THE HIGH COURT

[2015 No. 86 S.P.]

IN THE MATTER OF SECTION 39 OF THE NURSES ACT 1985

BETWEEN

MARGARET MARIAN (RITA) DOWLING

PLAINTIFF

AND

AN BORD ALTRANAIS AGUS CHÁIMHSEACHAIS NA hÉIREANN

DEFENDANT

[2015 No. 87 S.P.]

IN THE MATTER OF SECTION 39 OF THE NURSES ACT 1985

BETWEEN

ELLEN THERESA ANNE CARROLL

PLAINTIFF

AND

AN BORD ALTRANAIS AGUS CHÁIMHSEACHAIS NA hÉIREANN

DEFENDANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 6th day of September, 2017.

1. This judgment concerns the issue of the costs relating to proceedings pursuant to s. 39(3) of the Nurses Act 1985 ("the Act of 1985") in which I delivered judgment on the substantive issues on 25th January, 2017; [2017] IEHC 62.

2. The two plaintiff nurses in the substantive proceedings case did not challenge the findings of the Fitness to Practice Committee of An Bord Altranais ("the board") which found that there had been misconduct on their part. Their s. 39(3) proceedings concerned two matters; first, the question of the sanction imposed, which was the sanction of erasure from the register of nurses; and, secondly the question of whether the board had sat with the appropriate quorum required by statute when imposing sanction. In the judgment concerning these matters, I quashed the sanction of erasure for the reasons set out therein and directed the board to reconsider the question of sanction.

3. Following that decision, when the matter came before me for a decision on the costs of the s. 39(3) proceedings before this Court, the parties referred to a considerable number of authorities and were in dispute as to the basic approach to be adopted by the court towards costs in a case such as the present one. For that reason, I reserved judgment on the issue of costs.

4. The plaintiffs, in essence, argued that they had brought their proceedings in accordance with the route indicated by the statute itself, namely s. 39 of the Act of 1985, and had succeeded in their proceedings and that the costs should therefore follow the event. It may be noted that s. 39(3) provides that a person to whom a decision of erasure relates may, within the period of twenty-one days, apply to the High Court for cancellation of the decision and goes on to provide that the High Court "may direct how the costs of the application are to be borne". It was submitted on behalf of the plaintiffs that this clearly envisaged that the court had discretion as to the matter of costs. It was argued that the normal position, regarding the exercise of discretion in relation to the issue of costs, should be applied. Anticipating that the defendant would argue that the plaintiffs had failed on some of their arguments and that costs should (at least) be apportioned in accordance with the decision in *Veolia Water U.K. plc. v. Fingal County Council (No. 2)* [2007] 2 I.R. 81, it was argued that the bulk of their case concerned the issue of sanction and the question of delay and mitigation and that they had been successful in that regard.

5. Counsel on behalf of the board adopted a fundamentally different approach to the question of costs, arguing that in a case where a body such as An Bord Altranais, which is tasked with a public interest function in ensuring the highest standards on the part of nurses, is unsuccessful in court proceedings, it should not have any award of costs made against it. In this regard, he relied upon what he said was a line of authority to the effect that, where a statutory regulator has carried out their functions *bona fide* in the public interest without any impropriety or abuse of process, the courts as a matter of policy have tended not to award costs against them. The purpose of this was to prevent regulators being inhibited in the discharge of their statutory functions. In this regard, the court's attention was drawn to the case of *Baxendale-Walker v. Law Society* [2007] EWCA Civ. 233 (discussed below). The court was also referred to in an ex tempore judgment in the case of *T. v. Medical Council* [2011] IEHC 352 (also discussed below) in which Kearns P. approved the *Baxendale-Walker* case. He also referred to ex tempore note of the costs decision in the *Hermann v. Medical Council* (unreported, High Court, Charleton J., 6th December, 2010) subsequently approved by the court on 10th March, 2011, in which no order for costs was made. He referred to *O'Doherty Advertising Ltd. & Companies Acts*: *Stafford v. Beggs* [2006] IEHC 258, which involved a decision to seek a disqualification order in respect of a company director which was unsuccessful. No costs were awarded on the basis that the Office of the Director of Corporate Enforcement was exercising its statutory functions. He also relied on *O'D. v. O'Leary* [2016] IEHC 757 in this regard. Counsel also relied, in the alternative, for an apportionment of costs on the *Veolia* principle, on the basis, he said, that a considerable amount of effort in this case had gone into dealing with matters upon which the plaintiffs were ultimately unsuccessful.

Is the Court's Discretion Constrained by the fact that the Respondent is a Statutory Body Discharging Functions in the Public Interest?

6. The first matter arising is whether the court is "at large" with respect to the discretion to be exercised under s. 39(3)(c) of the Act of 1985 or whether there is a principle or presumption that costs should not be awarded against the board in proceedings arising out of a decision made by them in the course of the exercise of their statutory functions.

7. I mentioned above that Counsel on behalf of the board referred to the decision in *Baxendale-Walker v. Law Society* [2007] EWCA Civ 233, a decision of the English Court of Appeal, on appeal from the divisional court of the Queen's Bench. The case arose from

disciplinary proceedings instigated by the Law Society against a solicitor in respect of two allegations of "unbefitting conduct". The case was heard by the solicitor's disciplinary tribunal. The first allegation was found not proved while the second was proved, and the Tribunal suspended the solicitor from practice for three years. The Tribunal made an order that the Law Society pay 30% of the solicitor's costs of the proceedings in light of the fact that the first allegation was not proved and in consideration of the fact that a greater proportion of costs had been incurred in defending that allegation. The solicitor appealed his suspension to the divisional court and this appeal was dismissed. The Law Society cross-appealed on the issue of costs and this appeal was upheld, with the court finding that the principles relating to costs in proceedings brought in the public interest by bodies exercising regulatory functions differed from those applicable in ordinary litigation. It was ordered that the solicitor pay 60% of the Law Society costs. In analysing the issue of costs, the court stated at para. 35:-

> "…[I]t is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the Tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings. Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest…by ensuring that high professional standards are maintained, and, when necessary, vindicated. Although…it is true that the Law Society is not obliged to bring disciplinary proceedings, if it is to perform these functions and safeguard standards, the Tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly, the Law Society has an independent obligation of its own to ensure that the Tribunal is enabled to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation – dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the unsuccessful party – would appear to have no direct application to disciplinary proceedings against a solicitor."

8. The court examined a number of authorities, one of which was *R. (Gorlov) v. Institute of Chartered Accountants in England and Wales* [2001] EWHC Admin. 220., and went on to say at para. 40:-

> "Unless the complaint is improperly brought, or, for example, proceeds as it did in *Gorlov*, as a 'shambles from start to finish', when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The 'event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the Tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage."

9. However, the *Baxendale-Walker* case concerned the issue of costs before the disciplinary tribunal hearing itself *i.e*. the proceedings at first instance. The next case does not. In *Walker v. Royal College of Veterinary Surgeons* [2007] UKPC 20 the disciplinary committee of the Royal College of Veterinary Surgeons had found Mr. Walker guilty of two out of three charges of "disgraceful conduct," relating to the inaccurate certification of horse passports. The committee had decided to remove his name from the register of veterinary surgeons. On appeal, the Privy Council allowed the appeal and directed that the sanction of removal be replaced with an order of suspension for six months. The issue of costs then arose in relation to the appeal to the courts. The respondent opposed Dr. Walker's costs application relying, *inter alia*, on *R. (Gorlov) v. Institute of Chartered Accountants in England and Wales (supra)* and *Baxendale-Walker v. Law Society (supra).* It was held that those authorises had no bearing on the case because they concerned the position of costs before disciplinary tribunals. The Privy Council noted that there was a practice of awarding costs against the defendant if an appeal succeeded, giving examples of cases taken against bodies including the General Dental Council, the Paramedics Board, and the Professional Conduct Committee of the General Medical Council. It was further noted that, in a number of cases, no order for costs had been made where the appeal failed on liability but succeeded on penalty. The Privy Council held that, in line with previous practice, a costs order in favour of the applicant was fair, having regard to the fact that the successful appeal was solely on the issue of sanction and had been at all times vigorously opposed by the respondent. Accordingly, the English practice, as described in the Privy Council decision, distinguishes clearly between the costs of the first instance proceedings and the costs of any appeal to the courts.

10. I was furnished with a short *ex tempore* judgment of Kearns P. in *T. v. Medical Council* in which the then President of the High Court allowed the appeal and cancelled the decision of the Medical Council that the applicant was guilty of professional misconduct. There had been substantial delays in the case and some fourteen years had elapsed before the complaint had been made, which was essentially one of sexual misconduct. In reaching the decision to quash the finding of misconduct, the President found that "the rights and wrongs of this matter are really lost now in the mists of time". In his decision in respect of the costs of the matter (unreported, High Court, Kearns P., 25th July, 2011) Kearns P. stated "I am satisfied insofar as the regulation of complaints against medical practitioners is concerned that the Medical Council has a vital regulatory function" and that "the Medical Council had no option but to take the steps they did and pursue it as they did pursue it." He drew attention to what he described as the unusual situation whereby an appeal had been pursued after the disciplinary proceedings instead of a judicial review seeking to restrain the respondent from embarking on the hearing when the matter had actually been before the fitness practice committee. He said: -

> "I am very taken and impressed by the principles enunciated in the case of *Baxendale-Walker v. The Law Society*, which is reported at [2008] 1 WLR, as indeed was my learned colleague, Mr Justice Finnegan, in a case which he had to deal with, namely *O'Connor v. The Medical Council* [2007] IEHC 304. He was of the view there should be no order as to costs, not least because the Medical Council in defending an appeal of this sort are doing no more than fulfilling their regulatory function against a background of increasing public demands for inquiries in almost every circumstance, and I would think it would have far-reaching and highly undesirable consequences for the Council if I were to make an order for costs against the Medical Council. So, in all those circumstances I propose making no order as to costs."

11. There is no reference in his judgment to the Privy Council decision in *Walker v. Royal College of Veterinary Surgeons* and there is no explicit reference to the fact that *Baxendale-Walker* concerned costs at first instance as distinct from the costs of the court proceedings arising out of the disciplinary proceedings. I note also that Kearns P. was critical of the fact that an appeal after the event had been brought instead of proceeding by way of judicial review in advance of the hearing. I have no record of the decision referred to by Finnegan J. (as he then was) in *O'Connor v. Medical Council*. The decision set out at the citation given in the ex tempore decision of Kearns P. is a decision on the merits in the *O'Connor* case and does not deal with the issue of costs.

12. I was also furnished with an Order of Finnegan P. dated 29th July, 2004, in the case of *R. v. An Bord Altranais*. From the order, it appears that the court ordered the applicant to pay the costs of the respondent in circumstances where the court upheld the

decision of the board that the applicant was guilty of professional conduct but had refused to confirm the decision to erase the name of the applicant from the register. There does not appear to be any judgment in relation to this matter.

13. I was also referred to the decision of Charleton J. as to costs in *Hermann v. Medical Council* where the learned trial judge made no order as to costs. The judgment of Charleton J. in *Hermann* has been discussed at some length in my decision on the substantive matters in the present case. There is no judgment on costs and the court was merely referred to counsel's note in relation to it. There appear to be references to the exercise of public functions by the Medical Council and an analogy drawn with the role of the Director of Corporate Enforcement when bringing a case against a director for a disqualification or restriction, as discussed in *O'Doherty Advertising Ltd. & Companies Acts: Stafford v. Beggs* [2006] IEHC 258. There also appears to have been reference to judgments by Charleton J. himself and McKechnie J. in relation to costs in criminal cases.

14. Turning, therefore, to *O'Doherty Advertising Ltd. & Companies Acts: Stafford v. Beggs,* this was a case in which an application had been brought by a liquidator under s. 150 of the Companies Act 1990 in respect of five company directors. A decision was made by the High Court that four of the five respondents should not be restricted because they acted honestly and responsibly. Two of these directors were the respondents who brought applications for costs. O'Leary J. referred to the argument of the directors that they were the successful parties in circumstances that they had proved to the court they had acted in an honest and responsible fashion. He questioned whether an application brought by a liquidator could be properly called a "claim" and said that the liquidator was merely the presenter of the application and not a claimant or party with any interest in the outcome. He compared the situation to that of the awarding of costs in criminal cases. He said that costs should not normally be awarded to a director who satisfies the court that he or she should not be the subject of a restriction order under s. 105. He then addressed the question of whether there were any exceptional circumstances warranting a departure from the normal rule and concluded there were not. He made no order as to costs in all of the circumstances. It may be noted, however, that again these costs in issue were the costs of the disqualification/restriction proceedings themselves, which under the statute are brought directly to the court.

15. The reference by Charleton J. in *Hermann* to certain costs decisions in criminal cases may have been to his decision in *Director of Public Prosecutions v. Kelly* [2007] IEHC 450, where he discussed the jurisdiction of the Central Criminal Court to make a costs order following the acquittal of an accused and set out a list of ten factors which should be taken into account when exercising that discretion. The question of awarding costs in criminal cases was later considered by the Court of Criminal Appeal in *People (D.P.P.) v. Bourke Waste Removal Ltd*. [2013] 2 I.R. 94. This concerned the issue of costs in a case where the respondent had been acquitted by jury in the Central Criminal Court of offences under the Competition Act 2002. The Central Criminal Court (McKechnie J.) made an order for costs in favour of each of the respondents and the D.P.P. appealed to the Court of Criminal Appeal. This may be the decision of McKechnie J. that Charleton J. had in mind when he referred to a decision of McKechnie J in *Hermann* without identifying the case in question. The Court of Appeal in the *Bourke Waste Removal* case referred to the celebrated decision in *People (Attorney General) v. Bell* [1969] I.R. 24 which made it clear that while O. 99, r. 1(1) of the Rules of the Superior Courts 1962 did apply to prosecutions in the Central Criminal Court, the exercise of that discretion was not coupled with any presumption that costs should follow the event or in effect accord with the outcome of an acquittal. The court referred to what it described as the "helpful judgment" of Charleton J. in *Director of Public Prosecutions v. Kelly* (supra), as well as a judgment of Cooke J. in *Director of Public Prosecutions v. McNicholas* [2011] IECCC 2 which arose in the context of competition law offences. The Court of Appeal, having regard to both of those decisions, as well as the first instance decision of McKechnie J, formulated four questions which it said would merit consideration in applications for costs in the Central Criminal Court where there have been acquittals of this particular nature. These questions related to matters such as: whether the prosecution was warranted; whether the prosecution authorities had conducted themselves in fairly or improperly; what the outcome of the prosecution was and whether, if an acquittal, it was on foot of a direction of the trial judge or not; and, how the defendants had met the proceedings. The court also referred to a decision of the High Court on a judicial review application in relation to costs in a criminal matter in *F.(S.) v. Murphy* [2009] IEHC 497; a case in which costs had been refused by the Circuit Court trial judge following the acquittal of an accused of child pornography charges. Thus, there has been quite an amount of case-law since Charleton J. made his references to criminal cases in the *Hermann* case in December of 2010, but it is nonetheless the case that in considering whether or not to award costs to an accused following an acquittal of a criminal charge, the fact that the D.P.P. is acting in the public interest is factored into the situation. However, in the *Bourke Waste Removal* case, the Court of Criminal Appeal did say at para. 21 that "the actual result of the prosecution is still the most important consideration regarding the award of costs" and "the acquittal of the accused is, accordingly, the starting point of any inquiry as to costs, to be considered in junction with other relevant circumstances". The court went on to refer to an argument made by counsel for the applicant that the effect of a ruling adverse to his argument might dissuade the initiation of criminal prosecutions in certain cases, which would not be in the public interest. To this the court responded:-

> "We would observe in response that costs in civil proceedings have been awarded against the State and State bodies since the foundation of the State in 1922, and the existence of this rule has not been thought to inhibit the proper discharge of statutory functions by these bodies. Moreover, the suggestion that the prosecution should enjoy some tacit immunity or quasi-immunity from costs has uncomfortable echoes of a long-distant prerogative immunity from costs previously enjoyed by the Crown and those suing on its behalf prior to 1922: see the comments of Kenny J. in The *People (Attorney General) v. Bell* [1967] I.R. 24, at p. 29. If it were thought appropriate that the prosecution authorities should enjoy a special status so far as costs is concerned, this is a matter of policy which, we suggest, would be a matter for the Oireachtas (or, perhaps, the Superior Court Rules Committee) to consider."

16. The above discussion illustrates that, even with respect to decisions in criminal cases where the issues of costs arises in relation to the actual criminal trial itself following the acquittal of an accused, the position is not as clear-cut as a general immunity from costs for the prosecuting authority nor a prohibition on the awarding of costs against the D.P.P., further, it is certainly not the case that, where an applicant is successful against the D.P.P. in judicial review proceedings, no order for costs is made simply by virtue of the fact that the D.P.P. is *bona fide* discharging public interest functions pursuant to statute.

17. Counsel on behalf of the Board also referred the court to the decision of the Supreme Court in *Child and Family Agency v. O.A.* [2015] 2 I.R. 718. This was a case in which the Supreme Court set out the principles and criteria applicable to determining costs applications in District Court childcare proceedings. The court held *inter alia* that the general default position was that there should be no order for costs in favour of parent respondents unless they were distinct features to the case such as the Child and Family Agency having acted capriciously, arbitrarily or unreasonably in commencing or maintaining proceedings, where the outcome of a case was particularly clear and compelling, or where a particular injustice would have been inflicted on the parents if they were left to bear the costs. It was held that where a District Court sought to depart from the general default position and award costs, it was necessary to give reasons and that these reasons must identify some clear feature or issue which rendered the case truly exceptional. The court went on to say that, while the rule that costs follow the event was normally a starting point, there were cases in which it be proper to order the costs of unsuccessful parents to be paid by the Child and Family Agency.

18. In delivering judgment on behalf of the Supreme Court, MacMenamin J. said at para. 42:

> "I pause here to observe that the use of the term 'the event', as in 'costs follow the event' is not always, in itself, a satisfactory criterion in the context of child care cases, where, as here, there may be a number of 'events', and there are different orders made as part of a continuum. The term 'outcome' may be a more apposite approach when considering such applications, thereby allowing a judge to take a more all-encompassing view."

19. I am not convinced, however, that the analogy holds good with the present proceedings. Childcare proceedings have as their object the best interests of the child, and, as McMenamin J. pointed out, different orders may be made as part of a continuum with that object in mind. In the present case, the applicants challenged the decision of the board dated the 25th March, 2015 and were successful in having that decision quashed. The court proceedings were distinct from the proceedings before the board which preceded, and were the subject of the court proceedings, and from the proceedings before the board which will have to (or may already have) take place as a result of the court's decision on the substantive issues. In that context, it seems to be that it does make sense to speak of an "event," which is the quashing of the board's decision of that date.

20. I am conscious that, in accordance with the principles set out in *Re. Worldport Ireland Ltd. (In Liquidation)* [2005] IEHC 189 and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, this Court is bound by previous decisions of the High Court. However, the height of the authority cited to me with regard to the principles to be applied in professional disciplinary appeals to this court were the decision in *T. v. Medical Council* and the decision in *Hermann*. The decision of Kearns P. was an *ex tempore* decision and relied upon an English authority which was subsequently clearly distinguished by the Privy Council in a decision which may not have been brought to the attention of Kearns P. All I have of the *Hermann* costs decision is counsel's note. It seems to me that there is no clearly established practice or firm line of jurisprudence to the effect that costs should not be awarded against a body such as the board in respect of court proceedings successfully brought by way of statutory appeal by a plaintiff. Further, it seems to me that, if the intention of the Oireachtas had been to circumscribe the discretion to award costs in respect of proceedings brought pursuant to s. 39(3) of the Act of 1985 in such a fundamental manner, this would have been explicitly stated in the legislation. As noted above, this consideration was mentioned by the Court of Appeal in the Bourke Waste Management case. Accordingly, it seems to me that the matter falls to be considered in accordance with the usual principles concerning the award of costs in court proceedings.

Application of 'Ordinary' Costs Principles

21. In *Veolia Water U.K. plc. v. Fingal County Council (No. 2)* the High Court (Clarke J., as he then was) said that it was incumbent on a court, at least in complex cases, to give consideration as to whether it was necessary to engage in a more detailed analysis of the precise circumstances giving rise to costs before awarding costs and to attempt to do justice as between the parties by fashioning orders for costs which did more than simply award costs to the winning side. The normal default position should remain that costs follow the event but, in complex cases where the winning party has not succeeded on all issues which were argued before the court, the court should consider whether it was reasonable to assume that the costs of the parties were increased by virtue of the successful party having raised additional issues upon which it was not successful and the court should reflect that fact in its order for costs. He went on to say that the fact that additional unmeritorious issues were raised should only affect costs where the raising of the issues could reasonably be said to have affected the overall costs of the litigation to a material extent. In *Moorview Developments Ltd. v. First Active plc.* [2011] 3 I.R. 615, Clarke J identified the policy of deterrence underlying this approach, in order to prevent parties having what the learned trial judge described as a "free ride" as to how they conduct litigation without there being any real risk of a meaningful costs order being made against them. In *John Ronan & Sons v. Clean Build Ltd* [2011] IEHC 499, the High Court (Clarke J.) summarised the principles he had set out in an earlier case *of A.C.C. Bank plc. v. Johnson* [2011] IEHC 500 as follows:-

> "1. First, in light of O. 99, r. 1(3) of the Rules of the Superior Courts, the overriding principle is that costs follow the event. This in turn begs the question of what precisely is the 'event', which can, itself give rise to difficulties. O. 99, r. 1(4) speaks of the costs of every issue of fact or law following the event. It is, however, in that context, important to make one significant distinction. There is a very great difference between the different elements that go to make up a cause of action, on the one hand, and a series of entirely separate causes of action, potentially dependent on different facts, on the other hand. In between those two extremes, there may well be cases in the penumbra which require the court to identify what the event is or whether there are multiple events and in the case of the latter, then proceed to make any award of costs with reference to each individual 'event'...
>
> 2. Second, the jurisprudence has clearly established that the starting point is that the party who wins the event gets full costs.
>
> 3. Third, the court should consider departing from awarding full costs to the party who wins the event where it is clear that that party, although generally victorious, materially added to the costs of the proceedings by raising additional grounds or arguments which the court found to be unmeritorious. In that context, it is important to emphasise that the exercise is not one of narrowly looking at the amount of time spent on each point, but rather taking a broad view as to whether it can fairly be said that the costs of the proceedings as a whole were materially increased. In that light, the court should make an appropriate order to reflect the fact not just that the winning party should not be awarded costs attributable specifically to an aspect of the case on which that winning party lost, but also to compensate the losing party for the fact that that party's costs has been increased by reason of the raising of the unmeritorious issues concerned. It should also be noted that there can, of course, be other factors that can be relevant to the award of costs. One example, which arose in *A.C.C. Bank plc. v. Johnston*, is the fact of a change in the nature of a claim brought or a defence made (particularly at a late stage by, for example, an amendment to the pleadings) which can lead the court to legitimately question whether in such circumstances costs should fully follow the event.
>
> 4. Fourth, and finally, the substance of the event can be narrowed by a defendant making concessions in its pleadings, by lodgement or by a Calderbank letter (see *Calderbank v. Calderbank* (1978) 3 All E.R. 333)."

22. In *Wright v. Health Services Executive* [2013] IEHC 363, Irvine J. addressed the issue of costs in the context of medical negligence litigation. The plaintiff had brought proceedings against two defendant hospitals in which she had received care, and the proceedings were heard over a period of twenty-one days in the High Court. In her judgment on the substantive proceedings, Irvine J. concluded that both defendants were liable in respect of one aspect of her claims only. This related to the plaintiff's care between four particular dates and it would appear that less than 20% of the twenty-one days of the hearing were spent in dealing with this aspect of the case. At para. 17 of her judgment she summarised the principles which appeared to emerge from the authorities as follows:-

> "(i) The costs of proceedings in any court are ultimately a matter for the discretion of the trial judge.
>
> (ii) In non-complex litigation a successful plaintiff will usually be entitled to an order for the reasonable costs of bringing

their case to court to secure their rights. Similarly, a successful defendant will normally be entitled to an order providing for their reasonable costs of defending the action.

(iii) In complex litigation, where there are several events or relatively discrete issues which have not all been resolved in favour of the party who may be considered to have been the successful party in the overall sense, the court should look with greater scrutiny as to how the costs should be treated.

(iv) Where in complex litigation it can be concluded with some degree of certainty that the trial of any discrete issue of law and/or fact which was not resolved in favour of the successful party had the effect of increasing the costs of the proceedings by extending the duration of the hearing then the court should reflect this fact in its order for costs.

(v) Where in complex litigation the party who is in the overall sense considered to have been the successful party has unsuccessfully litigated an issue requiring evidence to be heard from witnesses directed solely towards that issue, the court should disallow the costs of that party's witnesses and should consider making an order that the party who was successful on the issue be paid their costs which should then be set off against any order for costs made against them.

(vi) In complex litigation the court should seek to fashion an order for costs that will do more than award the costs to the winning side so as to discourage parties from raising additional unmeritorious issues."

23. In comparison to some of the proceedings at issue in the authorities referred to above, the present case was not particularly long or complex. The hearing took six days and proceeded on evidence by way of affidavit. There had been no challenge to the findings of misconduct made by the Fitness to Practice Committee of the board and the proceedings were confined to the sanction imposed; that of erasure from the register of nurses. Essentially there were two broad areas the subject of legal argument. The first was the "quorum" issue and this in turn divided into two sub-issues. The first was, as to whether the board was quorate when it held a meeting to decide on the sanction, which issue involved a net point of statutory interpretation. The second was whether, in the event that that the board was not quorate, whether the plaintiffs were estopped from raising the point in these proceedings because no objection had been made on their behalf at the time. In relation to the first issue, the plaintiffs were successful in persuading the court that upon the proper construction of the relevant legislation, the board was not quorate when it imposed the sanction. However, the plaintiffs were unsuccessful on the second sub-issue as the court found that they were estopped from relying on the point now, having failed to raise an objection at the time of the board hearing. The second broad issue in the case related to the severity of the sanction. A number of different issues were raised on behalf of the plaintiffs in this regard. One of these was the issue of whether there had been delay on the part of the board and/or the Fitness to Practice Committee of the board, and if so whether they should be taken into account when imposing sanction. Another was whether certain particular mitigating factors identified by the Fitness to Practice Committee should have been given greater weight in the decision of the board relating to sanction. The third was an issue primarily relied upon by one of the two plaintiffs, namely Ms. Carroll, which was an argument that the board had erred in the manner in which it dealt with a "dishonesty" dimension to the allegations made against her. The court did not ultimately find in favour of the plaintiff on the latter issue but did accept that the board itself and its legal advisors had created a certain amount of confusion by reason of the manner in which the dishonesty issue had been dealt with in correspondence. The plaintiffs were successful overall with regard to the issue of sanction and the court ultimately quashed the sanction of erasure and remitted the matter to the board by reason of the manner in which the board had addressed the issue of sanction.

24. The issue of estoppel referred to above had also raised in turn a factual issue as to whether a document entitled "Procedures of the Board when considering reports of the Fitness to Practice Committee pursuant to Part V of the Nurses Act 1985" had or had not been sent by the board to the plaintiffs in advance of the board hearing relating to sanction. There was an exchange of affidavits in this regard and having reviewed the evidence, the court ultimately reached the conclusion that the plaintiffs were on notice at least that there was in existence a document setting out the procedures of the board and also that it was likely on the balance of probabilities that the procedures document itself was enclosed with the letter. In my view, this is the only area where one could say that there was unnecessary prolongation of the proceedings by the plaintiffs by reason of the manner in which this particular issue was dealt with. Overall, however, I am not satisfied that the parties on either side unnecessarily prolonged the proceedings or conducted themselves unreasonably.

25. The starting point appears to me to be that the "event" in this case was the granting by the court of the order sought by the plaintiffs; namely, a quashing of the board's decision dated the 25th March, 2015, imposing the sanction of erasure, which outcome was vigorously opposed by the board. Taking all other matters into account, I propose to award 80% of the plaintiff's costs in these proceedings. I do not propose to award the final 20% of costs by reason of the plaintiff's lack of success on the "quorum/estoppel" point and on the point relating to the service of the Procedures document, referred to above.