THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 391

[2022 202 JR]

BETWEEN

SEAN KENNY

APPLICANT

AND

LEGAL COSTS ADJUDICATOR (BARRY MAGEE)

RESPONDENT

AND

GREG WINTERS

NOTICE PARTY

JUDGMENT of Mr. Justice Mark Heslin delivered on the 7th day of July 2023

Introduction

1. By way of background, the Applicant is a retired solicitor who, in February 2018, instructed the Notice Party, who is a solicitor, to act on his behalf in respect of certain proceedings which were ultimately disposed of in July 2020.

2. The Notice Party produced a bill of costs which was referred for adjudication before the Respondent.

3. By order made on 21 March 2022 (Meenan J.) the Applicant was granted leave to apply by way of application for judicial review for the reliefs set out at para. [D] in the Applicant's Statement, filed on 10 March 2022, on the grounds set out at para. [E] therein. The relevant relief sought was as follows:-

> "*1. A declaration that the decision of the Respondent which was communicated to the Applicant by letter dated 24th February 2022 purporting to refuse the applicant's application for a consideration by the Respondent of the determination in the adjudication of costs as between legal practitioner and client and entitled 'Greg Winters v. Sean Kenny bearing record number OCLA 2021: 000705' is null void and of no effect.*

2. An order of Certiorari by way of judicial review quashing a decision of the Respondent which was communicated to the Applicant by letter dated 24th February 2022 purporting to refuse the applicant's application for a consideration by the Respondent of the determination in the adjudication of costs as between legal practitioner and client and entitled 'Greg Winters v. Sean Kenny bearing record number OCLA 2021: 000705'.

3. An order of Certiorari by way of judicial review quashing a certificate of adjudication issued by the respondent in the adjudication of costs as between legal practitioner and client and entitled 'Greg Winters v. Sean Kenny bearing record number OCLA 2021: 000705'.

4. A Declaration that the determination in the adjudication of costs as between legal practitioner and client and entitled 'Greg Winters v. Sean Kenny bearing record number OCLA 2021: 000705' was furnished to the applicant on 1st February 2022 and the applicant's request for a consideration of the determination under Section 160 of the Legal Services Regulation Act 2015 was accordingly made to the respondent within the requisite 14 days.

5. An order remitting to the respondent for reconsideration and review the bill of costs in the adjudication of costs as between legal practitioner and client and entitled 'Greg Winters v. Sean Kenny bearing record number OCLA 2021: 000705'. . .".

4. At the hearing, this court was informed that the wording of draft orders had been agreed and this was handed into court.

5. The remaining issue in dispute between the parties, concerned responsibility for the costs of these proceedings. In essence, the Applicant acknowledges that he has no entitlement to seek costs against the Respondent, but asserts that entitlement to costs from the Notice Party. The Applicant submits that the Notice Party and his cost accountant played "a pivotal role in bringing about" the making, by the Respondent, of the impugned decision. The Notice Party rejects this and contends that, in circumstances where the Applicant rejected an offer made by the Notice Party that there should be no order as to costs, the court should award the costs of the present application against the Applicant in favour of the Notice Party.

LSRA 2015

6. Certain provisions of the Legal Services Regulation Act, 2015 ("the 2015 Act") are discussed in this judgment and, for the sake of clarity, it is appropriate to set out, at this juncture, what is provided for in sections 57 and 160 of the 2015 Act:

"***Preliminary review of complaints***

57. *(1) Where the Authority receives a complaint under this Part, it shall conduct a preliminary review of the complaint to determine whether or not the complaint is admissible.*

(2) The Authority, for the purpose of its preliminary review under subsection (1), shall notify the legal practitioner concerned of the complaint, which notification shall request the legal

practitioner to respond to the Authority, within such reasonable period as is specified in the notification, with his or her observations on the complaint.

(3) A notification under subsection (2) shall be accompanied by a copy of the complaint and any documents relating to the complaint that are submitted by the complainant.

(4) The Authority, for the purpose of determining whether a complaint is admissible under section 58, may request from the complainant or the legal practitioner further information relating to the complaint.

(5) The Authority, having considered the response (if any) of the legal practitioner to the notification under subsection (2) and any information received under subsection (4), shall, in accordance with section 58, determine that the complaint is—

(a) admissible,

(b) inadmissible, or

(c) one to which section 58 (6) applies.

(6) The Authority shall notify the complainant and the legal practitioner concerned of its determination under this section and of the reasons for its determination.

(7) Where the Authority makes a determination referred to in subsection (5)(b), it shall take no further action under this Part in relation to the complaint.

…

***160.** (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.*

(2) An application under subsection (1) shall be—

(a) in such form as may be specified in rules of court or, where applicable, under section 166, and shall specify by a list in a short and concise form the matters or items, or parts thereof, to which the decision of the Legal Costs Adjudicator being objected to relates and the grounds and reasons for such objections, and

(b) made on notice to the other party to the adjudication.

(3) The Legal Costs Adjudicator shall, if he or she considers it appropriate to do so, and upon the application of the party entitled to the costs, issue an interim determination pending consideration of an application under subsection (1), in respect of—

(a) the remainder of the matters or items in the determination to which no objection has been made, and

(b) such of the matters or items that are subject of the application as the Legal Costs Adjudicator considers reasonable.

(4) For the purposes of an application under subsection (1), the Legal Costs Adjudicator shall reconsider and review his determination having regard to the matters or items specified under subsection (2)(a), and sections 155 to 158 shall apply in relation to such a consideration.

(5) The Legal Costs Adjudicator, having considered an application under this section may decide—

(a) not to vary his or her determination, or

(b) to make a new determination,

and the determination referred to in paragraph (a) or (b) shall, subject to section 161, take effect immediately.

(6) The functions of a Legal Costs Adjudicator in relation to an application under this section shall, insofar as practicable, be performed by the Legal Costs Adjudicator who made the determination to which the application relates."

Submissions

7. Before proceeding further, I want to express my thanks to Ms. Byrne BL, for the Applicant and to Mr. Fitzsimons SC, for the Notice Party. Both made oral submissions of sophistication and skill during the hearing. These supplemented written submissions of great clarity, which were furnished to the court on the morning of the hearing and which I have since considered carefully. The foregoing has been of considerable assistance to me in determining this matter.

8. The bedrock of this court's decision must be the facts which emerge from the evidence. I have carefully considered all the evidence, in the form of the affidavits sworn by the Applicant and Notice Party, respectively, and the exhibits thereto. From that evidence the following relevant facts emerge (and for the sake of greater clarity as regards the chronology of events, I have underlined certain dates).

Relevant facts

9. A hearing took place before the Respondent on 2 November 2021, at which the Applicant represented himself and the Notice Party was represented by Mr. Rob McCann of McCann Sadlier, Legal Costs Accountants. The Respondent reserved his decision to 19 November 2021 at 2 p.m.

10. Due to a mistake on the Applicant's part, he did not attend until the later time of 3:30 p.m. on 19 November 2021, by which time the matter had been dealt with. At para. 5 of the Applicant's 9 March 2022 affidavit, he avers inter alia that the Respondent informed him:-

"…. that his determination would be furnished to me by Mr. McCann, legal costs accountant representing the notice party. I requested the respondent to give me some indication as to his decision and he proceeded to name the various headings set out in the Bill of Costs and in respects of heading (sic) confirmed he found same to be reasonable except one which he reduced slightly….".

11. At para. 7 of the Applicant's 9 March 2022 affidavit he avers inter alia that:-

"as the respondent had made only a small adjustment to the Bill of Costs, I informed the respondent that I intended to appeal the matter. The respondent confirmed an application for a consideration by him could be made under Section 160 of the Legal Services Regulation Act 2015 [hereinafter referred to as 'the 2015 Act']. The respondent informed me that his

decision would be given to me in detail by Mr. McCann as he had requested this of Mr. McCann at the conclusion of the hearing that day and Mr. McCann had agreed to do this".

12. On the same issue, the Respondent's 18 January 2022 determination states inter alia the following at para. 3:-

"*On the 19th November at 2 p.m., Mr. Kenny was not in attendance, however, Mr. McCann, on behalf of Mr. Winters, was. On the basis that the matter had clearly been listed for 2 p.m. I proceeded to deliver my decision orally. As matters turned out Mr. Kenny was under the mistaken apprehension that the matter had been listed for 3:30 p.m. and he attended at that time. At his request I indicated to him what my decision had been in the main reasons for it. I also indicated that Mr. McCann would be furnishing him with a more detailed outline of the decision as he had agreed to do so at the conclusion of the 2 p.m. hearing".*

13. The Notice Party's affidavit sworn on 6 December 2022 contains inter alia the following averments para. 15 (b):-

"*Mr. McCann was under no obligation to furnish Mr. Kenny with the oral ruling / determination of the LCA but . . . did (as a courtesy) provide him with a copy of the determined Bill of Costs on Tuesday 23 November 2021 and, in any event, Mr. Kenny learned of the nature and content of the LCA's ruling when he attended later on in the afternoon of Friday 19 November 2021….".*

14. It is a fact that the Applicant emailed Mr. McCann on 22 November 2021 in the following terms:-

"*Dear Rob,*

Further to the above matter coming before Mr. Barry Magee for adjudication, I am informed by Mr. Magee that you will forward a copy of the determination to me. Could you please email a copy of same to me….".

15. On 23 November 2021, Mr. McCann emailed the Applicant in the following terms:-

"*Please find a copy Bill of Costs will all deductions in red. Total costs are calculated at the back of the bill on p. 39.*

Please note that these are my own preliminary calculations and they have yet to be reconciled with the Office of the Legal Costs Adjudicator, at which time a Certificate of Adjudication will be issued. The figures that will be contained on the Certificate will be definitive".

16. The Bill of Costs furnished by Mr. McCann to the Applicant comprised a 40 – page document. Page 39 comprised a summary under two headings namely "*Summary to total costs claimed*" and "*Summary to total costs allowed on adjudication*" respectively.

17. On 26 November 2021, the Applicant emailed Mr. McCann as follows:-

"*Please advise as to whether you are in receipt of the Certificate of Adjudication / report from the Adjudicator. If so, you might please let me have the same by return, as it is my intention to appeal same.*
Looking forward to hearing from you….". (emphasis added)

18. I pause at this juncture to make the following observation. It is perfectly clear from the contents of the foregoing email that, as of 26 November 2021, the Applicant was *not* calling upon the Notice Party's costs accountant to produce a report. Rather, the inquiry was whether same had been received *from* the Respondent (and, if so, the Applicant was anxious to receive a copy, given his intention to appeal the Respondent's adjudication).

19. On 29 November 2021, Mr. McCann emailed the Applicant in the following terms:-
"*The Certificate of Adjudication will be sent to you as soon as same is received from the office of the Legal Costs Adjudicator (OLCA) in the meantime, should you have any queries you should contact the OLCA".* (emphasis added)

20. In light of the foregoing, the status quo, as of 29 November 2021, was that the Applicant was *not* waiting for the Notice Party to produce anything. Rather, *both* the Applicant and Notice Party were waiting on the Respondent. This fact is underlined by the averments made at para. 10 of the Applicant's 9 March 2022 affidavit, which make clear that it was the Respondent's obligation to produce the documentation which was then outstanding:-
"*10. I became increasingly concerned as I had neither the determination nor the report of the Respondent in order to lodge an application for a consideration of the Respondent's determination under s. 160 of the 2015 Act. I say and believe that either the determination of the respondent under s. 157 (2) or the report of the Respondent under s. 157 (9) is absolutely necessary in order for a party to an adjudication of costs to properly prepare and set out the grounds of any objections that the party may have for the purposes of a consideration of a determination. I say that this detail is mandated under the provisions of s. 160 of the 2015 Act".* (emphasis added)

21. Consistent with the fact that all relevant statutory obligations were on the Respondent, not on the Notice Party, the Applicant instructed Orlaith J. Byrne & Co. Solicitors, who wrote to the Respondent, on 3 December 2021 in a letter which included the following:-
"*We confirm that this firm have been instructed to lodge objections to the determination. In this regard we would be obliged for a copy of the Cost Adjudicator's Report for consideration.*

On receipt of this report we will arrange to lodge the Objections aforesaid and we are formally requesting an extension of time to lodge same. In particular we are suggesting that the Objections be lodged within a period of fourteen days from receipt of the Legal Cost Adjudicator's Report aforesaid.

If it is appropriate that a formal application be made in relation to the items above, you might provide us with a date and time to attend before Mr. Magee to make the application. Finally, we would request that you defer issuing a final Certificate pending the hearing and determination of the objections of the Objections aforesaid….".

22. The position, as of 3 December 2021 was, therefore, that the Applicant was calling upon the Respondent (not the Notice Party) to furnish documentation which the Respondent had a statutory obligation to provide.

23. In other words, irrespective of anything the Notice Party's costs accountant agreed to provide on 19 November 2021, it was not within the gift of the Notice Party to comply with the Respondent's statutory obligations. This is something the Applicant accepts, in circumstances where the Applicant makes inter alia the following averments at para. 19 of his 9 March 2022 affidavit:-

"*I have been advised by counsel and believe that the respondent may not delegate his statutory duty to furnish his determination to a party in the adjudication and particularly so in the case of an oral determination".* (emphasis added)

24. Having regard to the foregoing, the status quo, as of 3 December 2021, was *not* brought about by the Notice Party. As of 3 December 2021, no request was being made to the Notice Party and there is simply no question of the Notice Party being in breach of a statutory obligation (which the Notice Party never had).

25. Moreover, the aforesaid 3 December 2021 letter makes clear that it was exclusively within the gift of the Respondent (not the Notice Party) to decide whether to grant, or not, what the letter described as "*an extension of time"*.

26. In addition, it was exclusively within the Respondent's power to decide whether he required that "*a formal application be made"* of the type referred to in the aforesaid letter of 3 December 2021 from the Applicant's solicitor to the Respondent.

27. It is clear that the Respondent required the Applicant to make a formal application for an extension of time. This took place on 16 December 2021 at which the Applicant was represented by Mr. Stephen Daly BL and the Notice Party was represented by Mr. McCann.

28. The Respondent reserved his decision at the end of the 16 December hearing and provided a five–page written determination, dated 18 January 2022, which went to the parties on 20 January 2022.

29. The "*Introduction*" section to the 18 January 2022 determination refers to the background and summarises the submissions made on behalf of the Applicant and Notice Party, respectively, in the following terms:-

"*Mr. Daly submitted that the written report of the determination was necessary in order to properly prepare the grounds for consideration under s. 160. Therefore, it followed that the 14–day time limit could only run from the furnishing of the report as opposed to the furnishing of the determination.*

7. He also submitted that I enjoyed a jurisdiction pursuant to Ord. 99 r. 36 (10) RSC to extend the relevant time limit. As a matter of fairness, Mr. Kenny should be in possession of the written report prior to being required to formulate the grounds for his Consideration.

8. In reply, Mr. McCann indicated that the provisions of s. 160 were clear. There is no provision within the statute for an extension of time. Ord. 99, r. 36 (10) was clearly caveated by the phrase 'subject to any provisions of statute'. Therefore, it was submitted that the rule could not permit an extension of the 14 – day time limit provided in s. 160. Whilst Mr. Kenny had represented himself at the adjudication, it was the case that Mr. Kenny had been a practicing solicitor up until his recent retirement from practice. In those circumstances his position should not be equated to that of a 'traditional' lay litigant".

30. It is perfectly clear from the foregoing that *two* distinct issues were the subject of submissions. The primary submission, as made on behalf of the Applicant, was that the 14–day time limit had not started to run on 19 November 2021 (when the Respondent gave his determination, orally) but could only run from the furnishing, by the Respondent, of his report. The Notice Party made *no* submission with respect to this primary argument.

31. The secondary submission made by the Applicant was that the Respondent enjoyed a jurisdiction to extend the aforesaid time limit. That was plainly a secondary submission because if the Respondent accepted the Applicant's primary submission (that time would only begin to run from the furnishing of the report) there would be no need for any extension of time. The Notice Party made a submission with respect to this secondary issue, namely, that s. 160 did not provide for an extension of time.

32. Under the heading of "*Discussion*" the Respondent set out his analysis, from paras. 9 to 24 inclusive, as can be seen from pp. 2 to 5, inclusive of his 18 January 2022 determination. In respect of the primary submission made by the Applicant's counsel, the Respondent came to the following view:-

"*18. The 14 – day time limit in s. 160 is said to run from 'the date on which the determination is furnished to him or her under s. 157 (2)'. Section 157 (2) provides that 'a determination shall, as soon as practicable after it is made, be furnished to the parties to the adjudication'".*

33. At paras. 19 and 20 of his determination, the Respondent quoted ss. 157 (8) and (9) of the 2015 Act and proceeded to state the following from para. 21 onwards:-

"*21. It is clear from the text of these sections that there is a clear distinction between a determination being furnished and a written report being prepared in relation to such*

determination. There is nothing in the language of the sections that indicates that the 14–day time limit provided for in s. 160 only runs from the furnishing of a written report pursuant to s. 157 (9). This is clear from the text of s. 157 (8) which clearly anticipates the request for a report under subsection (9) being made after the determination is made.

22. Whilst those findings are sufficient to determine the issue, I would also add that the oral determination delivered on 19 November to Mr. McCann and Mr. Kenny, albeit separately, did contain my reasons as to why I was allowing the costs in the amounts that I allowed. Therefore, it is not the case that the written report I will be furnishing under subsection 9 will contain any additional reasons that I had not already furnished to the parties on 19 November.

23. Whilst Mr. Kenny may well be of the view that it is unfair that a consideration is required to be lodged prior to a written report being received, that is the structure of the legislation under which I am obliged to operate, and I have no jurisdiction to depart from it".

34. In the foregoing manner, the Respondent decided the primary issue against the Applicant, holding that the Applicant had 14 days (commencing on 19 November 2021 and expiring on 3 December 2021) to request a *consideration* (previously known as *objections*) in relation to his determination of the costs adjudication.

35. Not only did the Notice Party make no submission in relation to this matter (confining his contribution to the uncontroversial proposition that s. 160 does not provide for an extension of time) it was very obviously a matter exclusively for the Respondent to reach a decision.

36. In other words, it was not within the gift of the Notice Party to dictate the manner in which the Respondent would decide the outcome of an application which, it will be recalled, the Respondent required the Applicant to make (see 3 December 2021 letter discussed earlier).

37. It now appears to be accepted by the Respondent that time did *not* run until the date of the receipt by the Applicant of the Respondent's report (of 1 February 2022). Again, that change of mind was no more within the Notice Party's gift than it was within the Notice Party's power to control the outcome of the 16 December 2021 hearing, which produced the Respondent's 18 January 2022 determination.

38. The Respondent prepared a report which is dated 1 February 2022, which comprises a written determination of the hearing which had taken place on 2 November 2021. That report was issued by the Respondent's office, by email to the parties on 1 February 2022.

39. By letter dated 14 February 2022, the Applicant's solicitor wrote to the Respondent with reference to s. 157 (2) of the 2015 Act, pointing out the Respondent's duty to *furnish* his determination to both parties. The letter went on to make clear that, even if the Notice Party's cost

accountant had furnished to the Applicant a more detailed outline of the Respondent's decision "*…same would not be in compliance with s. 157 (2) of the LSRA 2015 whereby the obligation to furnish a determination rests with the LCA".*

40. Thus, at all material times, all statutory obligations rested upon the Respondent, not on the Notice Party (see also the Applicant's 26 November 2021 email to the Notice Party's cost accountant, discussed earlier). In the 14 February 2022 letter, the Applicant's solicitor went on to state inter alia the following:-

> "*You will note that we have briefed Counsel in this matter and Counsel's advice is that s. 160 (1) expressly mandates the statutory time limit of 14 days must run from the date on which a determination is furnished to a party under s. 157 (2). On the facts as set out in the Decision of the LCA dated 18th January 2022 it is clear that the determination in the above entitled matter was not furnished to our Client on 19th November 2021 and the LCA's duty to furnish to my Client was only fulfilled on 1st February 2022 when this office was furnished by email with the report of the LCA.*
>
> *Accordingly, and in accordance with s. 160 (1) my Client hereby applies to the LCA for the consideration of the decision and the making of the determination in the above-entitled matter. We enclose application for consideration herein for your attention.*
> *Please also note that in the event the enclosed application for consideration is not accepted by your office, our client will be left with no alternative but to seek judicial review and for such Orders and reliefs as may be advised by Counsel".*

41. The said letter of 14 February 2022 was also 'cc'd' to the Notice Party and to his cost accountant.

42. It is perfectly clear that the issue giving rise to the 14 February 2022 letter was the primary issue, upon which the Applicant (but not the Notice Party) made submissions during the 16 December 2021 hearing, which gave rise to the 18 January 2022 written determination.

43. In other words, by means of the 14 February 2022 letter from his solicitor, the Applicant was calling upon the Respondent to acknowledge that, under s. 160 of the 2015 Act, time did not begin to run until 14 days from 1 February 2022, being when the Respondent furnished his report.

44. Just as it was exclusively the responsibility of the Respondent *to* furnish the said report, the Notice Party had no hand, act, or part in *when* it was furnished. The 14 February 2022 letter, in effect, called upon the Respondent to alter his view on the primary issue.

45. With respect to the position which pertained as of 14 February 2022, the following can also be said:-

- Not only had the Notice Party made no submission as to when time began to run, the Applicant did not write to the Notice Party on 14 February 2022 to invite any submission from the Notice Party on this issue;

- It was never within the gift of the Notice Party to make the decision as to when the 14 – day time limit began to run, pursuant to s. 160;
- It was never within the power of the Notice Party to change the Respondent's mind on this issue;
- The most the Applicant did was to send a copy of the 14 February 2022 letter to the Notice Party and his cost accountant;
- The Applicant did not call upon the Notice Party or his costs accountant to *do* anything with respect to the 14 February 2022 letter;
- Still less did the Applicant call upon the Notice Party to 'row in behind' the Applicant in any way (e.g., by expressing a view similar to the Applicant's and/or by communicating that view to the Respondent in an attempt to try and persuade the Respondent to alter his stance).

46. Despite the reality that it was never within the Notice Party's power to determine the Respondent's attitude to the question of when the 14–day time limit began to run, and despite the fact that the Notice Party was never invited by the Applicant to express any view on the issue, still less to try and persuade the Respondent to alter his view, the Applicant contends that the Notice Party is responsible for the present proceedings.

47. Having carefully examined the facts which emerge from the evidence before this Court, I am 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 present proceedings.

48. I say this in circumstances where the final paragraph of the 14 February 2022 letter put the Respondent squarely 'on notice' that if the latter (not the Notice Party) did not alter his view, the Applicant would seek judicial review. I now turn to the impugned decision.

49. By letter dated 24 February 2022, Mr. Gary Cummins of the Respondent's office wrote to the Applicant's solicitor in the following terms:-

> "*We acknowledge receipt of your letter of the 14th inst which has been passed to Adjudicator Magee.*
>
> *He has indicated that the issues raised in your letter under reply were dealt with by him in his written decision of 18th of January 2022. For the reasons set out therein, the request for a consideration is out of time".*

50. This is the decision challenged in the present proceedings and it seems to me that the following can be said in relation to it:-

- The Notice Party had not been asked to play any role in this decision;
- This decision was made exclusively by the Respondent;
- It was simply not open to the Notice Party to make this decision;
- Just as the Applicant had never called upon the Notice Party, or his costs accountant, to make a submission, still less one in support of the Applicant's position, the

Respondent did not call upon the Notice Party to make any submission prior to the Respondent coming to this 24 February 2022 decision;

- The Notice Party was unaware of this decision until it was furnished to him, on 1 February 2022.

51. The foregoing reality is reflected in the relief sought by the Applicant. I quoted this earlier and all of it is directed at the *Respondent's* 24 February 2022 decision, alone.

52. As noted earlier, the Applicant's statement of grounds is dated 10 March 2022 and the Applicant's verifying affidavit was sworn on 9 March 2022 and filed in the Central Office on 10 March.

53. The Applicant's ex parte docket is dated 15 March 2022 and the order granting leave was, as previously noted, made on 21 March 2022.

54. The relevant notice of motion was issued by the Applicant on 28 March 2022 and was initially returnable for 24 May 2022.

55. At no stage did the Notice Party object to the relief sought by the Applicant in the present proceedings.

56. On 19 May 2022, the Chief State Solicitor's Office ("CSSO") wrote to the Notice Party stating inter alia the following:-

> *"We refer to the above matter which is returnable for May 2022.*
> *You will be aware that there is a well – established line of case law confirming that it is inappropriate for District/Circuit judges and quasi – judicial persons/bodies to intervene in High Court judicial review proceedings to defend their orders and that the matter should be left to the parties to the proceedings which are the subject of the judicial review.*
> *Accordingly, please note that we have written to the applicant's solicitor to advise that our client does not intend to participate in these proceedings in circumstances where your client, the Notice Party is the legitimus contradictor and should have seisin of the matter….".*

57. The motion for directions, which was initially returnable for 24 May 2022, was adjourned to 5 July 2022. Prior to the adjourned date, by letter of 4 July 2022, the Notice Party wrote to the *applicant's solicitors stating inter alia the following:-*

> *"In advance of the adjourned date of the motion for directions, I take this opportunity to set out my position in relation to the proceedings and, in particular, the reliefs sought on the notice of motion dated 28 March 2022.*
>
> *It is evidence that four of the five substantive reliefs sought on the notice of motion dated 28 March 2022 (paras. 1, 2, 4 and 5) are directed towards the decision made by the respondent Legal Costs Adjudicator, and communicated to the applicant by letter dated 24 February 2022, to refuse the applicant's application for a consideration by the respondent of*

the adjudication and determination of costs. The fifth relief (at para. 3 of the notice of motion) seeks to quash the purported "certificate of adjudication", which is a document which does not exist….".

58. The said letter went on to state, accurately, that the grounds of challenge concentrate exclusively on the fact that the Respondent did not furnish his determination until 1 February 2022; and that the Applicant asserts that the 14–day statutory time limit, pursuant to s. 160 of the 2015 Act, commenced on 1 February 2022 (not on 19 November 2021 as decided by the Respondent on 24 February 2022).

59. The Notice Party went on to make clear that he did *not* object to orders being made in respect of paras. 1, 2, 4 and 5 of the Applicant's motion (subject to certain re-wording of the remittal order, which is not material to the present application). The Notice Party also made clear that there was no necessity for the reliefs sought at para. 3 of the aforesaid motion (again, something which is not material to the present dispute). Finally, the Notice Party made clear that no order for costs should be sought against him in the present proceedings.

60. On 4 July 2022, the Notice Party also wrote in similar terms to the Respondent.

61. Not having received any reply, the Notice Party wrote again to the Applicant's solicitor approximately two months later, by letter dated 2 September 2022 which stated:-

"Our letter of the 4th July last refers and we would be obliged to hear from you in relation to this matter".

62. By letter dated 8 September 2022, the Applicant's solicitor wrote to the Notice Party asserting inter alia that:-

"… this entire situation could have been avoided if your costs accountant had furnished our Client with the determination as had been agreed by him. Further it was your cost accountant who urged the Legal Costs Adjudicator not to grant an extension of time resulting in the Court application herein….".

63. The facts which emerge from the evidence before this Court utterly undermines the proposition that the present proceedings could have been avoided, had the Notice Party's costs accountant furnished "*the determination"* to the Applicant.

64. In the manner examined earlier, it was never the responsibility of the *Notice Party* to issue a determination. Furthermore, as and from 26 November 2021, the Applicant was not asking the Notice Party's costs accountant to produce anything. Rather, the Applicant was asking whether Mr. McCann was "*in receipt of"* documentation "*from the Adjudicator"*. Moreover, and as noted earlier, at para. 19 of the Applicant's 9 March 2022 affidavit, the Applicant averred inter alia that "…*the Respondent may not delegate his statutory duty to furnish his determination to a party in the*

adjudication…". Furthermore, it will be recalled that the letter dated 14 February 2022 sent by the Applicant's solicitor to the Respondents stated inter alia:-

> "*Despite requests, Mr. McCann did not furnish a 'more detailed outline of the decision' to our client. Even if he had done so, same would not be in compliance with s. 157 (2) of the LSRA 2015 whereby the obligation to furnish a determination rests with the LCA*".

65. For these reasons, the first of the assertions made in the 8 September 2022 letter is utterly undermined by the facts.

66. As to the second assertion in the said letter, it is true that, during the 16 December 2021 hearing, the Notice Party's costs accountant submitted that s. 160 of the 2015 Act did not allow for an extension of time. However, it will be recalled that this was the *secondary* issue (the primary one being the Applicant's submission that time did not begin to run against the Applicant until the Applicant had been furnished with the Respondent's written determination). It is, of course, that issue (not whether s. 160 permits the Respondent to grant an extension of time) which is at the heart of the judicial review proceedings.

67. Nor was any relief sought by the Applicant in respect of the 16 December 2021 hearing, or the 18 January 2022 written determination which followed it (and the submission made by the Notice Party, on the secondary issue, was made at the 16 December 2021 hearing). This is perfectly clear, not only from the statement of grounds, but from the Applicant's 9 March 2022 affidavit in which his case is succinctly put by means of the following averment at para. 21:-

> *"I have been advised and believe that the decision refusing to accept my application for a consideration under s. 160 of the 2015 Act was therefore made ultra vires the power of the respondent as my application was made within 14 days of the determination having been furnished to me on 1st February".* (emphasis added)

68. It is perfectly clear from the foregoing and from the statement of grounds that the core contention made by the Applicant is not that the Respondent had the power to grant an *extension* of time, but that his application was made *within* time (i.e., within 14 days of 1 February 2022). At the hearing which the Respondent required, and which took place on 16 December 2021, the Notice Party made a submission on the former issue, not the latter.

69. By letter dated 10 October 2022, the Notice Party wrote to the Applicant's solicitor in response to the aforesaid 8 September letter, taking issue with the Applicant's characterisation of matters. The Notice Party's 10 October 2022 letter stated inter alia:-

> *"…. you are entirely incorrect in your assertions that 'this entire situation could have been avoided', if Mr. McCann had furnished Mr. Kenny with the determination 'as had been agreed by him'. The basis for your further assertion that this firm is not standing over the position of Mr. McCann is not understood.*

At all events, the decision which is impugned in these proceedings is the decision communicated by the respondent by letter dated 24 February 2022, which precluded your client from applying for the consideration. If your client has any application for his costs of the proceedings, that issue should be taken up with the respondent.

. . . .

For the avoidance of doubt, I confirm that in the event that the matter is dealt with by consent in the terms as set out above and in relation to paras. 1 and 2 of the notice of motion as set out to you in my letter to you dated 4 July 2022, then my client will not seek any order for costs as against any other party.

However, if your client makes any application for costs as against me, such application will be vigorously contested by me, and I have engaged the services of senior and junior counsel in this regard. In circumstances where I am forced to defend any such costs application, then I shall seek to have the costs incurred in defending that costs application (to include the costs of retaining senior and junior counsel) awarded as against your client".

70. In the foregoing manner, the Applicant was presented with the opportunity for matters to be dealt with on the basis of consent and with no order for costs against any party. Furthermore, the Applicant was put squarely 'on notice' that, if he insisted on progressing an application for costs against the Notice Party, the latter would be forced to defend such an application and would seek his costs against the Applicant.

71. Regrettably, the Applicant chose to decline the option presented to him and proceeded to file a second affidavit in the proceedings for the purposes of seeking (as para. 5 thereof makes clear) "*Orders as agreed"* between the parties and "*for an Order for the Applicant's costs of these proceedings including all reserved costs same to be adjudicated in default of agreement".*

<u>Legal Principles</u>

72. In their oral and written submissions, both counsel referred to the 5 May 2021 decision of Ms. Justice Murphy in *O'Donovan v County Registrar for Cork & Anor.* [2021] IEHC 307, as encapsulating relevant principles. From paras. 30 to 38, inclusive, the learned judge conducted an analysis with respect to the law on costs in judicial review applications where the decision impugned was made by a judicial or quasi-judicial person or entity. Having examined relevant authorities, Murphy J. summarised the law at para. 39 of her judgment 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 male 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." (emphasis added)

73. In the manner explained earlier, the Respondent chose not to defend his decision and there is no suggestion whatsoever of the Respondent having acted *mala fides* or with impropriety. Thus, the Applicant accepts that they have no entitlement to an order for costs against the Respondent.

74. Focusing on the principles set out such clarity by Murphy J. at [iii] and [iv], it is appropriate to note that: (a) the Notice Party did *not* defend the impugned decision; (b) the Notice Party did *not* participate in the proceedings.

75. The central contention made on behalf of the Applicant is that the Notice Party was *responsible* for the error of law which occurred. I am entirely satisfied that the facts wholly undermine that proposition.

76. It was the Respondent, alone, who, on 24 February, 2022 refused the Applicant's application, on the basis of his view that the relevant 14-day statutory time limit ran against the Applicant from 19 November 2021 (when the Respondent delivered, orally, his determination with respect to the original adjudication hearing of 1 November 2021).

77. At para. 38 of Ms. Justice Murphy's decision in *O'Donovan*, she stated the following:

"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 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'."* (emphasis added)

78. The facts in this case do not at all support the proposition that the Notice Party "*caused the error*" or *"brought about the making of"* the 24 February 2022 decision. Nor do the facts allow for a finding that the Notice Party is *"in any way responsible for"* that decision.

79. On the contrary, the facts which emerge from a careful consideration of the evidence establish that the error on the part of the Respondent is one for which the Notice Party is in no way responsible and he conceded the invalidity of the impugned decision, never having sought to support or uphold it.

80. It is fair to say that, despite the great skill with which they are made, the submissions made to this court by the Applicant's counsel are based on the twin propositions advanced in the letter of 8 September 2022 from the Applicant's solicitor, which has been examined earlier in this judgment.

81. First, it is submitted that the entire situation could have been avoided if the Notice Party's legal costs accountant furnished the Applicant with the determination. Second, it is asserted that the submission made by the Notice Party's legal costs accountant, at the 16 December hearing (to the effect that s. 160 of the 2015 Act does not provide for an extension of time) gave rise to the need for these proceedings.

82. In the manner examined earlier, neither of these issues gave rise to the decision challenged. The present proceedings concern *not* whether the Respondent has jurisdiction to grant an extension of time, but whether time only started to 'run' as of 1 February 2022 (when the Applicant received the Respondent's written determination).

83. The foregoing is perfectly clear from the relief sought, which is reflected in the draft orders agreed.

84. In short, without objection by either the Respondent or by the Notice Party, the Respondent's 24 February, 2022 decision will be declared null void and of no effect and will be quashed.

85. What was at the heart of the Applicant's claim can also be seen *inter alia* from the following relief which appears in the draft orders which are to be made without objection:

> "*A declaration that the determination in the adjudication of costs as between legal practitioner and client and entitled 'Greg Winters v Sean Kenny bearing record number OCLA 2021:000705' was furnished to the Applicant on 1 February, 2022 and the Applicant's request for a consideration of the determination under s. 160 of the Legal Services Regulation Act, 2015 was accordingly made to the respondent within the requisite 14 days*". (emphasis added)

86. Counsel for the Applicant submits that, by reason of the Notice Party *"sitting back"* in February 2022, it was necessary for the Applicant to bring the present proceedings. I cannot agree.

87. First, the facts do not support that characterisation of the Notice Party's behaviour in February 2022. It will be recalled that the height of what the Applicant did was to send the Notice Party and his costs accountant a copy of the letter dated 14 February 2022, as sent by the Applicant's solicitor to the Respondent. The Applicant did not call upon the Notice Party to take *any* action whatsoever. Insofar as *"sitting back"* is characterised as a failure on the part of the Notice Party to take action, it does not seem at all fair to criticise a Notice Party for failing to take action which he was never called upon to take.

88. It is not necessary to repeat the analysis contained earlier in this judgment. Suffice to say that the Applicant never asked the Notice Party (i) to write to him; or (ii) to write to the Respondent setting out the Notice Party's view on the question of when time began to run. Still less did the Applicant ever (iii) call upon the Notice Party to *"row in behind"* the Applicant in an attempt to convince the Respondent that the latter was wrong in his view as to when the 14 day statutory time limit began.

89. In reality, the Applicant is seeking to hold the Notice Party liable for costs arising out of what the Notice Party's counsel referred to as the *"sin of omission"*. It must be emphasised, however, that there is simply no evidence of the Notice Party ever *omitting* to do something he had a legal obligation to do. Nor, in the manner examined, was the Notice Party even called upon, in February 2022, to take any step. Thus, it does not seem to me that the Notice Party, in fact, omitted to do anything.

90. Having regard to the foregoing, the worst that can be said of the Notice Party is that between 14 February 2022 (when he received a copy letter addressed to the Respondent) to 24 February 2022 (when the Respondent made the impugned decision) the Notice Party was silent/passive. However, not having been called upon to *"row in behind"* the Applicant, I fail to see how it could be fair to criticise the Notice Party for not doing so.

91. Guided by the principles in *O'Donovan*, I cannot take the view that the Notice Party either brought about or was in any way responsible for the Respondent's 24 February 2022 decision. Nor, as I have already explained, did the Notice Party ever attempt to support it. Rather, this is a situation where the Notice Party had no responsibility for the decision which gave rise to the application for judicial review and where the Notice Party did not participate in the proceedings.

92. There is, however, an added aspect to the present situation, which flows from the Notice Party's letter dated 10 October, 2022. In the manner examined earlier, the Notice Party made an entirely reasonable offer to the Applicant that there should be no order as to costs in the proceedings. Had the Applicant chosen to accept this offer, the same relief would have been obtained but a vigorously-contested costs hearing, which took almost half a day of finite court resources would have been avoided. Unfortunately the Applicant chose to spurn the offer made and he did so fully 'on notice' that the Notice Party, who had retained senior and junior counsel, would be seeking costs against the Applicant, were the latter to insist on seeking costs against the former.

93. For the reasons set out in this decision, the Applicant is not entitled to an order for costs against the Notice Party.

94. Having carefully considered all relevant matters I am satisfied that, as the "*entirely successful*" party in respect of the present application (see s. 169 of the 2015 Act) the Notice Party is entitled to the costs of this costs application, to include the costs of senior and junior counsel.

95. A draft order reflecting this court's decision should be furnished within 14 days.