Neutral Citation Number: [2011] IEHC 111

THE HIGH COURT

2010 259 MCA

BETWEEN

JABAAR LIMITED

PLAINTIFF

AND

TOWNLINK CONSTRUCTION LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 18th day of February, 2011.

1. The applications

1.1 These proceedings were initiated by an originating notice of motion issued on behalf of the plaintiff (Jabaar) by its solicitors, O'Sullivan & Associates (Jabaar's solicitors) on 7th October, 2010. The motion, which was returnable for 22nd November, 2010, sought various reliefs under the Arbitration Act 1954, the primary relief being an order setting aside the award of an arbitrator. The award arose out of a reference to arbitration on foot of a building contract. After a hearing in July 2010 the arbitrator, Kevin Brady, issued a corrected interim award on 26th August, 2010 directing that Jabaar should pay to the defendant (Townlink) the sum of €441,654.84 and Townlink's costs of the reference.

1.2 On 19th November, 2010 Townlink issued a notice of motion in these proceedings returnable for 6th December, 2010 seeking an order striking out the claim of Jabaar on the basis that it had been dissolved and was no longer on the register of companies or, in the alternative, an order for security for costs pursuant to s. 390 of the Companies Act 1963 against Jabaar.

1.3 After both motions had been listed for hearing, the Court was told that Jabaar was withdrawing its application, which has rendered Townlink's application unnecessary. The issue which has arisen between the parties is that Townlink contends that, having regard to the dissolution of Jabaar and its non-existence when the proceedings were issued, Jabaar's solicitors should be directed to pay Townlink's costs of the proceedings. The sequence of events, which is of importance, will be outlined next.

2. The chronology

2.1 Jabaar, which had been incorporated in 2003, was dissolved with effect from 20th August, 2010, as I understand it, for failure to file annual returns in the Companies Registration Office (CRO) in accordance with its statutory obligations. According to the CRO printout which has been exhibited, the company's last annual return filed was for the year to 30th September, 2008.

2.2 Jabaar's originating notice of motion was grounded on an affidavit which was sworn by a solicitor in Jabaar's solicitors' firm on 7th October, 2010. The proceedings were served on Townlink by service on its solicitors on 7th October, 2010. Having carried out a company's office search against Jabaar, and having discovered that it was dissolved, on the following day, 8th October, 2010, Townlink's solicitors wrote to Jabaar's solicitors pointing out that Jabaar had been dissolved with effect from 20th August, 2010 and querying how it was in a position to give instructions to Jabaar's solicitors to issue and serve the proceedings and how Townlink's costs would be dealt with. Further, the proposals of Jabaar's solicitors for security for costs were sought. There was no response to that letter. Townlink's solicitors sent a reminder on 12th October, 2010 seeking a response and referring to "consequences which may result from the issue of proceedings on behalf of a client who does not exist". Mr. Cathal O'Sullivan, a solicitor in Jabaar's solicitors' firm, in an affidavit sworn by him on 10th February, 2011, averred that until he received the letter of 12th October, 2010 and spoke to the member of Townlink's solicitors' firm who wrote it, he was unaware that Jabaar had been struck off the register. He immediately contacted his "instructing client", John O'Connor. Mr. O'Connor is registered in the CRO as a director of Jabaar. Mr. O'Sullivan has averred that Mr. O'Connor's initial reaction was that he was unaware of the striking off and that he would instruct Jabaar's accountants to reinstate the company.

2.3 Chronologically, the next step taken in the proceedings was the issue of Townlink's notice of motion on 19th November, 2010. That motion was grounded on an affidavit sworn by the solicitor in Townlink's solicitors' firm dealing with the matter. In paragraph six of that affidavit, which was sworn on 19th November, 2010 and filed on the same day, it was averred:

> "I say that as [Jabaar] is dissolved and was so at the time of issue of the within proceedings, the proceedings ought to be struck out as [Jabaar] no longer exists. I further say that in such circumstances [Townlink] should be entitled to its costs as against [Jabaar's solicitors], who commenced proceedings on behalf of a company that is dissolved."

In addition to addressing the ground on which Townlink sought to have the proceedings struck out, other matters were addressed in the affidavit: the alleged inability of Jabaar to pay costs, which was illustrated by reference to the last set of accounts of Jabaar which had been filed in the CRO in relation to the year ended 31st December, 2006; and Townlink's defence to the proceedings. In connection with the s. 390 element of the application, there was exhibited in the affidavit an estimate of the costs of the proceedings prepared by Peter Fitzpatrick & Co., Legal Costs Accountants.

2.4 Both applications were adjourned until Monday, 13th December, 2010. As they were not matters which could be dealt with in a Monday list, they were transferred to the Chancery List to fix dates on 15th December, 2010, when both motions were listed for hearing on 11th February, 2011, both parties being given leave to file further affidavits. The proceedings were listed for mention in late January to ensure that the parties would be ready to proceed on 11th February, 2011. On 24th January, 2011 the Court was

informed that Jabaar was withdrawing the proceedings and that the hearing date of 11th February, 2011 should be vacated.

2.5 On 28th January, 2011 Townlink's solicitors informed Jabaar's solicitors that they would be seeking costs against that firm, as it was not open to them to seek an order for costs against Mr. O'Connor and it would be inappropriate to seek an order against an entity which did not exist. In response, by letter dated 31st January, 2011 Jabaar's solicitors indicated that they would be vigorously defending an application for costs.

2.6 In his affidavit sworn on 10th February, 2011, which was filed to address the costs issue, Mr. O'Sullivan outlined his position in "the interim period", which I assume to mean from the time he told Mr. O'Connor that Jabaar was struck off on 12th December, 2010 to the time he was instructed to withdraw the proceedings. Initially, he was advised by Mr. O'Connor that Jabaar's accountants were in fact putting together the relevant documentation to have the company reinstated. Later, on or about 22nd November, 2010, Mr. O'Connor was advised by his "financial advisers" that taking the steps necessary to reinstate the company would take some time. He had considerable discussions with Mr. O'Connor in relation to the proceedings. In the light of those discussions and given the advice which Mr. O'Connor had received from his "financial advisers", Mr. O'Connor decided not to proceed with reinstating the company at that time and to withdraw the proceedings. Mr. O'Sullivan was given instructions to withdraw the proceedings on 24th January, 2011 and he immediately advised Townlink's solicitors by telephone of the situation. Mr. O'Sullivan has further averred that his instructions are that Jabaar may be reinstated but unfortunately it was not possible to do so within the limited timeframe.

2.7 Before they were informed that the proceedings were to be withdrawn, Townlink's solicitors filed a replying affidavit to Jabaar's application, which was sworn by T.J. Walsh, a director of Townlink, on 13th January, 2011. That affidavit largely replicated the affidavit grounding Townlink's motion and it was reiterated in it that Townlink had been advised that it was entitled to its costs as against Jabaar's solicitors who had commenced proceedings on behalf of a company which was dissolved.

2.8 I am satisfied that at all material times the stance of Townlink's solicitors was that Townlink was entitled to costs against Jabaar's solicitors and that that was communicated to Jabaar's solicitors from the outset, albeit somewhat obliquely in the letter of 8th October, 2010.

3. The bases of Townlink's claim as against Jabaar's solicitors

3.1 Counsel for Townlink argued that Jabaar's solicitors could be directed to pay Townlink's costs on one or other of the following bases:

> (a) under the Court's inherent jurisdiction over solicitors; or
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> (b) under Order 99, rule 7 of the Rules of the Superior Courts 1986 (the Rules).

I will consider each basis in turn.

4. The Court's inherent jurisdiction over solicitors

4.1 The liability of a solicitor for costs in the context of the solicitor/client agency relationship is summarised as follows in O'Callaghan on *The Law of Solicitors in Ireland* at para. 4.20 (Butterworths, June 2000):

> "It was held in *Simmons v. Liberal Opinion Ltd*. that a solicitor assuming to act for one of the parties to an action warrants his authority, and is personally liable to the opposing party for costs, if it turns out that the client for whom he is assumed to act does not exist, or has revoked the authority. . . . In any instance where proceedings are instituted, defended or continued without authority, a solicitor is similarly liable to costs to the other party. Any application to visit the solicitor personally with costs should be made promptly, for the party whom the solicitor purports to represent may ratify the solicitor's actions retrospectively."

4.2 The first sentence in the quotation from O'Callaghan is a replication of the head note of the report of the decision of the Court of Appeal in *Simmons v. Liberal Opinion Ltd*. [1911] 1 KB 966. In that case the plaintiff had brought an action for libel against the defendant which was named in the newspaper which printed the alleged libel as its publisher. A solicitor, Mr. Dunn, entered an appearance on behalf of the defendant and delivered a defence admitting publication by the defendant of the words complained of in the statement of claim. He also prepared an answer to interrogatories and an affidavit of documents sworn by a deponent who averred that he was the managing director of the defendant company. Before the matter went to trial the plaintiff's solicitors who had researched the status of the named defendant and had carried out a company's office search and found that no company was registered under the name Liberal Opinion Ltd. asked Mr. Dunn to inform them of the exact constitution of "Liberal Opinion", for example, whether it was a partnership. Mr. Dunn's response was to suggest that the plaintiff's solicitors continue their own research. After the trial had started Mr. Dunn was definitely informed by the deponent of the affidavit of documents that the company had not been actually registered under the Companies Act nor under the Industrial and Provident Societies Act 1893, although it would appear that an application was pending under the Act of 1893. On those facts, the Court of Appeal held that Mr. Dunn was liable for the costs of the action. The basis on which that decision was arrived at is explained in the following passage from the judgment of Fletcher Moulton L.J. (at p. 972):

> "It has always been held that a solicitor who enters an appearance warrants that he has authority from the client to enter that appearance. This is a matter of importance to the plaintiff, because if that appearance is not entered no action can be carried on. Judgment comes at once, and therefore where there is no existing defendant the plaintiff is not exposed to the costs of an abortive action.
>
> This is a principle which has not only long been recognized, but it is a principle which is almost a necessity to the procedure in our Courts. A plaintiff cannot challenge the acts of the defendant's solicitor in the action. He is bound to treat them as acts authorized by the defendant himself, and if it were not held that the solicitor warrants that he has authority from his client to do all the things necessary for the action the gravest injustice might often be done. So I have no hesitation in coming to the conclusion that we ought to treat Mr. Dunn as having warranted his authority to enter the appearance and accordingly to hold him liable to pay the costs of the plaintiff in this action."

4.3 Other examples in which the courts of the United Kingdom have considered the principle applied by Fletcher Mounton L.J. were cited by counsel for Townlink in her submissions, namely:

(a) *Yonge v. Toynbee* [1910] 1 KB 215

That was also a decision of the Court of Appeal and was referred to in the judgment of Cozens-Hardy M.R. in the *Simmons* case as "a recent illustration" of the well established principle that the solicitor must be held to warrant the authority which he claims as representing his client. In that case, the solicitors whom it was sought to make liable for costs had been instructed by a client to conduct his defence to an action which was then threatened and was afterwards commenced against him. Before the commencement of the action the client became, and was certified as being, of unsound mind. In ignorance of that, the solicitors entered an appearance in the action and delivered a defence to which the plaintiff replied, and other interlocutory proceedings took place in the action. However the action did not come on for trial because the plaintiff's solicitors were informed that the defendant had been certified as being of unsound mind. On an application for costs against the solicitors who had purported to defend the proceedings, the Court of Appeal held that the solicitors who had taken on themselves to act for the defendant in the action had thereby impliedly warranted that they had authority to do so, and therefore were liable personally to pay the plaintiff's costs of the action.

(b) *Fernée v. Gorlitz* [1915] 1 Ch. 177

That was a decision of the Chancery Division of the High Court. In that case, the solicitor had commenced an action on behalf of an infant by her next friend who was also an infant. It was held that the solicitor was personally liable, on a solicitor and client basis, for the costs which the defendants had incurred in defending the action, including costs of an application to set aside the writ. In his judgment, Eve J. stated (at p. 180) that, in instituting the action on behalf of the infant, the solicitors responsible for the proceedings had represented to the defendants that the next friend by whom the infant was suing was qualified by age to act in that capacity. However, he was not. While acknowledging that the solicitors may have been misled, he stated that they took the risk and, in the event, the issue was the extent of the liability they had come under by reason of the representation turning out to be true. He held that the defendants were entitled to damages and that the measure of the damages was the costs which they had incurred in defending the action, including the costs of the application, to be taxed as between solicitor and client (p. 181).

(c) *Nelson v. Nelson* [1997] 1 WLR 233

That was a decision of the Court of Appeal. While the application for costs against the solicitor personally was not successful in that case, the analysis of the jurisdiction contained in the judgments in the Court of Appeal is helpful in identifying the relevant principle. The facts were that the plaintiff had instructed the solicitors to act on his behalf in respect of an interest in a property without disclosing that he was an undischarged bankrupt. When the solicitors discovered that the property had been sold by the first defendant, they obtained a Mareva injunction to protect the proceeds of sale. On the return date of the injunction the solicitors learned that the plaintiff was an undischarged bankrupt and the injunction was discharged because the property had vested in the trustee in bankruptcy. Waller L.J., having stated (at p. 239) that in a case where the Court orders a solicitor to pay the costs when he is acting without authority the Court is acting under its inherent jurisdiction, went on to analyse the circumstances in which the solicitor will be held personally liable in the following passage (at p. 240):

> "It is in a situation in which a solicitor is entirely innocent but may be acting without authority that it becomes really important to analyse the basis on which he may be held liable to pay the costs of the opposing party. There is no question that if the person for whom the solicitor purports to act does not exist, e.g. a defunct corporation, the solicitor is, on the analogy of breach of warranty of authority, held liable to pay the costs. Similarly, if the capacity of the would-be client is such that the client is simply not able to instruct a solicitor, the solicitor will be held liable to pay the costs on the same analogous basis, e.g. a minor or a person of unsound mind. *Yonge v. Toynbee* is an example of the latter case. But, in such cases, it is I think of some importance (1) that the persons or entities simply have no power to retain solicitors at all and thus (2), applying the analogy of want of authority, it need go no further than warranting that the solicitors have a principal who has authorised them, as opposed to a warranty that the solicitor has the principal who is himself authorised. There is a distinction between those warranties, and in exercising its supervisory jurisdiction it seems to me important to analyse precisely what warranty by analogy should be imposed on a solicitor if he is to be rendered liable in costs."

Having found that the bankrupt did not have the power to commence the proceedings in issue, Waller L.J. went on to consider what warranty on the part of the solicitor should be implied: was it that he had the authority of the person entitled to enforce the rights in relation to the property, or was it merely a warranty that he had a retainer from the plaintiff and the plaintiff was a person against whom a costs order could be made. He held it was the latter and that it was complied with. However, he made the following observations (at p. 241), which I think it is worth recording:

> "First, because even in the want of authority case the court is exercising its inherent jurisdiction, it must be right to say that the court ultimately has a discretion. But, second, it is of such importance that solicitors do not commence proceedings without authority leaving the opposing party without even a person or entity against whom an order for costs can be obtained, that it is difficult to contemplate circumstances where, if the lack of authority leads to that result, the discretion would be exercised in favour of the solicitors. The warranty by analogy, however, is not a warranty of solvency or that the costs will be recovered; it is that the plaintiff exists and has authorised the proceedings and no more."

4.4 The Court has not been referred to any authority in this jurisdiction in which the personal liability of a solicitor for costs incurred by the opposing side in circumstances where the party for whom the solicitor represented he was acting by either commencing, or entering an appearance to defend, the proceedings did not exist has been determined. However, the following passage from the judgment of Finnegan P. in *Kennedy v. Killeen Corrugated Products Ltd*. [2007] 2 I.R. 561 (at para. 8) recognises the existence of the inherent jurisdiction of the Court to impose personal liability for costs on a solicitor in such circumstances, albeit *obiter*:

> "The inherent jurisdiction of the High Court over solicitors has not been affected by the Solicitors Acts 1954 to 2002 . . .. Order 99, r. 7 of the Rules . . . has its origin in the exercise of that jurisdiction. The courts have fixed solicitors personally with costs in a wide variety of circumstances - acting for either plaintiff or defendant in an action without authority, joining a plaintiff without his authority, acting for a non-existing plaintiff, defending an action with knowledge that no defence is possible, failure to deliver bills of costs, acting against a former client, instituting fraudulent proceedings, instituting a collusive action, instituting a frivolous and vexatious action, unreasonably pleading fraud and undue influence. In short, the jurisdiction has been exercised where there has been improper conduct during proceedings."

(Emphasis added)

4.5 By initiating these proceedings, Jabaar's solicitors warranted that they had authority from an existing legal entity to bring the proceedings. As Jabaar had been dissolved almost three months before the proceedings were initiated, Jabaar's solicitors were in breach of that warranty or representation. Even though I accept that they were not aware on 7th October, 2010 that Jabaar had been dissolved (although I must express a degree of scepticism in relation to the assertion that Mr. O'Connor, who did not swear an affidavit in these proceedings, was not aware of the strike off given the nature of the strike off process), I am satisfied that they must be held personally liable for the loss which Townlink has incurred in defending these proceedings under the Court's inherent jurisdiction. Even though Jabaar's solicitors were unaware that Jabaar was dissolved when the proceedings were initiated, in my view, it is of significance that before most, if not all, of the costs in defending the proceedings were incurred by Townlink, Townlink's solicitors informed Jabaar's solicitors that Jabaar had been dissolved. That being the case, in my view, there is absolutely no basis on which the Court could exercise its discretion in relation to costs in favour of Jabaar's solicitors so as to leave Townlink bearing the costs. At the very least, having become aware that the purported applicant in these proceedings did not exist, Jabaar's solicitors should have immediately informed Townlink's solicitors that they would apply to Court to stay the proceedings pending the restoration of Jabaar to the register of companies or to withdraw the proceedings, as they eventually did. If they had done so, the costs incurred by Townlink in defending the proceedings would have been avoided.

5. Order 99 rule 7

5.1 Order 99, rule 7 provides:

> "If in any case it shall appear 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 solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay any other person, and thereupon may make such order as the justice of the case may require."

There follows provision for an investigative procedure before the Taxing Master.

5.2 The jurisdiction of the Court under rule 7 arises in two circumstances: where costs have been improperly or without reasonable cause incurred; or where costs properly incurred have been wasted due to misconduct on the part of a solicitor. Insofar, if at all, as rule 7 applies to this case it must be on the basis that costs have been improperly or without reasonable cause incurred. If the jurisdiction conferred by rule 7 arises, two distinct outcomes may ensue from its exercise by the Court. The first is that the costs may be disallowed as between the solicitor and his own client. The second is that the solicitor may be ordered to repay to his own client any costs which his client has been ordered to pay to any other person. Neither outcome could be implemented in this case because the kernel of the problem is that Jabaar did not exist when these proceedings were initiated nor does it exist now so that an order for costs cannot be made against Jabaar.

5.3 On the basis of the foregoing analysis, in my view, Order 99, rule 7 has no application. This case is distinguishable on the facts from *O.J. and Anor. v. The Refugee Applications Commissioners and Ors.* [2010] IEHC 176 in which Order 99, rule 7 was applied by Cooke J., in that in this case there is no applicant against whom the Court can make an order for costs, because Jabaar does not exist, and, consequently, no order over that Jabaar's solicitors repay to its client the costs awarded against the client can be made.

6. Order

6.1 There will be an order under the Court's inherent jurisdiction that Jabaar's solicitors pay Townlink's costs of the proceedings when taxed and ascertained.

6.2 For the avoidance of doubt, the intention of the Court is that the costs be taxed on a party and party basis. No argument was advanced that Townlink should be entitled to costs on a solicitor and client basis. I mention that merely because I have recorded the approach adopted by Eve J. in *Fernée v. Gorlitz* earlier.