THE COURT OF APPEAL

UNAPPROVED

Court of Appeal Number: 2020/186

Neutral Citation: [2022] IECA 175

Noonan J.

Collins J.

Binchy J.

BETWEEN/

JAMES WALL AND JEAN HOURIGAN PRACTICING UNDER THE NAME AND STYLE OF JAMES WALL SOLICITORS

PLAINTIFFS/

RESPONDENTS

- AND -

C B

DEFENDANT/

APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 29th day of July 2022

1. This is an appeal from a decision of the High Court (MacGrath J.) of 30th April 2020 whereby he granted the respondents' application for summary judgment against the appellant in the sum of €216,717.84.

Background

2. The respondents are a firm of solicitors practicing under the name and style of James Wall Solicitors ("the Firm"). In or about October 2011, by retaining the services of the first

named respondent, Mr. Wall, the appellant retained the services of the Firm in connection with family law proceedings in which she was already engaged with her then husband. The Firm was simultaneously retained by the appellant in connection with chancery proceedings concerning a company jointly owned by the appellant and her husband, which company (the "Company") was the principal source of income of the parties.

3. The family law proceedings were originally issued in the jurisdiction of the Circuit Court and were ready and set down for hearing over the course of three days in January 2012. However, they did not proceed at that time because, at the last minute, the parties entered into discussions with a view to the appellant acquiring the interest of her husband in the Company. When those negotiations did not prove fruitful, the proceedings were then transferred to the High Court, to the intent that they would travel together with the chancery proceedings, and all matters would be resolved at the same time. The family law proceedings (and only the family law proceedings) came on for hearing in the High Court over the course of thirteen days, concluding on 26th March 2014.

4. On 7th October 2011, Mr. Wall had issued the appellant a letter, for the purposes of s.68 of the Solicitors (Amendment) Act, 1994 (the "Act of 1994"), setting out in detail the basis upon which the appellant would be charged for the Firm's services. The letter provided that pending the conclusion of the proceedings, the appellant would be charged on the basis of hourly rates specified in the letter, with the rate varying depending upon the individual within the Firm acting on behalf of the appellant at any moment in time. The letter further provided for taxation of costs, in default of agreement, and specifically advised the appellant of her entitlement to have "any bill submitted" taxed by the Taxing Master. The letter further stated that the Firm would provide the appellant with any information as regards this process, upon request.

5. Finally, as far as is relevant to this judgment, the letter provided that the Firm would invoice the appellant on account on a monthly basis. It is common case that this did not occur, although the Firm did seek and receive from the appellant substantial payments on account of fees in October 2011 and January 2012 in the total amount of €104,018.90.

6. Judgment in the family law proceedings in the High Court was handed down in November 2014. On 11th December 2014, the appellant wrote to Mr. Wall asking for (a) a breakdown of all monies paid by the appellant to the Firm up to that point in time, whether for their own services or for the services of others procured by the Firm on behalf of the appellant and, (b) a full breakdown of all amounts outstanding by the appellant to the Firm, including fees owing to counsel. The appellant also enquired as to how much VAT could be reclaimed by the Company in respect of fees already paid. The appellant further stated in this letter that she wished to pay the Firm whatever was owed as soon as she could.

7. Mr. Wall replied by e-mail of 17th December 2014. To that e-mail he attached:-

(1) A previous e-mail of 23rd August 2013, in relation to fees then outstanding;

(2) An updated fee note headed "Interim Fee Note on Account";

(3) Time sheets from 23rd August 2013 to 12th December 2014 and,

(4) Fee notes from counsel. In the heading to the fee notes of Senior Counsel, the client is identified as both the appellant and the Company.

8. The total amount due was stated to be €216,717.84.

9. In relation to the Company, Mr. Wall stated:

"I have firmly told you on every occasion you have raised the issue that I did not do any work for [the Company] and that I will not issue a VAT invoice to [the Company]. I have consistently told you that while 75% of my time has been spent on your file dealing with [the Company] and the ownership of it I have done no work for that company and will not under any circumstances issue a VAT invoice to it."

10. It is unclear just how much correspondence was exchanged between the parties following the issue of the Firm's bill in December 2014, but there is exhibited to the affidavits a certain amount of correspondence exchanged between the parties in March 2015. In this correspondence, the appellant indicates a willingness to discharge all fees due, but says that she wants a "final" account from the Firm, and she repeatedly asks the Firm and counsel for a discount, which she claims Mr. Wall had promised. For his part Mr. Wall says that he did not offer a discount, but he invites the appellant to make a meaningful proposal for consideration. The appellant indicates that she has difficulty in paying the account until she has a new business up and running, and she asks for the assistance of the Firm. She concludes an e-mail of 27th March 2015 to Mr. Wall as follows:-

> "In conclusion, James, you and all the other members of my team want to be paid and I want to pay you all at the earliest possible moment - please do not do anything to prevent me from doing so or more importantly please do all you can to assist me now".

11. On 24th July 2017, Mr. Wall sent the appellant a demand for payment, informing her that unless the Firm received a concrete proposal to pay the debt within seven days, then the Firm would have no alternative but to issue proceedings. This letter refers to repeated requests for proposals for payment. It also refers to an e-mail of the appellant of 28th February (presumably referring to 2017) in which (Mr. Wall claims) the appellant stated:-

> "I trust that this will convince you and all the others James, that when I say that I will do all I can to pay the bill – I mean exactly what I say – though I do expect everyone to allow me to get on with what I need to do now and to support me in whatever way they can, to our mutual benefit."

The proceedings

12. On 5th October 2017, the Firm issued a summary summons whereby they claimed the sum of €216,717.84 from the appellant, for work done and services rendered to the appellant.

The endorsement of claim stated that full particulars of the amount claimed were set out in the Firm's bill of costs dated 17th December 2014. The proceedings were duly served and the firm of Maurice Power Solicitors entered an appearance on behalf of the appellant on 21st March 2018.

13. On 28th March 2018, the Firm issued a Notice of Motion seeking an order granting the Firm liberty to enter final judgment against the appellant in the sum of €216,717.84. This was grounded on a short affidavit of Mr. Wall of 27th March 2017, referring to the bill of costs dated 17th December 2014 as well as the demand for payment, and averring that the appellant has no *bona fide* defence to the claim.

14. Thereafter, the parties exchanged no less than nine further affidavits. The position adopted by the appellant was that the account rendered by the Firm on 17th December 2014 was an interim account only and not a bill of costs amenable to taxation. The appellant further claimed that the fee note did not give her credit for sums previously paid by her on account of costs, and nor did it provide her with information as to how the fees were calculated. She averred that the sum claimed is excessive. She further averred that the Firm did work on two cases, one being a family law case and the other being a chancery case, and the account rendered fails to distinguish between work done on in the family law case and work done in the case involving the Company. She claims that two separate bills are required distinguishing between the work done on each matter. She asserts that the work done on behalf of the Company was substantial, and referred to an e-mail in which Mr. Wall had stated that approximately 75% of his time in the proceedings had been spent on matters relating to the Company. Moreover, she asserts that Mr. Wall was aware that a payment on account had been funded by monies drawn down by the appellant from the Company, although payment had been made by a bank draft obtained by the appellant herself.

15. For his part, Mr. Wall claims that there is no rigid format for a bill of costs, and in support of this proposition he refers in his first replying affidavit to *Spillane v. Dorgan* [2016] IECA 84. He avers that the bills sent to the appellant were at all times solicitor and client costs and were in compliance with the Solicitors (Amendment) Act, 1994. He exhibits the engagement letter that he sent to the appellant, an earlier bill (from which a balance remained outstanding) dated 23rd August 2013, time sheets and fee notes of counsel. He avers that the professional fees charged by him to the appellant have been calculated on the basis of the hourly rates quoted in the engagement letter sent to the appellant (and to which she agreed) and are easily verifiable by reference to the time sheets provided. He avers that at no time has the appellant disputed the time required to be spent on the matters in respect of which the Firm was retained, and specifically referred to the fact that time records were sent to the appellant on four separate occasions. He refers to an e-mail of 27th March 2015 in which the appellant assured Mr. Wall that she wanted to pay the Firm at the earliest possible moment (and he exhibits that e-mail).

16. In relation to the chancery proceedings, Mr. Wall explains that that case involved an application for a mareva injunction (brought by the appellant) to restrain her husband from taking assets of the Company outside of the jurisdiction. That application, and in effect, those proceedings, were resolved by consent between the parties on 25th January 2011, before the Firm came on record for the appellant (on 12th October 2011). While Mr. Wall says he sought advice from Senior Counsel in relation to the proceedings (and a fee note of that Senior Counsel is provided) nothing further was done by either party to progress those proceedings and no further action was taken. Any work done in that matter therefore was minimal in the overall context. Mr. Wall denies that he was aware that the payment made by the appellant on account of costs in January 2012 had been funded by the Company; on the contrary he avers that he was assured by the appellant that the funds had not been drawn

on the Company account, and he only became aware that this was incorrect upon receipt of a letter from the appellant's husband's solicitors of 22nd March 2012.

17. Mr. Wall confirms that a very large amount of time spent by him on the appellant's family law proceedings related to the Company, through which the business of the appellant and her husband was conducted, and which had substantial assets. However, although the appellant consistently requested Mr. Wall and counsel to issue bills to the Company, they refused to do so on the basis that their services were being provided to the appellant and not the Company. Mr. Wall exhibits correspondence exchanged with the appellant in this regard, and also with the appellant's accountants, which makes this clear. So, for example, in a letter of 10th January 2012 to the appellant, requesting a payment on account, Mr. Wall states:-

> "I must re-emphasise to you that this money should not be discharged from [the Company's] account as there is a court order against you directing you not to use any company funds other than for company purposes. In my strong view, discharge of this bill by company funds would breach the order. Breach of the order would in all likelihood have serious consequences in your matrimonial case".

In a further e-mail to the appellant nine days later, Mr. Wall clearly stated that "All of the work that was done by my firm was done for you personally in the context of your family law proceedings and in your capacity of a shareholder of the Company" (there is a more complete extract from this letter at para. 63 below).

18. Senior Counsel retained by Mr. Wall on behalf of the appellant also swore an affidavit in the proceedings, on 23rd May 2019. She did so in reply to an affidavit of the appellant of 12th April 2019, in order to address the appellant's assertion that the Firm had also acted on behalf of the Company.

19. Senior Counsel averred that she had been instructed originally to represent the appellant by the solicitors who had acted on behalf of the appellant, prior to the Firm being instructed by the appellant. Thereafter, the Firm had continued to instruct her. Senior Counsel averred that the Company was by far the most valuable asset in the dispute and the appellant was very strongly motivated to secure full control of it. A great deal of time was therefore devoted to this objective during the course of the proceedings. However, Senior Counsel averred that she was not at all involved in the "commercial" proceedings. Moreover, while the appellant was very insistent that her legal advisors would invoice the Company, her legal team consistently pointed out that the work of the appellant's legal team was work on behalf of the appellant relating to the Company, and not work on behalf of the Company.

Judgment of the High Court

20. The trial judge first considered the principles applicable to applications for summary judgment, and specifically the decisions of Hardiman J. in *Aer Rianta Cpt. v. Ryanair Limited* [2001] 4 IR 607, that of McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 IR 1 and Clarke J. in *GE Capital Woodchester Ltd. v. Aktiv Capital Investments Limited* [2009] IEHC 512. The trial judge then went on to consider the statutory framework applicable to solicitors' bills of costs, and specifically s.2 of the Attorneys and Solicitors (Ireland) Act, 1849 (the "Act of 1849") and s. 68 of the Act of 1994 as well as O.99, r. 15 of the Rules of the Superior Courts.

21. He noted that the effect of ss. 2 and 6 of the Act of 1849 was summarised by McCarthy J. in *The State (Gallagher Shatter & Co.) v. De Valera* [1986] ILRM 3 as follows:-

> "The combined effect of ss. 2 and 6, in respect of a Bill of Costs for solicitors and client charges duly served would appear to be that:-
>
> (1) The solicitor cannot lawfully sue for one month after delivery;

(2) The client has a period of twelve months within which to demand and obtain taxation;

(3) After the expiry of twelve months or after payment of the amount of the bill, then the Court may, if the special circumstances of the case appear to require the same, refer the bill to taxation, provided the application to the Court is made within twelve calendar months after payment.

(4) After the expiry of the latter period, there is no statutory power to refer for taxation."

22. The trial judge then considered briefly ss. 68(2) and (6) of the Act of 1994. These provisions provide as follows:

"(2) A solicitor shall not act for a client in connection with any contentious business (not being in connection with proceedings seeking only to recover a debt or liquidated demand) on the basis that all or any part of the charges to the client are to be calculated as a specified percentage or proportion of any damages or other moneys that may be or may become payable to the client, and any charges made in contravention of this subsection shall be unenforceable in any action taken against that client to recover such charges."

"(6) Notwithstanding any other legal provision to that effect a solicitor shall show on a bill of costs to be furnished to the client, as soon as practicable after the conclusion of any contentious business carried out by him on behalf of that client—

(*a*) a summary of the legal services provided to the client in connection with such contentious business,

(*b*) the total amount of damages or other moneys recovered by the client arising out of such contentious business, and

(*c*) details of all or any part of the charges which have been recovered by that solicitor on behalf of that client from any other party or parties (or any insurers of such party or parties),

and that bill of costs shall show separately the amounts in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of such legal services."

23. At para. 12, the trial judge noted that, given the regulated nature of the relationship between solicitor and client, it is necessary for a plaintiff to establish compliance with these statutory requirements. The bill must show separately the amounts claimed in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of the legal services in question. The trial judge also observed that a client is entitled, pursuant to O.19, r. 15 of the Rules of the Superior Courts, within twelve months of the presentation of a bill which accords with the statutory requirements, to request that the bill of costs be referred for taxation by the Taxing Master.

24. The trial judge then went on to summarise the grounds put forward on behalf of the appellant in the High Court as constituting an arguable defence:-

(1) The bill does not comply with the requirements of s.68 of the Act of 1994;

(2) The appellant was furnished with an interim fee on account only;

(3) There are errors in the bill;

(4) The fees are excessive;

(5) The respondents carried out work on two cases, a family case and a company law matter and failed to distinguish between work done and fees due in respect of each and,

(6) The bill of costs did not take account of the payment of €103,000 by the appellant in January 2012, and monies paid to Senior Counsel and Junior Counsel in the sum of €27,007 and €21,177 respectively.

25. Having thereafter summarised the factual background and the submissions of the parties, the trial judge moved on to his discussion and decision. He observed that it was clear from *Spillane v. Dorgan* that while a bill of costs in contentious litigation must contain the details prescribed by statute, and in particular must comply with the requirements of s.68 of the Act of 1994, the Act does not prescribe any particular format. It is content rather than form which is of importance, the trial judge said. He considered that since no one format is prescribed, there is no requirement that everything be contained in one document, provided that the fees, outlays and disbursements are evident from the totality of the documentation furnished.

26. Over the course of paras. 55 and 56 of his judgment, the trial judge considered the totality of the information furnished, and concluded at para. 57, that on a close examination of the documents sent to the appellant on 17th December 2014, there had been compliance with the provisions of s.68 of the Act of 1994. These documents included: a note of professional fees and outlays outstanding as of 12th December 2014, fee notes from Senior and Junior Counsel, time sheets vouching work for the relevant period, a note of professional fees outstanding from an earlier interim account of 22nd August 2013, and time sheets relating to that period.

27. The trial judge further rejected an argument that just because the account furnished was entitled "Interim Fee Note on Account" it is not a final bill constituting a bill of costs for the purposes of the legislation. He noted that no authority was open to the court in support of that argument, and if that were the case, then any bill submitted by a solicitor to a client during the course of lengthy and protracted proceedings might be without legal

validity. He considered such a proposition to be not only contrary to the agreement contained in the retainer, but also without any authoritative support. While he considered that it would have been better if the word "interim" had not been placed on the fee note, that did not detract from the validity of the bill for the purposes of the legislation.

28. The trial judge then went on to consider an argument to the effect that the bill of costs had not been signed by the solicitor in hard copy form. He rejected that argument, holding that it was sufficient that it had been signed electronically.

29. The trial judge then addressed the argument that some of the fees due may more properly have been due by the Company. He reviewed the limited correspondence between the parties after the issue of the bill on 17th December 2014, and noted that there was no suggestion that any of the fees due were due by the Company. The only reference to the Company in this context was that the appellant suggested that if the Firm produced a VAT receipt addressed to the Company, that would go some way to making more funds available to discharge fees. But there was no suggestion made at that time that any part of the fee was properly due by the Company, as distinct from the appellant personally. The trial judge further held that the fact that Senior Counsel had mentioned both the appellant and the Company in her fee note did not alter the situation.

30. At para. 63, the trial judge concluded:-

> "Given the particular statutory framework which applies, the defendant not having contested the bill or sought to have it referred to taxation within twelve months of the date of its issuance, *prima facie* therefore, the plaintiff ought to be entitled to judgment."

31. The trial then went on to consider whether or not the court should, in the exercise of its inherent jurisdiction, direct that the matter be referred to taxation despite the fact that the request for taxation was made outside the twelve-month period provided for by s.6 of the

Act of 1849. The trial judge noted that this was a bill of costs that had been issued in response to a request by the appellant. The initial response of the appellant was not to dispute the bill, but to seek to compromise and/or seek an extension of time within which to pay. He further noted that it was clear from the terms of the retainer that the appellant had been made aware of her entitlement to have the bill of costs referred to taxation. While the period of time within which to do so was not specified, the appellant had made no enquiry about the process. He observed that the first occasion on which there is evidence of a desire by the appellant to refer the bill to taxation is in her affidavit in response to the application for summary judgment. He noted that in the correspondence that followed the issuance of the bill of costs, while the appellant had set out some of her concerns and complaints, she did not complain of overcharging. No evidence was adduced to corroborate the assertion later made by the appellant that the bill was excessive, or by how much. He considered it of some significance that the first complaint of excessive fees came only after the institution of proceedings. At para. 74 he held:

> "There has been very considerable delay by the plaintiff in seeking to have the bill referred to taxation. No misunderstandings of the rule, time limits or disability are suggested. These are also significant factors to be weighed in the balance."

32. For these reasons, the trial judge concluded that this was not an exceptional case in which the court should exercise its inherent jurisdiction to refer the matter to taxation. For all of the foregoing reasons, the trial judge expressed himself satisfied that the Firm was entitled to judgment in the amount claimed.

Application for stay

33. The judgment of the High Court was handed down on 30th April 2020. The order was not perfected until 29th July 2020. On that day, the trial judge heard an application from the appellant to re-visit certain aspects of his judgment, and to grant a stay of the enforcement

of the judgment pending an appeal. This application, which was grounded on an affidavit of the appellant running to 35 pages, was opposed by the Firm. I return to this at the concluding part of this judgment.

Notice of Appeal

34. Before addressing the Notice of Appeal, I should mention that it appears that almost immediately following the delivery the judgment of the High Court, the relationship between the appellant and her legal team broke down. Her solicitors applied for and were granted liberty to come off record. The appellant therefore drafted her own Notice of Appeal.

35. Although the grounds of appeal run to seventeen pages, it is somewhat unclear in what way the appellant claims the trial judge erred. Moreover, not all of the grounds of appeal arise out of the decision of the trial judge, but in any case they may be summarised as follows.

36. The principal ground of appeal relied upon by the appellant is that the Firm was engaged by the appellant personally in connection with the family law proceedings, and by the Company in connection with the chancery proceedings. It is her contention that Mr. Wall is seeking to recover from her monies that are properly payable by the Company, in connection with services provided by the respondent to the Company.

37. The appellant claims that she was unaware that it was open to her to refer the bill of Mr. Wall to taxation. She claims that she was informed by her then solicitor only the day before the commencement of the proceedings in the High Court that she could have had the bill referred to taxation.

38. The appellant claims that the Firm promised to reduce the account, and for this reason she did not take issue or dispute the account any sooner than she did.

39. The appellant places reliance on the fee notes of Senior Counsel, which identify the client as both the appellant and the Company.

40. The appellant claims that the trial judge erred in not requesting the Firm to present an amended or corrected account to take account of errors identified by the appellant and also to take account of payments previously made by the appellant to the Firm. She also claims that the bill is excessive.

41. The appellant further claims that the trial judge erred in holding that she had never questioned the account furnished by Mr. Wall.

42. Finally, while it is clear from the judgment of the trial judge that was argued on behalf of the appellant that the bill was not in the format required by statute - an argument rejected by the trial judge - the appellant makes it clear in her submissions that she takes no issue at all with the format of the bill, and in particular whether or not that format complies with the statutory requirements.

Respondents' Notice

43. In their Respondents' Notice, the Firm pleads that the trial judge identified the correct principles applicable to applications for summary judgment, and applied those principles to the evidence adduced before him.

44. The Firm states that the trial judge was satisfied that there was no credible evidence to suggest that anybody other than the appellant was liable to pay the costs claimed in the proceedings, and that that conclusion is supported by the evidence.

45. Since the appellant now accepts that she could have referred the bill of costs for taxation when it was delivered to her, the principal basis upon she opposed the application for summary judgment has fallen away and cannot now be pursued.

46. The Firm denies that there are any mathematical or computational errors in the bill of costs. Without prejudice to that contention, the Firm refers to the affidavit sworn by the appellant on 28th July 2020, after the trial judge had delivered his judgment, in which she asserted errors in the computation of the bill of costs. While not accepting those errors, the

Firm agreed to a variation of the order made by the trial judge to substitute the sum of €208,685.94 for the sum of €216,717.84 in the order under appeal.

Application to adduce new evidence on appeal

47. On 21st January 2021, the appellant moved an application in this Court for leave to advance new arguments and adduce new evidence on appeal. This application was refused.

Submissions of the appellant

48. The written submissions of the appellant focus very substantially on the argument that the Company must be liable for a substantial proportion of the account furnished by the Firm. The appellant refers to a statement made by Mr. Wall, in correspondence with the auditors to the Company, that 75% of the work done by the Firm on behalf of the appellant related to the Company. Significantly, however, nowhere in her submissions, written or oral, does the appellant identify any services provided by the Firm to the Company, following the compromise of the appellant's application for a mareva injunction in January 2011, which was ten months *before* the retainer by the appellant of Mr. Wall.

49. Somewhat unusually, the appellant asks this Court to declare that she was entitled to draw down funds from the Company to meet the legal costs of the Company. The appellant claims that Mr. Wall should have insisted on being paid by the Company, having identified that 75% of his work was spent on matters relating to the Company. She also submits that the Firm has received almost €160,000 in payment of fees from the Company, but in spite of that have declined to issue invoices to the Company. She submits that the Firm "can't have this both ways".

50. The appellant claims that her bill "jumped" by €110,000 between 15th August 2013 and 22nd August 2013, just six days later. She submits that there is no explanation for this, and the bills are unclear. In answer to a question from the Court as to in what way the trial judge erred in his decision, and in particular on what basis the amount claimed is not owing,

the appellant responded by referring to this alleged increase of €110,000 in fees between 15th August 2013 and 22nd August 2013.

Submissions of the Firm

51. The Firm submits that the appellant does not have an arguable defence. It is not in dispute that she retained the services of the Firm as her solicitors, and that when doing so she agreed a basis of charge for the services that they would provide. It is not disputed that the Firm provided services to the appellant, and retained counsel for the purposes of those services. The appellant requested a bill, and having received it she did not question the amount or refer it to taxation. Instead she asked for time to pay. The amount claimed was never disputed until proceedings were instituted.

52. The Firm submits that the evidence makes clear that the Firm was retained by the appellant alone. Initially this was for two sets of legal proceedings, but ultimately they were instructed by the appellant in fours sets of legal proceedings, one of which was the chancery proceedings. However, it was the appellant, and not the Company instructed the Firm in connection with those proceedings, and the Firm at all times made it clear that it was the appellant would have to pay for any costs incurred with those proceedings (and, for that matter, all other proceedings) and not the Company. In the event, almost no work was required in connection with the chancery proceedings.

53. It is submitted that there is no error in the judgment of the High Court. Having carefully considered the evidence adduced by the parties, the trial judge was satisfied that the Firm's bill of costs complied with the requirements of the Act of 1849 and the Act of 1994. The trial judge was satisfied that there was no credible basis to suggest that evidence might become available to support the appellant's assertion that the work to which the bill of costs related had been carried out on behalf of the Company, rather than the appellant or that any part of the fee claimed was properly due by the Company, rather than the appellant.

54. As far as the scope of this appeal is concerned, it is limited to the issues that were before the trial judge, and this Court should not have any regard to documentation submitted or arguments made by the appellant after the delivery of the judgment of the High Court, in the context of the application for a stay. This is *a fortiori* the case in circumstances where the appellant applied to this Court for liberty to adduce new evidence, and that application was rejected. The Firm, in its written submissions, acknowledged that it is open to a defendant to identify errors in an untaxed bill of costs, in an action upon that bill. In this regard they refer to the decision of the Court of Appeal of England and Wales in the case of *Turner & Co. v. O. Palomo SA* [2000] 1 WLR 37. In that case the Court of Appeal considered whether the client of a solicitor loses the right to challenge the amount of a bill after the period for taxation has passed. The court held that provisions in the Solicitors Act, 1974 (being similar to those in the Act of 1849) did not "take away the need for the solicitor to prove that his fees are reasonable, if they are challenged, absent any express agreement as to what they should be."

55. In this case it is submitted that the bill of costs of the Firm is based on agreed hourly rates of charge, that the bill has been fully itemised and the basis upon which has been computed is clearly set out. The appellant argued, for the first time in July 2020, *after* the judgment of the High Court, that there were errors in the bill, and that the Firm sought to charge her for work which was not done. While the Firm argues that the appellant is not entitled to raise such an argument after the hearing in the High Court, nonetheless, in their written submissions, reflecting what had been stated in their Respondents' Notice, they say that they are willing, without any admission, to vary the order made by the trial judge and to substitute the amount of €208,685.94 for €216,717.84 to address those issues. However, that is a secondary position; the primary relief the Firm seeks is the dismissal of the appeal.

Discussion and decision

56. In my view, this appeal is without merit. The trial judge correctly identified and applied the principles applicable to applications for summary judgment, and in particular those principles as enunciated by the High Court (McKechnie J.) in *Harrisgrange Limited v. Duncan* [2003] 4 IR 1, at p.7. Having analysed very carefully all the arguments put forward by the appellant in the High Court, he rejected each of those arguments and concluded that the appellant had no defence to the claim of the Firm.

57. A significant portion of the judgment is taken up with an issue not pursued on this appeal, that being the assertion that the Firm's bill was not in compliance with the Act of 1849 and/or the Act of 1994. That argument was rejected and has not been pursued by the appellant on this appeal.

58. As to the claim that the Firm had undertaken work on behalf of the Company, and that the Firm failed to distinguish in the bills furnished to the appellant between work done on behalf of the appellant personally, and work done on behalf of the Company, the trial judge also subjected this claim to careful scrutiny. He noted that while in her e-mail of 11th December 2014, the appellant suggested to the Firm that if they produced a VAT receipt for the Company, that would help to make more funds available to pay the account, she did not suggest at that time that any part of the fee was properly due by the Company. The trial judge referred to an e-mail of Mr. Wall of 17th December 2014 in which he said that he had firmly told the appellant on every occasion that she raised the issue that he had not done any work for the Company. While Mr. Wall had said that 75% of his time spent working for the appellant was spent on matters relating to the Company and its ownership, he insisted that he had not worked for the Company itself and he would not under any circumstances raise an invoice addressed to the Company. The trial judge observed that the issue did not further raise its head until the appellant's second affidavit in these proceedings.

59. The trial judge concluded that there was no evidence or no credible evidence or any credible basis upon which it might be suggested that evidence might become available to support the appellant's claim that the Firm had provided services to the Company. The fact that Senior Counsel had mentioned the Company in her fee note did not in his view alter matters, particularly in light of the contents of the affidavit sworn by Senior Counsel in which she had made it clear that she had at all times advised and acted on behalf of the appellant personally, and that both she and the Firm had at all times made it clear that they were not acting on behalf of the Company. The trial judge also observed that the letter of engagement sent by the Firm at the outset of the retainer was addressed to the appellant personally.

60. In my view, the analysis and conclusion of the trial judge on this issue was undoubtedly correct. I consider the arguments of the appellant in relation to this issue to be wholly lacking in merit. There is not a scintilla of evidence that the Firm conducted *any* work on behalf of the Company at all, not to mention that the account, payment of which the Firm seeks in these proceedings, relates to services provided to the appellant only in connection with her family law proceedings.

61. While the appellant places reliance upon the chancery proceedings, this reliance is entirely misplaced. It was the appellant who was the plaintiff in those proceedings and not the Company. While the appellant has submitted that she was acting on behalf of the Company in those proceedings, and the plenary summons states that she takes the proceedings as a derivative action on behalf of the Company, no evidence was adduced to show that she had obtained the leave of the court to do so. Moreover, and in any event, those proceedings resolved at interlocutory stage ten months before the appellant retained Mr. Wall to act on her behalf. The appellant was unable to point to any work at all done in those proceedings subsequent to engaging Mr. Wall to act on her behalf. Significantly, the terms of settlement of the interlocutory application dated 25th January 2011 provided that there

was to be no order for costs, which hardly suggests that the Company had any responsibility for them.

62. The appellant relies very heavily on the statement made by Mr. Wall in an e-mail to the accountants of the Company of 19th January 2012 in which Mr. Wall stated that: "I confirm that approximately 75% of the time spent and fees charged related to the Company […]." She claims that Mr. Wall sent this letter in the hope that the accountants could be persuaded that it was appropriate for the Company to discharge fees then due to Mr. Wall. Moreover, she claims that fees paid on account at around this time were in fact discharged, indirectly, by the Company because she drew down money from the Company to do so, and, at the insistence of Mr. Wall, paid fees by way of a bank draft which she purchased using those monies.

63. For his part, however, Mr. Wall points to an e-mail of the same date in which he says:-

> "I must reiterate my view, expressed on several occasions now, which is that although the time spent by my firm and fees arising thereon did indeed 'relate to' the Company, it was not 'incurred by' the Company. All of the work that was done by my firm was done for you personally in the context of your family law proceedings and in your capacity of a shareholder of the Company. This means that the work was not done for the Company, and therefore is not an allowable expense as far as the Company is concerned. I will be invoicing you and not the Company for the work done."

This e-mail, it may be observed, was sent more than two years before the family law proceedings came on for hearing in the High Court.

64. In the course of the hearing of this appeal, the appellant stated expressly that she required the Company to pay her fees, because she did not have the funds to do so. When it was put to her by a member of the Court that this submission served to demonstrate that the services were provided to her personally, and not the Company, she replied that she had been

advised by counsel (in the chancery proceedings, before the involvement of Mr. Wall) that where a person takes action on behalf of a company, that person must be entitled to draw down funds from the company to support those actions, since those actions are required to meet obligations under company law. However, as I have said above, there was no evidence that the appellant obtained the leave of the court to take a derivative action on behalf of the Company. While reference to the proceedings being a derivative action is made both in the plenary summons issued in the chancery proceedings, and in the appellant's affidavit grounding her application for a mareva injunction, that is the beginning and end of any reference to a derivative action, permission of the Court to issue which is required, pursuant to O.15, r. 39(2) of the rules of the Superior Courts, *prior to* the issue of proceedings. In any case, and perhaps most significantly of all, there is no evidence at all that the Firm undertook *any* work on behalf of the Company.

65. The only other ground upon which the appellant seeks to rely in this appeal is that there are errors in the account furnished by the Firm. The difficulty with this ground is that it was not argued in the court below and forms no part of the judgment of the High Court. While, in an affidavit sworn on 9th November 2018, the appellant did claim that there are errors in the figures claimed by the Firm, and in particular that "one error would be clear if Mr. Wall had exhibited his fee note of 15 August 2013", the issue does not appear to have been developed any further in the High Court. It was only raised in any substantive way after the delivery of the judgment of MacGrath J. on 30th April 2020, but before the order of the High Court was perfected on 29th July 2020. The order was perfected on that date following a hearing at which the parties were heard as to the terms of the order and in particular in relation to the application advanced by the appellant for a stay upon the order.

66. As I mentioned above, the day before this hearing the appellant, who had by then parted company with her legal representatives, swore an affidavit running to 35 pages in

which, in addition to rehearsing again the arguments about the liability of the Company to the Firm, she subjected the accounts of solicitors and counsel to a detailed analysis in which she purports to identify inconsistencies and inaccuracies. The appellant had delivered to the Firm an unsworn copy of this affidavit a week previously, so they had had an opportunity to consider it in advance of the hearing before the trial judge on 29th July 2020. On the basis of this affidavit, the appellant effectively asked the court to revisit its judgment and to refer the Firm's account to taxation. She also applied to the court for a stay of execution of the judgment.

67. In reply, the Firm said that they had examined the affidavit and were unable to identify any errors in the account as rendered. In addressing the issue, the trial judge observed that the matters raised by the appellant were matters which were considered and addressed, or if they were not, ought to have been addressed, in the course of the trial. The trial judge said that it would be inappropriate for him to revisit his judgment and further stated that he was satisfied that the Firm was entitled to judgment in the sum claimed. While he refused the application for a stay, he noted the undertaking of the Firm not to take any steps to enforce the judgment, pending the determination of the appeal, other than to register the judgment as a judgment mortgage over a particular property of the appellant. In a comment now relied upon by the appellant, the trial judge stated: "I should say that a number of points have been made to me by [the appellant] and I have no doubt that Mr. Wall will consider the position going forward. That's all I have to say in the matter."

68. In my view the trial judge was absolutely correct to hold as he did that he could not revisit his judgment and the matters raised by the appellant ought to have been canvassed at the hearing in the court below. For much the same reason, this Court cannot now embark upon an enquiry that did not take place before that court and which therefore is not the subject of any decision made by the trial judge.

69. As to the comment of the trial judge that he had no doubt that "Mr. Wall will consider the position going forward" it appears the Firm has done so in volunteering, without conceding any obligation to do so, that a reduction in the amount claimed of €8031.90 would be sufficient to address any of the errors alleged by the appellant, and in agreeing to vary downwards the amount of the judgment to €208,685.94. While the explanation for this concession and adjustment was not provided to this Court, I am satisfied that it should be reflected in the order to be made on this appeal.

70. Finally, even though the issue may not have been canvassed before the trial judge, given the amount involved I think it appropriate to address the claim by the appellant that fees claimed by the Firm increased inexplicably by €110,000 over a period of just seven days between 15th August and 22nd August 2013. This appears to me to be a mistaken perception arising out of the manner in which the documents concerned were presented on these dates. On 15th August, the Firm wrote to the appellant stating that fees *due* to the Firm alone *as of that date* were of the order of €73,185. One week later, Mr. Wall presented an interim fee note which appears to me to relate to all fees that had accrued back to the time he was originally instructed in 2011, up to 22nd August 2013, because the same fee note brings into account the payments on account of fees made in October 2011 and January 2012. While this fee note comes to a total of €183,892.12, the *balance* due as of 22nd August, having taken into account payments received is stated as being €79,873.22. While this is greater than the sum of €73,185 referred to one week earlier, the margin of differential is well short of the €110,000 about which the appellant expressed concern.

Conclusion

71. I have been unable to identify any error in the judgment of the High Court. As the trial judge held, there was no basis at all for the appellant's claim that the Company engaged the services of the Firm, or that it could have any liability for any of the fees and outlay claimed

by the Firm. The period for referring the Firm's bills to taxation had long since expired by the time proceedings issued, and the decision of the trial judge not to exercise his discretion to refer the bills to taxation pursuant to the inherent jurisdiction of the High Court was carefully reasoned, taking all relevant matters into account, and there is no basis upon which this Court should interfere with that exercise of his discretion by the trial judge. Moreover, it is not open to the appellant to raise now issues not raised in the High Court regarding alleged errors or inaccuracies in the Firm's accounts and supporting documentation. All of that being the case, this appeal should be dismissed, and the order of the High Court affirmed, save only that the amount of the judgment should be varied downwards for the reason mentioned above to the sum of €208,685.94. It follows also that the Firm is released from its undertakings given to the High Court on 29th July 2020 whereby they restricted the properties over which they would otherwise have been entitled to register a judgment mortgage, and agreed to take no steps to enforce the judgment against the appellant.

72. Since the Firm has been entirely successful in this appeal, my preliminary view is that the appellant should pay the costs of the Firm, to be adjudicated in default of agreement. If the appellant wishes to contend that a different order as to costs should be made, she may contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by the parties in relation to the appropriate order for costs. In light of the fact that this judgment is being delivered on the last day of the legal term the appellant should make any such request no later than 16th September 2022. The appellant should note that in the event that she is unsuccessful in altering the provisional order for costs which I have indicated, she may be required to pay the costs of the additional hearing.

73. As this judgment has been delivered electronically, Noonan and Collins JJ. have authorised me to indicate their agreement with it.