THE HIGH COURT

2023 No. 163 MCA

IN THE MATTER OF AN ARBITRATION BETWEEN PRINCIPAL CONTRACTORS LIMITED AND WESLEY CARTER AND IN THE MATTER OF THE ARBITRATION ACT 2010

BETWEEN

PRINCIPAL CONTRACTORS LIMITED

APPLICANT

AND

WESLEY CARTER

RESPONDENT

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 21st June, 2024

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1. Introduction

1. In this judgment I determine an application by the applicant, Principal Contractors Limited, to enforce an award made by an arbitrator on 7th June 2019, against the respondent, Wesley Carter, in a domestic arbitration between the applicant and the respondent. The award of 7th June 2019 was solely directed to the costs, fees, and expenses of the arbitrator, which the arbitrator directed be paid by the respondent in accordance with the terms of a settlement agreement made between the applicant and the respondent.

2. The applicant brought its application to enforce the award pursuant to s. 23(1) of the Arbitration Act 2010 (the "2010 Act"). The applicant produced what, on the face of it, is a valid award made by the arbitrator which has not been set aside by a court under Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "Model Law"). Notwithstanding the award's apparent validity, the respondent sought to resist its enforcement on a number of different grounds. The primary ground on which he sought to rely was the alleged refusal by the arbitrator to accede to his request, under s. 21(4) of the 2010 Act, to refer her costs, fees, and expenses for "*taxation*" (now called adjudication) by a "*Taxing Master*" (now a Legal Costs Adjudicator).

3. For the detailed reasons set out in this judgment, I am not satisfied that the respondent has advanced any good defence to the enforcement of the award. The position is as follows: First, there is a valid award which has not been the subject of a set-aside application under Article 34 and has, accordingly, not been set aside. The award is, therefore, enforceable under s. 23 of the 2010 Act. Second, no request was, in fact, made by the respondent to the arbitrator to make an order referring the issue of her costs, fees and expenses to a Legal Costs Adjudicator in accordance with the provisions

of s. 21(4) of the 2010 Act. In that respect, I reject, in particular, the respondent's contention that a letter dated 21st August 2019 from his solicitors to the arbitrator constituted a valid request to the arbitrator to refer those costs for adjudication by a Legal Costs Adjudicator for the purposes of s. 21(4). In fact, none of the letters relied upon by the respondent amount to a valid request under that provision. Third, the time for making a request under s. 21(4) expired, at the latest, 21 working days from 21st August 2019, when the parties received from the arbitrator the full details of her costs. The respondent did not make the requisite request for a reference to adjudication within that time period, or at all.

4. I am satisfied, therefore, that the respondent has no valid defence to the applicant's application to enforce the award. I will, therefore, give the applicant leave to enforce the award and will enter judgment in the terms of the award, being the figure of €40,224.10. I will award interest on that figure at the statutory rate, but, in light of the substantial delay on the part of the applicant in seeking enforcement of the award in circumstances where it was made available to the parties on 19th August 2019, but the applicant did not bring an application to enforce the award until 2nd June 2023, the interest will accrue from 2nd June 2023.

2. Relevant Factual Background

5. The respondent engaged the applicant to carry out certain construction works consisting of conservation and upgrading works to the respondent's home in Co. Kildare. The parties entered into a contract in August 2012, which incorporated certain of the Royal Institute of Architects in Ireland ("RIAI") terms (the "contract"). The contract contained an arbitration clause. Following the commencement of the works, a dispute arose between the applicant and the respondent concerning interim certificates and the

final account for the contract. The dispute was referred to arbitration and the President of the RIAI appointed Ms. Paula M. Murphy as arbitrator in November 2016. The parties agreed the initial terms and conditions of appointment of the arbitrator in November 2016. Both parties paid the arbitrator €2,400 each as a non-refundable deposit.

6. Amended terms of appointment of the arbitrator were agreed between the parties in early 2017 so as to identify the applicant by its correct legal name, which had since been changed from Principal Construction Limited to Principal Contractors Limited. Under the amended terms of appointment, the applicant and the respondent jointly and severally agreed:

(i) to pay the arbitrator's fees, costs, and expenses in connection with the arbitration, whether or not the arbitration was carried out to a conclusion, or an award made or published. They further agreed that the arbitrator's fees, costs, and expense would be charged at rates quoted in the schedule therein and that the arbitrator would be entitled to *"tax"* those fees, costs, and expenses (Clause 1), and

(ii) to take up the award within 10 days from receipt by the applicant and the respondent of a notice of publication of the award (Clause 2), and

(iii) that the costs of the reference and award would be in the arbitrator's discretion, and that the arbitrator *"may tax or settle the amount of costs to be paid or any part thereof"* (Clause 3).

7. A confusing feature of the documents provided in evidence in these proceedings is the use by the arbitrator and the parties of the terms *"tax"* and *"taxation"* in the context of the arbitrator's fees, costs, and expenses. The arbitrator appeared to use those terms in two ways: first, to mean the measurement or assessment of the relevant costs and,

second, to refer to what was, at that time, the taxation of costs by the Taxing Master, and which has, since the commencement, in October 2019, of s. 139 of the Legal Services Regulation Act 2015 (the "2015 Act") been referred to as adjudication of costs by a Legal Costs Adjudicator. When the arbitrator referred to her "*taxing*" her own "*fees, costs and expenses*" in the amended terms of appointment, she appeared to be using the term in the first sense, that is to say the measurement or assessment of her costs.

8. Pleadings were exchanged between the parties in accordance with directions given by the arbitrator, and a hearing of the arbitration was scheduled for two weeks, commencing in late January 2019. In December 2018, having unsuccessfully applied to the arbitrator for an adjournment of the hearing, the respondent made an unsuccessful application to the court seeking an order adjourning the hearing.

9. In January 2019, prior to the date of the scheduled hearing, the parties settled the substantive dispute between them and entered into a written settlement agreement on 19th February 2019 (the "Settlement Agreement").

10. At Clause 1(a) of the Settlement Agreement, it was agreed that the respondent, having paid the applicant the sum of €441,600 (including VAT) (the "Settlement Amount") further agreed:

> *"to discharge* [the applicant's] *party/party costs of the Arbitration (save and except for those already paid), to be taxed in default of agreement, in full and final settlement of the Dispute and the Parties' respective claims, cross claims, counter-claims, rights, entitlements, demands, set-offs, losses and expense arising under, out of or in connection with the Contract and the Dispute on the further terms set out in* this *Agreement. Either party shall be entitled to refer*

> [the applicant's] *party/party costs of the Arbitration to taxation by the Taxing Master pursuant to Section 21 of the Arbitration Act 2010."*

11. The reference in Clause 1(a) to costs being *"taxed"* and being referred to *"taxation"* by the *"Taxing Master"* pursuant to s. 21 of the 2010 Act, should now be understood as a reference to the independent assessment or adjudication of costs by an independent officer, previously known as the Taxing Master and now, under the 2015 Act, a Legal Costs Adjudicator.

12. Under Clause 1(b), it was agreed that the respondent:

> *"shall discharge the Arbitrator's costs and expenses, save and except for those already paid, (said costs to be taxed by the Arbitrator in default of agreement) and all other costs incurred and/or payable (including cancellation costs and charges) in respect of the Arbitration.* [The respondent] *shall have the right to make submissions to the Arbitrator in relation to the Arbitrator's costs and also shall be entitled to refer the issue of the Arbitrator's costs to the Taxing Master pursuant to s. 21 of the Arbitration Act 2010."*

13. This is a very significant provision of the Settlement Agreement as it provides for the respondent's agreement to pay the arbitrator's costs and expenses, excluding those costs and expenses that have already been paid, which, in the context of the agreement reached between the parties, must have been intended to be a reference to the arbitrator's costs and expenses which had already been paid by the respondent rather than the applicant. The reference to those costs being *"taxed"* by the arbitrator in default of agreement is clearly a reference to the arbitrator measuring or assessing her costs and expenses in the event that they could not be agreed between the parties.

14. Clause 1(b) conferred the right on the respondent (as the paying party) to make submissions to the arbitrator in relation to her costs. It also recorded the respondent's

entitlement, under s. 21 of the 2010 Act, to refer the issue of the arbitrator's costs to the *"Taxing Master"*.

15. Clause 2 of the Settlement Agreement provided a breakdown of the Settlement Amount and is not relevant for present purposes.

16. Clause 3 is relevant, however. Clause 3(a) provided:

> *"On execution of this Agreement the Parties shall disclose to the Arbitrator the provisions at clauses 1 and 2 above (and whatever other provisions are necessary) so that the Arbitrator may issue an interim award in respect of the Agreement, the Settlement Amount and directing that* [the respondent] *discharge* [the applicant's] *party/party costs of the Arbitration (including costs of the counterclaim) to be taxed in default of agreement (the 'Interim Award')."*

17. The position in relation to the arbitrator's own costs was dealt within Clause 3(b). It provided:

> *"The Arbitrator shall retain seisin of the Arbitration for one calendar month following the date of the Interim Award and/or the issuing of a certificate of taxation by the Taxing Master in respect of the Arbitrator's Costs, unless either Party objects and thereafter shall be considered functus officio."*

18. When referring to the issuing of a certificate of *"taxation"* by the *"Taxing Master"* in respect of the arbitrator's costs, Clause 3(b) should now be read as referring to the issue of a certificate by a Legal Costs Adjudicator in respect of her costs, were a valid request to have been made by the respondent in accordance with the provisions of s. 21(4) for 2010 Act. For reasons which I discuss later in this judgment, I am satisfied that no such request was made by the respondent in this case.

19. A copy of the Settlement Agreement was provided to the arbitrator on 19th February 2019. There followed a protracted exchange of correspondence between the arbitrator

and solicitors for the parties, Damien Keogh & Associates Solicitors, now DKA Solicitors ("DKA") for the applicant and Burns Nowlan LLP ("Burns Nowlan") for the respondent. That correspondence was, in many respects, unnecessarily complicated, protracted, and confusing, and most of it is irrelevant to the issues which I have to determine. It should also be noted that the arbitrator suspended the provision of her services for a couple of weeks for reasons that are unclear but are not relevant for present purposes.

20. The arbitrator was requested by DKA, in a letter dated 8th March 2019, to prepare an interim award on the terms agreed in Clause 3(a) of the Settlement Agreement. Burns Nowlan disputed the arbitrator's entitlement to make such an award in a letter dated 15th March 2019, for reasons which I have found impossible to understand in light of the terms of Settlement Agreement reached between the parties.

21. Further correspondence of an unnecessarily argumentative nature was exchanged between the parties' respective solicitors and the arbitrator. On 19th March 2019, DKA requested the arbitrator to issue two awards, one directing the respondent to discharge the applicant's party/party costs of the arbitration (save and except for those already paid), to be *"taxed"* in default of agreement, together with an order for the *"taxation"* of those costs by the *"Taxing Master"* pursuant to s. 21 of 2010 Act ("award 1"), and the other directing the respondent to discharge the arbitrator's costs and expenses save and except for those already paid ("award 2"). It was said that in the event that the arbitrator decided to issue the latter award (i.e., award 2) without reference to the "*taxation*" of those costs, then the respondent would be entitled to take whatever action it considered appropriate in relation to her determination pursuant to s. 21(4) of the 2010 Act. Burns Nowlan reiterated the respondent's opposition to the arbitrator issuing any award in further correspondence on 24th March 2019.

22. In a further letter and procedural order dated 1st April 2019, the arbitrator confirmed that she was *"proceeding to consider the preparation of a form of 'Award'"* and noted that it was a matter for her, as arbitrator, to satisfy herself in relation to the form and content of any award. She further stated that:

> *"In accordance with my terms of appointment I will be taxing my costs and fees up to the date of the Award, payment of which will be required prior to taking up the Award and both parties shall remain jointly and severally liable for* [the] *discharging of same in the normal way.*"

23. In another procedural order dated 12th April 2019, following further correspondence from Burns Nowlan, the arbitrator stated, at para. 25, that she was *"proceeding to tax* [her] *costs (to the relevant date of presentation) in accordance with* [her] *terms…and to consider whether or not to prepare an 'Award'/'Awards' Consent or otherwise…*". In a further procedural order dated 30th April 2019, the arbitrator informed the parties that they had been afforded the opportunity to make submissions in respect of matters arising since the cancellation of the hearing and the execution of the Settlement Agreement, and that she considered that submissions were now closed, and she was proceeding to conclude matters.

24. In an order dated 7th June 2019, the arbitrator gave formal notice to the parties' solicitors that she had prepared an award, which she would release on payment of the outstanding balance of her fees, costs, and expenses in accordance with the terms of her appointment. She reminded the parties that they were required to take up the award within ten days of the date of the notice and that she was deeming the notice to have been received by the parties "*no later than 10th June 2019 with time running from that date"*. She confirmed that that the outstanding balance of her fees, costs, and expenses (inclusive of VAT) was €39,338.00.

25. DKA wrote to Burns Nowlan, copying the arbitrator, on 10th June 2019, referring to the arbitrator's order of 7th June 2019, and calling on the respondent to comply with Clause 1(b) of the Settlement Agreement and to discharge the arbitrator's costs on or before 20th June 2019, failing which they would issue court proceedings. Burns Nowlan replied on 12th June 2019, enclosing a letter of the same date that they had written to the arbitrator seeking, *inter alia,* details and supporting documentation in respect of her costs. They asserted that the arbitrator was obliged to furnish "*not merely a statement of her costs but detailed particulars thereof"*, and that they would then be entitled to have the issue of costs referred to the *"Taxing Master"*.

26. In their letter to the arbitrator of 12th June 2019, Burns Nowlan protested at the failure by the arbitrator to furnish the precise details of her costs, of how those costs were calculated and of the number of hours on which the calculation of costs was based. The letter then stated:

> *"We have previously asserted our client's right and entitlement to have your costs referred to the Taxing Master pursuant to Section. 21 of the Arbitration Act 2010. As you will appreciate in its current format, we are not in a position to make any such reference."*

27. Burns Nowlan asked the arbitrator to provide precise details of her costs and the manner in which her fees were calculated, together with all supporting documentation. They stated that, on receipt of that information, they would *"revert"* to the arbitrator. It was subsequently clarified by the respondent that the reference in the above letter to Burns Nowlan having "*previously asserted our clients right and entitlement to have your costs referred to the Taxing Master"* was to a letter dated 27th February 2019 sent from Burns Nowlan to the arbitrator. In that letter, Burns Nowlan reserved their right and

entitlement to make submissions to the arbitrator in relation to her fees and costs and stated:

> *"In addition our client is also entitled under the provisions of the Arbitration Act to seek to have the said costs taxed by the Taxing Master."*

28. The arbitrator replied to the Burns Nowlan letter of 12th June 2019 by email on that same date, referring to her order of 7th June 2019 and setting out her position as follows:

> *"I have taxed my costs in accordance with my Terms and Conditions for works and costs since November 2016 and an Invoice/Receipt will be provided with the Award. Any errors in computations (both up or down) can be made via the slip rule."*

29. In a further order dated 21st June 2019 (headed "*PEREMPTORY NOTICE*"), the arbitrator noted that neither party had taken up the award within the required time period. She extended the deadline for taking up the award to 30th June 2019 and stated that interest applied to her costs at the statutory rate from the date of the award.

30. The arbitrator issued the second, more-detailed, order on the same date (21st June 2019), dealing with various matters including her costs. She enclosed an "*extract*" in respect of her costs, showing a breakdown of the sum of €39,338.50 referred to in her order of 7th June 2019. The breakdown included the total time spent in hours and the rate charged per hour, as well as other expenses, all calculated in accordance with the rates set out in the arbitrator's amended terms of appointment. She referred to s. 21 of the 2010 Act and noted that she was satisfied that she had jurisdiction in relation to the "*Taxing*" of her costs based on the terms of her engagement. She was clearly referring here to her entitlement to measure or assess her costs rather than referring to "*taxation*" or, rather, adjudication by a Taxing Master or Legal Costs Adjudicator. There is nothing in that letter to indicate that, if a valid request were made to the arbitrator under s. 21(4) of the

2010 Act, she would not have made an order for the adjudication of her costs by a Legal Costs Adjudicator in compliance with that section. To the extent that it was suggested or implied on behalf of the respondent that the arbitrator would not have done so, I unequivocally reject that suggestion. I have no reason to believe that the arbitrator would not have complied with a valid request made under s. 21(4) had such a request been made. I have concluded that it was not.

31. As the applicant was most anxious to obtain a copy of the arbitrator's award, DKA wrote to the arbitrator on 27th June 2019, confirming that the applicant would pay the outstanding balance of her fees in full, in the amount of €39,338 (including VAT), and would seek to recover that amount from the respondent when enforcing the award and/or the Settlement Agreement. The applicant offered to pay approximately half the amount due (€19,669.25) that day, and the remaining sum (€19,668.75) on the earlier of 30th October 2019 or recovery of all sums from the respondent on enforcement of the award and/or the Settlement Agreement. On that basis, DKA requested the arbitrator to release the award.

32. The respondent was not happy with that proposal. Burns Nowlan wrote on his behalf to DKA on 28th June 2019, noting that they had queried the bill of costs submitted by the arbitrator and had not received an adequate reply to those queries. They noted that the respondent disputed that the sum of €39,338 was due and owing to the arbitrator. They stated that the respondent was *"entitled to have the costs of the said Arbitrator referred to taxation"*. They formally objected to the proposal that the applicant pay one half of the amount claimed by the arbitrator, on the basis that the arbitrator's costs had not been *"taxed",* and that the arbitrator had afforded neither the applicant nor the respondent an opportunity of "*examining or querying and/or taxing*" those costs. Burns Nowlan had obviously misunderstood the proposal contained in the DKA letter of 27th June

2019, which was to pay the arbitrator's fees and costs in full and not merely half of them. DKA replied on 1st July 2019 observing that the arbitrator was entitled to and had "*taxed"* her costs under the terms of her appointment and under the 2010 Act and that, in those circumstances, it was irrelevant whether the respondent queried or disputed those fees or costs. They confirmed that the applicant did not dispute the arbitrator's costs and did not wish to examine, query, or seek any further "*taxation*" of them. DKA further disputed the entitlement of the respondent to challenge the sum claimed by the arbitrator in respect of her costs and noted that as soon as the arbitrator released the award, they would be proceeding to enforce it against the respondent.

33. The arbitrator sent a further order to the parties on 4th July 2019. In that order, she stated that she was satisfied that she had carried out the "*Taxation*" of her costs "*based on proper principles*" and that she was entitled to await full payment of those costs prior to releasing the award. She explained that she was satisfied, based on the series of matters set out at para. 9(a) – (m) of the order, that her costs (and lien) were reasonable. Those matters included (a) the complexity of the matter, (b) the volume of correspondence and documentation arising in the arbitration, (c) the amount in dispute (a claim of in excess of €1 million and a counterclaim of €1 million), (d) the particular expertise of the arbitrator, and various other factors. She confirmed that she would not release her award until the outstanding sum due to her was paid by one or both of the parties.

34. On 28th July 2019, DKA informed the arbitrator that it was the applicant's intention to discharge the remaining balance due to the arbitrator in respect of her costs, in order to enable her to release the award. The arbitrator responded on 31st July 2019, noting, *inter alia*, that a further sum of €885.60 (inclusive of VAT) had become due since 7th June

2019. She confirmed that, on receipt of the full outstanding balance, the award would be sent to both parties.

35. On the same date, 31st July 2019, Burns Nowlan wrote to DKA referring to the email of 28th July and to the arbitrator's response, stating that they had previously requested, but had not received, an itemised bill from the arbitrator. The letter said: *"We require same by return as same is to be taxed pursuant to the relevant section of the Arbitration Act."*

36. The letter concluded by stating that, pending receipt of an "*itemised Bill"* from the arbitrator, the respondent did not accept the amount sought by the arbitrator or the amount paid by the applicant.

37. The applicant paid the outstanding sum due to the arbitrator by making an additional payment of €20,555.10, on 1st August 2019. The amount paid by the applicant to the arbitrator in respect of her fees was, in total, therefore €40,224.60.

38. On 19th August 2019, by means of a further order made in the arbitration, the arbitrator acknowledged receipt of that amount from the applicant in respect of the arbitrator's outstanding costs in order to secure release of the award. The arbitrator enclosed a "*Final Consent Award*" and stated that she was *"functus officio in relation to the matters contained in the Award save as provided for the* [Arbitration] *Act"*. She further reminded the parties in underlined text that "*costs continue to accrue in respect of the Arbitrator and parties if applicable up to Termination Order or as provided for under the Act/Arbitrator Terms*".

39. On 20th August 2019, the arbitrator wrote to Burns Nowlan, copying DKA, enclosing a copy of a "*Resource Record*" providing details of how the arbitrator's costs had been calculated up to 3rd June 2019, (at that stage €39,338.50 including VAT). The "*Resource Record*" did not include the additional €885.60 referred to and explained by

the arbitrator in her email of 31st July 2019. On 21st August 2019, the arbitrator noted that there was an inadvertent computation error in computation in the "*Resource Record"* (the arbitrator had apparently undercharged). She did not amend the error in her favour. A further version of the "*Resource Record"* may have been sent to the parties and received by them on 21st August 2021.

40. Following receipt of the award and the detailed breakdown contained in the *"Resource Record"*, Burns Nowlan wrote to the arbitrator on 21st August 2019. In that letter, they stated that they had requested from the arbitrator "*a detailed bill of costs and a facility for the examination of* [her] *file so that they said costs could be referred to* [the respondent's] *Legal Cost Accountants*". The letter then stated that: *"In addition, we also advised that we would be seeking to have the said costs referred to taxation pursuant to s. 21 of the Act."*

41. This letter is important, as the respondent's counsel relied on it as constituting the requisite request by the respondent to the arbitrator to make an order for the taxation or, rather, adjudication of the arbitrator's costs by a Legal Costs Adjudicator for the purposes of s. 21(4) of the 2010 Act. For reasons which I believe are clear from the terms of the letter itself, and as I explain in more detail below, I have concluded that this letter does not amount to a request to the arbitrator to make an order for the adjudication of her costs for the purposes of s. 21(4) of the 2010 Act.

42. The arbitrator replied to the Burns Nowlan letter of 21st August 2019, on 29th August 2019, reiterating that she was "*functus officio in respect of matters contained within the award*". She stated that submissions to an arbitrator were to be made in advance of her making a determination and/or *"Taxing"* her costs, and that she had not received any submissions in relation to the liability for her costs (that issue having been agreed between the parties in the Settlement Agreement) or in relation to quantum in advance

of her "*Taxing*" (i.e., assessing or measuring) her costs. No further letter appears to have been sent thereafter by Burns Nowlan, or by the respondent himself, containing any request to the arbitrator to make an order referring her costs for adjudication under s. 21(4).

43. The next communication between the parties was a letter from DKA to Burns Nowlan of 9th October 2019. That letter referred to Clause 1(b) of the Settlement Agreement and to the award issued to the parties by the arbitrator on 19th August 2019, in which the arbitrator awarded and directed the respondent to pay her costs in a manner provided for Clause 1(b) of this Settlement Agreement (para. (b) of the Operative Part). The award recited that the arbitrator had taxed her outstanding costs on the basis agreed by the parties, up to the date of the award, at €39,338.50 (inclusive of VAT) in accordance with s. 21(1) of the 2010 Act. The award further noted (at para. (d) of the Operative Part) that the liability for those costs was as set out in 1(b) of the Settlement Agreement (recited at para. (b) of the Operative Part of the award) (namely, that the respondent was liable to pay those costs). The award further provided (at para. (f) of the Operative Part) that:

> *"… in the event of a party paying for the taking up of this award, or at any later time, relating to the recovering of costs where the other parties responsible for these costs this sum shall be reimbursed to the paying party with interest at the statutory rate accruing seven days from the date of delivery of this award."*

44. In the letter of 9th October 2019, DKA requested payment of the outstanding amount which the applicant had paid in order to secure the release of the award, namely €40,224.10 inclusive of VAT, within seven days of the date of the letter, failing which High Court proceedings would be issued to recover that amount plus interest and costs.

45. Burns Nowlan replied on 11th October 2019 stating that the Settlement Agreement provided that the costs of the arbitrator would be "*taxed",* that submissions were made to the arbitrator in relation to the "*taxation*" of her costs, and that it remained the respondent's contention that he was entitled to "*query the costs issued by the Arbitrator and if necessary, refer same to taxation*". They confirmed that the respondent would defend any proceedings issued by the applicant. Further correspondence was sent by DKA to Burns Nowlan on 18th October 2019, and 23rd December 2019. On 7th January 2020, Burns Nowlan replied, referring to the Settlement Agreement. In that letter, they stated:

> *"Notwithstanding our request that the Arbitrator have her fees referred for Taxation she refused to do so. It is our understanding that nonetheless your clients have discharged the disputed fees charged by the arbitrator. We continue to dispute the fee sought by the arbitrator as same have* [sic] *never been taxed."*

46. There is simply no basis for the assertion in that letter that the arbitrator refused the respondent's request to "*have her fees referred for Taxation"*. As I have indicated, and as I will explain in more detail later, no valid request was made by the respondent to the arbitrator for an order referring her costs for adjudication under s. 21(4). While Burns Nowlan and the respondent may have continued to dispute the arbitrator's costs, they did not take the relatively simple, but legally necessary, step of making a request for those costs to be adjudicated within the time-period referred to in s. 21(4).

47. There was then complete silence between January 2020 and until 30th March 2021, when DKA wrote to Burns Nowlan again seeking payment of the arbitrator's costs, which the applicant had discharged. The sum claimed in that letter was €42,624.10 plus statutory interest at the rate of 2% per annum, amounting to a total of €44,156.80. It subsequently emerged that the amount sought in that letter (and originally in the

application to court) was incorrect and that the sum which ought to have been claimed on foot of the award was €40,224.10 plus interest at that statutory rate.

48. In a response dated 30th March 2021, Burns Nowlan again disputed any liability on the part of the respondent to pay that amount. Having referred to the Settlement Agreement, the letter then stated:

> *"Your clients were aware that our client at all times disputed the Arbitrator's costs and we repeatedly wrote to her on our client's behalf in relation thereto. Notwithstanding the foregoing your clients discharged the arbitrator's cost without reference to our office and also without reference to our client's right to make submissions to the Arbitrator in relation to the costs and also to have the said costs referred to the Taxing Master pursuant to Section 21 of the Arbitration Act 2010."*

49. Burns Nowlan submitted that, in those circumstances, the applicant was not then entitled to seek payment of the sum which it had paid, and that the respondent was entitled to rely on the terms of the Settlement Agreement in relation to the arbitrator's costs. They further noted that the applicant had the opportunity of including the arbitrator's costs within the adjudication of the applicant's party/party costs but did not do so. The parties' respective Legal Costs Accountants agreed the applicant's party/party costs in March 2021, and the applicant received payment of an agreed sum in respect of those costs.

50. DKA did not reply to the content of that letter, but instead sent what was, in effect, a further letter of demand to Burns Nowlan on 27th September 2021, seeking payment of the sum of €42,624.10 plus interest. Burns Nowlan replied on 28th September 2021, again, disputing the applicant's entitlement to be reimbursed the amount paid in respect of the arbitrator's costs, and further asserting that the negotiations between the parties'

respective legal costs accountants had settled all issues in relation to the costs and expenses and outlays relating to the arbitration. I note, however, that the negotiations between their respective legal costs accountants and the agreement which they reached on foot of those negotiations, concerned only the party/party costs which the applicant was entitled to recover from the respondent under the Settlement Agreement and under the terms of the arbitrator's award. The respondent did not assert on affidavit or in submissions, that the applicant's entitlement to recover the amount paid in respect of the arbitrator's costs was settled as between the legal costs accountants. There is no evidence, whatsoever, that it was.

51. Burns Nowlan wrote on 5th October 2021, confirming that they had authority to accept service of proceedings brought by the applicant. However, no further steps were taken by DKA until 18th May 2023, more than eighteen months later, when they wrote to Burns Nowlan making a further demand for payment in respect of the arbitrator's costs, failing which proceedings would be issued. The proceedings were not actually issued until 2nd June 2023.

3. Application for Enforcement of Award

52. As noted, the applicant issued its application to enforce the award on 2nd June 2023. The applicant sought:

(a) An order granting leave to enforce the award pursuant to s. 23(1) of the 2010 Act and O. 56, r. 3(1)(j) RSC;

(b) Judgment in the terms of the award in the sum of €40,224.10 (the sum originally claimed was €42,624.10, but it was acknowledged that that included an element of double-counting, and the correct figure was given during the hearing);

(c) Interest pursuant to statute; and

(d) Costs

53. The applicant's application was grounded on an affidavit sworn by Niall Daly, a Director of the applicant. Mr. Daly set out, in some detail, the background to the application and exhibited the Settlement Agreement, the award and the extensive correspondence between the parties and the arbitrator which I have sought to summarise earlier in this judgment. In concluding his affidavit, Mr. Daly drew attention to the fact that:

(a) the respondent did not apply to the court to have the award set aside on any of the grounds set out in Article 34 of the Model Law and the three-month time period for doing so had passed more than two years prior to the applicant's application to enforce the award; and

(b) the respondent did not seek to refer the arbitrator's cost for adjudication pursuant to s. 21 of the 2010 Act, and the 21 working-day time limit for doing so had long since passed by the time the applicant commenced proceedings.

54. A replying affidavit was sworn by the respondent himself. In that affidavit, the respondent asserted that he had sought to refer the arbitrator's costs to the *"Taxing Master"* pursuant to s. 21 of the 2010 Act *"when* [he] *made it clear at all times to both the Arbitrator and* [the applicant] *that* [he] *wished to have the Arbitrator's costs referred for a taxation"* (para. 15 of the respondent's replying affidavit). The respondent did not specifically identify any requests to the arbitrator that she refer a question of her costs for adjudication pursuant to s. 21 although that issue was addressed by the respondent's counsel at the hearing. Rather, in his affidavit, the respondent referred to correspondence sent from Burns Nowlan on 30th March 2021, (almost 20 months after the award was provided to the parties by the arbitrator) as setting out his position in relation to the taxation or adjudication of the arbitrator's costs. The

respondent did refer (at para. 18) to the Burns Nowlan letter of 12th June 2019, which I have quoted earlier, but that letter clearly did not, even on its own terms, amount to a request to the arbitrator to refer her determination in respect of costs for adjudication under s. 21(4). In fact, as the letter itself made clear, while asserting that the respondent had a right and entitlement to have the arbitrator's costs referred to taxation or adjudication pursuant to s. 21, Burns Nowlan said that they were not in a position to make (or seek) any such reference at that stage, as they were still looking for precise details of the arbitrator's costs and how they had been calculated.

55. The respondent contended in his affidavit that the arbitrator refused to refer a question of her costs for taxation or adjudication notwithstanding requests by him. I am satisfied, however, that is not the case. As I explain later, the only reasonable conclusion to be drawn from the correspondence is that no valid request was made by the respondent to the arbitrator to refer the question of her costs for adjudication under s. 21(4) of the 2010 Act.

56. The respondent also contended (at para. 21 of his affidavit) that the payment by the applicant of the arbitrator's costs without those costs being taxed or adjudicated was "*contrary*" to the Settlement Agreement, and that the payment of those costs by the applicant denied him his right to have the costs independently adjudicated. There is no basis for that contention. There was nothing to prevent the respondent or his solicitors from making a request to the arbitrator to refer the question of her costs for adjudication after she had determined what those costs were (and furnished details of those costs), provided, of course, that such a request was made within the time period set in s. 21(4). If such a request had been made and a Legal Costs Adjudicator decided that the appropriate costs were lesser than those measured by the arbitrator herself, then I have no doubt but that the arbitrator would have repaid any overpayment. That would,

ultimately, have reduced the amount claimed by the applicant on foot of the award. None of that happened, however.

57. While the respondent did contend on affidavit (at para. 22) that the party/party costs were agreed following negotiation between the parties' respective cost accountants and that it was agreed that the payment made on foot of that agreement was to be in full and final settlement of "*all matters pertaining to costs as between the parties"*, it was acknowledged by the respondent that the applicant had not included the arbitrator's costs in that referral to adjudication and those costs were not the subject of negotiation or agreement between the parties' respective costs accountants (paras. 20 and 22).

58. It was not contended on behalf of the respondent in his written submissions or at hearing that the applicant's claim in respect of the payment of the arbitrator's costs had been compromised or settled by the agreement reached between the cost accountants in respect of the party/party costs. While the respondent contended that he was denied his right to have the costs independently "*taxed"* or adjudicated, the evidence does not support that contention. I have seen no reason why the respondent or his solicitors could not have made a request to the arbitrator to refer the question of her costs for adjudication, provided that was done within 21 working-days after she had determined those costs and provided a detailed breakdown of those costs to the parties, which was done, at the latest, by 20th or 21st August 2019).

59. The respondent swore a supplemental affidavit on 19th October 2023, in which he referred to the Burns Nowlan letter of 27th February 2019, (discussed earlier) and to the *"Final Resource Summary"* received by Burns Nowlan on behalf of the respondent on (at the latest) 21st August 2019. He also referred, at para. 12 of that affidavit, to the letter of 21st August 2019 sent by Burns Nowlan to the arbitrator, stating that, in that letter, his solicitors said the following: "*In addition, we also advise that we would be*

seeking to have the said costs referred to taxation pursuant to Section 21 of the Act." However, this is a misquote of the letter which actually reads: *"In addition, we also advised that we would be seeking to have the said costs referred taxation pursuant to Section 21 of the Act"* (emphasis added). That was a reference back to previous correspondence which, I have already concluded, does not amount to a valid request to the arbitrator to refer her costs for adjudication for the purpose of s. 21(4).

4. The Award

60. Before turning to the relevant statutory provisions and setting out my conclusions on the issues raised in this application, I should refer to the award which was provided by the arbitrator to the parties on 19th August 2019. The award is entitled "*Final Consent Award*" and is dated 7th June 2019. As the correspondence, summarised earlier, discloses, the arbitrator was not prepared to release the award to the parties until her costs were discharged. As noted by Dowling-Hussey & Dunne in *Arbitration Law* (3rd edn, Round Hall 2018), at common law, arbitrators have a lien over the arbitral award in respect of their fees and expenses of the arbitration hearing, with the consequence that the parties may not take up the award until the arbitrator's fees and expenses have been discharged in full (para. 5–76 at p. 256). As the authors observe (at para. 2–85, p. 107), there is nothing in the 2010 Act or in the Model Law which alters that common law position. The arbitrator was clearly entitled to withhold the award from the parties until her costs (to include, of course, her fees and expenses) were paid. The award contained an express statement that the arbitrator was exercising a lien in respect of costs (para. (d) of the Operative Part of the award).

61. The award set out, in considerable detail, the background to the issues dealt with by the award including issues relevant to her own costs. The award noted that the amended

terms of the arbitrator's appointment made clear that she was entitled to be paid her outstanding costs prior to issuing her award. The arbitrator "*taxed"* her costs up to the date of the award (7th June 2019) at €39,338.50 (inclusive of VAT). While she stated in the award that she had *"not agreed to submit her Costs for Taxation by the Taxing Master"*, the context in which that expression appears is clear. She had a right, under her terms of appointment and under s. 21 of 2010 Act, to measure her own costs in the first instance. I do not read that term in the award as meaning that, if faced with a valid request from one both of the parties under s. 21(4), she would not have made an order for the taxation or adjudication of those costs (having been determined in the sense of being measured or assessed by her in the first instance).

62. I have referred earlier to the Operative Part of the award (pp. 12–13 of the award), which reproduces the provisions of Clause 1(a) and (b) and Clause 2 of the Settlement Agreement, and to para. (d) of the Operative Part of the award, which sets out her measurement or assessment of the costs due to her (calculated in accordance with the terms of her engagement). The liability for those costs is stated to be as set out in para. 1(b) of the Operative Part of the award which, in turn, incorporates the provisions of Clause 1(b) of the Settlement Agreement under which it was agreed that the respondent would discharge the arbitrator's costs. As noted earlier, the arbitrator made provision for interest to be payable at para. (f) of the Operative Part of her award.

5. <u>Relevant Statutory Provisions: Arbitration Act 2010 and Model Law</u>

63. Section 21 of the 2010 Act contains the provisions relevant to costs. It introduced some significant changes to the law in this area. Under s. 21(1), the parties to an arbitration agreement may make such provisions as to the costs of the arbitration as they see fit. In this case, the parties agreed, in the amended terms of appointment of the arbitrator,

that the costs of the reference and award were within the arbitrator's discretion and that she could *"tax or settle the amount of costs to be paid or any part thereof"*. As noted earlier, the parties jointly and severally agreed to pay her costs on a particular basis. That was, of course, subject to the arbitrator being entitled to determine which of the parties should ultimately be liable for those costs. In this case, however, the parties reached agreement in the Settlement Agreement as to who should pay the party/party costs and the arbitrator's costs. Section 21(8) provides that the term "*costs*" includes *"costs as between the parties and the fees and expenses of the arbitral tribunal"*. The references to "*costs*" in s. 21, therefore, include the arbitrator's costs, fees and expenses.

64. Section 21(3) provides that where the parties to an arbitration agreement have not made provision for costs for the purposes of s. 21(1), the arbitral tribunal *"shall, subject to subsection (4), determine by award those costs as it sees fit"*.

65. Section 21(4) is perhaps the most important provision of 2010 Act for the purpose of this case. It provides:

> *"In the case of an arbitration (other than an international commercial arbitration) the arbitral tribunal shall, on the request of any of the parties to the proceedings made not later than 21 working days after the determination by the tribunal in relation to costs, make an order for the taxation of costs of the arbitration by a Taxing Master of the High Court … and the Taxing Master, … shall in relation to any such taxation, have (with any necessary modifications) all the functions for the time being conferred on him or her under any enactment or in any rules of court in relation to the taxation of costs to be paid by one party to another in proceedings before a court."*

66. As noted earlier, the reference to taxation by a Taxing Master of the High Court, should, with effect from October 2019, be read as a reference to adjudication by Legal Costs Adjudicator in the Office of the Chief Legal Costs Adjudicator.

67. Section 21(5) provides that where the arbitrator makes a determination under s. 21(3) (both as to the liability to pay the costs and as to the amount of those costs) they shall specify three matters:

> *"(a) the grounds on which it acted,*
>
> *(b) the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each, and*
>
> *(c) by and to whom they shall be paid."*

68. The cumulative effect of these various provisions is that, where the parties have agreed that it is a matter for the arbitrator to determine who should pay the costs (and what those costs should be) or, in default of that agreement, where the arbitrator has the power and obligation, by virtue of s. 21(3), to make the relevant determination in relation to costs (which must deal with the matters referred to in s. 21(5)), it is only when that is done that the parties may request the arbitrator to make an order for the relevant costs to be adjudicated by a Legal Costs Adjudicator under s. 21(4). Such a request must be made within 21 working days of the relevant determination.

69. In this case, there is no doubt that the arbitrator was entitled to determine: (a) which of the parties was liable for the costs of the arbitration, including her own costs, and (b) the amount of those costs. This was agreed in the amended terms of appointment of the arbitrator. Ultimately, the arbitrator did not have to determine who had the liability to pay the costs (being the party/party costs and the arbitrator's own costs) as the parties agreed in the Settlement Agreement that the respondent would be liable to pay those costs. In the absence of agreement between the parties on the amount of the arbitrator's

costs, it was, again, a matter for the arbitrator to determine that amount under the terms of her appointment or, alternatively, by award under s. 21(3). The arbitrator did so in the award she made in this case.

70. The award was received by the parties on 19th August 2019 and a detailed breakdown of the arbitrator's costs was received on either 20th or 21st August 2019. At that point, the arbitrator had made a determination in relation to her costs for the purpose of s. 21(4). There was then a time limit of 21 working-days within which either of the parties could request her to make an order for the taxation or adjudication of those costs by the Taxing Master or a Legal Costs Adjudicator. The respondent did not make such a request within that period.

71. The next relevant section of the 2010 Act is s. 23 and, in particular, s. 23(1) and (2). Those provisions are as follows:

> *"(1) An award (other than an award within the meaning of section 25) made by an arbitral tribunal under an arbitration agreement shall be enforceable in the State either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and where leave is given, judgment may be entered in terms of the award.*
>
> *(2) An award that is referred to in subsection (1) shall, unless otherwise agreed by the parties, be treated as binding for all purposes on the parties between whom it was made, and may accordingly be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in the State."*

72. Article 5 of the Model Law, which has force of law in this State by virtue of s. 6 of the 2010 Act, provides that *"In matters governed by this Law, no court shall intervene except where so provided in this Law".* Article 34 of the Model Law sets out the circumstances in which an award may be set aside by the court specified in Article 6.

Article 34 makes clear in its heading that the procedure in Article 34 to set aside an arbitral award amounts to *"exclusive recourse"* against such an award. That is also expressly provided for in Article 34(1) which states:

> *"Recourse to a court against an arbitral award may be made* ***only*** *by an application for setting aside in accordance with paragraphs (2) and (3) of this article."* (emphasis added)

73. That is further reinforced by Article 34(2) which states that an arbitral award may be set aside by the court specified in Article 6 (which, as provided by s. 9(1) of the 2010 Act, is the President of the High Court or another judge of the High Court nominated by the President) *"only if"* certain specified grounds are satisfied. Those grounds are then set out in Articles 34(2)(a)(i)-(iv) and in Article 34(2)(b)(i)-(ii). Dowling-Hussey Dunne correctly explained, in *Arbitration Law* (at para. 8-140, p. 505), that the combined effect of Articles 5 and 34 of the Model Law is that the only means of defending an application, made under s. 23 of the 2010 Act, to enforce an arbitral award is to bring a cross-application to set aside the award under Article 34 of the Model Law within the time limit provided for in Article 34(3) (i.e., within three months from the date on which the party making the set aside application received the award). The law is also correctly stated in another leading text in this area: Barry Mansfield, *Arbitration in Ireland – Arbitration Act 2010 and Model Law: A Commentary* (2nd edn, Clarus Press, 2018) where the author states, in the context of applications under s. 23 of the 2010 Act, that *"a party who is unhappy with an award must apply to the High Court to set aside the award pursuant to the Model Law"* (at p. 70). As a matter of fact, the respondent is a person who is unhappy with the award, but he has not sought to set aside the award on any of the grounds in Article 34 of the Model Law. That is fatal to his resistance to the applicant's application to enforce the award.

6. Decision on Applicant's Application

74. I am satisfied that the applicant is entitled to the orders which it seeks under s. 23(1) of the 2010 Act, namely leave to enforce the award of the arbitrator and entering judgment in the sum of €40,224.10, in favour of the applicant in terms of that award. The applicant is entitled to orders in those terms as against the respondent for two principal reasons. The first and fundamental reason is that the award made by the arbitrator has not been the subject of any "set aside" application by the respondent under Article 34 of the Model Law, the time limit for which has long since expired. The award must, therefore, be treated as binding for all purposes on the parties and is, therefore, binding on the respondent having regard to the provisions of s. 23(1) and (2) of the 2010 Act. The second and secondary reason is that the respondent did not make any request to the arbitrator under s. 21(4) of the 2010 Act, after the arbitrator had determined the quantum of her costs to be paid by the respondent, for the taxation or adjudication of those costs by the Taxing Master or a Legal Costs Adjudicator, whether within or outside the 21 working-day period provided for in that subsection.

(1) Valid Arbitration Award

75. The arbitrator provided her award to the parties on 19th August 2019. The respondent could have requested her to refer the issue of her costs for adjudication under s. 21(4) but did not do so. The only means by which the respondent could have resisted the enforcement of the award is by way of an application to set aside the award on one of the grounds set out in Article 34(2) of the Model Law. These grounds are of a limited and restricted nature and the jurisprudence in this area indicates that the set-aside jurisdiction under Article 34 is one which should be exercised sparingly: see, for example, *Ryan v. O'Leary (Clonmel) Limited* [2018] IEHC 660.

76. Two important principles can be derived from the Irish cases considering Article 34. The first is that the cases stress the importance of the finality of arbitration awards. The second is that the cases make clear that an application to set aside an award is not an appeal from the decision of the arbitrator and does not afford the court the opportunity of second-guessing the merits of the arbitrator's decision, whether on the facts or on the law. Article 34(2)(a) sets out four grounds on which an award may be set aside, and Article 34(2)(b) provides for two other grounds. However, the bottom line here is that the respondent did not make an application to set aside the award on any of those grounds or at all. The award has not been set aside and, therefore, it is binding on the parties and enforceable against the respondent (under s. 23(1) and (2)). That conclusion is sufficient to dispose of the case and to compel the court to enforce the award against the respondent.

(2) No Request for Adjudication under Section 21(4)

77. It is not, strictly speaking, necessary for me to consider the respondent's failure to make a request under s. 21(4) of the 2010, having regard to my conclusion on the first and primary issue above. However, for the sake of completeness, I will do so. In summary, the respondent's position is that his solicitors requested the arbitrator to refer the assessment or measurement of her costs for taxation or adjudication, that the applicant frustrated that request by paying the costs (in order to secure release of the award) and that the arbitrator refused to refer the measurement of her costs for taxation or adjudication. As indicated earlier in this judgment, I reject all of those contentions as they are not supported by the evidence.

78. As noted above, the right to seek taxation or adjudication of costs (including the arbitrator's costs) is contained in s. 21(4) of the 2010 Act. I have already set out the

provisions of that section. The arbitrator is obliged to make an order for the taxation or adjudication of the relevant costs (including the arbitrator's own costs) where a valid request under that subsection is made. Such a request must be made after the arbitrator has made his or her determination in relation to costs provided that request is made not later than 21 working days after the determination has been made. The arbitrator is entitled, in the first instance, to determine the level of her costs by virtue of the agreement of the parties (as set out in the amended terms of appointment and in the Settlement Agreement (Clause 1(b) which applied to the arbitrator's costs)), as well as s. 21(3) of the 2010 Act which requires the arbitrator to determine the costs by award, where no such agreement is reached, subject to the right to seek taxation or adjudication under s. 21(4). In this case, while the arbitrator provided the figure for her costs on 7th June 2019, and a bit more detail on 21st June 2019, she did not provide a detailed breakdown until she provided her "*Resource Record*" which was received by the parties on 20th or 21st August 2019 (the second version of the record was received on 21st August 2019). That record did provide a very detailed breakdown of her costs. Having regard to the provisions of s. 21(5) of 2010 Act which enumerates the matters which must be specified by the arbitrator in his or her determination, I am satisfied that the parties did not receive the arbitrator's determination in relation to costs until, at the latest, 21st August 2019, notwithstanding that her award was provided to them on 19th August 2019. Accordingly, a valid request to the arbitrator to refer the measurement of her costs for adjudication would have had to have been made by the respondent within 21 working days of 21st August 2019, at the latest. No such request was made by the respondent within that time period, or at all.

79. At various points in his affidavit and in the written and oral submissions made on his behalf, reliance was placed on certain letters or emails as amounting to a request, under

s. 21(4), for the costs to be referred by the arbitrator for taxation or adjudication. I am satisfied that none of those letters or emails, which I consider individually below, constituted a valid request under s. 21(4).

(a) Burns Nowlan Letter to Arbitrator dated 27th February 2019:

80. The arbitrator had not made or provided her award to the parties at the time of this letter. In the letter, Burns Nowlan noted that they were reserving the right and entitlement to make submissions on behalf of the respondent in relation to the arbitrator's costs. They also stated, *"[i]n addition our client is also entitled under the provisions of the Arbitration Act to seek to have the said costs taxed by the Taxing Master"*. However, since the arbitrator had not measured or determined her costs at that stage (and costs continued to be incurred up to, and after, 7th June 2019). That letter was, therefore, clearly not a valid request for the purposes of s. 21(4).

(b) Burns Nowlan Letter to Arbitrator dated 12th June 2019:

81. As noted earlier, the respondent's solicitors complained, in their letter of 12th June 2019, about the fact that the arbitrator had not provided precise details of her costs and how they had been calculated. They stated that they had *"previously asserted"* the respondent's *"right and entitlement to have* [the arbitrator's] *costs referred to the Taxing Master pursuant to s. 21"* of the 2010 Act. They further stated: *"as you will appreciate in its current format, we are not in a position to make any such reference."*

82. They then asked the arbitrator to provide *"precise details"* of her costs, the manner in which the costs were calculated and all supporting documentation relating to such costs. They said that, on receipt of that material, they would *"revert"* to the arbitrator. While the arbitrator had, at that stage, made the award (the award was made on 7th June 2019), she had not released the award to the parties pending payment of her costs. The respondent's solicitors were complaining about the absence of details in relation to her

costs and expressly acknowledged that they were not in the position to make any reference to taxation or adjudication in the absence of those details. Since the details required under s. 21(5) for a valid determination on costs were not available to the respondent at that stage, the Burns Nowlan letter of 12th June 2019 does not amount to a valid request to the arbitrator to refer her costs for adjudication for the purposes of s. 21(4).

(c) Burns Nowlan Letter to DKA dated 28th June 2019:

83. This letter was addressed to DKA, the applicant's solicitors, and not to the arbitrator (although it was copied to the arbitrator). In this letter, Burns Nowlan asserted to DKA that the respondent was *"entitled to have the costs of the said Arbitrator referred to taxation"*. However, the letter clearly did not amount to a request to the arbitrator to refer her costs for taxation or adjudication as the arbitrator had not, at that stage, provided a detailed breakdown of her costs, which is what the respondent was seeking. She had not, therefore, made a determination in relation to those costs for the purposes of s. 21(3) and (5). This letter predated receipt by the parties of the arbitrator's determination in relation to costs and was not, therefore, a valid request for the purpose of s. 21(4).

(d) Burns Nowlan Letter to DKA dated 31st July 2019:

84. This was another letter sent by the respondent's solicitors to the applicant's solicitors and copied to the arbitrator. In the letter they noted that they had previously requested, but had yet to receive, an itemised bill from the arbitrator. They stated that they *"require same by return as same is to be taxed pursuant to the relevant section of the Arbitration Act"*. The letter is clearly not a request to the arbitrator to refer her costs for adjudication as it was sent prior to receiving a determination from the arbitrator in

relation to her costs which contained the information required by s. 21(5). It is not, therefore, a valid request for the purpose of s. 21(4)

(e) Burns Nowlan Letter to Arbitrator dated 21st August 2019:

85. This is a letter to the arbitrator at a time when the parties had received the award and the first version of the *"Resource Record".* However, it does not contain any request to the arbitrator to refer her costs for taxation or adjudication. Rather, it requested the arbitrator to correct a statement contained in a "*document in relation to costs*" sent by the arbitrator (it is not clear to what document the solicitors were referring). The letter stated that the solicitors had requested a "*detailed Bill of Costs*" and a facility to examine the arbitrator's file so that her costs could be referred to the respondent's Legal Cost Accountants. The letter then stated: *"in addition, we also advised that we would be seeking to have the said costs referred to taxation pursuant to s. 21 of the Act"* (emphasis added). The letter suggests that the respondent's solicitors would be making a request that the arbitrator refer her costs to taxation, at some stage in the future, but it does not amount to a request to refer her costs for taxation or adjudication. This was the document upon which the respondent's counsel relied at the hearing as being the request that the arbitrator refer her costs for adjudication. On its terms, it is clearly not such a request. It is a request for a correction of a statement contained in another document and a suggestion that a request would be forthcoming at some point in the future. No such request was, however, subsequently made, whether within the 21 working day period after 21st August 2019 or otherwise.

86. None of these letters or emails amount to a valid request for the purposes of s. 21(4). In my view, no such valid request was made, and there was no reason why such a request could not have been made, as the correspondence from the respondent's solicitors was replete with references to s. 21 of the 2010 Act.

87. Nor, as I have indicated earlier, is there any merit to the point that the applicant frustrated the respondent's entitlement to have the arbitrator's costs adjudicated, once a valid determination was made. Had such a valid request been made and had a Legal Costs Adjudicator reduced the costs payable to the arbitrator, there is no reason to believe that the arbitrator would not have repaid any overpayment, in which case the amount which the applicant would have been claiming from the respondent would have been correspondingly reduced. I am satisfied, there being no evidence to the contrary, that the arbitrator would have complied with the mandatory obligation contained in s. 21(4) to make the relevant order referring her costs for adjudication had a valid request been made.

7. Interest

88. In addition to seeking enforcement of the award, insofar as the principal amount of the arbitrator's costs is concerned, the applicant also seeks interest on the basis of para. (f) of the Operative Part of the award. That paragraph provided for interest to be paid by the party required to pay the costs under the award (in this case, the respondent) at the *"statutory rate accruing seven days from the date of delivery"* of the award. The applicant claims statutory interest at the rate of 2% per annum with effect from 14th June 2019. However, the award was not delivered until 19th August 2019, so there can be no entitlement to interest from 14th June 2019 (being seven days from the date of the award). There is, however, in my view, a more fundamental issue in relation to the applicant's claim for interest on the sum claimed from the respondent in these proceedings. That is the failure by the applicant to move expeditiously to enforce the award.

89. I have summarised the correspondence earlier. The applicant could have sought to enforce the award soon after it was released to the parties, and it became clear that the

respondent was not prepared to discharge the amount awarded to the applicant. The timeline (as outlined earlier) discloses that, having corresponded on a number of occasions between October and December 2019, and having received a response from Burns Nowlan, on behalf of the respondent, in January 2020, DKA did not write again until March 2021 and September 2021 and, while threatening proceedings in that correspondence, and again in May 2023, did not commence those proceedings until early June 2023. In those circumstances, I do not believe that it would be fair or reasonable to require the respondent to pay interest from seven days from the date of the award of 7 June 2019, or from the date of the issuing of the award to the parties on 19th August 2019. Nor, having regard to the timeline mentioned and to the delay in commencing the proceedings, would it be fair or appropriate to require the respondent to pay interest on the sum awarded prior to the commencement of the proceedings on 2nd June 2023. As interest is a discretionary matter, I conclude, in the exercise of that discretion, that interest should run on the principal amount of €40,224.10 at the statutory rate from 2nd June 2023.

8. Summary of Conclusions

90. For the detailed reasons set out in this judgment, I have concluded that the applicant is entitled to an order granting it leave to enforce the award of the arbitrator dated 7th June 2019, pursuant to s. 23(1) of the 2010 Act and that it is entitled to enter judgment in the terms of the award in the amount of €40,224.10, together with interest on that sum from the statutory rate with effect from 2nd June 2023.

91. As I have explained in this judgment, the arbitrator's award was not challenged by the respondent under Article 34 of the Model Law and is, therefore, binding on and

enforceable against him having regard to the provisions of s. 23 of the 2010 Act. That is sufficient to dispose of the proceedings in the applicant's favour.

92. For completeness, I have concluded that the respondent did not make any valid request to the arbitrator under s. 21(4) of the 2010 Act that she refer her costs for adjudication to the Legal Costs Adjudicator. There is no question of the arbitrator refusing any valid request that she makes such a reference. Nor is there any basis for the respondent's contention that the applicant frustrated or deprived the respondent of any entitlement to make a valid request under s. 21(4) for the arbitrator's costs to be referred for adjudication.

9. Open Offer: Costs

93. In written and oral submissions, the respondent's counsel informed the court that open offers were made by the respondent with a view to settling the applicant's claim. The most recent offer, the court was told, was €35,000, which was made on 21st October 2023, a couple of days before the hearing. That offer was not accepted by the applicant which was seeking its claim in full together with interest and costs. I do not believe that the fact that those offers were made to, and rejected by, the applicant is relevant in terms of the orders I propose to make. It is unfortunate that it was not possible for the parties to reach agreement on the sum payable by the respondent. However, the fact of the matter is that the applicant has succeeded in its claim for the principal sum which the arbitrator directed the respondent to pay. My provisional view is, therefore, that the applicant is entitled to its costs of these proceedings to be adjudicated upon in default of agreement. If the respondent wishes to dispute that provisional view, he should put in a short written submission setting out the grounds on which he disputes that order within ten days of the electronic delivery of this judgment. If the applicant wishes to respond, it must do so within seven days of receipt of any such submission from the

respondent. I will list the matter for the purpose of making final orders, including any order for costs, on 17th July 2024 at 10:30am.