

**APPROVED**

**[2023] IEHC 156**



**THE HIGH COURT**

2018 No. 899 S

**BETWEEN**

**CORMAC LOHAN  
(PRACTISING UNDER THE STYLE OF LOHAN & CO. SOLICITORS)**

**PLAINTIFF**

**AND**

**STEPHEN HATTON  
MARINA HATTON**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Garrett Simons delivered on 31 March 2023**

**INTRODUCTION**

1. The within proceedings were commenced by way of summary summons. The plaintiff subsequently issued a motion seeking to enter judgment. The plaintiff has since accepted that the proceedings should be remitted to plenary hearing. This judgment addresses the conditions upon which such remittal is to be made.

**PROCEDURAL HISTORY**

2. The plaintiff in these proceedings is a solicitor. The proceedings were instituted by way of summary summons and seek to recover a sum of €381,277.43 said to be due and owing to the plaintiff in connection with legal services provided to the defendants. The legal services related to High Court litigation in respect of a mortgage in favour of Danske Bank (“*the Danske Bank litigation*”).
3. The proceedings are predicated on a bill of costs dated 8 March 2017. The bill of costs is addressed to the two defendants and to a company known as Edenfarms Ltd. The solicitor’s professional fee is in an amount of €170,000 (plus VAT). It has to be said that the level of detail provided in the solicitor’s bill of costs is sparse, especially given the very significant sums involved.
4. The solicitor’s bill of costs is accompanied by copies of the fee notes furnished by senior and junior counsel to the solicitor. Counsels’ fees are in an aggregate amount of €136,100 (plus VAT).
5. It should be observed that there is nothing in the limited papers before the court which indicates that the defendants had been informed in advance that the legal fees would be so high. The only figure in respect of fees which had been identified in the initial letter of engagement, dated 4 September 2015, had been a figure of €10,000 which the solicitor had requested as an upfront payment. Whereas it might be that the fee estimate could not have been more precise at that early stage of the Danske Bank litigation, it is not obvious from the limited papers before the court that the defendants were ever provided with an updated fee estimate.
6. The legal fees have not been adjudicated upon by the Taxing Master of the High Court. It does not appear from the limited correspondence which has been

exhibited that the defendants had been informed at the time that they had an entitlement to refer the bill of costs for independent adjudication by the Taxing Master. (The adjudication function is now performed by the Office of the Chief Legal Costs Adjudicator pursuant to the Legal Services Regulation Act 2015. The relevant provisions commenced on 7 October 2019).

7. The defendants purported to make a complaint to the Law Society in respect of the plaintiff on 12 September 2018. The purported complaint raises a range of matters, some of which relate to the bill of costs. By letter dated 7 December 2018, the Law Society wrote to the defendants as follows:

“As Mr. Lohan has issued Court proceedings, under S13 of the Solicitors (Amendment) Act 1994, the Law Society is not in a position to investigate this matter further until the proceedings are determined. When the proceedings have concluded and if there are issues which the Court did not deal with, you can write to the Law Society again, raising the complaints you would like to be investigated, which were not dealt with by the Court.”

8. The within proceedings were instituted on 25 July 2018, that is, prior to the complaint to the Law Society. The application to enter summary judgment was listed, initially, for hearing on 2 February 2023. On that date, the matter had to be adjourned because of the fact that written legal submissions had not been exchanged as had previously been agreed by the parties. Counsel on behalf of the plaintiff was asked by the court to consider, first, whether it might be necessary to apply to amend the pleadings having regard to the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, [2020] 2 I.L.R.M. 423; and, secondly, the implications, if any, of Section 68 of the Solicitors (Amendment) Act 1994.
9. On the adjourned date, 13 March 2023, counsel indicated that the plaintiff now accepted that the matter should be remitted to plenary hearing. The court

canvassed with counsel for the plaintiff whether his client would be prepared to agree to the referral of the bill of costs for adjudication. Counsel, having taken instructions, confirmed that his client did so agree.

10. Counsel on behalf of the defendants did not raise any substantive objection to the proceedings being remitted to plenary hearing but did point to the delay in the proceedings to date. Counsel for the defendants also emphasised that, aside entirely from any question of the adjudication of the quantum of the legal costs, his clients were maintaining the defence, outlined on affidavit, that there was a collateral agreement whereby the costs were to be borne by another company, Moralltach Ltd.

## **DECISION**

11. For the reasons which follow, I am satisfied that the proceedings should be remitted to plenary hearing. First, it is apparent from the affidavits that there is a significant factual dispute as to whether or not some form of collateral agreement had been entered into between the parties to the effect that a company known as Moralltach Ltd would provide a loan to cover the entirety of the defendants' outstanding indebtedness to Danske Bank and that any legal costs would be discharged by Moralltach Ltd. This is strenuously denied by the plaintiff. This factual dispute cannot be resolved on the basis of affidavit evidence alone. Secondly, it may be doubtful as to whether the summary summons, in its current form, complies with the requirements for summary proceedings as identified by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley*. Thirdly, a question mark arises as to whether the bill of costs is sufficiently detailed to allow the plaintiff to rely upon the provisions of

Section 2 of the Solicitors (Ireland) Act 1849 (sometimes described as the Attorneys and Solicitors (Ireland) Act 1849). This provision has to be read in conjunction with Section 68(4) of the Solicitors (Amendment) Act 1994. The interaction of these provisions has been considered in detail by the Court of Appeal in *Dorgan v. Spillane* [2016] IECA 84.

12. It will be a matter for the trial judge to consider all of these various issues and it should be emphasised that no finding is being made at this stage of the proceedings other than that the threshold of a credible or arguable defence has been met and that summary judgment is not appropriate.
13. The proceedings will, accordingly, be remitted to plenary hearing. It is a condition of this remittal that the defendants are entitled, if they so wish, to refer the legal costs for adjudication. As indicated, the plaintiff has confirmed that he has no objection to such a condition. If the defendants wish to avail of the opportunity to refer the legal costs for adjudication, they have liberty to apply to this court within a period of three months from today's date. If such an application is made, then a formal order referring the legal costs for adjudication will be made pursuant to the court's inherent jurisdiction.
14. The objective of allowing for the possibility of adjudication is to ensure that the defendants are not prejudiced by the lack of detail in the bill of costs sent to them nor by the (seeming) lack of an accurate fee estimate. It would seem unfair were the defendants to be shut out by time-limits from seeking an adjudication of the legal costs. This is especially so in circumstances where there is nothing in the limited correspondence currently before the court which indicates that the defendants were advised of their entitlement to refer the legal costs for taxation or adjudication.

15. It should be emphasised that it is ultimately a matter for the defendants to decide, with the benefit of advice from their new lawyers, whether they wish to refer the legal costs for adjudication. The defendants may wish, instead, to defend the proceedings solely on the separate ground that some sort of an agreement had been reached with Moralltach Ltd and that accordingly they do not have any liability in relation to legal costs.

### **CONCLUSION AND PROPOSED FORM OF ORDER**

16. These proceedings will be remitted to plenary hearing pursuant to Order 37, rule 7 of the Rules of the Superior Courts. The defendants have liberty to defend the proceedings in general, and this is not confined to any specific grounds of defence identified in the replying affidavits. It is a condition of the remittal that the defendants have liberty to refer the legal costs for adjudication.
17. I propose to make the following directions in relation to the exchange of pleadings. The plaintiff should deliver a statement of claim within six weeks of today's date (this extended period is intended to make allowance for the Easter vacation). The defendants will have a period of four weeks thereafter to deliver a defence. The plaintiff will have a period of two weeks thereafter within which to deliver a reply.
18. The parties have liberty to apply to me for further directions at that stage, or, alternatively, they may prefer simply to issue any motions in the ordinary way in relation to matters such as particulars or the discovery of documents. As explained, the defendants have liberty to apply to me within three months of today's date to seek an order referring the legal costs for adjudication.

19. The matter will be listed before me for mention on Wednesday 19 April 2023 at 10.30 o'clock to address any matters arising out of this judgment.

Approved  
Gareth S. Moss