

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 558 J.R.

BETWEEN

EDWARD MCDONAGH

APPLICANT

AND

GALWAY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 5 December 2019

INTRODUCTION

1. This judgment addresses the question of which party should bear the legal costs of the within judicial review proceedings. This is, in fact, the third reserved judgment to be delivered in the proceedings. The first judgment addressed the question of whether the conduct of Galway County Council in destroying a horse owned by the Applicant was unlawful. (*McDonagh v. Galway County Council (No. 1)* [2019] IEHC 304). This issue was resolved in favour of the Applicant. The second judgment addressed the question of whether the unlawful conduct of the local authority sounded in damages. (*McDonagh v. Galway County Council (No. 2)* [2019] IEHC 717). This issue was also resolved in favour of the Applicant, and he has been awarded damages in the sum of €2,000.
2. The principal questions to be addressed in this costs judgment are as follows. The first question is whether it is appropriate to make an order apportioning the costs as between particular issues in the case, by reference to the principles in *Veolia Water UK Plc v. Fingal County Council (No. 2)* [2006] IEHC 137; [2007] 2 I.R. 81.
3. The second question concerns the legal effect of a letter written on behalf of Galway County Council which offered to pay a particular sum by way of damages to the Applicant. This letter had been written in advance of the hearing on the assessment of liability. As it happens, the sum offered fell short of that ultimately awarded by the court by way of damages. Notwithstanding this shortfall, leading counsel on behalf of Galway County Council submits that the existence of this letter justifies the making of no order as to costs in respect of the hearing on 26 June 2019.
4. I will address these two questions under separate headings below.

(1). APPORTIONMENT OF COSTS

5. The general rule is that costs follow the event. Put more colloquially, the successful party will normally be entitled to an order for costs as against the unsuccessful party. The rule is stated as follows under Order 99, rule 1 and rule 4.
 - (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

[...]

- (4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.
6. A rule in similar terms has since been put on a statutory footing under Section 169 of the Legal Services Regulation Act 2015, as follows.
- 169.(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
- (a) conduct before and during the proceedings,
 - (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
 - (c) the manner in which the parties conducted all or any part of their cases,
 - (d) whether a successful party exaggerated his or her claim,
 - (e) whether a party made a payment into court and the date of that payment,
 - (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
 - (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.
- (2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.
7. The above statutory provisions were brought into force on 7 October 2019. See Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019 (S.I. No. 502 of 2019).
8. The application of the general rule that costs follow the event requires the court to identify the “event”, and to determine which party has been successful in respect of same. See, for example, *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535, [52] and [53] as follows.

“The overriding start point on any question of contested costs is that the general principle applies; namely, that costs follow the event. All of the other rules, practices and approaches are supplementary to this principle and are designed to further its application or to meet situations where such application is difficult, complex or, indeed, even impossible.

For the rule to apply quite evidently there must be an ‘event(s)’, which is capable of identification. In most cases that will not cause a difficulty, but in some it might. There may be situations which, it can said, involve numerous issues, sometimes discrete and sometimes inter-related. *Veolia Water UK plc v. Fingal County Council*

(No. 2) [2006] IEHC 240, [2007] 2 I.R. 81 gives assistance in this regard. When a multiple issue case requires assessment in light of the decision, the courts in more recent times have become more discerning and nuanced in their approach, sometimes awarding less than full costs and sometimes determining costs relative to issues which have been won or lost as the case may be. Such an approach, as well as perhaps being fairer, can also be considered as part of the court's function to regulate, in an expeditious and cost effective manner, complex litigation which ever increasingly now appears before it. Care, however, must be taken: not all cases will be suitable for such analysis and even when applied, the overall picture must not be lost sight of."

9. On the facts of the present case, the Applicant had brought a claim for damages arising out of what he alleged to have been the unlawful destruction of a horse owned by him by Galway County Council. The local authority, as it is entitled to do, opposed the application on all grounds. Even when the issue of the legality of the destruction of the animal had been determined against it by the first judgment of the court, the local authority continued to oppose the making of *any* award of damages to the Applicant. It was argued that it would be contrary to public policy to impose a financial liability upon the local authority. This opposition necessitated the holding of a separate hearing on 26 June 2019, and the delivery of a second reserved judgment in the proceedings. The issue was ultimately decided against the local authority, and the court made an award of damages in the amount of €2,000 in favour of the Applicant.
10. Notwithstanding this procedural history, leading counsel on behalf of Galway County Council, Mr Stephen Dodd, SC, submits that the Applicant did not succeed in relation to all "events". First, it is said that the Applicant failed in his argument that the initial detention of the horse had been unlawful. Secondly, it is said that whereas the Applicant did succeed in obtaining damages, the amount actually awarded fell far short of that contended for. The award is for an amount of €2,000, whereas the Applicant had sought to value the animal at €35,000.
11. Counsel submits that some allowance should be made in the costs order to reflect the fact that the Applicant was not successful in all his arguments. In particular, counsel suggests that a deduction of one third should be applied to the costs of the first hearing. In other words, the Applicant should only be entitled to recover two-thirds of the costs of the hearing on 9 April 2019 as against the local authority.
12. Counsel invokes the principles established in *Veolia Water UK Plc v. Fingal County Council* (No. 2) [2006] IEHC 137; [2007] 2 I.R. 81 ("*Veolia Water*"). This judgment indicates that, at least in complex cases, it may be appropriate to apportion costs between different issues in the proceedings. The successful party might not be allowed to recover the costs associated with certain issues on which it was unsuccessful, or might even have to pay the costs incurred by the other side in respect of those issues.

13. Clarke J. (as he then was) reiterated that the starting point is to identify "the event", and to consider whether the pursuit of unsuccessful arguments had added to the costs of the proceedings. See page 86 of the reported judgment as follows.

"However, as indicated above, it seems to me that the starting point of any consideration of costs has to be to identify what the 'event' is and, thereby, identify the winning party. In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be, will have been justified by the result. Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that, ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful.

Where the court is so satisfied, then the court should attempt, as best it can, to reflect that fact in its order for costs. Where the matter before the court involved oral evidence and where the evidence of certain witnesses was directed solely towards an issue upon which the party who was, in the overall sense, successful, failed, then it seems to me that, ordinarily, the court should disallow any costs attributable to such witnesses and, indeed, should provide, by way of set off, for the recovery by the unsuccessful party of the costs attributable to any witnesses which it was forced to call in respect of the same issue. A similar approach should apply to any discrete item of expenditure incurred solely in respect of an issue upon which the otherwise successful party failed.

Similarly, where it is clear that the length of the trial of whatever issues were before the court was increased by virtue of the raising of issues upon which the party who was successful in an overall sense, failed, then the court should, again ordinarily, award to the successful party an amount of costs which reflects not only that that party should be refused costs attributable to any such elongated hearing, but should also have to, in effect, pay costs to the unsuccessful party in relation to whatever portion of the hearing the court assesses was attributable to the issue upon which the winning party was unsuccessful."

14. Before turning to apply these principles to the facts of the case before me, I should observe that I have some misgivings as to whether the principles are properly applicable to straightforward litigation of the type involved here. The present litigation is of an entirely different character to the complex commercial litigation at issue in *Veolia Water*. The substantive application for judicial review in this case was heard in less than a day.

There were no separate interlocutory hearings prior to the substantive application for judicial review.

15. To apply the principles in *Veolia Water* to such straightforward litigation may have the consequence that the amount of court time expended in determining the incidence of legal costs would be disproportionate in scale to the time actually spent on the case proper. It might also have the consequence that the parties would incur significant *additional* costs in arguing about the costs of the substantive application.
16. In this regard, I respectfully agree with the following observations of Clarke J. in *Veolia Water*. See pages 87/88 of the report.

“It seems to me that an approach along those lines is appropriate in more complex litigation involving a variety of issues even where, in the overall sense, one party may be said to have succeeded and the other party may be said to have failed. Before leaving the general principle I should, however, add that it seems to me that an approach such as that which I applied in *O’Mahony v. O’Connor* [2005] IEHC 248, [2005] 3 I.R. 167, and *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 15, (Unreported, High Court, Clarke J., 18th January, 2006) and which I propose applying in this case, may not be appropriate in more straightforward litigation, notwithstanding the fact that some element of a plaintiff’s case or a defendant’s defence may not have succeeded. The fact that such an additional issue was raised should only affect costs where the raising of the issue could, reasonably, be said to have effected the overall costs of the litigation to a material extent.”

17. Notwithstanding my misgivings, I propose to apply the *Veolia Water* principles to this case *de bene esse*. For the reasons which follow, the circumstances of the case do not require a departure from the general rule that costs follow the event. In particular, I am satisfied that neither of the two issues which Galway County Council suggests had been decided against the Applicant resulted in any appreciable additional costs being incurred.
18. The first issue, namely whether the *initial detention* of the animal in February 2018 had been lawful, scarcely took up any court time. Rather, the core of the dispute between the parties centred on what occurred thereafter. The principal issue which the court had to decide was whether the *destruction* of the animal several weeks later was lawful.
19. It should also be noted that both parties had prepared written legal submissions, and I had the opportunity of reading these in full over the lunch time adjournment. This had the consequence that what had been listed as a two-day case was heard within one day. Both parties thus had the benefit of a significant saving in costs.
20. The second issue, namely the quantification of the damages payable, had been dealt with at a subsequent hearing on 26 June 2019. The stance which the local authority had adopted at that hearing was to say that the Applicant was not entitled, as a matter of law, to any damages at all. Detailed submissions, both oral and written, were advanced in

support of this stance. This issue took up most of the hearing time, and most of the content of the second judgment is addressed to this issue.

21. Whereas it is correct to say that the amount ultimately awarded by way of damages fell far short of that which the Applicant had been contending for, the fact remains that the local authority's position had been that the Applicant was not entitled to *any* damages. The "event" in this regard went *against* the local authority. The time spent on oral evidence was far shorter than that which had been consumed by legal argument on the issue of principle raised by the Local Authority.
22. In summary, therefore, I am satisfied that in circumstances where the Applicant succeeded in establishing, first, that the conduct of the local authority was unlawful; and, secondly, that he was entitled to an award for damages, the "event" was decided in his favour. The fact that the Applicant did not succeed in every single one of his arguments does not affect his entitlement to an award of costs. Neither of the two issues in respect of which the Applicant has said to have been unsuccessful took up much court time or contributed in any appreciable way to additional costs.

(2). OFFER LETTER OF 15 MAY 2019

23. One of the curious features of these proceedings is that whereas the amount of damages claimed by the Applicant came within the monetary jurisdiction of the Circuit Court, it was nevertheless necessary to issue proceedings in the High Court. This is because one of the essential proofs of the Applicant's claim had been that the conduct of the local authority was unlawful. This illegality could only be established in judicial review proceedings taken before the High Court.
24. As indicated in the second judgment, there are certain procedural steps which a respondent can take to minimise its exposure to legal costs in such circumstances. See *McDonagh v. Galway Council (No. 2)* [2019] IEHC 717, [59] and [60].

"It is perhaps anomalous that a claim which falls well short of the monetary jurisdiction of the High Court should have to be pursued before that court with the attendant legal costs. This is, however, the consequence of the allocation of jurisdiction. There are certain procedural steps which a respondent who wishes to reduce the potential exposure to legal costs can take. More specifically, a respondent has the option of making an offer to the applicant on a 'without prejudice save as to costs' basis. In other words, the respondent, without formally conceding liability in the proceedings, could nevertheless protect itself in relation to costs by making an offer in settlement of the claim which would only be brought to the attention of the court for the purposes of a costs application subsequent to a ruling by the court on the substance of the case. If an applicant had failed to 'beat' the offered amount, then this would have adverse consequences for them in terms of costs.

Put shortly, the costs rules are sufficiently robust to allow for the introduction of an element of financial reality to judicial review proceedings."

25. The public policy in encouraging the settlement of litigation finds expression in the previous version of Order 99, rule 1A of the Rules of the Superior Courts as follows. (The order has been amended since the costs hearing before me: see now Rules of the Superior Courts (Costs) 2019 (S.I. 584 of 2019)).

1A. (1) Notwithstanding sub-rules (3) and (4) of rule 1:

[...]

(c) the High Court, in considering the awarding of the costs of any action (other than an action in respect of a claim or counterclaim concerning which a lodgment or tender offer in lieu of lodgment may be made in accordance with Order 22) or any application in such an action, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other party's (or those other parties') claim, counterclaim or application;

(2) In this rule, an 'offer in writing' includes any offer in writing made without prejudice save as to the issue of costs.

26. As it happens, Galway County Council did make an offer of sorts to the Applicant by letter dated 15 May 2019. The parties are in disagreement as to the legal consequences of this letter. Leading counsel for the Applicant, Mr Michéal P. O'Higgins, SC, submits that the letter was entirely conditional in its terms.

27. Given this disagreement, it is necessary to consider the detail of the letter. The letter reads as follows.

"We refer to your letter dated 14th May 2019 requesting the Council to put forward proposals on the question of damages.

Mr Justice Simons noted that neither the principle of whether the Council was liable to pay damages nor the quantum were argued before the Court and so he proposed adjourning the matter to see if the parties can reach agreement. The Council are of the view that while your client was successful in obtaining a determination that the Council acted ultra vires in the disposal of the horse, it does not follow from this that the Council is liable in terms of damages. The Council therefore rejects that it is liable in damages to your client for the horse, whether in the context of these judicial review proceedings or any other proceedings. Nonetheless the Council fully takes on board the comments of Mr Justice Simons in respect of the legal costs of further argument relating to the issue of damages. Therefore strictly without prejudice to the above position that the Council is not liable for any damages to your client, the Council is prepared to offer the sum of €1750 in respect of damages. This offer is being made in the interest of saving costs and also court time in dealing with this matter and generally in the interest of co-operation.

This offer is also being made without prejudice to any other matters which the Council reserves its entitlement to rely upon including but not limited to: that your client has not demonstrated ownership of the horse; that the valuation evidence you submitted was in Affidavits which were excluded by Mr Justice Simons and any set off in respect of monies owed by your client to the Council.

This offer is also being made on the following basis which is that insofar as the claim for damages is premised on the determination that the Council acted ultra vires – that in the event of an appeal of the judgment and the Council are successful in reversing the determination that it acted ultra vires, it further follows you (sic) client can have no entitlement to the sum of €1750. The offer is therefore strictly without prejudice to the Council's entitlement to appeal the judgment – which if successful will mean that the amount of damages will not be payable at all and/or liable to be returned, if paid prior to the determination of any appeal. For the avoidance of doubt, this is therefore a term of the offer.

In the event you reject this offer and it is subsequently determined following legal argument and/or any assessment of damages, that your client is entitled to a sum which is not more than €1750, the Council will rely upon this letter to seek its costs incurred arising from the rejection of this offer."

28. Crucially, the letter does not state that Galway County Council would discharge the Applicant's legal costs to date in the event that the sum of €1,750 were to be accepted. Rather, the only reference to costs is in the final paragraph. It is indicated there that the local authority intended to rely on the letter in the event that the Applicant was found to be entitled to a sum not more than €1,750. The wording of the letter suggests that it (the letter) is to be deployed offensively, i.e. to ground an application for costs in favour of the local authority. There is nothing in the letter which acknowledges that the local authority would be responsible for the costs to date. This is a significant omission. Most of the costs of these proceedings had already been incurred at this point. In particular, the two largest items, i.e. the solicitors' general instructions fees and counsels' brief fees, had been incurred. The combined fees of the two parties, as per the Schedule of Costs submitted by the parties on 9 April 2019, were estimated to be in the order of €60,000. The costs of the subsequent hearing of 26 June 2019 fall to be adjudicated on the basis of a refresher fee and a (second) set of written legal submissions.
29. In *Murnaghan v. Markland Holdings Ltd* [2004] IEHC 406; [2004] 4 I.R. 537, the High Court (Laffoy J.) held that an offer of settlement, which had left liability for costs wholly at large, could not be relied upon for the purposes of a subsequent costs application. Laffoy J. held that the offer lacked certainty as to the "totality of the outcome" flowing from either its acceptance or non-acceptance. It is a prerequisite to penalising a party for not accepting the offer that the terms of the offer be certain. The same logic applies to the letter of 15 May 2019.
30. Moreover, the offer made by Galway County Council was entirely conditional. The local authority expressly reserved the right to appeal the (principal) judgment of the High

Court to the Court of Appeal. Whereas the local authority, as with any other litigant, is entitled to bring an appeal to the Court of Appeal in conventional judicial review proceedings, the insistence on reserving its rights in this regard has the legal consequence that the letter of 15 May 2019 cannot be said to be an offer "to satisfy the whole or part of" the Applicant's claim.

31. In effect, the Applicant was being asked to limit his claim to damages to the sum offered (€1,750) in circumstances where the local authority expressly reserved the right to recoup that sum in the event of a successful appeal. This was done without any commitment on the part of the local authority in relation to the legal costs incurred to date.
32. Having regard to these features of the letter, same cannot realistically be relied upon by the local authority in support of its argument that costs should not follow the event.
33. The rationale for taking into account an offer which has been made on a "without prejudice save as to costs" basis is that a party should be encouraged to settle proceedings in circumstances where an offer of settlement provides that party with as much as it could achieve in the proceedings. By contrast, the Applicant would have been worse off in accepting the offer in the letter of 15 May 2019 than by continuing the proceedings. The letter did not meet the requirements under Order 99, rule 1A. It was not an offer "to satisfy the whole or part of" the Applicant's claim, and it did not accept responsibility for the legal costs to date. Accordingly, the Applicant did not act unreasonably in declining to accept the terms offered under the letter of 15 May 2019.
34. For all these reasons, then, I have concluded that the sending of the letter of 15 May 2019 does not have the legal consequence of displacing the general rule, namely that costs follow the event.
35. Of course, even if, contrary to my findings above, the letter could be regarded as an offer to satisfy the proceedings, this would not avail Galway County Council. This is because the damages actually awarded *exceeded* the sum of €1,750. Put colloquially, the Applicant "beat" the (conditional) offer.
36. Counsel on behalf of Galway County Council submits that the court should have regard to the fact that the difference between the (conditional) offer and the award of damages is a mere €250. It is submitted that, given this slender margin, the appropriate outcome would be that each side bear its own costs of the hearing on 26 June 2019, i.e. the court should make no order as to costs. Counsel relies, by analogy, on the judgment of the Supreme Court in *Reaney v. Interlink Ireland Ltd* [2018] IESC 13. This case concerned inter alia the interpretation and operation of Order 22 of the Rules of the Superior Courts. This order governs the making of a lodgement in any action for a debt or damages.
37. Order 22, rule 6 provides as follows.

6. If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in but proceeds with the action in respect of such claim or cause of action, or any part thereof, and is not awarded more than the amount paid into Court, then, unless the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct, the following provisions shall apply:
 - (1) If the amount paid into Court exceeds the amount awarded to the plaintiff, the excess shall be repaid to the defendant and the balance shall be retained in Court.
 - (2) The plaintiff shall be entitled to the costs of the action up to the time when such payment into Court was made and of the issues or issue, if any, upon which he shall have succeeded.
 - (3) The defendant shall be entitled to the costs of the action from the time such payment into Court was made other than such issues or issue as aforesaid.
[...]
38. As appears, if a plaintiff is not awarded more than the amount paid into court then— unless otherwise ordered for special cause shown—the normal order would be to allow the plaintiff’s costs only until the date of the lodgement. Put otherwise, if a plaintiff fails to “beat” the lodgement, then the normal order would be that he or she would be liable for the defendant’s costs from the date of the lodgement onwards.
39. The majority of the Supreme Court in *Reaney* indicated that this rule should not be applied in a mechanical manner. Rather, some consideration should be given to the margin by which a plaintiff has exceeded the lodgement. O’Donnell J., delivering the majority judgment, summarised his conclusions in this regard as follows.
 - “(v) Where a plaintiff fails to beat a lodgement, but falls short by a clear margin, and the matter is one of general assessment rather than precise award, a court may consider that a sufficient ground to depart from the presumptive costs order under Order 22 Rule 1(5) in which case a court may reflect the reasonableness of the pursuit of the claim by, if appropriate disallowing some element of the plaintiff’s costs, by reference to the *Veolia* principles where there are distinct issues or more generally;
 - (vi) Conversely where a plaintiff beats a lodgement but by only a small amount, a court may still consider if it was reasonable to have pursued the case, and may reflect that adjudication in its award of costs either under the *Veolia* principles where there are clearly distinct issues, or by extension of them.”
40. At an earlier point in his judgment, O’Donnell J. had stated as follows.

“In a complex case with a number of variables upon which parties and judges could reasonably differ, and where the assessment of damages is not a precise calculation of already ascertained, or ascertainable figures, I consider that if the

plaintiff's claim comes very close to the amount of a lodgement, and certainly within the range of 5%, the trial court is entitled to consider that in itself is a reason to otherwise direct, and is entitled to consider the broader question whether it was reasonable for the plaintiffs to pursue the claim notwithstanding the lodgement. If the difference was more than 5% it would require very weighty factors in an individual case to consider departing from the presumptive rule under Order 22 Rule 6."

Application of principles

41. Even assuming for the sake of argument that the principles in *Reaney v. Interlink Ireland Ltd* [2018] IESC 13 ("Reaney") apply by analogy to an "offer in writing" notwithstanding the vast difference in wording between Order 22 and Order 99, this does not avail Galway County Council. The circumstances of the present case are entirely distinguishable from those at issue in *Reaney*. First, the bulk of the costs in the present case had already been incurred by the time the letter of 15 May 2019 had been sent. The substantive application for judicial review had been heard and determined, and the two "big ticket" items, i.e. the solicitor's general instructions fee and counsels' brief fees, had been incurred. By contrast, the lodgement in *Reaney* had been made more than a year prior to a twelve-day trial.
42. Secondly, the margin by which the Applicant in the present case "beat" the offer was almost 15 per cent. On the facts of *Reaney*, the margin was less than 2 per cent. Moreover, as noted above, the Supreme Court has suggested a rule of thumb of 5 per cent.
43. Thirdly, the ratio between (i) the legal costs, and (ii) the shortfall between the offer and the actual award is far closer than had been the case in *Reaney*. The costs which the Applicant would recover on adjudication by the Legal Costs Adjudicator are largely confined to counsels' refreshers and the costs of a second set of written legal submissions. By contrast, the costs at issue in *Reaney* were in respect of a twelve-day hearing before the High Court. These costs were likely to be a multiple of the €6,000 shortfall between the lodgement and the actual award.
44. Before concluding this discussion, it should be reiterated that the letter of 15 May 2019 was not unconditional and did not address liability for costs. Accordingly, the discussion above is largely academic. The principal difficulty that Galway County Council faces is not so much that the Applicant beat an "offer in writing", albeit by a slender margin, but rather that there was never an unconditional "offer of writing", still less an actual lodgement.

EXTENT OF LEGAL REPRESENTATION

45. Legal costs should be proportionate to the value and importance of the proceedings. As noted above, the curiosity of the present case is that proceedings with a very modest monetary value had to be taken in the High Court. This has resulted in an asymmetry between the legal costs and the value of the case. This is apparent from the schedule of

the costs which the parties had submitted, at the direction of the court, on 9 April 2019. The combined costs of the parties at that stage were estimated in the order of €60,000.

46. I have given careful consideration as to whether this asymmetry might be mitigated by restricting the amount of costs which the Applicant can recover to the costs of one counsel. Whereas it is ultimately a matter for each individual litigant to decide, with the benefit of advice from his or her solicitor, whether or not to brief counsel, and, if so, how many, a party is only entitled to recover from the other side costs which have been reasonably incurred. If, for example, the court considered that the case only merited one counsel, then this is all that the Applicant would be entitled to recover from Galway County Council. The Applicant would be responsible for discharging the costs of the second counsel himself.
47. I have come to the conclusion that the briefing of senior and junior counsel was justified in the circumstances of this case. Whereas the monetary value of the case was modest, the legal issues, especially in relation to the second hearing, were complex. This was a consequence of the spirited opposition which Galway County Council mounted to the proceedings. The local authority, as it is entitled to do, sought to rely on any number of arguments in defence of the proceedings. The issues raised, and, in particular, the question of whether a finding of unlawful conduct sounded in damages, necessitated the consideration of a large body of case law. These issues were ably pursued on behalf of the local authority by a very experienced junior counsel who has, in fact, since taken silk. In all the circumstances, it was entirely reasonable for the Applicant to have retained the services of senior counsel to respond to the local authority's arguments in this regard.

CONCLUSION AND FORM OF ORDER

48. The incidence of the costs of these proceedings falls to be determined by reference to the general rule that costs follow the event. The Applicant was successful in the proceedings, and is entitled to his costs notwithstanding that he may not have succeeded on all the issues. None of the issues in respect of which he did not succeed added in any appreciable way to the costs of the proceedings.
49. Galway County Council is not entitled to rely on the letter of 15 May 2019 for the purposes of avoiding the general rule that costs follow the event. The letter does not amount to an "offer in writing" to satisfy the proceedings in whole or in part within the meaning of Order 99. The letter was entirely conditional and did not accept liability for the costs of the proceedings incurred to that date. Moreover, the Applicant was awarded an amount in excess of that offered by the local authority. The facts of the case are entirely distinguishable from those at issue in *Reaney v. Interlink Ireland Ltd* [2018] IESC 13.
50. I propose, therefore, to make an order directing that the respondent, Galway County Council, do pay the costs incurred by and on behalf of the Applicant in relation to these judicial review proceedings. For the avoidance of any doubt, the recoverable costs are to include *inter alia* all reserved costs, the costs of two sets of written legal submissions, the costs of senior and junior counsel, and the cost of the costs hearing on 22 November

2019. The costs of the hearing on 26 June 2019 are to be measured on the basis of a second day's hearing, rather than as incurring a separate brief fee or instructions fee. In default of agreement, the costs are to be adjudicated upon by the Legal Costs Adjudicator pursuant to the provisions of the Legal Services Regulation Act 2015.

51. The execution of the costs order will be subject to a stay in the event of an appeal to the Court of Appeal and/or an application for leave to appeal to the Supreme Court.