

THE HIGH COURT

COMMERCIAL

[2022] IEHC 219; [2021/556JR]

BETWEEN

WORD PERFECT TRANSLATION SERVICES LIMITED

APPLICANT

AND

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

(No. 2)

JUDGMENT OF Mr. Justice Twomey delivered on the 7th day of April, 2022

SUMMARY

1. The Supreme Court in *Permanent TSB plc v. Skoczylas* [2021] IESC 10 at para. 12 has made it clear that one of the functions of making costs orders is to ‘*encourage*’ an ‘*efficient approach to litigation*’. At a time when there is a well-publicised shortage of judges and a backlog in the courts’ system, it is even more important that costs orders encourage such efficiency by ensuring that scarce court resources are only used when necessary (i.e. if mediation or other forms of dispute resolution have failed or are inappropriate) and then only to the extent that is necessary (i.e. by only litigating those issues which are necessary to determine the dispute). Where this is not the case, there are likely to be negative costs consequences for the parties. Whether such negative costs orders will ‘*encourage*’ litigants to take a more ‘*efficient approach to litigation*’ remains to be seen. However, due to a relatively

recent legislative change, it is significant that when a court exercises its function of making costs orders, it is now obliged to ask, in every application for costs by a party that has been entirely successful, *have the parties conducted the case in the most cost-effective way possible?*

2. The existence of this obligation is clear from the wording of s. 169(1) of the Legal Services Regulation Act, 2015 (the “2015 Act”), which came into effect on 7th October, 2019 and from recent judgments of the High Court and the Court of Appeal i.e.

- The Court of Appeal in *Chubb v. The Health Insurance Authority* [2020] IECA 183, makes clear that s. 169(1)(a) and (b) of the 2015 Act places an obligation on a court to have regard to the conduct of parties when considering whether to award costs to a party that has been entirely successful in its proceedings. The mandatory nature of the obligation of a court is clear from para. 19(e) of Murray J.’s judgment in which he states that ‘*the matters to which the court shall have regard*’ when deciding on costs, ‘*include the conduct of the parties before and during the proceedings*’ (Emphasis added).
- In reliance on s. 169, the High Court in *Somers v. Kennedy* [2022] IEHC 78 at para. 10 refused to make an order for 100% of a winning party’s costs. Butler J. refused to do so because of that party’s failure to conduct the case ‘*in the most cost effective manner possible so that the ultimate costs burden – no matter who has to bear it – will be as low as possible.*’ (Emphasis added)

3. It is entirely logical that a court is obliged to ask whether the case has been conducted cost-effectively. This is because where a winning party has not conducted her case in the most cost-effective manner possible, it would be unjust for the losing litigant to have to discharge legal costs which were unnecessarily incurred by the winning litigant. As noted in *Ryanair v. An Taoiseach* [2020] IEHC 673 at para. 22 by Simons J. ‘*one side should not have to bear costs which have been incurred unnecessarily by the other side.*’ (Emphasis added)

4. It can be seen therefore that s. 169 provides a powerful financial incentive for litigants to be as efficient as possible with the use of court time. Accordingly, it has the potential to lead to a significant change in the attitude of litigants and their lawyers regarding how they resolve disputes and a significant saving to court resources, in the public interest.

5. The most obvious way, in which litigants might resolve their dispute in the most cost-effective manner possible is by the use of mediation, failing which there may be cost consequences. Thus, for example in the Court of Appeal decision in *Mascarenhas v. Karim & Anor.* [2022] IECA 48, a failure by one party to accept an invitation to mediate the dispute led to a significant difference in the costs which would otherwise have been payable to the winning party.

6. While the present case does consider whether mediation was canvassed by the parties, its primary focus is on the cost consequences of the fact that the winning party, the State, did not seek to have the ‘eligibility’ of Word Perfect to challenge the Request for Tenders, dealt with as a preliminary issue by the court. Instead, the State allowed the case to go to trial on three ‘substantive’ claims regarding the legality of the Request for Tenders, as well as on the eligibility point. At the trial, the State won on the eligibility point and therefore it was unnecessary for this Court to adjudicate on Word Perfect’s three substantive claims regarding the Request for Tenders.

7. The losing party, Word Perfect, now claims that if the State had conducted this case in the most cost-effective manner possible, which the State is obliged to do if it wants all of its costs, it would have sought to have the eligibility point dealt with as a preliminary issue. On this basis, Word Perfect claims that even though its entire case challenging the Request for Tenders has been dismissed, it should not be liable for the ‘unnecessary’ costs involved in dealing with the three ‘substantive claims’. For its part, the State points out that it was entirely successful in these proceedings and that, as such, it should be entitled to 100% of its costs.

8. However, as is clear from the wording of s. 169 and the case law, in order for a winning party to get 100% of its costs, it is no longer sufficient for that party to have been entirely successful in litigation. The party must also have conducted her case in the most cost-effective manner possible, failing which she is unlikely to get her full costs.

9. For the reasons set out below, this Court concludes that this case was not conducted in the most cost-effective manner possible and that this led to the unnecessary use of court resources and unnecessary costs to the parties. It is estimated that *circa* 20% of the costs were taken up with the ‘eligibility’ point, with the remainder of the time, and costs, spent on the three ‘substantive claims’. Nonetheless, this Court will not restrict the State to 20% of its costs, but will instead award it 50% of its costs, for the reasons set out below. This includes the fact that the obligation to conduct the case in the most cost-effective manner possible applies not just to the State, but also to Word Perfect, and it did not seek to have the eligibility point dealt with as a preliminary issue. If Word Perfect had done so, it would be in a stronger position to claim that it should pay only 20% of the State’s costs.

BACKGROUND

10. In *Word Perfect v. The Minister for Public Expenditure and Reform* [2022] IEHC 54 (the “Principal Judgment”), Word Perfect, challenged the legality of a Request for Tenders by the State for the supply of Irish translation services on three substantive grounds, i.e. (i) the price floor for the translation services in the Request for Tenders was alleged to be unlawful, (ii) the turnover threshold for suppliers was alleged to be too low and (iii) the method of allocating contracts to suppliers (by rotation) was claimed to be unlawful.

11. In its defence, in the Statement of Grounds of Opposition, as well as denying each of the substantive claims, the State made a preliminary objection that Word Perfect was not eligible to challenge the Request for Tenders, as it had never submitted a tender in the first

place. Thus, the State claimed that Word Perfect was not an ‘eligible person’ to challenge the Request for Tenders under the Remedies Regulations.

12. In the Principal Judgment (and defined terms therein are used in this judgment), this Court found for the State on the ground that Word Perfect was not an eligible person. Since this meant that Word Perfect’s challenge to the Request for Tenders was dismissed, it was not necessary for this Court to consider whether Word Perfect was correct in its three substantive claims regarding the legality of the Request for Tenders.

13. Accordingly, it is clear that it was not necessary for the resolution of the dispute between the parties for this Court to have heard the substantive claims, since the dispute was resolved on this preliminary point on eligibility.

14. As a losing litigant normally pays the winning litigant’s legal costs, this raises the question of whether the State should have its costs restricted to the costs involved in arguing the preliminary point on eligibility, or whether it should also get the costs involved in arguing the three substantive claims, which it was not necessary for this Court to decide.

15. This raises the key question of whether the State could be said to have conducted its case in the most cost-effective manner, which Word Perfect claims it did not, since the State opted not to run the eligibility point as a preliminary issue in these proceedings.

WHY LOSING PARTY CLAIMS IT SHOULD ONLY PAY REDUCED COSTS?

16. It is common case that the State chose not to bring a motion regarding the eligibility of Word Perfect pursuant to Order 84A, rule 6(2), but instead proceeded with the hearing of the three substantive issues, *as well as* the eligibility issue, at the trial of the action.

17. Order 84A, rule 6(2) of the Rules of the Superior Court states:

“Where a contracting authority, **contracting entity or notice party opposes the application on the ground that the applicant is not an eligible person** (within the meaning of Regulation 4 of the Public Procurement Remedies Regulations or, as the

case may be, Regulation 4 of the Utilities Remedies Regulations), that contracting authority, **contracting entity or notice party may apply to the Court for an order dismissing the application by motion on notice**, grounded on an affidavit, in the proceedings commenced by Originating Notice of Motion, which motion may be made returnable for the return date of the Originating Notice of Motion.” (Emphasis added)

18. Word Perfect made uncontroverted submissions that the purpose of this rule is to promote and encourage the determination of eligibility as a discrete issue, with the objective of minimising costs and the burden on court resources, so as to avoid the situation where a substantive case is heard unnecessarily. It seems to this Court that this is the entirely logical objective of this rule.

19. Word Perfect also claims that the State should have brought this eligibility motion, rather than awaiting the trial, as it would, by so doing, have saved on a huge amount of court time, as well as the expense involved with discovery and expert evidence. This is because there was no real dispute between the parties regarding the facts relevant to the eligibility dispute. This is also why it only took up a small portion of the costs of the entire proceedings, relative to the substantive claims, as the substantive claims involved expert evidence and discovery. On this basis, in its written submissions, Word Perfect, while accepting that it lost the challenge to the Request for Tenders and so that it should be liable for the State’s costs, states:

“an award of approximately 20% of its costs to the [State] would be a fair, and indeed generous, result, given that eligibility did not even account for 20% of the resources and time applied to the proceedings.”

20. For its part, the State argued that it was entirely successful in its action and so disputed any reduction in its legal costs. However, it did not dispute to any significant degree the

estimate provided by Word Perfect regarding the relatively small amount of time which was taken up with the eligibility issue.

THE LAW APPLICABLE TO LEGAL COSTS

21. The new regime regarding costs does not need to be restated to any degree and it has been comprehensively set out in *Chubb*, which was replied upon by both parties. At para. 20 of the Court of Appeal’s judgment in *Chubb*, Murray J. observed a key difference between the pre-2019 costs regime and the post-2019 regime.

22. Prior to the commencement in 2019 of s. 169(1) of the 2015 Act, a reduction in costs for a winning party, where that party did not succeed on all of the issues raised by it, was limited to ‘complex’ cases (per the decision of Clarke J. (as he then was) in *Veolia Water UK plc v. Fingal County Council* (No. 2) [2007] 2 I.R. 81). Of considerable significance however is the fact that, as Murray J. points out, no such restriction is contained in the 2015 Act. Indeed, as noted below, a court is now obliged to consider, in every application for costs by a party that has been entirely successful, the conduct of the parties.

23. Word Perfect also relied upon this Court’s decision in *Byrne v. Revenue Commissioners* [2021] IEHC 415 which considered the impact of s. 169(1) on the legal costs landscape. In that case, the Revenue Commissioners won the litigation, but were only awarded 60% of their costs because they raised and lost on issues which took up 20% of court time. Costs for those issues which were lost by the Revenue Commissioners were awarded to Mr. Byrne, with the net effect being that Mr. Byrne was liable for 60% of the costs incurred by the Revenue. In that case, this Court relied upon s. 169 (1) of the 2015 Act to support that reduction in legal costs for the winning party in that case. That section states:

“Costs to follow event

169. (1) 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) the manner in which the parties **conducted all or any part of their cases,**
- (d) whether a successful party exaggerated his or her claim,
- (e) whether a party made a payment into court and the date of that payment,
- (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
- (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.” (Emphasis added)

24. This section requires a court to award full costs to a winning litigant *unless* the court decides that, *inter alia*, the ‘*conduct of the proceedings by the parties*’ or the ‘*conduct before and during the proceedings*’ or ‘*the manner in which the parties conducted all or any part of their cases*’ justifies a lesser award of costs.

25. It must logically follow, that for a court to properly discharge its function under s. 169, the court *must consider* in every costs application, where a litigant who has been entirely successful is seeking its costs, whether, *inter alia*, the parties, including the winning party, conducted the case in a manner which justifies a lesser award.

26. It also logically follows that the court, in discharging this function, must consider the conduct of the winning party, not just at the hearing, but from the moment of the commencement of the dispute to the conclusion of the litigation (since it is the legal costs for all of this period which are being determined by the court).

27. The fact that this is a mandatory obligation to be discharged by the Court is also clear from the language used in para. 19 of *Chubb*, where Murray J. states:

“I have included in an Appendix to this judgment the relevant provisions of O.99 as it stands since December 3 2019, as well as the relevant parts of s.168 and 169 of the Legal Services Regulation Act 2015. Reading these in conjunction with each other, it seems to me that the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

[...] (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 (s. 169(1)(a) and (b)).” (Emphasis added)

ANALYSING THE CONDUCT OF BOTH PARTIES

28. As regards this Court’s consideration of the conduct of the parties in this case, it seems clear from *Somers* that when considering the ‘conduct’ of the parties for the purposes of s. 169, a court must ask whether the parties conducted the proceedings in the most cost-effective manner possible. This is because at para. 6 *et seq*, Butler J. states:

“**The costs of litigation in this jurisdiction are, by any standards, high.** Certain types of litigation are **even more expensive** than others, with the costs of plenary actions in the Chancery list being towards the higher end of the range involving as they do both

the marshalling of evidence and witnesses and potentially complex legal argument. Whilst it is not generally a matter for the court to determine the actual sum that an award of costs should entail, experience would suggest that the **costs of having a discrete legal point argued as a preliminary issue on foot of a notice of motion will generally be lower, sometimes significantly lower, than the costs of a plenary trial.** [...]

[W]here there are various procedural mechanisms open to a litigant to have an issue determined, **all else being equal the litigant should avail of the mechanism which adds least expense to the overall cost of the proceedings.**[...]

[G]iven the very high cost of litigation, I think it is **incumbent on both sides of a case to ensure that it is conducted in the most cost effective manner possible** so that the ultimate costs burden – no matter who has to bear it – will be **as low as possible.**”
(Emphasis added)

29. In this case therefore, this Court must consider whether the State should have availed of its entitlement to bring a motion on eligibility as a preliminary issue to resolve the entire dispute and thereby save on the legal costs which were incurred in hearing the three substantive claims.

30. The State however argues that, notwithstanding the terms of s. 169(1) and the foregoing case law, it is entitled to its full costs, including those incurred relating to the substantive claims. Its reasons for this position will be considered first.

State had ‘option’ of *not* bringing a preliminary application, so no reduction in costs?

31. The State has argued that Order 84A is, by its express terms, clearly permissive in nature (*‘may apply to the Court’*) and so the State had the option of bringing, or *not bringing*, the eligibility motion. It claims that it should not be penalised for opting not to bring the eligibility motion, which it was perfectly entitled to do.

32. In this regard, it points out that the State has previously raised the eligibility issue as part of the hearing of a substantive action in other public procurement cases like this one (e.g. *Copymoore Ltd v. Commissioners of Public Works in Ireland* [2013] IEHC 230).

33. This is true. However, it is also of course the case that the State has previously sought to have the eligibility point in procurement cases dealt with as a preliminary issue using Order 84A, rule 6(2) - see for example the case of *Payzone Ltd. v. National Transport Authority* [2021] IEHC 212.

34. However, in this Court's view, this argument misses the point of *Somers*. The key point is not whether in previous litigation the State did or did not pursue a certain option, or indeed whether there was no obligation on the State to take a course of action because it was 'optional'. Rather the key point from *Somers* is that, in light of the new costs regime, a court must ask whether the winning litigant had other options in relation to the litigation it pursued. If it had, then this is not the end of the exercise as suggested by the State. Rather, it is only the start of the exercise, since the key question then is whether it chose the most cost-effective option? That is the exercise this Court is involved in pursuant to s. 169, in determining whether to award a party that was entirely successful, its entire costs. As a result, it is also the exercise which litigants during the course of litigation are now required to undertake under the new costs regime (if they wish to avoid negative costs implications).

A reduction in costs amounts to penalising a winning litigant?

35. The State also argues that it has been entirely successful in these proceedings, which it has, since Word Perfect's challenge has been dismissed. On this basis, it claims that it should receive all of its costs, as to do otherwise would be penalising it as the winning litigant.

36. However, it seems to this Court, that the only difference between a conclusion that one is 'penalising' a winning litigant in the manner in which she has conducted her case and a conclusion that one is 'incentivising' a winning litigant in how she conducts her case, is the

perspective from which it is being viewed, whether it is the person paying the costs or receiving the costs.

37. However, unlike litigants, a court has the advantage of having a more objective perspective (as its perspective is from neither the winning party's perspective nor the losing party's perspective). In addition, a court should have regard to the impact of costs orders on the public interest in seeking to preserve court resources. This is clear from the Supreme Court case of *Tracey t/a Engineering Design and Management v. Burton* [2016] IESC 16 at para. 45, where McMenamin J. observed that:

“Court time is not solely the concern of litigants, or their legal representatives. There is a **strong public interest** aspect to these issues.” (Emphasis added)

38. Since the effective use of court resources is a matter of public interest, it follows that from the objective perspective of a court, incentivising litigants to adopt the most cost-effective approach to resolving their litigation is a matter of considerable public interest.

39. In addition of course, from the objective perspective of a court, it makes sense for there to be an incentive for litigants to undertake dispute resolution in the most cost-effective manner possible, particularly when one considers that the losing litigant has no control over the costs incurred by the winning litigant. In this regard, as noted earlier, it is important to observe that in *Skoczylas*, the Supreme Court observed that:

“Part of the function of the court's jurisdiction to award costs is to encourage a **responsible and efficient approach to litigation.**” (Emphasis added)

40. In a similar vein, Simons J. in *Re Independent News and Media plc* [2021] IEHC 232 at para. 17 noted, in reference to the change in the costs regime brought about by s. 169 of the 2015 Act, that it may encourage discipline in legal proceedings in a time of scarce court resources:

“It is in the interests of justice to ensure that **scarce judicial resources** are not dissipated unnecessarily, and a court might legitimately mark its disapproval by withholding costs on this basis. The prospect of costs being withheld (or even awarded to the other side) for unreasonable litigation conduct **encourages discipline in legal proceedings.**” (Emphasis added)

41. Indeed, as observed by Baker J. in the Supreme Court case of *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26 at para. 42, this concentration on expediency and the effective use of court resources by litigants, which is the result of the new costs regime, is also in the parties’ own interests, since:

“[E]xpedience and the efficient use of court resources is in the interests of the administration of justice generally, and **can in many cases benefit the individual interests of the parties** by avoiding lengthy and costly actions.” (Emphasis added)

In the present case, this point is perfectly illustrated by the fact that if the State had sought to have Word Perfect’s challenge dismissed on the grounds of eligibility, this would have led to that challenge being dismissed quicker and at a fraction of the cost and with less use of court resources, to the benefit of both parties.

42. Accordingly, this Court does not accept that it is ‘penalising’ a winning litigant when it is considering, as it is now obliged to do, under s. 169 of the 2015 Act, the conduct of the case by the parties and, in particular, whether the winning party could have run the case in a more cost-effective manner and, if not, the reduction in costs which should apply.

No criticism of the manner in which the State conducted the litigation

43. It is important to point out at this juncture that there is no criticism by this Court of the fact that the State chose not to raise the eligibility issue as a preliminary matter. Indeed, as previously noted, the State was able to point to at least one case in which this had been done previously. This is because there may well be very good tactical, commercial or self-interest

reasons why the State, or any litigant, decides to run a case in a particular way, which all make sense from its perspective.

44. However, how a litigant chooses to run her case has implications for the other parties to the litigation who may have to pay her legal costs. As noted by Laffoy J. in *Fyffes plc v. DCC plc* [2006] IEHC 32 at para. 28, ‘*the defendants were entitled to raise any issue they thought fit in the proceedings*’ but their decision to do so ‘*should not be devoid of consequences*’. In this case, this Court must consider these consequences and in particular whether it is fair that the losing litigant should have to pay whatever legal costs the winning litigant *chose* to incur.

45. Having dealt with the State’s arguments, this Court will next consider whether the State should be awarded less than 100% of its legal costs, despite being entirely successful in dismissing Word Perfect’s challenge to the Request for Tenders. The key issue which will determine this point is whether the State could have conducted this case in a more cost-effective manner, which, in this instance is determined primarily by whether it should have brought a preliminary application to deal with the eligibility point.

Should the State have brought a preliminary application?

46. In answering this question, it is useful at this juncture to consider the facts in *Somers*. At the substantive hearing in that case, the defendants applied to strike out the plaintiff’s proceedings on the grounds that they were based on allegations of professional misconduct against them as solicitors and so were within the exclusive remit of the Legal Services Regulatory Authority. On this basis, the defendants argued that the proceedings should never have been instituted in the first place. In many ways therefore, that situation is comparable to the State’s claim that Word Perfect was not entitled to bring the challenge to the Request for Tenders and so should never have instituted the proceedings to challenge the Request for Tenders in the first place.

47. In *Somers*, the defendants had pleaded this point in their defence and the effect of Butler J.'s decision in favour of the defendants, at the substantive hearing of the claim, was that the hearing did not proceed and the plaintiff's proceedings were struck out.

48. However, at the costs hearing in *Somers*, the plaintiff argued that the defendants were not entitled to their full costs by reason of the defendants' decision not to bring a preliminary application to have the plaintiff's case struck out. The plaintiff stated that instead the defendants waited until the hearing of the action to argue this preliminary point, with all the additional costs that that entailed. On this basis, the plaintiff claimed that it should not be liable for these costs which he claimed were unnecessary.

49. Butler J. noted that, as in this case, the defendant had been entirely successful in dismissing the plaintiff's claim and, as in this case, no issues had been decided against the defendants. Nonetheless, she concluded at para. 11 that the defendants should not be awarded the costs of the trial, but instead they should be awarded just the costs of a motion which they should have brought (if they had conducted the case in the most cost-effective manner) i.e. the costs of a motion to have the justiciability of the plaintiff's proceedings determined as a preliminary issue.

50. Significantly, she pointed out at para. 8 that:

“[T]he defendant **had a direct choice** between, on the one hand, bringing the type of preliminary application that is frequently brought under O. 19, r. 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court and, on the other, allowing the matter to be listed for plenary hearing and proceeding to trial; **the latter option is inevitably more expensive than the former**, but the defendant nonetheless chose the latter route to achieve an outcome that could equally well have been achieved by the former.” (Emphasis added)

The State had the option of bringing a preliminary application but chose not to

51. And so it is in this case, since it appears to this Court that the State had a clear choice between bringing a motion on eligibility under Order 84A, rule 6(2) or allowing the matter to proceed to hearing on the eligibility issue (*circa* 20% of the hearing time) at the same time as the substantive claims (*circa* 80% of the hearing time).

52. By opting not to pursue the preliminary point, the State failed to do what Romer L.J. hoped more litigants would do in *Gold v. Patman* [1958] 2 ALL E.R., at p. 503E, where he states:

“As things have turned out, all this could have been determined by a preliminary point of law [...] **I wish litigants would take advantage of the facilities which are afforded of having a preliminary point of law decided.**” (Emphasis added)

It is possible with the recent change in the legal costs regime in Ireland, the complaint made by Romer L.J. may be less likely to arise in this jurisdiction.

53. However, of more immediate concern is the financial effects of such a decision on the losing party and the public interest, which will be considered next.

The effect of a winning party’s choice, for the losing party and the public interest

54. The decision of the State not to bring a preliminary application has clear financial implications for the party (Word Perfect) that the State wants to pay its legal costs. Word Perfect has argued that by making its choice not to pursue a preliminary issue on the ‘eligibility’ point, the State thereby chose to increase the costs of resolving its dispute with Word Perfect. Taking a notional figure of €100,000 as the total costs for the ‘eligibility’ issue and the three substantive claims to be resolved, Word Perfect is therefore claiming that the State *chose* to resolve its dispute with Word Perfect at a cost of €100,000, when it could have been resolved it at a cost of €20,000 (20%). If these figures ended up being accurate estimates of the costs involved, it means that Word Perfect is claiming that it should only be liable, as the losing party, to pay costs of €20,000 to the State and not the additional €80,000 (80%) spent on the

substantive claims. In this regard, it is also important to remember that, quite apart from the issue of whether Word Perfect has to pay *the State's lawyers* for this 80% of 'unnecessary' time, Word Perfect will also have to pay *its own lawyers* for the time they 'unnecessarily' spent on the substantive issues and for which it is not receiving any contribution from the State because these 'substantive claims' were not decided by this Court, as it was unnecessary to do so. This contrasts with the position in *Byrne*, where the losing party had won on certain points (which took up 20% of the hearing time) which were unnecessarily raised by the winning party and so was awarded costs for same.

55. Of course, quite apart from the financial effect of the State's decision on Word Perfect, there is also the effect on court resources. In this regard, it is clear that not only would bringing a motion on eligibility have saved a significant amount in legal costs for both parties, but it would have resulted in a considerable saving of court resources. This is a matter of considerable public interest in Ireland at present, where we have one of the lowest number of judges in Europe and a considerable backlog in the courts.

56. In all of the foregoing circumstances, this Court has little hesitation in concluding that this is a case in which it is appropriate not to award the winning litigant, the State, its full costs even though it has been entirely successful. This is because of the State's failure to seek to resolve its dispute in the most cost-effective manner possible.

57. Since Word Perfect claims that it should have to pay only 20% of the State's costs, the next question therefore is the level of reduction in legal costs which is appropriate in this case to reflect the State's failure to engage in more cost-effective litigation.

THE FACTORS IN DECIDING ON THE LEVEL OF REDUCTION IN LEGAL COSTS

58. Word Perfect claims that it should be obliged to pay no more than 20% of the State's legal costs on the grounds that no more than 20% of the proceedings was taken up with the eligibility issue.

59. However, there are a number of non-exhaustive factors to be taken into account in determining the appropriate reduction in legal costs when a winning litigant has not conducted her case in the most cost-effective manner possible. These will be considered next.

(i) **Was the winning litigant ‘entirely successful’?**

60. First, it would be too simplistic to simply award the State 20% of its legal costs, since if this were to be done, no account would be taken of the fact that the State has won the litigation by getting what it sought from the court, namely an order dismissing Word Perfect’s challenge to the Request for Tenders.

61. If this Court were to limit the State to 20% of its legal costs, it would be ignoring the general rule that ‘*costs follow the event*’ (which remains the margin note to s. 169). More accurately however, this Court would be ignoring the fact that the State has been ‘*entirely successful*’ in the litigation and the fact that the default position under the express wording of s. 169(1) is that such a party is entitled to all her costs.

62. In these circumstances, it seems to this Court that in determining the reduction in the State’s legal costs, it is not simply a case of awarding the State 20% of its cost because only 20% of the costs were attributable to the eligibility point (which should have been, but was not, taken as a preliminary issue). Instead, account must be taken of the fact that the State has been entirely successful.

63. This is what occurred in *Gold v. Patman*, since in that case, although the winning litigant spent only 25% of court time (two of the eight days) on the winning issues in the case (and the remaining 75% of the time on losing issues), the English Court of Appeal did not award the winning litigant just 25% of its costs. Instead, the Court of Appeal awarded the winning litigant 50% of its costs. It seems clear that the Court of Appeal doubled the time spent on the winning issues and awarded costs for this figure, in order to take account of the fact that the person seeking those costs had won the litigation.

64. While doubling the amount of time spent on winning issues might work with percentages of circa 25% or less, it obviously does not work with percentages of 51% or more. In this case, we are dealing with *circa* 20% of the time spent on what, with the benefit of hindsight turned out to be ‘necessary issues’ and 80% of the time spent on ‘unnecessary issues’. As observed by Simons J. in *Ryanair v. An Taoiseach* [2020] IEHC 673 at para. 22:

“The rationale for making a modified costs order is that **one side should not have to bear costs which have been incurred unnecessarily by the other side**. The raising of multiple issues has the potential to prolong the hearing of proceedings and to add to the volume of documentation, e.g. in terms of pleadings, affidavits or discovery.”

(Emphasis added)

Similarly, in this case if this litigation had been fought only on the eligibility point there would have been no need for discovery or for the expert evidence. In these circumstances, but while also taking account of the fact that the State was entirely successful on all the points decided by this Court, a fair starting point, in this Court’s view, is for the amount of costs to be awarded to the State to be twice the time spent on necessary issues. Thus, before going on to consider other factors, the starting point in this case is that the State would be awarded 40% of its costs.

65. If there were no other factors affecting that percentage, this Court regards this as a fair contribution by Word Perfect to the legal costs of the State. This is particularly so when one bears in mind that Word Perfect will have to pay out of its own resources the costs of its own lawyers (which will include the 80% of costs spent ‘unnecessarily’ on the substantive issues and for which it receives no contribution from the State). This is a financial cost to Word Perfect of the State being entirely successful but in a manner which involved it arguing points which were unnecessary, which fact should not be overlooked.

(ii) **Any adverse findings against the parties**

66. A related issue to the fact that the winning party was entirely successful is whether there were any adverse findings against the parties and in particular the winning party. In this regard, it is relevant to note that reliance was placed by Word Perfect on the *Gold v. Patman* case, mentioned above, in which a winning defendant was only awarded 50% of its costs in a case it won. This was because it failed to take, as a preliminary issue, the issue of the construction of a contract (which took *circa* 25% of the time). The remaining 75% of the time was taken up with other defences, all of which the defendant lost and so there were adverse findings in *Gold v. Patman* against the winning party seeking its costs against the losing party.

67. It is also relevant to note that *Gold v. Patman* has been relied upon in the Irish courts. In *Fyffes plc v. DCC plc* [2006] IEHC 32 at para. 15, Laffoy J. relied on the following extract from the judgment of Hodson L.J. in *Gold v. Patman*, in support of her decision in the *Fyffes* case to reduce the winning defendants' costs in relation to one of the issues at the trial, which was decided against the defendants.

68. She first referred to a decision of the Supreme Court of Victoria in *Byrns v. Davie* [1991] 2 V.R 568 in which Gobbo J. referred to *Gold v. Patman*. At para. 12 of her judgment, Laffoy J. goes on to state that:

“Gobbo J. also referred to a more recent English decision, the decision of the Court of Appeal in *Gold v. Patman & Fotheringham Limited* [1958] 2 All E.R. 497. Gobbo J. quoted a statement from Sellers L.J. (at p. 503) to the effect that, if a plaintiff makes unnecessary and unfounded claims, they can well be segregated and he may be penalised in costs; **but a greater latitude is given to a defendant. That statement seems to have been made in exchanges with counsel** on the question of costs following the determination on the substantive appeal. **The basis on which the Court of Appeal ordered** that the successful defendants should only be

awarded half their costs at first instance **is set out in the judgment of Hodson L.J.** as follows (at p. 503):

“This is a course which the court does not often take, because, when a **defendant has an action brought against him he is entitled to raise such defences as are available to him**, but I think that in this case there was an opportunity for the defendants to take a clear cut point of law which depended on the construction of the document and on which this case has ultimately turned, and if that course had been taken a very large expenditure of money would have been saved. On all the issues of fact which were raised by the defendants by calling evidence to prove or disprove certain facts, the learned judge in the court below found against them. For these reasons I think this is a case in which the court is justified in taking an unusual course and **not giving the successful party the whole of the fruits of his victory in the court below.**”

Both Romer and Sellers L.JJ. agreed, each pointing out that the **defendant could have sought the determination of a preliminary point of law** on the question of the construction of the contract raised by them.” (Emphasis added).

69. It is relevant to note that although the substantive judgment of Laffoy J. was overturned on appeal by the Supreme Court ([2009] 2 I.R 417), the analysis of the costs issue was not considered by the Supreme Court. It is also of course relevant to note that, since Laffoy J.’s judgment, the 2015 Act has implemented changes to the costs regime, to which reference has already been made, which oblige a court to have regard to the conduct of the parties, before awarding costs to the party that has been entirely successful in the litigation.

70. However, in this case, unlike in *Gold v. Patman*, this Court did not make any decision on the three substantive claims and so this is not a case where there has been any adverse finding against the State on the substantive defences that it raised to those claims. Similarly, the decision in *Byrne* is distinguishable from this case, since in *Byrne*, the Revenue Commissioners, while winning the litigation, lost on an issue that took up 20% of the court's time. In contrast, in this case, the only finding was on the eligibility point and this Court found in favour of the State regarding same.

71. Therefore, since there has been no adverse finding in this case against either of the parties (save that Word Perfect lost on the eligibility point and account has already been taken thereof in the uplift of 20% to 40%), this factor does not lead to any further impact on the State's costs of 40%.

(iii) **Some 'latitude' in litigation when viewing it with 'clarity of hindsight'**

72. Thirdly, it is important to bear in mind that, as observed by the Supreme Court in *Kelly v. Minister for Agriculture* [2021] IESC 28 at para. 9, some 'latitude' needs to be given to parties to litigation regarding the approach taken by them, when one is analysing their actions after the event, as this will inevitably be done with the 'clarity of hindsight'.

73. In this instance, it is only with the benefit of that hindsight that it is clear that the State could have saved substantial legal costs and court resources if it had brought a motion on eligibility. However, the State *did not know* as a matter of fact which way this Court would decide that eligibility point in advance. The State chose to fight the eligibility issue and the three substantive claims at the one time, presumably on the basis that if it lost on the eligibility point, it hoped to win on the three substantive claims.

74. When analysing this issue now for costs purposes, it would be fair, in this Court's view, to give the State some margin of discretion for the fact that it is being done with the benefit of hindsight. This is because there needs to be some recognition of the fact that if the State had

dealt with the eligibility point as a preliminary issue, it could have lost on that issue, in which case it would then have to deal separately, at a later date, with the three substantive claims.

75. It might be argued therefore that it was not a completely unreasonable position for the State to take, to deal with all issues in one go, rather than dealing with the eligibility point alone. This argument would be that if it lost on the eligibility point as a preliminary issue, it would then not have to separately and subsequently deal with the substantive claims. This is particularly so where one is dealing with a challenge to a tender for Irish language translation services which the State claims is urgent. Indeed, for its own commercial, tactical or self-interest reasons, the State may have chosen not to pursue the eligibility point as a preliminary issue, notwithstanding that the State would, or should, have known that if it won on this issue, it would lead to a considerable saving on legal costs.

76. However, it is crucial to bear in mind that while there is some latitude when considering the costs incurred by a winning litigant, the fact that there are self-interest reasons why a winning litigant pursued a more expensive litigation strategy, e.g. because it felt the matter was urgent, does not mean that the losing litigant will have to bear the full costs of that strategy.

77. To put the matter another way, while there might be some uplift in the figure of 40% to reflect the fact that the State is being criticised for its strategy with the benefit of hindsight, it is not as significant a factor in this Court's view as the fact that the State was entirely successful.

78. This is because when litigants are in the midst of litigation, and so before hindsight applies, they have to be aware that if they win the litigation and become 'winning' litigants, there will be financial consequences arising from their tactical decisions in winning that litigation, when it comes to an award of costs. Accordingly, if a winning litigant decides, for tactical or other self-interest reasons, to run a case in a way which turns out *not* to be cost effective, this does not mean that the losing litigant should have to bear the entire costs of the

winning litigant. This is particularly so, when one considers that the losing litigant has no say in how the winning litigant runs the case, yet it is being asked to bear all her costs.

79. In this instance, a suitable recognition of the fact that one is criticising the State's litigation strategy with the benefit of hindsight (i.e. that it should have pursued the eligibility point as a preliminary issue) is an uplift in the 40% of costs to 45% (to be paid by Word Perfect to the State).

(iv) Conduct of both parties to be considered

80. Fourthly, it is important to bear in mind that under the express wording of s. 169(1), a court has to have regard to the conduct of *both* parties in relation to how the case was conducted.

81. In this regard, as a general point, every litigant knows, or should know, that there is a chance that she will lose her case, in light of the unpredictability of litigation. Two recent examples illustrate this unpredictability. In *Minister for Justice & Equality v. Sciuka* [2021] IESC 80 over the course of hearings in three different courts (the High Court, the Court of Appeal and the Supreme Court), the applicant eventually won, even though five judges (one in the High Court, three in the Court of Appeal and one in the Supreme Court) found for the respondent while four judges (in the Supreme Court) found for the applicant. Similarly, in *Higgins v. The Irish Aviation Authority* [2022] IESC 13 the High Court (a judge sitting with a jury) reached one conclusion regarding damages, but that decision was *unanimously* set aside by the Court of Appeal, in which the three judges reached agreement on the level of damages, but whose decision was then itself *unanimously* set aside by the Supreme Court, in which the five judges *failed to reach unanimous agreement* on the appropriate level of damages.

82. In view of this inherent unpredictability of litigation, it is therefore prudent for all litigants to approach litigation, save in the most clear-cut cases, on the basis that there is a 50:50 chance that they will lose and so a very good chance that they will have to pay the other party's

costs. For this reason, it is in both parties' interest to seek to ensure that whatever dispute needs to be resolved, it is done so in the most cost-effective manner possible.

83. Thus, when Word Perfect claims, as it does here, that it should only be liable for 20% of the State's costs, it is important to bear in mind that the *Somers* case makes clear that the onus is on both parties, and so not just the State, but also Word Perfect to seek to have this dispute resolved in the most cost-effective manner possible. This is clear from the wording of s. 169 (1) of the 2015 Act ('conduct of the proceedings by *the parties*') and the judgment of Butler J. ('incumbent on *both sides* of a case').

84. The fact that the onus is not on the winning party alone to conduct the case in the most cost-effective manner possible should be obvious. This is because when the decision is being made by the parties regarding litigation strategy, neither party knows which one will be the winning litigant and so which party will be paying the legal costs.

85. In this case, if Word Perfect had sought to have the eligibility point resolved as a preliminary issue, it would have ensured that Word Perfect would have resolved this dispute without expending unnecessary legal costs (and court resources). Yet, there is no evidence to suggest that Word Perfect sought to conduct this case in the most cost-effective manner possible. For example, there was no evidence of Word Perfect writing to the State to suggest that it should bring a motion on eligibility as it had pleaded this point in its defence. If it had done so, and the State had refused to bring a motion on eligibility, then Word Perfect would be in a stronger position, than it is now, to claim that Word Perfect should not have to bear *any* of the costs attributable to the substantive issues.

86. It is not a defence (in relation to the allocation of costs) for Word Perfect to claim, as it does here, that it was a matter solely for the State to bring proceedings which could lead to Word Perfect's case being dismissed. Similarly it is not a defence for Word Perfect to claim that it is not for it to seek to encourage or facilitate the bringing of an eligibility motion which

might lead to the dismissal of its proceedings (without a court hearing its substantive claims). This is because, whether Word Perfect liked it or not, this 'eligibility' point was an issue in this case which could always determine the case against it and it needed to be resolved. It could have been resolved in the most cost-effective manner possible, whether at the instigation of the State or at the suggestion of Word Perfect. Word Perfect chose not to propose to the State that the eligibility point could have been dealt with as a preliminary issue.

87. In this regard, it is also relevant to note that Word Perfect makes the point, in seeking only to have to pay 20% of the State's costs, that it is not being critical of the State for not having raised the eligibility point earlier in the proceedings. Rather, Word Perfect claims that it is simply seeking to ensure that the implications of that decision by the State are felt by the State when it comes to legal costs. However, this principle cuts both ways. Thus, it is equally true that Word Perfect knew that it could lose this case on the eligibility point. In order to resolve its dispute with the State in a cost-effective manner, it could have requested the State to deal with this point as a preliminary issue, such that, if Word Perfect ended up losing on the eligibility point, at least the resolution of its dispute with the State would have incurred 20% of the costs, that it would otherwise incur. However, just like the State, Word Perfect may have had tactical, commercial or self-interest reasons why it did not take this approach. However, also like the State, it too must suffer the consequences of that decision.

88. To put this matter another way, a losing party, who is seeking to have the costs of the winning party reduced, will have her conduct analysed during the litigation (when of course she was neither a winning nor a losing litigant). This analysis will consider whether she sought to have the dispute resolved in the most cost-effective manner possible. If she failed to do so, then she is unlikely to get the reduction in legal costs to which she would otherwise be entitled.

89. In this case, Word Perfect says the State failed to adopt a costs saving strategy for the resolution of their dispute. Yet during the litigation, Word Perfect failed to suggest this costs

saving strategy to the State. It may have had self-interest or tactical reasons for so doing. However, the consequence for Word Perfect is that this Court does not regard the conduct of the parties, and in particular Word Perfect, as something which justifies a further reduction in the State's legal costs from 45%.

Was there a failure by either party to offer to mediate?

90. As already noted, one of the ways in which to seek to resolve a dispute in the most cost-effective manner possible is by suggesting or agreeing to mediation or other form of dispute resolution.

91. In this regard, s. 169(1)(g) of the 2015 Act provides that:

“169. (1) 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—

[...] (g) where the parties were **invited by the court** to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were **unreasonable in refusing** to engage in the settlement discussions or in mediation.” (Emphasis added)

92. It seems clear that this section has no application to this case, since there was no invitation by a court to engage in mediation.

93. However, this is not the end of the matter, since what the parties decide to do regarding mediation amounts to the ‘conduct’ of the proceedings/case by the parties for the purposes of the opening sentence of s. 169(1), s. 169(1)(a) and s. 169(1)(c). This therefore means that a court is obliged to consider any acts or omissions by the parties regarding mediation before awarding costs to a party that is entirely successful. In particular when applying *Somers* and

considering whether the parties conducted the case in the ‘*most cost effective manner possible*’, it seems to this Court that it *must* have regard to whether either of the parties proposed the mediation of their dispute and if so the response of the other party.

94. Support for this conclusion regarding mediation (at the instigation of the one of the parties, as distinct from on the court’s invitation) is to be found in the Court of Appeal decision in the *Mascarenhas* case. In that case, the court was dealing with whether the entire costs of the applicant, who was ‘*entirely successful*’ should be awarded against the losing party, the appellants. Costello J., in reaching the court’s decision considered the conduct of the case by both parties, as required by s. 169. However, she held that the applicant had been less than candid with the High Court. She concluded at para. 279 that she ‘*would normally therefore reduce the applicant’s costs by 10% as reflecting an appropriate sanction for this conduct.*’ However, she then considered the conduct of the appellants. At paras. 37 and 41, she notes that the applicant had asked the appellants to enter a process of mediation. Then at para. 279 she concludes that:

“the appellants have equally conducted the litigation in a manner which this court cannot condone and they **twice refused the opportunity to resolve the dispute by mediation**. For this reason, I would not in fact make any deduction from the costs of the applicant.” (Emphasis added)

Thus, in analysing the conduct of the parties, the Court of Appeal took account of the offer to mediate by one party and the refusal to mediate by the other party, to support the court’s decision not to apply the 10% reduction in costs (which would otherwise have applied) to the applicant who was entirely successful. The costs penalty under s. 169 therefore for not engaging, *inter alia*, in meditation was 10%.

95. The offer to mediate and/or a refusal to mediate is of particular relevance to a decision whether the parties conducted the case in the most cost-effective manner possible, because of

the very high costs of litigation in Ireland. As observed by Butler J. in *Somers*, the reason, that there is this onus on litigants to conduct their litigation in the most cost-effective manner possible is because of *'the very high cost of litigation'* in Ireland (at para. 10). As noted in the *Review of the Administration of Civil Justice*, October 2020 at p. 267 *'Ireland ranks among the highest-cost jurisdictions internationally for civil litigation'*. This rationale is particularly compelling in the High Court, since usually, this is where the greatest level of costs is incurred (However, the regular reference to the high cost of High Court litigation in Ireland should not lead to the conclusion that litigation costs in all courts are high, see for example the *Irish Times* of 5th April 2022 at p. 4, where it is noted that fees paid to lawyers for a District Court remand hearing amount to just €25.20.).

96. The high cost of High Court litigation means that in many cases, it will be difficult to see how a party could be said to have conducted the case in the most cost-effective manner possible, if it did not consider mediation (whether to make an offer to mediate or to accept such an offer). This is particularly so when one considers that in most cases resolution of a dispute by mediation will inevitably be preferable to a court resolution, since to quote Hogan J. *'mediation is a thousand times preferable than litigation'* (*Lyons and Murray v. Financial Services Ombudsman and Bank of Scotland plc* [2011] IEHC 454 at para. 37)

97. It logically follows therefore that to ensure that a case is resolved in the *'most cost effective manner possible'* consideration should usually be given by both parties to mediation or other forms of dispute resolution. This is because when a court is obliged under s. 169 to analyse whether the litigation was conducted in the most cost-effective manner possible, it is difficult to see how consideration could not be given to the reasonableness of the parties in failing to offer to mediate and/or the reasonableness of the parties in refusing an offer from the other party to mediate.

98. As regards the factors to be taken into account and the level of deduction in costs that might result from the failure to propose/accept mediation under s. 169 of the 2015 Act, this issue has not received much attention to date in the Irish courts. As noted above, in the *Mascarenhas* case, the Court of Appeal effectively applied a 10% reduction in costs because of the appellants' conduct and in particular their refusal to mediate. In the U.K., there has been a more extensive consideration of the factors to be considered by a court. For example, in *PGF II SA v. OMFS Company 1 Limited* [2013] EWCA Civ 1288 at para. 52, the Court of Appeal held that while in principle a court could order that a winning litigant 'pay all or part of' of a losing party's costs because of the failure of the winning party to engage in alternative dispute resolution, this 'draconian' sanction should only be reserved for the most serious and flagrant failures to do so, such as where the court's encouragement to mediate was ignored by a party.

99. However, it is also important to bear in mind that Word Perfect's proceedings involved a challenge to the legality of the actions of a State body. It is also relevant that Word Perfect did not claim that the case was suitable for mediation. Nor did Word Perfect claim that the State could have resolved the dispute in a more cost-effective manner if it had proposed mediation. In addition, Word Perfect did not point to any invitation by it to the State to seek to resolve the dispute which was rejected by the State.

Obligation of the Court to consider if mediation should have been proposed

100. Yet, it seems to this Court that, irrespective of the attitude adopted by the losing party, there is an *obligation* on a court under s. 169 to consider whether the party that was entirely successful could have conducted the case in a more cost-effective manner (which would include by proposing mediation or alternative dispute resolution or by its response to a mediation proposal from the other party).

101. It also seems to this Court that this obligation arises not just because of the wording of s. 169 (which imposes an obligation on the court to consider the conduct of the case), but also

because, as noted by the Supreme Court in *Tracey v. Burton*, there is more at stake than just the financial interests of the parties (as to how much costs are paid). There is also the public interest in ensuring that court resources are not unnecessarily wasted, particularly where an offer of mediation might have led to a saving of those resources.

102. However, even undertaking this independent analysis, as required by s. 169, in the circumstances of this case, this Court concludes that this is not a case where the conduct of the parties regarding the prospect of a mediated resolution of the dispute was unreasonable such as to justify any modification to the costs, whether that be an increase or a decrease in the percentage of costs to be awarded to the State.

(v) **The winning party is a defendant who had no choice but to incur legal costs**

103. Fifthly, it is also relevant to bear in mind that the winning party in this instance was a defendant/respondent in the proceedings. While not the most important factor, it is nonetheless relevant that this is a case where the party which instituted the proceedings, Word Perfect, is seeking to pay less than 100% of the legal costs incurred by the winning defendant, when clearly it was Word Perfect, of its own free will, who *chose to sue* the defendant and was unsuccessful in so doing.

104. The relevance of this factor appears to this Court to be implicit in the statement of Hodson L.J. in *Gold v. Patman* to which reference has already been made:

“This is a course which the court does not often take, because, **when a defendant has an action brought against him** he is entitled to raise such defences as are available to him.” (Emphasis added)

It appears to this Court to be implicit in this comment (and the prior exchange with counsel in *Gold v. Patman* to which Laffoy J. refers at para. 12 in *Fyffes*) that the position of a defendant, who has generally no choice in being sued, is given greater latitude to use whatever arguments

are available to him, than say a plaintiff who is, generally speaking, in much more control of the litigation process than a defendant.

105. In many instances the defendant may have had no choice but to incur the legal costs in defending the proceedings. This will be particularly so if an offer of mediation or settlement was made by the winning defendant but refused by the losing plaintiff. However, as already noted, in this instance, there is no evidence of any such offer of mediation by the State.

106. In this case, on a very general level, this Court is being asked to analyse retrospectively the decision of the State to *choose* not to bring an eligibility motion and to consider the implications of that decision from a costs perspective.

107. However, while undertaking that analysis, this Court cannot ignore the fact that legal costs were only incurred in this case because Word Perfect *chose* to institute these proceedings against the State. If it had not instituted the challenge to the Request for Tenders, then there would be no legal costs for it to discharge. On a very general level therefore, it has only itself to blame for now having to bear the legal costs of its failed challenge.

108. To put the matter another way, if Word Perfect was a defendant who had lost, it might be in a slightly stronger position, than it is now, to argue for a forensic and critical examination of the conduct of the case by the State (where the State was the plaintiff). This is for the simple reason that in that example it would be the State, as a plaintiff, that would have chosen the form and timing of the proceedings, the claims to be made etc, whereas a defendant's role is often, but not always, one of having to respond to the claims made against it by the plaintiff.

109. It has already been noted that this Court is expected to analyse retrospectively and critically (with the benefit of hindsight) the decision of the State *not to issue* an eligibility motion (which this Court found it should have) and the consequences thereof from a cost perspective.

110. However, if it is taking that approach to the State, it must also analyse retrospectively and critically (and with the benefit of hindsight) the decision of Word Perfect *to issue* the proceedings in the first place (which this Court has found it never should have instituted).

111. Thus, it seems to this Court, as is implicit in *Gold v. Patman*, that it is likely to be more difficult for a losing plaintiff to obtain a reduction in legal costs awarded against it, since he *chose* to institute the proceedings (which choice proved to be incorrect), than a losing defendant who has no choice in the matter of being sued.

112. While Word Perfect may complain about how the State conducted this litigation, if Word Perfect had not incorrectly (in the view of this Court) brought this litigation in the first place, then it would have nothing about which to complain.

113. In a very general sense therefore, Word Perfect is the author of its own misfortune and to the extent that there is any margin of discretion, regarding legal costs, it is in favour of a losing defendant, as the party who was brought to court against its will and who has won its case. There may of course be cases where a plaintiff had no choice but to bring the proceedings, in which case it would not be appropriate to increase the costs of the winning defendant.

114. However, this is not such a case. Thus, when considering the extent to which Word Perfect should be relieved from paying the State's cost for the substantive claims (which it was unnecessary for this Court to hear), it is relevant to bear in mind that it was Word Perfect which chose how many substantive claims to bring against the State. To put the matter another way, the fact that the party that was entirely successful in these proceedings is a defendant is a factor in favour of the State's costs being increased. This Court will therefore increase them further from 45% to 50%.

CONCLUSION

115. In summary, this Court has concluded that the State should have brought a preliminary application to dismiss these proceedings on the grounds of Word Perfect's eligibility to

challenge the Request for Tenders in the first place. While Word Perfect claimed that, for this reason, it should be liable to pay only 20% of the State's legal costs, since only 20% of the proceedings dealt with the eligibility issue, this Court considered the following factors in determining the appropriate percentage of the State's legal costs to be paid by Word Perfect:

i. Was the winning litigant entirely successful?

While *circa* 80% of the hearing was taken up with the substantive claim (which the State should *not* have pursued, if it were conducting the litigation in the most cost-effective manner possible), the State should nonetheless be awarded more than 20% of its legal costs in recognition of the fact that it has been entirely successful in the proceedings.

This Court has concluded that the starting point in the analysis is that that the State should have this 20% (of time attributable to the only legal issue it was necessary to hear to resolve the dispute) increased to 40%, to take account of the fact that the State was entirely successful in the proceedings.

ii. Were any adverse findings made against the parties?

Apart from the finding on the eligibility point (which was adverse to Word Perfect), there were no adverse findings made against either of the parties. In particular, there were no findings made in relation to the three substantive claims (since no judgment was necessary on those claims). Accordingly, this factor does not lead to any increase or decrease of the State's costs from 40%.

iii. Latitude has to be given to winning litigant in light of the 'clarity of hindsight'

Bearing in mind that some latitude has to be given when examining litigants' conduct retrospectively because of the '*clarity of hindsight*', it is appropriate not to be too harsh in the criticism of the State for not conducting the litigation in a more cost-effective manner, and, in particular, for not seeking to have the eligibility point heard as a

preliminary issue. For this reason, it is proposed to increase the percentage of costs to which the State is entitled somewhat and so this leads to an increase in the figure of 40% to 45%.

iv. Conduct of both parties has to be taken into account

The conduct of not just the winning party, but also the losing party, has to be taken into account. In this regard Word Perfect did not seek to have the eligibility point dealt with as a preliminary issue. This is despite the fact that the onus is on both parties to litigation to conduct the proceedings in the most cost-effective manner possible (if they wish to have a favourable costs order made). In this way Word Perfect is, in a sense, seeking to be wise after the event, as if it had no role in ensuring that the dispute was resolved in the most effective manner possible.

Because of the importance of mediation and alternative dispute resolution to the cost-effective resolution of disputes, consideration was given to whether there should be any modification of the costs order to take account of the fact that the State did not propose mediation, that Word Perfect did not propose mediation and that accordingly neither party refused mediation. However, for the reasons set out above, including that no submissions were made regarding the suitability of the dispute to resolution by mediation, there is no basis under this heading to increase or decrease the percentage of the State's costs from 45%.

v. Did the losing litigant institute the proceedings?

Finally, it is relevant to note that the State is the party which had to defend these proceedings and is seeking its costs for that successful defence. Thus, one would not be having a dispute about costs if Word Perfect had not chosen, incorrectly in this Court's view, to institute these proceedings. Accordingly, this factor is in favour of the State and justifies the State having its costs increased from 45% to 50%.

116. In all of these circumstances therefore, it is this Court's view that the appropriate proportion of costs which should be paid by Word Perfect to the State is 50% of the State's legal costs, which should be agreed between the parties or adjudicated upon by the Legal Costs Adjudicator, in the absence of agreement.

117. Finally, it is to be observed that a reduction in legal costs of 50% for a party that was entirely successful in its litigation may operate '*to encourage*', in the words of the Supreme Court, litigants and their lawyers when conducting litigation to consider, at every turn, not just how do they resolve their dispute, but rather how do they resolve their dispute in the most cost effective manner possible, whether that be by means of the use of preliminary applications on points of law, other preliminary applications, other litigation tools, mediation or other forms of alternative dispute resolution.