THE HIGH COURT
WARDS OF COURT
IN THE MATTER OF THE APPROPRIATE CARE OF A WARD OF COURT

JUDGMENT ON COSTS of Mr. Justice Denis McDonald delivered on 24 January, 2020

1. This judgment is concerned solely with the issue of costs. The unusual underlying facts have already been set out in detail in the judgment delivered by me on 31st May, 2019 ([2019] IEHC 393) and do not require to be repeated in detail here. In this judgment, I will use the same abbreviations as in my May 2019 judgment. In that judgment, I described the unfortunate circumstances which left the Ward in a PVS condition. While initially cared for by the HSE in a Community Nursing Unit, the Ward was subsequently transferred to a sophisticated home facility constructed specifically for her care in an extension to her parents' home. The transfer of the Ward to the home facility occurred in March 2015 and thereafter a private care team was engaged to look after the Ward. This was funded by the proceeds of a settlement paid to the Ward by way of compromise of a claim brought on her behalf relating to the brain injury sustained by her.

2. In June 2018, it became clear that the proceeds of the settlement would not be sufficient to continue to care for the Ward. Against that backdrop, the issue of the long-term care arrangements for the Ward was listed before Kelly P. (at his own direction) on Monday 2nd July, 2018 so that the court could be updated on the issue as to how the ongoing care of the ward was to be managed. The Committee of the Ward was requested to submit a proposal in relation to the Ward's long-term care arrangements. In addition, the solicitors for the HSE were notified of the matter by letter dated 14th June, 2018 which also noted that an assessment had been carried out by the HSE team of the current care needs of the Ward. Subsequently, both the Committee and the HSE set out proposals for the ongoing care of the Ward. It will be necessary, in due course, to address those proposals in more detail. It is sufficient, at this point, to note that, in broad terms, the initial position adopted by the Committee was that the Ward should continue to be cared for in the home facility at the expense of the HSE. In contrast, the initial position adopted by the HSE was that the Ward should be cared for in the Community Nursing Unit.

3. In addition, there was an issue between the parties as to the terms of an appropriate Do Not Resuscitate Direction ("*DNR*"). A form of DNR had been executed by the Committee on 30th August, 2018 (following consultation with the general practitioner treating the Ward) which stated that in the event of a full cardio-pulmonary arrest, CPR should not be attempted. However, the DNR also stated that in the event of a respiratory arrest without a cardiac arrest, relief was to be provided for a period of five minutes through the mechanism of a device known as an Ambu bag which would be used to stimulate respiration. The DNR stated that CPR should not be applied if respiration had not been restored after five minutes use of the Ambu bag.

4. Having regard to the condition of the Ward and the medical advice available to the HSE, the HSE was concerned about the appropriateness of the DNR proposed by the Committee

and suggested the removal of any reference to the use of the Ambu bag. There were, accordingly, three issues in dispute between the parties namely:-

(a) The appropriateness of the DNR which had been executed by the Committee on 30th August, 2018;

(b) Whether the court should accept on behalf of the Ward, the offer made by the HSE of residential care for the Ward at the Community Nursing Unit which the HSE argued was appropriate having regard to the PVS diagnosis in respect of the Ward;

(c) Whether the Committee was entitled to a court order directing the HSE to continue to fund the existing home care package. This was strongly contested by the HSE which contended that, as a matter of law, there could be no basis for any order compelling the HSE to allocate its financial or healthcare resources in a particular way. The HSE submitted that it must be in a position to decide how its resources should be applied and that it was not the function of the court to interfere in that process.

5. The matter appeared before Kelly P. on a number of occasions in the period between July 2018 and early 2019. In the course of that time, the HSE, very helpfully but without prejudice to its position as summarised in para. 4 (c), continued to fund the existing homecare package for the Ward which had been put in place by the Committee. During this period, a number of medical reports were obtained. These included a report from Professor Conor Burke who was instructed at the specific direction of Kelly P. In his report, Professor Burke suggested that, although PVS patients are usually most appropriately managed in a nursing home environment rather than at home, it would be possible to continue to maintain and care for the Ward in the home facility with a scaled down care team. Professor Burke suggested that her needs could be met by the presence, on a 24 hour basis, of one permanent carer as opposed to a permanent nurse and carer under the then current arrangements which were in place.

6. Professor Burke also dealt with the terms of the DNR. In his report, he confirmed that he had discussed the matter in detail with the Ward's parents and they confirmed their agreement to replace the DNR described above with a new DNR which would provide that no resuscitation measures should be instituted in the event of a cardiac arrest, a respiratory arrest or a cardio-pulmonary arrest. Under the replacement DNR, no use would be made of the Ambu bag or any other extraordinary measure but all comfort measures, including morphine (as required) would be continued.

7. Following receipt of Professor Burke's report in January 2019, the HSE, in February 2019, put forward a revised proposal (as an alternative to care in the Community Nursing Unit) under which the care of the Ward would be continued at the home facility. This would involve:-

(a) The attendance for two hours per day of a registered general nurse to attend to the Ward's nursing needs;

(b) The attendance of a healthcare assistant on a 24 hour basis to support the family of the Ward to maintain and provide comfort for her in the home; and

(c) The parents of the Ward would be required to maintain 24 hour responsibility for all her care needs and would be required to be present at all times in the absence of the registered general nurse.

8. It should be noted that the cost of this revised proposal was less than the cost of maintaining the Ward in the Community Nursing Unit. This revised proposal was not, however, accepted by the Committee. In a letter dated 26th February, 2019, the solicitors for the Committee indicated that, in the view of the Committee, the appropriate minimum level of care required for the Ward would be the presence of two healthcare assistants on a 24 hour basis. With a view to minimising the cost of this arrangement, the Committee proposed that, in light of the views expressed by Professor Burke, there should be no need to require the attendance of a registered general nurse. Instead, it was suggested that the parents of the Ward, with the guidance of the general practitioner, would assume the duties of the nurse in terms of administering medication and food and carrying out any further medical requirements.

9. This counter proposal by the Committee was opposed by the HSE. In broad terms, the position of the HSE was that the presence of a registered general nurse as a team leader was an absolute necessity in order to ensure that an appropriate level of care was provided to the Ward. In addition, the HSE maintained that the presence of one carer would be sufficient and that it was the obligation of the parents of the Ward to provide any additional care that might be required. The HSE strongly argued that its resources were limited and that it was the only appropriate party to determine how its resources should be allocated. It should be noted that, under the proposal made by the HSE, no provision was made for any respite for the Ward's parents. In other words, there was no provision for the attendance of a second carer to relieve the obligations on the Ward's parents as envisaged under the third element of the revised HSE proposal (summarised in para. 7 (c) above).

10. Subsequently, a hearing took place before me over four days in March 2019 following which I delivered judgment in May 2019 in which I confirmed the terms of the revised DNR proposed by Professor Burke (which was not opposed by the Committee during the course of the hearing in March) and examined the concerns of the HSE in relation to the care plan proposed by the Committee. In paras. 98 to 103 of my judgement, I sought to address those concerns. In my May 2019 judgment I did not determine the legal issues that were debated in the course of the hearing in March 2019 in relation to whether the HSE could be compelled to provide funding for the home care plan proposed by the Committee. Instead, I simply asked the HSE to consider the views expressed by me in the judgment. I indicated that, in the event that a resolution could not be achieved, I would rule on the legal issue as to whether the HSE can be compelled by court order to fund the care package for the Ward to a level set by the court. In the meantime, I asked the parties to consider the views expressed in the judgment. I further indicated that, if

there were insuperable difficulties for the HSE in taking the course suggested by me in the judgment, I was still of the view that any care plan put in place by the HSE would require some level of adjustment to provide for an appropriate level of respite for the Ward's family.

11. The matter was then adjourned to allow the parties to consider the judgment. In a letter dated 18th June, 2019 from the HSE's solicitors, the HSE sought to explain why it would not be possible for it to proceed in the manner suggested in my May 2019 judgment. The matter thereafter came on for hearing before me on 21st June, 2019. On that occasion, I indicated to the HSE that I was unhappy with the approach taken in the letter of 18th June, 2019 and I requested that the HSE should review the matter again and in particular address the issue of appropriate respite for the parents of the Ward. The matter was adjourned to July 2019. At that point, a very detailed and considered submission was made by the HSE in its solicitor's letter of 4th July, 2019 which, in my view, demonstrated that the HSE had given appropriate consideration to the judgement of May 2019. In that letter, the HSE also set out revised proposals for respite care under which a second healthcare assistant would be provided on a 24 hour basis for 30 days per anum. As explained in the letter from the solicitors for the HSE (at p. 21):-

> *"This is a very significant amendment to the Comfort Care Package [previously proposed by the HSE]. It is designed to engage in a constructive and substantive manner with the points made at paragraph 118 of the Judgment in light of the additional comments of the Court on 21 June 2019. It is indicative of the HSE's good faith desire to promote the best interests of the Ward and to engage constructively with this Honourable Court wherever reasonably possible for it to do so".*

12. When the matter next came before me in July 2019, I heard submissions from the parties and indicated that, in the absence of determining the legal issue, I did not believe that I could direct the HSE to go any further than what was proposed in the letter from their solicitors of 4th July, 2019. I then enquired of counsel for the Committee as to whether the Committee wished me to proceed to determine the legal issue and I was informed by counsel that the Committee did not propose to do so at this time. In those circumstances, the court approved the care plan proposed by the HSE as modified in the course of the hearing in March 2019 in relation to the provision of certain additional equipment including a new bed designed to minimise the development of pressure sores and as further modified in the letter of 4th July, 2019 (i.e. the modification to include 30 days respite on the terms quoted in para. 11 above).

13. The matter was adjourned to October 2019, at which point, directions were given in relation to the determination of any dispute between the parties in relation to costs. Thereafter, written submissions were delivered on behalf of both parties in relation to the issue of costs. In addition, oral argument was heard by me in relation to costs at a hearing which took place on 5th November, 2019.

The arguments of the parties

14. The HSE did not seek costs against the Committee. The positon of the HSE was that, although it contended that it had succeeded in the proceedings, no order for costs should be made. In accordance with the provisions of O.99 r.1, the HSE argued that the normal rule is that the costs of every proceeding "*follow the event"* and that this principle can only be departed from where there are special circumstances that justify a departure from the normal rule on the basis that the interests of justice so require. The HSE argued that it had succeeded in relation to the DNR issue. With regard to the issue of the care of the Ward, the HSE submitted that it pro-actively responded to the report from Professor Burke by proposing the option of a care package as an alternative to the proposed placement in the Community Nursing Unit. The HSE drew attention to the fact that, by letter dated 26th February, 2019, the solicitors for the Committee refused to accept the HSE proposal for a homecare plan. As a consequence of the Committee's unwillingness to accept the HSE plan, a four-day hearing ensued involving extensive oral evidence. The HSE submitted that, ultimately, the court approved the homecare plan offered by the HSE and declined to make any order compelling the HSE either to amend its offer or to provide or fund the homecare plan proposed by the Committee.

15. Against the backdrop described above, the HSE argues that it was successful in relation to both the DNR issue and the care plan. While, under the normal rule, the HSE would be entitled to an order for its costs against the Committee, it was indicated that the HSE did not seek its costs.

16. In the event that the Committee sought to suggest that the court should depart from the normal rule applicable under O.99, the HSE argued that there was no basis, in the interests of justice, to "*radically*" depart from the normal rule and award costs in favour of the Committee against the HSE. In relation to this element of its argument, the HSE placed particular emphasis on the following:-

    (a) The role of the HSE in these proceedings was quite different to the far more common scenario in which the HSE comes before the court in wardship as a petitioner or as an applicant seeking a series of orders against a particular respondent. In this case, the role of the HSE was entirely different. It was not in any sense the moving party. It has at no time sought any order from the court to impose any treatment or service on the ward. It was submitted that it would be inappropriate to compel the HSE to pay the legal costs of a Committee in proceedings essentially initiated by the court and necessitated by the previous decision of the Committee to remove the ward from the Community Nursing Unit and to place her in a privately arranged home care package which created a manifestly unsustainable financial burden for the ward.

    (b) Secondly, the HSE suggested that its conduct in the proceedings showed that it had acted at all times reasonably particularly in light of the PVS condition of the Ward. The HSE argued that the homecare package devised by the Committee had been premised on a mistaken contention that the Ward had "*locked-in syndrome*" and was not in a PVS condition. The HSE also highlighted the fact that it had incurred

the additional cost of funding the status quo for a significant period of time in the period between July 2018 and July 2019;

(c) Thirdly, the HSE suggested that the oral hearing in March, 2019 was necessitated by a mistaken positon adopted by the Committee who had refused to take on board the issues highlighted in a letter of 26th June, 2018 sent by the solicitors for the HSE which had highlighted issues in relation to clinical governance, levels of care, the terms of the DNR and the viability cost and sustainability of providing for the care of the ward in the home facility.

(d) The HSE argued that there were significant issues of principle precedent and public policy which weighed against the making of an award of costs against it. In this context, the HSE laid particular emphasis on its statutory obligation to operate within its allocated budget, to have regard to the resources available to it and the need to secure a beneficial effect of and efficient use of those resources. These are matters which are quintessentially for the HSE itself. It was argued that it would be unjust and unsustainable to expect the HSE to pay the legal costs of the *"unsuccessful moving party".* It was urged that it would be entirely inappropriate (in the context of a healthcare system where demand outstrips resources), that the HSE would be exposed to: *"the costs and inconvenience of what in effect would be risk-free legal challenge by dissatisfied service users".*

(e) The HSE also argued that the unfortunate circumstances of the Ward and her family cannot of themselves provide a justification for an order compelling the HSE to pay the legal costs of this "*unsuccessful challenge".*

17. In response, the Committee argued that the circumstances underlying these proceedings are exceptional. Although the Committee and the HSE held opposing views as to the appropriate mode of care for the Ward, the proceedings did not involve adversarial litigation in the normal sense. The Committee argued that, in those circumstances, there was no clear "*event*" for the purposes of O.99. Instead, it was submitted that the proceedings were analogous to an inquiry as to the best interests of the Ward.

18. In the alternative, the Committee argued that, if the matter is to be assessed by reference to classic "*follow the event*" principles, the Committee should be regarded as having substantially succeeded in the proceedings. In this context, the Committee emphasised that in the period from July 2018 to February 2019, the HSE maintained that the only suitable mode of care for the Ward was by way of a residential placement in the Community Nursing Unit. It was only on 15th February, 2019, following receipt, at a late stage in these proceedings, of the report of Professor Burke, that the HSE first countenanced any form of alternative care. According to the Committee, this represented a "*major departure"* from the HSE's previous position and a "*significant milestone*" in the Committee's attempts to secure the provision of ongoing care for the Ward in their home.

19. The Committee also placed significant emphasis upon the fact that, subsequent to the May 2019 judgment and the post-judgment hearing in June 2019, the HSE made an

amendment to its homecare plan in its letter of 4th July, 2019 which the HSE itself described as *"a very significant amendment".* In these circumstances, the Committee submitted that, contrary to the case made by the HSE, it was not until 4th July, 2019 that a suitable homecare package was in fact put in place. The Committee stressed that this occurred only after the four-day hearing. It is therefore wrong (so the Committee submits) to suggest that the court had in any sense approved the HSE proposal made prior to the four-day hearing in March 2019.

20. The Committee submits that, in substance, it succeeded in the proceedings in circumstances where:-

    (a) It was not until immediately before the hearing, that the HSE reversed its "*previously unshakeable position*" that a residential placement was the only care package that would be provided to the Ward;

    (b) Secondly, the very significant amendment made by the HSE to its homecare plan (as set out in its letter of 4th July, 2019) was only achieved after the hearing was completed and the May judgment had been delivered. According to the Committee, this: *"went a considerable distance to addressing the Committee's concerns with the Homecare Plan previously offered by the HSE".*

21. Insofar as the DNR is concerned, the Committee submitted that, in the context of the proceedings as a whole, this was a "*relatively minor discrete issue*" and was a very straightforward one which did not require the wide-ranging inquiry which characterised the remainder of the proceedings.

22. In light of the considerations summarised in paras. 18 to 21 above, the Committee submitted that it is not necessary to embark on an analysis of the interests of justice in order to make an award of costs in its favour. The considerations summarised in para. 16 above are therefore not relevant. The Committee submitted that it should be entitled to costs by reference to the normal O.99 principles. Without prejudice to that submission, the Committee argued that it is in the interests of justice that an award of costs should be made in favour of the Committee. For this purpose, the Committee made the following submissions:-

    (a) If the ultimate level of care provided in July 2019 had been available at an earlier point in the proceedings, the matter would have been resolved at a much earlier stage and accordingly it would not have been necessary for the HSE to fund the pre-existing homecare regime for as long as it actually did;

    (b) The HSE was saved significant expenditure by the fact that, in the period between 2015 and 2018, the care of the Ward had been funded entirely privately out of the proceeds of the settlement of her claim;

    (c) The Committee sought to make the case that it is in the public interest that vulnerable persons such as the Ward should be protected. The Committee also

argued that, in no sense, could the proceedings which took place here be described as "*unmeritorious*";

(d) In the event that the court was minded to rule against the Committee in respect of its submission that it substantially succeeded in the proceedings, the result was, at worst, "*evenly balanced between the two parties".* Furthermore, the proceedings were not initiated by the Committee but by the court in the exercise of its wardship jurisdiction. In circumstances where the Committee was required to partake in the proceedings initiated by the court, it could not be said that it had "*lost*" the case;

(e) It was also urged that, at no stage, did the Committee seek to compel the HSE to spend beyond its means and that, in fact, the care plan proposed by it (as revised in advance of the hearing) involved a similar level of expenditure to that proposed by the HSE;

(f) With regard to the argument made by the HSE in relation to its statutory responsibilities, the Committee submitted that the end result of the proceedings is that the HSE will provide a service to the Ward that is eminently more suitable both for her and her family, at approximately the same or a lower cost than the residential care option initially proposed by the HSE. The Committee submitted that it is "*self-evidently*" in the public interest that the HSE be required, in cases such as this, to consider alternative care options rather than adhering inflexibly, and without regard to the particular circumstances of the case, to inferior and more costly packages of care.

Discussion

23. The first issue which requires to be addressed is whether O.99 r.1 applies to the very unusual circumstances of this case. Insofar as relevant, O.99 r.1 provides as follows:-

> *"Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:*
>
> *(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*
>
> *(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.*
>
> *(3) …the costs of every action, question, or issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct.*
>
> *(4) …the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event…"*

24. It will be seen that the provisions of O.99 r.1 are subject to any contrary statutory provisions relating to costs. In the course of their written submissions, the HSE referred, in this context, to the provisions of s. 169 (1) of the Legal Services Regulation Act, 2015 ("*the 2015 Act*") which has introduced new statutory criteria to be taken into account. However, that subsection was not commenced until 7th October, 2019 (i.e. after the substantive matter had been concluded) and, in those circumstances, counsel for the HSE, in the course of his very helpful oral argument, indicated that the HSE was not seeking to rely on s. 169 (1).

25. Accordingly, it seems to me that I should proceed solely by reference to O.99 (to the extent that it is applicable to this very unusual form of proceeding) and the relevant case law. I must first consider whether O. 99 applies at all. In this context, it is clear from O.99 r.1 (1) that it applies to the costs of "*every proceeding*" in the Superior Courts. The same phrase is used in O.99 r.1 (2). No guidance is given in O.99 as to what is meant by "*every proceeding*". Order 125 of the Rules provides no definition of "*proceeding*". However, it appears from the decision of Kenny J. in the *People (Attorney General) v. Bell* [1969] I.R. 24 that "*proceeding*" is to be given a wide meaning. In that case, an issue arose as to whether O.99 r.1 of the 1962 rules (which was in similar terms to the current version of O.99 r.1) was capable of applying to criminal proceedings before the Central Criminal Court. Kenny J. held that it was and his decision was upheld by the Supreme Court. In that case, Kenny J. had regard to a number of definitions in what was then O.111 (now O.125) including the definition of the word "*action*" and the word "*cause*". At p. 33-34, Kenny J. said:-

> *"Order 111 (the interpretation clause) of the Rules of 1962 contains two definitions of importance. The word 'action' is defined as meaning 'a civil proceeding commenced by originating summons…but does not include a criminal proceeding at the suit of the Attorney General'; and the word 'cause' is defined as including 'any action, suit or other original proceeding between a plaintiff and defendant and any criminal proceeding'. There is no definition of the word 'proceeding' but the two definitions show that the word 'proceeding' is used in a wide sense, particularly as the Rules of 1962 are stated to apply, where appropriate, to all proceedings in causes or matters; and 'causes', by definition, include criminal proceedings".*

26. At p. 34, Kenny J. also referred to the decision of O'Byrne J. in *The State (Minister for Lands and Fisheries) v. Judge Sealy* [1966] I.R. 107 where O'Byrne J. observed, at p. 34, that:-

> *"It seems to me that, taking the Rules as a whole, the expression 'any proceeding in the Court' must be held to include all proceedings of a civil or criminal nature which the court has power to entertain, and is sufficiently wide to cover the case…".*

27. On appeal to the Supreme Court, the decision of Kenny J. was upheld by a majority of four to one. At p. 51 of the report, Walsh J. (who gave the majority judgment) said:-

> *"…I think the wording of Order 99, - r.1 is sufficiently clear …. 'every proceeding' can only be held to include all proceedings of a civil or criminal nature which are within the jurisdiction of the High Court. In my view the case of the State (Minister for Lands and Fisheries) v. Judge Sealy correctly decided that the words 'any proceeding in the Court' contained in the then Rules of the Circuit Court were sufficient to include all proceedings of a civil or criminal nature which the then Circuit Court had power to entertain".*

28. Although it is clear from the decision in *Bell* that a wide meaning is to be given to the word "*proceeding*" in the context of O.99 r.1, it has been suggested by Gibson J. in Northern Ireland in *Allen v. Redland Tile Co. (Northern Ireland) Ltd* [1973] N.I. 75 at p. 78 that a:

> *"…proceeding is an act which has some degree of formality and significance and which is done in furtherance of an action…something in the nature of a formal step being either an application to the court or at least a step taken by a litigant in the prosecution of the action, being a step which is required by the rules".*

29. I am of opinion that the hearing which took place before me in relation to the terms of the proposed DNR and in relation to the appropriate mode of care for the ward well qualifies as a "*proceeding*" within the meaning of O.99 r.1. While the matter was commenced in a very informal way, the respective positions of the parties were very quickly formalised thereafter in a very considered exchange of correspondence which set out, in some detail, the case which each of them proposed to make and how they each believed the DNR should be framed and how the future care of the Ward should be arranged. That process was managed under the direction of Kelly P. and was ultimately the subject of a full hearing before me at which sworn evidence was given by witnesses for both sides and each of the witnesses was cross examined by the opposing side. In my view, notwithstanding the relative informality of the way in which the proceedings were commenced, the process was, very plainly, a "*proceeding*" within the meaning of O.99 r.1. As outlined above, despite the informal way in which the matter was listed before the court, the process had a significant degree of formality once it was underway. The process also had very considerable significance both for the ward (in terms of her care) and for the HSE (in terms of the legal issue which was debated relating to the extent to which (if at all) the HSE could be ordered to provide the level of care proposed by the Committee for the ward). While the process did not involve any step required by the rules, it did involve an application to the court and, as described above, a full hearing on oral evidence before the court. It therefore well surmounts the relatively low hurdle laid down in *Allen v. Redland Tile* and constitutes a "*proceeding*" for the purposes of O.99.

30. The next issue which arises is whether it can be said that the process described above falls within the rubric of O.99 r.1 (3) or r.1 (4). Insofar as O.99 r.1 (3) is concerned, the question which arises is whether it can be said that the costs which were incurred fall within the ambit of "*the costs of every action, question, or issue tried by a jury…*". The costs in this matter clearly do not relate to an issue tried by a jury. Nor can it be said

that the costs arise in relation to an "*action*" since that word is given a relatively narrow meaning by O.125 as constituting a "*civil proceeding commenced by originating summons or in such other manner as may be authorised by these Rules…*". Given the informal way in which the process commenced, it could not be said to constitute an "*action*" for the purposes of O.99 r.1 (3). However, it seems to me that the process described above undoubtedly falls within the ambit of the remaining element of O.99 r.1 (3) namely *"the costs of every … question…*". As outlined in para. 4 above, there were a number of questions that fell for consideration in this process and therefore the requirements of this element of O.99 r.1 (3) appear to me to be satisfied. In this context, I do not believe that O.99 r.1 (3) is to be read as confined to a question tried by a jury. The punctuation of the rule suggests that the reference to trial by a jury is confined to an *"issue tried by a jury*". The punctuation suggests that the phrase *"every action, question, or issue tried by a jury*" is intended to be read disjunctively and that the reference to trial by jury applies solely to the last of the three events enumerated in the sub rule. If there is any doubt about that, then it seems to me that the provisions of O.99 r.1 (4) would cover the present situation insofar as that sub rule provides as follows:-

> "(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

There is no definition for this purpose of either a "*claim*" or of a "*counterclaim*" but, it seems to me that there were claims made on both sides in these proceedings which raised issue of fact and law and accordingly, even if I am wrong in my conclusion that O.99 r.1 (3) applies, the matter would be covered by O.99 r.1 (4). Moreover, it is clear from the decision of the Supreme Court in *Dunne v. Minister for the Environment* [2008] 2 I.R. 775 that the principle that costs should follow the event is now regarded as a rule of law. In that case, Murray C.J. said at p. 783:-

> *"The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party has an obvious equitable basis..."]*

31. Both O.99 r.1 (3) and O.99 r.1 (4) provide that costs are to "*follow the event".* It has been recognised, however, that there are some cases where the term "*event*" may be too narrow for this purpose. For example, in *Child and Family Agency v. O.A*. [2015] IESC 52, the Supreme Court, in the context of a District Court childcare hearing (which was described as being, at least in part, inquisitorial) suggested that the use of the term *"the event"* is not always satisfactory. There may well be a number of "*events*" and different orders made as part of a continuum. In such circumstances the term "*outcome*" may be a more appropriate criterion to use.

32. In light of my conclusions as to the applicability of the O.99 principles to this very unusual case, I must now consider whether an "*event*" or an "*outcome*" can be identified for the purposes of the application of those principles. If so, then costs must follow that event unless there is a proper basis in line with the decision of the Supreme Court in *Dunne v. Minister for the Environment* to depart from those principles. In considering this issue, I

am very conscious that the significant legal issue which arose for consideration was not ultimately determined by me. Nonetheless, there was an outcome to the hearing. That outcome involved a new regime of care for the ward in the home facility. The level of manpower available under this new care regime was, however, significantly less than had previously been in place. It was also significantly less than the revised level of care proposed by the Committee in response to the HSE homecare proposal made in February 2019. Nonetheless, it was strongly urged by counsel for the Committee that the outcome represented a significant success for the Committee. In the course of his oral submissions, counsel for the Committee suggested that the event in this case is the achievement of continued care for the ward at the home facility. He stressed that the HSE had refused to countenance any form of homecare package in the period between July 2018 (when the court first decided to list the matter before it) and February 2019 (when the homecare package was offered by the HSE for the first time). According to counsel for the Committee, the HSE had only shifted its position following receipt of Professor Burke's report. Counsel for the Committee also argued that the HSE could not succeed in any alternative argument based on the refusal of the Committee to accept the homecare package proposed by the HSE in February 2019. Counsel highlighted in this context the fact that the homecare package approved by the court in July 2019 contained what he described as a very important amendment namely the provision for an additional homecare assistant for a period of 30 days per anum. The second homecare assistant was not offered by the HSE until July 2019 which was after the hearing which took place in March 2019.

33. In response, counsel for the HSE stressed that the HSE had not only succeeded insofar as the important issue of the DNR was concerned (following the reversal of the position on the part of the Committee subsequent to the meeting of the Ward's parents with Professor Burke) but it had also succeeded in relation to the care plan. Counsel argued that, if one were to look at the matter objectively, the care plan that was demanded by the Committee is not the care plan that is now in place today following the order made in July 2019. Counsel argued that, in those circumstances, if the conventional O.99 principles are applied, the position of the HSE has been vindicated and it would be entitled to seek costs against the Committee although it did not propose to go that far. The HSE is prepared to accept that no order should be made as to costs. Counsel for the HSE also argued that, insofar as the Committee seeks to rely on the additional respite provision agreed by the HSE in July 2019, this was done in response to the exchange of views between the court and the parties (following the delivery of judgment) and was done as a "*gesture*" by the HSE. Counsel argued that:-

> *"But we can't be punished for doing that now in costs because that was a gesture in an exchange with the Court. It is also something that was never sought …by the Committee in the first place. It came up as an afterthought and I think that it is not a significant matter, but I wouldn't like it to be misunderstood. So I say it would put us, the HSE, notwithstanding the unfortunate circumstances of the ward, it would put us in a truly invidious positon if it is now to be seen that, in circumstances where we have provided a home care package for a person, that we*

are to be fixed with the costs of a hearing (a) that wasn't … in any sense necessary. But leaving that aside, we are not the moving party in the matter, we did not cause any of the shortfall, we provided a service, we responded to the needs of the person in public, and we have to be allowed to come in and out of wardship matters where our managers, our nurses and doctors do not feel that they are going to have to hesitate or pause because a significant legal cost will follow them if they do anything positive in favour of a ward…."

34. In circumstances where I have formed the view (for the reasons outlined in paras. 24-31 above) that O.99 principles must be applied to these proceedings notwithstanding the informal way in which they were commenced, I do not believe that it is appropriate for me to take into account the fact that the HSE was not the moving party or that no form of plenary or other proceedings were ever instituted against the HSE. It seems to me that, subject to any considerations which may subsequently arise should it be necessary to consider whether there are any discretionary factors that would justify a departure from the usual rule, I must approach the matter the same way as the court would approach any application for costs under O.99. This reinforces my view that I must seek to identify whether there is an "*event* "or "*outcome*" by reference to whether the issue of costs can be determined.

35. As outlined above, both parties have sought to characterise themselves as the successful party. The HSE maintains that it should be seen as having succeeded in circumstances where the care plan ultimately put in place in July 2019 is substantially the same as the care plan that was proposed by it in February 2019 in advance of the four day hearing. On the basis of that scenario, the relevant "*event*" or "*outcome*" is the court's approval of the care plan as revised in July 2019.

36. On the other hand, the Committee has equally portrayed itself as the successful party in that, on its view, it has succeeded in securing the continuation of home care for the ward (albeit on less generous terms than it would wish). The Committee maintains that the homecare plan put in place in July 2019 is not the same as that proposed in February 2019 in that it now includes a significant respite provision through the mechanism of the provision of a second care assistant on a 24 hour basis for a period of 30 days, annually. While counsel for the HSE has sought to characterise that addition to the homecare plan as a "*gesture*", counsel for the Committee has highlighted the language used in the letter of 4th July, 2019 where it is described as "*a very significant amendment to the Comfort Care Package*…". Counsel for the Committee urges that, in those circumstances, the HSE cannot plausibly suggest that the costs of the four day hearing in March could have been avoided. In my view, the question whether the costs of the hearing could have been avoided requires separate consideration and will be addressed further below once I have reached a determination as to whether, absent consideration of that question, the Committee should be entitled to some level of costs.

37. In some cases, it is a straightforward matter to identify a relevant event or outcome by reference to which success can be measured. In this case, however, the issue is not

straightforward. It is unsurprising that both sides have claimed to be the successful party. Both parties have succeeded to some extent. The HSE has succeeded fully in relation to the DNR issue. While the terms of the DNR proposed by the HSE were ultimately agreed by the Committee, that only occurred in the period immediately before the hearing and was only formalised in the course of the hearing. However, that issue, although of very considerable importance, did not occupy much of the time spent on the hearing of the case. In fact, the bulk of the hearing related to the the appropriate care regime that should be put in place for the future care of the Ward.

38. As noted above, shortly before the hearing, the HSE changed its position. Contrary to the case which it had made up to February 2019, the HSE proposed, for the first time, a homecare package for the Ward as an alternative to a placement in the Community Nursing Unit. As a consequence of this change of position on the part of the HSE, there was much less, in the way of disagreement between the parties, in the course of the hearing, than would otherwise have been the case. There was, however, significant debate about the level of care that would be required for the Ward were homecare to be continued. Under the proposal made by the HSE in the weeks prior to the commencement of the hearing, the parents of the Ward would have a much more "*hands on*" role in the day to day care of the ward than under the proposal made by the Committee (which would have seen two carers being available at all times over a 24 hour period).

39. Ultimately, what has been put in place, following the judgment in May 2019 and the subsequent hearing in June 2019, is a homecare package which is substantially similar to that proposed by the HSE in February 2019 but with the addition of a second healthcare assistant on a 24 hour basis for 30 days per anum. Crucially, under that arrangement, the ward will continue to be maintained in her home. This therefore represents a significant outcome for the Committee and the ward in terms of her future care which is quite different to the Community Nursing Unit placement originally envisaged by the HSE. To that extent, the Committee has succeeded. However, it is, at best, a partial success. The homecare package which has been put in place is not the homecare package for which the Committee argued. To that extent, the HSE has also achieved a level of success in the proceedings. It has successfully resisted the imposition of a regime which would require it to fund the presence of two homecare assistants on a 24 hour basis 365 days of the year.

40. The difficulties which arise in cases where neither side is wholly successful have been considered in a succession of cases commencing with 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. In that case, Clarke J. indicated that it is appropriate to base the award of costs on an assessment of how much of the hearing might be said to be attributable to the issues upon which each party succeeded. In that case, he ultimately concluded, on the facts, that an analysis of the time spent on the issues in question resulted in a "*roughly equal allocation of time in favour of both parties*". In those circumstances, he came to the conclusion that the justice of the case would be met by making no order as to costs.

41. In some of the authorities which have arisen since *Veolia*, the courts have carried out an exercise as to the time spent on the issues on which the respective parties were successful and awarded costs by reference to the result of that analysis. Thus, by way of example, if a hearing had taken six days and four of those days were spent on an issue in which the plaintiff was successful while two of the days were spent on an issue on which the defendant was successful, the plaintiff might be awarded the costs of a two day hearing (after essentially allowing a set off of two days' costs for the defendant against four days' costs for the plaintiff).

42. In other cases, it is not always feasible to make precise mathematical calculations of the kind outlined in para. 40 above. In such cases, the courts have, sometimes, awarded a party (who has been partially successful) a certain proportion of the costs. Thus, for example, in *Wright v. HSE* [2013] IEHC 363, Irvine J. awarded the plaintiff 65% of the costs. She did so even so even though she found that no more than 20% of the evidence in that case was spent on the issue on which the plaintiff was ultimately successful. The judgment of Irvine J. in that case and other relevant case law on this issue has recently been very helpfully summarised and considered by Barr J. in *Anderson v. Birthistle* [2019] IEHC 302. In that case, Barr J. held that the trial was prolonged to some extent by virtue of the investigation of an aspect of the plaintiff's case which ultimately failed. He held that, in order to do justice between the parties, some deduction had to be made from the costs recoverable by the plaintiff to take account of the fact that the hearing was prolonged to that extent. He highlighted the decision of Irvine J. in the *Wright* case where the plaintiff was awarded 65% of her costs notwithstanding that only 20% of the time of the trial had been spent dealing with the issue on which the plaintiff was successful. He also drew attention to the decision of Peart J. in the Court of Appeal in *Naylor v. Maher* [2018] IECA 32 where the plaintiff sought to challenge a will on a number of grounds including undue influence. The plaintiff failed on that issue but succeeded on a different point based on estoppel. Although the undue influence issue represented 50% of the plaintiff's case, Peart J. came to the conclusion that he should be awarded 75% of his costs. In *Anderson*, Barr J., having considered these authorities, came to the conclusion that the plaintiff there should recover 80% of her costs.

43. I am also aware that the Supreme Court, having determined an appeal from the Court of Appeal in relation to taxation of costs issues in *Sheehan v. Corr* [2017] 3 I.R. 252 (in which the plaintiff had succeeded in part only), subsequently awarded the plaintiff 70 % of her costs.

44. In the present case, there was undoubtedly time taken up at the hearing in addressing the case made by the Committee that there should be two healthcare assistants available on a 24 hour basis to care for the Ward. The Committee failed on that issue. However, I take the view that the Committee did succeed to some extent in that it secured for the Ward a continuation of her care at her home albeit on new terms. As noted above, it seems to me that I should deal separately with the issue as to whether the Committee should be deprived of any costs as a consequence of the failure to take up the offer made by the HSE (following Professor Burke's report) in February 2019. In addition, the

Committee failed on the DNR issue. At the start of this process, the Committee sought to establish that the DNR should be in the terms summarised in para. 3 above. The Committee subsequently abandoned that case and agreed to the terms of the DNR as proposed by the HSE. I am of opinion that, in those circumstances, the Committee must be treated as having failed on the DNR issue.

45. I regret to say that I do not believe that it is feasible in this case to attempt to carry out a scientific analysis of the extent of the hearing that was occupied with evidence on issues on which the Committee failed. It would be particularly difficult to do so in this case in circumstances where some of the evidence at the hearing (inevitably) was concerned with historical issues. Both sides clearly wished to ensure that the court should be fully apprised of the reasons why they had adopted positions in the past. For example, the HSE spent some time, in the course of the evidence, in dealing with the suitability of the Community Nursing Unit as a place of care for the Ward.

46. I therefore do not believe that I can carry out a scientific analysis of the kind envisaged by Clarke J. in *Veolia*. It seems to me that the best I can do is to take the more rough and ready approach which has been adopted by the High Court in *Wright* and in *Anderson* and by the Court of Appeal in *Naylor* and also by the Supreme Court in *Sheehan v. Corr*. I am of the view that, in order to do justice between the parties, some deduction has to be made from any costs recoverable by the Committee to take account of the fact that the hearing was undoubtedly prolonged by the continued maintenance of the claim by the Committee to round the clock care by two homecare assistants. I must also bear in mind that the result falls significantly short of what was sought by the Committee. It seems to me that the outcome is best characterised as a partial success on the issue of homecare by the Committee. In addition, I must have regard to the fact that the Committee has fully failed on the DNR issue. Taking all of these matters into consideration, it seems to me that, if the Committee is to be awarded costs in these proceedings (and the ultimate decision on this issue will depend upon the view I form in relation to the refusal of the Committee to accept the offer made by the HSE in February 2019) the Committee should only be entitled to recover a proportion of its costs of the proceedings. In my opinion, viewing the matter in the round and bearing in mind the considerations outlined above, the appropriate proportion is 60%. In addition, however, it seems to me that I should also disallow in its entirety the costs of one day of the four day hearing which took place in March 2019. This is to reflect the fact that at least some of the evidence which was heard by me during the course of the hearing related to the DNR issue on which the Committee has wholly failed and a more significant amount of time was spent on the case made by the Committee for round the clock care by two carers on a 365 day basis (on which the Committee also substantially failed).

The impact of the offer made by the HSE in February 2019

47. If the ultimate decision in this case had been to approve, without any significant modification, the proposal made by the HSE in February 2019, I would have no hesitation in confining the award of costs to the Committee to the period up to the date of the HSE proposal. However, I have come to the conclusion that it would not be appropriate to

take that course in circumstances where a significant modification was in fact made to that proposal in July 2019 in response to the observations made by me during the course of the post-judgment hearing which took place in June 2019. In my view, the modification which was made in June 2019 represented a significant change to what had been proposed previously. In the course of the post-judgment hearing which had taken place in June 2019, I had indicated in strong terms to the HSE that I believed that serious consideration should be given to providing some level of respite care to assist the parents of the Ward on whom a significant burden now lies under the care package proposed by the HSE. They would essentially have to be available virtually 24 hours a day to assist in the day to day care of the ward. In taking this important adjustment to the care package into account, I am acutely conscious of the submissions made by counsel for the HSE that the HSE should not be penalised in costs as a consequence of the "*gesture*" made by it in response to the appeal which I made to the HSE in the course of the post-judgment hearing in June 2019. I fully acknowledge the force of the submission made by counsel for the HSE that its officers may hesitate in the future to offer (by way of gesture) to provide an additional resource if any such offer is capable of having costs consequences for the HSE. It would be highly undesirable that any decision of the court should have that consequence. However, having very carefully reflected on the issue, I do not believe that it is correct to characterise the modification made by the HSE in July 2019 as a gesture of that kind. While I fully acknowledge that the modification was made with goodwill on the part of the HSE, it was not made spontaneously but was prompted by the serious concerns which I expressed in the course of the post-judgment hearing in June 2019. In practical terms, it was a modification that was extracted from the HSE as a consequence of the concerns expressed by me. Had this modification not been made, it would, in my view, have been necessary for me to resolve the legal issue as to whether the HSE could be compelled to provide a homecare package in the particular circumstances of this case. While the HSE may not have considered itself to be at any significant risk in relation to the determination of that issue, it is inconceivable that the HSE thought it was at no risk of an adverse finding on the issue. In those circumstances, I have come to the conclusion, in the very particular circumstances of this case, that it is appropriate for the court to have regard to the modification that was made. Given the significance of the modification, I believe it is both reasonable and appropriate to take the view that what was ultimately offered in July 2019 represents a significant improvement over the offer previously made in February 2019. In those circumstances, I do not believe that I could reasonably form the view that the Committee should be deprived of a costs order in this case by reason of its failure to accept the offer made by the HSE in February 2019 a number of weeks before the hearing commenced on 5th March, 2019.

Other considerations?

48. In light of the views which I have reached on the basis of the application of O.99 principles, I do not believe that it is necessary to address any of the discretionary factors that might arise in accordance with the decision of the Supreme Court in *Dunne v. Minister for the Environment* [2008] 2 I.R. 775. That issue was addressed by the HSE solely in the context of resisting an order for costs against it in the event that the court were to conclude, on the application of O.99 principles, that the HSE had been the

successful party. The HSE argued that, in those circumstances, there would be no basis on which to award costs against it by reference to the discretionary factors identified by the Supreme Court in that case. It was in that context that the HSE had made submissions in relation to the matters summarised in para. 16 above. Having regard to my view that the Committee is entitled to costs on O.99 principles, it is unnecessary to consider these additional arguments on the part of the HSE (as summarised in paragraph 16 above).

Conclusion

49. For all of the reasons outlined above, I have come to the view the Committee should be entitled to 60% of its costs of these proceedings save that no costs whatever should be allowed for one day of the four day hearing which took place in March 2019.