THE HIGH COURT

COMMERCIAL

Record No. 2016/4809P

BETWEEN

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

- AND -

FACEBOOK IRELAND LIMITED AND MAXIMILLIAN SCHREMS

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 30th day of October 2020

1. On 3 October 2017, I delivered judgment in these proceedings. The plaintiff, the Data Protection Commissioner ("the DPC") sought a reference to the Court of Justice of the European Union ("the CJEU") in order that the validity of the SCC decisions, referred to in the proceedings, be determined either by this court declining to make a reference pursuant to Article 267 of the Treaty of the Functioning of the European Union ("TFEU"), on the basis that no issue as to the validity of the SCC decisions arises, or on the basis that the court makes a reference to the CJEU and the CJEU makes a ruling on the validity of the SCC decisions.

2. I decided to make a reference and on 2 May 2018 an Order for Reference issued. The CJEU delivered judgment on 16 July 2020 in Case C-311/18 *Data Protection Commissioner v. Facebook Ireland Limited and Maximillian Schrems*

EU:C:2020:559. As is the practice of the CJEU, the decision on the costs is a matter for the national court.

3. On 1 October 2020, I heard submissions from the parties in relation to the costs of the proceedings. The positions of the parties were as follows:

- The DPC sought her costs against Facebook;
- Mr. Schrems sought his costs against the DPC; and
- Facebook sought no order for costs in its favour but resisted any order for costs against it.

4. All the steps in the proceedings, save the delivery of the judgment by the CJEU and the application for costs, occurred prior to the commencement of ss.168 and 169 of the Legal Services Regulation Act 2015. In those circumstances, the parties are agreed that the decision on the cost of the proceedings should be made by reference to the provisions governing the award of costs prior to the commencement of those sections. Thus, the parties are agreed that the issue is to be decided by reference to Order 99 of the Rules of the Superior Courts and the relevant case law.

5. Order 99, Rule 1 establishes a general rule that the costs of, and incidental to, every proceeding in the Superior Courts shall be in the discretion of those courts. This is, and remains, the fundamental principle. The discretion is not untrammelled and must be exercised judicially.

6. O.99, r.1(4) provides that *"…the costs of every issue of fact or law raised upon a claim or counter-claim shall, unless otherwise ordered, follow the event."* This is known as the normal rule and is frequently referred to as the starting point for every decision. The rule does not provide any guidance as to when it should not be followed, simply referring to *"unless otherwise ordered"*. In *Veolia Water U.K. plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81, Clarke J. (as he then was) held that

the general rule could be departed from *"by virtue of special or unusual circumstances".* In *Curtin v. Clerk of Dáil Éireann* [2006] IESC 27, Murray C.J. referred to *"special reasons"* and in *Dunne v. The Minister for the Environment, Heritage and Local Government* [2008] 2 I.R. 775, Murray C.J. used the formula *"special circumstances"*.

7. The burden is on the party contending that costs should not follow the event to satisfy the court that there are special reasons or special circumstances or unusual circumstances which should sway the court to exercise its discretion to depart from the normal rule in sub-rule (4).

8. It is important to bear in mind the principle behind the rule that costs follow the event. In *Veolia Water*, Clarke J. said that:-

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

9. In *Godsil v. Ireland* [2015] 4 I.R. 535, McKechnie J., speaking for the Supreme Court, stated:-

> *"A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so, but it is, with the 'costs follow the event' rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of*

merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process including over court participation or attendance. If however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him, to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff."

10. In *University College Cork v. Electricity Supply Board* (Unreported, High Court, 4 December 2015), Barrett J. identified a number of underlying rationales for the principles that costs should follow the event. Three are relevant to this case:

(1) It is equitable that an unsuccessful party pay the victor's legal costs;

(2) A litigant should be made financially whole for a legal wrong suffered; and

(3) Misconduct should be punished.

11. Each case must be decided by reference to its own facts. It is also clear that the order for costs, so far as it is possible, must strive to achieve justice as between the parties or, where this may not be possible, to achieve the least injustice in the overall circumstances.

The nature of the proceedings

12. This was a most unusual case. It was not by any stretch of the imagination a normal *lis inter partes*. The plaintiff, the DPC, was carrying out her role as a Data Protection Commissioner, not only within the State but also under EU law. During the course of investigating the (revised) complaint made by Mr. Schrems regarding the processing of his personal data by Facebook, she formed the view that the complaint raised issues as to the validity of the SCC decisions having regard to the

provisions of Article 7 and/or Article 8 and/or Article 47 of the Charter of Fundamental Rights of the European Union by reason of the (known) surveillance activities of the NSA and other bodies in the United States, and the limitations on individual right of action in relation to data protection in respect of alleged interference with personal data by governmental, state, security or police entities. She instituted the proceedings in light of the judgment of the CJEU in C-362/14 *Schrems v. Data Protection Commissioner*, EU:C:2015:650 ("*Schrems No. 1*"), and in particular para. 65 of the judgment, in order that the validity of the SCC decisions may be determined either by this court refusing to make a reference pursuant to Article 267 of the TFEU, on the basis that no issue as to the validity of the SCC decisions arises, or on the basis that this court makes a reference to the CJEU and the CJEU makes a ruling on the validity of the SCC decisions.

13. Facebook and Mr. Schrems were each joined as defendants to the proceedings on the basis that they were each a *legitimus contradictor*. No relief was sought against them and no wrongdoing was alleged against them. It was acknowledged that they each had a vital interest to protect in the proceedings: Mr. Schrems in relation to his complaint and Facebook in relation to the manner in which it processed millions, if not billions, of items of data emanating from within the European Union which were thus entitled to the protections afforded then by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Directive").

14. At paragraph II of her draft decision, the DPC said:-

> "*This decision is issued in 'draft' format to preserve the right of* [Mr. Schrems] *and/or* [Facebook] *to make such further submissions as they may wish to make*

in relation to its terms, and to allow me to give full consideration to such submissions in due course. For the reasons outlined above, however, and in circumstances where (a) it is my intention to join [Mr. Schrems] *and* [Facebook] *to the proceedings before the national court … I believe it is appropriate that I will commence those proceedings forthwith …".*

15. When counsel for the DPC opened the case, he indicated that the sole relief sought was to make a reference to the CJEU for a decision by that court on the validity of the SCC decisions. Facebook opposed the application on an extraordinary number of grounds, as is apparent from the primary judgment. Mr. Schrems also opposed the reference on the basis that it was not necessary. He argued, (a) his complaint did not challenge the validity of the SCC decisions, save in the most tangential fashion, and (b) the DPC had the power and the tools to deal with all the concerns she raised regarding the lack of protection equivalent to that afforded to the data of EU citizens once it was transferred for processing to the United States. He said that Article 4 of the SCC decisions empowered the DPC to suspend or prohibit data flows to the United States and, therefore, a reference was not necessary. In effect, the remedy to the difficulty she identified was in her own hands.

16. It is important to emphasise that Mr. Schrems agreed with the concerns raised by the DPC regarding the level of protection afforded to his data by reason of the laws and practices prevailing in the United States, but he felt that the solution adopted by the DPC was not the correct solution.

17. At paragraph 4 of my judgment, I noted that Facebook and Mr. Schrems were joined by the DPC as defendants as they were the parties most concerned with the issues in order that they might engage fully in the proceedings and that they each had done so.

18. In response to a motion issued by Mr. Schrems seeking a protective costs order, the DPC argued that his participation in the proceedings was not necessary and that he was joined to the proceedings so that he would have an opportunity to participate in the proceedings if he so wished. The motion was compromised upon the agreement of the DPC and Facebook not to seek costs from Mr. Schrems. No further agreement on costs was reached by the parties which, accordingly, falls to be decided by the court.

The decision of the CJEU

19. The CJEU delivered a lengthy, detailed judgment which I shall not attempt to summarise here. For the purposes of my decision on costs, I note that the CJEU dismissed all but one of the grounds upon which Facebook had opposed the reference and had argued that the reference was moot, and that the SCC decisions were not invalid. It shared the DPC's concerns about the protections afforded to EU data subjects when their data was transferred to the United States for processing. The CJEU determined that the adequacy decision of the Commission regarding the United States, the Privacy Shield decision, was invalid. To that extent, the DPC's arguments prevailed and those of Facebook were rejected.

20. However, the CJEU held that the concerns raised by the DPC did not affect the validity of the SCC decisions, *inter alia*, on the grounds that the controller or processor in the first place or, failing action by them, the DPC, should assess in each case whether data transferred for processing to a third country was afforded equivalent protection to that mandated by EU law. If this was not the case, the controller, processor or, failing action by them, the DPC could suspend or prohibit data flows to that third country.

21. In these circumstances, each of the DPC and Facebook argue that they succeeded on the "event" and reject the position adopted by the other. Before

considering the position of the DPC or Facebook I shall first consider Mr. Schrems' application for costs against the DPC.

The "event"

22. Each party argued that costs should follow the event and that they had succeeded on the event, so it is necessary to identify, if possible, the event in the proceedings and the party who succeeded on the event.

23. The DPC argued that, in the first place, she sought clarity on the law and sought a declaration *whether* the SCC decisions were valid, not a declaration as to their invalidity. On this version of the "event" she could never lose but, equally she could never win the event as she merely needed to know the true legal position so she could proceed with her investigation of Mr. Schrems' complaint. I do not accept that this could be the correct interpretation of the event in the circumstances. It amounts to a submission that she must be entitled to her costs against the parties she sued, regardless of the outcome of the proceedings, which cannot be correct. This is further underscored in the circumstances of this case where she seeks her costs against a party against whom no wrongdoing is alleged – Facebook – and thus, a principal rationale for the rule does not arise.

24. Second, she argues that the "event" in the High Court was the reference under Article 267 of the TFEU to the CJEU. She submits, correctly, that both defendants opposed the reference and she succeeded because the court made a reference. Whilst this argument is superficially attractive, I do not believe that it is correct. A reference is not an end in itself, though it was the only relief sought by the DPC at the hearing. A reference, even in the circumstances of this case, is an intermediate step in proceedings. The case did not conclude once the order for reference was made. The court makes the reference if it forms the view that a decision by the CJEU is

necessary for it to decide the case before it. It is primarily for the benefit of the court, so it can obtain clarity on a point of the law which it considers to be unclear when resolving the case before it. In these proceedings, it was the CJEU alone which had jurisdiction to resolve the legal controversy (assuming the High Court did not reject the arguments of the DPC), but I do not believe that fact thereby changed the nature of a reference so that it can be regarded as the "event" of the proceedings for the purposes of awarding costs.

25. Furthermore, on the DPC's theory of the "event", had I refused to make a reference because I did not share her doubts as to the validity of the SCC decisions, she would have lost the event on this version of the event, but won it on her first version. That cannot be correct.

26. Third, she says that *"the underlying substance which gave rise to the event to be decided"* was the substantive issue of the adequacy of the protection of EU data subjects' data once it was transferred to the United States. This court shared her concerns as to the validity of the SCC decisions, and the CJEU upheld virtually all of her substantive complaints and arguments, so she was successful on the substance of the case and this should be regarded as succeeding on the event.

27. This analysis invites the court to consider the issues in the case and to determine the costs by reference to the number of issues on which one party or another was successful. It is true that the concerns raised regarding the protections afforded to the data of EU citizens whose data were transferred to the United States for processing was shared by the High Court and the CJEU, but that concern was not determinative of the case. Ultimately, the issue in the case was binary: either the SCC decisions were valid or invalid. The fact that in a sense it mattered not to the DPC what answer was given to her question does not alter the fact that she contended strongly that the

SCC decisions were invalid and the court did not agree. Given the decision of the CJEU on this point, it is difficult to see how the event can be described by reference to the number of issues on which the argument of the DPC was upheld, but where ultimately her position on the validity of the SCC decisions was rejected.

28. I accept the submission of counsel for Mr. Schrems that the three central points of the decision of the CJEU are that, (1) the SCC decisions are not invalid; (2) largely, though not exclusively, this is because they provide for effective mechanisms, including Article 4, to ensure that the transfer to a third country of personal data can be suspended or prohibited where the transferee either does not or cannot comply with the clauses; and (3) the Privacy Shield decision is invalid. The DPC's position on points (1) and (2) was rejected, and she did not come to court seeking the third point. This underscores my rejection of her arguments on her third ground for asserting that she succeeded on the event.

29. Fourth, she says that Facebook greatly expanded the scope of the case by introducing a huge range of issues by way of defence which were not previously in the case, thereby greatly adding to the length of the trial and her costs. She says that Facebook lost all its arguments in the High Court and in the CJEU. She succeeded on all her arguments in the High Court and the CJEU against Facebook. While the CJEU held that the SCC decisions were not invalid, they did so on a ground not advanced by Facebook and the court upheld her concerns regarding the absence of adequate protection for EU data subjects whose data is transferred to the United States for processing, and they declared the Privacy Shield decision to be invalid. In those circumstances, notwithstanding the fact that the CJEU held that the SCC decisions were not invalid, she should be regarded as having won the event.

30. It is important to note that, in making this argument, she says the court should not apply a *Veolia Water* type analysis, a position with which all parties agree.

31. Facebook counters by saying that the reference was not the event and the CJEU rejected her arguments that the SCC decisions were invalid. Accordingly, she lost the event, regardless of the fact that the CJEU rejected (some of) the arguments advanced by Facebook in support of the contention that the SCC decisions were not invalid. The DPC did not seek a reference to determine the validity of the Privacy Shield decision so the fact the CJEU declared it to be invalid is not an event upon which she can rely to seek an order for costs against Facebook.

32. I accept the submissions of Facebook and do not accept that the DPC succeeded on the event against Facebook, notwithstanding the fact that she was upheld on so many arguments. While Facebook argued for the validity of the SCC decisions on grounds which were not upheld by the CJEU, on Day 17, at pages 30-33, counsel for Facebook argued for the validity of the SCC decisions on the basis of the *"safety valve"* of Article 4 of those decisions. This was an essential part of the reasons the CJEU upheld the validity of the decisions. In all the circumstances, I do not accept that, as against Facebook, the DPC succeeded on the event.

33. In relation to Mr. Schrems, the DPC's approach to his costs was based upon a variation of the rule that costs follow the event. She argued that, in the High Court, his position was either aligned with that of the DPC, in which case his involvement was unnecessary, or, where he disagreed with the DPC, his position was rejected by the High Court. He was therefore either unsuccessful on the event where he disagreed with her position or an unnecessary additional participant. In either case, he was not entitled to his costs of the High Court against the DPC. Insofar as he led evidence and advanced arguments in relation to the laws of the United States and engaged in issues

raised by Facebook rather than the DPC, she should have no liability to him for these costs. In relation to the costs of Mr. Schrems before the CJEU, she adopts the same position and argues that she was substantially successful in the CJEU, notwithstanding the failure of the CJEU to declare the SCC decisions to be invalid.

34. Mr. Schrems argued that he was successful before the CJEU on each of the points in the case where his position was different to that of the DPC. On each question referred to the court, his position (whether it was also that of the DPC or not) was upheld. He must therefore be regarded as being successful on the event. Insofar as the DPC differed from him, and her position was rejected by the CJEU, she was not successful on the event.

35. I accept the submissions of Mr. Schrems and accept that he was successful on the event against the DPC and Facebook, where he adopted positions different to either of them.

Mr. Schrems' costs

36. I have decided that Mr. Schrems was successful on the event. I must now consider whether there are "special circumstances" or "special reasons" why costs should not follow the event. The DPC objected to Mr. Schrems obtaining an order for costs against her. She argued that his position largely duplicated hers and that, in this respect, his participation was unnecessary. The only difference between the DPC and Mr. Schrems was on the need for a reference and in respect of Article 4 of the SCC decisions, in respect of which the CJEU agreed with Mr. Schrems that Article 4 was *a factor* in concluding that the SCCs offer "effective mechanisms" (see paras. 146-149 of the judgment). She submitted that the time spent on addressing the Article 4 issue was easily outweighed, or at the very least counterbalanced, by the time spent by Mr. Schrems unsuccessfully opposing the making of the reference. She submitted that his

position was analogous to that of a notice party in a judicial review application. Finally, she argued that insofar as Mr. Schrems sought costs for disputes in which the DPC did not participate, namely the compliance of US law with Articles 7 and 8 of the Charter, that those costs should be recovered from Facebook and not the DPC.

37. I do not accept that Mr. Schrems' participation in the proceedings was unnecessary. He was the complainant. He is the relevant party in interest. He was sued as a defendant. No allegation of wrongdoing was made against him and no relief was sought against him. The CJEU confirmed in *Schrems No. 1* that he must be entitled to raise his complaint and this, to my mind, includes participating in any proceedings arising from his complaint. By reference to the authorities cited above, he must be entitled to his costs of defending his position.

38. In my judgment, Mr. Schrems' position was not analogous to that of a notice party in judicial review proceedings. He was sued as a defendant, not as a notice party and he did not ask to be joined as a notice party. His position was not entirely aligned with that of the DPC; on central issues, it was diametrically opposed. I do not find the case law in relation to the costs of a notice party in judicial review proceedings to be of assistance in this case.

39. In my judgment, it was reasonable for him to advance his own position, especially as he disagreed with the DPC whether there should be a reference; he disagreed with her as to the meaning of his revised complaint (he did not allege that the SCC decisions were invalid) and he was entitled to advance his position in relation to Article 4 of the SCC decisions, as she argued against that his position was wrong. It is particularly noteworthy that each of the positions he adopted in respect of the many issues raised in the case were endorsed by the CJEU. It follows that it was

reasonable for him to participate in the proceedings, and he should be entitled to those costs.

40. The real issue was whether it was reasonable for him to engage in the litigation fully, and to the extent that he did, and to seek to recover the legal costs thereby incurred. This, in turn, means determining whether he ought to have confined his participation in the proceedings to those issues where he did not agree with the position of the DPC, and if not, should he therefore be deprived of an order for costs under O.99, r.1(4)? Or alternatively, where he engaged in issues where Facebook was effectively his opponent, should he recover his costs from it?

41. In my judgment, it would be unjust to deprive Mr. Schrems of part of his costs on the basis that his participation in the trial should have been limited. He did not engage in "luxurious litigation" by participating fully in the trial. His full participation was justified. He did not have merely a discrete interest in one or some of the points in the case, such that he ought to have confined his attendance in court to the days where those issues were likely to be engaged. I do not accept that because Mr. Schrems unsuccessfully opposed a reference to the CJEU that he should either be deprived of costs to which he is otherwise entitled, or that the time spent on this point should be set-off against the time taken on the Article 4 point (on which he was successful before the CJEU). Given the decision of the CJEU, which upheld his reasons for opposing the reference, it would amount to a grave injustice were he not to be awarded costs on this basis. It would amount to a penalty for being correct in relation to a matter of European law which was upheld by the CJEU.

42. In addition, the DPC argues that her position in respect of costs is bolstered by her special status. Firstly, she brings the proceedings in fulfilment of her obligations under EU law, as set out in para. 65 of *Schrems No. 1*. She must be able to raise the

issue of the validity of the SCC decisions in legal proceedings. She does so as the guardian of fundamental rights. There is an onus on the court to ensure that the effectiveness of these duties and entitlements is not undermined by obliging her to do so at extraordinary cost; this would be so if she were required to pay the costs of a party that unsuccessfully opposed her application for reference. She also argues that, by analogy with costs orders in regulatory proceedings, it is not appropriate to award costs against her by reason of her role and the chilling effect of such orders.

43. These submissions amount to an argument that she is entitled to litigate free from the normal rules as to costs and there is no basis to believe that the Oireachtas intended this to be the case, nor that it is a requirement of EU law. The DPC advances none. She must be treated the same as any other party who is charged with carrying out duties for the benefit of the public; it does not entitle them to automatic immunity from orders for costs. Indeed, in other cases, costs have been awarded against her and I have not been informed that the argument now advanced was made in those proceedings, including the appeal in these proceedings to the Supreme Court in relation to the order for reference. Logically, if her position is correct, then it should apply to all proceedings and not merely to those, as here, where the orders for costs are likely to be very onerous. As I have held that she was not successful on the event in the sense she advocates, the arguments premised on this position fall away. Thus, the arguments based upon her role do not assist her in resisting an order for costs in favour of Mr. Schrems.

44. The onus rests on the party who asks the court to depart from O.99, r.1 to satisfy the court as to the existence of special circumstances or special reasons to do so. I am not satisfied that the DPC has done so in this case. In my judgment, Mr. Schrems is entitled to the costs of the High Court and the CJEU, to include all reserved costs.

45. The DPC asks, in these circumstances, that there should either be an order for his costs against Facebook or, in the alternative, that the DPC be entitled to recover from Facebook the costs she is required to pay to Mr. Schrems. I shall consider this point later in this judgment.

The costs of the DPC

46. The DPC seeks her costs against Facebook on the basis that costs follow the event and she says that she was entirely successful on the event against Facebook. For the reasons set out above, I do not accept this submission.

47. She also seeks her costs on the basis of her role as Data Protection Commissioner. For the reasons discussed above, this argument does not avail her against Facebook either.

48. She submits that her entitlement to costs is reinforced by the general principles on costs in public interest proceedings. She says these are public interest proceedings and that there is simply no basis not to award costs to a successful party in such proceedings, especially where unsuccessful parties can, in some circumstances, be awarded costs.

49. I do not accept that she is a successful litigant in this sense and, therefore, do not accept her argument as formulated. But, that leaves the question whether, as an unsuccessful party who succeeded on by far the greater part of her arguments against Facebook, she ought to be entitled under this jurisprudence to her costs against Facebook?

50. The sole ground I have been able to find upon which Facebook successfully argued a point in opposition to the DPC was on Day 17 which I have cited above, though I accept that Facebook argues that the CJEU upheld its argument that the SCC clauses afforded contractual protections, and this was a factor in its conclusion that

the decisions were not invalid. The Article 4 argument was not a point which was pleaded, nor was it argued in Facebook's written submissions or opening submissions. It would be fair to say that it played a very minor part, lasting less than ten minutes, of the submissions Facebook made to the court over a trial of six weeks. So, her argument that she was successful against Facebook notwithstanding the fact that the CJEU held that the SCC decisions were not invalid has considerable merit. However, no authority has been cited of public interest proceedings where the costs of the *public body* who was unsuccessful in the proceedings were awarded against a *private party* whose position prevailed. The rationale for awarding costs to an unsuccessful *private* party in public interest litigation is that it is considered to be in the public interest that the point of exceptional public importance was resolved, albeit against the private litigant. Usually, the private party is the moving party. That is not the case here. The DPC sued Facebook; it did not initiate the litigation nor seek any relief from the court. There was no wrongdoing alleged against it. It is difficult in those circumstances to see why it is to be held to be at fault to such an extent that it should bear the costs of the DPC.

51. It is important to emphasise that it does not seek its costs from the DPC, it simply resists her claim to costs against it.

52. I am mindful of the fact that the DPC was obliged to bring the case regardless of the approach of either Facebook or Mr. Schrems once she was concerned about the efficacy of the SCC decisions adequately to protect the rights of EU data subjects whose data were transferred to the United States for processing, in fulfilment of her obligations as set out in *Schrems No. 1*, at para. 65. She was required to adduce evidence to substantiate her concerns before the High Court in order to persuade the court to share her concerns and to refer the question of the validity of the SCC

decisions to the CJEU. She needed to adduce sufficient evidence for that court to make a ruling on the validity of the SCC decisions. All of these costs would have been incurred had neither defendant even entered an appearance.

53. The DPC accepts that this is so but argues that Facebook greatly expanded the scope of the case by introducing a myriad of unmeritorious arguments, all of which she says were roundly rejected by this court and the CJEU. In the circumstances, therefore, it ought to pay her costs.

54. There are circumstances where a court may penalise a party by ordering it to pay costs where it has unjustifiably prolonged proceedings by pursuing unmeritorious claims or arguments. *Veolia Water* is an example of such a case. All parties agree that this is not a case in which it is appropriate to apply the principles set out in that authority. The essence of the submissions of the DPC on this point is that there is an element of wrongdoing in the conduct of the litigation by Facebook, such that it would be just to depart from the normal rule pursuant to O. 99, r. 1(4). I do not accept that this occurred in this case. It is true that Facebook raised an extraordinary number and variety of arguments in opposing the application of the DPC. It introduced literally volumes of evidence. Counsel for the DPC described the approach of Facebook as "warfare". While I can sympathise that the DPC may have felt that absolutely no stone was left unturned in the opposing her application, that is very far from saying that the litigation was conducted improperly by raising so many points. The fact that each point was ultimately unsuccessful does not, of itself, mean that either collectively or individually the points were so wholly without merit that it amounted to some form of abuse of the court process to advance them. The points were all at the very least stateable, and often of considerable weight and complexity. Other than their number and the duration of the case, counsel for the DPC pointed to

no unstateable or wholly unmeritorious – as opposed to unsuccessful or possibly weak – arguments advanced by Facebook. It is imperative that parties are free to defend a case in a *bona fide* manner without the fear that they face an *added* risk that costs might be awarded against them, even if they are successful, on the basis that they raised too many grounds of defence which were rejected by the court. Were it otherwise, it could have a most detrimental chilling effect on litigation. Whether there can ever be an analogue to *Veolia Water* for a successful defendant who raises a plethora of wholly unmeritorious grounds of defence, I leave to another day. On the facts of this case, it does not arise.

55. I am satisfied that the case advanced by Facebook was not of this kind and it does not justify an award of costs in favour of the DPC.

56. After judgment was delivered, there was a four-day hearing when Facebook and the United States sought to correct what they termed to be errors in the judgment and the parties discussed the questions to be referred by the court to the CJEU. I estimate that had the hearing been confined solely to the issue of the questions to be referred it could have been disposed of within a day but, in fact, the parties were engaged for a further three days. In my judgment, it is appropriate to consider the question of the costs incurred for this hearing as a separate interlocutory hearing. Some minor technical changes were made to the judgment to ensure that it correctly reflected the detail of the laws of the United States, largely at the instigation of counsel for the United States. This could probably have been resolved by agreement had it not been for the more substantial points advanced by Facebook, which I rejected. In the circumstances, it is appropriate that Facebook should bear the costs of these three days, and that neither the DPC nor Mr. Schrems should bear those costs. I order that

the DPC and Mr. Schrems each recover their costs for three of the four days from Facebook.

Can the DPC recover Mr. Schrems' costs from Facebook?

57. The DPC argues that if the court orders that she pays Mr. Schrems' costs, she should be entitled to recover these from Facebook in the exercise of the court's discretion under O.99. In particular, she points to issues fought between Mr. Schrems and Facebook which she did not raise or engage with. She says that she should bear no liability for Mr. Schrems' costs incurred in arguing points he introduced, or in response to those raised by Facebook and that he should recover them directly from Facebook or, in the alternative, she should be entitled to be reimbursed from Facebook for the costs she is required to discharge but did not cause to be incurred.

58. The apparent unfairness of an order for costs in favour of Mr. Schrems identified by the DPC does not necessarily mean that she should be relieved of the burden of discharging Mr. Schrems' costs and that they should be borne by Facebook. There must be a basis upon which it is just that Facebook be liable for Mr. Schrems' costs in the first place, not simply an argument that she should not have to bear them. The argument that Facebook should be liable for some or all of Mr. Schrems' costs is that, (1) the true dispute is between Mr. Schrems and Facebook, and it is being "mediated" through the DPC and, in turn, through these proceedings, and (2) that insofar as they responded to her proceedings by introducing issues wider than those she raised, she should not be exposed to an order for costs for those issues.

59. In relation to the first point, that is the "exceptional role" argument in another guise. Her role is to investigate Mr. Schrems' complaint and she brought these proceedings on the basis that they were necessary to enable her to progress that investigation. She cannot, therefore, be regarded as a mediator who has no

independent role in this drama. She has an essential function mandated by EU law and she cannot avoid the implications of that role by saying that the dispute is between the data subject and the data processor. Her role is to take the burden from the shoulders of the individual data subject and to use her expertise and resources to investigate his claim and, if needs be, vindicate his rights, if necessary by bringing issues before the courts. So her role as Data Protection Commissioner is not a reason to order that the data processor should pay the costs of the data subject.

60. The second point equally does not avail her. I have held that they were each entitled to participate fully in the proceedings. Neither defendant raised issues which ought not properly to have been considered in the proceedings, whether they were successful before the High Court or the CJEU or not at all. The case was not confined to the issues raised in her draft decision. Therefore, the fact that they widened the issues in the case does not amount to any wrong which the court should weigh in the exercise of its discretion when awarding costs.

61. It is important to reiterate that no wrongdoing was alleged against Facebook (or Mr. Schrems) and no relief was sought against either party. In the circumstances, I am not satisfied that it would be just that Facebook should be ordered to indemnify the DPC, or otherwise pay the costs of Mr Schrems, other than as specified in para. 56 above.

Conclusion

62. Mr. Schrems is entitled to the costs of the proceedings, including the costs of the reference to the CJEU against the DPC, to be adjudicated in default of agreement, less the costs in respect of three of the four days when the court considered the application of Facebook (and the United States) to correct errors in the judgment of the High Court ("the errors application"), which he is entitled to recover from

Facebook. There shall be no order as to costs between the DPC and Facebook, save that the DPC is entitled to her costs for three days of the errors application against Facebook, to be adjudicated in default of agreement.

63. I am acutely aware that the effect of this decision is to place a very heavy financial burden on the DPC in circumstances where she brought these proceedings in fulfilment of her obligations under EU and national law, when there was no suggestion, never mind finding, of any fault against her, and when the resources of her office are finite. Despite the fact that she acted entirely correctly, her office must bear the majority of the costs of the application. It is, in my view, an unavoidable incident of her role and this outcome ought not to impact on the future functioning of the Commission for Data Protection. I sincerely hope that it will not have a chilling effect upon the future conduct of her successor, the Data Protection Commission. It is a matter for government to ensure that the Commission is adequately resourced so that considerations of legal costs do not act as a deterrent which hinder or prevent the Commission from carrying out its vital functions as a truly independent, national supervisory authority and guardian of fundamental rights.

64. This judgment is to be delivered electronically. If the parties do not agree on the order for costs which should be made in respect of the hearing on 1 October 2020 on the costs of the proceedings, I invite the parties to file short submissions. Mr. Schrems and Facebook have 14 days from 30 October 2020 to deliver their submissions and the DPC has 14 days to respond. In each case the submissions should not exceed 1000 words.