



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

S:AP:IE:2018:000059

**O'Donnell J.  
Dunne J.  
Charleton J.  
O'Malley J.  
Baker J.**

**Between/**

**BRENDAN KILTY**

**Appellant**

**and**

**JUDGE CORMAC DUNNE**

**Respondent**

**and**

**CAMPION PROPERTY CONSULTANTS LIMITED**

**Notice Party**

**Judgment of Ms. Justice O'Malley delivered the 20<sup>th</sup> day of October, 2020.**

1. This appeal, which has its roots in judicial review proceedings taken by the appellant against the respondent judge, relates only to one aspect of those proceedings.

The central issue is whether the Court of Appeal applied the correct legal principles in

declining to award the costs of an appeal before it to the appellant against the respondent judge.

2. In very brief summary, the issue before the Court of Appeal was that the High Court had made no order as to the costs of the substantive judicial review. The appellant succeeded in his appeal to the extent that the issue of those costs was remitted to the High Court for further consideration. The decision to remit that aspect is not challenged. However, the Court of Appeal made no order as to the costs of the appeal itself. It is that decision which is now before this Court.

### **Background**

3. The litigation has a long and complex history. In summarising it here, I intend to provide only such details as are necessary to understand the context of the issue before the Court.

4. The notice party's principal, Mr. Campion, is an auctioneer. His firm ("Campion Property") had acted for the appellant in the disposal of certain property, but a dispute between them led to a refusal by the appellant to pay the professional fees sought by the firm. Part of the dispute related to the role played in the sale by the appellant's then solicitor: Mr. Rory O'Donnell of the firm known, at that time, as Eversheds O'Donnell Sweeney ("Eversheds"). The resulting litigation culminated in Campion Property obtaining judgment in the High Court against the appellant for over €350,000. That result was upheld on appeal to this Court.

5. Under the statutory regime then in place, auctioneers were obliged to apply for the requisite licence to the Revenue Commissioners each year. In order to do so, it was necessary to obtain a certificate of qualification from the District Court. An application for a certificate could be objected to by the Gardaí, or by any person considered by the court to have an interest in the matter.

6. In 2009, two acquaintances of the appellant objected to the grant of a certificate of qualification to Champion Property. The hearing took place over the course of a number of separate days between late 2009 and early 2010. It appears to have been put to one of the objectors in cross-examination on the first day of the hearing that he had, in effect, been influenced by the appellant in making his objection. After the hearing adjourned, the appellant submitted a written objection to the renewal of the certificate. His grounds of objection, which made various allegations against Mr. Champion and Champion Property, included an express allegation of a conflict of interest in relation to Eversheds.

7. At a subsequent hearing, some two and a half months later, Mr. O'Donnell was present in court. He was not there in a representative capacity or as a witness but, as perceived by the appellant, in support of Champion Property's application. (It was subsequently confirmed on affidavit by Mr. Champion and Mr. O'Donnell that the latter was there both to support the firm's application and to hear what might be said about himself.) The appellant was also present, and represented by solicitor and counsel. The respondent ruled that his objection had been lodged too late, that the appellant was not entitled to participate, and that his evidence should not be heard.

8. The respondent ultimately granted the certificate. According to the evidence, when he gave his ruling on the 18th January, 2010, he stated that he was placing a "warning note" on the court file, to warn other District Court judges not to have regard to any objections that the appellant might make about the notice party in future

### **The Judicial Review Proceedings**

9. On the 21st June, 2010, the appellant sought and was granted leave to apply for judicial review. The reliefs sought included an order of *certiorari* in respect of the grant of the certificate of qualification. He also sought orders quashing the "warning note"

on the file and any consequential order, along with declarations to the effect that the respondent had breached his right to fair procedures.

**10.** The grounds upon which leave was given included claims that the respondent ought to have disqualified himself, by reason of the (alleged) fact that Mr. O'Donnell from Eversheds, who had been present in court, was the respondent's own personal solicitor and that the respondent had failed to disclose this relationship. The appellant's evidence in this regard was that it had come to his attention in February 2010 that the respondent and his son had been defendants in Commercial Court proceedings in 2009, and that Eversheds had represented them in the matter. In making his case on this point, the appellant presumed that the respondent had read the written objection submitted by him in the District Court and argued that it was incumbent on the respondent to disclose his connection with Mr. O'Donnell and Eversheds.

**11.** It was also claimed that the respondent had acted unfairly in refusing to hear the appellant's objection; and that the respondent had acted improperly and in want or excess of jurisdiction in placing the "warning note" on the court file.

**12.** The appellant was directed by the leave judge to serve the proceedings on the Chief Clerk of the Dublin Metropolitan District and on the Chief State Solicitor. The latter subsequently corresponded with the appellant's representatives, in July 2010. It was stated that the respondent did not intend to participate in the proceedings and that, having regard to the Supreme Court authorities on the subject, the usual rule regarding judicial immunity from costs should apply. Confirmation was requested that no costs would be sought against the respondent.

**13.** The appellant does not appear to have answered the letter directly, but instead applied for directions from the court. (This application was on notice to the notice party but not, on the face of it, to the respondent.) He referred in submissions to the content

of the letter from the Chief State Solicitor's Office, and argued that the respondent should take part in proceedings where there was an allegation of bias. This submission was made with express reference to the principle that costs of proceedings should not be awarded against a judge who does not take an active part in the proceedings. Hedigan J. directed (on the 14th October, 2010) that the matter should proceed without the participation of the respondent "at this time".

**14.** A statement of opposition was then filed on behalf of the notice party. It was pleaded that Mr. O'Donnell was not the respondent's solicitor, and that they did not know each other. It was expressly denied that the respondent had placed a warning note on the file. (Mr. Campion, on this aspect, averred that his solicitor had written to the Chief State Solicitor's Office asking whether or not such a note had been made, but had not received confirmation one way or the other.) The notice party asserted that the judicial review proceedings were an abuse of process and part of a campaign of vilification by the appellant against the Campion family.

**15.** Mr. O'Donnell swore an affidavit in which he denied knowing the respondent or having ever acted for him. He averred that he had not recognised him in court. However, he confirmed that Eversheds had acted for him "in the past". The affidavits sworn by the appellant, notice party and Mr. O'Donnell thereafter are very largely concerned with the history of their own disputes, which is not relevant here.

**16.** The case came on before Hedigan J. on the 13th October, 2011, and this Court has the benefit of a transcript of the hearing. It is clear therefrom that, despite their respective efforts, neither the appellant nor the notice party had actually managed to get sight of the District Court file. The notice party intended contesting the issue about the "warning note" on the basis that there was no evidence that the respondent had actually made such a note, as opposed to merely saying that he would. However, the chief clerk

of the District Court with responsibility for the licensing office had been served by the appellant with a *subpoena duces tecum* and attended court with the file relating to the certificate application. The documentation in his possession included an email from the court official who had sat with Judge Dunne on the 18th January, 2010. That email was accepted by Hedigan J. as demonstrating that the respondent had purported to make an Isaac Wunder order against the appellant and one of the two objectors. He thereupon invited and allowed an amendment to the statement of grounds to include a claim that the Isaac Wunder order was *ultra vires*.

**17.** It is worth noting here that counsel for the notice party made it clear that he was not in a position to contest this issue further, and suggested that the respondent ought to be notified about the change in the nature of the case. Hedigan J. expressed the view that the respondent had chosen not to participate. This, he said, was the price to be paid for that choice. It appears that he did not remember, and neither the appellant nor the notice party reminded him of, the order he had made in the directions application. This unfortunate fact is understandable, in circumstances where that ruling had been made about a year earlier and there had been a subsequent change in the legal representation.

**18.** The trial judge then proceeded to rule on the substantive issues, commenting that there was “a very strong case” for granting the order sought. He found, firstly, that there was a clear case of objective bias in that a reasonable person would have had strong grounds for concern as to the respondent’s impartiality, given his close professional relationship with a firm of solicitors who were central to the allegations made by the appellant in his written objection. In this regard, he stated that the court should assume that the respondent did, at the very least, glance briefly at the appellant’s objection.

19. Secondly, he ruled that the respondent, as a District Court judge, had no power to make an Isaac Wunder order preventing the appellant and the other named person from objecting in the future, and accordingly granted an order of *certiorari*.

20. The trial judge also made a declaration that the respondent had breached the appellant's right to fair procedures. For this reason, he granted *certiorari* in respect of the certificate of qualification, while noting that such an order could not affect the notice party at that stage (since licences were renewed on an annual basis, and the certificate granted by the respondent was spent by the time of the High Court hearing).

21. When it came to the question of costs, the trial judge expressed the view that the notice party had been "caught in the cross-fire", and had had nothing to do with the purported Isaac Wunder order. On this basis, he found that the notice party was entitled to his costs. He awarded the costs of both the appellant and the notice party against the respondent.

### **The Respondent's Appeal**

22. It appears that the Chief State Solicitor's Office did not become aware of the High Court order until 2012, when it received bills of costs from both the appellant and the notice party. Steps were then taken to lodge an appeal in this Court on behalf of the respondent in respect of the costs orders, and to seek a stay on those orders from the High Court pending appeal.

23. The notice of appeal stated in terms that it was against that part of the order awarding costs against the respondent only. The grounds included assertions that the trial judge had failed to consider the established rule that costs should not be awarded against a respondent judge, in the absence of *mala fides* or impropriety, where the judge had not participated and had not sought to defend the impugned order; that no finding of *mala fides* or impropriety had been made, and that there was no evidence to support

such a finding; that the correspondence from the Chief State Solicitor's Office had not been brought to the attention of the trial judge; that it had not been specifically pleaded in the statement of grounds that the conduct of the respondent was such that costs should be ordered against him; and, that the respondent was not on notice that an order for costs would be sought against him.

**24.** Despite the express statement that the appeal was limited to the costs order only, the grounds also included a plea that the trial judge had erred in making a declaration that the appellant had a reasonable apprehension of bias by reason of the relationship between the respondent and Mr. O'Donnell, in circumstances where it was contended that there was no evidence to support that finding.

**25.** In an affidavit sworn for the purpose of seeking the stay, a solicitor in the Chief State Solicitor's Office addressed the position of the respondent in the following terms:-

*“As can be seen from the transcript, a number of unsubstantiated allegations were made against the respondent judge in the course of the High Court hearing. However, the Respondent Judge is fully cognisant of the Supreme Court authorities which state that it is not generally appropriate for a Judge to intervene in proceedings or to swear an affidavit as such is seen as a compromise of the rule on judicial independence. He is also cognisant of the requirement by the Superior Courts of forbearance on the part of Judges of the District and Circuit Courts in judicial review proceedings, and that they state that the issues should be left to be litigated by the parties to the action, and is further cognisant of the principle that costs should not be awarded in judicial review proceedings against a judge of the District Court or Circuit Court in the absence of a finding of impropriety or mala fides on the part of the judge concerned and where that judge has not sought to defend the proceedings. The*



*Respondent Judge instructs that he has adhered to these principles, which are binding upon him, throughout this action. His participation at this stage in an appeal to the Supreme Court is only to the extent necessary to reverse the costs order made against him. However, for the avoidance of doubt and as was stated on his behalf in the letter sent on the 22nd September, 2010 [exhibited], his non-participation in the substantive proceedings in the High Court, is and was at all times in accordance with the above case law and is not to be taken as an admission of any of the matters alleged therein. In particular he instructs me that while the firm of Evershed O'Donnell Sweeney have acted for him in the past, Mr. Rory O'Donnell has never acted in any capacity for him and that Mr. O'Donnell is not personally known to nor would be recognisable by the judge. (I say that Mr. O'Donnell in his affidavit sworn on 23 November 2010 makes a similar statement at paragraph 7 where he notes that he does not know the Respondent Judge.) I say that this comment is offered only by way of explanation to this Court and lest the Judge's silence on these matters be regarded as an admission of the allegations in the pleadings. I say that the Respondent Judge, in compliance with the case law of the Superior Courts, is not participating in the substantive issues in the case."*

26. There is no reference in the affidavit to any other factual issue in the case.
27. I think it necessary to comment here that the question as to whether the respondent and Mr. O'Donnell knew each other is something of a red herring – the findings of the trial judge were that Eversheds was named in the context of allegations made in the appellant's written objection; that, as a matter of probability, the respondent had seen the reference to Eversheds; that Eversheds was acting for the respondent at the time; and, that this was a situation requiring disclosure.

28. Apart from the affidavit, written submissions were lodged on behalf of the respondent. The finding of objective bias was challenged in those submissions, on the basis that there was insufficient evidence that the respondent was actually aware of the contents of the appellant's written objection, and in the light of the sworn evidence of Mr. O'Donnell. Further, the case was made that the email evidence in relation to Isaac Wunder order was only hearsay, and that there was no evidence that it reflected a decision by the respondent.

29. Despite these submissions on the facts of the case, the primary points made on behalf of the respondent were that the statement of grounds had not indicated with sufficient particularity that costs would be sought against the judge; that no specific finding of *mala fides* or impropriety had been made against him; and, that he had not been put on notice of an application for costs against him.

**Judgment of MacMenamin J.**

30. The sole judgment in the appeal was delivered on the 7th December, 2015, by MacMenamin J. (with whom Denham C.J., O'Donnell, McKechnie and Charleton JJ. agreed – see [2015] IESC 88). The primary finding of this Court was that the trial judge had breached fair procedures in respect of the costs order. It was held that, as a matter of first principle, a court should not make an adverse order against an absent or unrepresented party who was not put on notice of the application.

31. The judgment referred to *McIlwraith v. Fawsitt* [1990] 1 I.R. 343 (“*McIlwraith*”) and *O'Connor v. Carroll* [1999] 2 I.R. 160, two of the leading authorities dealing with the circumstances in which costs may be awarded against judges, but expressed no view on their application in the case. The point made here was that issues of fact, and the extent of any immunity arising, were for the High Court to determine at first instance. The Court also declined to embark on a further inquiry into the underlying facts of the

case, or to consider any further proposed amendment of the statement of grounds. The question of costs was therefore remitted to the High Court.

32. The Court made no order on the costs of the appeal.

### **Subsequent High Court Order**

33. The case was dealt with again by Hedigan J. on the 25th July, 2016. Having read the Supreme Court judgment in advance of the hearing, he did not enquire further into the case, and refused to hear further submissions. He stated that this Court had made it plain, and effectively directed him, that he was to make no order on costs. He therefore made an order to that effect.

### **The Court of Appeal**

34. The appellant appealed on the ground that, essentially, Hedigan J. had misunderstood the Supreme Court judgment and had erred in refusing to hear submissions.

35. A notice was filed on behalf of respondent, opposing the entirety of the appeal and contending that the trial judge had made no errors in interpreting the judgment or applying its *ratio* and had correctly concluded, within his discretion, that it was appropriate to make no order. Written submissions supported this position, arguing that there had been no finding of *mala fides* or impropriety in the original proceedings and that Hedigan J. would not have made an order against the respondent if he had recalled that he had excused his participation, or if he had been addressed on the law relating to judges and costs.

36. In a judgment delivered on the 17th October, 2017, by Hogan J., the Court of Appeal held that Hedigan J. had erred in his understanding of the Supreme Court judgment and determined that the issue of costs should again be remitted to the High Court.

**37.** There followed a dispute about the costs of the appeal, in which the Attorney General participated as *amicus curiae* at the invitation of the Court. A further written judgment was delivered on the 22nd March, 2018, (see [2018] IECA 80).

**38.** At paragraph 15 of the judgment, Hogan J. summarised the issue in the following terms:-

*“There is, I think, no question but that in the ordinary way had it not been for the status of the respondent as a judge of the District Court, costs would have followed the event in the ordinary way in the manner contemplated by Ord. 99, r. 1 so that the Court of Appeal costs would have been awarded against the losing party, i.e., the District Court judge. This, accordingly, now requires the Court to consider the applicability of the quasi-immunity from costs long enjoyed by judicial personages.”*

**39.** The judgment refers to the concept of the complete immunity of judges from liability in tort in respect of acts done or things said in the course of exercising their judicial functions. The common law principles on this aspect were seen as having been supplemented by constitutional considerations since, without such immunity, no person could discharge judicial office with the independence required by the Constitution. The question of costs in judicial review proceedings was described as the most common manifestation of the immunity.

**40.** The authorities relating to the circumstances in which costs may be awarded against a judge in judicial review proceedings were then considered in detail. The line of authority in this jurisdiction commences with the judgment of Palles C.B. in *R. (King) v. Justices of Londonderry* (1912) 46 I.L.T.R. 105, where it was stated that, as a rule, magistrates ought not to be obliged to pay costs “unless they were acting in some way that was not *bona fide*, or unless they took it upon themselves to put forward and

support a case that was wrong in point of law”. The question, according to the Chief Baron, was whether the magistrates were “worthy of censure”, meaning whether they had acted from an indirect motive, or were biased.

**41.** This decision was approved in *State (Prendergast) v. District Justice Rochford* (Unreported, Supreme Court, Maguire C.J., 1st July, 1952) (“*Prendergast*”), where Maguire C.J. stated that the principle continued to apply where the District Justice or Circuit Court judge had been guilty of no impropriety and had not shown cause in the proceedings.

**42.** The principle was restated in *McIlwraith*, where the respondent Circuit Court judge had, without jurisdiction, made an order extending time for an employer to appeal against a decision of the Employment Appeals Tribunal. The employee sought to quash that order. The respondent did not appear or oppose the application, and the employer settled with the employee and therefore did not appear either. The High Court judge initially made an order for the employee’s costs against the respondent. Ultimately, after hearing counsel on behalf of the respondent, he decided that the employee could recover costs against the Attorney General as the indemnifier of the respondent. Further, he ordered that the respondent and the employer could also recover against the Attorney General.

**43.** On appeal, neither the respondent nor the employer attempted to stand over the order, while the employee argued for an indemnity from the Attorney General. Giving judgment on behalf of the Court, Finlay C.J. stated that the principle in *Prendergast* applied. It was incorrect to order costs against a District or Circuit Court judge “in a case where there is no question of impropriety or *mala fides* on the part of the judge concerned and where he has not sought to defend an order which apparently is invalid”. (Here, Finlay C.J. referred approvingly to the practice of adding the other contesting

party as a respondent in judicial review proceedings, to ensure that there was a *legitimus contradictor* for any issue that might arise). The order as against the Attorney General could not stand either, since he had not been a party in the proceedings and had no interest in them.

**44.** An *obiter* passage in the judgment makes the following interesting observation:-

*“Considerations of the obligation owed by the Executive under the Constitution to support the Judiciary in the carrying out of its separate duties under the Constitution may well lead in appropriate cases to an obligation which the courts could enforce against the Executive to indemnify members of the Judiciary in regard to costs which are properly awarded against them, but no question of that description has been debated before this Court on this appeal and it is not necessary for me to express any opinion upon it.”*

**45.** *McIlwraith* was followed in *Miley v. Employment Appeals Tribunal* [2016] IESC 20, another decision of this Court, where the relevant principles were seen as applicable to members of a statutory tribunal such as the Employment Appeals Tribunal.

**46.** In the instant case, Hogan J. stated that the reasons for, and benefits of, immunity from costs were clear. The prospect of potentially ruinous costs orders being made against judges in judicial review proceedings would clearly undermine their capacity to perform their judicial functions in a truly independent manner and would be bound to inhibit their judgment, thus making it difficult or impossible for them to fulfil their judicial declaration.

**47.** Having considered the case law, the judgment moved onto consider the application of these principles to the instant case. At paragraph 26, Hogan J. stated that “[s]o far... as this particular appeal to this Court is concerned” there was no question of impropriety or *mala fides* on the part of the respondent. It was noted that counsel for

the appellant had argued that the quasi-immunity did not apply where a respondent judge takes part in the substantive proceedings and that, by participating in the costs appeals, this respondent was indeed taking part. The analysis adopted by the Court of Appeal is set out in paragraphs 28-30 as follows:

*“28. It is clear, however, that the test articulated in McIlwraith as to when judges will lose the quasi-immunity is two-fold in nature. First, there must have been either mala fides or impropriety on the part of the judge concerned. Second, he must not [sic] have sought to defend the validity of an order which has been successfully challenged in the judicial review proceedings. It is unnecessary for the present purposes to express any view as to whether these requirements are singular or cumulative as I consider that the respondent judge can meet both tests.*

*29. As I have already indicated, there is no question of any mala fides on the part of the respondent judge so far as this appeal is concerned. As Denham C.J. explained in Miley, the concept of impropriety is slightly different and it suggests “a different aspect of conduct, such as wholly unfit proceedings”. As the decision in Miley itself illustrates, mere routine error – such as that disclosed here in respect of the interpretation of the Supreme Court order of 22nd February, 2016 – does not amount to impropriety in the McIlwraith sense of that term. The first limb of the test is accordingly satisfied.*

*30. The second limb of the test requires the Court to consider whether the respondent judge has sought to defend the validity of an order which was subsequently quashed. In my view, however, it cannot be said that the judge by participating in these costs applications has sought thereby to defend the validity of the District Court order which he made and which has since been*

*quashed. After all, the judge was obliged to seek to appeal the original adverse costs order made by the High Court since – as the Supreme Court subsequently found – he had not been heard on that question. It was then perfectly reasonable for him to have advanced a particular understanding of the effect of that order before the High Court and, more latterly, before this Court, even if that understanding transpired to be erroneous. But none of this means that the judge has thereby sought to defend the validity of the order made by him in the District Court.”*

**48.** In conclusion, Hogan J. stated that were it not for the question of judicial quasi-immunity, the Court would “naturally” have awarded the costs of the appeal to the appellant. However, the respondent was entitled to avail of the quasi-immunity because (i) there had been no *mala fides* or impropriety on his part in the conduct of the appeal, and (ii) by participating in the costs issue, he did not thereby seek to defend the validity of the order made in the District Court.

**49.** Accordingly, the Court of Appeal made no order on costs.

### **Submissions in the Appeal**

**50.** The appellant submits, as part of his case, that the Court of Appeal misinterpreted the decision of this Court in *McIlwraith*. However, he wishes to broaden the argument very significantly by arguing that, in any event, *McIlwraith* should not be accepted as correct, and that the common law quasi-immunity is incompatible with the evolution of constitutional jurisprudence exemplified in judgments such as *Byrne v. Ireland* [1972] I.R. 241 and *Webb v. Ireland* [1988] I.R. 353. It is envisaged, in this scenario, that judges would be indemnified by the State. He submits that the Court should consider this issue at this point, rather than (as he envisages) having to argue it in the High Court with the inevitability of further appeals.



51. The respondent focuses on a narrower view of the case. He submits that the Court of Appeal applied *McIlwraith* correctly, on the basis that, if costs cannot be awarded against a judge in a substantive matter in the absence of *mala fides*, the same principle must be applied to any necessary procedural steps. While he accepts that the “decision” under consideration in the Court of Appeal was that of the High Court trial judge, and not the decision made by him in the District Court, he argues that he had an interest in upholding it and that, therefore, the correct question was whether it was a reasonable error made in good faith.

52. The Attorney General, who has again appeared as *amicus curiae*, submits that the immunity afforded to the respondent by the Court of Appeal can be seen as coming within *McIlwraith*, on the basis of an argument that, for the purposes of any given case, the immunity either exists or does not. However, it is submitted in the alternative that if it is an extension of *McIlwraith*, then it is a logical and legitimate one.

### **Discussion**

53. The issue in this appeal can, I think, be disposed of in a fairly straightforward manner. I do not consider that, given the history of the case, it is possible for the Court to revisit the *McIlwraith* principles in this matter. Firstly, this Court previously gave an express direction to the High Court that the costs of this litigation were to be considered in accordance with those principles. That direction was, unfortunately, not implemented on the first remittal. That is why the appellant succeeded in the Court of Appeal, which also ordered remittal. The part of the order directing remittal was not appealed and is not before the Court. Accordingly, the High Court is currently obliged to deal with the matter on the basis of the existing jurisprudence.

54. Secondly, it would, in my view, be inappropriate for the Court to embark upon a revision of the jurisprudence at this point, on an issue that was never debated in the High Court.

55. Thirdly, in my opinion, the *McIlwraith* test did not govern the question of the costs of the appeal before the Court of Appeal, and that Court erred both in applying it and in considering that it involved an analysis of the manner in which the respondent had argued the appeal. If this view is correct, then it would, again, be both unnecessary and inappropriate to embark upon a reassessment of *McIlwraith*.

56. The *McIlwraith* test is concerned in the first instance with the decision or conduct of a respondent judge acting *qua* judge, not *qua* litigant. It asks, for the purpose of deciding whether to order costs against the judge, whether the decision or conduct impugned in substantive judicial review proceedings was in some way *mala fide* or improper. The second, separate question is whether the respondent had participated in the subsequent litigation in order to stand over the validity of his or her order.

57. It seems to me to be clear that if either limb of the test is satisfied, the quasi-immunity will be lost. That is because a judge who acts *mala fide* or improperly in deciding a case, to the detriment of a litigant, will not come within the purpose for which the protection is conferred, and to confer it could bring the administration of justice into disrepute. Separately, a judge who insists on defending the validity of his or her decision, even if acting entirely in good faith, thereby becomes a litigant. The authorities make it clear that it is highly inappropriate to do so, but should it occur, and should the judge not succeed, the contesting party will have been put to extra, unnecessary trouble and expense and it would, again, not be unjust to remove the protection.

**58.** These were the questions that Hedigan J. had omitted to address at first instance in this case, and he had proceeded to make an order against the respondent without putting him on notice that he was at risk of losing his immunity. It was for that reason that this Court remitted the matter to him for proper determination. However, they are questions that had no relevance to the situation being dealt with by the Court of Appeal, where the conduct of the respondent in making the decision in the District Court was not in issue.

**59.** The respondent was, by then, undoubtedly taking part in the proceedings and was doing so with a view to protecting his own interests rather than by way of standing over his decision. (It might seem that he came perilously close to the latter, in instructing his solicitor to file an affidavit denying any acquaintanceship with Mr. O'Donnell, and in instructing counsel to lodge submissions that challenged the findings of the trial judge in relation to the two key issues of objective bias and the making of the Isaac Wunder order. However, nothing turned on these aspects in the previous decision of this Court or in the Court of Appeal.)

**60.** The decision to participate in the appellant's appeal, against the refusal of the trial judge to make any costs order, was a choice that the respondent may have been entitled to make. However, in contesting the appeal, he can only be seen as having acted as a litigant. In that capacity, he pursued a line of argument that failed. Whether he did so in good faith, and whether his interpretation of the decision of this Court and the subsequent ruling of Hedigan J. could be described as the result of a reasonable error on his part, or whether he conducted his argument in the appeal in proper fashion, was no more relevant to the issue of costs in the Court of Appeal than it would be in the case of any other litigant in any other case. It had nothing to do with the ordinary principles according to which costs are awarded.

**61.** I would therefore allow the appeal. Since it is abundantly clear from its judgment that the Court of Appeal would have awarded costs to the appellant were it not for its belief that the immunity applied, I see no reason to remit this matter and would simply propose that the costs of the appellant’s appeal to the Court of Appeal should be awarded to him.

**Some Further Observations**

**62.** It may be necessary to emphasise that these proceedings were instituted before the amendment of the provisions of O.84 RSC in 2015 by S.I. 345/2015 and are not, therefore, covered by that amendment. O.84 r.22 now provides that, where the object of the judicial review is to quash a court order, the judge of the court concerned is not to be named as a respondent or notice party unless the relief sought is grounded upon an allegation of *mala fides* or other form of personal misconduct by that judge “such as would deprive that judge of immunity from suit”. It is not necessary to elaborate here upon the concept of immunity from suit, but I will simply note that, in proceedings brought after the change in the Rules, it may bring into play issues not previously dealt with in the authorities relating to costs, and may necessitate consideration of such provisions of the Justices Protection (Ireland) Act 1849 as are still in force.

**63.** The initiation of the proceedings also pre-dated a protocol drawn up by the Attorney General in 2011, which sets out the conditions pursuant to which legal representation is provided to judges. However, that protocol was in place at the time at which the decision was made to provide representation for the purposes of the appeal against the original costs order.

**64.** Finally, I note that the reliefs sought by the appellant were obtained by him in 2011, and that the litigation thereafter has been exclusively concerned with costs. It seems clear that the objective of the appellant at this stage is not to establish a right to

recover costs from the personal funds of the respondent, but to establish that he can recover his costs. It is, of course, highly unfortunate that the resolution of this issue has taken so long to date. However, since the suggestion has been made that there will be further debate and appeals on the question of the costs jurisdiction, I would simply observe that such litigation is never risk-free for any party.