



**THE SUPREME COURT**

**[Appeal No: 37/2020]**

**Clarke C.J.,  
O'Donnell J.,  
MacMenamin J.,  
Dunne J.,  
O'Malley J.**

**BETWEEN/**

**WORD PERFECT TRANSLATION SERVICES LIMITED**

**APPLICANT/APPELLANT**

**AND**

**MINISTER FOR PUBLIC EXPENDITURE AND REFORM**

**RESPONDENT**

**Judgment of Mr. Justice Frank Clarke, Chief Justice, delivered the 24th of March, 2021.**

**1. Introduction**

- 1.1 On the 25th of September, 2020, this Court delivered the substantive judgment on this appeal, *Word Perfect Translation Services Ltd. v. The Minister for Public Expenditure and Reform* [2020] IESC 56 ("the principal judgment"). As appears from the principal judgment, the Court invited the parties to seek to agree on the precise orders which should be made in the light of the findings contained in that judgment. While a measure of agreement was reached between the parties, it was intimated to the Court that a number of issues remained outstanding. In those circumstances the Court listed the matter for a further hearing, which took place on 12 November, 2020.
- 1.2 It is convenient to identify the issues which remained outstanding between the parties under three headings.
- 1.3 The first issue concerned a suggestion put forward on behalf of the applicant/appellant ("Word Perfect") which, in substance, would involve a variation on the scheme identified in the principal judgment. It should be recalled that the principal judgment suggested that certain categories of discovery should be directed at this stage but that, in respect of certain other categories, arrangements should be made to have the documents whose disclosure was sought, identified and retained so that they would be available in court at the hearing of the action. As appears from the principal judgment, the thinking behind that arrangement was that the trial judge would be in a better position to fully understand the true issues which require to be resolved and, importantly, the relevance of any potentially confidential information to the proper resolution of those issues.
- 1.4 On that basis, this Court determined that certain questions of discovery should be left over to the trial judge. What Word Perfect proposed, but the respondent ("the Minister") opposed, was that there should be an intermediate stage where the High Court would be invited to direct further discovery in advance of the hearing. It will be necessary to return to that issue in early course.

- 1.5 Second, there were certain questions of detail about whether particular categories of documents ought properly be the subject of a discovery order in light of the Court's general approach as identified in the principal judgment. In that context it should be recalled that much of the debate at the original hearing of this appeal centred on issues of principle with, perhaps, less focus on how the principles under debate might affect the specific categories of discovery sought.
- 1.6 Third, there was a dispute between the parties as to the proper order for costs which should be made. I propose to turn to the first issue.

## **2. The Protocol**

- 2.1 The proposal put forward by Word Perfect involved a "Protocol of Inspection" ("the protocol") which would enable the High Court to direct further discovery in advance of the hearing and after Word Perfect had received such discovery as this Court might now order.
- 2.2 The protocol proposes that certain documents in respect of which discovery is ordered might be redacted on the grounds of confidentiality and/or commercial sensitivity. The protocol proposes a mechanism by which, first, the Minister would consider whether redaction was considered appropriate and, if so, refer the documents in question to other tenderers (so that those tenderers could consider the proposed redaction) and, second, disputes in relation to any redaction could be brought before the High Court to be considered and determined.
- 2.3 In more detail, the protocol provides that any parts of the discoverable documents which were generated by the Minister, and which were considered by the Minister to be confidential or commercially sensitive to a tenderer, could be redacted. Insofar as any part of these documents referred to one of the tenderers, and/or contained any information which may have been confidential or commercially sensitive to that tenderer, the protocol provides that the Minister should furnish copies of the material parts of those documents to the tenderer concerned and request that party to identify any parts which they considered should be redacted on the basis of containing confidential and/or commercially sensitive information. In respect of any discoverable documents which were generated by a tenderer, the protocol likewise suggests that the Minister should furnish copies of the material parts of those documents to that tenderer and that the tenderer concerned could indicate any parts which they consider should be redacted.
- 2.4 The protocol then proposes that, in circumstances where Word Perfect is dissatisfied with the scale or nature of the redaction of the discovery documentation, Word Perfect should be entitled to nominate lawyers to review unredacted versions of the documentation in question. Those lawyers would be required to undertake not to discuss the content of the material identified for redaction with Word Perfect without first obtaining the consent of the person whose documentation is at issue. Where such consent is not forthcoming, the protocol suggests that the lawyers in question should only be entitled to disclose the content of the redacted material if granted leave to do so following an application to the court. Finally, the protocol suggests that, if it is not possible to resolve any issues

relating to confidentiality or commercial sensitivity, such issues could also be the subject of an application for directions to the court.

- 2.5 I should start by commenting that there may be cases where an arrangement along the lines of that suggested by Word Perfect (or a variation on same) may be an appropriate way of dealing with the sort of difficulties which arise in cases like this where there is a potential conflict between the need to avoid the unnecessary or disproportionate disclosure of confidential information, on the one hand, and, on the other, the obligation on the Court to ensure that all material which can truly influence a just decision in the case is available to the parties and to the Court itself. That problem stems from the fact that neither the Court nor an opposing party will ordinarily know the actual content of a document whose discovery is sought and it follows that it may not always be easy to judge just how material the document in question may be to the proper resolution of the issues which arise in the case.
- 2.6 If overbroad discovery is directed, then much confidential information may be disclosed for little or no gain in ensuring a just resolution of the case. If overly narrow discovery is directed, then material information which could potentially influence the outcome of the proceedings may not be brought to the Court's attention. There can be an often difficult balance to be struck in such circumstances. The core of the problem is that it will often not be possible to assess, with any great level of precision, the relevance and importance of the content of documents until the documents in question are seen but, where the documents concerned contain confidential information, that confidence is irrevocably lost by them being seen. This area of procedural law is concerned with attempting to work out practical ways in which a court can seek to maximise the likelihood of relevant material being made available for the hearing, while minimising the risk of unnecessary disclosure of often highly confidential information. For the reasons just identified, there will rarely be a perfect solution to problems such as these, but the Court must do the best it can.
- 2.7 It was in those circumstances that the Court determined in the principal judgment that the best course of action to adopt in this case was to divide the documents sought into three categories being those whose disclosure would be ordered now, those whose disclosure would be refused and those whose disclosure would be left over to the trial judge.
- 2.8 What is now proposed by Word Perfect deviates from the solution identified by the Court in the principal judgment. While a court should always be prepared, when dealing with practical issues such as those involved in this appeal, to consider any suggestions put forward as to how the balance to which I have referred can be met, I do not consider that a court should lightly depart from a regime on which it has determined, following full agreement and a detailed reasoned judgment, unless there are strong grounds for believing that an alternative suggestion would clearly better meet the difficult balance which must be struck.

- 2.9 I am not persuaded that Word Perfect has put forward a sufficient basis for suggesting that this Court should, in substance, depart from the view which it has already taken as set out in the principal judgment. There can, undoubtedly, be practical difficulties encountered if, in the middle of a trial, a judge directs the disclosure of a significant volume of additional material. However, on the other hand, the whole point of the regime on which this Court determined in the principal judgment was that it was likely that the trial would have to progress to at least some material extent so as to enable the trial judge to have a sufficiently detailed understanding of the real issues so as to be, therefore, in a position to make a more informed judgment on whether the disclosure of confidential information was truly necessary.
- 2.10 In all those circumstances, I am not satisfied that it would be appropriate to alter the regime originally determined on by the Court in the principal judgment and I would not propose, therefore, to include the additions to the order of the Court proposed in that regard by Word Perfect. I now turn to the issues which remain between the parties in relation to the specific categories of categories sought.

### **3. The Specific Categories**

- 3.1 The parties produced rival drafts of the orders which they suggest the Court should make in the light of the principal judgment. Leaving aside the protocol issue, with which I have already dealt, there were a number of differences between the parties in relation to the specific categories of discovery sought. The original draft produced by Word Perfect was the subject both of proposed tracked changes inserted on behalf of the Minister and certain further replying changes proposed by Word Perfect.
- 3.2 In order to properly understand the differences between the parties it may be helpful to set out in full the categories of discovery originally sought which, as has already been pointed out, were allowed in full by the High Court but rejected in full by the Court of Appeal, the categories are:-

Category 1: All documents relating to the evaluation of tenders by reference to Criterion 4.1(b) – “Very Urgent Requests For Service”.

Category 2: All documents relating to the evaluation of tenders by reference to Criterion 4.1(e) – “Interpreter Support”.

Category 3: All documents relating to the evaluation of tenders by reference to Criterion 4.3 – “the Quality Assurance Plan”.

Category 4: All documents relating to the evaluation of tenders by reference to Criterion 4.2(b) – “Management Structures”.

Category 5: All documents relating to the evaluation of tenders by reference to Criterion 4.2(c) – “Management Escalation Processes”.

Category 6: The Successful Tenderer’s Tender and all documents submitted by the Successful Tenderer in response to the SRFT and/or in response to any

requests for clarification, including any communications between the Successful Tenderer and the Respondent during the course of the competition.

Category 7: All documents relating to the evaluation of the Successful Tenderer's Tender.

Category 8: All documents relating to the evaluation of the Applicant's Tender.

Category 9: All documents relating to the Respondent's failure to observe a standstill period.

- 3.3 However, in certain of the versions of the draft orders, redefined proposed categories were described which were designated as categories A. and B. They were as follows:

Category A: The Evaluation Report insofar as it relates to the evaluation of tenders by reference to the following criteria:

- (1) Criterion 4.1(a)- Reliability of Service;
- (2) Criterion 4.1(c)- Bookings;
- (3) Criterion 4.1(d)- Continuing Professional Development;
- (4) Criterion 4.2(a)- Management Resources;
- (5) Criterion 4.4(a)- Proposal for Resourcing Telephone Interpretation Delivery Plan; and
- (6) Criterion 4.4(b)- Proposal for Security and Confidentiality of Telephone Interpretation Plan.

Category B: The portions(s) of the Successful Tenderer's tender, relating to the pricing of its tender.

- 3.4 In respect of Categories 1, 2 and A, the parties were in agreement to a certain degree as to the scope of discovery which ought to be ordered. Both parties' draft orders suggested in general terms that Category 1 and Category 2 should they be subject of discovery together with the so-called Category A.
- 3.5 However, the Minister's draft order sought to add the stipulation that the Minister should be able to redact confidential and commercially sensitive information from the documents in those categories, as well as parts of documents which contained material which does not relate to the categories concerned or which relate to the third, unsuccessful tenderer.
- 3.6 The parties agreed in their draft orders that the Minister should prepare unredacted versions of the discoverable documents in respect of the above Categories and that the Minister should have these documents available at trial in order to facilitate the trial judge. Where the parties differed in that regard, however, was in relation to the scope of the unredacted material to be prepared. The Minister suggested that only portions of the final Evaluation Report addressing Categories 1, 2 and A should be prepared in their unredacted form, whereas Word Perfect suggested that an unredacted version of the entirety of the documentation relevant to these Categories should be prepared.

- 3.7 In their draft orders, the parties were, however, in agreement that, in respect of Categories 1, 2 and A, Word Perfect should be permitted to seek to persuade the trial judge to disclose further documentation where the trial judge was persuaded that such disclosure was required for the fair resolution of proceedings, although the parties disagreed on the precise wording of this point.
- 3.8 The parties' draft orders also differed in relation to Categories 4-8. In respect of Categories 4 and 5, the parties disputed the scope of discovery which should be ordered. Word Perfect's draft order suggested that all documents relating to the evaluation of tenders should be the subject of discovery. The Minister's draft order took a narrower approach, suggesting that only "the portion of the final evaluation report", insofar as it relates to the relevant criterion, should be the subject of discovery. The Minister's draft order also suggested including Category B in this section of the order thereby replacing Categories 6-8.
- 3.9 In addition, the Minister's draft order expressly suggested that granting discovery of Category B would involve Word Perfect gaining access to highly sensitive commercial information about the pricing structure of a major competitor and that, as such, further information should only be disclosed when it becomes clear that it is necessary for the just resolution of proceedings, thus implying, if not expressly stating, that Category B might be left to the trial judge. In that regard, Word Perfect's draft order proposed a less restrictive approach and suggested that, in respect of Categories 4-8, Word Perfect should be permitted to seek to persuade the trial judge that discovery of further documents was needed to the fair resolution of proceedings. Word Perfect also suggested that Categories 6-8 as originally formulated should be the subject of the discovery order. It should also be noted that some of the language proposed in Word Perfect's draft presupposed that the protocol, to which reference has been made, would be adopted.
- 3.10 Before going on to deal with the specific orders which I suggest should be made by the Court, it may be appropriate to make some general observations which inform the orders which I propose.
- 3.11 There was some debate between the parties as to the appropriateness or otherwise of redactions being made when discovered documents are produced. In that context, counsel for Word Perfect referred to the judgment of Haughton J. in *Courtney v. Ocm Emru Debtco Dac* [2019] IEHC 160, in which he correctly drew attention to the fact that excessive redaction tends to generate understandable suspicion which in turn can lead to protracted disputes. In that context I would make a distinction between redaction for the purposes of protecting confidential information (where such redaction is justified as a result of a court order) and redaction on the basis of an assertion of lack of relevance. There are, of course, documents which deal with more than one question and where there may be significant sections of a relevant document which have no bearing whatsoever on the issues in the relevant proceedings. There can be circumstances where it is, therefore, appropriate to redact on the basis of a consideration that a particular portion of an otherwise relevant document is not relevant to the case.

- 3.12 However, in my view, parties should err on the side of avoiding redaction where the only basis for the possible deletion of a portion of a document from disclosure is relevance as opposed to confidentiality or, indeed, privilege. It has often been observed that discovery inevitably involves some element of trust. A party is obliged to exercise a proper judgment on whether a portion of a document in respect of which redaction might be considered can truly be taken to be irrelevant to the case. In that context, represented parties are obliged to take and follow the advice of their lawyers who will be in a better position to form a judgment on relevance. However, to avoid the very problem identified by Haughton J., redaction for irrelevance should be kept to an absolute minimum. There is also a difference in practice between a sustainable and *bona fide* decision to exclude a document from discovery altogether, on the grounds that it does not come within the scope of the discovery ordered, on the one hand, and redaction of a portion of a document, on the other.
- 3.13 These observations apply with even greater force in a situation such as arises in these proceedings where a party is given the benefit of being only required to make limited disclosure at this stage with other matters being left to the trial judge. In such a situation, it is all the more important that redaction is kept to the minimum and applied only in situations where there is a true basis for asserting that the information contained in the redacted portion of the documents in question is sufficiently confidential to potentially justify its non-disclosure or where such information is manifestly irrelevant. Obviously any party making discovery has to form a proper judgment on whether a particular document comes within the scope of the discovery ordered. A *bona fide*, reasonable and informed decision that a document does not, on that basis, have to be discovered at all will normally be sufficient to comply with the relevant party's obligations. However, it seems to me that greater care needs to be exercised where a document is being discovered on the basis that it comes within the scope of discovery, but where it is sought to suggest that a portion of the document can be redacted on the grounds of relevance. It is that practice which leads to the suspicion which was rightly identified by Haughton J. in *Courtney*. Where no basis in privilege or confidence can legitimately be asserted in respect of a portion of a document, where the document itself is undoubtedly discoverable, parties should lean heavily against redaction on the grounds of relevance alone.
- 3.14 I would add that a court should be slow, therefore, to exclude a category of discovery sought on the grounds of relevance unless the court is confident that no relevant documents could arise within the parameters of the relevant category. A court may, in an appropriate case, give an indication as to what it would consider to be relevant and, potentially, adjust the language of the category sought to make that clear. However, there is ultimately a duty on any party in respect of whom an order for discovery is made to disclose all relevant material within the parameters of the category ordered. A court should not absolve a party from complying with their obligation to conscientiously make that disclosure except in cases where it is clear that the category concerned could not contain material which is relevant or where there is some other basis, such as

proportionality or manifestly privileged materials, which would justify not making any order at all in respect of the category concerned.

- 3.15 Having regard to those general observations, I now propose to deal with the specific disputes in relation to the relevant categories.
- 3.16 As indicated earlier, it does not seem to me that it is appropriate for a court to give a form of pre-clearance for redaction for relevance, save in cases where it is manifestly clear that wholly irrelevant material might otherwise be unnecessarily disclosed. The onus is on the party making the discovery to exercise, with appropriate advice, a conscientious decision on redaction with the effect that there might be further consequences in costs if that obligation is not reasonably and properly complied with. In those circumstances I would not propose that the order should contain the provisions suggested by the Minister which expressly permit redaction for relevance. That does not mean that redaction may not be possible on that ground but it is a matter, at least initially, for the Minister to decide what can properly be redacted on the basis of advice and in light of the observations set out in this judgment. Redaction on the basis of disclosure of highly confidential material should be permitted subject to the entitlement of Word Perfect to revisit any such redaction at trial.
- 3.17 The next dispute concerned the extent of the documentation which should be available in court in an unredacted form so as to enable the trial judge to direct further disclosure should the trial judge be persuaded that same was necessary. It seems to me that, in this regard, it is appropriate to err on the side of requiring the presence of all documentation. The fact that there will be an obligation to have the materials in unredacted form in court does not, of course, mean that there will necessarily even be an application that they be disclosed in that form, less still that the trial judge might accede to any such application. The burden of having them in court does not seem to me, in the circumstances of this case, to be in any way disproportionate or unreasonable. Whether some or all of the redactions may ultimately be disallowed by the trial judge, and full disclosure in that regard directed, is something which will only occur after the parties have been given an opportunity to address the trial judge and in circumstances where the trial judge will have a significantly greater knowledge of the real issues in detail. I would, therefore, propose that the more restricted suggestion of the Minister in that regard should be rejected.
- 3.18 It is next necessary to turn to categories 4 and 5. In light of the overall approach which the Court has adopted to discovery in this matter, being that Word Perfect will have the opportunity to attempt to persuade the trial judge to require the disclosure of further documentation should the trial judge be persuaded that such is required, I would favour the suggestion of the Minister that narrower disclosure in respect of those categories be ordered at this stage. It seems to me that this approach better achieves the balance between ensuring that relevant materials will, if they are truly necessary to the proper resolution of the proceedings, be available to the trial judge while at the same time minimising the necessity to disclose potentially highly confidential information. I would,

however, propose at the same time that all of the documentation which comes within these categories be available in unredacted form in court lest the trial judge consider that they are required. There is no material disadvantage to the Minister in having the documents in question ready to be made available on the direction of the trial judge. There is every disadvantage to Word Perfect if certain documents are even excluded from that obligation if it should transpire that the trial judge is ultimately persuaded that some or all of the documents in question (or redacted portions of them) might play a real role in the proper disposition of the case.

- 3.19 The next issue concerns Categories 6 – 8. In respect of these Categories I would take the same view that I have proposed in respect of Categories 4 and 5, thus accepting that disclosure in accordance with the Minister’s draft order should be made for the present but ensuring that all documents coming within those Categories are potentially available for full disclosure should the trial judge so direct.
- 3.20 On the final issue of detail in dispute, the Minister seeks, in substance, to define the circumstances in which the trial judge might consider it appropriate to direct further disclosure. In my view, the type of regime which this Court has put in place requires that the trial judge should have the maximum flexibility in relation to any additional documentation which should be disclosed or in respect of the disclosure of unredacted versions of documents previously disclosed in a redacted form. I would, therefore, propose rejecting the Minister’s submission that the order should limit the trial judge’s entitlement to direct disclosure of any document, or redacted portion of document, to cases where the trial judge becomes satisfied that its disclosure is necessary for the just resolution of the proceedings. The test which the trial judge should, in my view, apply is that disclosure should be ordered where the trial judge considers that such disclosure would contribute to a just resolution of the proceedings and would not amount to a disproportionate infringement of the right to confidentiality having regard to the extent of its materiality to the issues truly arising at the trial.
- 3.21 Finally, it is necessary to turn to the question of costs.

#### **4. Costs**

- 4.1 On the issue arising between the parties as to the proper order for costs which should be made, Word Perfect submitted that, as it was ultimately successful in its discovery application, it is entitled to all of its costs in the High Court, the Court of Appeal and in this Court. The Minister submitted that this position was unsustainable and proposed that a proper order for costs would award Word Perfect one third of its costs in this Court so as, it was said, to reflect the fact that Word Perfect was only partially successful in its appeal before this Court.
- 4.2 The Minister submitted that the principles governing the courts’ power to award costs in civil proceedings are now contained in ss. 168 and 169 the Legal Services Regulation Act 2015 (“the 2015 Act”). The parties are in agreement that these provisions substantially represent a codification of the principles outlined by me in my judgment in *Veolia Water UK plc v. Fingal County Council* (No. 2) [2007] 2 IR 81 and further explained in

subsequent case law. The Minister sought to rely on these statutory provisions in support of the proposal that Word Perfect should be awarded only one third of its costs in this Court. Section 169(1) provides that, where a party has been “entirely successful” in civil proceedings, the party concerned should be entitled to an award of costs against the unsuccessful party, unless the court orders otherwise. Section 169(1) also enumerates a list of factors, relating to the circumstances of the case and the conduct of the parties, which a court must take into consideration when deciding against making an order for costs in circumstances where a party has been entirely successful. These factors include those set out in s.169(1)(b), which involve a consideration of whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings, and in s. 169(1)(f), which involve a consideration of whether a party made an offer to settle the matter the subject of the proceedings and, if so, the date, terms and circumstances of that offer.

- 4.3 It was the Minister’s submission that Word Perfect was not entirely successful within the meaning of s. 169(1) of the 2015 Act as, it was argued, Word Perfect did not succeed in obtaining discovery of all the categories sought and, in respect of Categories 3 and 4, it was said that Word Perfect achieved less than that which had been offered by the Minister. The Minister’s position was, therefore, that Word Perfect should not be awarded any of its costs in the High Court or the Court of Appeal on the basis that there is no existing order as to costs made by these courts. As already noted, it was the Minister’s case that Word Perfect should only be awarded one third of its costs in this Court as it only partially succeeded in its appeal.
- 4.4 The Minister contended that Word Perfect’s decision to argue Categories 1-4 in this Court engages s. 169(1)(f), as the Minister had made offers to resolve these categories prior to the commencement of the appeal. It was further submitted by the Minister that s. 169(1)(b) was engaged both by Word Perfect’s decision to make arguments in relation to Categories 4 and 5 and by its alleged “misconceived interpretation” of the judgment in in *Roche Diagnostics Ltd. v. The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC) and its related argument that a new standard should apply for discovery as an effective remedy as a matter of European law. The Minister contended that, by making arguments in relation to Categories 4 and 5 of discovery in this Court, Word Perfect took up a disproportionate amount of court time as these categories concerned relatively small scoring differences of 0.05% and 0.1% respectively. In respect of Word Perfect’s arguments in relation to Roche Diagnostics, the Minister submitted that a considerable amount of judicial time and resources were absorbed on what was, in the Minister’s submission, an unsuccessful attempt to create a new test for discovery in the procurement context in Irish law. The Minister submitted that, in light of ss. 169(1)(b) and 169(1)(f) having been engaged, even if Word Perfect had been entirely successful, this Court would now be entitled to decline to make an order for full costs. On these bases, the Minister argued that the proposal that Word Perfect be awarded one third of its costs in this Court amounted to a just and fair solution.

- 4.5 Word Perfect, on the other hand, argued that it is entitled to, and ought to be awarded, all of its costs in the High Court, the Court of Appeal and this Court. It was Word Perfect's submission that, while it did not achieve the entirety of the discovery sought, it did achieve considerably more than that which had been offered by the Minister. Word Perfect also argued that it was forced to pursue its application as far as this Court in order to obtain this discovery.
- 4.6 Furthermore, Word Perfect submitted that, in the course of its oral and written submissions, it made important arguments which, it suggested, were ultimately accepted by this Court. In respect of the arguments made in relation to *Roche Diagnostics*, it was submitted by Word Perfect that this Court accepted its submissions regarding the necessity for an effective remedy and its concern as to the lack of an effective remedy where there is a denial both of reasons and of discovery. Word Perfect therefore submitted that it would not be appropriate to engage s. 169(1) in the present proceedings, arguing that the judgment in *Veolia Water* (which was given statutory footing in the 2015 Act) was only intended to be applied where the successful party added materially to the cost of the proceedings by raising unmeritorious issues. It was contended by Word Perfect that the issues it raised in relation to Categories 4 and 5 and *Roche Diagnostics* were not unmeritorious as Word Perfect was ultimately successful in obtaining discovery, albeit with variations as to formulation and timing, in respect of all the categories of discovery that it had sought, with the exception of Categories 3 and 9. Word Perfect also did not accept that the 2015 Act could be applied to the present proceedings in any case, as the proceedings were issued prior to its enactment.
- 4.7 In this context, Word Perfect argued that the "normal rule", that the costs follow the event, should apply. It was also submitted by Word Perfect that, even if this Court concludes that it is appropriate to apply section 169(1), the proposal set out by the Minister is nonetheless wholly inadequate and unjust given that successful applicants are generally entitled to the entirety of their costs in the High Court, the Court of Appeal and the Supreme Court. On this basis, Word Perfect argued that there is no justification for the Minister's proposal to limit its entitlement to costs.
- 4.8 There was some debate between the parties as to the precise effect of s.169 of the 2015 Act, both as to whether it amounts simply to a codification of the principles identified in *Veolia* and subsequent case law and also as to whether it has application in a case such as this where the proceedings were commenced before that provision came into effect. There may be cases where it will be necessary to address either or both of those issues, but I am not satisfied that the resolution of either of those questions one way or the other would affect the appropriate order as to costs which should be made in this case.
- 4.9 It is clear that Word Perfect, in light of the judgment which this Court has now given in relation to discovery, was required to bring an application before the High Court in order to obtain a level of discovery which was not on offer by the Minister. However, it is equally clear that, in light of the judgment of this Court, the Minister was required to bring an appeal to the Court of Appeal for the discovery ordered by the High Court has

been found by this Court to have been excessive. On the basis of a similar logic, Word Perfect was entitled to bring an appeal to this Court for the situation as it lay after the Court of Appeal was that Word Perfect had been denied discovery to which this Court has found it to be entitled.

- 4.10 Where there has been a series of hearings, both at first instance and on appeal, it is necessary, in the context of fashioning a just order in respect of costs, to have regard to the justification for taking each step in that sequence. Of course it might be said that Word Perfect, having ended up with a more advantageous regime in respect of discovery than had been on offer by the Minister, was justified in bringing the matter all the way to this Court to achieve something which, in the words of Veolia, it would not have obtained had it not brought the matter to court. On the other hand, it can, and in my view with greater force, be argued that a party which seeks and obtains from the High Court more than it is ultimately found to be entitled to, must accept that this very fact will lead at least to an appeal to the Court of Appeal. At that stage it would have been open to Word Perfect, by letter or otherwise, to indicate that, while it had succeeded in full in the High Court, it would accept a lesser level of discovery as a means of averting the need for an appeal to the Court of Appeal. If Word Perfect had restored the High Court order (or achieved something very similar to full restoration) its argument might well prevail. However, in my view, the better analysis is that the appeal to the Court of Appeal was necessitated by the fact that Word Perfect sought and obtained from the High Court more than it was entitled to.
- 4.11 In those circumstances, I would set off the costs in both the High Court and the Court of Appeal one against the other. That leads to the situation in this Court.
- 4.12 The starting position is, of course, that Word Perfect had no discovery at the time when an appeal was brought to this Court. There was, of course, the Minister's offer. It is true that Word Perfect has not fully succeeded in this Court in that it maintained a position in which it sought to restore the full order for discovery which it had obtained in the High Court. It undoubtedly failed on some of the points raised. However, I am not persuaded that it can safely be said that the overall costs of the appeal before this Court were materially increased because Word Perfect argued points on which it did not succeed. In those circumstances, I would propose that Word Perfect be awarded its costs in this Court with no order as to costs being made in respect of either the High Court or the Court of Appeal.

## **5. Conclusion**

- 5.1 For the reasons set out earlier in this judgment, I would not propose that this Court should make an order which would, in substance, vary the regime identified in the principal judgment by adopting the protocol suggested by Word Perfect.
- 5.2 I have also made certain observations as to the proper approach to dealing with questions of redaction of parts of documents, most particularly where the redaction concerned is stated to be on the grounds of relevance as opposed to privilege or confidentiality (in circumstances where the court ordering discovery has made clear that redaction for

confidentiality may be permissible). In those circumstances I propose that the Court should not give any form of preclearance to the Minister to redact on the grounds of relevance for it will be a matter for the Minister, having taken appropriate advice, to act conscientiously in that regard and in light of the comments made in this judgment concerning redaction of portions of documents for relevance. I do, however, propose that the Minister should be entitled to redact portions of documents which contain highly sensitive confidential material subject, of course, to the possibility that the trial judge may nonetheless require the removal of such redaction if satisfied that such removal would contribute to a just resolution of the proceedings and would not amount to a disproportionate infringement of the right to confidentiality having regard to the extent of the materiality of the redacted portions of the documents in question to the issues truly arising at the trial. The affidavit of discovery to be sworn in this case should, in circumstances where redaction has occurred, clearly indicate the basis on which such redaction is said to be justified.

- 5.3 In light of the regime which this Court has sought to put in place in the principal judgment, I am of the view that it is appropriate to accept the Minister's narrower suggestions in relation to discovery of Categories 4 – 8 at this stage, subject again to the entitlement of Word Perfect to revisit such scope at the trial.
- 5.4 Finally, and for the reasons also set out earlier in this judgment, I would make no order as to costs in either the High Court or the Court of Appeal but would grant Word Perfect the costs of the appeal to this Court. I would trust that the parties will, in light of this additional judgment, now be in a position to agree a final form of the order which the Court should make, reflecting the content both of the principal judgment and of this judgment.