

THE HIGH COURT

[2024] IEHC 667
Record No. 2008/11089P

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 3 OF THE
LEGAL PRACTITIONERS (IRELAND) ACT, 1876

BETWEEN:

WILLIAM NAYLOR (OTHERWISE HOARE)

PLAINTIFF

-AND-

JEAN MAHER

DEFENDANT

JUDGMENT of Mr Justice Oisín Quinn delivered on the 21st day of November, 2024

I. Introduction

1. This judgment concerns an application made on behalf of a firm of solicitors, James Lucey & Company (the “Firm”), for orders pursuant to section 3 of the Legal Practitioners (Ireland) Act, 1876 in respect of unpaid fees due from the plaintiff for litigation, being this probate case.

2. Section 3 of the 1876 Act is a charging provision which entitles the court to make an order declaring that a solicitor who has litigation costs due from a client is entitled to a charge in respect of those outstanding costs against both property and an order for costs recovered for the client as a result of that litigation.

3. This application was initiated by way of a Notice of Motion issued on 14 June 2024 and heard by this court on 8 and 12 November 2024. The application was grounded on an affidavit sworn by Mr. Lucey, the principal solicitor in the Firm. There was an affidavit sworn by the plaintiff in opposition to the application and then a further supplemental affidavit of Mr. Lucey. Those affidavits disclose a significant factual dispute as to the nature of the arrangement claimed to have been agreed in relation to fees.

4. The outstanding legal costs in question relate specifically to the fees of counsel incurred when acting for the plaintiff in these probate proceedings, firstly in the High Court and then in

the Court of Appeal between 2011 and 2018. During the proceedings the plaintiff was represented by a different firm of solicitors whose fees (excluding the bulk of Counsels' fees) were ultimately discharged by means of an agreement reached between the plaintiff and that original firm of solicitors. After the proceedings had concluded, the plaintiff was then represented by a different firm of solicitors, which firm then ceased practice and then the file passed to the Firm making this application. There were further legal disputes concerning the estate to which the plaintiff was a notice party.

5. As a result of the litigation the Plaintiff recovered a 122 acre farm and was granted an order for 75% of his High Court costs and all of his Court of Appeal costs, which were ordered as "costs in the administration of the Estate". The Firm seeks a section 3 order over both the costs and the farm.

II. Background

6. The underlying proceedings concerned a claim by the plaintiff (the "former client") challenging the last will of his late father (the "Deceased") who died on 7 April 2007. The defendant is the sister of the plaintiff, and she was originally the executrix of the Deceased's estate, until being removed in 2019 by the High Court.

7. The Deceased's estate included a farm of some 122 acres in Tipperary (the "Farm"). The last will of the Deceased made on 9 November 2006 left the Farm to the defendant. A previous will made on 30 September 2005 had left the Farm to the plaintiff. The plaintiff claimed that he was entitled to the Farm on two grounds. Firstly, that he had been promised the Farm for many years and had worked on the Farm for decades for minimal pay and that, consequently, a proprietary estoppel arose. Secondly, he sought to have the last will struck down on the grounds that it was extracted by duress and undue influence.

8. The case ran in the High Court before Mr. Justice O'Keeffe for 21 days between 19 October 2011 and 3 February 2012. Judgment was delivered by O'Keeffe J. on 14 September 2012; see [2012] IEHC 408. A consideration of the judgment indicates the deep-rooted origins of some of the matters in dispute between the parties.

9. The plaintiff succeeded on the proprietary estoppel ground and was found to be entitled to ownership of the 122 acre Farm and was entitled accordingly to be registered as full owner of the Farm, being the lands contained in Folios 21455 and 18131 of the Register of Freeholders, County Tipperary. The plaintiff was unsuccessful in his challenge to the last will. Both the plaintiff and the defendant were granted orders for their costs "in the administration of the estate" by Order of O'Keeffe J. made on 21 January 2013.

10. The defendant appealed the proprietary estoppel finding of the High Court and the appeal was ultimately heard by the Court of Appeal on 18 December 2017. By Order of 7 February 2018, the Court of Appeal dismissed the appeal and affirmed the order of the High Court, except that the plaintiff was required, as a condition of receiving the transfer of the entire Farm to disclaim a bequest of €150,000 in the last will (the last will had not left the Farm to the Plaintiff, but rather just provided for this bequest) and, in addition, the costs order made by the High Court was varied to provide that the plaintiff recover 75% of his costs in the High Court (on the grounds that the duress and undue influence argument had been unsuccessful). The plaintiff was awarded his full costs of the Court of Appeal, and both sets of the plaintiff's costs were made "costs in the administration of the Estate". In addition, the defendant's costs in the Court of Appeal were also made "costs in the administration of the Estate".

11. Unfortunately, there has been further litigation in relation to this estate. The solicitor who had acted for the defendant as executrix in these proceedings brought proceedings in 2018 to have her removed as executrix. Those proceedings were successful and accordingly, by Order of the High Court made on 5 March 2019 the defendant was removed as executrix and Mr. Gilvarry, the solicitor, was appointed as administrator in her place. Subsequently, Circuit Court proceedings commenced between the administrator and the defendant concerning another property in the estate. This led to further costs being incurred in the administration of the estate.

12. As a result of all of the foregoing, the position now is that the estate has become insolvent and cannot discharge all of the costs that have been incurred. Indeed, according to the Administrator, the funds in, and likely to be realised by, the estate are estimated to probably be insufficient to meet even the costs of the executrix and latterly the administrator, much less the costs of the plaintiff herein, which have also been ordered by the court as "costs in the administration of the Estate".

13. Consequently, Mr. Gilvarry, as administrator of the Deceased's estate, has then brought further proceedings, this time, against the plaintiff herein by way of Special Summons record number 2023/311, seeking orders as to the priority to be applied in respect of the various costs that have arisen. Judgment in that matter has also been delivered today by this Court in which I have concluded that the executor's and administrator's costs take priority.

14. As a result of the litigation, the plaintiff is now the owner of the Farm. He also has an entitlement to 75% of his costs in the High Court and his costs in the Court of Appeal, both of which have been ordered as "costs in the administration of the Estate".

15. The plaintiff reached an agreement with and discharged an agreed sum to the initial firm of solicitors who represented him in the High Court and the Court of Appeal. He also paid an initial sum of €30,000 to his senior counsel in advance of the High Court hearing. According to the applicant Firm herein, a further total sum of €351,853.50 is due for the balance of the fees due to counsel for the High Court and Court of Appeal hearings. This figure was gleaned by counsel for the Firm referring to fee-notes exhibited in an affidavit of the plaintiff filed in the Special Summons proceedings referred to above (in which the plaintiff herein is the defendant).

16. According to the judgment of O’Keeffe J. at para 3, the evidence was that as of February 2011 the Farm was worth €525,000.00.

17. According to the parties, the Farm is currently not charged or encumbered in any way. It is not disputed that the Farm is being farmed by the plaintiff, and it is said, without dispute, that the plaintiff has no intention of disposing of or otherwise encumbering the property. Nor is the application based on any apprehension by the Firm that the plaintiff intends to or is considering selling or otherwise encumbering the Farm.

18. In relation to the costs outstanding, the grounding affidavit of Mr. Lucey states that Bills of Costs incorporating Counsels’ fees have been filed with the Office of the Legal Costs Adjudicator and a hearing date for adjudication is currently awaited.

19. Accordingly, the Firm seeks orders pursuant to section 3 of the 1876 Act declaring that the Firm is entitled to a charge, and the consequential right to payment out, for these fees over:-

- (i) the order for costs made in favour of the plaintiff in both the High Court and Court of Appeal;
and more particularly (in light of the insolvency of the estate)
- (ii) the Farm, being property recovered by the plaintiff in the proceedings.

III. Submissions

20. Fundamentally, the plaintiff says that the Orders sought are not necessary. Specifically, on behalf of the plaintiff, it is said that a number of issues with these costs have been raised. These are summarised in a letter from the plaintiff exhibited by Mr. Lucey at JL4 of his second Affidavit and are deposed to in the plaintiff’s Affidavit. The principal objection is a fundamental one. The plaintiff’s starting position is that having paid the sum of €30,000 to his senior counsel in advance of the trial in the High Court his understanding was that it was agreed that the balance of Counsels’ fees were thereafter to be discharged from the Estate. This, it is said, is not a bare assertion. The plaintiff’s position arguably finds some support in an email

of 11 October 2019 from his original solicitor exhibited by him: “... [Counsel] confirmed her position is and was that she had received all of the money she was going to receive directly from [the plaintiff] and she confirmed her position was if any additional fees were due they would come from the proceeds of the Estate and she would not be seeking recourse to [the plaintiff’s] private resources outside of the proceeds of the Estate”. In addition, the plaintiff’s position is arguably supported by an email of 1 November 2018 sent by his daughter to the original solicitor which was drafted by Mr. Lucey: “Dad is extremely concerned to know exactly what the position is in relation to what fees he might have to pay himself as he had always understood that all legal fees would be paid by the Estate ...”. The plaintiff claims that Mr. Lucey drafted this email and while Mr. Lucey accepts this, he says the draft was simply based on what the Plaintiff told him.

21. From the Firm’s perspective, the plaintiff’s assertion that any further liability for Counsel’s fees is limited to funds realised from the order for costs against the estate is resolutely disputed by Mr. Lucey in his affidavits. Counsel for the Firm pointed to various matters that, he asserted, were not consistent with this alleged “understanding”. These included:

- (i) statements on behalf of the plaintiff that the amounts being claimed were, in certain respects, “unfair”; and
- (ii) the plaintiff’s refusal to authorise his legal team to accept a potential offer from the Administrator towards his costs, which it was said was not consistent with the alleged “understanding” of the plaintiff that he would only be liable for additional fees to the extent that fees were recovered from the estate.

There is no doubt that counsel for the Firm drew attention to matters that were, arguably, inconsistent with the idea that there was a clear agreement that counsel’s fees were limited to what could be recovered from the estate.

22. Notwithstanding the foregoing, both sides accepted that this dispute cannot be resolved in the context of this application.

23. In addition, both sides agreed that this dispute, and indeed all of the other alternative points made on behalf of the plaintiff about the costs, can and should be determined by the Legal Costs Adjudicator as part of the statutory adjudication process.

24. It follows from the foregoing that, even on the Firm’s case in this application, the Court must approach the matter on the basis that there is a prospect that the plaintiff’s liability to discharge further legal fees may be limited to fees recovered from the estate as part of the order granting the costs of the plaintiff as “costs in the administration of the estate”.

25. Furthermore, on behalf of the Firm it is said that there is no real prejudice to the plaintiff if the order is made and that all of the plaintiff's concerns about the outstanding fees can be addressed during the adjudication process.

26. Finally, it is submitted, that the making of the order will reduce the chance that the Firm could be prejudiced if the plaintiff were to transfer the Farm to a "bona fide purchaser for value without notice" (per the language of section 3 of the 1876 Act); although it is not suggested that the Firm apprehends such a risk at present.

IV. Relevant Legal Principles

27. Section 3 of the Legal Practitioners (Ireland) Act, 1876 (the "1876 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 bonâ 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."

28. The jurisdiction granted to the Court by section 3 of the 1876 Act is helpfully considered in some detail by the Supreme Court in the judgments of Dunne J. in *Lett & Co. v Wexford Borough Council & Ors* [2016] 1 IR 385 and then more particularly by Laffoy J. for the Supreme Court in *Lett & Co. v Wexford Borough Council & Ors* [2016] 1 IR 418. In the first *Lett*, Dunne J. (with whom Laffoy J. agreed, McKecknie J. dissenting) decided that the Supreme Court had jurisdiction *ab initio* to hear a section 3 application in circumstances where that court had made the costs order that was sought to be charged. The substantive features of section 3 were then considered by the Supreme Court in the second *Lett* decision, where the judgment is delivered by Laffoy J.

29. From paragraphs 22 to 28 of the reported judgment, Laffoy J. describes seven significant features of the provision, which can be summarised as follows:-

- (i) the section is concerned with the costs of litigation;
- (ii) the jurisdiction granted is discretionary;
- (iii) the jurisdiction is overlaid with equitable principles and where a solicitor establishes a *prima facie* entitlement to relief, “*the court has to consider whether there are countervailing considerations on the basis of which the court should not exercise the jurisdiction*”;
- (iv) where the costs sought have yet to be adjudicated (‘taxed’) then it is good practice to state the maximum limit of the costs;
- (v) the court has a jurisdiction to make ancillary orders for the raising and payment of the costs out of the relevant property;
- (vi) in terms of priority, “the overall clear intention of the legislature in s. 3 is to give priority to the Solicitors’ charge subject to the one exception stipulated” (namely the ‘bona fide purchaser for value without notice’); and
- (vii) the section contains a proviso that no order shall be made where the right to recover the costs is statute barred.

30. In addition, the judgment contains several further helpful observations. Firstly, in paragraph 29 it is observed that “... it would not be appropriate that the court, on an application under s. 3, should attempt to resolve disputed questions of fact or disputed questions of priority as between charges or prospective charges.” That observation is relevant here, where there is a significant factual dispute as to whether the client’s exposure to further costs will be limited to the costs recovered from the estate.

31. Next, it appears clear that a dispute about the final amount of the costs is not in itself a bar to relief under the section; see para 33 where Laffoy J. states: “[t]he reality of the situation

is that s. 3 of the 1876 Act only confers a right to a charge for taxed costs on a solicitor. In this case, as has been noted earlier, the Solicitors are merely seeking a charge in respect of the taxed party and party costs, which are the subject of the pending taxation process. The taxation will be determinative as to the quantum of party and party costs, whether at taxing master level or on review to the High Court”.

32. In that vein, it is also observed by Laffoy J. in para. 32 of *Lett* that a failure to send a section 68 letter (the letter specified in section 68 of the Solicitors (Amendment) Act, 1994) is not a bar to relief, Laffoy J. concluding on that point that “[t]he absence of a s. 68 letter does not raise a countervailing consideration which could override the Solicitors' entitlement to a declaration under s. 3”.

33. A potentially more significant issue, in the context of this application, is as to whether or not the applicant solicitor needs to show that without the order he would otherwise not be able to recover his fees or whether some kind of default is required on the part of the client to merit the court exercising its jurisdiction in favour of the solicitor. In other words, can an application be made pursuant to section 3 of the 1876 Act where a client recovers property (including where an order for costs is made in the client's favour), irrespective of whether the circumstances indicate any kind of ‘default’ by the client in paying the fees due. In the case of *Lismore Buildings Ltd. V Bank of Ireland Finance No.2* [2000] 2 IR 316 the client was insolvent. In considering this question, Laffoy J. in *Lett* states at para 34 as follows:-

“A further ground [relied upon by Lett in opposing the application] is that Lett is not insolvent, citing the decision of this court in Lismore Buildings Ltd. v. Bank of Ireland Finance Ltd. (No. 2)[2000] 2 I.R. 316. While, as a matter of fact, in Lismore Buildings Ltd. v. Bank of Ireland Finance Ltd. (No. 2), the plaintiff company was insolvent, there is nothing in s. 3 or, indeed, in the analysis of s. 3 contained in the judgment of Barrington J. in Lismore Buildings Ltd. v. Bank of Ireland Finance Ltd. (No. 2), to suggest that the client litigant being insolvent is a precondition to a declaration being made under s. 3. What is implicit in s. 3 is that the entitlement to a right to a charge arises where fees and outlay have not been paid by the litigant client to the solicitor by whose efforts the costs were procured for the client.” (underlined for emphasis).

V. Decision

34. Specifically, therefore, it seems that it is implicit from the jurisprudence that the entitlement to relief depends on there being costs *due* that have not been paid.

35. In addition, most of the cases seem to involve some clear apprehended difficulty on the part of the solicitor in getting paid, which apprehension is not simply related to a genuine dispute as to the actual liability for the fees claimed. Examples include where the client is insolvent (as in *Lismore*); or where there is concern that the solicitor will not recover the costs because another party may seek to *garnishee* the costs (again, as in *Lismore*); or where the client's bankers (or the banker's transferee, as in *Lett*) might seek to charge the property recovered; or where the client has subsequently gone into liquidation and the liquidator claims to have agreed to set off the costs ordered in the client's favour as part of a wider deal (see *RHS Energy Ltd v ES Energy Saving System* [2020] 1 IR 799); or where the other party to the litigation claims to be entitled to set off the costs awarded to the client and the client is bankrupt, as in *Mars Capital v Hunter* [2024] IEHC 118.

36. Nonetheless, there is no closed set of categories of circumstances in which an application must fit. A simple unexplained refusal to pay could plausibly come within the circumstances that might trigger a section 3 application once the statutory requirements are met. In all events, the court is still required in the exercise of its discretion to consider all the circumstances that pertain to the situation.

37. The features identified by Laffoy J. in *Lett* indicate that the jurisdiction granted is discretionary in nature and is overlaid with equitable principles and requires the court to consider "whether there are countervailing circumstances"; see para 24. Specifically, the court is required to consider the overall circumstances in which it is said that the fees "have not been paid".

38. The application by the Firm seeks to charge both the order for costs and the property recovered by the plaintiff. In passing it should be observed that the order for the recovery of the property was made by the High Court and affirmed by the Court of Appeal, albeit with a condition that the Plaintiff disclaim the bequest made in his favour in the 2006 will. The order for costs of 75% of the High Court and of the Court of Appeal as costs in the "administration of the estate" was made by the Court of Appeal. It was not argued that this court did not have jurisdiction to deal with an application for a section 3 order over the costs, albeit it is an

application intertwined with an application for a section 3 order over real property recovered by virtue of the High Court order which was affirmed.

39. The order for costs was for “costs in the administration of the estate”. The Plaintiff does not seriously dispute the Firm’s entitlement to recover payment of any fees due from any monies recovered for the plaintiff from that order for costs.

40. The substantial dispute between the parties concerns whether there should be an order charging the Farm.

41. As noted above, both sides agreed in submissions that the dispute about whether or not the plaintiff had an agreement that any further fees due to counsel would be limited to fees recovered from the estate, is a dispute that can, and should, be determined by the Legal Costs Adjudicator as part of the statutory adjudication process.

42. This argument on behalf of the plaintiff was not a bare or mere assertion. The plaintiff’s position arguably finds some support in the email from his original solicitor of 11 October 2019. There is also arguable support for his position in the email drafted by Mr. Lucey and sent by the plaintiff’s daughter on 1 November 2018 to the original solicitor.

43. In addition, it must be remembered that the Plaintiff, as is made clear in the judgment of O’Keeffe J., left school early in his life so he could work on the Farm and has limited education and literacy. Any lack of precision or documentation in relation to his claimed understanding of the fee arrangements made in 2011 has to be assessed, certainly at this juncture, in that context.

44. Equally the Firm is pursuing a claim for fees on behalf of professional people. The Firm took over the file from the previous solicitors. In that context, it is not wholly irrelevant to note the relative absence of paperwork submitted on behalf of the Firm in support of this application.

45. The grounding affidavit says very little about the non-payment of the fees. Documents setting out the actual amount of the fees being claimed and any demands for payment were not exhibited at all. Indeed, counsel for the Firm was obliged to rely on the fee-notes of counsel exhibited by the plaintiff in another case to set out for the Court what was claimed to be due.

46. It follows from the foregoing that, even on the Firm’s case in this application, the Court must approach the matter on the basis that there is a prospect that the plaintiff’s liability to discharge further legal fees may be limited to fees recovered from the estate as part of the order granting the costs of the plaintiff as “costs in the administration of the estate”.

47. In addition to the foregoing, it is relevant context to note that the application is not made on the basis that the former client is now insolvent or that the asset recovered is likely to be, or is even apprehended of being, transferred or charged to any other party.

48. In conclusion therefore, in terms of the costs that might be recovered as costs “in the administration of the Estate” there is no real argument from the former client that he is other than willing to see those paid in discharge of any fees due, subject to his arguments about the amounts. However, as the authorities make clear, that, in itself, is not a bar to a solicitor obtaining relief pursuant to section 3 of the 1876 Act.

49. The apprehension of the Firm, which is both perfectly understandable and warranted, is, rather, that due to the insolvency of the estate no fees will emerge from the estate to the benefit of the former client and his legal team. This leaves the property, being the Farm, which was recovered for the plaintiff due to the efforts of his legal team as the most realistic source of having those fees discharged.

50. However, both sides agree that the plaintiff has a number of issues with those fees and that one of those issues is fundamental to whether he will have any liability to discharge those fees above and beyond fees which he recovers from the estate. If the former client is correct about that argument, which both sides agree is to be determined by the Legal Costs Adjudication Officer, then the entitlement to recover payment would be limited to the costs recovered from the estate and there would be no proper basis for any fees being recovered by means of a section 3 order in respect of the Farm.

51. This is a significant countervailing circumstance against granting relief in terms of the Farm. In the context of the additional circumstances, namely, where it is not claimed that the plaintiff is apprehended of transferring or otherwise charging the Farm or is otherwise seeking to put that property beyond the reach of his former legal advisors then, I am of the view that all of these countervailing circumstances combined are sufficient to justify not granting the relief sought as against the Farm.

VI. Form of Order

52. Accordingly, the Court grants an Order pursuant to section 3 of the 1876 Act declaring that the firm of James Lucey & Company, Solicitors is entitled to a charge upon any sum (limited to €351,000.00) paid to the plaintiff by the administrator of the estate of

the late Michael Hoare deceased in respect of the orders for costs made in favour of the plaintiff by the High Court on 21 January 2013, as varied by the Court of Appeal by order of 7 February 2018, and the order for costs made in favour of the plaintiff by the Court of Appeal on 7 February 2018.

53. The application for relief under section 3 of the 1876 Act as against the property comprised in Folio 21455 and Folio 18131 of the Register of Freeholders, County Tipperary is refused.

54. In the event of there being any material change of circumstances, including but not limited to arising from the costs adjudication process, there is liberty to apply.