

**THE HIGH COURT**

[2022] IEHC 77

[2017 No. 387 MCA]

**IN THE MATTER OF THE CENTRAL BANK ACT 1942 (AS AMENDED) AND IN  
THE MATTER OF PART VIII B THEREOF AND IN THE MATTER OF AN  
APPEAL PURSUANT TO SECTION 57CL THEREOF**

**BETWEEN:**

**JOHN BILLANE AND DEIRDRE BILLANE**

**APPELLANTS**

**– AND –**

**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**RESPONDENT**

**– AND –**

**RSA INSURANCE IRELAND LIMITED (2)**

**NOTICE PARTY**

**JUDGMENT of Mr Justice Max Barrett delivered on 9<sup>th</sup> February, 2022.**

**SUMMARY**

*This is an application for costs following a failed appeal against a decision of the respondent. For the reasons set out hereafter, the court makes an order for costs in favour of the respondent but makes no order for costs as regards the notice-party.*

1. This is an application for costs following on the court's judgment of 23<sup>rd</sup> November 2021.
2. The court respectfully adopts the respondent's summary of applicable law, at paras. 2-3 of the respondent's written submissions on the issue of costs, viz:

*“2. The principles governing the Court's discretion with respect to the issue of costs, following the commencement of ss. 168 and 169 of the Legal Services Regulation Act 2015 and the recasting of Order 99 of the Rules of the Superior Courts, were considered by the Court of Appeal in Chubb European Group SE v The Health Insurance Authority [2020] IECA 183. As relevant here, s. 169(1) of the Legal Services Regulation Act 2015 provides:*

*‘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...’ (our emphasis)*

3. In Chubb, Murray J summarised the general principles that apply when considering liability for the costs incurred in proceedings as a whole as follows:

- (a) *The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).*
- (b) *In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s.169(1) (O.9, r.3(1)).*
- (c) *In a case where the party seeking costs has been 'entirely successful in those proceedings', the party so succeeding 'is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).*
- (d) *In determining whether to 'order otherwise' the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s.169(1)).*
- (e) *Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).*
- (f) *The Court, in the exercise of its discretion may also make an order that where a party is 'partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).*
- (g) *Even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).\**
- (h) *In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a))."*

\* I.e. "(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.”*

3. The foregoing account of applicable law suffices to deal with this costs application.

4. The court has considered the entirety of the submissions made by the parties. In treating with the issue of costs, it has been particularly alive to the following factors:

– the applicants were at all times dealing as consumers (though as against this, in bringing the within application they were consumers acting with the benefit of legal advice).

– the applicants have been left in a position where they cannot obtain home insurance as a result of having had a claim declined on the grounds of material non-disclosure, notwithstanding the decision of the respondent that there was no deliberate concealment or misrepresentation as to facts.

– notwithstanding the court’s rejection of the OTC dimension of the applicants’ contentions, it was accepted by the respondent that the issue had not been determined by it, which made this a reasonable ground on which to bring an appeal, albeit one that floundered on the fact that the contract in issue was not *Aro Road*-style OTC insurance (and, it might also be noted, many arguable/reasonable appeals are brought to the courts, one side loses, and what might be described as ‘standard’ orders for costs, pursuant to which the losing party pays, nonetheless issue).

– the court was struck throughout these proceedings as to how the sale and substance of a relatively simple insurance product was transmuted by RSA into a quite complex process coupled with an abundance of documentation. It is unsurprising that confusion and dispute should have arisen where the Billanes were confronted with a relatively complex process and an abundance of documentation that is notably dense.

– as regards the behaviour of RSA only, the court notes the decidedly less than impressive behaviour of RSA as regards making the discovery ordered by the court, compounded by the fact that (quite remarkably) a motion seeking attachment and committal was ultimately required in order to procure compliance with the court’s order for discovery.

– though it is perhaps a difficult ‘call’ for a notice party in proceedings such as the within, the court ultimately does not consider that anything was achieved by RSA’s electing to participate actively in the within proceedings instead of leaving matters to the respondent.

**5.** Notwithstanding the points made in para.4, the court does not see that the respondent falls in any way to be criticised. It did its job, did it right, legitimately resisted the criticisms made by the Billanes of its actions, and triumphed in court. Thus the court cannot but see that an order for costs should be made in favour of the respondent. Having regard to the points made in para.4, the court considers that this is a case in which no order for costs should be made in favour of RSA.

**6.** By way of *obiter* observation, it is to be hoped that, in the future (it did not apply here), insurers will take s.8 of the Consumer Insurance Contracts Act 2019 to heart when it comes to

drafting consumer insurance documentation. The requirements of s.8 are rigorous and will doubtless be applied scrupulously by the courts.

**TO MR AND MRS BILLANE:  
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

*Dear Mr and Mrs Billane*

*As you know, both the Ombudsman and RSA have asked, following on my judgment of last November, that you should pay their legal costs. In the previous few pages I have set out in 'lawyer's language' what I have decided. However, I am always concerned that consumers should be told in plain language what I have decided in a judgment that affects them. That is why I have added this 'plain English' note to you. Everyone else in the case will get to read it, but really it is written for you. The other parties are well-used to legal language and so will be well able to understand my judgment without any need for 'translation' into plain English.*

*Because lawyers like to argue over things, I should add that this note, though a part of my judgment, is not a substitute for the detailed text of my judgment in the previous few pages. It seeks merely to help you understand what I have decided in what are your proceedings.*

*As mentioned in my judgment of last November, I do not see any error to present in the reasoning or actions of the Ombudsman. As a result, my sense is that you should pay the legal costs of the Ombudsman. I take a different view as regards RSA and have identified various reasons in my judgment why I consider that you should not pay the legal costs of RSA.*

*Your lawyers will be able to explain my reasoning in more detail.*

*Yours sincerely*

*Max Barrett (Judge)*