

**THE HIGH COURT**

**COMMERCIAL**

**[2023] IEHC 581**

**Record No. 2023/680JR**

**BETWEEN**

**CHC IRELAND DAC**

**APPLICANT**

**AND**

**THE MINISTER FOR TRANSPORT**

**DEFENDANT**

**AND**

**BRISTOW IRELAND LTD. (No. 2)**

**NOTICE PARTY**

**JUDGEMENT of Mr Justice Twomey delivered on the 24th day of October, 2023**

**INTRODUCTION**

1. As a result of the recent Court of Appeal decision in *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at para 94 per Donnelly J.,

the High Court is now obliged to take ‘*a broad-brush-stroke approach*’ to costs and not to engage in nit-picking:

– ‘*a broad-brush-stroke approach **must be taken***’ (Emphasis added).

2. This is entirely logical since, as noted by Donnelly J., the trial court having heard the trial and adjudicated on the case is in an excellent position to make the costs decision and this should be capable of being done quickly by taking a broad approach to the issue. As noted by Donnelly J. the other reason for a broad-brush approach and a quick decision is that everything should be done to avoid a situation where there is a long and complex costs hearing where ‘*available court resources are depleted and costs mount for litigants*’ (at para 50).

3. Accordingly, in this case this Court is adopting a broad-brush approach to the costs. More generally it seems to this Court that in light of the *Word Perfect* judgment, requiring the High Court to determine costs on a broad-brush basis, means that the parties themselves should make submissions on that basis, and so costs hearings in the future should not take up any more than 15 minutes of a court’s time, in most cases.

4. The issue in this case is whether a notice party is entitled to costs for its part in successfully defeating the attempt, by the applicant, to suspend the awarding by a State body of a public contract to the notice party.

5. Terms and expressions used in the principal judgment (*CHC Ireland DAC v The Minister for Transport* [2023] IEHC 457) are used in this judgment.

### **The law in relation to costs for a notice party**

6. The question of whether *Bristow* is entitled to costs as a notice party must be considered in light of the most recent Court of Appeal caselaw on this subject. In particular in the case of

*Dowling & Ors v Minister for Finance* [2023] IECA 197, Haughton J. held at para. 26 that under s 169 of the Legal Services Regulation Act, 2015 and O. 99 of the Rules of the Superior Courts, the ‘*default position*’ is that a winning notice party is entitled to her costs and it is for the losing party to persuade the court that a court should exercise its discretion not to award costs to the notice party.

7. A question arises as to the effect, if any, of *Dowling* on the approach to notice parties’ costs, and in particular on the previous position adopted by the High Court regarding notice party costs in the cases of *Telefonica 02 Ireland Ltd v Commission for Communications Regulation* [2011] IEHC 380 and *Sanofi Aventis Ireland Ltd v HSE* [2018] IEHC 719.

8. It seems to this Court that *Dowling* does not alter the position regarding notice party’s costs but rather clarifies it. In particular, it is noted that in the High Court case of *Telefonica*, at para. 73.6, Clarke J. held that just because a notice party has a right to be heard does not mean that that she is:

*“necessarily entitled to the costs of fully participating in the litigation most particularly where the party concerned does not really have anything substantial to add to the argument on the questions which the court has to decide”* (Emphasis added)

9. While there is perhaps a different emphasis in *Telefonica* than in *Dowling*, the end result is the same. This is because, even with the *Dowling* presumption (that a notice party who wins a case is entitled to her costs), this presumption can be displaced. One way in which it is displaced is, as observed in *Telefonica*, where the notice party does not really have anything substantial to add to the argument on the questions to be decided by the court.

**10.** For the same reason, what was said by the High Court in *Sanofi* is not, in this Court’s view, displaced by the Court of Appeal in *Dowling*. There, at para. [33], McDonald J. held that a notice party was not entitled to its costs for appearing at the hearing, since a notice party’s:

*“entitlement to be joined as a notice party must be distinguished from its entitlement to costs .... [and so] .... where the proceedings were fully defended by the [respondent] there was no need for the [notice party] to replicate that defence.”*

For this reason, in the *Sanofi* case, McDonald J. did not grant the successful notice party its costs for attending the hearing.

**11.** It seems to this Court therefore that, while, in light of *Dowling*, there is a presumption that a notice party who wins a case will be entitled to her costs, it must still be remembered that the position of a notice party is qualitatively different from that of a respondent. It must always be remembered that it is the respondent, not the notice party, who is being sued and the notice party is not required to attend the hearing but is entitled to attend the hearing.

**12.** In addition, a court, in deciding whether to confirm or rebut the presumption that a winning notice party gets her costs, should bear in mind that a losing applicant should not have to ‘pay on the double’ for pursuing her, albeit unsuccessful, action. Therefore, in considering whether this presumption should be displaced, regard should be had to whether for example the notice party simply replicated evidence and submissions made by the respondent or whether it was reasonable or proportional for her to attend the hearing as she had something substantial to add to the proceedings.

**13.** Furthermore, it appears to this Court that, as observed in *Sere Holding Limited v HSE* [2023] IEHC 133 at para. 55 in considering whether to rebut the presumption, it is relevant to bear in mind, that there may be ‘*very good commercial, as distinct from legal reasons*’, why a

notice party engages legal representation, e.g. the contract at stake may be very valuable and it wants to leave nothing to chance in seeking to ensure that the respondent wins the case.

However, as observed by McDonald J in *Sanofi* at para 29:

*“the fact that a notice party has an interest to protect does not necessarily justify doubling the costs of defending judicial review proceedings where the case made by both the respondent and the notice party is substantially the same”* (Emphasis added)

14. Finally, it is important to bear in mind that in determining whether a notice party had anything substantial to add to the proceedings, this Court, in line with the dicta of Donnelly J. at para. [50] of *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189, should not get into ‘nit picking’ on costs as it is obliged to take a ‘broad-brush-stroke approach’ to the costs.

15. In summary therefore, it seems from the foregoing caselaw that the question which this Court must ask itself in deciding whether to rebut the presumption in favour of Bristow, is whether, taking a broad-brush approach to the case, Bristow really had ‘*anything substantial to add to the argument on the questions which the court*’ had to decide.

#### **Applying a ‘broad-brush-stroke’ approach to Bristow’s costs**

16. It became clear at the costs hearing that CHC appears to accept that Bristow should be entitled to its costs for providing evidence on affidavit to the hearing in support of the respondent’s case (e.g. to defeat the claim that Bristow would not be able to meet the 1 July 2025 start date for the services). Accordingly, the key question in this case, is whether Bristow should be entitled to its costs for appearing at the hearing, which is disputed by CHC.

**17.** Taking a broad-brush approach to costs, firstly, it is relevant to note that this case involved the most serious claims by CHC, which only Bristow could answer, namely that Bristow would not be able to provide the search and rescue aviation services by 1 July 2025.

**18.** The gravity of these claims against Bristow is highlighted by the fact that CHC claimed that this could lead to a loss of life. There are no more important questions for a court to decide than ones that involve a potential loss of life. Taking a broad-brush approach therefore, one would *expect* Bristow to have something substantial to add to the argument, that it would not be able to comply with the contract deadline and that this would lead to a loss of lives. It seems to this Court, not only would this be a matter for affidavit evidence (which was provided by Bristow), but in light of its importance and gravity, this was a matter on which Bristow might reasonably have anticipated to be questioned.

**19.** While this Court did not question counsel for Bristow on this matter in the High Court, the fact that it may have attended the High Court, in anticipation of such questioning, is evidenced by the fact that the Court of Appeal questioned Bristow's counsel in this regard. Thus, as Bristow might have reasonably anticipated such questioning in the High Court on such an important issue, it seems to this Court that it was reasonable for it to have been represented at the hearing, in anticipation of such questioning.

**20.** Secondly, again taking a broad-brush approach, it is relevant to note that, in view of the fact that lives were alleged to be at risk by both sides, this case was critically urgent. This is evidenced by the fact that from the commencement of the proceedings on 14<sup>th</sup> June, 2023 to the end of dispute on 28<sup>th</sup> July, 2023 (including the High Court hearing on 4<sup>th</sup> July, 2023, High Court judgement on 25<sup>th</sup> July, 2023, Court of Appeal hearing on 27<sup>th</sup> July, 2023 and Court of Appeal judgment on 28<sup>th</sup> July, 2023), took only a period of six weeks. It is important therefore, with the

benefit of hindsight and after the urgency has passed, not to be overly critical of the need for legal representation of a party in those exceptional circumstances in light of the urgency, importance from a life-saving perspective, and value of the case.

**21.** Thirdly, again taking a broad-brush approach, in the two weeks or so prior to the hearing in the High Court (on 4<sup>th</sup> July, 2023), there was a huge volume of material, approximately 2,500 pages, generated which had to be reviewed by the legal teams involved. This was not an easy task and Bristow might have reasonably anticipated (not solely because of the seriousness of the issues, which is dealt with above) that because of the amount of documentation and the very tight time-frames, new issues might be raised by some of the parties at the hearing regarding that documentation, which required its presence in court.

**22.** Fourthly, taking a broad-brush approach, it is relevant to note that we are dealing with the costs of just one day, despite the complexity of some of the issues and the amount of documentation involved. This was not therefore a case where there was time for much repetition by a notice party, of arguments or evidence already made by a respondent, or which could/should have been made by a respondent.

**23.** Fifthly, taking a broad-brush approach, it is relevant to note that this was not a dispute which was minor in value, where an award of two sets of costs might be regarded as disproportionate, since one was dealing with a contract with a value of €800 million over 10 years.

**24.** For all these reasons, and adopting a broad-brush approach, but subject to the following caveats, this Court will award Bristow its costs against CHC.

**The costs for similar written legal submissions**

25. The first caveat relates to the costs of Bristow's written legal submissions, CHC argued that it should not have to pay 'on the double' for these written legal submissions, since they were very similar to those of the Minister.

26. While not denying their similarity, counsel for Bristow explained the similarity by pointing to the fact that both sets of submissions were required to be submitted on the same day and under an exceptionally tight timeframe. For this reason, he explained that it was not surprising that they would cover the same legal points. However, it seems to this Court while this might *explain* why the legal submissions are similar, this is not a sufficient justification for a losing party to effectively have to pay twice for the same thing. Accordingly, Bristow will not be entitled to its costs for its written legal submissions.

**The costs of the hearing on 19<sup>th</sup> July, 2023 regarding the Oireachtas Committee**

27. Then there are the costs of the half-day hearing on 19<sup>th</sup> July, 2023 which was requested by CHC in light of the information which came to light regarding a proposed meeting of the Oireachtas Joint Committee on Transport and Communication on the 19<sup>th</sup> July, 2023. It was argued by CHC that the fact that an Oireachtas Committee had scheduled a meeting to discuss the award of the contract the subject of these proceedings, was a factor in favour of this Court lifting the suspension. Contrary arguments were made by the Minister and by Bristow.

28. It seems to this Court that this issue, raised by CHC, was a matter which was exclusively a matter for the Minister to deal with, since it was concerned primarily with issues of the separation of powers (and not for example whether Bristow would be able to meet a deadline under a contract), something which the counsel for the Minister was able to argue, without any assistance from Bristow.



**29.** For this reason, it seems to this Court that this is an example of a situation where Bristow was perfectly entitled to attend, and had ‘commercial interests’ in attending, that part of the hearing (since it wanted to do everything to ensure that the award of the contract to it would not be suspended). However, it did not have legal reasons for attending. Thus, this Court does not see why it should be paid by the losing party (CHC) for choosing to pursue its commercial, rather than its legal, interests by attending the hearing. To put the matter another way, Bristow did not *‘really have anything substantial to add to the argument on the’* question before the Court on that day. Accordingly, it should not be entitled to its costs for that half day hearing.