Neutral Citation No: [2022] NIQB 2	*Ref:*	**ROO11725**
	ICOS No:	**21/39161**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**12/01/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PATRICIA DOWNEY FOR JUDICIAL REVIEW OF THE DECISION OF A CORONER

(DETERMINATION OF COSTS)

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Mr David Heraghty BL (instructed by McCann & McCann, Solicitors) for the applicant
Mr Philip Henry BL (instructed by the Coroner's Office) for the respondent

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ROONEY J

[1] The background to this case is as detailed in the substantive judgment in which I dismissed the applicant's judicial review application challenging the decision of the respondent not to recuse himself from hearing an Inquest. The respondent now seeks his costs.

[2] Order 62, Rule 3(3) of the Rules of the Court of Judicature (NI) 1978 provides as follows:

> "(3) If the court in the exercise of its discretion sees fit to make any Order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other Order should be made as to the whole or any part of the costs."

[3] The general rule is that costs follow the event and that the unsuccessful party will be ordered to pay the costs of the successful party. However, any award of costs is at the discretion of the Judge, provided that the discretion is exercised proportionately and, as emphasised by Carswell LCJ in *Re Kavanagh's Application*

[1997] NI 368, at 382, in accordance with settled principle. In *Ritter v Godfrey* [1920] 2KB 47 at 60, (cited by Carswell LCJ in *Kavanagh*) Atkin LJ stated as follows:

> "In the case of a wholly successful defendant, in my opinion, the Judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) had done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

[4] For the purpose of this application, it is not necessary to set out an exhaustive list of possible orders which the court may make in the exercise of its discretion. A decision on costs will depend upon the facts of each individual case. The court will have regard to all the circumstances, to include, inter alia, the conduct of the parties before and during the conduct of the proceedings; the extent to which the parties followed the pre-action protocol ("PAP"); whether it was reasonable for a party to raise, pursue, or contest a particular issue and the specific purpose of bringing the judicial review proceedings.

Summary of the Background Facts

[5] The applicant is the mother and next of kin of Michelle Downey ("the deceased"). The respondent was assigned to hear the Inquest into the death of the deceased. An issue arose during the course of preliminary hearings as to whether the Inquest engaged Article 2 ECHR. The respondent stated that it was his preliminary view that it was not an Article 2 ECHR Inquest, but that he would receive submissions on the issue. However, correspondence sent by the respondent to Legal Services Agency (LSA), which was subsequently forwarded to the applicant, specifically stated without qualification that the respondent did not believe Article 2 was engaged. In consequence, the applicant alleged the respondent had demonstrated actual or apparent bias to the extent that the respondent had predetermined the Article 2 ECHR issue and closed his mind without any consideration of competing arguments or submissions.

[6] The applicant's solicitors sent a letter dated 22 December 2020 to the respondent outlining their concerns arising from the respondent's said responses to the correspondence from the LSA and requested him to convene a hearing.

[7] At a hearing on 19 February 2021, the applicant's counsel asked the respondent to recuse himself. The applicant contends that during the course of the said hearing the respondent made a decision not to recuse himself and indicated that he would provide written reasons. The respondent disputes that he reached a decision on recusal on this date and indicated he would provide written reasons some weeks later. In the context of the disputed background, one matter is clear, namely that the respondent did not provide a written decision within a short period

after the hearing. Rather, his written decision was not delivered until after the PAP letter dated 16 April 2021.

[8] The applicant's PAP letter dated 16 April 2021 stated as follows:

> "On 19 February 2021 the Coroner convened a Pre Inquest Review at which all submissions were made. During the course of that hearing the Coroner indicated that he would not be recusing himself. The Coroner agreed to provide written reasons for this decision and the same are outstanding. The applicant wished to consider those reasons before proceeding to the issuing of a Pre Action letter. However, given that a three month time limit applies to instituting of judicial review proceedings, it is considered appropriate to take this Pre Action Protocol step at this stage."

[9] On 23 April 2021 the respondent provided a written decision refusing the recusal application. In a postscript attached to the decision, the respondent stated that he was surprised to receive the PAP letter before he had an opportunity to deliver his decision. It is noteworthy that this court was not advised of any correspondence from the respondent to the applicant's solicitors prior to the PAP letter explaining that there would be a delay in providing his written decision and specifically the date when the decision would be delivered.

[10] In contravention of the Judicial Review Practice Direction 3/2018 (hereinafter 'the Practice Direction'), the respondent failed to provide a PAP response within twenty-one days or indeed at all. It is significant that the respondent did not send an interim reply or request a reasonable extension. Appendix 1, para 1 of the said Practice Direction provides:

> "Strict compliance with the Pre-Action Protocol ("PAP") is required in all but the most exceptional of cases."

[11] The Order 53 Sstatement and an affidavit from the applicant dated 17 May 2021 was served on the court. On 26 May 2021, Mr Justice Scoffield granted leave. The Learned Judge made specific reference to the fact that, apart from the respondent's written decision, there had been no response on his behalf to the pre action correspondence.

[12] This court ordered that the respondent file an affidavit on or before 6 August 2021. The respondent failed to comply with this order. On 11 August 2021, an unsworn affidavit was served on the applicant. The respondent's sworn affidavit was not served until 17 September 2021. An exhibit was attached to sworn affidavit which had not been appended to the previous unsworn affidavit.

[13] Para 6, Part A (PAP) of the Practice Direction states that:

> "any failure to comply properly with the PAP may have (*inter alia)* adverse cost implications for the defaulting party or its representatives."

[14] The respondent's Counsel argues that the respondent's failure to comply with the PAP did not result in any prejudice. That is a matter for debate. The problem remains that the applicant was never provided with any form of response to its pre action correspondence. As stated by the Court of Appeal in *R (on the application of M) v Croydon LBC* [2012] EWCA 595:

> "[45] Further, the parties' conduct is a relevant matter, as CPR 44.3(4) provides, so that failure to adhere to the provisions of any relevant protocol may well affect any decision the court makes on costs."

[15] The respondent also failed to comply with an order of the court. Again, the respondent argues that this did not cause any prejudice. The fact of the matter is that the respondent and/or his Office, in contravention of a court order, failed to serve a sworn affidavit until six weeks after the said order. No application was made by the respondent to the court to vary or seek an extension for the submission of the affidavit.

[16] I refer to para [73] of my decision:

> "[73] The respondent's response to the LSA questionnaire, without qualification, that *"this is not an Article 2 ECHR inquest"* clearly raises a real possibility of bias in the form of predetermination on the respondent. The applicant and her legal advisers were justifiably entitled to take this view. The respondent himself acknowledged that "*the wording in [his] response to LSA at Part 2(c) could be read as though [his] mind was made up on the Article 2 issue*." The respondent's said response plainly raises pertinent questions as to the critical issue, namely, whether a fair minded and informed observer, having considered the relevant facts, will conclude that there exists a real possibility that the respondent was bias in that he had already closed his mind on the Article 2 issue."(Emphasis added)

[17] It is clear that the central issue in this case, namely the appearance of bias on the part of the respondent, was legitimately raised by the applicant. The respondent himself, albeit after a prolonged period of time, acknowledged that his response to the LSA questionnaire could reasonably and justifiably lead to an interpretation that he was guilty of predetermination. Accordingly, adopting the dicta of Lord Atkin in *Ritter* (see para 4 above), the respondent "has done something connected with the institution or the conduct of the suit" and indeed the respondent's conduct brought about the litigation.

[18] At para [79] of my judgment, I indicated this was not a straightforward decision and that I had significant concerns that the respondent had predetermined the issue and should have recused himself. On balance, after much deliberation, I gave the respondent the benefit of the doubt.

[19] In his decision to make an application for costs, the court is bound to observe that the respondent does not seem to have taken fully into consideration para [73] of the judgment. In summary, this was a meritorious application stimulated by the respondent's acknowledged poor choice of words in his response to the LSA questionnaire. The respondent accepted in his affidavit that his response could be interpreted as suggesting that he has guilty of predetermination. The proceedings were properly brought. In these circumstances I am satisfied that the first of Atkin LJ's three exceptions to the general rule (above) applies fully.

[20] Furthermore, the pre–proceedings situation created by the respondent was both perpetuated and exacerbated by his failure to reply to the PAP letter. The respondent has further failed in a timely and appropriate manner to provide any reasonable explanation for this failure. Furthermore, and again without any explanation, the respondent failed to comply with the Practice Direction and also an order of this court. These multiple failures on the part of a public authority in public law proceedings are a matter of serious concern. They have obvious relevance to how this court should exercise its discretion regarding costs. They are matters of considerable substance. Even if the suggestion that there was no consequential prejudice to the applicant is sustainable, which the court doubts, this qualifies as a factor of minimal weight at most.

[21] On the two grounds elaborated in paras [19] and [20] above, either of which in my view would suffice, there will be no order as to costs inter - partes.