

**THE HIGH COURT**

**[Record No.2015/13 MCA]**

**BETWEEN**

**GALWAY CITY COUNCIL**

**APPLICANT**

**AND**

**QDM CAPITAL LIMITED**

**RESPONDENT**

**AND**

**[Record No. 2011/284 JR]**

**QDM CAPITAL LIMITED**

**APPLICANT**

**AND**

**NEW ROSS TOWN COUNCIL**

**RESPONDENT**

**JUDGMENT of Ms. Justice Iseult O'Malley delivered the 10th day of March 2015.**

**Introduction**

1. This judgment concerns two applications relating to the costs currently being taxed in proceedings entitled *QDM Capital Limited v New Ross Town Council* 2011/ 284 JR. In the first, Galway City Council seeks to make absolute a conditional order of garnishee over the monies. The basis for its claim is a taxed order for costs against QDM in separate proceedings.

2. In the second, Brian Lynch & Associates Solicitors, the solicitors for QDM in the New Ross case, seek an order pursuant to s. 3 of the Legal Practitioners (Ireland) Act 1876, declaring that they are entitled to a charge upon the judgment and costs in those proceedings.

3. It is common case that the solicitors are entitled to apply for the charge. The issue is whether Galway City Council's claim has priority.

4. The applications were heard two days apart but it is agreed that the order in which they were listed cannot be a deciding factor.

**Background facts**

5. The garnishee application arises from the successful defence, by Galway City Council, of two judicial review proceedings brought against it by QDM Capital Limited. Those proceedings 2011/365 JR and 2011/305/ JR were in relation to a tender for the Leisureland complex in Salthill in Galway.

6. The two cases were heard on 20th, 21st and 22nd July, 2011. Costs were ultimately awarded to the City Council on the 23rd January, 2012, arising from the successful defence of both judicial reviews.

7. Thereafter, the taxation process commenced and the City Council was awarded taxed costs for the two judicial review proceedings for a sum totalling €113,342.80. Interest at a rate of 8% is accruing on these sums from the date of Certificate of Taxation, the 8th November, 2013.

8. The taxed bill of costs for both judicial review proceedings remains outstanding in full.

9. Galway City Council became aware that QDM had previously taken judicial review proceedings against New Ross Town Council. That case resulted in a settlement, reflected in a consent order made on the 12th July, 2011, on favourable terms for QDM, including an order for costs in its favour to be taxed in default of agreement. The bill of costs arising from that settlement is awaiting an imminent decision from the Taxing Master, on the 12th March, 2015.

10. The City Council obtained a conditional garnishee order in an *ex parte* application on the 26th January, 2015, pursuant to O.45 of the Rules of the Superior Courts.

11. On the 17th February, 2015, Brian Lynch & Associates made an application pursuant to s.3 of the Legal Practitioners (Ireland) Act 1876, for a declaration that they are entitled to a charge upon the judgment and costs ordered by the High Court on 12th July, 2011, in respect of their costs, charges, and expenses in the New Ross proceedings. QDM has consented to this order being made.

12. The amount of costs claimed in the bill, the subject of taxation, is €40,520.67 plus VAT at 23%, plus €16,617.32 in disbursements.

13. Galway City Council says that it obtained the conditional order before the solicitors initiated their application, and that as it was the first in time it must prevail. The solicitors say that their entitlement arose on the day that QDM became entitled to its costs in the New Ross proceedings, long before the conditional order of garnishee and in fact before the City Council got an order for costs in its own proceedings.

**Statutory provisions**

14. Order 45, r.5 of the Rules of the Superior Courts provides that

*"Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be*

*attached belongs to some third person, or that any third person has a lien or charge upon it, the Court may order such third person to appear, and state the nature and particulars of his claim upon such debt.*

15. Section 3, Legal Practitioners (Ireland) Act, 1876 provides as follows:

*" In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat or which shall operate to defeat such charge or right shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations."*

#### **Authorities**

16. In *James Bibby Ltd. v. Woods and Howard* [1949] 2 K.B. 449 judgment creditors were seeking an order against money, which the garnishee had agreed to pay to the judgment debtor. At the hearing of the application to make the order absolute the debtor's solicitor claimed, for the first time, that he had a lien on the money for his costs in the proceedings. The order was nonetheless made and the debtor appealed.

17. Giving the leading judgment of the divisional court, Lord Goddard C.J. noted, firstly, that in truth the appeal was not that of the debtor but of the solicitor, who had never applied to the court for a charging order. Secondly, the argument that the solicitor had a lien was misconceived. A lien, properly so called, can only exist where the person claiming it has in his or her possession the property which is claimed to be subject to the lien. What the solicitor in this case had was a right to claim the equitable interference of the court, seeking an order that the judgment obtained by his efforts stood as security for his costs. If he had obtained such an order before the application to make absolute the garnishee order came on, his charge would have taken precedence over the creditor's claim. However, having made no such application he had no right in the property.

18. *Bibby* was approved in this jurisdiction by O'Hanlon J. in *Fitzpatrick v DAF Sales* [1988] I.R. 464. In that case the plaintiff had obtained judgment against one defendant, while the second defendant succeeded in getting judgment against the plaintiff in a counterclaim. The second defendant sought a garnishee order in respect of the money owed by the first defendant to the plaintiff.

19. In an affidavit sworn on behalf of the plaintiff for the purpose of opposing the garnishee application, his solicitor claimed that the plaintiff had agreed to pay him a specified sum by way of costs. It was argued by the plaintiff that the judgment creditor should rank behind the solicitor, in reliance on the solicitor's lien for costs.

20. On this issue O'Hanlon J. opted to follow *Bibby*, finding that the judgments were convincing and that it had "stood the test of time" over the forty years since it had been given. He also rejected an argument that, where a party had notice of a solicitor's lien that was sufficient to preserve the priority of the solicitor's claim against the fund. The authority sought to be relied upon for this latter proposition is not named in the judgment but according to O'Hanlon J. it was one where the solicitors had written formally to put the other party on notice that they were claiming a lien and proposing to assert it against the fund in question. The learned judge concluded that the entitlement of the judgment creditor to have the order of garnishee made absolute was not affected in any way by the solicitor's claim.

21. In *Larkin v Groeger* [1990] 1 I.R. 461, the competing claims against an unsuccessful plaintiff were those of i) a judgment creditor whose claim was secured on an undertaking given by the plaintiff's solicitor; ii) a judgment in favour of a bank, secured by way of a conditional order of garnishee attaching the proceeds of an award in the plaintiff's favour in an arbitration and iii) the claim of the plaintiff's solicitors for a s.3 order relating to their costs in the arbitration and subsequent High Court proceedings. The defendants in the action also sought to set off their award off costs in the High Court against their liability on foot of the arbitrator's award.

22. With reference to the solicitors' position, Barrington J. noted that the court had to decide which of two innocent parties was to bear a loss. He rejected the defendant's claim that, since the conditional order had been obtained before the s.3 application was brought, the "first in time" principle applied and accepted the argument that the solicitors were relying, not upon a mere equity, but upon a statutory right to invoke the discretion of the court.

*"It is clear from the wording of s.3 that a charging order under that section, once made, takes precedence over all other claims except that of a bona fide purchaser for value without notice. A person who held an absolute order of garnishee would not be a bona fide purchaser for value. Therefore it would appear to be wrong to prefer the holder of a conditional order of garnishee to a solicitor who claimed a charging order to protect an existing lien."*

23. In *Kanwell Developments Ltd v Salthill Properties Ltd* [2008] IEHC 3, Clarke J. was dealing with the competing merits of a winding up petition and a garnishee application. Noting that both operated so as to significantly constrain the freedom of action of the debtor, he considered that the best approach was to determine the issue on the basis of the times when the respective procedures were initiated. This was, in his view, both "technically correct" and in conformity with "first principles and fairness". At paragraph 7.3 he said:

*"There is an old adage to the effect that "where the equities are equal the first in time prevails". I have already indicated that, in my view, the technical prima facie position is that the first in time as and between a petition and a garnishee application both grounded upon the same debt, is that the first in time should prevail. I see nothing in the equities of the competing contentions concerning the bona fides or otherwise of the two competing applications in this case to suggest that they are other than equal. They do not, therefore, in my view, displace the underlying position which is, as I have pointed out, to the effect that the petition should prevail."*

24. In *Mount Kennett Investment Company & Anor v Patrick O'Meara & Ors* [2012] IEHC 167 the plaintiff companies had won an award of damages but subsequently settled the action. The solicitors, one of whom was the beneficial owner of one of the

companies, brought an application under s.3 of the Act of 1876.

25. Clarke J. considered the relationship between s.3 and the common law, noting that solicitors enjoyed, at common law, a lien for costs on money in the solicitor's hands recovered by the solicitor concerned for his client, but that the section operated in addition to the common law. Analysing the terms of the section, he further noted that it was not mandatory but conferred a discretion on the court. At paragraph 4.8 he said, with reference to *The Law of Solicitors in Ireland* (O'Callaghan, 2010),:

*"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."*

26. Discussing the significance of an order under s.3 Clarke J. said

*"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..."*

*... 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 rights of the solicitor to a charging order. ..."*

27. On the issue of priorities, it was held that

*"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."*

28. In *Collins v Gharion* [2013] IEHC 316 the plaintiff firm of solicitors sought both a Mareva injunction and a declaration pursuant to s.3 in relation to fees due to it from the defendant company. The defendant maintained that there had been an express agreement as to the amount of fees payable and that that sum had been discharged, albeit only after the motion had been issued.

29. Birmingham J. held that on the facts a Mareva order was not warranted. Although unimpressed by the defendant's conduct in relation to the fees, he also refused the s.3 order as being inappropriate at the interlocutory stage where the existence of liability was hotly disputed. In so ruling, he held that the section did not require the amount due to have been quantified but that it must be established that some fees are due.

30. For present purposes it is worth noting that Birmingham J. cited *Mount Kennett* as demonstrating the significance of a s.3 order for third parties as well as for the solicitor and client.

31. Finally, I note that in the textbook by Mr. O'Callaghan cited by Clarke J. in *Mount Kennett*, the following advice is given (at p. 187):

*"Where it has occurred that possession of the fund or proceeds of a judgment have not come into the possession of, or have been parted with by the solicitor, without payment of the moneys due in accordance with the particular lien, a solicitor should seek an order charging the funds recovered with his interest under s 3 of the Legal Practitioners (Ireland) Act 1876 if there is any likelihood of a third party garnishing the funds which he recovers for his client, in order to preserve the benefit of the particular lien. Otherwise his interest may well be defeated."*

32. Mr. O'Callaghan is of the view that *Fitzpatrick* was wrongly decided, on the argument that the third party garnishor does not give value for his order but merely steps into the shoes of the party whose debt is garnished. His rights are therefore subject to all rights subsisting as against the interest of the judgment debtor, and he is on notice that a judgment debt is subject to a solicitor's lien (citing *Dallow v. Garrold* (1884) 14 QBD 54). However, I do not think that I need to express a view on this.

## Conclusions

33. In the circumstances, it seems to me that, in the first place, the solicitors were entitled to seek a charging order as and from the 12th July, 2011, which was the date of the consent order granting their client its costs. While the authorities are not entirely free from doubt, it seems clear that such an order should be made where the statutory criteria are satisfied and in the absence of any circumstances which would render it inequitable. Further, it seems that there is a clear distinction to be drawn between an application under the Act and an attempt to intervene in garnishee proceedings with a mere assertion of entitlement to a lien over property which is not in the solicitor's hands. The s.3 application is an invocation of a statutory right.

34. The order granting Galway City Council its costs against QDM was not made until the 23rd January, 2012. In seeking an order of garnishee against the taxed costs, the City Council was, by definition, on notice of the solicitor's entitlement to be paid. In the circumstances it is not, in my view, unjust to deny to the Council a right to take priority over the solicitor's entitlement.

35. On the facts of this case, the solicitors for QDM have demonstrated that they come within the terms of the statute and that there has been no culpable delay or other culpable behaviour on their part such as might unjustly affect the rights of third parties.

36. That being so, I do not think it possible for the City Council to claim priority. It cannot claim to be a bona fide purchaser for value without notice, since it manifestly was on notice of the fact that the taxation process involved an assertion of the right to legal fees. Although the conditional garnishee order was obtained before the s.3 application was moved, the statute prevents the latter claim from being defeated once it is initiated before a garnishee order is made absolute.

37. Since the solicitor's claim is based on statute rather than a common law lien, it does not depend on the solicitor having actual possession of the money and takes effect once the order is made.

38. In my view, therefore, the declaration under s.3 of the Legal Practitioners (Ireland) Act 1876, should be granted.