THE COURT OF APPEAL

Appeal No. 2014/1314

Whelan J.
Baker J.
Costello J.

BETWEEN/

DOUGLAS KELLY

PLAINTIFF/RESPONDENT

- AND -

PETER McNICHOLAS & NANCY McNICHOLAS

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 13th day of November 2019

1. This appeal seeks to set aside the decision of the former President of the High Court, Kearns P., of the 17th July, 2014 granting summary judgment to the respondent in the sum of €150,000 together with costs and remitting the balance of the claim to plenary hearing.

Background

2. On the 20th March, 2012 the respondent, a solicitor based at Swinford, County Mayo, instituted proceedings by way of summary summons against the appellants seeking to recover the sum of €245,916.94 in respect of fees and outlay alleged to be outstanding. The claim was disputed by the appellants and a motion seeking summary judgment came on for hearing before the President on the 17th July, 2014. The claim primarily pertained to fees due for professional services rendered to the appellants in respect of proceedings instituted in 2007 entitled *Peter McNicholas and Nancy McNicholas v. Mayo County Council & SIAC Wills JV Limited* (High Court Record No. 2007/6160P) (the 2007 proceedings).

History of 2007 proceedings

3. In 2004 six parcels of the appellants' lands at Cuilmore, Swinford, County Mayo had been acquired by way of compulsory purchase order by Mayo County Council in furtherance of construction of the Charlestown Bypass on the N5 roadway, the national primary route between Longford and Westport. Mayo County Council made a compulsory purchase order and same was confirmed by An Bord Pleanála pursuant to s.51 of the Roads Act, 1993 on or about the 10th November, 2004. The bypass cut across the access road to the appellants' residence and property. At issue in the 2007 proceedings was whether an appropriate alternative means of access to the appellants' said residential property had been provided. The access provided comprised an overbridge onto the property from the local road L-13032-0 rather than an underbridge as the appellants had sought. They contended, *inter alia*, that same did not constitute suitable alternative access to their lands as required by the provisions of the Roads Act, 1993. The action was heard over

five days in the High Court and judgment was delivered on the 31st July, 2009 by McGovern J. ([2009] I.E.H.C. 379).

4. The said judgment noted that the appellants had never challenged the bypass scheme and CPO which had been approved by An Bord Pleanála. McGovern J. determined the CPO scheme to be valid. The judgment noted that appellants had sought direct access from their property onto the bypass, but this was never an option. He found that the newly constructed access road, although built in accordance with a valid permission granted by An Bord Pleanála, appeared to be substandard and had been constructed on lands insufficient for the purpose. Nevertheless, he concluded that a suitable access way to the property of the appellants could have been constructed had they behaved in a more reasonable manner and that they had to bear responsibility for their own conduct. He refused to make any declaratory orders or grant injunctive reliefs as had been sought by the appellants.

5. The retainer of the respondent solicitors' firm was confined to the High Court proceedings only.

6. The decision was appealed to the Supreme Court and the judgment of that court was delivered by Dunne J. on the 1st June, 2017 as set out hereafter. She dismissed the appeal and allowed the cross-appeal brought by Mayo County Council.

Summary proceedings before the High Court

7. On the 7th June, 2013 the respondent issued a motion for judgment in the summary proceedings seeking liberty to enter final judgment in the sum of €245, 016.94 together with interest thereon from 10th November, 2010. There were eight affidavits before the High Court, two sworn by Douglas Kelly, the respondent, the 28th May, 2013 and the 4th November, 2013 and an affidavit of his father Charles Kelly sworn 4th November, 2013. Five affidavits were filed on behalf of the appellants. Peter McNicholas swore three affidavits on the 8th October, 2013, 28th January, 2014 and the 28th February, 2014 respectively. His daughter Marilyn McNicholas, herself a solicitor previously employed by the firm Douglas Kelly & Son, swore two affidavits on the 8th October, 2013 and the 28th January, 2014 supporting her parents' position and opposing the claim for fees.

Position of appellants before the High Court 17th July 2014

8. It is clear from the transcript of the hearing of the motion for summary judgment that the eight affidavits were opened in full before the President of the High Court. Prior to the hearing, the appellants had discharged their solicitors and Mr. McNicholas was a litigant in person. He was assisted in presenting his defence by Mr. Alan Lynskey, husband of his daughter Marilyn McNicholas. Mr Lynskey acted as McKenzie Friend for Mr. McNicholas also at the hearing of this appeal. Mrs. McNicholas was indisposed on the date of the hearing.

9. It was contended on behalf of the appellants that the indorsement of claim in the summary summons failed to expressly state that a signed bill of costs had been served upon them. Whilst the signed bill of costs was exhibited by the respondent in his first affidavit, it was contended that in addition Order 19, rule 3 of the Rules of the Superior

Courts (RSC) required the pleadings to contain a statement of the material facts and the failure of the summary summons to expressly state that a signed bill of costs had been served was fatal to the claim.

10. Emphasis was placed by the appellants on the fact that in connection with the 2007 proceedings against Mayo County Council an appeal was then pending to the Supreme Court. At page 78 of the High Court transcript Mr. Lynskey states (Referring to the anticipated conclusion of the Supreme Court proceedings): -

> "At that stage, like, if we are successful, any fees that Douglas Kelly & Son are entitled to, that Mayo County Council will be in a position… and that if we are not successful at that stage, that I suppose it's proven that what we are saying isn't correct."

11. On behalf of the appellants, Marilyn McNicholas in her first affidavit had deposed that in June 2006 she joined the firm Douglas Kelly & Son Solicitors of Swinford. She recalled the history of how, at the behest of the respondent's father Charles Kelly, solicitor, at a time when she was employed in the firm she took on carriage of the litigation file for the purposes of instituting what would become the 2007 proceedings seeking to compel Mayo County Council to provide suitable alternative access to her parents' property aforesaid.

12. The first appellant Peter McNicholas deposed in his first affidavit: -

> "I say that the fees claimed by the Plaintiff are not owing because the case to which the alleged fees relate was accepted by the Plaintiff's practice on the basis that I would pay any out of pocket expenses incurred by the practice and in the event of a successful outcome Douglas Kelly & Son Solicitors would collect their fees from Mayo County Council."

13. A separate issue advanced before the President of the High Court and reiterated before this court on appeal concerned the identity of the respondent and whether he had *locus standi* to bring proceedings or sue in respect of fees claimed to be due and owing to the legal firm Douglas Kelly & Son. It was contended that in the year 2006 and thereafter, Charles Kelly was the principal of the practice. The name of the firm was referable not to the respondent but to his paternal grandfather.

14. It was argued that since the firm Douglas Kelly & Son rendered the services, the respondent Douglas Kelly was not entitled to recover any sums as might be found due. It was conceded on behalf of the appellants that Douglas Kelly had become a principal in the firm Douglas Kelly & Son Solicitors some three months or so prior to the hearing of the motion for summary judgment under appeal on the 17th July, 2014. The first appellant stated that: -

> "…Douglas Kelly only became principal in February 2009 when Charles Kelly was restricted from practicing. This was 3 years after the agreement on fees had been

reached. Charles Kelly remained on as a consultant in the practice until it ceased trading in February 2001 according to Law Society records…".

15. The appellants made a complaint to the Incorporated Law Society of Ireland pursuant to s. 9 of the Solicitors (Amendment) Act, 1994 that the fees sought were excessive on the basis of a claimed fee agreement and failure to serve a Section 68 letter. It appears that the Law Society determined that the bill of costs ought to be abated by approximately ten percent for failure on the part of the respondent to furnish a letter concerning fees to the appellants as required pursuant to s. 68(a) of the Solicitors (Amendment) Act, 1994 prior to or at the time of retainer.

16. On the 17th July, 2014 the President of the High Court was informed that there were no proceedings in being alleging negligence or breach of retainer against the appellants' legal advisers, including the respondent. The appellants contended that fees due to junior and senior counsel in connection with the conduct of the High Court litigation pertaining to the planning, including applications for interlocutory injunctions as well as the substantive hearing, were not covered by the fee agreement which they alleged existed with the respondent. The first appellant deposed that, having reviewed all the papers in the planning litigation, and correspondence with counsel and having considered the judgment of Mr. Justice McGovern: -

> "I say and believe that there may be a question mark in relation to the professional conduct in respect of the case."

Position of respondent before the High Court

17. Senior counsel for the respondent outlined the history of dealings between the parties. There was undisputed evidence that on the 10th November, 2010 the respondent had served a bill of costs and requisition to tax on the appellants. The said bill of costs was for €258,496.82. The exhibits showed that on the 29th November, 2010 the respondent wrote to the appellants requesting return of the requisition to tax prior to the 6th December, 2010. The requisition to tax was never returned to the respondent by the appellants. The exhibited correspondence indicated that in default of same, proceedings would be instituted in the High Court to recover the fees outstanding.

18. The respondent strenuously contested the claims that a fee agreement of the nature contended for had ever existed. He deposed to a telephone conversation regarding the outstanding fees with Ms. Marilyn McNicholas. At this time, she had commenced practice as a solicitor in Castlebar, Co. Mayo circa August 2009. The respondent deposed to email communications between him and Ms. Marilyn McNicholas on the 25th and 26th November, 2009 wherein he had sought a proposal as to the discharge of fees due by the appellants, where she had stated: -

> "…It was common case that in the event that the case was unsuccessful that it would be possible to discharge costs from the CPO compensation award."

It appears that this was a reference to an application made for compensation arising from the compulsory purchase order made in 2004. The court was informed at the hearing of this appeal in July 2019 that the issue of the fixing of the compensation due to the appellants in respect of the 2004 CPO has not yet concluded. It appears that Marilyn McNicholas & Company Solicitors continues to be retained to deal with the 2004 CPO compensation claim on behalf of her parents.

19. The respondent exhibited an email of the 26th November, 2009 from Ms. Marilyn McNicholas which stated: -

> "It has always been the case that compensation arising from the CPO arbitration would be used towards settlement of costs, if necessary and neither you nor counsel stipulated any requirement for prior cash contribution before now. When you raised this issue today, I explained that my parents are not currently in a position to make such a payment and you said it would be necessary to discharge the outlay incurred to date to which I agreed. You did not stipulate that I needed to provide you with an immediate proposal in relation to fees."

20. At the time of the exchange of emails between the respondent and Ms. Marilyn McNicholas the appellants had been unsuccessful in their High Court 2007 proceedings seeking injunctions and related orders. The issue of an appeal from the judgment and orders of Mr. Justice McGovern was under consideration. On the 27th November, 2009 Ms. Marilyn McNicholas sent an email to the respondent stating: -

> "… As the solicitor who commenced this litigation for my parents, I can confirm that it was the position and the understanding that any costs that arose would be discharged from CPO compensation."

The correspondence continued: -

> "I will give you a solicitor's undertaking to discharge the reasonable costs (of your office and Counsel) subject to agreement and in default of agreement, subject to taxation and I shall take over the file and carry out a Supreme Court appeal myself."

21. One of the exhibits relied upon by the respondent was an email from the Ms. Marilyn McNicholas dated 26th February, 2010 stating: -

> "Douglas [referring to the respondent] and I met and discussed the professional fee and it was agreed that I would come back to him once Dad has been able to speak to his bank manager to make an arrangement regarding the proposed fee…"

The contention on behalf of the appellants was that the purported agreement regarding fees was concluded with Charles Kelly, the respondent's father. In his affidavit Charles Kelly denies any such agreement.

22. Clearly the appellants were unhappy with the outcome of the 2007 proceedings and profoundly disagreed with the judgment delivered by Mr. Justice McGovern wherein he refused the declarations sought and injunctions claimed and made orders in respect of costs in favour of the successful respondents Mayo County Council and SIAC. It is clear from the documentation exhibited in the various affidavits that the appellants were keen to pursue an appeal to the Supreme Court from the decision of McGovern J. They were primarily being advised by highly experienced senior and junior counsel chosen by their daughter Ms. Marilyn McNicholas, as outlined above, had established her own firm in Castlebar and was actively advising her parents. The counsel in question advised the appellants of the risks involved and counselled against the prudence of pursuing an appeal to the Supreme Court. This however was not the advice which the appellants wanted to hear.

23. By email to the respondent dated the 26th November, 2006 Ms McNichols stated: -

> "… On the basis that I am of the opinion that there are valid grounds for appeal and I feel Counsel's opinion overlooked certain arguments in this regard, I submitted a draft proposal via email to Counsel and included your office on said email on Saturday last. … To date Counsel's advice is that there are no grounds for appeal and no response has been made to the grounds I proposed in draft notice of appeal emailed last Saturday."

The email observed that junior counsel had submitted a bill for more than €52,000.

24. On the same date the respondent replied stating, *inter alia*, -

> "I know that [senior counsel] was of the view that an appeal would not succeed. I understand that [senior counsel] also sent you a letter at that time in which he stated:-
>
> > 'Counsel has not been paid to date in a complex and time-consuming case. At this stage I would like to understand the proposals for payment.'
>
> There is certainly no indication in that letter that [senior counsel] was of the view that he had to await the outcome of the CPO hearing for payment. I have spoken to Charles, and there was never any discussion with you in relation to this Firm awaiting payment from the CPO proceedings. In that regard, in the first instance, we are no longer dealing with the CPO matter and, secondly, I understand that the CPO hearing has now been postponed indefinitely."

Decision of High Court

25. The President in his *ex tempore* decision of 17th July, 2014 noted a bill of costs was duly prepared with a requisition to tax and served on the appellants in November 2010. It was never challenged. Regarding the contention of the appellants that there was never an obligation to pay any fees other than outlay and that the only circumstances in which fees would be recoverable by the solicitors would be if the claim against Mayo County Council were to be successful the President observed: -

"That is an extraordinary claim which isn't backed up by a shred of documentary evidence anywhere in the papers that have been opened to me. It is an assertion made by the First Named Defendant and it would be very untypical of any firm of solicitors that they would undertake a case of this nature, which involved a great deal of technical evidence and in respect of which the services of senior counsel had to be retained, along with junior counsel and when I am told there was a five-day hearing in the High Court..."

The President noted: -

"The First Named Defendant, having lost the case, is now extremely unhappy and the issue of an appeal therefore arose."

He proceeded to observe at pages 82-83: -

"But really what to a large degree undermines the credibility of the assertions offered on behalf of the Defence are the multiple different versions of what is contended for because certainly Mr. McNicholas' daughter-in-law (*sic*) on more than one occasion referred to an undertaking to pay the Plaintiff's costs out of the CPO compensation. That's a completely different case than that deposed to by the First Named Defendant. Also, there was some toing and froing where other sums were being bandied about what might possibly satisfy the liability and defences have been suggested which, in truth, aren't defences in full to this claim for costs for work done. There is no doubt that work was done. I appreciate Mr. McNicholas says it wasn't done to his satisfaction and he seems primarily to blame the barristers…but I am told without contradiction that no proceedings have been initiated against [senior counsel] or [junior counsel] so that it a bald assertion, which, without some backup, simply cannot be accepted as any form of defence to the claim."

26. Having considered the entirety of the affidavits, all eight of which were open to him, the President of the High Court considered that five different versions of the position regarding entitlement to recover fees had been advanced as follows:

(i) Version one was an alleged agreement that fees would only be recoverable if the proceedings against Mayo County Council were successful, subject only to payment of outlays by the appellants.

(ii) Version two was that maintained by the respondent, that no such agreement was ever made.

(iii) Version three was that costs would be payable out of the proceeds of the CPO.

(iv) Version four was that irrespective of what sums were claimed, an offer to accept a sum of €75,000 plus VAT in respect of professional fees within a specific time frame had been accepted by the respondent.

(v) The fifth version was that an offer had been made by the appellants to dispose of the entire claim for the sum of €25,000.

These five scenarios are outlined at pages 65 and 66 of the transcripts of the hearing.

27. On the evidence the President granted judgment in favour of the respondent in the sum of €150,000 together with costs and remitted the balance of the claim to plenary hearing.

Notice of Appeal

28. The grounds of appeal include that the President: -

(i) Failed to apply the principles appropriate to an application for summary judgment;

(ii) Erred in granting summary judgment in the sum of €150,000;

(iii) Erred in refusing to remit the entire claim to plenary hearing;

(iv) Erred in dismissing the appellants' claim as "extraordinary and failing to consider whether, if established at the trial of the action, such a claim would amount to bona *fide* defence";

(v) Erred in accepting that the respondent was the appropriate party to bring the claim;

(vi) Erred in failing to consider and determine whether the appellants had a credible defence to the claim;

(vii) Failed to consider whether any counter claim in negligence could amount to an equitable set off;

(viii) Erred in construing the affidavit evidence;

(ix) Erred in granting costs.

Subsequent events

29. The Supreme Court subsequently placed a stay on the order for summary judgment of the President pending conclusion of this appeal on condition that the appellants lodge a sum of €50,000 into an escrow account and furnish a registered lien over thirty acres of forestry land in Co. Mayo within a period of four weeks. That condition was complied with. It is clear from the submissions – both written and oral – that the first appellant in particular continues to be personally aggrieved about aspects of the conduct of the High Court 2007 proceedings instituted against Mayo County Council culminating in the judgment of McGovern J. in July 2009 in the High Court.

30. An appeal against the decision of McGovern J. ultimately came on for hearing before the Supreme Court. A key grievance of the first appellant was that, in his view, during the hearing of the 2007 proceedings evidence given by Mayo County Council to the effect that there was an accommodation road to his property on plot 112 in the bypass development

was never challenged under cross-examination. The hearing proceeded over five days before Mr. Justice McGovern on the basis that such an accommodation road was part of the proposed development when it in fact was not. The Supreme Court dismissed the appeal and allowed a cross-appeal which had been brought by Mayo County Council.

31. The Supreme Court judgment in the 2007 proceedings was delivered by Ms. Justice Dunne ([2017] I.E.S.C. 37). At page 35 she concluded: -

> "The conduct of this appeal on behalf of Mr. McNicholas was unsatisfactory to say the least. A number of issues were raised which had not been raised before the learned High Court judge. The question of whether or not the accommodation road was comprised in the decision of An Bord Pleanála as modified was an issue before the High Court despite not having been pleaded as such, but it was never an issue before the High Court that the accommodation road could not be constructed in accordance with the decision of An Bord Pleanála by reference to the mitigation measures referred to in the decision. In practical terms that was no more or less than a direct challenge to the decision of An Bord Pleanála. It was entirely inappropriate to attempt in this appeal to challenge the decision of An Bord Pleanála not least because such a challenge can only be brought in accordance with the statutory provisions contained in the Planning and Development Act 2000 and in proceedings in which An Bord Pleanála is a party."

32. Separately, it appears that after the granting of summary judgment by the President of the High Court in July 2014 the appellants instituted proceedings against the firm Douglas Kelly & Son Solicitors and also against the senior and junior counsel alleging professional negligence in their conduct of the litigation pertaining to the CPO and in respect of the 2007 proceedings. That litigation has not progressed.

Appellants' arguments at hearing of this appeal

(i) Identity of respondent

33. At the hearing of this appeal a key issue raised was whether the respondent was the correct plaintiff and whether it could ever be said that any sum was due and owing to the respondent personally. It is argued that the litigation ought to have been brought by the respondent trading as Douglas Kelly & Son. It was contended that it was the respondent's father Charles Kelly who had represented the appellants at the oral hearing in relation to the N5 Charlestown Bypass compulsory purchase order in 2004. He had also instituted the 2007 proceedings and prepared same when it went to hearing in May 2009. Hence, it was argued that any alleged contract for the legal services referred to in the bill of costs had been concluded not with the respondent but between Charles Kelly trading as Douglas Kelly & Son and the appellants. Douglas Kelly trading as Douglas Kelly & Son had not been a party to the contract it was argued: "Accordingly, the Plaintiff Douglas Kelly is not a party to the alleged contract". A separate argument raised was that the respondent Douglas Kelly could not sue in his own personal name even when the contract between Charles Kelly and the appellants was assigned to him after Charles Kelly was restricted from practice and the respondent commenced practicing as Douglas Kelly & Son in February 2009 and took over the file.

34. It was contended that the respondent failed to aver in his affidavits that he commenced trading as Douglas Kelly & Son Solicitors instead of his father Charles Kelly in the month of February 2009 and that the appellants' files had been assigned to him at that date. It is contended that failure to expressly make these averments was fatal to his entitlement to summary judgment.

(ii) Error on face of notice of motion

35. A second point raised in argument is that in the notice of motion seeking liberty to enter final judgment the sum of €245,016.94 is claimed together with interest from the 10th November, 2010. This was a new point which had not been raised in the High Court, was not advanced before the President and was not the subject of any argument before the High Court. Neither is it identified in the grounds of appeal. By contrast with the notice of motion the grounding affidavit subsequently sworn on the 28th May, 2013 accurately deposed that the sum due was €245,916.94. It was argued that since the respective sums identified in the grounding affidavit and the notice of motion were different this amounted to an error which disentitled the respondent to judgment.

36. Reliance was placed on the decision of this court in *Ulster Bank Ireland Limited v. Grimes* [2015] I.E.C.A. 346 wherein Irvine J. stated: -

> "The customer is entitled to a straightforward, clear and unambiguous statement on affidavit demonstrating how the sum claimed in the notice of motion is lawfully due and owing. Regrettably, the bank must accept the consequences of the errors and confusion created by its own pleading."

(iii) Negligence giving right to defend and set off

37. It was contended that the President had erred in finding that negligence was not a defence to the claim for a liquidated sum in the summary summons. It was argued that since in a replying affidavit filed on the 30th January, 2014 the first appellant had asserted that Douglas Kelly & Son were negligent in the prosecution of the 2007 proceedings against Mayo County Council and further, that since none of the claims of negligence alleged against him in that affidavit had been denied by Douglas Kelly, that the claims should be deemed to have been admitted by him; "At this stage of the proceedings, it is not open to Mr. Kelly to deny those claims of negligence against Douglas Kelly and Son in this appeal". The appellants submitted as follows: -

> "Although the claim made by Mayo and Douglas Kelly & Son on behalf of the McNicholas' in 2007 that there was an accommodation road in the Proposed Road Development underpinned the findings in both the High Court Judgment and the Supreme Court Judgment that the accommodation road built by Mayo was approved by An Bord Pleanála, this claim or fact was untrue and there was no accommodation road in the Proposed Road Development."

38. In an affidavit sworn on the 28th February, 2014 the first named appellant contended at paragraph 13 of his affidavit that: -

"…in order to provide accurate instructions to counsel and to the expert witnesses retained a reasonably competent Solicitor would have obtained written confirmation from Mayo County Council establishing the status of the New Road before proceeding with a 5-day High Court hearing. I say and believe that had Douglas Kelly & Son Solicitors established the legal status of the New Road, they would have been able to argue without doubt that the New Road was unsuitable because;

i. If the New Road was a non-public road, it did not serve our home by virtue of the fact that there was no right of way registered over the New Road in favour of our home.

ii. If the New Road was a public road, it was not built in accordance with the NRA standards for public roads (TD9) as per evidence of ARUP engineering."

Arguments advanced on behalf of the respondent

39. The respondent pointed out that an application had been brought by the appellants seeking to adduce further evidence. The matter had been heard by Irvine J. who delivered judgment on the 12th October, 2018 refusing the application. The respondent acknowledges that the original bill of costs drawn and served on the appellants on the 10th November, 2010 was in the amount of €258,496.82. Their requisition to tax was never signed or returned by the appellants. Subsequently, the appellants made a complaint to the Law Society pursuant to s. 9 of the Solicitors (Amendment) Act, 1994. In October 2011 the Law Society informed the respondent that it had made a finding of inadequate professional services, particularly because of failure to issue a Section 68 letter to the appellants, and the Law Society had further directed that the professional fee of the respondent should be capped at ninety percent of the fee originally specified in the bill of costs. Arising from that determination of the Law Society the respondent had served a letter of demand for the lower sum of €245,916.94 together with interest.

40. The key substantive issues raised by the appellants during the appeal were responded to as follows: -

(i) The identity of the respondent – this was characterised as a technical objection. Reliance was placed on the affidavit of Charles Kelly sworn on the 4th November, 2013 wherein he had deposed: -

> "My son Douglas Kelly, the Plaintiff herein became Principal of the practice of Douglas Kelly & Son in February 2009 and I became a consultant solicitor. I retired from the practice of Douglas Kelly & Son in December 2009."

It was submitted that the respondent was "… entitled to sue in his own name as he is no longer trading as the firm of solicitors Douglas Kelly & Sons as the firm ceased to practise in January 2011".

(ii) Variation in the sum being sought as between affidavit and notice of motion – it was contended that this point had not been raised before the High Court or

in any of the five affidavits filed on behalf of the appellants before the High Court, nor did the McKenzie Friend or the first named appellant advance such submissions, either before the Master of the High Court or the President of the High Court. It was submitted that the figure in the notice of motion represented a clerical error where the number zero had erroneously replaced the number 9. It was contended that the objection was rendered moot since the President of the High Court had granted a judgment for a lesser sum of €150,000 with the balance of the claim remitted to plenary hearing.

(iii) Regarding the contention that a claim in negligence could amount to a defence to the bill of costs – it was argued that the appellants are at liberty to advance a negligence suit in separate proceedings should they wish to do so: -

> "It is not in dispute… that the work carried out from 2001 to 2009 was done. The Defendants/Appellants are unhappy that they were unsuccessful in the High Court proceedings and do not now wish to honour the debt set out in the Bill of Costs. This does not amount to a Defence to a claim for payment of the sums set out [in the] Bill of Costs."

It is contended that the first occasion in which any allegation of negligence in connection with the conduct of the proceedings was raised was made on the 8th October, 2013 in a "vague and general manner at paragraph 16 of the Affidavit of the First Named Appellant/Defendant". No allegation of negligence was advanced in the context of the complaint made by the appellants to the Law Society. It was contended that the allegation of negligence now being advanced was merely an attempt to avoid having to discharge the bill of costs.

(iv) Regarding the alleged fees agreement – it was contended that the positions being adopted by the appellants, particularly the first appellant and by Ms. Marilyn McNicholas, were inconsistent, that there was no evidence of any pre-existing fee agreement and the President was correct in his conclusion that the various assertions were ultimately not credible. The findings of the trial judge ought not to be disturbed.

Discussion

(i) *Locus standi* and the position of the respondent

41. It is not in dispute that Douglas Kelly & Son Solicitors was a firm of long standing based at Swinford, County Mayo. Marilyn McNicholas was employed as a solicitor at the said firm between the month of June 2006 and August 2009. The bill of costs submitted was in respect of work done by that firm for the benefit of the appellants. Over time circumstances changed within the firm. The respondent became principal of the firm in February 2009. His father Charles Kelly by then became a consultant solicitor retiring from practice in December 2009. The respondent continued trading as Douglas Kelly & Son until the month of January 2011. I am satisfied as a matter of law that the

respondent is entitled to pursue the claim in respect of the fees. The mere fact that he has changed the name of the firm is not material as it continued in existence and could sue through its current partner or principal. The appellants have not demonstrated that the respondent is not entitled to bring proceedings for recovery of fees due and owing in respect of services which they do not deny were rendered. The affidavit of Charles Kelly unequivocally acknowledges the beneficial rights of the respondent. The appellants have failed to contradict those averments.

(ii) Error in notice of motion

42. It is not material that through a typographical error the notice of motion understates the fees claimed by €900. It is very clear from the grounding affidavit that the sum sought is €245,916.94. No point was taken regarding the typographical error when the matter was heard before the High Court. The error caused no prejudice to the appellants. The error is not a basis on which the appellants can succeed in this appeal. The grounding affidavit deposes to the correct sum claimed and where inconsistency arises between the affidavit and the notice of motion the court is entitled to have regard to the credible and obvious explanation for how the disparity arose. Where the point was never raised in the High Court and no prejudice is shown to arise this point is misconceived and unsustainable and does not avail the appellants.

(iii) No express reference to the bill of costs in the summary summons

43. The appellants argued that, it not being expressly stated on the face of the summary summons that the bill of costs had been duly signed by the respondent, the proceedings should be struck out and were bad for non-compliance with the rules. The regulatory framework for the recovery of fees by a solicitor is governed by statute. The procedures are set out in the written legal submissions furnished on behalf of the respondent to this appeal and include the Solicitors (Ireland) Act, 1849 and the Solicitors (Amendment) Act, 1994. After the institution of the proceedings the law was modified by the introduction of the Legal Services Regulation Act, 2015 which is not relevant to this appeal.

44. Clearly the respondent's firm was remiss in failing to serve a Section 68 letter in accordance with s. 68(a) of the Solicitors (Amendment) Act, 1994 on being retained in respect of the 2007 planning litigation. However, this omission was addressed by the Law Society which abated the fees being charged by approximately 10 %. Peart J. in *A&L Goodbody Solicitors v. Colthurst* [2003] I.E.H.C. 74 at p. 95 noted: -

> "… I do not believe that Section 68 was intended to deprive the solicitor, who has failed to send a Section 68 letter, of his right to recover his costs when taxed, in spite of the fact that the section is worded in mandatory terms. I agree with Counsel for the plaintiff that if such were to be the consequence of failure to send the letter, it would have said so in clear terms given the seriousness of the consequence of failure to do so."

That view was endorsed by the Supreme Court (Laffoy J.) in *Lett v. Wexford Borough Council & others* [2016] 1 I.R. 418.

45. The appellants' entitlement to have the costs taxed – a process of which they were aware and could have availed of from November 2010 – provided an efficient forum where all propositions suggesting they had either no, contingent, varied or reduced liability for the fees sought in the bill of costs could have been disclosed and comprehensively ventilated. The Taxing Master is fully empowered to take all material factors into account in the discharge of his or her functions, including the power to attach such weight and significance to the absence of a Section 68 letter considering the facts and evidence presented in any given case and can adjust a bill of costs accordingly. Additionally, there is the entitlement of a party dissatisfied with the determination of the Taxing Master to seek a review of the taxation by the High Court. The appellants elected instead to ignore the requisition to tax served on them in November 2010.

46. The first appellant in his first affidavit at para. 5 deposed: -

> "While it is accepted that the Plaintiff did serve a bill of costs and requisition to tax as averred to at paragraphs 4 and 7, the sum and right to demand payment of same is denied."

Thus, he had full knowledge of the bill of costs and requisition to tax since 10th November, 2010. He chose to ignore it and never sought to tax the costs as was his entitlement. In the circumstances it would give rise to an injustice were the Rules of the Superior Courts construed in an unduly pedantic fashion.

(iv) The principles governing summary judgment

47. The test for summary judgment is that as stated by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 at p. 623: -

> "In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J., having reviewed the relevant case law on the topic, summarised the principles as follows at para. 9:-

> "(i) the power to grant summary judgment should be exercised with discernible caution;
>
> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
>
> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

48. That decision reflects the earlier jurisprudence including *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 wherein Murphy J. endorsed the principle established in *Banque de Paris v. Naray* [1984] 1 Lloyd's Law Rep. 21 that: -

"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence."

49. I am satisfied that the learned President was correct in his assessment that a fair and reasonable probability that the appellants had a real or *bona fide* defence was not made out. As the learned President noted, fatal to their contentions was the fact that a spectrum of arguments was advanced as to why the fees were not being paid. These included that there was the alleged agreement concluded between Mr. Charles Kelly and the first named appellant whereby there would be an entire waiver of fees and effectively a "no foal no fee" arrangement was put in place save for outlay, wherein the respondent's firm would only be able to recover fees if the appellants' claim against Mayo County Council was successful. Another – inconsistent – claim advanced by Ms. Marilyn McNicholas was that suggested in emails exhibited, that the fees would be discharged out of the proceeds of the award forthcoming in respect of the 2004 CPO of the appellants' lands. It is noteworthy that notwithstanding the significant passage of over a decade the appellants have taken few steps to pursue their entitlement to the CPO monies. This appears a curious omission in circumstances where, at one point in correspondence, their daughter was informing the respondent that the appellants were not in a financial position to pay fees.

(v) Negligence allegation

50. It is noteworthy that at the hearing of the action before the President of the High Court on the 17th July, 2014 the court was informed that no proceedings for professional negligence had been instituted, either against the barristers or any solicitor. There was no credible evidence before the High Court of a defence of the kind which has been contended for by the first named appellant himself.

51. Neither was any relevant allegation advanced to the Law Society beyond a complaint of failure to serve the appropriate letter in accordance with s. 68 of the Solicitors (Amendment) Act, 1994. The ever-shifting sands of the appellants' grievances against the respondent points primarily to a general disaffection with the outcome of the 2007 litigation. Notwithstanding the high expectations evinced by the McKenzie Friend before the President of the High Court as to the prospects of reversing the outcome of the 2007 plenary proceedings in the then pending Supreme Court appeal, as counsel had presciently advised in the summer of 2009, appealing the decision was inadvisable. The grievances of the appellants, particularly the first named appellant, are primarily directed towards the outcome that transpired. That outcome was upheld on appeal.

52. It is noteworthy that senior and junior counsel retained by the firm in the 2007 proceedings were experienced and competent. They were chosen not by the respondent but by the appellants' daughter, a qualified solicitor, who was at the time working within the firm primarily responsible for the carriage and conduct of the litigation.

53. In his third affidavit the first appellant deposed that: -

> "… I believe that the legal services being billed for were flawed and were not professionally rendered that the Plaintiff did not notify his insurers of my claim. I say and believe that Douglas Kelly and Sons Solicitors have no valid professional indemnity run-off insurance in place presently…"

This averment appears to be directed towards the existence of a valid policy of insurance in connection with a professional negligence suit not commenced at the date of the High Court hearing in July 2014 rather than supporting a contention that he had no liability to discharge fees claimed. Negligence proceedings were only instituted after the summary judgment.

54. It is unclear why such an extraordinary lack of promptitude occurred in instituting a negligence suit had any cogent basis been identified in respect of same. One is left with the impression that the belated institution of such proceedings now is primarily to serve as a *cheval de frise* against summary judgment. Order 37. r.7 of the RSC confers wide discretion on the court and encompasses the possibility that a defendant in summary proceedings may in certain circumstances be permitted to pursue a counterclaim or cross-claim for an unliquidated sum if sufficiently connected to the plaintiff's claim that it would be inequitable to allow the claim to be disposed of without having regard to the cross-claim. I am not satisfied that the appellants met that threshold. The analysis in *Delany & McGrath on Civil Procedure* (4th ed., Round Hall, 2018), at para. 27-95 *et seq*. supports this. Furthermore, it is noteworthy that summary judgment granted was for the sum of €150,000 only and the balance of the claim has been remitted to plenary hearing. This represented a just and reasonable approach on the part of the President, having due regard to the inconsistent stances of the appellants. It was manifest to the President that the inconsistent claims of the appellants regarding the existence of a liability to pay costs, the amount of such liability as well as the manner and time of payment substantially undermined the credibility of the assertions of the first appellant.

Conclusions

55. I am satisfied that the respondent did have *locus standi* and was entitled to maintain proceedings seeking recovery of the fees due and owing.

56. Regarding the error on the notice of motion, this issue was first raised on appeal and it is clear from a perusal of all of the affidavits and exhibits that it represents a typographical error in the notice of motion where the figure "€245,916.94" was mistyped as "€245,016.94". It does not amount to inconsistent claims or errors of the kind under consideration by Irvine J. in *Ulster Bank v. Grimes* referred to above.

57. I am satisfied that the appellants have failed to meet the test well established in this jurisdiction and articulated clearly in cases such as *First National Commercial Bank v. Anglin, Aer Rianta cpt. v. Ryanair Ltd* and *Harrisrange Ltd. v. Duncan* which require parties in the position of the appellants to demonstrate to the satisfaction of the courts that there is a fair and reasonable probability that they have a real or *bona fide* defence and further that the said defence is credible. The credibility of the appellants was fatally eroded, as the President of the High Court noted, by the advancing of a wide array of different and inconsistent scenarios and alleged agreements, all directed towards a proposition that they had either no obligation at all or some deferred arrangement for payment of the fees, costs and expenses demonstrably incurred by the respondent in respect of the conduct of the clearly complex and difficult planning litigation which continued over a number of years. The bare assertion on the part of the first named

appellant of a “no foal no fee” type arrangement was not credible and was fundamentally contradicted by the emails sent by the appellants’ daughter and exhibited in the affidavits of the respondent.

58. Part of this claim was remitted to plenary hearing and it is open to the appellants to deliver such defence as they see fit in the context of the plenary hearing.

59. I am satisfied that having due regard to all the surrounding factors that the President was entitled to reach his conclusion which was just and ought not to be interfered with.

60. Accordingly, I am satisfied that this appeal ought to be dismissed.