APPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

Neutral Citation Number: [2024] IECA 282

Court of Appeal Record Number: 2024/54

High Court Record Number: 2022/326 MCA

Pilkington J.
Meenan J.
O'Moore J.

BETWEEN/

WILLIAM MULROONEY

PLAINTIFF/APPELLANT

- AND –

DOLPH MCGRATH AND NICHOLAS SHEE PRACTICING UNDER THE TITLE AND STYLE OF JOHN SHEE AND CO. SOLICITORS

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Charles Meenan delivered on the 22nd day of November 2024

Background

1. The within appeal is yet another chapter in proceedings that have been ongoing for some 20 years. In summary, the appellant's father entered into a lease with a client of the respondents, a Mr. Edward Malone. In or around August 2002 Mr. Malone issued Circuit Court proceedings against the appellant's father and the appellant, seeking damages arising

out of a claim that the lease had been wrongfully repudiated. Mr. Malone was successful and was awarded damages in the Circuit Court. This decision was appealed to the High Court but shortly before the hearing the matter was settled between the parties, with agreed damages being paid. Notwithstanding this settlement, the appellant and his father subsequently issued a number of further proceedings against various parties arising out of the same dispute.

2. The instant proceedings concern an action brought by the appellant against the respondents, seeking to obtain Mr. Malone's original lease. The respondents' position was that these proceedings were an abuse of process amounting to an attempt by the appellant and his father to continue litigation that had already been settled. The respondents brought a motion before the High Court seeking dismissal of the proceedings and an *"Isaac Wunder"* order against the plaintiff.

3. The respondents were successful and an order was made by the High Court (Noonan J.) dated 8 July 2016 dismissing the proceedings and granting the respondents an *Issac Wunder* order. In addition, the High Court made an order granting the respondents their costs of the motion and the proceedings against the appellant, such costs to be taxed in default of agreement.

4. The appellant appealed the order of the High Court to the Court of Appeal. This Court dismissed the appeal on 18 December 2017, with costs in favour of the respondents to be taxed in default of agreement. The appellant then proceeded to apply to the Supreme Court for leave to appeal. No leave was granted and the respondents were awarded costs for objecting to the application.

5. Resulting from this litigation, the respondents had orders for costs in their favour from the High Court, the Court of Appeal and the Supreme Court. No agreement was

reached on the level of costs and so the matter was referred to the Chief Legal Costs Adjudicator (CLCA) pursuant to the provisions of the Legal Services Regulation Act 2015 (the Act of 2015). A report and determination of the legal costs was issued, dated 18 November 2022.

6. The appellant sought an order pursuant to O. 99, r. 38(1) of the Rules of the Superior Courts reviewing the decision of the CLCA.

7. By order of the High Court (O'Regan J.) it was ordered that the High Court approve the decision of 18 November 2022 and that the respondent be awarded their costs against the appellant. This is the appeal against the said order of the High Court.

Report and determination of the CLCA (the *"Report"*)

8. The CLCA issued a detailed report that ran to some 21 pages. In the course of the adjudication the appellant applied to have sight of the respondents' solicitors' files. The appellant wanted to review these files to look at timesheets and chargeable rates. He stated that he was not prepared to engage with the figures claimed in the Bill of Costs without having access to such files.

9. In considering the appellant's application for access to the solicitors' files the report states: -

> *"16. Regarding Mr. Mulrooney's submission that he is, or ought to be entitled to access to the opposing solicitor's file, who also happened to be the defendants, would require to be argued before the High Court. A claim to privilege is robustly asserted by the defendants, and it is easy to see why. Mr. Mulrooney is the plaintiff in the High Court proceedings. The solicitors concerned are defendants. Privilege, and its application or otherwise, is a justiciable matter and is entirely a matter for the court.*

Any Legal Costs Adjudicator would simply have no jurisdiction to decide such a matter, and I so advised Mr. Mulrooney at the time. That he would have to apply to the court for access to the defendants' solicitors' file."

and: -

"25. --- I afforded him [the appellant] an opportunity to apply to the High Court to have access to the defendants' solicitors' files. This was not taken up ---"

10. Para. 45 of the report states that the obligations on him are set out at s. 155 of the Act of 2015. S. 155(1). Schedule 1 sets out the principles that are to be applied to the adjudication of a Bill of Costs and lists, in some detail, various headings and matters which the CLCA should have regard to. Having done so, the CLCA made a reduction to the respondents' instruction fee from €19,000 to €15,000 and some minor reductions in the fees charged by counsel.

11. In the report, the CLCA considered other submissions made by the appellant, namely that he failed to apply or consider appropriate comparators and have regard to the absence of timesheets. Having considered a number of authorities including *Superquinn v Bray UDC* [2001] 1 IR 459 and *Quinn v Eastern Health Board* [2005] IEHC 399, the CLCA concluded: -

"72. It would follow therefore that I do not accept Mr. Mulrooney's contention that the adjudication was flawed by failing to have regard to comparator cases, first, on the grounds that none were offered and second that their utility is very limited.

73. Regarding Mr. Mulrooney's contention that a failure to consider timesheets does not stand up having regard to the first and basic point, that they do not exist and

secondly, as a sole basis to determine solicitor's and counsel's fees, is not in accordance with the Directive jurisprudence applicable to me."

12. It is clear from the report that the appellant's principal submission was that without sight of the solicitor's file, which would have required the lifting of solicitor/client privilege, he could not properly contest the Bill of Costs or engage in the adjudication process. This submission was made notwithstanding the fact that the appellant was informed and was at all times aware that the CLCA had no jurisdiction to lift privilege and that any application for such would have to be made to the Court.

High Court review: -

13. The matter came on before O'Regan J. on 18 January 2024. In an *ex tempore* ruling, the trial judge rejected the application. It would appear from the ruling that the appellant proceeded on the basis of making an application for discovery of the solicitors' file. This was rejected by the trial judge who stated: -

"... So, one way or the other, this mechanism, this notice of motion and these two affidavits that you have filed in this application is not a valid application for discovery and the removal of a leave of professional privilege. So, it's not appropriate to even entertain that, in the manner that you have proceeded with the application. What I'm here to do today is to look at your complaint on figures effectively within the Taxing Master's Report, given that you do accept as you indicated in your submission's opening that the Taxing Master was correct in saying that this is a matter for the High Court. ..."

Notice of Appeal: -

14. Apart from a number of general grounds of appeal, the appellant complained that the trial judge failed to have regard to the decision of this Court in *Loomes v Rippington* [2023] IECA 90.

15. The appellant filed written submissions in support of his appeal. These submissions were made *".. in the context of my motion to admit new evidence at the hearing of my appeal."* This motion was yet another attempt by the appellant to gain access to the solicitors' file. The motion to admit new evidence was heard on 31 May 2024 and rejected by Costello J. (as she then was).

Consideration of appeal: -

16. *Loomes v Rippington* is of no relevance to the appellant's application. The issue in that case was the decision of the trial judge to measure costs on the basis of the evidence that was before him. The Court of Appeal, reversing the decision, held that in the circumstances the measure of costs ought to be referred to adjudication.

17. The principal submission made by the appellant was that he required access to the solicitors' file for the hearings before the CLCA. The appellant understood that this would require the lifting of privilege and that the CLCA had no jurisdiction to do so. The appellant was fully aware that any application in respect of privilege would have to be made to the High Court. The appellant made no such application. Indeed, when questioned by the Court, the appellant gave no information as to what grounds or authority he would be relying on were he to apply to the Court to make such a far-reaching order.

18. By reason of the foregoing, I am satisfied that the appellant has established no grounds to disturb the ruling of the High Court and so I dismiss the appeal.

Costs: -

19. In the course of his submissions counsel for the respondents indicated that, were he to be successful in resisting the appeal and awarded costs, that he would apply to this Court to measure such costs. Though the Court has jurisdiction to do so, and the application is understandable given the long history of this litigation, I am of the opinion that the Court should not measure costs and, in default of agreement, costs would be referred to adjudication. In my view, the measuring of costs may involve both parties adducing evidence from Legal Costs Accountants which evidence may be the subject of cross-examination. Such a process is best carried out by a Legal Costs Adjudicator who has experience in such matters.

Conclusion: -

20. By reason of the foregoing, the appeal will be dismissed.

21. As for costs, the provisional view of the Court is that as the respondents were "wholly successful" in opposing the appeal they ought to be awarded their costs. Should the appellant wish to dispute this, he may do so by filing written submissions (not more than 1,000 words) within 14 days of the date hereof and the respondents may reply by written submissions (also not more than 1,000 words) within 14 days thereafter.

22. As this judgment is being delivered electronically, O'Moore and Pilkington JJ. have authorised me to record their agreement with it.