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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION (JUDICIAL REVIEW)

Between:

BRONAGH BOWDEN AS PERSONAL REPRESENTATIVE
OF LIAM HOLDEN (DECEASED)

Appellant

and

DEPARTMENT OF JUSTICE

Respondent

AND IN THE MATTER OF AN APPLICATION BY BRONAGH BOWDEN AS PERSONAL REPRESENTATIVE OF LIAM HOLDEN (DECEASED) FOR JUDICIAL REVIEW

Mr Desmond Hutton KC (instructed by Harte Coyle Collins Solicitors) for the Appellant
Mr Tony McGleenan KC and Philip McAteer (instructed by Departmental Solicitor's Office) for the Respondent
Mr Andrew McGuinness (instructed by the Ministry of Defence) as a Notice Party

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Before: Keegan LCJ, Horner LJ and Humphreys J

KEEGAN LCJ *(delivering the judgment of the court)*

Introduction

[1] This appeal relates to a claim for miscarriage of justice and concerns the simple issue whether legal costs should be paid to the appellant's solicitors under the statutory scheme. There is both an appeal and a cross-appeal from the decision of temporary High Court Judge Simpson (hereinafter referred to as "the judge") wherein he refused the appellant's judicial review of the decision not to pay legal costs having

found that the judicial review was within time and made no order for costs between the parties.

[2] The original applicant to these proceedings, Liam Holden, has died since the commencement of these proceedings. Therefore, the proceedings were continued by his personal representative Ms Bronagh Bowden.

[3] The case arises as on 23 March 2017, the appellant accepted an award of the statutory maximum compensation of £1 million under section 133 of the Criminal Justice Act 1988 ("the 1988 Act"). This award represented full and final settlement of the appellant's application with the respondent for compensation for a miscarriage of justice. Subsequently, the independent assessor ("IA") assessed the appellant's reasonable legal and other expenses incurred by the application as £120,171.12. The respondent declined to pay these costs.

[4] Judicial review proceedings ensued and on 12 September 2023, the judge dismissed the application for judicial review. The judge concluded that, on a proper interpretation of the statute, there is no power to pay costs over and above the statutory maximum compensation figure.

[5] On 24 October 2023 the appellant lodged an application to appeal the decision of the judge. The appellant submitted four substantive grounds of appeal all relating to the finding that the legislation did not permit payment in respect of legal costs over the statutory maximum of £1 million.

[6] On 17 January 2024 the respondent gave notice to cross-appeal the decision of the judge made on 12 September 2023 and his order (re costs) dated 9 January 2024. The grounds of cross-appeal submit that the judge erred in failing to find the appellant's application was lodged out of time and erred in failing to order the appellant to pay the respondent's costs of the application on dismissing the application.

[7] The appellant also sued for the shortfall in compensation given the statutory cap and was successful in obtaining a further £350,000 in damages (£250,000 special loss and £100,000 for general and aggravated damages) against the Ministry of Defence ("MOD"), for the reasons set out in a reported decision, *Holden v The Ministry of Defence and the Chief Constable of the PSNI* [2023] NIKB 39.

Grounds of appeal

[8] The appellant's grounds of appeal are that the judge erred as follows:

(a) In failing to find unlawful the decision communicated to the appellant by the respondent on 3 May 2018 by which the respondent refused to pay the appellant's costs relating to his application for compensation for miscarriage of justice ("the impugned decision").

(b) In failing to find the impugned decision and the respondent's interpretation of section 133(4A) and section 133A(5) of the 1988 Act were misdirected and unreasonable on grounds that:

   (i) They undermine the expressed statutory intent of the compensation scheme to the effect that a deserving applicant should receive *restitutio in integrum* subject to the defined statutory maxima. By virtue of the impugned decision, a deserving applicant will never in fact receive the statutory maximum of compensation but will only ever receive the statutory maximum minus the costs.

   (ii) Related to (i) above, the impugned decision means deserving applicants will receive a figure less than that considered appropriate to afford them full compensation in accordance with the scheme.

   (iii) The impugned decision and legislative interpretation fail to accord with the legislative purpose and fail to avoid undesirable or absurd adverse consequences.

(c) In failing to find an alternate, proper, remedial and/or updating construction of the relevant statutory provisions is required so as to clarify that deserving applicants whose compensation is assessed as being higher than the defined statutory maximum under section 133(4A) and section 133A(5) of the 1988 Act are entitled to payment of their necessary, reasonable and proportionate costs relating to their application for compensation on the grounds that:

   (i) Legal representation is clearly necessary to an applicant seeking compensation under section 133 of the 1988 Act.

   (ii) Forensic accountancy and other expertise is also necessary for applicants seeking to quantify their losses in such an application.

   (iii) Not providing for the payment of the necessarily incurred expenses of such experts and legal representatives would impose an inequitable and unjust burden on deserving applicants which suffers from all the defaults referred to in para (b) above.

   (iv) Power to pay or provide for costs can be found or inferred by necessary implication from the power to pay compensation in the first place in accordance with the legal maxim translated as 'where anything is granted, that is also granted without which the thing itself is not able to exist.'

(d) In respect of ground (c)(iv) above, the judge erred specifically in finding that one cannot infer, by necessary implication, into the relevant statutory

provisions the power to pay costs over and above the maximum compensation figure.

[9] The respondent's grounds of cross-appeal are, that the judge erred in:

(a) Failing to conclude the appellant's application for leave to apply for judicial review was out of time, that time ought not to have been extended to bring the application and that leave should therefore have been refused on the ground of delay in particular in circumstances which:

(i) The appellant knew the respondent's position in all material respects following receipt of its letter of 22 March 2017 and indeed signed an acknowledgement of those matters on 23 March 2017. Proceedings ought to have been issued within three months of that date.

(ii) Proceedings did not issue until 3 August 2018.

(iii) The judge erred in concluding the date of the impugned decision was 3 May 2018, that being the wrong test to apply in law and in any event, the wrong conclusion.

(iv) The application was exceedingly late, there was no good reason to extend time, and none was identified by the court.

(b) Failing to order that the appellant pay the respondent's costs of the application on dismissing the application particularly in circumstances in which:

(i) The presumptive principle is that costs will follow the event and there was no basis upon which to depart from the usual practice in this instance.

(ii) The appellant failed in his application and the respondent has succeeded in defending it.

(iii) The original appellant knew what the arguments were long before proceedings issued, and the arguments did not change. The appellant elected to take the risk of issuing and pursuing proceedings in full knowledge of the parties' respective positions and the costs risks.

(iv) The court took into account immaterial considerations in its costs decision, namely that this was the first case in which the issue was raised and that the respondent now had the advantage of judicial guidance.

(v) The court erred in taking into account, and or the weight given to, the fact of the assessment exercise at para [12] of the decision.

Factual Background

[10] The factual background is not in dispute and so we refer to it in summary only as follows. In 1973 the original appellant was convicted of the (then) capital offence of murder and was sentenced to death; the sentence was later commuted to one of life imprisonment. In 1989, after serving 17 years in custody (1972-1989), the appellant was released on life licence. In June 2012 the conviction was quashed by the Court of Appeal.

[11] On 12 February 2014, the appellant lodged an application for compensation for a miscarriage of justice pursuant to the provisions of section 133 of the 1988 Act. By letter dated 12 November 2015 the Department of Justice indicated that the appellant was entitled to compensation under the 1988 Act and enclosed a guidance document entitled "Notes for successful applicants." This document stated, *inter alia,* "all legal costs are only payable as part of any payment up to the appropriate compensation limit", the appropriate compensation limit being £1 million.

[12] An independent assessor, then Kevin Rooney QC determined that the total amount of compensation for pecuniary and non-pecuniary loss was £1,182,166. However, since the provisions of the 1988 Act restricted the maximum award of compensation to £1 million, the appellant received the statutory maximum. On 22 March 2017 the respondent issued a letter of offer to the appellant inviting him to accept the statutory maximum compensation of £1 million. The correspondence noted that the IA was working on a separate assessment of reasonable legal costs and other outlays. The letter noted "the maximum compensation that can be awarded (including outstanding legal costs) is £1,000,000."

[13] The appellant, if content to accept the payment, was to sign the document (and did sign the document on 23 March 2017), which read as follows (as material):

> "I, William Holden, accept £1,000,000 in full and final settlement of my application with the Department of Justice for compensation for a miscarriage of justice under section 133 of the Criminal Justice Act 1988 …"

[14] Subsequently the IA assessed the necessary, reasonable and proportionate legal costs and expenses incurred by the appellant in the sum of £120,171.12.

[15] The respondent has refused to pay these costs. In an email of 3 May 2018, containing what the appellant submits is the impugned decision, the respondent said, in response to a request for the payment of the costs:

> "Please note as previous correspondence has highlighted, section 133A(5) of the Criminal Justice Act 1988 (as amended) applies in this case. As such your client has

already received the maximum compensation that can be awarded."

Relevant Legislation

[16] Sections 133 to 133B of the 1988 Act apply. The relevant portions read as follows:

"**133. Compensation for miscarriages of justice**

(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to, his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.

(2AA)…

(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(4) If the Secretary of State determines that there is a right to such compensation the amount of the compensation shall be assessed by an assessor appointed by Secretary of State.

(4A) In assessing so much of any compensation payable under this section to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the assessor shall have regard in particular to—

(a) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction;

(aa) the seriousness of the offence with which the person was charged or detained (but in respect of which offence the person was not convicted);

(b) the conduct of the investigation and prosecution of the offence; and

(c) any other convictions of the person and any punishment resulting from them.

(5) …

133A. Miscarriages of justice: amount of compensation

(1) This section applies where an assessor is required to assess the amount of compensation payable to or in respect of a person under section 133 for a miscarriage of justice.

(2) …

(5) The total amount of compensation payable to or in respect of a person under section 133 for a particular miscarriage of justice must not exceed the overall compensation limit. That limit is—

(a) £1 million in a case to which section 133B applies, and

(b) £500,000 in any other case.

(6) …

133B. Cases where person has been detained for at least 10 years

(1) For the purposes of section 133A(5) this section applies to any case where the person concerned ("P") has been in qualifying detention for a period (or total period) of at least 10 years by the time when—

(a) the conviction is reversed, or

(b) the pardon is given, as mentioned in section 133(1).

(2) P was "in qualifying detention" at any time when P was detained in a prison, a hospital or at any other place, if P was so detained—

(a) by virtue of a sentence passed in respect of the relevant offence,

(b) under mental health legislation by reason of P's conviction of that offence (disregarding any conditions other than the fact of the conviction that had to be fulfilled in order for P to be so detained), or

(c) as a result of P's having been remanded in custody in connection with the relevant offence or with any other offence the charge for which was founded on the same facts or evidence as that for the relevant offence.

…"

The judgment at first instance

[17] The judge issued two judgments, the first dismissing the judicial review and the second dealing with costs. The substantive judgment is reported at [2023] NIKB 89 and the costs ruling is dated 5 January 2024. In summary, the judge found as follows:

(a) There is no definition of "compensation" in the 1988 Act (at para [47] of the substantive judgment).

(b) There is no reference to costs or payment of costs in the 1988 Act. It is noteworthy that the Criminal Injuries (Compensation) (NI) Order 1988 both defines compensation (article 2) and makes provision in relation to costs (article 13). The judge opined, for there to be a liability in costs, there must be a basis for a court or tribunal to award costs (at paras [48] to [53] of the substantive judgment).

(c) A draft amendment was amended to remove references to costs and insert section 133A (at para [55] of the substantive judgment).

(d) On a proper reading of the 1988 Act, the £1 million awarded was the statutory maximum compensation award and must include the costs incurred during the making of the application. There is no relevant statutory provision permitting payment of costs over and above the compensation payment (at para [56] of the substantive judgment).

(e) The judge was satisfied that part of the purpose behind the amendments to the 1988 Act was to apply a cap to the payment of all moneys to an applicant to include costs (at para [56] of the substantive judgment).

(f) Not to pay costs over and above the 'compensation' does not result in absurdity but produces the outcome intended by the legislature. The legal maxim *restitutio in integrum* does not assist because the statutory cap means an applicant whose compensation is assessed at over £1 million (as in this case) will not be fully compensated, and there can never be *restitutio in integrum* for such an applicant (at para [59] of the substantive judgment).

(g) The legal maxim translated as 'where anything is granted, that is also granted without which the thing itself is not able to exist' does not mean the court can or should infer that costs are payable over and above the statutory maximum for compensation. Both parties were aware at all times that the application would involve costs (at para [62] of the substantive judgment).

(h) Following the compensation award of the statutory maximum of £1 million the IA went on to assess the reasonable costs with the encouragement, or at least, acquiescence of the respondent. The respondent knew it would not pay these costs. The appellant's solicitors believed the costs would be paid. This exercise relating to costs was futile and unnecessary and incurred additional expenditure (at para [64] of the substantive judgment).

(i) Nonetheless, on a proper interpretation of the statute, there is no power to pay costs over and above the maximum compensation figure (at para [65] of the substantive judgment).

(j) The application is not out of time as the date of the impugned decision is 3 May 2018; that is the date the appellant discovered the respondent would not pay the costs. The judge rejected the submission that the date of the impugned decision was 23 March 2017, that is the date the compensation of the maximum £1 million was accepted (at para [70] of the substantive judgment).

Consideration

[18] This case is primarily concerned with a question of statutory interpretation in relation to sections 133 and 133A of the 1988 Act. Thus, at the outset, it is apt to remind ourselves of what the Supreme Court said in *Re R & Re O v Secretary of State for Home Department* [2022] UKSC 3.

[19] Paras [29]-[31] of the judgment delivered by Lord Hodge refer as follows:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke*

Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:

> 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'

(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

> 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the

> meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.
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> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:
>
>> 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

[20] In *R (Bhatt Murphy (a firm) and Others) v Independent Assessor; R (Niazi and Others) v Secretary of State* [2008] EWCA Civ 755 the appellants challenged the respondents' decision to withdraw the discretionary scheme to compensate victims of miscarriages of justice and to reduce the level of costs payable to solicitors acting in such cases on grounds which included failure to consult. The Court of Appeal found the impugned decisions did not breach the doctrine of legitimate expectation. The following paras of the judgment relate to compensation and costs generally albeit by passing reference in para [8] as follows:

> "The Independent Assessor fixed the level of compensation under both schemes, including sums in respect of claimants' legal costs. Under the statutory scheme this was (and is) on the footing that the phrase "the amount of the compensation" in s.133(4) of the 1988 Act is apt to include costs."

[21] Mr Hutton, on behalf of the appellant, submitted that it is unclear and unlikely that Parliament would have intended the word "compensation" to include the associated costs of obtaining that compensation when enacting the 1988 Act and the subsequent amendments in 2008. He maintained that such an interpretation goes against the ordinary, everyday meaning of the word. In this regard he relied on *Halsbury's Laws* which notes that "Costs are on principle kept distinct from damages." Thus, the appellant's argument was it is unlikely that when Parliament capped compensation under the 1988 Act it was capping both the recovery of compensation for damage and associated costs. Further, Mr Hutton submitted that such an interpretation undermines the statutory intention that a deserving applicant should receive *restitutio in integrum* and results in an absurd outcome.

[22] Mr Hutton also maintained that the judge erred in finding it significant that costs are not referenced in the 1988 Act and that he erred in finding it relevant that the Criminal Injuries (Compensation) (NI) Order 1988 both defines compensation (article 2) and makes provision in relation to costs (Article 13). Also, the claim was made that the judge erroneously relied upon affidavit evidence of Ms Nicholson on behalf of the respondent for the purpose of discerning Parliamentary intent when the evidence was inadmissible for such a purpose; see *Bennion on Statutory Interpretation* section 24.2 and 24.10.

[23] Finally the appellant submitted that fresh evidence in the form of Rooney J's decision in *Holden v The Ministry of Defence and the Chief Constable of the PSNI* [2023] NIKB 39 is of assistance in the index matter. Rooney J considered that compensation under section 133 of the 1988 Act did not include costs.

[24] In reply, Mr McGleenan made the simple case that whatever is paid under section 133 of the 1988 Act, it cannot exceed the statutory maximum of £1 million. He also submitted that if costs are payable separately under a statutory scheme, then specific provision must be made, see Article 13 of the Criminal Injuries (Compensation) (NI) Order 1988. Thus, the respondent submitted that, given there is no such provision in the 1988 Act the alternative options are: (a) there is no power to make any payment in respect of costs; or (b) legal costs form part of the pecuniary loss suffered by an applicant in respect of the miscarriage of justice and are therefore payable within the limit.

[25] The respondent submitted the *Bhatt & Niazi* case reflects that there was a clear policy decision that compensation includes costs, and that case proceeded on the basis

that the effect of the amendments made to the 1988 Act in 2008 was to limit the costs payable by including them within the amount of (capped) compensation payable.

[26] In reply to the appellant's submissions that the correct interpretation of the 1988 Act permits payment of costs outside the award of compensation, the respondent stated that this represents an impermissible attempt to re-write primary legislation. Mr McGleenan submitted that the absence of express provision for the payment of costs is not accidental, but a policy objective as supported by the written ministerial statement by Charles Clarke, Home Secretary on 19 April 2006. Further, he pointed out that the 2014 guidance supports the respondent's interpretation of the 1988 Act as amended wherein it states:

> "All legal costs are only payable as part of any payment up to the appropriate compensation limit."

[27] We have considered the competing arguments summarised above. Having done so we first record how unsatisfactory the trajectory of this case was in certain respects. Specifically, after the IA had decided the amount of compensation, the respondent did not object to a further process of costs assessment which engaged both parties and the IA. This process was entirely unnecessary if the statutory cap is applied. We have received no satisfactory explanation as to why this exercise was undertaken if costs were never going to be paid by the respondent. The result is that the appellant and the solicitors can justifiably feel aggrieved that costs were not paid.

[28] However, that is not the end of the matter because there must be legal authority to pay costs under the statutory scheme. Mr Hutton submitted that there is an implied power and relies on the fact that costs are routinely paid in cases which fall below the statutory cap. This is a sustainable argument. However, it does not solve the issue we have to deal with which arises when the final amount to be paid goes over the cap (in this case £1 million). If that circumstance arises the legislation does clearly prevent any further payment. The respondent could as an expression of goodwill pay the costs in this case given the tenable view that the taxation process was entered into with the expectation that costs would follow. This course would set no precedent given the unique circumstances of this case. However, the respondent is not legally obliged to do so based on the statutory provisions discussed above which contain a statutory cap. Payment of any amount above that would require statutory amendment. Thus, it follows that the respondent's argument is legally correct.

[29] Furthermore we agree with the judge that not to pay costs over and above the "compensation" does not result in absurdity but produces the outcome intended by the legislature. The legal maxim *restitutio in integrum* does not assist because the statutory cap means an applicant whose compensation is assessed at over £1 million (as in this case) will not be fully compensated, there can never be *restitutio in integrum* for such an applicant. We recognise that this does have the effect that an applicant who achieves the most after assessment of a claim is penalised. However, that is what the legislature determined by way of the cap, and we cannot rewrite the law.

[30] The civil claim which followed the compensation claim does not provide an answer either in favour of the appellant given the difference between a claim based on statute and one grounded in tort. Also, the reference in *Halsbury's Laws* relied upon by the appellant clearly arises in a different context where courts hold a power to award costs to successful parties before them.

[31] Overall, we accept that there is an implied power to make a payment in respect of costs with the statutory scheme. That has been the practice in cases of this nature but is subject to the statutory cap. This position is endorsed by the guidance we have referred to which places legal costs within the pecuniary loss suffered by an applicant in respect of any miscarriage of justice and therefore payable within the limit. Nothing we say in this judgment should change that practice. We, therefore, affirm the judge's findings in all material respects.

[32] We depart from the judge as regards only one matter although this does not invalidate the substantive decision that was made. We consider that the judge has fallen into error, at paras [28] to [30] and [55] of the judgment where he considered an earlier draft of the provision that would become section 133A of the 1988 Act. *Bennion* at para 24.2 provides:

> "An overarching principle running through the case law is that material ought not to be admitted as an aid to construction unless it is publicly available."

[33] As became apparent during argument in this court, it is not clear that this earlier version of the provision was publicly available. In our view, the Explanatory Notes and extracts from the second reading of the Bill indicate this earlier version of the draft was not the one considered by Parliament or publicly available. Therefore, this is not material which should have been relied upon in this case. There is also limited assistance to be gained from the Home Secretary's statement referred to at para [28] herein given that it was two years before the introduction of the legislation at issue. Given what we have said there is a lesson to be learnt in terms of good practice in judicial review.

[34] Dealing with the cross-appeal, we are sympathetic to Mr Hutton's argument that the notice of counter-appeal is itself out of time. However, we do not need to form a conclusive view on this as we find the purported cross-appeal totally without merit in substance. The request for the respondent to pay costs on 3 May 2018 is the significant point when the "grounds for the application first arose" as per Order 53 rule 4(1) of the Rules of the Court of Judicature (NI) 1980. The correspondence referenced before that date was ambiguous and uncertain. We also agree with Mr Hutton that had this been an appeal on costs only, it required leave of the judge (which is absent in this case) pursuant to section 35(2)(f) of the Judicature Act (NI) 1978 ("the Judicature Act"). In such circumstances leave cannot be provided by the Court of Appeal.

[35] Finally, in relation to the cost's argument, section 59 of the Judicature Act provides that costs incurred in High Court proceedings are at the discretion of the court. Whilst the court has this discretion, Order 62 rule 3(3) of the Rules of the Court of Judicature (NI) 1980 states the default position that costs follow the event except where the court considers there are circumstances that some other order should be made. There were clearly exceptional circumstances in play in this case as the court was considering a novel question of statutory interpretation. Thus, we consider that the judge's exercise of discretion on costs cannot be faulted and so we uphold his decision.

Conclusion

[36] Accordingly, we dismiss the appeal and dismiss the issues raised in the respondent's notice by way of cross appeal. We will hear the parties as to the costs of this appeal.