Neutral Citation: [2012] IEHC 167

THE HIGH COURT

[2005 No. 1657 P]

BETWEEN

MOUNT KENNETT INVESTMENT COMPANY

AND BY ORDER OF THE COURT GREENBAND INVESTMENTS

PLAINTIFFS

AND

PATRICK O'MEARA, ANTHONY FITZPATRICK AND JOHN TOBIN

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 29th of March, 2012

1. Introduction

1.1 There have already been a number of judgments in these proceedings. (See - *Mount Kennett Investment Company v. O'Meara & Ors* [2007] IEHC 420; *Mount Kennett Investment Company & Anor v. O'Meara & Ors* [2010] IEHC 216; and *Mount Kennett Investment Company & Anor v. O'Meara & Ors* [2010] IEHC 210). As appears from those judgments, Smyth J. originally concluded that the defendants were obliged to specifically perform a contract for the sale of a site intended to be developed as a shopping centre in Clonmel. Thereafter the defendants failed to make title and I determined that the plaintiffs were, in all the circumstances, entitled to proceed with a claim in damages. That claim was ultimately tried and an award of €2,447,893.00 together with costs was made against each of the defendants jointly and severally. Each of the defendants appealed against that order.

1.2 The position that then pertained was that there remained in being, in addition to the appeal, a series of issues between the defendants. First, there were notices for contribution or indemnity in these proceedings. In addition, Mr. O'Meara had separately sued Mr. Fitzpatrick for professional negligence; Mr. Fitzpatrick being an accountant. Mr. O'Meara had also sued Mr. Tobin for professional negligence in a separate set of proceedings; Mr. Tobin being a solicitor. Finally, Mr. Fitzpatrick had also sued Mr. Tobin for professional negligence.

1.3 As all of the issues which arose both in the indemnity proceedings in this case and in the three other professional negligence actions were closely interconnected, all of those matters came for trial before me in February of this year. When the case had been at hearing for 14 days and had, it was estimated, approximately two days left to run, it was intimated to me on the morning of the fifteenth day that the parties were close to agreement. Time was provided and a settlement of all issues between those parties was reached. However, when the settlement was being ruled it was also intimated that the parties had reached a settlement of these proceedings which also, of course, remained alive by virtue of the fact that each of the defendants had filed separate notices of appeal. It transpired that the plaintiffs had been placed into receivership by NAMA, or a NAMA entity, and that the receivers appointed had negotiated a settlement of the appeal on behalf of the plaintiffs. The entitlement of the receivers to compromise the appeal was not contested.

1.4 When the matter was being ruled, counsel for the receivers attended to confirm that latter settlement and to invite me, on consent, to vacate the order for damages and costs. It should also be noted that, even at that stage, counsel did intimate that the solicitors who had acted on behalf of Mount Kennett and Greenband in these proceedings prior to the receivership might have an application to make. The solicitors who bring this application are the firm of McMahon O'Brien Solicitors. That prediction therefore proved correct and the application which is now before me was brought by those solicitors. The application is for a charging order under s. 3 of the Legal Practitioners (Ireland) Act 1876 ("the 1876 Act"). It will be necessary to turn to the provisions of the 1876 Act and the case Jaw applicable to it in due course. However, it is, perhaps, more logical to start with the facts insofar as they are material to the question which I have to decide which is as to whether a charging order should be made and, if so, in what form. I, therefore, turn to the facts.

2. The Facts

2.1 As pointed out earlier, judgment was given against the defendants in the sum of €2,447,893.00 together with interest on part of that sum up to the date of judgment. Thereafter interest would have accrued on the entire sum awarded between the date of judgment in March 2011 up to the ultimate settlement of the appeal in February 2012. By the time that settlement was reached it seems likely that the sum due was a little over €2.6m. In addition, there was an award of costs which have been variously estimated at between €500,000.00 and a little over €900,000.00. As a rough estimate, therefore, and solely for the purposes of facilitating an analysis of what occurred, it seems to me to be appropriate to consider the liability of the defendants, jointly and severally, to Mount Kennett and Greenband as being of the order of €3.25m inclusive of costs, give or take.

2.2 It is as against that background that the settlement entered into by the receivers, which amounted to a sum of €1.5m inclusive of costs, needs to be seen. However, in order to assess the circumstances in which that settlement was entered into some additional facts do need to be noted.

2.3 First, there is, of course, the question of the appeal. For the reasons set out in the judgment on damages ([2010] IEHC 210), the calculation of damages in this case was both complex and difficult. It must be acknowledged that the prospects of the successful pursuit of an appeal (at least in part) were real. It seems to me that any prudent party would have had to take into account in their analysis of the situation the possibility that the appeal would succeed and that, as a consequence, the total amount which could be available for recovery would be reduced.

2.4 Second, it needs to be noted that each of the three defendants was separately represented and had, as I understand it, taken somewhat different approaches to the issues to be raised on the appeal. A number of consequences flow from that fact. The appeal

was likely to be protracted and, therefore, costly from the point of view of the receivers. In addition, having regard to the prospect that the appeal might succeed in part, there was no guarantee that the receivers would be awarded their costs or, indeed, awarded their costs in respect of each of the appellants. Indeed, there was always a prospect that some or all of the appellants might succeed sufficiently on their appeal that the Supreme Court would take the view that the appellant concerned should be awarded the costs of any appeal.

2.5 While it might reasonably be said, for the reasons already addressed, that the amount of the award which I had made (including costs) had a value, as of the time of the negotiations, of approximately €3.25m, nonetheless any commercial analysis of the value of that award would need to take into account the prospect of the underlying award being reduced on appeal, the costs of the appeal from the point of view of the receivers, the possibility that some or all of those costs might not be awarded to the receivers and the risk that some or all of the costs of some or all of the appellants might actually be awarded in favour of those appellants. The precise extent to which it would be appropriate to discount the likely total recovery to reflect those factors must, necessarily, be a matter of judgment. That those factors were real and substantial questions that any prudent party would need to take into account and accord significant weight can hardly, in my view, be doubted.

2.6 Before leaving this aspect of the case I should address one further point that arose in the course of the hearings as and between the defendants but which had the potential to have some effect on the claim brought by Mount Kennett and Green band. The claim for damages was, as pointed out in the relevant judgment, in two parts being damages in lieu of specific performance arising out of the additional monies that had to be paid to secure the lands in the manner described in that judgment, together with damages for delay which amounted to an estimate of the sums lost by Green band by virtue of the delayed opening of the shopping centre concerned. The latter damages were fixed at €1.1 m.

2.7 However, in the course of the evidence at the trial of the issues between the defendants, it emerged that Green band appeared to have sold a significant interest in the shopping centre to a third party prior to the damages issue coming on for trial. When that evidence emerged, I indicted to the parties that I found it surprising given that there had been no intimation to the court on behalf of Mount Kennett and Greenband, at the trial as to damages, of the fact that Greenband had sold a part of its interest in the shopping centre. Whether, and if so to what extent, that sale might have affected the level of damages is a matter on which it is only possible to speculate at this stage. It would not, however, be possible to rule out that there could be an effect. On at least one view any losses attributable to the share in the shopping centre which was sold crystallised on that sale with the proper measure of damages in respect of that share being any losses up to the date of sale together with any reduction in the sale price for the share concerned that could be attributed to the delayed opening. Given that, at the very least, the sale places an objective capital value on the shopping centre at an important point in time it is surprising indeed that I was not told about it during the damages hearing. Given that the defendants became aware of the facts to which I have just referred (and their potential impact on the damages claim), it would be surprising if the defendants did not seek to explore, for the purposes of the appeal, the extent to which it might be possible to place reliance on the failure of Greenband to disclose the sale in the course of the hearing. That additional factor would need, by any responsible party, to be taken into account in assessing the situation as it appeared in February 2012.

2.8 Apart from the factors which [have already analysed, which concern the likely ultimate award (inclusive of costs) that Mount Kennett and Green band would achieve after the proceedings were finalised, there is also the question of recoverability. In that context some additional facts need to be noted.

2.9 As pointed out, the claim of Mr. O'Meara against both Mr. Fitzpatrick and Mr. Tobin and the claim of Mr. Fitzpatrick against Mr. Tobin were in professional negligence. As I understand the position, Mr. Tobin was represented at the proceedings between the defendants by a legal team nominated by his insurers but I am informed that that representation was without prejudice to the insurers' position. The situation in respect of Mr. O'Meara's claim against Mr. Fitzpatrick was that Mr. Fitzpatrick's insurers had withdrawn cover and a legal team which had been appointed by those insurers had largely withdrawn from the case on the basis of an arrangement entered into. Because the dispute which emerged between Mr. Fitzpatrick and his insurers arose late in the day and because it seemed to me that any judge having to deal with the logistics of getting the case on for hearing in the light of that dispute might have to be told things which the trial judge should not know, I arranged for the question of the solicitors appointed by Mr. Fitzpatrick's insurers coming off record to be heard before Feeney J.

2.10 It follows that, to put it at its mildest, there were difficulties about the extent to which any insurer might be required to indemnify either or both of Mr. Fitzpatrick and Mr. Tobin with the problem, perhaps, being more acute in the case of Mr. Fitzpatrick. In addition, it needs to be noted that one of the central issues in the proceedings between the defendants was the question of the extent to which Mr. Fitzpatrick and/or Mr. Tobin could be said to have been acting in a professional capacity. On Mr. Fitzpatrick's case he was simply an investor who doubtless brought his accountancy skill to the table but did not act in any way in a professional capacity. Mr. Tobin accepted that he had a professional role in the matter (given that he was the solicitor appointed in respect of the property transaction at the heart of the proceedings) but argued that there were limits to the extent to which his actions could be viewed as having been carried out in that professional capacity and that at least in many material and significant respects it was said that Mr. Tobin was acting purely as an investor. It follows that there was a second layer of difficulty concerning the position of the insurers. Even if both Mr. Tobin and Mr. Fitzpatrick were "on cover" so far as professional negligence is concerned, it did not necessarily follow that the findings which would lead to a distribution of liability between those parties would place all of the liability of either or both of Mr. Tobin and Mr. Fitzpatrick into a category for which a professional indemnity insurer would be liable. There were, therefore, two bases on which the insurers might not be liable. First, the liability of Mr. Tobin and/or Mr. Fitzpatrick might be found, in whole or in part, to have been due to decisions made by them as investors rather than in a professional capacity. Second, even and to the extent that any liabilities might be attributed to professional negligence, there were, at the least, doubts as to whether the insurers could be obliged to indemnify.

2.11 The reason why I have analysed the insurance position with some care is that, in the absence of any or a particular proportion of the claim being found to be attributable to professional negligence and a relevant insurer being on cover, Greenband and Mount Kennett (and through them the receivers) would have to look to the individual defendants for recovery. While the means of the respective defendants was not, in itself, an issue in the hearing between them which was, as I have indicated, tried almost to a conclusion before me prior to settlement, it was possible to form at least a general view on the position of those individual defendants. Suffice it to say that there were reasonable grounds for any third party looking at the situation from the outside (such as the receivers) to be concerned as to the extent to which it would be possible to recover substantial sums (perhaps in excess of €3m) from the individual defendants and in the absence of an insurer being required to provide indemnity.

2.12 In assessing the position of the receivers, one further set of facts needs to be taken into account. It might be said that the receivers ought to have engaged in a more comprehensive analysis of the likely result of any appeal, the consequences of potential costs orders or the lack of them arising out of such an appeal, the assets of the various defendants which might be available for recovery in the event of one or both of the relevant insurers ultimately being able to escape liability for any of the reasons which I

have sought to analyse, and any other material factors. However, the problem was that the situation was moving fast. The case involving the defendants' liabilities inter se was proceeding. Doubtless part of what was in it for Mr. Tobin's insurers was saving their own costs of defending those proceedings and, to the extent that it might be necessary to agree to pay any of the other defendants' costs, reducing the bill that might thereby arise. As the case wore on the savings that might be achieved by settlement were reduced. It followed that it was reasonable for the receivers to conclude that the appetite of Mr. Tobin's insurers to agree to pay over a significant sum of money would correspondingly reduce for the savings that might be achieved by a global settlement were diminishing by the day. It follows that the receivers did not have the luxury of time. On the evidence before me it would appear that the settlement reached was, in effect, one whereby the entire sum to be paid to the receivers was to come from Mr. Tobin's insurers. As a result of the settlement reached between the defendants it appears that Mr. O'Meara is, therefore, not liable for any of the damages awarded and is to be entitled to receive his costs from those insurers. For the reasons already analysed that costs bill is likely to be larger than it would have been had the settlement occurred at an earlier stage. No order was made in respect of Mr. Fitzpatrick's costs and I am not aware as to whether there was any side arrangement, not requiring an order, in that regard.

2.13 Before leaving the question of the settlement it is also important to note that there were discussions and negotiations between the receivers and McMahon O'Brien prior to the settlement being concluded. It does not seem to me that it is appropriate to express any view on those negotiations or the positions adopted by the respective parties thereto. The mere fact that there were such negotiations and the fact that the receivers were, therefore, on notice (if they had not otherwise been) of the potential claim of McMahon O'Brien is a factor that may have to be taken into account.

2.14 There is one further aspect of the facts that needs to be noted. McMahon O'Brien acted at all material times on behalf of Mount Kennett and Green band in these proceedings. However, the only two equity partners, on the evidence, in that firm of solicitors, are Mr. Paul O'Brien and Mr. Dennis McMahon. It was argued that aspects of Mr. O'Brien's position, *vis-á-vis* Mount Kennett and Greenband, and the position of both Mr. O'Brien and Mr. McMahon in respect of NAMA are of relevance to the issues which I have to decide.

2.15 First, it does need to be recorded that Mr. O'Brien was the principal behind Mount Kennett and Greenband and, so far as the evidence at the various trials which I conducted was concerned, he was, at all material times, the beneficial owner of Greenband. For the reasons set out in the judgment in relation to damages ([2010] IEHC 210), the entire losses were suffered by Greenband. Whatever its relevance there can be little doubt, therefore, that the case, in respect of which the order under s. 3 of the 1876 Act is sought, is one in which Mr. O'Brien was the beneficial owner of the client and one of only two equity partners in the firm of solicitors acting on behalf of that client.

2.16 In addition, the receivers have placed before the court affidavit evidence of the conclusions to be reached from the statements of affairs filed with NAMA by both Mr. O'Brien and Mr. McMahon. I do not understand there to be any controversy as to the conclusions reached as to the position of both gentlemen as set out in those statements of affairs. It follows that Mr. O'Brien has liabilities to NAMA of €287,778,118.00 and that his assets are estimated to have a value of €86,991,591.00. It follows that Mr. O'Brien is in negative equity in a sum of just over €200M to NAMA.

2.17 Insofar as Mr. McMahon is concerned, the relevant figures from his statement of affairs disclose liabilities of €35,500,499.00, assets of €21,692,000.00, with a deficit, therefore, of€13,808,499.00. The precise relevance, if any, of that situation will be addressed in due course. In addition, and for completeness, it should be noted that the firm McMahon O'Brien has two further partners who are fixed income partners and who thus, as I would understand it, do not share in any extra income which the firm might generate. Thus, any marginal increase in the fee income of the firm is shared solely by Mr. O'Brien and Mr. McMahon. Against that factual background it is next necessary to turn to the issues which arise.

3. The Issues

3.1 McMahon O'Brien principally relies on the fact that, it is said, the provisions of s. 3 of the 1876 Act apply to the circumstances of this case. It will be necessary to analyse that contention in due course. As against that proposition a number of arguments are put forward on behalf of the receivers which give rise to the main issues which require to be determined in this application.

3.2 In summary, the receivers argue that relief under s. 3 of the 1876 Act is discretionary. Certain factors are pointed to which, it is said, ought lead the court to exercise its discretion either against making any order or in favour of making a reduced and special order on the facts of this case. Next it is said that equity ought not to act in vain. That argument is connected with the suggestion that no effective order can now be made by virtue of the provisions of the National Asset Management Agency Act 2009 ("the 2009 Act"), and, in particular, s. 149(2) thereof. Third, reliance is placed in the written submissions filed on behalf of the receivers on the fact that the receivership predates any application under s. 3 of the 1876 Act, and any potential liquidation of both Mount Kennett and Greenband (the petitions for winding up both companies having been filed in advance of the application under s. 3 of the 1876 Act so that, in the event that liquidation follows, an event said to highly likely, the liquidation would be taken to relate back to the date of those petitions). It is said that those factors lead to a situation where it is not possible or appropriate to make an order under s. 3 of the 1876 Act. Against the background of those issues it seems to me appropriate to turn next to the law.

4. The Law

4.1 There was no dispute between counsel as to the general principles applicable to an application such as this.

4.2 Solicitors enjoyed, at common law, a lien for costs on money in the solicitor's hands recovered by the solicitor concerned for his client. However, that common law lien could have no application to the facts of this case for the relevant monies were never actually recovered by the solicitors concerned and never came into their hands.

4.3 However, it is clear that s. 3 of the 1876 Act operates in addition to the common law. What s. 3, in its terms, does is to make it "lawful for the court or judge before whom any [...] suit" has been heard "to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved" so as to create a charge for taxed costs arising out of the matter.

4.4 As to the first part of the section, there can be no doubt but that McMahon 0'Brien were solicitors employed to prosecute a suit in this Court. As to the second part of the test which states that "it shall be lawful" to make the charging order, it is clear that those words are not mandatory in operation- see *Roche v. Roche* (1892) 29 L.R. Ir. 339 at 343. In passing, it should also be noted that as. 3 order can be made where money is recovered or preserved by reason of a compromise, as in this case (see *M'Larnon v. Carrickfergus U D. Council* [1904] 2 I.R. 44).

4.5 A range of factors, many of which are not of any relevance to this case, have been identified in the case law as circumstances which might lead the court not to make an order. See, for example, para. 9.77 of O'Callaghan, "*The Law on Solicitors in Ireland*" (Butterworths 2000) and the cases cited therein. The question of delay, to which I will return, is the only factor mentioned in those

cases which seems to me to have any relevance to the unusual issue which I now have to decide. I will, therefore, return to the non-mandatory nature of s. 3 in due course.

4.6 The remaining aspects of the requirements of s. 3 seem to me to be clearly met. The sum of €1.5m recovered for Mount Kennett and Greenband (even though it was paid to receivers acting on behalf of those companies) is, nonetheless, property recovered or preserved by the efforts of the solicitors firm concerned. The settlement was a compromise, albeit at a reduced amount, of a claim which had been successfully brought home by those solicitors on behalf of Mount Kennett and Greenband. The property has certainly been recovered "through the instrumentality" of the solicitors concerned as that term is used in the section.

4.7 Finally, it is well established that a charging order under s. 3 gives the relevant solicitor priority over all other creditors and all claims except that of a purchaser for value without notice of the right of the solicitor to a charging order. See *Cole v. Eley* [1894] 2 Q.B. 350, and *Hamer v. Giles* (1879) 11 Ch.D 942 at 947. However, it does have to be noted, for it is the subject matter of a number of the cases that were referred to in argument, that the solicitor can only take subject to any rights of setoff which subsist against his client. In truth, the proper characterisation of a setoff is that the person from whom the property may be recovered is not obliged to pay the full sum to the client concerned for that party is entitled to a setoff. The money notionally awarded before a setoff is applied is not, therefore, money actually recovered or preserved for the client. It is for that reason that a person entitled to a setoff does not have that entitlement disturbed by any entitlement of the solicitor for his opponent to a charging order under s. 3.

4.8 The overall thrust of the case law seems to me to establish that a solicitor will ordinarily be entitled to a charging order under s. 3 if the formal requirements are met but that the court can take into account what O'Callaghan describes as clear countervailing considerations of an equitable nature which render the making of the order inequitable. It is clear on the facts of this case that the formal requirements are met. The sum of €1.5m was recovered as a result of the efforts of McMahon O'Brien and, therefore, it seems to me to come down to a question as to whether there are countervailing factors of an equitable nature which would make it inequitable to make a charging order or which might require that the charging order be in an unusual form. It is against that background that it is necessary to return to the issues raised on behalf of the receivers.

5. Discussion

5.1 It seems to me that it would be unreal to disregard the fact that the relationship between the client and the solicitor in this case was less than at arms length. As pointed out, Mr. O'Brien was the beneficial owner of the client and one of the only two equity partners in the firm of solicitors. This is not a case where there was an entirely independent relationship between a firm of solicitors and a client with whom that firm had no direct connection.

5.2 It also seems to me to be necessary to at least pay some regard to the fact that the ultimate settlement achieved was an "all-in" settlement for, perhaps, a little less than half of the full value of the claim including costs. Whether that factor could be of any relevance in a case where the client and solicitor were entirely at arms length is a matter to be decided in other proceedings. I do, however, take into account the fact that, in the real world of legal practice, it is almost universal that, where, for the sort or reasons which arose in this case, it is necessary to compromise proceedings for a sum inclusive of costs, it is the almost invariable practice that, in the words of counsel for the solicitors in this case, everyone must "share the pain". In practical terms, the fact that the client is not recovering the full amount also means that the lawyers may be required to take less than what might otherwise be the fees that they would hope to be paid. I am satisfied that, in circumstances where the firm of solicitors concerned have the close connection which I have already noted with their client, it would be inequitable to allow those solicitors to assert a claim to full costs to be charged on a costs inclusive settlement when there would have been no reality to that eventuality occurring had the settlement remained in the hands of the client and solicitors concerned who would, in those circumstances, have been guided by the same person. For like reasons, it seems to me that there could be no reality to the recovery of solicitor and client costs in a case such as this. It is unreal to believe that McMahon O'Brien would have sought to recover any additional solicitor and client costs from Greenband which was owned by a principal of the firm. For those reasons, it seems to me that counsel for the receivers was correct when he suggested that the Court must have regard to the fact that the settlement was for 50% (as he put it) or a little less (as I have found it) of the full value of the award made inclusive of costs. I will return shortly to how the Court should exercise its discretion arising from that factor.

5.3 The second major matter to be determined stems from the undoubted significant indebtedness of both Mr. O'Brien and Mr. McMahon to NAMA for whose benefit the monies have now been recovered. Counsel for McMahon O'Brien sought to place reliance on the distinction between the firm and the two individuals. I am not sure that there is any great validity, however, to that distinction on the facts of this case. A firm of solicitors which is a partnership does not have a separate legal personality to its equity partners. It is not a corporate entity. It is true that the partnership may have rights and obligations (such as the obligation to pay staff and incur other outgoings or the right to recover fees). However, ultimately, those rights and obligations are those only of the partners and, insofar as it can be said that any individual has a direct interest in the recovery of fees, then it seems to me that that party or parties is or are the equity partner(s). Counsel for McMahon O'Brien referred to the fact that the equity partners only share a proportion of the fees recovered. There is no doubt that that is true. However, it is equally true that for every extra €1,000 that comes in in any given year above and beyond the costs of running the partnership, including paying the salaries of the fixed income partners, the entirety of that extra €1,000 is shared by the equity partners. On the basis of that analysis, it does not seem to me that there is any basis for making a meaningful distinction between Mr. McMahon and Mr. O'Brien in their capacity as the sole equity partners in McMahon O'Brien, on the one hand, and Mr. McMahon and Mr. O'Brien in their capacity as debtors to NAMA, on the other hand.

5.4 However, I am not satisfied that the fact that both gentlemen are in significant debt to NAMA is, of itself, a reason for not making a charging order under s. 3. I have come to that view, not because of the arguments raised on their behalf concerning the distinction between their capacity as partners and as debtors but rather because it seems to me that NAMA must follow whatever enforcement measures may be available to it against Mr. O'Brien and Mr. McMahon. If and when any monies come to be paid over to McMahon O'Brien on foot of any charging order made, then the interests of a range of parties not before the Court might legitimately come into play. There is, for example, the position of counsel and expert witnesses, whom, I understand, have not been paid to date for their services and could only expect to be paid out of any costs recovered. It is also possible that other persons with connections to the firm of McMahon O'Brien might also claim an entitlement. It seems to me that it would be inappropriate, on a motion such as this, to make a final determination as to any priorities that might arise as and between the undoubted entitlement of NAMA to recover monies which can be said to be beneficially those of Mr. McMahon and Mr. O'Brien personally (including monies which may be, in substance, theirs, because they represent a surplus in a solicitors firm in which they are the only equity partners), and the interests of any other persons who might claim an interest in the same monies. That is an issue which will be determined when it arises. The consequences should lie where they fall. Nothing in this judgment should, however, be taken as implying that NAMA is, in any way, precluded from seeking to recover by any legitimate lawful means, its entitlements from Mr. O'Brien and Mr. McMahon, including any means which may prove to be lawful for attaching monies due to them as costs.

5.5 It, therefore, seems to me to follow that, subject to questions of delay and whether an effective order can be made, this case turns on the appropriate response of the Court to the fact that there was a compromise and the effect that that should have on what is equitable in respect of the costs of the relevant litigation in circumstances where there is a strong connection between the client and the solicitor of the type already analysed. I propose dealing first with the question of delay and whether an effective order can be made. I turn to that question.

6. Delay

6.1 As pointed out earlier it is clear that delay can be a factor which can properly lead the court to decline to make an order under s. 3 of the 1876 Act. It seems to me that delay potentially arises in two ways in this case. First, there is delay *simpliciter*. It is said on behalf of the receivers that McMahon O'Brien should have sought a charging order at or around the time when the original judgment was granted, which was some 11 months before the events which have given rise to this application. There is certainly some suggestion in the authorities that the appropriate time to seek an order is from the trial judge at a time proximate to the events which cause the property, over which a charging order is sought, to be recovered or preserved.

6.2 However, it does need to be noted that the order on foot of which Greenband and Mount Kennett were to recover a sum of just less than €2.5m and costs, was the subject of a stay which remained operative up and until the time of the settlement. There was, therefore, no immediate prospect, in the absence of a settlement, of any recovery of any property up to the time of the events which led to this application. In those circumstances I am not satisfied that delay alone is a significant factor to be taken into account.

6.3 The second leg of the delay argument is to the effect that events were allowed to evolve without an application being made under s. 3 of the 1876 Act. It is clear that by delaying in making an application, solicitors may run the risk that third parties with *bona fide* entitlements and not on notice may come to acquire interests in relevant property so as to defeat the prima facie entitlements of the solicitors concerned. However, that did not happen here. Insofar as NAMA, through the receivers, has recovered any property to which it was entitled as a result of its relationship with Greenband and Mount Kennett, both NAMA and the receivers did so with notice of the asserted claims by McMahon O'Brien. As noted in O'Callaghan "*The Law of Solicitors in Ireland*", what a charging order gives the solicitor priority over is the rights of all other creditors except a purchaser for value without notice of "the right of the solicitor to a charging order". Priority does not stem from the charging order itself but rather priority stems from the entitlement of the solicitor to seek a charging order. The entitlement to seek a charging order arose in this case at the very latest when judgment was given. The right of McMahon O'Brien to a charging order, at least *prima facie*, existed at the time of the receivership, the liquidation petitions, the settlement and the payment over by the receivers to NAMA. Clearly a solicitor who has a right to seek a charging order and delays in culpable circumstances so that the rights of third parties may be affected, may lose his right. However, I am not satisfied that there was any culpable delay in this case. For the reasons already analysed delay *simpliciter* does not arise because of the stay. McMahon O'Brien did not, after the settlement became clear, delay significantly in pursuing their application under s. 3 of the 1876 Act. It seems to me, therefore, that, at the level of principle, a charging order under s. 3 is effective against all creditors save those who would not have had notice of the entitlement of the solicitors concerned to seek a charging order. If there was culpable delay then the proper course of action is not to make a charging order at all. If there is not culpable delay and an order is made, then it will have priority over the entitlements of other parties. For those reasons it seems to me that the making of an order in this case would not be in vain.

6.4 For like reasons, it does not seem to me that it is necessary to deal with s. 149 of the 2009 Act, which deals with the status of the receivers in this case. Section 149(2) provides that the chargor is responsible for the remuneration of the receivers. It is thus Greenband which is liable to pay the receivers if it has the money. However, it does not seem to me that that provision has any application to the sort of issue which I have to decide. A charging order under s. 3 of the 1876 Act takes priority over any other creditor and all other parties save a *bona fide* purchaser for value without notice. There is nothing in s. 149 of the 2009 Act which displaces that position.

6.5 It, therefore, follows that it is necessary to return to the appropriate response of the court in the light of the compromise. I, turn to that question.

7. The Consequences of the Settlement

7.1 1t is not necessary for me to approve the settlement reached by the receivers as such. However, if I were to conclude that the receivers had acted unreasonably in agreeing to the terms of settlement in all the circumstances, that fact would be likely to affect the equity of the situation. Whether, if the receivers had had more time, it might have been possible to do a more rigorous exercise and negotiate a better settlement is a matter on which one can only speculate. As pointed out earlier, the receivers did not have the luxury of time. Having regard to all of the factors present (many of them being factors of which I was well aware, being the judge conducting the litigation), I am more than satisfied that the receivers did not act unreasonably in entering into a sensible commercial arrangement.

7.2 In the light of that, it seems to me that equity requires that the recovery, by means of a charging order under s. 3, of McMahon O'Brien, in the particular circumstances of the close connection between McMahon O'Brien and Greenband, should be no more than a proportionate recovery. It seems to me, therefore, that I should make a charging order for an amount to be ascertained as a result of taxation by the following formula:-

$$\frac{1{,}500{,}000}{2{,}447{,}893 + i + TC} \times TC$$

where **TC** represents the costs taxed on a party and party basis and I represents the interest under the court order until the 31st January, 2012.

7.3 By that formula, the amount of costs which will be taxed on a party and party basis will be reduced proportionately to the recovery. It will be for another day to determine any further issues arising between NAMA and Mr. O'Brien and Mr. McMahon concerning those costs, Even if, however, there is a mechanism whereby NAMA can attach some or all of these costs, then at least that attachment would work to reduce the indebtedness of Mr. O'Brien and Mr. McMahon to NAMA. While that may appear to be a relatively modest reduction in the context of their overall indebtedness, it nonetheless seems to me to give a just result. If, as was urged by the receivers, I was to make no charging order at all, then that would, it seems to me, create an injustice in that Mr. McMahon and Mr. O'Brien would not recover or even be given credit for any costs despite a reasonable expectation that they would be able to do so in the event of there being recovery.

8. Conclusion

8.1 I, therefore, propose to make an order under s. 3 of the 1876 Act, declaring that McMahon O'Brien are entitled to a charging order in accordance with the formula referred to above.

8.2 I will also order that the costs of Mount Kennett and Green band of this litigation be taxed on a party and party basis and that the figure which is come to as a result of that taxation process be fed into that formula as appropriate.

8.3 I will hear counsel as to the costs of this application.