

APPROVED

[2026] IEHC 626



THE HIGH COURT
CIRCUIT APPEAL

2024 281 CA

IN THE MATTER OF THE LANDLORD AND TENANT (AMENDMENT) ACT
1980

BETWEEN

VERBENAGROVE LTD

PLAINTIFF

AND

SIMON EVANS
MAUREEN GRIFFIN

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 17 September 2026

INTRODUCTION

1. This supplemental judgment addresses the incidence of the legal costs of these landlord and tenant proceedings. The principal judgment was delivered on 4 March 2026 and is published as *Verbenagrove Ltd v. Evans* [2026] IEHC 124.

PRINCIPLES GOVERNING THE ALLOCATION OF COSTS

Overview

2. The default position under the Legal Services Regulation Act 2015 is 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. If the court departs from the default position, it must state the reasons for doing so.
3. The default position reflects the principle that, in some cases, it would be unjust to require a party to pay for its own litigious victory. It reflects the equity that a person who institutes or defends proceedings to establish rights or to resist an unmeritorious claim should ordinarily be entitled, if successful, to an award of costs against the unsuccessful party. Of course, an award of costs is only as valuable as the ability of the unsuccessful party to pay. If the unsuccessful party is not a mark for costs, there is no indemnity provided by the State.
4. The question of whether a party is “*entirely successful*” is primarily relevant to where the burden lies in the process of deciding how costs should be allocated (*Little v. Chief Appeals Officer* [2024] IESC 53). Put otherwise, it identifies the party who is entitled to the benefit of the statutory presumption. Once that status has been established, it is for the unsuccessful party to demonstrate, by reference to the considerations identified in section 169(1), why the court should order otherwise.
5. A party will be regarded as having been “*entirely successful*” where it has obtained the substantive result sought in the proceedings. The inquiry is directed to the practical outcome of the proceedings. In the case of an appeal, the identification of which party has been successful is done by reference to the ultimate outcome of the proceedings and not by reference to the first instance

decision alone. A party may be characterised as having been “*entirely successful*” notwithstanding that it did not prevail on one or more specific issues of law or fact.

6. The combined effect of sections 168 and 169 of the LSRA 2015 is to allow the court to adopt a distributive approach to costs. Rather than treat the proceedings as an indivisible whole for costs purposes, a court may, instead, allocate liability for costs by reference to distinct parts of the litigation. An obvious example would be where the costs of an interlocutory hearing are allocated distinctly to those of the trial of the action.
7. The case law sometimes refers to an otherwise successful party as having lost a particular issue. The term “*issue*” is capable of being used in several different senses. It can, for example, refer to a distinct element of a claim or defence. A defendant may have failed on a plea under the Statute of Limitations 1957 but nevertheless have successfully resisted the plaintiff’s claim on the merits. The term may also be used in a broader sense to refer to a particular argument in support of a claim or defence, or to refer to an evidential controversy.
8. Generally, an issue will only be allocated distinctly for costs purposes if it can first be separated out from other aspects of the proceedings. The criteria to be considered include whether the issue was specifically pleaded, required evidence which would not otherwise have been necessary, or occupied an identifiable portion of the hearing. Even where an issue can nominally be separated out, it will still be necessary to consider whether it was reasonable for the party to raise, pursue or contest the particular issue in the proceedings.
9. A costs adjustment should not ordinarily be made unless the issue had a material effect on the costs of the proceedings. The costs jurisdiction is not an accounting

exercise requiring every minor success or failure to be separately priced. Even where an issue is conceptually separable, an adjustment may be refused where the costs attributable to it are *de minimis* or where the exercise would necessitate the court examining the course of the proceedings in granular detail.

Reasonableness of pursuing arguments in the alternative

10. The present proceedings disclose an important question of principle in relation to the reasonableness of pursuing arguments in the alternative. The specific question is whether the Tenant should have relied *solely* on the grounds that an expired lease cannot be forfeit and that a period of statutory occupation can only be terminated by court order. Those grounds proved to be decisive in the principal judgment. In the event, the Tenant pursued a number of additional issues, in the alternative, with mixed success.
11. To answer this question, it is necessary to recall the language of section 169 of the LSRA 2015. One of the criteria to which the court must have regard is whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. The term “*reasonable*” denotes something more than that a party pursued a legal issue in good faith and in the belief that they would succeed on the issue: *In the matter of M.V. Lady Magda* [2021] IECA 51 (at paragraphs 5 and 6). The term does not, however, imply that the party must have been *correct* on the legal issue. Were it otherwise, the statutory criterion of reasonableness would be surplusage in that it would merely replicate the criterion of success in the proceedings.
12. The “*reasonableness*” threshold recognises that a party who does not succeed on a particular issue should not invariably suffer an adverse costs consequence in respect of that issue. To avoid this consequence, however, there must have been

an objective basis upon which it was reasonable to raise and pursue the issue. Such a basis may arise from the factual or legal circumstances of the case, including uncertainty in the applicable legislation or authorities, the potential significance of the issue to the outcome, or the manner in which the opposing party framed or conducted its case.

13. Reasonableness must be assessed by reference to the circumstances in which the issue was raised and pursued, rather than solely by reference to the ultimate outcome of the proceedings. The court which allocates costs will necessarily have the benefit of hindsight, but care must be taken lest knowledge of the ultimate outcome obscure the circumstances confronting the parties during the proceedings.
14. The question whether it was reasonable to pursue an issue will most often arise where the relevant party has been *unsuccessful* on that issue. As the present proceedings illustrate, however, a costs question may also arise where the party has succeeded on several alternative arguments, but the cumulative pursuit of those arguments is said to have been unnecessary or disproportionate.
15. A court is entitled to exercise its costs jurisdiction to promote procedural discipline. A successful party who has engaged in luxurious litigation should not be entitled to visit its own disproportionate expenditure upon the losing party. There must be a reasonable relationship between the potential of an issue to affect the outcome of the proceedings and the amount of time dedicated to it. The statutory test is whether it was reasonable for the party to raise, pursue or contest the issue. The fact that the party was ultimately unsuccessful on the issue will be a relevant but not determinative consideration.

16. The costs jurisdiction should not be exercised in a manner which inhibits a party from exercising their right of access to the courts by way of reasonable participation in litigation. Such an approach would move beyond a healthy disciplining effect and create an unhealthy deterrent effect. A plaintiff or defendant is entitled to pursue alternative arguments without an automatic penalty in costs, provided always that it was reasonable to do so. They should not be expected to pursue only their very best point, on peril of an adverse costs order.
17. A costs adjustment may be justified where a party pursued an issue which was unnecessary or disproportionate, even if the party's contention on that issue was held to be correct. A costs adjustment will not ordinarily be justified where an issue represented a reasonable alternative basis for the party's case, arose in answer to the opposing party's case, or only remained undecided because the proceedings were ultimately determined on a narrower basis. The inquiry remains whether it was reasonable to raise and pursue the issue to the extent that the party did.
18. The application of these principles to the present proceedings is complicated by the fact that the Tenant succeeded on some of its alternative arguments, whereas others became unnecessary to decide once the proceedings were determined on a narrower basis. I return to this question below in considering the Tenant's arguments concerning whether the purported re-entry upon the demised premises had been peaceable and concerning the mode of service of the forfeiture notice.

DISCUSSION

Overview

19. The starting point for the costs analysis is that the Tenant has been entirely successful in the proceedings. The Tenant had a statutory right to a new tenancy under Part II of the Landlord and Tenant (Amendment) Act 1980. The Landlords refused to acknowledge and give effect to this right. Accordingly, it was necessary for the Tenant to institute proceedings. The Landlords sought to defend those proceedings on the ground that they were entitled to re-enter the demised premises by reason of the Tenant's non-payment of rent and that the act of re-entry defeated the claim for a new tenancy. The Circuit Court directed a modular trial, with this defence being addressed in the first module. This defence was rejected by the High Court for the reasons set out in the principal judgment. The terms of the new tenancy have since been fixed by the Circuit Court in the second module and that decision has not been appealed.
20. The Tenant has, in short, achieved precisely what it set out to do by the institution of the proceedings. It was entirely successful in the first module in that it successfully resisted the Landlords' defence to the claim to a new tenancy.
21. The Tenant is, therefore, presumptively entitled to a costs order in its favour. The Landlords submit that any costs recoverable should be significantly reduced to reflect the Tenant's conduct of the proceedings. More specifically, it is said that the Tenant was unsuccessful on numerous issues pursued by it, and that the decisive legal point upon which the appeal was ultimately determined was not raised by the Tenant at all but was identified by the court itself. The factors relied upon by the Landlords are addressed, in turn, below.

THE CIRCUIT COURT'S REASONING

22. The first factor relied upon by the Landlords in support of their argument for a costs adjustment is that the grounds upon which the Tenant succeeded before the High Court were *different* from those upon which it succeeded before the Circuit Court. The Landlords say that the Circuit Court made three principal findings as follows. First, the Circuit Court held that the forfeiture notice was invalid because the Landlords had demanded payment of rent and VAT while failing to comply with their own obligation under the lease to furnish VAT invoices. Second, the Circuit Court held that service of the forfeiture notice was invalid, having regard to the manner and timing of delivery, the parties' preceding communications, and the Landlords' knowledge that the Tenant was likely to remain unaware of the notice. Third, the Circuit Court held that cutting through the locks on two doors did not constitute peaceable re-entry.
23. The Landlords submit that the appeal to the High Court was determined on an entirely different legal basis, namely, that an expired lease cannot be forfeit and that a period of statutory occupation can only be terminated by court order. It is said that the High Court disagreed with the first two findings made by the Circuit Court and declined to decide the third in circumstances where it was not necessary to do so.
24. The Landlords submit that a costs order should reflect the actual basis upon which the case was decided and that the Circuit Court's costs rationale has been effectively displaced. The implication is that, as the rationale which informed the Circuit Court's allocation of costs has not been endorsed by the High Court, the costs order must fall.

25. The difficulty with the Landlords' submission is that it seeks to isolate the Circuit Court's decision from the overall outcome of the proceedings. In the case of an appeal, the identification of which party has been successful is done by reference to the ultimate outcome of the proceedings and not by reference to the first instance decision alone.
26. In the specific context of a *de novo* appeal from the Circuit Court to the High Court, the decision of the High Court will generally be determinative of success in the proceedings. A party who is entirely successful before the High Court on appeal has a presumptive entitlement to the costs above and below, i.e. the High Court costs and the Circuit Court costs. This is so irrespective of whether that party had been successful at first instance before the Circuit Court.
27. This approach reflects the underlying principle that a party who has been required to pursue proceedings to vindicate their rights is generally entitled to an award of costs against the unsuccessful party. A party, such as the Tenant, who has been required to pursue proceedings before the Circuit Court and then to resist an appeal to the High Court should not normally be required to pay for their own litigious victory. Logically, this principle embraces the costs of the overall litigation and does not make a principled distinction between the costs at first instance and the costs of the appeal. The party is out of pocket in respect of both.
28. It follows that the difference in reasoning between the two courts does not displace the Tenant's presumptive entitlement to costs. The decision of the Circuit Court has been superseded by the decision of the High Court. This is the benchmark against which the identification of the successful party is made. The Tenant has been entirely successful in relation to the first module. The Tenant

would be presumptively entitled to its costs before the Circuit Court even if the Circuit Court had, counterfactually, found against it. The Tenant cannot be in a worse position in circumstances where the Circuit Court had actually found in its favour.

COSTS IN RELATION TO CLAIM FOR EQUITABLE SET-OFF

29. The Landlords advance an alternative argument in relation to the Circuit Court costs as follows. The Landlords' purported forfeiture was predicated on an assertion that the Tenant was in arrears of rent. In response, the Tenant claimed an equitable set-off against the rent due, asserting that it had incurred expenditure on repairs which were properly the Landlords' responsibility.

30. The Circuit Court declined to take the asserted set-off into account, stating as follows:

“In relation to the right of set-off of rent as claimed by the tenant I am of the view the landlord is correct to state that procedure should only be availed of where the liability has been ascertained and the landlord is on notice of same. Therefore I am not taking this into account for the tenant's application on the validity of the forfeiture notice for the purposes of this module of the trial.”

31. I will refer to this issue as “*the claim for equitable set-off*”, or, simply, “*the repairs issue*”.

32. Counsel for the Landlords estimated that the repairs issue had occupied approximately two of the five hearing days before the Circuit Court. Counsel submitted that the High Court should proceed on a broad-brush basis and make a significant adjustment to the costs recoverable by the Tenant.

33. I am satisfied that the claim for equitable set-off should be treated as a separate costs issue. The claim presented a distinct and defined issue for resolution and

necessitated the introduction of a significant body of evidence referable to that issue alone. It added materially to the length of the hearing before the Circuit Court.

34. In assessing whether it was “*reasonable*” for the Tenant to have pursued the claim for equitable set-off, it is appropriate to have regard to the fact that the claim was always a weak one. The Tenant had ceased paying rent prior to notifying the Landlords of a quantified set-off. The claim appears to have combined an assertion that the contractual rent was excessive, having regard to the condition of the premises, with a claim in respect of expenditure allegedly incurred on repairs. The liability relied upon had not been ascertained prior to the withholding of rent. The pursuit of the claim required extensive documentary and oral evidence concerning the condition of the premises, responsibility for individual items of repair and the amounts said to have been expended. The claim for equitable set-off was unsuccessful before the Circuit Court and the Tenant, sensibly, did not pursue the claim before the High Court. The pursuit of this issue caused the Landlords to incur significant costs which would not otherwise have arisen in relation to the Circuit Court proceedings.
35. It is necessary next to consider the appropriate costs adjustment. Having regard to the Landlords’ invitation to adopt a broad-brush approach, I propose to estimate the approximate proportion of the costs attributable to the repairs issue.
36. An assessment of the Circuit Court transcripts indicates that this issue occupied approximately 40 per cent of the hearing time. The proportion of hearing time devoted to a particular issue represents only a rough proxy for the proportion of costs attributable to that issue. This is especially so where oral evidence is involved. The taking of oral evidence is a relatively slow exercise compared

with the making of legal submissions. The time expended in presenting a legal submission at a hearing will usually represent only a fraction of the time expended in preparing it. Using hearing time as a proxy tends to overstate the costs attributable to factual issues and understate those attributable to legal issues. It is necessary to make an adjustment to reflect this.

37. The figure of 40 per cent of hearing time is likely to overstate the proportion of the overall costs attributable to the claim for equitable set-off, given that the issue is largely factual. Applying an adjustment to reflect this, it is reasonable to attribute 30 per cent of the Circuit Court costs incurred by each party in respect of the first module to this issue. This gives rise to two costs consequences. First, the Tenant is only entitled to recover 70 per cent of its Circuit Court costs as against the Landlords. Second, the Landlords are notionally entitled to 30 per cent of their Circuit Court costs, to reflect the costs which they were unnecessarily required to incur in addressing the repairs issue.
38. It would be disproportionate to require the costs of both parties to be measured merely for the purpose of setting one amount off against the other. Adopting a broad-brush approach, and on the assumption that the respective amounts recoverable by the parties on adjudication would be comparable, I will give effect to the set-off by directing that the Tenant recover 40 per cent of its costs of and incidental to the first module before the Circuit Court. This avoids the additional expense of separately measuring the Landlords' costs, while producing a reasonable approximation of the net result which reciprocal costs orders would otherwise achieve.
39. The Landlords further submit that they incurred costs in preparing to address the repairs issue before the High Court. Prior to the exchange of written legal

submissions, the Tenant had indicated that all issues remained live. The Landlords, who were required to deliver their submissions first, addressed the repairs issue in those submissions. The Tenant subsequently confirmed in its written legal submissions of 23 September 2025, approximately one month prior to the appeal hearing, that it would not pursue the issue. No evidence or oral argument was directed to repairs before the High Court, and no additional witness was called for that purpose. Any unnecessary costs were therefore confined to a limited element of the preparation of the Landlords' written submissions and are *de minimis* in the context of a six-day appeal. No separate adjustment to the High Court costs order is warranted.

LANDLORDS' REASONABLENESS IN PURSUING AN APPEAL

40. The Landlords' written legal submissions state that—in light of the decision of the Circuit Court and the costs consequences which followed—they were left with no reasonable alternative but to appeal the decision to the High Court. The Landlords say that the Circuit Court failed to address several arguments which were central to their case. These included their argument that it had not been necessary to serve a forfeiture notice at all, and their argument that clause 5 of the lease provided for entry upon *part* of the premises in the name of the whole. The Landlords further submit that the failure to engage with these arguments left significant issues undetermined and deprived them of a reasoned decision on matters critical to the outcome of the case.
41. The Landlords seek to juxtapose these criticisms of the Circuit Court's decision with the quantum of the costs claim made against them. The Landlords report that the Tenant served them with a bill of costs exceeding €400,000 in relation

to the Circuit Court hearing. They emphasise that the demised premises are valued at approximately €750,000 and that they are private individuals, rather than large-scale commercial landlords with portfolios of investment properties and dedicated legal teams. They submit that, in the face of what they describe as a flawed judgment and an overwhelming costs demand, an appeal was the only proportionate course open to them.

42. Counsel expressed the position in somewhat more qualified terms in oral submission. Counsel characterised the complaint as being that the Landlords' arguments had not been addressed by the Circuit Court and that the findings by which the forfeiture had been held invalid had not been properly reasoned. Counsel said that the Landlords felt that their arguments had not been listened to, that they had not been treated fairly, and that having been faced with a bill of costs exceeding €400,000, they felt that they had to appeal.
43. With respect, these submissions conflate two distinct matters. The first is the underlying merits of the proceedings; the second, the remedies available to a party served with what they consider to be an excessive bill of costs.
44. The starting point in determining the incidence of legal costs in any given case is the outcome of the proceedings. The first question that the court must ask is whether either party has been "*entirely successful*" in the proceedings. The underlying merits of the proceedings are thus central to the allocation of costs. In the present case, the Landlords' asserted defence to the claim for a new tenancy was misconceived from the outset. This truth is not altered by the fact, if fact it be, that the Circuit Court's decision did not address each of the Landlords' arguments in detail. A party who pursues an unsuccessful appeal to the High Court cannot avoid costs liability by seeking to criticise the decision

below. The Landlords had a full rehearing of their case before the High Court and were unsuccessful on the merits.

45. A party who chooses to pursue an appeal against a decision of a lower court does so on hazard of exposing themselves to liability for two sets of costs if the appeal is not successful. This is so even if the appellant considers its appeal to be reasonably brought and reasonably based: *In the matter of the MV Lady Magda* [2021] IECA 51. It would be unfair to deny the successful respondent their presumptive entitlement to an award of costs simply because an appellant had pursued an appeal in good faith.
46. The fact that the Landlords had been served with a bill of costs running to the hundreds of thousands cannot provide a shield against the statutory rules in relation to costs. If the Landlords believed the bill of costs to be excessive, then their remedy was to apply to have same measured by the County Registrar in accordance with Part 10 of the Legal Services Regulation Act 2015. The touchstone for the adjudication of legal costs under the Act is reasonableness. The costs must have been reasonably incurred and must be reasonable in amount. It was not necessary for the Landlords to pursue an appeal to the High Court to obtain a remedy in respect of what they say is an excessive claim for costs.
47. There is a further difficulty with the Landlords' submission that they had no reasonable alternative but to appeal. The Landlords explained that they had expected that the second module would not proceed until the appeal from the first module had been determined. That expectation was overtaken by the refusal of their application for a stay and the subsequent determination of the second module. By the time the present appeal came on for hearing in October 2025, the terms of the Tenant's new tenancy had been fixed and the Landlords had not

appealed from that determination. Nor had they invited the Circuit Court, in the second module, to refuse the new tenancy for good and sufficient reason by reference to the matters now relied upon.

48. In oral submission, counsel initially suggested that the progression of the second module had effectively deprived the Landlords of their right to appeal from the first module. It was pointed out to counsel that the Landlords could have appealed the order made in the second module, allowing both appeals to be heard together before the High Court. Counsel ultimately accepted that such an appeal could have been brought. Against that procedural background, the Landlords have not explained satisfactorily what practical advantage could have been obtained by prosecuting the appeal from the first module alone. Even success on one or more of the controversies concerning the events of 17 August 2023 would not, without more, have displaced the subsisting and unappealed order fixing the terms of the new tenancy.

CROFTER PROPERTIES

49. Counsel for the Landlords very fairly accepts that the Tenant has been entirely successful in relation to the forfeiture issue. The Landlords nevertheless seek to justify a departure from the default costs position by reference to the provenance of the point upon which the Tenant succeeded. To understand this argument, it is necessary to recall the procedural history as follows.
50. During the substantive hearing of the appeal in October 2025, I drew the parties' attention to the decision in *Crofter Properties Ltd v. Genport Ltd* [2007] IEHC 80, [2007] 2 I.L.R.M. 528. The decision addresses the legal character of a tenant's statutory occupation in the interregnum between the

expiration of a tenancy and the determination of an application for a new tenancy pursuant to Part II of the Landlord and Tenant (Amendment) Act 1980. I invited the parties to consider whether this decision might be relevant to the question of forfeiture. I will refer to this point as “*the Crofter Properties point*”.

51. As explained in *Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42 (at paragraphs 37 to 46), the adversarial system does not mean that a judge cannot actively engage with the argument and course of the trial. A judge may explore questions of law that he or she considers arise on the pleaded case. In particular, a judge may, for reasons of fairness and with the intention of arriving at a correct answer, invite submissions on a point which has not already been argued, or which appears to have been incompletely addressed. Not to do so could give rise to a result which is wrong in law, incomplete or likely to create an unsatisfactory precedent.
52. In the present case, the principal defence pleaded was that the purported re-entry defeated the Tenant’s claim for a new tenancy. The determination of whether this line of defence was well founded necessitated careful consideration of the meaning of section 28 of the Landlord and Tenant (Amendment) Act 1980. The decision in *Crofter Properties* is the leading authority on the section. The proper resolution of the proceedings required that the decision be addressed.
53. Following the conclusion of the evidence, the proceedings were adjourned to allow the parties time to prepare and file supplemental written legal submissions on the *Crofter Properties* point. I then heard oral argument over two days in December 2025 and reserved judgment. For the reasons explained in the principal judgment, the decision in *Crofter Properties* proved central to the disposal of the appeal.

54. The Landlords seek to rely, for costs purposes, on the fact that the *Crofter Properties* point was initially raised by the court rather than by the parties. The gravamen of the submission is that the Tenant cannot claim credit for an argument it never identified. It is submitted that both parties had laboured under the same misapprehension as to the law, prior to the *Crofter Properties* point having been raised. It is further submitted that the parties had thought that the case was “*all about*” whether breaking a lock constituted a lawful re-entry and that the parties had been “*sidelined and sidetracked*” on that issue and had “*missed*” the anterior point.
55. With respect, the fact that the *Crofter Properties* point had been introduced into the proceedings by the court could only have been relevant to the incidence of costs had the Landlords revised their case in response. The Landlords might have responded by accepting that their claim to have lawfully re-entered the demised premises was inconsistent with the rationale of *Crofter Properties*. Had they done so, and withdrawn their defence at that stage, then there *might* have been grounds for saying that the parties’ supposed mutual mistake should be reflected in any costs order. The Landlords might have said that had they known of the point earlier, they would never have pursued the defence.
56. In the event, however, the Landlords chose to contest the applicability of *Crofter Properties* to the circumstances of the case. This was the Landlords’ prerogative. The legal argument had been deferred for the precise purpose of allowing the parties to consider the decision in *Crofter Properties* and to make such submissions as they wished in relation to same.
57. The relevant chronology for costs purposes is as follows. The Landlords had amended their original written defence to plead that the lease had been forfeited

and the tenancy terminated. The Landlords continued to stand over this plea following the raising of the *Crofter Properties* point, both in their written legal submissions and oral argument. The Landlords sought to amend their written defence a second time to omit this plea on the penultimate day of the six-day hearing. Even then, the Landlords persisted in the specific plea that they had lawfully entered and repossessed the demised premises. The Tenant, by contrast, pressed the *Crofter Properties* point in the supplemental written legal submissions and in oral argument. It is incorrect to say, as the Landlords do, that the argument was never made by the Tenant. Once the point had been identified, the Tenant pursued it with vigour.

58. The parties adopted diametrically opposed positions on the *Crofter Properties* point. It follows that the point had to be heard and determined in order to resolve the proceedings. This exercise necessitated the Tenant incurring additional costs which could otherwise have been avoided. Had the Landlords accepted that the *Crofter Properties* decision governed the position, the proceedings could have concluded after four days, not six.
59. The provenance of the point became irrelevant once it was pursued by the Tenant and resisted by the Landlords. The measure of the costs incurred would have been the same had the point been first raised by the parties rather than by the court. This is because, as is explained below, the Tenant acted reasonably in pursuing its other arguments in the alternative, notwithstanding that the appeal was ultimately determined on the *Crofter Properties* point.

MODE OF SERVICE OF THE FORFEITURE NOTICE

60. The Landlords submit that they succeeded on the issue of whether the forfeiture notice had been validly served in accordance with the terms of the expired lease. They observe that the High Court reversed the Circuit Court's finding on this issue. The Landlords further submit that this is a discrete issue on which the Tenant failed, and that the costs of litigating it should not be borne by the Landlords. It is said that the issue required oral evidence from Mr Frawley and Ms Griffin, cross-examination, a site inspection, and extensive submissions, thereby adding materially to the length and cost of the proceedings.
61. With respect, the issues in relation to the service of the forfeiture notice are more nuanced than the Landlords' submissions imply. Two issues arose as follows. The first was the narrow issue of whether the mode of service complied with the notice provisions under the lease. The second was the broader issue of whether the choice of the mode of service disclosed an intention to secure a litigation advantage rather than recover the arrears of rent.
62. It is correct to say that the Landlords succeeded on the first of the two service-related issues described above. The Landlords were, however, unsuccessful on the second issue, with the court finding that their true intention was to contrive a forfeiture rather than to secure payment of the arrears of rent.
63. The position is put as follows in the principal judgment (at paragraphs 55 and 56):

“Having regard to all of the foregoing, the decision to serve the forfeiture notice by way of hand delivery to the premises, to the exclusion of any of the habitual methods of communication between the parties, is only consistent with an intention to effect service in a form which was technically compliant, but which presented the least likelihood of the forfeiture notice being seen by the Tenant in sufficient time

to remedy the failure to pay the rent before the fourteen-day period prescribed for payment had expired.

Mr Frawley has never properly explained why he failed to take the obvious step of sending a copy of the forfeiture notice to the Tenant's solicitors. The parties' respective solicitors engaged in voluminous correspondence: the booklet of *inter partes* correspondence runs to in excess of five hundred pages. Yet the forfeiture notice appears to be the only document not sent by email or post to the solicitors on record. The forfeiture notice was directly relevant to the ongoing litigation between the parties. If the Landlords' objective had been to secure the payment of the arrears of rent, then the most obvious thing to have done would have been to write to the Tenant's solicitors. This offered the best prospect of securing a prompt payment. Mr Frawley confirmed in evidence that he had been aware that the terms of the terminated tenancy allowed for a number of alternative methods of service, including, relevantly, service on an agent."

64. The broader of the two service-related issues occupied substantially more time during the substantive hearing in October and December 2025 than did the narrow question of compliance with the notice provisions of the lease. This is because the broader issue required consideration of the previous course of communications between the parties, the interactions between the principals and the solicitors on the day immediately prior to the service of the forfeiture notice, and the subsequent failure of the Landlords to accept promptly the offer of the payment of the rent arrears.
65. By contrast, the time expended on the narrower issue of whether the service complied with the terms of the lease was minimal. In effect, it required consideration of the relevant clause under the lease—the interpretation of which was not vigorously contested—and an examination of the physical layout of the letter slot and the delivery box at the demised premises. The factual question was whether the letter slot was visibly disused, such that placing the forfeiture

notice there could not constitute valid service. That question was readily resolved by reference to the engineer's report and the subsequent site inspection.

66. Neither service-related issue warrants a separate allocation of costs. The narrow issue concerned compliance with the notice provisions under the lease. The Tenant was unsuccessful on the narrow issue. This issue took up minimal time at the hearing, and it would not be appropriate to allocate costs on such a granular basis.
67. The Tenant succeeded on the second, broader issue. It was reasonable for the Tenant to have pursued this issue—and not confined itself to the *Crofter Properties* point—in circumstances where the Landlords had intimated an intention to rely on the non-payment of rent during the period of statutory occupation as a ground for setting aside the order fixing the terms of the new tenancy. As explained in the principal judgment, non-payment of rent might well represent a “*good and sufficient reason*” for refusing to renew for the purposes of section 17(1)(a)(v) of the Landlord and Tenant (Amendment) Act 1980. As it happens, the Landlords chose not to agitate this issue at the hearing of the second module but did intimate that they might apply to the Circuit Court to set aside the order made on the second module. Against this background, it was “*reasonable*” within the meaning of section 169 of the LSRA 2015 for the Tenant to have pursued this issue as part of the first module. The issue was not closed off by the *Crofter Properties* point and the Tenant was entitled to protect its position lest the Landlords apply to set aside.

PEACEABLE RE-ENTRY

68. The Landlords next rely upon the time devoted to the issue of whether the purported re-entry was peaceable. They submit that the Tenant devoted substantial time to this issue on appeal, and that its pursuit required detailed oral evidence and extensive written submissions in circumstances where there were competing authorities on the extent to which a landlord might use force to re-enter its premises. Reference is made to the evidence concerning the garden gate, sliding bolt, the locksmith's actions, and Ms Griffin's conduct on 17 August 2023. The Landlords submit that the issue was ultimately immaterial to the outcome of the proceedings and that the costs of litigating it should not fall upon them.
69. It is necessary, therefore, to consider whether it was reasonable for the Tenant to contest the Landlords' assertion that they had effected a peaceable re-entry, or whether the Tenant should, instead, have relied solely on the grounds that an expired lease cannot be forfeit and that a period of statutory occupation can only be terminated by court order.
70. The Tenant found itself in a position where the Landlords continued to deny its entitlement to a new tenancy by reference to the purported forfeiture of the (already expired) tenancy. The Tenant had at least two reasonable answers to this. The first was that an expired lease cannot be forfeit and that a period of statutory occupation can only be terminated by court order. The second was that—even on the assumption that the Landlords might, in principle, have had an entitlement to re-enter the premises—the asserted re-entry was unlawful in that it did not constitute peaceable re-entry. Each of these answers was well supported by case law. The decision in *Crofter Properties* was decisive of the

first, and there was a consistent line of case law to the effect that the breaking of locks was inconsistent with peaceable re-entry.

71. It should also be recalled that the re-entry issue had been introduced into the proceedings by the Landlords, not the Tenant. The initial stance of the Landlords had been to accept that the Tenant had a statutory right to a new tenancy, but to dispute the precise terms on which it should be granted. The Landlords belatedly amended their written defence to plead re-entry and forfeiture. The Tenant acted reasonably in contesting this pleaded defence. The Tenant initially contested the defence primarily on the ground that the asserted re-entry had not been peaceable; thereafter, the Tenant also relied on the *Crofter Properties* decision.
72. It would not be appropriate to make a costs adjustment to reflect the fact that the case was ultimately disposed of by reference to only one of these two grounds. To punish a party for pursuing two reasonable and complementary grounds would not promote procedural discipline. A party who has had to pursue legal proceedings to vindicate their rights—in this case a statutory right to a new tenancy—by reason of the wrongheadedness of another should not be inhibited in the proper presentation of their case. The proper presentation of the Tenant's case necessitated the pursuit of both grounds in circumstances where the Landlords were doggedly pursuing their defence in the teeth of the case law. For as long as the Landlords maintained that their re-entry was legally effective, the Tenant had a reasonable basis for preserving its alternative answer that the entry was not peaceable.
73. The inappropriateness of making a costs adjustment would have been all the more obvious had the “*peaceable re-entry*” issue been determined in favour of the Tenant. The issue was not, however, decided in favour of either party. It

was deliberately left undetermined because it had become unnecessary to the disposition of the appeal and its determination would have required the court to consider whether to depart from a decision of coordinate jurisdiction. This is not, therefore, a case in which the otherwise successful party had pursued and failed on an alternative argument. The Landlords cannot treat the absence of a determination as a success on the issue or place it on their side of the costs ledger.

VAT INVOICES

74. The Landlords seek a costs adjustment in respect of the VAT invoices issue. More specifically, the Landlords submit that they should not bear the full costs of that part of the appeal hearing which was directed to establishing a proposition which, or so they say, the High Court declined to endorse.
75. To put this submission in context, it is necessary to describe how the issue arose. The Landlords had elected to treat the letting of the premises as subject to VAT. Section 97(1)(c)(i) of the Value-Added Tax Consolidation Act 2010 permits a landlord to exercise the option to tax by including in the letting agreement a written provision that VAT is chargeable on the rent. Clause 3.29 of the lease expressly recorded the exercise of that option. Having elected to charge VAT on the rent, the Landlords became liable to account for that VAT and were subject to the statutory obligation under section 66 of the 2010 Act to issue a VAT invoice in respect of the taxable supply. Clause 3.29 of the lease reflected that obligation by providing that the Landlords would furnish the Tenant with a VAT invoice upon payment of the rent.
76. The Landlords ceased issuing VAT invoices in respect of the rent in or about July 2020. This was done on the basis of legal advice to the effect that the

Landlords should not accept any rent for any period following the expiration of the lease. It seems that, as of July 2020, the Landlords intended to resist the claim for a new tenancy and the concern was that the acceptance of rent might prejudice their position. The Landlords subsequently changed their stance in June 2022. The Landlords sought to negotiate the terms of a new tenancy and delivered a formal defence in January 2023 admitting that the Tenant was entitled to a new tenancy.

77. The Landlords' evidence was to the effect that, notwithstanding this change in stance, they continued not to issue VAT invoices. This was said to be by way of an oversight.
78. The Tenant had offered, in the immediate aftermath of the purported forfeiture on 17 August 2023, to pay the arrears of rent, subject only to the proviso that the Landlords issue the requisite VAT invoices. An amount equivalent to the rent arrears had been placed in an escrow account with the Tenant's solicitors.
79. It was not until 14 February 2024 that the Landlords finally issued the VAT invoices in respect of the rent payable for the period between February 2023 and 16 August 2023. The issuance of the VAT invoices triggered the payment of the monies held in escrow by the Tenant's solicitors.
80. The Circuit Court held that the Tenant had not been required to pay rent having regard to the dispute in relation to the issuance of VAT invoices.
81. The issue was addressed as follows in the principal judgment (at paragraphs 139 to 140):

“[...] Here, the Tenant acted reasonably in paying the rent into an escrow account immediately upon learning of the purported forfeiture. By contrast, the Landlords acted unreasonably: (i) the Landlords never had any lawful reason to refuse to issue the VAT invoices, and (ii) the manner in which the Landlords chose to serve the forfeiture notice

gives rise to the irresistible inference that their true intention was to contrive a forfeiture rather than secure payment of the arrears of rent. See paragraphs 48 to 60 above.

It is not necessary, for the resolution of the present proceedings, to go as far as the Circuit Court did and to find, *as a general proposition of law*, that a tenant would always be entitled to withhold rent by reason of a dispute in relation to the issuance of VAT invoices. The present proceedings can be resolved on the narrower, fact-specific grounds outlined above.”

82. It is, therefore, an oversimplification to suggest that the Landlords were successful in relation to this issue. Whereas it is correct to say that the High Court did not uphold the broad finding of the Circuit Court, the High Court did make a finding of fact that the Landlords had acted unreasonably. The principal judgment held that the late payment of the rent did not represent a good and sufficient reason to refuse to grant a new tenancy.
83. A costs adjustment would only be appropriate had it been unreasonable for the Tenant to have pursued the issue. One of the factors to be considered is whether there is a reasonable relationship between the potential of the issue to affect the outcome of the proceedings and the amount of time dedicated to it. Here, the issue had the potential to be dispositive: the purported re-entry and forfeiture were predicated on the Tenant being in arrears of rent. If the Tenant had succeeded in establishing that there was no obligation to pay the rent by reason of the non-issuance of VAT invoices, then this would have removed the predicate. The time taken up by the issue was immaterial in the context of a six-day hearing. The parties were in broad agreement as to the relevant facts and the legal submissions on the issue were limited: the parties referred to the relevant clause in the lease and, in very general terms, to the legislative context.

84. In all the circumstances, it was reasonable for the Tenant to have pursued the issue. This is especially so where, by reference to a narrower version of same, the Tenant succeeded in that the late payment of the rent was held not to represent a good and sufficient reason to refuse to grant a new tenancy.

BASIS OF MEASUREMENT OF COSTS

85. The Tenant has applied for an order that its costs be measured on the legal practitioner and client basis. Its written legal submissions describe the effect of such an order by reference to the pre-2019 version of Order 99 of the Rules of the Superior Courts. The Tenant relies in this regard upon *Trafalgar Developments Ltd v. Mazepin* [2020] IEHC 13. There, the costs application had been argued by reference to the legal position as it stood *prior* to the commencement of the relevant provisions of the Legal Services Regulation Act 2015.
86. Under the former regime, the distinction between the two bases of measurement was expressed in different substantive tests: party-and-party costs were confined to costs which were “*necessary or proper*”, whereas solicitor-and-client costs were recoverable unless they had been “*unreasonably incurred*” or were “*unreasonable in amount*”. This express asymmetry is not reproduced in the recast Order 99. Rules 10 and 11 now provide for both bases to be adjudicated in accordance with section 155 of, and Schedule 1 to, the Legal Services Regulation Act 2015. Those provisions apply the general requirements that costs be reasonably incurred and reasonable in amount.
87. Accordingly, the court requires further written legal submissions addressing the following:

- (1) The practical effect of a direction that costs be adjudicated on a legal practitioner and client basis, including an explanation of how such an adjudication differs in substance from an ordinary party-and-party adjudication;
 - (2) In light of that difference, if any, the criteria by which the court should determine whether such a direction ought to be made.
88. The determination of those questions, and the application of the relevant criteria to the conduct relied upon by the Tenant, will be reserved for determination in a further judgment.
89. The Tenant is to file and serve its submissions by 19 October 2026, with the Landlords to file and serve their replying submissions by 9 November 2026.

CONCLUSION

90. The Tenant was entirely successful in the first module of these landlord and tenant proceedings. The Landlords' attempt to resist the claim for a new tenancy by reference to their purported re-entry upon the demised premises has been dismissed for the reasons set out in detail in the principal judgment.
91. It follows that the Tenant is presumptively entitled to an award of costs in its favour in respect of both the Circuit Court and the High Court stages of the first module. Save for one exception, none of the arguments advanced on behalf of the Landlords is effective to displace this presumptive entitlement.
92. The exception is in relation to the Tenant's pursuit of a claim for equitable set-off before the Circuit Court. For the reasons explained at paragraphs 29 to 39 above, the Tenant will recover only 40 per cent of its costs of and incidental to the first module before the Circuit Court.

93. An order will be made pursuant to sections 168 and 169 of the Legal Services Regulation Act 2015 as follows:
- (1) The Tenant (Plaintiff) is entitled to recover the costs of and incidental to the High Court appeal in relation to the first module of the landlord and tenant proceedings. The costs include, *inter alia*, the costs of two counsel, two sets of written legal submissions, stenography costs, and all reserved costs.
 - (2) The Tenant (Plaintiff) is entitled to recover 40 per cent of the costs of and incidental to the Circuit Court proceedings in relation to the first module of the landlord and tenant proceedings. The costs include, *inter alia*, the costs of two counsel, one set of written legal submissions, stenography costs and all reserved costs.
 - (3) In accordance with Order 61, rules 11 and 12, the costs are to be taxed (measured) by the County Registrar having regard to the principles under the Legal Services Regulation Act 2015.
 - (4) The parties have liberty to apply.
94. The determination of the Tenant's application for a direction that its costs be adjudicated on the legal practitioner and client basis will be the subject of a separate reserved judgment. The parties are directed to file further written legal submissions for the reasons explained at paragraphs 85 to 87 above.
95. The proceedings will be listed, for mention only, on Tuesday, 1 December 2026. The parties are to inform the court on that date whether they wish to make further oral submissions or are content to rest on their written legal submissions.

Appearances

Michael Howard SC and Niall Ó hUiginn for the plaintiff instructed by Maples and Calder (Ireland) LLP

Roughan Banim SC and Aoife McCarthy for the defendants instructed by O'Hagan Ward & Co.