THE HIGH COURT
COMMERCIAL

[2022] IEHC 532
[2020 No. 707 J.R.]
[2020 No. 146 COM]

BETWEEN

MAXIMILIAN SCHREMS

APPLICANT

AND

DATA PROTECTION COMMISSION

RESPONDENT

AND

FACEBOOK IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered electronically on the 29th day of September 2022.

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1. Introduction

1. The judgment of the Court of Justice of the European Union in Case C-311/18 *Data Protection Commissioner v. Facebook Ireland Ltd. And Maximilian Schrems* ("*Schrems II*") on 16 July 2020 and the steps taken by the Data Protection Commission ("DPC") following that judgment set in train a series of events which led to two sets of further proceedings being commenced in the High Court, one by Facebook Ireland Limited ("FBI") and the other by Mr. Schrems.

2. Mr. Schrems was a Notice Party to the proceedings brought by FBI (the "Facebook proceedings") and fully participated at the hearing of those proceedings in December 2020. The Facebook proceedings were heard and determined by me. In a judgment delivered on 14 May 2021, [2021] IEHC 336 (the "Facebook judgment"), I dismissed FBI's claims in those proceedings. Orders were then made on consent on 20 May 2021.

3. Those orders included an order that FBI pay 90% of the DPC's costs of the Facebook proceedings and all of Mr. Schrems' costs of those proceedings.

4. The proceedings brought by Mr. Schrems, i.e., these proceedings, had been listed for hearing to commence on 13 January 2021 following the conclusion of the hearing of the Facebook proceedings. However, following an exchange of correspondence between Mr. Schrems' solicitors and the DPC's solicitors between 4 December 2020 and 12 January 2021 (and culminating in an agreement evidenced, in part at least, by a letter from Philip Lee, the DPC's solicitors, to Ahern Rudden Quigley ("ARQ"), Mr. Schrems' solicitors, dated 12 January 2021), Mr. Schrems and the DPC agreed to resolve all substantive issues in dispute in the proceedings on certain terms. However, the parties expressly left over the issue of the costs of the proceedings to be determined by me once I had delivered judgment in the Facebook

proceedings. Subsequent to the delivery of the judgment in the Facebook proceedings on 14 May 2021 and to the making of orders in those proceedings on 20 May 2021, I directed the exchange of submissions between Mr. Schrems and the DPC on the issue of costs and held a hearing on that issue. This is my judgment on the costs issue.

2. Summary of Decision on Costs Issue

5. In summary, the respective positions of the parties were as follows. Mr. Schrems sought his costs in full against the DPC on the basis that he had succeeded in obtaining a *"substantial part"* of the reliefs he was seeking in the proceedings, in accordance with the principles set out by Murray J. in his judgment for the Court of Appeal in *Hughes v. Revenue Commissioners* [2021] IECA 5 (*"Hughes"*). In response, the DPC contended that there should be no order as to costs, on the basis that Mr. Schrems had not obtained the main relief he was seeking in the proceedings, which, it said, was an order quashing the DPC's decision to commence the inquiry the subject of the proceedings and that both parties had moved or compromised their respective positions on the other reliefs sought in the proceedings. It contended that Mr. Schrems had not obtained a *"substantial part"* of the relief he was seeking in the proceedings and that, therefore, in accordance with the applicable principles set out, principally, in *Hughes*, I should make no order as to costs.

6. As I explain in more detail below, I am satisfied that the appropriate order to make in the exercise of my discretion in accordance with the applicable legal principles and the order which best does justice between the parties is that the DPC should pay 80% of Mr. Schrems' costs of the proceedings to be adjudicated upon in default of agreement. That is the order for costs which I will make in the proceedings.

3. Background

7. A good deal of the relevant background is set out in the Facebook judgment. It is unnecessary and would be disproportionate to the issue which I have to decide to set out that background again in any great detail here. I refer in that regard to ss. 4-8, paras. 12-96 of the Facebook judgment. The procedural background is set out in s.9, at paras. 97 to 103. Reference is made to the resolution of Mr. Schrems' proceedings in s.10, paras. 104-106. I adopt all of that background for the purposes of this judgment.

8. In very short summary, following the judgment of the CJEU in *Schrems II* on 16 July 2020 and exchanges of correspondence between Mr. Schrems and his solicitors and the DPC, and between Mr. Schrems' solicitors and FBI's solicitors, the DPC decided to undertake an own-volition inquiry to be conducted pursuant to s.110 of the Data Protection Act 2018 (the "2018 Act") and Article 16 of the GDPR. The purpose of the inquiry was to consider two issues, namely:

(a) Whether FBI was acting lawfully and in a manner compatible with the GDPR in making transfers of personal data relating to individuals in the EU/EEA using or interacting with FBI's services to Facebook Inc. pursuant to certain standard contractual clauses (SCCS) following the judgment in *Schrems II;* and

(b) Whether and/or which corrective power should be exercised by the DPC under the GDPR in the event that it reached the conclusion that FBI was acting unlawfully and infringing the GDPR.

9. The DPC informed FBI of its decision by letter dated 28 August 2020. That letter enclosed a "Preliminary Draft Decision" ("PDD"). I will refer shortly to aspects of the 28 August 2020 letter and the PDD. The DPC informed Mr. Schrems of its

decision in a letter dated 31 August 2020 following which further correspondence was exchanged between the DPC and FBI's solicitors and Mr. Schrems' solicitors. It will also be necessary to refer later in more detail to some aspects of the correspondence exchanged between the DPC's solicitors and Mr. Schrems' solicitors.

10. Following further correspondence between FBI and the DPC, FBI commenced the Facebook proceedings seeking to challenge the DPC's decision to commence the inquiry on 14 September 2020. FBI obtained a stay on the taking of any further steps in the inquiry pending the determination of those proceedings.

11. Mr. Schrems commenced the present proceedings seeking to challenge the DPC's decision and its failure expeditiously to progress and conclude its investigation into a complaint originally made by Mr. Schrems back in 2013, which was reformulated in December 2015, in circumstances described in s.4, paras. 12-26 of the Facebook judgment.

12. By orders made on 29 October 2020, Mr. Schrems was joined as a notice party to the Facebook proceedings and FBI was joined as a notice party to Mr. Schrems' proceedings. Directions were made for the hearing of both sets of proceedings sequentially.

13. The Facebook proceedings were listed for hearing, commencing on 15 December 2020. They were heard over the course of five days between 15 December 2020 and 21 December 2020. Mr. Schrems played an active role in the Facebook proceedings and made written and oral submissions through counsel at the hearing. Judgment was reserved in the Facebook proceedings on 21 December 2020.

14. Directions were made for the hearing of Mr. Schrems' proceedings to commence on 13 January 2021 and for the exchange of written submissions in advance of that date. Mr. Schrems' furnished his written submissions in these

proceedings on 10 December 2020. FBI, as a notice party in the proceedings, provided its written submissions on 23 December 2020. The DPC provided its written submissions on 7 January 2021. In those submissions the DPC contended that, in light of certain correspondence exchanged between it and Mr. Schrems' solicitors between 4 December 2020 and 7 January 2021, the proceedings were moot and that issues and reliefs sought by Mr. Schrems had been fully addressed.

15. As we shall see, Mr. Schrems did not agree with that contention. Further correspondence was sent on his behalf on 8 January 2021. Following further engagement between the parties culminating in the letter from Philip Lee of 12 January 2021, it was accepted by both parties that the proceedings were resolved on terms which were, for the most part, set out in that letter of 12 January 2021, although it appears to be common case that at least one aspect of the agreement between the parties concerning the submission of a further reformulated complaint by Mr. Schrems was addressed in an earlier letter and is not referred to in the 12 January 2021 letter. As the letter makes clear, the parties agreed to leave the issue of costs to be determined by me.

4. Approach to Determination of Costs Issue

16. Before considering the arguments of the parties in support of the order for costs which each contends should be made, in the circumstances, it is necessary to go back to some of the correspondence exchanged between the parties prior and subsequent to the commencement of the proceedings and to look at some aspects of the pleadings. It is, however, necessary to bear in mind that, in adjudicating on the costs issue, I am precluded from taking into account the strength of Mr. Schrems' case in the proceedings and that of the DPC's response to that case. I cannot factor into my

consideration of the costs issue any consideration of whether it could be said with confidence which party would have won the case had it gone to trial. This is clear from the decision of the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] 3 IR 222 (*"Cunningham"*) *per* Clarke J. at para. 21 and from the decision of the Court of Appeal in *Hughes*, *per* Murray J. at para. 55. I do note, however, that in that same paragraph Murray J. stated that, at least where it could be said with confidence that a case was *"noticeably weak or self-evidently strong"*, account should be taken of that in deciding on the appropriate costs order in circumstances where a case has been compromised but the issue of costs has been left over to the court. However, that qualification does not apply here as neither side contended that the other side's case was either *"noticeably weak"* or *"self-evidently strong"*. I am, therefore, precluded from considering the strengths and weaknesses of the case on each side and who I believe might have won the case had it run to trial.

5. Relevant Correspondence and Pleadings

17. Mr. Schrems was informed of the DPC's decision to undertake the own-volition inquiry in a letter from the DPC dated 31 August 2020. Some aspects of that letter are relevant to the issue as to whether Mr. Schrems should get some or all of the costs of the proceedings. Having informed Mr. Schrems of the decision and of the issues to be considered in the inquiry, the DPC informed him that it had written to FBI identifying the issues the subject of the inquiry, setting out its preliminary views on those issues and noting that FBI had been invited to respond within 21 days. The letter then stated that FBI's response would be carefully considered by the DPC following which a draft decision would be prepared pursuant to Article 60(3) of the GDPR and issued to other European supervisory authorities. It further stated that it was anticipated that a

draft decision would be submitted to the Article 60 procedure within 21 days of receiving FBI's submissions. The letter then contained the following:

> *"Thereafter, the Commission will, in turn, review and consider such further or other steps as may be required to conclude its ongoing investigation into your complaint".*

18. It seems pretty clear from the letter that, contrary to what was subsequently submitted on its behalf, the DPC was proposing to conduct the inquiry, consider submissions from FBI and then prepare a draft decision for the purposes of the Article 60 procedure without reference to Mr. Schrems. It was only *"thereafter"* i.e., after it had taken those steps, that the DPC would in turn review, consider and conclude its investigation into Mr. Schrems' reformulated complaint. The letter then stated that *"at this point"* (i.e. at 31 August 2020) the DPC *"neither requires nor intends to call for further submissions"* from Mr. Schrems and referred to the fact that extensive submissions and materials had already been provided by Mr. Schrems in the course of the earlier proceedings. The letter stated that the DPC *"will review and, if necessary, determine your complaint following the completion of the inquiry"* described in the letter and stated that Mr. Schrems will be given *"an opportunity to make a submission to the Commission <u>at that point</u>, prior to the determination of your complaint"* (emphasis added).

19. It seems to me that a clear reading of that letter is that the DPC did not intend to seek submissions from Mr. Schrems in the context of the inquiry and that it was only after the completion of the inquiry that it would turn to a review and, if necessary, a determination of Mr. Schrems' complaint and that it would only be *"at that point"* that he would be given an opportunity to make a submission to the DPC prior to its determination of the complaint.

20. A similar message was conveyed by the DPC to FBI in its letter of 28 August 2020 informing FBI of its decision to undertake the inquiry and furnishing it with the PDD. In referring to the enclosed PDD, the DPC's letter to FBI stated that it would notify Mr. Schrems of the inquiry *"as it is undoubtedly relevant to the Commission's ongoing investigation into the complaint"*. The letter continued:

> *"At this point, however, the Commission proposes to progress the inquiry to conclusion in the first instance, at which point it will then review and consider such further or other steps as may be required to conclude its ongoing investigation into the complaint. For clarity, as the inquiry is an own-volition inquiry, it is not the intention of the Commission at this point to accept submissions from Mr. Schrems."*

21. ARQ, Mr. Schrems' solicitors, replied to the letter of 31 August 2020 on 7 September 2020. Several points were made in opposition to the DPC's decision and proposed course of action. It was said that the DPC was acting in breach of an undertaking given to the High Court on 20 October 2020 to investigate Mr. Schrems' complaint *"with all due diligence and speed"*. It was argued that there was no rational reason for undertaking the inquiry, that the inquiry would lead to further delay in the consideration of Mr. Schrems' complaint and a duplication of work. It was asserted that there was no reason why the DPC could not issue a decision in relation to the complaint within a similar time period as set out for the inquiry. It was contended that the inquiry breached Mr. Schrems' right to be heard, in that the intention appeared to be to produce a decision which would inform and perhaps determine the investigation into Mr. Schrems' complaint without allowing him an opportunity to be heard in relation to that decision. It was further contended that the DPC's actions in opening the inquiry and its express exclusion of an entitlement on

the part of Mr. Schrems to make submissions was a clear breach of his right to be heard in relation to the inquiry and in relation to the investigation of his existing complaint. It was also argued, without prejudice to Mr. Schrems' position, that the inquiry was irrational and that the scope of the inquiry was insufficient to deal with Mr. Schrems' complaint. At the conclusion of the letter, Mr. Schrems' solicitors called on the DPC to confirm that it would not proceed with the inquiry but rather would deal with all issues in the context of Mr. Schrems' complaint and that if the DPC failed to do so, proceedings would be commenced and an injunction sought restraining the DPC from proceeding with the inquiry and compelling it to comply with the High Court undertaking by immediately resuming investigation of his complaint.

22. The DPC replied in a detailed letter dated 10 September 2020. In that letter the DPC explained the rationale for the inquiry. In the course of that explanation, the DPC contended that, having regard to ss.8(2) and (3) of the 2018 Act, any continued investigation into Mr. Schrems' complaint would be governed by the previous Act, the Data Protection Act 1988 (the "1988 Act") and not by the GDPR. The DPC explained its position that the inquiry was a separate own-volition inquiry conducted under a different legal regime to that which applied to the investigation of Mr. Schrems' complaint and was concerned with the personal data of EU data subjects rather than being concerned solely with Mr. Schrems' data transfers. On the issue of the timing of the investigation into Mr. Schrems' complaint, the DPC maintained that the handling of the complaint was not being suspended. Rather, it contended, the DPC was proceeding with all due expedition and in a logical sequence to deal with matters relevant to data subjects generally in the first instance. With respect to the

scope of the inquiry, the DPC disputed Mr. Schrems' claim. In that context, the letter stated:

> *"Given that the inquiry is an own-volition inquiry, we do not regard your client as having any standing to comment on the scope of the inquiry"*

23. With respect to the claim of a breach of Mr. Schrems' right to be heard, the letter reiterated that Mr. Schrems' complaint would be addressed on its merits and that he would be invited to make a further submission to the DPC before that complaint was determined. On that basis it was disputed that Mr. Schrems had been denied fair procedures. The DPC rejected the contention that the purpose of the inquiry was to produce a decision which would inform and perhaps determine the investigation into the complaint without allowing Mr. Schrems the opportunity to be heard in relation to that decision. In the conclusion to the letter, the DPC stated that the course of action on which it had embarked was both necessary and appropriate and that, therefore, the confirmation requested by Mr. Schrems would not be given, and any proceedings brought by him would be fully defended.

24. Mr. Schrems' solicitors replied in a short letter dated 7 October 2020. That letter did not engage in detail on the contents of the DPC letter of 10 September 2020. It informed the DPC that Mr. Schrems would be issuing proceedings but would not need to seek injunctive relief in light of the stay obtained by FBI when it commenced it proceedings.

6. <u>The Proceedings</u>

25. Mr. Schrems obtained leave to bring the proceedings on 12 October 2020. He sought a number of reliefs in the proceedings which can conveniently be grouped together.

26. Reliefs 1 – 3 sought:

(1) an order quashing the DPC's decision to open the own-volition inquiry pursuant to s. 110 of the 2018 Act;

(2) a declaration that the DPC failed to provide Mr. Schrems with any or any sufficient reasons for its decision to open the own-volition inquiry rather than a complaints-based inquiry; and

(3) a declaration that any inquiry to be conducted into the issues the subject of the proposed own-volition inquiry had to be conducted as part of a complaints-based inquiry arising from Mr. Schrems' reformulated complaint within the meaning of s. 110 of the 2018 Act.

27. Reliefs 4 – 6 sought:

(4) an order of *mandamus* directing the DPC to complete its investigation of the reformulated complaint with all due diligence and speed;

(5) a declaration that the DPC failed to provide any or any adequate reasons why the investigation of the reformulated complaint could not proceed in any event; and

(6) a declaration that the DPC failed to provide Mr. Schrems with any or any sufficient reason for the suspension or "sequencing" of the reformulated complaint pending the outcome of the own-volition inquiry.

28. Relief 7 sought a declaration that the DPC acted in breach of Mr. Schrems' right to be heard and his right to fair procedures by refusing to permit him to make submissions in the inquiry which it was said was a procedure intended to affect his rights and the outcome of his reformulated complaint.

29. Relief 8 sought an order of *certiorari* quashing the DPC's decision that the investigation of the reformulated complaint was to be conducted solely by reference

to the 1988 Act and the predecessor to the GDPR, namely, Directive 95/46/EC (the "Directive").

30. Reliefs 9 and 10 concerned Mr. Schrems' request for access to certain documents. Relief 10 sought a declaration that by refusing to provide a submission made by FBI in response to Mr. Schrems' reformulated complaint, the DPC had breached Mr. Schrems' right to fair procedures. Relief 9 sought an order of *mandamus* directing the DPC to provide copies of all documents received from or sent to FBI in the context of the investigation of Mr. Schrems' original complaint and his reformulated complaint.

31. The grounds on which Mr. Schrems sought those reliefs were then set out in the statement of claim under four headings. They were:

(i) the DPC's obligation to investigate the complaint/the reformulated complaint with all due diligence and speed;

(ii) the alleged breach by the DPC of its obligation to investigate the complaint/the reformulated complaints;

(iii) the allegations that the DPC's actions were *ultra vires*, unreasonable, irrational and/or a breach of Mr. Schrems' rights to fair procedures and his right to be heard; and

(iv) Mr. Schrems' case concerning the law applicable to the investigation of his reformulated complaint.

32. Mr. Schrems contended that various provisions of the 1988 Act, the Directive, the judgment of the CJEU in *Schrems I*, the order of the High Court of 20th October 2015, the GDPR and the judgment of the CJEU in *Schrems II* imposed an obligation on the DPC to investigate Mr. Schrems' reformulated complaint with all due diligence. He further contended that the DPC was in breach of that obligation by

commencing the own-volition inquiry and sequencing that inquiry to be completed prior to completion of the investigation of the reformulated complaint. Mr. Schrems claimed that the decision by the DPC to open an own-volition inquiry in the particular circumstances was *ultra vires* its powers under the 2018 Act. He further claimed that where all the relevant issues flowed from the reformulated complaint, which remained unresolved, a claim that the inquiry was commenced of the DPC's own-volition was unsustainable, irrational and illogical. Mr. Schrems contended that the DPC failed to provide any or any adequate reason for its decision to sequence the inquiry and the investigation into the reformulated complaint in the manner in which it did. At para. 67, he claimed that the DPC failed to provide any reasons why *"at the very least the investigation cannot continue in tandem and/or form part of the inquiry"* so far as it is/was admitted to affect Mr. Schrems' interests and the reformulated complaint and that such a course of action would preserve Mr. Schrems' rights rather than deprive him of those rights. Mr. Schrems complained that the opening of the own-volition inquiry excluded him from the process and that he was not permitted to make submissions on issues relevant to the reformulated complaint. This, he said, was a denial of his rights to be heard, and to due process.

33. With respect to the law applicable to the investigation, Mr. Schrems disputed the position adopted by the DPC in its letter of 10 September 2020, that the 1988 Act and the Directive were the governing provisions for the investigation of the reformulated complaint. He noted (at para. 70 of the statement of grounds) that, while agreeing that the infringement of data protection law occurring before the GDPR came into effect had to be assessed in light of the 1988 Act and the Directive, it was Mr. Schrems' case that any continuing infringement had to be assessed by reference to the provisions of the GDPR. He claimed that the DPC could not lawfully maintain

that the investigation of the reformulated complaint had to be conducted by reference solely to the 1988 Act but had to take account of the relevant provisions of the GDPR and of the 2018 Act.

34. In its statement of opposition, the DPC opposed all of the reliefs sought by Mr. Schrems and disputed all of the grounds advanced by him in support of those reliefs. At the outset of its statement of opposition, the DPC pleaded that Mr. Schrems' application turned on *"at least six flawed and misconceived premises"*. Certain of those alleged premises are relevant to the costs issue.

35. It was contended that it was a flawed premise that Mr. Schrems would be an appropriate participant in the own-volition inquiry and that he was not affected any differently to any other data subject and, therefore, had advanced no basis requiring that he, over all other EU data subjects, should be entitled to participate in the inquiry.

36. The next alleged flawed premise was that the DPC had reached a concluded view that Mr. Schrems could not participate in the inquiry. The DPC referred to its letter of 31 August 2020 and contended that in that letter Mr. Schrems was informed that the DPC would not hear submissions from Mr. Schrems *"at that point"* but that no concluded view was reached in that regard. As noted earlier, I do not accept that that is a correct reading of the letter or of the message it conveyed to Mr. Schrems at the time.

37. The next alleged misconceived premise related to Mr. Schrems' application to be permitted to make submissions in the inquiry and in particular Relief 7 sought by him. For various reasons, it was pleaded that Mr. Schrems did not have any such entitlement.

38. The next alleged false premise concerned the Relief 8 sought, which was that the DPC could convert its investigation of the reformulated complaint into an

investigation under the GDPR. It was said that Mr. Schrems had overlooked certain matters in advancing that case and reference was made to the coming into force of the GDPR on 25 May 2018, to Article 99 of the GDPR and to ss.8(2) and (3) of the 2018 Act. The DPC expressly pleaded (at para 34(7)) that it was bound to conclude its investigation into the reformulated complaint by reference to the 1988 Act and the Directive. Later at para. 144(3) the DPC denied that the GDPR and the 2018 Act applied to the reformulated complaint. It maintained that position at paras. 159 to 161 of the statement of opposition.

39. The DPC also raised a further alleged mistaken premise underpinning the application which was that its decision to commence the inquiry and as to how to conduct the inquiry, as well as its decisions in relation to the investigation of the reformulated complaint and as to the sequencing of that investigation and the own-volition inquiry, were amenable to judicial review.

40. The statement of opposition then contained detailed pleas setting out the DPC's specific opposition to the various grounds on which Mr. Schrems sought the reliefs in the proceedings. Each of the grounds advanced by Mr. Schrems was fully disputed by the DPC. No concessions were offered by the DPC in respect of any of the reliefs sought or in respect of any of the grounds advanced by Mr. Schrems. The position was therefore that as of the delivery of the statement of opposition, the DPC was opposing all of the reliefs sought by Mr. Schrems and disputing all of the grounds on which those reliefs were sought.

7. <u>Correspondence leading to Compromise of the Proceedings</u>

41. As noted earlier, the Facebook proceedings were due to commence at hearing on 15 December 2020. The hearing of Mr. Schrems' proceedings was due to start on

13 January 2022. Before Mr. Schrems furnished his written submissions in these proceedings and before the hearing of the Facebook proceedings commenced on 15 December 2020, Philip Lee wrote to ARQ on 4 December 2020. That letter made an significant concession by the DPC and started a further train of correspondence which ultimately led to the compromise of the proceedings on 12 January 2021.

42. In the letter of 4 December 2020, the DPC maintained that both in the earlier correspondence and in its statement of opposition, it was made clear that the DPC's position was that *"at that point"* it was not proposed to hear from Mr. Schrems in connection with the own-volition inquiry. It was maintained that no final decision had been made by the DPC to exclude Mr. Schrems' participation in the own-volition inquiry. Without prejudice to that position, the letter went on to propose that, in order to avoid further expense in litigating the issue and with a view to narrowing the differences between the parties, the DPC had decided that it would hear from Mr. Schrems in the own-volition inquiry on certain terms which were then set out. Those terms (which ultimately formed part of the terms on which the proceedings were compromised) provided for Mr. Schrems to make submissions in the context of the inquiry as an interested party and to retain his right to make further submissions in the context of the investigation of his reformulated complaint.

43. I agree with Mr. Schrems that this was a significant change from the DPC's previous position. Up to then, the DPC's position (both in the correspondence and in the statement of opposition) was to the effect that Mr. Schrems did not have a right to be heard in connection with the own-volition inquiry. I do not agree that the proper interpretation of the correspondence and the statement of opposition is that the DPC had left open a decision on whether Mr. Schrems would be permitted to participate in the own-volition inquiry. In my view, the correct interpretation of the correspondence

and the statement of opposition is that it was only after the inquiry was completed that Mr. Schrems would be given an opportunity to make a submission and only then in the context of the reformulated complaint. The Philip Lee letter of 4 December 2020, therefore, made a significant concession on this issue and concerned one of the reliefs sought by Mr. Schrems.

44. ARQ, Mr. Schrems' solicitors, did not reply to the letter of 4 December 2020. Mr. Schrems delivered his written submissions in the proceedings on 10 December 2020. The hearing of the Facebook proceedings commenced on 15 December 2020. Mr. Schrems participated fully in those proceedings. He supported some of the grounds advanced by FBI and opposed some of those grounds. Mr. Schrems' counsel addressed the court on 18 December 2020. Subject to one point which it was agreed would be left over to be argued in the context of Mr. Schrems' proceedings, the hearing of the Facebook proceeding concluded on 21 December 2020.

45. On the following day, 22 December 2020, Philip Lee wrote again to ARQ. This was a very significant letter and, in my view, contained a number of significant concessions by the DPC in addition to that made in the letter of 4 December 2020. The letter of 22 December 2020 started by referring to the submissions made by Mr. Schrems' counsel in the Facebook proceedings on 18 December 2020. It was asserted in the letter that, having considered those submissions, there appeared to be *"little, if any, difference between the positions of"* the DPC and Mr. Schrems. The letter referred to the *"primary relief"* which Mr. Schrems was seeking, namely, an order quashing the decision of the DPC to open the own-volition inquiry such that all issues relating to FBI's transfers of data to the United States would be addressed solely in the context of Mr. Schrems' complaint. The letter then stated that although the DPC would disagree with Mr. Schrems in relation to the *"primary relief"* which he was

seeking, that disagreement had become *"less important*" in light of the other matters dealt with in the letter.

46. The letter then referred to the *"second broad relief"* which Mr. Schrems was seeking, as explained by his counsel to the court on 18 December 2020. That broad relief was described by Mr. Schrems' counsel as being *"an order requiring the DPC to proceed with this investigation of Mr. Schrems' complaint, whether instead of or in addition to the own-volition inquiry, as opposed to postponing it until after completion of the own-volition inquiry…"*. The letter noted that the DPC had previously understood that Mr. Schrems was seeking to have his complaint dealt with first and the own-volition inquiry postponed until after the complaint was addressed (in the event that it was not quashed). However, as a result of what was said by Mr. Schrems' counsel, the DPC understood that Mr. Schrems would be satisfied with a situation where his complaint would be processed *"concurrently and in parallel"* with the own-volition inquiry and the DPC was prepared to deal with the matter on that basis.

47. In my view, that was a very significant concession by the DPC and followed the earlier significant concession in the letter of 4 December 2020, which was not prompted by any statement or submission on behalf of Mr. Schrems. While Mr. Schrems did not seek any specific relief to the effect that the two processes should be conducted concurrently and in parallel, he did complain in the statement of grounds about the failure on the part of the DPC to provide reasons as to why the investigation into his complaint could not *"at the very least…continue in tandem and/or form part of the inquiry"* and that such a course of action would preserve Mr. Schrems' rights (para. 67 of the statement of grounds). That plea was denied in the statement of opposition (para. 156(3)). The concession by the DPC that it was prepared to deal

with both processes *"concurrently and in parallel"* was, in my view, a very significant one in light of the position adopted up to that point by the DPC.

48. The letter repeated the concession with respect to another of the reliefs sought by Mr. Schrems which had been made in the letter of 4 December 2020, which was that the DPC was prepared to allow Mr. Schrems to make submissions in the own-volition inquiry. That was a very significant concession in light of the position adopted by the DPC in the earlier correspondence and, in particular, in the letters of 31 August 2020 and 10 September 2020 and in its statement of opposition. As explained earlier, in my view, the proper interpretation of the words used in the letter of 10 September 2020 and in the relevant parts of the statement of opposition was that the inquiry would be conducted by the DPC and only after its completion would the DPC direct itself to the investigation of Mr. Schrems' complaint and only in the context of that investigation would Mr. Schrems be entitled to be heard. That position changed in the letter of 4 December 2020 and that change was reiterated in the letter of 22 December 2020.

49. Another significant concession in that letter was that the DPC was prepared to furnish Mr. Schrems with copies of all documents received from or sent to FBI in the context of the investigation into the original and reformulated complaint, subject to the potential need to redact some of that material. That concession was directly relevant to Reliefs 9 and 10 sought by Mr. Schrems in the statement of grounds. It represented a significant change of position on the part of the DPC which up to that point was not prepared to concede Mr. Schrems' entitlement to obtain copies of those documents.

50. Another significant concession in the letter concerned the law applicable to the investigation of Mr. Schrems' complaint. Having referred to the fact that Mr.

Schrems' complaint was made before the 2018 Act and the GDPR came into force and related to contraventions of the 1988 Act, and having regard to ss. 8(2) and 8(3) of the 2018 Act, the DPC's position was that the 1988 Act applied to the complaint and that, since the investigation had begun before the commencement of the 2018 Act it had to be completed in accordance with that Act. That was the position maintained by the DPC in the earlier correspondence, such as in the letter of 10 September 2020, and in its statement of opposition. However, the letter of 22 December 2020 stated that if Mr. Schrems confirmed that he was no longer asking the DPC to investigate data transfer prior to the date of the commencement of the 2018 Act and that the complaint should be treated as confined to transfers occurring after that date, the DPC could deal with the matter under the 2018 Act and the GDPR. It required an updated or reformulated version of the complaint to identify the relevant provisions of the GDPR. That was another significant concession by the DPC as it had maintained the position that the 1988 Act and the Directive applied in the earlier correspondence and in the pleadings. It had not made the suggestion that the complaint could be dealt with under the 2018 Act and the GDPR on the basis set out in the letter of 22 December 2020, prior to that letter.

51. On the basis of the position of the DPC as set out in the letter, it was asserted on behalf of the DPC that the *"primary relief"* sought by Mr. Schrems quashing the decision to commence the own-volition inquiry or preventing it from proceeding with the inquiry in advance of dealing with Mr. Schrems' complaint would not be necessary in circumstances where the DPC was prepared to deal with both matters concurrently once the own-volition inquiry resumed.

52. The letter of 22 December 2020 was copied to FBI's solicitors. It responded on 23 December 2020 raising certain queries in relation to the DPC's position as set out

in the letter of 22 December 2020. The contents of that letter are, however, not particularly relevant to the costs issue which I have to decide.

53. ARQ replied to the letter of 22 December 2020 on 5 January 2021. In that letter, it welcomed what it referred to as the *"significant shift in position"* by the DPC. It noted that the position adopted by the DPC prior to the 22 December 2020 letter was that the own-volition inquiry would be *"sequenced"* ahead of the investigation into Mr. Schrems' complaint and that investigation would not proceed until after the inquiry had concluded. The letter referred to Mr. Schrems' *"main concerns"* as always having been that the commencement of the own-volition inquiry created an obstacle to the timely completion of the investigation into the complaint and that the issues raised in the complaint might be dealt with in the inquiry without Mr. Schrems being afforded an opportunity to be heard. ARQ responded to the various points made in the letter of 22 December 2020.

54. First, while welcoming the commitment to complete the investigation into Mr. Schrems' complaint with *"all due diligence"*, the suggestion that both matters would be dealt with concurrently once the own-volition inquiry resumed, meant that it was not clear when the investigation into the complaint would take place as it was unclear if and when the inquiry would resume. It was asserted that the DPC's proposed course of action failed properly to address the DPC's independent obligations to investigate the complaint with all due diligence pursuant to the GDPR, the judgment in *Schrems II* and the undertaking previously given to the High Court. Mr. Schrems was seeking to have the investigation proceed immediately regardless of the course of the own-volition inquiry.

55. Second, without prejudice to Mr. Schrems' position that he had an entitlement to be heard in the own-volition inquiry as set out in his pleadings and in his

submissions in the proceedings, ARQ noted that Mr. Schrems was agreeable to the proposal that he be heard in the inquiry as set out originally in the letter of 4 December 2020 and as repeated in the letter of 22 December 2020.

56. Third, ARQ noted that if those two matters could be agreed, Mr. Schrems' concerns in relation to the own-volition inquiry would be *"substantially addressed"* and that *"no substantial disagreement"* would remain between Mr. Schrems and the DPC in relation to the inquiry.

57. Fourth, Mr. Schrems welcomed the fact that the DPC was prepared to furnish him with copies of the relevant documents and sought confirmation that the agreement also extended to further documents produced during the course of the investigation into the complaint.

58. Fifth, with respect to the law applicable to the investigation of his complaint, while asserting that Mr. Schrems was entitled to insist that violations prior to May 2018 be investigated and decided, in the event of an agreement between the parties, Mr. Schrems was willing expressly to limit his complaint to data transferred after 25 May 2018. It was said that that should give the DPC *"additional legal certainty"* and should *"simplify the proceedings"*. On that basis, it was ascertained that it was not necessary for the complaint to be reformulated.

59. Sixth, the letter referred to some of the issues raised by FBI in its letter of 23 December 2020.

60. Finally, the letter asserted that the DPC should discharge Mr. Schrems' costs of the proceedings.

61. Philip Lee replied on behalf of the DPC on 7 December 2021. The DPC's written submissions in the proceedings were also delivered on that date. In its letter of 7 January 2021, Philip Lee did not accept that there had been a *"significant shift"*

on the part of the DPC. The letter asserted that the *"clarification"* provided in the course of the submissions made on behalf of Mr. Schrems at the hearing of FBI's proceedings as to the *"true gravamen of his concerns"* had prompted the letter of 22 December 2020. The letter asserted that it had not been apparent prior to those submissions that Mr. Schrems' main concerns were that the inquiry constituted an obstacle to the timely completion of the investigation into Mr. Schrems' complaint and that the issues the subject of the complaint could be addressed without Mr. Schrems having the opportunity of being heard. It was said that there were only two issues remaining between the parties:

(a) the timetabling and/or sequencing of the handling of the complaint; and

(b) the issue of costs.

62. With respect to (a), it was said that the DPC could not immediately proceed with the investigation of the complaint in circumstances where some of the issues raised by FBI in the Facebook proceedings were directly relevant to the conduct of the complaint. The letter reiterated the commitment made in the letter of 22 December 2020 that the complaint would be handled expeditiously in accordance with the DPC's obligations under the GDPR and the 2018 Act.

63. With respect to (b), it was suggested that the question of costs be dealt with by the court once there was clarity between the DPC and Mr. Schrems as to the terms on which Mr. Schrems' proceedings would be discontinued and the court had ruled on all of the issues raised by FBI in the Facebook proceedings and in Mr. Schrems' proceedings.

64. The letter then responded to the specific points made in the ARQ letter of 5 January 2021. It referred to the DPC's intention to advance the inquiry and the handling of the complaint concurrently and to progress them as expeditiously as

possible in accordance with the DPC's obligation under the GDPR and the 2018 Act. It noted that the terms on which Mr. Schrems would be heard in the context of the own-volition inquiry were now agreed between the parties. Similarly, there was no disagreement in relation to the disclosure of the relevant materials and it was confirmed that any submissions made by FBI in the own-volition inquiry and in the context of Mr. Schrems' complaint would be shared with him. With respect to the applicable law, while the DPC was maintaining its interpretation of s.8 of the 2018 Act, the letter referred to confirmation that Mr. Schrems was willing to limit his complaint to transfers of his personal data to the United States after 25 May 2018.

65. On the same date, 7 January 2021, the DPC's written submissions in the proceedings were delivered. In those submissions the DPC referred to the correspondence which had been exchanged between the parties since 4 December 2020 and asserted that the proceedings were now moot as the issues raised and reliefs sought by Mr. Schrems had been fully addressed in that correspondence.

66. ARQ replied on 8 January 2021. There was still some disagreement between the parties at that stage. Objection was taken to the fact that the DPC had not confirmed its intention to resume the investigation of Mr. Schrems' complaint immediately and had not provided an indicative timeline or any backstop date for the conclusion of that investigation. On that basis, it was asserted that the dispute between the parties had not been resolved and would have to proceed to trial. It was contended in the letter that there was no legal impediment to the DPC proceeding with the investigation into the complaint immediately. Confirmation was sought in respect of certain other aspects of what was being proposed by the DPC.

67. It is evident there were discussions between the parties following the ARQ letter on 8 January 2021 and agreement was ultimately reached between the parties on the

substantive issues in the proceedings. Most of the terms of the agreement were set out in a letter from Philip Lee to ARQ dated 12 January 2021.

68. The purpose of the Philip Lee letter of 12 January 2021 was stated to be to *"confirm the matters we understand to be agreed between us by way of resolution of all issues arising"* in the proceedings apart from the issue of costs. The letter then set out in a series of numbered paragraphs the terms of the agreement between the parties, save in relation to the agreement by Mr. Schrems to limit his complaint to personal data transferred after 25 May 2018 as set out in the ARQ letter of 5 January 2021.

69. Those terms may be summarised as follows:

(1) It was agreed that if in my judgment in the Facebook proceedings I was to permit the DPC to proceed with the own-volition inquiry, the DPC agreed to advance the handling of Mr. Schrems' complaint and the own-volition inquiry from the date of the Facebook judgment as expeditiously as possible in accordance with its obligations under the GDPR and the 2018 Act.

(2) In the event that I was to rule that the inquiry could not proceed or if there was an appeal from a judgment finding that it could proceed and if a stay were imposed, the DPC would nonetheless advance its handling of the complaint under and by reference to ss. 109 and 113 of the 2018 Act.

(3) If I was to rule that the own-volition inquiry could proceed and the stay on that inquiry was lifted, the DPC agreed to hear from Mr. Schrems in that inquiry on the terms set out in the Philip Lee letter of 4 December 2020. Those terms were then reproduced in the letter of 12 January 2021.

(4) There was agreement in relation to the provision of materials by the DPC to Mr. Schrems including certain materials exchanged between the DPC

and FBI, submissions made by FBI in the own-volition inquiry and in respect of the complaint on certain terms and subject to any issue of confidentiality.

(5) The parties agreed that I would have to rule on the issue of costs in the proceedings once I delivered judgment in the Facebook proceedings.

In light of my judgment in the Facebook proceedings, the term agreed at (2) above did not arise.

70. It is clear from a comparison of what was being proposed at the outset by the DPC with respect to Mr. Schrems, what was sought by Mr. Schrems in the proceedings and what was ultimately agreed between the parties as substantially set out in the letter of 12 January 2021, that Mr. Schrems made very considerable gains in the proceedings. First, the DPC no longer took the position that it would deal initially with the own-volition inquiry and then with Mr Schrems' complaint. Rather it agreed to deal with both matters concurrently and in parallel. Second, the DPC expressly committed to progress both processes as expeditiously as possible in accordance with its obligations under the GDPR and the 2018 Act. Third, the DPC agreed that with respect to Mr. Schrems' complaints arising from the transfer of his personal data to the U.S. after 25 May 2018, the relevant provisions of the GDPR and the 2018 Act would apply. Fourth, the DPC agreed that Mr. Schrems would be heard in the inquiry on terms which were originally set out in the Philip Lee letter of 4 December 2020 and were repeated in subsequent correspondence, including in the letter of 12 January 2021. Prior to the letter of 4 December 2020, the DPC's position was that it would deal first and complete the own-volition inquiry before turning to Mr. Schrems' complaint and commence hearing from him. As I have explained earlier, I do not accept the interpretation offered by the DPC of its letter of 10 December 2020 and of

the relevant parts of its statement of opposition in relation to hearing from Mr. Schrems. Fifth, Mr. Schrems would receive the materials which he was seeking prior to and in the course of the proceedings (both in relation to the inquiry and in relation to his complaint). None of this was offered to Mr. Schrems prior to the commencement of the proceedings and prior to the letter of 4 December 2020 at which the first significant concession was made acknowledging Mr. Schrems' entitlement to be heard in the own-volition inquiry.

71. I must now briefly consider the applicable legal test, statutory provisions and legal principles to be applied in adjudicating upon the issue of costs which the parties left over to be decided by me. I must then apply those principles to the relevant facts as I have found them.

8. Applicable Legal Test: Statutory Provisions and Legal Principles

72. There is no dispute between the parties on the applicable legal principles. The new costs regime introduced by ss. 168 and 169 of the Legal Services Regulation Act 2015 ("the 2015 Act") applies to this case. O. 99, r.2 RSC provides that, subject to the provisions of statute (including ss. 168 and 169 of the 2015 Act), and except as otherwise provided by the RSC:

> *"(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."*

73. O. 99, r.3(1) RSC provides that "*the High Court, in considering the awarding of the costs of any action or step in any proceedings…in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable."*

74. Section 168 of the 2015 Act provides for the power to award legal costs in civil proceedings. Section 169(1) is headed *"Costs to follow event"* and provides that a party who is *"entirely successful"* in civil proceedings is entitled to an award of costs against the unsuccessful party unless the court orders otherwise. In that regard, the court has regard to the *"particular nature and circumstances of the case and the conduct of the proceedings by the parties"* including the matters set out in sub-paragraphs (a) to (g).

75. This is not a case where either party was *"entirely successful"* in the proceedings. The parties compromised the proceedings but left over the issue of costs to be determined by the court. The parties are agreed that the proceedings were rendered moot as a result of the settlement agreement (see, for example, *Lofinmikin v. Minister for Justice* [2013] 4 IR 274, *per* McKechnie J. at para. 65 and *Irwin v. Deasy* [2010] IESC 35) although, as noted by Murray J. in *Hughes* at para. 52, it might be better to describe the proceedings as having been compromised rather than rendered moot. Clear guidance on how a court should approach its decision on costs in a case where the parties have compromised the proceedings but left over the issue of costs to be determined by the court was given by Murray J. in *Hughes*. Both parties accept that this is the most relevant case for present purposes. I agree.

76. Murray J.'s judgment contains a helpful analysis of the development of the proper approach for a court to adopt when determining costs in a case which has become moot. He described how the courts developed a more structured approach than before through a series of cases starting with the judgment of Clarke J. in the High Court in *Telefonica 02 Ireland Limited v. Commission for Communications Regulation* [2011] IEHC 80 and the same judge's judgment for the Supreme Court in *Cunningham*. He traced the evolution of this approach through further judgments of

the Supreme Court in *Godsil v. Ireland* [2015] 4 IR 453 ("*Godsil*") and *Matta v. Minister for Justice, Equality and Law Reform* [2016] IESC 45 and referred to the helpful distillation and summary of the principles by Humphreys J. in the High Court in *MKIA (Palestine) v. IPAT* [2018] IEHC 134 at para. 6. Mr. Schrems relied on these various cases in the course of his written submissions.

77. Murray J. noted, at para. 30 of his judgment in *Hughes,* that the essential structure put in place by these cases could be reduced to three broad propositions which he then set out at paras. 31-33 of his judgment. The first is where the case has become moot as a result of an event which was entirely independent of the actions of the parties. In that situation the fairest outcome would generally be that each party should bear its own costs. The second is that where the case has become moot because of the actions of one of the parties (and where those actions follow from the facts of the proceedings or are properly categorised as *"unilateral"* or where they could reasonably have been taken before the proceedings or all of the costs were incurred), the costs should often be borne by the party who took those actions which resulted in the case becoming moot. The third proposition deals with the particular position of statutory bodies which, Murray J. noted, cannot be expected to suspend the discharge of their statutory functions merely because legal proceedings relating to the prior exercise of their powers are in existence.

78. Murray J. noted that the cases strike a balance between the various considerations in which the court has to consider whether the taking of the new decision which renders the proceedings moot constitutes a *"unilateral"* act or whether it has resulted from a change in external circumstances. He noted at para. 34 that each of those three propositions reflects a general approach rather than a set of *"fixed, rigid rules"*. He continued:

"The starting point is that the Court has an over-riding discretion in relation to the awarding of costs, and the decisions to which I have referred are intended to guide the exercise of that discretion. They are thus properly viewed as presenting a framework for the application of the Court's discretion in the allocation of costs in a particular context and should not be applied inflexibly or in an excessively prescriptive manner (PT v. Wicklow County Council [2019] IECA 346 at paras. 18 and 19)."

79. These observations were subsequently endorsed by Collins J. in his judgment for the Court of Appeal in *J.O. & Ors. v. Minister for Justice and Equality* [2021] IECA 293 at paras. 36 and 37 and reflect what the Supreme Court had previously stated in *Cunningham* and *Godsil*.

80. However, as Murray J. made clear, it may not be easy to apply the structured approach developed in *Cunningham* and in the other cases referred to where proceedings are resolved as a consequence of an event to which the parties have agreed (para. 50). Murray J. noted that it is necessary to distinguish between two different scenarios. He referred to the first of these scenarios at para. 51, which is where the respondent offers to the applicant all of the relief claimed in the action but makes no offer as to the costs incurred by the applicant. In such a situation, he explained that the *Cunningham* principles can be applied with *"only limited modification"*. He continued at para.51:-

"Provided the respondent has either been requested to grant the claimed relief before the action is started or has at the very least been given sufficient time to consider its position before substantial costs are incurred, by eventually agreeing to that relief the respondent will, prima facie, have changed its position and given the applicant what he instituted the proceedings to obtain.

Once the applicant accepts the offer the proceedings have become moot. Even though that mootness occurs through a bilateral agreement by which the applicant agrees not to seek relief, absent particular circumstances and/or evidence from the respondent establishing that the relief was offered for reasons that are not connected to the proceedings, the applicant should obtain at least some of his costs."

81. At para. 52, Murray J. described the second scenario which is where the applicant is only offered part of the relief sought. In that case, the application of the *Cunningham* principles does not resolve how the issue of costs should be determined. He explained that in such a case the applicant has a choice. He explained the choice as follows:

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

82. Murray J. concluded that *Hughes* was a case falling within the second of these scenarios and noted that it would be open to the court to refuse to make any order for costs on the basis that it was a matter for the parties to deal with costs when entering

into the relevant agreement. However, he observed that that would unnecessarily constrain the jurisdiction of the court and ignore *"the legitimate public interest in encouraging parties where possible to seek to resolve litigation"* (para. 54). At para. 56, Murray J. stressed that each case must depend on its facts but noted that the discretion of the court, which was governed by the then terms of O.99, r.1 RSC, had to take account of certain overriding considerations.

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> *"(i) the general public interest in obtaining a resolution of proceedings.*
>
> *(ii) the need to ensure that respondents/defendants are not inhibited in proposing reasonable measures to address proceedings by the concern that they will end up having to discharge the costs of an action they believe to be unmeritorious.*
>
> *(iii) the related consideration that where there are third party interests in play it would be undesirable that a respondent/defendant should have to choose between making a decision which will benefit third parties and paying the costs of an action which it believes unmeritorious, or not providing that benefit and fighting the case.*

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

84. While this case must be decided by reference to the recast O.99, the overriding considerations to which Murray J. referred to at para. 56 apply to varying extents in this case. The consideration referred to at para. (iii), which is directed to third party interests, is perhaps less relevant in the present case. The other three considerations are, however, relevant here.

85. I also completely agree with what Murray J. stated at para. 57 of his judgment. There he said:

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

86. I fully endorse those comments which have direct relevance to the issue which I have to decide.

87. Having set the scene as it were, Murray J. then set out four questions which are potentially relevant when deciding how costs should be addressed in a case falling within the second scenario described by him. At para. 58 he identified those questions as follows:

> *"(i) Did the agreement entered into between the parties result in the applicant obtaining a substantial part of the relief he sought in the action?*
>
> *(ii) Could the necessity for the proceedings or their continuation have been avoided by the agreement being offered to the applicant by the public body at an earlier stage in the process?*
>
> *(iii) Would the applicant have obtained the benefit of the resolution ultimately put in place without instituting proceedings?*
>
> *(iv) Is there any aspect of the conduct of the parties that militates against or in favour of their obtaining costs or having costs awarded against them?"*

88. Murray J. went on to answer those questions by reference to the facts of that case and concluded that the appropriate order to make was to award the applicant 50% of the costs of the proceedings.

89. I entirely accept that the approach which I should take in determining the appropriate order for costs to be made in these proceedings is that outlined by Murray J. in *Hughes* and the parties agree. While it was contended on behalf of Mr. Schrems that his case fell within the first of the two scenarios identified by Murray J. at para. 51 of his judgment, that submission was not really pressed on behalf of Mr. Schrems. On any fair reading of the pleadings and the correspondence in the case, it could not be said that Mr. Schrems obtained all of the relief claimed in the proceedings. The

DPC contended and ultimately it was, in effect, accepted by Mr. Schrems that this case came within the second scenario identified by Murray J. in that the applicant was offered and obtained, in substance, part of the relief which he was seeking.

90. That being the case, I agree that the roadmap to follow is that outlined by Murray J. in *Hughes*. The *Cunningham* principles cannot be applied without significant adaptation. The appropriate adaptation is that proposed by Murray J. at para. 58 by reference to the four questions which he set out there. Not all of those questions are necessary, and their potential relevance will depend on the facts. In this case, for example, both parties agree that question (iv), which asks whether any conduct of the parties might militate against or in favour of obtaining an order for costs, does not apply here. The relevant questions are questions (i) to (iii).

91. The first question to ask, therefore, is whether Mr. Schrems obtained a *"substantial part"* of the relief he sought in the action in the settlement reached with the DPC. The next question is whether the proceedings could have been avoided at the outset or brought to an end much sooner if the terms ultimately agreed had been proposed by the DPC at an earlier stage in the process. The final question is whether Mr. Schrems would have obtained the benefit of the resolution set out in the agreement ultimately reached with the DPC without having to bring the proceedings.

9. Application of Legal Test and Decision

92. As noted above, this case falls within the second of the two scenarios identified by Murray J. in *Hughes*. Mr. Schrems did not get all of the reliefs which he was seeking before commencing the proceedings and in the proceedings themselves in the terms agreed between the parties to settle the proceedings. In those circumstances, it would be open to me to refuse to make any order for costs on the basis that the parties

could have dealt with the question of costs in the agreement instead of leaving that issue for me to decide. However, I do not believe that that is the course which I should take. To do so would, in my view, unnecessarily constrain my jurisdiction under the recast O. 99 RSC and would fail properly to take into account the significant public interest in encouraging parties to seek to resolve their disputes, where at all possible. I am satisfied that, in considering the appropriate order for costs to be made, it is appropriate that I take into account certain of the *"overriding considerations"* referred to by Murray J. at para. 56 of his judgment in *Hughes*, including:

(a) the general public interest in proceedings being resolved by the parties;

(b) the public interest in ensuring that respondent or defendant parties do not feel constrained in proposing reasonable measures to address proceedings brought against them for fear that they will end up having to pay the costs of proceedings which they believe to be without merit;

(c) the fact that the court should exercise its discretion in adjudicating upon the question of costs in a manner which encourages applicant or plaintiff parties to identify clearly the relief they seek from the opposing side before commencing proceedings and equally encourages the opposing parties to face up to and address at the earliest opportunity the reliefs which are been claimed against them.

93. For these reasons, I am satisfied that it is appropriate and in the interests of justice that I attempt fairly to resolve the issue of costs and that I do not simply make no order as to costs on the basis that the parties chose not to agree that issue but decided to leave it to be decided by me.

94. As explained earlier, since this is a case which falls within the second of the two scenarios identified by Murray J., it is appropriate that I consider those questions

which he identified at para. 58 of his judgment as are relevant to the facts of this case. I agree with the parties that one of those questions is not relevant in that there is no aspect of the conduct of either Mr. Schrems or of the DPC which militates against or in favour of either party obtaining an order for costs or having such an order made against it. The other three questions ((i) – (iii)) are relevant and I will now briefly deal with them in turn.

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

95. It is contended on behalf of Mr. Schrems that he did receive a *"substantial part"* of the relief he sought in the proceedings in the agreement reached between the parties to compromise the proceedings. While it is accepted that he did not obtain an order quashing the DPC's decision to commence and proceed with the own-volition inquiry or the reliefs ancillary to that relief (i.e. Reliefs 1-3 in the statement of grounds), it was contended on his behalf that, in light of the other matters agreed, it was no longer necessary for Mr. Schrems to obtain those reliefs. In particular those matters were the DPC's agreement to conduct the own-volition inquiry and the investigation into Mr. Schrems' complaint concurrently and in a parallel manner, its decision to afford an entitlement to be heard to Mr. Schrems in the own-volition inquiry and its agreement to make available certain materials emanating from FBI in the context of Mr. Schrems' complaint and in the context of the own-volition inquiry. It was argued on his behalf that the concession of those additional matters by the DPC after the commencement of proceedings meant that he should obtain all of his costs in the proceedings.

96. In response, it was argued on behalf of the DPC that significant weight should be attached to the failure by Mr. Schrems to secure the principal relief which he

sought prior to and in the proceedings, namely, an order quashing the DPC's decision to commence the own-volition inquiry and not to deal with the issues raised as part of Mr. Schrems' complaint. While the DPC had agreed, in the terms of agreement reached between the parties, to deal with both processes concurrently and in parallel, its agreement to do so was prompted by the submissions made on behalf of Mr. Schrems in the Facebook proceedings which made clear, for the first time, that Mr. Schrems would be content with something less than the quashing of the DPC's decision to commence the own-volition inquiry and that he would be satisfied with the two processes being conducted at the same time. It was submitted on behalf of the DPC that this was not clear until those submissions were made in the Facebook proceedings. It was accepted that the DPC had shifted its position from where it was at in August/September 2020 to the position ultimately taken by it and agreed between the parties on 12 January 2021. However, it was submitted that Mr. Schrems had also significantly shifted his position from that taken prior to and in the proceedings where he had initially sought to quash the decision and to prevent the DPC from carrying out an own-volition inquiry to his ultimate agreement that such an inquiry could be conducted in tandem with the investigation of his complaint.

97. With respect to the agreement to hear from Mr. Schrems in the own-volition inquiry and to give him access, subject to issues of confidentiality, to materials provided by FBI in the investigation of Mr. Schrems' complaint and in the own-volition inquiry, it was acknowledged on behalf of the DPC that this did represent a shift in the position adopted by the DPC prior to 4 December 2020. However, the DPC sought to downplay the significance of the shift in its position by relying on the fact that, notwithstanding that the DPC indicated its agreement to hear from Mr.

Schrems in the context of the own-volition inquiry in the letter of 4 December 2020, Mr. Schrems did not respond to that offer until 5 January 2021.

98. With respect to the ultimate agreement as to the law applicable to the investigation of Mr. Schrems' complaint, the DPC argued that the position ultimately agreed between the parties on that issue represented a compromise between the parties and involved movement on both sides. Once Mr. Schrems agreed to confine his complaint to transfers of his personal data by FBI to the United States after 25 May 2018 (on 5 January 2021) then the DPC was in a position to confirm that the GDPR and the 2018 Act would apply. That represented a compromise between the parties.

99. In all the circumstances, therefore, the DPC argued that Mr. Schrems did not obtain a *"substantial part"* of the reliefs which he was seeking in the proceedings, that the overall result was effectively a *"score draw"* and that there should be no order as to costs.

100. It should be said, however, that both parties accepted that it was not an all-or-nothing situation. Both sides accepted that it would be open to me to make an order as to costs representing a percentage of the total costs, as was done in *Hughes*.

101. I am satisfied that, on the particular facts of this case as I have outlined them earlier, Mr. Schrems did succeed in obtaining a *"substantial part"* of the relief which he sought in the proceedings. The DPC shifted its position on several critical aspects of the proceedings at various points from 4 December 2020 onwards. I have already outlined where those shifts in its position occurred. The first significant shift was in the Philip Lee letter of 4 December 2020 when, for the first time, the DPC accepted that it would hear from Mr. Schrems in the own-volition inquiry on the terms set out in that letter. He was not afforded a right to be heard in the DPC's letter of 31 August 2020. When he protested, he was again denied a right to be heard in the DPC's letter

of 10 September 2020 where it was denied that there was any breach of fair procedures. Indeed, to emphasise the position, the DPC disputed Mr. Schrems' standing or entitlement to comment on the scope of the inquiry at all in that letter. Mr. Schrems challenged the refusal to hear from him in the inquiry. Relief 7 in the statement of grounds was directed at that issue. Mr. Schrems' claims to that relief were fully disputed by the DPC in the statement of opposition. I have already indicated that, in my view, the DPC's interpretation of the letters of 31 August 2020 and 10 September 2020 and of the relevant pleas in the statement of opposition is not correct. I am satisfied that a decision was made in August/September 2020 that Mr. Schrems would not be heard in the own-volition inquiry and that position was maintained in the correspondence and in the statement of opposition until it changed in the Philip Lee letter of 4 December 2020.

102. The second significant and major shift in the DPC's position came in the Philip Lee letter of 22 December 2020. That shift took a number of different forms. First, the DPC confirmed that it would be prepared to deal with the own-volition inquiry and with the investigation of Mr. Schrems' complaint concurrently and in parallel. This was a major move from the DPC's previous position, as explained earlier. That shift may have been promoted by Mr. Schrems' counsel's submissions in the Facebook proceedings on 18 December 2020 and, in particular, his reference to the *"second broad relief"* which was being sought in Mr. Schrems' proceedings, namely an order requiring the DPC to proceed with the investigation of Mr. Schrems' complaint *"instead of or in addition to"* the own-volition inquiry as opposed to postponing it until after the completion of that inquiry. However, while it is true that Relief 1 in the statement of grounds sought an order quashing the decision to commence the own-volition inquiry and while Reliefs 2 and 3 were directed to the

DPP's decision to commence the inquiry, Mr. Schrems did specifically plead (at para. 67) that the DPC failed to provide any or any adequate reasons as to why, at the very least, the investigation into his complaint could not continue *"in tandem and/or form part of the inquiry"* insofar as it was admitted to affect Mr. Schrems' interests. The DPC expressly responded to that plea at para. 156(3) of the statement of opposition, where it was denied that it had failed to provide adequate reasons as to why, at the very least, the investigation could not continue in tandem or form part of the inquiry. It expressly referred back to the letter of 10 September 2020. The fact that Mr. Schrems' counsel described the *"second broad relief"* in the terms referred to, which envisaged the inquiry proceeding in addition to the investigation into the complaint, could not, therefore, have come as any surprise to the DPC. It was open to the DPC at any stage to seek clarification as to what was meant by Mr. Schrems at para. 67 of his statement of grounds. However, instead of doing so, and perhaps understandably, it simply denied the allegation in the manner just mentioned.

103. I accept the submission made on behalf of Mr. Schrems that, by reason of the concessions made by the DPC in terms of running the two processes concurrently and in parallel and in terms of providing Mr. Schrems with the opportunity to be heard in the context of the inquiry, as well as providing him with access to the materials and agreeing to consider the complaint in respect of post 25 May 2018 transfers, it was no longer necessary for him to seek to quash the own-volition inquiry or to seek the ancillary relief sought in Reliefs 2 and 3.

104. The second significant concession made in the letter of 22 December 2020 was the DPC's indication that it was prepared to provide Mr. Schrems with the documentation emanating from FBI in the context of the complaint and the reformulated complaint (subject to any redactions which FBI may have required for

reasons of confidentiality). That indication and concession was not made prior to the letter of 22 December 2020 and was not made in response to anything said by Mr. Schrems' counsel in the Facebook proceedings on 18 December 2020.

105. The third concession was, in fact, a reiteration of the concession made in the letter of 4 December 2020 that the DPC would hear Mr. Schrems as part of the own-volition inquiry.

106. The fourth concession was an indication that the DPC was prepared to consider Mr. Schrems' complaint under the GDPR and the 2018 Act provided he confirmed that he confined his complaint to transfers which occurred after 25 May 2018. No such indication was made on behalf of the DPC prior to that letter and no indication of any openness to consider the complaint in accordance with those provisions was indicated in any of the correspondence prior to the proceedings or in the statement of opposition.

107. The next significant concession by the DPC was made in the Philip Lee letter of 7 January 2021 in response to the ARQ letter of 5 January 2021, in which it was accepted on behalf of Mr. Schrems that, in the event of an agreement between the parties, Mr. Schrems was willing to expressly limit his complaint to data transferred after 25 May 2018. In the Philip Lee letter of 7 January 2021, the DPC reiterated its commitment to handle the investigation of Mr. Schrems' complaint expeditiously and in accordance with its obligations under the GDPR and under the 2018 Act. While the DPC rebuffed the suggestion that it was obliged to proceed immediately with the investigation of the complaint irrespective of the outcome of the proceedings or of the progress of the inquiry, following the ARQ letter of 8 January 2021 it was ultimately expressly agreed (in para. 1 of the Philip Lee letter of 12 January 2021) that the DPC would advance the handling of Mr. Schrems' complaint and the own-volition inquiry

from the point at which I delivered judgment in the Facebook proceedings, in the event that I permitted the DPC to proceed with the inquiry. The DPC also agreed that both processes would be progressed as expeditiously as possible in accordance with its obligations under the GDPR and the 2018 Act. While undoubtedly there was some measure of compromise on the part of Mr. Schrems in that he did not proceed to seek an order quashing the inquiry or insist that the investigation of his complaint commence immediately, and without reference to what was to happen in the Facebook proceedings, nonetheless, in my view, the concession on the part of the DPC, when compared with the position it had taken in the correspondence in August and September 2021 and in the statement of opposition, was a significantly greater one which ought properly to merit some award of costs in favour of Mr. Schrems.

108. Ultimately, as a result of the agreement reached between the parties, Mr. Schrems succeeded in obtaining an agreement that his complaint would be investigated concurrently and in parallel with the own-volition inquiry and would be determined expeditiously. This was not available to him before the proceedings. He obtained an agreement that he would be heard in the course of the inquiry. This was not available to him in advance of the proceedings. He obtained a commitment to provide him with access to documents provided by FBI in the context of the complaint and also in the context of the inquiry (subject to issues of confidentiality). This was not available to him before he commenced the proceedings. Finally, he obtained confirmation that the DPC would consider his complaint in respect of data transferred after 25 May 2018 by reference to the GDPR and the 2018 Act. That was not available to him before the proceedings were commenced. Mr. Schrems made allegations and sought reliefs in the proceedings directed to most of these issues, save that he did not explicitly seek relief that both processes would be conducted

concurrently and in parallel. However, he did include a plea in the statement of grounds impugning the DPC's failure to give reasons as to why the processes could not proceed in tandem. I have accepted the submission advanced by Mr. Schrems as to why it was no longer necessary for him to seek an order quashing the inquiry in light of the significant concessions made by the DPC in respect of each of the matters just mentioned.

109. For these reasons, I am satisfied that the agreement reached between the parties to resolve the issues in the proceedings (apart from costs) did result in Mr. Schrems obtaining a *"substantial part"* of the relief which he sought in the action. I do not accept that the overall result was a *"score draw"* as suggested on behalf of the DPC.

(ii) *Could the necessity for the proceedings or their continuation have been avoided by the agreed terms being offered to Mr. Schrems by the DPC at an earlier stage?*

110. I am satisfied that, by reason of the nature of the concessions made by the DPC and the timing of those concessions, commencing with the Philip Lee letter of 4 December 2020 and culminating in the terms agreed on 12 January 2021, the day before the case was to commence, the proceedings or the continuation of the proceedings could have been avoided if the terms ultimately agreed had been offered by the DPC prior to their ultimate agreement on 12 January 2021. Indeed, it seems to me likely, in light of the ultimate agreement between the parties, that if everything that was ultimately agreed on 12 January 2021 was offered in the correspondence in September 2020, the proceedings could have been avoided. If they had been offered in the statement of opposition, the continuation of the proceedings could have been

avoided. If they had been offered in the letter of 4 December 2020 then the continuation of the proceedings beyond that point could also have been avoided.

(iii) *Would Mr. Schrems have obtained the benefit of the resolution ultimately put in place without instituting proceedings?*

111. I have no doubt but that if Mr. Schrems had not threatened and then brought the proceedings, he would not have obtained the benefit of the resolution of the proceedings on the terms set out in the letter of 12 January 2021. It is in my view highly unlikely that the DPC would have offered or agreed to the terms ultimately agreed without the proceedings being commenced or at least being brought to the point where they were about to be commenced. Realistically, I think it can be said with some certainty that, in view of the position adopted by the parties in the correspondence and in the exchange of pleadings in the proceedings, it is highly unlikely that Mr. Schrems would have obtained the benefit of the resolution of the proceedings on the terms set out in the letter of 12 January 2021 without initiating the proceedings.

112. While I accept that the guidance given by Murray J. in *Hughes* is not be read as if it were statutorily mandated and, while it is guidance, I have found it of great assistance in keeping focus on the matters required to be considered in the exercise of my discretion as to who should bear the costs of the proceedings under the recast provisions of O.99 RSC.

113. Doing the best that I can in following the guidance given by Murray J. in *Hughes*, it seems to me that the interests of justice are best served in this case by ordering the DPC to pay 80% of Mr. Schrems' costs in the proceedings, such costs to

be taxed in default of agreement. I have deducted 20% of the costs to reflect the fact that Mr. Schrems did not ultimately pursue his claim for an order quashing the inquiry and for the ancillary reliefs referred to in Reliefs 2 to 3 of the statement of grounds. However, in light of the fact that I have accepted the explanation as to why he did not pursue his claim for that relief, it would not, in my view, be appropriate to order Mr. Schrems to pay 20% of the DPC's costs and to deduct that from the 80% which I have ordered the DPC to pay. The most appropriate order and the one which, in my view, best serves the interests of justice in the case in light of the ultimate agreement between the parties is an order that the DPC pay 80% of Mr. Schrems' costs.

10. Conclusion

114. In conclusion, therefore, for the reasons set out in some detail in this judgment, while it would have been open to me to refuse to deal with the question of costs on the basis that the parties could have dealt with costs in the agreement they reached settlement in all other aspects of the proceedings, I do not believe that that would be an appropriate exercise of my discretion on the particular facts of this case.

115. Following the helpful guidance contained in *Hughes*, I am satisfied that the appropriate order for costs is that the DPC pay 80% of Mr. Schrems' costs of the proceedings to be adjudicated upon in default of agreement. For the same reasons, and subject to the entitlement of the parties to make further submissions to me to the contrary, and as this judgment is to be delivered electronically, it seems to me that I should indicate my provisional view that Mr. Schrems should also receive 80% of the costs of the costs application itself, also to be adjudicated upon in default of agreement. If either party wishes to dispute that latter provisional view, they should do so in writing, setting out reasons, within seven days of the date of the electronic

delivery of this judgment. The other side will then have seven days to respond. I will then deal with the dispute in respect of the costs of the costs application in writing without the need for any further hearing, unless I believe, having considered any further submissions from the parties that justice requires a further oral hearing on that issue.