APPROVED **[2021] IEHC 232**

THE HIGH COURT

2018 No. 124 COS

IN THE MATTER OF INDEPENDENT NEWS AND MEDIA PLC

AND IN THE MATTER OF SECTION 748 OF THE COMPANIES ACT 2014

AND IN THE MATTER OF AN APPLICATION

BETWEEN

LESLIE BUCKLEY

MOVING PARTY

AND

RICHARD FLECK
SEAN GILLANE

RESPONDENTS TO THE APPLICATION

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 April 2021

INTRODUCTION

1. This judgment determines the incidence of costs for an (unsuccessful) application for the removal of two court-appointed inspectors. The inspectors had been appointed by the High Court (Kelly P.) to investigate and report upon the affairs of Independent News and Media plc ("***the Company***"). The inspectors had been appointed pursuant to section 748 of the Companies Act 2014.

NO REDACTION REQUIRED

2. Mr. Leslie Buckley subsequently brought an application to have the appointment of the inspectors revoked ("***the revocation application***"). The revocation application was refused for the reasons set out in a reserved judgment delivered on 15 February 2021, *Independent News and Media (Recusal application)* [2021] IEHC 101 ("***the principal judgment***").

3. In circumstances where the principal judgment had been delivered electronically, the attention of the parties had been drawn to the statement published by the Chief Justice and Presidents on 24 March 2020 to the effect that questions concerning costs will generally be dealt with by written submissions post-judgment. The principal judgment noted that were the default position in respect of costs under the Legal Services Regulation Act 2015 to obtain, then the inspectors, having successfully resisted the application to revoke their appointment, would be entitled to their costs as against Mr. Buckley (such costs to be assessed by the Chief Legal Costs Adjudicator in default of agreement). I directed that if any of the parties wished to contend for a *different* form of order, then written submissions should be filed.

SUBMISSIONS ON COSTS

4. One of the notice parties to the revocation application, Mr. Robert Pitt, filed submissions on 1 March 2021 asserting an entitlement to recover his costs as against Mr. Buckley. It is contended that Mr. Pitt was a necessary party to the proceedings, and that he did not—and indeed could not—take a neutral role on the issues raised by Mr. Buckley. It is further contended that his participation in the proceedings was both necessary and reasonable to protect his interests, and that he is accordingly entitled to his costs.

5. Mr. Pitt also makes complaint about the initial directions hearing in these proceedings on 27 April 2020. It is said that Mr. Buckley brought the application before the High Court

without putting Mr. Pitt on notice of the fact that the former would—or so it is said—be disclosing confidential information from the inspection process publicly, and would be impugning Mr. Pitt's character publicly without an opportunity to reply.

6. The position adopted by Mr. Buckley in replying submissions delivered on 11 March 2021 is to say that much of Mr. Pitt's participation in the proceedings had been directed to misplaced complaints, divorced from the substance of the revocation application, on issues around notice and confidentiality. In respect of the substance of the case, it is said that Mr. Pitt added nothing to the case made by the inspectors.

7. Mr. Pitt delivered a second set of submissions, by way of rejoinder, on 26 March 2021, in which he elaborates upon his complaints as to the publication, following the initial directions hearing, of the detail of the inspectorship process which had, until that point, been conducted in private.

8. Neither party has sought an oral hearing on the question of costs. The allocation of costs has, therefore, been decided on the basis of the papers, in accordance with the statement published by the Chief Justice and Presidents. The submissions are published with this judgment.

PRINCIPLES GOVERNING COSTS

9. The principles governing the incidence of costs in legal proceedings are now prescribed by the Legal Services Regulation Act 2015 ("***LSRA 2015***") and Order 99 of the Rules of the Superior Courts (as revised in December 2019). The default position is that a party who has been entirely successful in proceedings is entitled to their costs as against the unsuccessful party.

10. To date, most of the case law on the revised costs regime has been directed to the test to be applied in determining "success" in proceedings, especially in circumstances where

the party who might be said to have "won" overall may nevertheless have been unsuccessful on a number of specific issues. (See, for example, *Chubb European Group v. Health Insurance Authority* [2020] IECA 183). The question which arises in the present proceedings is different: it requires consideration of the entitlement, if any, of a *notice party* to costs.

11. Both sides helpfully referred me to the judgment in *Usk and District Residents Association Ltd v. Environmental Protection Agency* [2007] IEHC 30 ("***Usk***"). The proceedings in *Usk* were judicial review proceedings which sought to challenge the validity of a waste licence that had been granted for the development and operation of a waste landfill facility. The respondent to the proceedings had been the competent authority which had made the decision to grant the licence, i.e. the Environmental Protection Agency. The licensee, i.e. the operator of the proposed facility, had been joined to the proceedings as a notice party.

12. The judicial review proceedings were ultimately dismissed. The High Court made a costs order in favour of both the respondent and the notice party as against the unsuccessful applicant. The court held that the proceedings were "intimately concerned with the rights and entitlements of" the notice party as licensee. As such, the notice party was entitled to defend its legitimate interests by putting forward arguments in support of the Environmental Protection Agency's defence of the challenge to the waste licence.

13. Clarke J. (then sitting in the High Court) reiterated that the default position is that a successful party is entitled to an award of costs. See paragraph 5.2 of the judgment as follows.

> "[…] the default position is that all costs should be awarded to the successful party. Where that successful party is a defendant, respondent, or, indeed, a notice party who opposes an application, then that position should be departed from only where the court is satisfied that there are good grounds for taking the view that the costs of the proceedings as a whole (including any appropriate

> interlocutory applications) have been clearly increased by reason of an unreasonable position adopted by that successful party in respect of some issue which has not already been the subject of a costs order reflecting the relevant unreasonableness."

14. Clarke J. emphasised, however, that a notice party does not necessarily have an entitlement to costs in all cases. See paragraph 5.5 of the judgment as follows.

> "I should, however, note that there may well be cases where it would be appropriate for notice parties (who are not as intimately connected with the issues as in this case) to consider whether it is necessary to participate, or at least participate fully, in judicial review proceedings. The mere fact that the party may have a sufficient interest so as to make it legitimate that they be placed on notice of the proceedings does not, of itself, necessarily carry with it an entitlement to that party to an unquestioned order for costs in the event of the proceedings being successfully defended. The extent to which such a notice party may be entitled to some or all of the costs of successfully supporting the defence of the application, will depend on all the circumstances of the case and, in particular, the extent of the interest of that party in the issues which are the subject of the judicial review application and the extent to which it may be regarded as reasonable for that party, in those circumstances, to independently oppose the application. Having regard to those principles it does not appear to me to be appropriate to diminish the entitlement of [the notice party licensee] to costs on the facts of this case."

15. As appears, the entitlement to costs is limited by reference to the extent of the interest of the notice party in the proceedings, and by consideration of whether it is reasonable for the notice party to participate. It seems to me that such a limitation on the recoverability of costs is a necessary compromise, intended to ensure that the constitutional right of access to the courts is not rendered ineffective in proceedings involving multiple notice parties. Were it otherwise, and were it to be the position that notice parties had a *prima facie* entitlement to costs, irrespective of the strength of their interest in the proceedings, then this would have a disproportionate deterrent effect on opposing parties. An individual might well be dissuaded from instituting proceedings for fear of incurring a financially-ruinous liability for the costs of multiple parties. A principle which confines

the right to recover costs to those notice parties whose rights and entitlements will be directly impacted upon by the outcome of the proceedings strikes an appropriate balance.

16. The judgment in *Usk* pre-dates the coming into force of the revised costs regime under the LSRA 2015 on 7 October 2019. The principles identified in that judgment can, nevertheless, legitimately be extended to the revised costs regime. This is because the "old" and the "new" costs regime share the same underlying objective, namely that costs orders should be employed to vindicate the constitutional right of access to the courts. In most cases, this is best achieved by awarding costs to the successful party. The interests of justice will usually require that a party who has successfully pursued, or has successfully defended, a claim should not be out of pocket. The authoritative statement of the rationale for this approach is to be found in *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535. McKechnie J., writing for the Supreme Court, stated as follows (at paragraph 20 of the reported judgment).

> "A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so but, it is, with the 'costs follow the event' rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process, including over court participation or attendance. If, however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff."

17. On occasion, however, it will be necessary to depart from the default position, i.e. that the successful party is entitled to their costs. The constitutional right of access to the courts will, in some instances, be better served by making a different form of costs order. One obvious example is where the successful party had prolonged the proceedings

unnecessarily by unreasonably pursuing or contesting certain issues. It is in the interests of justice to ensure that scarce judicial resources are not dissipated unnecessarily, and a court might legitimately mark its disapproval by withholding costs on this basis. The prospect of costs being withheld (or even awarded to the other side) for unreasonable litigation conduct encourages discipline in legal proceedings.

18. The principles identified in *Usk* are entirely consistent with the approach to costs now embodied in the LSRA 2015. The first consideration identified in *Usk*, namely the importance of the outcome of the proceedings to the notice party; reflects the general principle that a party who has been put to the expense of pursuing or defending a claim should normally be entitled to recover the measured costs of so doing from the losing side. This assumes, of course, that their rights or entitlements are actually at issue in the proceedings. Hence the need to assess the extent of the interest of the notice party in the proceedings.

19. The second consideration identified in *Usk*, namely that the default position should be departed from only where the court is satisfied that the costs of the proceedings have been clearly increased because of an unreasonable position adopted by the successful party in respect of some issue; chimes with the statutory criteria under section 169(1) of the LSRA 2015, which focus on the conduct of the proceedings by the parties.

20. The last aspect of the judgment in *Usk* which is relevant to the present proceedings concerns the *point in time* at which the reasonableness of a party's conduct should be assessed. The judgment cautions against making the assessment with the benefit of hindsight, i.e. following the conclusion of the proceedings. I respectfully agree. The parties to litigation have to make decisions as to the nature and extent of their participation in "real time". The parties cannot know, in advance, how precisely the litigation will play out. The focus at the hearing of the action—or, indeed, in the

judgment of the court—may be narrower than the pleadings or even the written legal submissions might have suggested. A party might reasonably have incurred costs in pursuing arguments which turn out, with the benefit of hindsight, to have been unnecessary to the ultimate outcome of the proceedings.

21. Finally, and on a separate point, it should be emphasised that the proportion of the hearing time taken up by a notice party's submissions cannot be determinative of that party's entitlement to costs. The fact that a notice party may have made short, focused submissions, which complement rather than duplicate those of the main party, does not necessarily diminish the notice party's entitlement to costs. It is often the position in planning and environmental litigation, for example, that the time dedicated to the submissions on behalf of the beneficiary of the impugned development consent represents a fraction of the overall hearing time. This is not normally a factor which is relied upon to deny the notice party its costs. Indeed, it is more likely that costs will be withheld where a notice party has prolonged the proceedings unnecessarily—by repeating arguments which have already been made by the main party or by pursuing an issue unreasonably—than a notice party will be punished for being too concise. The principal determinant of whether a notice party is entitled to its costs will be the strength of its interest in the outcome of the proceedings, rather than the length of its submissions.

22. I turn next to apply the principles discussed above to the facts of the present case.

DISCUSSION AND DECISION

23. The first matter to be considered in determining whether a notice party is entitled to recover costs is the nature and extent of the interest which the notice party has in the "proceedings" in respect of which the costs were incurred.

24. The proceedings in the present case took the form of an application to revoke the appointment of the two inspectors. The circumstances leading up to the appointment of the inspectors in September 2018 have been set out in detail in the judgment of the then President of the High Court, Kelly P., in *In the matter of Independent News and Media plc* [2018] IEHC 488; [2019] 2 I.R. 363. As appears from that judgment, Kelly P. had been satisfied that the Director of Corporate Enforcement ("***the Director***") had put sufficient material before the court to meet the statutory criteria for the appointment of inspectors under section 748 of the Companies Act 2014. In particular, the Director had identified a number of alleged incidents which were suggestive of the affairs of the Company having been conducted for an unlawful purpose or in an unlawful manner.

25. For present purposes, it is relevant to note that many of these alleged incidents had been the subject of earlier protected disclosures made by Mr. Pitt to the Company and to the Director of Corporate Enforcement, respectively. It is also relevant to note that many of these allegations have been made against Mr. Buckley specifically.

26. It is apparent from the affidavits and exhibits (including extracts from the transcripts of interviews conducted by the inspectors) filed on the revocation application that, in order to prepare a meaningful report on the affairs of the Company, it will be necessary for the inspectors to attempt to resolve, insofar as they can, the very significant factual disputes between Mr. Buckley and Mr. Pitt.

27. However, as correctly observed in the written legal submissions filed on his behalf on 18 September 2020 (at §33), Mr. Pitt is merely a witness, and is not a protagonist, in the inspectorship process and in the revocation proceedings. The principal objective of the inspectorship process is not to vindicate either Mr. Pitt or Mr. Buckley personally. Rather, as appears from section 748 of the Companies Act 2014, and as discussed in detail in the judgment of Kelly P. appointing the inspectors (cited at paragraph 24 above),

inspectors are appointed for specific statutory purposes. The decision to appoint the inspectors to the Company has been made in the public interest, in terms of ensuring that the affairs of a public company, which occupies a dominant position in the media sector in this country, are conducted entirely above board and with proper respect being afforded to the interests of all shareholders and not just some.

28. Subject to the observations above, Mr. Pitt can, in a very broad sense, be said to have a legitimate interest in the conduct of, and ultimate outcome of, the inspectorship process. It does not follow as a corollary, however, that Mr. Pitt has an interest in the outcome of the *revocation application* such as would justify the making of a costs order in his favour as against Mr. Buckley. The issues presenting on the revocation application were very specific: did the conduct of the inspectors to date give rise to a reasonable apprehension of bias applying an objective standard. The relief sought was also very specific: Mr. Buckley sought to have the two inspectors removed, by the revocation of their appointment. This was not a case where, for example, it was sought to regulate the future conduct of the inspectorship process by seeking directions from the High Court on matters such as, say, the disclosure of documents or the right to cross-examination. Directions of that type might well have had a direct bearing on Mr. Pitt. In contrast, the objective of the revocation application was to have the current inspectors removed entirely, with a view to their being replaced.

29. There were, therefore, only two potential outcomes of the revocation application. The inspectors' appointment would either be revoked, or the allegation of objective bias would be dismissed. For the reasons set out in detail in the principal judgment, the latter outcome eventuated. The revocation application has been dismissed, and the inspectors remain in post and will continue their investigation.

30. Whereas Mr. Pitt might be said to have had a general interest in the outcome of the revocation application, it is no greater than that of any of the other individuals and companies who have been involved in the inspectorship process and who might similarly be inconvenienced were the process to have to recommence with new inspectors. Perhaps tellingly, none of these other parties has sought a costs order in their favour.

31. Crucially, Mr. Pitt's interest falls well short of the type of interest which was found to attract an entitlement to costs in *Usk and District Residents Association Ltd v. Environmental Protection Agency* (cited earlier). The notice party in *Usk* had been the beneficiary of the development consent under challenge in the judicial review proceedings. The notice party thus had a tangible interest in the outcome of the proceedings. Unless the legal challenge was successfully defended, the notice party would lose the advantage of the development consent, with an immediate impact on its ability to develop its lands. It was against this background that the High Court held that the proceedings were "intimately concerned with the rights and entitlements of" the notice party as the holder of the impugned development consent.

32. By contrast, the revocation application did not engage any right or entitlement peculiar to Mr. Pitt. The only specific concerns raised by Mr. Pitt in respect of the revocation application related to the publication of the detail of the inspectorship process which had, until that point, been conducted in private. Mr. Pitt complains that, following upon the initial directions hearing before the High Court on 27 April 2020, some of the content of Mr. Buckley's affidavit grounding the revocation application was published by the media. Mr. Pitt further complains that he had not been put on notice of the initial directions hearing, and that he should have been afforded an opportunity to apply for reporting restrictions. (It should be explained that the precise purpose of the initial directions hearing had been to seek directions from the court as to which parties were to

be served. Mr. Pitt was then duly served with the papers in accordance with the court's directions, and joined as a notice party to the proceedings at the next directions hearing).

33. These concerns and complaints all relate to events *prior to* the substantive hearing of the revocation application, which commenced on 13 October 2020. For the reasons explained presently, I am satisfied that Mr. Pitt is entitled to recover the costs associated with the directions hearings in advance of the substantive hearing. These legacy issues cannot, however, ground an application for the costs of the substantive hearing itself.

34. Although not directly relevant to the determination of costs, it is only fair to Mr. Buckley and his legal advisors to record that the question of reporting restrictions had been canvassed at the hearing on 27 April 2020. Counsel for Mr. Buckley very properly raised the issue but pointed out, correctly, that Mr. Buckley would not be in a position to apply for reporting restrictions himself. The issue was also addressed by counsel on behalf of the inspectors. Counsel for the inspectors confirmed that his clients accepted that the constitutional imperative, that justice be administered in public, applied in respect of the revocation application, subject to a caveat that it might be necessary to apply subsequently for certain reporting restrictions to avoid any potential prejudicial impact on the inspection process. Counsel also explained that whereas there is an inherent or implied assumption that the inspection process would be confidential, there is no express provision in the relevant part of the Companies Act 2014 whereby hearings relating to an inspection process can be conducted *in camera*.

35. The hearing on 27 April 2020 was, therefore, properly conducted in public, and members of the media were entitled to publish fair and accurate reports of the hearing in the ordinary way. No sensible argument has ever been made as to how the publication of the content of Mr. Buckley's grounding affidavit could be said to have undermined the inspectorship process.

36. In the event, the only application for reporting restrictions which was subsequently made by any party was by counsel acting on behalf of the Company and its former directors. An order was made on 28 July 2020, without objection by any of the parties, to the effect that the content of identified paragraphs of two affidavits and an exhibit were not to be published. Other than that, *bona fide* members of the media were entitled to attend at the remote hearing of the revocation application and were facilitated with access to the pleadings in accordance with the usual protocols. Tellingly, no application has ever been made by Mr. Pitt for reporting restrictions.

37. Returning now to the allocation of costs, Mr. Pitt's position on the revocation application had been that the allegation of objective bias was unfounded. Mr. Pitt submitted, in the written legal submissions filed on his behalf on 18 September 2020, that the inspectorship process should be allowed to run its course. Mr. Pitt had been critical of the fact that Mr. Buckley had brought his application at a time prior to the commencement and completion of cross-examination before the inspectors. Relevantly, the written legal submissions stated as follows (at §29).

> "It is not appropriate for Mr. Pitt to defend his position before this Court; that is a matter for cross-examination in the inspection process."

38. Oral submissions were made on behalf of Mr. Pitt on Day 6 of the hearing (21 October 2020). Counsel on his behalf adopted, in their entirety, the submissions made on behalf of the inspectors. The focus of much of the oral submissions made on behalf of Mr. Pitt was trained on the initial directions hearing on 27 April 2020 and the subsequent media reportage.

39. The position since adopted by Mr. Pitt for the purposes of his costs application is that he had been required to participate in the proceedings to protect his good name, reputation, professional competence, and his position in relation to his protected disclosures and the

inspection process. (See §11 of the submissions of 1 March 2021). The position is summarised as follows (*ibid*, §16).

> "It was acknowledged on behalf of Mr. Pitt that it would be inappropriate for him to engage in an exercise of defending these allegations individually, as the confidential inspection process is the appropriate forum for such actions. However, it was necessary for Mr. Pitt to participate in the proceedings to make that submission to the Court on the unmeritorious and self-serving approach taken by Mr. Buckley, and to seek to protect his good name from that unwarranted attack."

40. With respect, this position overlooks that the outcome of the revocation application was only ever going to be binary. The High Court did not have jurisdiction to rule on the correctness or otherwise of the allegations. As Mr. Pitt himself had correctly observed in his submissions on the substantive hearing, the appropriate forum for the resolution of the merits of his allegations is the inspectorship process not the High Court.

41. I have concluded that the appropriate costs order is as follows. Mr. Pitt is entitled to the costs incurred up and until the substantive hearing of the revocation application. These costs include costs incurred in respect of (i) representation at the various directions hearings; (ii) the preparation and filing of affidavits; (iii) the reviewing of the written legal submissions filed on behalf of Mr. Buckley and the inspectors; and (iv) the preparation of the written legal submissions on behalf of Mr. Pitt. The costs are to be measured ("adjudicated") by the Office of the Chief Legal Costs Adjudicator in default of agreement.

42. The costs order does not extend to costs incurred in respect of the eight-day substantive hearing on the revocation application. Thus, no brief fee, refreshers nor general instructions fee are recoverable.

43. The rationale for allowing Mr. Pitt his costs up and until the substantive hearing of the revocation application is that it was only when the written legal submissions of all other parties had been filed in July and September 2020 that an informed decision as to his

future participation in the proceedings could have been made. As explained in *Usk*, the reasonableness of a notice party's conduct should not be assessed with the benefit of hindsight. The precise parameters of proceedings often only crystallise when the written legal submissions have been exchanged. It is only at this stage that the issues come into sharp focus. Prior to this, Mr. Pitt had a full right to participate in the case management process. In particular, Mr. Pitt would have been allowed, had he so wished, to apply for reporting restrictions on the evidence to be adduced at the substantive hearing.

44. Given the nature of the case being advanced on behalf of Mr. Buckley, as set out in final form in his written legal submissions, and having regard to the detailed replying submissions delivered by the inspectors, it would have been apparent as of September 2020 that the only necessary *legitimus contradictor* to the revocation application was the inspectors themselves. Whereas various of the notice parties might well have had an interest in being heard on the application, none had a sufficiently compelling interest such as to justify an entitlement to recover the full costs of participation in the substantive hearing. As explained by Clarke J. in *Usk*, the mere fact that a person may have a sufficient interest so as to make it legitimate that they be placed on notice of the proceedings does not necessarily carry with it an entitlement to an unquestioned order for costs in the event of the proceedings being successfully defended.

45. In exercising its discretion on costs under Part 11 of the LSRA 2015, a court is to have regard to the particular nature and circumstances of the case, and to the conduct of the proceedings by the parties. Relevantly, the court is to have regard to whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. The court also has discretion, under section 168, to order that costs be paid from or until a specified date or that costs be limited to one or more particular steps in the proceedings.

46. As discussed earlier, the revocation application did not engage any right or entitlement peculiar to Mr. Pitt. Mr. Pitt has not identified any interest which would justify his recovering the costs of representation at the eight-day hearing. Adopting the language of section 169 of the LSRA 2015, such costs were not reasonably incurred. If and insofar as Mr. Pitt wished to participate, it would have been sufficient to the purpose for him to rest upon his written legal submissions (the costs of which he is entitled to recover). I hasten to add that this is not intended as any criticism of either Mr. Pitt or his legal advisors. Nor is it being suggested that Mr. Pitt acted unreasonably in the general sense of that word. Rather, the concept of "reasonableness" has a particular meaning in the context of legal costs. A party is not entitled to a full indemnity on costs: at most, they are entitled to recover costs necessarily and reasonably incurred. Given Mr. Pitt's limited interest in the outcome of the revocation application, the costs of full representation at the eight-day hearing were not reasonably incurred within the meaning of the LSRA 2015.

47. Mr. Pitt comes within that category of notice parties who have a sufficient interest to be allowed participate in proceedings, if they so wish, but whose interest falls short of that required to justify an award of full costs. As discussed at paragraph 15 above, such a limitation on the recoverability of costs is a necessary compromise to ensure that the constitutional right of access to the courts is not rendered ineffective in proceedings involving multiple notice parties. It should also be observed that Mr. Pitt's limited role cuts both ways. Had the revocation application been successful, Mr. Pitt, as a bit player, would not have been on hazard as to costs, notwithstanding that he had opposed the application. The appropriate "mark" for costs would lie elsewhere.

48. This outcome may well be disappointing for Mr. Pitt. It should be recalled, however, that it was made clear at the directions hearing on 10 June 2020 that his joinder to the

proceedings as a notice party did not imply an entitlement to costs. This court expressly indicated that the question of his entitlement, if any, to recover costs was a matter for another day and, ultimately, for the trial judge.

CONCLUSION AND FORM OF ORDER

49. Mr. Pitt is entitled to the costs incurred up and until the substantive hearing of the revocation application. These costs include costs incurred in respect of (i) representation at the various directions hearings; (ii) the preparation and filing of affidavits; (iii) the reviewing of the written legal submissions filed on behalf of Mr. Buckley and the inspectors; and (iv) the preparation of the written legal submissions on behalf of Mr. Pitt. In default of agreement, the costs are to be measured ("adjudicated") under Part 10 of the LSRA 2015 by the Office of the Chief Legal Costs Adjudicator.

50. The costs order does not extend to costs incurred in respect of the eight-day substantive hearing on the revocation application. Thus, no brief fee, refreshers nor general instructions fee are recoverable. This is because the application to revoke the appointment of the inspectors did not engage any right or entitlement peculiar to Mr. Pitt. Mr. Pitt has not identified any interest which would justify his recovering the costs of representation at the eight-day hearing. Adopting the language of section 169 of the LSRA 2015, such costs were not reasonably incurred.

51. For the purposes of any adjudication, under Part 10 of the LSRA 2015, upon the costs associated with the reviewing of, and preparation of, the written legal submissions, regard should be had to the fact that no brief fee is being allowed. There is often an overlap between the work referable to the brief fee and the work referable to the preparation of written legal submissions. This tends to result in the fee allowed for written legal submissions being relatively modest, on the basis that the work will, in part, be recompensed by the brief fee. The Legal Costs Adjudicator, in measuring the costs

incurred in respect of the written legal submissions in the present proceedings, should, in accordance with section 155 of the LSRA 2015, have particular regard to the nature, extent and value of the work, and the time taken to carry out the work. In the absence of any brief fee, the fee allowed in respect of the review and preparation of submissions should fully reflect the work involved.

52. Finally, for the sake of completeness, it should be noted that—in the absence of any objection by Mr. Buckley—a separate order for costs is being made in favour of the inspectors as proposed in the principal judgment. The inspectors, having been entirely successful in resisting the revocation application, are entitled to their costs including, obviously, the costs of the eight-day hearing; the costs of their written legal submissions; the costs of an overnight transcript; and all reserved costs. Such costs to be adjudicated under Part 10 of the LSRA 2015 in default of agreement.

Appearances

Seán Guerin, SC, Lorcan Staines, SC and Brian Gageby for Mr. Buckley instructed by A & L Goodbody
John Rogers, SC, Tom Mallon and Orla Murphy for Mr. Pitt instructed by Daniel Spring & Co.

Approved