THE COURT OF APPEAL
CIVIL

NO REDACTION NEEDED

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Court of Appeal Record No. 2019/153
High Court Record No. 2017/502 J.R.

Costello J.
Murray J.
Pilkington J.

BETWEEN:

JOSEPH HUGHES

PLAINTIFF/APPELLANT

AND

THE REVENUE COMMISSIONERS AND THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 15th day of January 2021

1. Over the past decade the Supreme Court has in a number of decisions addressed the appropriate approach to the allocation of the costs of proceedings that have become moot. These have produced a framework within which many such cases can be resolved. This appeal

presents a variant on the issues addressed in those decisions, and raises the question as to how the principles identified in those cases should be applied where proceedings become moot not as a result of either the '*external events'* or '*unilateral action'* identified in the relevant judgments, but instead where the parties effectively compromise the case as between themselves but do not make provision for costs in that agreement.

2. Specifically, shortly before this Judicial Review action came on for hearing, the first named respondent determined to take steps the effect of which was to both grant the applicant part of the relief he sought in the proceedings and at the same time to dissolve the legal basis on which he had sought that relief. For reasons more fully explained later, it was necessary for the applicant to agree to this course of action before it could be implemented. The applicant did so agree. In that way, the specific concern that motivated him to bring this case was addressed to his satisfaction and the parties have each adopted the position that the proceedings have thus been rendered moot. However, the parties could not agree how the costs would be borne. The applicant applied to the High Court for his costs, and that application was resisted by the respondents. In a reserved judgment delivered on March 8 2019 ([2019] IEHC 147) Allen J. determined that in the circumstances no order for costs should be made. The applicant now appeals against that decision.

3. The proceedings had their origin in a collective agreement known as the Legal Technical Agreement ('LTA') negotiated in November 2004 between the IMPACT trade union and the Corporate Services Division of the first named respondent. The LTA was intended to address staffing issues in the Revenue Solicitors' Office ('RSO'). The applicant was employed as part of the technical staff of that office. The LTA provided for the reclassification of existing grades of technical staff employed in RSO into four levels – Legal Executive Officers, Higher

Legal Executive Officers, Assistant Principal Legal Officers and a Revenue Principal Legal Executive Officer. It specified the number of persons within each such grade (one, four, six and seven, respectively).

4. The LTA was finalised and implemented in 2007, being backdated to 2004. The applicant was designated in accordance with the LTA as a Legal Executive Officer ('LEO') and in March 2008 was promoted to the position of Higher Legal Executive Officer ('HLEO'). The next grade up from HLEO was the Assistant Principal Legal Executive Officer ('APLEO'). While the LTA specified that there would be four APLEO positions, between 2008 and 2010 all of those positions became vacant and none were filled. This, according to the first respondent's evidence, was a consequence of the recruitment and promotion moratorium implemented by the Government in 2009 during the economic and fiscal crises of that time.

5. Following a meeting between representatives of the IMPACT trade union and the first respondent in November 2015, and in the light of the relaxation of the recruitment and promotion moratorium that had by then occurred, it was agreed that there would be a review of the staffing requirements of RSO. That review was carried out in 2016 and a report was delivered in March 2017. The review was undertaken by a body called Manpower Advisory Services ('MAS'). This is a unit within the first named respondent established in 2002 for the purpose (according to its evidence) of ensuring the optimal development of staff resources and evaluating the skills and competencies needed to ensure Revenue's effectiveness. The review concluded that the legal resource allocation recommended in the LTA was no longer viable and that '*at present'* it should '*retain the existing legal technical staff allocation with no proposed increase'*. After delivery of the report, there was continued liaison between IMPACT and the Corporate Services Division, with correspondence being exchanged between the parties in March 2017 and a meeting taking place between them on 13 April 2017.

6. The applicant adopted the position that this review was deficient in a number of respects. He felt it was not conducted in a sufficiently comprehensive fashion. He believed that the review was conducted in a biased manner, that it was compiled under a misapprehension as to the allocation of work within the first named respondent and that it failed to take account of the complexities of work undertaken by members of the Legal Technical Stream. He said that its findings were not properly considered and were prejudged, that they were contaminated by a lack of fair procedures, and that the MAS failed to take account of the lack of promotional opportunities being made available to members of the Legal Technical Stream.

7. The applicant recorded his complaints in the first instance in correspondence from his solicitor to the first named respondent of May 12, and (that letter not being replied to) thereafter in these proceedings which he commenced five weeks later. While he sought sixteen separate reliefs in the action, the core remedy he claimed was an order of *mandamus* compelling the first respondent to maintain four APLEO positions within the relevant stream. The essential legal basis for that relief was the contention that the failure to maintain these positions was in breach of the LTA, although the applicant also agitated in the action the range of criticisms of the MAS review to which I have referred.

8. The respondents' opposition papers were delivered in December 2017 and robustly defended their position. Ms. Janice Dempsey of MAS swore an affidavit in which she emphatically rejected the applicant's allegations that there were shortcomings in the MAS review and the conclusions thereof. Mr. Paul Dempsey (an Assistant Secretary of the Corporate Services Division of the first named respondent) explained the context to the recruitment moratorium in the public service and the fact that it precluded the filling of posts

in the first named respondent. The essential point made by him was that for the duration of that moratorium the APLEO positions which had become vacant were not regarded as critical and that, after the lifting of the moratorium there had been such changes in the RSO that the legal resource allocation in the LTA was no longer viable. He emphasised both the terms of the LTA and the fact that it was a collective agreement negotiated between the applicant's trade union and the first named respondent. He explained that it fell to be understood in that context.

9. Mr. Dempsey also referred in his affidavit to the General Council of the Civil Service Conciliation and Arbitration Scheme ('*the C&A Scheme'*). This, he said, is an agreed and ample procedure for dealing with staff-side claims, to be undertaken by way of claim from the relevant recognised union (in that case IMPACT). Litigation, he said, was what the C&A Scheme was intended to avoid. It was the first named respondent's position that the appropriate way to air any grievance of the kind in issue was through the processes established by that scheme rather than through litigation. It was emphasised by Mr. Dempsey that that scheme remained open to the applicant. All of these various propositions were reflected in the respondents' Statement of Opposition.

10. It is the sequence of events following the delivery of these papers that is most important to this application. Shortly after the respondents' replying affidavits and statement of opposition were delivered, the case was afforded a hearing date of March 22 2018. On February 14 the applicant delivered a detailed affidavit replying to first named respondent's opposition papers. He said, in particular, that the C&A Scheme did not provide an effective and timely avenue for redress stating *inter alia* that he was not entitled to have recourse to that Scheme. On February 27, the respondents sought unsuccessfully to adjourn the proceedings in order so that they could reply to these affidavits. On March 8 the respondents delivered two

affidavits replying to the applicant's second affidavit – one of Mr. Dempsey and one of Ms. Dempsey.

11. Meanwhile a separate process was underway between another trade union (PSEU) and the first named respondent within the C&A Scheme. Essentially, PSEU maintained that there had accrued a 'debt' of promotions to one hundred and eleven outstanding posts across two grades on foot of an earlier Arbitration Board Finding of 25 May 2004 (the 'ABF'). On February 15 2018 and as part of that process, a hearing took place before an adjudicator in accordance with the Scheme. PSEU was contending that the ABF required that the first respondent fill seventy-four posts at HEO level and thirty seven posts at Assistant Principal level by means of seniority, subject to suitability. The respondent denied such a liability and contended that various events since 2004 had rendered the ABF irrelevant. The adjudicator issued his findings on February 19. His essential conclusion was that the ABF had been overtaken by events and that there was accordingly no promotion 'debt'. At the same time he adopted the position that an industrial relations solution was required for the union's claim. To meet that claim he recommended special competitions to establish panels to fill eight posts at HEO level and six posts at Assistant Principal Officer level and proceeded to identify certain conditions in relation to selection for those competitions. This would then draw a line under the previous arrangements and practices.

12. Although it was common case that this decision was unrelated to the subject of these proceedings, it appears to have at least focussed minds on the issues that had given rise to the MAS review. On March 12 Mr. Dempsey advised Ms. O'Brien of Forsa (a new trade union formed through the amalgamation of IMPACT, the Civil, Public and Services Union ('CPSU') and PSEU)) of the determination of the Adjudicator. As explained by the respondents in their submissions, Mr. Dempsey's position was that he would be willing to accept a similar claim

from Forsa for the creation and filling of a single APLEO in the legal technical stream to be recruited from the existing HLEO's (including the applicant), with future technical posts to be filled in accordance with business needs.

13. In an affidavit sworn on October 15 2018 for the purposes of the application for costs before the High Court, the applicant explains what happened as follows:

> '*Mr. Dempsey informed Ms. O'Brien that the First Respondent was prepared to accept a claim from Forsa Trade Union for the creation and filling of 1 Assistant Principal Legal Executive Officer in similar terms to that provided for in the C&A decision of 19 February 2018,* ***in response to the subject matter of the within proceedings***. *I say and am so advised that Mr. Dempsey made it clear to Ms. O'Brien that* ***this was being done in order to address the issues raised in the within proceedings and was being undertaken in direct response to the within proceedings****.'*
>
> (Emphasis added)

14. On March 13 Mr. Dempsey e-mailed Ms. O'Brien repeating this proposal. The mail (which had the subject '*Legal Technical Claim'*) was as follows:

> '*As discussed, I would be prepared to agree that if FORSA makes a claim to fill legal executive AP posts under the C&A Scheme – in the light of the recent arbitration findings with the CPSU and PSEU, to propose to FORSA that in view of those precedents that we* ***settle the claim*** *on the following basis:*
>
> *1. Future legal technical posts are filled on business needs;*

2. *A competition is held for one AP Legal Executive post for HEO's with 10 years' service and relevant legal experience/qualifications.*

If FORSA agrees Revenue would expect Mr. Hughes to drop his action.

(Emphasis added)

15. I should pause here and say that in the course of her oral submissions, counsel for the applicant said that the reference to '*the claim'* to be settled in the manner proposed was to the applicant's claim in these proceedings. I think the text makes it clear that what is being settled is the '*claim'* from Forsa invited by Mr. Dempsey – he refers to the applicant's proceedings as '*his action'.* Perhaps more importantly, the mail did not require the applicant to '*drop his action'* as a precondition to the course of action suggested. It merely recorded Mr. Dempsey's expectation that this would occur.

16. The applicant formed the view that if this post at APLEO level were created and filled, this would meet the main issues in the proceedings. He avers that he told the Revenue Solicitor this, saying as follows:

'*the Revenue solicitor made it clear to me at our meeting that the actions of the Respondent, and of Mr. Dempsey, in creating and filling the post of APLEO were being undertaken in response to the within proceedings.'*

17. He also says that in the course of that meeting he advised the Revenue Solicitor and other representatives of the first respondent that the issue of the costs of the within proceedings remained unresolved and that he would be seeking his legal costs against the respondents.

18. On March 14, the applicant instructed his solicitors to apply to the Court to vacate the hearing date, and on March 15 an application to that end was made and granted. The proceedings, it should be noted, remained in being and were adjourned for mention, a hearing date being subsequently set aside to deal solely with the question of costs.

19. Five steps were then required, and taken, in order to implement what the applicant describes as '*the agreement with Revenue'*. First, on 15 March Forsa was advised that all four Higher Legal Executive Officers in the Revenue Solicitors Office (including the applicant) agreed to the creation and filing of the post of APLEO. Second, on April 4 the Revenue Departmental Council approved '*the claim'*. Third, on the 6th April Forsa submitted a claim for approval for the creation and filling of one APLEO post. Fourth, on 16 April a meeting occurred between Forsa and the first named respondent to discuss the matter. Finally, on 23rd April 2018, Revenue replied to Forsa accepting the claim. That letter records the first named respondent as '*willing to accept this claim and propose it be settled'* through the creation of a post. It states as one of the terms of the resolution, that '*all future posts in the Revenue Solicitors Office will be filled on the basis of critical business needs only'.* This was duly accepted by Forsa on May 1.

20. In none of the exchanges occurring in the course of these five steps was reference of any kind made to the applicant's legal action, and the formal document of May 1 recording the agreement between Forsa and the first named respondent makes no reference to the conversation between Mr. Dempsey and Ms. O'Brien of March 12 or to Mr. Dempsey's mail of the following day. The applicant avers that the omission of reference to that correspondence may give the impression that the claim for the creation of an APLEO post came from Forsa

without the prompting of the first named respondent, and he says that that record does not reflect an accurate picture of what transpired between the applicant, the first respondent and Forsa.

21. The new APLEO position was thereafter created, advertised and a competition held in which the applicant participated but in which he was not successful. The applicant avers that the first respondent in creating and filling the APLEO post was acting in direct response to the proceedings and would not have so acted without the proceedings being initiated.

22. The respondents never replied to the applicant's affidavit of October 15. In consequence, when the matter came before Allen J. the applicant's averments to the effect that on two occasions Revenue had advised that the post of APLEO was being created and filled in response to the proceedings, was uncontradicted. After a hearing which spanned two half days in October 2018 and which was directed exclusively to the costs of the proceedings consequent upon this development, Allen J. in a reserved judgment decided that no order for costs should be made.

23. His findings on the evidence, where relevant, can be summarised as follows:

(i) Noting that the MAS review was agreed in the hope of progressing a long outstanding claim by IMPACT to fill vacant posts, he expressed the view that the common intention of IMPACT and the first respondent when the MAS review was agreed, must have been that the claim would be revisited when the outcome of the MAS review became known (at para. 36):

(ii) As of 12 and 13 March 2018, there was no '*agreement'*: the implementation of what had been proposed required the concurrence of all four serving HLEO's

in the RSO, the approval of the first respondent's Departmental Council, the submission by Forsa of a claim for the creation and filling of one post, and the acceptance by the first named respondent of that claim (at para. 38):

(iii) In consequence, as of the date the matter was listed for hearing, the case was not moot (at para. 39):

(iv) The allegation made by the applicant that the agreement to create and fill one post was brought about by these proceedings and was intended as a direct response to the proceedings did not, Allen J. said, '*withstand scrutiny'* (at para. 40). The proposal first suggested on 12 March 2018 '*was a proposal by an employer to a union of an industrial relations solution to an industrial relations problem and an industrial relations claim which dated back to 2014'*. It made perfect sense that the first respondent would not make a collective agreement for one post while there was an ongoing legal claim by the applicant that it was obliged to fill four. The requirement for the applicant's concurrence was not a great deal different to the requirement for the concurrence of his colleagues of the same rank in RSO or of Forsa (to whom, the Court emphasised, the offer had been made). The agreement ultimately reached, Allen J. said, '*settled the industrial relations claim and drew a line under the 2004 agreement by providing that all future posts in the Revenue Solicitors Office would be filled on the basis of critical business needs only'* (at para. 41):

(v) For much the same reason, Allen J. rejected the contention of the applicant that the suggestion that one post might be created and filled was made in order to address the issues in the proceedings. The issue in the proceedings was whether

> (if the applicant was entitled to enforce a collective agreement) the respondents were bound to fill four positions. As Allen J. put it '*[t]he industrial relations solution which was found was to create and fill one position, rather than to simply fill even one of the four which the applicant's case was the respondents were obliged to fill.'* (at para. 42)

24. Following from these findings, the ultimate conclusion of the High Court Judge was shortly expressed (at para. 49):

> '*… it seems to me that this is a case which, by the time the costs argument came before me, was moot, but at the time when it might have been heard, probably was not. The cause of the mootness was not, strictly speaking, either the unilateral act of one of the parties or an underlying change of circumstance. The catalyst which gave rise to the result, however, was a factor outside the control of the parties.*'

25. The '*catalyst'* to which the Court was referring here was the decision of the Adjudicator. Essentially, according to the first named respondent's submissions (but not its evidence) the Adjudicator's finding presented a model as to how a compromise might be fashioned in such matters which prompted the first respondent and Forsa to find a new *modus vivendi* in respect of the staffing in the legal technical stream.

26. Earlier, Allen J. characterised the proximate cause of the proceedings becoming moot as (at para. 44):

'*… a collective agreement between Revenue and Forsa, in which the applicant expressly concurred'*.

27. He elaborated on the effect of this later (at para. 47):

'*The creation and filling of the one position was not the unilateral action of the first respondent and was not undertaken in direct response to these proceedings. The creation and filling of that post was by agreement, to which the applicant was a party'*

28. The language used by Allen J. in these paragraphs falls to be understood in the light of the case law to which I made reference at the commencement of this judgment. Those decisions, in turn, must be considered bearing in mind the very particular issues presented by issues around the allocation of the costs of moot proceedings. A determination or concession of mootness may render the investment the parties have made in the commencement, preparation of or (depending on the point in time at which the action becomes moot) participation in the trial and prosecution of the appeal of legal proceedings, futile. At first glance, it might be thought that the most reliable way of deciding where that cost should lie would be to determine who would have prevailed in the proceedings had they run to conclusion. However, this would represent both an inefficient use of court resources and of the resources of the parties themselves. It would also undermine one of the purposes underlying the mootness doctrine – which is not merely directed to ensuring the most productive use of court time, but also reflects a broader constitutional principle that the Courts should not generally involve themselves in determining proceedings which do not present a live *lis inter partes* (see

Lofinmakin v. Minister for Justice Equality and Law Reform [2013] IESC 49 at para. 82 , [2013] 4 IR 274, at p. 298).

29. Until the decision of the High Court in *Telefonica O2 Ireland Ltd. v. Commission for Communications Regulation* [2011] IEHC 380, the courts in practice often resolved these issues on a case by case basis, sometimes looking not as much to the cause of the mootness as to the more general question of whether it was, in all the circumstances, reasonable for the litigant seeking the costs up to the point the action became moot, to have incurred them. That, for example, was the course taken in *Garibov v. Minister for Justice, Equality and Law Reform* [2006] IEHC 371 and it reflects the approach adopted in England and Wales (see for example the unreported judgment of the English High Court of 22 May 1996 in *R v. Independent Television Commission ex parte Church of Scientology*). While maintaining flexibility and allowing each case to be determined on its particular facts, that approach suffers from the difficulty both that in some (but not all) cases it embroils the Court – at least to some extent – in the underlying merits of the case, and in that it may result in inconsistencies in the approach to an issue which (if the number of reserved judgments on the question is anything to go by) arises with remarkable frequency.

30. In *Telefonica* the High Court proposed, and in *Cunningham v. v. President of the Circuit Court* [2012] IESC 39 [2012] 3 IR 222 the Supreme Court developed, a more structured approach. This has evolved further in *Godsil v. Ireland and the Attorney General* [2015] IESC 103 [2015] 4 IR 53, and *Matta v. Minister for Justice, Equality and Law Reform* [2016] IESC 45, the relevant principles being helpfully distilled and summarised by Humphreys J. in the course of his judgment in *MKIA (Palestine) v. IPAT* [2018] IEHC 134 at para. 6). This approach focuses not on the merits of the underlying action but instead on the cause of the mootness. *Garibov* and the approach it suggests must be taken as no longer representing the

law in this jurisdiction in the light of these decisions and the different emphasis they propose (*see* the comments of MacMenamin J. in *Matta* at para. 22). The essential structure now put in place by these cases can, I think, be reduced to three broad propositions.

31. First, where the mootness arises as a result of an event that is entirely independent of the actions of the parties to the proceedings, the fairest outcome will generally be that the parties should bear the costs themselves. Neither is responsible for the mootness, and neither should have to pay for costs rendered unnecessary by an event for which they bear no responsibility.

32. Second, however, where the mootness arises because of the actions of one of the parties alone and where those actions (a) can be said to follow from the fact of the proceedings so that but for the proceedings they would not have been undertaken, or (b) are properly characterised as '*unilateral'* or – perhaps – (c) are such that they could reasonably have been taken before the proceedings, or before all of the costs ultimately incurred in the proceedings were suffered, the costs should often be borne by the party whose actions have resulted in the case becoming moot. In the first of these situations, it can be fairly said that there was an *event* which costs can and should follow in accordance with conventional principle. In the second, it will frequently be proper that the party who is responsible for the unilateral action which results in the mootness should bear the costs. In the third, it might be said that where a party who could reasonably have acted so as to prevent the other party from incurring costs failed to do so, it is proper that they should have to discharge those costs.

33. The third general proposition addresses the particular position of statutory bodies. Agencies with obligations in public law cannot be expected to suspend the discharge of their statutory functions simply because there are extant legal proceedings relating to the prior

exercise of their powers. They must be free to continue to exercise those powers in accordance with their legal obligations. At the same time, it would be wrong if under the guise of exercising their powers in the normal way, the statutory authority both effectively conceded an extant claim, and avoided the legal costs that would otherwise attend such a concession. The cases strike a balance between these two considerations by suggesting that where the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the court should look at the circumstances giving rise to that new decision in order to decide whether it constitutes a '*unilateral act'* for these purposes. If the new decision is caused by a change in the relevant circumstances occurring between the time of the first decision, and of the second, the Court might not treat the new decision as a '*unilateral act'* and may accordingly make no order as to costs. If, however, there has been no such change in circumstances so that the body has simply changed its mind, costs may be awarded against it. If the respondent wishes to contend that there has been a change in circumstances it is a matter for it to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that this is so. This requires the respondent to establish that there was a change in the underlying circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. In conducting this analysis, the Court should not embark upon a determination of the merits of the underlying case.

34. Each of these three propositions – it must be stressed – present a general approach rather than a set of fixed, rigid rules. The starting point is that the Court has an over-riding discretion in relation to the awarding of costs, and the decisions to which I have referred are intended to guide the exercise of that discretion. They are thus properly viewed as presenting a framework for the application of the Court's discretion in the allocation of costs in a particular context and

should not be applied inflexibly or in an excessively prescriptive manner (*PT v. Wicklow County Council* [2019] IECA 346 at paras. 18 and 19).

35. In one sense, this case might appear to call for no more than a straightforward application to the facts of these principles, and to a large extent that was how it was debated. The respondents say that the cause of the mootness was the new collective agreement between Forsa and the first named respondent. Because of that collective agreement, they contend, there was no longer any subsisting 2004 Agreement on which the applicant could sue. Crucially, they contend, the applicant and his fellow HLEOs concurred in the new arrangement when he might have (a) refused to accept it and (b) prosecuted his judicial review to conclusion instead. There were, the respondents say, a number of moving parts in the process (Revenue's consent, Forsa's agreement, the agreement of the applicant and the consent of the other HLEOs) and not all of these were within the control of the first respondent. Therefore, the argument runs, the proceedings were rendered moot not by an event that was unilateral, but by an occurrence that resulted from and depended upon the agreement of the applicant not to pursue his claim in the event that the procedure to which I have referred earlier resulted in the creation of a new post.

36. Following from this, and in summary, the respondents say (a) they never conceded the validity of the applicant's claim, (b) the creation of the single APLEO post was not a unilateral act of the respondents and (c) the creation of that post was not caused or in response to the applicant's proceedings. Therefore, on the basis of the *Cunningham* case law, the applicant has no entitlement to costs.

37. The applicant, on the other hand, says that the event which actually caused the mootness was the respondent's proposal to fill the single APLEO position. Stressing that the respondents

never replied to the applicant's affidavit of October 15, he says that the evidence before the Court was inconsistent with the findings of the trial Judge that the cause of the mootness was a factor outside the control of the parties. The offer communicated to the applicant was, he says, deliberately aimed at removing the basis for the applicant's claim. That was a *unilateral* action of the respondent, and, having undertaken such a unilateral action (he says) the first respondent has failed to discharge the burden of showing that it was caused by external circumstances in the sense envisaged by the authorities.

38. Once that proposal was made, the applicant furthermore says, it would have been irresponsible not to accept it, as not to have done so would have resulted in the applicant having to take the risk of incurring the costs of the proceedings as a whole when a significant component of what he was seeking in the action was being offered to him. His counsel also makes the point that for him to have adopted this course of action would have resulted in the unnecessary expenditure of court time on a claim that could have been resolved to the satisfaction of both parties. Because the unchallenged evidence of the applicant was that the actions of the first named respondent in creating the new post were a consequence of the proceedings, he says that this should have been viewed by the High Court Judge as an '*event'* from which a costs order should have followed.

39. In seeking first to resolve these issues on the basis of *Cunningham*, the approach suggested by that case requires the Court to answer four questions:

(i) What was the specific event that resulted in the action becoming moot?

(ii) Was that event the result of an occurrence outside the control of either party?

(iii) Was that event caused by the unilateral actions of one of the parties?

(iv) If the answer to (iii) is in the affirmative, has the person responsible for the mootness established that their actions were not undertaken in response to the proceedings?

40. Subject to the general intervention of the Court's discretion to which I have referred earlier, if the answer to (ii) is in the affirmative, the default position is that no order for costs should be made. If the answer to (iii) is in the affirmative and to (iv) is in the negative, the default position is that costs should be awarded against the party whose action caused the mootness. But all of this depends on characterising the event that gives rise to the action becoming moot in the first place.

41. An action will become moot where a legal dispute has ceased to exist, where the issue has materially lost its character as a *lis,* or where the essential foundation of the action has disappeared (see *Lofinmakin v. Minister for Justice, Equality and Law Reform* at para. 82). The offering by the first respondent of a new APLEO post, although unilateral, did not cause the mootness. This required the agreement of Forsa, the applicant and the three other HLEO's before it had any effect. Even when the agreement of those parties was forthcoming, the creation of that new post did not itself render the action moot. The action claimed an entitlement to four APLEO posts, not one. While the applicant says that the creation of one post caused the action to '*materially lose its character'* or '*caused the legal dispute between the parties to exist'* he is mistaken. The legal dispute – as framed by the applicant – was whether there was an obligation to fill four posts. His case was clearly and unequivocally expressed in his Statement of Grounds (at para. 15) on the basis that the contents of the 2004 Agreement represented a clear statement and commitment that the grading structure within the Legal Technical Stream would be maintained at the levels in paragraph 9 of the LTA. That

case would have become moot if the first respondent had filled four such positions. It did not become moot by one of them being filled.

42. Of course, the context for the case may well have changed – in particular given the first named respondent's position in the litigation that no posts at the level of APLEO were required within it - but that change in context did not make the action moot. Mootness, it must be stressed, arises in respect of an action which will not have the effect of resolving a controversy affecting or potentially affecting the rights of the parties. Until such time as there were four APLEO positions filled or the LTA itself had ceased to have an effect, there remained in being such a controversy (see *Goold v. Collins* [2004] IESC 38). The issue of whether the factual context had changed so that the applicant did not feel it necessary to pursue that controversy is a different matter.

43. To that extent, it is irrelevant whether the offering of that position was a unilateral act of the first named respondent, just as it is irrelevant whether this was an act undertaken in response to the proceedings and caused solely by them. Both may have (as the applicant says in his submission) '*addressed'* what he describes as his '*concerns about inadequate staffing levels at the grade of APLEO'* but that was his subjective assessment of, and response to, the changed situation. It did not alter the legal context in which the action then stood, nor did it operate to prevent him from proceeding with his claim (if he wished to do so).

44. What actually rendered the action moot was the fact that the LTA was superseded by a new collective agreement. Part of that collective agreement, certainly, was the creation of one new post. But the critical part was the stipulation that the parties to the original LTA had now agreed that thereafter positions would be filled on the basis of a business need. Once this happened, the legal basis of the applicant's claim dissolved.

45. This was not an event that occurred independently of any of the parties, but neither can it be properly characterised as '*unilateral'.* It was undertaken with the agreement of the applicant. Had it been the case that the first named respondent and Forsa could have and did enter into this agreement without reference to the applicant or above his objection, he would have enjoyed a strong case on the evidence adduced here (and in particular the comments made by the Revenue solicitor to him which were not disputed and which - there being no proper basis to reject that evidence - the Court must assume were thus made) that the action giving rise to the mootness occurred in response to the proceedings. He might in that circumstance have thus been entitled to at least some of his costs. This, however, is not what happened. He agreed to the changes. Because he agreed to it, as he seemingly had to for the new post to be created, it was not unilateral.

46. The applicant makes the point that the event that caused the mootness in *Cunningham* (*viz.* the entry of a *nolle prosequi*) was a development with which the applicant in that action would have concurred. Indeed, the same can be said of *Godsil* (the repeal of legislation the constitutional validity of which she challenged in her action). On that basis, he says, the fact that the applicant may have agreed to the actions of the respondents in creating the post of APLEO does not deprive the actions of their characteristic of being the unilateral acts of the respondents.

47. The suggestion that an action which is undertaken with the agreement of the applicant is actually a unilateral act of the respondent seems curious. That said, within the argument lies an important point: in both of these cases the actions of the respondents did not require the applicant's consent and in neither case was it sought. Here, the first respondent was proceeding on the basis that the consent of all the HLEO's was required. Once that was the case, the

applicant had it in his power to block the proposal if the action was not resolved on terms that were satisfactory to him. He could have prevented the action from becoming moot but he chose not to do so. This makes his position quite different from that of the applicants in the cases upon which he relies. None of them had that facility. Thus, *Cunningham* and the cases that follow it are concerned only with mootness which arises in one of two ways – because of an event outside the control of either party, or because of an action of just one of them. This is clear from the comments of Clarke J. in *Cunningham* when he observed (at para. 24):

> '*a court ... should ... ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot'*.

48. When the Court proceeded in *Cunningham* to elaborate a set of principles by reference to which costs of moot proceedings could be determined, it was concerned exclusively with situations in which the mootness arises from either unilateral acts or changes in circumstances outside the control of the parties (see in particular paras. 27 and 28).

49. *Godsil* presented in one sense a variant, but in another, an implementation of the principle thus identified by Clarke J. There, the plaintiff claimed that a statutory provision preventing an undischarged bankrupt from standing as a candidate for election to the European Parliament was invalid. Within two weeks of the proceedings being instituted, the Government had introduced draft amending legislation removing the statutory prohibition of which the plaintiff complained. Shortly thereafter this was passed by the Houses of Oireachtas and signed into law by the President. The Court determined that the enactment of that legislation in the circumstances which presented themselves was an '*event'* for the purposes of costs.

Specifically, McKechnie J. said that the actions of the respondents in enacting the legislation could only reasonably be understood as being in direct response to the proceedings issued (see para. 63 of the judgment). Therefore, the applicant by her action had procured the outcome she had sought to achieve by litigation and was, to that extent, entitled to her costs. However, the same result would have followed from *Cunningham* and without any reference to the '*event'*: the cause of the mootness was a unilateral act of the respondents and, as a consequence of their inability to establish that this was not a response to the proceedings, the applicant was entitled to her costs under the formulation suggested in that decision.

50. To resolve if, when and how the principles in *Cunningham* can be applied to circumstances in which proceedings are resolved as a consequence of an event to which the parties have agreed, and putting to one side the distinct issues that may arise where the agreement involves terms that have nothing whatsoever to do with the reliefs sought in the underlying claim, it is necessary to distinguish between two different scenarios.

51. One is where the respondent offers to the applicant all of the relief claimed in the action but makes no offer as to the costs incurred by the applicant. In that situation, it would represent a significant constraint on the jurisdiction of the Court to conclude that if placed in that position the applicant was not entitled to say, if necessary, that he will accept the offer and allow the court to decide the issue of costs. In that situation, the *Cunningham* principles can be applied with only limited modification. Provided the respondent has either been requested to grant the claimed relief before the action is started or has at the very least been given sufficient time to consider its position before substantial costs are incurred, by eventually agreeing to that relief the respondent will, *prima facie*, have changed its position and given the applicant what he instituted the proceedings to obtain. Once the applicant accepts the offer the proceedings have become moot. Even though that mootness occurs through a bilateral agreement by which the

applicant agrees not to seek relief, absent particular circumstances and/or evidence from the respondent establishing that the relief was offered for reasons that are not connected to the proceedings, the applicant should obtain at least some of his costs.

52. The second situation is where the applicant is only offered part of the relief he seeks. In that case the applicant has a choice. Because the respondent has offered only part of what he seeks, the action will not be rendered moot by that offer unless he both accepts it and agrees not to press for more (in which event it is perhaps easier to refer to the proceedings are being compromised rather than rendered moot). In that situation, *Cunningham* does not resolve how costs should be addressed. While the respondent may have changed its position by offering something, the reason the action is not proceeding is that the applicant has agreed to accept what is proffered. That is not a unilateral action, and there are various considerations relevant to whether it is fair that the costs should be awarded in favour of the applicant which take the situation outside the structure put in place by that case.

53. This case falls within the second of the situations with the difference that here there were other parties whose agreement was also required and the additional feature that the applicant's acquiescence in the terms operated to dissolve the LTA and render his original action without legal foundation. In this second scenario, the Court is concerned not with the consequence for costs of an act over which at least one of the parties has no control, but is instead looking at whether it is just that one party should have to bear costs, or another party should have to forgo them when the proceedings are not being heard as a result of agreement over which both had control.

54. It would be open to the Court to refuse to make any order for costs on the basis that it was a matter for the parties to resolve the question of costs when they entered into their

agreement, and that it was not correct for them to leave the Court in the position of an arbitrator on an aspect of the settlement which could not be agreed between them. However, I think this would both unnecessarily constrain the jurisdiction of the court, and (at least in the context of proceedings such as this action which involve third party interests) would ignore the legitimate public interest in encouraging parties where possible to seek to resolve litigation. Such a jurisdiction was accepted in judicial review actions, and its limits explained, in *M v. Croydon LBC* [2012] EWCA Civ. 595, [2012] 3 All ER 1237 as follows (at para. 47):

> '*It is open to parties in almost any civil proceedings to compromise all their differences save costs, and to invite the court to determine how the costs should be dealt with. The court has jurisdiction in such a case to determine who is to pay costs, but it is not obliged to resolve such a free-standing dispute about costs. Accordingly, by settling all issues save costs, the parties take the risk that the court will not be prepared to make any determination other than that there be no order for costs not only because that is the right result after analysing all the arguments, but also on the ground that such an exercise would be disproportionate'*.

55. While these comments also describe the law in this jurisdiction, they have to be applied with caution. In that case, the English Court of Appeal adopted the position that one of the factors it would take into account in resolving such an issue is whether it can be said with confidence which party would have won had the action run to trial (see para. 51). Such an approach – at least as the law presently stands – seems to be emphatically out-ruled as an option by the decision in *Cunningham* (see para. 21 of the judgment). I note that a similar view was adopted by Noonan J. in *SF v. Secretary General of the Department of Education and Skills* [2016] IEHC 577 at para. 10. I will proceed here, accordingly, to address costs independently of the strengths of the case, while noting that I think that at least where it can be said with

confidence that a case was noticeably weak or self-evidently strong, account should be taken of that in deciding how costs should be fairly distributed in a situation such as that in issue here.

56. Needless to say each case will depend on its facts. However, the discretion of the Court (which at the time this matter was heard in the High Court was governed by O.99 Rule 1(1) and Rule 1(3) and (4)) has to take account of the application to an individual case of four over-riding considerations:

(i) the general public interest in obtaining a resolution of proceedings.

(ii) the need to ensure that respondents/defendants are not inhibited in proposing reasonable measures to address proceedings by the concern that they will end up having to discharge the costs of an action they believe to be unmeritorious.

(iii) the related consideration that where there are third party interests in play it would be undesirable that a respondent/defendant should have to choose between making a decision which will benefit third parties and paying the costs of an action which it believes unmeritorious, or not providing that benefit and fighting the case.

(iv) that the Court should exercise its discretion in the award or refusal of costs in a manner which both encourages applicants/plaintiffs to clearly identify what they want from respondents/defendants before they initiate proceedings, and to prompt those respondents/defendants to address in a timely manner the relief which is claimed.

57. Overhanging these factors is the position of the court itself. While parties are to be encouraged to settle their disputes, the interests of the court and the public are not significantly advanced if a lengthy dispute around the underlying contest between the parties is replaced

with a time-consuming dispute about the costs following settlement. Whatever rule is applied in seeking a just outcome to the type of situation that presents itself here, it must be heavily influenced by the need to encourage litigants to settle all of their disputes, not to enter into agreements that substitute one form of litigation for another. Thus, the starting point is that where the parties take the risk of compromising between themselves on the basis that the Court will decide the issue of costs, they entrust their fate to the Court's discretion, and they must expect that the consequence of adopting this course of action may well be that the Court cannot fairly resolve the issue other than by making no order.

58. That said, and adapting the approach adopted in *Cunningham*, the following questions seem to me to be potentially relevant in deciding how costs in a case such as this should be addressed:

(i) Did the agreement entered into between the parties result in the applicant obtaining a substantial part of the relief he sought in the action?

(ii) Could the necessity for the proceedings or their continuation have been avoided by the agreement being offered to the applicant by the public body at an earlier stage in the process?

(iii) Would the applicant have obtained the benefit of the resolution ultimately put in place without instituting proceedings?

(iv) Is there any aspect of the conduct of the parties that militates against or in favour of their obtaining costs or having costs awarded against them?

59. Taking all of these considerations into account, it seems to me that there are three factors which point to the conclusion that the applicant in this case should obtain *some* order for costs in his favour. First, the Court must approach the question of costs on the basis that the course of action adopted by the first named respondent and ultimately resulting in the filling of one new APLEO position, was a response to the proceedings. While fully noting the entitlement of the trial Judge to view sceptically the suggestion of the applicant that this was the sole factor motivating the actions of the first named respondent, the fact of the matter is that the Court had before it an uncontradicted averment that the applicant was advised by the Revenue Solicitor that the suggested filling of one post was '*being undertaken in response to the proceedings'*. The timing of the Revenue proposal strongly suggests that there was a connection between the two.

60. Second, the effect of the resolution ultimately obtained was to give the applicant *some* of what he sought when he instituted the proceedings. This came not only in the form of filling one position but, as stressed by his counsel in her oral submissions, by reversing the position adopted by MAS and defended in the respondents' affidavits that there was no need for *any* new APLEO position.

61. Third, I do not believe that the Court had before it any basis on which it could have concluded that there was a good reason the respondents did not put in place the one APLEO position ultimately offered, sooner than they actually did. The applicant's solicitors wrote a letter on May 12 2017 in which they complained about the conclusions of the MAS review. While the trial Judge may have been correct in observing that this letter did not call for a particular response in terms, it made it absolutely clear that the applicant was proposing to bring Judicial Review proceedings, it recorded that the solicitors expected a response, and it clearly identified his essential grievance as being that his career had been inhibited, and his

expectations frustrated, by the absence of any opportunity of advancement. It was open to Revenue to present the option of filling a single APLEO position at any point from then until the following March. It did not do so, and never even responded to the letter. While it was suggested in argument to the trial Judge and was accepted by him that the findings of the Adjudicator of February 19 operated as a '*catalyst'* for the proposal to the applicant, there was not only no evidence to that effect but the suggestion itself seems to me to be entirely vague. Indeed, in the course of argument in this Court it was said by the respondents that that process was separate.

62. Most importantly, had this offer been made sooner legal costs (and indeed Court time) could have been saved. This, it seems to me, is a crucial aspect of the context. Had the respondents offered the proposal made to the applicant in March by way of an open letter at that time, and had the applicant refused that offer and the case proceeded, the Court would have been fully within its rights in refusing to penalise the applicant because he did not accept that offer in the absence of some proposal being made to deal with his costs incurred up to the date of the offer. An analogous example of that approach can be found in the decision in *Heffernan v. Hibernia College Unlimited Company* [2020] IECA 121.

63. As against this the applicant did not obtain all, or even most, of the relief he claimed. Whatever his reason for seeking it, the applicant's claim was that the respondents were obliged to fill four APLEO positions. Not only did the proposal made by the first named respondent fall significantly short of this, but the agreement in which the applicant acquiesced resulted in the dissolution of the entire legal basis for his claim – the alleged continued enforceability of the LTA. That this occurred in a context in which, whether prompted by these proceedings or

not, the respondents were seeking to resolve an industrial relations issue which affected Forsa and the applicant's colleagues is an important factor that cannot be ignored.

64. Balancing these various factors, it seems to me that the applicant should be awarded 50% of the costs of his proceedings, to include the hearing before Allen J. in respect of costs. I have reached this conclusion on the following basis:

(i) Because the applicant obtained from the respondent's proposals a benefit that, on the evidence, was provided in response to these proceedings it would be wrong if no order for costs were made in his favour.

(ii) Insofar as the applicant did not obtain all, or even most, of the relief he claimed in the action, it would not be appropriate to order that he obtain all of his costs;

(iii) While, in a crude sense, the benefit he did obtain was but a quarter of that sought, to frame costs on a mathematical basis that reflected this would ignore the fact that the applicant had to incur the costs of the entire action to obtain that benefit and would also pay insufficient regard to the fact that the respondents have failed to advance any evidence that would allow the Court to conclude that this offer could not have been made sooner, thereby avoiding these costs.

65. In reaching a position that thus differs from the view of the trial Judge I should make it clear that I do so because – quite understandably having regard to the basis on which the matter was argued before him – he approached this application solely on the basis of the test in *Cunningham* when in my view a different approach to the issue was required.

66. Finally, I should observe that this judgment should not be taken by parties as encouragement to those involved in judicial review or other proceedings to settle their actions on the basis that the issue of costs will be passed over to the Court to decide. In that regard I stress that apart from those cases where the respondent can establish that this proposal was not made in response to the proceedings, where a public body determines to offer to an applicant in judicial review proceedings the substance of all the relief claimed, that unless that offer has been made promptly, provided the respondent was afforded the opportunity to accede to that relief before substantial costs were incurred and absent persuasive reasons why on the particular facts costs should not follow, the applicant will obtain his costs not merely of the action, but of fighting for his costs. Similarly, I emphasise that where an applicant decides to compromise his case on a basis that involves the grant of significantly less than he seeks, he will not usually obtain all of his costs and may obtain no costs at all if the Court cannot in the circumstances justly adjudicate on how costs should be borne. By not agreeing costs as part of a settlement, each party takes a risk that both should avoid. The parties here took such a risk, which resulted in the applicant obtaining some of his costs – but only because the respondents did not explain why the offer made in March 2018 was not made sooner and because the Court concluded based on the evidence that the proposal then made by them was a response to the proceedings. The failure to address costs as part of the agreement of the applicant to the creation of a new APLEO position resulted in increased irrecoverable costs for both parties of the application before Allen J. and of this appeal.

67. Having been partially successful in his appeal, it is my provisional view that the plaintiff should obtain the same proportion – 50% - of the costs of the appeal. Should either party wish to dispute this provisional allocation of the costs of the appeal they should advise the Court of Appeal office within ten days of the date of this judgment, whereupon a date will be fixed for

the hearing of oral submissions on the issue. The parties should note that in the event that either party disputes this suggested allocation but fails to establish a basis for the Court to order otherwise, the costs of such an application may be awarded against them (see *Allied Irish Banks v. Griffin* [2020] IECA 339 at para. 7).

68. Costello J. and Pilkington J. are in agreement with this judgment and the orders I propose.