Neutral Citation: [2014] IEHC 280

THE HIGH COURT

[2005 No. 336 S]

BETWEEN

JOHN MEAGHER

PLAINTIFF

AND

DUBLIN CITY COUNCIL AND HEALTH SERVICE EXECUTIVE (No.2)

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 28th May, 2014

1. On 1st November 2013 I delivered my first judgment in these proceedings: see *Meagher v. Dublin City Council* [2013] IEHC 474. The plaintiff sought to recover certain unpaid invoices in respect of the provision of accommodation and other services which he had provided to asylum seekers in the period between 1997-2002 at the request of both Dublin City Council and the Health Service Executive ("HSE"). While I dismissed the claim against the Council, I ultimately ruled that the plaintiff was entitled to recover the sum of €106,640 from the HSE. I also ruled that the plaintiff was entitled to recover four days' costs as against the HSE.

2. The issue which now arises is whether I should make a charging order pursuant to s. 3 of the Legal Practitioners (Ireland) Act 1876 ("the 1876 Act") in respect of both that costs order and the further sum of €106,640 in favour of the plaintiff's solicitors. This issue arises in the following way.

3. These proceedings began in 2005 and proceeded in a very leisurely fashion. Indeed, the proceedings were not even served until April, 2008 and even then only after the making of an order extending time for the service of the proceedings. Further delays ensued, with the result that the matter was only set down for trial in August, 2012. The proceedings themselves came on for hearing before me in March, 2013 and, following two short adjournments, ultimately concluded on 9th July, 2013, following a ten day hearing. I then reserved judgment and delivered that judgment on 1st November, 2013.

4. For reasons which will become apparent later in this judgment, it has not proved necessary to consider whether one possible effect of a delay of that kind might be to disentitle the plaintiff's solicitors to the benefit of a charging order under s. 3 of the 1876 Act to which they might otherwise have been entitled.

5. In the meantime, however, Danske Bank had issued proceedings in January, 2013 against Mr. Meagher. On 23rd February, 2013, Danske Bank obtained judgment by default against Mr. Meagher for the sum of €6.98m. Mr. Meagher appealed that decision to the Supreme Court, but on 1st April, 2014, that Court dismissed the appeal: see *Danske Bank A/S v. Meagher* [2014] IESC 38.

6. Danske then applied to this Court (Kelly J.) to have a receiver appointed. Such an order was duly made and Kelly J. directed that all sums that may be due to John Meagher from the defendants in these present proceedings - including any judgment which he might obtain – should be amenable to a garnishee order.

Application for a charging order under s. 3 of the 1876 Act

7. In June, 2013 the plaintiff's solicitors, CCK Law Firm ("CCK"), applied to this Court for a charging order pursuant to s. 3 of the Legal Practitioners (Ireland) Act 1876 ("the 1876 Act"), in respect of any judgment so recovered. Section 3 of the 1876 Act essentially creates a mechanism whereby the plaintiff's legal team can in effect become secured creditors with a prior entitlement to be paid out of the funds thus recovered.

8. Section 3 of the 1876 Act provides:-

> "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 pending 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, tenure or kind the same may be, which shall have been recovered or preserved to the instrumentality of such attorney or solicitor for the tax cost charges and expenses of or in reference to such matter or proceedings and it shall be lawful for such court or judge to make such order or orders for taxation of and or for raising and payment of such costs, charges, and expenses out of the said property if 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 have no affect 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."

9. There is no doubt whatever but that a charging order takes effect as against all other creditors bar a *bona fide* purchaser for value without notice: see, *e.g., Larkin v. Groeger* [1990] 1 I.R. 461, 467, *per* Barrington J. . CCK maintain, however, that it is entitled to a charging order under s. 3 of the 1876 Act such as would entitle it to a charge in respect of the solicitor and client costs associated with the recovery of the sum of €106,640 from the HSE in the current litigation, over and above that which was recoverable in the ordinary way in respect of the (admittedly limited) costs order which I made in favour of Mr. Meagher. Putting this another way, CCK effectively maintain that it is entitled to appropriate the entire sum recovered as damages in these proceedings in satisfaction of the solicitor client costs properly incurred by the plaintiff in the course of this litigation.

The effect of s. 3 of the 1876 Act

10. At common law a solicitor enjoys a solicitor's lien over unpaid costs, but just as in *Mount Kennett* itself, the question of a lien does not arise because the plaintiff's solicitor is not (yet) holding funds recovered for the benefit of the client. It is, however, clear

from both the language of the section and the relevant case-law that s. 3 of the 1876 Act goes further than the common law: see *Mount Kennett Investment Co. v. O'Meara* [2012] IEHC 167, *per* Clarke J It is also clear from that judgment that the s. 3 power is discretionary, even where the formal requirements of that section have been fulfilled.

11. In *Mount Kennett* the plaintiffs had sued the defendants for damages in respect of the non-completion of a property transaction. In this Court the plaintiffs were awarded damages (plus interest), together with costs by order of Smyth J. made at an earlier stage in the proceedings. In his later judgment on the s. 3 charging order issue, Clarke J. considered that the overall liability of the defendants to the plaintiffs was in the order of €3.25m., inclusive of costs.

12. Receivers were, however, subsequently appointed to the plaintiff companies and the defendants in turn had appealed this award to the Supreme Court. A decision was taken by the receivers to settle the appeal and their entitlement to do so was not questioned. The settlement of €1.5m. was, however, a costs inclusive figure and, as Clarke J. pointed, the receivers could scarcely be faulted for exercising their judgment in arriving at the settlement which they did:

> "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...[T]he receivers did not have the luxury of time. Having regard to all of the factors present…I am satisfied that the receivers did not act unreasonably in entering into a sensible commercial arrangement."

13. A further factor in that case was that there was a close connection between the plaintiffs' solicitors and the plaintiffs themselves. One of the two equity partners in that firm of solicitors was also the beneficial owner of the second plaintiff.

14. It was against that background that the plaintiffs' solicitors application under s. 3 of the 1876 Act fell to be considered. Clarke J. considered that the equity of the case required the making of the order under s. 3, but, critically, not for all of the costs which had been incurred:

> "…[I]t seems to me that equity requires that the recovery, by means of a charging order under s. 3 [in favour of the plaintiffs' solicitors], in the particular circumstances of the close connection between the [those solicitors and the second plaintiff], should be more than a proportionate recovery."

15. Clarke J. then made an order that the plaintiffs' solicitors obtain a charging order which was approximately three fifths of the taxed party and party costs. The three fifths figure was based on a comparison of the overall sum ultimately recovered by the receiver and the damages award obtained by the plaintiffs in the High Court.

16. It seems to me that this is the approach which should largely govern the present application. The most important difference between the two cases is that in the present case the plaintiff actually obtained an order for costs in addition to the damages award. Moreover, Danske accept that the costs which are recoverable by the plaintiff's solicitors pursuant to that costs order fall outside the scope of the sums which the receivers might seek to recover in satisfaction of that debt.

17. A further consideration is that the costs order which I made was itself intended to be a proportionate one. After all, the plaintiff failed entirely in the case against the Dublin City Council and the ultimate award against the HSE was a considerably lower percentage of the sum which was originally claimed. Indeed, it might be said that as against that background the award of four days' costs was itself a generous one.

18. The plaintiff relied heavily on the decision of North J. in *Charlton v. Charlton* (1884) 49 *Law Times* 267, 270 where in the context of the similar charging provisions contained in s. 28 of the (English) Solicitors Act 1860 the judge invoked the principle of salvage in interpreting these charging order provisions:

> "The law is, if you have save a sinking ship, you shall be paid what is just out of the value of that ship. That I take to be the principle of the Solicitors Act referred to, for the words are distinct and clear and carry into effect plainly that principle."

19. These comments must be viewed, however, in the context of the actual order made by North J. since he acknowledged that "the amounts to be charged can only be in respect of taxed costs": see (1884) 49 *Law Times*, 267, 272.

20. The underlying policy of the 1876 Act must also be considered. It is true that, as North J. pointed out in *Charlton*, it reflects to some degree the principles of the law of salvage. This is why it would have been unfair not to have made some form of charging order in *Mount Kennett*, as thanks to the efforts of the plaintiff company's legal team, funds were recovered for the benefit of the company, and, ultimately, its creditors. In a case such as *Mount Kennett* where no separate provision was made for costs in the settlement, why should the creditors of the company in effect receive everything, while those who toiled to effect that salvage (namely, the legal team) should receive nothing at all? This is especially so when without those efforts the creditors themselves would have recovered nothing at all. One can thus readily appreciate that in a case such as *Mount Kennett*, considerations of fairness and equity would thus justify the making of a charging order.

21. The analogy drawn from the law of admiralty cannot, however, be stretched too far. It should be recalled that admiralty law is not a complete *corpus juris* in its own right, reflecting as it does the particular characteristics of the law and customs of the sea. The law of salvage reflects the peculiar need to give salvors – who often courageously put life and limb at risk as they seek to rescue the stricken vessel – a special priority over other creditors.

22. While there is also a public interest in ensuring that the legal rights of distressed companies and financially pressed individuals are also safeguarded by seeing to it that lawyers who act for them might have some priority entitlement to payment out of the funds thus recovered through their efforts, there the comparison with the law of salvage surely ends. Specifically, it cannot be said that either the law of the 1876 Act or its underlying policy requires or mandates that the courts should as an invariable rule accord such legal teams a form of super-priority status over other creditors. If that were thought to be necessary or desirable, then express provision would have been made for this purpose, perhaps along the lines of the priority given to an examiner's costs in examinership by s. 29(2) and s. 29(3) of the Companies (Amendment) Act 1990.

23. Viewed thus, the underlying principle of s. 3 of the 1876 Act is that expressed by Clarke J. in *Mount Kennett* is that, generally speaking at least, the legal teams should recover only a fair proportion of the funds recovered in a case of this kind. As illustrated by the comments of North J. in *Charlton*, the charging order should be in respect of taxed costs only. But where, as in the present case, the plaintiff's legal team have obtained a *separate order* for costs and that order is itself designed to reflect proportionately a fair

balance between the interests of plaintiff and defendant in line with the approach of Clarke J. in *Veolia Water UK plc v. Fingal County Council* [2006] IEHC 240, [2007] 2 I.R. 81 it would not be appropriate to go further and to make a charging order in respect of the funds recovered itself.

Conclusions

24. It follows, therefore, that for the reasons stated and noting that the interests of the plaintiff's legal team must in the circumstances be deemed to be adequately safeguarded by the making of the costs order in respect of the four days costs, I will not make a charging order under s. 3 of the 1876 Act in respect of the funds recovered by the plaintiff's legal team by way of an award in favour of the plaintiff as against the HSE. It is true that the plaintiff's legal team will thus not recover the full measure of costs which they are justly due, but the same can equally be said of the interests of the creditor bank, who will only recover an even smaller fraction of the sums which it advanced to the plaintiff.