# THE COURT OF APPEAL

**Neutral Citation Number [2021] IECA 192**

**Record No. 2021/10**

**Ní Raifeartaigh J.**

**Power J.**

**Binchy J.**

**BETWEEN/**

**PHILIP KEANE**

**PLAINTIFF/RESPONDENT**

**- AND -**

**DERMOT MCGANN GROUNDWORKS LIMITED**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Binchy delivered on the 8th day of July, 2021**

**1.** This is an appeal from an order of the High Court (O'Hanlon J.) whereby she made absolute a conditional order of garnishee attaching a sum of money obtained by the defendant/ appellant in other litigation, for the purpose of satisfying an award of damages and costs previously made by O'Hanlon J., in favour of the plaintiff/ respondent as against the defendant/ appellant in these proceedings. An unusual feature of this case is that that other litigation was taken by the defendant/ appellant against its insurers and insurance brokers *after* the award made by O'Hanlon J. in favour of the plaintiff/ respondent (in these proceedings), for the express purpose of securing funds to satisfy that award. The amount

recovered by the appellants in that other litigation was inclusive of the costs incurred by the appellant in pursuing those other proceedings. All of this is against the background that it appears to be accepted that the appellant has very little or no other means to satisfy the award made by O'Hanlon J. in favour of the respondent, and enforcement of that award would result in the liquidation of the appellant, with little prospect of recovery for the respondent.

**2.** On 26th October, 2017, the respondent suffered an injury while at work in the employment of the appellant, causing him the loss of the index finger of his left hand. He issued proceedings against the appellant arising out of that accident. On 29th November, 2018, O'Hanlon J. handed down judgment in the proceedings, finding for the respondent and awarding him the sum of €100,000 in respect of general damages and €5,315.69 in respect of special damages, together with the costs of the proceedings, when ascertained. The order of the High Court was perfected on 20th December, 2018. The costs were subsequently referred for adjudication and determined in the sum of €123,896.86, which included the sum of €8,965.00 in respect of the stamp duty payable on taking up the adjudication order.

**Indemnity Proceedings**

**3.** Following the conclusion of the proceedings, they were adjourned from time to time for mention by reason of a dispute between the appellant and its indemnifiers. The appellant issued proceedings against both its insurance brokers and insurance underwriters (the "Indemnity Proceedings"). While no specific evidence has been advanced as regards the financial standing of the appellant, it has been indicated in general terms that it is either insolvent or on the brink of insolvency. This appears to have been implicitly accepted by the respondent who took no steps to enforce his judgment as against the appellant, and instead co-operated in the ongoing adjournment of the proceedings while the appellant prosecuted proceedings as against its insurers (Capital Cover Group Limited, a Lloyds syndicate, the

"Underwriters") and insurance brokers (Fingal Insurance Group DAC, the "Brokers") with a view to securing indemnity to enable it to satisfy the judgment obtained by the respondent.

**4.** I should also mention that the context in which the proceedings, which were otherwise concluded, were from time to time adjourned, was that the court put a stay of execution on the award in favour of the respondent, when the order was perfected on 20th December, 2018. This stay was initially until 28th February, 2019, but was I believe, continued as the matter was adjourned from time to time, all so as to facilitate the conduct of the proceedings taken by the appellant against the Underwriters and the Brokers, which was in the interests of both the appellant and the respondent.

**Settlement of Indemnity Proceedings**

**5.** Following a mediation that took place in Dublin on 15th December, 2020, the appellant settled its claim for indemnity as against the Brokers, for the total sum of €250,000. Settlement with the Underwriters was also reached, on terms less attractive to the parties to those proceedings, involving simply the withdrawal of those proceedings, with each party to bear their own costs. The terms of settlement with the Brokers provided for the division of the settlement sum as to €170,000 in respect of the legal costs of the appellant incurred in three separate sets of High Court proceedings i.e. the respondent's proceedings in the High Court against the appellant, and the two separate sets of proceedings brought by the appellant as against the Brokers and the Underwriters, with the balance of €80,000 to be paid to the respondent, inclusive of his costs. The settlement was committed to writing, and the terms of settlement contained a confidentiality clause whereby the parties there to agreed that its terms were to be kept confidential and not disclosed save as may by required by law.

**6.** The appellant had invited the respondent to attend and participate in the mediation, which took place in Dublin, but the solicitor for the respondent (who is Limerick based, as is the solicitor for the appellant) was unable to attend in person. However, he was available

for remote participation, and did speak with the mediator during the course of the mediation. It has not been suggested, however, that the respondent was in any way party to or approved of the terms of this agreement.

**Appellant Notifies Respondent of Settlement of Indemnity Proceedings**

**7.** By letter dated 16th December, 2020, the solicitors for the appellant wrote to the solicitors for the respondent informing them of the settlement. In this letter they stated that they had been able to "*secure a payment of €80,000 for the plaintiff in the personal injury action inclusive of his costs*". They also stated that they had "*agreed to reduce the overall costs* [incurred by the appellant] *of the three actions which were due and owing to us, inclusive of VAT, outlay and counsel, in an amount of €90,000 approximately*."

**8.** The letter went on to state that they intended, on receipt of the settlement funds to make payment of a sum of €80,000 to the solicitors for the respondent, in full and final settlement of the respondent's claim, including his costs. The letter concluded by stating that in default of the respondent accepting this amount (of €80,000) the respondent could, as the main creditor of the appellant, petition the court for the liquidation of the appellant, and in that event the solicitors for the appellant would "*freeze*" the sum of €80,000 and hand it over to the liquidator appointed in due course. The letter did not give any indication as to the balance payable to the appellant's solicitors pursuant to the terms of settlement, in respect of the legal costs incurred by the appellant in the three sets of proceedings, i.e. the sum of €170,000.

**Garnishee Application**

**9.** Upon being notified of the settlement, the respondent made an application, *ex parte*, for a garnishee order over the settlement proceeds. This application came before Cross J. on 18th December, 2020, on which date the respondent sought an order attaching the sum of €229,212.55 of the proceeds of the settlement entered into between the appellant and its

insurers. This sum was broken down as to €105,315.69 being the total award made by O'Hanlon J. to the respondent and the balance of €123,896.86 being in respect of the costs awarded to the respondent, including the stamp duty payable thereon, following upon adjudication. A conditional garnishee order was made to this effect by Cross J. on 18th December, 2020. Cross J. then adjourned the matter to 12th January, 2021, returnable before O'Hanlon J. to "*show cause why* [the appellant and/or its insurers and/or its solicitors] *should not pay to the Plaintiff the said debt due by* [sic] *them by the Defendant or so much of the said sum as may be sufficient to satisfy the said judgment* [being the judgment in favour of the respondent in his claim as against the appellant] *and the costs (if any) of the garnishee proceedings*", i.e. to show cause why the order nisi should not be made absolute.

**10.** On 6th January, 2021, an affidavit was sworn and filed by Mr. Brendan Harrison, of Harrison O'Dowd, solicitors, on behalf of the garnishee, i.e. the Brokers, addressing certain concerns that he had as regards the wording of the conditional order of garnishee. No affidavit was filed on behalf of the appellant, or its solicitors, in response to the application to make the garnishee order absolute on 12th January, 2021, when all the parties, including the Brokers, duly attended before O'Hanlon J.

**Application to Make Order Nisi Absolute, 12th January, 2021**

**11.** The court was informed as to the settlement between the appellant and Brokers and Underwriters. However, the court was not provided with a copy of the settlement agreement. The court was also informed as to the conditional order made by Cross J. on the 18th December, 2020. Counsel for the Brokers informed the court that his client simply wanted to pay the money which it had agreed to pay pursuant to the terms of the settlement, to the appellant's solicitors. Counsel for the respondent submitted to the court that it should follow the procedure prescribed by Order 45 of the Rules of the Superior Courts and make the conditional order of Cross J. absolute. That, it was submitted, would amount to a discharge

of any liabilities of the Brokers to the appellant pursuant to the terms of settlement. In making this submission to the court, counsel also made the point that the full amount of the settlement had not yet been disclosed (either to the respondent or to the court). At this point, the court and the solicitors for the respondent had been informed of the terms of settlement only to the extent of the information contained in the letter from the appellant's solicitors of 16th December, 2020, as referred to above.

**12.** Counsel for the appellant reminded the court as to the history of the matter, and the fact that the court had granted a stay of execution on its order in favour of the respondent, on 20th December, 2018, in order to afford the appellant the opportunity to pursue its insurers. He stated that without the proceedings taken by the appellant against the Underwriters and the Brokers, there would have been no money at all available to satisfy the award made in favour of the respondent. He summarised the proceedings that had been pursued by the appellant against the Underwriters and the Brokers, following upon the judgment of the court of 29th November, 2018. He did not inform the court of the total value of the settlement, nor did he tell the court that he was bound by the confidentiality clause in the settlement agreement not to do so. In the course of exchanges with counsel, the trial judge observed that €80,000 was not sufficient to satisfy the award made in favour of the respondent. Counsel for the appellant replied that if they could have done better they would have done better. He proposed, after some discussion, that the €80,000 be paid to the respondent, with the balance to be held pending, in effect, agreement or, perhaps, further court order. I say "*perhaps*" because the exact words used by counsel were:

> "Until we determine the issue of any additional amount they [the respondent] are seeking to recover over the €80.000."

**13.** However, the respondent pressed the court to make the garnishee order absolute. In the course of these submissions and exchanges, the trial judge invited the parties to try and

resolve matters amongst themselves, but while brief discussions took place, no agreement was reached.

**14.** The trial judge then gave a ruling on the issue, *ex tempore*. She decided to accede to the application of the respondent and made an order making absolute the order of Cross J. of 18th December, 2020. In her ruling, she said the following:

> "I think I have to uphold the order for garnishee, given that none of the other potential solutions is going to arrive at a proper discharge of the debt to the plaintiff. And that is the problem.
>
> Now he may not, he may fare worse by continuing to litigate, and it is extra costs for the other parties, and I do respect the fact that they took the trouble to go to a mediation. They are perfectly entitled to do that, with or without the plaintiff, as I would see it. But it's not helpful that they haven't disclosed the amount or the full issues, the full facts. But that's their business and they won't be compelled by me to do that. They can't be.
>
> But nonetheless Order 45 is there for a reason and I have to, I think, in these circumstances, make absolute the order of Judge Cross so you might perhaps email into the registrar the draft order agreed among yourselves and send it by email to him as soon as possible."

**15.** O'Hanlon J. then heard submissions as regards the costs associated with the garnishee application and made orders in favour of the respondent and the Brokers as against the appellant, for their costs associated with the application. While the order remained to be perfected, the proceedings were not adjourned for this or any other purpose.

**Application of Appellant to High Court, 21st January, 2021 to Introduce New Evidence and to Re-Open Decision of 12th January, 2021**

**16.** On the 20th January, counsel for the appellant applied to the court, having put the respondent and the Brokers on notice of his intention to do so, to ask the court to list the matter again for the following day, 21st January. O'Hanlon J. acceded to this application and the matter was again listed before her on 21st January, 2021. On this occasion, counsel on behalf of the appellant applied to the court for liberty to introduce evidence to the court (by way of affidavit sworn by the solicitor for the appellant, Mr. Ronan O'Neill dated 20th January, 2020), with the intent, *inter alia*, of opening to the court the terms of the settlement agreement entered into between the appellant, the Brokers and the Underwriters, which the appellant had been unable to do on the 12th January, 2021, by reason of the confidentiality clause in that agreement. The affidavit also exhibited a letter of consent to the disclosure to the court of the terms of the settlement agreement, from the solicitors acting on behalf of the Brokers (Messrs. Harrison O'Dowd), which was obtained on the 14th January, 2021.

**17.** The purpose of the appellant in moving this application was, if successful, to ground a legal argument not made to the court on 12th January, and to invite the court to re-visit and reverse its decision of 12th January. While the court heard the application, including submissions from counsel as to the legal principles applicable to such an application, O'Hanlon J. refused the application to re-open the terms of the order made by her on 12th January. She stated that she considered that she was *functus officio* in the matter since she made her order on the 12th January, and that insofar as the matter was before her again on the 21st January, this was only for the purpose of perfecting the order. That concluded the matter and the order of 12th January was then perfected.

**18.** Accordingly, the court did not get to hear the legal argument that the appellant wished to make, which was that the monies payable to the appellant in respect of costs, under the terms of settlement were, by reason of those terms, subject to a trust that they would be applied only for that purpose, failing which they were subject to a resulting trust in favour

of the payers, i.e. the Underwriters to the Brokers. The form of trust which the appellant wished to contend for is known as a "Quistclose" trust, and I address this presently.

**The Notice of Appeal**

**19.** The appellant filed an amended notice of appeal dated 27th January, 2021. At para. 2 of the notice of appeal it is stated that it is an appeal against the order of the court of 12th January, 2021, as perfected on 21st January, 2021. In the same paragraph, it is stated that the order under appeal is the order of the court that the conditional order of garnishee made by Cross J. on 18th December, 2020 be made absolute, together with an order that the appellant pay the costs associated with the garnishee application.

**20.** Ten grounds of appeal are then set out. The first of these states that the order made by O'Hanlon J. on 12th January, and perfected on 21st January, 2021, making absolute a conditional order of garnishee made by Cross J. on 18th December, 2020, is wrong in law and defective. However, the remaining nine objections are all directed to the refusal of O'Hanlon J. to revisit her ruling of 12th January, 2021. It is stated that the court erred in refusing to accept the explanation offered by counsel as to why the terms of the settlement could not be disclosed to the court on 12th January, 2021, and in refusing to take into account that the settlement monies included a specific sum for the costs payable to the appellant for the express and exclusive purpose of discharging legal costs owed by the appellant in connection with three separate sets of legal proceedings. It is also claimed that the court was in error in refusing to consider the terms of settlement and to hear the submissions of counsel that the terms of settlement created resulting trusts on the portion of the settlement monies that was expressly allocated to the costs of the appellant.

**21.** At para. 4 of the notice of appeal, the relief sought by the appellant is an order setting aside the order of O'Hanlon J. of 12th January, 2021, coupled with an order confirming that

the settlement proceeds are the subject of a resulting trust in respect of legal costs payable by the appellant to its legal advisors.

**Submissions of the Appellant**

**22.** The appellant submits that it was not possible, on 12th January, 2021, for the appellant to open in full the terms of settlement to the court. It was precluded from doing so by the terms of the settlement agreement and the court was informed that this was the case. The appellant further submits that the trial judge fell into error (on 21st January) in rejecting the submission of counsel that the contents of the settlement agreement were material to her consideration of the garnishee application. The trial judge herself stated, at the hearing on 12th January, 2021, that it was not helpful that the appellant had not disclosed the full terms of settlement, and it follows therefore that those terms could not have been irrelevant to her consideration of the application.

**23.** The appellant submits that, when she was asked to re-open the matter on 21st January, 2021, the trial judge had good reason to do so, and the appellant submits, on the authority of *AIB Mortgage Bank v. Nadine Thompson* [2018] IEHC 306, that the trial judge had jurisdiction to re-open the decision and order that she made on 12th January, 2021. Counsel opened this authority to the trial judge on 21st January, 2021.

**24.** Although the notice of appeal states that the order under appeal is that made by the court on 12th January, 2021, as perfected on 21st January, the appeal proceeded somewhat differently before this Court. At the hearing of this appeal, counsel for the appellant urged the Court to overturn the decision of the trial judge on 21st January, 2021, i.e. her decision not to re-open and reconsider the decision that she made on 12th January, 2021. Counsel submitted that before refusing to re-open the matter, the trial judge, on 21st January, should at least have heard and considered the new evidence the appellant sought to adduce to the court, and then considered that evidence in the light of the principles enunciated in *AIB*

*Mortgage Bank v. Thompson*. In failing to do so, the trial judge fell in to error. Accordingly, it follows that matters should be sent back to the trial judge to reconsider her decision of 12th January, 2021 in the light of the full terms of the settlement, and the legal effect of those terms. Counsel for the appellant acknowledged, however, that if this Court did not consider there were good reasons for the High Court to re-consider the matter, in the light of the new evidence, then it is appropriate to dismiss the appeal.

**25.** It is apparent from the above that the relief sought at the hearing of this appeal is a different relief to that sought in the notice of appeal. However, the respondent took no issue with this disparity, and in any case, as will become apparent, nothing turns on the difference in the reliefs sought, for the purposes of this judgment.

**26.** In this regard, it is submitted that the terms of settlement make it plain that the sum of €170,000 payable thereunder in respect of legal costs is not the property of the appellant and cannot therefore be the subject of a garnishee order in favour of the respondent. Those monies, it is submitted, are subject to a trust which requires that they may only be applied for the express purpose agreed between the parties to the settlement agreement, i.e. in discharge of the appellant's legal costs, failing which there is a resulting trust in favour of the payer. This form of trust is known as a Quistclose trust, taking its name from the case of *Barclays Bank Limited v. Quistclose Investments Limited* [1970] AC 567. It is submitted that this form of trust was first recognised in Ireland in the case of *Money Markets International Stockbrokers Limited (No.2)* [2001] 2 IR 17.

**27.** While the question as to whether or not the sum of €170,000 payable under the terms of the settlement is subject to such a trust was not argued in the court below – because the terms of settlement were not opened to the court below and the application to revisit the order of the 12th January was rejected – the appellant laid these authorities before this Court so as to apprise the Court as to the reason why the appellant wished to adduce new evidence,

and thereby to assist the Court in determining the procedural question as to whether or not the decision of the trial judge of 12th January, 2021 should be re-opened so as to consider the legal effect of the terms of the settlement. Nonetheless, counsel for the appellant indicated to the Court that the appellant would have no difficulty with this Court adjudicating on this issue, i.e. whether or not the sum of €170,000 is subject to a trust of this kind as claimed by the appellant, if this Court considered it appropriate to do so.

**28.** In response to questions from the Court, counsel for the appellant confirmed that he did not ask the court, on 12th January, 2021, to adjourn the application before the court so as to enable the appellant to obtain the permission of the Brokers and/or the Underwriters to reveal the full terms of the settlement to the court. In the court below, on 21st January, 2021, the trial judge made the observation that the appellant could have sought the permission of the Brokers and the Underwriters prior to or even during the course of the hearing on 12th January, 2021, and further could have sought an adjournment from the court on that day if it was unable to obtain an answer to such a request. In answer to these observations, counsel took full responsibility, and offered an explanation for the omission to the court, but the trial judge was not prepared to accept this explanation, and referred, *inter alia*, to the fact that there is an outstanding substantial judgment in favour of the respondent. I will come back to this issue later in this judgment.

**29.** This appeal came on for hearing on 23rd February, 2021. Unfortunately, there was insufficient time to conclude the matter on that date, and the Court therefore adjourned the matter to 5th March, 2021, to conclude the hearing of the appeal. While counsel for the appellant had concluded his submissions to the Court on 23rd February, 2021, in his reply to the submissions of the respondent on 5th March, 2021, he asserted, on behalf of the solicitors for the appellant, for the first time, a solicitors' lien on the sum of €170,000 payable under the terms of settlement, pursuant to s.3 of the Legal Practitioners (Ireland) Act, 1876.

Unfortunately, because of the lateness of the hour at which this claim was made, counsel for the respondent had no opportunity to reply to this claim.

**Submissions of the Respondent**

**30.** Firstly, the respondent submits that the fact that the terms of settlement were not opened in full to the trial judge is a problem entirely of the appellant's own making. The terms of settlement, it is submitted, were deliberately not disclosed to the court, and the letter from the solicitors for the appellant to the solicitors for the respondent, of 16th December, 2020, whereby the former notified the latter of the settlement as between the appellant, the Brokers and the Underwriters, was carefully crafted so as to avoid stating the amount allocated to the legal costs of the appellant.

**31.** Moreover, it is submitted that the appellant had ample time to deliver a replying affidavit in the garnishee proceedings, between the date of the conditional order of garnishee made by Cross J. on 18th December, 2020, and the next return date of 12th January, 2021, but the appellant did not do so. In contrast, the solicitor for the garnishee swore an affidavit dated 6th January, 2021, which was available to the court, and opened to the court, on 12th January, 2021. Further, the respondent submits that it was open to the appellant to seek an adjournment, if it did not have adequate time to deal with the matter between 20th December, 2020 and 12th January, 2021.

**32.** The respondent further submits that even though the full terms of the settlement were not available to the court on 12th January, 2021, the significance of this is exaggerated by the appellant, in circumstances where the only information that was not available to the court was the amount attributable to the costs of the appellant. The court was made aware of the fact of the settlement, that it was an "*all in*" settlement (it was expressly described as such by Mr. Brendan Harrison, solicitor for the garnishee, in his affidavit of 6th January, 2021) and that €80,000, including costs, was allocated for payment to the respondent. The trial

judge stated that this was not enough, meaning that this sum was insufficient having regard to the award made to the respondent.

**33.** As regards the hearing on 21st January, 2021, the matter was not listed for hearing before the court on that date. There was no motion before the court. The respondent submits that the appellant orchestrated this hearing by indicating its disagreement with the terms of the draft order of 12th January, 2021, which was circulated by the registrar after that date. However, no explanation was given as to why the appellant's legal representatives did not agree with the terms of the draft order. In these circumstances, the respondent submits that the trial judge was fully entitled to decline to permit the appellant to re-open and re-argue the matter by seeking to rely on the terms of the settlement agreement, which it had expressly declined to put before the court on 12th January, 2021. Furthermore, it is submitted that no new arguments were opened to the court on behalf of the appellant on 21st January, and counsel for the appellant was repeating submissions that he had made on 12th January, 2021.

**34.** The respondent submits that the case relied upon by the appellant – *AIB Mortgage Bank v. Nadine Thompson* makes it clear that, before a court may re-open a decision it has already made, strong reasons based on exceptional circumstances are required. The respondent submits that the trial judge was entitled to conclude that there were no such strong reasons or exceptional circumstances in this case.

**35.** Furthermore, the appellant fails to meet the test for the introduction of new evidence on appeal as set forth in *Murphy v. Minister for Defence* [1991] 2 IR 161. The evidence in this case was available at the time of the original hearing and the appellant made a conscious decision, it is submitted, not to get permission from the Brokers and Underwriters to disclose the terms of settlement. When, after 12th January, 2021, that permission was sought, it was obtained by return with a minimum of explanation on the part of the appellant (to the Brokers and Underwriters). In other words, the consent was readily and easily obtainable.

**36.** Finally, the respondent submits that there is no question of a Quistclose trust arising in this case. The payer in this case – the Brokers – have no interest at all in how the settlement proceeds are applied by the appellant. The only interest that the payer has in the matter is to extricate itself from the proceedings. This is in sharp contrast to the circumstances in the case of *Quistclose*, in which funds were advanced by a bank to be used for express purposes – in the interests of the bank as much as the borrower. None of that arises in this case.

**37.** In answer to a question from the Court, counsel for the respondent agreed that, strictly speaking, the Quistclose trust argument was not one that was argued before or decided upon by the trial judge and accordingly does not fall for determination on this appeal. However, since this argument has been the subject of extensive submissions before this Court, and having regard to the limited funds available, counsel for the respondent expressed the view that it may be preferable for this Court to resolve this issue, rather than referring it back to the High Court for determination.

**Discussion**

**38.** In general terms, costs claimed and recovered by a party to legal proceedings belong to that party, and not to its legal advisors. This is for the simple reason that the court awards the costs to a party to the proceedings, and not to its legal advisors. As between that party and its legal advisors, there may well be contractual arrangements as to the treatment of such costs, but as regards the world at large, ownership of the funds pending their disbursement remains with the party to the proceedings who has been successful in recovering the costs concerned, subject to any lien as the solicitor for that party may have over the same.

**39.** In this case, it is of considerable significance that, at the time the respondent moved his application before Cross J., no money had yet been paid to the solicitors for the appellant by the Brokers under the terms of the settlement. It hardly needs to be said, that any money

changing hands or about to change hands is vulnerable to an application for attachment pursuant to O. 45 of the Rules of the Superior Courts. The fact that the monies in question comprise costs recovered on behalf of the debtor does not necessarily exempt those monies from the application of O. 45, or protect the debtor, or its solicitors and counsel instructed by them, from the effect of an order attaching funds intended for the discharge of such costs, unless the legal representatives concerned are in a position to establish, to the satisfaction of the court, that the funds concerned should not be attached for reasons recognised by law. In this case, the appellant wishes to argue that there are two such reasons, firstly, that the funds concerned are subject to a Quistclose trust, and secondly, that they are subject to a solicitors' lien arising under s.3 of the Legal Practitioners (Ireland) Act, 1876.

**Refusal of Trial Judge to Admit New Evidence**

**40.** Before addressing those claims however, or even considering whether those claims should be determined on this appeal at all (since these matters were not argued before the trial judge), it is first necessary to consider the appellant's main argument to this Court which is that the trial judge erred, on 21st January, 2021, firstly in refusing to permit the appellant to adduce new evidence to the court in support of the application of the appellant to re-open the decision of the trial judge of 12th January, 2021, and secondly, in refusing to reconsider the same decision. At the hearing of this appeal, both parties agreed that the decision that the trial judge was required to make was one to be made at her discretion.

**41.** The new evidence comprised the affidavit of Mr. Ronan Connolly, solicitor for the appellant, sworn on 20th January, 2021, and the exhibits thereto. The exhibits included the settlement agreement, and also certain correspondence, including a letter from the solicitors for the appellant inviting the participation of the respondent in the mediation, as well as correspondence generated after the hearing on 12th January relating to the waiver by the Brokers of their entitlement to confidentiality in the terms of settlement.

**42.** There is some merit in the submission of counsel for the respondent that, at the hearing on 12th January, the trial judge was provided with sufficient information to enable her to make the decision that she made on that date. The only information she did not have available to her was the amount payable pursuant to the terms of settlement (in respect of the appellant's costs) over and above the sum of €80,000 which was disclosed to the court. So, the argument goes, it is unlikely that knowing the amount allocated to the appellant's legal costs under the terms of the settlement would have altered the judge's view of matters, which was that the sum of €80,000 payable to the respondent was inadequate.

**43.** However, it is not just that the trial judge was unaware of the full amount payable under the settlement agreement; neither was she aware of the clause that provided that the sum of €170,000 was expressly stated to be a contribution to the costs of the appellant in three sets of legal proceedings. The point made at the hearing of this appeal was that the appellant wished to draw this to the attention of the trial judge in support of its arguments that these funds were subject to a trust, and were not therefore amenable to a garnishee order. The appellant also makes the point that the trial judge herself subsequently observed (on the 21st) that it was unhelpful that the appellant did not disclose to the court the full terms of the settlement, so those terms could not be irrelevant to the decision that she made.

**44.** Counsel for the respondent submitted, in the court below, that the trial judge should in the first instance decide, in principle, whether or not the court was prepared to re-open its decision of 12th January, before deciding whether or not to receive the new evidence (the affidavit of Mr. O'Neill, with exhibits). He submitted that what was before the court was a wholly irregular attempt on the part of the appellant to re-argue the issue already decided by the court, that the matter was concluded, and the High Court was *functus officio*. Nonetheless, he did say that the court might wish to receive the affidavit of Mr. O'Neill, *de bene esse*. In response to this, counsel for the appellant submitted to the trial judge that she

should receive the affidavit, if necessary *de bene esse*, for the purpose of adjudicating upon the application to re-open her decision of 12th January.

**45.** In arriving at her decision, the trial judge did not consider it necessary to receive the affidavit of Mr. O'Neill. She stated (and here I am paraphrasing the transcript) that on 12th January she had afforded the parties every possible opportunity to make whatever arguments and submissions they required to make. Permission to disclose the settlement agreement to the court could have been sought from the other parties to that agreement, before the hearing on 12th January, or even on the day of the hearing, by telephone or by e-mail. The parties had been afforded ample time to have discussions on 12th January, and the permission of the Brokers could have been requested in that interval. If all else failed, the appellant could have asked for an adjournment.

**46.** While she did not say so expressly, it is clear that the trial judge did not consider the explanation offered by counsel (for not taking one or other of these courses) to be adequate. She said that if the matter was to be re-opened, it would have to be on the basis of cogent and substantive grounds, and she was of the view that there were no such grounds. She said that the grounds advanced on 21st January had "*absolutely nothing to do with*" the matters before the court on 12th January. She held that there were insufficient grounds to re-open the matter and stated that she considered herself to be *functus officio*. She also emphasised the need for finality in litigation and stated that she had considered the decision of Baker J. in *AIB Mortgage Bank v. Nadine Thompson,* but she did not think it appropriate or necessary to re-open her decision of 12th January. She did not consider that the fact that there was a confidentiality clause in the settlement agreement, preventing its disclosure to the court, was an exceptional circumstance such as to justify re-opening the matter.

**47.** It is clear that the trial judge listened carefully to the arguments made to her on 21st January, but she was not persuaded that the criteria for re-opening the earlier decision were

satisfied. She was plainly of the view that the matters relied upon by counsel for the appellant could or should have been addressed by the appellant in some manner or other on or before 12th January, either by obtaining instructions in advance of that date, seeking instructions on the date itself or applying for an adjournment. In effect the trial judge rolled two decisions into one; she refused to receive the new evidence and she refused to re-open her earlier decision, for the same reasons. Of course once she refused the application to receive new evidence , it followed inevitably that the application to re-open the matter had to be refused.

**48.** As has been mentioned, counsel for the appellant, when inviting the trial judge to re-open the matter (on 21st January), referred her to the decision of the High Court in *AIB Mortgage Bank Limited v. Nadine Thompson*, and he quoted extensively from that decision to the trial judge. In that case, Baker J. considered the authorities relating to the jurisdiction of a court to re-visit a decision already made. Having reviewed the authorities, she concluded that:

1) The jurisdiction is exceptional and the authorities suggest that strong reasons are required;
2) The jurisdiction must respect the importance of the principles enunciated in *Henderson v. Henderson* and the need for finality in litigation.
3) Where the court is being asked to consider new evidence or new arguments, it is necessary to assess the explanation as to why those matters were not put before the court previously;
4) New evidence or argument must be material such that it might have an important influence on the result of the case;
5) Where the jurisdiction is exercised, it should be exercised in such a manner as to ensure that it is exercised narrowly so as to confine the "*revisiting*" to whatever

questions or issues led the court to consider that the interests of justice required such a revisiting to occur in the first place, and no wider latitude should be permitted.

**49.** At this point I should mention that while there are several authorities of both this Court and the Supreme Court on the principles governing applications of this kind, this authority, of Baker J. (when in the High Court), was the one upon which the appellant relied both in the High Court and before this Court on appeal. It is expedient therefore for present purposes to focus on this authority alone, not least because of the very clear and helpful enumeration of the applicable principles by Baker J.

**50.** The third and fourth of these principles are of particular relevance to this appeal. Dealing first with the third principle, the trial judge was manifestly dissatisfied with the explanation provided on 21st January as to why the settlement agreement had not been opened to her on 12th January. She gave her reasons for this, and I can find no fault with those reasons. If a court is not satisfied that there are good reasons as to why new evidence relied upon to support an application to re-open a decision already made by that court was not produced to the court originally, then it must be entitled to refuse to receive and consider that evidence for the purpose of the application to re-open its decision. The decision whether or not to receive and consider such evidence is one to be made at the discretion of the trial judge concerned, and provided that that discretion is reasonably exercised (as I believe it was), it may not be interfered with by an appellate court. It seems to me that it is an inevitable consequence of the decision to refuse to receive the new evidence, upon which the application to re-open the original decision is based, that the latter application must fail, as occurred in this case. Accordingly, my conclusion is that the trial judge acted reasonably and within the scope of her discretion in refusing to receive the new evidence and re-open the case, on the basis that she was not satisfied that there was good reason to do so.

**51.** Arguably that conclusion is determinative of this appeal, and this Court should not proceed to consider the significance of the new evidence, as it was not considered by the trial judge. In case, however, this may be an unduly narrow approach to the application to re-open the decision of the Court of 12th January, and having regard to the fact that the argument as to the existence of a Quistclose trust was fully argued before this Court, and that both parties agreed that this Court could determine the point, I will proceed to consider this argument in the light of the fourth of the principles enumerated by Baker J. in *AIB Mortgage Bank Ltd. v. Thompson* – i.e. would the new evidence, if admitted, be such as to have an important influence on the result of the case? Or, in other words, does the new evidence establish a strong case that €170,000 of the settlement proceeds are subject to a Quistclose trust?

**Quistclose Trust**

**52.** A Quistclose trust takes its name from the case of *Barclays Bank Limited v. Quistclose Investments Limited* [1970] AC 567. The respondent in that case, Quistclose Investments Limited ("Quistclose") had advanced funds to a company, Rolls Razor Limited, for the express purpose of paying a dividend which the company had declared. These monies were deposited with the appellant – Barclays Bank Limited, and lodged into an account especially opened for this purpose. However, before the dividend could be paid, Rolls Razor Limited went into voluntary liquidation. Quistclose brought an action against Rolls Razor Limited and Barclays Bank Limited claiming that the money had been held by Rolls Razor Limited on trust to pay the dividend, and that trust having failed, it was held on a resulting trust for Quistclose. The background to the loan provided by Quistclose was that Rolls Razor Limited was already in financial difficulties and was trading significantly in excess of its overdraft facility with Barclays Bank Limited. A financier expressed an interest in providing a substantial loan to Rolls Razor Limited, but would only do so on condition that Rolls Razor

Limited could source the funds necessary to discharge the dividend that had already been declared. The judgment records that Quistclose was either owned or controlled by a Mr. Bloom, who was also described in the judgment, by Lord Wilberforce as the "*moving spirit*" of Rolls Razor Limited.

**53.** Lord Wilberforce held, as regards the arrangement between the parties, and the claim advanced by Quistclose, that:

> "There is equally, in my opinion, no doubt that the loan was made only so as to enable Rolls Razor Ltd. to pay the dividend and for no other purpose. This follows quite clearly from the terms of the letter of Rolls Razor Ltd. to the bank of 15 July, 1964, which letter, before transmission to the bank, was sent to the respondents under open cover in order that the cheque might be (as it was) enclosed in it. The mutual intention of the respondents and of Rolls Razor Ltd., and the essence of the bargain, was that the sum advanced should not become part of the assets of Rolls Razor Ltd., but should be used exclusively for payment of a particular class of its creditors, namely, those entitled to the dividend. A necessary consequence from this, by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to the respondents: the word 'only' or 'exclusively' can have no other meaning or effect.
>
> That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases of over some 150 years."

**54.** This Court was referred to a number of other cases in which Quistclose trusts have been acknowledged by the courts. In this jurisdiction, the concept of such a trust has been acknowledged by the courts, although there do not appear to be any decided cases in which

a claim for such a trust has been upheld. In *Harlequin Property (SVG) Limited v. Padraig O'Halloran* [2013] IEHC 362, McGovern J. (at para. 98) said:

> "A Quistclose Trust is one whereby one party (A) pays money to another (B) so that B holds the money in trust for A subject to a power for B to apply the money for a stated purpose. Such an arrangement has the effect that A's beneficial interest in the money will remain unless and until the money is applied in accordance with the stated purpose of the power (see '*Equity and the Law of Trusts in the Republic of Ireland*', Keane 2011, 2nd Ed.). The Trust gets its name from the case of *Barclays Bank Ltd. v. Quistclose Investments Ltd*. [1970] AC 567, although it was acknowledged that this form of trust had been in existence for over 150 years. Quistclose Trusts were recognised in Ireland in *In Re Money Markets International Stockbrokers Ltd. (No. 2)* [2001] 2 I.R. 17."

**55.** McGovern J. then referred to and adopted a statement as to the nature of the Quistclose trust made by Patten L.J. in *Bieber v. Teathers Ltd.* [2012] EWCA Civ 1466 as follows:

> "First, the question in every case is whether the payer and the recipient intended that the money passing between them was to be at the free disposal of the recipient: *Re Goldcorp Exchange* [1995] 1 AC 74 and *Twinsetra* at [74]. [*Twinsectra Ltd. v. Yardley* [2002] UKHL 12]
>
> Second, the mere fact that the payer has paid the money to the recipient for the recipient to use it in a particular way is not of itself enough. The recipient may have represented or warranted that he intends to use it in a particular way or had promised to use it in a particular way. Such an arrangement would give rise to personal obligations but would not of itself necessarily create fiduciary obligations or a trust: *Twinsetra* at [73].

Thirdly, it must be clear from the express terms of the transaction (properly construed) or it must be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient but should be used exclusively to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer: *Toovey v. Milne* (1819) 2 B&A 683 and *Quistclose Investments* at 580 B.

Fourth, the mechanism by which this is achieved is a trust giving rise to fiduciary obligations on the part of the recipient which a court of equity will enforce: *Twinsetra* at [69].

Equity intervenes because it is unconscionable for the recipient to obtain money on terms as to its application and then to disregard the terms on which he received it from a payer who has placed trust and confidence in the recipient to ensure the proper application of the money paid: *Twinsetra* at [76].

Fifth, such a trust is akin to a 'retention of title' clause, enabling the recipient to have recourse to the payer's money for the particular purpose specified but without entrenching on the payer's property rights more than necessary to enable the purpose to be achieved. It is not as such a 'purpose trust' of which the recipient is a trustee, the beneficial interest in the money reverting to the payer if the purpose is incapable of achievement. It is a resulting trust in favour of the payer with a mandate granted to the recipient to apply the money paid for the purpose stated. The key feature of the arrangement is that the recipient is precluded from misapplying the money paid to him. The recipient has no beneficial interest in the money: generally, the beneficial interest remains vested in the payer subject only to the recipient's power to apply the money in accordance with the stated purpose. If the stated purpose cannot be achieved, then

the mandate ceases to be effective, the recipient simply holds the money paid on resulting trust for the payer, and the recipient must repay it: *Twinsetra* at [81 ], [87], [92] and [100].

Sixth, the subjective intentions of payer and recipient as to the creation of a trust are irrelevant. If the properly construed terms upon which (or the objectively ascertained circumstances in which) payer and recipient enter into an arrangement has the effect of creating a trust, then it is not necessary that either payer or recipient should intend to create a trust: it is sufficient that they intend to enter into the relevant arrangement: *Twinsetra* at [71].

Seventh, the particular purpose must be specified in terms which enable a court to say whether a given application of the money does or does not fall within its terms: *Twinsetra* at [16]."

**56.** Applying those principles to this case, it is clear that the fact that the Brokers agreed to pay a sum of money to the appellant to be paid towards the costs it incurred in the three sets of proceedings is not in itself sufficient to give rise to fiduciary obligations or a trust. The third principle makes clear that it must be "*objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient…*" (my emphasis). It is very difficult to construe the essence of the settlement agreement entered into between the appellant and the Brokers in this way. The only interest that the Brokers had in settling the proceedings was to bring those proceedings to an end. As counsel for the Brokers informed the court on 12th January "*I simply want to pay the money* [to the appellant's solicitors, (Messrs. Connolly O'Neill) as provided for in the settlement agreement]… *If the money is paid and preserved by Connolly O'Neill pending the outcome of any dispute about whether or not it can be garnisheed as between the plaintiff*

*and the defendant… That's another day's work. But that doesn't involve me in any way.*" It could hardly be more clear that it was a matter of complete indifference to the Brokers how the appellant dealt with the monies received.

**57.** The settlement agreement expressly records that the sum of €250,000 is to be paid by the Brokers to the appellant and is to be "*split at the request of the policyholder as to €170,000 to the* [appellant's] *legal costs in three separate sets of High Court proceedings…leaving a balance of €80,000 in respect of the judgment and costs order in favour of Philip Keane…*". While it was the mutual intention of the parties that the proceedings as between the appellant and the Brokers should be settled for the sum of €250,000, the division of that sum, being at the request of the appellant, could hardly be described as a "*mutual intention*" of the parties to the agreement. The furthest the matter could be put in this regard is that the Brokers intended this division of the settlement sum only to the extent that it was prepared to accede to the request of the appellant to express the settlement in this way. Had the appellant gone on to decide an alternative or adjusted apportionment of funds between itself and the respondent, there would have been no question of the Brokers objecting thereto and demanding a return of the funds they had paid over in settlement of legal proceedings to which they had been party. Viewed objectively, the manner in which the appellant chose to treat with the settlement proceeds was a matter of complete indifference to the Brokers.

**58.** Finally, so far as the claim to a Quistclose trust is concerned, there must be some considerable doubt as to whether or not the appellant has the standing to make this argument at all. If the settlement proceeds are indeed subject to such a trust as claimed by the appellant, the beneficiary of the trust must be the Brokers or their insurers, and not the appellant. Moreover, the Brokers were represented in court on both the 12th and 21st January, and although fully aware that the respondent had advanced an application for a garnishee order,

at no stage was it suggested on their behalf that the settlement proceeds were the subject of a trust of any kind. It was clear from the submissions made to the court by counsel on behalf of the Brokers that their sole interest in the proceedings was to pay over the settlement proceeds and to extricate themselves from the contest that was underway as between appellant and respondent. I am fortified in this view by the fact that, in all of the authorities to which the Court was referred, the person asserting the existence of a Quistclose trust was the payer of the relevant monies and not the payee.

**59.** For these reasons, I am of the opinion that the sum of €170,000, allocated at the request of the appellant to its legal costs, is not subject to a resulting or Quistclose trust as asserted by the appellant. That being the case, the new evidence, had it been available to the trial judge on 12th January, would have had no bearing at all on the outcome of the application before the court on that occasion.

**Solicitors' Lien**

**60.** I mentioned above that in his reply, counsel for the appellant asserted, for the first time, a solicitors' lien over the sum of €170,000 of the settlement proceeds. The claim to a lien was advanced pursuant to s. 3 of the Legal Practitioners (Ireland) Act, 1876 (the "Act of 1876"), which 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 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."

**61.** The problem with this argument is that it is not a ground of appeal, and counsel for the respondent had no opportunity to respond to this claim because of the manner in which it was first asserted. Furthermore, and fundamentally, there is no decision of the trial judge on this issue from which to appeal. When the Court raised this with counsel for the appellant, his response was that the lien arose by operation of law, regardless as to whether or not it had been raised in the High Court, or in the appellant's grounds of appeal. With respect, however, a lien arising pursuant to s. 3 of the Act of 1876 is an entitlement which must be asserted – as is apparent from s. 3 itself, a declaration must be sought from the court – and the party against whom it is asserted must have an opportunity of responding, before the court may adjudicate on the application. In my opinion it would wholly inappropriate for this Court to entertain this claim of the appellant as though it were a court of first instance.

**The Order of 12th January - the Order Under Appeal**

**62.** At para. 19 above, I mentioned that in the second paragraph of the notice of appeal, it is stated that the order under appeal is the order of O'Hanlon J. of 12th January, 2021, whereby she made absolute the order nisi of Cross J. of 20th December, 2020. However, all subsequent paragraphs related to the decision of O'Hanlon J. of 21st January, 2021 not to re-

open her decision of 12th January, and until this point, this judgment has been concerned with the latter. The fact is however that there was very little argument about the substantive order of the trial judge of 12th January.

**63.** In *Response Engineering Limited v. Caherconlish Treatment Plant Limited* [2011] IEHC 345, Hogan J. considered the discretionary nature of the remedy provided by O. 45 RSC. At para. 27, he stated:

> "While it is true that the making of an order under O. 45 remains in the discretion of the court, it would generally require special circumstances before the court would decline on discretionary grounds to make an order in favour of a judgment creditor who had otherwise satisfied the necessary proofs. It is probably fair to say that the approach of the court in relation to such orders is more direct and somewhat less nuanced than might obtain in the cases, for example, of an application for an injunction or an application for judicial review."

**64.** It is probably fair to say, therefore, that the remedy is something of a blunt instrument. It is most likely, though not necessarily exclusively, through the mechanism of O. 45 that special circumstances of the kind referred to by Hogan J. will be identified and adjudicated upon. In particular, O. 45 rr. 5 and 6 provide for the making of claims by third parties to an interest in the funds sought to be attached. Order 45 r. 5 specifically refers to a claim to a lien – which would, for example include the appellant's solicitors' claim to a lien over the monies sought to be attached. It empowers the Court to direct inquiries into such claims. But before the Court may exercise its powers under the rule, or inquire into any claim of "*special circumstances*" a claim must be advanced in the first place, which affords the party seeking the order of garnishee an opportunity to respond. No claim of any kind was advanced, leaving the trial judge in the situation referred to by Hogan J., i.e. the proofs for the application were satisfied, no special circumstances were identified, and therefore the

substantive order made by the trial judge on the 12th January was made well within the discretion conferred on her under the rule.

**65.** I am very cognisant that in this case the funds available now available for the respondent were secured through the hard work, and indeed at the expense of the legal advisors of the appellant, and on the face of it the order of 12th January operates very unfairly in very likely depriving those parties of fees properly due to them in recovering those funds. However, the mechanisms by which they may have protected themselves against such an outcome were simply not invoked in the court below, and regrettably, this is not something that can be corrected in this appeal.

**66.** It follows from the above that this appeal must be dismissed. As this judgment is being delivered electronically, my provisional view is that the costs of the appeal should follow the event and that the appellant should pay the costs of the respondent, to be adjudicated in default of agreement. If either party wishes to contend that a different order as to costs should be made, they may, within fourteen days of the delivery of this judgment, contact the office of the Court of Appeal and request a short oral hearing at which submissions will be made by each side in relation to the appropriate order for costs. In such event, the parties should note that in the event that they are unsuccessful in altering the provisional order for costs which I have indicated, that they may be required to pay the costs of the additional hearing.

**67.** Ní Raifeartaigh and Power JJ. have considered this judgment and authorised me to indicate their agreement with it on their behalf.