



**THE COURT OF APPEAL
Civil**

UNAPPROVED

Appeal Number: 2018/188

Neutral Citation Number [2023] IECA 234

**Collins J.
Whelan J.
Noonan J.**

BETWEEN/

JACKSON WAY PROPERTIES LIMITED

PLAINTIFF/RESPONDENT

- AND -

THOMAS KEVIN SMITH AND MAIREAD SMITH

DEFENDANTS/APPELLANTS

-AND-

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Ms. Justice Whelan delivered on the 5th day of October 2023

Introduction

1. The substantive judgment of this Court [2023] IECA 185 was delivered on the 21st July 2023. This Court having reversed the decision of the High Court, at para. 205 of the judgment, provisionally indicated that the appellants were entitled to their costs of the appeal and in the High Court.

Essential elements of High Court order

2. The key conclusions in the High Court included the following: -

- (a) That the burden of the restrictive covenant contained in a deed of transfer of 1947 was not annexed to the transferor's land.
- (b) That the lands of the transferee to the 1947 deed of transfer, part of which subsequently vested in the plaintiff, were not bound by or otherwise subject to the said covenant.
- (c) That the defendants were not entitled to enforce the restrictive covenant against the lands now vested in Jackson Way, which form part of the lands transferred by the deed of transfer of 1947.

All of those determinations were reversed on appeal.

The position of Jackson Way/the respondent

3. The respondent acknowledges that the appellants have been "*largely successful*" in their appeal. It is contended that they have not been entirely successful, having raised a number of issues in which they were unsuccessful in this Court or in the High Court. It is contended that the order for costs should take account of issues which were resolved in Jackson Way's favour. The respondent in its submissions places reliance on the relevant provisions of sections 168 and 169 of the Legal Services Regulation Act, 2015 (the 2015 Act), it being emphasised that pursuant to s. 168(2) of the 2015 Act a costs order may direct a party to pay a portion of another party's costs (s. 168(2)(a)), or costs from or until a specified date, or costs relating to one or more steps in proceedings (s. 168(2)(c)).

4. The respondent places emphasis on s. 169 of the 2015 Act insofar it provides that, in general, costs are recoverable by a party who is "*entirely successful*" in civil proceedings, from a party who is not successful. Emphasis is placed on s. 169(1) of the Act which provides that a court may order otherwise "... *having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties*". Reliance is placed on the comprehensive summary of the costs regime as set out by Murray J. in his

judgment in this Court in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183 and in particular para. 19 of the said judgment. The judgment of Murray J. offers a comprehensive *vade mecum* encompassing the fundamental principles to be derived from the relevant statutory provisions of the 2015 Act and, where relevant, aligning same with the cognate provisions of the recast Order 99 of the Rules of the Superior Courts. To the extent relevant to the key elements in this application that judgment will be considered in greater detail hereafter.

5. The respondent contends that “*an overly meticulous approach*” to the proper allocation of costs is not required and that the court need not (and perhaps should not) engage in a granular analysis of every argument made during the course of the hearing but contends “*it must nevertheless consider the statutory criteria, analyse how the issues before the court were resolved, decide whether any unmeritorious argument was advanced and whether this added to the costs associated with the hearing as a whole*”, relying on *Connelly v An Bord Pleanála* [2018] IESC 36.

6. The respondent contends that the appellants have been largely (but not entirely) successful but that “*... they are not entitled to recover their costs in respect of those issues on which Jackson Way prevailed. Moreover, Jackson Way is entitled to recover a proportion of the costs it incurred, to be set off against the costs recoverable by the defendants*”. The respondent contends that it succeeded in a number of material respects notwithstanding that all the key orders made in the High Court were reversed/set aside.

The Conveyancing Act, 1881 sections 6 and 58 issue

7. The appellants had pleaded at para. 20(f) and (g) of their defence, by way of an alternative argument, that the covenant specified in the 1947 deed had been annexed to their lands by virtue of the operation of either or both statutory provisions under the 1881 Act. The judgment of the High Court considered the arguments and the respondent notes that:

“The learned trial judge’s detailed analysis of this issue is contained in paragraphs 81 to 99 of his judgment and accounts for approximately 20% thereof.”

The appellants appealed against that finding of the High Court judge by Ground of Appeal number 15 in the notice of appeal, contending that the High Court judge had fallen into error in his analysis of the two sections. The respondent emphasises that in the appellants’ written submissions the arguments around this ground of appeal were developed at para. 65-75 (inclusive) in this Court. While the arguments did not meet with favour in this Court, they did however succeed in overturning the High Court decision and obtained key orders sought in their counterclaim on different grounds. The issue of the contended for statutory annexation is dealt with at paras. 143-158 of this Court’s judgment. The respondent places emphasis on para. 148 of that judgment where I expressed the view that the jurisprudence of the courts of England and Wales did not offer support for this ground of appeal. Reliance was also placed on paras. 154 and 158 of the judgment, including the conclusion that no authority was established for the construction of s. 6 of the Conveyancing Act, 1881 as had been suggested by the appellants.

8. Separately it had been contended by the appellants in their defence (para. 12) that Jackson Way had acknowledged *“the efficacy of the covenant by obtaining releases from adjoining landowners”*. This point had been rejected in the High Court (para. 76 of High Court judgment). The appellants appealed that determination unsuccessfully.

9. Finally, emphasis was placed on the fact that before the High Court the appellants had contended that Jackson Way had been guilty of *“... an inexcusable delay amounting to laches”* such as should disentitle the plaintiff/respondent to the relief it sought. That argument had been rejected by the trial judge *“for the reasons set out at para. 101 of his judgment. The defendants did not cavil with the learned trial judge’s analysis of this issue on appeal.”* The point was not pursued on appeal.

10. Jackson Way contends in the alternative that even if the appellants should be regarded as having been entirely successful in this appeal, *“it would still be appropriate to have regard to the success of Jackson Way on these issues with s. 169(1)(b) expressly providing that a court can have regard to ‘whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings’”*.

11. Jackson Way contends that since it *“succeeded”* in opposing the statutory annexation issue in the High Court and on appeal and *“succeeded”* on the other issues identified above in the High Court, the costs order made by this Court should reflect this success. As a consequence, it is contended that in light of the decision in *Veolia Water UK Plc v Fingal County Council (No. 2)* [2007] 2 IR 81, *“not only should costs not be awarded in favour of the defendants on those issues, there should be a set off in respect of the costs of Jackson Way in respect of these issues.”* It is contended that *“the relative degree of success of the parties would be that this Court would make an order that the defendants recover 80% of their costs of the appeal and 75% of their costs in the High Court.”* (Para. 15 of submission).

Response of appellants

12. The appellants’ position is simply put: They contend that they have been wholly successful in this appeal and that the order of the High Court made on the 19th March 2018 has been overturned in its entirety. The appellants’ counterclaim was granted in full. The argument of the respondent is characterised as in effect canvassing *“the proposition that because some of the arguments before this Court were not successful that it should be awarded some of its costs against the Appellant.”*

13. The appellants contest the respondent’s characterisation of the effect of the judgment of this Court and contend that there were but two net issues in the case:

- (a) *“Did the Covenant in question bind the lands of the Plaintiff and had it Notice of such covenant?”* and

(b) *“Was the benefit of that covenant annexed to the property of the Covenantee such that it remained enforceable by successors in title to that Covenantee?”*

It was argued that the latter was the primary focus of the debate. In support of a contention that the appellants were *“entirely successful”*, it is contended that they had advanced several alternative bases upon which the second issue might be established. It is contended that that did not make them *“separate issues”* in the sense identified by Clarke J. in *Veolia*. *“This is not a case where the Appellant sought multiple reliefs and only obtained some of them. As the Judgment of this Court states, at paragraph 205, the Appellant has been ‘entirely successful’.”*

14. The appellants seek to distinguish this case from *Veolia* in particular, contending that this case was not a complex litigation in the sense characterised by Clarke J. in *Veolia* at heading number 2 in that judgment.

“The issue may be legally complex, but the litigation was anything but complex having been decided by this Court wholly on the basis of documentary evidence available to the Court.”

It was contended that the principles in *Veolia* are not engaged and the rationale for departing from the statutory basis of s. 169(1) of the 2015 Act is absent. It was argued on behalf of the appellants that none of the considerations or principles considered by Clarke J. at 2.14 of his judgment in *Veolia* assist the respondent’s contention that Jackson Way is entitled to recover part of its costs or that part of the appellants’ costs ought to be disallowed.

“8...The principal issue of annexation was argued on alternative bases not requiring any additional evidence and not delaying the trial or the appeal to any significant extent.”

9. *It is respectfully submitted that the Appellant have demonstrably been 'entirely successful' in their appeal and thus entitled to their costs per Section 169 and that there are no grounds to order otherwise."*

The relevance of *Veolia Water v Fingal County Council (No.2)* [2007] 2 IR 81

15. *Veolia* is of particular significance in informing the approach of the court to the establishment of the proper allocation of costs in complex litigation. Clarke J. (as he then was) at para. 2.2 observed that it was incumbent upon a court in complex cases to consider whether it is necessary to conduct a more detailed analysis of the precise circumstances giving rise to the costs which have been incurred before making any award in respect of costs. In the interests of achieving justice as between the parties it might as a result be appropriate in certain instances for the court to make an order for costs which does more than merely award costs to the winning party.

16. The judgment has been the subject of extensive observations subsequently. Sight must not be lost of the fact that Clarke J. had emphasised in the first instance that two key factors had traditionally been taken into account by the courts continue to remain "*of the highest significance*"; first, a court always enjoys discretion as to the question of costs awards and it is entitled to depart from that default position where it is considered appropriate to do so by virtue of special or unusual circumstances and secondly, the principle that "*costs follow the event*" continues to be the standard position. At para. 2.5 of the judgment Clarke J. had observed:

"Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings."

17. Taking that statement in the first instance and considering it in the context of the s.169(1), I am satisfied that, as Murray J. makes clear in *Heather Hill Management v An Bord Pleanala* [2022] IESC 43 at para. 133, ss. 168 and 169 of the 2015 Act significantly augment the court's power to apportion costs in a case where the "winner" has not been "entirely successful" and s. 169(1) articulates a comprehensive suite of factors that can be taken into account in the exercise of power.

18. Jackson Way was the plaintiff and moving party in the within proceedings. This Court has ultimately determined that its contentions and assertions which pertain to the property rights of the defendants were not well founded and were in substance unmeritorious proceedings within the meaning of para. 2.5 of *Veolia*. The appellants have secured the vindication of their property rights and the reliefs sought by them in their counterclaim.

"The event"

19. At para. 2.8 of *Veolia Water* Clarke J. had considered that the starting point when considering the issue of costs is to identify the "event" and the ascertainment of the successful party should follow: -

"In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be, will have been justified by the result."

20. The exercise to be carried out in the context of para. 2.8 is to evaluate whether the appellant has in fact secured a substantive entitlement which could not have been secured but for the prosecution of the litigation or the appeal in question. It is also germane that to

be entirely successful in the “event” subtending the litigation, the party does not have to be successful on every point or ground advanced in support of the claim in question. A key question is was this appeal in substance justified by the result secured by the appellant as a result of pursuing it?

21. Clarke J. in *Veolia* was of the view that where a winning party has not succeeded on all issues which were argued or contended for before the court, then a court should consider whether it is reasonable to assume that the costs of the parties in pursuing the issues in question before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful. If a court is so satisfied, insofar as possible this should be reflected in the order for costs.

22. Clarke J. opined that where the length of the trial was increased due to issues being raised by the successful party which had failed, the court should fashion an order for costs which refuses that party such costs as are attributable to such a protracted hearing and effectively require such a litigant to pay the costs of the unsuccessful party in relation to the portion of the hearing identified by the court as being attributable to the issue upon which the winning party was unsuccessful. Clarke J. expressed the view that this approach had certain attractions, including discouraging parties from adopting an indiscriminate approach towards the litigation, such as a plaintiff who relies on additional unmeritorious grounds beyond the grounds upon which he may succeed or a defendant who is ultimately successful in resisting an application but nevertheless by the approach adopted has significantly elongated the hearing by raising unmeritorious grounds of defence. Clarke J. emphasised that this approach is appropriate in more complex litigation involving a variety of issues but may not be appropriate in more straightforward litigation, even if an aspect of the plaintiff’s case or the defendant’s defence did not succeed as this should only affect costs where raising

this additional issue could reasonably be said to have affected the overall costs of the litigation.

23. It is noteworthy that Clarke J. in his analysis at para. 3.9 considered that there were two “*equally valid*” approaches to the assessment of the basis of an award for costs where one party was not wholly successful. One approach is to make the award of costs on the basis of an assessment as to how much of the hearing could be said to be attributable to the issues upon which each party succeeded. The other is to look at whether the issues might have arisen regardless of the outcome and as such ought to be attributed proportionally across the range of issues to which they were applicable for the purposes of the court arriving at a global view as to the length of time taken at the hearing in respect of the issues upon which either party might be said to have succeeded.

24. In *M.D. v N.D.* [2015] IESC 66 Clarke J. revisited and clarified certain aspects of the so-called *Veolia* principles. At para. 2.6 he emphasised that it should be apparent that the raising of additional unmeritorious points “... *actually and materially increase the costs of the case*”. Clarke J. at 2.4 observed that by virtue of the *Veolia* principles a court “*should consider whether it needs to depart from what might be the default position to reflect the fact that the costs of the litigation have been increased because of unmeritorious actions taken by one or other party.*” He further observed: -

“In ordinary inter partes litigation the starting point is that the winner obtains an order for all reasonable costs against the loser. Costs, as it is put, follow the event. In such a context, the Veolia principles require the court to consider whether unmeritorious action on the part of the winning party has had the effect of increasing the costs of the litigation as a whole to a material extent.”

He observed -

“An unsuccessful defendant may properly be obliged to pay the plaintiff’s costs. However, if that unsuccessful defendant has been put to a great deal of additional and unnecessary expense because of the way in which the case was run by the successful plaintiff then that fact needs to be taken into account in fashioning an appropriate and just order as to costs.”

25. Clarke J. cited with approval the nuanced analysis of the *Veolia* principles offered by Barrett J. in the High Court in his judgment in *IBB Internet Services and Others v Motorola Limited* [2015] IEHC 445 at para. 6 and observed of *M.D.*): -

“It is clear, therefore, that the proper application of the Veolia principles does not involve the court in simply determining that an otherwise successful party was unsuccessful in 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.”

He otherwise observed -

“The court must 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.”

At 2.7 Clarke J. reiterated the continuing centrality of the core principle governing the proper allocation of costs when he observed: -

“It should also be 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 although, as pointed out in Veolia itself, there may be certain types of cases or applications where it may be less clear as to what the ‘event’ is. Likewise, a party which successfully defends proceedings must also be taken to have

‘won’. It should also be noted that courts frequently do not have to resolve some of the issues raised because of the view which the court takes on other issues. It would be wrong to penalise an otherwise successful party by not awarding them costs attributable to issues which were reasonably raised but which did not have to be resolved because of the way in which other issues in the case were determined.”

Clarke J. suggested elsewhere in the judgment, (para.3.2) 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: -

“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.”

He counselled against an approach that might turn the exercise of the determination of 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.”*

26. Returning once more to the *Veolia* principles in *Connelly v An Bord Pleanála* [2018] IESC 36, Clarke C.J. returned to his theme, stating (at para. 6): -

“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 Mrs. 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 number of issues on which one or other party might be said to have succeeded 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.”*

The judgment continues -

“8. ... *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. ...*

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.*”

27. Clarke C.J. in *University College Cork v Electricity Supply Board* [2021] IESC 47 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.”

Veolia is to be read now in the light of and subject to ss. 168 and 169 of the 2015 Act.

28. As was made clear by MacMenamin J. in the judgment of the Supreme Court as to costs in *Higgins v The Irish Aviation Authority* [2022] IESC 45: -

“Order 99 of the Rules of the Superior Courts (Costs) 2019 is now to be read subject to the provisions of sections 168 and 169 contained in Part II of the Legal Services Regulation Act, 2015, (“the Act”) which statutory provisions, in turn, closely reflect the decision of the High Court in Veolia Water UK Plc. v Fingal County Council (No. 2) [2006] IEHC 240.” (Para. 12)

MacMenamin J. emphasised at para. 13 that the said sections of the 2015 Act require the court firstly to enquire as to whether either party to the proceedings was *“entirely successful”* as the said words are used in s. 169(1) of the Act. Second, in the circumstances of the case the court must then enquire whether, having regard to the matters specified in s. 169(1)(a) to (g) *“... there is any reason why all of the costs should not be awarded in favour of a successful party.”* Thirdly, if neither party has been entirely successful, the court must ask itself whether one or more of the parties have been partially successful, within the meaning of s. 168(2)(d) of the Act. If a party has been partially successful, having regard to

the factors outlined in sections 169(1)(a) to (g), “... *the court must then consider whether some of the costs should be awarded in favour of the party that was “partially successful”, and if so, what those costs should be.*

29. In *Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform* [2023] IECA 189, Donnelly J. carried out a succinct and comprehensive analysis of the *Veolia* principles and their interrelationship with the statutory and regulatory framework in regard to costs to be found in sections 168 and 169 of the 2015 Act. She emphasised at para. 61: -

“... *Section 169(1) commences with the direct statement that ‘a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise...’*”

She then turned to analysis of the decision of Murray J. in *Chubb* and in particular para. 19 where he summarised the principles. Donnelly J. was of the view that “*It is the order in which he states those principles which is significant*”. The principles are as follows:-

- “(a) *The general discretion of the court in connection with the ordering of costs is preserved (section 168(1)(a) and Order 99, rule 2(1)).*
- (b) *In considering the awarding of costs of any action, the court should ‘have regard to’ the provisions of s. 169(1) (Order 9, rule 3(1)).*
- (c) *In a case where the party seeking costs has been ‘entirely successful in those proceedings’ the party so succeeding ‘is entitled’ to an award of costs against the unsuccessful party unless the court orders otherwise (section 169(1)).*
- (d) *In determining whether to ‘order otherwise’ the court should have regard to the ‘nature and circumstances of the case’ and ‘the conduct of the proceedings by the parties’ (section 169(1)).*

- (e) *Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (section 169(1)(a) and (b)).*
- (f) *The court, in the exercise of its discretion may also make an order that where a party is 'partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (section 168(2)(d)).*
- (g) *Even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s. 169(1)(a) - (g) when deciding whether to award costs (Order 99, rule 3(1)).*
- (h) *In the exercise of its discretion the court may order the payment of a portion of a party's costs or costs from or until a specified date (section 168(2)(a))."*

30. Donnelly J. emphasises at para. 63 of her judgment: -

"Those principles confirm that the general discretion of the court in connection with the ordering of costs is preserved and that the court is required to have regard to s. 169(1) of the 2015 Act. Importantly, Murray J. then stated that it is the entitlement of an entirely successful party to succeed in an award of costs unless the court orders otherwise. It is only if the court is determining whether to order otherwise, that the court has to have regard to the other factors set out in the first part of s. 169(1) and the sub-sections listed therein. Nowhere in his principles does Murray J. state that it is mandatory to ask in every application for costs under the section whether the parties have conducted the case in the most cost-effective way possible."

Application of the principles to the within case

31. The respondent to this appeal invokes section 169(1) in addition to asserting that the *Veolia* principles are engaged and further that the award as to costs should be abated in the manner advanced in the submissions, both in respect of the High Court and in this Court, notwithstanding that the appellants succeeded in their appeal. Section 169(1) provides a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings unless the court orders otherwise having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties including: -

- “(a) *conduct before and during the proceedings;*
- (b) *whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings;*
- (c) *whether the manner in which the parties conducted all or any of their cases...*”

The appellants were not entirely successful

32. The appellants were significantly and substantially successful in their appeal but not entirely so. They successfully defended the plaintiff’s claim which was entirely unmeritorious. The plaintiff did not obtain any of the reliefs sought in the Statement of Claim. The appellants overturned and reversed the High Court orders, securing the key orders sought in their counterclaim. Those orders were sought on a number of discrete legal, equitable and statutory bases. The issue of costs and the applicability of the *Veolia* principles in the instant case, where the appellants have not been entirely successful to the extent that not all of the arguments and propositions advanced in support of their claim found favour with this Court, must nonetheless be approached on a common sense basis, taking a holistic view as was urged by MacMenamin J. in *Higgins v Irish Aviation Authority*. As in the instant

case, in *Higgins* the High Court case had run as a “*single integral unit*”. Comprehensive written legal submissions were made and a perusal of the transcripts of the High Court and in this Court demonstrate that the various bases on which the counterclaim was pursued involved an efficient marshalling of arguments and of time. It will be recalled that MacMenamin J. in *Higgins*, taking a holistic view, observed that the crux of the costs application could be reduced to asking the question “... *had the plaintiff obtained in the High Court what he has now obtained in this court, would it be said that he had been ‘entirely successful’ for the purposes of s. 169(1) of the 2015 Act?*” The answer in this case can only be in the affirmative.

33. Simply put, the defendants were brought before the High Court on the basis of contentions that they did not have the property rights which they asserted. They pleaded a defence contesting the plaintiff’s contentions and further counterclaimed as to the nature of the covenant asserted to be annexed to their property. They were successful on appeal in establishing the nature and extent of the rights contended for.

34. Whilst several distinct bases were advanced in support of the counterclaim, both as to annexation of the covenant to the dominant lands and as to the running of the benefit and the burden of same respectively it was only necessary for the appellants to succeed on one legal basis in order to bring home their claim – which they did.

Laches point

35. In the course of the High Court hearing the plea that there had been inexcusable delay and equitable laches was not accepted by the trial judge. However, there is no suggestion that this argument took up more than very modest time in the High Court hearing. Further, the point was not pursued in this appeal. In that regard one is minded of the observation of Donnelly J. in *Word Perfect* where at para. 94 she observed: -

“It must also be borne in mind that the costs hearing ought not to be an exercise in nit-picking and a broad-brush-stroke approach must be taken. If it is not, there is a danger that costs applications will spiral out of control and have implications in the overall administration of justice.”

The Conveyancing Act 1881, ss.6 and 58 point

36. For the most part the respondent’s costs arguments based on *Veolia* and s.169 (1) of the 2015 Act are directed towards the unsuccessful arguments advanced based on ss.6 and 58 of the Conveyancing Act, 1881. It is said that engagement with same accounts for approximately 20% of the High Court judgment.

37. However, it is 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 and s.169(1) exercise of discretion in favour of apportionment of costs. Sometimes it is necessary to engage in an unpacking of arguments succinctly and efficiently made for the purposes of offering a clear exposition as to why such arguments or propositions have not found favour in the context of the appeal in question. 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.

38. A review of the High Court proceedings indicates that the appellants advanced their Conveyancing Act arguments in a succinct fashion. At issue was the applicability or otherwise of the so-called rule in *Tulk v Moxhay* (1848) 2 Ph 774, a judgment that after 175 years still governs negative covenants created prior to the 1st December, 2009 in this jurisdiction.

39. Whilst the arguments in question did not find favour either in the High Court or in this Court did not find favour, 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. In light of the language of ss. 6 and 58 taken literally, coupled with developments in the law of conveyancing jurisprudentially after the coming into operation of the Conveyancing Act of 1881 in this jurisdiction and decisions of the courts of England and Wales prior and subsequent to the coming into operation of the Law of Property Act, 1925, it would be surprising if the appellants had decided to conduct the case by way of a defence and counterclaim either before the High Court or on appeal to this Court without reference to the sections.

40. If section 58 had not been mentioned at all, this Court would likely have invited the parties to consider and comment on the remarks of Brightman J. in *Federated Homes Ltd. v. Mill Lodge Properties Ltd.* [1980] 1 All E.R. 371. Given the linguistic and historic nexus between ss. 6 and 62 of the Law of Property Act (England and Wales), 1925 the parties would likely have been invited to express a view on the relevant academic writings of Professor Wade.

41. Sight must not be lost of the fact that the appellants achieved a complete reversal of the outcome in the High Court in this appeal. Their counterclaim was found to have been well made. The order of Keane J. has been overturned.

42. A close analysis of the presentation of the counterclaim points in both courts demonstrates that the arguments advanced by the appellants, particularly those directed towards the contention that the benefit of the restrictive covenant specified in the 1947 instrument was annexed to the lands retained by the vendor, were advanced on several distinct and alternative bases, and in that regard the appellants did not seek multiple reliefs. The arguments advanced by and on behalf of the appellants were briefly, succinctly and

clearly made. For instance, on day two of the appeal at p. 77 of the Transcript counsel for the appellants observed: -

“As for the section 58 point, the court does not need to decide the effect of section 58 if it is with me on annexation.”

Very little time was spent on advancing the arguments directed towards s. 6 of the Conveyancing Act of 1881. The appellants quite properly relied on the academic writings of the late H.W.R. Wade, QC one time Master of Gonville and Caius College, University of Cambridge and who was an acknowledged expert in the law of real property. Merely because his contentions and analysis did not find favour with either court is not a reason in this instance for concluding that the material ought not to have been brought to the attention of the court or was not properly deployed in support of the appellants' counterclaim. As *Tulk v Moxhay* itself attests, the principles of equity evolve and develop analogously over time.

43. Ultimately, it has to be said that the appellants succeeded on appeal notwithstanding having failed to establish the arguments advanced in relation to sections 6 and 58 of the Conveyancing Act of 1881. Arguably this Court did not need to determine those points. The appellants ought not to be penalised because the Court saw fit to come to a view in respect of same. By contrast with decisions such as *Chubb* it cannot be contended that the appellants succeeded in this appeal on any narrow or merely technical point but that they have failed on their central point. In substance, what the respondent is seeking is that this Court engage in an excessively granular approach towards the question of costs, an approach out of step with s.169(1) of the 2015 Act and clearly discouraged by the Supreme Court in *Connelly* and *UCC v ESB* and also in the decisions of this Court both in *Chubb* and *Word Perfect*.

44. The respondent has failed to demonstrate that the conduct of the appellants was unreasonable in regard to the points unsuccessfully advanced. The contentions that the plea

before the High Court that the plaintiff had been guilty of inexcusable delay amounting to laches which was unsuccessfully advanced in and of itself engaged the *Veolia* principles is not well made.

45. With regard to the arguments on the alternative basis advanced both in the High Court and in this Court in respect of sections 6 and 58 of the Conveyancing Act, 1881, in my view the respondent's argument does not succeed, having due regard to the particular nature and circumstances of the case. It is material that the defendants were counterclaiming to vindicate private property rights and the equitable nature of key aspects of the claim. The respondent has failed to demonstrate how it is that the arguments directed towards sections 6 and 58 of the Conveyancing Act of 1881 could be characterised in all the circumstances of this case (they being clearly indicated to be alternative arguments and constituting an alternative basis for the substantive claim and remedy to which this Court has found the appellants were entitled) 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. In that regard I consider relevant the concession clearly made by counsel on behalf of the appellants on day two as referenced above. The respondent has not demonstrated a valid basis whereby an adverse costs consequence should ensue in light of the *Veolia* principles. The transcripts show that arguments concerning laches and ss. 6 and 58 of the 1881 Act were dealt with quite efficiently and were ancillary arguments.

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 and indeed the arguments directed towards section 6 were very brief in ambit and nature. 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 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.

Conclusions

47. This is a case where the appellants were brought before the High Court and ultimately successfully resisted a claim found to be unmeritorious. The respondent came to court to achieve something to which it was found not to be entitled. By the counterclaim the appellants obtained a remedy which they could not otherwise have achieved. 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. Neither can the appellants be faulted for the manner in which they conducted any part of the proceedings, nor is their conduct either in the pleadings, the proceedings before the High Court or in this appeal in any material respect established by the respondent to be such as would warrant a deviation from their entitlement to an order for the entirety of the costs.

48. 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.

49. Neither can the approach of the appellants be said to have been unreasonable in that regard. Issues concerning the doctrine in *Tulk v Moxhay* come before the courts in this jurisdiction rarely enough. That being so it is to be expected that decisions in the neighbouring or common law jurisdiction in relation to somewhat analogous statutory provisions warrant being raised in the course of the hearing and I am satisfied that those points and issues and authorities were dealt with very succinctly and in a manner that has not been demonstrated by the respondent to have materially contributed to an increase in the costs of the litigation.

50. Accordingly, I conclude that neither the *Veolia* principles nor the provisions of sections 168 and 169 of the 2015 Act warrant any apportionment of the costs or any reduction in the costs that the successful party should be entitled to recover. Accordingly, the appellants are entitled to all their costs in this Court and in the High Court for all the reasons outlined above since they prevailed on appeal and were substantially successful in

overturning the decision and orders of the High Court and secured significant orders on their counterclaim. No basis having been satisfactorily identified for deviating from their entitlement to same notwithstanding that some alternative grounds for the said reliefs were not successfully argued.

51. Collins and Noonan JJ. have authorised me to note their concurrence with the within judgment.