THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 307
[RECORD NO. 2018 37 JR]

BETWEEN

RICHARD O'DONOVAN

APPLICANT

AND

COUNTY REGISTRAR FOR COUNTY CORK

RESPONDENT

AND

CORK CITY COUNCIL

NOTICE PARTY

JUDGMENT of Ms. Justice Murphy delivered on the 5th day of May, 2021

1. The issue before the court is whether the notice party, Cork City Council, is liable to pay the applicant's costs of an *ex parte* application for a judicial review and an uncontested application for *certiorari* and various declaratory reliefs.

Background

2. On the 1st November 2012 the applicant had an accident when the bicycle he was cycling along the public roadway hit a pothole causing him to fall from his bicycle. His solicitor, having conducted necessary investigations, concluded that the applicant had a stateable claim in negligence against Cork City Council for the injuries, loss and damage which he had sustained in the fall. The requisite application was made to PIAB on the 2nd September 2014. Cork City Council refused consent to an assessment by PIAB and accordingly an authorisation to commence personal injuries proceedings was issued to the applicant by PIAB on the 17th December 2014.

3. A personal injuries summons issued out of Cork Circuit Court office on the 14th May 2015 alleging negligence and breach of duty and breach of statutory duty against Cork City Council as a consequence of which, the applicant alleged, that he had suffered personal injuries, loss of damage. The personal injuries summons wasn't served until the 23rd December 2015. Messrs. Ronan Daly Jermyn solicitors entered an appearance on behalf of notice party on the 11th January 2016. A week later, the said firm of solicitors served an extensive notice for particulars. The particulars were replied to on the 10th August 2016 and approximately a month later, a full defence was filed on behalf of Cork City Council in which the applicant was put on proof of all matters pleaded by him. A notice to produce was served with the defence. Because the defence as delivered put all material facts in issue, the applicant's solicitor deemed it appropriate to seek discovery of Cork City Council's records detailing any remedial works undertaken by it at the accident locus. In the circumstances of the case, the onus was on the applicant to establish misfeasance on the part of Cork City Council. Discovery was sought on the 22nd of February 2017 in respect of a trial which was then listed for hearing on the 10th March 2017. It is not clear from the papers whether or not an order for discovery was made, but in any event, the applicant's claim was settled shortly before trial for the sum of €9,500 plus costs (including any reserved costs) to be taxed in default of agreement.

Taxation of costs

4. The amount of the award was paid promptly to the applicant and thereafter his solicitor began preparation of his bill of costs. On the 4th July 2017 the applicant's solicitors furnished to the notice party's solicitors a bill of costs covering the period from November 2012 when the accident occurred to April 2017 when the claim was settled. The bill of costs contains 145 items inclusive of counsel's fees, expert witnesses, expenses outlays, instruction fee and value added tax, coming to a total of €37,756.83. In the letter accompanying the bill of costs, the applicant's solicitor invited the notice party's solicitor to identify any item or items contained in the bill of costs which it contended should be disallowed in whole or in part and the basis for such an assertion. A week later on the 11th July 2017, the notice party's solicitors acknowledged receipt of the bill of costs and sought some additional supporting vouchers. These were supplied.

5. Without further query or rejoinder of any kind, the notice party's solicitors wrote to the applicant's solicitor on the 6th September 2017 enclosing a cheque in the sum of €10,201 being "tender in respect of your costs herein". The applicant's solicitor was invited to either accept and cash the cheque, in payment of his costs, or return same if it was not being accepted. By letter dated the 11th September 2017 the applicant's solicitor rejected the tender of €10,201 and indicated that he was putting that matter in the hands of his legal accountant. In response to that letter the notice party's solicitors wrote what to the court seems a significant letter, dated the 20th September 2017. The letter reads: -

> *"I acknowledge receipt of the City Council cheque in respect of your costs. However, I would point out that the amounts offered would be in compliance with the county registrar's guideline scale in the Circuit Court**. The City Council adheres strictly to that scale in all cases**. (emphasis added) Perhaps you might reconsider and let me know if you intend to send your file in circumstances which I feel are unnecessary really given the scale in practice".*

6. The "scale" being referred to in this letter is a scale devised by the respondent for what are described as "standard cases".

The County Registrar's scale

7. In November 2006, the respondent issued what is described as a litigation circular, to advise parties as to the amounts likely to be allowed by her, on taxation of costs. The initial circular states that the figures set out should not be interpreted as a scale of costs but an indication only of what fees would be allowed in a "normal" type action. The circular specifies that these figures would not apply to any complex cases or to cases in the equity jurisdiction.

8. The sum allowed for costs is calculated by reference to the amount of the award rather than work done, an indicative sum of €2,500 plus 12.5% of the award is indicated for cases where liability is in issue. A sum of €2,000 plus 12.5% of the award is indicated for cases where liability is not in issue. Should a case settle before it is listed for hearing, a deduction of 20% would apply. The circular goes on to set out fees allowed for various

scheduled items such as motion fees and the like. Indicative outlays for expert reports and court attendances for doctors and engineers are also set out.

9. The circular was updated with effect from the 1st January 2015 in which the costs allowed are increased somewhat but the format remains the same, i.e. a set amount plus 12.5% of the award. While the circulars state that the sums allowed for costs are not to be interpreted as a scale, in reality the sums specified have been applied in all "standard" or "normal" cases since 2007. The applicant complains that the respondent is not entitled to devise and apply a non – statutory scale of costs to legal costs adjudications. Further, the applicant complains that the respondent is not entitled to determine costs by reference to the quantum of damages received. The system of taxation envisaged by O. 99 of the Rules of the Superior Courts as implemented by O. 66 of the Circuit Court Rules is that items of costs claimed be assessed individually and allowed either in full or in part, or disallowed.

10. Upon receipt of the notice party's solicitor's letter of the 20th September 2017, the applicant's solicitor issued a summons to tax returnable before Cork County Registrar on Tuesday the 17th October 2017. The notice party's solicitor's response to that summons to tax was to once again forward the payment order from the notice party for €10,201, as a tender against the bill of costs. The applicant's solicitors, on the 13th October 2017, asked for a breakdown of the tender amount. In response the notice party's solicitors furnished a copy of their advices to the notice party as to the tender sum. The contents of the letter make it abundantly clear that the tender sum was arrived at entirely by reference to the respondent's "scale" for "standard" or "ordinary" cases. The major point of difference between the "scale" costs and the bill of costs is the sum claimed and allowed for the applicant's solicitor's professional fee. The sum claimed in the bill of costs is €25,900 while the sum allowed in the breakdown of the tender amount is €1,187 which equates to 12.5% of the agreed damages of €9,500.

The taxation

11. The applicant's solicitor retained Flynn O'Donnell, legal costs accountants to represent the applicant at the taxation. The notice party was represented by a solicitor from Ronan Daly Jermyn Solicitors, who act for the notice party. The applicant complains that the taxation hearing was held in the respondent's chambers and not in a courtroom equipped with digital audio recording. According to a post taxation report prepared by Flynn O'Donnell, exhibited in the grounding affidavit, Shane O'Donnell, cost accountant, highlighted to the county registrar that the instant case was far from a normal case and that he noted that while scale costs can never and should never apply, that "even if she was minded to apply scale costs they could only apply to standard cases". He reports that he highlighted the nature and extent of the work done by the applicant's solicitor which was a direct consequence of the "extraordinarily robust defence of these proceedings". Again ,according to his report, "I put it to the County Registrar that in all cases against these defendants, considerations such as the law in relation to misfeasance, malfeasance, etc., would in and of itself be enough to secure a higher fee than provided for in any scale that she applies". He reports that the County Registrar did not take in the papers to review;

did not ask for sight of any documentation from the file, Mr. O'Donnell reports that he did address the County Registrar on the appropriateness of applying scale costs in the context of s. 27 of the "Court Officer's Act 1995 and the provisions of O. 99 dealing with the manner in which costs are assessed in this jurisdiction". According to the cost accountant's report, the only input from the notice party's solicitor was to repeat *"the mantra that this was a 'standard case'"*. The upshot of the hearing was that the respondent County Registrar applied the "scale" and called the taxation to a halt. The evidence is that the entire process took approximately fifteen minutes. As it happens, the County Registrar taxed the applicant's costs at slightly less than the sum of €10,201 tendered by the notice party. The sum allowed on taxation was €9,712.83 being €488.17 less than the sum tendered. In late October 2017 the solicitors for the notice party sought reimbursement of the excess of the tender over the amount actually taxed.

12. As a consequence of the events of the taxation, the applicant was rendered liable to pay the costs of taxation and at least in principle was liable to his own solicitor for the shortfall in costs recovered.

Judicial review

13. On the 15th January 2018 the applicant was given leave (Noonan J.) by way of an application for judicial review for the following reliefs: -

    (i) An order of *certiorari* quashing the legal costs adjudication made by the respondent on the 17th day of October 2017 in respect of a taxation of costs as between party and party involving the applicant and the notice party arising out of Circuit Court personal injuries proceedings entitled "Richard O'Donovan v. Cork City Council record no. 2016/1063;

    (ii) A declaration by way of an application for judicial review that the respondent, when exercising the powers of a taxing master of the High Court/legal costs adjudicator, is not entitled to apply a non – statutory scale of costs to legal costs adjudications/taxations of costs as between party and party;

    (iii) A declaration by way of an application for judicial review that the application of a non – statutory scale of costs is ultra vires the powers of the respondent, is arbitrary, discriminatory against impecunious litigants, unreasonable and unfair in all the circumstances;

    (iv) A declaration by way of an application for judicial review that the respondent is not entitled to measure and/or index legal costs, or any part thereof, by reference to a specified percentage or proportion of any damages or other monies that may be, or may become, payable to the successful party in whose favour a costs order has been made;

    (v) A declaration, by way of an application for judicial review, that the respondent by opting to conduct legal costs adjudications/taxations of costs as between party and party in chambers and/or in camera is acting contrary to the constitutional

requirements of the administration of justice and constitutes a breach of the plaintiff's constitutional and natural rights;

(vi) A declaration by way of application for judicial review that the respondent, when exercising the powers of a taxing master of the High Court/legal costs adjudicator is obliged to conduct legal costs adjudication/taxations of costs as between party and party in like manner, and apply the same legal principles relating to legal costs, as legal costs adjudications/taxations of costs as between party and party are conducted by taxing masters of the High Court/legal costs adjudicators;

(vii) An order remitting the applicant solicitor's bill of costs dated the 4th day of July 2017 to another County Registrar for a legal costs adjudication/taxation of costs as between party and party.

14. The applicant was given leave to apply for the aforesaid reliefs on the grounds set out at "E" in the statement of grounds.

15. Grounds upon which judicial review is sought: -

Ground 1

16. The respondent acted ultra vires the statutory powers conferred upon County Registrars by the Solicitors (Ireland) Acts 1849 – 1881, the Courts of Justice Acts 1924 – 2014, the Court Officers Acts 1926 – 2014, the Courts (Supplemental Provisions) Acts 1961 – 2015 and/or the orders and rules made thereunder (in particular s. 27 (Additional powers of Taxing Master of High Court) of the Court and Court Officers Act 1995, O. 99 (Costs) of the Rules of the Superior Courts 1986 (as amended) and O. 66 (Costs) of the Circuit Court Rules 2001 (as amended) by applying an arbitrary non – statutory scale of costs to the taxation of costs as between party and party involving the notice party and the applicant.

Ground 2

17. The respondent acted ultra vires the statutory powers conferred upon County Registrars, by the Solicitors (Ireland) Acts 1849 – 1881, the Courts of Justice Acts 1924 – 2014, the Court Officers Acts 1926 – 2014, the Courts (Supplemental Provisions) Acts 1961 – 2015 and/or the orders and rules made thereunder (in particular s. 27 (Additional powers of Taxing Master of High Court) of the Court and Court Officers Act 1995, O. 99 (Costs) of the Rules of the Superior Courts 1986 (as amended) and O. 66 (Costs) of the Circuit Court Rules 2001 (as amended), by failing on the taxation of costs as between party and party involving the applicant and the notice party: -

(a) Ascertain what work was done and how long such work took;

(b) Conduct a root and branch examination of the applicant's solicitors' bill of costs dated the 4th day of July 2017 and the other papers in the case, in respect of each item of professional service in issue;

(c) Consider the time and labour expended by the applicant's solicitor and the skill, specialised knowledge and responsibility required of him, when assessing whether the amount being charged for each professional service was fair and reasonable;

(d) Assess the complexity of the matter, the difficulty or novelty of the issues involved in the case and the other matters prescribed by O. 99, r. 37 (22) of the Rules of the Superior Courts 1986 (as amended), as applied to Circuit Court taxations of costs as between party and party by O. 66, r. 6 of the Circuit Court Rules 2001 (as amended) and consider whether these factors required an adjustment to the applicant's solicitor's instruction fee;

And,

(e) Give any, or any adequate, reasons for summarily disallowing 73% of the total legal costs claimed on behalf of the applicant.

Ground 3

18. The respondent failed to exercise the discretionary power vested in County Registrars on legal costs adjudications/taxations of costs as between party and party by the Solicitors (Ireland) Acts 1849 – 1881, the Courts of Justice Acts 1924 – 2014, the Court Officers Acts 1926 – 2014, the Courts (Supplemental Provisions) Acts 1961 – 2015 and/or the orders and rules made thereunder (in particular s. 27 (Additional powers of Taxing Master of High Court) of the Court and Court Officers Act 1995, O. 99 (Costs) of the Rules of the Superior Courts 1986 (as amended) and O. 66 (Costs) of the Circuit Court Rules 2001 (as amended), when electing to adhere to an inflexible policy rule of applying an arbitrary scale of costs which had the effect of prejudging the taxation of costs as between party and party involving the applicant and the notice party on the 17th day of October 2017.

19. It is the applicant's case that the application of the said non – statutory scale is ultra vires the powers of the respondent and is contrary to the principles of good and efficient administration of justice. The respondent enjoys no statutory power, either express or implied, to develop such a scale for the assessment of legal costs. Furthermore, and without prejudice to the foregoing, the respondent is not entitled to measure and/or index solicitors' costs and barrister's fees or any part thereof, by reference to a specified percentage or proportion of any damages or other monies that may be, or may become, payable to the successful party in whose favour a costs order has been made in circumstances where solicitors and barristers are proscribed by law and rules of professional conduct, respectively, from so doing.

Ground 4

20. It is also the applicant's case that the said scale discriminates against plaintiff litigants by giving them the invidious choice of accepting an inadequate tender, pitched at a predetermined point on the scale operated by the respondent, and thereafter becoming liable for the balance of their legal costs on a solicitor and own client basis or, alternatively, proceeding to taxation only to find the respondent, as here, measured the legal costs at issue at the same point on the said scale as the tender and becoming liable

for the costs of the taxation itself pursuant to the provisions of O. 66, r. 8 of the Circuit Court Rules 2001 (as amended).

Ground 5

21. The respondent in this case, and as a matter of routine, conducts legal costs adjudications/taxations of costs as between party and party in chambers or in camera. This practice is contrary to the constitutional requirement that justice be both done and be seen to be done, contrary to the public interest in the administration of justice, and in breach of the applicant's constitutional and natural rights to have the proceedings conducted in an open and public forum. The absence of the digital audio recording (DAR) system, or any recording system at all, substantially prejudices this honourable court's capacity to review the legality of the decision the subject matter of these judicial review proceedings.

Events Post Leave

22. The order of the High Court granting leave to apply for judicial review and for the reliefs of *certiorari* and the various declarations set out above, was made on the 16th January 2018. A notice of motion for application for judicial review returnable for the 6th March 2018 was served on the respondent County Registrar, the Chief State Solicitor's office and the City Manager of the notice party on the 7th February 2018. When the matter came before the court on the 6th of March 2018, there was no appearance on behalf of the respondent and the High Court adjourned the application for judicial review to the 10th April 2018 and directed that the respondent be notified of that fact. That was done. On the 21st March 2018, a letter on behalf of the respondent, was sent by the Chief State Solicitor's office to the applicant's solicitor with a copy therof, to the notice party's solicitor. In that letter, the Chief State Solicitor's office sets out the position being adopted by the respondent in relation to the judicial review proceedings and states: -

> "As you are likely aware, it is normal practice that County Registrars do not ordinarily appear in judicial review proceedings to defend their Orders. Rather matters are left to the parties of the underlying proceedings to litigate the subject matter of the judicial review and it will be primarily for those parties to make submissions on the point at issue in the judicial review proceedings.
>
> The County Registrar, a statutory quasi – judicial body, is in the entirely analogous position of a District or Circuit Judge whose decision can be the subject of judicial review challenges. There is a well – established line of case law confirming that it is inappropriate for a judge to intervene in High Court judicial proceedings, unless there is an allegation of mala fides or impropriety made against them. These cases have also been applied successfully where issues of participation and liability for costs have been raised in relation to quasi – judicial bodies: McIlwraith v. Fawsitt [1990] ILRM 1, O'Connor v. Carroll [1999] 2 IR 160, Stevens v. Connellan [2002] 4 IR 321 (per McKechnie J.) Noonan Services Ltd. & Ors v. The Labour Court & Anor, 14th May 2004 per McGuinness J; O'F v. Judge O'Donnell & Ors. [2009] IEHC 142 (per O'Neill J.) Casey v. Private Security Authority (Unreported, 11th December 2009 per Dunne J.).

In line with the case law quoted above, the County Registrar will take no part in these proceedings. Rather, the appropriate legitimus contradictor in this case is the notice party, Cork City Council. Please note that it is the considered position of the County Registrar that it is appropriate for her to take this stance. Her decision not to challenge these proceedings should not be taken as a concession in any way as to the correctness of the applicant's position".

23. The letter goes on to summarise the County Registrar's position as follows: -

"(i) The County Registrar is in the position analogous to a judge whose decision is the subject of a judicial review challenge,

(ii) Where there is no allegation of mala fides or impropriety on the part of the judicial body being reviewed, no order for costs should be made against it where it does not participate in the proceedings, even if the decision is quashed, see Supreme Court decision in O'Connor v. Judge Carroll and Bankers Inn Ltd., notice party [1999] 2 IR 160,

(iii) There is no allegation of mala fides or impropriety made against the County Registrar in these proceedings.

24. In a letter of the 9th April 2018, in response to the Chief State Solicitor's letter, the applicant's solicitor noted the assertion, that the County Registrar's decision not to participate in the proceedings, "should not be taken as a concession in any way as to the correctness of the applicant's position". Such an assertion could perhaps be construed as a defence of the validity of the respondent's impugned order. In any event, the applicant's solicitor went further in his letter and suggested that the County Registrar had a case to answer because *"in voluntarily electing to 'improperly conduct' taxations of costs as between party and party, by "(putting) forward and (supporting) a (scale of costs) that was wrong in point of law", the respondent acted with the requisite "impropriety" as distinct from mala fides, which had the effect of rendering the taxations generally, and the taxation of costs concerning the applicant and the notice party in particular "wholly unfit proceedings"*

25. In coming to that conclusion the applicant's solicitor relied on the decision in *R(John Conn King) v Justices of Londonderry* and in particular that part of the dictum of Palles C.B. where he opines that magistrates could render themselves liable to costs where *"they took it upon themselves to put forward and support a case that was wrong in point of law*." He also relied on the analysis of Denham C.J in *Miley v. Employment Appeals Tribunal* in which the Supreme Court had considered and analysed the meaning of the word "impropriety", in relation to judicial conduct.

26. On the same date, the 9th April 2018, the notice party wrote to the applicant's solicitors advising them that they did not intend to take part in the judicial review proceedings and that in those circumstances the notice party did not expect to have any costs liabilities in respect of the proceedings.

27. On the adjourned hearing date of the 10th April therefore the position was that neither the respondent nor the notice party had indicated an intention to contest the application for judicial review, though the respondent had asserted that her stance was not to be taken as a concession of the correctness of the applicant's position. In addition, the applicant had asserted that the respondent's conduct amounted to impropriety, which of course if established, would make her liable for costs. It appears that this assertion by the applicant's solicitor, sparked the interest of the Attorney General's office, and on the new adjourned date of April 24th he applied and was joined as a notice party to the application. On the 1st May, Senior Counsel appeared instructed on behalf of the Attorney General. The applicant's solicitor was under the mistaken impression that the Attorney General intended to appear in order to oppose the application for judicial review, however on the following day a letter from the Chief State Solicitor's office indicated that the Attorney General was not opposing an order for *certiorari* and remittal for rehearing to a different County Registrar but if costs were being sought as against the respondent, he would dispute the applicant's entitlement to an order for such costs.

28. The applicant's solicitor, not content with the concession of an entitlement to *certiorari* and remittal, wrote back on the 11th May enquiring whether the declaratory reliefs sought were being opposed and if so the basis upon which the AG had locus standi to participate and oppose the application for judicial review or the application for costs. The letter also sought details of the precise basis upon which the applicant's application for declaratory relief was being opposed. The applicant's solicitor adverted to a real risk that in the absence of the necessary declarations, the respondent would persist in her practice which was longstanding, of measuring costs by reference to a scale. He stated that without a declaration, he apprehended that upon remittal to the County Registrar for a fresh taxation of costs, it might be necessary to issue another judicial review seeking prohibition. The Chief State Solicitor's office did not reply to this letter and never addressed the substance of the applicant's solicitor's concern. Ultimately on the advice of counsel, the applicant's solicitor reluctantly agreed not to seek costs against the respondent in the judicial review. In advising the Chief State Solicitor of that fact by letter of the 26th November 2018, the applicant's solicitor also advised that it had come to his attention that the respondent was continuing to operate her unlawful costs practice to taxations of costs on a party and party basis, coming before her, notwithstanding the fact that the practice is the subject matter of these judicial review proceedings. He advised that in the circumstances the applicant would also be seeking the declaratory reliefs sought in the notice of motion.

The hearing

29. The matter came before this Court on the 30th November 2018. At the commencement of the hearing the court was informed that as costs were no longer being sought against the respondent, the Attorney General had no further interest in the proceedings and counsel for the Attorney General withdrew. The position facing the court as of the 30th November 2018 was that the application for judicial review was unopposed, neither the respondent nor the notice party having filed any opposition to the application. On behalf of the Attorney General, it had been conceded that the applicant was entitled to *certiorari* and a

remittal to the Circuit Court for a rehearing of the taxation on costs. The only issue in dispute was whether or not in the circumstances of this case the notice party should be made liable for the costs of the plaintiff in seeking judicial review. Those costs consist of the preparation of the *ex parte* application; the *ex parte* application; the preparation and service of the notice of motion; the costs of the first adjournment of the notice of motion on the 6th of March 2018 and the costs of the formal application for judicial review on the 30th November 2018. As of the 9th of April 2018 the notice party made it clear that it did not intend to participate in the proceedings and accordingly expected that it would have no liability as to costs. On the 16th of May 2018, the notice party sought an undertaking that no application for costs would be made against it. No such undertaking was given.

The law

30. The law on costs in judicial review applications where the Order in issue was made by a judicial or quasi- judicial person or entity, is clear. Judges in the discharge of their judicial functions have an immunity from suit. Were it otherwise, every judicial decision could be the source of further, perhaps endless, litigation. This would manifestly be contrary to public policy and a direct interference with the principle of the independence of the judiciary, upon which the rule of law depends. This immunity extends to costs orders, in judicial review proceedings where *certiorari* is granted in respect of the Order of a lower court or tribunal. Just as it would be unthinkable that a litigant could seek or obtain costs against a trial judge on an appeal from their decision, so too it is unthinkable that a judge would be made liable for the costs of quashing an Order which was erroneously but otherwise, properly made by them.

31. The immunity from costs orders enjoyed by judicial and quasi-judicial entities in judicial review proceedings, is not absolute. As has been clear since the foundational decision in *McIlWraith v Fawsitt* [1990]1 I.R. 343, there are two circumstances in which the immunity may be lost. The first is where the judicial entity engages in the judicial review, for the purpose of defending the validity of the order made. The rationale for this exception is that by entering the fray, the judicial entity transforms itself into a litigant and like any litigant is liable to have a costs order made against them should they be unsuccessful in their defence. The second circumstance in which immunity from costs may be lost is where the judicial entity is proved to have acted *mala fides* or with impropriety in making the impugned Order.

32. If the decision maker must stay out of the arena, for fear of transforming itself into a litigant with a consequent liability for costs, who then will defend the impugned Order? In *McIlwraith v Fawsitt and Gilroy Automation Limited* [1990 1I.R. 343, Finlay C.J. approved and endorsed the practice of naming the beneficiary of the impugned Order as either a co-respondent or notice party to the application. ""*The learned Circuit Court judge had made an order which was in excess of the jurisdiction vested in him by the applicable statutory provisions in an error occasioned by the application made on behalf of the second respondent Gilroy Automation Limited and, one must presume, upon the submissions made on its behalf that he had power to make such an order*"

33. The Court continued;

" I am satisfied that the practice which I understood to have been usual in the High Court of adding as a further respondent in judicial review proceedings the other contesting party so as to create a legitimus contradictor for any issue that may arise in the event that the Circuit Court Judge or District Justice concerned does not seek to defend the Order should be universally followed."

34. Should the *legitimus contradictor* be unsuccessful in its defence of the Order, it becomes liable for the applicant's costs. In that case Finlay C.J. made it clear that he would have been prepared to order costs against the beneficiary of the impugned Order on the basis that he was responsible for having led the Circuit Judge into error. The principles set out in McIlwraith which derived from the earlier decision of Palles C.B. in *Rex (John Conn King) v Justices of Londonderry(1912) 46 I.L.T.R*. and *Prendergast v Rochford (Unreported Supreme Court 1st July 1952)* have been universally adopted and applied since 1990.

35. Over the years, cases have occurred, where neither the decision maker nor the beneficiary of the impugned order, have opposed the application for judicial review. In such cases, the usual practice is to make no order as to costs. In *O'Connor v Carroll* [1999] 2 IR 160, the notice party, Bankers Inns Limited, did not seek to stand over the Order made by the Circuit Court judge. Furthermore, in the course of the Circuit Court hearing, it had actively supported the applicant in seeking to persuade the judge to hear the evidence which she wished to adduce and which he had refused to admit. In such circumstances it would clearly have been unjust to have required it to bear the costs of the application for judicial review.

36. On the other hand, *in Curtis v Kenny (Notice parties Higgins and Lynch)* [2001] 2 IR 96, the notice parties were made liable for the applicant's costs even though neither had acted as a *legitimus contradictor* in the judicial review nor had they opposed the application in any respect. The misfortunate applicant in that case had been imprisoned for an unspecified contempt, the purging of which became thereby impossible. The applicant was a potential witness in a civil action in which the notice party,(Higgins), was a defendant. Notwithstanding the fact that the applicant had not been summoned to court, he was arrested and brought before the court. While he was present in court the second named notice party (Lynch), a solicitor, raised before the court a dishonoured cheque for £1,000 allegedly paid to him by the applicant in respect of fees due. The applicant was imprisoned for contempt of court but the court refused to identify the nature of the contempt. The ratio of the decision of Kelly J. is as follows:

"A considerable injustice was done to Mr. Curtis and indeed to his family in this case. He has succeeded in this judicial review and seeks his costs against Judge Kenny, Mr Higgins and Mr. Lynch. The normal rule is that costs follow the event and I see no basis for not awarding costs against Messrs Higgins and Lynch. They participated fully in what occurred in the Circuit Court and appeared to support the committal. If anything, I think that Mr. Lynch is the more responsible of the two since he, as a solicitor, must have known that the question of £1,000, allegedly due

to him [by the applicant] should not even been brought to the attention of Judge Kenny, still less utilised as a basis for the imprisonment of Mr. Curtis."

37. Costs were not awarded against the judge both on the *McIlwraith* principles and because ill-will*, mala fides* or impropriety had not been advanced as a ground upon which leave to seek judicial review was sought or granted.

38. The principle that a party who caused the error which gave rise to the need to seek judicial review should be made answerable for the costs of the application is neatly expressed in the judgment of Mr. Justice Lavery in *Prendergast v Rochford* (Unreported Supreme Court) 1952. Though that particular case did not concern a judicial review the, the principle is apposite. He stated:

> *"If a complainant in the District Court or other inferior tribunal has either brought about the making of the defective order or is in any way responsible for the error or after the order is challenged has attempted to support it, it is clear that he should be regarded as an unsuccessful party and in the absence of other circumstances may, and perhaps should, be made pay costs. If however, the error is one for which he is in no way responsible and if on its being discovered he concedes the invalidity and does not seek to uphold the order, he ought not, in my opinion, to be condemned in costs."*

39. The law on costs in judicial review of the decisions of judicial or quasi-judicial persons, may thus be summarised as follows:

[i] Where the decision maker is exercising a judicial or quasi -judicial function, they should not be named personally as a party to the proceedings and no order for costs should be sought or made against them, unless it is pleaded and proved that the decision maker acted *mala fides* or with impropriety;

[ii] Where there is no allegation of *mala fides* or impropriety, the impugned decision should be defended by the beneficiary of that decision, who should be named as either a co-respondent or as a notice party;

[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.

Denial of costs and Access to Justice

40. The fact that an applicant could be successful in an application for judicial review and yet be denied an order for costs has given rise to a separate strand of jurisprudence in this area, in which it has been argued that the state should be an indemnifier in respect of

costs in such situations, and that the failure to provide for costs amounts to a denial of access to the courts within the meaning of article 6 of the European Convention on Human Rights and Fundamental Freedoms and/or a denial of an effective remedy pursuant to article 13 of the said Convention.

41. The leading cases on this aspect of the matter are *O.F. v O'Donnell* [2012] 3 IR 483 and *Miley v The Employment Appeals Tribunal* [2018] 1 IR 787. In the *Miley* case the Supreme Court, while acknowledging that in some circumstances a denial of a costs order could infringe article 6 rights, held that in a limited set of circumstances a successful party could be left without an order for costs, without infringing the Convention.

42. Denham CJ. cited with approval the following passage from the decision of O'Neill J *in OF v O'Donnell* [2012] 3 IR 483, who had considered a number of European authorities before concluding: -

> *"From the above it is clear that the Convention does not require in all cases that there be provision in law for the recovery of costs by a successful party from the defeated party. Recovery of costs per se is not an essential feature of the right of access to courts or tribunals (article 6) or of an effective remedy (article 13). The costs issue only engages the Convention and invariably article 6, rather than article 13, at the point where the lack of a provision in law for the recovery of costs acts as an impediment to access to the courts."*

43. The Chief Justice acknowledged, therefore, that there might be cases where a successful applicant would not be granted costs but pointed out that the number of such cases would be "*by definition very limited*", before stating: -

> *"If a decision-making body defends judicial review proceedings then it may be liable for costs if it loses. If it does not take part in the proceedings, then it is still open for the party who benefited from the challenged ruling to defend the proceedings, in which case it will be responsible for costs if the claim succeeds. It is only if neither party seeks to stand over the conduct or ruling, that the applicant will succeed in the judicial review but not recover the costs of so doing. Those costs can only amount to the drafting of the application and the ex parte application for leave, and the uncontested application for judicial review. These costs are necessarily limited. There are other features of the legal system where parties can be successful but fail to recover some or all of the costs they incurred, often more substantial than the costs involved here."*

44. The *O'F* and *Miley* decisions are concerned with whether the denial of an order for costs to a successful applicant is an unlawful interference with the right of access to justice, guaranteed by article 6 of the European Convention, and both have held that in the limited circumstances of judicial review of judicial and quasi-judicial decisions, the denial of costs is not such an interference. Neither decision alters the general law set out at paragraph 39 above. However, insofar as the applicant bases his claim on a denial of access to justice, these cases in effect dispose of his complaint in that regard.

Submissions

Notice Party

45. The Notice Party summarises its position as follows: -

    (i) The Notice Party was aware that the Respondent applied a scale of costs and advised the Applicant accordingly in advance of the costs hearing;

    (ii) The Notice Party had little or no involvement in the costs hearing itself;

    (iii) The Notice Party took no active steps in the present application other than to indicate it would have no difficulty with the matter being adjudicated upon by a different County Registrar.

46. The Notice Party submits, in such circumstances, that no order for costs should be made against the Notice Party.

47. In addition, the notice party reminds the court that judicial review is a discretionary remedy and suggests that the fact that the applicant had the option of a full appeal to the Circuit Court from the order of the respondent, which he chose not to avail of, is supportive of the notice party's submission that there should be no order for costs.

Applicants submissions

48. The Applicant's case is that the actions of the Notice Party in this case were sufficiently supportive of the decision in respect of which *certiorari* has been conceded to justify an order for costs being against it. In this regard he submits:

    - The Notice Party specifically tailored its initial offer to the scale operated by the Respondent,

    - When this was refused the Notice Party specifically referenced that scale and noted that the Notice Party stuck *"strictly"* to same,

    - When this was again refused the Notice Party offered a tender in the same quantum as the scale and placed the Applicant with the difficult choice of accepting an insufficient offer or hazard proceeding to taxation,

    - When the matter came on for taxation the Notice Party refused to join with the Applicant in its submission as to the illegality of the scale and supported the Respondent in applying the relevant scale,

    - Once the Respondent had reached its determination in accordance with the scale the Notice Party sought repayment on the basis of a tender which had been prepared with the considerable tactical advantage of foreknowledge of the scale.

49. It is the Applicant's submission this conduct is sufficient to justify an award of costs in the Applicant's favour as against the Notice Party and that such an award would be consistent with the principles in *Prendergast, Fawsett* and *Curtis.* This is particularly the case where

the Applicant cannot, because of the principles identified in *Fawsett,* seek to recover any costs as against the Respondent.

50. If the Applicant cannot recover as against the Respondent and cannot recover against the Notice Party the Applicant submits that he will have to bear the costs of defending his own legal rights and in circumstances where he has been completely vindicated in these proceedings. This would, in the Applicant's view, constitute a grave injustice to a successful litigant.

51. The Applicant is not in a position to discharge the legal fees associated with these proceedings should an Order for costs be refused. In that case, or in the case of no order as to costs, the Applicant will be left with an Order of *certiorari* and a considerable legal bill for having sought and secured same. In the Applicant's view such a situation would be entirely inconsistent with his natural and constitutional right of access to justice. As pointed out above, the decisions in *O'F* and *Miley* effectively dispose of the applicant's complaint that a failure to grant him an order to costs would amount to a denial of access to justice. If he is to be granted an order for costs it must be on another basis.

Decision

Application for Judicial Review

52. The County registrar's system for the taxation of costs in 'standard' or 'ordinary' cases has a number of attractions, not least the fact that it provides certainty and expedition in the taxation of costs. Unfortunately, the system first promulgated in 2007, attractive though it may be, is also unlawful and *ultra vires* her powers. There is an established process for the measurement of legal costs, which is conducted by reference to work done, and not by reference to a percentage of the award. The applicant has fairly made the point in his application that solicitors and barristers are precluded by law from charging fees as a percentage of an award. How then can a County Registrar without any legislative authority, develop her own system and scale for measuring legal costs which to a significant extent, measures costs as a percentage of the award of damages. The simple answer is that she cannot do so.

53. None of the grounds on which leave was granted have been opposed or contested. The Attorney General was specifically asked when conceding the applicant's entitlement to an Order of *certiorari* whether he was opposing the applicant's claims for declaratory relief. No substantive reply to that question was given. When the applicant's solicitor, on the advice of Counsel, conceded that he was not pursuing costs against the respondent County Registrar, he advised that as the impugned practices of the respondent County Registrar were continuing, he intended to maintain his application for the declaratory reliefs sought.

54. It appears to the court that the applicant's claim for declaratory relief is made out on the pleadings and the evidence contained in the grounding affidavit. The court therefore proposes to grant declaratory relief in addition to an order of *certiorari* and remittal for re-hearing to a County Registrar, other than the respondent. Declarations are necessary to

ensure that the impugned conduct is not continued or repeated. The court will hear the parties on the appropriate form of declaration(s).

Costs

55. The applicant has conceded that as a matter of law he is not entitled to an order for costs against the respondent. Since the notice party did not contest the application, he can only recover costs against it, if the court is persuaded that the notice party bears a responsibility for the error of law which has occurred in this case. The court is so persuaded. The notice party is a public body, an emanation of the state. It is represented by one of the state's leading legal firms. As a public body, it has a particular responsibility to act properly in the conduct of litigation. For years, it has invoked a taxation process which it knew or ought to have known was unlawful. In effect, it conceded the unlawfulness of the process the moment it was challenged in the High Court. The notice party is not some innocent bystander caught up in someone else's legal error, for which it has no responsibility. It has actively invoked, exploited and endorsed an unlawful system of taxation of costs. When the applicant's solicitor sent his bill of costs in July 2017, the notice party refused to engage with it and somewhat arrogantly, drew up its own schedule of costs, based on the respondent's scale, which it then tendered against the applicant's solicitor's bill of costs. At the taxation, it supported the respondent's approach to taxation by asserting that the case was a 'standard case' to which the respondent's scale applied. To have one's approach to taxation approved and endorsed by a public body, which is represented by a leading law firm, can only have been a reassurance to the respondent that her approach to taxation was the correct one. On the other side of the coin, a word of caution as to the legality of the process, from the same source, would immediately have given the respondent cause to pause. No such word of caution issued even when the applicant's cost accountant raised the appropriateness of her approach having regard to the law on taxation of costs in this jurisdiction.

56. Post taxation the notice party further endorsed the 'legal error' that had been perpetrated by seeking a repayment of the amount by which the sum awarded on taxation, had been exceeded by the tender. In this case, and for many years, the notice party has actively sought, supported and has benefitted from an unlawful system of taxation operated by the respondent. Its decision not to contest the application does not alter that central fact. Applying the principle established *Prendergast v Rochford,* and restated in *McIlwraith v Fawsitt* and *Curtis v Kenny* the court is satisfied that the notice party by its actions carries a significant responsibility for the legal error which occurred in the taxation of the applicant's costs and in justice should be held liable for the applicant's costs of bringing his application for judicial review.

57. The court rejects the notice party's suggestion that costs should be refused on the grounds that the applicant had the alternative remedy of a full appeal to the Circuit Court. The notice party was entitled to defend the respondent's order or otherwise contest the applicant's entitlement to judicial review. It chose not to do so. Having in effect conceded the applicant's entitlement to an order of *certiorari* by its decision not to contest his

application for judicial review, it would be inappropriate to allow the notice party to oppose orders for judicial review or the costs thereof on the substantive grounds that judicial review was unnecessary. If the notice party wished to argue that judicial review was unnecessary it should have stepped into the arena and contested the application. The court is not disposed to allow it to do so by a back door method. For completeness sake, even if the court had allowed the notice party to make substantive arguments about the necessity for judicial review the court would have rejected that argument on the basis that judicial review is an entirely appropriate remedy in circumstances where inferior tribunals act in excess of jurisdiction.

Extent of the Costs Order

58. In his submissions, the applicant set out extensively, the reasons why he considered it necessary to join the County Registrar as a respondent to his application. The court has no difficulty in holding that in the circumstances of this case, it was appropriate to join the office of County Registrar as respondent, while not naming the person who holds that office. Judicial review is a public law remedy. It is essential that the nature of the remedy sought and the office against whom it is sought is clear on the face of the application. There is no need to identify the individual office holder but the capacity in which they made the decision is essential to the process. It is also essential that the decision maker is made aware of the challenge to their decision and the basis for that challenge. This is achieved by naming the office held by the decision maker and by serving the application on them. If the decision maker is excluded from the process all sorts of mischief could ensue, for example, the parties might misrepresent, innocently or otherwise, the events that gave rise to the order that is being impugned.

59. When a decision of the High Court is appealed, the High Court Judge is furnished with the notice of appeal and is in most instances is asked to certify the transcript of the hearing before them. This ensures that the Court of Appeal can be satisfied that the evidence on which its decision is based, is reliable. In judicial review, by naming the office of the decision maker as a respondent and by serving the application on them the same end is achieved, namely that the court hearing the judicial review can be satisfied that the evidence before them is reliable.

60. In this case, having served the respondent County Registrar, there was considerable engagement between the applicant's solicitor and the Chief State Solicitor. In the course of that correspondence, the applicant's solicitor alleged that the conduct of the County Registrar was such as to amount to impropriety, which if proved, would have rendered her liable to having a costs order made against her. Ultimately, the applicant's solicitor did not pursue the allegation of impropriety and accepted the respondent's entitlement to immunity from costs. It seems to the court that the extensive correspondence which took place between the applicant's solicitors and the Chief State Solicitor between March and November 2018, is not related to any action taken by or on behalf of the notice party and consequently, any costs arising therefrom should not be recoverable from the notice party. Accordingly, the costs order in favour of the applicant should be limited to the costs of the preparation of the *ex parte* application; the *ex parte* application; the preparation

and service of the notice of motion; the costs of the first adjournment of the notice of motion on the 6th of March 2018 and the costs of the uncontested application for judicial review on the 30th November 2018.

61. Undoubtedly, the most significant costs in this case are likely to have been incurred in arguing the costs issue before the court. The applicant has been successful on that issue and on this aspect of the case, it seems to me that the general rule that costs follow the event should apply. The court gives liberty to the notice party to apply in respect of this aspect of the court's decision on the 19th of May when final orders will be made. If it chooses to do so it should notify the applicant in advance of the nature of its application and the basis on which it is made, so that final orders can be made on the 19th of May 2021.