THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 146

Record No. 2017/65

Irvine J.
Whelan J.
Baker J.

BETWEEN/

RHS ENERGY LIMITED

PLAINTIFF

- AND -

ES ENERGY SAVING SYSTEMS LIMITED

AND

MICHAEL KEANE AND JAMES GOURAM

DEFENDANTS

JUDGMENT of the Court delivered on the 16th day of May 2019 by Ms. Justice Baker

1. Messrs Larkin Tynan Nohilly formerly acted as solicitors for the plaintiff in High Court proceedings and have brought this application for a declaration pursuant to s. 3 of the Legal Practitioners (Ireland) Act 1876 ("the Act") that the firm is entitled to a charge over a cost order made by the Court of Appeal on 22 February 2017 in favour of the plaintiff against the first defendant.

2. The plaintiff and the first defendant are now in liquidation. A provisional liquidator was appointed to the first defendant by Twomey J. on 16 February 2017 and his appointment was confirmed by order of White J. on 6 April 2017. Aidan Garcia Diaz was appointed liquidator of the plaintiff company on 27 April 2017 by O'Connor J. following a petition presented by its employees.

3. The notice of motion issued on 30 November 2017, grounded on the affidavit of David Nohilly sworn on that date and the documents therein referred to and exhibited. John Healy, the liquidator of the first defendant, swore a replying affidavit on 20 March 2018 in which he denies that the applicant firm is entitled to a charging order, *inter alia*, on the grounds that he, as liquidator of the first defendant, compromised the substantive proceedings at negotiations had on 22 May 2017 by which, *inter alia*, it was agreed that the plaintiff would discontinue its proceedings and by way of compromise, pay the sum of €10,000 plus VAT and outlay to the first defendant and that the costs order made in favour of the plaintiff by the Court of Appeal would be set off.

4. It is argued in the circumstances that the costs order over which the charging order is sought has been extinguished by the agreement to set off and that the application should be refused.

5. David Nohilly swore a supplemental affidavit in reply on 10 April 2018 in which he, *inter alia*, avers to the fact that the Court of Appeal order continues to subsist and has not been varied or vacated, and no application under O. 99, r. 4 of the Rules of the Superior Courts ("RSC") for set-off has been made, and that the firm's costs were taxed with the knowledge and authority of Messrs AMOSS solicitors now on record for the plaintiff, the liquidator of which has not resisted the application.

6. When the matter first came on for hearing before this Court, the question arose as to whether the compromise entered into between the liquidator of the plaintiff and the liquidator of the first defendant required the sanction of the High Court pursuant to s. 231 of the Companies Act 1963 and whether the provisions of s. 627 of the Companies Act 2014 had altered the position in a material way.

7. At that point, and following legal argument, the liquidator of the plaintiff was directed to furnish an affidavit dealing with the circumstances in which the compromise was agreed. Mr Garcia swore an affidavit on 12 February 2019.

8. Mr Healy, liquidator of the first defendant, furnished a supplemental affidavit sworn on 13 December 2018 in which he explained the circumstances and details of the compromise of the substantial proceedings.

9. Written legal submissions and supplemental submissions were provided by both parties and the legal issues crystallized in the course of those submissions and oral submissions to this Court.

The Legal Practitioners (Ireland) Act 1876 ("the Act")
10. Section 3 of the Act 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."

11. The section provides for an application to the relevant court for a declaration that an attorney or solicitor is entitled to a charge, in respect of his taxed costs, over the property recovered or preserved in any suit, and at the making of the declaration shall constitute a charge upon and against and a right to payment out of the property.

12. No dispute arises as to whether Messrs Larkin Tynan Nohilly had been engaged by the plaintiff to prosecute the High Court proceedings, and to defend the motion for the stay of the order of Twomey J. made on 16 February 2017, and the firm was on record for the plaintiff when the costs order of 22 February 2017 was made by the Court of Appeal after it had refused the order for a stay.

13. Having regard to the clear authority of the judgment of Barrington J. in *Lismore Builders Ltd v.Bank of Ireland Finance Ltd (No.2)* [2000] 2 IR 316 and the later Supreme Court decision *in Lett & Co Ltd v. Wexford Borough Council* [2015] IESC 24, [2016] 1 IR 385, the motion for relief pursuant to s. 3 of the Act is one correctly commenced by originating motion before this Court as the court which made the order for costs sought to be charged.

14. In her judgment in *Lett & Co Ltd v. Wexford Borough Council*, Dunne J. explained this and quoted with approval from Greene, *Cordery's Law Relating to Solicitors* (5th ed., Butterworths, 1961) at p. 399 as follows:

> "One object of the section is to secure a judicial inquiry into the extent to which property should be charged, which can only be done properly by the judge who heard the case, and therefore the application should, where possible, be made to him even though other judges have equal jurisdiction […]."

15. Cordery was considering the provisions of s. 72 of the UK Solicitors Act 1957 which mirrors closely the provisions of s. 3 of the Act which, in turn, was in similar terms to the provisions of s. 28 of the Solicitors Act 1860. Dunne J. was satisfied that the relevant provisions of the UK legislation mirrored sufficiently closely the provisions of s. 3 of the Act to offer assistance.

Costs order may be charged

16. The Supreme Court, in *Lett & Co Ltd v. Wexford Borough Council*, accepted that an order for costs came within the meaning of "property" in s. 7 of the Act and, at para. 75 of her judgment, Dunne J., with whom Laffoy J. agreed, noted that the judgment of the Supreme Court in *Lismore Builders Ltd v. Bank of Ireland Finance (No.2)*, provided support for the proposition that a charging order under s. 3 could be made in respect of a costs order. In that case Barrington J. giving the judgment of the court with which Hamilton C.J. and Barron J. agreed, stated the following proposition:

> "There is no doubt that a solicitor, whose fees and outlay have not been paid by his client, will normally have a lien on a property or fund recovered by his efforts to secure professional costs and outlay incurred by him. The same principle applies to a fund recovered under an order for the payment of costs. For the same reason it is proper for a court to protect the solicitor's position by granting him a charge on property or costs recovered or preserved as a result of his efforts. Section 3 of the Act of 1876, also contemplates that the charging order should be made by the court which made the order under which the claim to costs arises. The solicitor's application is therefore properly made in this court and this court will therefore make an order charging all monies recovered under the said first and second orders of this court dated the 11th February, 1998, with the payment of all costs and outlay due and owing by the plaintiff to his solicitor arising out of the solicitor's conduct of these proceedings" (at p. 319).

17. Dunne J. quoted with approval this passage in her judgment in *Lett & Co Ltd v. Wexford Borough Council* at para. 80.

18. While, in his judgment in *Lett & Co Ltd v. Wexford Borough Council*, McKechnie J. disagreed as to the question regarding the appropriate forum for an application for a charging order, he agreed that the judgment in *Lismore Builders v.Bank of Ireland Finance (No.2)* was on point and quoted the same extract from the judgment of Barrington J.

19. In the light of these clear authorities, the application for a charging order in respect of the costs to which the plaintiff company was entitled is one that may properly be made by the Court of Appeal, and the costs order is one that is amenable to the relief sought.

20. In those circumstances, the applicant firm is entitled to engage s. 3 of the Act, and is prima facie entitled to the charging order sought.

The argument with respect to a set-off

21. The liquidator of the first defendant argues that the costs order made by the Court of Appeal was extinguished by reason of the agreement entered into between him and Mr Garcia, the liquidator of the plaintiff company. It is of some importance that the order appointing Mr Garcia was made after the order for costs now sought to be charged was made by the Court of Appeal, that Mr Healy was appointed as provisional liquidator of the first defendant after the High Court order but before the Court of Appeal dismissed the appeal, and that the order for costs was made following the refusal of the Court of Appeal to grant the stay sought by the provisional liquidator of the first defendant.

22. Counsel for the applicant argues that, as no application was made for a formal set off pursuant to O. 99, r. 4 RSC and as the costs order was not varied or vacated, the argument with regard to set-off must be rejected. He makes the point, correctly, that the statutory jurisdiction to grant an order pursuant to s. 3 of the Act does not extend to determining priorities, but that, having regard to the judgment of the Supreme Court in *Comhlucht Páipéar Ríomhaireachta Teo. (in Voluntary Liquidation) v. Údarás na Gaeltachta* [1990] 1 IR 320, in which it was held that the costs of a successful litigant against the company in liquidation must be regarded as having the same priority against other creditors as the costs of the liquidator, the costs order is a property right of the applicant firm.

23. Counsel for the first defendant argues that the costs are no longer payable and that, therefore, the order made by the Court of Appeal is to be treated as having been extinguished in the agreement by which the proceedings were compromised and a set-off against other costs agreed. Counsel argues that the application for a charging order comes too late as the compromise was entered into on 22 May 2017 and this motion issued some months later on 30 November 2017.

Sanction of the court?
24. While objection was made by the applicant that the compromise by the two liquidators required the sanction of the court under s. 231 of the Companies Act 1963, it was accepted in the course of hearing that the application is governed by s. 627 of the Companies Act 2014, which makes no provision for application to the court or supervision of the relevant power by a liquidator nor imposes the necessity for the sanction of the court for the settlement agreement.

25. However, counsel for the applicant firm makes the argument that s. 629(1) of the Companies Act 2014 offers an alternative protection. Section 629(1) of the Companies Act 2014 provides as follows:

> "Subject to subsection (2), where a liquidator exercises any power specified in paragraph 1 or 2 of the Table to section 627, he or she shall, within 14 days after the date of such exercise, give notice of such exercise—
>
> (a) in the case of a winding up by the court or a creditors' voluntary winding up, to the committee of inspection or, if there is no such committee, to all of the creditors of the company who are known to the liquidator or who have been intimated to the liquidator, or
>
> (b) in the case of a members' voluntary winding up, to the members of the company."

26. It is accepted that no notification was given to the applicant firm of the proposed compromise and, having regard to the fact that the compromise did, in its terms, impact upon the right of the applicant firm to seek a charging order, it seems to me that the applicant firm was entitled to be notified or informed of the making of the compromise with sufficient particularity to allow it to make application for directions to the court should it have chosen to do so.

27. No sanction or other remedy is provided by the express terms of s. 629(1) of the Companies Act 2014 arising from the failure to notify a relevant creditor of the making of the agreement of compromise, but it seems to me that the purpose of notice is to enable application to be made by the relevant creditor for directions regarding the effect or enforceability of the action taken by the liquidator.

28. In the light of that, it is appropriate that I would consider whether the claimed right of set-off can, or does, have the effect for which the first defendant contends and if the costs order and the *prima facie* entitlement of the applicant firm to a charging order against the costs has been extinguished.

Order 99, Rule 4 of the Rules of the Superior Court
29. Order 99, r. 4 RSC makes provision for a set-off in regard to costs in certain circumstances.

> "A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

30. This rule provides no mandatory set-off, is permissive in nature, and does no more than permit the court in certain circumstances to make provision for set-off notwithstanding the existence of a solicitor's lien.

31. Order 99, r. 4 RSC does not provide an answer to the present application in those circumstances. The rule does not provide for an automatic or self-executing set-off in respect of a costs order or orders regarding the effect of O. 99, r. 4 RSC on the right to make an application under s. 3 of the Act. The matter falls to be considered as the exercise of a discretionary power.

32. Before I consider the discretionary nature of the right of set off, I turn to examine the nature and purpose of the order under s. 3 of the Act.

Purpose of s. 3 of the Act
33. Section 3 of the Act affords a right to a solicitor to apply for a charge and is, therefore, a means by which security is sought in respect of a right that derives from the work already done and an entitlement to costs that arises therefrom.

34. In *Lett & Co Ltd v. Wexford Borough Council* McKechnie J. identified the purpose of s. 3 as:

> "[…] to offer protection to solicitors in seeking remuneration for work undertaken on behalf of a client in their professional capacity which had the effect of obtaining or acquiring some benefit or advantage (for the client), in the sense of leading to the recovery or preservation (for him) of some item of property."

35. McKechnie J. at para. 24 described it as a form of execution and preservation:

> "to preserve an asset, and to impress upon it an equity in favour of a solicitor for his appropriate costs. It has been described as akin to a right of salvage because of the recovery aspect of the efforts. It may also be considered as a form of or at least as a step in debt execution, which bears much similarity in purpose and end, if not in approach, to other forms of execution".

36. McKechnie J. considered that the section was grounded on "equitable considerations, the equity being that professional efforts which secure, either by acquisition or defence, an asset on behalf of a client, should not, without contrary agreement, go unrewarded."

The nature of the right for which s. 3 of the Act provides
37. Whether s. 3 of the Act provides for what is called "a statutory lien" or a "statutory charge" was discussed by McKechnie J. at para 23, where he said that the description of the section as creating a statutory lien is incorrect "apt to confuse and should be avoided". He preferred the description "statutory charge" as he said that a lien "cannot exist unless one has possession of the subject matter".

38. The right pursuant to s. 3 of the Act is a right to seek that to have costs secured, and is akin to, but not identical to, a lien.

39. Swinfen Eady J., in *In re Meter Cabs Ltd* [1911] 2 Ch 557, on an application by the solicitor for a determination that his bill of costs was payable out of the assets of a company, said that the monies had been recovered "by the exertions of the solicitor". He quoted from the decision in *In re Born* [1900] 2 Ch 433, where Farwell J. pointed out that, although the application for a charging order under the then equivalent UK legislation was one made under statute. A statutory charge is a means by which a solicitor enforces a right he or she already possesses and which, in that case, was held to exist prior to the winding-up.

40. A solicitor may seek an order under s. 3 of the Act even when no other property exists over which a lien is claimed. All that is required is to establish a link between an asset recovered or preserved and an entitlement to be paid for the work done in the process of the recovery or preservation of that asset.

41. Further, in my view, because the order under s.3 is to declare a right charged against an identified asset, the right to make an application under s. 3 of the Act is vested once the costs order is made in favour of the client of a solicitor, albeit until the charge is declared the security is inchoate or incompletely constituted. This has a consequence for the nature of notice required to constitute a person a bona fide purchaser for value without notice within the meaning of the statute, discussed in more detail below.

Priority afforded to s. 3 charge

42. The judgment of Pim J. in the Irish decision of *Young v.Mead* [1917] 2 IR 258 sets out the early history of the right of set-off against a solicitor's lien for costs and the General Orders for Ireland of 1854 which provided that no set-off of damages or costs should be allowed to prejudice the attorney's lien for costs in the same suit in which the claim of set-off is sought. Order 65 r. 8 of the rules made under the Judicature Act changed this position and the provision for set-off is broadly identical which now exists in the current Rules of the Superior Courts. The difference between the chancery and common law practice, and what Barrington J. in *Larkin v. Groeger* [1990] 1 IR 461, at p. 466, described as the "complex and difficult" authorities on the relationship between a set off and an unpaid solicitor's lien for costs on a fund recovered by his efforts, arose in part from the difference in practice between the chancery and common law courts prior to the Judicature Act.

43. In *Hamer v. Giles* (1879) 11 Ch D 942 Jessel M.R. determined the question of priority of a charge under s.28 of the Attorneys and Solicitors Act 1860 in terms identical to those found in the Act on a number of grounds. He pointed out that a solicitor always has a lien on a property recovered enforceable by an order in the suit. He also considered, at p. 947, that "by no possible process" could a third person gain priority over that lien or charge. The right of the solicitor was in equity prior to that of such third party:

> "I am quite clear about the priority; but the only question is on what ground to put it: there are so many. In the first place a solicitor always had a lien on property recovered, quite independent of the Act, and that lien could always have been enforced by an order in the suit. Therefore, treating this as a mere order in the actions, it would have been a very good charge. It was a declaration of the solicitors' previous lien, which they had by law, and a direction for taxation. That would make the order good independently of any question of title, and it was made on service and before the liquidator's order nisi was served; for the solicitors' order was made on the 4th of December, the liquidators order *nisi* not being served till the 5th.
>
> But, besides that, I am of opinion that by no possible process could *Giles* give a third person a prior charge to his solicitor. The interest of *Giles* was equitable, whatever it was; and the right of the solicitor was in equity prior to that of *Giles*, and consequently *Giles* could not have given a prior right in equity to an equitable *chose in action* to the liquidator. But those considerations are quite independent of the Act of Parliament."

44. A similar conclusion was arrived at in the earlier case of *Cole v. Eley* [1894] 2 QB 180. Section 28 of the Solicitors Act 1860, in terms similar to that found in the Irish s. 3 of the Act, voided conveyances to defeat a charging order unless made to a *bona fide* purchaser for value without notice. Charles J. identified the contest as between a solicitor who had obtained a charging order upon money recovered by his exertions and a person who has bought for valuable consideration a judgment debt. A judgment debt was purchased before the charging order was obtained and the question for the court was whether the charging order should be upheld and whether the purchaser of the debt could be said to have been on notice of the right of the solicitor. The assignee of the judgment, being aware of the existence of the action, and that the solicitor was acting in it for the plaintiff, was to be taken to have had notice of the solicitor's right to the lien on the property recovered and could not therefore be described as a purchaser for value without notice. The solicitor was held entitled to a charging order.

45. The reasoning of Charles J. is instructive. As he said, a solicitor had a lien for his costs from the date of a judgment. Section 28 of the Solicitors Act 1860 provided that any conveyances and acts done to defeat, or which could operate to defeat, the charging order should, unless made to a *bona fide* purchaser for value without notice, be absolutely void and have no effect against the charging order. The question for the court concerned which notice was material. Charles J. rejected the reading of the Solicitors Act 1860 that the notice to which it referred was notice of the making of the charging order and came to the conclusion that it "must be taken to mean notice of the solicitor's right to a lien on the proceeds of the judgment." Charles J. relied on the judgment of *Romilly M.R. in Haymes v. Cooper* (1864) 33 Beav 431, and that knowledge of the existence of the suit was knowledge sufficient to constitute the purchaser as other than a *bona fide* purchaser for value without notice.

46. Collins J. agreed with the reasoning that the relevant notice is notice of the solicitor's right to a lien or to a right to seek a charging order and not notice of the existence of a charging order.

47. Both of these judgments were relied on by Clarke J. in *Mount Kennett Investment Co. v. O'Meara* [2012] IEHC 167 as authority for the proposition he stated that a charging order "gives the relevant solicitor priority over all other creditors and all claims except that of a purchaser for value without notice of the right of the solicitor to a charging order" (para 4.7).

48. Clarke J. stated the proposition regarding priority as follows:

> "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" (para 6.3).

49. In the light of these observations regarding the nature and effect of a charging order, I turn to examine the discretionary nature of the powers under O. 99, r. 4 RSC.

Discretion

50. In *Larkin v. Groeger*, Barrington J. was hearing an application *inter alia* for an order pursuant to s. 3 of the Act in respect of costs awarded against the defendants who sought to set off other costs against their liability for the costs sought to be charged. The

application for a set-off was opposed by the solicitor who had acted for the plaintiff in the High Court and in an earlier arbitration. Barrington J. granted the set-off to the defendant notwithstanding its effect on the solicitor's lien for costs and the consequential effect on the charge. Having dealt first with the question of whether O. 99, r. 4 RSC had any application in the light of the argument made by the solicitors on the grounds that the proceedings in which the set-off was sought were not the same "cause or matter" as the arbitration proceedings from which the costs order derived, and having taken the view that the matters were "two battles in the same war", Barrington J. concluded that the two disputes could not properly be characterised as "the same cause or matter", and that therefore O. 99, r. 4 RSC had no application. He then went on to deal in general with the provisions of O. 99, r. 4 RSC which he described as "one set of circumstances in which a set-off can arise", but considered that those circumstances were not exhaustive and that the court could, in its inherent jurisdiction, allow a set-off.

51. Barrington J. considered that whether a set-off would be allowed depended on the justice of the matter and that the courts powers are discretionary. He quoted from the *dicta* of Younger J. in *Puddephatt v. Leith (No.2*) [1916] 2 Ch 168, at p. 180, as follows:

> "*prima facie* a set-off should not owing to such a lien be refused if as between the parties themselves it would be fair and just to allow it and if no fraud or imposition has been practised upon the solicitor by collusion between them."

52. The matter then is one of discretion as to whether the court should allow a set-off in the interest of justice.

53. Barrington J. referred to *Young v.Mead*. That decision deserves some analysis. The plaintiff had obtained judgment and costs against the defendant and later brought a debtor's summons in the bankruptcy division of the High Court in respect of the judgment debt and costs. The debtor's summons was dismissed with costs. On the application by the defendant's solicitor for a charging order on the bankruptcy costs and a cross application by the plaintiff seeking liberty to set off the bankruptcy costs against the costs and sum recovered in the action, the court following *Puddephatt v. Leith (No.2)* held that the court had a discretion to allow a set-off and it would in the circumstances allow the set-off notwithstanding the defendant's solicitors' lien.

54. In *Young v.Mead*, Pim J. considered that in law the solicitors were entitled to the charging order they sought but that the right of set-off against those costs was "in effect paramount to the solicitors' claim" and that the set-off, if allowed, was to be made subject to the solicitors' lien.

55. Having reviewed the earlier case law and the view taken by the old Chancery Courts (which seemed to him to be wrong) that no discretion was vested in the court, he agreed as he put it "absolutely and entirely" with the view of Younger J. *in Puddephatt v. Leith (No.2)*, at p. 180, that:

> "the old views as to the sanctity of a solicitor's lien no longer obtain."

56. The matter would be decided on the principles of fairness and justice.

57. Pim J. concluded in *Young v.Mead* that it would be unfair and inequitable to require the parties to pay not only their own costs but the costs of the solicitor of the party against whom they had obtained judgment and he refused the application for the charging order and permitted the set-off.

58. Barrington J. did allow the set-off in his judgment in *Larkin v. Groeger* because the issues arose in the same dispute and the same firm of solicitors acted for the plaintiff in both proceedings. As he put it:

> "this is not a case where a fund recovered by one solicitor in one set of proceedings has been put in danger by the outcome of different proceedings conducted by a different solicitor"

59. An order under s. 3 of the Act once made does not operate in equity but is a statutory charge which carries the priority for which provision is made in the section, that is priority over all comers except *bona fide* purchaser for value without notice. The power of the court under O. 99, r. 4 RSC is discretionary and factors such as those in play in *Larkin v. Groeger* and *Mount Kennett Investment Co. v. O'Meara* are to be weighted in the determination as to whether the order under s. 3 of the Act is to be subject to set-off as to some or all of the property recovered.

60. In *Mount Kennett Investment Co. v. O'Meara* application was made under the Act on behalf of the firm of solicitors in respect of legal costs. Clarke J. made the charging order but went on to provide that the solicitor's right in turn was to be subject to any rights of set-off which subsisted against his client.

61. Counsel for the first defendant argues that this proposition is conclusive regarding the correct approach to the set-off agreement in the present case and I turn now to examine this argument.

What is actually recovered?

62. In *Mount Kennett Investment Co. v. O'Meara* Clarke J. described the consequences of a set-off as being:

> "[…] that the person from whom the property may be recovered is not obliged to pay the full sum to the client concerned for that party is entitled to a set-off. The money notionally awarded before a set-off is applied is not, therefore, money actually recovered or preserved for the client. It is for that reason that a person entitled to a set-off does not have that entitlement disturbed by any entitlement of the solicitor for his opponent to a charging order under s. 3" (para. 4.7).

63. The solicitors were held entitled to a proportionate recovery of their costs and a charging order for such proportionate amount.

64. Counsel for the first defendant argues that as the compromise made express provision for a set-off, no costs were "actually preserved" in the suit.

65. The conclusion of Clarke J. in *Mount Kennett Investment Co. v. O'Meara* reflected the close connection between the partners in the solicitors' firm and their client and his dicta at para 4.7 concerned the effect of existing or subsisting rights of set-off subject to which a solicitor would take.

66. In the present case, the applicant firm's right to a lien and the firm's corresponding entitlement to seek a charging order already existed before the set-off was agreed. The costs order was actually recovered by the exertions of the applicant firm. The compromise agreement could not have displaced that right without either an order of the court or the agreement of the person entitled to the lien. The judgment of Clarke J. was concerned with the corollary, where a solicitor could not be said to be entitled to either a lien or a

charging order in respect of anything other than monies actually owed. A person already entitled to a set-off does not have that entitlement disturbed by a charging order and any subsequent agreement for a set-off could not, in my view, displace an existing entitlement of a solicitor to a lien, and their not yet crystallized but vested right to seek a charging order.

67. In the present case, unless the applicant firm consented the first defendant did not have an entitlement to set-off until after the rights of the applicant firm had come into existence, or, to use the language of Clarke J. in *Mount Kennett Investment Co. v. O'Meara*, until after the costs were preserved for the plaintiff.

68. The agreement to set off does not therefore displace the rights of the applicant firm.

Application to the facts and conclusion

69. This application is not concerned with the enforcement of the solicitors' charge but rather with the question of whether the charging order should be made in the first place, and although the question of priorities may fall to be considered in more detail in some later application to the High Court, the fact that as a matter of first principle the order would carry the kind of priority which Barrington J. identified in *Larkin v. Groeger*, means that the right to apply for an order under s. 3 of the Act is a right something akin to a property right and one which in the present case, it is clear, both liquidators had notice.

70. Whilst this Court has no jurisdiction to determine the question of priorities, the fact that the costs order would, *prima facie* at least, be entitled to rank, in terms of priority, with the costs of liquidation, means that there must be some likelihood that it will be met, and the position might have been otherwise had the costs order fallen to be treated to rank *pari passu* with other unsecured and non-preferential creditors in the light of the insolvency of the plaintiff company and/or the first defendant.

71. I am satisfied in the circumstances of the present case that the applicant firm is entitled to an order pursuant to s. 3 of the Act. It is clear and was not the subject of any great debate at the hearing of the application, that the order for costs made by this Court is properly characterised as "property recovered or preserved" as a result of the appeal, that those costs were recovered through the instrumentality of the applicant firm.

72. I am also satisfied that the liquidator of the first defendant cannot defeat the entitlement of the applicant firm to a charge as neither he, nor the first defendant, may be characterised as a *bona fide* purchaser for value without notice of the award of costs and of the entitlement of the applicant firm be paid those costs.

73. It is not necessary that the liquidator of the first defendant or the first defendant company itself had notice of the fact that the applicant firm would, or even intended to, bring an application for a charging order under s. 3 of the Act, as the relevant notice is that of the existence of the order for costs made by this Court: this was the result of *Cole v. Eley*. The power of the court to grant an order under s. 3 of the Act is a power by which the entitlement of the applicant firm to its costs is declared well charged upon those costs which were recovered in the action. It is sufficient therefore for the purposes of notice that the first defendant and its liquidator had notice of the existence of that order for costs, and that they had such notice is manifest from the fact that by compromise reached in May 2017 those costs were agreed to be set off against other costs.

74. It is not, in my view, determinative that the liquidator of the plaintiff does not resist this application, and I am satisfied that the first defendant through its liquidator had standing to oppose the application as it is the party obliged to pay those costs and who relies on the agreement to set-off as a full defence to the obligation to pay, and *ipso facto* to the entitlement of the applicant firm to a charge.

75. The right is a right which has not in the circumstances been defeated by the actions of the liquidators of the plaintiff and the first defendant in compromising the substantive proceedings, and no compromise entered into between them can impact upon or prejudice the entitlement of the applicant firm to seek an order in respect of costs which were awarded and over which it had a lien and an entitlement to seek a charge before the first defendant went into liquidation and several months before the compromise was achieved.

76. The agreement to set-off takes subject to the order under s. 3 of the Act and does not defeat it. My conclusion is strengthened by the fact that no notice was given of the compromise under s. 627(1) of the Companies Act 2014 to the applicant firm, service of which might have enabled application to be made to the court at an earlier stage for directions regarding the impact upon the entitlement of the applicant firm to its costs.

77. For completeness, I am satisfied that the applicant firm did not delay in bringing this application, one made in respect of taxed costs, and while delay is matter to which regard would be had in any application to the court in the exercise of its discretion, I am not satisfied that any prejudice has been caused by the delay. In that regard, I agree with the view expressed by Clarke J. in *Mount Kennett Investment Company v. O'Meara*, at para. 6.1, and that no events were, to use the language Clarke J., "allowed to evolve" by which a third party *bona fide* might have a right to the relevant property which might defeat the making of the order.

78. I am satisfied in all the circumstances that the applicant firm is entitled to a charging order and as the question of priorities or the mechanism for enforcement is not before this Court, I make no determination in regard thereto.

79. In the circumstances therefore, I would propose that the Court make an order pursuant to s. 3 of the Act, declaring that the firm of Larkin Tynan Nohilly be entitled to a charge upon the costs order made by the Court of Appeal on 22 February 2017 in these proceedings against the first defendant, and refuse the application for a set-off under O. 99, r. 4 RSC.