Neutral Citation: [2014] IEHC 256

THE HIGH COURT

[1995 No. 1988 P]

BETWEEN:

USED CAR IMPORTERS OF IRELAND LIMITED

PLAINTIFF

AND

THE MINISTER FOR FINANCE, THE REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 27th day of February, 2014

1. The defendants to these proceedings seek, by way of notice of motion dated 15th March, 2013, an order pursuant to O. 5, r. 13 of the Rules of the Superior Courts or s. 53 of the Supreme Court of Judicature (Ireland) Act 1877, or pursuant to the inherent jurisdiction of the court joining Mr. Niall O'Dowling as a fifth named defendant to the within proceedings, and an order directing that Mr. O'Dowling be personally liable for the costs awarded in favour of the first, second, third and fourth named defendants as against the plaintiff in these proceedings.

2. The judgment was delivered in these proceedings by Murphy J on 15th March, 2013. This case was heard over 33 days from March to June, 2012. The plaintiff company sought a mandatory injunction requiring the second named defendant, the Revenue Commissioners, to publish to the plaintiffs the values for Vehicle Registration Tax (hereafter "VRT") purposes of the full range of new and used motor vehicles and to publish revised values from time to time. The plaintiff also sought a number of other reliefs including declarations of unconstitutionality in relation to the legislation which enacted the VRT and declarations that this legislation was contrary to EU law. The plaintiff also sought damages against the defendants arising out of this allegedly wrongful interference with its constitutional and EU rights. The claim for damages was in the region of €131m. The court refused all reliefs sought by the plaintiff. On the same date as the judgment was delivered Murphy J gave liberty to the defendants to issue the motion herein seeking to have Mr. O'Dowling joined as a defendant for the purposes of securing a costs order against him. On 21st March, 2013, Murphy J. awarded costs of the action in favour of the defendants as against the plaintiff company and the motion currently before the court was adjourned to allow it to be prepared for hearing.

3. The plaintiff to these proceedings is a limited liability company which operated a business based on the importation and resale in Ireland of used motor vehicles particularly from Japan and member states of the European Union. VRT was introduced from 1st January, 1993, by s. 132 of the Finance Act 1992, as amended by s. 8 of the Finance (No. 2) Act 1992. The plaintiff complained that the manner in which this VRT system was operated was lacking in transparency and made it impossible for the plaintiff, when purchasing and selling stock, to calculate the correct VRT liability which it owed to the Revenue Commissioners in relation to each vehicle. The business of the plaintiff has been in progressive decline and the plaintiff claimed in that the actions of the defendant caused it to suffer loss and damage. The court refused all the reliefs sought by the plaintiff in these proceedings.

4. During the course of the main proceedings a substantial amount of time was given to the oral testimony of Mr. Niall O'Dowling, the subject of the proceedings currently before the court. It is clear that Mr. O'Dowling was at the date of the commencement of the main proceedings a 50% shareholder and a director of the plaintiff company. His co-director and co-shareholder was Mr. Fintan Riordan. However, according to the decision of Murphy J, Mr. Riordan said in his evidence that Mr. O'Dowling left the plaintiff company in 1995 as the company could not afford to pay two salaries at a sufficient level. Murphy J stated at p. 235 of his decision that "no satisfactory explanation was given as to the reasons or to the terms of Mr. O'Dowling's departure". The court, in relation to the evidence given by Mr. O'Dowling and Mr. Riordan, stated at p. 168 of the decision that "there is no evidence to prove the allegations made".

5. This Court has had regard to the decision of Murphy J. in coming to its conclusion on the motion as currently before the court.

6. In an affidavit sworn to ground this motion Mr. Declan Sherlock, Deputy Revenue Solicitor, avers that the plaintiff company had insufficient funds to maintain this litigation. Mr. Sherlock relies on a number of statements made by Mr. O'Dowling in the course of his evidence in chief, cross examination and re-examining during the trial of the main proceedings in order to conclude that Mr. O'Dowling was substantially involved in funding the proceedings which were concluded with the decision of Murphy J. in March, 2013. Mr. Sherlock notes that on Day five of the trial it was confirmed by Mr. O'Dowling under direct examination by counsel for the plaintiff that he had ceased to act as a shareholder and a director of the plaintiff company in autumn or late summer of 1995. No exact date for this change in company ownership was available to the court. Mr. Sherlock also avers that Mr. O'Dowling confirmed this fact under cross-examination on Day six of the trial. Mr. Sherlock then refers to a number of admissions made by Mr. O'Dowling in relation to the funding of the litigation. On day nine of the trial, 20th March, 2012, Mr. O'Dowling stated under cross examination by counsel for the defendants that he had, from his own personal monies, funded the costs incurred in the proceedings brought by the plaintiff company up to that date. He stated that he had paid legal expenses incurred by the plaintiff company as they arose in the proceedings, he had made payments to counsel for the plaintiff for legal services provided by them to the plaintiff during the proceedings, he had paid for the preparation of all expert reports tendered in evidence in the proceedings and had maintained the proceedings and kept them going from his own personal funds. On Day 10 of the trial, 21st March, 2012, Mr. O'Dowling stated under re-examination by counsel for the plaintiff that he had entered a verbal agreement whereby if the plaintiff company was successful in its claim Mr. O'Dowling would "come back in" as a shareholder in the plaintiff company for the purposes of benefiting from any award of damages that the High Court would possibly make in his favour. The basis or terms of this re-entry to the shareholding of the plaintiff company was not made clear during the oral evidence given by Mr. O'Dowling.

7. Mr. Sherlock further avers that there was no basis for Mr. O'Dowling to believe that any costs ordered to be paid by the plaintiff company could be met by that company and that Mr. O'Dowling was to be a principal beneficiary of these proceedings if successful and funded the proceedings knowing that even if the defendants were successful in defending the action they would have to pay their own costs due to the impecunious position of the plaintiff company. According to the transcript of the trial of the action for Day

9, Mr. O'Dowling also stated under oath, in response to a question about what sort of legal expenses he discharged and as to how much he funded the litigation, that "most of it is done on a no foal no fee basis". According to the transcript of the proceedings on Day 9 Mr. O'Dowling also stated that he made payments to senior counsel for advice and that he funded the production of expert reports etc. On Day 10 of the proceedings Mr. O'Dowling, in reference to the agreement between himself and Mr. Riordan, accepted under cross examination that he had a financial interest in the proceedings.

8. Mr. Sherlock also exhibits a letter from the Revenue Commissioners which was sent to Mr. O'Dowling on the eleventh day of the trial being 22nd March, 2012, the day after Mr. O'Dowling stated that there had been an agreement between himself and Mr Riordan in relation to the funding of the proceedings which claimed to put him on notice as to a potential claim for costs arising out of these proceedings which would possibly be made by the defendants after a determination of the main proceedings had been made by Murphy J. This letter referred to the transcript extracts of the preceding days of the trial as set out above and to relevant jurisprudence in relation to the jurisdiction for the joining of a party as a defendant for the purposes of making that party liable for costs in the proceedings. This letter also set out the terms of an offer of compromise to Mr. O'Dowling, setting out that if the proceedings were discontinued at that stage the defendants would bear their own costs.

9. The proceedings were initiated by the plaintiff on 15th March, 1995 and it took 19 years before the case was finally heard and determined in 2013.

Submissions on behalf of the defendant/applicant

10. It is not in dispute between the parties that the decision of the Supreme Court in *Byrne v John S. O'Connor & Company* [2006] 3 I.R. 379 confirmed that there is a jurisdiction exercisable by this court for the making of an order for costs against a non-party to proceedings where those proceedings have been significantly personally funded by a person through a limited company for his personal benefit. This jurisdiction is derived from O. 15, r. 13 of the Rules of the Superior Courts and s. 53 of the Supreme Court of Judicature (Ireland) Act 1877.

11. In *Moorview Developments Ltd v. First Active plc* [2011] 3 I.R. 615 Clarke J. outlined in more detail the test to be applied by a court in making an order under this jurisdiction. Clarke J. stated at p.633-635:

> "[47]…The key factors seem to be the extent to which it might have been reasonable to think that the company could meet any costs if it failed, the degree of possible benefit to the non-party concerned, and any factors touching on whether the proceedings were pursued reasonably and in a reasonable fashion.
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> [48] On the facts of this case there does not seem to have been any basis for believing that any costs ordered to be paid by any relevant companies could have been met from within the resources of those companies for reasons which I have already analysed. It must have been absolutely clear that First Active would have had no ability to recover the costs of any of these proceedings from any of the relevant companies. Second, for the reasons which I have already analysed, it seems clear that the main beneficiary from these proceedings, if successful, would have been Mr. Cunningham and his wife. Mr. Cunningham, therefore, funded proceedings where he knew that First Active, even if it was successful, would have to bear the cost of these proceedings itself but where the benefit of the Cunningham Group winning would ultimately pass to Mr. Cunningham and his wife at a personal level. Those two factors overwhelmingly favour the making of the order sought. However, it is clear from the judgment of Tomkins J., that the court should also pay regard to the reasonableness of bringing or defending the proceedings or the reasonableness of the way in which the proceedings were conducted. It seems to me that there is very great sense in that proposition. The ultimate justification for the exercise of the jurisdiction must be to redress a potential injustice that could arise where a person is able to pursue litigation largely for his own benefit but with no risk as to costs because the litigation is conducted through a company. If the company loses, then the costs will be awarded against the company which is insolvent. If the litigation succeeds, then the benefit will ultimately accrue to the shareholder who funds the action. However, if it was a reasonable action to bring or defend (albeit it might be unsuccessful in the end) that is also a factor to be taken into account…
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> [50] One of the policy reasons why it is said that it is important that a jurisdiction of the type which I have identified exists, is to prevent parties having a "free ride" as to how they conduct litigation, designed for their benefit, without there being any real risk of a meaningful costs order being made against them…
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> [53] There is one further factor that I need to refer to which seems to me to be relevant on the facts of this case. Given that there was some doubt about the existence of the jurisdiction which I have identified in this judgment, it seems to me that it might well be relevant for a court in considering whether to exercise such a jurisdiction (at least in cases which came to trial prior to delivery of this judgment) to consider whether the person sought to be made liable as a non-party for costs was on reasonable notice of the fact that such an order might be sought.
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> [54] In this regard there is correspondence (to which I have referred) in which solicitors for First Active raised with solicitors on behalf of the Cunningham Group and Mr. Cunningham (the same solicitors represented all of the companies within the Cunningham Group and Mr. Cunningham personally in the linked cases) and made clear that First Active were contemplating seeking an order of the type now sought against the funder of the proceedings. That correspondence was at a relatively early stage in the proceedings before the bulk of the relevant costs had been incurred. Mr. Cunningham was, therefore, on notice that an application of this type was at least in contemplation. On the facts of this case it seems to me that the third party funder must be said to have been aware of a possible application of this type…"

12. Counsel for the defendant moving party submits that the defendant has satisfied the court as to the three tests which must be met in making such an order. On the question of whether it was reasonable to think that the plaintiff company could meet any costs if it failed in its action the defendant answers that this was not the case as the 2009 accounts of the plaintiff showed a deficit of €1, 192, 393 which has not been disputed in any affidavit by Mr. O'Dowling.

13. In relation to the second element of the test, the degree of possible benefit to the non-party concerned of maintaining the action in question, Counsel for the defendants submit that Mr. O'Dowling himself stated during his oral testimony that he had a "financial interest" in the outcome of the trial and that there was an agreement in existence between Mr. O'Dowling and the plaintiff to the effect that if the trial of the action was successful and the plaintiff company was in receipt of monies by way of damages Mr. O'Dowling would resume a position as a shareholder of an uncertain percentage in the company in order to take the benefit of such funds. Damages of €131m were sought by the plaintiff in these proceedings. Counsel for the defendant submits that had the plaintiff company succeeded in obtaining an award of that magnitude or any substantial award Mr. O'Dowling would have received a very significant windfall.

14. A third element of the test set out by Clarke J and applied in *Moorview Developments v. First Active plc.* [2011] 3 I.R. 615 is whether there are any factors in the circumstances of the case which touch on whether the proceedings were pursued reasonably and in a reasonable fashion. Counsel for the defendant submits that the losses claimed by the plaintiff company were unfounded and exaggerated. Counsel also submits that Mr. O'Dowling left the company in September, 1995 and started his own company, Sports Car Centre Limited, which became a competitor of the plaintiff and operated profitably. Murphy J. held in relation to this evidence at p. 229 that "this profitable venture could have been replicated within the plaintiff company to mitigate any losses that the plaintiff suffered. In the circumstances, it is difficult to understand the plaintiff's claim that VRT was the cause of its losses". Counsel also relies on the finding of Murphy J at pp. 231-232 of the judgment that the plaintiff fell into the *post hoc ergo propter* hoc fallacy in claiming that the decline in the plaintiff company's share in the Japanese import market was caused by the introduction of VRT. The Court found that since competitors of the plaintiff did not see a decline in their market share until a few years later than that of the plaintiffs, it could not be true to say that this decline resulted from the introduction and operation of the VRT system by the defendants. Counsel for the defendant also relied on the statement of Murphy J at p. 228 of the judgment to the effect that: "Even if the court were…to treat damages as a separate heading it is difficult to see from the pleadings how the components of the claim for some €130million could arise." Counsel submits that in maintaining such a claim for damages the plaintiff company failed to act in a reasonable manner.

15. In relation to the question of whether the person sought to be made liable as a non-party for costs, in this case Mr. O'Dowling, was on reasonable notice of the fact that such an order might be sought and counsel for the defendants submits that as soon as the defendants became aware from the evidence given by Mr. O'Dowling in oral testimony that he was funding and maintaining the litigation and would personally benefit from any successful outcome they notified him in the letter dated 22nd March, 2012, of their intention to join him as a defendant for the purposes of making him personally liable for the costs of the proceedings. There was also an offer of compromise made but the proceedings continued for a further 22 days after this offer was made.

Submissions on behalf of Mr. O'Dowling, Respondent to the Defendant's Motion

16. Counsel for Mr. O'Dowling, during the course of the hearing of this motion, did not contest the existence of the jurisdiction of this Court to make the order sought however it was submitted that the court should take cognisance of a statement made by Tompkins J. in the New Zealand decision of *Carborundum Abrasives Limited v. Bank of New Zealand (No. 2)* [1992] 3 N.Z.L.R. 757 which was cited with approval and adopted by Clarke J. in his decision in *Moorview Developments Limited v. First Active plc* [2011] 3 I.R. 615. Tompkins J. stated at p. 764 that:

> "the discretion to award costs against a person standing behind a non-party should only be exercised against a person standing behind a company litigant in exceptional circumstances. Such an order would be justified only where the circumstances demonstrated that the connection or involvement was such as to justify the making of what I accept should be regarded as an exceptional order."

Counsel emphasises that the jurisdiction to make such an order is exceptional in nature and should not be exercised other than in exceptional circumstances.

17. Counsel submitted that the *Moorview* litigation, in which an order similar to that sought on this application was made, was such an exceptional case due to the severe criticisms which Clarke J made of the litigation and the fact that the defendants were granted a non-suit or direction on most issues at the close of the plaintiff's case. Counsel also submits that although this application was threatened in the course of the trial on 22nd March, 2012, it was not actually brought for over a year until after the judgment was given on 15th March, 2013.

18. Counsel submits that in contrast to the situation in *Moorview* where the Cunningham Group of companies had collapsed and the situation in *Carborundum Abrasives Limited v Bank of New Zealand (No. 2)* [1992] 3 N.Z.L.R. 757 where the plaintiff company was in receivership, the plaintiff company in the within proceedings is not in such a position. The plaintiff company did make payments in respect of the litigation. Counsel refers to p. 65 of the decision of Murphy J at which it is stated that "Mr. Riordan confirmed the plaintiff paid the legal costs in 1994. In 2010/2011 legal costs were funded from Mr. O'Dowling's Sports Car Centre by way of a loan from the Sports Car Centre to UCII." Counsel also submits that it is clear from the transcript of the hearing in the original action that Mr. O'Dowling had stated under oath that most of the work in the case was done by lawyers on a no foal, no fee basis. In 2009, 2010 and 2011 Mr. O'Dowling paid for expert reports not due to any agreement with Mr. Riordan but because he had sold certain property at the time and therefore had the necessary funds available. Counsel submits that this evidence indicates that it could not have been the case that the defendants would not have had to deal with this action without the financial assistance of Mr. O'Dowling since there were a number of other factors relevant to the funding of this litigation. Counsel submits that these circumstances are also not sufficiently exceptional to warrant the making of the order sought.

19. Counsel for the defendant also relied on a decision of Clarke J in *Thema International Fund plc. v. HSBC Institutional Trust Services (Ireland) Limited [*2011] 3 I.R. 654 in support of her submission that there is nothing objectionable about a person with a legitimate interest in the outcome of proceedings in providing funding for the proceedings. It was submitted that in this instance Clarke J drew a distinction between persons with such a legitimate interest such as creditors or shareholders and professional third party funders who make a commercial decision to invest in litigation with a view to making a profitable return. Clarke J. stated at p. 662 of his decision in this case that:

> "After all, if the litigation is well founded then the shareholder or creditor is only getting their due. If an insolvent company has a good cause of action, then the shareholders or creditors who might benefit by any recovery on foot of that cause of action are getting no more than their entitlements. If the proceedings are *bona fide* progressed, then such parties are simply funding an entity in which they have a legitimate interest in the hope that that entity will be able to pay them monies due (in the case of creditors) or dividends or capital distributions (in the case of shareholders)."

At p. 663 of the decision in this case Clarke J. defined a professional third party funder as "a third party, who has no direct or indirect connection with the litigation, [and] becomes involved by 'buying in' to the case on the basis of an agreement to fund the action in return for sharing in the proceeds." Clarke J. further stated at p.663 of his decision that:

> "Any company which lacks funds always has the possibility that its shareholders (or its creditors) may choose to provide further funding for a whole range of reasons not confined to potential litigation. Commercial judgment will often lead to parties with a direct interest in a particular enterprise investing further sums. There is, therefore, in my view a substantial difference between a party who already has an indirect link to the impecunious party and who has, therefore, already got an indirect interest in the relevant litigation, on the one hand, and a party with no such prior link who simply buys into the litigation on the other hand. A party in the position of the defendant must be aware that shareholders in, or others with an indirect interest in, the plaintiff may well chose to fund the plaintiff so as to enable it to pursue litigation which is in

the plaintiff's interests but which will also, potentially, indirectly benefit them by increasing the value of the shareholding in the plaintiff or permitting the plaintiff to pay its lawful obligations."

20. Counsel submitted in support of this point that, by way of example of the frequency with which interested parties do fund litigation, it is typical for liquidators of insolvent companies to institute proceedings in the name of an insolvent company challenging payments made by the insolvent company on grounds such as fraudulent preference or other grounds. Such proceedings may be funded by creditors such as the Revenue Commissioners and there is nothing improper according to Counsel for the respondent in an interested party such as a creditor of an insolvent company in funding litigation by an impecunious plaintiff.

21. Counsel for the respondent submitted that Mr. O'Dowling is a person who at all material times had a legitimate interest in the outcome of the proceedings and in providing funds to the Company. Counsel submits that Mr. O'Dowling was originally a shareholder and director of the company at the time the within proceedings were initiated and Counsel submits that the evidence of Mr. O'Dowling and Mr. Riordan was that the decision of these two parties to cease operating the plaintiff company together was amicable and based simply on the fact that the company could not support two directors salaries to a sufficient degree. Since Mr. O'Dowling was a shareholder of the company at the time of the alleged wrongful acts he was a person with an interest in the financial success of the company and was a person who had, in the terms of Clarke J. in *Thema International Fund plc. v. HSBC Institutional Trust Services (Ireland) Limited* [2011] 3 I.R. 654, a legitimate interest in the funding of the proceedings.

22. In relation to the third element of the test set out by Clarke J. in *Moorview Developments v. First Active plc.* [2011] 3 I.R 615, the reasonableness of the conduct of the proceedings, counsel for the respondent submits that these proceedings were reasonably brought and pursued. The fact that the proceedings were not successful does not render them unreasonable. Counsel distinguishes the situation which pertains in relation to this litigation from the *Moorview* proceedings, the conduct of which was criticised by Clarke J. It was stated at p. 653 of the *Moorview* decision that "the overall costs of the proceedings from the perspective of [the defendant] were significantly increased by reason of serious procedural failures on the part of the [funding parties]". Counsel submits that these criticisms could not be applied to the within proceedings. It was submitted that the proceedings raised serious issues of fact and law, the proceedings were institued with the benefit of advices of senior counsel, the complaints made were supported by four expert economists who gave evidence in the course of the proceedings and by other experts such as tax practitioners. Counsel also submits that the proceedings were reasonably conducted as the decision of Murphy J. has been appealed to the Supreme Court on significant grounds. In *Moorview* a direction of non-suit was made by the court in relation to a large number of the issues which were raised by the plaintiffs. This did not occur in this case.

23. Counsel submits that any blame in relation to the reasonableness of the conduct of these proceedings must be laid at the door of the defendants. It is submitted that the proceedings were instituted in March, 1995 but there were significant delays in bringing the matter on for trial, due in the main to the slow progress made by the parties in relation to discovery. Counsel relies on the decision of Laffoy J. in relation to the discovery in this case in *Used Car Importers of Ireland v. The Minister for Finance and Ors* [2006] IEHC 90 ordering that the Revenue Commissioners make discovery of key data necessary in order for the plaintiff to make out its claim. Counsel submits that in all the circumstances the within proceedings were reasonably conducted.

24. In relation to the degree of possible benefit to the non party it is submitted by counsel for the respondent that the position of Mr. O'Dowling is to be distinguished from that of Mr. Cunningham and his wife in the *Moorview Developments v. First Active plc.* [2011] 3 I.R 615 litigation where it was held by Clarke J. that the couple would have been the main beneficiaries of the proceedings. It is not the case that the defendant to these proceedings, by reason of the involvement of Mr. O'Dowling alone, was required to meet this case and it cannot be said that Mr. O'Dowling was to be the main beneficiary of these proceedings as the plaintiff company and Mr. Riordan also stood to benefit from any successful outcome.

25. Counsel for the defendants submitted in response to the submissions made by counsel for Mr. O'Dowling that the latter was not a *bona fide* shareholder nor a director. It was also submitted that there was no evidence on which to base a submission that any of the costs attendant upon the litigation were discharged by any person other than Mr. O'Dowling. All the costs in this litigation paid since the proceedings were instituted in 1995 were paid by Mr. O'Dowling and that Mr. O'Dowling has not sworn an affidavit in support of his view of the evidence on this motion. In response to the submission that the within proceedings are distinct from both *Moorview Developments v. First Active plc.* [2011] 3 I.R 615 and *Carborundum Abrasives Limited v. Bank of New Zealand (No. 2) [*1992] 3 N.Z.L.R. 757 as in these cases the companies from which costs were sought were both impecunious but in the within proceedings the plaintiff company is not insolvent and it was submitted by counsel for the defendant that this is not relevant since the plaintiff company is unable to pay the costs of the defendant in defending this litigation regardless of whether it remains technically solvent or not. Mr. O'Dowling was aware that the plaintiff company could not pay the costs of the defendant. Counsel submits that the fact that proceedings were brought reasonably or defended reasonably cannot in itself be a bar to the making of the type of order sought on this application. It was submitted that Clarke J. in *Moorview* placed little weight on this factor in coming to his conclusion and in making the order sought. Counsel for the defendant also submits that the decision of Laffoy J. in relation to a discovery aspect of the within proceedings does not substantiate her submission that the delay in bringing on the proceedings was caused by the defendants. Counsel for the defendant also submits that the jurisdiction is not in fact exceptional in nature.

Conclusion

26. It is not in dispute between the parties that there is jurisdiction exercisable by this Court to join a non-party for the purpose of making an order for costs against them, and that this jurisdiction is derived from O. 15. r. 13 of the Rules of the Superior Courts and s. 53 of the Supreme Court Judicature (Ireland) Act 1877.

27. In arriving at my decision I propose to follow the rationale as expressed by Clarke J. in *Moorview Developments Limited v. First Active Plc* [2011] 3 I.R. 615, and his decision in *Thema International Fund Plc v. HSBC Institutional Trust Services (Ireland) Ltd* [2011] 3 I.R. 654 and the decision of Tomkins J. in the New Zealand decision of *Carborundum Abrasives Ltd v. Bank of New Zealand (No.2)* [1992] 3 NZLR 757 which was cited with approval and adopted by Clarke J. in his decision in *Moorview*.

28. The first factor to be taken into account by this Court is as to whether or not it might have been reasonable to consider that the plaintiff, who is primarily liable for the costs for which the non-party may be held to be liable, could meet any costs if it failed in the proceedings, which it did in this instance. It appears to this Court to be reasonably clear and not disputed that the plaintiff company was and is not in a position to meet the order which has been made against it to pay the costs of the successful defendants herein to be taxed in default of agreement.

29. As regards the degree of possible benefit of the proceedings to Mr. O'Dowling and his particular involvement, this Court is satisfied that Mr. O'Dowling had at least an indirect connection with the litigation and that he is not a party with no prior link. He was a director and a 50% shareholder in the company at the material time of the alleged cause of action and at the point in time when the proceeding were instituted. He ceased to be a director and shareholder at some time later in 1995. He certainly made a contribution

to the costs of the plaintiff's proceedings and made a number of admissions in this regard while giving evidence before the trial judge. There does not appear to be any direct evidence as to the extent of his contribution in monetary terms, and it is clear from the transcript of the hearing in the original action that Mr. O'Dowling stated under oath that most of the work in the case on the plaintiff's behalf was done by the lawyers on a no foal, no fee basis. It does appear reasonable to conclude that Mr. O'Dowling funded the ongoing costs to a certain level but not a substantial level particularly if counsel were prepared to act on a no foal, no fee basis. It is also the position that this Court does not have the benefit of knowing the amount of funds as contributed by Mr. O'Dowling to the plaintiffs for the purpose of litigation, and that Clarke J. in his conclusion in *Thema International Fund v. HSBC Institutional Trust Services (Ireland)* [2011] 3 I.R. 654 concluded that it was necessary for a senior official within the plaintiff to give undertakings which, *inter alia*, provided that proper records be maintained and kept identifying the amount and source of any third party funding.

30. Clarke J. in *Thema* asserts that there is nothing objectional about a person with a legitimate interest in the outcome of proceedings providing funding for the proceedings. Clarke J. drew a distinction between persons with a legitimate interest such as creditors of shareholders and a professional third party funder who makes a commercial decision to invest in litigation with a view to making a profitable return. He stated at p. 662 of his decision that:-

> "After all if the litigation is well founded then the shareholder or creditor is only getting their due. If an insolvent company has a good cause of action, then the shareholders or creditors who might benefit by any recovery on foot of that cause of action are getting no more than their entitlements. If the proceedings are bona fide progressed, then such parties are simply funding an entity in which they have a legitimate interest in the hope that the entity will be able to pay them monies due (in the case of creditors) or dividends or capital distributions (in the case of shareholders)."

31. At p. 663 of his decision Clarke J. defined a professional third party funder as a third party who has no direct or indirect connection with the litigation and becomes involved in buying in to the case on the basis of an agreement to fund the action in return for sharing the proceeds. He went on to state that in his view there was a substantial difference between a party who already has an indirect link to the impecunious party and who has, therefore, already got an indirect interest in the relevant litigation on the one hand, and a party with no such prior link who simply buys into the litigation on the other hand.

32. In my view on the evidence available, Mr. O'Dowling can certainly be regarded as a non-party who partially funded the litigation but was not a professional funder who had no direct or indirect connection with the litigation. Unlike the situation in *Mooview*, however, it does not appear that Mr. O'Dowling was the funder of all the litigation nor is the situation clear that Mr. O'Dowling would have been the beneficiaries of a successful outcome by an overwhelming margin, or have been the main beneficiary. The situation appears to have been that Mr. O'Dowling would have shared the proceeds with his previous co-director and co-shareholder, Mr. Fintan Riordan. Clearly, it is the case that Mr. O'Dowling would benefit from the proceedings if they were successful.

33. There was extensive evidence which if accepted by the trial judge may have led to a different conclusion. It is a recognised hazard of commercial litigation that the evidence, both factual and professional, as offered on behalf of a party to the litigation may or may not be accepted by the trial judge as opposed to the factual and professional evidence as offered on behalf of the other party. The fact that the proceedings were not successful does not render them unreasonable. In the particular circumstances of this case the judgment of the trial judge has been appealed to the Supreme Court.

34. This situation if very far removed than that which prevailed in "Moorview" which resulted in a non-suit at the close of the plaintiff's case. It does not appear that in the particular circumstances of this case the costs were significantly increased by reason of serious procedural failures on the part of the plaintiff, or in some way connected with or to Mr. O'Dowling. It does appear that the proceedings raised significant issues of fact and law and that the proceedings were instituted with the benefit of advices of senior counsel and that the plaintiff's case was supported by a number of credible expert witnesses. It also appears that there were significant issues with regard to discovery which resulted in an order of this Court (Laffoy J.) of 1st March, 2006. In describing the proceedings Laffoy J. refers to the fact of an order which was made by Costello P. on 17th July, 1995, wherein by consent of the parties a timeframe was fixed for delivery of pleadings and it was further ordered that each side should made discovery within six weeks from the delivery of the defence of the documents which are or have been in their respective possession or power relating to the matter in question in the action. As Laffoy J. states unfortunately the enthusiasm for a speedy resolution of the matter which obviously inspired that order, appears to have dissipated and three years later by order of this Court (Geoghegan J.) as dated 22nd June, 1998, the first and second named defendants were ordered to make further discovery of specific documentation. The subject matter of the judgment of Laffoy J. as delivered on 1st March, 2006, was an appeal from an order of the Master on foot of a motion for further and better discovery which the plaintiff issued on 17th May, 2004, seeking particular documents. The Master previously on 10th December, 2004, had directed discovery of Category D as sought by the plaintiffs which was access for the plaintiff and his experts to the full database of all vehicles registered for VRT as would allow them to conduct such studies as are necessary to establish the manner in which the tax has been administered and the appeal itself comprised certain other categories described as A, C and E ,and in the judgment of Laffoy J. an order was made for discovery in the terms of para. C of the notice of motion.

35. Accordingly, it is clear that there were very significant issues with discovery and suffice to say it does not appear that the plaintiff is in any significant way criticised in this regard. In fact, it appears to this Court in reading the judgment of Laffoy J. of 1st March, 2006, that the plaintiffs were pursuing very particularised and intricate data obviously with a view to instructing their expert witnesses. I do not consider that the costs of the proceedings were increased by the manner in which the proceedings were pursued by the plaintiff company. I accept that the trial judge made reference to the extent of the plaintiffs claim for monetary damages in the sum of €130m, but he did so by reference to the pleadings and the components of the claim and stated that he found it difficult to see how the claim could arise. He did not make any determination on the evidence adduced before him as to the level of damages the plaintiff may have been entitled to if successful in the claim. In all the circumstances in this regard the submissions on the defendants behalf that the proceedings were not pursued reasonably or in a reasonable fashion do not find favour with the court.

36. I take the view that having regard to the fact that this Court has to exercise its discretion in a reasonable manner, it is necessary to consider the aspect as to whether or not Mr. O'Dowling was put on reasonable notice of the consequence of his actions and I am satisfied to accept that prior to 22nd March, 2012, he was not on notice but clearly with the letter of 22nd March, 2012, he was on notice.

37. I further take the view in the exercise of my discretion that I have regard to the views which were cited with approval and adopted by Clarke J. in *Moorview* in respect of the *New Zealand decision of Carborundum Abrasives Ltd v. Bank of New Zealand (No.2)* [1992] 3 NZLR 757 and the judgment of Tompkins J. wherein he expressed the view that discretion to award costs against a non-party should only be exercised against a person standing behind a company litigant in exceptional circumstances. Such an order would be justified only where the circumstances demonstrated that the connection or involvement was such as to justify the making of what one accepts should be regarded as an exceptional order.

38. I consider it appropriate to state that in normal circumstances clearly it is preferable that an application such as this be made to the trial judge. In this instance that was not possible.

39. The conclusion of this Court is that the order as sought has to be regarded as exceptional. Having considered the judgment of Clarke J. in *Moorview*, I am satisfied that there are a number of distinguishing factual features with this case which I have referred to herein. The court is satisfied that if the plaintiff company was to fail with the principal proceedings herein, it was always reasonable to conclude that the company was not going to be in a position to meet any award of costs made against it. Mr. O'Dowling was going to benefit financially resulting from the proceedings if they were successful, but he was not a professional funder without a connection to the litigation. The proceedings in the view of this Court were pursued reasonably and in a reasonable fashion and were decided by the trial judge on the basis of a preference of the defendants' factual and expert evidence, as against that offered on the plaintiffs behalf. Mr. O'Dowling was not on notice of the order as sought herein prior to receiving the letter of 22nd March, 2012, on the 11th day of the hearing of the proceedings before the trial judge.

40. Insofar as the defendants rely on the offer as contained in the letter of 22nd March, 2012, it has to be borne in mind that the company was the plaintiff and not Mr. O'Dowling.

41. The outcome to this application is relatively finely balanced and the onus rests on the defendants as the moving party. I do not consider that the evidence and submission of the defendants is sufficient to satisfy this Court that in the exercise of its reasonable discretion Mr. O'Dowling should be joined as a fifth named defendant to the within proceedings and should be directed to be personally liable for the costs awarded in favour of the first, second, third and fourth named defendants in these proceedings.

42. Accordingly, the reliefs as sought by the defendants herein pursuant to the notice of motion as dated 15th March, 2013, are refused.