application for summary judgment. Gibson DCJ., did not hesitate in holding the company and its director jointly liable for the defendant's costs.[865]

3.5 The Rule in *Ritter v Godfrey*

There is an overwhelming though not irrebutable presumption that successful defendants

859 *Munonyedi v Refugee Appeals Tribunal*, (HC, 16 November 2010).

860 *Bebenek v Minister for Justice and Equality* [2018] IEHC 323 [180], the applicant withdrew judicial review proceedings seeking to challenge a removal order made on the grounds of public policy owing to the threat which the applicant presented to society. The court awarded the costs of the proceedings to the Minister and ordered the applicant's solicitor to indemnify her client for those costs, having found that the applicant's solicitor did not display proper candour by failing to aver to necessary matters on affidavit including the notification from the Department in 2015 informing the applicant of the proposed removal.

861 [1940] AC 282, 319.

862 *Kagalovsky v Balmore Invest Ltd* [2013] EWHC 3876 (QB), Turner J., dismissed a wasted costs application expressing the view that the wasted costs jurisdiction was designed for allegations of a summary nature, for example, the failure of a party to appear, or conduct the case which leads to an otherwise avoidable step in the proceedings, or prolongation of a hearing as a result of gross repetition or extreme slowness in the presentation of legal argument.

863 *Time for Monkeys Enterprises Pty Ltd v Southern Cross Austereo Ptd Ltd* [2015] NSWDC 13; *Borros v Swann* [2014] NSWDC 227 (Gibson DCJ).

864 UCPR, 7.2.

865 Civil Procedure Act, 2005, section 98 (NSW).

enjoy a *prima face* entitlement to recover their legal costs. However there is ample authority[866] from the nineteenth century to support the proposition that a successful defendant's conduct including pre-litigation behaviour may be a legitimate factor for depriving such a party of costs. *Ritter v Godfrey* centred on a claim against a medical practitioner for damages for negligence in connection with the delivery by the plaintiff's wife of a still-born child. Though the trial judge held in favour of the defendant on the negligence argument he refused to make an award of costs principally on the grounds of the defendant's disposition in correspondence with the plaintiff. The Court of Appeal[867] held that while the correspondence did not provide sufficient grounds for depriving the successful defendant of costs, the pre-litigation conduct was something which could be legitimately taken in to account, providing that it had a sufficient causative connection with the initiation of the litigation. Atkin LJ.[868] conceeded that it was not easy to deduce the precise principles which would guide the court in imposing a restriction on the loser pays principle. He asserted however that where there is an entirely successful defendant the court must award such a party its costs unless there is evidence that such a party triggered the litigation, or that it did something connected with its instigation, or its conduct was calculated to cause unnecessary litigation and expenditure. It may even include something which that party did wrong during the currency of the transaction which forms the subject matter of the proceedings.[869] In determining whether there are good grounds to depart from the loser pays principle the court must first eliminate from consideration the conduct constituting the alleged cause of action and it must inquire whether the defendant conducted himself *ante litem modem* so as to induce the plaintiff in to a reasonable belief that there was no valid defence, or goaded the plaintiff in to litigation, which the plaintiff would never have embarked on but for the misconduct. Atkin LJ's dictum was observed in *Re Kavanagh's Application*,[870] and in both *Walker v Daniels*[871] and *Kerr v Ulsterbus Limited.*[872] In *Capron v Government of Turks & Caicos Islands,*[873] the Privy Council concluded that while the actions of TCInvest and the Department of Lands and Survey may have been disgraceful and deliberate the magnitude of

866 *Angus v Clifford* [1891] 2 Ch 449; *Bostock v Ramsey Urban Council* [1900] 2QB 616; *Ritter v Godfrey* [1920] 2 KB 47.
867 Lord Sterndale MR, Atkin LJ, Eve J.
868 *Ritter v Godfrey* [1920] 2 KB 47, 60; *Bostock v Ramsey Urban Council* [1900] 2 QB 616.
869 *Ibid,* 60; cited in *Watkins v Eggslishaw* [2002] UR Z (8 January 2002).
870 [1997] NI 368, p 382 i.
871 3 May 2000, unreported (Lord Woolf MR), the successful appellants were refused costs as they brought the appeal on themselves as a result of the manner in which the case was conducted at trial.
872 [2010] NIQB 2 (HC, judgment 6 January 2010).
873 [2010] UKPC 2.

the *ineptitude* fell short of igniting the rule.[874] The courts in Ireland had to contend with conduct on the part of a successful defendant which disentitled it to costs. In *Garda Representative Association v The Minister for Public Expenditure & Reform*[875] the plaintiff body sought an exemption for its members from the reduction in sick leave entitlements for public servants. The reason for so doing was based on the conditions that they had historically enjoyed. Those conditions provided for a more generous sick pay scheme owing to the risks associated with their work. The plaintiff sought an exemption from the new regulations[876] which created a parallel system. Kearns P. sitting in the Irish High Court, dismissed the action however the question of costs came in to sharp focus.[877] Late in the trial it emerged that the defendant had failed to disclose an intervention by the Irish Congress of Trade Unions opposing the potential exemption. Kearns P. expressed concern at the lateness of the discovery of the electronic communications between the Irish Congress of Trade Unions and the Department as they were germane to the issues involved. Additionally the Minister elected to include An Garda Síochána within the scope of the reduced sick pay regulations following the intervention. The Court of Appeal observed that there had been a failure by the defendant at the outset of the proceedings to present all factual matters which were relevant. The defendant though successful was obliged to give a complete picture of any relevant factual matter. Furthermore, no such explanation had been advanced for the initial failure to disclose that information.[878] In the High Court Kearns P. made an order for costs in favour of the unsuccessful plaintiff which was affirmed on appeal.

874 *Ibid* [42] (Lord Kerr).

875 *Garda Representative Association v The Minister for Public Expenditure and Reform* [2018] IESC 4, (Clarke J, O'Donnell J, MacMenamin J, Dunne J, and O'Malley J).

876 Public Service Management (Sick Leave) Regulations 2014 (SI 124/2014).

877 *Garda Representative Association v The Minister for Public Expenditure and Reform* [2014] IEHC 457.

878 *Garda Representative Association v The Minister for Public Expenditure and Reform* [2018] IECA 18, (Ryan P) [68] " In the initial replying affidavit no reference was made to the intervention of Mr. Coady or to the emails exchanged with DPER on the 4th and 5th December. Those facts only came to light late in the day on the production of discovery."

3.6 Broader Public Interest

In *O'Shile (a minor) v Minister for Education and Science,*[879] the unsuccessful plaintiffs were awarded their full costs on the grounds *inter alia* that the proceedings had significance which extended beyond the sectional interests of the plaintiffs, and that it was in the broader public interest[880] that the extent of various obligations and rights created by Article 42 of the Constitution should be clarified. The primary beneficiaries of the proceedings would have been children who relied upon their parents to invoke the courts jurisdiction to vindicate their constitutional rights. In *O'Connor v Nenagh Urban District Council*[881] the Supreme Court in Ireland, refused to interfere with the exercise of the High Court's discretion not to award costs to the unsuccessful applicant in judicial review proceedings. It did so on the basis that whilst there was an element of public interest, it did not involve issues of considerable public importance. The question as to whether an action engages with public interest is to be determined by the legal and factual matrix in each case. In *Grimes v Punchestown Developments & Co. Ltd* the applicant who was unsuccessful in seeking an injunction to restrain a particular use of the land by the respondent under the planning laws, sought to appeal the order for costs which was awarded against him in the High Court. He contended that it was only on the day of the hearing of the injunction that the respondent disclosed the prior use of the land for a similar purpose. The Supreme Court upheld the order for costs noting that the discretion had been properly exercised. Cooke J. asserted of '*Grimes'* that it is authority for the proposition that if a prevailing party is to be deprived of an order of costs, then it is at least necessary, to show the presence of some feature of the way in which the prevailing party has behaved, as being unsatisfactory.[882] In '*Grimes'* one of the most conspicuous factors invoked by the court as justification for discounting the public interest element, was the fact that the applicant did not reside in the area in question, and so he could not have suffered any injury or damages. The assertion of a public interest dimension in that case, in an effort to displace the costs follow the event rule, proved too tenuous.

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879 (HC, 10 May 1999) (Laffoy J); cited in *McEvoy v Meath County Council (No.2)*; (HC, 24 January 2003) pp. 1-2, (Quirke J).

880 *Cork County Council v Shackleton* [2011] I IR 443, 448; *Dubsky v Ireland* [2005] IEHC 442, [2007] 1 IR 63; *Harrington v. An Bord Pleánala* [2006] IEHC 223 (HC, 11 July 2006) (Macken J), considered; *P.C. v Minister for Social Protection* [2016] IEHC 315.

881 *O'Connor v Nenagh Urban District Council* (SC, 26 May 2002).

882 *BUPA Ireland Limited v The Health Insurance Authority,* p 4 (HC, 30 April 2013).

3.7 Irish Constitutional Law actions

In Irish Constitutional law actions the courts often require to resolve novel but critical[883] questions. Once the court is satisfied that the issues engage with matters of general or public importance, then it may elect to render no order as to costs against the unsuccessful plaintiff. In some instances the controversial question is whether the court should go one step further by making a full or partial award of costs in favour of the losing party. In *Horgan v An Taoiseach*[884] the court considered the utilisation of Shannon airport, by a foreign state as a transit point for the transportation of military personnel and equipment. The case manifestly engaged with important issues of neutrality and the separation of powers doctrine, and the unsuccessful plaintiff was awarded half of his costs. In *AG v X*,[885] the Irish State gave an undertaking to pay the defendant's legal costs of the Supreme Court appeal on a question of Constitutional interpretation which engaged with issues concerning the right to life of the unborn child, which was of public importance.[886] In *BUPA Ireland Ltd v The Health Insurance Authority,* Cooke J. sitting in the Irish High Court, reviewed the authorities before asserting that where any party who has not succeeded *on the event* seeks to resist the application of the loser pays rule, then that party bears the onus of demonstrating that the circumstances justify dislodging it.[887] The burden of displacing the rule rests heavily on the shoulders of the party who asserts that it should be displaced.[888] It is well settled that the courts possess a discretion to depart from that rule, when there are special or exceptional circumstances in a particular case.[889] In *Society for the Protection of Unborn Children (Ireland) Limited v Coogan* Finlay CJ. was adamant that it is necessary for very substantial reasons of an unusual kind to exist before the courts can displace the rule on appeal.[890]

883 *Curtin v Dáil Eireann* [2006] IESC 27.

884 *Horgan v An Taoiseach* [2003] IR 468.

885 *AG v X* [1992] 1 IR 1; *Sinnott v Minister for Education* [2002] 1 IR 84, the State gave an undertaking to pay the plaintiff's costs in respect of defending the State's appeal from the High Court.

886 *Ibid*, Alcock, *Costs follow the event v Costs to follow event,* p 3, (fn 16 and 17).

887 HC, 30 April 2013, p 3 (Cooke J).

888 *Grimes v Punchestown Development Co. Ltd* [2002] 4 IR 515, 522 (Denham J); *Fyffes Plc v DDC Plc* [2006] IEHC 32, (Laffoy J).

889 *O'Keeffe v Hickey* [2009] IESC 39.

890 [1990] 1 IR 273, 275; *Cooper Flynn v Radio Telefis Éireann* [2004] 2 IR 72.

3.7.1 Tragic Cases

Societies in geographically dispersed common law jurisdictions[891] have grappled with cases, of the broader public interest[892] or public importance, where parties have attempted to invoke the alleged right to suicide. This right is sometimes otherwise described, including as being the right *to die*, or the *right to assistance in suicide*, or even the *right to kill oneself*.[893] The courts in Ireland and Canada have awarded full costs to unsuccessful parties in such cases. In *Fleming v Ireland* ,[894] the appellant who was suffering from multiple sclerosis[895] appealed against the Divisional High Court, in Ireland[896] for its refusal to grant an order declaring that section 2 (2) of the Criminal Law (Suicide) Act, 1993[897] was unconstitutional. The plaintiff contended that disabled persons suffering from severe pain arising from terminal and degenerative illness, who are able to express their wishes, ought not to be prevented by the criminal law from receiving assistance, in order to enable them to initiate steps to end their lives. While she failed to advance any Constitutional rights that had been infringed, she nonetheless argued for a right, to enable a limited class of persons, to commit suicide. The High Court, in dismissing her action, awarded her one hundred per cent of her costs. Clearly, the case was a fundamental one, which touched on sensitive aspects of the human condition, and it warranted a departure from the general rule on costs. The Supreme Court dismissed her

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891 *Vacco v Quill* 521 U.S. 793; *Washington v Glucksberg* 521 U.S. 702, 117 S. Ct. 2258m 117 S.CT 2302; 138 L.Ed. 2d 772; *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61; [2002] 1 AC 800; *Pretty v United Kingdom* [2002] 35 EHRR 1; [2001] UKHL 61; *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 54 [2010] 1 AC 345*; Purdy: R (Nicholson) v Ministry of Justice* [2012] EWHC 2381 (Admin).

892 *O'Shile (a minor) v Minister for Education* (HC, 10 May 1999) (Laffoy J), the unsuccessful plaintiff received a full award of costs, as the proceedings extended beyond the plaintiffs interests, and it was in the broader public interest that the extent of the rights and obligations to provide for free primary education under the Constitution should be clarified. The primary beneficiaries of the proceedings would be children who relied on their parents to invoke the courts to safeguard and vindicate their Constitutional rights; cited in *McEvoy v Meath County Council (No.2)*, pp. 1-2, (HC 24 January 2003) (Quirke J); *Dubsky v Ireland* [2005] IEHC 442; [2007] 1 IR 63.

893 *Dying v Washington*, 49 F. 3d 586, (CA9 1995); *People v Kevorkian*, 447 Mich. 436, 437, n. 47.527. N. W. 2d 714, 730, n.47 (1994); *Quill v Va*cco 80 F.3d 716, 724 (CA 1996); *Vacco v Quill* 521 U.S. 793; *Washington v Glucksberg* 521 U.S. 702, 117 S. Ct. 2258m 117 S.CT 2302; 138 L.Ed. 2d 772; *Washington v Glucksberg et al* 521 U.S. 702.

894 *Fleming v Ireland* [2013] IESC 19.

895 An immune mediated inflammatory disease caused by neurological defects and which follows a relapsing remitting pattern with progressive neurological deterioration and death. There are no drugs to treat the advanced stages of the disease, *Ibid* [13] (Denham CJ).

896 *Fleming v Ireland* [2013] IESC 19 (Kearns P, Carney J, Hogan J).

897 Criminal Law (Suicide) Act 1993, section 2 provides "(1) Suicide shall cease to be a crime. (2) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence and shall be liable on conviction on indictment for a term not exceeding fourteen years."

appeal on 29th April 2013, and on 21st January 2014,[898] it awarded her (estate) half of the costs of that failed appeal. A not dissimilar case came before the courts in Canada, in *Rodriguez v British Columbia*.[899] The applicant in these proceedings was a middle-aged woman who was suffering from amyotrophic lateral sclerosis.[900] She challenged the validity of the prohibition on assisted suicide contained in the Canadian criminal code,[901] arguing that it was contrary to her fundamental rights as set out in the Canadian Charter of Fundamental Rights and Freedoms.[902] Her appeal was dismissed by a majority of the Supreme Court,[903] though with some notable dissents including Chief Justice Lamer, and McLaughlin J. the future Canadian Chief Justice. In *Carter v Canada (Attorney General)*[904] Smith J. departed from '*Rodriguez'*[905] owing to new evidence that had emerged from other jurisdictions, in which the prohibition on assisted suicide had been relaxed, which was not available when '*Rodriguez'*[906] was decided. The court held that the prohibition in the criminal code was unconstitutional, as it was inconsistent with the principles of fundamental justice, disproportionate, and that it unjustifiably infringed the plaintiff's right to life, liberty, security, and equality, contrary to sections 7 and 15 of the Charter. The trial judge furthermore made an award of special costs in the plaintiff's favour, on a full indemnity basis, and the court ordered the Attorney General for British Columbia to bear responsibility for ten per cent of the trial costs on a full indemnity basis. The matter came before the Canadian Supreme Court after the Court of Appeal allowed the appeal against the trial judge's decision, on the basis that the trial judge was bound to apply '*Rodriguez'.* The Supreme Court allowed the appeal holding that sections 241 (b) and 14 of the criminal code unjustifiably infringed section 7 of the Charter.[907] The appellant applied for special costs on a full indemnity basis to cover the costs of the entire action. The Supreme Court acknowledged that the action resulted in issues being ventilated that transcended the immediate interests of the parties and the appellants had

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898 The appellant passed away some months after the appeal hearing but before the Supreme Court addressed the issue of costs.

899 *Rodriguez v British Columbia* [1993] 3 S.C.R 519, 1993 CanLII 75 (SCC).

900 Lou Gehrig's disease.

901 Canadian Criminal Code, section 241 (b) R.S.C 1985.

902 Canadian Charter of Rights and Freedoms, Sections 7, 12 and 15 (1).

903 La Forest, Sopinka, Gonthier, Iacobucci, Major JJ.

904 *Carter v Canada (Attorney General)* [2012] BCSC 886.

905 *Rodriguez v Canada* [1993] 3 SCR 519.

906 *Pretty v Director of Public Prosecutions* [2001] UKHL 61 [15] (Lord Bingham), "The most detailed and erudite discussion known to me of the issues in the present appeal is to be found in the judgments of the Supreme Court of Canada in Rodriguez v Attorney General of Canada."

907 The appellant applied for special costs on a full indemnity basis to cover the costs of the entire action. The Supreme Court noted that the trial judge awarded costs exceeding $1,000,000 on public policy grounds; citing *Victoria (City) v Adams* 2009 BCCA 563 (CanLII) 100 BCLR (4th) 28 [188]; while costs on the more usual party and party basis would not have exceeded $150,000.

neither a personal nor proprietary interest in the litigation. The court observed that special costs are only available in exceptional cases.[908] It cautioned against the dangers of bringing an alternative system of legal aid in to being.[909] However it conceded that the trial judge was correct to make an award,[910] and though it was unusual, there was no rule against it.[911]

3.7.2 Heterogeneous Cases

In '*Collins'* the Divisional High Court in Ireland availed of the opportunity to provide clarification on the circumstances under which the courts could depart from the normal rule by making a partial or full award of costs in favour of losing parties. The court enumerated various identifiable categories of cases. The High Court dismissed the action brought by the plaintiff who was a member of the legislature challenging the *vires* of certain ministerial orders, which were made pursuant to the Credit Institutions (Financial Support) Act, 2008.[912] The unsuccessful plaintiff opposed any order for costs, and submitted that she should receive an award of costs, given the public interest dynamic to the case.[913] The Divisional High Court asserted that the starting point for any consideration of this question is to be found in *Dunne v Minister for the Environment*.[914] It further observed that the pre-existing case law for awarding costs to unsuccessful litigants in constitutional cases can be described as heterogeneous. The case law reveals a variety of distinct themes. Hogan J. summarised these readily identifiable principles from the jurisprudence which include cases: (i) which were fundamental and touched on sensitive aspects of the human condition; involving human

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908 *Carter v Canada (Attorney General)* [2016] 1 SCR 13, 2016 SCC 4 [137]*; Finney v Darreau du Québec* 2004 SCC 36 (CanLII) (2004) 2 S.C.R 17 [48].

909 *Little Sisters Book and Art Emporium v Canada (Commissioner for Customs and Revenue)* 2007 SCC 2 (CanLII) 2007 S.C.R. 38 [44].

910 *Carter v Canada (Attorney General)* [2016] 1 SCR 13, 2016 SCC 4, [144]; *British Columbia (Minister for Forestry) v Okanagan Indian Band*, 2003 SCC 71 (CanLII) (2003) 3 SCR 371 (Le Bel J).

911 *B (R) v Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC); [1995] 1 S.C.R 315; *Hegeman v Carter* 2008 NWTSC 48 (CanLII) 74 C.P.C. (6th) 112; *Polglase v Polglase* (1979) CanLII 587 (BCSC) 18 B.C.L.R 294 (S.C).

912 The litigation arose out of the recapitalisation in 2010 of two credit institutions by means of issuing promissory notes in favour of Anglo Irish Bank and the Educational Building Society. The court rejected both the plaintiff's contention that the legislation violated Article 15.2.1 of the Constitution by failing to articulate appropriate principles and policies in the body of the Act and the contention that the Act violated Articles 11 and 17 of the Constitution, in that it allowed for the appropriation of public money, without upper limits, absent legislative approval.

913 *Ibid*, Alcock, *Legal Costs: Loser Pays*, p 13.

914 [2007] IESC 60, [2008] 2 IR 755.

embryos,[915] assisted suicide[916] and homosexuality;[917] (ii) of conspicuous novelty, often where the issue touched on aspects of the separation of powers doctrine between the various branches of government;[918] (iii) which involve actions where the issue was one of far reaching importance in an area of law with general application;[919] (iv) which have clarified an otherwise obscured or unexplored area of law; (v) which have not been brought for personal advantage and where the issues are of special and general public importance.[920]

The court stated that in any assessment of the public interest the fact that the Ministerial decisions which were challenged were among the most far-reaching which any Government and individual Ministers have taken in the history of the state cannot be overlooked. The task of re-capitalisation of the banks and the burden of repayment associated with this fell heavily on the citizenry for the foreseeable future.[921] The court concluded that it was in the public interest that the constitutionality of such reaching legislation should be judicially determined.[922] The Divisional court[923] noted that in '*Horgan'* and '*Curtin'* the unsuccessful plaintiffs were awarded fifty percent of their costs. In *Roche v Roche*[924] and *Fleming v Ireland*[925] full costs were awarded: having regard to the exceptional nature of the case; the importance of novel questions of Constitutional law; the weighty issues raised; and the fact that the plaintiff was a public representative and did not act out of personal advantage. The plaintiff was award of seventy five percent of the costs.[926] The court appeared to draw a comparison between '*Horgan'* and '*Curtin',* not least because those cases engaged with the

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915 *Roche v Roche* [2006] IESC 10; Constitutional status of human embryos (the unsuccessful plaintiff was awarded one hundred percent of the High Court costs but was not a beneficiary of a costs order in respect of the failed appeal).

916 *Fleming v Ireland* [2013] IEHC 19; the unsuccessful litigant was awarded one hundred per cent of her High Court legal costs in this *tragic* case.

917 *Norris v AG* [1984] IR 36; *Horgan v An Taoiseach* [2003] IR 468 (what constitutes participation in war for the purposes of Article 28 of the Constitution); *Curtin v Dáil Eireann* [2006] IESC 27, aspects of the judicial impeachment power.

918 *Horgan v An Taoiseach* (2003) 3 IR 468; *Curtin v Dáil Eireann* [2006] IESC 27.

919 *T.F. v Ireland & Anor.,* [1995], (SC 27 July 1995) (Hamilton CJ), Constitutionality of the Judicial Separation and Family Law Reform Act 1989, which has potential ramifications for at least 3000 cases; *O'Shile v Minister for Education* [1999] 2 IR 321; aspects of the State's duty under Article 42.4 of the Constitution to provide for free primary education; *Enright v Ireland* [2003] 2 IR 321, Constitutionality of the Sexual Offences Act 2001; *M.D. (a minor) v Ireland* (2012) IESC 1 IR 697, the Constitutionality of legislation making it an offence for under age males only to have sexual intercourse with under age females; *P.C. v Minister for Social Protection* [2016] IEHC 315, state pension entitlements.

920 *DB v Minister for Health and Children* (SC 26 March 2003); the State informed the Supreme Court that it would pay the opposing party's costs.

921 *Collins v The Minister for Finance* [2014] IEHC 79, 3 (HC Div. 27 February 2014).

922 *Ibid,* Alcock, *Legal Costs: Loser Pays,* pp. 13-14.

923 Hogan J, (Kelly J, and Finlay Geoghegan J, concurring).

924 *Roche v Roche* [2016] IESC 10.

925 *Fleming v Ireland* [2013] IESC 19.

926 *Collins v The Minister for Finance* [2014] IEHC 79 [19] - [22].

separation of powers doctrine. Yet, having drawn such parallels, the court went on to award the unsuccessful party three quarters costs. This is more consistent with the pattern in cases which touch upon sensitive aspects of the human condition. The case was exceptional[927] and it merited a departure from the normal rule. On appeal, the Supreme Court[928] dismissed the appeal, and the question of costs came in to sharp focus once again. The court observed that the 2008 legislation was a permissible constitutional response to an exceptional situation and that the case raised exceptional issues affecting the state's finances. The Chief Justice asserted that the court would depart from the normal rule as the appeal raised *grave constitutional* matters. The appellant did not stand to make any personal or private gain and the court awarded her half of the costs of the appeal,[929] while recognising that the appeal had failed.[930] The plaintiff additionally received three quarters of the costs of the failed High Court proceedings.

In *O'Brien v The Clerk of Dáil Eireann*[931] the plaintiff argued that there were several novel aspects to the case, including the factual matrix, namely that there had been a deliberate uttering in the chamber of the legislature of confidential information that was the subject of a court order. It was contended that this had never previously happened, which in turn raised a number of novel legal questions, including questions as to the scope of sub-Articles 15.12 and 15.13 of the Constitution. The defendants asserted that the plaintiff's case amounted to no more than a series of skilful arguments with a veneer of novelty, which in reality required the court to do no more than apply the established legal principles. Consequent to the substantive action, both sides, including the unsuccessful plaintiff applied for their legal costs. The successful defendants did so on the basis that the normal rule should apply, while the losing plaintiff, sought his costs on the basis of the court's exceptional jurisdiction to award costs to the losing party in certain circumstances.[932] The court observed that the applicable principles had been discussed in '*Dunne*'[933] '*Collins*'[934] and *Kerins v McGuinness.*[935] It noted that while a losing party is usually the subject of an order for costs,

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927 *Ibid* [19].

928 Denham CJ, O'Donnell. McKehnie J, Clarke J, Dunne J, Charleton J.

929 *Collins v The Minister for Finance [*2016] IESC 73 [7] (SC, *Ex- tempore* 24 January 2017) (Denham CJ); *P.C. v Minister for Social Protection* [2016] IEHC 315 (Binchy J).

930 *Ibid,* [13] (Denham CJ).

931 *O'Brien v The Clerk of Dáil Eireann* [2017] IEHC 377 (HC, 2 May 2017).

932 *Ibid*, Alcock, *Legal Costs: Loser Pays,* p 15.

933 [2008] 2 IR 775.

934 [2014] IEHC 79.

935 [2017] IEHC 217, [30] – [35] (cost ruling 5 April 2017). The case raised important questions of freedom of speech in Parliament, the separation of powers doctrine, and the extent to which the court may intervene in the affairs of the legislature. The unsuccessful applicant had a personal interest in the outcome of

the court retains a discretion to depart from the ordinary rule, provided it does so on a reasoned basis. The plaintiff issued the proceedings primarily to protect and vindicate his own personal interests, though the issues raised necessarily would have a consequential impact upon other persons who found themselves in a similar position. The issues, therefore, were of general public importance. In determining costs the court held it was more typical of a case where the plaintiff brought proceedings for personal reasons in order to have his position vindicated, which would have implications for other persons. The court reached the conclusion that, while the factual matrix was novel, and the treatment of the subsisting jurisprudence required more than a straightforward application of identifiable principles, there was an insufficient degree of novelty with the issues raised to justify any departure from the normal rule.[936]

The applicant in *CA v The Minister for Justice* [937] launched a comprehensive attack, in the High Court in Ireland, against the State's reception facilities for asylum seekers. The action was characterised as a campaigning case. The proceedings were ambitious in seeking to attack every possible aspect of direct provision. Indeed, the court referenced the proceedings as being a cluster bomb most of which missed its target.[938] The respondents conceded that the applicant was entitled to an acknowledgement to costs to the extent of her success being approximately twenty per cent of her costs. The applicant was successful on several points including her right to privacy, the right to an independent complaints handling procedure, and on the socio economic rights issue. For their part, the respondents who successfully defeated the applicant's challenge to the system of direct provision contended that they were entitled to an award of costs in respect of that module. Five days were expended on procedural arguments that the applicant lost, but nonetheless, the applicant invited the court to reflect her limited success by making a costs order in her favour. The respondents contended that no significant points of public or Constitutional law were clarified and the complex module on human rights, failed to advance any areas of public interest. The applicant attempted to characterise her case as being one that concerned sensitivity of the human condition. She contended that she was in a hopeless environment.[939] MacEochadih J. award of twenty per cent of the costs in the applicant's favour, which he then reduced by one quarter to factor in to

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the proceedings, which was not fatal, as the proceedings were a proportionate response to what occurred. The applicant was awarded two thirds of her legal costs against the respondents, save for Ireland and the Attorney General, and one hundred per cent of the costs of the transcripts.

936 [14] (HC, 2 May 2017).

937 *CA v The Minister for Justice* [2015] IEHC 42.

938 *Ibid* [3].

939 *Ibid* [22].

account the inefficiencies which characterised the applicant's approach to the litigation.[940] The applicant attempted to draw comparisons with *Norris v AG*[941] and as such she was implicitly seeking a higher costs award by drawing such a comparison with that case.

3.8 Test cases in Ireland

It is now time to consider those cases where the courts may elect to make no order as to costs based on the subject matter raised. This category occupies a form of intermediate tier between those cases where the courts apply the normal rule but make some form of deduction and those cases where the courts positively reverse the loser pays principle by making a full or partial award of costs in favour of the losing party. The courts are willing to exercise their discretion by making no award as to costs in *test cases*. In such cases they adopt the starting point that the normal rule applies, but they elect to make no order as to costs by reason of the fact that the matters pleaded engage with *test case* principles. In *Cork County Council v Shackleton* [942] the High Court in Ireland, asserted that the circumstances under which test cases may arise are protean. Such a case may occur for example, where there is a dispute about the proper interpretation of the common law, Constitution, or enactment. If there is such a dispute then one or a small cohort of cases, may clarify the legal issues. There is no free standing right to deprive a prevailing party of costs just because a case comes within such a test category.[943] In '*Shackleton'* the court recognised that cases may arise which would sit between the two extremes namely where a public authority has no responsibility for the applicable (opaque) legislation, but which is answerable to the ministry that was responsible, while at the same time trying to contend with the law in the same fashion as any other party. Clarke J. considered that, in such a situation, the court retains a discretion to consider whether there should be some departure from the normal rule.[944] He made an order in the terms that the parties should bear their own costs. In *Ryanair v The Revenue Commissioners,* the High Court in Ireland, had to determine whether litigation privilege could attach to

940 *Ibid* [29].
941 [1984] IR 36.
942 *Cork County Council v Shackleton* [2007] IEHC 241, a conflict between two High Court judgments arose in *R.A. v Refugee Appeals Tribunal* [2015] IEHC 830 (Humphreys J).
943 *Cork County Council v Shackleton* [2011] I IR 443, 489 [13].
944 *Ibid* [15]; cited in *Ryanair Limited v The Revenue Commissioners* [2017] IEHC 262, [3] (5), (HC, 5 May 2017).

communications between Ireland and the European Commission in a state aid investigation. Barrett J. sought to explore the rationale for the test case rule in '*Shackleton'* when he asserted that the normative view is that an entitlement to costs generally arises on the part of the prevailing party. The rule vindicates the rightfulness of the winner's position and it promotes a sense of fairness. It also performs a compensatory function, and it penalises excessive litigation, and it encourages the expeditious settlement in actions. The loser pays rule can also produce efficiency in litigation.[945] The court went on to observe that the loser pays approach is not without flaw, as the prospect of having to discharge legal expenses may deter litigants of modest or middling means from entering the court, thereby skewing accessibility. The court commented that the rationale for the rule could be based on a fundamental fallacy that a vanquished party is blameworthy, for having issued proceedings. In the instant case Barrett J. elected to depart from the default rule on the basis that the application was a test case.[946] The court adopted the '*Shackleton'*[947] approach, where absent one clear interpretation, there were often doubts in many cases, and the case provided clarification on the issues.[948] Consequently, Barrett J. made no order as to costs. This chapter has considered those cases where the courts have demonstrated a judicial willingness to make a reduction or discount on the level of costs awarded to the winning party and also the circumstances under which the courts may elect to apply the intermediate rule. It will now consider the operative circumstances under which the courts may boldly go one step further by making either a partial or full award of costs in favour of unsuccessful parties. The circumstances under which the courts have been prepared to make such awards have become translucent in recent years with the emergence of identifiable categories of cases. This is in contradistinction to the uncertainty and lack of judicial clarity that was pervasive. Quirke J. summed up the situation when he asserted that there appeared to be no statement of the principles for departing from the loser pays rule in Irish Constitutional ligation.[949]

3.9 First subsidiary research question

945 *Ryanair Ltd v The Revenue Commissioners* [2017] IEHC 262, 6 [4] (HC, 5 May 2017).
946 *Ibid*, 6 [4].
947 *Ibid*, 8 [7].
948 *Ibid*, 7 [6]; *K.R.A v Minister for Justice and Equality (No.2)* [2016] IEHC 421 (Humphreys J).
949 *McEvoy v Meath County Council (No.2)*, (HC, 24 January 2003) [2] (Quirke J), there seemed "to be no statement or record from which the principle which should govern an application for costs by an unsuccessful plaintiff in a Constitutional action can be deduced."

The first subsidiary question asks in *the context of Irish Constitutional Law actions – are we turning losers in to winners.* The question is important owing to increasing propensity on the part of the Irish courts, to render partial or even a full costs awards in favour of unsuccessful parties. There is an ever-increasing propensity, to abandon the loser pays rule, in certain categories of identifiable Constitutional law actions. The propagation of a winner pays (loser friendly) costs rule represents an erosion or even an abdication of the loser pays philosophy. The loser pays rule is ordinarily observed in commercial, business, mercantile, medical negligence, judicial review, personal injuries, and other civil actions. The abandonment undermines the centuries-old rule that seeks to indemnify the successful party. The erosion, can as an unintended consequence, imbue unsuccessful parties with an irrational sense of moral victory. The abandonment in certain Constitutional law actions substitutes the costs shifting model. The unsuccessful litigants seek to recover not only the costs of the failed first instance hearing but also the costs of any failed appeal. In so doing, they seek two bites at the cherry paid for out of public funds, as invariably central Government, or other emanations of the state are cited as the respondents such actions. Such a proposition enables plaintiffs to conduct litigation in a risk-averse environment, irrespective of the judicial outcome. The normal risk (associated with loser pays principle) is deactivated. There is no active deterrent in the form of an adverse costs order. Absent the normal rule there is no costs inhibitor in this Utopian risk-averse environment. Additionally, litigants may enter conditional fee arrangements to limit their exposure. Some unsuccessful litigants are not only immune from any exposure to the successful party but with conditional fee arrangements the litigation can be conducted free of risk. An analysis of the costs awarded to losing parties in certain Constitutional actions reveals certain patterns. The costs awarded in cases touching upon sensitive aspects of the human condition, involving the end of life, or sexuality[950] are the highest at one hundred per cent. While cost awards in actions that engage with the separation of powers vary from between fifty to seventy five percent. The unsuccessful litigants in '*Roche'* and '*Fleming'* were awarded one hundred per cent of their High Court costs, respectively. The latter also received a further fifty per cent of the costs of her failed appeal, while the former litigant experienced a costs-neutral outcome in the failed appealed. '*Collins'* occupies a position between '*Fleming'* and '*Roche',* by virtue of the fact that she was awarded three quarters of the costs of the failed action. The plaintiff was also awarded a

950 *O'Brien v Clerk of Dáil Eireann* (HC, 2 May 2017) [3].

further fifty per cent of the cost of the failed appeal. This comes close to eclipsing *Roche,* while in '*Kerins'* the unsuccessful plaintiff, and was awarded two-thirds of her costs. This is more consistent with the pattern of awards, of not less than fifty per cent and not exceeding three quarters, which are awarded in cases that engage with the separation of powers doctrine. Six potential costs outcomes emerge. The first of which sees the traditional application of the normal costs follow the event rule while the second sees a disallowance applied to that rule to reflect some form of conduct or behaviour on the part of the winning party. The third or intermediate possibility arises where the courts elect not to make an order for costs when certain test case criteria are present, which is tantamount to splitting the costs. When this third scenario comes to fruition the parties bear their own costs. The fourth and fifth scenarios arise where the courts elect to make a partial or full award of costs in favour of unsuccessful parties in certain (mostly Constitutional law) actions. The sixth may arise where there is a confluence of factors in two or more of the foregoing scenarios. If such a factual situation were to present itself, it would be open to the unsuccessful party to advocate for the most attractive *loser-friendly* outcome. The first and second scenarios observe the two way shifting costs model as the burden is passed on to the unsuccessful party. Though a disallowance is applied in the second scenario, it nonetheless, observes the two way shifting costs model. The third or intermediate scenario is costs neutral, as each party pays their own respective costs, and as such, the two-way shifting model is held in abeyance. In scenarios four and five the two-way shifting model is partly suspended. They operate to prevent a successful party (perhaps a Government department) from recovering its costs. The unsuccessful party continues to enjoy the benefits that flow from the two way shifting costs model. The prevailing party will be ordered to discharge the losing party's costs in full or in part. In these last two scenarios the unsuccessful private party gains a number of distinct advantages. It enjoys all the benefits that the two-way shifting costs model can confer. Such a party can *prima facie* recover costs under the loser pays principle should it prevail. It may also benefit from a partial or even full award of costs should it fail. This variant is particularly loser-friendly. In certain categories of Irish Constitutional law actions, the subsidiary question can be answered in the affirmative.

In *CA v Minister for Justice* [951] the court observed that if this were ordinary private litigation then the court would have no reason to be concerned by the possibility of the applicant's

[951] [2015] IEHC 42 [26] (MacEocdaidh J); in *B.W. v Refugee Appeals Tribunal* [2015] IEHC 833, the court disapplied the loser pays rule as the case brought clarity for all asylum applicants under the Refugee Act, 1996.

lawyers not being paid. It was cognisant however, that the only way in which a person in the applicant's circumstances could exercise her Constitutional right of access to court is if her lawyers were willing to act on a conditional fee basis. The court was inherently treating the litigation differently to litigation between two or more private parties. Furthermore, it noted that the applicant was a member of a vulnerable group who had been living in the challenging circumstances for lengthy periods of time. The court surmised that to award the respondent the costs of the issues on which it prevailed would have a chilling effect on litigation of this sort. It might even have the effect of denying vulnerable and marginalised people their constitutional right of access to the courts.[952] In Irish Constitutional law actions, there is a marked judicial reluctance to apply the loser pays principle. This is particularly so in actions involving central Government. There are therefore few financial disincentives or brakes to discourage such actions. In some such actions, the loser pays principle is turned on its head, as the courts apply a winner pays principle. The circumstances under which courts award costs to losing parties are protean. Even partial awards can render litigation attractive. They offer a form of judicially sanctioned legal aid, which is tantalising low hanging fruit. The question can undeniably be answered in the affirmative, in the context of such Irish Constitutional law actions, the courts are transforming losers in to winners. They do so by using the device of judicially sanctioned legal aid. This produces costs outcomes that are counter-intuitive to the normal fee allocation rule. The costs of legal services are sometimes a crucial factor in determining whether citizenry can secure access to justice. Perhaps, such judicially sanctioned legal aid is an implicit recognition that the litigation process is too expensive, slow and cumbersome. It places many litigants (who do not enjoy the veil of incorporation) at a disadvantage.[953] If, indeed, the legal system is accessible only by the rich and those eligible for legal aid, then in the absence of any affirmative steps to extend the legal aid franchise, the only way in which access to the courts can be guaranteed is by the courts themselves the question of costs on a case-by-case basis. The awarding of full or partial costs to losing parties, in Constitutional law matters, is a form of parallel judicial legal aid.[954] The judiciary in Canada have stated that issues of public importance will not automatically entitle a losing litigant to preferential costs treatment.[955] It might only occur in exceptional

952 [2015] IEHC 42 [27]; *R.A. v Refugee Appeals Tribunal* [2015] IEHC 830 (Humphreys J).

953 *Access to Justice:* Interim Report to the Lord Chancellor on the civil legal system in England and Wales, Lord Chancellor's Department, London (1995) p 4.

954 *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)* 2007 SCC 2, [2007] 1 S.C.R. 38 [44].

955 *Carter v Canada* [2015] 1 SCR 331; *Victoria (City) v Adams*, (2009) BCCA 563, 100 BCLR 4th, 28, [188].

circumstances.[956] The Supreme Court in Canada has held that the circumstances in which the court can displace the loser pays rule, and deliver a full award of costs in favour of the vanquished party are rare.[957]

3.10 Conclusion

Chapter 3 traverses the concepts of punishment, deterrence and reward. It examines the justice-related test that is inspired by common law jurisprudence.[958] It considers the different forms of disentitling behaviour that can manifest, and how such behaviour, can inform the judicial calculus for awarding costs. It considers the factual matrices where the judiciary have displaced the loser pays principle and it explores *conduct* as a factor that the courts can take cognisance of before rendering a cost award in favour of an otherwise unsuccessful party.[959] It considers litigation motivated by a broader public interest that transcends any sectoral interest, and the outcomes in *test cases*, before the courts in Ireland. It examines the origins and application of the rule in *Ritter v Godfrey* and the observance of that rule in Ireland. It considers costs awards in certain Irish Constitutional law actions, which have generated their own counter intuitive shifting costs model which often results in winners, either wholly or partially, discharging the costs of the losing party. It considers the wasted costs jurisdiction and it raises comparative considerations in doing so. The concluding part of the chapter broaches the first subsidiary research question, which in turn supplants the hypothesis, that in certain Irish Constitutional law actions the courts are transforming losers in to winners.

956 *Finney v Barreau du Qúebec* 2004 SCC 36 [2004] 2 SCR 17 [48].
957 *Carter v Canada* [2015] 1 SCR 331 [143]; special costs on a full indemnity basis awarded against Canada throughout.
958 *Donald Campbell & Co. v Pollak* [1927] AC 732; *Ritter v Godfrey* [1920] 2 KB 47; *Byrns v Davie* [1991] 2 V.R 568.
959 *Antonelli v Allen* , The Times, December 8 (2000).

CHAPTER 4

4.1 Introduction

Chapter 4 will consider the antiquated and lackadaisical notions of *winners* and *losers*. It will further examine the amendments introduced to the Rules of the Superior Courts and the Legal Services Regulation, Act 2015 in Ireland, by reference to the operative provisions of the Civil Procedure Rules in England and Wales. It will examine the factors which motivate the judiciary to displace the loser pays rule in complex civil litigation, and the factual matrices where the courts have departed from that rule.[960] Prevailing parties seldom succeed on all points[961] and so the chapter will consider how the judiciary tailor bespoke costs orders to cement the subjective notions of success and failure. The chapter will also examine how the judiciary penalise parties, for the manner in which they conduct complex litigation.[962] It also examines those judicial devices that are deployed in complex litigation, with particular emphasis on the '*Bullock'* and '*Sanderson'* mechanisms, and their modern day application in England and Wales and Ireland. The fourth chapter also engages with the second and third subsidiary questions which ask is *it equitable that a party which enjoyed many discrete victories, but ultimately lost, should pay all the winners costs?*, and *is it equitable that a party which lost many discrete applications, but which ultimately prevailed, should receive a full award of costs?* Their connectivity manifests in complex litigation that is characterised by the proliferation of interlocutory stages and the escalation of discrete points. The judiciary may form a view as to whether the outcome of the proceedings globally, may not offer the only basis for the awarding of costs, having regard to the fact that not all of the issues ventilated might be determined in favour of the victorious party. A protagonist may win many battles but lose the war. Conversely a party which enjoyed many standalone victories during the life cycle of the litigation, and which prevailed on many if not on the preponderance of the points,

960 *BUPA Ireland Ltd v The Health Insurance Authority* [2013] IEHC 177; *Veolia Water UK Plc v Fingal County Council* [2006] IEHC 240; *Walsh and Cassidy v The County Council for the County of Sligo* [2010] IEHC 437, [2014] IESC 22 (SC); *University College Cork v The Electricity Supply Board* [2015] IESC 598.

961 *McCambridge Ltd v Joseph Brennan Bakeries* [2011] IEHC 433 (HC 7 December 2011); the successful plaintiff was awarded only 40% of its costs which was insufficient to discharge lawyer and client costs.

962 *Antonelli v Allen* (The London) Times, December 8, 2000); [2001] Lloyd's Reports, PN 487, [65] – [77]; English High Court ordered the successful plaintiffs to pay three quarters of the defendants legal costs; *McEvoy v Meath County Council No.2* [2003] IR 208; V*eolia Water UK Plc v Fingal County Council* [2006] IEHC 240, 245; *O'Mahony v O'Connor Builders* (HC, 22 July 2005).

may feel aggrieved if it is deemed to be the loser (in overall terms). The second and third subsidiary questions which bolster the hypothesis that the loser pays rule is dead or on life support will be addressed at the end of this chapter.

4.2 Winners v Losers

A cigarette packet transmits the warning that smoking can kill and perhaps the standard terms of a solicitor's retainer ought to convey a similar warning that litigation can cost because it rarely delivers clear cut winners and so *caveat litigator* pertains.[963] This warning assumes heightened significance in modern *big ticket* or *mega litigation,*[964] which is imbued with "Rambo-like" tactics,[965] and also in satellite litigation.[966] The default position is that protagonists who issue proceedings with a view to securing their rights are *prima facie* entitled to recover the reasonable costs sustained during those proceedings. The judiciary can jettison the costs follow the event rule when compelling or exceptional circumstances present themselves.[967] Parties who successfully defend proceedings are *prima facie* entitled to recover their costs [968] because successful defendants have an expectation which is analogous to that of any successful plaintiff. Circumstances may arise when the courts have to consider displacing the loser pays principle. This is particularly so where a plaintiff receives only a partial victory. There is an insatiable subconscious cultural appetite, if not an almost

963 *Kagalovsky v Wilcox Ventures Ltd* [2015] EWHC 1337 (QB) [42] (Turner J); citing *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905 [1] (Ward J).

964 "Civil litigation, usually involving multiple and separately represented parties, that consumes many months of court time and generates vast quantities of documentation in paper or electronic form", "*Mega – Litigation, towards a new approach"* Sackville J., (FCA) [2007] FedJSchol 13; Justice Ronald Sackville Supreme Court of NSW Annual Conference, Quay West Resort, Central Coast, 17 – 19 August, 2009; S*even Networks Ltd v News Ltd* [2007] FCA 1062 *("C7 Case")*.

965 *Connolly v Law Society* [2007] EWHC 1175 (Admin); high-handed conduct, resorting to unnecessary applications and motions, advancing entirely unfounded additional claims, and failing to provide sufficient time to respond [46] (Laws LJ, Stanley Burton J); or precipitous and aggressive applications and motions.

966 Generating parallel proceedings; *Denton v TH White Ltd* [2014] EWCA Civ 906, [39]-[41], "parties who opportunistically and unreasonably oppose applications for relief from sanctions" or lawyers who take advantage of mistakes made by the opposing party in the expectation that relief from sanctions will be denied and they will obtain a windfall strike out, or, where the failure of the other party is neither serious nor significant and good reasons can b e demonstrated; *Mitchell v News Group Newspapers Ltd* [2015] 1 All ER 880.

967 *Veolia Water UK Plc v Fingal County Council* [2006] IEHC 240, 242 (Clarke J).

968 *O'Keeffe v Hickey* [2009] IESC 39 (SC).

monomaniacal obsession, to identify a winner and a loser. This often arises against the backdrop of an outcome which may fall somewhere short of the positions pleaded by the parties. It is incorrect to adopt a default position that the result must produce a winner and a loser. Too much energy can be expended, trying to identify an overall winner, with all the trappings that that may entail. An overly robust observance of the loser pays rule can encourage litigants to increase costs. It tends to discourage parties from focusing on those unique points that they should advance.[969] The judiciary have formulated judicial devices that are designed to deal with litigation that is conducted within complex matrices. They continue to exercise a broad discretion on costs,[970] as they endeavour to determine, as a matter of substance and reality, the identity of the winner.[971] In commercial proceedings the loser is ordinarily ascertained by identifying which party is paying the money. Though in some rare instances the findings of law may militate against the court being able to identify an overall winner.[972] The courts strive from the outset to identify the winning party[973] by conducting an exercise in common sense[974] when viewed from a realistic and commercially sensible perspective.[975] The question as to who is the successful party, for the purpose of the costs follow the event rule, is to be determined by reference to the *corpus* of litigation.[976] The judiciary will endeavour to fashion costs orders that reflect the overall justice of the result.[977] This is neither a notional nor technical exercise, when set against the backdrop of the Civil Procedure Rules. The courts are looking at factual real life outcomes.[978] There is an innate sense of acceptance that it is a fortunate protagonist who prevails on every point.[979] Therefore real and practical weight must be accorded to the victorious party in order to redound its overall standing.[980] The judiciary evaluate the litigation in totality in order to identify the successful party.[981] They take the view that in commercial cases, at least, the most pressing

969 *Phonographic Performance Limited v AEI Redifussion Music Ltd* [1999] 1 WLR 1507, [1999] EMLR 335.

970 "It is trite that a Judge's decision on costs is a matter of discretion"; *King v Zurich Insurance Co.* [2002] EWCA Civ 598 [33] (Brooke LJ).

971 *King v Zurich Insurance Co.* [2002] EWCA Civ 598 [33]; *Roache v News Group Newspapers Ltd (1992)* [1998] EMLR 161, 166.

972 *King v Zurich Insurance Co.* [2002] EWCA Civ 598 [33].

973 *Barnes v Time Talk* [2003] BLR 331 [28] (Longmore LJ).

974 *BCCI v Ali (No 4)* 149 NLJ 1222 (Lightman J).

975 *Fulham Leisure Holdings v Nicholson Graham & Jones* [2006] EWHC 2428 (Ch) [3] (Mann J).

976 *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119 [142] (Rix L.J).

977 *Kidsons (A Firm) v Lloyd's Underwriters* [2007] EWHC 2699 (Com Ct) [10] (Gloster J); citing Travelers' *Casualty v Sun Life* [2006] EWHC 2885 (Com Ct) (Clarke J).

978 *BCCI v Ali (No 4)* NLJ 1222 (Lightman J).

979 *Travelers' Casualty v Sun Life* [2006] EWHC 2885 (Com Ct) [12] (Clarke J).

980 *Scholes Windows v Magnet (No 2)* [2000] ECDR 266, 268.

981 *Sirketi v Kupeli* [2018] EWCA Civ 1261 [8] (Hickinbottom LJ); *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119 [143] (Rix LJ).

need is to identify the party who is transferring money to the other.[982] If there are two or more parties competing for the winner's trophy, and there is no obvious winner, then it may be awarded by ascertaining who is issuing the cheque.[983] But Hickinbottom LJ. cast some doubt on this suggestion, in the context of a complex group claim when the court held that Whipple J., had acted erroneously when he equated the party that *receives the cheque* as the *winner*.[984]

4.2.1 Identifying the winner

In complex disputes the judiciary sometimes require to undertake an exercise in order to identify the winner. In *Shirley v Carswell*[985] the plaintiff succeeded on some issues, but failed on others, and abandoned or discontinued other points. The Court of Appeal held that the trial judge would exercise discretion correctly by awarding the plaintiff a portion of the costs in respect of the successful points, but the costs which were incurred on those points which were discontinued ought to be disallowed as having been unreasonably incurred.[986] The challenge of identifying the potential winner, where the winner does not conveniently emerge, takes on an added layer of complexity when one party seeks financial reliefs or remedies that the other does not.[987] A plaintiff may obtain some if not all of the remedies that it is seeking, including damages. Additionally, a defendant may also succeed on some points, or on all the points pleaded, in its counterclaim. It cannot follow that the plaintiff is the winner in overall terms simply because it receives a financial award, if the defendant, who is not seeking monetary

982 *AL Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 404 [28] (Longmore LJ).

983 *Day v Day (Costs)* [2006] EWCA Civ 415.

984 *Sirketi v Kupeli* [2018] EWCA Civ 1264. The proceedings were not consolidated in to a group litigation order. 792 of the 838 claims failed, only two of the ten lead claims succeeded at trial. Costs were the main propellant and many of the claims had only a nominal value of several hundred pounds. The costs towered over the value of the cases. Hickinbottom LJ. (Davis LJ concurring) substituted Whipple J.'s order that Atlasjet pay one third of the claimants costs, by electing to make no order. None of the parties were remotely near success and the court rejected the "who has to write the cheque" test formulated in *Day v Day* [2006] EWCA Civ 415 CP Rep 35, 17, which the court held "does not reflect the reality of the outcome" as "neither side comes out of all this with much credit"; *Sirketi v Kupeli* [2018] EWCA Civ 1264 [91].

985 *Shirley v Carswell*, The Independent 24 July (2000), CA.

986 *Ibid*, Alcock, *Legal Costs: Loser Pays,* p 9.

987 *Palm Bridge PTY Ltd v Miles* (2001) WASCA, 334, 12 [22], Steytler J. " The 'final flow of money' from the Claimant to the Respondent, in respect to the issue of variations, is not the sole, or even the proper, determination influencing me on the question of costs in this issue. Money could not have possibly flowed in the other direction. A rule based on the final flow of money, in this issue, is not appropriate."

reliefs, succeeds on such points. Furthermore, it is not open to the court to conclude that the overall winner is simply the party that receives a financial award, but rather, it must instead have regard to the entire tapestry of the case, in what can sometimes be a complex mosaic.

4.2.2 The simple mechanical test

In *Magical Marketing*[988] Briggs J. asserted that, consistent with CPR 44.3(2) (a) the first step is to identify the successful party. He opined that in *Procter & Gamble Co. v Svenska Cellulosa Aktiebolaget SCA*,[989] Hildyard J. asserted that in a money claim a simple mechanical test[990] of identifying which of the parties is compelled at the end of the day to pay money has much to commend it.[991] In Australia the courts have asserted that in determining success or failure it is neither appropriate to count the proportion of paragraphs nor pages devoted to a particular issue. This is a highly artificial exercise,[992] which creates a false *air of mathematical precision*.[993] Practical difficulties manifest in cases of a commercial and non-commercial character, where one party seeks reliefs that are predominantly pecuniary in nature, while another seeks a hybrid of reliefs comprising of a monetary and non-monetary character (for example injunctive relief). The purest application of the loser pays principle would analyse the *final flow of monies*. This is accorded the status of a watershed event, but while this test is superficially attractive, it should not be the determinative factor for establishing the identity of the winner. This is particularly so where the receiving party does not succeed on all issues, or even on the preponderance of them. A more nuanced approach may consider whether a party which is viewed as having unjustifiably dragged another in to litigation, or even provided such a party with reasons to have recourse to the court in order to vindicate its right, should recompense the other party for its costs.[994] *Miles v Palm Bridge Pty Ltd*[995] offers compelling reasoning that resists the attractive superficial proposition that the

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988 *Magical Marketing Ltd v Ward & Kay LLP* [2013] EWHC 636 (Ch); [2013] 4 Costs LR 535.

989 [2012] EWHC 2839 (Ch).

990 Different considerations may where one party seeks monetary relief and the other seeks non-pecuniary relief.

991 [2012] EWHC 2839 (Ch) [6] – [7].

992 *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2) (2011)* 288 ALR 385.

993 (2011) 288 ALR 385 [84].

994 *Scherer v Counting Instruments Ltd* [1986] 1 WLR 615, 621.

995 *Miles v Palm Bridge Pty Ltd* [2001] WASCA 334 (Malcolm CJ, Steytler J, and Wheeler J); *Ibid*, Alcock, *Legal Costs: Loser Pays*, p 9.

winner is adjudged to be the party to whom the *final flow of money* goes.[996] The common law has yet to find a formula for constructing how costs are to be allocated or apportioned in complex litigation. In *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)*[997] the court postulated that where there is a mixed outcome the question of apportionment of costs will be a matter of discretion which depends upon impression and evaluation.[998] In *Camertown Timber Merchants Ltd v Sabrinder Singh Sidhu* [999] the English Court of Appeal entertained an appeal after the trial judge determined that both parties were equally winners and losers.[1000] The Court of Appeal appeal averred that the trial judge was justified in rendering no orders as to costs.[1001]

4.2.3 The 'something of value' test

In *Roache v Newsgroup Newspapers Limited & Ors.,*[1002] the plaintiff was awarded damages precisely equivalent to the combined payments, into court, which were made by the defendant. He also obtained an injunction prohibiting a repetition of the defamation. The court concluded that since an undertaking would have been offered, the defendant had been

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996 The arbitrator awarded the builder $97,733.63, but ordered that party to discharge the home owner's legal costs, on the basis that that former had not succeeded on all the issues, or even on the majority of them. The builder's appeal was upheld and the appellant was ordered to pay the respondent's costs, which in turn, triggered the homeowner's appeal to the Supreme Court. Steylter J. observed that the builder won more, in financial terms, than the appellant both in numbers and in valuation. However the court held that this was not necessarily a guide as to the costs. It noted that money would have flowed from the appellant to the respondent in any event. Consequently the "final flow" to the builder, was not the sole, or even the proper determinant to influence the court on the question of cost. A rule based on the *final flow of money* is not appropriate in such a case and the court remitted the case to the arbitrator for fresh consideration on costs, *Miles v Palm Bridge Pty Ltd* [2001] WASCA 334 [22].

997 [2011] NSWCA 171 [9] – [10] – [14].

998 [2011] NSWCA 171 [22]; citing *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* [1993] FCA 259; [1993] 26 IPR 261, 272; *City of Canada Bay Council v Bonaccorso Pty Ltd* [*No 3*] (2008) NSWCA 57, 22; *Turkmani v Visvalingham (No 2)* [2009] NSWCA 279.

999 [2011] EWCA Civ 104 (Ward LJ) (Moore-Bick LJ andRimer LJ concurring).

1000 The appellants contended that they were the overall winners but conceded that they had lost on issues. The trial judge was critical of the disproportionate expenditure on costs to achieve an award of just £16,000 and displayed no enthusiasm for applying the costs follow the event rule. The respondent succeeded in its case except for one issue that was only raised by way of amendment after the trial commenced. Trial time was taken up with attacks on the respondents' integrity by attempting to establish that invoices were invented. The respondents would have succeeded entirely, but for an additional pleading. The appellants who claimed £20,000 in project management fees were awarded only £4,500. The appellant obtained judgment but the respondent was a very substantial winner.

1001 [2011] EWCA Civ 104 [36] (Ward LJ) "*A plague on both your houses*."

1002 *Roache v Newsgroup Newspapers Ltd* [1998] EMLR 1611 (Bingham MR).

the prevailing party. Sometimes the judiciary opt to deploy a more nuanced approach in order to glean the identity of the successful party. This transpired in a series of decisions that flowed from *Roache v Newsgroup Newspapers Limited.*[1003] Bingham MR. asserted that it is necessary to consider in substance, whether the plaintiff has come away with the prize.[1004] *Roache* was applied in a series of cases[1005] in which the paying party, rather than the receiving one, was, perhaps, counter-intuitively adjudged to be the winner. The overt reasoning was that the defendants had obtained *something of value*.[1006] In *Fox v Foundation Piling Ltd*, the Court of Appeal[1007] effectively excluded personal injuries claims from such a formulas for determining winners and losers.[1008] However, other considerations may be enlivened if a plaintiff is proven to be dishonest.[1009] In England, the courts commence from the default position that the prevailing party is entitled to an award of costs. They then proceed to analyse whether any departure from this position, is warranted, having regard to all of the circumstances of the case, including the relative successes of the parties, on differing issues, which can be reflected in a proportionate costs order. The task of identifying the winner in global terms increases in complexity when a party exaggerates a claim, but nonetheless succeeds in obtaining a judgment, albeit one where the *quantum* represents only a portion of the sum claimed.[1010] In *Painting v University of Oxford,*[1011] Longmore LJ. asserted that the trial judge did not address who was the overall winner or acknowledge the fact that the University was the effective winner. The first instance judge also did not properly weigh in the balance, the misleading claim when compared to the inadequacy of the payment in to court.[1012] Notably in *Islam v Ali,*[1013] the claimant obtained judgment for approximately

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1003 [1998] EMLR 161.

1004 *Ibid,* 168-9, "The Judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

1005 *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750.

1006 *Reynolds v Times Newspapers* [1998] 3 All ER 961.

1007 Ward LJ, Moore-Bick and Jackson LJJ.

1008 *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 [48]; citing *Goodwin v Bennett UK Limited* [2008] EWCA Civ 1658; The claimant sought £280000 but was only awarded approximately £31,700, which exceeded the defendants offer to settle. Jackson LJ. considered the plaintiff to be the successful party and noted that "In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs."

1009 [2011] EWCA Civ 790 [63].

1010 *Painting v University of Oxford* [2005] EWCA Civ 161; the claimant sought £400,000 in damages but secured just £25,000. The Court of Appeal concurred with the University that it was the *real winner*, not least, because the proceedings engaged with the disproof of a dishonestly exaggerated personal injuries action. The plaintiff effectively lost her claim notwithstanding she obtained judgment.

1011 [2005] EWCA Civ 161.

1012 *Ibid* [24].

1013 [2003] EWCA Civ 612.

£12,700 but the Court of Appeal reversed the order that the defendant should pay the costs. It did so on the basis that the paying party was the real winner, by reason of the dissonance between the sums expended by the claimant in pursuing the claim when compared to the sum which was retrieved.[1014]

4.2.4 Split Costs Orders & The Veolia Principles

Split costs orders may assume different forms including an order for costs from a specific date or for a specific percentage[1015] and such costs orders may also factor in a set off. In Ireland section 168 2 (a) of the Legal Services Regulation Act, 2015 mandates the courts to order a party to discharge a portion of the costs of the other and subsection (b) permits the courts to award costs from or until a specified date.[1016] The legislation also permits the judiciary to sever those issues on which the winning party won or lost, by enabling the court to make a costs order which is linked to the successful elements of the case.[1017] The legislation, like the Civil Procedure Rules in England and Wales, erodes the notion that any degree of success whatsoever is sufficient to attract a full cost award. The Act avoids articulating any methodology for split costs order. The construction of section 168 (2) (a) which refers to a portion of another party's costs is worded in similar terms to CPR r. 44.3(6) (a)[1018] and r. 44.3(6) (c)[1019] employs almost identical language to section 168 (2) (b).[1020] Section 168 (2) (d) which states that the prevailing party may receive costs relating to the successful element or elements of the action has a similar construction to r. 44.3(6) (f).[1021] The courts in Ireland have wrestled with formulating split costs orders which are sometimes referred to as issues based costs orders. The courts can dislodge the default (loser pays)

1014 *Ibid* [23], Auld LJ., "The disparity between what Mr Islam sought including what he put Mrs Ali through to get it, and what he received was so large as to put the relatively small amount finally awarded in the balance between the two rival contentions into relevant insignificance"; In *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] EWHC 2428 (Ch) the claimant sought £7.75 million for losses incurred through alleged professional negligence and £100,000 in professional fees. Mann J., made a finding of negligence but he asserted that this did not cause the losses. He awarded the negligible sum of £6,750 and concluded that the claimant's success was "utterly insignificant" in the context of the global claim, and the defendant had been the real winner.

1015 Both the Act and the CPR refrain from using the word percentage.

1016 This includes a date before the commencement of the proceedings.

1017 Section 168 (2) (d).

1018 CPR, r. 44.3(6) (a) "a proportion of another party's costs."

1019 *Ibid*, r. 44.3(6 (c) "costs from or until a certain day only."

1020 *Ibid*, s. 168 (2) (b) "costs from or until a specified date."

1021 CPR, r. 44.3(6) (f) "costs relating only to a distinct part of the proceedings."

mode where the prevailing party materially added to the costs by pleading, raising, or ventilating issues which failed.[1022] The innate difficulties in attempting to fashion a fair costs outcome or even to tailor make a split costs order emerged in *Veolia Water UK Plc v Fingal County Council.*[1023] In this seminal case the plaintiff contended in the High Court in Ireland that it was entitled to an award of costs not least because it prevailed on the preliminary issue. On the other hand '*Fingal'* countered that it had prevailed from a global perspective. The future Chief Justice of Ireland Clarke J. saw merit in both positions and in order to identify the winner he analysed the issues and their outcomes.[1024] Clarke J. factored in that both general legal and factual matters had to be canvassed. '*Fingal'* succeeded in excluding a significant number of issues, and were it not for the preliminary application many of the points pleaded by '*Veolia'* would have required judicial determination. '*Veolia'* countered that '*Fingal'* failed on the preliminary application, because if it had succeeded, the proceedings would have been brought to an abrupt end. In so far as either party had been successful in relation to the specific issues canvassed the matter came out at very close to equality. [1025] Both had been successful in relation to specific issues which was tantamount to a positon where the victories were evenly distributed.[1026] The the net result produced an outcome which was very close to nugatory.[1027] Clarke J. concluded that in the unusual circumstances of the case both parties could form an equally legitimate outlook that they had prevailed. The litigation had in overall terms produced an outcome of rough equality. The court elected to render a cost-neutral outcome and it made no cost order.[1028]/[1029] In England the High Court[1030] embraced the principles elucidated by Jackson J.[1031] who asserted that in

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[1022] *Kavanagh v Ireland* [2007] IEHC 389 (Smyth J); *Mennolly Homes Ltd v Appeal Commissioners* [2010] IEHC 56 (Charleton J); *McAleenan v AIG (Europe Ltd)* [2010] IEHC 279 (Finlay Geoghegan J).

[1023] *Veolia Water UK Plc v Fingal County Council (No.2)* [2006] IEHC 240, 242, [2007] 2 IR 81.

[1024] *Fingal* succeeded on the first of the four issues which concerned when time runs, and the balance of the issues were inter linked. *Veolia* succeeded in achieving an extension of time on two of the three interrelated issues while the third issue (upgradability) was not as extensive. The length of time devoted to the triple set might, slightly, have favoured *Veolia*, but only by a margin of significantly less than two thirds to one third.

[1025] *Ibid,* '*Veolia'* [3.8]; *Sirketi v Kupeli* [2018] EWCA Civ 1264 (Hickinbottom LJ).

[1026] *Ibid, Sirketi v Kupeli.*

[1027] *Ibid, 'Veolia',* [3.8].

[1028] *Ibid, 'Veolia',* [2.4]; *IBB Internet Services Limited v Motorola Limited* [2015] IEHC 445 [6]; *D v D* [2015] IESC 66; *Mennolly Homes Ltd v Appeal Commissioners* [2010] IEHC 56; *Kavanagh v Ireland* [2007] IEHC 389; *ibid , Sirketi v Kupeli* [91], "the Court of Appeal noted that Atlasjet succeeded on the preliminary issue which was designed to provide guidance on the claims, and it also succeeded on a number of substantive points, and in circumstances where none of the parties were remotely close to achieving complete success, the court elected to make no order as to costs as "neither side comes out of all this with much credit."

[1029] *Ibid, Sirketi v Kupeli* [75], the Court of Appeal substituted the High Court order for costs, by making no order as to costs, as Atlasjet were entirely successful on the preliminary issues which were intended to provide guidance for the body of the claims and it also succeeded on many substantive issues.

[1030] *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch) [11], [13-16], [19-22], [28]; the claimants succeeded overall but lost on a very significant point and on some minor ones. The issues on which the claimant

commercial litigation where the parties assert that a balance is owing to it the party which succeeds in achieving the payment ought to be denoted as the winner in overall terms. Mann J. recognised[1032] the: (i) fact that a party did not succeed on every issue neither erodes nor constitutes a disentitlement to retrieve a fair portion of its costs, not least because in complex litigation, any prevailing party, is bound to fail on one or more issues;[1033] (ii) reasonableness of taking a failed point can be taken into account;[1034] (iii) additional costs associated with the failed points should be considered; (iv) need to detach and survey the matter globally, to consider the extent, if any, to which it is just and fair to deprive the prevailing party of costs;[1035] (v) conduct of the parties before and during the proceedings can be relevant.[1036] In '*Sycamore Bidco'* the claimants, who succeeded globally, lost not only a very significant point but also on a number of minor ones. Mann J. formed the view that the matters on which the claimants failed were significant enough to take the case out of the class of normal cases in which some issues were lost without reflecting that in the costs order. The defendants argued that it was appropriate to make a costs deduction from the total costs awarded. The successful claimants lost on the misrepresentation claim (£17 million damages) but the alternative claim for breach of warranty succeeded although the primary tort claim failed.[1037] The defendants argued that it was appropriate to make a costs deduction from the total awarded to the successful claimants.[1038] Mann J. accepted that the misrepresentation claim was a significant enough loss to justify it being treated as a separate issue. The court surmised that the claimants went for the big prize, expending concomitant levels of resources, and failed on that point. Mann J. elected to utilise a broad-brush approach to the vexed issue of costs by awarding the claimants sixty per cent of their costs. The court factored in a certain amount of trial time which was generic to several issues.[1039] The defendants contended that

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failed were significant enough to take the case out of the class of normal cases in which some issues were lost without reflecting that in the costs order. The court accepted that the misrepresentation claim was a significant enough loss to justify it being treated as a separate issue to be reflected in the costs order.

1031 *Multiplex v Cleveland Bridge* [2009] Costs LR 55.

1032 *Ibid, 'Sycamore Bidco'* [12].

1033 *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 [35] (Simon Brown LJ), "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues"; *Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Com Ct) (Gloster J).

1034 *Antonelli v Allen,* The Times 8 December 2000 (Neuberger J).

1035 *Ibid*, *Antonelli v Allen.*

1036 CPR, r. 44.3(5).

1037 A large amount of evidence was prepared and many hundreds of documents were disclosed and studied. There were extra witness statements, valuation reports, and extra time was taken at trial, and a very significant amount of evidence was given (including cross examination).

1038 The defendants submitted that the claimants invested heavily on big issues and fifty per cent of trial time was devoted to the points on which the claimants had lost.

1039 *Ibid, 'Sycamore Bidco'* [13] – [16], [19] - [22], [28].

50% of the trial time was devoted to the points on which the claimants prevailed [1040] and Mann J. appeared to concur but he awarded the prevailing party 60% of its costs on the basis that there would have been a certain amount of trial time common to all issues.[1041] In *Revenue Commissioners v Fitzpatrick* the Court of Appeal in Ireland observed that where each of the protagonists succeed on certain issues the court can reduce or set off costs.[1042] In not dissimilar terms to '*Sycamore Bidco'* in *McAleenan v AIG*[1043] the High Court in Ireland determined that the discrete issues on which the plaintiff prevailed accounted for forty percent of the costs, which the plaintiff could recover, and the defendant the balance.[1044] There appear to be two methodological approaches which the courts in Ireland employ for tailoring a split costs order. The first was utilised in *McAleenan v AIG* where the court concluded that the vanquished party prevailed on a number of discrete issues which contributed to the overall complexity and duration of the costs. It wanted to deliver a partial costs orders in favour of the prevailing party and so it adumbrated the percentages on which the issues won by the vanquished party contributed to the total costs, and it rendered a net order.[1045] The second examines whether the prevailing party failed on what could be termed an evidential issue, or some other issue, which would make it appropriate to diminish the number of trial days for which the winning party can recover costs.[1046] This approach was applied by the High Court in Ireland in '*Fyffes* 'where Laffoy J. discounted the award of costs made in favour of the prevailing party as the victorious party had consumed twenty five days trial time ventilating points on which it failed.[1047]/[1048] This second approach can be optimised where the issue(s) can be easily segregated from other issues both in terms of how they are pleaded and the number of trial days.[1049] The court elected to observe the first approach in *Fairfield Sentry Ltd v Citco Bank*[1050] where the plaintiffs sought an order for

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[1040] It was noteworthy that there were large bundles of documents which related purely to the *lost issues.*

[1041] *Ibid, 'Sycamore Bidco'* [13] – [28]; *Ibid*, Alcock, *Legal Costs: Loser Pays*, materials and lecture paper p 1.

[1042] *Revenue Commissioners v Fitzpatrick* [2017] IECA 15 [10] (CA, 7 April 2017).

[1043] *McAleenan v AIG (Europe) Ltd* [2010] IEHC 279, [2013] 2 IR 202.

[1044] The resultant outcome produced a net order of 20% in favour of the defendant.

[1045] *Sony Music Entertainment (Ireland) Ltd v UPC Communications Ireland Ltd* [2017] IECA 96 [23] (CA, 24 March 2017) (Finlay Geoghegan J).

[1046] *Ibid*, *Sony Music v UPC* [25], this may be a suitable methodology where the vanquished party prevailed on a number of points which formed part of the preparatory costs, including the pleadings and submissions.

[1047] The successful defendant was awarded the costs of the proceedings except 80% of the costs of making discovery and 25 days trial costs.

[1048] *Ibid, 'Fyffes',* citing *Gold v Patman & Fotheringham Limited* [1958] 2 All ER 497, 503, the prevailing defendant was only awarded half of its costs.

[1049] This method may be incapable of application if certain issues become entangled or intermingled with other issues in which case they would not be severable and they may even become indivisible.

[1050] *Fairfield Sentry Ltd v Citco Bank* [2012] IEHC 462, the plaintiffs prevailed on a number of points,

75% of their costs but they failed to secure a declaration that the Dutch orders for conservatory garnishment were entitled to judicial recognition in Ireland.[1051] The parties invited the court to apply the *Veolia* principles which were applied in *McAleenan v AIG (Europe) Ltd.*[1052] Finlay Geoghegan J. determined that *Shell* and *Atlanta* were the prevailing parties on the basis that the kernel issue was whether the conservatory garnishment orders should receive judicial recognition in Ireland and the plaintiff failed on this point. The court proceeded from the default position that prevailing parties are *prima facie* entitled to receive their costs.[1053] Finlay Geoghegan J. noted that it was a complex case and the plaintiff prevailed on a number of significant issues which necessitated delivering interrogatories. The trial comprised of five days and the points on which the plaintiff succeeded added to the complexity and length of the proceedings and they also contributed to the additional pleadings and submissions.[1054] The court elected to apply a reduction by allocating a percentage to the overall issues on which the (unsuccessful) plaintiff succeeded and the court determined that those issues contributed to one quarter of the complexity and length of the case. On this basis the court held that that prevailing defendants were entitled to three quarters of their costs.[1055] In *Sony Music Entertainment (Ireland) Ltd v UPC Communications Ireland Ltd*[1056] the Court of Appeal in Ireland entertained an appeal on the vexed issue of costs.[1057] Creegan J. ordered that the plaintiff should receive sixty percent of the costs up to the date of the substantive judgment[1058] after which each party should discharge their own costs.[1059] The plaintiff contended that it succeeded on the substantive claim for an injunction and there was no basis for departing from the loser pays rule.[1060] The defendant asserted that it was an innocent intermediary which had done no wrong as a non-infringing internet service provider.[1061] The trial judge found in favour of the UPC on many

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including the recognition of the winding up orders, the liquidator, and the proper law of contract point.

1051 *Ibid* [10].

1052 *Ibid, McAleenan v AIG (Europe) Ltd* [2010] IEHC 279.

1053 *Ibid* [14], this operates akin to the high water mark from which the court considers whether there are any countervailing circumstances which would militate against making a full award of costs, which would see the tide recede.

1054 *Ibid* [16].

1055 *Ibid* [16].

1056 *Ibid, Sony v UPC* [2017] IECA 96.

1057 The plaintiff had sought an injunction under the Copyright and Related Rights Act, 2000, s. 40 (5A) (inserted by Article 2 of the European Union (Copyright and Related Rights) Regulation 2012 (SI 59/2012)) giving effect to Article 8 (3) of Directive 2000/29/EC.

1058 27 March 2015.

1059 *Ibid, Sony v UPC* [4].

1060 *Ibid* [6].

1061 *Ibid* [7] – [11].

points[1062] and the order made in favour of the the plaintiff was radically different from the one which was initially sought.[1063] On appeal Finlay Geoghegan J. noted that section 40 (5A) of the Act had substantially altered the law with regard to the grating of injunctive relief as it enabled the High Court to grant injunctions against parties which had exhibited no wrong.[1064] The appellate court determined that the trial judge was entitled to form a view as to how the issues contributed as a matter of probability, to the applicable percentages, of the cost of the overall litigation.[1065] Finlay Geoghegan J. identified the alternative orders available. The first of which required making two orders while the second required just one on a set off basis.[1066] She reaffirmed her judgment in *McAleenan v AIG*[1067] namely that if a court of first instance reaches a conclusion that the vanquished party prevailed on a number of discrete issues, which contributed to the complexity and duration of the costs of the proceedings, and the court is minded to deliver a partial costs orders in favour of the successful party, then the judge should adumbrate those percentages which the issues won by the vanquished party contributed to the total costs of the proceedings, and make a net order.[1068] In *Sony Music v UPC* the trial judge crystallised on the view that the issues on which the defendant prevailed amounted to 20% of the total costs and so the prevailing party was entitled to recover 80% of its costs. [1069] Neither party dissented when the trial court deployed this methodology[1070] and the Court of Appeal concluded that it did not deliver an injustice.[1071] In '*Fyffes*'[1072] which predated '*Veolia'* Laffoy J. utilised a different methodology for reducing costs. She had recourse to the the Australian authority of *Byrns v Davie* [1073]where the plaintiffs failed on a gateway point which was dispositive of the proceedings as a whole namely the construction of a covenant. They did prevail on other points which consumed a large amount of trial time. Gobbo J. cited various common law authorities[1074] including *Jackson v Anglo-American Oil Co. Ltd*[1075] which supported the proposition that if there are separate issues on which the (victorious) defendants succumbed,

1062 *Ibid* [21].
1063 *Ibid* [6].
1064 *Ibid* [13].
1065 *Ibid* [22].
1066 *Ibid* [22].
1067 *Ibid*, *McAleenan v AIG (Europe) Ltd* [2010] IEHC 279, [2013] 2 IR 202.
1068 *Ibid*, *Sony v UPC* [23].
1069 *Ibid* [24], which produced a net order for 60% in that party's favour.
1070 *Ibid* [25].
1071 *Ibid* [26].
1072 *Ibid, 'Fyffes';* citing *Donald Campbell & Co. v Pollak* [1927] AC 732; *Ritter v Godfrey* [1920] 2 KB 47; *Grimes v Punchestown Developments Co. Ltd* [2002] 4 IR 522; Byrns *v Davie* [1991] 2 VR 568.
1073 *Byrns v Davie* [1991] 2 VR 568 (28 November 1990), [1997] VicRep 93.
1074 *Ibid*, *Gold v Patman & Fotheringham Ltd.*
1075 *Jackson v Anglo-American Oil Co. Ltd* (1923) 2 KB 601, pp. 605-606 (Lush J).

then the court could order the defendants to bear the costs concomitant to those issues, in order to produce a set off, against the costs which were incurred on the issues in which they had prevailed.[1076] Gobbo J. surmised that seventy percent of the trial time was consumed by points on which the second and third named defendants failed. The court rendered a single costs order which fixed the portion of the costs to be paid by the respective parties. In Ireland Laffoy J. made an award of costs in favour of the prevailing defendant but the future justice of the Supreme Court adopted a similar approach to that expounded by Gobbo J. She discounted 25 days trial costs [1077] on the basis that the defendant had failed on a point of a very substantial nature. In *Revenue Commissioners v Fitzpatrick*[1078] the respondent succeeded on an important point in the High Court[1079] and on the appeal against the consequential order.[1080] The Court of Appeal made an award of costs in favour of the applicant against the respondent for half of the costs of the High Court application.[1081] The appellate court noted that each party had achieved some degree of success, but the plaintiff succeeded on the primary (removal) issue. The court awarded that party half of the costs of the first and second appeals (which were treated as con-joined) [1082] up to the date of the judgment and it made no award for costs with regard to any further appeals after 26th July 2016. While in *O'Reilly v Neville*[1083] the defendant requested the court to tailor a costs order which would reflect the unnecessary costs which the prevailing plaintiff materially contributed to. [1084] Binchy J. made an award of costs in favour of the defendants from 18th February 2016 onwards except for those costs which were incurred in relation to the plaintiff's claim for the reimbursement of monies for renting alternative accommodation. The plaintiff was awarded all of the other costs which were incurred until that watershed date, together with the monetary sums expended on such accommodation.[1085] In *McD v Governor of X Prison*[1086] the High Court delivered a costs ruling in circumstances where the plaintiff only partly

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1076 *Ibid*, *Byrns v Davie*, this approach has many inherent attractions not least as it extinguishes the need for cross orders and it obviates circuitry. The Australian court ordered that the second and third named defendants retrieve 40% of their costs while the first named defendant was granted a full award of costs.

1077 The defendant was awarded the costs of the proceedings except 80% of the costs of making discovery and 25 days trial costs.

1078 *Ibid*, *Revenue Commissioners v Fitzpatrick*.

1079 *Ibid* [26].

1080 The judge did not have jurisdiction to make an order under the Companies Act, 2014, s.638 (2) as it was inoperative on the hearing date (May 2015). It commenced on 1 June 2015 by Ministerial Order.

1081 *Ibid*, *Revenue Commissioners v Fitzpatrick* [26].

1082 *Ibid* [27].

1083 *O'Reilly v Neville* [2018] IEHC 228 (HC, 18 January 2018) (Binchy J).

1084 *Ibid* [14], the plaintiff initially sought damages for breach of contract and then abandoned the claim for rescission which all contributed to prolongation of the litigation.

1085 *Ibid* [14].

1086 *McD v Governor of X Prison* (HC, 1 February 2019).

succeeded. The case focused on the food delivery system, exercise regime, and the complaints procedure in a prison. The plaintiff lost on the first and second matters but he successfully contended that there was a failure to reasonably address his complaints with expedition. [1087] In global terms the plaintiff prevailed on only one of the three core issues and on ten of the fourteen factual ones. [1088] Baker J. recognised that '*Veolia'* represents a departure from the general rule of awarding costs to the victorious party, without examining the manner of the victory, or the way in which the plaintiff succeeded or failed in global terms. The victory on just one core item and ten factual ones informed the decision process for allocating costs.[1089] The High Court made a costs order of 30% in favour of the plaintiff [1090] which incorporated a slight deduction to reflect the prolongation of the trial caused by certain untruths.[1091] Baker J. took cognisance of the methodological approach utilised by Finlay Geoghegan J. in *Sony v UPC*[1092] which she differentiated as being more apt for utilisation in commercial cases where protagonists cross swords on the basis of some degree of monetary parity.[1093] While Baker J. contemplated that the *Veolia* principles are optimally deployed in commercial litigation, they can be utilised in other areas of litigation, including family law litigation, albeit in a modified form for calculating percentages and achieving a fair set off. In '*Sycamore Bidco'* Mann J. permitted the prevailing plaintiff to recover approximately ten per cent of its costs in respect of trial time for issues which were germane to the proceedings as a whole, by virtue of the fact that it takes time to introduce the court to the salient facts and principles. This generic time cannot be allocated to any one issue. The same methodology could be applied to the *Veolia* principles in commercial litigation.

In *Reaney v Interlink Ireland Ltd (T/A DPD)* [1094] the plaintiff purchased a franchise to operate couriers and the resultant dispute was heard over twelve days in the High Court. Gilligan J.

1087 *Ibid* [12].

1088 *Ibid* [4].

1089 *Ibid* [4].

1090 *Ibid*, [13], the plaintiff was awarded the full costs of the legal submissions and issues paper because a one third award would not properly take account of the work which was performed during the formative and preparatory stages of the proceedings.

1091 *Ibid* [13].

1092 *Ibid* [15], the plaintiffs received an award of 80% of their costs and the defendants a cross order for 20% which produced a net order of 60% in favour of the moving party.

1093 A pure application of the *Veolia* principles in this prison type case would have produced an award of costs in favour of the defendant, notwithstanding the plaintiff (partly) prevailed on one main point. An unadulterated application of *Veolia* would result in the plaintiff being granted two thirds of its costs (for successfully fending off two of the three core issues) and the set off would produce a net order of one third in favour of the defendant.

1094 *Reaney v Interlink Ireland Ltd (T/A DPD)* [2018] IESC 13.

awarded the plaintiffs a total of €356,200[1095] and sixty per cent of their legal costs based on the principles in '*Veolia'*. [1096] On appeal the Supreme Court in Ireland opined that the margin of difference between the award (exclusive of interest) and the lodgement was quite small (less than €6,000). It was even tighter when the variables, including the termination payments, and the component calculations for turnover and assets were considered. [1097] The Supreme Court considered that the fundamental issue was whether the plaintiffs had acted reasonably in pursuing the claim despite the lodgement being made. O'Donnell J. determined that the proximity of the final award to the lodgement, and the differing variables together with the complexity of the case, and the award of interest, represented a special reason why the defendant should not receive an award of costs. [1098] The Supreme Court held that interest should not be included with the lodgement for the purpose of considering whether the plaintiffs received an award which beat the lodgement. [1099] O'Donnell J. determined that the matter was fairly and appropriately dealt with by the application of the '*Veolia'* principles which resulted in the High Court awarding the plaintiffs sixty per cent of their costs. [1100] The decision provides comfort for protagonists which receive an award which fails to beat a lodgement where the case raises issues of general assessment rather than a precise award.[1101] If necessary the court can disallow some portion of costs by utilising the *Veolia* principles, where there are clear and distinct issues in play. [1102] Additionally if a plaintiff fails to beat a lodgement but only by a negligible margin, then the court may consider if it was reasonable for that party to have pursued the case, which the court may reflect in its award of costs by using the '*Veolia'* principles, or by extending those principles. [1103] The jurisprudence discloses no magic formula for determining how costs can be split and so any attempt at engineering some perfect scientific or mathematical formula is misguided.[1104] The exercise of discretion is informed by impression and evaluation. [1105] The

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[1095] €356,200 being €308,921, including vat, plus €38,599.50 and the *parcel line* claim including vat, and €8,680 for the *Pulsar* amount, which included vat. The award was strikingly close to the sum of €362,243.23 which was lodged by the defendant but which had been disallowed as a lodgement for non-compliance with the rules.

[1096] *Ibid, 'Veolia'.*

[1097] *Ibid, Reaney* [37].

[1098] *Ibid*, [39].

[1099] *Ibid*, [41].

[1100] *Ibid*, [39].

[1101] RSC, Ord. 22 r. 1 (5).

[1102] *Ibid, 'Reaney'* [41].

[1103] *Ibid*, [41 (vi)], the making of offers or lodgements will not necessarily displace the *Veolia* principles.

[1104] *Ibid, Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No.2)* [2011] NSWCA 171 [9] – [10] – [14].

[1105] *Ibid, 'Macquarie'* [2011] NSWCA 171 [22]; citing *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* [1993] FCA 259, [1993] 26 IPR 261, 272; *City of Canada Bay Council v Bonaccorso Pty Ltd*

courts in Australia steer clear of forensically ruminating over the time devoted to issues which can be a highly synthetic exercise as it can produce split costs orders which are based on a false sense of scientific precision.[1106] This thesis would not advocate the *Chablis test* espoused by Coulson J. as it may be too optimistic to reach conclusions based on just one perusal of the papers.[1107]

[No.3] (2008) NSWCA 57; *Turkmani v Visvalingham (No 2)* [2009] NSWCA 279.

[1106] *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No.2)* [2011] 282 ALR 385 [84].

[1107] *Amec Group Ltd v Secretary of State for Defence* [2013] EWHC 110 [23] (TCC) (8 February 2013), the court can reach a conclusion based on the first examination of the papers with a bottle of Chablis and smoked salmon.

4.2.5 Impression and evaluation

The jurisprudence reveals no magic formula for constructing how costs are to be apportioned or allocated and any attempt at achieving some form of forensic mathematical computation is illusory.[1108] Judicial discretion depends on the art of impression and evaluation.[1109] The decision on costs must accord real weight to the prevailing party. The courts should heed the advice of their Australian brethren who cautioned against creating an artificial air of mathematical precision.[1110] The three quarters approach was utilised in *Walsh and Cassidy v The County Council for the County of Sligo,*[1111] which had been one of the longest running property disputes before the Irish courts. The plaintiffs, who enjoyed high profile legal careers, successfully appealed against the High Court decision, which held in favour of the local authority's claims that a right of way existed through their 410-acre demesne. The Supreme Court found that no right of way existed over three routes, but that a limited right of way existed on a fourth route, to Bunbrenóige. Denham C.J. awarded the plaintiffs three quarters of their costs in respect of the High Court and Supreme Court proceedings.[1112]

In *McCambridge Limited v Joseph Brennan Bakeries,* which was instigated in the High Court in Ireland, the plaintiff had by virtue of its position attained approximately thirty per cent of the traditional brown bread market in Ireland. In 2008 the defendant, who was familiar with the plaintiff's production processes having previously produced some of its products, adopted a newly revised form of packaging that utilised styled calligraphy. This took the form of a white on green signature in a resealable packet, with a printed rectangular block, and an elevated shade of lime green with a yellow background. Peart J. held that the defendant committed the tort of *passing off* by reason of an unintentional infringement which resulted in the *get up* of the defendant's product being very close to that of the market leader.[1113] The

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1108 *'Macquarie'* [2011] NSWCA 171 [9], [10], [14].

1109 *Ibid*, [22]; citing *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* [1993] FCA 259; [1993] 26 IPR 261, 272; applied in *City of Canada Bay Council v Bonaccorso Pty Ltd [No 3]* (2008) NSWCA 57 [2].

1110 *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No.2)* [2011] 282 ALR 385 [84].

1111 *Walsh and Cassidy v The County Council for the County of Sligo* [2010] IEHC 437 (McMahon J); [2014] IESC 22 (SC, Fennelly J, McKechnie J, and MacMenamin J).

1112 The court noted that the Plaintiffs succeeded in relation to three of the four declarations sought and failed in relation to part of the fourth, where the court, found that there is a public right of way over some of their lands. Taking all the circumstances of the case in to account, the Chief Justice awarded the Plaintiffs three quarters of their costs, in the High Court and in the Supreme Court; *Ibid*, Alcock, *Costs follow the event v Costs to follow event,* p 10.

1113 *Reckitt and Coleman Products Limited v Borden Inc* [1990] 1 WLR 491, 499; approved *Miss World Limited v Miss Ireland* [2004] 2 IR 394; *Fruitfield Limited v United Biscuits (UK) Ltd* [2007] IEHC 368.

court went on to rule that the successful plaintiff should bear some of its costs after it failed in significant aspects of its claim, namely that the defendants had deliberately imitated its packaging and infringed its copyright. Peart J. awarded the plaintiff just forty per cent of its legal costs.[1114] The forty percent rationale was replicated in the High Court in England and Wales in *Various Claimants v WM Morrison Supermarkets Plc*.[1115] Langstaff J. determined that while the claimants were successful in overall terms they lost on the direct liability issue which comprised thirteen of the fourteen points argued at trial. The only point on which they prevailed was the vicarious liability one. The claimants raised tenuous arguments that expended considerable time and but for the failed arguments on the direct liability issue, the trial time would have been halved. The court was determined that the defendant should benefit from a costs order which reflected the fact that it successfully repulsed thirteen of the fourteen contested points. That party was ordered to discharge forty per cent of the claimants' costs which reflected the fact that the defendant had strenuously fended off many claims. The claimant's assertion that it was the winner was somewhat tenuous and it only stemmed from the fact that it was more of a winner than the defending party.[1116]

[1114] Gordon Deegan, Irish Independent, 5 June 2013; *Ibid,* Alcock, *Costs follow the event v Costs to follow event,* p 10.

[1115] *Various Claimants v WM Morrison Supermarkets Plc* [2018] EWHC 1123.

[1116] *Ibid* [25], the claimants were the winners at least marginally more so than the defendants, in that they succeeded without being totally successful; (CPR, r. 44 (4) and (5)).

4.3 Section 168: Legal Services Regulation Act 2015

In Ireland, the Legal Services Regulation Act, 2015 introduced provisions that are strikingly similar to those which are found in England and Wales, under the Civil Procedure Rules. Section 168 of the legislation confers power on the court to award legal costs.[1117] The court may, furthermore, on the application by a party at any stage, and from time to time, order one of the protagonists to pay the costs of the proceedings.[1118] Subsection 2 empowers the court to make an order requiring a party to pay: (a) a portion of another party's costs;[1119] (b) costs from or until a specified date; (c) costs relating to one or more steps in the proceedings; and (d) where a party is partially successful in proceedings, the costs relating to the successful element or elements.[1120] The legislation which is couched in terms similar to CPR 44.3 (6) (a),[1121] enables the court to make a costs order before or after a specific date.[1122] This is once again broadly similar to the power conferred by the CPR.[1123] The CPR allow the court to make a costs order in relation to steps in the proceedings, and the act contains a similar provision.[1124] The legislation contemplates situations where the prevailing party fails on some points. It now enables the judiciary, in the exercise of their discretion, to award costs where a party is partially successful in proceedings.[1125] The provisions are similar to those that are contained in the CPR, which require the judiciary to have regard to all the circumstances of the case. This includes whether a party has prevailed on part of its case, even if it has not succeeded totally.[1126] The CPR-like section 168 (2) (d) provides a legislative basis for fashioning issue based costs orders. One conspicuous feature of the CPR is found at 44.3 (7) which provides that where the court would otherwise make an order under 44.3(6) (f) namely for the costs concomitant to a distinct part of the proceedings, the court must instead, if practicable, make an order under 44.3(6) (a) or (c).[1127] In 2014, the Court of Appeal in Ireland

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1117 Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No.2) Order 2019 (SI 502/2019) brought section 168 in to force with effect from 7th October 2019.

1118 Section 168 (1) (a).

1119 CPR, r. 44.3 (6) (a) provides for the payment of a "proportion of another party's costs."

1120 Section 168 (2) (a) (b) (c) (d).

1121 Section 168 (2) (a).

1122 Section 168 (2) (b).

1123 CPR, r. 44.3 (6) (c); "costs from or until a certain date only."

1124 CPR, r. 44.3 (6) (e); section 168 (2) (c) "costs relating to one or more steps in the proceedings."

1125 Section 168 (2) (d).

1126 CPR, r. 44.3(4) (b).

1127 For "a portion of another party's costs" or costs from or until a certain date only. This may suggest a preference on the part of the drafters against utilising 44.3(6)(f) for making what could be termed a "module" or "modular" based costs orders, though not necessarily issued based costs orders. The Act contains no such

was conferred with jurisdiction to determine the liability for the costs of an appeal or an application for leave to appeal, when factoring in to account the number of issues raised or contested by the protagonists on the appeal. It can also consider whether it was reasonable for a party to have raised, pursued or contested the matters in dispute.[1128] The provision mirrors those in the Civil Procedure Rules, 44.3(5) (b), which operate in England and Wales.[1129]

provision.

[1128] RSC (Court of Appeal Act 2014) SI 485/2014: Amendment to Ord. 99.

[1129] The provision requires the court to consider "whether it was reasonable for a party to raise, pursue, or contest a particular allegation or issue", and it has been used to punish successful parties for the unreasonable way in which they elect to advance, pursue, or contest points.

4.4 Loser pays: discounts in complex litigation

The raw elements which influence the courts to dilute, vary, or displace the loser pays rule in complex litigation are protean. Certainly they are neither predetermined nor prescribed.[1130] Invariably an unsuccessful party will face an uphill struggle to convince the court that the loser pays rule should be displaced, if the point on which it succeeded is neither a fundamental nor dominant one and it is capable of being isolated, from minor or inconsequential issues.[1131] Success on a discrete, but important issue, may be sufficient to attract judicial consideration.[1132] If a prevailing party loses on issues that are clearly severable[1133] then it will impact against that party.[1134] The determination on cost ought to reflect the time expended on the issue on which the otherwise, successful party failed.[1135] Ultimately it may be just and fair to deprive an otherwise prevailing party of its costs owing to the amount of time expended on hearing evidence or legal arguments.[1136] A prevailing party's entitlement to costs ought not to be at risk because of the unsuccessful party's success on an issue that contributed to only a very minor role in the litigation.[1137] Aside from the question of whether an issue is severable, the costs follow the event rule may be displaced, wholly or partly, where a defendant or other party to a cross appeal, which has lost in overall terms, has nonetheless succeeded on a substantial issue.[1138] Where each party achieves substantial success the court may elect to make no order as to costs.[1139] This is particularly so where the claimant's success flows directly from a late amendment to the pleadings.[1140] In *Beoco*[1141] the court held that, as a general rule, where a plaintiff amends the pleadings late in the case that substantially alters the thrust of the case, and without which the action would

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1130 *Waters v PC Henderson (Aus) Pty Ltd* (CA, 6 July 1994); an issue or module may be identifiable and severable.

1131 *Correa v Whittingham (No 2)* [2013] NSWCA 471 [26] – [30]; *Smith snackfood Co Ltd v Chief Commissioner of State Revenue* (NSW) [2013] NSWCA 470 [229] – [232].

1132 *Williams v Stanley Jones & Co. Ltd* [1926] 2 KB 37; *Jelbarts Pty Ltd v McDonald* [1919] VLR 478.

1133 A severable matter can be one which relates to law or fact; *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296, 34.

1134 *Australian Conservation Foundation Inc v Forestry Commission of Tasmania* (1988) 81 ALR 166, 169; *Richmond River Council v Oshlack* (1996) 39 NSWLR 622, 637; *Hendriks v McGeoch* [2008] NSWCA 53, 104.

1135 *Elite Protective Personnel Pty Ltd v Salmon (No 2)* (2007) NSWCA 373.

1136 *Sabah Yazgi v Permanent Custodians Ltd (No 2)* [2007] NSWCA 306, 24; if an appellant unsuccessfully argues additional issues on appeal, which has the effect of escalating costs, it may be necessary to reflect this in the costs order; *Sydney City Council v Geftlick (No 2)* [2006] NSWCA 374 [27].

1137 *Macourt v Clark (No 2)* (2012) NSWCA 44 [7].

1138 *Lewis v Nortex Pty Ltd [in Liq]* [2006] NSWSC 480 [20] – [22].

1139 *Hogan v Trustees of the Roman Catholic Church (No 2)* [2006] NSWSC 74 [40].

1140 *Beoco Ltd v Alfa Laval Co Ltd* [1995] 1 QB 137; [1993] EWCA Civ 22, [1994] 3 WLR 1179, [1994] 4 All ER 464.

1141 [1995] 1 QB 137, [1993] EWCA Civ 22 (Balcombe LJ, Stuart-Smith and Gibson LJJ).

have failed, then the defendant should be entitled to costs up to the date of the late amendment.[1142] The courts should be prepared to tailor their costs orders where the successful party has been guilty of elongating the proceedings. This could take the form of extracting the costs that are attributable to the points on which the prevailing party succumbed. In *O'Mahony v O'Connor Builders,*[1143] Clarke J. sitting in the Irish High Court concluded that the issue under consideration should be decided in favour of the plaintiff (who was the defendant on the issue concerned). Yet the court clearly found against the plaintiff on a significant number of issues that were ventilated at the trial. Clarke J. concluded that the original hearing was extended by approximately one day owing to the plaintiff having canvassed those additional issues. The trial took three days to dispose of, and Clarke J. determined that it was appropriate to award the plaintiff the costs of the issue limited to just one day's hearing time. The methodology underlying the calculation is predicated on the idea that the plaintiff was entitled, in general terms, to be regarded as the winner. The court reasoned that the plaintiff was obliged to pay the defendant one day's costs, in order to reflect the fact that the defendant had been unnecessarily put to the cost of an additional day's hearing by virtue of the plaintiff having raised unmeritorious issues.[1144]

4.5 Res Judicata

It is not uncommon for protagonists to fail on a preliminary *res judicata* argument before succeeding in overall terms. *BUPA* engaged with the concept of risk equalisation and insurance health premiums in the Irish health insurance market. The unsuccessful applicants, not only sought to resist an application for costs but they also sought an order for their costs. Cooke J. reviewed the authorities and observed that where any party who has not succeeded on the event seeks to resist the application of the loser pays rule then that party bears the onus of demonstrating that the circumstances justify displacing the rule.[1145] Cooke J. sitting in the

[1142] [1995] 1 QB 137, 154 A, Stuart-Smith LJ., made an order for costs in terms that the plaintiff pay all the defendants costs down to the date of the amendment of the Statement of Claim and thereafter 85% of that party's costs; *Kaines UK Ltd v Osterreichische* [1993] 2 Llds 1, 9.

[1143] (HC, 22 July 2005) (Clarke J); *PMcD v Governor of X Prison* (HC, 1 February 2019) (Baker J) the court distinguished that case from *Veolia*.

[1144] *O'Mahony v O'Connor Builders* (HC, 22 July 1995) (Clarke J).

[1145] *BUPA Ireland Ltd v The Health Insurance Authority* [2013] IEHC 177, 179 (Cooke J); *Grimes v*

High Court in Ireland, was satisfied that the balance of justice between the parties in respect of the final stage in the litigation should be reflected in an award of costs in favour of the respondents limited to seventy five per cent of the costs.[1146] The principal issue, which went against the successful respondent, was the reliance placed on *res judicata*. There was no suggestion that the time expended on this point was wasteful, vexatious or even unsatisfactory.[1147] A more technical partial disallowance, for an unsuccessful *res judicata* argument occurred, in the *National Museum of Ireland v The Minister for Social Protection.*[1148] Murphy J. sitting in the High Court in Ireland, adjudicated on costs in circumstances where the successful applicant lost on one point but prevailed on the balance of the arguments in overall terms. The notice party applied for costs consequent to the judgment in the substantive proceedings in which the court set aside the respondent's decision on her employment status and remitted the case for fresh consideration. The successful applicant sought an order for the costs, while the respondent opposed the application on the grounds that the applicant had failed on one issue. The notice party sought her costs on the grounds that her participation was necessary both in order to ensure a prompt disposal of the proceedings and to protect her position. Murphy J. accepted that when the proceedings are surveyed in global terms that it is manifestly clear that the applicant prevailed and the outcome was not open to any other reasonable construction. The prevailing party which succumbed on the *res judicata* point submitted that a split order as to costs was inappropriate as that point formed only a small part of the preparatory work.[1149] The court was satisfied that the gravamen of the applicant's claim was that the deciding and appeals officer had erred by determining that the notice party was engaged in insurable employment, and in maintaining that position, one argument advanced was that the issue was *res judicata*. While that attack on the validity of the appeals officers' decision was unsuccessful an alternative attack based on fair procedures was successful. A significant part of the hearing was taken up with the plea of *res judicata.* The court performed an elemental breakdown and analysis of the audio recording of proceedings. It calculated that from a total time of 370 minutes, 90 had been expended on arguments and submissions on that point. Murphy J. reasoned that a quarter of the hearing time was expended on the issue which impacted on the

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Punchestown Developments Co. Ltd [2002] 4 IR 515; *Fyffes Plc v DCC Plc* [2006] IEHC 32; *Cork County Council v Shackleton* [2011] 1 IR 443*; John Ronan and Son v Cleanbuild Ltd* [2011] IEHC 499.

1146 *Ibid, BUPA,* [2013] IEHC 177, 179, 191; *Ibid, Alcock, Costs follow the event v Costs to follow event,* p 10.

1147 *Ibid,* Alcock, p 10.

1148 [2017] IEHC 198.

1149 *Ibid*, (HC, 7 March 2016) [12].

overall costs of the the litigation to such an extent that the High Court elected to reduce the costs payable to the prevailing party by one quarter.[1150] Murphy J. cited '*Veolia'* [1151] and awarded the notice party a quarter of her costs which were to be discharged by the prevailing party on the basis that the latter party raised the *res judicata* point which the notice party felt compelled to respond to.[1152]

4.6 Sanderson and Bullock devices

For centuries the courts have fashioned costs orders to meet the exigencies of multi-party litigation, in circumstances where the plaintiff may succeed against one or more defendants, but lose against the remainder. The emergence of complex costs orders coincided with the courts granting liberty to parties to join additional defendants to the proceedings, mainly in tortious litigation. Though the courts exercise a broad discretion as to whether costs are payable by one party to another[1153] the starting point is that the losing party will be ordered to bear the costs of the successful parties.[1154] This may necessitate more forensic consideration of whether a party, which only succeeds in some of its case, should receive a full award of costs.[1155] The Court of Chancery did not exercise an exclusive monopoly on the formulation

1150 (HC, 7 March 2016) [15].

1151 *Ibid* [15], citing *Veolia Water v Fingal County Council (No. 2)* [2006] IEHC 240 [2.14] "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 affected the overall costs of the litigation to a material extent."

1152 *Ibid* [18].

1153 CPR, r. 44.2.

1154 CPR, r.44.2 (2) (a) and 44.3(2); "the starting point for the exercise of the Court's discretion is that costs follow the event"; *Whitehead v Barrie Searle Hibbet Downall & Newtown (a firm)* [2007] EWHC 2046 (QB) [13] (Griffith Williams LJ).

1155 CPR, r. 44 (2) (4) (b).

of complex costs mechanisms, which were also utilised by the Admiralty Court, most notably where the principal issue lay between successful and unsuccessful defendants. The latter would be ordered to pay the costs of the former.[1156] It was well settled that an unsuccessful defendant might be ordered to pay the plaintiff the costs of a successful co-defendant, which the plaintiff had been ordered to discharge.[1157] The practice at common law was to direct the successful plaintiff to pay the successful defendants costs. These would in turn then be added to the costs which the plaintiff could claim from the unsuccessful defendant.[1158] The Court of Appeal discontinued this practice after the Judicature Acts came in to force.[1159] The preferred practice was to make an order holding the losing defendant liable for the costs as between that party and any successful co-defendants which were to be paid directly. After the Judicature Acts the courts gravitated towards ordering the losing defendants to pay the costs of the successful ones directly.[1160] The Judicature Acts and rules conferred full power to order a co-defendant to pay the costs of another. Following the Judicature Act, Jessel MR.[1161] extended this form of cut through costs order, to all cases involving co-defendants, where it was appropriate. The '*Sanderson'*[1162] device sees the costs routed directly from the unsuccessful to the successful defendants. The '*Bullock'* order immunises the plaintiff but it operates in a more circuitous manner which sees the losing defendant(s) pay the plaintiff the successful defendants' costs (which are *superadded*) to the plaintiff's costs.[1163] The genesis of *Bullock* and *Sanderson* mechanisms pre-dates the coming into operation of the Civil Procedure Rules in England and Wales. Colman J. elucidated judicial reasoning underpinning the *Sanderson* mechanism in *Arkin v Borchard Lines Ltd (No. 3)* when he observed that for over a century, when a plaintiff succeeds in alternative claims against one of two defendants,

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1156 *Arkin v Borchard Lines Ltd (No. 3)* [2003] EWHC 3088 (Com Ct) [14], (Colman J), [2004] 1 LLR 636; [2004] 1 Lloyd's Rep 636, [2004] 2 Costs LR 267; *Sanderson v Blyth Theatre Company* [1903] 2 KB 533, 542, 543 (Stirling LJ); *Bullock v The London General Omnibus Co.* [1907] 1 KB 264.

1157 *Sanderson v Blyth Theatre Co.* [1903] 2 KB 533, 537-538 (Vaughan Williams LJ); *Parkes v White* (1805) 11 Ves. 209; *Jones v Lewis* (1786) 1 Cox. 199; the trustee who refused to join a conveyance was ordered to pay the costs of the action while the plaintiff was ordered to pay the costs of all other defendants but have those costs over the trustee.

1158 *'Sanderson v Blyth Theatre'* [1903] 2 KB 533, 542; *Blenkinsopp v Blenkinsopp* (1850) 12 Beav 568, 588.

1159 *Rudow v Great Britain Mutual Life Assurance Society* (1897) 17 Ch Div 600, 607,608,610.

1160 *'Sanderson v Blyth Theatre'* [1903] 2 KB 533, 535 (Romer LJ); *Rudow v Great Britain Mutual Life Assurance Society* (1897) 17 Ch Div 600.

1161 *Rudow v Great Britain Mutual Life Assurance Society* (1897) 17 Ch Div 600; *Johnson v Ribbons* [1997] 1 WLR 1458.

1162 *'Sanderson v Blyth Theatre'* [1903] 2 KB 533 (Romer LJ).; cited in *Davies v Forrett* [2015] EWHC 1761 (QB); *Irvine v Commissioner of Police for the Metropolis* [2005] EWCA Civ 129, [2005] 3 Costs LR 380, [2005] CP Rep 19.

1163 *Bullock v The London General Omnibus Co.* [1907] 1 KB 264, 269, 270 (Collins MR) (Cozens-Hardy LJ concurring).

and fails against the other, it has been deemed appropriate to make a *cut-through* order. The justification for which is to avoid any inequity to the winning defendants, which could occur if an order routing the successful defendants' costs, from the losing party, through the plaintiff could not be achieved owing to the plaintiff's insolvency.[1164] The *Sanderson* device cements the plaintiffs result.[1165] Romer LJ. elucidated the rationale for the cut-through device when he observed that a successful plaintiff who is ordered to pay the costs of the successful defendant and then to have those costs over against a vanquished defendant, potentially carries an increased risk of losing them if the defendant is insolvent. The modern practice to avoid circuity has been to order the unsuccessful defendant to pay the costs directly to the successful defendant. While there is a discretion to observe the old practice if necessary, [1166]the new practice should be adhered to whenever it proves practicable.[1167] These devices which survived the introduction of the Civil Procedure Rules[1168] are predicated on the view that the plaintiff's victory ought not to be eroded.[1169] '*Bullock'* and '*Sanderson'* are typically deployed in cases where the plaintiff cannot determine which party is liable.[1170] In *Irvine v Commissioner of Police for the Metropolis*[1171] the High Court refrained from making either a '*Bullock'* or '*Sanderson'* order owing to the delphic nature of the plaintiff's pleadings. The Court of Appeal confirmed that where a plaintiff reasonably institutes proceedings against two or more separate defendants, and succeeds against one, but fails against the others, there is no rule compelling the making of a '*Sanderson'* or '*Bullock'* order. In *Moon v Garrett* [1172] the court opined that there is no hard-and-fast rule for determining when it may be appropriate to utilise the devices. The court will consider whether the plaintiff's behaviour was reasonable in issuing proceedings against more than one defendant, and whether the issue of liability was clear, from the inception of proceedings. In *Jabang v Wadman*[1173] Nicol J. considered whether the successful claimant could recover, from the second defendant, not only those costs for which the claimant was liable to the successful defendants, but also the

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1164 *Arkin v Borchard Lines Ltd (No. 3)* [2003] EWHC 3088 (Com Ct) [15]; citing Rudow *v Great Britain Mutual Life Assurance Society* (1897) 17 Ch. Div 600 (Sir George Jessel MR).

1165 *King v Zurich Insurance Company* [2002] EWCA Civ 598.

1166 *'Sanderson v Blyth Theatre'* [1903] 2 KB 533, 539; citing *Rudow v Great Britain Mutual Life Assurance Society* (1897) 17 Ch Div 600.

1167 *Ibid*, 543.

1168 CPR, r.44 (2) (2) (a).

1169 *King v Zurich Insurance Co.* [2002] EWCA 598 [33] (Brooks LJ).

1170 *Whitehead v Barrie Searle Hibbet Downall & Newton (a firm)* [2007] EWHC 2046.

1171 [2005] EWCA Civ 129 [23]; *Hong v A&R Brown Ltd* [1948] 1 KB 515; *Mulready v JH & W Bell Ltd* [1953] 2 All ER 215.

1172 [2006] EWCA Civ 1121.

1173 *Jabang v Wadman* [2017] EWHC 1993 (QB).

claimant's own costs incurred in taking the proceedings against the successful defendants.[1174] Nicol J. noted that the court's discretion is very wide and it is not linked to models applied in the past.[1175] He made a '*Bullock'* order requiring the losing defendant to pay claimants costs, while ordering the claimant to discharge the costs of the successful third, fourth, and fifth named defendants.[1176]

4.6.1 Statutory position in Ireland

In Ireland the '*Bullock'* mechanism was accorded statutory recognition in section 78 of the Courts of Justice Act 1936.[1177] Before making a '*Bullock'* type recoupment order the court will require to be satisfied that it was reasonable for the successful plaintiff to have named the successful defendants in the proceedings. The prerequisite to have behaved reasonably broadly mirrors the requirements in England and Wales. The recoupment order often sees the costs being paid directly from the unsuccessful defendant to the successful one in a cut through fashion[1178] which is analogous to the '*Sanderson'* device. Section 168 (1) (a) of the Legal Services Regulation Act, 2015 provides for the making of an order, at any stage in the proceedings, ordering a party to pay the costs of one or more of the other parties. If there was any residual doubt as to the fate of these devices section 169 (3)[1179] provides for the making such orders. They clearly survived the enactment of the Act just as they survived the

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1174 The (unsuccessful) second and (successful) fifth named defendant were partners in the same practice and they were represented by the same firm of solicitors and counsel. The (unsuccessful) second defendants, further, argued that his liability in costs to the claimant should be reduced by approximately one third to reflect the time taken up on an allegation, which the claimant, failed on.

1175 *Jabang v Wadman* [2017] EWHC 1993 (QB) [16].

1176 He also ordered the losing defendant to indemnify the claimant for that party's liability against the successful defendants.

1177 Section 78:- "Where in a civil proceeding in any court there are two or more defendants and the plaintiff succeeds against one or more of the defendants and fails against the others or other of the defendants, it shall be lawful for the Court, if having regard to all the circumstances it thinks proper so to do, to order that the defendant or defendants against whom the plaintiff has succeeded shall (in addition to the plaintiff's own costs) pay to the plaintiff by way of recoupment the costs which the plaintiff is liable to pay to the defendant or defendants against whom he has failed".

1178 *Rudow v Great Britain Mutual Life Assurance Society* (1897) 17 Ch Div 600; *Arkin v Borchard Lines Ltd. (No.3)* EWHC 3088 (Com Ct) [15].

1179 Section 169 (3) "Where a party succeeds against one or more than one of the parties to civil proceedings but not against all of them, the court may order, to the extent that the court considers that it is proper to do so in all the circumstances, that- (a) the successful party pay any or all of the costs of the party against whom he or she has not succeeded, or (b) the party or more than one of the parties against whom the successful party has succeeded pay not only the costs of the successful party but also any or all of the costs that the successful party is liable to pay … "

introduction of the CPR. In *White v Bar Council*[1180] Barrett J. the High Court in Ireland elected to make an *order over* when the plaintiff (a former Judge) succeeded in his action against the State but failed against the Bar Council of Ireland. He sought to return to practise as a barrister[1181] after having served on the bench for many years. The successful plaintiff sought those costs which he had incurred against the successful defendant from the unsuccessful one. Barrett J. noted the discretion within section 78 and he observed that the costs resulted from the same cause of action. The court asserted that it was reasonable for the plaintiff to have joined the Bar Council as its code of conduct was germane to the determination of the issues. The Minister appealed[1182] arguing that the High Court had erroneously exercised its discretion by making such an order and the Minister contended that the reliefs which the plaintiff sought against the Bar Council[1183] were of a different character and distinct from those which the plaintiff sought against the Minister.[1184]/[1185] The appellant contended that the section only applies where a number of defendants are sued in respect of the same cause of action and implicitly on the same facts[1186] while the respondent countered that the statutory provision makes no reference to joint or concurrent wrongdoers or joint and several liability.[1187] The Court of Appeal, in Ireland, observed that the claims that were made and the reliefs that were sought against each of these parties were distinct and different. The trial judge could never have granted many of those reliefs against the appellant and it was not possible to find any joint liability. Peart J. elucidated through the prism of wagering parlance the rationale underpinning section 78. It exists to provide the court with a statutory jurisdiction to make an *order over* where there are two defendants who may have a liability either jointly or severally arising out of the same wrong, and where the plaintiff is aware on the basis of the known facts that the defendants may be found liable. The section facilitates the plaintiff backing both horses. The Court of Appeal concluded that section 78 only operates if it is deemed to apply to litigation that involves protagonists in the same cause of

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1180 *White v Bar Council* [2016] IEHC 406.

1181 Ccontrary to a long-standing convention that judges do not return to practise after retirement.

1182 *White v The Bar Council* [2018] IECA 48 (Peart J).

1183 The claim against the Bar Council primarily revolved around the lawfulness of rule 5.21 of the Code of Conduct of the Bar Council, which the plaintiff argued was *ultra vires*, a restraint on trade, and a disproportionate interference with his Constitutional right to earn a livelihood.

1184 The claim against the Minister, on the other hand, was for an order of Certiorari to quash that party's decision to refuse to include Mr White on the panel of counsel who are eligible to provide legal services under the criminal legal aid scheme.

1185 Criminal (Legal Aid) Regulations, 1965, the plaintiff sought a declaration that the decision of the Minister to require him to be a member of the Law Library and/or to comply with rule 5.21 of the Bar Council Code of Conduct for inclusion on the Legal Aid panel represented a decision to give legal effect to that Code.

1186 *White v The Bar Council* [2018] IECA 48 [29].

1187 *Ibid* [26].

action and flowing from the same factual matrix. The relief sought against the Bar Council could never have been granted against the Minister and *vice versa*. The conclusion of the High Court that it had jurisdiction to make the order over was erroneous. On appeal the Court of Appeal vacated that part of the order that enabled the plaintiff to recoup, from the Minister, the costs which the plaintiff was required to pay to the Bar Council.[1188]

4.7 Second and third subsidiary research questions

The second and third subsidiary questions ponder *is it equitable that a party which enjoyed many discrete victories, but which ultimately lost, should pay all of the winners costs?*, and the reverse which asks *is it equitable that a party which lost many discrete applications, but which ultimately prevailed, should receive a full award of costs?* Their connectivity manifests against the backdrop of complex litigation that is characterised by the proliferation of interlocutory steps, the escalation of discrete issues, and the amplification of trial hearings. The Civil Procedure Rules like the Legal Services Regulation Act, enable the court to form a view as to whether the result of the litigation, when surveyed globally, might not properly provide the only basis for making an award of costs. Circumstances where a protagonist may win the battles but lose the war will frequently arise. The courts, particularly in commercial litigation (including mercantile, business and intellectual property law actions), may elect to make an award of costs in favour of the prevailing party contemporaneous to disposing of any interlocutory application. Moreover, a commercial litigant who secures various or multiple costs orders during the interlocutory phases can accumulate those victories. They can, at the very least, be presented as costs bargaining chips, later in the substantive litigation. Conversely, a party which fought many discrete battles during the currency of the litigation, and which prevailed on many if not on the preponderance of the main points, may feel aggrieved if it is deemed to be the loser (in overall terms) and ordered to discharge the winning party's costs. It is not equitable that a party which failed on many discrete points, but which prevailed in overall terms, should receive a full award of costs, and neither, is it equitable that a party which won many discrete battles, but which lost in global terms, should

1188 *Ibid* [40] – [41].

have to discharge all of the prevailing party's costs. The courts in England and Wales, Australia and Ireland concede that there is no instant formula for determining how costs are to be apportioned, in complex litigation, absent a clear knock out.[1189] In proceedings with a mixed outcome, the apportionment will be a matter for judicial discretion. It is important to state that any attempt at achieving mathematical precision is deceptive. The exercise of discretion is based on an evaluation,[1190] and not on analysing the number of paragraphs devoted to topics in transcripts.[1191] There is an inbuilt recognition that prevailing parties seldom succeed on all points, and they are bound to fail on, at least some issues.[1192]

The courts are favourably disposed to tailoring costs orders which reflect the relative successes and failures of protagonists, which in the case of complex multi-party actions, are more often than not characterised by counter claims and cross defences. An overly vigorous observance of the loser pays rule can provide a disincentive for parties, even successful ones, to jettison weaker points.[1193] The judiciary across the expanse of the common law world will in the exercise of their untrammelled discretion[1194] examine the body of the litigation as a whole,[1195] before fashioning a costs order that reflects the overall justice of the case between the respective parties.[1196] They will do so instead of simply awarding to costs to the winning side.[1197] The task of selecting the winner should be nothing other than evaluating the real life outcome.[1198] In *O'Mahony v O'Connor Builders*[1199] Clarke J. sitting in the High Court in Ireland, found against the successful plaintiff on a significant number of issues, and the future Chief Justice of Ireland, awarded the defendant which had been exposed to the expense of a further days hearing, the requisite costs. In *Veolia*,[1200] however, the future Chief Justice of Ireland elected to make no costs order. In so doing he rendered something akin to equality, notwithstanding that *Veolia* was recognised as the winner in overall terms. While in '*Sycamore Bidco'* the English High Court elected to award the successful plaintiff sixty per

1189 *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171.
1190 *Ibid* [22].
1191 *The National Museum of Ireland v The Minister for Social Protection* [2017] IEHC 198.
1192 *Multiplex v Cleveland Bridge* (2009) Costs LR 55; *Bugden v Andrew Gardner Partnership* [2002] EWCA Civ 1125; *Kidsons v Lloyd's Underwriters* [2007] EWHC 2699 (Com Ct).
1193 *Phonograph Performance Limited v AEI Refiffusion Music Ltd* [1999] 1 WLR 1507.
1194 *King v Zurich Insurance Co.* [2002] EWCA Civ 598.
1195 *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119.
1196 *Kidsons (A firm) v Lloyd's Underwriters* [2007] EWHC 2699 (Comm); *Traveler's Casualty v Sun Life* [2006] EWHC 2885 (Com Ct).
1197 *Veolia Water U.K. Plc v Fingal County Council (No.2)* [2006] IEHC 240, 243 (Clarke J).
1198 *BCCI v Ali (No 4)* NLJ 1222.
1199 *O'Mahony v O'Connor Builders* (HC, 22 July 2005).
1200 *Veolia Water UK Plc v Fingal County Council* [2006] IEHC 240.

cent of its costs, after it went for the big prize but failed. In *McCambrige Limited v Joseph Brennan Bakeries,* the successful plaintiff was awarded just forty per cent of its costs, by the High Court in Ireland, after it failed on significant issues.[1201] It is noteworthy that the prevailing party's entitlement to costs should not be at risk because the losing party succeeds on a discrete or minor issue that rendered no significant contribution to the litigation.[1202] If each party achieves substantial success it is open to the courts to take the view that it may be appropriate to make no order as to costs.[1203] The Civil Procedure Rules[1204] like the Legal Services Regulation Act, in Ireland[1205] observe the proposition that the losing party will require to meet the costs of the successful one, but both jurisdictions are cognisant of the way in which[1206] the prevailing party conducts itself.[1207]

The rule in *Ritter v Godfrey*[1208] imposes a restriction on the loser pays principle, where a successful defendant conducts itself in a manner which precipitated the litigation, which would not otherwise have been instigated. The judiciary may, in the exercise of their discretion, consider certain factors including the level of costs expenditure in comparison to the level of the award.[1209] This often arises where the defending party succeeds on all but one issue, stemming from a late amendment of pleadings, and but for that one isolated amendment, the plaintiff would have failed.[1210] In circumstances, where there is a considerable disparity between the sums claimed and those awarded, the defending party may be viewed as a substantial winner. This is, notwithstanding the plaintiff obtains judgement, and if the trial judge forms a view that both parties are winners and losers, then the court may elect to make no order as to costs. This is justifiably tantamount to declaring a plague on both

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1201 *McCambridge Limited v Joseph Brennan Bakeries* [2014] IEHC 267.

1202 *Macourt v Clark (No.2)* [2012] NSWCA 44.

1203 *Hogan v Trustees of the Roman Catholic Church (No 2)* [2006] NSWSC 74; *Veolia Water U.K. Plc v Fingal County Council (No.2)* [2006] IEHC 240.

1204 CPR r. 44.3(2) (a); "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful one."

1205 Legal Services Regulation Act (2015) section 169 (1) "A party who is entirely successful in civil proceedings is entitled to an award of costs against a party which is not successful in those proceedings, unless the court otherwise orders, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties."

1206 *Antonelli v Allen,* London Times) December 8, 2000, [2017] Lloyd's Reports PN 487.

1207 CPR, r. 44.3 (4) (a) " the conduct of all the parties." ; CPR 44.3(4)(a) " conduct before, as well as during, the proceedings"; CPR r. 44.3.(5) (C) " the manner in which a party has pursued or defended his case or a particular allegation or issue"; Legal Services (Regulation) Act, 2015; section 169 (1)(a) " conduct before and during proceedings " and (1) (c) " the manner in which the parties conducted all or any part of their cases."

1208 *Ritter v Godfrey* [1920] 2 KB 60.

1209 C*amertown Timber Merchants Ltd v Sabrinder Singh Sidhu* [2017] EWCA Civ 104.

1210 *Beoco Ltd v Alfa Laval Co Ltd* [1995] 1 QB 137.

your houses.[1211] The courts may also consider making an order for costs relating to one or more of the steps in the proceedings.[1212] The court may also considering making an order which relates to a distinct part of the proceedings.[1213] In Ireland, where the prevailing party only partially succeeds, the court may consider awarding costs relating to just, the successful element.[1214] The '*Bullock'*[1215] and '*Sanderson'*[1216] devices enable the courts to fashion orders in favour of successful parties where such party's costs can be discharged by one or more of the unsuccessful defendants. The judiciary can furthermore adjudicate on costs in interlocutory applications, rather than carrying such matters over to the substantive hearing.[1217] This permits a party which succeeds on a substantial but discrete issue, to achieve some *set off* on costs, at the very least.

4.8 Conclusion

1211 C*amertown Timber Merchants Ltd v Sabrinder Singh Sidhu* [2017] EWCA Civ 104 [36] (Ward LJ).
1212 CPR, r. 44.3 (6) (e); Legal Services (Regulation) Act, 168 (2) (c).
1213 CPR, r. 44.3 (2) (e).
1214 Legal Services (Regulation) Act, 2015; section 168 (2) (d); CPR, r 44.3 (4) (b) "whether a party has succeeded on part of his case, even if he has not been wholly successful."
1215 *Bullock v The London General Omnibus Company* [1907] 1 KB 264.
1216 S*anderson v Blyth Theatre Co.* [1903] KB 533; *Davies v Forrett* [2015] EWHC 1761 (QB).
1217 *Solarus Products v Vero Insurance (No 4)* [2013] NSWSC 1012; *Khaira v Shergill* [2017] EWCA Civ 1687; *Morris v Bank of America National Trust* [2001] 1 All ER 954; *Glaxo Group Limited v Rowex* [2015] IEHC 467; *O' Dea v Dublin City Council* [2011] IEHC 100.

Chapter 4 examined the judicial zeal for identifying *winners* and l*osers* in common law litigation and it considered the various tests that are utilised by the courts including those propounded by the courts in England[1218] and Wales, Australia[1219] and Ireland.[1220] It was informed by comparative considerations as it explored the pervasive jurisprudence, including the: the simple mechanical test; the impression and evaluation test; the something of value test;[1221] and the final flow of money test.[1222] It observed the operative provisions of the Civil Procedure Rules in England and Wales and the pertinent costs rules in Ireland. It considered the origins of the '*Sanderson'*[1223] and '*Bullock'*[1224] devices and their modern usage in Ireland.[1225] The chapter, like chapter 3, analysed the factual matrices where the judiciary have displaced the default presumption, in place of fair and balanced costs orders in complex litigation, including the making of split costs orders. It considered the leading authorities like '*Sycamore Bidco'*[1226] and '*Veolia'.* Finally, the chapter considered the second and third subsidiary research questions that engage with complex multi-party litigation.

CHAPTER 5

5.1 Introduction

Chapter 5 considers the costs rules, including the *special rule,* in actions which are inspired by environmental protection concerns, which are in turn derived from public interest litigation.[1227] It considers both the Aarhus Convention and the Public Participation Directive, both of which seek to curtail the loser pays rule.[1228] The chapter will also examine the

1218 *Shirley v Carswell*, The Independent, 24 July, 2000, CA.
1219 *Magical Marketing Ltd v Ward & Kay LLP* [2013] EWHC 636 (Ch).
1220 *Veolia Water UK Plc v Fingal County Council* [2006] IEHC 240.
1221 *Roache v Newsgroup Newspapers Ltd* [1998] EMLR 1611.
1222 *Miles v Palm Bridge Pty Ltd* (2001) WASCA 334.
1223 *Sanderson v Blyth Theatre Company* [1903] 2 KB 533.
1224 *Bullock v The London General Omnibus Co.* [1907] 1 KB 264.
1225 *White v Bar Council* [2016] IEHC 406.
1226 *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch).
1227 *Ibid,* Alcock, *Costs follow the event v Costs to follow event,* p 11.
1228 Directive 2003/35/EC, for public participation relating to the environment and amending the public participation and access to justice Council Directives 85/337/EC and 96/61/EC: Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters, 25 June 1998, adopted by Directive 2009/28/EC as approved by Council Decision 2005/370/EC; *Ibid*, Alcock, *Costs follow the event v Costs to follow event,* p 17 (fn 48), 17 December 2014.

advanced or pre-emptive costs jurisdiction,[1229] and it will evaluate the salient case law. It will investigate whether the courts in Ireland have tapped in to a stream of jurisprudence of the protective costs jurisdiction.[1230] In this regard, it will evaluate whether the courts in Ireland have created a synthetic jurisdiction, with special costs rules, in response to international initiatives[1231] by enacting the Environment (Miscellaneous Provisions) Act, 2011 and the Planning and Development (Amendment) Act, 2010.[1232] The legislation accords the American rule a statutory footing in Ireland.

5.2 Cost appropriation: base starting point

The allocation of costs is not incompatible with the Aarhus Convention, and requirements of the European Union mandate that costs must not be *prohibitively expensive*. It remains a matter for each contracting state to enact laws which comply with both EU law and the Convention.[1233] Displacing costs shifting models delivers a regime which is not prohibitively expensive. Ccommon law jurisdictions whose traditions flow from the Supreme Court of Judicature framework[1234] have exercised their discretionary power, by granting cost protection, in order to alleviate two way costs shifting. Jurisdictions which abide by the judicature model have granted protection: (i) to an organisation which was active against bribery and corruption;[1235] (ii) in proceedings which sought to protect the habitat of the indigenous koala bear;[1236] (iii) to aboriginal people in Canada based on their Constitutionally

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1229 The courts in England and Wales have granted pre-emptive cost protection including capping the maximum costs liability; *R (Campaign for Nuclear Disarmament) v Secretary of State for Defence* [2002] EWHC 2712 (Admin). Simon Brown LJ granted a pre-emptive costs order under CPR 44.3 to cap the costs at £25,000.

1230 *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 [32].

1231 *Hunter v Nurendale Limited Trading as Panda Waste* [2013] IEHC 430 (Hedigan J); *CLM Properties Ltd v Greenstar Holdings Ltd* [2014] IEHC 178; *Rowan v Kerry County Council* [2012] IEHC 544, *Friends of the Curragh Environment Ltd v An Board Pleanála* [2006] IEHC 243, 254.

1232 The provisions do not effect the courts discretion to award costs in favour of a party in a matter of "exceptional public importance and where in the special circumstances of the case it is in the interest of justice to do so" (section 3 (3)), while the court may also award costs against a party if the proceedings are vexatious or frivolous or by reason of the manner in which a party has conducted the proceedings (section 3 (4)).

1233 *Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republiky,* Case C-240/09 [2012] QB 606; [2011] ECR 1-1255 [47]; *Impact v Ministry of Agriculture and Food,* Case C-268/06 [2008] ECR 1-2483; [2009] All ER (EC) 306 [44]; *The Royal Society for the Protection of Birds v The Secretary of State for Justice* [2017] 2309 (Admin) [12].

1234 36&37 VICT. c. 66: 23 *Halsbury's Laws of England* (1st ed); 178.

1235 *'Corner House Research'* [2005] EWCA CIV 192.

1236 *Oshalack v Richmond River Council* (1998) HCA 11.

asserted rights;[1237] (iv) to a mother in Ireland seeking to challenge whether a waste facility was operating in compliance with the terms of its planning permission and licence;[1238] (v) an action relating to Maori culture and heritage in New Zealand.[1239] The prospect of such applications succeeding are bolstered where the applicant secures *pro bono* representation, and is agreeable to a costs ceiling, while also make a concession to forego costs should that party prevail on the merits, of the case. Such a party also needs to satisfy the requirement that there is no private or sectoral gain. The courts in England have taken the view for decades that the discretion to formulate an advance costs order even in cases involving public interest challenges ought to be exercised only in exceptional circumstances.[1240] The Irish High Court observed in *Friends of the Curragh Environment Ltd v An Bord Pleanála* that across the expanse of the common law world the question of costs is determined at the termination of litigation, and in general they are awarded to the prevailing litigant.[1241] The difficulties concomitant to making a protective costs order are obvious, as the granting of such an order pre-dates the adjudication on the merits of the case, and as such, it carries with it an innate risk that an inappropriate order may be made. The *costs follow the event* rule preserves the integrity of the successful party's assets, which is no less important in public law proceedings as it is in any private law action. Whilst the courts in Ireland accept as a matter of principle that such advance costs orders may be granted in exceptional cases,[1242] more often than not they are refused.[1243] The burden always rests on the shoulders of the party which is seeking a pre-emptive costs order to justify that exceptional circumstances abound which necessitate a departure from the rule that costs should be decided at the end.[1244]

5.3 Advance/Pre-emptive costs orders

1237 *British Columbia (Minister for Forests) v Okanagan Indian Board (2003)* 114 CCR 2nd 108.
1238 *Hunter v Nurendale Limited Trading as Panda Waste* [2013] IEHC 430.
1239 *New Zealand Maori Council v A-G of New Zealand* [1994] 1 AC 466.
1240 *R v The Lord Chancellors Department, ex p Child Poverty Action Group* [1998] EWHC Admin 151 [35] (Dyson J).
1241 *'Friends of the Curragh'* [2006] IEHC 243 [3]; *Ibid*, Alcock, *Costs follow the event v Costs to follow event*, p 12.
1242 *Village Residents Associations v An Bord Pleanála* [2000] 4 IR 321 (Laffoy J) endorsed the principles enunciated by Dyson J. in *R v The Lord Chancellors Department, ex p Child Poverty Action Group* [1999] 1 WLR 347, 358, where he affirmed that the discretion of the court to make such an order should only be exercised in the most exceptional circumstances.
1243 *Friends of the Curragh Environment [*2006] IEHC 243, 21, (Kelly J), approved Corner *House Research* [2005] 1 WLR 2600, noting that a protective costs order would only be made "in the most exceptional circumstances where the interests of justice require such a course of action."
1244 *R v The Lord Chancellors Department, ex p Child Poverty Action Group* [1998] EWHC Admin 151, [37].

The difficulty with pre-emptive or protective costs order is that the court is put in an invidious position of being asked to adjudicate prospectively as to how the issue of costs will be disposed of, following the determination of the merits of the case. Kelly J. asserted in *Friends of the Curragh* that the court is essentially being requested to render an order that would be tantamount to insulating the applicant from the operation of any adverse costs liability, regardless of the outcome in the litigation.[1245] The difficulty is that court is being invited to front load hindsight by undertaking an exercise to gainsay the outcome, as advance costs orders prospectively determine how costs will be dealt with following the determination of the action and the courts may be reluctant to grant such relief.[1246] In '*Corner House Research',* Brooke LJ. observed that over the last two decades the view has crystallised in many countries, which have adopted the loser pays regime, that access to justice is impeded if there is a submissive adherence to the loser pays mentality,[1247] because of the anxiety which it can generate for unsuccessful parties, who have to discharge the costs of the opposing party, with all the consequences which that entails to either the individual, or group instigating the action.[1248] The guiding principles[1249] for granting such advance costs orders, were enunciated by Dyson J. in *R v The Lord Chancellors Department, ex-p, Child Poverty Action Group,* and endorsed by the Court of Appeal in *Hodgson v Imperial Tobacco*,[1250] and affirmed in *R v LB of Hammersmith and Fulham, ex p, CPRE London Branch.*[1251] The Court of Appeal restated those principles in '*Corner House Research',* [1252] which contemplate that the matters raised are of general public importance and the applicant harbours no private interest[1253] in the outcome of the case. The overriding objective of the protective costs order[1254] is to enable a

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1245 *Friends of the Curragh Environment [*2006] IEHC 243 [1], (HC 14 July 2006).

1246 *McCoy v Shillelagh Quarries Ltd*, [2015] IECA [36] (Hogan); *O'Connor v Environmental Protection Agency* [2012] IEHC 370; *DK v Crowley* [2002] IESC 66, [2002] 2 IR 712.

1247 *'Corner House Research'* [2005] EWCA Civ 192 [28] (Brooke LJ).

1248 *Ibid* [31].

1249 *'Child Poverty Action Group'* [1998] EWHC Admin 151 [41], "First, that the court is satisfied that the issues raised are truly ones of general importance. Secondly, that it has a sufficient appreciation of the merits of the claim that it can conclude it is in the public interest to make the order. Thirdly, the court should have regard to the financial resources of the applicant and the respondent and the amount of the costs likely to be in issue and it would be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant and where it is satisfied that unless the order is made the applicant would probably discontinue the proceedings and will be acting reasonably in so doing."

1250 *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056, 1068 A.

1251 *R v LB of Hammersmith and Fulham, ex p, CPRE London Branch* (transcript 26 October 1999).

1252 *'Cornherhouse Research'* [2005] 1 WLR 2600 [74], [75]; cited in *The Royal Society for the Protection of Birds v The Secretary of State for Justice* [2017] 2309 (Admin) [9] (Dove J).

1253 *Browne v Fingal County Council* [2013] IEHC 63 [19], Peart J. found that the applicant had a private commercial interest in the outcome of the proceedings.

1254 Protective costs orders did not form part of the suggestions regarding costs which were canvassed by

claimant of limited resources to gain access to the courts in order to advance a case. The protection afforded expels any anxiety created by an adverse costs order which could in reality close the doors of the court.[1255] The order creates a level playing field by ensuring that the litigation is dealt with in a manner which is proportionate to the monetary resources of the protagonists.[1256] In '*Corner House Research'* the court considered *Village Residents Association v An Bord Pleanala*[1257] where Laffoy J. sitting on the High Court in Ireland, stated that there is a jurisdiction to make such an order[1258] In *ex p, Child Poverty Action Group* Dyson J., observed that the discretion conferred by the Supreme Court Act, 1981,[1259] in England and Wales is quite broad,[1260] before he concluded that the court must be satisfied that the issues raised are truly ones of general public importance.[1261] In *'Corner House Research',* Phillips MR. acceded to the appeal[1262] and granted a protective costs order, albeit one where costs were capped.[1263] The court reconstructed[1264] the principles[1265] that were adumbrated by Dyson J. in the first instance.

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the Law Commission its Consultation Paper No. 126, Administrative Law: Judicial Review and Statutory Appeals (1993) [11.1] - [11.14].

1255 *'Child Poverty Action Group*' [1999] 1 WLR 347 cited in *'Corner House Research'* [2005] EWCA Civ 192, [6].

1256 *R (Campaign for Nuclear Disarmament) v Secretary of State for Defence* [2002] EWHC 2712 (Admin) [3], (Simon Brown LJ), citing *R v LB of Hammersmith and Fulham ex- p CPRE London Branch* (transcript 26 October 1999) (Richards J).

1257 *'Village Residents Association'* [2000] 4 IR 321; '*Corner House Research'* [2005] EWCA Civ 192 [53].

1258 Though it would be difficult in the abstract to identify the type or types of cases in which the interests of justice would require the court to deal with costs in such a manner; 'Village *Residents Association'* [2000] 4 IR 321.

1259 Supreme Court Act, 1981, section 51.

1260 *'Child Poverty Action Group'* [1998] EWHC Admin 151 [20]; citing *Aiden Shipping Ltd v Interbulk* [1986] AC 965, Lord Goff 975 F-H; RSC Ord. 62. RSC Ord. 62 r 2 (4), RSC Ord 62. r 3 (3).

1261 *'Child Poverty Action Group'* [1998] EWHC Admin 151 [44].

1262 The respondent was ordered to pay both the costs of the appellant's appeal and the application for a protective costs order before Davis J. on a standard basis.

1263 *R (Refugee Legal Centre) v Home Secretary* [2004] EWCA Civ 1239 [21] – [22]; Brooke LJ. made a protective costs order protecting the claimant from any potential order for costs on the clear understanding that the applicant would not be seeking an order for costs against the Secretary for State if it succeeded, citing *King v Telegraph Group Ltd* [2004] EWCA Civ 613, *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 543 [44] - [48], [2004] 3 All ER 543; *R v The Prime Minister, ex p CND* [2002] EWHC (Admin) 2712; *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250 (Admin); *Wilkinson v Kilzinger* [2006] EWHC 835 (Fam), the petitioner wanted to seek a declaration as to her marital status having married in a civil ceremony overseas in 2003, and she sought a declaration of incompatibility with the Matrimonial Causes Act, 1973 as it failed to recognise same sex marriage, and she sought a protective costs order. The court applied the *Cornerhouse Research* principles and while there was proper and considerable public interest in the issue the court refused to make a protective costs order but it made an order limiting the amount of costs which the respondent could recover.

1264 '*Corner House Research'[*2005] 4 All ER 1 [74].

1265 Applied in *R (on the Application of Buglife) The Invertebrates Conservation Trust) v Turrock Thames Gateway Development Corp* [2008] EWCA Civ 1209, [2008] Env LR 18 *("Buglife")*; *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 *("Compton")*; *Morgan v Hinton Organics (Wessex) Limited* [2009] Civ 107 [2009] Env LR 30 [44] (Carnwath LJ); *The Secretary of State for Communities and Local Government v Venn* [2014] EWCA 1539 [20] –[21] (Sullivan LJ).

5.4 Discretionary electives

Distinct electives and options arise in terms of protective costs orders, and there is no uniform or heterogeneous form of order. While there are multiple variants and some hybrids, the judiciary can be heavily influenced by an applicant's reluctance to seek cost shifting, should that party prevail on the merits of the case. The variants identified below are neither prescriptive nor exhaustive, but they include circumstances where the applicant secures pro *bono* legal services under the terms of a retainer, and the applicant signals an intention to forego costs in the event of success, in the substantive proceedings.[1266] A second variant is where the applicant seeks to cap its potential costs liability, and that party also indicates that it will only seek to recover reasonable costs, should it prevail.[1267] This elective retains two way costs shifting albeit the claimant's liability is capped while the opposing party's potential liability is left somewhat undetermined. A third option is where an applicant requests the court, in advance, to render no costs order should the action fail.[1268] A fourth is where a claimant seeks to invoke protections afforded by the Aarhus Convention, in certain environmental matters, which has precipitated the legislatures in Ireland[1269] and England and Wales[1270] to introduce bespoke costs rules, including the special (American) rule in the former, where each party bear their own costs, while the judiciary retain a repository discretion to introduce costs shifting, should the applicant prevail. A fifth variant is where the applicant seeks an advance indemnity for costs. This arose in *Browne v Fingal County Council* where the applicant moved a preliminary application seeking a somewhat unconventional protective costs order. The applicant invited the court to make no order for costs in the event that the proceedings failed, while granting an order for costs in his favour if he succeeded.[1271] Peart J. contended that what the applicant was seeking was tantamount to legal aid or an indemnity against any future costs, irrespective of the outcome of the case.[1272]

1266 (*R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1296.

1267 *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin) an order capping (at £25,000) the claimant's maximum costs liability in the event that it fails in the litigation.

1268 *'Child Poverty Action Group'* [1999] 1 WLR 347.

1269 Planning and Development Act, 2000, section 50B as inserted by the Planning and Development (amendment) Act, 2010, section 33; sections 3 and 7 of the Environment (Miscellaneous Provisions) Act, 2011.

1270 CPR: r. 8 (5) of the Civil Procedure Amendment Rules (2017/95); introduced amendments in cases engaging with environmental law. The regime which is referred to as the Aarhus Costs Rules ("ACR") came in to force on 28 February 2017; previously the only jurisdiction vested with the courts to make such orders was that expounded in '*Cornerhouse Research'*; *The Royal Society for the Protection of Birds v The Secretary of State for Justice* [2017] 2309 (Admin) [9] (Dove J).

1271 *Browne v Fingal County Council* [2013] IEHC 630 [3] (HC, 11 December 2013).

1272 *Ibid* [6].

The court was not satisfied that the Aarhus Convention conferred any type of blanket indemnity nor was it satisfied that such an order could be made, as the jurisdiction to make a protective costs order in environmental matters, was not so wide sweeping so as to enable it to encompass the form of order which the applicant was seeking.[1273]

5.5 Statutory positon in Ireland

Section 169 (5) of the Legal Services Regulation Act, 2015 provides that nothing within Part II of that legislation will be construed as effecting section 50B of the Planning and Development Act 2000, as amended,[1274] or part 2 of the Environment (Miscellaneous Provisions) Act, 2011. This statutory default position provides that the *costs follow the event* rule will apply, while the Acts of both 2000, as amended, and 2011 envisage that the special (American) rule operates. Section 3 of the Environment (Miscellaneous Provisions) Act, 2011, envisages that the commencing point in relation to costs in proceedings to which part 2 of the legislation operates, is that each party will discharge its own costs, and therefore, section 3 (1) ousts the normal loser pays principle.[1275] Noonan J. observed in *Diamrem Limited v Cliffs of Moher Ltd* that section 3 represents a very significant exception to the loser pays principle of cost allocation.[1276]

1273 *Browne v Fingal County Council* [2013] IEHC 630 [16]; citing '*Village Residents Association'* [2000] 4 IR 321, referred to in '*Friends of the Curragh'* [2006] IEHC 243.
1274 The Act envisaged that each party would subject to limited exceptions bear their own costs.
1275 *Hunter v Nurendale Limited (T/A Panda Waste)* [2013] IEHC 430 [8].
1276 *Diamrem Limited v Cliffs of Moher Centre Limited* [2017] IEHC 91 [27].

5.6 The special costs rule

In *J.C Savage Ltd v An Board Pleanála,* Charleton J. identified the three prescribed sets of cases which fall within the operation of 50B,[1277] namely, projects subject to the Environmental Impact Assessment Directive,[1278] plans and programmes within the Strategic Environmental Assessment Directive,[1279] and finally projects within the rubric of the Integrated Pollution Prevention and Control Directive.[1280] The introduction of section 50B was necessitated as a result of the obligations of the Irish state under European Law.[1281] Section 50B and section 3 of the Environment (Miscellaneous Provisions) Act, 2011 confer a discretion to apply costs shifting if a claim is vexatious or frivolous,[1282] or because of the manner in which a party has conducted itself in the proceedings.[1283] The provisions do not undermine the court's entitlement to make an award of costs in a matter of *exceptional public importance* and where *it is in the interest of justice to do so*.[1284] Section 50B and section 3 satisfy the national obligations under both the convention[1285] and European Law.[1286] Charleton J.[1287] sitting on the High Court in Ireland, entertained an application for costs[1288] in proceedings which had been withdrawn. The future justice of the Supreme Court opined that section 50 was amended by section 33 of the Planning and Development (Amendment) Act, 2010, which provides for special rules in certain cases, namely that each party will bear their

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1277 *J.C Savage Ltd v An Board Pleanála* [2010] IEHC 71; *Shillelagh Quarries Ltd v An Bord Pleanála (No.2)* [2012] IEHC 402;

1278 Directive 2011/92/EU; In *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006 the Court of Appeal in England and Wales accepted that the '*Corner House Research'* principles required to be modified in cases engaging with the EIA Directive as there is no justification for "general public importance" or "public interest" to be satisfied; *The Royal Society for the Protection of Birds v The Secretary of State for Justice* [2017] 2309 (Admin) [11].

1279 Directive 2001/42/EC.

1280 Directive 2008/1/EC.

1281 *JC Savage Supermarket Ltd v An Bord Pleanála* [2011] IEHC 488 [2.1] ; Council Directive of 27 June 1985, (85/337/EC) as inserted by Article 7 of Council Directive of 26 May 2003, which provides for public participation in certain environmental programmes and plans.

1282 Planning and Development Act, 2000, section 50B (3) (a) as inserted by section 33 of the Planning and Development (Amendment) Act, 2010; section 3 (a) of the Environment (Miscellaneous Provisions) Act, 2011.

1283 Section 50B (3) (b) of the Planning and Development Act, 2000 as inserted by section 33 of the Planning and Development (Amendment) Act, 2010; section 3 (b) of the Environment (Miscellaneous Provisions) Act, 2011.

1284 Environment (Miscellaneous Provisions) Act, 2010 section 3 (3).

1285 The scope of the Convention is mainly governed by Article 6(1) (a). Paragraph 19 of the Annex also provides that it will apply where "public participation is provided for under an environmental impact assessment procedure" under national legislation; *Kimpton Vale Developments Limited v An Bord Pleanála* [2013] IEHC 442 [12] (Hogan J); *J.C Savage Ltd v An Board Pleanála* [2010] IEHC 71.

1286 *Case C-427/07, Commission v Ireland.*

1287 *JC Savage Supermarket Ltd v An Bord Pleanála* [2011] IEHC 488.

1288 Planning and Development Act 2000 section 50B; the original section 50 had been amended by section 33 of the Planning and Development (Amendment) Act, 2015.

own costs, notwithstanding the import of Order 99 of the Rules of the Superior Courts.[1289] Under section 50B the court may render an adverse costs order if any of the conditions set out in sub section (3) are operative.[1290] In *CLM Properties Ltd v Greenstar Holdings Ltd,* [1291] Finlay Geoghegan J. sitting in the High Court in Ireland rejected the plaintiff's contention that the special costs rule applied in those proceedings. The action was not instigated by the plaintiff ostensibly for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition within the meaning of s.4 (1) (a) of Environment (Miscellaneous Provisions) Act, 2011. The court held that in reality and substance, the aim of the proceedings was to achieve the payment of the monies which were allegedly due to the plaintiff for work done at specified landfill sites.[1292] The plaintiff did not gain the protection afforded by section 3 (1) of the 2011 Act, and thus the loser pays rule was operative.[1293]

5.7 Prohibitively expensive

In *Browne v Fingal County Council,*[1294] Peart J. commented on the implicit difficulties in trying to comprehend the meaning of prohibitively expensive. He opined, sitting on the High Court in Ireland that according to Article 9 of the Convention judicial proceedings in environmental disputes must not be *prohibitively expensive*. However, neither the Convention nor any guidance, expounds whether the test is a subjective or objective one. The European Court of Justice has clarified[1295] that the nomenclature prohibitely expensive does not preclude a national court from rendering an order for costs.[1296] Peart J. observed that the

[1289] Planning and Development Act, section 50B (3) as inserted by section 33 of the Planning and Development (Amendment) Act, 2010.

[1290] The court may award costs if it considers it appropriate where a claim or counterclaim is frivolous or vexatious, or because of the manner in which a party has conducted the proceedings.

[1291] *CLM Properties Ltd v Greenstar Holdings Ltd & Ors.,* [2014] IEHC 288.

[1292] *Ibid* [10]; *Ibid,* Alcock, *Costs follow the event v Costs to follow event,* p 12, 17 December 2014.

[1293] RSC Ord. 99, r.1 (4).

[1294] *Browne v Fingal County Council* [2013] IEHC 630 [7].

[1295] R (*Edwards) v Environment Agency (No.2)* [2013] EUECJ C-260/11; *Commission v United Kingdom* (C- C-530/11).

[1296] R (*Edwards) v Environment Agency (No.2)* [2013] EUECJ C-260/11 [25]; The need relates "to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and the principle of effectiveness, whereby procedural rules must not make it in practice impossible, or excessively difficult to exercise rights conferred by European law". The cost of bringing a challenge "must not be so expensive as to prevent the public from seeking review in appropriate cases"; *R (Edwards) v Environment Agency (No.2)* [2013] EUECJ C-260/11 [33]; cited *Browne v Fingal County Council*

enactments in Ireland afford greater protection to the losing application than which is required under the Aarhus Convention.[1297] In *The Secretary of State for Communities and Local Government v Venn*,[1298] the Court of Appeal in England[1299] determined that the cost protection regime which was introduced by the Civil Procedure Rules[1300] fell short of Aarhus compliance because it was restricted to judicial review proceedings and it excluded statutory appeals and other forms of review applications. Sullivan LJ. held that a costs protection regime which depends on neither the environmental decision nor on the legal principles on which it may be challenged but on the identity of the decision maker is flawed. *Venn* precipitated the legislature amending the rules in order to secure Aarhus compliance.[1301] The courts now have the power to vary standard costs caps where they are satisfied that doing so would not result in the proceedings being prohibitively expensive, or, if a failure to make such alternations, would result in them so being.[1302] The Criminal Justice and Courts Act, 2015 in England and Wales provides for costs ceilings where proceedings are taken in the public interest,[1303] and are of general public importance,[1304] and raise a point of law of general public importance.[1305] It is also necessary to show that persons are likely to be directly effected.[1306] Costs shifting is neither incompatible with the Aarhus Convention nor European law requirements, which mandate that costs must not be *prohibitively expensive*. While the two notions may not overlap effortlessly they are neither incongruous nor mutually exclusive. It is for each contracting state to enact their own laws that are Convention compliant.[1307]

[2013] IEHC 630 [8].

1297 *Browne v Fingal County Council* [2013] IEHC 630 [11], section 50B of the Planning & Development Act, 2000 as amended stipulates that no order for costs may be awarded against the unsuccessful applicant but the court may render an order for costs in favour of a successful applicant under Section 50B (2A) of the Act.

1298 *The Secretary of State for Communities and Local Government v Venn* [2014] EWCA 1539 [34], [2014] WLR (D) 513, [2015] CMLR 52, [2015] 1 WLR 2328, [2015] CP Rep 12, [2015] Env LR 14, [2015] JPL 573.

1299 Sullivan LJ, with Gloster LJ and Vos LJ Concurring.

1300 CPR, r. 45.41.

1301 The review took account of the decision of the Court of Appeal in *Venn* in order to formulate a legal costs regime which is Aarhus compliant; Criminal Justice and Courts Bill (Hansard, 30th July 2014): Column 1655; Criminal Justice and Courts Act, 2015, Part 4, Section 90 (capping costs in environmental cases) provides for rules to be made by Statutory Instrument.

1302 CPR, r. 45.44; the court may also require (CPR 45.42) that a claimant file and serve a schedule of that party's financial resources which discloses any support which any person has provided or is likely to provide; Section 85 of the Criminal Justice and Courts Act, 2015.

1303 Criminal Justice and Courts Act, 2015 section 88 (6) (a).

1304 *Ibid*, section 88 (7) (a).

1305 *Ibid*, section 88 (8) (c).

1306 *Ibid*, section 88 (8) (a).

1307 *Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republiky,* Case C-240/09 [2012] QB 606, [2011] ECR 1-1255 [47]; *Impact v Ministry of Agriculture and Food,* Case C-268/06 [2008] ECR 1-2483, [2009] All ER (EC) 306 [44]; *The Royal Society for the Protection of Birds v The*

5.8 A *bona fide* belief in the prospects of success (or *abuse of process*)

The judiciary in Ireland are not precluded from allocating costs within this protective framework if certain operative features are extant. A party which seeks costs protection must harbour a *bona fide* belief that the proceedings can succeed. Section 50B does not confer any form of absolute costs protection, or immunity, which would shroud the beneficiary in a blanket impunity. To this extent the protections conferred by the legislation are qualified ones. Litigants which seek the protection of section 50B are not participating in ordinary litigation, but rather they are involved in a form of tangential litigation, in which a discrete statutory architecture for costs has been created. *Indaver NV v An Bord Pleanála*[1308] engaged with an application for costs by the respondent against the backdrop of the case having been withdrawn on the eve of trial. The respondent applied for costs notwithstanding the operation of the special rule. That party asserted that the manner in which the applicant conducted the case, and then caused it to be withdrawn, was tantamount to an abuse of process.[1309] On 25th July 2011, the applicant was granted leave to issue judicial review proceedings which were listed for hearing on 23rd October 2012. On 12th October 2012, the solicitors for the applicant issued a letter to their counterparts referencing new evidence, in the form of minutes of a meeting of the local authority on 10th September 2012, and a report on the evaluation of a waste management plan in the Cork region. [1310] On 19th October 2019, the solicitors for the applicant apprised their counterparts that the wasteplan vindicated their view that it was no longer relevant, and, that the state litigants were no longer required to expend resources on litigation in order defend the action. They also indicated that the court would be informed on 22nd October 2012 that the action was not proceeding. The solicitors for the applicant affirmed that their client enjoyed the protection from fee shifting by virtue of section 50B of

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Secretary of State for Justice [2017] 2309 (Admin) [12].

1308 *Indaver NV v An Bord Pleanála* [2013] IEHC 11 (Kearns P).

1309 *Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd* [1975] AC 581; *R v Governor of Pentoville Prison, ex p Tarling* [1979] 1 WLR 1417.

1310 The solicitors for the applicant outlined that they would be seeking an adjournment and that it was necessary for the court to be informed of the new evidence. Their counterparts replied on 15th October 2012 asserting that the new evidence was irrelevant. They also indicated that any application to adjourn would be resisted. The application which was made on 18th October 2012 was refused.

the Planning and Development Act, 2000, as amended.[1311] Kearns P. sitting in the High Court in Ireland, observed that generally the costs of the proceedings are at the discretion of the court and ordinarily they follow the event.[1312] The President noted that judicial discretion in certain judicial review actions which engaged with specific environmental matters had been curtailed. [1313] Section 50B was introduced subsequent to the decision of the European Court of Justice[1314] when it determined that Ireland had failed to meet certain access to justice requirements. European law mandates that the citizenry must have a cost-effective means of access that should be timely, fair, equitable and not prohibitively expensive.[1315] Those requirements were intended to prohibit litigation from being prohibitively expensive, for members of the public to instigate judicial review proceedings of decisions on major developments projects, which had the potential to seriously impact on the environment.[1316] The section also permits the court to make an award of costs in favour of a party in certain *exceptional circumstances*[1317] which is accorded an ordinary and every day meaning.[1318] Kearns P. decided that the factual matrix fell within the statutory exception[1319] which would permit the court to disengage the special rule and apply costs shifting. In doing so he took cognisance of Charleton J. in *JC Savage Supermarket Ltd v An Bord Pleanála* where the court observed that the special rule can be dislodged as a result of abuse. [1320] The jurisdiction exercised by the courts in England and Wales[1321] to strike out proceedings as an abuse of process is also observed in Ireland[1322] in broader civil litigation, and so Kearns P. also considered *McEvoy v Meath County Council.*[1323] The discretion in that case was exercised in circumstances where the preponderance of factual matters in dispute were decided in favour of the defeated party. The protagonists could have reached agreement on the contents of the

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1311 *Indaver NV v An Bord Pleanála* [2013] IEHC 11 [7].

1312 *Ibid* [17].

1313 Planning and Development Act, 2000, section 50B as inserted by the Planning and Development (Amendment) Act, 2010, section 33.

1314 Case C-427/07 *Commission v Ireland* (16 July 2009).

1315 *Shillelagh Quarries v An Bord Pleanála* [2012] IEHC 402; cited in *Indaver NV v An Bord Pleanála* [2013] IEHC 11 [21].

1316 *Ibid* [19].

1317 Planning and Development Act, 2000, section 50B (4).

1318 *Ibid* [18], *R v Kelly* [2000] QB 198, 208, [1999] 2 All ER 13, 20 (Lord Bingham); *McCallig v An Bord Pleanála v Donegal County Council* [2014] IEHC 354 [46] (Herbert J).

1319 Planning and Development Act, 2000, section 50(B) (3) (b), as amended.

1320 *JC Savage Supermarket Ltd v An Bord Pleanála* [2011] IEHC 488 [4.1] (HC 22 November 2012).

1321 *Noorani v Calver* [2009] EWHC 561 (QB); *Cammish v Hughes* [2012] EWCA Civ 1655 (Arden LJ).

1322 *Gilchrist v Sunday Newspapers Ltd* [2017] IECA 190 (SC 21 June 2017) (Finlay Geoghegan J); *Minister for Justice and Equality v J.A.T (No.2)* [2016] IESC 17.

1323 *Ibid* [23], *McEvoy v Meath County Council* [2003] 1 IR 208, the court ordered the prevailing party to discharge the full cost of the transcript together with half of the costs incurred by the vanquished party.

documentation, and the failure to do so, resulted in the trial being protracted.[1324] In awarding costs against the applicant owing to the manner in which it conducted the case[1325] Kearns P. averred that the section embraces the unnecessary prolongation of proceedings in circumstances where a party no longer harbours a *bona fide* belief that its case could succeed.[1326] The applicant was dilatory in seeking an adjournment when new evidence emerged.[1327] That party also failed to act promptly which resulted in an escalation of legal costs and it no longer had any real intention of continuing with the substantive hearing.[1328] The proceedings constituted an abuse of process from that point onwards.[1329] The President asserted that the applicant could no longer avail of any statutory exemptions from its costs liabilities as its behaviour fell within the ambit of section 50 (B) (3). The loser pays rule dislodged the default positon, namely the special rule. The court made an order for costs in favour of the respondent from the date on which the applicant no longer harboured a *bona fide* belief in its case, which can be characterised as a form of *split costs* order. The case demonstrates that while section 50B offers a costs neutral default position[1330] the statutory positon can be displaced if any of the exceptions contemplated by the Act materialise. The circumstances under which claimants in England and Wales can lose *QOCS* protections are not dissimilar to those which can see a party lose the benefit of the special rule in Ireland. The default position in the latter jurisdiction can be dislodged if the court deems that the claim is vexatious or frivolous, or because of the manner in which a party conducts itself, or where contempt is present.[1331] In '*Indaver NV'* Kearns P. appeared to conflate abuse of process with conduct or at least the former element constituted a sub category of the latter. These conclusions can be discerned from '*Indaver NV'* namely that where the special rule is set as the default mode in certain environmental litigation the judiciary may as a matter of discretion resuscitate costs shifting when it is ripe to do so. The protections afforded by the American rule within statutory frameworks such as S50 (B) are not absolute. They only confer a qualified form of immunisation from cost shifting. The loser pays philosophy will be reactivated in the event of an unmeritorious claims or an abuse of process or where a party no

1324 *Ibid* [23].
1325 *Ibid* [24].
1326 *Ibid* [24].
1327 *Ibid* [25].
1328 *Ibid* [25] – [26]; from 10 September 2012 the continuation of the proceedings was an abuse of the court process and the statutory exemption from liability for costs was no longer operative.
1329 *Bank of Ireland v Kelly* [2018] IESC DET 60 (SC 23 April 2018) (Clarke J); *Farrell v Bank of Ireland* [2015] IESC 71 (SC 30 July 2015) (Denham CJ).
1330 *Ibid* [21].
1331 Environment (Miscellaneous Provision) Act 2011, section 3(3) (a)-(c).

longer holds a *bona fide* belief in the strength of its case. The reactivation of the rule is not unlike how it can be resuscitated in contested probable litigation. This occurs where a party no longer conducts litigation with a *bona fide* concern regarding the execution of the testamentary documents.[1332] The courts enjoy a discretion within both rubrics to reactivate costs shifting, which may even occur on an identifiable date, during the currency of the life cycle of the litigation. Just as the general rule supports costs shifting so too the exceptions should embrace the allocation of costs against parties which do not properly avail of those exceptions as occurred in '*Indaver NV'.* The loser pays rule mandates costs allocation to ensure that successful protagonists recover costs but the rule is neither absolute nor impenetrable. It can be diluted[1333] or suspended and in exceptional circumstances the courts may order the prevailing party to discharge all or a portion of the costs of the vanquished party, as a penalty.[1334] This notably occurs where there is dis-entitling or unmeritorious behaviour. This concept has received the judicial imprimatur of the courts in jurisdictions which observe the Supreme Court of Judicature Act model. It operates irrespective of whether the prevailing party is prosecuting[1335] or defending[1336] the litigation. The loser pay rule engages with costs shifting but it is vulnerable to disengagement. In certain prescribed statutory instances the special rule is installed as the preferred statutory default mode, which is resistant to costs shifting. The loser pays rule is ingloriously substituted by the (special rule) exception which performs a reverse takeover by supplanting the loser pays rule which is relegated to status of an exception. And in this way the rule becomes the exception and *vice versa.*[1337] However such statutory frameworks do not eradicate the loser pays rule entirely. As with any rule neither the loser pays rule nor the special rule are impermeable. In England and Wales *QOCS* protection in personal injuries cases is lost if the court determines that there were no reasonable grounds for bringing the case, or the proceedings represented an abuse of the court's process or for conduct attributable to the claimant.[1338] In the United States of America *Christiansburg Garment v EEOC* is authority for the view that the courts can shift

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1332 *Elliott v Stamp* [2008] 3 IR 11, 34-35; *Reburn deceased* [2012] IEHC [15].

1333 *Fyffes Plc v DCC Plc* [2006] IEHC 32; *Byrns v Davie* [1991] V.R 568; *Gold v Patman & Fotheringham Ltd* [1958] 2 All ER 497.

1334 *Antonelli v Allen* [2001] Lloyd's Report, PN 487.

1335 *Donald Campbell & Co. v Pollak* [1927] AC 732, [1927] All ER 1; *Lamont v Burton* [2007] EWCA Civ 429.

1336 *Ritter v Godfrey* [1920] 2 KB 47; *Garda Representative Association v Minister for Public Expenditure & Reform* [2018] IESC 4.

1337 Just as the loser pays rule cannot guarantee to shift costs so too the special rule cannot offer absolute protections against costs shifting. The special rule contemplates the revival of the loser pays rule where parties do not properly avail of the special rule, which is what occurred in '*Indaver NV'*.

1338 CPR, r. 44.15 (a)-(c).

costs against unsuccessful plaintiffs if the action was frivolous, baseless, or without foundation.[1339] In England and Wales there is jurisdiction to shift costs against a party for abuse of process pursuant to CPR, r. 44.15 (b). The special rule which substitutes for the loser pays rule is in turn be substituted by that primary rule if it is revived. There are neither absolute rules nor absolute exceptions. As Lord Lloyd pointedly noted the fundamental rule in relation to costs is that there are no rules as costs are always discretionary.[1340]

5.9 A certain measure of substance

The first case in Ireland where the High Court granted a protective costs order occurred in *Hunter v Nurendale Limited (T/A Panda Waste)*.[1341] The respondent was operating a commercial waste facility just seventy metres from the applicant's home where she resided with her family. The applicant alleged that the waste facility being operated by the respondents, on those lands near her home, was not being conducted in compliance with the terms of the grant of planning permission nor the waste licence. It was also alleged that unauthorised development had been carried out. The applicant, who was of limited financial means, objected to the: intensification of the use of the waste facility; existence of odiferous municipal waste; noise levels; operational times; lights at night, all of which went to the very core of her ability to lead a normal family life. Hedigan J. observed that for the court to grant a protective costs order the applicant would be required to advance a case that has a *certain measure of substance* to it. Though this need not be tantamount to establishing a probability of success,[1342] Hedigan J. proposed that there must be at least a good chance of success in

1339 *Christiansburg Garment v EEOC* 434 U.S 412, 422 – 24 (1978).

1340 *Bolton v Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176, 1178F.

1341 *Hunter v Nurendale Limited (T/A Panda Waste)* [2013] IEHC 430; Ibid, Alcock, *Costs follow the event v Costs to follow event,* p 11.

1342 An applicant making an application seeking a declaration under section 7 of the Environment (Miscellaneous Provisions) Act, 2011 must advance more than "mere assertions" of damage or likely damage to the environment; *O'Connor v County County of the County of Offaly* [2017] IEHC 606 [63] (Baker J); citing *Aer Rianta c.p.t v Ryanair Limited* [2001] IESC 94 (Hardiman J), affidavit evidence must have "some reasonable foundation" *National Asset Loan Management Limited v Barden* [2013] IEHC; [2013] 2 IR 28 (Charleton J).

terms of the substantive case.[1343] The High Court concluded that the applicant satisfied the requirements for the granting such an order by establishing that she had a reasonable prospect of success.[1344] It was also satisfied that the Environment (Miscellaneous Provisions) Act, 2011 applied.[1345] In granting the order, the court observed that the costs would be of a very high level that the applicant would be unlikely to meet without very serious and prejudicial financial consequences. Hedigan J. proceeded to sketch out some practical guidance for parties who are minded to seek costs protection, which includes tendering a financial statement, and addressing the basis for the party's belief that it has a reasonable prospect of success, together with details of any conditional fee agreements on costs which it may have entered in to with any legal advisers.[1346] In *McCoy v Shillelagh Quarries Ltd* [1347] the Court of Appeal endorsed this helpful guidance. It refrained from criticising the applicant's failure to address its financial situation and lack of details of any conditional fee arrangements,[1348] when the applicant's status was indisputable.[1349] It also affirmed the order granted.[1350]

1343 *Hunter v Nurendale Limited (T/A Panda Waste)* [2013] IEHC 430 [14].

1344 The *reasonable prospect of success* test was adopted in *McCoy v Shillelagh Quarries Limited* [2014] IEHC 511 [20] – [21], "The proceedings must be substantive and have a certain measure of substance and there must be a reasonable prospect of success."

1345 *Hunter v Nurendale Limited (T/A Panda Waste)* [2013] IEHC 430 [15].

1346 "(a) The proceedings should be brought by motion on notice supported by an affidavit of the applicant which should set out firstly what broadly the expenses involved in such an application would be;(b) secondly, the applicant should set out a broad statement of the claimant's financial situation;(c) thirdly, the applicant should set out the reasons why he believes that there is a reasonable prospect of success,(d) fourthly, the applicant should set out clearly what is at stake for the claimant and for the protection of the environment;(e) fifthly, the applicant should deal with any possible claim of frivolous proceedings, should that arise; and (f) finally, the applicant should deal with the existence of any possible legal aid scheme or any contingency arrangement in relation to costs that may have been made with their solicitors"; *Hunter v Nurendale Limited (T/A Panda Waste)* [2013] IEHC 430 [16].

1347 *McCoy v Shillelagh Quarries Ltd* [2015] IECA 28 (Hogan J).

1348 *Ibid* [40] - [44].

1349 *Ibid* [48].

1350 *McCoy v Shillelagh Quarries Ltd* [2014] IEHC 511 (Baker J).

5.10 Fashioning a cost agreement

It is open to the parties to fashion an appropriate cost agreement. This can obviate the need of the court to make a formal protective costs order. In *Swords v Minister for Communications, Energy and Natural Resources*[1351] the plaintiff issued plenary proceedings seeking a number of declarations against the defendants including declarations that they had acted in contravention of the Aarhus Convention[1352] The plaintiff sought a protective costs order pursuant to the inherent jurisdiction of the court, or alternatively, an order under section 7 of the Environment (Miscellaneous Provisions) Act, 2011 that section 3 of that Act applied. The defendants issued a letter to the plaintiff who included an unequivocal concession that section 50B of the Planning and Development Act, 2000 applied. Keane J. noted the express unequivocal acceptance on the part of the defendants who concurred that section 50B of the 2000 Act and sections 3 and 7 of the 2011 Act were operative. The court deemed that the state must be taken as having agreed that it would not seek its costs.[1353] The court declined to make a protective costs order on the grounds that it would be superfluous to do so.[1354]

5.11 Dichotomy of costs regimes

Proceedings may be brought which raise multiple issues only some of which may enjoy the benefit of costs protection in which case the court may elect to render a split order for costs, where the issues fall under different costs regimes. In *McCallig v An Bord Pleanála*[1355] the applicant enjoyed some success in judicial review proceedings, but not to the full extent of the case which was pleaded. Herbert J. decided that given the separate and discrete issues generated by the claim that costs ought to be broken down and awarded on an issues basis rather than on some form of overall effective success basis, which is often denoted as the

1351 The proceedings arose from the State's National Renewable Energy Action Plan ("NREAP") which sets out state policy for achieving binding renewable energy targets by 2020, as mandated by Directive 2009/28/EC.

1352 Articles 6 and 7 of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental matters ("Aarhus Convention" 25 June 1998); *Swords v Minister for Communications, Energy and Natural Resources* [2016] IEHC 503 [4] (HC, 12 August 2016).

1353 *Ibid* [93].

1354 *Ibid* [94].

1355 *McCallig v An Bord Pleanála* [2014] IEHC 354.

winner takes all approach.[1356] The court isolated five issues, three of which related to planning and development, and the balance, comprised of two environmental impact assessment issues, which stemmed from the same planning matter. The respondent unsuccessfully contended that section 50B should apply to all of the issues. Herbert J. awarded the prevailing applicant the costs of the three matters on which she succeeded but directed that the parties should bear their own costs on the matters that were germane to the environmental impact assessment issues, as the applicant, who did not prevail in those matters, nonetheless enjoyed a statutory protection from costs.

5.12 Aarhus compliance

The Aarhus Convention does not prohibit costs shifting, though it provides that costs must not be prohibitively expensive. Setting at neutral the loser pays rule delivers a costs regime which Aarhus compliant. The *special rule* which was introduced by way of the Planning and Development Act, 2000, and the Environment (Miscellaneous Provisions) Act, 2011 broadly mirrors statutory developments in the United States from the 1960s onwards, when the Federal and state legislatures enacted plaintiff friendly statutes, which permitted successful plaintiffs to recover their costs, but which precluded successful defendants from recovering theirs, in what represented a form of qualified one way fee shifting, which ensures that the gates of the court remain open to the citizenry. The laws were intended to underpin social reforms by encouraging litigation in public interest matters, such as civil rights[1357] and the environment, and they increased access to justice.[1358] Such qualified fee shifting supports a form of private attorney general doctrine. In the United States of America, the cases of '*Piggie Park*'[1359] and '*Christiansburg Garments*'[1360] are declaratory for the proposition that unsuccessful plaintiffs will almost never face costs consequences, unless vexation can be proved, which almost never occurs. The courts in Ireland may in certain forms of

1356 *McCalligh v An Bord Pleanála* [2014] IEHC 354 [1].

1357 Australian Law Reform Commission, ALRC 75, *"Costs Shifting who pays for litigation",* 31 August 1995, Appendix C, p 116; Civil Rights Attorneys Fees Awards 42 USCA 1988 (1982); Equal Access to Justice 28 USCA 2412 (1988).

1358 Gerard Walpin, *American's Failing Civil Justice System; Can we learn from other Countries*, 41 N.Y.L Sch L. Rev., p 647 at 657 (1996-1997).

1359 *Newman v Piggie Park Entertainment, Inc., 390* U.S. 390 U.S. 402 (1968).

1360 *Christiansburg Garments v EEOC* 434 U.S. 412 (1978) 434 U.S. 415-422.

environmental litigation, shift costs on to unsuccessful plaintiffs, as a result of their conduct. This is evidenced by *'Indaver NV'* where penal costs shifting was imposed.[1361] The courts in Ireland retain a discretion to award costs in cases of exceptional public importance where the special circumstances of the case require that they do so in the interests of justice. [1362]

5.13 Conclusion

[1361] *Indaver NV v An Bord Pleanála* [2013] IEHC 11; Planning and Development Act, 2000, section 50B (3) (b) as inserted by section 33 of the Planning and Development (Amendment), Act 2010.

[1362] Planning and Development Act, 2000, section 50B (4) as inserted by section 33 of the Planning and Development (Amendment), Act 2010.

Chapter 5 examines the genesis of the jurisprudence underpinning advance costs orders. It considers the guiding principles for granting protective costs orders and the leading judgments as enunciated in '*Child Poverty Action Group', 'Village Residents Association'*, '*Corner House Research'*, '*Friends of the Curragh',* and *Browne v Fingal County Council*. Additionally it examines the special legislative measures which were enacted in Ireland[1363] to ensure that costs in certain environmental litigation are not prohibitively expensive. To this end, the chapter investigates the meaning of the nomenclature prohibitively expensive, which does not preclude fee shifting. It analyses the jurisprudence that requires a party to have a *bona fide belief* in the prospects of its success when seeking to avail of the protective costs jurisdiction. The chapter considers those cases in which the courts in England and Wales and Ireland have granted protective costs orders, and the conditions or stipulations that have been attached to them. It also considers the case of *Indaver NV v An Bord Pleanála* where the applicant lost the benefit of the special rule owing to the manner in which it conducted the litigation thereby demonstrating that protection against fee shifting can never be absolute.

CHAPTER 6

6.1 Introduction

The chapter examines the salient provisions of both the Civil Procedure Rules and the Legal Services Regulation Act 2015 [1364] as they pertain to costs. The Act mirrors the provisions in the CPR by enabling the judiciary to award costs against parties, even all conquering ones, when factoring the totality of the litigation in to the equation. Those factors which the courts

1363 Planning and Development Act, 2000; Environment (Miscellaneous Provisions) Act, 2011.
1364 Legal Services Regulation Act 2015 section 169 (1).

may consider include *conduct before and during the proceedings*, payments in to court[1365] and Calderbank offers[1366] or tenders.[1367] They also include where the parties unreasonably rebuff invitations to mediation.[1368] The courts in Ireland now have a statutory mandate,[1369] like the judiciary in England and Wales, to penalise successful parties[1370] which exaggerate their claims.[1371] The chapter also examines the flawed architecture of Part 36 of the Civil Procedure Rules and it considers how the courts in Ireland apply costs rules in the absence of any comparable structure. In this regard it considers how the courts in Ireland give effect to *without prejudice* offers and why the 2015 Act did not embrace a regime which is comparable to Part 36. In so doing it provides reasons why the legislature in Ireland elected not to establish a comparable mechanism in lieu of allowing the law to develop incrementally. The chapter also engages with the final subsidiary question that asks *can the primary rule survive the enactment of the Legal Services Regulation Act 2015* and it considers whether the loser pays rule has been rendered *moribundis*. It also addresses the main research question which asks *has the costs follow the event rule become a relic?* The answer to which has universal implications which transcend the jurisdictions of England & Wales and Ireland.

1365 *Ibid*, section 169 (1) (e).

1366 CPR, r. 36.23(4) " for the purpose of rule 36.20, a claimant fails to better a Part 36 payment if it fails to obtain judgment for more than the gross sum specified in the Part 36 payment notice"; Practice direction for Part 36, paragraph 10.5; " In establishing at trial whether a claimant has bettered or obtained a judgment more advantageous than a Part 36 payment to which this paragraph relates the Court will base its decision on the gross sum specified in the Part 36 payment notice."

1367 *Ibid*, section 169 (1) (f).

1368 *Ibid*, section 169 (1) (g) provides "whether 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 mediation."

1369 Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No.2) Order 2019 (SI 502/2019) brought sections 168 and 169 in to force with effect from 7th October 2019.

1370 *Molloy v Shell UK Ltd* [2001] ADR. L.R. 07/06; *Painting v University of Oxford* [2005] EWCA Civ 61.

1371 *Ibid*, section 169 (1) (d).

6.2 Costs to follow event

The Supreme Court of Judicature Act (Ireland) 1877 provided that *costs shall follow the event* and Order 99 rules (3) and (4) of the Rules of the Superior Courts until recently[1372] observed the geomorphology of the expression *follow the event*.[1373] The header of section 169 of the Legal Services Regulation Act 2015 provides for *costs to follow event*. The absence of the word *the* could be seized upon as confirmation of a legislative dilution of the *costs follow the event* rule, not least because it deprives the rule of its specificity and definite effect. Section 169 provides that the prevailing party is entitled to receive an award of costs unless the court is minded to make a different order. The court may be disposed to do so when factoring in to account the nature and circumstances, which includes the conduct of the parties. Conduct is afforded a broad meaning, and it may embrace circumstances where a party made a payment in to court[1374] or an offer to settle the cause of action.[1375] The statutory default mirrors the operative provisions in the Civil Procedure Rules which acknowledge that the losing party will be ordered to meet the costs of the successful one.[1376] Those rules mandate the judiciary to take cognisance of all of the circumstances of the case including any conduct,[1377] which may include a payment in to court, or offers to settle.[1378] On a subjective analysis if it was the intention of the legislature in Ireland to jettison the pure costs follow the event rule then the disappearance of the word *the* reaffirms such a legislative intent. The disappearance may be confirmation of a preference for tailoring costs orders which reflect the relative successes and failures of the parties. This is particularly so in complex modern litigation (including

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1372 SI 584/2019 – Rules of the Superior Courts (Costs) 2019 which was signed by the Minister for Justice and Equality on 20 November 2019 and came in to force on 3 December 2019 expunged Ord. 99 r. (3) and (4).

1373 Ord. 99 r. (3) provided "The costs of every action, question, or issue tried by a jury shall follow the event unless, the Court, for special cause, to be mentioned in the order, shall otherwise order."; Ord. 99 rule (4) provided that "The costs of every issue of fact or law raised upon a claim or counterclaim, shall unless otherwise directed, follow the event"; as amended by SI 584/2019.

1374 Legal Services Regulation Act 2015 section 169 (1) (e).

1375 *Ibid*, section 169 (1) (f).

1376 CPR, r. 44.3 (2) (a) "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party."

1377 *Ibid*, r. 44.3 (4) (a) "in deciding what orders to make about costs, the court must have regard to all the circumstances" including the conduct of the parties.

1378 *Ibid*, r. 44.3 (4) provides that in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including – (c) any payment in to court or admissible offer to settle made by a party which is draw to the court's attention" (and which is not a part 36 offer).

business, commercial, mercantile, and intellectual property) which is characterised by a greater judicial propensity to apportion costs, or even to make an award of costs based on the success in one or more of the steps, phases, or modules.[1379] This may also occur where a party achieves only a limited success in any one elements of the case.[1380] The judiciary may take cognisance of myriad variables under section 169 (1) (a)-(g) including the conduct and behaviour of the parties both before and during the currency of litigation, the reasonableness of raising, contesting or pursuing points, and the manner in which a party conducted litigation and exaggeration.[1381] The Civil Procedure Rules elucidate the factors to be taken in to account for the purpose of exercising such judicial discretion.[1382] Rule 44.3(2) (a) retains the loser pays rule[1383] and the position is mirrored in Ireland in section 169 of the Legal Services Regulation Act, 2015. The Civil Procedure Rules identify factors which the courts may consider for the purpose of deciding what costs order to fashion, having regard to all the circumstances of the case,[1384] including the conduct of the parties.[1385] This embraces conduct before as well as during proceedings.[1386] It may include payment in to court or an admissible offer which is drawn to the court's attention.[1387] The court may also consider whether a claimant who succeeded in whole or in part is guilty of exaggeration.[1388] Section 169 enacts strikingly similar provisions to those contained in the CPR.[1389] The Act also requires the judiciary in Ireland to take cognisance of various factors including conduct before and during the proceedings,[1390] and whether a party made a payment in to court[1391] or an offer to settle,[1392] and whether the prevailing party has exaggerated its claim.[1393] Statutory Instrument No. 584/2019 – Rules of the Superior Courts (Costs) 2019 which came in to force on 3rd December 2019 amended Order 99 in the manner set out in Schedule 1, Part II of that secondary legislation. The amended Order 99 now provides that costs will in the discretion

1379 Legal Services Regulation Act 2015 section 168 (2) (a) and (c).
1380 *Ibid*, section 168 (2) (d).
1381 *Ibid*, section 169 (1) (a) (b) (c) (e).
1382 Amended by the Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435).
1383 CPR, r. 44.3 (2).
1384 *Ibid*, r. 44.3(4).
1385 *Ibid*, r. 44.3(4) (a).
1386 *Ibid*, r. 44.3 (5) (a).
1387 *Ibid*, r. 44.3(4) (c).
1388 *Ibid*, r. 44.3(5) (d).
1389 The CPR require the court to have regard to "the particular nature and circumstances of the case, and the conduct of the proceedings by the parties."
1390 Legal Services Regulation Act, 2015, section 169 (1) (a).
1391 *Ibid*, section 169 (1) (e).
1392 *Ibid*, section 169 (1) (f).
1393 *Ibid*, section 169 (1) (d).

of the Superior Courts [1394] and the newly amended rules state that in considering the awarding of costs, in any action, or appeal, the courts will consider section 169 (1) of the 2015 Act.[1395] The prevailing parties' presumptive entitlement to costs previously found in Order 99 r.1 (4) has been expunged but the courts will continue to exercise their discretion for the purpose of determining by whom, what, how, and when costs are to be allocated.

6.3 Part 36 and the costs rules in Ireland

Public and private interests are optimally served when disputes are expeditiously compromised[1396] in order to satisfy the stated public policy objective of settling cases. [1397]/[1398] Two modes emerged for compromising litigation namely offers and payments in to court but they were only available to the defending parties. These devices exerted pressure on plaintiffs who would be compelled to discharge the costs of the defending party if they failed to secure an award which was superior to the pecuniary sum offered or paid in to court.[1399] The practice permitting the payment of monies emerged during the tenure of Kelynge LCJ[1400] when the courts also considered offers.[1401]The practice of paying has existed since time immemorial[1402] and the tender before action[1403] became ubiquitous during the seventeenth century.[1404] Part 36 was constructed to provide a matrix for making and accepting offers with predetermined costs consequences[1405] and Part 36 requires to be surveyed as a component in a broader vista which includes alternative dispute resolution and settlements. [1406] Part 36 suffered from a dual personality.[1407]While it provides a matrix with incentives, the rules can alienate even

1394 Ord. 99 r. 2 (1).
1395 Ord. 99 r. 3 (1).
1396 *South Eastern Sydney Area Health Service v King* [2006] NSWCA 2, 23.
1397 *Ely v Dargan* [1967] IR 89 (O'Dalaigh CJ); Stuart Sime, *Offers to Settle: incentive, coercion, clarity, Civil Justice, Special Issue: The Implementation of Sir Rupert Jackson's Review of Civil Litigation Costs,* Vol 32, Issue 2, 2013 p 182.
1398 *Carver v BAA Plc* [2008] EWCA Civ 412 [31].
1399 *Ibid*, Sime, p 182.
1400 1665 to 1671.
1401 RSC, Ord. 99 r. 1 A (1)-(2) as inserted by SI 12/2008.
1402 *Larkin v Whitony* [2002] IESC 49 (SC, 19 June 2002) (Geoghegan J).
1403 *The Mona* [1894] 265, 268; *Davys v Richardson* [1888] 221 (QB) 202, 205.
1404 *Hartley v Bateson* BRH 27 G3 IT R 627; the practice required the defendant to pay costs up to the date of payment. Plaintiffs who refused payments were exposed to considerable risks if their award failed to surpass the sum paid in to court.
1405 *Ibid*, Sime, p 182.
1406 *Ibid*, Sime, p 182.
1407 *Ibid*, Sime, at 183.

sophisticated parties. The proposition that it is unduly technical is underpinned by the burgeoning reservoir of cases.[1408] Prior to the introduction of Part 36 Order 99 offered a mechanism for defendants to pay monies in to court accompanied by any adverse costs consequences for non-acceptance. [1409] The mechanism which was only available to defendants required an actual payment. The pre-Part 36 process had no mechanisms for hybrid or non-monetary claims.[1410] The lack of provision gave rise to the Calderbank letter of offer[1411] which is expressed[1412] to be without prejudice save as to costs. For public policy reasons[1413] the courts historically refused to consider without prejudice offers and Sir Robert Megarry VC. observed that they can only be relied upon where the parties fail to reach a compromise and the parties consent.[1414] Under Part 36 the protagonists may deliver a Part 36 offer[1415] to settle the whole or part of any action counterclaim or appeal.[1416] Part 36 was designed to facilitate compromise. It is open to the parties to make or rebuff offers but an offeree which rebukes[1417] an offer assumes the heightened risk of attracting adverse costs consequences,[1418] if that party fails to achieve an award [1419] which is more advantageous than the sum offered.[1420] The judiciary can specify the date[1421] when the offer is deemed operative[1422] and offerees can seek judicial clarity.[1423] Part 36 does not dislodge the presumptive default [1424] regarding costs namely that they follow the event[1425] except where it is apt to order otherwise.[1426] The courts retain a broad discretion[1427] and they ordinarily

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1408 *Ibid*, Sime, at 183.
1409 *Ibid*, Sime, at 183.
1410 *Ibid*, Sime, at 183.
1411 *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 WLR 586.
1412 RSC Ord. 22, r. 14; *Ibid*, *Sime* at 183.
1413 *Walker v Wilsher* [1889] 23 QB D 335; *Stotesbury v Turner* [1943] KB 370.
1414 *Computer Machinery Co. Ltd v Drescher* [1983] 3 All ER 153; [1983] 1 WLR 1379; *Cutts v Head* [1984] Ch 290, 311, [1984] 1 All ER 597, [1984] 2 WLR 349.
1415 CPR, r.11 (1) "A part 36 offer is accepted by serving written notice of acceptance on the offeror."
1416 CPR, rr. 20.2, 20.3; the rules apply to claimants or defendants instigating or defending an additional claim.
1417 CPR, r.36.11 (1); Part 36 offers are accepted by serving the correct notice.
1418 CPR, r.36. 17 (1) (a); there are negative costs consequences for a claim who fails to obtain a judgment in monetary terms which is more advantageous to the Part 36 offer.
1419 CPR, r.36. 12 (c); such offers are not communicated to the trial judge before the judgment.
1420 CPR, r. 36.9.
1421 CPR, r.36.13; where an offer is accepted within the relevant time the claimant will be entitled to the costs of the action up to the date on which the notice of acceptance was served.
1422 CPR, r. 36.8 (3).
1423 CPR, r. 36.8 (1).
1424 CPR, r. 44 (3) (1).
1425 CPR, r. 44.2 (2) (a); "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party .."
1426 *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 (Lord Woolf MR); *BritNed Development v ABB AB* [2018] EWHC 3142 (Ch) (Smith J) (HC, 14 November 2018).
1427 *Ibid, 'BritNed Development'.*

implement the loser pays rule.[1428] Part 36 was not intended to be a "stab in the dark" [1429] and it was intended to confer a high degree of certainty.[1430] It provides a structure for offers rather than actual payments as initially envisaged by Lord Woolf.[1431] His initial preference for Calderbank offers rather than lodgements[1432] went unimplemented when the legal profession interjected, [1433]and his conversion to Part 36 was somewhat belated.[1434] Waller LJ. expounded the virtues of that process when he noted that written offers cannot enjoy precise equivalence.[1435] Part 36 offers are without prejudice save as to costs[1436] but they do not preclude Calderbank offers which fall outside of the scope of that part, [1437] as Part 36 does not impose a free standing architecture.[1438] Waller LJ. averred that Part 36 offers are analogous to payments in to court and they enjoy that status[1439] but without prejudice offers enjoy no such parity.[1440] The first manifestation of Part 36 [1441] included pure Part 36 payments which required the actual lodging of money and the issuance of a formal letter which the offeree had 21 days to accept.[1442]The CPR stipulate the ingredients for a valid offer[1443] which in personal injuries actions must contain particular details.[1444] It included included the more traditional Calderbank type letter which was apt for utilisation in non-pecuniary type claims.[1445] It also included hybrid claims where defendants could offer to compromise both the monetary and non-monetary limbs of the action and it permitted

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1428 *Ibid*, '*BritNed Development'* [2] – [25]; it would be unfair to saddle the defendant with the costs as the plaintiff recovered less than 10% of the £135 million which it sought. The overall justice of the case produced no order as to costs.

1429 *Global Assets Advisory Services Ltd v Grandlane Development Ltd* [2019] EWCA Civ 1764 [24] (CA, 23 October 2019) (Asplin LJ) (Patten LJ concurring); *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions* (UK) Ltd [2009] EWHC 274 (TCC) (Coulson J).

1430 *Ibid*, '*BritNed Development'* [3].

1431 *Ibid*, Cortés, p 3; *Access to Justice: Interim Report to the Lord Chancellor on the Civil System in England and Wales*, Ch.2, para 27.

1432 *Crouch v King's Health Care NHS Trust* [2004] EWCA Civ 1332 [34] – [36] (CA, 15 October 2004) (Waller LJ); what used to be termed a Calderbank offer could produce the same result as a payment in to court.

1433 *Ibid*, '*Crouch'* [37].

1434 *Ibid*, *'Crouch'* [36]; the payment being secondary and optional; *Stokes Pension Fund v Western Power Distribution (South West) Plc* [2005] EWCA Civ 854 [15] (Dyson J).

1435 *Ibid*, *'Crouch'* [30] (Mance LJ concurring).

1436 CPR, r.36.16 (1).

1437 CPR, r. 44.3 (4) (c).

1438 *Ibid, 'Global Assets Advisory Services'* [2019] EWCA Civ 1764 [32].

1439 *Ibid*, *Crouch* [45].

1440 *Ibid*, *Crouch* [30].

1441 From 1999 – 2007.

1442 *Ibid*, Sime, at 184.

1443 CPR, r.36.5; it must be in writing and make it clear that it is made pursuant to that part and specify a period of not less than 21 days within which the other party will be liable for the costs of the offeror; Pablo Cortés, *An Analysis of Offers to Settle in Common law Courts: Are They Relevant in the Civil Law Context?*, vol. 13.3, Electronic Journal of Comparative Law (September 2009).

1444 CPR, r.36. 18 (personal injury claims for financial loss).

1445 The letters were headed without prejudice save as to costs; CPR r.36.10 and r.36.5.

claimants to make a Part 36 offer which assumed some of the vestiges of the Calderbank device. [1446] A Calderbank offer made without prejudice save as to costs can be brought to the attention of the court for the purpose of determining costs.[1447] In *Lindner Ceilings Floors Partitions Plc v How Engineering Ltd* Seymour J. reflected on the centuries old public policy consideration underpinning the Civil Procedure Rules which seeks to encourage the compromise of disputes.[1448]/[1449] The Part 36 process was overhauled in 2007 after confidence ebbed away on foot of a number of judicial pronouncements.[1450] The Court of Appeal observed[1451] that in *Stokes Pension Fund v Western Power Distribution* the defending body did not require to lodge monies.[1452] Dyson LJ. observed that in '*The Maersk Colombo'*[1453] the plaintiff ought to have accepted the offer which exceeded the award and the court asserted that if it had been accepted then it would have been honoured.[1454] The Court of Appeal asserted that Part 36 did not require a real payment in to court[1455] and the defendant in that action like in '*Crouch'* was adjudged "to be good for the money."[1456] *'Crouch'* was authority for the proposition that it was permissible for the defendant to make an offer without any concomitant payment in to court, notwithstanding, that the cause of action was one for monies in the pure sense.[1457] The remodelled or second phase of Part 36[1458] extinguished the requirement for any actual payments in to court as a method for making a formal offer to settle.[1459] The new regime opened the making of such offers to all parties, irrespective of whether the cause of action was monetary or hybrid in character, and defendants enjoyed the

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1446 *Ibid*, Sime, at 184.

1447 *Calderbank v Calderbank* [1975] 3 All ER 333; *Computer Machinery v Dreschner* [1983] 3 All ER 153; *McDonnell v McDonnell* [1977] 1 All ER 766; *Cutts v Head* [1984] 2 W.L.R 349, 363 (365).

1448 *Lindner Ceilings Floors Partitions Plc v How Engineering Services Limited* [2000] EWHC (T&CC) 46 [12], " In my judgment, a major public policy interest underlying the Civil Procedure Rules is the encouragement of the settlement of disputes by agreement. It does not seem to me that this is a recently discovered public policy interest, but rather one which has always lain close to the heart of the system of civil justice in this country."

1449 In 1997 the respondent made an offer for £800,000 plus £20,000 interest in addition to value added tax. And there was a good prospect of the plaintiff being awarded costs; *Lindner* received an award of just £493,203.74 which was less than the sum offered - which in the view of the court ought to have been accepted.

1450 *Ibid*, Sime, at 185.

1451 *Ibid, 'Crouch'.*

1452 *Stokes Pension Fund v Western Power Distribution (South West) Plc* [2005] EWCA Civ 854 [15] (Dyson LJ) (Auld LJ concurring), [2005] 3 All ER 775.

1453 *Southampton Container Terminals Ltd v Schiffahrisgesellsch* "Hansa Australia" ("*The Maersk Colombo"*) [2001] EWCA Civ 717, [2001] 2 Lloyd´s Rep 275.

1454 *Ibid*, '*Stokes Pension Fund'* [20]; the defendant made an offer without prejudice save as to costs which was not accepted. Later the equivalent sum was lodged. The plaintiff failed to beat the sum offered.

1455 Clarke, Thorpe LJJ and Holland J; citing *Amber v Stacey* [2001] 2 All ER 88.

1456 *Ibid*, Cortés, p 2.

1457 *Ibid*, Sime, p 182 at 185.

1458 2007 – 2013.

1459 *Ibid*, Sime, at 185; Payments survived in an abridged form in the case of a tender before claim as found in Part 37.

presumption that they would be entitled to recover their costs if the claimant failed to better their offer.[1460] *Carver v BAA plc* introduced consternation when the court held that securing a more favourable judgment could be accorded a broad interpretation and so the issue as to whether the claimant obtained a judgment which *failed to better* the offer became less of a straightforward objective mathematical assessment and more of a subjective argument.[1461] *'Carver'* paved the way[1462] for arguments as to whether an award which exceeds the Part 36 offer by a negligible margin may not be more advantageous when all other factors are factored in to the equation.[1463] The decision introduced systemic uncertainty rendering it almost impossible for legal professionals to confer authoritative advice on the process.[1464] The CPR rules which were amended with effect from 2011 onwards are now declarative on the point, and so where an offer is made, the award will be deemed "more advantageous" if it exceeds the offer in monetary terms, even if the amount is *de minimus.*[1465] The Part 36 process is akin to a patient with dormant malaria who will never be fully cured. In *Finnegan v Spiers* the Court of Appeal boldly reversed the decision of the High Court which held that Part 36 provided a complete code.[1466] There is a persistent friction between Parts 36 and 44[1467] which need to be read harmoniously in a teleological fashion.[1468] Offers falling within the latter[1469] can be factored in to consideration[1470] for determining costs[1471] unless they are disingenuous.[1472] The court can order an interim payment of costs [1473] when a Part 36 offer is accepted and the offeree secures costs up to the date of notice of acceptance.[1474] The third phase of Part 36 which became operative from 2013 consequential to the Jackson reforms,[1475]

1460 CPR, r. 36.3(1) (c).

1461 *Carver v BAA plc* [2008] Civ 412, [2009] 1 WLR 113; the decision in 'Carver' remains binding authority with regard to the Part 36 regime from 2007 to 2011; *Ibid, Sime,* p 182 at 187.

1462 *Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2010] 1 WLR 2081.

1463 *Ibid,* Sime, at 187.

1464 *Ibid,* Sime, at 187.

1465 CPR, r.36. 14(1 A).

1466 *JP Finnegan v Spiers (T/A Frank Spiers Licensed Conveyancers)* [2018] EWHC 3064 (Ch) [11] (Birss J).

1467 *Ibid*, '*Global Assets Advisory Services'* [33]; *Lowin v W Portsmouth & Co. Ltd* [2017] EWCA Civ 2712, [2018] 1 WLR 1890, [2018] 2 All ER 896; *Broadhurst v Tan* [2016] 1 WLR 1928; *Soloman v Cromwell Group Plc* [2012] 1 WLR 1048; *Hislop v Perde* [2019] 1 WLR 201.

1468 *Ibid, 'Crouch'* [36].

1469 CPR, r.44.2 requires the court to consider an offer to settle which does not have the ramifications for costs set out in Part 36 when addressing the question of costs.

1470 *Ibid*, '*Crouch'* [41].

1471 *Ibid*, '*Crouch'* [42].

1472 *Ibid*, '*Crouch'* [42].

1473 CPR, r. 44.2(8); '*Global Assets and Advisory Services'* [1] – [6] (Asplin LJ) overruling *JP Finnegan v Spiers (T/A Frank Spiers Licensed Conveyancers)* [2018] EWHC 3064 (Ch) [1] – [4] (Birss J); *Lahey v Pirelli Tyres* [2007] EWCA 91.

1474 CPR, r.36.13 (1).

1475 *Ibid*, Sime, at 186.

adheres to the same matrix as the second with some modifications inspired by the *Jackson Report*.[1476] The term "more advantageous" has been narrowly defined[1477] and there is a boon for successful claimants who made an offer as they can now secure an additional ten percent of their claim for damages.[1478] The changes in relation to the costs consequences of accepting such offers at the pre-litigation stage were also altered[1479] and there is a new penalty targeted at encouraging settlement which requires defendants to pay an additional sum, [1480] if such parties rebuff an offer, and then fail to achieve an award which is equally advantageous.[1481] The Legal Services Regulation Act 2015 in Ireland did not introduce any analogous equivalent to Part 36. The courts in Ireland apply a pragmatic approach giving their imprimatur to offers which are made without prejudice save as to costs.[1482] In England and Wales the Calderbank device[1483] which took its name from the eponymous family law case of *Calderbank v Calderbank*[1484] gradually saturated the spectrum of civil litigation and it was accorded judicial recognition in Ireland in 1992[1485] and in 2008 it was introduced by way of secondary legislation.[1486] The High Court in Ireland echoed[1487] the view in Australia[1488] that the objective of the device is the settlement of disputes.[1489] It is designed to promote the

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1476 Lord Justice Jackson Final Report Reforms, *Review of Civil Litigation Costs: Final Report* (The Stationery Office) December 2009, TSO, ISBN 9780117064041; The Jackson reforms have no application in Ireland.

1477 CPR, r.36.14 (1A); meaning superior in monetary terms by any amount, however, small.

1478 CPR, r.36. 14(3).

1479 CPR, r.44.9 (2).

1480 The additional penalty is calculated as ten per cent of the award of damages and the same percentage for non-monetary claims. There is a cap on the monetary sanction.

1481 Peter Hurst; *The new Costs Rules and Practice Directions, Civil Justice, Special Issue: The Implementation of Sir Rupert Jackson's Review of Civil Litigation Costs,* Vol 32, Issue 2, 2013 p 153 at 164; CPR, r.36.14 (3) (a)-(d) including costs on an indemnity basis from the date on which the relevant period expired and interest; Offers to Settle in Civil Proceedings Order 2013, SI No 2013/2019; CPR r.35.14 (3) (d).

1482 *Geraghty and Gilmore v Galway County Council* [2011] IEHC 447 [5] (HC, 30 November 2011) (Murphy J); The Calderbank letter of offer is intended to possess all of the characteristics of a pure without prejudice offer enabling it to be invoked; citing *Foskett: The Law and Practice of Compromise* (5th Ed. 2002) para 26-05.

1483 The development of the device was not confined to matrimonial cases and had a history in Admiralty actions.

1484 *Calderbank v Calderbank* [1975] 3 All ER 333, 342 (Cairns LJ); *Calderbank v Calderbank* [1976] Fam. Law 93; *Computer Machinery Co Ltd v Drescher* [1983] 3 All ER 153, 156 (Megarry VC)*; Cutts v Head* [1984] 1 All ER 597, 601-602 (Oliver L.J).

1485 *O'Neill v Ryanair (No.3)* [1992] 1 IR 166; considered in *Murnaghan v Markland Holdings Ltd* [2004] IEHC 406.

1486 SI 12/2008 – Rules of the Superior Courts (Costs) 2008.

1487 *Ibid*, *Geraghty and Gilmore v Galway County Council*.

1488 *Messiter v Hutchinson* [1987] 10 NSWLR 525, 528 (Rogers J); in Australia the rejection of a reasonable offer can result in an award of indemnity costs; *Leichhardt Municipal Council v Green* [2004] NSWCA 341 (Santow JA); *Bishop v State of New South Wales* (SCNSW, 17 November 2000) (Dunford J).

1489 *Ibid*, *Geraghty and Gilmore v Galway County Council* [5]; parties are aware that adverse costs consequences may arise following the rejection of a reasonable offer as it is germane to conduct.

compromise of proceedings in the public interest by the prompt disposal of litigation.[1490] The Legal Services Regulation Act 2015 provides further statutory recognition for the Calderbank letter but it resists any attempt at prescribing the valid ingredients or elements for such an offer[1491] and the common law has refrained from stipulating the necessary components.[1492] The Calderank offer was acknowledged in *O'Neill v Ryanair (No.3)*[1493] and cited in *Murnaghan v Markland Holdings Limited.*[1494] In order to be valid an offer made without prejudice save as to costs must address itself to the costs consequences of acceptance and non-acceptance as failure to do so is likely to render it impotent.[1495] The offer must be structured to include the requisite constituent elements. The innate complexities associated with drafting a viable Calderbank offer were elucidated in *Nair-Smith v Perisher Blue Pty Ltd*[1496] and every case is tempered with judicial discretion.[1497] The courts have recourse to Calderbank letters in England and Wales for assessing all other considerations [1498] providing the offer is genuine.[1499] The device has garnered controversy and it was abolished in family law proceedings in England and Wales in 2006. There has been resistance to any potential reintroduction most notably from Mostyn J. who asserted that it is equivalent to a "mandatory form of spread betting".[1500] He expressed abhorrence for the notion of the various parties' needs being unravelled by the consequences of a substantial order for costs being rendered which he viewed as unconscionable.[1501] Offers made on a without prejudice basis can impinge upon the court's decision when it is exercising its discretion in relation to costs.[1502] The rationale underpinning the proposition is based on the progressive, if not punitive view, that the court should consciously reinforce in the minds of the parties, that their conduct or behaviour may put them in jeopardy, and render them at risk of an adverse costs order, if a

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1490 *South Eastern Sydney Area Health Service v King* [2006] NSWCA 2 [23].

1491 Section 169 (1) (f) enables the court to consider "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 ... " ; SI 584/2019.

1492 *Chrulew v Borm-Reid & Co. (a Firm),* [1992] 1 All ER 953, [1991] Costs LR (Core) 150, [1991] App. L.R. 05/16.

1493 *O'Neill v Ryanair (No.3)* [1992] 1 IR 166.

1494 *Geraghty and Gilmore v Galway County Council* [2011] IEHC 447.

1495 *Clancy v Nevin* [2008] IEHC 121 (Laffoy J); *Tramountana Armadora S.A. V Atlantic Shipping Co. S.A.* [1978] 2 All ER 870; *Angel Airlines (a Romanian Company in Liquidation) v Dean* [2008] EWHC 1513 (QB) (Coulson J).

1496 *Nair-Smith v Perisher Blue Pty Ltd (No.3)* [2013] NSWSC 1736 (Beech-Jones J).

1497 *Lindner Ceilings Floors Partitions Plc v How Engineering Services Limited* [2001] BLR 90.

1498 CPR, r.44.3.

1499 *Ibid, Crouch* [42].

1500 *GW v RW* [2003] EWHC 611 (fam) [88]; [2003] All ER (D) 40 (May); *J v J* [2014] EWHC 3654 (fam); [2014] All ER (D) 153 (Nov).

1501 *J v J* [2014] EWHC 3654 (fam) [55].

1502 *Dobb v Hacket* [1993] 10 WAR 532.

party steadfastly refuses what, on objective analysis, appears to be a reasonable offer.[1503] Historically in Ireland a defendant in a claim for a specific sum could plead the defence of tender before action prior to the proceedings being commenced.[1504]There is a judicial discretion to enlarge the time period for acceptance of lodgements[1505] though it should not be exercised in a manner which might prejudice another party.[1506] In Ireland Order 22[1507] permits payments in to court[1508] which require an actual lodgement in non –personal injuries actions, with certain exceptions.[1509] The Rules of the Superior Courts in Ireland were amended to allow for the making of offers[1510] and they[1511] enable certain categories of natural, legal, or corporate persons including a Minister of Government, the Attorney General, or the Government itself, to tender an offer of payment.[1512] This is similar to the positon in England and Wales where the rules were amended to obviate actual lodgement.[1513] The rationale being that it runs contrary to the public interest to have monies tied up on deposit [1514] which impacts on liquidity.[1515] If denial of liability is accompanied by a payment in to court, the plaintiff is unlikely to secure costs on the liability issue, if the defendant is awarded a sum exceeding the sum lodged.[1516] In *Ely v Dargan*[1517] the defendant attempted to tactically ameliorate the sum lodged[1518] before the re-trial, and in so doing, that party was seeking to

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1503 *Ibid*, 540; Obstinacy and unreasonableness will not go unpunished (Murray J).

1504 The defence does not arise in actions for unliquidated damages, *The Mona* (1894) 265, 268; *Davys v Richardson* (1888) 221 QBD 202, 205.

1505 RSC Ord. 122 r. 7.

1506 RSC Ord. 122, r. 7; *Window and Roofing Concepts Ltd v Tolmar Construction Ltd* [2004] ILRM 554.

1507 SI 229/1990: RSC (No. 3) 1990; SI 265/1993: RSC (No. 2) 1993; SI 328/2000: RSC (No. 5) (Offer Of Payment In Lieu Of Lodgment) 2000; SI517/2004: RSC (Personal Injuries Assessment Board Act, 2003) 2004; SI 249/2005: RSC (Tenders Between Defendants) 2005; SI 511/2009: RSC (Defamation) 2009; SI 396/2013: RSC (Payments Into Court) 2013; SI 255/2016: RSC (Chancery And Non-Jury Actions And Other Designated Proceedings: Pre-Trial Procedures) 2016.

1508 *Browne v Van Greene* [2018] (HC, 24 January 2018) (Barr J); a payment in to court is an offer to compromise litigation which if accepted prevents costs from escalating.

1509 SI 328/2000: RSC (No.5) (Offer of payment in lieu of lodgement); exempted parties include the Attorney General and the State.

1510 RSC (No.3) 1990, Ord. 22 (SI 229/1990); RSC (No.2) 1993 (SI 265/1993); RSC (No.5) (Offer of payment in lieu of lodgment) 2000 (SI 328/2000); Lodgments in the Circuit Court are governed by Ord. 15 rules, 9, 10 and 11 CCR; while Ord. 41 r 2 (5) and (6) DCR deals with lodgments in the District Court.

1511 RSC (No.5) (offer of payment in lieu of lodgment) 2000 (SI 328/2000), as inserted in to rule 14 of Ord. 22.

1512 RSC (No. 5) (offer of payment in lieu of lodgment) 2000 (SI 328/2000) Form No. 4A or 5A in Appendix C.

1513 Civil Procedure (Amendment No.3) Rules 2006 (SI No. 2006/3132).

1514 *Ibid*, *Cortés* p 2.

1515 David Cornes, *Commercial Mediation: The Impact of Costs*, (2007) Arbitration, 73 (1), 12.

1516 *Hulquist v Universe Pattern and Precision* [1960] 2 All ER 266, 272 (Sellers LJ); *Wilcox v Kettell* [1937] 1 All ER 222, 226 (Clauson J), the defendant paid £100 in to court and the plaintiff secured an award of just under £32. The latter was awarded costs up to the date of payment only.

1517 *Ely v Dargan* (1967) IR 89.

1518 £7,000 to £10,505 before the re-trial.

position itself in a more advantageous way. [1519] The Chief Justice granted liberty to increase the original sum on condition that the plaintiff's costs would be discharged up to the date of the enhanced lodgement, noting that circumstances may require special consideration, but absent such circumstances, a plaintiff wishing to enhance the original lodgement requires to restore the plaintiff to the position which that party would have occupied had the increased lodgement been the original one.[1520] In *Noble v Gleeson*, Barr J. also permitted a late lodgement which accorded some advantage on the defendant,[1521] while in *Brennan v Iarnrod Eireann*[1522] the court held that it was impermissible for the plaintiff to increase the sum lodged on foot of settlement discussions on the basis of the traditional rational, being that a party should not be permitted to avail of information harvested during the currency of a *bona fide* discourse, which is aimed at settlement.[1523] Barr J. observed that defendants should not be permitted to capitalise on any disclosures by utilising information which has been harvested for calculating a "tight lodgement."[1524] There was perhaps a gossamer of artificiality in that there was a parallel jurisdiction open to the plaintiff namely to issue an offer *without prejudice (save as to costs)*.[1525] In *Kearney v Barrett*[1526] the High Court noted that during the currency of negotiations various aspects of the action were analysed including the strengths and weakness of this personal injuries case, and the defendant served a notice of tender offer after negotiations concluded.[1527] Peart J. asserted that it is desirable that all efforts be made to resolve disputes without recourse to trial costs, but far less would be achieved if discussions were conducted in the atmosphere of a casino, where protagonists negotiated on the basis of unrealistic expectations. '*Brennan'* [1528] was decided before the introduction of the new disclosure rules[1529] and Peart J. distinguished it on that basis.[1530] The case marked a significant departure from the traditional authorities as embodied by *'Brennan'*.[1531] In *Coughlan v Stokes*[1532] the court endorsed *Ely v Dargan* when it asserted

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1519 *Ibid Ely v Dargan*, (1967) IR 89, 95 (O'Dalaigh CJ).

1520 *Ibid*, 95.

1521 *Noble v Gleeson* (HC, 19 February 2000) (Quirke J).

1522 *Brennan v Iarnrod Eireann* [1992] 2 IR 167, 169 (Barr J).

1523 *Ibid*, *Brennan v Iarnrod Eireann.*

1524 *Ibid*, [1992] 2 IR 167, 169.

1525 *Ibid*, Cortés, p 6.

1526 *Kearney v Barrett* [2003] IEHC 110 (HC, 17 December 2003) (Peart J).

1527 €100,151.

1528 *Ibid*, *Brennan v Iarnrod Eireann*; *Mehan v Keane* (SC, Appeal No. 33/1991); upholding O'Hanlon J. (HC, 16 December 1991) permitting a late lodgement following negotiations.

1529 SI 391/1998 – Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998.

1530 In so doing Peart J. refused the application to strike out the tender and opined that the plaintiff could have postponed participating in negations until the time afforded for making the tender had expired.

1531 The traditional view was that it was unconscionable for a defendant to lodge monies once that party became fully cognisant of the high water mark of the claim.

that the court must consider the issue from the perspective of justice including the public interest. In Ireland any party can issue an offer (counter offer) or make an offer without prejudice save as to costs. The parties in both jurisdictions are not restricted from making whatever offer(s) they choose.[1533] CPR 44.3 (4) (c)[1534] enable the courts to consider the terms of an offer outside of Part 36 while in Ireland section 169 subsections (1) (e)[1535] and (1) (f)[1536] of the 2015 Act[1537] permit such consideration. Section 169 of the 2015 Act refers to an "offer to settle" while the CPR[1538] refer to "an admissible offer to settle" but neither prescribes the characteristics of such an offer. The Act requires it to be dated with the terms and circumstances. The Rules of the Superior Courts in Ireland were amended[1539] to enable the Supreme and High Court to consider the terms of any offer in writing. The amendment[1540] operates when the Supreme Court exercises its appellate jurisdiction, and also when the High Court exercises its inherent and appellate jurisdictions.[1541] The refusal of a reasonable offer may attract negative costs outcomes in both jurisdictions,[1542] which is akin to a failure without good cause to participate in mediation.[1543] Part 36 permits protagonists to issue offers and to ameliorate them [1544] and there is nothing to curtail the parties from making an improved offer in Ireland. Legal services are expensive in jurisdictions which adhere to the loser pays model and no less so in England and Wales[1545] and Ireland, where offers to settle on a without prejudice basis are a staple.[1546] Both jurisdictions have a residual fall-back

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1532 *Coughlan v Stokes* [2009] IEHC 629 (HC, 20 April 2009).

1533 '*The Maersk Colombo'* [2001] EWCA Civ 717 [85] (Clarke LJ); though an offer which is external to Part 36 may be beyond the reach of the negative costs consequences of that part.

1534 "any payment in to court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)."

1535 "whether a party made a payment in to court and the date of that payment."

1536 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"

1537 SI 584/2019- Rules of the Superior Courts (Costs) 2019 " 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."

1538 CPR, r.44.3(4)(c) " any payment in to court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply".

1539 RSC (Costs), 2008, SI 12/2008, amending Ord. 99; Ord. 99 1 A (1); Ord. 99 1 A (1) (b); 1 A (1) (b) (c).

1540 The amendment enables the Supreme Court and the High Court, in certain circumstances, to consider the terms of any "*offer in writing"* which encompasses "*any offer in writing made without prejudice as to the issue of costs";* Ord. 99 1A (1) (c) (2); *Calderbank v Calderbank* [1976] Fam Law 93; [1975] 3 All ER 333; *"Without prejudice except (or save) as to costs."*

1541 Circuit Court appeals but not appeals from the Master of the High Court or Case Stated from the District Court.

1542 CPR, r. 44.5 (3) (a) (i); *Ibid*, section 169 (1) (c).

1543 *Ibid*, section 169 (1) (g), *Ibid Cortés* p 2; *Burchell v Bullard* [2005] EWCA Civ 358 (CA, 2 April 2005) (Ward LJ) (Rix LJ concurring), [2005] 3 Costs LR 507.

1544 CPR, r. 36.10, r. 36.9 (5), r. 36.9(5) (a).

1545 *Ibid*, Cortés, at 12.

1546 *Ibid*, Cortés, at 11.

position which leave the parties free to compromise disputes save as to costs[1547] which is necessitated by the loser pays rule which invites over investment.[1548] This is particularly so where the defendant is favourably disposed to admitting liability but cannot induce a compromise owing to the plaintiff's intransigence.[1549] The Court of Appeal in England and Wales asserted[1550] that the courts can order an interim payment of costs[1551] when a Part 36 offer is accepted thereby entitling the claimant to secure costs up to the date of acceptance.[1552] This facilitates recovery in advance of any assessment[1553] as costs forecasting has reached an advanced state in England and Wales. [1554] In Ireland payment on account is permissible though for reasons which are attributable to the delay in the costs assessment process.[1555] Part 36 suffered abnormal birth pangs and it was forged from conflicting preferences and predicated on a fiction[1556] namely the notional requirement to lodge monies. Under the old rules the procedure for making payments in to court was readily understood but it was substituted by an architecture which delivered innumerable difficulty and so it had to be overhauled in 2007.[1557] The revamped version [1558] was intended to be a standalone or self-contained set of rules[1559] but the judiciary have taken a contrary view.[1560] The lack of appetite on the part of the Irish legislature to introduce measures analogous to Part 36 is attributable to many factors, which without being prescriptive include: the resistance to codification and a proclivity for enabling the law to develop incrementally; a recognition that Part 36 fails to confer a high level of certainty ; [1561] the overly mechanistic structure and the corpus of litigation that it has spawned; the overtly technical rules which sophisticated

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1547 *Reed Executive Plc v Reed Business Information Ltd* [2004] 1 WLR 3026 [20] – [21]; *Muller v Linsley & Mortimer* [1996] PNLR 74, 77.

1548 Herbert Kritzer, *Risks, Reputations, and Rewards: Contingency Fees Legal Practice in the United States*, 39 tbl. 24 (2004) pp. 17-18.

1549 *Ibid*, Cortés, at 11.

1550 *Ibid, 'Global Assets Advisory Services'* [1] – [6] (Asplin LJ) (Patten LJ concurring).

1551 CPR, r. 44.2 (8).

1552 *Ibid, 'Global Assets Advisory Services'* [1] – [6]; costs are assessed on a standard basis.

1553 *Ibid, Global Assets Advisory Services'* [18]. *Days Healthcare UK Ltd v Pihsiang Machiney Manufacturing Co. Ltd* [2006] EWHC 1444 (QB); *Mars UK Ltd v Teknowledge Ltd* [2007] FSR 138.

1554 *Ibid, Global Assets Advisory Services'* [24].

1555 Ord. 99 r.1 (B) (5) "in all cases where there is no dispute as to the liability for payment of costs and in any other case which a Judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs .."; High Court PD (24 April 2017) (Kelly P); Legal Services Regulation Act 2015 section 168 (2) (e).

1556 *Ibid*, Cortés, pp. 2-3.

1557 *Ibid*, Sime, at 191.

1558 *Ibid*, Sime, at 191.

1559 *Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2011] 2 All ER 258 [5] (Moore-Bick LJ).

1560 *JP Finnegan v Spiers (T/A Frank Spiers Licensed Conveyancers)* [2018] EWHC 3064 (Ch) [11] (Birss J).

1561 *Ibid*, '*BritNed Development'* [3].

litigants struggle with;[1562] and the multitude of live offers. The costs of disputes revolving around Part 36 threaten to over tower the litigation, [1563] and consideration should be given to repealing it.[1564] Sim observed that each phase enjoys a limited life span and he opined that any replacement should embrace monetary claims, personal injury claims and hybrids. [1565]

6.4 Mediation Costs: Who Pays?

The question as to which party will be liable for discharging the costs of the mediation in Ireland is just as unclear as it is in many common law jurisdictions. This vexed issue can become another source of dispute between the parties. The common law permits contracting parties to stipulate how costs are to be allocated, apportioned, or discharged.[1566] Costs can be agreed between parties in leases,[1567] and in deeds, and in other contractual agreements. These instruments can stipulate how such costs are to be met. In reality most contractual agreements will lack the prophetic foresight to make provision for such clauses. The Law Reform Commission in Ireland has observed that mediation clauses are now regularly incorporated in to commercial contracts.[1568] Though a contractual clause must be certain in order to be enforceable.[1569] The parties are free as a matter of public policy to agree in contractual terms both how the professional fees of the mediation and the legal costs associated with it are to be discharged. The legislature in Ireland refrains from transgressing in to this area of private contractual between freely contracting parties. In mediation cases

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1562 "*The Maersk Colombo"* [2001] EWCA Civ 717, [2001] 2 Lloyd´s Rep 275.

1563 Civil Justice Council: *Improved Access to Justice – Funding Options and Proportionate Costs* (2005), p 53.

1564 *Ibid*, Sime, at 197.

1565 *Ibid*, Sime, at 197.

1566 Costs can be agreed between parties in leases, mortgages, clauses in mediation agreements, which may provide for costs payable by a party, including the basis upon which such costs will be payable; such agreements can displace the general rule and they may stipulate that costs are to be paid on an indemnity basis; *Rail Corp NSW v Leduva Pty Ltd* [2007] NSWSC 800 [18]; *Re Adelphi Hotel (Brighton) Ltd* [1953] 2 All ER 498; however if costs are to be paid on such a basis the contractual provisions must be clear and unambiguous; "all costs" entitles the recipient to costs on an indemnity basis; *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 1020 (Com Ct); Fisher and Lightwood's Law of Mortgage 13th edn para 55.10; *Fairview Investments Ltd v Sharma* (14 October 1999); *Gomba Holdings UK Ltd v Minories Finance Ltd (No.2)* [1992] BCLC 851; *Bank of Baroda v Panessar* [1987] Ch 335; *Drummond v S & U Stores Ltd* [1981] 1 EGLR 42.

1567 *Fairview Investments Ltd v Sharma* (14 October 1999) (Chadwick LJ), the lessor was entitled to costs incidental to the litigation to be assessed on an indemnity basis; *Gomba Holdings UK Ltd v Minories Finance (No.2) Ltd* [1992] BCLC 851 (Vinelott J); *Forceleux Ltd v Binnie* [2009] EWCA Civ 1072 (21 October 1999).

1568 Irish Law Reform Commission Report on *Alternative Dispute Resolution: Mediation and Conciliation*, (LRC 98-2010) [4.02] - [4.03].

1569 *Ibid*, LRC 98-2010) [4.08]; *Health Service Executive v Keogh (T/A Keogh Software)* [2009] IEHC 419 (Laffoy J); citing *Cable and Wireless Plc v IBM Plc* [2002] EWHC 2059, [2004] CLC 1319.

which derive from employment law disputes the plaintiff will seek to have the mediator's fees paid for by the employer. This is ultimately a matter for negotiation with the mediator. In a mediation between purely private parties the insurance underwriter will ordinarily seek to have the mediator's fees split evenly. It will be contended where the State is the employer that it can afford to discharge those fees, and no less so where the plaintiff employee is in a precarious financial position. If the matter settles during the currency of the mediation then invariably the agreement on costs will include the mediation costs.[1570] If the mediation fails to produce a settlement and the dispute settles prior to the trial then the plaintiff will seek to have the costs of mediation incorporated in to any settlement agreement. That party will seek to shift the mediation costs where the litigation settles at or close to the trial. Where the contractual *agreement to meditate* specifies how the costs of mediation are to be discharged then the courts in England and Wales will enforce such contractual provisions.[1571] In *Deutsche Bank (Suisse) SA v Khan* the court held that the reference in the facility agreement to *all costs* was to be construed as meaning precisely that unless those costs are unreasonable in the amount or if they have been unreasonably incurred.[1572] Hamblen J. held that the term (all costs) entitles the successful party to have costs assessed on an indemnity basis.[1573] The courts in England and Wales distinguish between a mediation which takes place independently of any litigation process and a mediation which occurs during the currency of such a process.[1574] The former may manifest in the form of a pre-litigation mediation. The costs incurred in this form of mediation should not be assimilated in to the costs of the litigation. The latter type of mediation which takes place during the currency or life cycle of the proceedings may trigger the operation of costs shifting. In *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* Coulson J. viewed the latter as having a closer proximity to the proceedings. Consequently any costs incurred in such a mediation could be construed as negotiations directed towards a settlement in which case those costs could be recoverable. In *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* Coulson J. asserted that the costs of

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1570 The court order that recite that the costs of the litigation include the mediation costs which is commensurate with a negotiation fee instead of a full blown brief fee.

1571 *Greco v GSL Enters Inc*, 137 MISC: 2d 714, 715; *Hooper Assoc., Ltd v AGS Computers Inc.*74 N.Y. 2D 487, 491 (N.Y. 1989); *SASOF TR-43 Aviation Ireland Ltd v Eastok Avia FZC, Yanair Ltd*, 2017 NY Slip Op. 31514 (U), Kornreich J. awarded the prevailing party legal fees under a contract which was clear on the matter.

1572 *Ibid*, *Deutsche Bank,* [23] (25 April 2013) *(*Hamblen J) "all costs" is equated to costs on an indemnity basis.

1573 *Ibid*, *Deutsche Bank,* [20]; *Bank of Baroda v Panessar* [1987] Ch 335; *Drummond v S&U Stores Ltd* [1981] EGLR 42 (Glidewell J).

1574 *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC) [2008] 1 BCLC 722, Coulson J. was clear to raise a distinction between the *Lobster Group* pre-litigation mediation and mediation which occurs after the proceedings have been instigated; *National Westminster Bank v Feeney* [2006] EWHC 90066 (Costs).

a stand-alone alternative dispute resolution process especially if it occurs before proceedings are commenced, would not usually be deemed to be costs of or incidental to the litigation. Sometimes it is agreed by the parties that they will absorb their own mediation costs and so the costs of a pre-action mediation will not normally be recoverable [1575] as a counterpoise to this view Coulson J. contended that the costs incurred during the pre-litigation process may be recoverable as costs incidental to the litigation.[1576] In '*Roundstone Nurseries'* Coulson J. determined that the respondent was incorrect to withdraw from the mediation where it formed part of a pre-action protocol which the parties were required to comply with, and without which, it could not be properly observed. The mediation was scheduled for the following Wednesday and he ordered the defendant to pay the plaintiff's costs *thrown away* by the late cancellation.[1577] In Ireland the Mediation Act 2017 [1578] which came in to force on 1st January 2018 enables the court at the request of any of the parties, or of its own volition, to invite the parties to consider mediation in an effort to resolve disputes.[1579] The Act which applies to civil proceedings with some exceptions [1580] imposes a statutory obligation on the parties to consider mediation as a form of dispute resolution. It places obligations on solicitors to advise their clients to consider mediation for resolving disputes.[1581] In Ireland the court rules were amended to provide for mediation arising from the introduction of the Act. The High Court can of its own motion in any proceedings to which the legislation applies, request the parties to consider mediation, pursuant to section 16 (1) of the Act.[1582] The Circuit Court rules were also amended[1583] to enable that court to consider any refusal or failure, by a party without good reason to participate in mediation, when that court deems it just, for the purpose of making an order for costs.[1584] Section 7 requires the parties in conjunction with the mediator to draw up and sign an *agreement to mediate.*[1585] This includes how the fees and

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1575 *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC) [46]; citing *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC).

1576 *Ibid, 'Roundstone Nurseries'* [48]; citing *McGlinn v Waltham (No.1)* [2005] 3 All ER 1126, on the facts of that case the Pre-Action Protocol costs were not considered recoverable.

1577 *Ibid, 'Roundstone Nurseries'* [54].

1578 Mediation Act, 2017.

1579 *Ibid*, section 16. (1) – (a).

1580 The Mediation Act, 2017 does not apply to matters set out in section 3 (1) (a) (i) including disputes under the Arbitration Act, 2010, disputes falling within the ambit of the Workplace Relations Commission, matters dealt with by the Appeal Commissioner under section 8 of the Finance (Tax Appeals) Act, 2015, matters in the High Court under the Taxes Consolidation Act, 1997, Judicial Review proceedings, proceedings against the State in respect of alleged infringement of fundamental rights and freedoms of a person (Constitutional law issues): matters under the Domestic Violence Acts, 1996-2011 and the Child Care Acts, 1991 – 2015.

1581 *Ibid*, section 14 (1) (a) (b) (c) (i) (ii) (d) (e).

1582 RSC, Ord. 56A, Mediation and other alternative dispute resolution processes (SI 13/2018) reg 3(1).

1583 Circuit Court Rules Amendment to Order 66: Circuit Court (Mediation) Rules 2018 (SI 11/2018).

1584 *Ibid*, 5 (i) (ii).

1585 *Ibid*, section 7.

costs of the mediation are to be discharged.[1586] Section 20 (1) requires the parties to pay the mediator the fees and the costs which are agreed in any such agreement. The agreement should address itself not only to the fees of the mediator and how they will be borne but also potentially to fee shifting. The Act is silent with regard to setting the loser pays rule as the default mode or setting. Section 20 (2) provides that the fees and the costs will be reasonable and proportionate.[1587] It is open to the parties to contract in to the American (user pay) rule for the purposes of suspending any cost shifting burdens if they wish. Sub-section (2) creates a nexus in terms of the proportionality of the costs with two factors namely *importance* and *complexity.* It fails however to draw any link in proportionality terms at least between the monetary value of the claim and the subject matter in dispute. Disputes will engage with important questions of law (e.g. a boundary dispute) and while they may be complex, they may nonetheless be insubstantial in pure monetary terms. The wording of the Act is similar to the wording which is contained in the Civil Procedure Act in New South Wales[1588] which requires the costs to be proportionate to the importance and complexity of the *subject-matter in dispute.* The Federal Court of Australia Act[1589] also espouses such nomenclature. It would be preferable if the section took cognisance of the financial value in dispute or even the financial standing of the parties, as in England and Wales.[1590] The issue as to whether mediation costs can or should be recoverable as part of litigation costs is tilted by subjectivity. The Law Reform Commission in Ireland[1591] noted that the New South Wales Supreme Court has in one instance declined to interpret the costs of the proceedings as including the costs of mediation.[1592] Bergin J. reasoned that such an interpretation would be inconsistent with the agreement brokered between the parties. Firstly as they regarded the mediation as a separate aspect of the litigation process. And secondly but no less so as a matter of public policy, because an order for mediation had been made on consent, and an agreement had been entered in to, and a settlement was ultimately produced. The Irish Law Reform Commission submitted that a distinction should be drawn where mediation which occurs independently of the proceedings and where it takes place during the life cycle of the

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1586 *Ibid*, section 7 (b) "the manner in which the fees and costs of the mediation will be paid."

1587 *Ibid*, section 20 (2) " the fees and costs of a mediation shall be reasonable and proportionate to the importance and complexity of the issue at stake and to the amount of work carried out by the mediator."

1588 Civil Procedure Act, 2005 (NSW), section 60.

1589 Federal Court of Australia Act, 1976, section 37 M (2) (e).

1590 CPR 1.1, dealing with a case justly includes dealing with it in ways that are proportionate; to the amount of money involved; the importance of the case; the complexity of the issues; and the financial position of each party.

1591 *Ibid*, LRC 98-2010 [4.117].

1592 *Mead v Allianz Australia Insurance Ltd* [2007] NSWSC 500.

litigation.[1593] In '*Wieland'*[1594] the Court of Appeal in New South Wales held that the costs of the proceedings embrace the costs incurred during mediation. '*Wieland'* nonetheless endorses the proposition that where there is an express agreement regarding how the costs of the mediation are to be paid then the court will give effect to it. This is particularly so where the agreement conveys that such costs are to be treated separately. In '*Wieland'* Ipp JA. focused on the construction of the words namely the costs of the proceedings. [1595] He noted that mediation costs should as a matter of articulated policy form part of the proceedings. The mediation process may produce a settlement which militates against further costs and it spares the use of precious judicial resources. '*Wieland'* is distinguishable from '*Meade'* because there was a court order to mediate in the former case. The mediation occurred in the District Court which was presided over by a judge acting as a mediator. Though it did not succeed the parties ultimately settled the action. The judge made an order in the terms that the council was to pay fifty per cent of the plaintiff's costs of the proceedings as agreed or assessed, but the parties failed to reach agreement on costs. During the currency of the costs assessment the local authority averred that no agreement had been brokered with regard to whether the mediation costs were to be incorporated in to the costs of the proceedings. Sidis J. observed that the council had initially agreed to discharge the opposing party's mediation costs and that mediation was discussed several times in the court during the currency of the proceedings. The mediation was also presided over by a judicial officer on the court premises.[1596] Ipp JA. endorsed the view of Sidis J. namely that the mediation formed part of the proceedings, and thus any costs generated by it, formed part of the process. He distinguished '*Meade'* where the parties had a mediation agreement in place as distinct from the adversarial litigation process. The court saw no reason why the costs of the meditation should not be construed as forming part of the costs of the hearing.[1597] Ipp JA. opined that many authorities support the contention that as a matter of policy the ordinary costs of the proceedings include mediation costs.[1598] He cited Mansfield J. in *Charlick Trading Pty Ltd v*

1593 *Ibid*, LRC 98-2010 [4.117], where mediation is attempted prior to litigation and a settlement is not achieved, then those costs should not form part of the costs of the litigation which are recoverable.

1594 *Newcastle City Council v Wieland* [2009] NSWCA 113 (Beazley JA, Hodgson JA, Ipp JA); *Wieland v Newcastle City Council* [2008] NSWDC 4.

1595 Civil Procedure Act, 2005, section 28 provides: "The costs of mediation, including the costs payable to the mediator, are payable: (a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or (b) in any other case, by the parties in such proportions as they may agree among, themselves."

1596 Law Society of New South Wales: *"Costs of Mediation if unsuccessful and litigation Proceedings"*, issued by the Law Society Civil Litigation and Practice Committee, 24 September 2010, pp. 1-2.

1597 *Ibid*, *Newcastle City Council* [42]; *Higgins v Nicol (No. 2)* (1972) 21 FLR 34.

1598 *Ibid, Higgins v Nicol (No. 2)* [57] – [58] (Joske J) "I see no reason why [the costs of attempting to

Australian National Railways Commission[1599] who rejected the proposition that the costs of negotiations to explore the compromising of a claim could never be allowed. There is a public interest as well as a private one in resolving disputes by negotiation or by mediation.[1600] Mansfield J. departed from jurisprudence which had flowed for almost one hundred years when he abandoned the line which was rigidly drawn by Holroyd J. in *McKay v Hamilton*[1601] who drew a distinction between those costs which are incurred for the simple purpose of brokering a settlement and those which are incurred in pursuing an action.[1602] Difficulties emerge where protagonists fail to identify with specificity what is to occur with the costs of the mediation, should that process fail, and the parties have recourse to litigation. The Law Society of New South Wales observed that where litigation is in progress and where there is no order to mediate then there remains an uncertainty as to whether the costs of any mediation will be treated as costs in the proceedings. This occurs where parties fail to address themselves to the question of costs in the mediation agreement, and no less so, where the agreement is clear in relation to the payment of the mediator's fees.[1603] Where the parties stipulate that the costs of the mediation are to be dealt with as a discrete matter then the court will give effect to that. The Law Reform Commission in Ireland submitted that where the court invites the parties to utilise mediation then it may in the absence of any contractual provisions with regard to costs, order the parties to bear their own costs, or make whatever order that it deems just. The exercise of such discretion could dislodge the loser pays rule.[1604]

6.5 Failure to participate

The courts in England have punished parties who failed, neglected or refused to explore the mediation option. In deciding whether a party has acted unreasonably in refusing mediation the courts are prepared to bear certain considerations in mind. In '*Halsey'*[1605] the Court of Appeal asserted that the question as to whether a party has acted unreasonably in refusing

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arrive at a compromise] should not be regarded as part of the costs of the course of the hearing and be allowed for on a party and party taxation."

1599 *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629.

1600 *Ibid* [92].

1601 *McKay v Hamilton* [1905] VicLaw Rp 68, [1905] VLR 457, 460-461.

1602 *Ibid, 'Charlick Trading Pty Ltd'* [93].

1603 *Ibid, "Costs of Mediation if unsuccessful and litigation Proceedings"*, 24 September 2010, p 2.

1604 LRC 98-2010 [4.122] - [4.123].

1605 *Ibid*, Alcock, *Costs follow the event v Costs to follow event,* pp. 6-8.

mediation must be determined having regard to all the circumstances of the case including namely:[1606] (a) the nature of the dispute,[1607] (b) the merits of the case;[1608] (c) the extent to which other attempts at settlement have been made; (d) whether the costs of mediation would be disproportionately high;[1609] (e) whether the delay setting up the mediation and getting it up and running would result in prejudice;[1610] (f) whether it has a reasonable prospect[1611] of succeeding.[1612] If proceedings are conducive to mediation then a party which refuses to participate will in all likelihood, whether it be a public body or otherwise, be penalised for acting unreasonably, and the self-styled border-line cases are also ripe for mediation in the absence of any countervailing circumstances. A party's subjective belief that it has a watertight case will not inoculate it against a refusal to mediate notwithstanding that it may prevail in the litigation.[1613] However where a party reasonably holds such a view then this may provide sufficient justification for failing to engage. The court must be satisfied that such a party acted unreasonably in refusing to mediate which in the case of Milton Keynes General NHS Trust, it was not. '*Halsey'* clarified the factors which the English courts consider for the purpose of deciding whether a refusal to mediate is unreasonable and the circumstances where a successful party can suffer dire cost consequences for unreasonably refusing

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1606 *PGG II SA v OMFS Company 1 Limited* [2013] EWCA Civ 1288 [22] (Briggs LJ).

1607 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 [6], there will be many cases within the broad spectrum of commercial court work which would be condusive to mediation not least where the parties require the court to determine points of law or the interpretation or construction of contracts, which may prove the basis for the parties long term commercial relationship; allegations of fraud or other disreputable conduct would not as a matter of probability result in a successful mediation; where the court had to determine a point of law which as a matter of precedent will enhance the development of the common law (absent which the development of the law in the area would be stiffed); cases involving the granting of injunctive or other forms of interlocutory relief which are essential for the protection and maintenance of a party's position.

1608 *Ibid* [18], large organisations no less so public bodies are vulnerable to pressures from claimants with weak cases who may invoke mediation as a strategic ploy (in an attempt to settle for a nuisance value in the knowledge that a party may be penalised for a failure to mediate); the courts should not discriminate against public bodies by making adverse costs award for a failure to mediate, though Government Agencies/Departments should be held to their "ADR" pledges; *Royal Bank of Canada v Secretary of State* for Defence [2003] EWHC 1841.

1609 *Ibid, 'Halsey'* [21], the cost of mediation can be just as expensive as a day in court, while, the parties will invariably require to retain legal representation often in the form of solicitor and counsel, while, the costs of a potentially abortive mediation should also be factored in to assessing whether a party was acting unreasonably be refusing to engage in mediation.

1610 The acceptance of mediation offered late in the proceedings may delay the trial of this action; this may be a pertinent factor to consider when deciding whether it was unreasonable for a party to refuse to go to ADR.

1611 *Ibid*, LRC 98-2010 [4.113], The Commission "considers that the fundamental issue which a Court should consider when imposing a costs sanction for an unreasonable refusal to consider mediation or conciliation is whether, taking in to account the circumstances of the case, mediation or conciliation had a reasonable prospect of success."

1612 If mediation has no real or genuine prospect of success then a party may (on the basis of sound legal advice) refuse to participate without adverse costs consequences, though this can be a high stakes tactical strategy.

1613 *Ibid, 'Halsey'* [19].

mediation.[1614] Section 169 of the Legal Services Regulation Act, in Ireland, provides that a party which is entirely successful in an action is entitled to receive an award of costs unless the court orders otherwise.[1615] The court may consider the manner in which that party conducted the litigation,[1616] and it may additionally consider whether a party which was invited to settle the proceedings was unreasonable in refusing to engage in talks or mediation.[1617] A successful party may witness its costs evaporate in the event that its behaviour is adjudged to be unreasonable. The section was not the first attempt to punish parties for refusing to engage in mediation. Order 56 of the Rules of the Superior Courts was amended[1618] to enable the court to direct parties towards dispute resolution.[1619] The Rules of the Superior Courts in Ireland enable the court of its own accord, having regard to all of the circumstances of the case, to adjourn the proceedings and invite the parties to use an alternative dispute resolution process. The High Court and Supreme Court may factor in a party's refusal or failure to participate, without good reason, when tailoring its costs award.[1620] Therefore a party which fails to properly engage may suffer the adverse costs consequences. There have been many judicial pronouncements[1621] in Ireland extolling the advantages which mediation can confer though in *Atlantic Shellfish Ltd v Cork County Council* [1622] Gilligan J. refused to exercise his judicial discretion by referring the matter to mediation once he was satisfied that the plaintiffs knew that their invitation to mediation could be rebuffed and it's dominant purpose was to consolidate that party's position with regard to a future application for costs.[1623] The Court of Appeal in England and Wales has contended with myriad factual matrices where one or more of the protagonists to litigation

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1614 *Ibid*, LRC 98-2010 [4.111].

1615 Section 169 (1) (a); pursuant to CPR, r. 44.3 (5) (a) conduct includes "conduct before as well as during the proceedings."

1616 *Ibid*, section 169 (1) (c).

1617 *Ibid*, section 169 (1) (g).

1618 RSC (Mediation and Conciliation) 2010 (No.4) SI 502/2010.

1619 In Ireland the term alternative dispute resolution process means " mediation or another dispute resolution process approved by the Court, but does not include arbitration."; SI 502/2010 – RSC (Mediation and Conciliation) 2010; In England and Wales "alternative dispute resolution" is defined in the Glossary to the CPR as a " collective description of methods of resolving disputes otherwise than through the normal trial process" which is ordinarily understood to mean some form of mediation by a third party.

1620 *Ibid*, SI 502/2010 (ii) and Explanatory Note; Ord. 99, rule 1B of the RSC 1986 provides:-"1B. Notwithstanding sub-rules (3) and (4) of rule 1, the Supreme Court or the High Court, in considering the awarding of the costs of any appeal or of any action, may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any ADR process referred to in Order 56A, rule 1, where an order has been made under rule 2 of that Order in the proceedings."

1621 *Atlantic Shellfish Limited v Cork County Council* [2015] IECA 283 [29] (Irvine J), citing *Lyons and Murray v Financial Services Ombudsman and Bank of Ireland Scotland plc* [2011] IEHC 454 [37] (Hogan J), "mediation is a thousand times preferable than litigation"; *Fitzpatrick v The Board of Management of St. Mary's National School Touraneena* [2013] IESC 62 (MacMenamin J).

1622 *Ibid, 'Atlantic Shellfish'* [2015] IEHC 570, [2015] IECA 283 [18] (CA).

1623 *Ibid* [18] (CA).

have repulsed any overtures to engage in mediation. In *Dunnett v Railtrack*[1624] the clamant and litigant in person[1625] sought leave to appeal against the order for costs. Schiemann LJ. granting leave advised her to explore the possibility of alternative dispute resolution[1626] and she signalled her intention to do so. The respondent however contended that it had limited funds and that it would not achieve a reimbursement of costs from a litigant in person. The Court of Appeal asserted that having regard to all of the circumstances of the case, the appropriate order on the appeal, was to make no order as to costs. [1627] The court ventilated its displeasure for the manner in Railtrack had refused out of hand to enter mediation when prompted by the court.[1628] Brooke LJ. asserted that the Court of Appeal must further the overriding objective of actively managing cases which includes encouraging the parties to use an alternative dispute resolution, if the court deems that appropriate. [1629] In '*Halsey'* the Court of Appeal acknowledged that mediation has a number of advantages over the court process. The Civil Procedure Rules include a general encouragement to mediate while rule 1.4 (2) (e) defines case management as including promoting the use of alternative dispute resolution if the court considers it appropriate. The general rule that the losing party will be ordered to discharge the costs of the successful one can be displaced where a successful party refuses to mediate, without good cause, in which case the court can render a different costs order having regard to the conduct of the parties,[1630] both before and during the proceedings.[1631] The judiciary in England and Wales have long since voiced their support for alternative dispute resolution processes including mediation.[1632] As Dyson LJ. observed in '*Halsey'* mediation is ordinarily less expensive than litigating, though most cases are in reality settled by negotiations, and mediators provide a greater spectrum of solutions compared to those which are available through litigation.[1633] Brooke LJ. noted in '*Dunnett'*

1624 *Dunnett v Railtrack* [2002] EWCA Civ 303.

1625 Mr Levene instructed by the Bar Pro Bono Unit appeared for the appellant.

1626 *Ibid, Dunnett v Railtrack* [7], Brooke LJ. noted that Schieman LJ. " … advised her that she ought to explore the possibility of Alternative Dispute Resolution, so as to get shot of this case as soon as possible. She has indicated that she is in favour of doing that, if the other side are also willing to do that. I cannot say any more about that, beyond suggesting that she tries."

1627 *Ibid, Dunnett v Railtrack* [16] (Brooke LJ).

1628 *Ibid* [15]; "It *is to be hoped that any publicity given to this part of the Judgment of the court will draw the attention of lawyers to their duties to further the overriding objective ... that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may face uncomfortable costs consequence"* (Sedley LJ concurring).

1629 *Ibid,* [14]; *Ibid,* Alcock, *Costs follow the event v Costs to follow event,* pp. 6 and 13.

1630 CPR, r. 44.3(5).

1631 CPR, r. 44.3(5) (a).

1632 *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 WLR 803; *Dunnett v Railtrack* [2002] EWCA Civ 303, [2002] 1 WLR 2434; *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep. 379; *Ibid Halsey* [8].

1633 *Ibid, 'Halsey'* [15] ; " It is usually less expensive than litigation which goes all the way to judgment,

that mediators can attain satisfactory results for both parties in many cases which are quite beyond the reach of the reliefs which lawyers and courts can achieve. Often mediators can procure results over which the protagonists can shake hands and feel that they have resolved the dispute on terms which are palatable.[1634] In *Marsh v Ministry of Justice,* the prevailing plaintiff offered to mediate, however, the defendant[1635] rebuffed any such overtures. Thirwall LJ. opined that employment claims were often amenable to mediation and this was one case where mediation was appropriate and where a party refused to engage then, for public policy reasons, it should be prepared to embrace the consequences. Moreover, notably in *Reid v Buckinghamshire Healthcare NHS Trust*,[1636] the wholly successful defendant was awarded only 66% in costs because owing to his failure to engage in alternative dispute resolution, and that the fact that such a party prevails in, the litigation is insufficient to render it immune from a finding that it acted unreasonably. In *Hurst v Leeming*[1637] Lightman J. analysed whether the defendant was justifying in refusing to proceed with mediation and concluded that mere fact that subtotalling costs[1638] had already been incurred does not provide a justification for refusing to enrage, as it is merely one factor to be considered. There was an allegation of professional negligence arising from a burning sense of injustice as a result of the dissolution of a partnership, and while the defendant was incapable of analysing the facts in a balanced manner, this did not provide good grounds, for a refusal.[1639] Though the court concluded that the plaintiff's case was hopeless and the defendant was justified in forming the opinion that mediation was not the appropriate course to take, and did not suffer a costs penalty for failing to mediate. The crucial factor is whether, when objectively viewed, the proposed mediation has any real prospect of succeeding, and if it does not, then a party can with impunity, refuse to enrage in mediation, on this ground alone. The simple act of refusing to mediate, however, is a high-risk behaviour, and should the court conclude that there was a real prospect of success, the refusal can be punished severely.[1640] In *Leicester Circuits Ltd v*

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although it should not be overlooked that most cases are settled by negotiation in the ordinary way. Mediation provides litigants with a wider range of solutions than those are available in litigation: for example, an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms, and an agreement by one party to do something without any existing legal obligation to do so."

1634 *Ibid, Dunnett v Railtrack* [14] (Brooke LJ); *Ibid, Halsey* [15].

1635 The Ministry of Justice made an alternative dispute resolution pledge in 2001 and it updated the "Dispute Resolution Commitment" in 2011; In June 2016 the court ordered the parties to attempt to use alternative dispute resolution, while four months later the plaintiff offered to settle for £180,000 and invited the Ministry to engage in mediation, before ultimately being awarded £286,000.

1636 *Reid v Buckinghamshire Healthcare NHS Trust* (2015) EWHC 1321 (costs).

1637 *Hurst v Leeming* [2001] EWHC 105 (Ch); [2003] 1 Lloyd's Rep. 379.

1638 *Ibid* [11].

1639 *Ibid* [12].

1640 *Ibid* [13].

Coates Brothers Plc[1641] the Court of Appeal asserted that the whole purpose of mediation is that complex and difficult problems can be resolved, and once the parties proceed down the mediation route they cannot later contend that it does not have a real prospect of success. The successful plaintiff's sudden withdrawal from an agreed mediation process was significant to the furtherance of the litigation and while it could not be assured that the process would produce results, there was some chance that it may, if it were permitted to proceed. On the other hand, in *Dunnett v Railtrack*[1642] the defendants signalled their unwillingness to contemplate alternative dispute resolution, with the concomitant levels of additions expenditure that would be incurred, and they were resoundingly punished not least as skilled mediators can procure outcomes that are beyond the powers of the courts. The encouragement of alternative dispute resolution forms an aspect of case management which in turn forms part of achieving the overriding objective under the Civil Procedure Rules, and the parties are under a duty to advance that aim which involves a serious consideration of alternative dispute resolution procedures absent which a party runs the gauntlet of the court imposing a '*Dunnett'* type order, notwithstanding its overall success in the litigation. In *Christian v The Commission of Police for the Metropolis*[1643] the unsuccessful claimants propounded that there should be no order as to costs owing to the defendant's failure to engage in mediation. For its part, the defendant highlighted the pressing need to make a stand against unreasonable claims, while it succeeded on every substantial point at trial, and it sought an indemnity costs award. Turner J. concluded that the case was not unsuitable for mediation, which would not have delayed the trial, while the costs expended would not have been disproportionate and the prevailing party's own skeleton arguments confirmed that mediation ought to take place, and the defendant did not make any offer with a view to compromising the litigation. Turner J. surmised that mediation had a reasonable prospect of success awarded the prevailing party two thirds of its costs on a standard basis. The case is authority for the proposition that a successful party will not be able to justify its failure to participate in mediation on the basis of the result, and such a refusal, even on the part of a prevailing party may constitute unreasonable conduct. The Court of Appeal[1644] has suggested that a party which experienced a resounding success in the litigation, should nonetheless have replied, through it's solicitor, to a written proposal seeking alternative dispute resolution, not

1641 *Leicester Circuits v Coats Brothers Plc* [2003] EWCA Civ 333 (Longmore LJ).
1642 *Ibid Dunnett v Railtrack* [2002] EWCA Civ 303; [PN] [2001] 1 WLR 2434.
1643 *Christian v The Commission of Police for the Metropolis* [2015] EWHC 371 (QB).
1644 *Sociéte Internationale de Telecommunications Aeronautiquess SC v Wyatt & Co. (UK) Ltd* [2002] EWHC 240 (Ch).

only as a matter of courtesy, but also to extinguish the risk of the victorious party having to provide an explanation as to why it did not accept such an offer. Though, in the instant case, Pill LJ. noted that there was no real prospect of the mediation succeeding and consequently the court did not seek to reduce the successful party's costs.[1645] In *Thakkar v Patel*[1646] both protagonists secured some measure of success, however the trial judge ordered the defendant to pay three quarters of the claimant's costs, when it emerged that the former had exhibited a lack of enthusiasm for mediation. The trial judge held that the defendant had been dilatory, and indeed, actively impeded mediation from occurring and made a finding of fact that if the parties had entered mediation it would have produced a settlement. The Court of Appeal observed that while the defendant had not point blank refused to mediate it had nonetheless delayed until the opposing party lost confidence, and the trial judge made a finding that the matter was suitable for mediation that had a real chance of achieving a settlement, or reducing the issues in contention, at least. Jackson LJ. asserted that the message from the Court of Appeal been consistent for over 15 years that mediation and alternative dispute resolution is to be encouraged.[1647] He issued a salutary caution of the hazards, if not penal consequences, which may flow from mediation frustration, for a dilatory party. The Court of Appeal remains a forceful proponent of alternative dispute resolution that was echoed recently in *Emojevbe v Secretary of State for Transport*[1648] where the court acceded to the claimant's appeal against a summary judgment. Lloyd Jones LJ. voiced a cautionary note in terms of the overall merits of the case, including the costs risks if the action proceeded to trial, which included a strong encouragement to mediate as a route to achieving settlement, in order to obviate further costs. In *Gore v Naheed*,[1649] which concerned a dispute over a right of way,[1650] the Court of Appeal, in England and Wales, was reluctant to accept that a party's motivation to have its rights determined by a court as opposed to mediation could be tantamount to unreasonable conduct, not least in circumstances, where that party's rights were upheld. Patten LJ. suggested that a failure to engage in mediation, even if unreasonable,[1651] does not automatically result in an adverse costs order. It is merely one factor to be considered in the exercise of judicial discretion. While in '*Gore',* he concluded that it was not unreasonable for the claimant to have refused to mediate, as the legal

1645 *Ibid* [34].
1646 *Thakkar and Anor v Patel* [2017] EWCA Civ 117.
1647 *Ibid, Halsey; PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288.
1648 *Emojevbe v Secretary of State for Transport* [2017] EWCA Civ 934.
1649 *Gore v Naheed* [2017] EWCA Civ 369.
1650 Claim for damages and injunction for an alleged obstruction of a right of way dispute over a drive way.
1651 *Ibid, Gore v Naheed* [49] (Patten LJ, Underhill LJ, and Lewison LJ, concurring).

representative advised that the process had no realistic prospect of success.[1652] '*Gore'* does not destabilise the equilibrium that a court may order costs against a successful party, flowing from its refusal to participate in mediation. The onus remains on such a party to justify its refusal, absent which it may face adverse costs consequences. The area would benefit from a review of '*Halsey'* with a greater degree of forensic focus on the question of whether on balance, mediation would, or could produce and outcome. A careful written invitation to participate in mediation may if it goes unanswered result in a partial or full costs sanction. The burden rests on the shoulders of such a party seeking the reduction to demonstrate the conduct of the other was unreasonable. While, a well-drafted letter of advices from a party's solicitor, advising against entering in to a mediation process, may suffice to discharge the evidential burden, that a party's failure to participate constitutes unreasonable conduct. The Law Reform Commission in Ireland considered that in general terms, at least, the guidelines elucidated in '*Halsey'* are appropriate in the context of determining whether costs sanctions ought to be applied.[1653] In particular they allow the court to determine whether to impose costs sanctions without having to explore the subjective intentions of the parties during a mediation or conciliation.[1654] In '*Atlantic Shellfish'* the Court of Appeal in Ireland considered when it might be appropriate to refer proceedings to mediation. To this end, it identified circumstances when it may be appropriate to make such a referral, and while the list is not prescribed, they may include: (i) the manner in which the parties conducted the litigation up to the date of the application; (ii) the existence of any relevant interlocutory orders; (iii) the nature and potential expense of the proposed mediation; (iv) the likely impact of the making of the order sought on the progress of the litigation if the invitation is accepted and it proves unsuccessful; (v) the potential saving in time and costs that might result from the acceptance of an invitation; (vi) the extent to which mediation can or might narrow the issues between the parties; (vii) any proposals made by the applicant concerning the issues that might be dealt with in the course of the ADR and (viii) any proposals as to how the costs of such a process might be paid.[1655] Factors (v) and (viii) in '*Atlantic Shellfish'* address the costs. They are like (d) in '*Halsey'* which is referable to the costs of the mediation. The general principle underpinning the financing of mediation is that the parties ought to share those costs

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1652 It would only amplify costs and the case raised complex issues which rendered it unsuitable for mediation.

1653 *Ibid*, Alcock, *Costs follow the event v Costs to follow event*, p 8.

1654 *Ibid*, LRC 98-2010 [4.112].

1655 *'Atlantic Shellfish'* [2015] IECA 283 [52] (Irvine J).

irrespective of the outcome.[1656] In Ireland section 169 of the Legal Services Regulation Act provides that a party which is entirely successful in civil proceedings is entitled to receive an award of costs against the losing party, unless the court orders otherwise, having regard to all of the circumstances of the case, and the conduct of the parties including conduct *before and during proceedings*, [1657] and the manner in which the parties conducted all or any part of their cases [1658] and " whether the parties were invited by the court to settle the claim and the court considers that one or more of them was or were unreasonable in refusing to engage in the mediation. [1659] A party which is wholly successful may see a costs award evaporate where it has refused to engage in mediation and that conduct or behaviour is deemed unreasonable. Section 169 was not however the first attempt to punish a party for its refusal to engage in mediation. Order 56 of the Rules of the Superior Courts was amended [1660] to enable the courts to direct the party's towards alternative dispute resolution including mediation. Those rules enable the court of its own accord, having regard to all of the circumstances of the case, to adjourn the proceedings and invite the parties to use an alternative dispute resolution process. The High Court and Supreme Court may factor in a party's refusal or failure to participate, without good reason, when tailoring it's costs award, [1661]and thus a party which fails to properly engage may suffer the adverse costs consequences. There have been many judicial pronouncements [1662] extolling the use of mediation, which can confer significant benefits on the parties which properly engage, though in *Atlantic Shellfish Ltd v Cork County Council* [1663] Gilligan J. refused to exercise his judicial discretion by referring the matter to mediation once he was satisfied that the plaintiffs knew that their invitation to mediation could be rebuffed and it's dominant purpose was to solidify its position with regard to a prospective application for costs. [1664] Section 21 of the Mediation Act sets out factors which the court

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1656 *Ibid*, LRC 98-2010 [4.102].

1657 Section 169 (1) (a); pursuant to CPR 44.3 (5) (a) conduct includes "conduct before as well as during the proceedings."

1658 *Ibid*, section 169 (1) (c).

1659 *Ibid*, section 169 (1) (g).

1660 RSC (Mediation and Conciliation) 2010 (SI 502/2010).

1661 RSC, Ord. 99, r. 1B provides:-"1B. Notwithstanding sub-rules (3) and (4) of rule 1, the Supreme Court or the High Court, in considering the awarding of the costs of any appeal or of any action, may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any ADR process referred to in Order 56A, rule 1, where an order has been made under rule 2 of that Order in the proceedings."

1662 *Atlantic Shellfish Limited v Cork County Council* [2015] IECA 283 [29]; *Lyons and Murray v Financial Services Ombudsman and Bank of Ireland Scotland plc* [2011] IEHC 454 [37] "mediation is a thousand times preferable than litigation"; *Fitzpatrick v The Board of Management of St. Mary's National School Touraneena and the Minister for Education and Science* [2013] IESC 62.

1663 *Ibid, 'Atlantic Shellfish'* [2015] IEHC 570; [2015] IECA 283 [18] (CA).

1664 *Ibid, 'Atlantic Shellfish'* [18].

may consider, after it has invited parties to consider mediation, for the purpose of determine the issue of costs[1665] The wording of sub sections (a) and (b) varies with section 169 (g) of the Legal Services Regulation, Act 2015.[1666] Though sections 21 and 169 are not seamless they do engage with the notion of an unreasonable refusal. The Circuit Court rules were also amended[1667] to enable the court to consider any refusal or failure, by a party without good reason to participate in mediation, for the purpose of making an order for costs.[1668] The Law Reform Commission in Ireland supports the proposition that a blanket refusal on the part of a party to consider mediation could result in an adverse costs sanction.[1669] It distanced itself however from any formal requirement to participate in good faith, which it perceived as suffering from an innate sense of subjectivity and ambiguity. [1670] The Law Reform Commission endorsed the application of the '*Halsey'* criteria albeit in general terms. [1671] The Commission considered that the principal issue that the court should consider before inflicting any costs sanction is whether the refusal to participate was unreasonable, when factoring all of the circumstances of the case in to consideration, and whether the mediation carried a reasonable prospect of success.[1672] The Commission considered that family law proceedings should not attract adverse costs consequences, for any unreasonable refusal[1673] to mediate, though exceptions may arise as a matter of judicial discretion.[1674] In *Gore v Naheed*, [1675] which concerned a dispute over a right of way, [1676] the Court of Appeal was reluctant to accept that a party's motivation to have its rights determined by a court opposed to mediation could be tantamount to unreasonable conduct and no less so where that party's rights were upheld. Patten L.J. suggested that a failure to engage in mediation, even if

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1665 Section 21 "(a) any unreasonable refusal or failure by a party to the proceedings to consider using mediation; and (b) any unreasonable refusal or failure by a party to the proceedings to attend mediation."

1666 *Ibid*, section 21 "one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or mediation".

1667 Circuit Court Rules Amendment to Order 66: Circuit Court (Mediation) Rules 2018 (SI 11/2018).

1668 *Ibid*, 5 (i) (ii).

1669 *Ibid*, LRC 98-2010 [4.106].

1670 Edward F. Sherman *"Good Faith Participation in Mediation: Aspirational, Not Mandatory"* (1997) 4 Dispute Resolution Magazine 2 at 14.

1671 *Ibid*, LRC 98-2010 p 93 [4.111]; (I) the nature of the dispute; (ii) the merits of the case; (iii) the extent to which other settlement methods have been attempted: (iv) whether the costs of mediation would have been disproportionately high (iv) whether the mediation had a reasonable prospect of success; LRC CP 50-2008 [11.71].

1672 *Ibid*, LRC 98-2010 [4.113].

1673 *Ibid*, LRC 98-2010 [4.114]; LRC CP 50 – 2008 [11.72].

1674 Family law contested probate litigation; Law Reform Commission Report, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010) [4.116].

1675 *Gore v Naheed* [2017] EWCA Civ 369.

1676 Claim for damages and injunction for an alleged obstruction of a right of way dispute over a drive way.

unreasonable, [1677] does not automatically result in an adverse costs order, as it is merely one factor to be considered in the exercise of judicial discretion. While in '*Gore'* he concluded that it was not unreasonable for the claimant to have refused to mediate, as the legal representative advised that the process had no realistic prospect of success and it would only amplify costs, while the case raised complex issues of law which rendered it unsuitable for mediation. '*Gore*' does not destabilise the equilibrium that a court may make an adverse costs order, against a successful party, flowing from its refusal to participate in mediation. The onus remains on such a party to justify its refusal, absent which it may face adverse costs consequences. A carefully constructed written invitation to participate in mediation, drawn up by a solicitor, may if it goes unanswered result in a partial or full costs sanction on the grounds of a refusal to mediate. The onus rests on the shoulders of the party seeking the costs reduction to demonstrate the the conduct of the other was unreasonable. A well drafted letter of advices from a party's solicitor advising against mediation, may suffice to discharge the evidential burden, that a party's failure to participate constitutes unreasonable conduct.

6.6 Exaggeration

The Civil Procedure Rules and the Legal Services Regulation Act, 2015 address the vexed issue of exaggeration in litigation which case law demonstrates is by no means a purely modern malaise. In the case of the Act, the courts may consider whether the prevailing party exaggerated his or her claim,[1678] while the Civil Procedure Rules allow the court to consider whether *a party that succeeds claim*, in whole or in part, exaggerated the claim.[1679] Exaggeration cases are recognisable by their particular if not idiosyncratic behavioural patterns. The claims which are legitimate to begin with transmogrify. They are underpinned by misleading or recalcitrant interactions with professionals and refusals to accept reasonable offers to settle. The strategies deployed are not unlike those that are used in cases where parties refuse to accept a lodgment or Calderbank offer. Sometimes parties elect to adopt a position of splendid isolation. Historically the victorious parties enjoyed a reasonable expectation that the unsuccessful party would pay the victor's costs.[1680] The court has an

1677 *Ibid*, [2017] EWCA Civ 369 [49].
1678 Legal Services Regulation Act section 169 (1) (d).
1679 CPR, r. 44.3(5) (d).
1680 *Johnstone v Cox* (1881) 19 Ch. D. 17, 19; "That would have been the natural course of Justice, and is

absolute and unfettered discretion to award or not to award costs.[1681] The courts in England displayed disdain for parties, even successful ones, which exaggerated their claims. Plaintiffs that advanced exorbitant claims knowingly predicated on false evidence were deprived of their costs, even though they recovered substantial damages.[1682] The principle is apparent in *Pearman v Baroness Burdett-Coutts*[1683] where the successful plaintiff was refused costs after recovering only a small portion of the damages claimed.[1684] The mere fact that a plaintiff recovers significantly less than that which was sought does not of itself offer grounds to deprive such a party of its costs.[1685] Exaggerated claims need to be forensically differentiated from fraudulent or fabricated claims (which is some instances conflate to create a third or cross over category).[1686] The '*Baroness Burdett-Coutts'* principle never required the successful plaintiffs to discharge the costs of their unsuccessful opponents. It merely operated to deprive an otherwise successful plaintiff of its costs, if certain circumstances were met. The rule offers a symmetrical balance to the rule in *Ritter v Godfrey*.[1687] Both rules operate on the same axis of judicial fairness and they survived the enactment of the Civil Procedure Rules and the Legal Services Regulation Act, 2015. In *Painting v University of Oxford*[1688] the plaintiff claimed damages for personal injuries and consequential loss[1689] while the defendant admitted liability but claimed contributory negligence. The trial judge ordered the defendant to pay all of the plaintiff's costs after she received an award of £25,331.78 in damages.[1690] On appeal the University contended that it was the victorious party. Maurice Kay LJ. held that it was the real winner as the trial was overwhelmingly concerned with the issue of exaggeration on which it had succeeded.[1691] He asserted that but for the exaggeration aspect of the claim the plaintiff would have settled at an earlier stage. The Court of Appeal observed that exaggeration can manifest in many forms and the rules make no distinction

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the course of Justice in every Court, the losing party pays the costs."

1681 *Campbell & Co. v Pollak* (1927) AC 732, 811 (Viscount Cave LC); *Morrison v Morrison* [1928] 2 D.L.R 958, 1000 (Middleton JA) (Latchford CJ and Order JA concurring).

1682 *Pearman v Burdett-Coutts* 3 T.L.R 719 (1887); *Ibid*, Goodhart, *Costs*, 849 at p 861.

1683 *Pearman v Burdett-Coutts* 3 T.L.R 719 (1887) (Esher MR); *Huxley v West London Extension Railway Company,* (1886) 17 QBD 373, 374.

1684 David Casson & Ian Dennis, Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice, 378-379 (22d ed. 1981); though a judge should not refuse costs to a successful plaintiff if only nominal damages are recovered; *Moore v Gill* (1888) 4 T.L.R 738, 861.

1685 *Pearman v Burdett-Coutts* 3 T.L.R (1887) 719, 720.

1686 The former are genuine to begin with but cases in the second category never stemmed from a genuine cause of action. They are fraudulent and they undermine the administration of justice.

1687 The rule in *Ritter v Godfrey* permitted full costs shifting against the successful party.

1688 *Painting v University of Oxford* [2005] EWCA Civ 161.

1689 The plaintiff, who was pregnant, fell and sustained an injury while reaching to take down a book from the shelf in the University library and she received her wages while on sick leave.

1690 Though the trial judge found that the plaintiff had misled a medical practitioner.

1691 *Ibid, 'University of Oxford case'* [2005] EWCA Civ 161 [21].

between intentional and unintentional exaggeration. It observed that Mrs Painting had been deliberately misleading and the exaggeration constituted a very important aspect that needed to be addressed in the costs assessment.[1692] The plaintiff demonstrated no willingness to negotiate or advance counter offers.[1693] To contest and lose on the issue of exaggeration is a matter of considerable significance.[1694] Longmore LJ. conflated the plaintiff's conduct[1695] and exaggeration[1696] observing that the latter can take many forms before asserting that the plaintiff had misled the trial court. [1697] The appellate court granted costs to the University.[1698] In *Islam v Ali*[1699] the plaintiff sought to recover remuneration in respect of chartered accountancy services which he had provided to the defendant's late husband. Both parties' proposals were distant in opposite directions to the sum awarded.[1700] In reality the defendant was the real winner as the plaintiff had lost the case on principle in relation to the main issues on which the defendant had succeeded. The fact that a claimant recovers more than the sum which was paid in to court or offered does not *prima facie* entitle such a party to its costs. This is supported by *Bajwa v British Airways*[1701] where the claimant recovered more than she would have done if she had accepted the defendant's payment in to court. Nonetheless Stuart Smith LJ. was not satisfied that this was sufficient to justify making an order for costs in the claimant's favour, where that party was extravagantly wrong and lost every issue during the trial.[1702] The court must also consider the parties conduct at the trial when exercising its discretion in relation to costs.[1703] One of the greatest attempts to undermine the administration of civil justice occurred in *Molloy v Shell*,[1704] where the plaintiff claimed over £300,000 in personal injuries while the defendant made a part 36 offer to settle. While the judge made an award of just £18,897 in the plaintiff's favour that party had manifestly exaggerated his claim until it was exposed just a few days before the trial. He was ordered to pay seventy five per cent of the defendant's legal costs. The latter appealed seeking one hundred percent of the costs that had been incurred since the date of their payment. The trial

1692 *Ibid*, Alcock, *Costs follow the event v Costs to follow event*, (fn 59), 17 December 2014.
1693 *Ibid, 'University of Oxford* case' [2005] EWCA Civ 161 [27] (Longmore LJ concurring).
1694 *Ibid* [22].
1695 CPR, r. 44.3(4) (a).
1696 *Ibid*, r. 44.3 (5) (d).
1697 *Ibid, 'University of Oxford case'* [26].
1698 The respondent to pay the University's costs (on a standard basis) up to January 2005 and on an indemnity basis thereafter.
1699 *Islam v Ali* [2003] EWCA Civ 612; '*University of Oxford case'* [15].
1700 The claimant expressed a willingness to settle for £45,000, including interest, plus £15,000 in legal costs. The £12,000 awarded by the trial judge was much closer to the offer made by the defendant.
1701 *Bajwa v British Airways* (1999) PIQR Q 152.
1702 *Ibid* [38].
1703 *Molloy v Shell UK Limited* [2001] EWCA Civ 1272 [18] (Laws LJ).
1704 *Ibid* [26].

judge recorded that the plaintiff had grossly deceived the doctors who had examined him and his general practitioner in obtaining sick notes. On appeal Laws LJ. asserted that the trial judge was obliged by part 44.3(5) of the Civil Procedure Rules to analyse the whole of the plaintiff's conduct not just the period after the date of the defendant's payment but also from the date when the claim was filed and until the plaintiff's cynical conduct was discovered. Laws LJ. expressed concerns as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should in fact entertain the matter at all, except for the purpose of ordering the plaintiff to pay the defendant's costs.[1705] While the court granted the defendant's request[1706] the utterances are authority for the view that the court may strike out a claim rather than simply awarding costs against the exaggerating party.[1707] In Ireland the Supreme Court considered the outcome of *Molloy v Shell* in *Shelley -Morris v Dublin Bus.*[1708] It observed that for the minority of litigants who are prepared to indulge in abuses they run the risk of losing their costs and they may be ordered to pay the costs of the opposing party, or the court may take an even more drastic type of action. Denham J. noted that while the plaintiff succeeded in obtaining an award of damages, the defendant had on balance, been more successful in overall terms. This was compounded by the finding of deliberate exaggeration on the part of the plaintiff. The court observed that the conduct of the plaintiff was an important factor to be considered by the court in the exercise of its discretion, and it averred that the plaintiff, who was awarded £45,000 was not entitled to the costs of the appeal. *Widlake v BAA Ltd* has become synonymous with the worst excesses of exaggeration.[1709] The trial judge was not impressed by the plaintiff's testimony and claim for £148,878.02. The court concluded that she sustained a relatively minor injury which interfered with her keep fit exercise which restricted her bending and body stretches. The plaintiff had deliberately concealed her previous medical history from medical professionals

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1705 *Ibid* [18] (Laws LJ concurring); *Ibid,* Alcock, *Costs follow the event v Costs to follow,* p 14 (fn 61).

1706 The Court of Appeal allowed the appeal with the costs to be paid by the Respondent to the Appellant.

1707 *Molloy v Shell UK Ltd* [2001] ADR. L.R. 07/06 " At least since the particulars of claim were filed on 20 September 1999 and until he was found out the respondent's approach to this action has been nothing short of a cynical and dishonest abuse of the court's process. For my part I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should once it knows the facts entertain the case at all save to make the dishonest claimant pay the defendant's costs. However, all that is sought here in an order for 100 per cent of the appellant's costs instead of 75 per cent, the costs in question being only those incurred after the date of the ... payment" [18].

1708 *Shelley-Morris v Dublin Bus* [2003] IESC 2 (Denham J) (McGuinness J, and Hardiman J concurring); citing *Hewthorn and Company v Heathcott* 39 ILTR 248; *Flannery v Dean* [1995] 2 ILRM 393.

1709 The plaintiff lost her footing on a stairwell near baggage reclaim suffering injuries to her back, buttocks, legs, knees and elbow. Her evidence shifted considerably including her apparent cramp symptoms. The defendant made a payment and covert surveillance was conducted on the plaintiff.

in the expectation of augmenting the amount of compensation.[1710] The trial judge determined that the injuries would resolve within 12 months of the accident and the court made an award of just £5,522.38. The Court of Appeal observed that the plaintiff succeeded in obtaining judgment for a pecuniary sum which exceeded the amount paid in to court. However like '*Painting'*[1711] and '*Molloy'*[1712] the plaintiff made no counter proposals and did not attempt to explore any settlement opportunities. Ward LJ. observed that the trial judge had concluded that the defendant was the real winner, as the plaintiff had embarked on misleading medical professionals, and it was not so much a case of detailing symptoms which were grossly exaggerated, as she withheld relevant material from her own medical experts. This was tantamount to an attempt to manipulate the civil justice system which in turn rendered it more grave than '*Molloy'*.[1713] Ward LJ. asserted that the Civil Procedure Rules are well entrenched and their overriding objective is to deal with cases justly.[1714] The court takes cognisance of all of the circumstances of the case, and whether a party which succeeded in whole or in part, exaggerated that claim.[1715] The position propounded by Ward LJ. in '*Widlake'* appears to extend '*Painting'* and '*Molloy'*. It mirrors the position adopted by the Irish Supreme Court in *Shelley-Morris v Dublin Bus*[1716] where it analysed '*Molloy'*[1717] and '*Grimes'*[1718] while asserting that a successful protagonist may not succeed in obtaining an order for costs if the factual matrix indicates features which are unsatisfactory as to the way in which that party behaved.[1719] '*Widlake'* exaggeration does not vitiate a successful plaintiff's entitlement to costs. It is necessary to undertake a judicial exercise to consider whether the exaggeration has resulted in additional costs being incurred. A prevailing plaintiff is entitled to receive a full award of costs. Though the court has a discretion to make a different award. The discretion ought to be exercised when it has been established that the exaggeration was grossly excessive resulting in an escalation of legal costs.[1720] There is no general rule prescribing that the exaggeration of a genuine claim will result in the disallowance of such a claim[1721] (though

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1710 *Widlake v BAA Ltd* [2009] EWCA Civ 1256 [15].
1711 *Painting v University of Oxford* [2005] EWCA Civ 161.
1712 *Molloy v Shell UK Ltd* [2001] EWCA Civ 1272.
1713 *Ibid, 'Widlake'* [18].
1714 *Ibid* [19] (Smith LJ and Wilson LJ concurring).
1715 *Ibid* [20].
1716 *Shelley-Morris v Dublin Bus* [2003] IESC 2 [9], [2003] 1 IR 332, [2003] 2 ILRM 12.
1717 *Ibid* [11].
1718 *Grimes v Punchestown Developments Co. Ltd* (SC, 20 December 2002) (Denham J).
1719 *Ibid* [9] (Denham J), [2003] 1 IR 332, [2003] 2 ILRM 12; *Donegal County Council v O'Donnell* (HC, 25 June 1982) (O'Hanlon J).
1720 *Widlake v BAA Ltd* [2009] EWCA Civ 1256 [31] (Ward LJ); citing *Cook on Costs:* para 11-11.2, 2009 edn; *Blakes Estates Ltd v Government of Montserrat* [2005] UKPC 46, [2006] 1 WLR 297.
1721 *Shah v Wassim Ul-Haq* [2009] EWCA Civ 542.

it may produce a more unusual form of costs order), not least because not all exaggerated claims stem from dishonesty, as sometimes exaggeration can be innocent resulting from a subconscious obsession with injury.[1722] The court should not seek to reduce costs because the result fell short of the plaintiff's expectations. In *Straker v Tudor Rose*[1723] the successful plaintiff was awarded £13,000 which exceeded the defendant's payment in to court but nonetheless the plaintiff received only a limited costs award. The Court of Appeal[1724] observed that the most important step is to identify the party that is paying money to the other party, and while it increased the award to sixty per cent, it applied a deduction,[1725] as a measure of its disapproval for that party's failure to comply with the pre-action protocol. While in *Jackson v Ministry of Defence*[1726] the Court of Appeal observed that despite the plaintiff beating the defendant's payment, albeit by a small margin, the reduction on costs would signal a considerable incentive to plaintiffs and their advisers against advancing exaggerated claims.[1727] In *Hall v Stone*[1728] the successful claimants sought one hundred per cent of their costs having been granted just sixty per cent by the trial judge who acquitted them for dishonesty, but found that there had been some exaggeration, in that the injuries were far less serious than had been alleged. The Court of Appeal[1729] opined that the issue of fabrication of symptoms had been resolved in the appellant's favour. It further noted that the defendant made no payment in to court, the issue as to whether the prevailing party had exaggerated their symptoms as opposed to fabricating them was secondary, and the plaintiffs were acquitted not only of dishonest fabrication but also of conscious exaggeration. Smith LJ. Ordered the defendants to discharge the plaintiff's entire costs, except those derived from the first set of medical reports, which were intrinsically connected to the exaggeration arguments.

6.7 A doctrine of proportionality

The concept of proportionality operates not only with respect to whether an order for costs is

1722 *Hall v Stone* [2007] EWCA Civ 1354 [17] (Smith LJ).
1723 *Straker v Tudor Rose* [2007] EWCA Civ 368.
1724 Longmore LJ and Waller LJ concurring.
1725 *Barnes v Time Talk UK Ltd* [2003] EWCA Civ 402 [28].
1726 *Jackson v Ministry of Defence* [2006] EWCA Civ 46.
1727 The defendant paid £150,000 in to court in an effort to compromise the action. The plaintiff recovered £155,000. The trial judge ordered the defendant to discharge seventy five per cent of the prevailing party's costs by reason of the fact that there had been a significant degree of exaggeration.
1728 *Ibid, Hall v Stone*.
1729 Smith LJ and Lloyd LJ (Waller LJ dissenting).

appropriate, but also and more importantly, with regard to the amount of costs which ought to be awarded. The concept has come to the fore in many common law jurisdictions, no less so in England and Wales where Jackson LJ. broached it *ex curia.*[1730] It has also received attention in Canada,[1731] while in Hong Kong the need to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings has been recognised.[1732] The Victoria Law Reform Commission considered proportionality to be one of the desirable goals of the civil justice system[1733] and it made a recommendation to the effect that the legal costs incurred in proceedings should be proportionate not only to the issues at play but also to the global sums in dispute.[1734] The New South Wales legislature has accorded statutory recognition to the concept[1735] and the courts can take cognisance of the disproportionate sums expended on legal fees relative to the monetary sums in dispute,[1736] while the overarching Federal Court of Australia Act, 1976 expressly references proportionality as an objective in section 37 M (2) (e).[1737] In England and Wales the Civil Procedure Rules[1738] are infused with the effervescence of proportionality which satisfies the policy objective of enabling the courts to deal with cases justly and in a fair manner.[1739] Litigation should be conducted in a proportionate fashion, and at a proportionate cost, where practicable. In Ireland the Legal Services Regulation Act 2015 makes no reference to proportionality in either sections 168 nor 169 and moreover section 155 and schedule 1 which deal with the principles of cost assessment are silent on the point. While the Act does not articulate any policy objective in

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1730 Lord Justice Jackson's, *Final Report on Civil Litigation Costs: An Overview* (2010), 35.

1731 British Columbia Justice Review Task Force, Civil Justice Reform Working Group, Effective and Affordable Civil Justice: *Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006).

1732 Chief Justices Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: An Overview – Judiciary* [2009] [2].

1733 Victoria Law Reform Commission, *Civil Justice Review,* Report 14 [2008] [4.14]; "it is increasingly accepted that the costs incurred by the parties and by the public in the provision of court resources should be 'proportional' to the matter in dispute. Relevant dimensions of the matter in dispute include the amount in issue or its importance."

1734 *Ibid*, Report 14 [2008] Rec. 16.3 a duty to use reasonable endeavours to "ensure that the legal and other costs incurred in connection with the proceedings are minimised and proportionate to the complexity or importance of the issues and the amount in dispute"; COAG, National Legal Profession Reform Discussion Paper, Legal Costs, 4 November, 2009.

1735 Civil Procedure Act 2005, section 60 (NSW) provides that "in any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject- matter in dispute."

1736 *Seven Network Ltd v News Ltd* [2007] FCA 1062 (Sackville J) 8 – 10.

1737 Section 37 M (2) (e) provides for "the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute."

1738 CPR, r. 44.3 (4) (a) (b) (c) (d) and r. 44.3 (5) (a) (b) (c) (d).

1739 The policy is reflected in the overriding objective set out in CPR 1.1. Dealing with a case justly includes so far as is practicable dealing with it in ways which are proportionate to the amount of money involved, the importance of the case; the complexity of the issues; and the financial position of each party.

relation to costs the plurality of the factors in section 169 (1) (a)-(g) suggest that the provisions can be skewed to achieve fairness, and notwithstanding the statutory silence with regard to proportionality, there is an argument to be advanced that the principle can be imported in to the shaping of a fair costs order. [1740] Such an approach would be consistent with the view that common law jurisdictions display no propensity to embrace claims for costs where the sums represent multiples of, and cast a dark shadow over, the monetary sums in dispute. Proportionality comes in to sharp focus when costs tower over the sums of damages awarded, and it is by no means uncommon for the amount of costs to surpass the monetary sums in dispute, by one hundred per cent, or more.[1741] Utilising the concept of proportionality is not simply synonymous with fashioning a reasonable costs award which is proportionate and just, or one which is proportionate to the value of the claim in issue, this is particularly so when the proceedings do not plead a specific quantum, or where the protagonists are seeking hybrid reliefs, which may or may not include a liquidated sum[1742] in addition to non-monetary reliefs.[1743] The costs incurred will be accepted as proportionate once they bear a recognisable relationship to the monetary amounts in dispute; the value of any non-pecuniary relief; the complexity of the proceedings; or any wider factors, which for example, might engage with issues of public importance.[1744] The proportionality exercise is not simply a matter of performing some form of notional, or mathematical or qualitative analysis of the nexus between the legal costs which have been incurred and the *quantum* of the claim or counter claim. For their part the courts in England and Wales consider the practice direction issued in furtherance of Civil Procedure Rule 45.[1745] The ratios between the costs that have been expended and the value of the claim, or counter claim, may not offer a truly accurate sum for comparison, not least where there is a public interest aspect to the case. It would be an affront, if not anathema to common sense, to advance the proposition that a fixed percentage could be allocated to the value of the claim with a view to deciding whether

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1740 Legal Services Regulation Act, 2015, section 155 4 (c) refers to a "fair and reasonable charge."

1741 *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) p 80, Lord Woolf.

1742 Australian Law Reform Commission; *Review of The Federal Civil Justice Jurisdictions in Australia* [4.51] - [4.54].

1743 *Marcura Equities FZE v Nisomar Ventures Ltd* [2018] EWHC 523 (QB), Nicholas Vineall Q.C, sitting as Deputy High Court judge rejected the contention that it was disproportionate for a party to estimate its costs at £450,000 in order to recover £35,000 with that party also obtained other non-monetary relief in the form of injunctions; citing *M v London Borough of Croydon* [2012] EWCA Civ 595 (Lord Neuberger MR)

1744 CPR, r. 44.3(5) states: "Costs incurred are proportionate if they bear a reasonable relationship to – (a)) the sums in issue in the proceedings;(b) the value of any non-monetary relief in issue in the proceedings; (c)) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) any wider factors involved in the proceedings, such as reputation or public importance."

1745 Which advises that "in applying the test of proportionality the court will have regard to rule 1.1(2) (c)."

such costs are proportionate.

6.7.1 The litmus test & Global reduction approach

Leggatt J. asserted in *Kazakhstan Kagazy Plc v Zhunus*[1746] that a party may expend spend as much as it likes on lawyers, but the courts, will control how much can be recovered. Proportionality is not analysed just by comparing the level of costs with the amount at stake in the litigation but having regard to all the circumstances including the legal work that the complexion of the case reasonably required. In proceedings where large financial sums are being contested, it may be eminently reasonable from a party's perspective to spare no costs on certain items. It does not follow however that such an expense falls to be considered as having been reasonably or proportionately incurred, or that it is even reasonable and proportionate. The nomenclature of reasonable and proportionate needs to be viewed objectively through a judicial prism.[1747] The litmus test is not the sum that it was in a protagonist's best interests to incur, but rather, it is the lowest amount that it could reasonably have been expected to expend so that it could present its case competently and proficiently.[1748] In *Home Office v Lownds*[1749] Lord Woolf advanced a two-stage approach which sees both a global and an item-by-item approach. The first will indicate whether the overall sum claimed is proportionate. If the costs when viewed as a whole are not proportionate within that test then it will be necessary to examine each item to determine whether they have been reasonably incurred. The costs for each item should be reasonable.[1750] The prevailing party is indemnified for the costs which it incurred but the burden on the vanquished party must be commensurate with the nature of the litigation, and not simply, the perceived value of the case. The courts attach the requisite weight to the issue of proportionality, while considering what necessary costs are, and a common sense standard is applied. The courts are wary of setting too high a threshold with the benefit of hindsight.

1746 *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Com Ct) [13]; cited in *Merricks v Mastercard Incorporated* [2017] CAT 27 [29] (HC 23 November 2017) (Roth J).

1747 *Ibid* [29] (Roth J) "The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently having regard to all of the relevant circumstances."

1748 *Ibid* [29], the respondent (Mastercard) was awarded 80% of its costs.

1749 *Home Office v Lownds* [2002] EWCA Civ 365, [2002] 4 All ER 775; applied *Giambrone v JMC Holidays Ltd (formerly t/a Sunworld Holidays Ltd (Costs)* [2002] EWHC 2932, [2003] 1 All ER 982 (Morland J).

1750 *Home Office v Lownds* [2002] EWCA Civ 365 [31].

Lownds mandates the court firstly to analyse whether the overall costs are proportionate, then secondly to assess whether they are reasonable and proportionate on a *per* item basis. *Lownds* does not require the court to scrutinise every item in some form of notional checklist,[1751] though if the prevailing party's costs are found to be disproportionate it may conduct such a discrete forensic exercise in order to determine whether they are necessary and reasonable.[1752] The fact that the costs may be fair and proportionate from the global perspective does not prevent individual items from being reduced if specific items of expenditure are disproportionate, when objectively viewed. In *Savoye v Spicers*[1753] Akenhead J. advanced the view that when assessing proportionality,[1754] the court should consider (a) the inter connectivity between the sums claimed in respect of costs which were reasonably incurred and the amounts in issue. If the monetary value of a claim stands at £100,000 and the costs amount to £1 million then they will be disproportionate; (b) the time expended by legal professionals with regard to the total length of the hearing(s);[1755] (c) the extent to which the legal professionals incurred costs and the time which they expended in the proceedings pertaining to any other prior dispute or resolution machinery; (d) whether the case is a test case or (e) whether it is of importance.[1756] Akenhead J. noted that the basic point[1757] had been investigated and the amount of solicitors' time claimed for was disproportionately high.[1758] In *May v Wavel*,[1759] Dr. May and his wife accepted the defendant's offer to settle of £25,000 in addition to damages, for noise nuisance, in a neighbour dispute. Their costs bill totalled £208,236.54. Master Rowley applied an item-by-item assessment for reasonableness that resulted in the figure being drastically curtailed.[1760] Thereafter he deemed that the sum was still disproportionate and he boldly opined that the claim was never going to exceed £25,000

1751 *Ortwein v Rugby Mansions Ltd* [2003] EWHC 2077 (Ch) (HC, 28 July 2003).

1752 *Research in Motion UK Ltd v Visto Corporation* [2008] EWHC 819 (Ch).

1753 *Savoye v Spicers* [2015] EWHC 33 (TCC).

1754 The claimant sought £201,790 after successfully enforcing the adjudication decision that was worth almost £999,000 in its favour. There were three hearings regarding summary judgment that lasted 7 hours. The main elements of the costs were 111 hours of partners' time at £520 per hour and 223 hours of associate time at £370 per hour.

1755 If 3,000 hours of professional time are expended on a case that involves just a one day hearing, that may be indicative of a disproportionate incurrence of professional time.

1756 *Savoye v Spicers* [2015] 1 Costs LR 99, [2015] EWHC 33 (TCC) [1], "If for instance an individual or a company is being sued for everything which he, she or it is worth, it may not be disproportionate for that individual to engage a QC even if the amount in issue is objectively not very large."

1757 The interpretation of section 105 of the Housing Grants, Construction and Regeneration Act 1996.

1758 The partners and associates time was reduced to 20 and 160 hours respectively, and given counsel's prior extensive involvement, the counsel's fees were reduced from £27,800 to £18,800, giving a total of £96,465 (from £201,790.66); *Kazakhstan Kagazy Plc v Zhunas* [2015] EWHC 404 (Com Ct); *Bloomberg LP v Sandberg (a firm)* [2016] EWHC 488 (TCC).

1759 *May v Wavell* [2016] EWHC B16 (Costs).

1760 To £99,655.00.

as he did not perceive the litigation as complex and the case had been compromised. Consequently he imposed a further reduction to reflect proportionality and he awarded the plaintiffs just £35,000 in costs. On appeal Dight J.[1761] countered that the claim necessitated sophisticated pleadings and he likened it to other cases at the complex end of the scale. The phase that the proceedings had reached was also pertinent to proportionality. Dight J. did not disagree with the global approach but he surmised that the final figure was bereft of any forensic explanation, as to how the various factors had been weighed, nor did the calculation appear to be predicated on any specific methodological foundation. The court concluded that Master Rowley misinterpreted and misapplied the proportionality test[1762] and it deemed that £75,000 was proportionate.[1763] The outcome mirrors the approach in Australia namely that costs must be proportionate to the value, complexity, and importance of the dispute.[1764/1765]

7.1 Summary and Conclusion

The research investigation examined the *costs follow the event* rule since its infusion in to the common law. The thesis utilises a flow methodology chronicling key developmental milestones which include the: culmination of two way fee shifting, in 1606; Supreme Court of Judicature Acts model; Civil Procedure Rules in England and Wales and the Legal Services Regulation, Act which entered the statute book in Ireland in 2015. The research performed a megascopic examination of the rules relating to legal costs in Ireland. It undertook a qualitative consideration of primary and secondary sources utilising a black letter traditional framework, with deductive reasoning. It views the loser and the user pays rules from the standpoint of functional equivalence and it takes cognisance of comparative

1761 Sitting in the Central London County Court with Master Whalan.

1762 *BNM v MGN* [2017] EWCA Civ 1767; the case that concerned "phone hacking" settled for £20,000 damages and undertakings. The bill of costs amounted to £247,817 which Master Gordon-Saker reduced on an item by item basis to £167,389, he then applied the global approach and further reduced the bill to £84,855. The sum in issue was modest and the value of the monetary relief was not substantial, and as such, the costs ought to bear a reasonable relationship to the value of the claim; *Hobbs v Guy's & St. Thomas' NHS Foundation Trust* [2015] EWHC B20 (Costs), clinical negligence claims have more complexity and involve more work on other claims of commensurate value.

1763 £75,000 plus v.a.t produced a global figure close to £90,000.

1764 *Skalkos v T&S Recoveries Pty Ltd* [2004] 65 NSWLR 151 [8].

1765 *Arjomandkhah v Nasrouallahi* [2018] EWHC B 11 (HC, 6 July 2018), the claim seeking injunctive relief (with no monetary aspect) failed. The claimant objected to the victor's costs of £23,523 on proportionality grounds. The court deemed they were proportionate when considering the nature of the non-monetary relief.

considerations.

Chapter 2 examined the origins, multi-faceted reasoning, objectives and functions of the *costs follow the event* rule which is juxtaposed against the American rule. It analysed the equitable doctrines that were developed from the eighteenth century onwards which enable the judiciary to depart from the harsh rigidity of the loser pays rule in the interests of securing fairness and justice. The chapter also examined the multi-parous exceptions to the loser pays rule and their disparate rationale(s) which manifest in probate litigation, family law proceedings, and *sui generis* proceedings, and which are predicated on access to justice-based reasoning.[1766] It analysed the indemnities that are conferred by that rule and the American rule which operate to inoculate trustees, mortgagees, and minority shareholders. It considered the rationale(s) for the American rule and it examined the principal judicial exceptions to that rule, which emerged in admiralty law, and under the common benefit and bad faith doctrines.

Chapter 3 examined the *justice-related test* espoused by the Irish courts in *Fyffes Plc v DDC Plc* and the factors which can displace the loser pays presumption so as to disentitle an otherwise successful party to a costs award. It considered how the conduct of the parties either before or during proceedings could negatively impact on a costs entitlement. It elucidated the factors in *Antonelli v Allen* which when present can disentitle an otherwise successful party to receive costs. It examined the cost allocation rules in *Ritter v Godrey,*[1767] and in Irish test cases, and in certain Irish Constitutional law actions. It considered those cases which are fundamental and touch upon sensitive aspects of the human condition, including cases engaging with the *right to die*, human embryos, conspicuous novelty, and the separation of powers doctrine. It performed qualitative analysis to provide a ready reckoner for anticipating likely costs awards in certain Constitutional law actions. The chapter also considered the wasted costs jurisdiction and it identified the salient jurisprudence.

Chapter 4 examined the traditional lackadaisical notions of *winners* and l*osers* against the backdrop of complex civil and commercial litigation where the courts attempt to fashion costs orders that reflect on the overall successes and failures of the parties. This approach is exemplified by the leading authority of '*Sycamore Bidco'*, in England and Wales, and '*Veolia'* and *O'Mahony v O'Connor Builders* in Ireland. The chapter examined how the judiciary have abandoned the notion that any degree of success is justification for securing an award of costs

1766 In such matters the protagonists enjoy risk-averse costs shifting.
1767 *Ritter v Godfrey* [1920] 2 KB 47.

and it considered the varying tests for determining the *real winner.*[1768] It also examined the '*Sanderson'* and '*Bullock'* devices which seek to preserve the integrity of the winning parry. The chapter also considered the modern application of these rules in complex litigation.

Chapter 5 examined the jurisprudence in public interest litigation including '*Child Poverty Action Group'* and '*Corner House Research',* which adumbrated a protective costs jurisdictions, and Aarhus Convention requirements, which stipulate that costs must not be prohibitively expensive. It considered those legislative developments in Ireland,[1769] which confer costs protections in certain environmental litigation, which placed the American rule on a statutory footing. It examined the salient jurisprudence in environmental litigation including *Browne v Fingal County Council*, where the court explored the meaning of prohibitively expensive, and *Indaver NV v An Bord Pleanála* where the court withdrew qualified one way costs shifting protections owing to the manner in which the plaintiff conducted the litigation, without a *bona fide* belief of success. There is no subsidiary question in chapter 5 but the findings in this chapter contribute to the conclusion that the costs follow the event rule has become a (living) relic, as fee shifting is increasingly sublimated.[1770]

Chapter 6 examined the salient features of the Civil Procedure Rules in England and Wales and the Legal Services Regulation Act in Ireland.[1771] The latter contains provisions that are almost identical to those which were introduced in England and Wales. Both jurisdictions embrace the notion that it is impermissible to render an award of costs which is predicated on the notion that any degree of success will suffice. The Act and the CPR preserve the default position that a successful party is entitled to an award of costs. They also elucidate factors, analogous to guidelines, for the judicial college to consider. The chapter also examined the legal terms of art such as the *conduct of the parties,* payments in to court,[1772] *Calderbank* offers,[1773] and tenders.[1774] It considered the public policy considerations propounded in *Dunnett v Railtrack,* '*Halsey'* and '*Atlantic Shellfish'* which underpin judicial reasoning for

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1768 The *final flow of money* and *something of value tests.*

1769 Planning and Development (Amendment) Act, 2000; Environment (Miscellaneous Provisions) Act, 2011.

1770 The justification for this finding is contributed to in some way by the adoption of the American rule for costs allocation, in certain environmental and public interest litigation.

1771 Legal Services Regulation Act, 2015 section 169 (1).

1772 *Ibid*, section 169 (1) (e)

1773 CPR, r. 36.23(4) "for the purpose of rule 36.20, a claimant fails to better a Part 36 payment if it fails to obtain judgment for more than the gross sum specified in the Part 36 payment notice"; PD for Part 36 [10.5]; "In establishing at trial whether a claimant has bettered or obtained a judgment more advantageous than a Part 36 payment to which this paragraph relates the Court will base its decision on the gross sum specified in the Part 36 payment notice."

1774 *Ibid*, section 169 (1) (f).

punishing successful protagonists that refuse a reasonable offer to settle or to engage in mediation.[1775] It demonstrated how the courts in Ireland have a propensity to follow their English counterparts by sanctioning successful parties[1776] for exaggerating claims.[1777] It also generated the final subsidiary question which is addressed separately as a discrete issue.

7.2 Findings of Research Investigation

The loser pays rule developed incrementally in England and Wales and Ireland since it was introduced in the thirteenth century. The power to shift costs was amplified over time by legislation and the rules of Equity. The equitable jurisdiction was adopted by jurisdictions which adhere to the Supreme Court of Judicature Act model, including Ireland, Australia, Canada and New Zealand. There is no proprietary entitlement to costs which are not awarded as a matter of right. The multitude of exceptions to the general rule continue to expand. The American rule which observes thousands of statutory exceptions, has gained some traction in England and Wales and Ireland, particularly in the area of environmental litigation which is underpinned by the notion of access to justice. In certain Irish Constitutional Law actions the courts apply a form of *winner pays* rule, this is particularly so in *tragic cases,* which touch upon the human condition. The rule is philosophically counter intuitive and it can vacillate between a partial or even full award of costs in favour of the vanquished party. The '*Sanderson'* and '*Bullock'* devices which were developed by the courts in England and Wales, in complex multi-party litigation, were carried over by both the Civil Procedure Rules and the Legal Services Regulation Act 2015, and the rule in *Ritter v Godfrey* was also carried over. The courts in Ireland just as in England and Wales observe a *justice-related* test which flows from a long line of authorities including Donald *Campbell & Co. v Pollak*. The test is predicated on the principle that otherwise successful protagonists can suffer a costs disallowance or deduction as a result of the manner in which they conduct litigation. The judiciary in England and Wales,[1778] Ireland[1779] and Australia display a propensity in complex

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1775 *Ibid,* Alcock, *Costs follow the event v Costs to follow event,* pp. 6, 7,8,13 and 14.

1776 *Molloy v Shell UK Ltd* [2001] ADR. L.R. 07/06; *Painting v University of Oxford* [2005] EWCA Civ 61.

1777 *Ibid,* section 169 (1) (d).

1778 *Sycamore Bidco Ltd v Breslin* [2013] [EWHC] 583 (Ch), (No. 4) [13]-[16], [19] – [22], [28].

1779 *Ibid*, Alcock, *Costs follow the event v Costs to follow event,* pp. 2-4; *Veolia Water UK Plc, v Fingal County Council* [2006] IEHC 240 243, Clarke J. asserted that *"it seems to me to be incumbent on the court to attempt to do justice to the parties by fashioning, where appropriate, orders for costs, which do more than*

litigation for fashioning costs orders which encapsulate the overall successes and failures of the parties when the body of the litigation is viewed as a whole.[1780] The courts have attempted to elucidate various tests for determining the identity of the victorious party which include the simple mechanical test, the final flow of money test, and the impression and evaluation test. The prevailing party is to be viewed from a common sense perspective when taking the body of litigation as a whole and real and practical weight must be accorded to the winner. The courts in England and Wales and Ireland are displaying a greater propensity to tailor bespoke costs orders which reflect the overall successes and failures of the protagonists. This constitutes a retreat from the pure loser pays model in favour of a more European style of cost allocation. The common law displays reluctance to prescribe how costs are to be allocated in complex, multi-party litigation, with mixed outcomes, but personal injuries actions remain occluded from such considerations, and so the loser pays rule continues to operate in an unbridled fashion, in this form of tortious litigation. The jurisdictions which derive their practices stem from the Judicature Act model exercise a broad discretion to alleviate costs shifting in public interest litigation and the common law courts countenance pre-emptive costs orders if exceptional circumstances are met.[1781] Though the legislature in Ireland has placed the American rule on a statutory footing in certain environmental enactments including the Environment (Miscellaneous Provisions) Act, 2011 and the Planning and Development (Amendment) Act, 2010, which implement European directives,[1782] a party without a *bona fide* belief in the substance of its case may lose the protections afforded by the American rule. [1783]Article 9 of the Aarhus Convention provides that costs cannot be *prohibitively expensive*, but there is no criteria for determining its meaning, and Article 9 does not preclude costs shifting.[1784] The costs rules experienced different evolutionary developments in England and Wales and Ireland consequent to the latter jurisdiction obtaining independence. Ireland did not have the benefit of the Civil Procedure Rules which were introduced in England and Wales in 1998 and so the

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simply award costs to the winning side"; *Ryanair Limited v Aer Rianta Cpt* (SC, 26 October 2001); *Davis v Walshe* [2003] 2 IR 152.

1780 *Ibid*, Alcock, *Legal Costs: Loser Pays*, materials and paper.

1781 In Ireland a party seeking advance or pre-emptive costs shifting protection must demonstrate a *bona fide* belief in its prospect of success. In *Hunter v Nurendale Limited (T/A Panda Waste)* [2013] IEHC 430, the High Court held that such an application must carry with it a *certain measure of substance.* The threshold is not analogous to the *reasonable prospect of success* test for granting interlocutory (injunctive) relief; *'Child Poverty Action Group'* [1998] EWHC Admin 151 [37]; '*Friends of the Curragh'* [2006] IEHC 243.

1782 Environmental Impact Assessment Directive 2011/92/EU; Integrated Pollution Prevention and Control Directive 2008/1/EC.

1783 *Indaver NV v An Bord Pleanála* [2013] IEHC 11.

1784 *R (Edwards) v Environment Agency (No.2)* 2013 EUECJ C-260/11.

evolutionary process in Ireland moved at a slower pace. The Civil Procedure Rules maintain the loser pays rule[1785] which is also placed on a statutory footing in the Legal Services Regulation Act 2015, in Ireland. The Act contains provisions[1786] which are strikingly similar to those contained in the Civil Procedure Rules[1787] for punishing exaggeration. The prevailing parties expectation to costs is not incomparable to a spring tide which starts to recede once the countervailing circumstances provided for in section 169 (1) (a) – (g) fall for judicial consideration. The tide may now recede further than it has ever done previously and it exposes a new low mater mark which can deliver almost penal like cost outcomes. The courts in Ireland continue to exercise their discretion for the purpose of determining by whom, what, how, and when costs are to be allocated. The judiciary in Ireland[1788] like their English counterparts[1789] can punish parties which refuse without reasonable cause to engage in mediation. While section 169 (1) recognises that a successful protagonist is entitled to an award of costs, the court must take cognisance of various factors including the parties conduct. Section 169 like Part 44 of the Civil Procedure Rules in England and Wales preserves the loser pays rule but both jurisdictions are distancing themselves from the notion that any degree of success is sufficient to shift the costs burden. Costs always remain in the discretion of the court, and they ought to follow the event, except where it is appropriate to make a diminution, or a reduction, or even to render a cost neutral outcome. The costs principles in both jurisdictions are now more closely aligned than they have been at any period since the bifurcation of both legal systems which occurred with Irish independence.

7.3 First subsidiary research question

1785 CPR r. 44.3 (2) (a).
1786 Legal Services Regulation Act, 2015 section 169 (1) (d); *Shelley-Morris v Dublin Bus* [2003] IESC 2.
1787 CPR, r. 44.3 (5) (d); *Molloy v Shell UK Limited* [2001] EWCA Civ 1272.
1788 *'Atlantic Shellfish' [*2015] IEHC 570, [2015] IECA 283.
1789 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

In the context of Irish Constitutional Law actions – are we turning losers in to winners?

Chapter 3 examined the first subsidiary question. It analysed the emergence of a counter intuitive *winner pays rule* within certain identifiable Irish Constitutional law actions. This represents an abandonment of the loser pays philosophy, which in turn undermines the notion of deterrence. The reversal can deliver unintended consequences including an artificial sense of moral victory. Under the *winner pays* model the unsuccessful litigants operate in a form of protected or risk-averse environment. The spectre of the loser pays threat is deactivated. Additionally, litigants may contract in to conditional fee arrangements, and the litigation is conducted free of financial repercussions. This delivers an extreme version of the loser pays rule, albeit in reverse, and the litigation can become volatile. The thesis analysed cost award patterns, most notably, in actions where the pleadings engage with sensitive aspects of the human condition, life, sexuality[1790] and the separation of powers doctrine. In '*Roche'* and '*Fleming'* the losing parties were awarded one hundred per cent of their first instance costs, while the latter also received half of the costs of the failed appeal. The question also identified the spectrum of costs outcomes which range from an adherence to the traditional *costs follow the event* rule, at one extreme, to a *loser-friendly type indemnity* rule at the other. The answer to the first supplemental question is resoundingly in the affirmative. This is to say that in the context of certain Irish Constitutional Law actions the vanquished party benefits from costs shifting. The corollary is that the loser pays concept has been corroded. A generous form of judicial legal aid, which enlivens expectations, supplants it instead. The response to the first subsidiary question makes a significant contribution to the primary one.

7.4 Second and third subsidiary research questions

Is it equitable that a party which enjoyed many discrete victories, but which ultimately lost, should pay all of the winner's costs?

And

Is it equitable that a party which lost many discrete applications, but which ultimately

[1790] *O'Brien v Clerk of Dáil Eireann* p 2 (HC, 2 May 2017) (Ni Raifeartaigh J).

prevailed, should receive a full award of costs?

The research investigation posed two inter related questions to underpin the hypothesis that the costs follow the event rule is dead or on life support. The second and third questions which arise in chapter 4 are especially important in the context of complex litigation. The Civil Procedure Rules in England and Wales like the Legal Services Regulation Act, in Ireland, mandate the courts to form a view as to whether the outcome in the litigation, when globally surveyed, might not provide an accurate basis for making an award of costs. Both of these supplemental questions examined the factual matrices when the courts, particularly in commercial litigation,[1791] can adjudicate on costs in interlocutory applications.[1792] The party that succeeds on a discrete issue can achieve a costs set off at the very least. A party which fought many discrete interlocutory battles and which prevailed on many if not on the preponderance of the main points may feel aggrieved if it is deemed to be the loser (in overall terms) and ordered to discharge the winning party's costs. The thesis takes cognisance of the pronouncements of the courts in England and Wales, Australia and Ireland which concede that there is no instant formula for determining how costs are to be apportioned in complex litigation absent a clear knock out.[1793] While in proceedings with a mixed outcome, the apportionment, will be a matter for judicial discretion and any attempt at mathematical precision is elusive. The exercise of discretion is based on an evaluation[1794] and not on a microscopic analysis of transcripts.[1795] Successful parties rarely succeed on all points and are bound to fail on at least some.[1796] The research demonstrates that the courts are favourably disposed to tailoring costs orders that reflect the relative successes and failures of protagonists. An overly vigorous observance of the loser pays rule can provide a disincentive for parties, even successful ones, to jettison weaker points.[1797] The judiciary in England and Wales, Ireland and Australia, in the exercise of their untrammelled discretion[1798] examine the body of the litigation as a whole,[1799] before fashioning a costs order which reflects the overall

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1791 Complex litigation including mercantile business and intellectual property law actions.

1792 *Solarus Products v Vero Insurance (No 4)* [2013] NSWSC 1012; *Khaira v Shergill* [2017] EWCA Civ 1687; *Morris v Bank of America National Trust* [2001] 1 All ER 954; *Glaxo Group Limited v Rowex* [2015] IEHC 467; *O' Dea v Dublin City Council* [2011] IEHC 100.

1793 *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service (No 2)* [2011] NSWCA 171.

1794 *Ibid*, 22.

1795 *The National Museum of Ireland v The Minister for Social Protection* [2017] IEHC 198.

1796 *Multiplex v Cleveland Bridge* (2009) Costs LR 55; *Bugden v Andrew Gardner Partnership* [2002] EWCA Civ 1125; *Kidsons v Lloyd's Underwriters* [2007] EWHC 2699 (Com Ct).

1797 *Phonograph Performance Limited v AEI Refiffusion Music Ltd* [1999] 1 WLR 1507.

1798 *King v Zurich Insurance Co.* [2002] EWCA Civ 598.

1799 *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119.

justice of the case.[1800] This is optimal in lieu of awarding to costs to the winning side.[1801] The task of selecting the winner should be nothing other than evaluating the real life outcome.[1802] In *O'Mahony v O'Connor Builders*[1803] Clarke J. sitting in the High Court in Ireland found against the successful plaintiff on a significant number of issues and he awarded the defendant which had been exposed to the expense of a further days hearing the requisite costs. The thesis examined the rule in *Ritter v Godfrey*[1804] which can suspend (or even apply a form of winner pays) cost shifting where the conduct of the otherwise prevailing defendant precipitated the litigation. In complex litigation the judiciary may consider certain factors including the level of costs expenditure in comparison to the level of the award.[1805] This may arise where the defending party succeeds on all but one issue, which stems from a late amendment of pleadings, and but for that one issue, the plaintiff would have failed.[1806] Where the court forms the view that both parties are winners and losers then it may refrain from ordering costs.[1807] The research also considered costs relating to one or more steps in a case [1808] and distinct parts of proceedings.[1809]/[1810] The thesis addresses the splitting of costs and the anatomy of *split costs* orders. The thesis also considered the '*Bullock'*[1811] and '*Sanderson'*[1812] devices which enable the courts to fashion orders in favour of successful parties where their costs can be discharged by one or more of the unsuccessful defendants. The loser pays rule has been perilously eroded in complex litigation by the counter balancing considerations which have emerged. There is a nominal observance of but no religious adherence to the rule. The answers to the second and third subsidiary questions demonstrate that the courts are disinclined to render a full award of costs against a party, which prevailed in many discrete battles, but which ultimately lost. Nor are they prepared to confer a full

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1800 *Kidsons (A firm) v Lloyd's Underwriters* [2007] EWHC 2699 (Com Ct); *Traveler's Casualty v Sun Life* [2006] EWHC 2885 (Com Ct).

1801 *Veolia Water U.K. Plc v Fingal County Council (No.2)* [2006] IEHC 240, 243 (Clarke J).

1802 *BCCI v Ali (No 4)* NLJ 1222.

1803 *O'Mahony v O'Connor Builders* (HC, 22 July 2005); While in '*Sycamore Bidco'* the English High Court elected to award the successful plaintiff sixty per cent of its costs, after it had gone for the big prize and failed.

1804 *Ritter v Godfrey* [1920] 2 KB 60.

1805 C*amertown Timber Merchants Ltd v Sabrinder Singh Sidhu* [2017] EWCA Civ 104.

1806 *Beoco Ltd v Alfa Laval Co Ltd* [1995] 1 QB 137; if there is a considerable disparity between the sums claimed and those awarded the defendant may be viewed as a substantial winner. This is notwithstanding that the plaintiff obtains judgement.

1807 C*amertown Timber Merchants Ltd v Sabrinder Singh Sidhu* [2017] EWCA Civ 104 [36], (Ward LJ).

1808 CPR, r. 44.3 (6) (e); Legal Services (Regulation) Act, 168 (20 (c).

1809 *Ibid*, CPR, r. 44.3 (2) (e).

1810 Legal Services (Regulation) Act, 2015; section 168 (2) (d); CPR r. 44.3 (4) (b) "whether a party has succeeded on part of his case, even if he has not been wholly successful."

1811 *Bullock v The London General Omnibus Company* [1907] 1 KB 264.

1812 S*anderson v Blyth Theatre Co.* [1903] KB 533; *Davies v Forrett* [2015] EWHC 1761 (QB).

award of costs on a party which lost many discrete battles, but which ultimately emerged victorious. The last safe oasis of the rule is preserved in the realm of personal injuries litigation[1813] where a party can legitimately expect to receive a full award of costs. The cost rules in complex litigation bolster the hypothesis that the rule is dead or on life support. It is more observed in its breach than in its adherence. The rule has become a (living) relic.

7.5 Fourth subsidiary research question

Can the primary rule survive the enactment of the Legal Services Regulation Act, 2015?

Chapter 6 raises both the final subsidiary question, which asks *can the primary rule survive the enactment of the Legal Services Regulation Act, 2015?* and the primary research question which asks *has the costs follow the event rule become a relic?* They will be addressed in reverse order not least as the loser pays rule appears to lie somewhere on the spectrum, between neutered and moribund. It is like a patient etherized upon a table in an ambulatory state between life and death.[1814] The Civil Procedure Rules, in England and Wales, and the Legal Services Regulation Act, in Ireland, appear to preserve the loser pays philosophy as the default mode.[1815] This starting position is, however in the case of the Civil Procedure Rules at least, tempered by the views of Lord Woolf MR., who sought to depart from the preoccupation, that any degree of success whatsoever, should be sufficient to generate an entitlement to costs.[1816] The Act like the CPR, retains the '*Bullock'* and '*Sanderson'* devices.[1817] It also preserves other rules that were developed by the Courts of Equity. One such rule seeks to ensure that the costs incurred by the estate of a deceased person, can be discharged out of the property of the estate or trust,[1818] or that the trustee or mortgagee can

1813 *Fox v Foundation Piling Ltd* [2011] EWC Civ 790 [48].
1814 Thomas Stearns Eliot, *The Love Song of J. Alfred Prufrock*, Prufrock and Other Observations, Faber & Faber, 1917.
1815 CPR, r. 44.3(7); *Multiplex v Cleveland Bridge* [2009] Costs LR 55; Legal Services Regulation Act, 2015 section 169.
1816 *AED Reddifusion Music Limited v Phonographic Performance Ltd* [1999] 1 WLR 1507 C.A.
1817 *Sanderson v Blyth Theatre Co.* [1903] 2 KB 533; *Bullock v The London General Omnibus Co.* [1907] 1 KB 264.
1818 *Ibid*, *section* 168 (1) (b).

receive their costs.[1819] The provisions are similar to those contained in section 53 of the Supreme Court of Judicature Act (Ireland), 1877 that enable a trustee or mortgagee to claim costs out of an estate or fund. Section 169 of the legislation provides that a party which is entirely successful in civil proceedings is entitled to an award of costs against a party which is unsuccessful, unless the court otherwise orders. The Act conferred a residual discretion on the court, which may in the exercise of its discretionary power (which has flowed from 1877),[1820] consider not only the conduct of the parties during proceedings[1821] but also their pior conduct. This measure is similar to the provision in the Civil Procedure Rules.[1822] Sub section 2 of section 169 provides that where the court orders that a party which is entirely successful in proceedings is not entitled to an award of costs against the unsuccessful party, then it will advance reasons for its decision. The necessity for tailor-made costs decisions will arise in a multiplicity of circumstances including where: (i) unreasonable conduct had been demonstrated;[1823] (ii) exaggeration is proved,[1824] (iii) an otherwise successful party conducts itself in a manner which is sufficient to deprive itself of costs;[1825] (iv) the action engages with some element of public interest;[1826] (v) a Constitutional law action raising matters of general or exceptional public importance or novelty;[1827] (vi) the prevailing party does not succeed on every contested issue which is now an ever-present reality of modern big ticket litigation.[1828]

7.6 Primary research question

1819 *Ibid*, section 168 (3) (b); Supreme Court of Judicature Act (Ireland) 1877 section 53.
1820 Supreme Court of Judicature Act (Ireland) 1877 section 53.
1821 Legal Services Regulation Act, section 169 (1).
1822 CPR, r. 44.3(5)(a); "conduct before, as well as during, the proceedings"
1823 *Ritter v Godfrey* [1920] 2 KB 47.
1824 *Pearman v Burdett-Coutts* 3 T.L.R 719 (1887); *Molloy v Shell UK Ltd* [2001] EWCA Civ 1272; *Painting v University of Oxford* [2005] EWCA Civ 161; *Islam v Ali* [2003] EWCA Civ 612; *Jackson v Ministry of Defence* [2006] EWCA Civ 46; *Hall v Stone* [2007] EWCA 1354.
1825 *Antonelli v Allen (*London Times) December 8, 2000; [2017] Lloyd's Reports PN 487.
1826 *Grimes v Punchestown Developments Co. Ltd* [2002] 4 IR 515, 522.
1827 *Roche v Roche* [2006] IESC 10; *Horgan v An Taoiseach* [2003] IR 468; *Curtin v Dáil Eireann* [2006] IESC 27; *O'Shiel v Minister for Education* [1999] 2 IR 321; *Collins v The Minister for Finance* [2014] IEHC 79; [2016] IESC 73; *Norris v AG* [1984] IR 36.
1828 *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch); *Multiplex v Cleveland Bridge* [2009] Costs LR 55.

Has the costs follow the event rule become a relic?

The research poses one primary question namely *has the costs follow the event rule become a relic?* It is bolstered by four supplemental questions, which arise in the context of chapters 3, 4 and 6 respectively. The loser pays rule like any rule has spawned multiple exceptions many of which fail to demonstrate any synoptic connectivity. They were separately formulated over the centuries and the courts have refined them. A general rule ordinarily casts a shadow over its exceptions, or even devours them. In the case of the loser pays principle and the American rule the exceptions have propagated to suffocate the general rules. The exceptions have performed a *de facto* reverse takeover. The condition of the loser pays rule is not dissimilar to the fate of the once great river Euphrates. It now has to contend with at least twenty artificially engineered dams constructed along its course. They deprive it of the capacity to flow uninterrupted, and while the river still runs from its source in to the sea, its power has been diminished. The subsidiary questions contribute to finalising an unambiguous response to the primary one. While none of subsidiary questions are individually dispositive of proving the hypothesis, they nonetheless corroborate it. The replies to the supplemental questions provide a corpus of evidence that suggests the demise of the rule. The evidence indicates that the loser pays rule has shrunk dramatically, and that it continues to wither. Based on the answers to the subsidiary questions, it is apparent that a convergence of factors, including Irish Constitutional Law actions, complex litigation and environmental litigation, and the Legal Services Regulation Act 2015 have fatally undermined the loser pays rule.

To secure a definitive answer to the primary question it is necessary to address three factors, namely: (i) the necessity for exceptions; (ii) how they inform us about the general rule; (iii) and their inherent function and value. Turning first to necessity, the loser pays rule like any other has generated disparate exceptions.[1829] It is a feature of the rule of law that there can be no rules without exceptions, and rules are defeasible.[1830] D'Almeida asserts that exceptions can create an independent phenomenon.[1831] Finkelstein posits that they can be viewed as a qualification of a rule that is external to the rule that it qualifies.[1832] Sator reasoned that some rules create a relationship with other ones, but when the exception contradicts the conclusion

[1829] Claire O. Finkelstein, *"When the Rule Swallows the Exception"*, Penn Law, Legal Scholarship Repository, QLR, vol: 19 p 505.

[1830] Luis Duarte D'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law,* Oxford University Press, pp. 20-21 n.44 (2015); The Logic of Legal Requirements: Essays on Defeasibility, edited by Jordi Beltrán and Giovanni Battista Ratti, Oxford University Press, (2012).

[1831] Luis Duarte d'Almeida, *The Irreducibility Thesis*, pp. 3-17; Frederick Schauer, Exceptions, University of Chicago, Law Review, 58, 871-899, (1998).

[1832] *Ibid*, p 508.

expounded by the general rule, then it renders it inoperative.[1833] He posited that rules that have a restricted application can be viewed in contradistinction to those rules that are broader in scope.[1834] Finklestein noted that is impossible to adumbrate a prescriptive guide delineating all exceptions to the rule which they are part of.[1835] The 'loser pays' rule, unlike many others, does not purport to devour its exceptions, which on the contrary have been amplified. In fact it is the exceptions that have devoured the rule. Their continued expansion is a fatal attack on the viability of the rule. Ultimately when a rule is more identified by exceptions, then it fails the recognition test. It becomes an outdated relic shrouded in its own idiosyncratic nomenclature. The exceptions are strewn across the great expanse of the common law[1836] but the rule has given birth to them in a multi-parous manner. Consequently it has shrivelled to a wizened state. The exceptions admittedly provide a counterweight to negate the harshness of the general rule. They were originally developed in equity,[1837] which was not servient to rules.[1838] They enable the courts to apply a broad, justice-related approach based on the circumstances of each case,[1839] in order to achieve the overriding requirements of fairness.[1840] They are so numerous that they resist any general synoptic analysis, in jurisprudential, societal, and practical terms. They are however connected by the desire to alleviate the harsh burden of the general rule. O'Donnell J. observed in *Reaney v Interlink Ireland Ltd (T/A DPD)* that if the standard rule was routinely applied then a party who has a strong claim would have an almost perverse incentive to impose pressure on a defendant by mounting the most expensive claim possible.[1841] The equitable indemnities furthermore ensure that trustees, mortgagees, administrators, and minority shareholders[1842] have their costs underwritten when they litigate reasonably to protect the assets of the trust, estate, pension fund, or corporation.[1843] Additionally the *Antonelli* factors[1844] mandate the courts to afford judicial consideration to various points for determining costs, which purports to fetter

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1833 Giovanni Sator, *A Treatise of Legal Philosophy and General Jurisprudence*, volume 5, "*Legal Reasoning A Cognitive Approach to the Law"*, p 207, Spring (2005).

1834 *Ibid*, p 207 at 208.

1835 *Ibid*, p 505 at 507.

1836 Luis Duarte D'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law,* Oxford University Press, (2015)

1837 *Trustees v Greenough*, 105 U.S 527 (1881).

1838 *Jones v Coxeter* (1742) Atk 400.

1839 *Fyffes Plc v DCC Plc* [2006] IEHC 32; *The National Museum of Ireland v The Minister for Social Protection* [2017] IEHC 198.

1840 *Sprague v Ticonic National Bank*, 307, U.S. 161, 167 (1939).

1841 *Reaney v Interlink Ireland Ltd (T/A DPD)* [2018] IESC 13 [10].

1842 *Bakery Workers Union v Ratne*r, 118 U.S. App. D.C 269

1843 *Wallersteiner v Moir (No.2)* (1975) QB 373, 373, 407; *Re Beddoe: Downes v Cotton* (1893) 1 Ch 547; *Re Axa Equity & Law Life Assurance Plc* (No.1) [2001] 2 BCLC 447;

1844 *Antonelli v Allen* [2001] Lloyd's Report PN 487.

judicial discretion that is no longer untrammelled. The most lethal threat to the rule arises in complex litigation where the courts are prepared to fashion costs orders that redound on the relative success and failures of the parties.[1845] The courts have rejected the winner-takes-all philosophy and almost one thousand five hundred years of Roman law and canonical norms.[1846] Both the costs follow the event and the American rules have lapsed into a poor state of health. They are choked by their respective exceptions, which enjoy some overlap, and prosper like poison ivy. The loser pays rule is excluded in social welfare, revenue, intellectual property and other administrative appeals, and it is displaced by *sui generis* proceedings, family law litigation, the Small Claims court, probate actions, the Chancery indemnities, Irish Constitutional Law actions, commercial litigation and certain environmental actions. What remains of the rule has been stripped of its characteristics, like a rose without any effervescence. It is analogous to the modern river Euphrates where the number of blockages and dams now exceed twenty.[1847] The river like the rule has been deprived of its historical ferocity and impact. It still flows from the source to the sea, but by mechanical design, it has been stripped of its powers. The rule has endured many blockages in the form exclusions, exceptions, and indemnities, which have been amplified. It too has been deprived of any opportunity to expand. The American rule fails to provide a viable alternative. It also has witnessed the emergence of multiple exceptions. Taking a global perspective, the loser pays rule appears less vulnerable to the possible expanse of the American one, and more susceptible to an awakening which favours a shift towards a more European approach to costs distribution and allocation. The thesis answers the primary research question (namely *has the costs follow the even rule become a relic?*) unequivocally in the affirmative. The general expanse of litigation supports the hypothesis that the loser pays rule is either dead or on life support. The rule is more readily identifiable by the exceptions and indemnities rather than by the general rule. The same findings apply *pari pasu* to the American rule. It is open to the legislature to expand the exceptions, which in turn can assume the status of new rules, but the thesis concludes that neither the general rule nor the exceptions should be absolute. Just as the general rule supports cost shifting so too the exceptions should embrace the allocation of costs for parties which do not properly avail of

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1845 *Veolia Water v Fingal County Council (No.2)* [2007] 2 I.R. 81; *O'Mahony v O'Connor Builders* (HC, 22 July 1995); *Arklow Holidays v An Bord Pleanála* (2006) IEHC 15*; McAleenan v AIG (Europe) Ltd* [2010] IEHC *279; citing Veolia Water UK Plc v Fingal County Council (No.2)* [2007] 2 IR 81; *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch) [11]; *Multiplex v Cleveland Bridge* [2009] Costs LR 55.

1846 *Ibid, 'Sycamore Bidco' [*2013] EWHC 583 (Ch) [11].

1847 The Hindiya Barrage (1913); Ramadi Barrage (1956); Lake Qadisiya Dam.

those exceptions as occurred in '*Indaver'.*[1848] The legislature should consider expanding the different forms of conduct and behavioural attributes which constitute disentitling factors.

7. 7 Recommendations

There is no apparent zeal amongst the common law jurisdiction, which observe the Supreme Court of Judicature template, for abandoning the costs follow the event rule, let alone, for adopting the American one. In addition to the Access to Justice Report in England and Wales,[1849] the various Law Reform Commissions in geographically dispersed jurisdictions, including Australia,[1850] have advised that the vestigial flicker of the rule should be preserved. [1851] There exists no appetite for replacing the loser pays rule with the user pays model.[1852] The Manitoba Law Reform Commission asserted that the exceptions to the latter are so numerous as to generate a doubt as to how much of a rule it is.[1853] The American rule is predicated on a philosophically and doctrinally alien premise[1854] and if one proceeds on the basis that the user pays rule forms the bedrock of the American legal system, then the cornucopia of exceptions, have eroded it to such an extent that what remains is a cavity which is doctrinally hollow to the core. In the seminal 1965 document entitled *Towards a Just Society* the future president of the Irish High Court recognised the need to align the law more with contemporary needs and he suggested co-operation with the judiciary in order to reduce the cost of litigation through

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1848 *Indaver NV v An Bord Pleanála* [2013] IEHC 11.

1849 UK Civil Justice Council did not recommend that fee shifting should be abolished in its report, *"Improved Access to Justice - Funding, Options and Proportionate Costs"*, (June 2007) p 37-39.

1850 Australian Law Reform Commission, *"Costs Shifting – Who Pays for Litigation?"* (Report 75, 1995), paras 2.27 and 4.2, and Appendix F (recommendation 8: "in civil proceedings, costs shall follow the event").

1851 Manitoba Law Reform Commission – *Costs awards in Civil Litigation* Report 1 September 2015, Library and Archives Canada Cataloguing in Publication, Queen's printer, Winnipeg, p 31.

1852 Australian Commonwealth Attorney General's Department, *Federal Civil Justice System Strategy paper*, (December 2003), New South Wales, Legal Fees Review Panel, *Report: Legal Costs in New South Wales* (2005); British Columbia Civil Review Task Force; *Effective and Affordable Civil Justice* (2006); Victoria Law Reform Commission, *The Cost of Access to Courts*, (February 2007); Canadian Judicial Council, *Access to Justice, Report on Selected Reform Initiatives in Canada*, June 2008; Law Reform Commission of Saskatchewan, *Awards of Costs and Access to Justice Research Paper*, (July 2011).

1853 *Ibid*, Manitoba Law Reform Commission, p 23.

1854 *Ibid*, p 24.

the elimination of cumbersome and costly procedures.[1855] The high burden of legal costs arises from a confluence of factors, including the business practices of the legal profession and micro economic factors, like frameworks governing litigation, the managerial methodology adopted by courts, and a variety of disparate considerations.[1856] The Bach Commission[1857] recommended that a minimum standard of access to justice could be achieved through a Right to Justice Act by establishing a right to receive reasonable legal assistance without imposing costs shifting which individuals cannot afford.[1858] In England and Wales the Justice Select Committee considered the monetary limits under the Small Claims track[1859] for personal injuries actions. It determined that increasing the financial ceiling, for such actions, could impede access to justice. The small claims process was designed to produce something akin to equality of arms. However, if the financial limits are increased then unrepresented claimants suffer against corporate defendants, in the form of insurance companies, where the not so straightforward issues of liability and *quantum* required resolution in an adversarial manner. The committee noted that increasing the financial limits in personal injuries actions, where many claimants do not secure legal representation, would result in a process that falls short of delivering unimpeded access to the courts. It would moreover result in the under settlement of claims.[1860] In 2017 more than half a century since *Towards a Just Society* the Minister for Justice and Equality in Ireland, as part of the programme for Government, charged the President of the High Court, with responsibility for leading a group, to conduct a review with a mandate for delivering a more efficient and effective legal system. It is anticipated that the group may revisit Order 99 of the Rules of the Superior Courts and the Legal Services Regulation Act, with a view to abandoning the notions of the *winner takes it all* and *any degree of success whatsoever* ought to be sufficient to secure an award of costs. Even minor legislative adjustments would have the effect of relegating the loser pays rule to the status of a souvenir. A rule which is more observed by its exceptions rather than by the rule itself becomes a relic. The thesis is concluding contemporaneous to the group issuing a report in or around July 2020. It is likely

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1855 Declan Costello, *Towards a Just Society*, Fine Gael Policy, 1965, heading 25 p 29.

1856 Victorian Law Reform Commission; *"The Cost of Access to Courts"*, paper for presentation at conference on "Confidence *in the Courts"*, 9-11 February 2007, Dr. Peter Cashman, p 4.

1857 The final report of the Bach Commission, September 2017, Fabian Policy Report, www.fabians.org.uk/access-to-justice-thebach-commission/ accessed 1 June 2018

1858 *Ibid*, pp. 5-7.

1859 The Small Claim limit was set at £1,000 in 1991 for all claims, and in 1996, it was raised to £3,000 generally, though the £1,000 limit for personal injuries actions, was retained; para 44, The Justice Select Committee (JSC) Report 17 May 2018, https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/659/675904.htm accessed 1 June 2018

1860 The Justice Select Committee (JSC) Report 17 May 2018, para 45.

that it will deliver recommendations which seek to reduce the costs of litigation, including the costs to the State, while improving access to justice, and streamlining practices and procedures, many of which have operated since the Supreme Court of Judicature (Ireland) Act 1877.[1861] Chapter 7 renders recommendations with a view to impacting on litigation patterns, which include amending the Legal Services Regulation Act, 2015 to ensure that costs are fair and reasonable and that they have been reasonably and proportionately incurred, when globally surveyed.[1862] The recommendations include amplification of the subject matter and jurisdictional limits of the small claims court[1863] and providing guidelines which would enable the courts to incarcerate a party for contempt, where it is adjudged that the claim was fabricated, fraudulent, or wholly dishonest.[1864] A modest legislative adjustment to the *costs follow the event* rule would impact on the approximately twenty two thousand personal injuries actions which are initiated annually in Ireland, including the 8,909 which were issued in the High Court in 2017 (up from 8,510 in 2016) and the 12,497 Civil Bills which were filed in the Circuit Court, during that period.[1865] A surgical amendment targeted specifically at altering the application of the rule in personal injury litigation would impact upon approximately 10 per cent of all civil cases that are initiated annually[1866] but more substantive amendments would require reproaching the Supreme Court of Judicature (Ireland) Act, 1877. Even a modest adjustment to the Rules of the Superior Courts by introducing an apportionment of costs allocation, which reflects the success and failures of the parties, would potentially impact on all civil law suits. The research makes the following recommendations, which are intended to be cost neutral, from the perspective of executive Government. They are intended to benefit the courts the legal profession and court users namely: - (1) amending the Legal Services Regulation Act 2015 to provide that costs must be fair and reasonable, in all of the circumstances, and that they must have been reasonably and

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1861 Department of Justice and Equality, 51 St. Stephens Green, Dublin 2, D02 HK52, Ireland, www.justice.ie/en/JELR/Pages/PR17000097 accessed 20 December 2018

1862 Reasonable both in terms of the monetary sum in dispute and the nature of the proceedings.

1863 Though not personal injuries, road traffic, employer's liability and occupiers liability litigation.

1864 In *Calderdale and Huddersfield NHS Foundation Trust v Atwal* [2018] EWHC 961, Spencer J on the application of the NHS Trust sentenced the respondent to three months imprisonment for contempt, and made a costs order of £75,000 against Mr Atwal (fractured right index finger causing some sensory disturbance) who the court determined had inflated his medical negligence claim, for £837,000, by grossly exaggerating his symptoms, including informing medical professionals that he had lost his confidence to perform, and found it impossible to lift and carry objects necessary to work as a courier driver. The video surveillance suggested that the respondent could work and drive and his disc jockey career as Sunny KMS continued unabated, while he was pictured on social media holding a champagne class without any adverse effects; cited *Homes for Haringey v Fari* [2013] EWHC 3477; *AXA Insurance UK Plc v Rossiter* [2013] EWHC 3805; *Airbus Operations Ltd v Roberts* [2012] EWHC 3631 (Admin).

1865 *Ibid*, Courts Service Annual Report 2017, p 48.

1866 22,417\228,000= .09832018 x 1000 =9.83201754.

proportionately incurred, and reasonable in amount when globally surveyed;[1867] (2) mandating the judiciary to ensure the efficient and cost effective resolution of disputes;[1868] (3) expanding the subject matter and limits of the small claims process;[1869] (4) expanding qualified one way costs shifting in certain consumer and environmental actions;[1870] (5) enacting legislation to enable the courts to punish professionals with wasted costs orders where the action is fundamentally dishonest,[1871] or where it did not have a reasonable prospect of success, or where the conduct of a legal representative falls below minimum ethical and professional standards;[1872] (6) imposing double costs orders where exaggeration is proved; (7) providing guidelines which would enable the courts to commit a claimant for contempt of court, where it has been demonstrated that the claim is fabricated, fraudulent, or fundamentally dishonest.[1873]

1867 Reasonable both in terms of the monetary sum in dispute and the nature of the proceedings.

1868 The Civil Procedure Act, 2010 (Vic), section 7, 9; Supreme Court (General Civil Procedure) Rules 2005.

1869 Though not in respect of personal injuries actions including road traffic and occupiers liability litigation which can generate complex issues of legal liability.

1870 In Australia under section 570 (2) (a) of the Fair Work Act, 2009 (Cth), costs will only be awarded against an unsuccessful plaintiff if the proceedings are deemed to be vexatious or unreasonable.

1871 *Calderdale and Huddersfield NHS Foundation Trust v Atwal* [2018] EWHC 961, Spencer J. observed that the case was predicated on a "wholly false and fraudulent premise."

1872 *Bebenek v Minister for Justice and Equality* [2018] IEHC 323 (Keane J); *R (Sathivel) v Secretary of State for Home Department* [2018] EWHC 913 (Admin); *R (Hamid) v Secretary of State for Home Department* [2014] EWHC 264; *R (Butt) v Secretary of State for Home Department* [2014] EWHC 264 [3]; *R (Adil Akram) v Secretary of State for Home Department* [2015] EWHC 1239 (Admin) [2].

1873 *Calderdale and Huddersfield NHS Foundation Trust v Atwal* [2018] EWHC 961; *Homes for Haringey v Fari* [2013] EWHC 3477; *AXA Insurance UK Plc v Rossiter* [2013] EWHC 3805.

APPENDIX A – BIBLIOGRAPHY

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APPENDIX C - TABLE OF (SALIENT) CASES

APPENDIX D – STATUTES

APPENDIX E – (COSTS) ORDERS & RULES