Unapproved

THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2024] IECA 34
Court of Appeal Record Number: 2023/253
High Court Record Number: 2022/202 JR

Costello J.
Power J.
Meenan J.

BETWEEN:

SEAN KENNY

APPELLANT

– AND –

LEGAL COSTS ADJUDICATOR (BARRY MAGEE)

RESPONDENT

AND

GREG WINTERS

NOTICE PARTY/RESPONDENT

JUDGMENT of Ms. Justice Power delivered on the 14th day of February 2024

Introduction

1. This is an appeal against the judgment of the High Court ([2023] IEHC 391, Heslin J.) delivered on 7 July 2023 in which the costs of judicial review proceedings were awarded against the appellant ('Mr. Kenny'). At the outset of the appeal, the parties

agreed that the order of the High Court, perfected on 11 August 2023 contained a flaw, on its face, in that it failed to record the High Court's order in respect of the substantive reliefs in the proceedings. These reliefs had been agreed between the parties in terms that had been submitted to the High Court. There was no dispute about the fact that the High Court had, in fact, granted those reliefs and this is clear from the judgment. An application under the 'slip rule' was required to correct the error and the parties agreed to furnish to the Court a draft of what the perfected order, as agreed, should have stipulated.

2. That matter aside, the background to the proceedings is set out comprehensively in the judgment of the High Court. The litigation arose from a dispute on legal costs between Mr. Kenny and the Notice Party ('Mr. Winters'), a solicitor who had represented Mr. Kenny in family law proceedings. That dispute became the subject of a legal costs' adjudication ('the adjudication').

The Facts

3. A hearing took place before the Legal Costs Adjudicator ('the Adjudicator') on 2 November 2021 at 2 p.m.

4. The Adjudicator reserved his decision until 2 p.m. on 19 November 2021. Mr. Kenny did not attend until 3.30 p.m. that day by which time matters had concluded. He asked the Adjudicator for some indication of the decision that he had made. The Adjudicator confirmed that he had found that Mr Winters' Bill of Costs to be reasonable, with a slight reduction being made to one item of the fees claimed. He also stated that Mr. McCann, who was Mr. Winters' legal costs' accountant, had undertaken to provide to Mr. Kenny a more detailed account of the Determination. Mr. Kenny indicated that he was going to appeal the matter and the Adjudicator confirmed that an application

for a consideration could be made under s.160 of the Legal Services Regulation Act 2015 ('the 2015 Act'). Section 160, in relevant part, provides that:

> "*(1) Where a party to an adjudication is dissatisfied with a decision of a Legal Costs Adjudicator under section 157 to confirm a charge, not to confirm a charge or to determine a different amount to be charged in respect of a matter or item the subject of the adjudication, he or she may, within 14 days of the date on which the determination is furnished to him or her under section 157(2), apply to the Legal Costs Adjudicator for the consideration of the decision and the making of a determination under this section.*"

5. On 22 November 2021 Mr. Kenny requested from Mr McCann a copy of the Adjudicator's Determination. On the next day and as a matter of courtesy, he was provided with a copy of the determined Bill of Costs arising from the decision delivered at the hearing on 19 November 2021. The copy furnished set out, in red, all deductions that had been made and Mr. McCann warned Mr. Kenny that these were his own preliminary calculations and had yet to be reconciled with the Office of the Legal Costs Adjudicators.

6. Some further email correspondence passed between Mr. Kenny and Mr. McCann thereafter and on 29 November 2021, Mr. McCann indicated that he would send Mr. Kenny the '*Certificate of Adjudication*' as soon as same was received and that, in the meantime, if Mr. Kenny had any queries, he should contact the Office of the Legal Costs Adjudicators.

7. On 3 December 2021 Mr. Kenny instructed a firm of solicitors to write to the Office of the Legal Costs Adjudicators to lodge objections to the Determination. He requested an extension of time for so doing should that be deemed necessary, and he also requested a copy of the Adjudicator's Report.

8. As matters transpired, the Adjudicator required that a formal application for an extension of time be made. To this end, a hearing was held on 16 December 2021 ('the hearing'). Mr. Kenny was represented by counsel and Mr. Winters was represented by his legal costs' accountant, Mr. McCann. There was no evidence before the Court that Mr. Kenny attended the hearing.

9. At the hearing, the Adjudicator heard submissions on (i) when, if at all, the 14-day period for seeking a consideration of his Determination had commenced and (ii) whether he, as Adjudicator, had, if necessary, a discretion to extend the statutory period.

10. The Adjudicator reserved his decision and on 18 January 2022, delivered a five-page Ruling ('the Ruling') on the issues that had been raised at the hearing.

11. At paras. 6 and 7 of the Ruling, the Adjudicator noted the two submissions made on behalf of Mr. Kenny. The first was that a written Report of the Determination was required to prepare, properly, the grounds for consideration under s.160 of the 2015 Act and that it followed, therefore, that the 14-day time limit could only run from the date of the furnishing of the Report (which Mr Kenny had not received) as opposed to the oral furnishing of the Determination. Secondly, on behalf of Mr. Kenny it was submitted that, if necessary, the Adjudicator enjoyed a jurisdiction pursuant to O.99, r.36(10) of the Rules of the Superior Courts ('the RSC') to extend the relevant time limit.

12. There is no reference in the Ruling to any submission having been made by Mr. McCann, on behalf of Mr Winters, on the first issue.

13. As to the second issue, the Adjudicator, at para. 8 of the Ruling, recorded the submission that had been made on behalf of Mr. Winters. He stated:

"*In reply Mr McCann indicated that the provisions of section 160 were clear. There is no provision within the statute for an extension of time. Order 99 rule 36(10) was clearly caveated by the phrase 'subject to any provisions of Statute'. Therefore, it was submitted, the rule could not permit an extension of the 14 day time limit provided for in section 160.*"

14. The Adjudicator held that any jurisdiction to extend the 14-day time limit must be found in primary legislation. He found that he did not have discretion to extend time because the statute did not provide for it and it was unlikely, in his view, that any Rule of Court could amend primary legislation. The Adjudicator was satisfied that whilst the case law opened to him dealt with decisions in respect of the Residential Tenancies Board, the findings made therein could apply more broadly. Accordingly, he concluded that the 14-day time limit ran from the date on which Mr. Kenny received the Determination (19 November 2021) and that it had expired on 3 December 2021. As he had no jurisdiction to extend the time limit and as no request for consideration had been received within the 14 days, Mr. Kenny was out of time in seeking such consideration.

15. Thereafter, a Certificate of Determination dated 31 January 2022 was issued.

16. On 1 February 2022, the Adjudicator's written Report, which had been requested by Mr. Kenny pursuant to s. 157(8) of the 2015 Act was furnished to his solicitor pursuant to s. 157(10) thereof.

17. Because Mr Kenny took the view that the 14-day period only began to run from the date he received the written Report (1 February 2022), he, through his solicitors, sent a letter on 14 February 2022 requesting a consideration of the Adjudicator's Determination. The letter was copied to Mr. Winters.

18. On 24 February 2022, the Adjudicator delivered a decision finding that Mr. Kenny's application for consideration was out of time for the reasons given in the Ruling.

The Proceedings

19. Leave to apply for relief by way of judicial review was granted on 21 March 2022. Six reliefs were sought in the Notice of Motion, including:

(1) A Declaration that the decision of the Adjudicator communicated to the applicant on 24 February 2022 purporting to refuse his application for a consideration of the Determination in the adjudication of costs was null, void and of no effect.

(2) An Order of *Certiorari* quashing the decision of 24 February 2022.

(3) An Order of *Certiorari* quashing the '*Certificate of Adjudication*' issued by the Adjudicator.

(4) A Declaration that the Determination in the adjudication of costs was furnished to Mr. Kenny on 1 February 2022 and that his request for a consideration of the Determination under s.160 of the 2015 Act was made to the Adjudicator within the requisite 14 days.

(5) An Order remitting to the Adjudicator for consideration and review, the Bill of Costs in the adjudication of costs as between Mr. Winters and Mr. Kenny.

(6) If necessary, an injunction restraining the Notice Party from enforcing the final '*Certificate of Determination*' in the adjudication of costs.

Mr. Kenny also sought such further or other orders and reliefs as the Honourable Court deemed fit together with an order for the costs of the application.

20. I pause to observe that, in his pleadings, Mr. Kenny did not seek any relief against Mr. Winters. There is nothing in the pleadings that allege that Mr. Winters, as Notice Party, had not discharged a responsibility that he was obliged to discharge or that he had breached a legal or any other duty that was imposed upon him. Specifically, Mr. Kenny did not seek any relief against Mr. Winters in respect of costs.

21. The core challenge of the judicial review was that contrary to what the Adjudicator had found, Mr. Kenny had not, in fact, been furnished with the Adjudicator's Determination until 1 February 2022. Thus, Mr. Kenny asserted that the 14-day period within which he was entitled to apply for a consideration of the Determination under s.160 of the 2015 Act commenced on 1 February 2022 and not on 19 November 2021 as decided by the Adjudicator in his Ruling.

Statement of Grounds

22. The specific grounds upon which Mr. Kenny applied for the reliefs he claimed were as follows:

- that the impugned decision was made *ultra vires* the powers of the Adjudicator and contrary to the provisions of the 2015 Act and, specifically, that the Adjudicator furnished his Determination to the applicant by way of email on 1 February 2022 and that the statutory time limit of 14 days applied from that date and not 19 November 2021;
- that the true construction of the 2015 Act meant the Adjudicator had a duty to furnish his Determination to all parties in the adjudication and that on 19 November 2021 the Adjudicator had failed or refused to furnish his Determination to the applicant;

- that the Adjudicator had failed to adhere to the provisions of s.157(2) of the 2015 Act or to provide fair procedures to the applicant in the adjudication process;
- that the Adjudicator had unlawfully delegated his duty to furnish his Determination to the Notice Party and that the Notice Party had, in turn, failed to furnish the Determination to the applicant;
- that the Adjudicator had fulfilled his duty to furnish the Determination when his Report dated 1 February 2022 was sent to the applicant by way of email;
- that the impugned decision constituted an unreasonable exercise of the statutory powers of the Adjudicator in that he was aware the applicant had not been furnished with the full extent of his Determination in order to allow him to properly prepare and lodge an application for a consideration of the Determination and to set out the grounds of his objection to each item of charge to be considered; and
- that the applicant would suffer loss and damage by reason of the impugned decision as he would be prevented from appealing the Determination which would become final and enforceable.

23. It should be noted that whilst the fourth ground of the Statement of Grounds includes a plea that the Notice Party failed to furnish the Determination to the applicant, Mr. Kenny also averred in his grounding affidavit that the Adjudicator could *not* delegate his statutory duty to furnish his Determination to a party in the adjudication.

24. Mr. Kenny averred that once furnished with the Adjudicator's Report on 1 February 2022 he then requested, on 14 February 2022, a consideration of the decision and the making of the Determination in the adjudication. As noted, that request was

refused on 24 February 2024 and it is *that* decision which Mr. Kenny alleged was made *ultra vires* the powers of the Adjudicator and it is *that* decision that was the subject of the judicial review proceedings.

25. From a perusal of the pleadings, it is clear that the substantive reliefs sought by Mr. Kenny were directed, almost exclusively, at the Adjudicator as respondent. On 19 May 2022, the Chief State Solicitor's Office (on behalf of the Adjudicator) wrote to Mr. Winters, as Notice Party, to notify him that they had informed the solicitors for Mr. Kenny that the Adjudicator did not intend to participate in the proceedings. The Adjudicator considered that it was the Notice Party who was the *legitimus contradictor* and who should have seisin of the proceedings.

26. When served with the proceedings, Mr. Winters, as Notice Party, did not file a Statement of Opposition.

27. As the Adjudicator has chosen not to participate in the proceedings and as four of the five substantive reliefs were directed towards a decision made by the Adjudicator (the relief sought at para. 3 referred to a non-existent document), Mr. Winters, as Notice Party, raised no objection to the orders sought in the Notice of Motion. To this end, he wrote to Mr. Kenny's solicitors on 4 July 2022 stating that he did not object to orders being made in terms of paras. 1, 2, 4 and 5 of the Notice of Motion but, on the condition that the terms of para. 5 be rephrased to accord with the wording of s.160(1) of the 2015 Act, and that no party would seek an order for costs against him, as Notice Party. Mr. Winters also averred that he confirmed that he would not enforce the final Certificate of Determination in the adjudication whilst the proceedings were pending. He pointed out, however, that by suggesting a sensible rewording of the relief sought, he was not acquiescing to any of Mr. Kenny's substantive objections in respect of the substance of the Adjudicator's Determination on the Bill of Costs.

28. Mr. Winters received no reply to his letter of 4 July 2022, and he sent a reminder letter to Mr. Kenny's solicitors on 2 September 2022.

29. By letter of 8 September 2022 Mr. Kenny's solicitors confirmed that four of the five substantive reliefs being sought were directed towards the Adjudicator's decision of 24 February 2022. The letter went on to allege, however, that Mr. Winters, through his conduct, was responsible for '*the entire situation*'. I shall return to the correspondence, in due course, but suffice it to say, at this stage, that Mr. Winters did not agree with the contention that the conduct of his representative, Mr. McCann, had given rise to the proceedings, and he objected to Mr. Kenny's attempt to fix him, as Notice Party, with the costs thereof.

The High Court

30. Thus, when the matter came on for hearing on 16 June 2023 before Heslin J. the parties had agreed the reliefs and the only outstanding issue was the question of costs.

31. Mr. Kenny accepted that he was not entitled to seek costs against the Adjudicator. However, he asserted that it was Mr. Winters, the Notice Party, who should pay for the costs of the proceedings. In his view, the Notice Party had played *'a pivotal role'* in bringing about the impugned decision of 24 February 2022 by reason of his conduct at the hearing held some two months earlier in December 2021.

32. On 7 July 2023, Heslin J. delivered his judgment in the matter. He found no basis for holding Mr. Winters responsible for the judicial review proceedings. Consequently, he declined to depart from the general provision of s.169 of the 2015 Act to the effect that an '*entirely successful*' party is entitled to his costs.

33. Based on the evidence opened to the Court, the trial judge was satisfied that there had been two issues before the Adjudicator at the hearing in December 2021. The first

was whether the time limit ran from 19 November 2021 or whether it could only run from the time that the Adjudicator had issued his Report on the adjudication of costs. On this issue, the judge was satisfied that Mr. Winters had made no submission at all.

34. The second issue concerned the Adjudicator's jurisdiction to extend the time limit. This was clearly secondary because if Mr. Kenny was correct on the first point (that time had not started to run) then there was no question of needing to extend it. Based on the evidence before the court, the trial judge was satisfied that Mr. McCann had made a submission in respect of this second issue. He had argued that s.160 makes no provision for an extension of time. On its face, that submission, in itself, must be correct.

35. Having considered the facts based on the evidence before him, the trial judge was satisfied that up to and including 14 February 2022, no act or omission on the part of the Notice Party could, fairly, be said to have *'brought about'* the need for the judicial review application. Recalling that it was the decision of 24 February 2022 that was challenged in the proceedings, the trial judge observed (at para. 50) that:

- the Notice Party had not been asked to play any role in that decision;
- that decision was made exclusively by the Adjudicator;
- it was simply not open to the Notice Party to make that decision;
- just as Mr. Kenny had never called upon Mr. Winters, or his costs accountant, to make a submission, still less one in support of his position, the Adjudicator had not called upon Mr. Winters to make any submission prior to the Adjudicator coming to his 24 February 2022 decision; and
- Mr. Winters was unaware of that decision until it was furnished to him, on 1 February 2022.

The judge further observed that the reality outlined above was reflected in the reliefs sought by Mr. Kenny, all of which were directed to the Adjudicator's decision of 24 February 2022.

36. The trial judge went on to consider that in the letter of 10 October 2022, the Notice Party had offered to Mr. Kenny a proposed resolution of the matter by way of agreement that there should be no order as to the costs of the proceedings. He noted that if Mr. Kenny had chosen to accept that offer, he would have obtained the reliefs which he ultimately obtained. However, that offer had been rejected by Mr. Kenny and a vigorously contested costs hearing had taken place for almost half a day before the High Court. Mr. Kenny, thus, had been fully *'on notice'* that Mr. Winters, who had gone to the trouble of retaining senior and junior counsel, would be seeking his costs against him if he were to insist on seeking costs against Mr. Winters.

37. Having considered the relevant authorities and, in particular, the judgment of Murphy J. in *O'Donovan v. County Registrar for Cork & Anor.* [2021] IEHC 307 ('*O'Donovan*'), Heslin J. concluded that the facts of the case wholly undermined Mr. Kenny's proposition that Mr. Winters should be held responsible for the Adjudicator's decision of 24 February 2022 which the appellant sought to impugn. He refused the relief sought in respect of costs and he further ordered that Mr. Winters recover his costs against Mr. Kenny, such costs being the costs of and incidental to the motion and the order that issued. Costs were to be taxed in default of agreement.

The Appeal

38. Six grounds of appeal are advanced by Mr. Kenny. In summary, he contends:

(1) that the trial judge erred in law in refusing to award *him* his costs against the Notice Party;

(2) that the judge erred in law in awarding costs *against* him and in favour of the Notice Party;

(3) that the judge was wrong in holding that *'no act or omission'* on the part of the Notice Party up to 14 February 2022 could, fairly, be said to have brought about the need for the judicial review proceedings;

(4) that, contrary to the judge's view, the Notice Party had been on notice of his application before the Adjudicator of 16 December 2021 and on that date *'did not support'* his application and/or failed or refused to acknowledge that the 14-day statutory time limit under s.160 of the 2015 Act had not then commenced;

(5) that the judge erred in holding that the Notice Party played no role in the impugned decision of 24 February 2022; and

(6) that the judge erred in law and fact in failing to hold the Notice Party partly responsible for the error of law that had occurred, and which had necessitated the issuing of judicial review proceedings.

The Respondent's Notice

39. Mr. Winters, as Notice Party and respondent in the proceedings as *legitimus contradictor*, opposes the appeal. He raises a preliminary objection that the Notice of Appeal was not served within 7 days after it was issued on 4 September 2023, contrary to the provisions of O.84A, r.14(1) of the RSC. He also objects to the grounds of appeal being general and unspecific in nature thus presenting a real and substantial difficulty for him in seeking to address them.

40. Without prejudice to those preliminary objections, Mr. Winters denies the alleged errors on the part of the trial judge. In his view, the judge found, correctly, that there

was no evidence that, as Notice Party, he had omitted to do anything that he had a legal obligation to do nor, indeed, had he been called upon to take any step in February 2022.

Discussion

41. A notable feature of the appellant's written submissions is that much of the argument centred not on the 24 February 2022 decision which he sought to impugn in the proceedings but, rather, on a hearing which had taken place some months earlier in December 2021. It is recalled that the High Court judge had found that, at that hearing, the Notice Party had made no submission in respect of the primary issue at that hearing, namely, when, exactly, the 14-day time limit for requesting a consideration began to run. He found that Mr. Winters made a submission only on the secondary issue, namely, that s.160 of the 2015 Act did not provide for an extension of time. The appellant contends that here, the High Court erred because Mr. McCann *had* argued that the 14-day time limit in this case had already expired by the time of the hearing in December 2021. This '*error of fact*', he says, fundamentally undermines the High Court judgment on the issue of costs.

The alleged error of fact

42. It was argued by Mr. Kenny in his written submissions that the judgment under appeal is vitiated by a fundamental error of fact. During the hearing, the appellant's focus remained on what had occurred at the December 2021 hearing. Remarkably, the error of fact relied upon by the appellant as undermining the trial court's judgment, concerns a fact to which Mr. Kenny himself cannot but be a stranger. There was and is no evidence, whatsoever, before this Court, or the court below, to substantiate his claim concerning the conduct of the Notice Party at the hearing in December 2021. The

reality is that Mr. Kenny was not at that hearing, nor does he claim to have been there, so he cannot testify to what Mr. McCann did or did not say by way of submission to the Adjudicator. His account as to what Mr. McCann did or did not submit amounts to no more than hearsay. That, in itself, may be sufficient to dismiss his appeal on the basis of an alleged error of fact (which is the main pillar of the appeal) but I would decline to do so on that basis alone.

43. Even accepting that he was not in attendance at the hearing, Mr Kenny submits that, '*as a matter of reasonable inference'*, Mr. McCann must have opposed or contested his claim concerning the start of the 14-day time limit in this case. This inference, he says, is clear because in the Adjudicator's Ruling (at para. 8) it is noted that Mr. McCann indicated that the provisions of s.160 were clear and that there was no provision within the statute for an extension of time. This, Mr. Kenny says, corroborates his '*evidence*' that the issue raised in the proceedings and '*conceded*' by the Adjudicator and the Notice Party, <u>had</u> been *'contested'* by the Notice Party at the December 2021 hearing. For that reason, his argument goes, the Notice Party should be fixed with the costs of the proceedings.

44. Three observations are apposite. First, it does not follow '*as a matter of reasonable inference*' that because Mr. McCann made a legal submission that s. 160 does not provide for an extension of time, he must, therefore, be taken to have argued that Mr. Kenny was out of time. It is equally plausible that, as Notice Party, Mr. Winters adopted a neutral stance on when, as a matter of *fact* the clock started ticking in this case, but argued that, irrespective of what the Adjudicator would decide on that issue, the *legal* position is that s. 160 does not provide for an extension of time.

45. Second, it seems to me that if, as Mr. Kenny contends, the Notice Party did argue that the request for consideration was out of time, that is a matter to which the

Adjudicator would have referred in his Ruling. He recorded that Mr. Kenny's representative had made a submission on *both* issues that were before him and recorded that Mr. McCann had made a submission on the second issue. No explanation has been advanced as to why the Adjudicator would fail to record such a critical submission if, in fact, it had been made.

46. Third, the grounds of appeal do not contain any assertion that Mr. McCann opposed or '*contested*' Mr. Kenny's application during the December 2021 hearing. It is said only that he did not support it or that he failed or refused to acknowledge that the 14-day statutory time limit had not then commenced. A failure to support an application is not synonymous with a decision to oppose it. Moreover, as noted, the Notice Party could well have taken the view that he was in the Adjudicator's hands when it came to when the time limit began to run in this case and that his only point was a legal one, namely, that s.160 contained no provision in respect of an extension of time.

47. To the extent that the appellant takes issue with the findings made by the trial judge in respect of the December 2021 hearing, I am satisfied that his complaint is misplaced. That hearing did not concern the subsequent decision of 24 February 2022 which is the only decision that is impugned in these proceedings. Mr. Winters averred that his costs' accountant submitted at the hearing that it was not a question of whether the Notice Party would consent to the extension or otherwise, but rather whether the Adjudicator had power to extend the time limit prescribed under s.160(1) of the 2015 Act. This is reflected in the Ruling of the Costs Adjudicator itself. It seems clear to me that the trial judge based his finding of fact on the evidence that was before him in the form of the Adjudicator's Ruling, and I see nothing to substantiate Mr. Kenny's

contention that an error of fact was made which undermines the entirety of the High Court judgment.

48. In any event, it cannot be the case that in adversarial litigation, a party who fails to 'row in' with an application or who makes a submission that is not supportive of an opponent's, should thereby carry an exposure on costs if, ultimately, that party's submission is accepted by the decision-maker. Such a proposition would have a most chilling effect on freedom of argument in the pursuit of fairness in litigation. Moreover, by this logic, a party whose submission is not accepted should likewise carry an exposure on costs based on an evident failure to persuade the decision-maker to rule in its favour. On this basis, it might be argued that Mr. Kenny would bear responsibility for the costs of the proceedings given his failure to persuade the Adjudicator that his position was the correct one from the outset.

The alleged 'inactions' or 'omissions'

49. It was also submitted that in addition to Mr. Winters failing to 'row in' behind Mr. Kenny's application for a consideration, the Notice Party failed to take action upon receipt of the letter of 14 February 2022. The point was made that, having been copied with Mr. Kenny's letter to the Adjudicator of 14 February 2022, Mr. Winters did not take the opportunity to '*change his position*' or to '*suggest*' that the Adjudicator had been incorrect. It was argued that such '*inactions*' after 14 February 2022 were sufficient to attract responsibility for the Adjudicator's ultimate decision of 24 February 2022. Since judicial review proceedings were then instituted, it was said that the '*omissions*' and '*inactions*' on the part of the Notice Party, were such that the Notice Party should be found to bear '*some responsibility*' for the proceedings, together with the costs arising therefrom.

50. As to the Notice Party's alleged '*inaction*' just prior to the institution of proceedings, this argument fails to persuade. Mr. Winters was copied into correspondence that was directed to the Adjudicator. As the trial judge observed, neither he nor his representative, Mr. McCann, was called upon to *do* anything. There was no obligation on his part to '*take up the baton*' on behalf of Mr. Kenny. Mr. Winters had no idea how the Adjudicator would respond nor had he any role to play or duty to discharge in the period between 14 and 24 February 2022.

51. I do not accept that Mr. Winters' alleged '*inaction*' between 14 February 2022 (when the request for consideration was copied to him) and 24 February 2022 (when the Adjudicator delivered his decision) is sufficient to fix him with any responsibility for the decision which the appellant sought to impugn. The notion that because of his '*inaction*' he should bear the costs of proceedings that Mr. Kenny chose to issue is entirely misconceived.

52. Until the Adjudicator's decision of 24 February 2022 issued, neither Mr. Kenny nor Mr. Winters was aware of how the request for consideration might be treated. It was possible that the Adjudicator, having given some further thought to the matter, could have acceded to the request. The fact that he did not, does not entitle Mr Kenny to seek to attribute responsibility to the Notice Party for a decision that was beyond his control.

53. The appellant's focus both on the alleged omission of Mr. Winters at the December 2021 hearing and his alleged '*inaction*' following the letter of 14 February 2022, serves only to detract from the fact that the relevant decision at the heart of the judicial review proceedings was the one made by the Adjudicator on 24 February 2022. That decision had not been made at the time when the hearing occurred, nor had it been issued during the period of alleged inactivity. When the decision finally issued

Mr. Winters, at no stage, sought to defend it. It was not his decision to defend. It was a decision for which the Adjudicator alone was responsible.

The 'added aspect' of the case

54. The trial judge considered that there was '*an added aspect*' to the case before him which flowed from the Notice Party's letter of 10 October 2022 in which an entirely reasonable offer as to costs was made. Whilst the judicial review proceedings did not come for hearing until June 2023, it is clear from the correspondence on file that, as early as 4 July 2022, the process could have been resolved since the substantive reliefs being sought by Mr. Kenny were, effectively, agreed at that early stage by Mr. Winters. He consented to the draft orders proposed (with some small editorial amendments) on condition that no order for costs be made against him. As there was no reply forthcoming, Mr. Winters sent a reminder letter on 2 September 2022.

55. As noted above, on 8 September 2022, Mr. Kenny's solicitors confirmed that, for the avoidance of doubt, '*four of the five substantive reliefs sought in the Notice of Motion are directed towards the decision made by the Respondent Legal Costs Adjudicator on the 24th February 2022'*. The letter then proceeded to set out the '*backdrop for that decision*' contending, *inter alia*, that Mr. Winters' representative had argued '*vehemently*' that the Adjudicator had no jurisdiction to extend time. Based on that '*backdrop*', it was alleged that the '*whole situation*' could have been avoided had Mr. McCann furnished Mr. Kenny with the Determination, as agreed. It is remarkable that as of September 2022 blame was being attributed to Mr. McCann for not providing Mr. Kenny with the Adjudicator's Determination while, as far back as March 2022, the Statement of Grounds had pleaded that the Adjudicator had unlawfully delegated his duty to the Notice Party.

56. Not surprisingly, Mr. Kenny's characterisation of the factual backdrop was disputed by the Notice Party. In his letter of 10 October 2022, Mr. Winters set out his position in respect of the matters that had transpired. He reiterated that he would not seek costs against any party but warned that if costs were sought against him, such an application would be '*vigorously contested*' and that the services of senior and junior counsel had been engaged in this regard. He further warned that if forced to defend such a costs application, he would seek to have the costs incurred in so doing awarded against Mr. Kenny.

57. Thus, the reality that prevailed when the matter came on for hearing before Heslin J. in June 2023 was that Mr. Kenny had been offered, almost one year earlier, an opportunity to walk away back-to-back on costs, having obtained, on consent, the substantive reliefs which he had sought in the judicial review process. He chose, however, to persist in his claim that he was entitled to recover the costs of the proceedings from the Notice Party who had not been responsible, in any way, for the decision he sought to impugn.

The O'Donovan Principles

58. The legal issue before the High Court was whether the Notice Party bore '*some responsibility*' for the impugned decision made by the Adjudicator. There was no dispute between the parties in respect of the applicable law. Both sides had advocated for the application of the principles articulated by Murphy J. in *O'Donovan*. In *O'Donovan*, Murphy J. observed (at para. 39):

> "*[iii] It is only in circumstances where the notice party chooses to defend the impugned decision or is otherwise responsible for the error of law which has occurred, that costs should be awarded against them;*

[iv] Where neither the decision maker nor the notice party participates in the proceedings and where the notice party has no responsibility for the error of law which has given rise to the application for judicial review, there should be no order as to costs."

59. The Notice Party has submitted that whilst the dispute before the High Court concerned the application of *legal* principles, the focus of the appellant's appeal was that an error of *fact* had occurred. That alleged error, it was said, was the trial judge's finding that Mr. McCann had not argued that the 14-day time limit had already run by the time of the hearing in December 2021.

60. In respect of that alleged error of fact, several authorities were opened by the appellant's counsel in support of the claim that Mr. Winters should bear some responsibility for the costs of the judicial review proceedings. These included *The State (Prendergast) v. Rochford* (Unreported) Supreme Court 1 July 1952 ('*Prendergast*'), *Curtis v. Kenny* [2001] 2 I.R. 96, and *O'Donovan*. Counsel submitted that the authorities point to the fact that it is only where a Notice Party can be shown to have borne '*no responsibility*' for the outcome of a subsequently impugned decision, that an order for costs against him will be avoided.

61. Apart from the fact that it has not been shown that Mr. Winters bore any responsibility for the impugned decision, the authorities opened to the Court in support of the contention that his '*omission*' exposed him to an order for costs are entirely distinguishable on their facts. In *Prendergast*, for example, the Supreme Court found that the Attorney General should have drawn to the attention of the Circuit Court a technical defect in an order made by the District Court, which order was then, on appeal, upheld by the Circuit Court. In the High Court, the applicant obtained an order

of *certiorari* quashing the order convicting him of road traffic offences, together with an order for costs against the respective judges of the District Court and the Circuit Court. Whilst the '*bad order*' was not the result of any act or omission on the part of the Attorney General, the Supreme Court, having set aside the High Court order as to costs, allowed the Attorney to be joined to the proceedings in order to pay the applicant's costs. As Collins and O'Reilly note in *Civil Proceedings and the State*, (3rd edn., Round Hall Press 2019, at para. 6-131), this approach was grounded upon *'the not unreasonable proposition that the applicant would not have found himself before the District Court had it not been for the Attorney General's decision to prosecute him.'* Lavery J. observed that the Attorney General, who had prosecuted the applicant in the District Court proceedings, should have alerted the Circuit Court to the technical defect in the order, particularly so where he had the '*responsibility for criminal prosecutions*'. For this reason, the Supreme Court exercised its discretion to award costs against the Attorney General.

62. There is nothing to suggest, let alone prove, that the Notice Party, in this case, bore any responsibility for the impugned decision or had somehow agitated for the outcome decided by the Adjudicator on 24 February 2022. Even the appellant's Grounds of Appeal refer only to the Notice Party's '*failure to support*' his application for consideration. The contention that by failing to support one's opponent in personal adversarial litigation one thereby bears some responsibility for the impugned decision and thus a liability for costs is, quite simply, untenable.

63. Moreover, whilst great focus was placed on the events that occurred at the December 2021 hearing, one must not lose sight of the fact that the decision Mr. Kenny sought to impugn was the one made by the Adjudicator on 24 February 2022. He is not entitled, now, to attempt to '*retrofit*' that decision with the events that occurred at the

earlier hearing (or his hearsay version thereof) or to shoehorn those events into the decision that ultimately became the subject of judicial review proceedings.

64. It is also instructive in my view that upon receipt of the proceedings, the Notice Party did not seek to defend the Adjudicator's decision. On the contrary, substantive orders were agreed promptly between him and the appellant, subject only to the approval of the High Court. Since most of the reliefs were directed against the Adjudicator, the Notice Party took no issue with the Adjudicator's decision being quashed, and the matter remitted to him for a consideration of the decision and for the making of a Determination under s.160 of the 2015 Act. This was an entirely reasonable approach to adopt in my view. In those circumstances, the only issue that remained for determination by the High Court was the question of costs.

65. Without prejudice to the Notice Party's preliminary objections (to which the appellant did not respond), it was submitted by the Notice Party that, by its very nature, a costs order is discretionary and that whilst an appellate court has full jurisdiction to overturn such an order where discretion is exercised improperly, its power should be exercised, sparingly. One of the *indicia* in deciding whether to interfere with an order for costs, it was argued, is where there has been an error of law on the part of the trial judge. If there is no error of law, then this court should intervene only where it considers that the trial judge's margin of appreciation was exceeded. This, it was submitted, had not occurred in the instant case.

Decision

66. Guided by the principles set out by Murphy J. in *O'Donovan* the trial judge concluded (at para. 91 of his judgment) that he could not take the view that Mr. Winters either brought about or was in any way responsible for the Adjudicator's decision of

24 February 2022 nor that he ever attempted to support it. He found that the Notice Party had no responsibility for the decision which gave rise to the application for judicial review. In my view, Heslin J. applied, correctly, the O'Donovan principles. Mr. Winters did not choose to defend the impugned decision and was not responsible for any error of law contained therein. His earlier proposal that no order as to costs be made was also in accordance with para. 39(iv) of *O'Donovan*.

67. An award of costs in judicial review proceedings is not always straightforward and as Clarke J. (as he then was) noted in *Veolia Water U.K. plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81, one of the fundamental principles underpinning any award of costs is the fact that the making of an award is always discretionary (p. 85). In *Flynn v. Braccia* [2017] IECA 163 the Court of Appeal highlighted the trial judge's jurisdiction to make a costs order and it was not satisfied that any basis arose to interfere with the manner in which the trial judge in that case had exercised his discretion given that the judge had *'a firm evidenced-based factual basis'* for making the decision that was made (para. 53).

68. Having considered the judgment and the submissions on appeal, I am satisfied that the trial judge had a clear evidenced-based basis for reaching the decision he made. At para. 50 of his judgment he listed several reasons for concluding that the Notice Party cannot be held responsible in any way for the Adjudicator's decision of 24 February 2022. That decision was one made exclusively by the Adjudicator. The appellant had never asked the Notice Party or his accountant to make a submission. Nor indeed was the Notice Party under any obligation to make a submission to support the appellant.

69. The trial judge was, in my view, correct to conclude that it was the Adjudicator who bore responsibility for the impugned decision. At no stage did the appellant call

upon the Notice Party to take any action whatsoever and there was no question of the Notice Party omitting to do something that he had a legal obligation to do. The fact that the Adjudicator agreed to revisit the decision he made on that point is not a reason to burden the Notice Party with the costs of judicial review proceedings.

70. This Court in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183, considered the effect of the 2015 Act and the recast O.99 of the RSC on the issue of judicial discretion and costs. Murray J. noted (at para. 20) that while the updated legal framework is largely consistent with the principles of earlier legislation relating to costs, it no longer contains the earlier language that '*costs follow the event*' but requires, rather, that a party be '*entirely successful*' in order to be '*entitled*' to costs unless the Court orders otherwise. Section 169(1) of the 2015 Act provides that:

> *"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including […]."*

71. The trial judge, correctly, in my view, had regard to what he described as the '*added aspect*' of the case before him. Once the proceedings were compromised, on consent, the Notice Party had made an entirely reasonable offer in respect of costs. The trial judge found that the appellant had acted unreasonably in spurning that offer of no costs arising on foot of orders being agreed. On the contrary, he had pursued, vigorously, his application for costs against the Notice Party. Moreover, he was on full notice of the fact that if an entirely reasonable offer was to be rejected then the Notice Party would seek his own costs in defending the application. Having had regard to the evidence before him and to the conduct of the parties, the trial judge held that the

applicant was not entitled to an order for costs against the Notice Party. I see no reason to interfere with the exercise of his discretion in this regard. To my mind, the trial judge was well within his discretion in this case to award costs to the entirely successful party and against the appellant who was not successful in his application for costs.

72. The trial judge in this case delivered a careful and detailed written judgment which set out, clearly, the reasons for his decision to refuse the appellant's application for costs and to award the Notice Party his costs.

73. For the reasons set out above, I would dismiss the appeal.

74. As the appellant has failed in his appeal and the Notice Party has been entirely successful, I see no basis upon which the appellant might avoid an order awarding the costs of the appeal to the Notice Party/respondent and I would make such an order on a provisional basis. However, if the appellant wishes to argue for an alternative order, he may apply within seven days to the Office of the Court of Appeal to have the matter listed for a short hearing on costs. If, however, a hearing on costs is requested and if, having heard the parties, the Court makes the order it has, provisionally, indicated, then the appellant may be at risk of having to pay the additional costs incurred as a result of the hearing.

75. As this judgment is delivered electronically, Costello J. and Meenan J. have indicated their agreement with the reasoning and the conclusions reached herein.