THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW
IN THE MATTER OF SECTION 73 OF THE FISHERIES (AMENDMENT) ACT 1997 (AS AMENDED)

2021/823JR

BETWEEN

SALMON WATCH IRELAND CLG

APPLICANT

AND

THE AQUACULTURE LICENCES APPEALS BOARD
AND
THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE,
THE MINISTER FOR ENVIRONMENT, CLIMATE AND COMMUNICATIONS,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BRADÁN FANAD TEO TRADING AS MARINE HARVEST IRELAND
COMHLUCHT IASCAIREACHTA FANAD TEORANTA TRADING AS MOWI IRELAND
SAVE BANTRY BAY, CARE OF ALEC O'DONOVAN,
BREDA O'SULLIVAN,
JOHN BRENDAN O'KEEFFE
DENIS O'SHEA, KIERAN O'SHEA AND JASON O'SHEA
BANTRY SALMON AND TROUT ANGLERS' ASSOCIATION
CHRIS HARRINGTON, VINCENT O'SULLIVAN, PETER MURPHY AND CHRIS FORKER
GALWAY BAY AGAINST SALMON CAGES
JOHN HUNT
FRIENDS OF THE IRISH ENVIRONMENT
INLAND FISHERIES IRELAND
FEDERATION OF IRISH SALMON AND SEA TROUT ANGLERS

NOTICE PARTIES

AND

2021/828JR

BETWEEN:

INLAND FISHERIES IRELAND

APPLICANT

AND

AQUACULTURE LICENCES APPEALS BOARD
THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

RESPONDENTS

AND

BRADÁN FANAD TEORANTA TRADING AS MARINE HARVEST IRELAND,
SAVE BANTRY BAY,
THE RESIDENTS OF ROOSK, ADRIGOLE,
JOHN BRENDAN O'KEEFFE,

DENIS O'SHEA, KIERAN O'SHEA AND JASON O'SHEA,
BANTRY SALMON AND TROUT ANGLERS' ASSOCIATION,
C. HARRINGTON, V. O'SULLIVAN, P. MURPHY, C. FORKER,
COOMHOLA SALMON & TROUT ANGLERS' ASSOCIATION,
GALWAY BAY AGAINST SALMON CAGES,
SALMON WATCH IRELAND,
JOHN HUNT,
FRIENDS OF THE IRISH ENVIRONMENT,
FEDERATION OF IRISH SALMON AND SEA TROUT ANGLERS

NOTICE PARTIES

AND

2021/831 JR

BETWEEN:

PETER SWEETMAN
FEDERATION OF IRISH SALMON AND SEA TROUT ANGLERS
JOHN BRENDAN O'KEEFFE

APPLICANTS

AND

AQUACULTURE LICENCE APPEALS BOARD
MINISTER FOR AGRICULTURE FOOD AND THE MARINE
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BRADAN FANAD TEORANTA T/A MARINE HARVEST IRELAND
COMHLUCHT IASCAIREACHTA FANAD TEORANTA T/A MOWI IRELAND
INLAND FISHERIES IRELAND

NOTICE PARTIES

COSTS RULING OF MR JUSTICE DAVID HOLLAND DELIVERED 11 December 2024

Contents

INTRODUCTION & THE COSTS APPLICATIONS

1. After a 15-day trial and by my substantive judgment in these three actions[1] and for the reasons set out at length therein, I decided to quash the Aquaculture Licence issued by ALAB and the Foreshore Licence issued by the Minister to MOWI for a salmon farm at Shot Head in Bantry Bay. More recently, I decided that they would be remitted to ALAB and the Minister for re-decision.[2] This ruling addresses the costs of the proceedings.

2. It is impossible and unnecessary to set out in this ruling a comprehensive summary of my regrettably lengthy substantive judgment. Briefly put, the Aquaculture Licence will be quashed for inadequate:

- AA Screening of the risk of effects of seal scarers on seals of the Glengarriff Harbour and Woodland SAC.

- EIA as to the risks of escape of salmon from the salmon farm. This finding relates to
    - necessity of re-consideration by ALAB of bespeaking the DAFM reports on the 2014 farmed salmon escape in Bantry Bay,[3] and
    - comprehensiveness of the EIA as it related to the specification and structural integrity of the salmon cage installation.

- reasons for the conclusion that the salmon farm will not lead to a breach of WFD[4] limits as to Dissolved Inorganic Nitrogen – specifically, reasons for reliance on RPS's "typical" data[5] in reaching that conclusion.

[1] SWI, IFI, Sweetman & Ors v ALAB & Ors [2024] IEHC 421. The reader of this judgment should have regard to that judgment as setting the context for this judgment. Defined terms used in that judgment are used likewise in this judgment.
[2] SWI, IFI, Sweetman & Ors v ALAB & Ors [2024] IEHC 608.
[3] As the substantive judgment records, these reports relate to an escape of salmon from another salmon farm, not then owned by MOWI, in Bantry Bay.
[4] Water Framework Directive.
[5] Data in reports prepared by RPS as consultants to MOWI and submitted by it to ALAB in the Aquaculture licensing process.

3. In addition, I will declare that ALAB delayed unreasonably as to AA Screening in a roughly 2-year period from the making of the Appeals[6] in October 2015 to embarking on AA Screening after the Oral Hearing Report of November 2017. For reasons set out at some length, I refused other relief as to delay notwithstanding the imposition by the Fisheries (Amendment) Act 1997 of a duty of expedition on ALAB and the fact that the entire process from MOWI's licensing applications to the issuing of the Foreshore Licence took almost 11 years and my observation that the lapse of time involved tends to bring the licensing scheme into disrepute and must be regretted. I took what I identified as the "*highly counterintuitive*" view, was somewhat *"surprised by my own conclusion"* and yet concluded *"not without hesitation, that the time taken by ALAB to decide this matter, while both very considerable and clearly regrettable, cannot be said, on close analysis of the evidence, sequence of events and particular circumstances of the case, to have been unreasonable."* For reasons I will not repeat here I also rejected objective bias arguments, some of which were closely entwined with the allegation of delay.

4. Briefly put also, the Foreshore Licence will be quashed as

- contingent on the quashed Aquaculture Licence, Ministerial regard to which was a statutory requirement of granting the Foreshore Licence.

- the Minister erred, in breach of s.82 of the 1997 Act, in granting the Foreshore Licence in 2022, in having regard to his Aquaculture Licence decision of 2015 rather than to ALAB's impugned Aquaculture Licence determination of 29th June 2021.

5. However, it is important to note that SWI obtained no relief against the State.

6. I also held that the effect of s.13A(6) of the Foreshore Act 1933 is that no EIA was required in the Foreshore Licence Application in this case and that the relevant EIA requirement arose and arose only in the Aquaculture Licence application and Appeal. However, the Ministerial decision on remittal in the Foreshore Licence application will have regard to ALAB's EIA done in the Aquaculture Licence Appeal.

7. I should note also that, in the interests of good public administration and also as to issues ventilated but not pleaded, I made certain remarks in the substantive judgment as to matters which did not ground relief but which the respective decision-makers might usefully bear in mind in making their remitted decisions.

8. My substantive judgment recorded that the proceedings agitated about 63 grounds of judicial review – though there was considerable overlap and duplication and the number in part turns on the categorisation of sub-grounds. Without comprehensively listing the grounds on which the challenges to the Impugned Decisions failed, they included delay (partial failure), objective bias (including structural bias),

[6] Appeals to ALAB as to the initial decision of the Minister to grant the Aquaculture Licence.

failure to decide the Aquaculture Appeal de novo, application of the 2011 EIA Directive without regard to the 2014 amendments thereof and various other alleged deficiencies having regard to EIA and AA law (including as to birds and sea lice and the alleged effect of the latter on wild salmon).

9. After much correspondence as to costs, I directed that each party prepare a written comprehensive submission as to costs to which I would have regard to the exclusion of the *inter partes* correspondence. I am grateful for their having done so[7] and for the helpful and admirably succinct oral arguments made by all at the costs hearing.

10. Broadly speaking, ALAB accepted that SWI and Sweetman[8] should have their costs. But they argued for an award to each of 50% of the costs of the proceedings against ALAB by way of so-called Veolia orders[9] - describing its proposal as generous. The State agreed with ALAB as to Sweetman but opposed any order against it as to SWI's costs.

11. Neither ALAB nor the State sought to set off their own costs of litigating the issues on which SWI and Sweetman lost against the costs to be awarded to SWI and Sweetman. In my view this was correct. While Veolia orders usually require such set off – for example, see **MD**[10] - in cases to which s.50B PDA 2000[11] apply it would be inappropriate

- as s.50B(2A) allows departure from the default rule of no order as to costs only in favour of applicants.
- unless the circumstances contemplated in s.50B(3)[12] apply – which they do not here.

12. SWI and Sweetman sought all their costs simpliciter and opposed any Veolia orders. If they were to be made, they suggested that any deduction should not exceed 20% - that they should recover at least 80% of their costs.

COSTS ORDERS IN SPECIFIC RESPECTS

13. It is convenient to, as it were, clear away certain aspects of the costs orders to be made which can be decided relatively easily before embarking on the more difficult questions whether, and if so in what terms, Veolia orders should be made.

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[7] SWI perfectly acceptably, simply adopted as its submission its letter to ALAB cc the State & MOWI dated 4 November 2024.

[8] No disrespect to Mr Sweetman is intended – as in the substantive judgment, his surname is used to conveniently include all the applicants of which he is the first-named in proceedings 2021/831 JR.

[9] Veolia Water v Fingal County Council (No 2) [2007] 2 IR 81.

[10] (2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.

[11] Planning And Development Act 2000.

[12] (3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—
(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,
(b) because of the manner in which the party has conducted the proceedings, or
(c) where the party is in contempt of the Court.

IFI

14. IFI seeks no costs and there shall be no order for their costs in their proceedings.

15. That leaves costs issues to be decided in the SWI and Sweetman proceedings only.

MOWI

16. Sweetman sought no costs against MOWI. There was some argument by SWI that the relief granted against ALAB and the State was in part brought about by the terms in which MOWI participated in the licensing processes and for costs accordingly on a joint and several basis against all of ALAB, the State and MOWI. It was not strongly pressed as to MOWI. I do not see that there is adequate basis in this case to depart from the practice in this list that notice parties in judicial review are not generally visited with costs of successful applicants. In this regard, I have borne in mind the jurisdiction under s.50B PDA 2000 to award costs against notice parties. MOWI has not sought any costs. On the footing that that it will bear its own costs, and with one exception, I will make no order as to costs for or against MOWI.

17. The exception is that it is agreed by all concerned that MOWI and ALAB will, jointly, severally and equally, bear SWI's costs of its motion to cross-examine, which order I granted but which both had opposed.

SWI AGAINST THE STATE & MATTERS CONSEQUENTIAL THEREON

18. As I have said, SWI obtained no relief against the State. It follows, and SWI did not really dispute, that SWI cannot have its costs against the State. I so order. As to the trial of the proceedings, I ascribe 2.5 days to the case against the State. That is a rough and ready approximation but, on my ventilating it at the costs hearing, met with no demur.

19. Two consequences follow on that order in my view. Indeed, when ventilated at the costs hearing they also met with no demur.

- Costs for SWI against ALAB will be granted and adjudicated on the basis that full trial would relate to a trial of 12.5 days. Any Veolia reduction will be applied to such costs.
- In contrast, and to simplify matters somewhat for me, costs for Sweetman against ALAB and the State will be granted against them jointly and severally and adjudicated on the basis of the full trial of 15 days. ALAB and the State have helpfully agreed that I can approach the matter in this way and adjourn any issue of contribution as between them in the hope that they can resolve it themselves.

PRE-TRIAL COSTS

20. While there was some argument to that effect, no factual matter was brought to my attention by the Respondents to demonstrate (they bear the onus of so doing) that the costs of the pre-trial procedures, including case management and pleading, were in any degree that matters increased by the litigation of the grounds on which SWI and Sweetman lost. Accordingly, I will grant SWI and Sweetman their costs in full in respect of the pretrial costs. Sweetman will have them in full against ALAB and the State. As it failed against the Minister, SWI will have no pre-trial costs against the Minister. It will have only its pretrial costs against ALAB. I note that Humphreys J took a similar view in **Flannery**.[13]

COSTS OF THE REMITTAL ISSUE

21. Only IFI opposed remittal of the proceedings to re-decision by ALAB. Despite that opposition, I ordered remittal. As recorded above, it is agreed that there will be no costs order in the IFI proceedings. My decision on remittal – inevitably - applied also in the SWI and Sweetman proceedings. SWI and Sweetman cheered IFI on from the sidelines on that issue but did not participate in the remittal hearing. There will be no order as to costs on that issue in the SWI and Sweetman proceedings.

LIBERTY TO APPLY

22. Given the complexity of this ruling, there will be liberty to all parties to apply as to the precise terms of the order to be made in accordance with this ruling.

TRIAL COSTS - SWI & SWEETMAN

23. The remaining and difficult issue is whether I should make so-called Veolia orders[14] as to the trial costs of SWI and Sweetman and, if so, in what terms.

COSTS FOLLOW THE EVENT & IDENTIFICATION OF THE EVENT

24. Due to s.50B PDA 2000, in the present case the starting point in law is not the normal one that costs follow the event. However, as s.50B is an exception to the normal rule and also as it is agreed that costs should in fact follow the event in the present case, it is of some interest to advert to the relevant principles. In **Godsil**,[15] McKechnie J (for a unanimous Supreme Court) described the principle that *"costs follow the*

[13] Flannery v An Bord Pleanála [2022] IEHC 327 §41.
[14] Veolia Water v Fingal County Council, (No 2) [2007] 2 IR 81.
[15] Godsil v Ireland and the Attorney General [2015] IESC 103 (Supreme Court, McKechnie J, 24 February 2015).

event" as the "*general principle*" and the "*overarching test*", the application of which is the "*overriding start point on any question of contested costs*" to which *"All of the other rules, practises and approaches are supplementary…."*. Departure from the rule was considered possible if the discretion was judicially exercised '*on a reasoned basis, clearly explained, and one rationally connected to the facts of the case*'. In **Little**,[16] Murray J recently described **Godsil** as framing the modern law as to costs up to the LRSA 2015.[17] Collins J in **O'Reilly**[18] described the rule that costs follow the event as "*the fundamental rule in costs*". In **Connelly**,[19] the Supreme Court said that it *"… would wish to emphasise strongly that it is important for parties generally to recall that the starting point for a consideration of costs in any case must be the result."* The rule is grounded in principles of justice and equity. In **Dunne**,[20] Murray CJ observed that: *"The rule of law that costs normally follow the event, … has an obvious equitable basis."*

25. Generally, the "event" in proceedings is its result. It is the end that matters, not primarily the means whereby the end was achieved. As McKechnie J said in **Godsil**,[21] the "*event*" to be followed in costs can usually be identified by asking the question "*who is really the winner and who is really the loser?"* In **O'Reilly**[22] the Court of Appeal said that one asks the questions: "*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?"* Given the adoption by ss.168 and 169 of the LRSA 2015 of the concept of "*success*"[23] – one may now ask "*Who, as a matter of substance and reality, has succeeded?".* That said, it seems to me that the concepts of winning and losing remain valuable – if only for their linguistic starkness. The determinant of costs in Connolly was that "*Ultimately Ms. Connelly won the case …"* Clarke J in **MD**[24] *"emphasised that a party who is forced to come to court to obtain some relief which is not otherwise available to it must, ordinarily, be taken to have 'won' the proceedings ...".* In ordinary *inter partes* litigation the "*winner*" gets all its reasonable costs from the "*loser*" - **MD**. That is so even where the winner "*may not have prevailed on every issue or succeeded in every argument*" - **O'Reilly**.[25] In **Flannery***[26]* - a planning case in which s.50B applied - Humphreys J observed: "*The starting point must be a presumption of full costs for the winning party even if they are not wholly successful on all issues.*" So and ordinarily as to costs, the overarching question is not who won the battles but who has won the war.

26. The "event" in these proceedings is the quashing of the two licences. It is the prize which SWI and Sweetman fought the action to win. SWI and Sweetman won, and ALAB and the Minister lost, these proceedings. As to obtaining relief in judicial review, while declarations are sometimes useful from a practical point of view in the particular case, they are often useful in more generally informing administrative practice. They are generally interesting to lawyers. But in many cases from the litigant's point of view they are often little more than an hors d'oeuvre (literally as well as metaphorically - and tasty but

[16] Little v The Chief Appeals Officer [2024] IESC 53. Little was cited to me – but only briefly by the State. It was not in the agreed list of authorities.
[17] Legal Services Regulation Act 2015.
[18] O'Reilly v Neville [2020] IECA 215.
[19] Connelly v An Bord Pleanála [2018] IESC 36, [2018] 7 JIC 3002.
[20] Dunne v Minister for the Environment [2008] 2 IR 775.
[21] Citing Roache v News Group Newspapers Ltd & Ors [1998] EMLR 161, Bingham M.R. at p166.
[22] O'Reilly v Neville [2020] IECA 215.
[23] Noted by Murray J in Heather Hill §133.
[24] MD v ND [2015] IESC 66, [2016] 2 IR 438.
[25] O'Reilly v Neville [2020] IECA 215.
[26] Flannery v An Bord Pleanála [2022] IEHC 327 §9.

not filling) to the meat of the matter - certiorari. In this case, SWI and Sweetman have obtained in substance and in full, the primary reliefs which they sought – the quashing of the Aquaculture and Foreshore licences. That was, ultimately, the object of their case and they attained it.

27. It must also be said that judicial review, and the more so in judicial review to which s.50B PDA 2000 applies, is not ordinary *inter partes* private law litigation. Nor by virtue of s.50B PDA 2000 does the fundamental rule that costs follow the event generally apply. The starting point is that each side bears its own costs. But where, as here and correctly in my view, the losers accept that in this case costs should in fact follow the event, the principles described above remain relevant.

S.50B PDA 2000 & PRACTICE THEREUNDER

28. There is no dispute but that s.50B PDA 2000 applies to this case. It follows, on the authority of **Kemper**,[27] that my jurisdiction as to costs in this case derives, not as in other cases from ss.168 and 169 of the LRSA 2015, but from s.50B.

29. I note that recently in **Little,** Murray J regarded ss.168 and 169 as non-exhaustive of the court's jurisdiction in costs and seems to have regarded s.168, not as a restriction of the presumption that costs follow the event, but as a restriction on the scope to depart from that presumption.[28] However, where a party has not been entirely successful "regard" to ss.168 and 169 is necessary.[29] He said: "*had the Oireachtas intended to recondition the long-standing and firmly established discretion of the courts in connection with the ordering of costs, and to render impermissible factors hitherto brought to bear on the exercise of that discretion, it would have done so either by express language, or by necessary implication from that which was so expressed."* He saw the LRSA in this respect as reflecting "*the gist of the case law*" which preceded its enactment.[30] And he considered that "*when the Oireachtas wished to release an identified category of litigants from the obligation to pay costs it has done so expressly*".[31] Murray J cited his own judgment in the Court of Appeal in **Higgins**[32] to the effect that:

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

[27] Joyce Kemper v An Bord Pleanála [2022] IEHC 25, [2022] 1 JIC 2106 §28.
[28] §38. He said they confer and regulate "a cost awarding power" – note the indefinite article. He also said that "While the discretion conferred by s. 168(1)(a) (and O. 99 R. 1(1)) is general - and wide - it is conditioned by s. 169(1) in one critical respect. That condition demands that where a party is 'entirely successful in civil proceedings' that party is 'entitled' to their costs 'unless the court orders otherwise'. "
[29] Murray J §39.
[30] Murray J §43.
[31] Murray J §48.
[32] Higgins v Irish Aviation Authority ('Higgins') [2020] IECA 277 §10.

30. In any event, in this case s. 50B is the starting point of consideration of the issue as to costs. As relevant,[33] s.50B provides as follows:

> *(2) … ,[34] in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.*
>
> *(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.*
>
> *(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—*
>
> *(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,*
>
> *(b) because of the manner in which the party has conducted the proceedings, or*
>
> *(c) where the party is in contempt of the Court.*
>
> *(4) Subsection (2) does not affect the Court's entitlement 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 interests of justice to do so."*

I should say that while subsections (3) and (4) were referred to in argument and I set them out accordingly, those references were only to contrast them with subsection 2A. No-one invoked either as applicable here.

31. There was also broad agreement *inter partes* that:

- S.50B is informed by, though it goes further than,[35] the NPE Rule for environmental litigation set by the Aarhus Convention as effected by EU and Irish law. A similar view was taken in **Flannery**.[36]

- In proceedings to which s.50B applies, the starting point is not that costs follow the event. The statutory default set by s.50B(2) is that, regardless of the result of the case, all parties bear their own costs.

[33] As there is no dispute as to the application pf s.50B I can omit s.50B(1).

[34] "Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4) …".

[35] Inasmuch as the NPE rule does not rule out awards of costs against unsuccessful applicants.

[36] NPE stands for "Not Prohibitively Expensive": see Article 9(4) of the Aarhus Convention. For a general description of the incorporation of this rule in EU and Irish law see Conway v Ireland [2017] IESC 13, [2017] 1 IR 53, Heather Hill v An Bord Pleanála and Burkeway Homes [2022] 2 ILRM 313, and Friends of the Irish Environment CLG v The Legal Aid Board [2023] IECA 19, [2023] 2 JIC 0301.

- Nonetheless in practice, successful applicants in judicial review tend to get their costs[37] via the exception created by s.50B(2A). The present degree of agreement of the parties that SWI and Sweetman should get at least some costs is consistent with such a practice. For my own part, I add that while that practice may not be required by Aarhus,[38] it is at least broadly consistent with its values of public participation and access to justice in environmental matters and is a pragmatic approach. I observe that this implies at least some value for present purposes in the cases which canvass departure from the ordinary rule that costs follow the event.

- My jurisdiction to award any costs to SWI and Sweetman derives from s.50B(2A).

- Importantly, s.50B(2A), understood purposively and as text in the context of costs law generally, and perhaps primarily by the words "*to the extent that*", is regarded as introducing the Veolia jurisprudence and analysis to the award of costs pursuant to s.50B(2A). In **Kemper**, Allen J, explicitly in the context of s.50B, said that "*The authorities are quite clear that in general the approach to the question of costs originally formulated in Veolia Water should be applied also in planning cases*" – though Allen J considered that the authorities were less clear that the Veolia approach to planning cases and that to complex private law litigation is precisely the same.[39]

32. S.50B refers to "relief" not to "grounds". It must be said that in **Heather Hill**,[40] admittedly in a somewhat different argument, Murray J observed that "*the reference in s.50 to "grounds" and the absence of any such reference in s.50B reinforces the omission of any linking of costs and grounds in the latter provision."* A view concentrated on the word "relief" would be consistent with the general rule as to costs which, at least generally, turns on the ends achieved rather than on the means whereby they are achieved – "who has lost and who has won". Nonetheless, in **Kemper**, Allen J, in rejecting an argument that as Ms Kemper got certiorari she must be awarded her full costs pursuant to s.50B, held that the extent of her success must be measured by reference to the grounds on which she impugned the Board's order. And he thought it important that "*Of the eleven areas into which the applicant's myriad grounds were grouped, she succeeded on one narrow ground in one of the areas."*[41] It seems to me that while there are arguments both ways, for present purposes at least, Kemper is authority that the word "relief" in s.50B(2A) is understood as encompassing in costs of judicial review not merely the relief obtained but that relief by reference to the specific grounds on which it was obtained. That seems to me to best accord with the Veolia-type jurisprudence which seems to me to, purposively, have prompted the enactment of s.50B.

[37] Leaving aside *pro tem* the issue of Veolia orders. In Hickwell v Meath County Council (No. 2) [2022] IEHC 631, Humphreys J recently said that "The starting point on costs is the substantive result, and any discretion must be exercised with regard in the foreground to the fact that the applicants won the case and are therefore presumptively entitled to all of their costs." However, though the case was entitled in s.50B PDA 2000, s.50B does not appear to have featured in the argument in that case.

[38] Inasmuch as the NPE rule does not rule out awards of costs against unsuccessful applicants.

[39] §70.

[40] Heather Hill v An Bord Pleanála and Burkeway Homes [2022] 2 ILRM 313.

[41] §§26, 68 & 69.

VEOLIA ORDERS – INTRODUCTION, PUBLIC POLICY AND MERIT

33. The principles on which Veolia orders are made were summarised as follows in **IBB**[42] as applicable in complex cases and were approved in **MD**:[43]

- First, the overriding principle is that 'costs follow the event'.
- Second, the party who wins the 'event' should get full costs.
- Third, the court should consider departing from awarding full costs to such a party where it is clear that it materially added to the costs of the proceedings by raising arguments or grounds found by the court to be unmeritorious; in doing so the court should focus on whether the costs of the proceedings as a whole were materially increased.
- Fourth, there can be other factors relevant to the award of costs.

The fourth point seems to me important in the present case.

As to the third point, Clarke J explained that

> *"the proper application of the Veolia principles does not involve the court in simply determining that an otherwise successful party was unsuccessful on one or more points raised. It is necessary, in order to depart from the principle that costs follow the event, that it be "clear" that the raising of those additional unmeritorious points actually and materially increased the costs of the case. …… The court must not only be satisfied that the otherwise successful party has raised unmeritorious points but also that it is clear that the raising of those points has materially increased the costs of the litigation as a whole."*

34. Further, Clarke J observed in MD that Veolia orders are discretionary – with the trial judge having a significant margin of appreciation as to each of whether and in what terms to make a Veolia order. If a Veolia order is to be made:

> *"There is a range of methods by which a court can properly reflect the fact that an otherwise successful party has made the proceedings significantly more expensive than necessary by adopting an unmeritorious position … There is no necessarily correct way in which it may be appropriate to apply the Veolia principles. It is very much a case of the trial judge deciding how best to deal with the particular circumstances which have arisen in the case in question."*

35. Importantly and in keeping, in my view, with this view of Clarke J, Whelan J was of the view in **Jackson Way**[44] that Veolia analysis should proceed on a "*common sense basis, taking a holistic view*".[45] One

[42] IBB Internet Services Ltd v Motorola Ltd [2015] IEHC 445.
[43] MD v ND [2015] IESC 66, [2016] 2 IR 438.
[44] Jackson Way Properties Ltd v Smith [2023] IECA 234, [2023] 10 JIC 0501.
[45] Citing MacMenamin J in Higgins v Irish Aviation Authority [2022] IESC 45, [2022] 7 JIC 2931. MacMenamin J had been considering ss.168 and 169 of the Legal Services Regulation Act 2015 but explicitly regarded them as closely reflecting the decision in Veolia. Murray J seems to have taken a more expansive view of the effect of ss.168 and 169, as compared to Veolia, a few months later in Heather Hill v An Bord Pleanála and Burkeway Homes [2022] 2 ILRM 313 §133.

must "*look at the big picture*".[46] In that regard it cannot be said, for example, that SWI and Sweetman succeeded here merely on a "*narrow or merely technical point*"– a consideration identified in Jackson Way.

36. Though it was at issue on the written submissions, in argument, all parties accepted that, if a Veolia order is to be made, it is acceptable to make it by applying a percentage deduction to particular cost items. As Clarke J said in MD and as I consider applicable here,

> *"While the trial judge was not, therefore, in any way bound to approach this case on the basis of an estimate of a percentage of costs, such an approach was, in my view, well within the range of approaches which were open to the trial judge. That was so particularly in the circumstances of this case where it would have been difficult to disentangle, with any real degree of precision, the costs attributable to the issues in respect of which a separate order in relation to Mr D's costs was required to be made."*

37. Of relevance here, in a case in which ALAB conducted an exercise attributing the time spent on discrete issues in a 15-day trial involving six separate legal teams to within a claimed accuracy of 15 minutes, is the observation of Clarke J in MD that there had been

> *"a detailed exercise, by reference to the transcript, of analysing the time spent dealing with various types of issues with a view to suggesting that the 20% figure fixed on by the trial judge was an underestimate. As noted earlier, I do not believe that the proper application of the Veolia principles is really capable of that sort of minute analysis. The costs of litigation are affected by a range of issues. The length of time spent on various issues in the course of a hearing is a significant, but by no means the only, factor. The fact that there is a hearing at all brings with it some costs irrespective of the issues. The presence of expert witnesses means that the costs associated with issues requiring such expertise may be greater than other issues. In reasonably lengthy litigation the fees of lawyers are structured in a way in which they are not necessarily directly proportionate to the number of hours or minutes spent on a particular issue.*
> *In those circumstances, it seems to me that a trial judge who becomes satisfied that the Veolia principles ought to be invoked to deviate from what might otherwise be the proper costs order may necessarily have to take a relatively broad brush approach. Indeed, adopting any other course of action may, in many cases, be likely to be counterproductive, for it would turn the exercise of determining the proper order as to costs into a major forensic debate in and of itself, thus adding significantly to the overall costs of the litigation."*

38. In **Jackson Way**, Whelan J understood Clarke J in MD to the effect that "*the proper application of the Veolia principles did not warrant a minute analysis, whether by reference to the transcripts of a hearing or otherwise by way of analysis of the time spent in the course of a hearing dealing with various categories of issues".* And Whelan J noted his counselling against a counterproductive *"major forensic debate"* – a *"major further hearing"* as to costs. Clarke CJ made similar remarks in **UCC v ESB**, as to avoiding **"***A long and*

[46] Higgins v Irish Aviation Authority [2022] IESC 45, [2022] 7 JIC 2931.

excessively granular approach to the detail of costs [47] And in **Connelly**, the Supreme Court was concerned that the costs the hearing before it had taken an hour. In fairness to all, I should record that, in this case, the parties set out their positions as to costs in writing and were admirably succinct in their oral submissions. Even so, the costs application prompted 5 sets of written submissions (most, it must be said, relatively short) and the costs hearing took approximately 2 hours 15 minutes. And that was without going the detail of the complex calculations done by ALAB and the State of time spent on various issues. Humphreys J in **Cork County Council**[48] instanced "*the much more significant problem of creating a perverse incentive for the parties to square up for another round of fisticuffs over costs."* and in **Flannery**[49] he vividly described the world of lengthy and resource-hungry costs-hearings.

39. Though the point was not argued at the costs hearing, given the length of the substantive judgment in this case I think I should note that Whelan J in Jackson Way thought it

> *"… difficult to understand why the extent to which a written judgment of the court engages with or focuses on a particular ground that ultimately transpires to be unsuccessful should in and of itself be seen to be a reliable indicator towards the application of the Veolia principles … Rather the dominant consideration is whether the unsuccessful party has established that the case was significantly prolonged and costs of the litigation were materially increased."*

40. Making another point of some relevance here, Clarke J said in MD that: *" … it is not clear as to the extent to which solicitors' instruction fees or barristers' brief fees may themselves have been higher because of the greater complexity and scale of the case which resulted from the raising by Ms D of those unmeritorious issues."* I have no knowledge of the quantum of the instruction and brief fees in this case – nor do I suggest I should have. In a very general and equally imprecise way one can contemplate that they would have been lower had the case been pleaded and run only on the points which SWI and Sweetman won. However, the points which they won – in particular that as to the Water Framework Directive – were very far from simple. Clarke J also said: *"There clearly were some aspects of the hearing in the High Court to which the judgment relates which would almost inevitably have been required in any event."* SWI and Sweetman make the reasonable point that, no matter how the case was run, it would have required lengthy elucidation of at least the complex and entwined Foreshore Licensing, Aquaculture Licensing, Habitats, EIA and WFD legislation. In my substantive judgment, I described the applicable regulatory regime as "Byzantine".[50] On any view of the case, the many and complex events of an 11-year licensing process would have required mastering in appreciable degree and explanation in some detail at trial. It is by no means clear

[47] University College Cork v Electricity Supply Board [2021] IESC 47. He observed: "A long and excessively granular approach to the detail of costs is likely to lead to less rather than greater justice, for it will only add to the overall cost burden on parties generally. Permitting such arguments to be made can only increase the already substantial burden on parties to significant litigation."
[48] [2022] IEHC 473.
[49] §31.
[50] §25 – In a footnote I observed that a flavour of the regime can be seen in the plea by SWI's plea that "The impugned decision is invalid because ALAB failed to carry out an assessment of the structural adequacy of salmon cages to prevent escapes, contrary to Article 6(3) of the Habitats Directive, as implemented by Regulation 42(8) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended), and Articles 2, 3 and 8a of the EIA Directive or their precursors, as implemented by Regulation 3 of the Aquaculture (Licence Application) Regulations 1998 (S.I. No. 236 of 1998) as amended by the Aquaculture (Licence Application) (Amendment) Regulations 2010 (S.I. No. 280 of 2010), Aquaculture (Licence Application) (Amendment) (No. 2) Regulations 2010 (S.I. No. 369 of 2010) and Aquaculture (Licence Application) (Amendment) Regulations 2012 (S.I. No. 301 of 2012) and European Union (Environmental Impact Assessment) (Aquaculture) Regulations 2012 (S.I. No. 410 of 2012) and / or as required by Article 3(1) of the Aquaculture Appeals (Environmental Impact Assessment) Regulations 2012 (S.I. No. 468 of 2012)."

to me that, had only the winning issues been run, the instruction and brief fees would have been greatly reduced in any degree capable of anything but the most broad-brush stroke depiction.

41. At this point, I can say, at least in general terms, that the points lost by SWI and Sweetman materially lengthened the trial and thereby increased the costs of the case. However, I am also of the view that even the points lost by SWI and Sweetman had, in most cases, substance to them. With two exceptions, none were, in my view raised unreasonably. In a process which took 11 years against a statutory target of four months it is difficult to criticise them for raising the issue of general delay – and they succeeded to the extent of declaration of a two-year delay. The issue of structural bias which they lost was a serious issue. Other allegations of objective bias were reasonably raised – many were closely entwined with the allegation of delay. The first exception relates to some of the allegations of objective bias against particular individuals which should not have been made. As to the second exception and as the substantive judgment records, attention at trial was also occupied by argument of points not pleaded – though whether argument of a point not pleaded was unreasonable as opposed to an exploration of the limits of the pleadings may itself be arguable. All this raises the question whether, in the terminology of Veolia, a point is "unmeritorious" merely if lost or whether something more is required.

42. The Veolia jurisdiction is essentially grounded in public policy. In **Connelly**, the Supreme Court thought it "*important to discourage parties from, as it were, throwing the kitchen sink into every case thus significantly increasing the costs and the amount of court time and resources which require to be deployed in resolving the case. Just because a party turns out to have one good point does not justify raising a large number of unmeritorious points*." It is notable that in **Flannery**, Humphreys J saw this passage as

> *"… highlighting that the impact of costs rules on the courts system was a factor as opposed to just the impact on the other side. That impact must ultimately be judged on the basis of the effect of any given approach on the system overall rather than by viewing any one given case in isolation."*

43. Subject to understanding what is meant by "unmeritorious", this policy is easily understood. Resources are scarce in all quarters – litigants', respondents' and the courts'. They should not be wasted on unmeritorious points. On the other hand, if a point is deemed unmeritorious merely because it is lost, and if the same standard is applied equally to both sides of a dispute, the logical implication is that there should never be any need for litigation and that all expenditure of resources on litigation is wasted. That logic is confounded by experience.

44. The State deployed the public policy argument by asserting, undoubtedly correctly, that litigants must be discouraged from pleading 100 bad grounds in the hope that having only succeeded on its 101st, it can recover costs for all 101 in virtue of the result of certiorari. However, and as so often extreme examples followed, as this one was, by an appeal to "logic" – what I would call the logic of the extreme example - require cautious analysis. That seems especially so where, in litigation requiring justice *inter partes*, the suggested public policy is, to coin a phrase, "*pour décourager les autres*". No more should an applicant who had succeeded on 100 good grounds be deprived appreciable costs in virtue of his failure on the 101st – nor,

in fairness, would the State suggest it. It must also be said that the State's argument and my response are illustrative rather than precise as they ignore the factor that discrete points occupy widely varying amounts of time at a trial. In truth, these examples represent opposite ends on a wide spectrum of possibilities such that justice requires a modulated response responding to the facts and circumstances of the case and on the occupation of the trial by the good and bad points respectively. However, there are principles on which Veolia orders are made and two views on the question what, for Veolia purposes, is an unmeritorious point.

45. In **Kemper**, Allen J in the High Court held, as to the question whether a point was meritorious or unmeritorious in the sense contemplated by Clarke CJ in Veolia, that the separation of wheat from chaff, the meritorious grounds from the unmeritorious, does not require the sub-separation of the points lost by the applicant into the meritorious and unmeritorious. As he said: *"the only test of merit is whether a point was won or lost".* On this view, for purposes of Veolia analysis, all lost points are unmeritorious. Veolia itself is to the same effect: *"where it is clear that the length of the trial of whatever issues were before the court was increased by virtue of the raising of issues upon which the party who was successful in an overall sense, failed, then the court should, again ordinarily,"* make a Veolia order. In **Connelly**, Clarke J considered the purpose of the Veolia exercise to be *"whether, and if so to what general extent it can be said that it is clear that significant areas of the case adding materially to the cost, were run and lost."*

46. Other pointers suggest an approach more forgiving of winners. In **Connelly**,

- First, and as will be seen, the Supreme Court explicitly and strongly emphasised that the default is that costs follow the event – the end being the result rather than found in the dissection of the grounds on which it was achieved.

- Second, in describing "unmeritorious" points and the public policy underlying Veolia orders, the Supreme Court deployed the metaphor of the "*kitchen sink*". In context, that seems to me to connote the indiscriminate pleading, in large number, of every, or all but every, conceivable ground, no matter how weak. As counsel for Sweetman put it: *"The whole idea of the kitchen sink is you throw everything regardless of quality."* The metaphor does not connote to me a need, intention or public policy to discourage the pleading of reasonably arguable grounds, though they may ultimately fail. That appreciable time has been spent on a point which failed does not of itself imply that the applicant threw in the kitchen sink. Indeed, especially in environmental litigation such an approach, it seems to me, would be contrary to public policy. As Humphreys J said in **Flannery**:

  > *"… environmental litigation is not inherently a bad thing in the same sense that other litigation is in principle undesirable. It is a necessary check and balance in modern society, and particularly important given the growing importance of environmental considerations in international and EU law."*[51]
  >
  > *"The broader context here is that environmental and planning law is highly complex compared to other areas, and imbued with an evolving overlay of EU law as well as domestic law … applicants can*

[51] §27.

> *be somewhat handicapped in identifying with reasonable confidence exactly what are more likely to be the winning points …"*[52]

Humphreys J also observed,[53] that while commercial litigants can be discouraged by the risk of Veolia orders from throwing in the kitchen sink, it is much less clear that such incentives are effective in environmental litigation as, where Aarhus principles apply, costs can in any event never be prohibitively expensive.

47. In light of these remarks in **Flannery** and while costs are emphatically not the spoils of war, it would be unfair and unrealistic not to recognise that, in the real world, a Veolia order may in whole or in substantial part render a plaintiff/applicant's deserved victory Pyrrhic in greater or lesser degree. Thereby such an order may diminish past access to justice and, by its example and the risk it poses, discourage future access to justice. It seems a somewhat weightier point in the planning and environmental law context in which, as has been said, environmental protection is, in appreciable degree, "crowdsourced" to "speak for the earth"– **Atlantic Diamond**,[54] **Jennings**,[55] and Kokott AG in **Edwards.**[56] Kokott AG said:

> *"Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations."*

48. Their having succeeded on multiple issues amply demonstrates that in the present case SWI and Sweetman, as applicants for judicial review, successfully spoke for the earth. In such light, in particular, where relief addresses public rather than private interests, but in any event generally and given that substantial legal costs unfortunately overshadow litigation, where an applicant has been vindicated by winning the case and whatever the need which may arise for a Veolia order to fulfil the public policy of discouraging "kitchen sink" pleading, in my view care may be required to avoid by a Veolia order transmuting de jure victory into de facto defeat.

49. In that light it seems to me that, where the starting point, grounded in an "*obvious equitable basis",* is the winners' full recovery in costs, to which Veolia orders are very much an exception,[57] there is at least some weight in the view that the terms and quantum of a Veolia order may be informed, in the particular circumstances of a case, more by the logic of the public policy driver to discourage "kitchen sink" pleading and what deduction will suffice to that end, than by an inevitably imprecise, and even illusory, attempt to mechanistically estimate, deduct and set off[58] the costs specifically attributable to unmeritorious grounds. That is not to say that such an attempt should not be the norm in relatively simple instances of Veolia

[52] §33.
[53] Flannery §32.
[54] Atlantic Diamond Limited v An Bord Pleanála & EWR Innovation Park Limited [2021] IEHC 322.
[55] Jennings v ABP & Colbeam [2022] IEHC 249.
[56] Case C-260/11 Edwards v Environmental Agency [2013] ECR I-000.
[57] Sherwin v An Bord Pleanála [2024] IESC 32.
[58] Though that does not occur in in cases to which s.50B applies.

orders. But, for reasons I attempt to explain in this judgment, this case is not such a simple instance. Indeed, given the ample authority for a broad brush, rough and ready, approach and the significant margin of appreciation allowed by MD, it may well be that an approach driven by the public policy rather than "time spent" analysis has in practice informed the caselaw. For example, Ms Connelly got 75% of her costs though she had won only one issue out of ten – and that a non-central issue.[59] Such orders may also suggest that, if only implicitly, the level of deduction has also been pitched bearing in mind another public policy objective recognised in the caselaw: avoiding inefficient use of court resources in deciding unmeritorious Veolia applications. *Ceteris paribus*, the greater the deductions to be had, the more such applications will be made as they will be seen as worth the risk.

50. It also seems to me relevant that, in planning and environmental judicial review, public participation and access to the courts are prominent values in activating what is the general aim and project of judicial review in maintaining and enhancing confidence in public institutions and ensuring the highest standards of public administration (e.g. **Shadowmill**,[60] **ETI**[61] & **O'Lone**[62]). In light of the *"broader public considerations"* at play, Humphreys J in **Flannery** read **Connelly** as implicitly recognising *"the need for a softer version of Veolia, … in the environmental context".*

51. These principles have been primarily deployed (for example in s.50B) in protecting unsuccessful environmental litigants from costs orders against them. Though they do not generally and per se justify awards of costs to unsuccessful environmental litigants, as to successful environmental litigants it seems to me reasonable to give some weight to these considerations in deciding whether and in what terms a Veolia order should be made.

52. I return to the question of the meaning of "unmeritorious". I have earlier cited **Jackson Way**.[63] It was a private law action as to restrictive covenants relating to land. Having decided the appeal in favour of the appellants (the Smiths), the Court of Appeal had provisionally indicated that they were entitled to their costs against Jackson Way. Jackson Way argued that that the Smiths had not been entirely successful – having failed on some issues. Whelan J reviewed the case law – notably Veolia, Chubb,[64] MD, Higgins, and Connelly. She held that Jackson Way had failed to demonstrate that the Smiths' failed arguments[65] *"could be characterised as in substance misconduct in the proceedings, warranting a sanction in the nature of a reduction in the costs to be awarded. … The respondent has not demonstrated a valid basis whereby an adverse costs consequence should ensue in light of the Veolia principles."*[66] While Whelan J was applying s.169 LRSA 2015 - which identifies as relevant "*whether it was reasonable for a party to raise, pursue or*

[59] Connelly v An Bord Pleanála [2018] IESC 36, [2018] 7 JIC 3002**.** As Humphreys J observed in Flannery and in Cork County Council v Minister for Housing [2022] IEHC 473. ALAB disputes this view of Connelly but I am content to adopt it, remembering that, doubtless, Humphreys J's depiction was painted with a broad brush.

[60] Shadowmill v An Bord Pleanala [2023] IEHC 157 §88, citing R v Lancashire CC ex p. Huddleston [1986] 2 AER 941; Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55; Murtagh v Kilrane [2017] IEHC 384; Environmental Trust Ireland v An Bord Pleanála, Limerick City and County Council & Cloncaragh Investments Ltd [2022] IEHC 540; Jennings v An Bord Pleanála [2022] IEHC 16.

[61] Environmental Trust Ireland v An Bord Pleanála & Cloncaragh [2022] IEHC 540 §232.

[62] O'Lone v An Bord Pleanála [2023] IEHC 136.

[63] Jackson Way Properties Ltd v Smith [2023] IECA 234, [2023] 10 JIC 0501.

[64] Chubb European Group SE v Health Insurance Authority [2020] IECA 183.

[65] Directed towards ss. 6 and 58 of the Conveyancing Act 1881.

[66] §45.

contest one or more issues in the proceedings" - she clearly saw herself as applying Veolia. And MacMenamin J in the Supreme Court in **Higgins**[67] explicitly regarded ss.168 and 169 as closely reflecting Veolia. Returning to Jackson Way, Whelan J also said of the Smiths' failed arguments, *"…. I am not satisfied that the approach of the appellants in pursuing the statutory argument could at any level be said to have been unreasonable nor has it been established that doing so increased the costs of the litigation to any material extent."*[68] And "*The respondent has failed to demonstrate that the conduct of the appellants was unreasonable in regard to the points unsuccessfully advanced."*[69]

53. Further, Whelan J said:

> *"In my view the respondent has not established that it was unreasonable for the appellants to raise, pursue or contest any one or more of the issues in the proceedings. Merely because the Conveyancing Act points have not succeeded does not render their raising unreasonable, having regard to the efficient and succinct manner in which the arguments were pursued by the appellants."*[70]
>
> *"I am not satisfied that the appellants in their approach, particularly to sections 6 and 58 of the Conveyancing Act, 1881, can be characterised as having engaged in unmeritorious litigation conduct of such a nature that have been demonstrated to actually and materially have increased the costs of the litigation significantly."*
>
> *Neither can the approach of the appellants be said to have been unreasonable in that regard."*[71]
>
> *"Accordingly, I conclude that neither the Veolia principles nor the provisions of sections 168 and 169 of the LRSA 2015 warrant any apportionment of the costs or any reduction in the costs that the successful party should be entitled to recover."*[72]

54. Whelan J had concluded:

> *"46. In my view, although the appellants did not succeed on every ground advanced and in particular did not succeed in the arguments directed towards ss. 6 and 58 of the Conveyancing Act, 1881, it is to be noted that the arguments were comprehensively presented in the written submissions and only succinctly dealt with in the course of the hearing ……. The approach of the appellants in pursuing grounds of appeal that did not succeed as complained of by the respondent did not in all the circumstances of this case, having regard to its nature and the nature of the interests of the appellants sought to be vindicated, amount to unmeritorious conduct. Neither has it been demonstrated in any convincing manner by the respondent that the approach to these specific grounds of appeal complained of led to an increase on the costs to any material extent. The conduct of the appeal and on the part of the appellants is not open to criticism having regard to the interests*

[67] Higgins v Irish Aviation Authority [2022] IESC 45, [2022] 7 JIC 2931.
[68] §39.
[69] §44.
[70] §47.
[71] §48 & 49
[72] §50.

at stake for their client. Considering the conduct during the proceedings on the part of the appellants complained of, in my view the preliminary question is whether it was reasonable for the appellants to raise, pursue and contest the various issues as they did in the proceedings, particularly the counterclaim. Overall, I am satisfied that it was reasonable. It was prudent for the appellants to advance the alternative arguments identified pursuant to the Conveyancing Act, 1881 in the limited manner they did and as the Supreme Court has made clear in the jurisprudence, merely because they did not succeed in all of the grounds advanced is not a basis for deviating from the fundamental starting point graphically illustrated by MacMenamin J. in Higgins v Irish Aviation Authority which emphasises that it is necessary to look at "the big picture". There is force in his argument that in circumstances where, as here, a case was run as a "single integral unit", it is impossible to separate out the issues for costs and indeed such an approach would in the context of a case such as the instant appeal be "entirely artificial". Rather the appropriate approach as was recommended by MacMenamin J. is to take a holistic view of the entirety of the litigation."

55. Certainly, the judgment of Whelan J can be sufficiently explained, in Veolia terms, as based on the finding that the victors' lost arguments were briefly made and did not add to the costs of the case. However, it is also very clear that Whelan J considered it relevant – indeed important – in rejecting the argument for a Veolia order that, as to their lost arguments, the victors had behaved prudently and reasonably in raising them. Whether in ordinary commercial or private litigation such analysis will in time prove influential, time will tell. But Humphreys J in **Flannery**[73] pointed out that Veolia itself arose in a private law commercial context "*where it is accepted that private parties may have to pay for every cent they unnecessarily impose on another private party*". But, he considered, that *"does not have an automatic read-across to the totally different context of public law, still less the special context of environmental law. … where broader public interest considerations arise either by reason of the important issues involved or of the wider interests engaged – such as the environmental concerns that can arise in challenges to development consent decisions.*

56. It seems to me that, while not ruling out Veolia orders as to grounds merely lost, having regard to Jackson Way and to the nature and societal function of environmental litigation as identified by Humphreys J in Flannery in this passage and those I have earlier cited, the reasonableness of the victor's having prosecuted the points lost is particularly suited to Veolia analysis in environmental litigation – analysis informing decisions both whether and in what terms a Veolia order should be made.

AVOIDABLY UNCLEAR LEGISLATION

57. Notably, the State submitted, in support of its Veolia application, that the issue of the interpretation of s.13A(6) of the Foreshore Act 1933 as to whether EIA was required in Foreshore Licence applications related to aquaculture, on which issue Sweetman lost, added to the time of the hearing.

[73] Flannery v An Bord Pleanála [2022] IEHC 327.

58. Making a point of which the **Jackson Way** view of merit seems to me generally supportive, Sweetman submit that the issue it lost derived from badly drafted legislation.[74] Specifically the State itself was driven to argue that to rescue s.13A(6) of the Foreshore Act 1933 from absurdity due to a drafting error, additional words must be read into it. I agreed "*with no little hesitation but confident of the matter from a purposive point of view*" that this was "*one of the relatively rare cases in which, both on the Inco Europe test for interpolation and on the authority of Re the Employment Equality Bill 1996 and H v H"* in which interpolation was justified. I also held that a related second legislative drafting error required correction.[75] In my view and on **Jackson Way** analysis, it cannot be said that Sweetman acted in any degree unreasonably or imprudently in litigating this issue.

59. Further this issue seems to me an example of the type instanced recently in **Little**[76] - of a point arising from avoidably unclear legislation. That was considered a situation "*generally relevant to the exercise of the discretion*" and in which a costs order favouring the loser *"should be viewed as an expression of the court's disapproval that persons affected by obviously unclear laws should have to bear the risk of litigation costs in order to secure a clarification that ought never to have been necessary."* While, in **Little**, the Supreme Court instanced a situation in which no order for cost was made against the loser, the rationale it offers based in "*the risk of litigation costs",* could support a grant in favour of a loser – though such orders are '*a genuine rarity*'.[77] But here one need not go that far. It suffices to observe that the lost point is marshalled here by the State as part of its argument for an exceptional Veolia order to upset the agreed starting premise that all costs follow the event.

60. In my view, that the case against the State derived in part from avoidably unclear legislation, while not decisive of itself, does weigh in Sweetman's favour as to costs.

PUBLIC POLICY – PRESCIENCE OF ALL INVOLVED

61. Sweetman cite my observation in **EPUKI**[78] as to cases in which the applicant has succeeded:

> *"… generally, if the victor is expected, on pain of costs, to confine himself with perfect prescience to only those points which transpire to find favour with the trial judge, or which do not find favour with the trial judge but find it on appeal, the vanquished has had from the start of the proceedings the unilateral opportunity to recognise its error, concede and thereby to end the proceedings. Thereby he can save almost all the costs – of both the victor's good points and his bad points. That is a level of control of which the eventual victor (ex hypothesi entitled to succeed) cannot, save rarely, avail for as long as the loser insists on fighting."*

[74] See generally §1399 et seq of the substantive judgment.
[75] Schedule 5, Part 2, §1(f) PDR 2001.
[76] The Supreme Court has recently, in Little v The Chief Appeals Officer [2024] IESC 53, charted the evolution of the jurisdiction to award costs.
[77] Murray J in Little §62 citing Charleton J in Minister for Justice v McPhillips [2015] IESC 47 §50.
[78] EPUK Investments v EPA [2023] IEHC 138.

On reflection, I would amend this passage – in reality perfect prescience is required of applicants only as to those grounds likely to add materially to the costs as, if they do not, a Veolia order will not be made even if the grounds are lost.

62. It appears to me that if there is a public policy that applicants in judicial review be discouraged from wasting the court's time by arguing hopeless "kitchen sink" arguments, it follows that there is a public policy that respondents be discouraged from wasting the court's time by defending the indefensible. **Connolly** is authority that plaintiffs should be discouraged from "*throwing the kitchen sink into every case*". The corollary, if metaphors are to be deployed, is that respondents should be discouraged from seeking to "*die in every ditch*". As applicable to respondents, **Fordham's Judicial Review Handbook** cites Sedley LJ[79] to the effect that *"It is not acceptable for a party to come to court when it knows that it has no legal leg to stand on in the hope that something may turn up."*

63. Fordham cites another case - **Adriano**[80] - in which the successful applicant sought indemnity rather than standard costs. The respondent resisted that application and also disputed that costs should be awarded at all as to certain grounds which the judge had decided were not necessary to argue. Sullivan J awarded costs as to all grounds as the reason some were not argued was because he had considered it "*so plain that the three principal points were going to succeed*". As to indemnity costs, he expressed his "*concern*" that from a particular point in the process the defence of the case had been "*wholly unreasonable*". He said of the trial: *"This is a hearing that simply should not have occurred."* He awarded indemnity costs from that point in the process. I do not suggest a similar order would necessarily have ensued on this side of the water. My purpose is merely to give an example of a decision readily understood in terms of deployment of measures to discourage, as a matter public policy applicable to both sides of a case, pointless and hence wasteful litigation as to foregone conclusions. There is an undoubted public interest in devoting in devoting scarce court resources to resolving only real and substantive disputes.

64. It could be suggested that respondents in judicial review, even if they foresee defeat, may have a systemic interest in having the law clarified and so may justifiably soldier on. Indeed, as the project of judicial review is the improvement of public administration,[81] there may be good reasons for such a course. But, if so, it is difficult to see, at least ordinarily, that this should be at the expense of the individual applicant, interested in a specific impugned decision and otherwise entitled to expect the respondent to concede a case the respondent expects to lose (or at least is entitled to such expectation to the same extent the respondent is entitled to expect the applicant not to prosecute a case the applicant expects to lose).

[79] R(N) v North Tyneside Borough Council, [2010] EWCA Civ 135, [2010] ELR 312, [2010] All ER (D) 115 (Jun) Sedley J also said: "What seems to me … a particular cause for concern is that, although it has been evident from the start that the judge had made an error of principle which made his decision unsustainable, the respondent local education authority resisted the appeal up to the point where their counsel, Mr Rowbottom, rose to his feet in this court today. … when asked by this court whether he could defend it, Mr Rowbottom for the first time accepted that he could not. His skeleton argument for this appeal had made no such concession. The result appears to have been the unnecessary incurring of a large sum in costs on both sides. The child's advisers of course have had no option but to bring the appeal before the court in order to secure the relief to which it is now accepted the child is entitled. The LEA has run up costs which presumably have to come out of a ring-fenced education budget. Yet it is clear that from the start there was no answer to the claim that the LEA was not complying with the child's statement."

[80] R (Adriano) v Surrey County Council [2002] EWHC 2471 (Admin), [2003] Env LR 555. However, the content as to costs does not appear in [2003] Env LR 555.

[81] Supra.

65. I hasten to say that I do not suggest (nor did SWI or Sweetman) that the State or ALAB unreasonably defended this case in any respect. Nor did ALAB or the State press any point that SWI and Sweetman had unreasonably advanced the grounds on which they had lost (though I held that certain particulars of alleged bias should not have been pursued). My point is merely to observe that ALAB's deployment is of a public policy underlying Veolia orders which cuts both ways. It applies to all parties – not just applicants.

66. If, as to applicants, the public policy extends beyond hopeless kitchen sink arguments to arguments stateable or reasonable but lost, it follows that the corresponding public policy as to respondents extends to their arguments stateable or reasonable but lost.

67. In one sense it can be said that there is a difference between the situations of applicants and respondents in that (assuming the award of costs pursuant to s.50B(2A)) the public policy as applicable to respondents is upheld by the ordinary rule that costs follow the event: respondents get no free ride for their hopeless arguments. However, that, it seems to me, is not the entire story.

68. There is a further difference between the situations of applicants and respondents: applicants who refrain from hopeless arguments must still come to court to argue their good arguments for the certiorari which is, typically, their object and, *ex hypothesi* for this purpose, their entitlement.[82] In contrast, respondents who refrain from hopeless defences have the opportunity at an early stage to concede the case[83] and thereby save all parties and the court most, if not virtually all, the costs of the case – of all grounds and defences on both sides, good and bad and of the court resources the case would consume if pursued to trial. There is much in Sweetman's submission that the *"primary reason for the costs incurred in all three cases by all parties is the failure of the Board and the Minister and MOWI to anticipate"* the result - as counsel put it: "*the loser fought on*".

69. If one takes the more censorious view of Veolia, that *"the only test of merit is whether a point was won or lost",* the premise seems to be that applicants, notwithstanding their success, should in effect be penalised in costs as they ought to have foreseen that they would be unsuccessful on all grounds which ultimately failed and should have run only the grounds on which they succeeded. Such omniprescience may be a necessary legal fiction in an environment in which a significant unpredictability of the outcome of litigation is well-known. That it is a legal fiction is demonstrated by the observation that if carried perfectly into action by all sides in all cases, it would result in no trials at all. Experience disproves that omniprescience. Certainly, as a barrister in practice, I laid no claim to omniprescience and, in my experience, those few who claimed it often did not serve their clients well in the real world. Humphreys J in **Flannery** has commented on environmental law as an area in which prescience is especially difficult. And, as with any legal fiction designed to serve justice, the logic of omniprescience may not be pursued to the point of injustice. So, it is no surprise that the general principle, founded perhaps in somewhat rough justice but in justice nonetheless, is that even where (as is typical in judicial review in which s.50B does not apply and, arguably,

[82] Veolia orders are made only as to victorious applicants.
[83] Allowing that the Court has the ultimate decision - Ballyboden Tidy Towns Group v An Bord Pleanála [2024] IESC 4.

in practice even where it does) the successful applicant fails on some grounds of challenge, costs nonetheless follow the events of success and failure in the proceedings overall.

70. In **Cork County Council v Minister for Housing**[84] Humphreys J said:

> *"The key point (as so often) is balance and incentives. The court has to balance the abstract desirability that winners would confine themselves to winning points against both the practical difficulty that a party can't know which are the winning points in advance and the much more significant problem of creating a perverse incentive for the parties to square up for another round of fisticuffs over costs."*

71. However, to whatever extent such omniprescience is required of applicants it must, of fairness, also be required of respondents. ALAB's concession before trial of any of the grounds on which it failed would, as a matter of high probability, have saved all parties the entire trial cost. ALAB could have saved itself almost the entire costs of all three cases by facing up early to the illegalities of its decision and conceding certiorari. In that sense, the omniprescience required of a respondent is much the more potentially powerful cost-reduction mechanism. Such factors suggest to me that, as the Supreme Court said in **Sherwin**,[85] Veolia orders should be "*very much the exception*", and made only ***"****where the raising of the unsuccessful issue could have affected the overall costs 'in a material extent"*. They suggest also that, when made, the terms of Veolia orders can be tailored to all the circumstances of the case, to the big picture – to do justice considered holistically rather than by mechanistic, arithmetic and exclusive regard to estimates of time spent at trial on particular issues. Though, of course, such estimates may contribute to an outcome.

CONNELLY

72. Though I have addressed it in various respects already, **Connelly**[86] bears specific mention as a Supreme Court authority in which the Veolia approach to planning judicial review was described – though, it must be said, not in the context of s.50B. Connelly was a case in which the impugned decision was, we know in hindsight, one to which s.50B(1) applied. But the case preceded the Supreme Court's decision in **Heather Hill**,[87] in which a previously restrictive view of the scope of s.50B(1) was corrected. That may be why s.50B did not feature in Connelly. In any event, Clarke CJ said:

> *"6. On the question of costs the Court would wish to emphasise strongly that it is important for parties generally to recall that the starting point for a consideration of costs in any case must be the result. Ultimately Ms. Connelly won the case and successfully resisted the appeal. It is neither necessary nor appropriate, in the context of costs, to attempt to parse and analyse in detail all of the issues which may have been canvassed in the course of proceedings or appeals and identify the*

[84] [2022] IEHC 473.
[85] Sherwin v An Bord Pleanála [2024] IESC 32.
[86] Connelly v An Bord Pleanála [2018] IESC 36, [2018] 7 JIC 3002.
[87] Heather Hill Management Company v An Bord Pleanála and Burkeway Homes [2022] IESC 43, [2022] 2 ILRM 313.

number of issues on which one or other party might be said to have succeed in whole or in part. Rather the overall approach, identified in Veolia Water and confirmed on many occasions since, is that the starting point has to be to decide whether the plaintiff or applicant has to come to court to achieve something which they could not otherwise have achieved or whether a defendant or respondent had to come to court to resist a claim found to be unmeritorious. The applicant in this case clearly falls into the category of a party who had to come to court in order successfully to have the permission granted quashed.

7 What the Veolia jurisprudence suggests, however, is two things. First it is important to discourage parties from, as it were, throwing the kitchen sink into every case thus significantly increasing the costs and the amount of court time and resources which require to be deployed in resolving the case. Just because a party turns out to have one good point does not justify raising a large number of unmeritorious points.

8 However, that proposition needs to be qualified by reference to the fact that an otherwise successful party should not be deprived of full costs unless it can be shown that it is clear that the raising of unmeritorious points added materially to the overall cost of the proceedings. In making that assessment it will rarely be appropriate to attempt either a very precise calculation of the extent to which costs may have been increased or, indeed, an overly meticulous approach to identifying the precise issues or variations on issues, which were canvassed. To take that approach would be counterproductive in that it would turn every costs application into a major further hearing resulting in even more costs. In that context it is worth noting that the hearing this morning took over an hour.

9 Rather a broad brush approach should be adopted to identify whether, and if so to what general extent, it can be said that it is clear that significant areas of the case, adding materially to the cost, were run and lost.

10 Applying that approach to the facts of this case the Court feels that it cannot ignore the fact that there were a number of significant issues raised (not least those connected to the EIA) which must undoubtedly have added materially to the costs of the High Court and added somewhat to the costs in this Court and on which Ms. Connelly failed. But at the same time the Court has to acknowledge that Ms. Connelly succeeded in the proceedings in the High Court as she obtained the only actual relief sought being to quash the planning permission and also succeeded on the appeal. It would be totally counterproductive to attempt to now ask the High Court judge to assess costs on the basis of the issues on which Ms. Connelly ultimately succeeded by comparison with those on which she has ultimately failed. Rather it is appropriate that the Court should do the best it can in all the circumstances and therefore the Court proposes to award Ms. Connelly 75% of the costs of both the High Court and of the appeal to this Court."

73. Of course, merely totting the issues won and lost is of little use. The identification and hence the count of issues may be disputable. More importantly such an analysis treats minor issues lost as equivalent to major issues won – and vice versa. In fairness, ALAB and the State did not suggest an approach. But the

point is worth mentioning as Humphreys J observed in **Flannery,**[88] that Ms Connelly had won only one issue out of ten. He said, strikingly, that she "*won 10% of her case and got 75% of her costs*". The point seems to me to be that Humphreys J identified the point Ms Connelly as "*a non-central issue*". Humphreys J said:

> *"We need to keep that context firmly in mind when coming to the Supreme Court's comment in the costs ruling that parties should be discouraged from "throwing the kitchen sink into every case", substantially qualified "by reference to the fact that an otherwise successful party should not be deprived of full costs unless it can be shown that it is clear that the raising of unmeritorious points added materially to the overall cost of the proceedings" (para. 8)."*

ALAB disputes this view of Connelly. But, remembering that, doubtless, Humphreys J's depiction was painted with a broad brush, I am content to adopt it.

UNITARY TRIAL

74. In my view a feature of these proceedings of considerable significance to disposal of these applications for costs is that the trial was a unitary trial of three separate proceedings – as evidenced by the title to this ruling. It was diaried for 12 days. It took 15. It was not modularised. All parties were represented at all times (as was also the case in **Flannery**[89]).

75. This unitary trial occurred at ALAB's instance. No doubt for good reason ALAB considered, in prospect, a unitary trial advantageous in its own interest. No doubt in deciding on it, ALAB considered the potential costs implications of so doing. One can readily see possible reasons why ALAB made that choice - given

- it had to win all three sets of proceedings to preserve the impugned Aquaculture Licence.
- three trials may well have totalled more than the 12 days foreseen when the application for a unitary trial weas made.
- the overlap of issues between the proceedings.
- possibly, a likely appreciable saving of their own costs as compared to those of three separate trials.

76. I am in no way critical of ALAB's choice. But that its advantages are no longer in view does not imply it may avoid its disadvantages. Whatever their reasons, the unitary trial was ALAB's tactical choice and they took the risks of it. The price to ALAB of those advantages which it perceived in a unitary trial of all three actions is that ALAB must bear any disadvantages as to costs fairly resulting from its choice of unitary trial. Had ALAB won it would have reaped the foreseen benefits. But it did not win. It took the risk of that choice if it lost (which it did) and, to appreciable extent forced that risk on IFI, SWI and Sweetman if they had lost (which they did not). By this latter observation I mean that each of IFI, SWI and Sweetman had to participate in a 15-day trial and were exposed to ALAB's, the State's and MOWI's costs of a 15-day trial. But, had three

[88] See also Cork County Council v Minister for Housing [2022] IEHC 473.
[89] §40.

separate trials been contemplated, and as we know in hindsight, one of IFI, SWI and Sweetman would have had to participate in one much shorter trial and the others, probably, in no trial at all. In hindsight we know that whichever case was tried first it would have succeeded and the other two trials would likely have been unnecessary or, if required, would likely have been much curtailed. For example, I accept the Sweetman submission that had its case proceeded on its own, both licences would have been quashed. Even assuming, somewhat artificially but for purposes of exposition, three hypothetical, appreciably shorter and separate trials, any Veolia orders in them would inevitably have related to far shorter periods in respect of which each applicant would be at the loss of costs. While I am unaware that they opposed a unitary trial, those 15-day trial costs having been in that sense imposed on IFI, SWI and Sweetman, it is not apparent to me why ALAB's choice of mode of trial should have increased its opponents' exposure to Veolia deductions from their costs in respect of work in fact done. All in all, I do not think in this light that I should weigh SWI's and Sweetman's costs applications on too fine a scales.[90]

PARTIES' PRESENCE AT TRIAL, OVERNIGHT TRANSCRIPT, MULTIPLE APPLICANTS & IFI AT THE TRIAL

77. The State argued that awards of costs to SWI and Sweetman for their attendance at trial while each other's issues were litigated would outweigh the costs benefits of the unitary trial. That may be so (for that matter, it may not be so – I had no evidence on the question). But if so, it is a function of the choice made by ALAB of a unitary trial in proceedings which it and the State have lost but for which choice the State wants SWI and Salmon Watch who, after all, won the case, to pay the price. The State's argument is predicated on the assumption that ALAB's and the State's foresight of costs savings of a unitary trial should be recast as a guaranteed entitlement to such savings to be realised regardless of the result of the case – even if SWI and Salmon Watch are to be put to the loss of costs they necessarily incurred in attending the unitary trial of cases they each won.

78. ALAB's written submissions argued that the attendance of SWI and Sweetman at the trial was unnecessary at times and called in aid its provision to the overnight transcript of the trial as facilitating their selective attendance at trial on days on which issues relevant to each of them were to be addressed. ALAB pursued these submissions sotto voce, if at all, in oral submissions. In my view that was wise.

79. A trial of the complexity, difficulty and duration of the trial which took place would have been very considerably more difficult, for all concerned, including me, without a transcript. ALAB's funding of the transcript and its supply to IFI, SWI and Sweetman was, by order of October 2022, a condition of the direction, at ALAB's choice, of a unitary trial anticipated as taking 12 days (It took 15). In short, a shared transcript was part of the price to ALAB of the unitary trial which it sought and obtained.

80. In some trials – for example in some modularised trials – it may be tenable to suggest that the attendance of a party or of certain parties is reasonable only for part if the trial. Having tried this case I can

[90] A metaphor deployed, albeit in a very different context, by O'Byrne J in Gregan v Sullivan [1937] 1 Ir Jur Rep 64 at 65.

say that this was very clearly not such a trial. While it is admittedly a view in hindsight – though the more rather than less valid for that – in my view, there was no reality to parties discretely attending the trial only as to the issues which concerned them. Issues overlapped. Issues were not assigned discrete days in advance. The trial was not modularised. The pace was not predictable – some arguments no doubt took longer and others less time than anticipated. At least in this case, the idea of entire legal teams standing by on the hazard of overnight notice to appear the following day, or participating for part-days, was quite illusory. Giving the idea weight in apportioning costs orders would be quite unjust. ALAB's choice of a unitary trial, inevitably implied that in appreciable degree each applicant would in practice need to be present for the argument of other applicants' cases.

81. I do not, for example, recollect any of the respondents and the notice party being unrepresented for any appreciable time – if any at all. Certainly, as a general observation, they did not attend on a Lanigan's Ball basis.[91] Neither, in my view, could they have been sensibly expected to do so.

82. In essence, ALAB's submission is an exercise in cakeism.[92] ALAB seeks to have the cake of a unitary trial and also to eat it by depriving SWI and Sweetman of appreciable costs of attending that unitary trial on the basis that it was not, in fact, unitary but modular.

83. To the extent these arguments were pursued – and in fairness I got the impression they were ultimately not seriously pursued, I reject them. I will award costs on basis that SWI's and Sweetman's presence at the entire trial was justified.

84. The unitary trial has a further aspect to it. In considering the usual circumstances in which Veolia orders are made in judicial review it seems fair to observe that multiple respondents are a commonplace. Multiple applicants are also common but are usually represented by a single legal team. While not at all unknown, less common is the situation brought about here by ALAB's choice of a unitary trial of all three cases: multiple applicants represented respectively by separate legal teams. This raises a difficulty of Veolia orders identified by Humphreys J in **Flannery**: *"All parties had to be present throughout given the nature of the hearing involving three cases being dealt with together. It wouldn't be fair to discount Party A's costs because of Party B's loquaciousness over which Party A had no control*." The applicants here were no more loquacious than usual. But loquaciousness is perhaps not the point. I have difficulty seeing why a successful applicant, obliged for good reason to be present for the entire unitary trial chosen by a respondent, should be deprived of its costs of being present during the other applicants' cases (including both their presentation by those applicants and the responses thereto by the respondents) whether or not those other applicants' grounds were won or lost.

[91] For those few unfamiliar with the lyric, its most famous refrain is: "She stepped out, I stepped in again. I stepped out and she stepped in again. She stepped out, I stepped in again, learning to dance for Lanigan's ball."

[92] Cakeism, Cambridge Dictionary: 'the wish to have or do two good things at the same time when this is impossible'. Comes from the phrase "to have your cake and eat it too".

85. In somewhat the opposite sense and inasmuch as their grounds overlapped parties adopted each other's submissions - thereby realising to ALAB at least some of the benefit it sought by a unitary trial.

86. IFI, too, won the case but seeks no costs. Whatever view one takes of the concept of the merit of a point for purposes of Veolia analysis, and though they adopted IFI's arguments in part, it does not seem to me fair that SWI and Sweetman should have their costs discounted by reference to IFI's failed arguments, the time IFI spent making them and ALAB spent refuting them.

NPE RULE - NO FOAL NO FEE/PRO BONO REPRESENTATION

87. It is clear that, in applying the NPE rule, all costs to be borne by the applicants for relief must be considered: not merely those of respondents to which applicants may be exposed if they lose, but also the applicants' own costs – **Klohn**.[93] ALAB and the State did not dispute, nor could they have, that SWI's and Sweetman's own costs of litigating this complex and difficult case, including of a 15 day trial with full (and in my view justified) legal teams, if paid to its legal teams on a market-rates solicitor/client basis, and even on the party and party basis on which they would be adjudicated if granted, would be very substantial indeed. The NPE rule does not require costs orders in favour of unsuccessful applicants and may not require precise or "*full equality of arms*" – **FoIE.**[94] But it must surely require adequacy of arms – adequate, that is, to the case in question.

88. ALAB argues, citing an **FoIE**[95] case, that the fact that Sweetman and SWI were able to litigate and were represented by solicitors and two counsel – whether on a pro bono or 'no foal no fee' (or similar) arrangement - is to be taken into account in assessing whether their costs of litigating would be prohibitively expensive unless they were awarded all the costs of the proceedings. The word "all" here in the context of the issue I now consider, in effect refers to all 15 trial days. In a sense it is a straw man as it is difficult to envision that, for example failure to recover one day's costs of the fifteen would result in a breach of the NPE rule.

89. I know nothing of the applicants' financial means or the actual fee arrangements between them and their respective legal teams, I am prepared to assume for the sake of argument against them (as ALAB seem to ask me to do)[96] that some such arrangements were in place.

90. ALAB does not elaborate how and with what weight such arrangements should be taken into account in the assessment or how that exercise should inform the question whether and in what terms a Veolia order should be made. However, ALAB's seems to me an argument based on a very narrow focus

[93] Klohn v An Bord Pleanála [2021] IESC 51, [2021] 8 JIC 0302 §2.10 citing Edwards v Environment Agency & Ors (Case C-260/11) (ECLI:EU:C:2013:221).
[94] Friends of the Irish Environment v Legal Aid Board [2020] IEHC 454 at §§107.
[95] Friends of the Irish Environment v Legal Aid Board [2020] IEHC 454 at §§106-109). One may add reference to Friends of the Irish Environment v Legal Aid Board [2023] IECA 19, [2023] 2 JIC 0301 §102.
[96] Written Submission §55.

lacking in required perspective. Clearly, in this case, the prospect of costs did not discourage SWI and Sweetman from litigating – though that is not the criterion for assessing compliance with the NPE Rule.[97] The word "prohibitive" in NPE denotes the principle that potential applicants in environmental litigation should not be unduly discouraged from litigating by the prospect of the costs to them of so doing. The reality is that such litigation is in many cases rendered both possible and NPE, in the absence of legal aid,[98] only by the willingness of lawyers to act for applicants in environmental litigation on the hazard, in greater or lesser degree, as to their fees. No doubt a sufficient number of lawyers take the long view of their willingness to act for impecunious or poorly-funded applicants – that, over time, they will win and recover costs in a sufficient number of cases to make their efforts overall worthwhile. Tears need not be shed on their behalf. No doubt such a system has the advantage of tending to discourage unmeritorious litigation – lawyers on the hazard are entitled to calculate their risks in deciding whether to take on a case. Nonetheless, it could be suggested that a system dependent on lawyers on the hazard is not a satisfactory basis on which to ground a practical right of access to justice in environmental matters (grounded in law, as it is) as to litigation identified in **Flannery** as "*not inherently a bad thing in the same sense that other litigation is in principle undesirable. It is a necessary check and balance in modern society, and particularly important given the growing importance of environmental considerations in international and EU law."* I need not decide that question. But whether or not it is satisfactory, to whatever extent it works and such proceedings are rendered NPE (if they are) that is so only because such no foal no fee and similar arrangements are predicated, perfectly properly, on the lawyers' expectations that if there is a foal there will be a proper fee – that if the case is won the applicant's lawyers will be paid. If such an expectation is generally not realised, it is difficult to see that the system of no foal no fee representation, as a general system, could long survive.

91. It is in this sense that it appears to me that ALAB's argument that no foal no fee arrangements should in some way weigh in favour of Veolia orders seems to me to be based on a very narrow focus lacking in required perspective. It seems to me that it is in this context that the observation in the High Court in **FoIE** that where, *inter alia*,[99] *"the applicant was in a position to obtain a legal team willing to act for it",* the judicial review procedure in place in Ireland is not so prohibitively expensive that the applicant is prevented from accessing it, and similar observations in the Court of Appeal, must be understood. *Ceteris paribus*, no foal no fee and similar arrangements are not in my view a weighty basis on which to reduce costs otherwise payable. Whatever relevance there may be in ALAB's point, it does not weigh significantly in my present decision.

RECENT TRENDS IN JUDICIAL REVIEW

92. It is clear that there is a significant recent trend to longer and longer statements of grounds pleading myriad grounds of judicial review – at least on the planning and environment side. As I observed in the

[97] Edwards v Environment Agency & Ors (Case C-260/11) (ECLI:EU:C:2013:221.
[98] By this observation I simply state the fact as relevant to the application of the NPE rule. I do not suggest that Aarhus requires a system of legal aid: see Friends of the Irish Environment v Legal Aid Board [2023] IECA 19, [2023] 2 JIC 0301 §98 et seq.
[99] The Court also cited the costs protection position.

substantive judgment, this was such a series of cases.[100] It contributed not only to the length of trial but to the regrettable delay in delivering judgment.

93. In part that is a function of the underlying complexity and range of planning and environmental law. In appreciable degree, it is not, at least initially, the fault of applicants. Their legal teams are required, on very short time-limits, to master and select what is promising from what are often complex and wide-ranging planning and environmental processes and facts (most of which will yield no grounds for judicial review in a given case), to identify and consider highly complex legal issues and to plead them in the knowledge that they will be held particularly strictly to their pleadings. (Collins J has recently noted this aspect of the matter[101]). There can be no doubt whatsoever that such observations can be made of these cases – of the 11-year factual matrix and the highly complex legal matrix. To expect counsel in such circumstances to perfectly fulfil their undoubted duties of judgement and discrimination as between grounds to plead and not plead is unrealistic. One result is predictable and understandable, if unwelcome, over-pleading.

94. But once the tyranny of brief time-limits has passed and the case is up and running – all the more so when opposition papers are in - counsel for applicants may fairly be expected to recover their powers of judgement and discrimination and discard grounds unworthy of pursuit, or, even, less likely to succeed. Counsel for respondents may likewise fairly be expected to apply their powers to discerning whether to defend the case on each ground alleged. To be fair, that is a common and very helpful feature of counsels' practice in planning judicial review – though sometimes one might wish it happened earlier in the case and applying a somewhat less optimistic approach. However, for all their exceptionality and as Humphreys J observes, balanced incentives such as Veolia orders do have a role in discouraging the pleading of and encouraging the discarding, at least before trial, of grounds and defences likely to fail.

TYPES OF TRIAL TO WHICH VEOLIA MAY APPLY

95. The trial in this case was complex and lengthy and required resolution of multiple more or less discrete issues - some of which SWI and Sweetman won and others of which they lost. In that sense, it was the type of trial to which a Veolia order may be suited. ALAB and the State argued that some recent decisions – including an observation by me in EPUKI – suggest a willingness to apply Veolia orders to short trials in which it can be shown that, by reason of a failed point, the trial went into an extra day. As this was not a short trial, I need not decide the issue. But I think I should say that the point I tried to make in EPUKI was not that Veolia orders could be made as to short trials but that the unit of calculation, as it were, for purposes of making a Veolia order is at least an extra day or part thereof. In other words, and as an initial but not necessarily dispositive criterion, a Veolia order would not be made if merely the lost issue took up time in a day on which the trial would have embarked in any event. As the Supreme Court put it, in refusing

[100] At §25 I observed that "*the proceedings agitate about 63 Core Grounds of judicial review. They have generated no less than 53 affidavits and about 12,000 pages of exhibits. 13 sets of written submissions run to 168,564 words and the Authorities folder contains 240 items*." In a footnote I observed, "*A brief websearch suggests that novels average 70,000 to 120,000 words. One website suggests that anything over 110,000 words is considered too long for a fiction novel. While these websearch results are to be taken with a pinch of salt, they suffice to give a general impression*."

[101] Save South Leinster Way v An Bord Pleanála [2024] IESC 55.

a Veolia order in **Sherwin**,[102] *"the appeal would have gone into a second day in any event, even without the first issue."*[103] In my view, applying Veolia to short trials would prompt a frequency of Veolia applications which would undesirably consume court resources and would be inconsistent with the Supreme Court's view in Sherwin that Veolia orders should be "*very much the exception*". As Humphreys J said in **Reid**,[104] *"Normally it makes no sense to try to cheese-pare a costs order against a winning party, except in a long case (at least over the 2-day mark) …".* For my part, I would strongly emphasise the words "at least" here and would confine Veolia orders to genuinely long trials significantly lengthened by lost issues. The courts do not have the resources to serve a cottage industry in Veolia applications. And even if they had such resources, the uncertainty and leverage for negotiation purposes which such a cottage industry would create would inevitably tend to undermine in practice the general and equitable principle that winners get all their costs. I make these observations given certain submissions made by ALAB and the State. But as the present case was clearly a long trial and was lengthened by lost issues it does not seem that my views as to the appropriateness of Veolia orders to short trials affect my disposition of costs in this case.

PROVISIONAL VIEWS AS TO COSTS – STARE DECISIS

96. I should add that some recent authorities cited by ALAB and the State were cases in which the court in its substantive judgment had, as is now the practice, expressed provisional views as to costs and invited argument in the event any party disagreed but on the basis that failing such argument costs orders would be made in accordance with those provisional views. It does not seem to me that such provisional views are binding on other courts as a matter of *stare decisis* – though of course they may well be persuasive.

DECISION ON TRIAL COSTS OF SWI & SWEETMAN

97. While s.50B provides that the default in cases such as this is no order as to costs, the respondents, in my view correctly and in accordance with *de facto* practice, did not oppose costs orders in favour of SWI and Sweetman pursuant to s.50(2A). In that light, much of the jurisprudence as to costs following the event has at least some weight in the case.

98. I have already in this judgment addressed appreciably the particular circumstances of this case. I listed generally in the introduction to this judgment, though not comprehensively, the points on which SWI and Sweetman lost. As lost, all were unmeritorious in the sense contemplated in Veolia and Kemper. In my view, while it is difficult to attribute time to these lost points, they did, together, take up very appreciable time in what was a lengthy trial (judicial reviews in this list are allocated 2 to 3 days by default). In principle, it seems to me that a Veolia order is appropriate. I reject the SWI and Sweetman submissions to the contrary.

[102] Sherwin v An Bord Pleanala & anor [2024] IESC 32.
[103] The applicant had lost the first issue.
[104] Reid v Bord Pleanála [2024] IEHC 27.

99. However, it seems to me, recollecting the fourth point made in **IBB**[105] and approved in **MD**,[106] that there are significant additional factors in the present case which should inform the terms of a Veolia order. I have set them out above. In particular:

- These are public law proceedings and environmental law proceedings – not private law or commercial proceedings. I have explained above why this consideration is relevant. In short, and even accepting that Veolia orders can be made in such proceedings, there are public policy considerations in play in addition to the public policy considerations which underlie Veolia orders and those former considerations somewhat dilute the latter.

- ALAB's choice of a unitary trial of the three cases seems to me particularly important for the various reasons I have explained. In my view this factor requires a considerable reduction of any Veolia deduction which might otherwise be made.

- Of the lost grounds, only some of the bias allegations were unmeritorious in the sense contemplated in **Jackson Way**.

- There is also merit in the view that the length of the trial was a function not merely of the grounds won and lost considered discretely but of the underlying complexity and volume of the relevant legislative regimes, of the relationships between them and of the narrative of the 11-year process under consideration.

- Had ALAB and the State conceded the case, as the substantive judgment implies they should have, just as much as it implies that the Applicants' lost points should not have been pursued, a highly complex 15-day trial – of good points and bad - would have been avoided entirely.

- SWI and Sweetman did not succeed here merely on a "*narrow or merely technical point*". They succeeded on points of appreciable substance.

100. Doing as the Supreme Court did in Connelly – the best I can – and applying a broad brush stroke taking in on a holistic or "big picture" basis all the factors I have discussed above, I consider that, while they must bear a Veolia order despite their submission to the contrary, SWI and Sweetman have proposed a level of deduction which better reflects the entire circumstances and justice of the case. They will have 80% of their trial costs and of the instruction and brief fees. Indeed, for reasons I have indicated, there may be some harshness in wielding the broad brush by way of reducing the instruction and brief fees. On any view, and having regard to the points on which SWI and Sweetman succeeded, this was a complex and demanding case. This is another reason for preferring the higher rather than the lower suggested percentage. For the avoidance of doubt, I will certify for senior and junior counsel for SWI and Sweetman.

[105] IBB Internet Services Ltd v Motorola Ltd [2015] IEHC 445.
[106] MD v ND [2015] IESC 66, [2016] 2 IR 438.

COSTS OF THE COSTS HEARING

101. Given neither side was entirely successful on the costs arguments, I will provisionally make no order as to the costs of the costs hearing. However, the parties have liberty to apply within 14 days hereof for a different order. Failing such application, my order will be perfected in accordance with that provisional view.

PERFECTION OF THE COSTS ORDER

102. Given the complexity of the costs order likely to result from this ruling, I respectfully invite the parties to liaise as to the terms of such order with a view to settling a draft to assist the registrar. I confirm that the liberty to apply to which I have referred above will extend to any difficulties experienced in this regard.

David Holland
11/12/24