APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/179

Neutral Citation Number: [2023] IECA 26

Haughton J.
Ní Raifeartaigh J.
Allen J.

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

BALFORD CONSTRUCTION LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 14th day of February, 2023

Introduction

1. The background to the application now before the court is set out in a judgment delivered by me on 25th July, 2022, with which Haughton and Ní Raifeartaigh JJ. agreed, [2022] IECA 169 and a later ruling by the same division of the court on 30th November, 2022

on an application brought by the defendant to *"review"* the judgments then delivered [2022] IECA 273 .

2. The decision of 25th July, 2022 was that the defendant's appeal should be dismissed. The decision on 30th November, 2022 was that the review application must be refused.

3. This judgment deals with the costs of the appeal and the review application. The plaintiff contends that the circumstances are such as to warrant not only an order that the defendant should pay the costs of both applications on a legal practitioner and client basis but a wasted costs order against the defendant's solicitor on the same basis.

Summary of the previous applications

4. The defendant's appeal was an appeal against a procedural order made by the High Court in the course of case managing a motion by the plaintiff to amend the special indorsement of claim on a summary summons and for summary judgment, and a cross motion by the defendant to strike out part of the special indorsement of claim.

5. The plaintiff's claim in the High Court was for judgment in the sum of €2,751,216.73, said to be due and owing on foot of two loan facilities, each of which was said to have been repayable on demand, and in respect of which demand was said to have been made. Shortly after the summary summons was issued the Supreme Court gave judgment in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 423. By reference to *O'Malley* the particulars were clearly insufficient and the plaintiff needed to amend the special indorsement of claim. Therefore the plaintiff issued a combined motion seeking first, leave to amend, and secondly summary judgment for the amount claimed.

6. The defendant's position was that the loans were not payable on demand and that the proposed additional particulars were inadequate but instead of simply making that case in

defence to the claim, the defendant issued a motion to strike out the plea that the loans were payable on demand, *"on the grounds that the said pleadings are untrue and prejudicial to the fair trial of the action"*.

7. As I observed, by the way, in my earlier judgment, it was not easy to see how the power invoked by the defendant's motion – O. 19, r. 27 of the Rules of the Superior Courts – was engaged. The rule relied on confers an express power to strike out or amend any matter in an indorsement of claim which is unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action. If, as was the defendant's position, the loans were not repayable on demand, that would be a matter of defence. If the defendant could show that there was a credible factual basis for contending that the loans were not repayable on demand, it could have done so by simply filing and serving an affidavit setting out its defence. Instead, the defendant, by its cross-motion, sought to pre-empt the case which the plaintiff wished to make. However, in the circumstances which I have previously set out, the defendant abandoned its motion before it was heard.

8. When the plaintiff's motion came before the High Court (Hanna J.) on 21st June, 2021 he ordered that it, and the defendant's cross motion which had been issued recently and was returnable for 8th November, 2021 should, in the case of the plaintiff's motion be adjourned to, and in the case of the defendant's cross-motion should be brought forward to, the following Thursday, to travel together *"to be heard and directed"* on the same occasion. Hanna J., sitting as he was in a busy Monday morning list, did not engage at all with the merits of either motion. Specifically, he made no order as to the sequencing of the motions.

9. My judgment of 25th July, 2022 traces the progress of the plaintiff's and the defendant's motions in the High Court. When they first appeared in the non-jury list on 24th June, 2021 there was no appearance on behalf of the defendant and they were put back to 28th June, 2021. On 28th June, 2022 the motions were further adjourned to accommodate a

personal difficulty on the part of Ms. McNicholas. On the further adjourned date, 12th July, 2021, there was again no appearance and the non-jury list judge gave directions for the exchange of affidavits with a view to a hearing on 15th March, 2022. The defendant failed to engage at all with the directions hearings or with the directions given as to the filing of affidavits. Absent any attendance on behalf of the defendant there was no debate, still less a direction, as to the sequencing of the hearing of the motions.

10. Ms. McNicholas, on behalf of the defendant, has steadfastly maintained that the defendant would be prejudiced if its motion was not heard first but was not able to say why. It is true, as Ms. McNicholas submitted – citing *Bank of Ireland Mortgage Bank v. O'Malley* – that the defendant was in principle entitled to sufficient particulars of the claim to enable it to know whether it should concede or resist the claim. But the issue which the defendant wished to raise by its cross-motion was entirely separate to the adequacy of the particulars.

11. On 20th July, 2021 the defendant filed a notice of appeal against the judgment and order of Hanna J. By then directions had been given for the exchange of affidavits and a trial date fixed. There was no appeal against the directions order.

12. The stated grounds of appeal were that the High Court judge (1) had erred in law in transferring the defendant's motion *"from the common law list to the summary judgment list without the consent of the common law list judge"* and (2) had erred in law when he ordered that the two motions should travel together and be heard and directed on the same occasion but, as was pointed out by the plaintiff in its respondent's notice, the grounds of appeal were bald assertions that the judge had erred in law and did not indicate how he had allegedly erred in law.

13. The order sought by the defendant from the Court of Appeal was an order directing that so much of the plaintiff's motion as sought to amend the summary summons as well as the defendant's cross motion should be heard before – indeed before even a hearing date

would be fixed for – that part of the plaintiff's motion seeking summary judgment. This was the sequencing which Ms. McNicholas had contended before Hanna J. While it is true that Hanna J. did not then make the order sought by the defendant, the fundamental flaw in the appeal was that it failed to recognise that he had not refused to do so but had simply postponed the debate as to the sequencing of the motions to the Thursday list.

14. The substance of the appeal – if that is the *mot juste* – was an appeal against the decision of Hanna J. to bring forward the return date of the defendant's motion and to put both motions into a list in which there would be sufficient time for the court to hear argument and to make a decision as to how they ought to be moved forward.

15. When the defendant's appeal first came into the Court of Appeal directions list on 15th October, 2021, Costello J. pointed out – as the plaintiff's solicitors had, in correspondence as well as in the respondent's notice – that the Court of Appeal will not interfere with the management by the High Court of its lists save in the most exceptional circumstances. By then the motions had been listed for hearing in the High Court. The plaintiff's solicitors had drawn Ms. McNicholas's attention to the relevant authorities and warned that if the appeal were pressed and failed, they would apply for indemnity costs.

16. The defendant's appeal came back into the Court of Appeal directions list on 20th May, 2022. By then the defendant's motion in the High Court had been abandoned by letter dated 4th May, 2022 and the Bank's motion – in both parts – had been heard on 10th May, 2022 and judgment reserved. Ms. McNicholas had not dealt with the Bank's solicitors' correspondence as to the disposition of the appeal. Costello J. then observed that there was nothing left in the appeal and allowed the matter to stand until after lunch to allow Ms. McNicholas to take instructions. Costello J., of her own motion, raised the issue of the possibility of a wasted costs order. It appears that Ms. McNicholas could not get instructions

– or at least could not get instructions to abandon the appeal – and the appeal was adjourned to the directions list on 24th June, 2022.

17. On 26th May, 2022 the plaintiff's solicitors wrote a long letter to Ms. McNicholas rehearsing the history of the appeal and summarising the previous correspondence. The plaintiff's solicitors gave notice of their instructions to apply for an order for costs to be adjudicated on a legal practitioner and client basis, and for a wasted costs order pursuant to O. 99, r. 9 of the Rules that Ms. McNicholas should be made personally liable to discharge such order as to costs as might be made.

18. By the time the appeal came back into the Court of Appeal directions list on 24th June, 2022 the substance of the High Court action had been decided by a judgment of Ferriter J. which had been delivered on 2nd June, 2022. ([2022] IEHC 356) Ms. McNicholas, however, insisted on a hearing date and a date was assigned for 25th July, 2022.

19. On 25th July, 2022, for the reasons given in my published judgment, with which Haughton and Ní Raifeartaigh JJ. agreed, and in short *ex tempore* concurring judgments the transcripts of which were made available to the parties, the appeal was dismissed.

20. As had been repeatedly pointed out by the plaintiff's solicitors and by Costello J., the order of Hanna J. of 21st June, 2021 the subject of the appeal had been overtaken by the order of Meenan J. of 12th July, 2021 which gave directions for the further progress of the motions and which had not been appealed. Whatever, if any, substance there could ever have been to the appeal was removed by the abandonment of the defendant's motion on 4th May, 2022. And the appeal was on any analysis unquestionably moot after the plaintiff's motion had been heard and determined by Ferriter J.

21. On the application of the plaintiff, the court formally called upon Ms. McNicholas to show cause as to why a wasted costs order should not be made against her and gave

directions for an exchange of affidavits and written submissions on the question of the costs of the appeal, which was listed for hearing on 6th October, 2022.

The motion to review

22. On 5th October, 2022 a motion was issued on behalf of the defendant, grounded on an affidavit of Ms. McNicholas, seeking a review of the judgments which had been delivered on 25th July, 2022. The court and the plaintiff's solicitors had prepared to deal with the costs application on the following day but that application was put back to allow the review application to be dealt with. On the application of Ms. McNicholas for the adjournment of the costs hearing, the court expressed its concern that Ms. McNicholas might not have fully engaged with the question of the very limited and exceptional basis of the jurisdiction of an appellate court to review its judgment and observed that insofar as the plaintiff was applying for a wasted costs order, Ms. McNicholas was acting for herself. The court exhorted Ms. McNicholas to consider instructing a solicitor and counsel to act at least on her behalf.

23. The defendant's motion to review was heard on 30th November, 2022 and disposed of in an *ex tempore* ruling of the court. ([2022] IECA 273) The defendant was represented by Ms. McNicholas.

24. The premise of the motion to review was that the court had not engaged with key elements of the appeal and that the defendant could not know why it had lost the appeal. For the reasons given by the court in its ruling, that submission was patently wrong.

25. The written submissions filed on behalf of the defendant suggested that the court had proceeded on the erroneous premise that Hanna J. had not directed that the plaintiff's application to amend, as well as its application for summary judgment, should travel together and be directed on the same occasion. On the oral hearing of the application Ms. McNicholas agreed that the plaintiff's motion, in both parts, had been heard and determined by Ferriter J.

but could not – of course – say how the motion, in both parts, had come before Ferriter J. unless, in the first instance, by having been adjourned from 21st June, 2021 to 24th June, 2021.

26. It was clear from the written submissions filed on behalf of the defendant as well as the oral argument of Ms. McNicholas that she had fundamentally failed to understand the difference between the substance of the plaintiff's motion and what had been a routine case management order. As was pointed out in the ruling, the efficient management of both the plaintiff's and the defendant's motions had nothing to do with the merits of either. The court found that there had been no denial of justice or engagement with any constitutional issue.

27. Following the disposal of the review application, counsel for the plaintiff applied for an order for costs against the defendant on a legal practitioner and own client basis and a wasted costs order against Ms. McNicholas in respect of that motion, which was adjourned to allow Ms. McNicholas to answer the application against the defendant and to show cause why the order sought against her should not be made.

The costs of the appeal

28. In support of the application for the special costs orders, a short affidavit of Michael Kelly, solicitor, was filed on behalf of the plaintiff. Mr. Kelly exhibited the correspondence sent to Ms. McNicholas over the course of the appeal which showed, he suggested, that the conduct of both the defendant and Ms. McNicholas was *"entirely unsatisfactory"* both from the perspective of the plaintiff and of the court. He identified five specific alleged shortcomings, which he suggested were (a) the initiation of a plainly misconceived appeal, (b) the refusal to withdraw the appeal despite many invitations to do so, (c) the failure to reply to correspondence in relation to the appeal, (d) the failure to obtain instructions in relation to the appeal, and (e) the refusal to accept that the appeal was moot. Mr. Kelly

pointed also to the failure of the defendant to engage with the High Court proceedings at the same time as prosecuting the appeal, specifically (a) the failure to attend the directions hearings in the High Court, (b) the failure to comply with the directions of the High Court, and (c) the failure to reply to correspondence in relation to the proceedings over an extended period of time. Mr. Kelly exhibited a bundle of correspondence in relation to the High Court proceedings.

29. Mr. Kelly identified a third issue which, he said, had come to attention since the determination of the appeal. He referred to a copy Folio 7229F, County Mayo – of which the defendant was the registered owner – which showed, he suggested, that part of the property had recently been transferred into the name of Ms. McNicholas. The Folio, he suggested, showed that the transfer had been effected on 2nd June, 2022, the very date on which Ferriter J. had given judgment. Mr. Kelly's affidavit did not in terms suggest that the transfer was a fraudulent conveyance but a letter of 27th July, 2022 to Ms. McNicholas suggested that it was *"entirely reasonable for our client to assume"* that it was. Ms. McNicholas had promptly replied on the following day to say that she had bought the property on an unspecified date in 2012 for €120,000, which was the market value of the property at that time, and that she was instructed that the plaintiff was aware of the sale and that *"almost all"* of the money she had paid had been paid to the plaintiff as interest payments in 2012 and 2013.

30. I think that it is convenient to pause here to dispose of the question of the transfer of the property. Ms. McNicholas in her relying affidavit on the costs application deals shortly with the transfer, which she says was dated 21st December, 2012 and by which the defendant acknowledged receipt of the consideration. Puzzlingly, perhaps, Ms. McNicholas suggests that the house was valued at €60,000 in 2012 and no explanation is offered for the delay of nearly ten years in registering the transfer. However, I am firmly of the view that quite apart from the absence of any jurisdiction to entertain this question, any property dealing between

the defendant and Ms. McNicholas, whenever and in whatever circumstances it took place, is wholly irrelevant to the conduct of the proceedings.

31. In reading the papers for the appeal I had noted that the question of the property transfer was not referred to in the written legal submissions filed on behalf of the defendant and that at the oral hearing of the costs application counsel for the plaintiff – quite rightly – conceded that it was not relevant to the question of the costs.

32. In response to the short affidavit of Mr. Kelly, Ms. McNicholas swore a 224 paragraph, 48 page, replying affidavit. She exhibited marked *"MM"* a booklet of copy documents running to 247 pages.

33. Ms. McNicholas identified herself as the defendant's solicitor and said that she made the affidavit for the purpose of resisting the application for costs in the terms sought. She did not unequivocally say that she made the affidavit with the authority of her client or that she made it on her own behalf, on behalf of the defendant, or on behalf of both, but I will treat it as having been made on behalf of both and with the defendant's authority.

34. Ms. McNicholas commenced her narrative by referring to the letter of loan offer from the plaintiff to the defendant of 19th February, 2008 and went through more or less the entire history of the lending, the alleged terms of the loans, the demands for payment, the realisation of the security, the High Court proceedings, the order of Hanna J., the appeal against that order, the later progress of the High Court proceedings, and the later hearing by this court of the appeal against the order of Hanna J. before eventually, at para. 190 on p. 41, coming to the application for costs against her.

35. Along the way, Ms. McNicholas deposed that her understanding of the order of Hanna J. was that he had ordered the plaintiff's application to amend and its application for summary judgment and the defendant's motion to strike out certain pleadings should be heard together. At para. 160, Ms. McNicholas acknowledged that she had been told by Costello J.

on 20th May, 2022 that in circumstances in which she had not proceeded with the strike out motion and the plaintiff's motion for judgment had been heard, the appeal was moot. At para. 163 she acknowledged that she understood that in circumstances in which the motion for judgment had been heard, it was not possible for the Court of Appeal to grant the relief sought. At para. 164 she said:-

> *"I say and believe that I proceeded with my appeal because I believed that the [plaintiff's] application to amend its pleadings and the [defendant's] application to strike out certain pleadings should have been heard and decided in advance of the [plaintiff's] application for judgment. I believe that it was not in accordance with law that a defendant would be refused an opportunity to challenge pleadings that were untrue before having to file a defence if they felt they were being prejudiced."*

36. Let me just pause here for a moment to say that this averment highlights Ms. McNicholas's fundamental misunderstanding of the intention and effect of the order which was appealed. On 21st June, 2021 Hanna J. did not have the time in a busy Monday morning list to deal with the issue as to how the motions should be progressed. His order in effect was a simple adjournment. Ms. Mc Nicholas did not appear on the adjourned date – or on either of the subsequent adjourned dates – to make whatever argument she wished as to the sequencing of the motions or the deferral of the filing of the replying affidavit on the plaintiff's motion.

37. Doing the best I can, what Ms. McNicholas offers in answer to the costs application is an argument that the plaintiff repeatedly relied on correspondence as evidence of the truth of what was said in the correspondence but without contesting the truth of what was set out in the correspondence, from which she moves to a criticism of the substantive hearing of the plaintiff's motion in the High Court and of the judgment of the High Court on that motion.

38. I note for completeness that Ms. McNicholas characterised the evidence of Mr. Kelly in relation to the transfer of the property in Folio MY7229F as *"false evidence … for the purpose of having me and my family kicked out of our home"* but for the reasons already given, the transfer of that property is not relevant to the costs of the appeal so it is not necessary or useful to dwell on it.

39. From the transfer of the property Ms. McNicholas moved back to the receivership and the realisation by the plaintiff of the security for the loans. Starting at para. 211, under the heading *"Conclusion"* Ms. McNicholas appears to move to the plaintiff's attempts to enforce the High Court judgment, then back to the hearing of the motion for judgment, then back to the adequacy of the particulars on the special indorsement of claim, then back to the price achieved for the security.

40. At para. 222 of her affidavit Ms. McNicholas suggests that it is factually incorrect that the appeal became moot when she decided not to proceed with her *"appeal"* on the date the application for judgment was being heard. She says *"appeal"* when she obviously means her motion to strike out and she refers to the date on which the plaintiff's motion was heard rather than 4th May, 2022 when the defendant's motion was withdrawn but the point she makes is that *"her"* appeal to this court became moot when Costello J. decided at the first directions hearing that the order of Hanna J. would not be interfered with and suggests that in effect she was denied an appeal.

41. A further affidavit of Jeremy Irwin, solicitor, filed on behalf of the plaintiff was largely argumentative and does not really advance matters. A further affidavit of Ms. McNicholas supplemented the formal correspondence which had been exhibited by Mr. Kelly with a bundle of e-mails about filing deadlines, which adds nothing, and a misguided critique of the judgments on the appeal.

The legal principles

42. In support of its application for an order for costs against the defendant on a legal practitioner and client basis, the defendant relied on s. 169(1) of the Legal Services Regulation Act, 2015 and O. 99, rr. 1(3) and 10(3) of the Rules of the Superior Courts.

43. As to the plaintiff's entitlement to costs, it was submitted that the plaintiff, having been entirely successful on the appeal, had a presumptive entitlement to an order for costs, which had not been displaced.

44. As to the scale of costs, the plaintiff relied on the summary of the law set out in the judgment of Barniville J. (as he then was) in *Trafalgar Developments Ltd. v. Mazepin* [2020] IEHC 13, which was cited with approval by Simons J. in *Doyle v. Donovan* [2020] IEHC 119 and by this court in *Fitzpatrick v. Behan* [2021] IECA 23.

45. In *Trafalgar* Barniville J., having considered the Irish authorities on the subject (and having distinguished two English authorities relied on by the plaintiff which dealt with the jurisdiction in England to make a wasted costs order) set out a summary of the legal principles relevant to an application for costs on a scale other than the ordinary party and party basis as follows:-

> *"54. It seems to me that the following principles can be derived from O. 99 r. 10 and from the judgments of the Irish courts discussed above and should inform the exercise by a court of its discretion to make an order for costs on the solicitor and client basis: -*
>
> > *(1) The normal position is that where costs are awarded against one party in favour of on other, those costs will be taxed or adjudicated on the party and party basis.*

(2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.

(3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).

(4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.

(5) The conduct in question can include: -

> *(a) A particularly serious breach of the party's discovery obligations;*
>
> *(b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;*
>
> *(c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a prima facie case in relation to such claims;*
>
> *(d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or disapproval, such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.*

(6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should: -

(a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;

(b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;

(c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;

(d) in light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).

(7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be justified, in the exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis).”

46. The plaintiff’s argument was that the appeal, and the persistence in the appeal, was an abuse of process and that the case was one in which the court ought to mark its displeasure or disapproval of the conduct of the defendant by departing from the normal rule. The

plaintiff's written legal submission repeated the specific shortcomings which had been identified in the affidavit of Mr. Kelly.

47. As to the wasted costs order which it was submitted ought to be made against the defendant's solicitor, the plaintiff referenced first O. 99, r. 9(1)(a) of the Rules which provides:-

> *"(1) If in any case it appears to the Court that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the legal practitioner, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court may –*
>
> > *(a) call on the legal practitioner acting for the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the legal practitioner and his client and (if the circumstances of the case require) why the legal practitioner should not repay to his client any costs which the client may have been ordered to pay any other person, and thereupon make such order as the justice of the case may require; …"*

48. The power of the superior courts to make an order under O. 99, r. 9(1)(a) was recently considered by this court in *Ward v. Tower Trade Finance (Ireland) Ltd.,* [2022] IECA 70. Noonan J. (in a judgment with which Whelan and Haughton JJ. agreed) observed at para. 19 that:-

> *"The rule recognises the inherent jurisdiction of the court to protect its processes from abuse by exercising control over its officers. It is a jurisdiction that has been described as both punitive and compensatory. The use of language such as 'without reasonable cause' denotes that it is not confined to deliberate misconduct."*

49. Noonan J. undertook a comprehensive review of the authorities and the leading commentators, from which he distilled ten principles at para. 33:-

> *33. I think the following points can be derived from the authorities summarised above: -*
>
> *(i) The jurisdiction arising under O. 99, r. 9 permits the court to make two types of wasted costs orders, the first disentitling the solicitor from recovering costs from his or her own client and the second, rendering the solicitor in effect personally liable for the costs of any third party whose costs the client has been ordered to pay;*
>
> *(ii) The jurisdiction is a wide one which empowers the court to make 'such order as the justice of the case may require';*
>
> *(iii) However, the jurisdiction is one to be exercised sparingly and only in the clearest of cases;*
>
> *(iv) In the absence of deliberate dishonesty or misbehaviour, a mere error of judgment, even one amounting to negligence, will not suffice to warrant the exercise of the jurisdiction;*
>
> *(v) What is required is gross negligence amounting to a serious dereliction of the duty of a solicitor to the court, which may in this sense be described as misconduct;*
>
> *(vi) Such misconduct includes the institution, pursuit and continuation of litigation which the solicitor knows, or ought reasonably to know, is vexatious, wasteful of court resources or otherwise an abuse of process;*
>
> *(vii) Pursuing litigation on the advice of counsel may afford a solicitor a defence to a wasted costs application, unless that advice is so obviously wrong*

that any reasonable solicitor giving the matter due consideration would realise that fact;

(viii) The fact that a claim is likely to be hopeless does not necessarily give rise to the potential for a wasted costs order, provided the case has at least some stateable basis, even if theoretical. Development of the law is often advanced by the bringing of claims that are novel, without precedent or even contrary to existing authority, and such claims ought not be stifled by an over zealous application of the jurisdiction;

(ix) The presence or absence of bona fides by the solicitor in pursuing litigation is not relevant to whether there has been gross negligence or not, but the presence of mala fides or an improper motive may render the pursuit of litigation, which might otherwise be regarded as merely negligent, properly the subject of a wasted costs application;

(x) The jurisdiction is properly regarded as both punitive and compensatory."

Summary of arguments

50. The plaintiff submits that this is a case in which Ms. McNicholas has been shown to have been guilty of gross negligence by bringing and pursuing an appeal which, if she did not know, she ought reasonably to have known, was vexatious, wasteful of court time, and an abuse of process. The appeal in this case, it says, like the appeal in *Ward*, was one in which *"the prospects [of the appeal were] hopeless to the point where the further continuation of the [appeal was] plainly wasteful and vexatious."*

51. On the costs application, a lengthy written submission, signed by Ms. McNicholas, was filed on behalf of the defendant and Ms. McNicholas but save in one sentence – to which I will come – it did not address the plaintiff's application for costs.

52. The defendant's written submission started by recalling the order of Hanna J. and the appeal before turning to the substance of the plaintiff's underlying claim. At great length, the submission repeated the mantras that the loans were not payable on demand, that the particulars on the summary summons were insufficient, and that the plaintiff's proposed additional particulars were insufficient and so on.

53. The defendant sought to justify the decision to appeal against the order of Hanna J. on the ground that it summarily decided the defendant's motion to strike out and prejudiced the defendant in its ability to defend the case. It then suggested that the refusal of Costello J. to assign a hearing date effectively decided the appeal summarily and that the assigned panel did not address the defendant's arguments.

54. Starting at p. 14, under the heading *"The Respondent/Plaintiff's Application for a Wasted Costs Order"*, the written submission correctly summarises the plaintiff's arguments as to why the orders sought should be made and seeks to justify the position taken by the defendant in the defence of the proceedings in the High Court.

55. I pause here to say that that I accept the defendant's submission that the order of the High Court limiting the time within which the defendant might file an affidavit in reply to the plaintiff's motion was not a direction that it should file such an affidavit, and therefore that the defendant's failure to file an affidavit could not properly be characterised as a flouting of the direction.

56. The submission misquotes Costello J. as having said that she would not interfere with the order of Hanna J. The evidence is that Costello J. did not say that she would not interfere with the High Court order but sought to impress on Ms. McNicholas – as the plaintiff's

solicitors had previously tried and failed to do – that the order the subject of the appeal was a merely procedural order which the Court of Appeal was highly unlikely to interfere with.

57. All that the defendant's written submission had to say about the costs was that *"It would only serve to compound the injustice suffered by the defendant if the plaintiff were given an order for costs."*

Discussion and decision

58. There is no dispute as to the existence of the jurisdictions invoked by the plaintiff or the principles according to which they are to be applied.

59. There were three broad strands to the plaintiff's argument.

60. I have already dealt with the third ground, the transfer of property by the defendant company to Ms. McNicholas. Apart altogether from the fact that the timing and circumstances are contested, it seems to me that any issue in relation the transfer is a wholly separate issue to the question of costs. As previously noted, this third ground, raised in the affidavit of Mr. Kelly, did not find its way into the plaintiff's legal submissions and was formally abandoned at the oral hearing.

61. The second strand to the plaintiff's argument was that this court, in dealing with the question of the costs of the appeal and of the review motion, should have regard to the conduct of the defendant and of Ms. McNicholas in the High Court.

62. The premise of this strand of the submission is that in coming to the conclusions it did as to the disposition of the appeal, this court had regard to the defendant's failure to engage with the High Court proceedings, specifically, (a) the failure to attend court listings, (b) the failure to comply with various directions, in particular the direction as to the delivery of replying affidavits, and (c) the failure to reply to correspondence. This strand of the

plaintiff's argument is based on a misunderstanding of the judgments delivered on the substance of the appeal. I did, at para. 13 of my judgment of 25th July, 2022 recall that there was no appearance on behalf of the defendant on the dates on which the motions were listed for directions but if Ms. McNicholas was unwise not to have attended court, I was not critical of her failure to do so. The point was – as I said at para. 14 – that Hanna J., in the order under appeal, had not made any order as to the sequencing of the motions. The first item on the agenda on 24th June, 2021, or 28th June, 2021, or 12th July, 2021, if anyone had appeared on behalf of the defendant to make the case, could have been the sequencing of the motions.

63. In my earlier judgment I said nothing at all about what further affidavits were or were not filed in the High Court. As I have said, Ms. McNicholas is perfectly correct in her submission that a deadline fixed for the filing of any affidavits is not to be taken as a direction that any affidavits should be filed. A respondent to a motion is perfectly entitled to meet the application by legal argument and although the practice is that legal arguments are flagged in advance in affidavits, there is no requirement that this be done. If it might be thought that a decision not to file a replying affidavit on a motion for summary judgment was a fairly high wire strategy, it was one which the defendant was entitled to adopt. Similarly, I said nothing in my earlier judgment about the exchange of correspondence in the High Court and I pay no heed to the bundle of that correspondence exhibited by Mr. Kelly or to the affidavits of Mr. Diggin sworn on 10th March, 2022 and 29th April, 2022 to which Mr. Kelly referred.

64. In his affidavit filed on this costs application, Mr. Kelly suggests that the correspondence shows that the defendant and its solicitor actively prosecuted a moot and misconceived appeal while breaching directions of the High Court and declined various opportunities which were available to them to address the concern which purportedly formed the basis of the appeal. This, too, appears to be based on a misunderstanding of the

judgments on the substance of the appeal. The appeal was misconceived because it failed to recognise that the order of adjournment of Hanna J. had been overtaken by the directions given by Meenan J. The defendant's complaint that it had been shut out of making the case it wished to make was misconceived not only because the case which the defendant wished to make did not depend on the sequencing of the motions but because the High Court never made a decision as to sequencing.

65. Mr. Kelly, I fear, has to some extent fallen into the same trap as Ms. McNicholas. The order of Hanna J. had nothing to do with the sequencing of the motions, still less the merits of the case. The significance of the several opportunities available to the defendant to make its submissions to the High Court as to the sequencing of the motions is not that they were declined but that they were not recognised by the defendant for what they were.

66. The first strand to the plaintiff's argument is the conduct of the defendant and of Ms. McNicholas of the appeal.

67. I will not put it as bluntly as Abraham Lincoln is reported to have done, but it is unwise for a lawyer to represent himself or herself. This is so irrespective of the nature of the business but applies *a fortiori* in litigation. It also applies to close family members and their corporate manifestations.

68. Ms. McNicholas, as a solicitor, has the right to represent her parents' company. With that right comes the responsibility to act professionally. It is the duty of an adviser and of an advocate to apply his or her skill, learning and diligence to the business of the client. If he or she is to do so effectively, it must be done dispassionately.

69. In my view, it is quite clear that Ms. McNicholas was out of her depth from the start. She identified a number of arguments which she wished to make on behalf of her client in defence of the plaintiff's claim against it, one of which was that the loans the subject of the proceedings were not, as alleged, payable on demand. The defendant's point, as I understand

it, was not that there had been no demand but that the plaintiff's cause of action for the debt had accrued upwards of six years prior to the commencement of the proceedings and was statute barred. This, if made out, might have been a defence. As I observed in my earlier judgment, there was no reason why the point could not have been made by way of defence. It may or may not have been that the loans were repayable on demand but the plaintiff's case was that they were and it was always going to be a challenge to persuade the High Court to prevent the plaintiff from making the case it wanted to make. If Ms. McNicholas came to the High Court on 21st June, 2021 confident that the plaintiff's motion would be put back until after the return date she had recently obtained in the office for her cross motion all that happened was that the return date for the defendant's motion was brought forward.

70. I pause here to make clear that contrary to what appears to be Ms. McNicholas's understanding, the proposition that the defendant – as was *O'Malley* – was entitled to know how the debt claimed was calculated was never in contest and was implicitly acknowledged by the plaintiff's motion to amend the special indorsement of claim to set out the required particulars, or at least what the plaintiff contended were the required particulars. Similarly, it is no part of the plaintiff's argument that Ms. McNicholas was negligent in applying to strike out the plea that the loans were repayable on demand. Rather the argument is that she was grossly negligent in the first instance in filing the appeal and later in pressing the appeal after the strike out motion had been abandoned.

71. Every lawyer who is offered an instruction or a brief has a professional duty not to undertake something which is beyond his or her competence. By reference to the notice of appeal, Ms. McNicholas appears to have been labouring under the misapprehension that the judge assigned to the Monday morning summary judgment list lacked jurisdiction to transfer the plaintiff's motion to the Thursday non-jury list or to deal with a common law motion returnable for a later date without the consent of whatever judge might ultimately be assigned

to deal with the list in which it might appear. If that was her belief, there was no conceivable basis for it.

72. As my earlier judgment shows, it became apparent on the hearing of the appeal that Ms. McNicholas was labouring under the misapprehension that the jurisdiction of the High Court to manage its business was limited to cases in which a formal case management order had been made under O. 63C of the Rules. If that was her belief, there was no conceivable basis for it. Order 63C was introduced into the Rules by the Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures), 2016. By letter dated 2nd September, 2021 – after Ms. McNicholas had filed and served the notice of appeal but well in advance of the first return date on 15th October, 2021 – the plaintiff's solicitors brought to Ms. McNicholas's attention the principle that an appellate court will not interfere with procedural directions unless it can be demonstrated that an element of irremediable prejudice would result. They cited the authorities for that proposition, including *Dowling v. Minister for Finance* [2012] IEHC 32 and *Weavering Macro Fixed Income Fund Ltd. v. PNC Global Inv. Servicing (Europe) Ltd.* [2012] IESC 60. The plaintiff then offered a *locus poenitentiae*; if the appeal was withdrawn by 10th September, 2021, it would bear its own costs, but if the appeal was pressed and failed, it would apply for indemnity costs. I find it impossible to understand how Ms. McNicholas might thereafter have persisted in any misunderstanding as to the jurisdiction of the High Court to manage its business or the circumstances in which the Court of Appeal will interfere with a procedural order. All that she had to do was to look at the date of the authorities to which she was referred – 2012 – and the date of the introduction of O. 63C – 2016 – to be disabused of any notion that the principle was not engaged.

73. It cannot be gainsaid that in the filing and pursuit of the appeal, Ms McNicholas has fallen far short of that degree of ordinary skill and care which her client was entitled to expect

of a solicitor who had held herself out as competent to deal with the defence of High Court proceedings. However, a solicitor owes no duty of care to the opposing party and the jurisdiction invoked by the plaintiff is not engaged by mere negligence.

74. Leaving aside the wisdom of acting, for all practical purposes, for her parents, Ms. McNicholas ought not to have accepted instructions in a case which she was not competent to conduct, *a fortiori* where, as appears to have been the case, she was determined to conduct it without counsel. Lawyers who appear in any court are expected to be at least broadly familiar with the rules and procedures of that court. Frequently, they will need to research points of law or procedure as they arise. If confronted with a point or argument, they may need to reassess. They are not entitled to put their heads down and to attempt to charge or blunder their way through a difficulty.

75. It is clear enough to me that Ms. McNicholas did not understand the intention and effect of the order of Hanna J. That, at the time, I am prepared to say, was a matter between her and her client. If Ms. McNicholas had engaged with the directions hearings in the High Court she may have come to understand the intention and effect of the order of Hanna J. but that too, I think, is a matter between Ms. McNicholas and her client. For the reasons already given, the filing of the appeal against the order of Hanna J. was misconceived from the outset but I am prepared to take the view that that was a matter between Ms. McNicholas and her client. However, the pursuit of the appeal is another matter.

76. If Ms. McNicholas did not know when she filed the appeal that it was misconceived, it was pointed out to her first by the plaintiff's solicitors by their letter of 2nd September, 2021 and then by Costello J. on the first listing of the appeal for directions. If Ms. McNicholas could not reasonably have been expected to have known at the time she filed the appeal that it was doomed, she simply ignored the plaintiff's solicitors' explanation and that of the Court of Appeal list judge.

77. The pursuit of the appeal thereafter was clearly vexatious. On the first directions hearing on 15th October, 2021 Costello J. made it clear that she would not allocate Court of Appeal time to an appeal against the order of Hanna J. which had been overtaken by the directions given by Meenan J. for the progress of the motions and the assignment of a hearing date and she adjourned the appeal to a date beyond the High Court hearing date. By the time the appeal came back into the directions list on 20th May, 2022 the defendant's motion to strike out had been abandoned and the plaintiff's motion heard. If Ms. McNicholas did not then acknowledge that the appeal was moot, she now agrees that she then recognised that the appeal was moot. It was the plaintiff's position, and it must have obvious to the defendant and to Ms. Nicholas, and if it was not, it was spelled out by Costello J., that it would be a waste of time if a hearing date was fixed. The matter was put back until after lunch to allow Ms. McNicholas to take instructions. It is not said that she asked for the necessary instructions or that the defendant refused to give them.

78. If anything, the defendant's and Ms. McNicholas's conduct on and after 24th June, 2022 was worse. By then, the High Court had given judgment against the defendant. The defendant, of course, had a right of appeal against that judgment and it did appeal. However, Ms. McNicholas insisted on a hearing date for the appeal against the procedural order and used that as a platform from which to try to ventilate the merits of the substantive proceedings.

79. The defendant's appeal was heard by this court on 25th July, 2022 and for the reasons then given, dismissed. As Ní Raifeartaigh J. then observed, the defendant had had fair warning of the infirmity in the appeal and of the plaintiff's intention to apply for special costs orders in the event that the appeal should fail. If it was not clear from my judgment, Haughton and Ní Raifeartaigh JJ. said in terms that it appeared that Ms. McNicholas had

been guilty of gross negligence such as might warrant the making of a wasted costs order and she was afforded the opportunity to show cause why such an order ought not to be made.

80. Any reservations I might have entertained as to the seriousness of Ms. McNicholas's conduct were dispelled by the prolix and vexatious affidavit which she filed in answer to the costs application from which it is clear that she has difficulty recognising the authority of the High Court and of this court. Rather than attempting to explain why the appeal had been pressed after it was acknowledged to have been moot, Ms. McNicholas saw the costs hearing as a further opportunity to rail against the order of Hanna J. and over and over again against the perceived injustice of not having been allowed to dictate the progress of the action in the High Court. I am satisfied that Ms. McNicholas was guilty of gross negligence in her persistence in an appeal which, if she did not know, she ought reasonably to have known was vexatious, wasteful of court time and an abuse of process.

81. Having come to the conclusion which it did on 25th July, 2022 as to the disposition of the appeal, the court gave directions for the exchange of affidavits and written legal submissions in relation to the question of the costs, and listed the matter for oral argument on 6th October, 2022. Ms. McNicholas must have known that apart from the court time allocated to the oral hearing, the plaintiff's lawyers and the court itself would have expended time and effort preparing for the costs hearing. Yet, on the eve of that listing and without warning Ms. McNicholas issued her review motion. It was clear from the papers which had been filed that little of any consideration had been given to the quite exceptional jurisdiction which was sought to be invoked and it was inevitably refused. However, the review application meant that the costs of the hearing listed for 6th October, 2022 were thrown away and the plaintiff was put to the further expense of dealing with it.

82. Formally, the defendant's application was that its costs of the appeal, its costs of the aborted hearing on 6th October, 2022, its costs of the review application, and the costs of this

application should be adjudicated on a legal practitioner and client basis and paid by Ms. McNicholas on a wasted costs basis but the focus of the submission was that the case was one which warranted a wasted costs order, although not automatically on a legal practitioner and client basis.

83. I am satisfied that this is a case in which it is appropriate to make a wasted costs order under O. 99, r. (9)(1)(a) making Ms. McNicholas personally liable for the plaintiff's costs of the appeal with effect from 31st October, 2021, including the costs of the directions hearings on 20th May, 2022, and 24th June, 2022, the costs of the aborted hearing on 6th October, 2022, the costs of the review application and the costs of this application.

84. Ms. McNicholas, having accepted instructions to act for the defendant in this litigation, assumed a duty to the court not to pursue an appeal which she knew or ought reasonably to have known was vexatious and wasteful of court resources. The appeal was misconceived from the outset. The proposition – by reference to *O'Malley* – that the defendant was entitled to know the case which it had to defend, specifically, that it was entitled to know the details of the amount claimed, was never contested. No less to the point, it had nothing to do with the order of Hanna J. Moreover, any shortcoming in the particulars of the claim whether as originally pleaded or in the proposed amendment was unrelated to the defendant's cross-motion to strike out the plea that the loans were repayable on demand. However, bearing in mind that the jurisdiction invoked by the plaintiff is to be exercised sparingly and only in clear cases, I am prepared to take the view that Ms. McNicholas' initial failure to understand the effect of the order of Hanna J. was not of such seriousness as to warrant the making of a wasted costs order in relation to the filing of the notice of appeal.

85. While any misunderstanding on the part of Ms. McNicholas as to the intention and effect of the order of Hanna J. certainly could and probably should have been dispelled by the

plaintiff's solicitors' letter of 2nd September, 2021, I am prepared to give her the benefit of the doubt.

86. In my judgment, the position radically changed after the first directions hearing on 21st October, 2021. If Ms. McNicholas had previously – and perhaps understandably – been sceptical about what she was being told by the plaintiff's solicitors, it was then made clear by Costello J. that she would not allocate court time to a pointless appeal. Furthermore, the adjournment then of the directions hearing until a date after the date which had been assigned for the hearing of the High Court motions meant that the appeal would almost certainly be moot by the time it came back into the list. As Ms. McNicholas now acknowledges that she then recognised, her strategy of trying to have the strike out motion decided before the plaintiff's motion, or, perhaps, of having the plaintiff's amendment application dealt with before the application for summary judgment could no longer be achieved by pressing the appeal. Whether or not she recognised that it was still open to her to pursue the same strategy in the High Court, the appeal was for all practical purposes moot. In choosing 31st October, 2021 as the date after which I consider that Ms. McNicholas should be ordered to pay the costs of the appeal, I have allowed a period of ten days in which she might have – if she did not – reflected on the consequences of what was said and done on the first directions hearing.

87. As I have previously said, my focus in allocating the costs of the appeal is on what happened in the Court of Appeal rather than the High Court but it is of some significance to note that the abandonment of the strike out motion rendered the appeal theoretically as well as practically moot since the Court of Appeal could not thereafter have made any order in relation to the abandoned motion. By the time the appeal came back into the directions list on 20th May, 2022 the plaintiff's motion had been heard by the High Court and judgment reserved.

88. Why it was that the appeal was pressed has never been explained. Following the disposition of the appeal Ms. McNicholas had the opportunity to advance any explanation there may have been but did not attempt to do so. The demonstrable fact of the matter is that all of the affidavits sworn in relation to the costs and the application to review were sworn by Ms. McNicholas. There is no suggestion that the various applications were other than her own idea or that she was subjected to any pressure from her client.

89. On the authorities, a significant consideration on an application for a wasted costs order against a solicitor is whether the litigation – in this case the appeal – was pursued on the advice of counsel. Although entreated by the court to consider retaining counsel on behalf of the defendant and a solicitor and counsel on her own behalf, she did not do so. In response to a query from the court as to whether and what attempt she had ever made to consult counsel, Ms. McNicholas said that she had consulted counsel in early 2022 but had not been happy with the advice offered. All the appearances from the fact that Ms. McNicholas was conducting the litigation on her own were that she was not acting on the advice of counsel. The inference to be drawn from her answer to the court's question appears to me to be that the appeal was pressed against the advice of counsel.

90. I come now to the application for costs on a legal practitioner and client basis.

91. The starting point is to recall that the normal position is that where costs are awarded against one party to litigation in favour of the other, those costs will be adjudicated on the party and party basis. In principle, it seems to me, the position should be no different when it comes to the basis on which the costs the subject of a wasted costs order are to be adjudicated.

92. As to the difference between party and party costs and legal practitioner and client costs, the arguments did not address the question of what the principled difference might be. In principle, the object of an award of costs – on the party and party basis – is to indemnify

the winning party against all such costs as were necessarily and properly incurred for the attainment of justice or for enforcing or defending the rights of the party whose costs are to be adjudicated. If that is so, the adjudication process – between party and party – should identify and disallow only so much of the costs claimed as were not necessarily and properly incurred. It is easy to contemplate that a particularly needy or difficult or demanding litigant might generate work for his solicitor or counsel over and above that necessary for the vindication of his rights. In that event, of course, the client must as a matter of contract pay for the work which has been done but the additional expense will be for his own account. At the level of principle the difference appears clear but it can be difficult to recognise the application of the principle in practice.

93. It appears to be accepted that the measure of solicitor and client costs will always be greater than the measure of party and party costs. It is routinely said on applications for security for costs – and it is accepted on all sides – that the costs recoverable between party and party, whoever wins, will likely come in at 80% of the actual costs which the parties are likely to incur in prosecuting or defending the action as the case may be but it is difficult to understand why this should be so. Three possible explanations occur to me but each is an unattractive as the others. The first possibility is that all litigants are so demanding that they will not allow their lawyers to get on with the necessary work. The second is that lawyers routinely do unnecessary work or routinely overcharge for the work which has been done. And the third is that the system of taxation or adjudication routinely fails to recognise that the work done was necessarily and properly done for the attainment of justice by the winning party. In the mix are a number of assumptions or practices which, as between solicitors and counsel, allocate the value of the work to whichever lawyer might have been expected to have done the work rather than the lawyer who actually did the work. But I digress.

94. In this case there is no suggestion that an award of costs on the party and party basis will not allow the plaintiff to recoup the costs necessarily and properly incurred. To be sure, what started off as a misconceived appeal and spiralled out of control has generated a great deal of work for the plaintiff's lawyers and has burned up a grossly disproportionate amount of court time but that goes to the amount of the costs rather than the basis on which they should be adjudicated.

95. This is a case in which the conduct of the appeal was such as to merit the marking of disapproval but all the appearances are that it was the defendant's solicitor rather than the defendant directly who was responsible for all that has gone on. The manner in which the appeal was pressed has given rise to a certain amount of frustration and even incredulity on the part of the plaintiff's lawyers but it has not, save as to the costs incurred, given rise to any prejudice on the part of the plaintiff in progressing its action. In all the circumstances I do not consider that it would be in the interests of justice to make an order for the payment of the plaintiff's costs on a legal practitioner and client basis.

96. The threshold for the exercise of the jurisdiction to award costs on a legal practitioner and own client basis is significant. It is to be exercised only where it has been shown that the litigant has been guilty of serious misconduct or a blatant failure to comply with a direction or order of the court. Such an order may be made to mark the displeasure or disapproval of the court of such misconduct or such a failure.

97. The threshold for the exercise of the jurisdiction to make a wasted costs order is even higher. The premise of the jurisdiction to make such an order is that costs have been incurred improperly or without any reasonable cause and the effect of such an order can be to make the solicitor personally liable to pay the costs. The jurisdiction is one which is to be exercised sparingly and only in the clearest cases. The authorities are clear that in

contemplating the making of such an order the court must be mindful of the potential chilling effect on the willingness of solicitors and counsel to take on difficult cases.

98. As Noonan J. observed in *Ward* the jurisdiction to make a wasted costs order is both punitive and compensatory. In this case, the making of a wasted costs order imposes a significant punishment on Ms. Mc Nicholas personally. That, by itself, will sufficiently mark the court's disapproval and displeasure of the manner in which the appeal was pressed. To order that the wasted costs be adjudicated on a legal practitioner and own client basis would be to risk imposing a double punishment.

99. I observed earlier that while the plaintiff formally applied for both a wasted costs order and an order that the costs be adjudicated on a legal practitioner and own client basis, the focus of the argument was that the case was one which warranted the making of a wasted costs order, although not automatically on the higher level. For that reason, the argument did not deal with the question of the jurisdiction to do both. The issue not having been argued, I express no concluded view on the question of whether or the circumstances in which a wasted costs order might be made on a legal practitioner and own client basis. In principle, however, it is not obviously easy to contemplate the imposition on a solicitor – by reason of the fact that costs were incurred improperly or without reasonable cause – of a liability in respect of the costs of the opposing party over and above all such costs as were reasonably and properly incurred.

Summary and conclusions

100. The plaintiff having been entirely successful on the appeal and the review application is entitled to an order for payment of its costs in respect of both. Those costs will include the

costs of the aborted costs hearing on 6th October, 2022 which were thrown away by the issuing of the review application.

101. On the application for the special costs orders, the plaintiff, having secured a wasted costs order against Ms. McNicholas, has substantially succeeded. I consider that the costs of the costs application were not materially increased by the inclusion of the application for the adjudication of the costs on a legal practitioner and client basis.

102. For the reasons given, I have concluded that the appropriate order is to make an order for the adjudication of the plaintiff's costs on the party and party basis and for payment by the defendant of so much of those costs as are attributable to the appeal between the service of the notice of appeal and 31st October, 2021 and for the payment of the costs thereafter by Ms. McNicholas personally.

103. As this judgment is being delivered electronically, Haughton and Ní Raifeartaigh JJ. have authorised me to say that they agree with it.