Neutral Citation Number: [2011] IEHC 117

**THE HIGH COURT**

**2003 9018 P**

**BETWEEN**

**MOORVIEW DEVELOPMENTS LIMITED, SALTHILL PROPERTIES LIMITED, VALEBROOK DEVELOPMENTS LIMITED, SPRINGSIDE PROPERTIES LIMITED, DRAKE S.C. LIMITED, MALLDRO S.C. LIMITED, THE POPPINTREE MALL LIMITED AND BLONDON PROPERTIES LIMITED**

**PLAINTIFFS**

**AND**

**FIRST ACTIVE PLC, RAY JACKSON AND**

**BY ORDER BERNARD DUFFY**

**DEFENDANTS**

**AND**

**2005 272 S**

**BETWEEN**

**FIRST ACTIVE PLC**

**PLAINTIFFS**

**AND**

**BRIAN CUNNINGHAM**

**DEFENDANT**

**JUDGMENT of Mr. Justice Frank Clarke delivered the 16th March, 2011**

**1. Introduction**

1.1 Two further issues fall for decision in the long running litigation in respect of the Cunningham Group. The first issue arises out of a motion brought on behalf of First Active plc ("First Active") seeking to have Mr. Brian Cunningham made personally liable to pay costs awarded in favour of First Active in certain of these linked proceedings. The relevant costs were awarded against various companies of which Mr. Cunningham and his wife are the beneficial owners and in respect of which Mr. Cunningham is a director and, it would appear, prime mover. The second application seeks to have Mr. Cunningham cross examined in aid of execution (together with various connected reliefs) in the context of orders which have already been made, in one of the linked proceedings, against Mr. Cunningham personally.

1.2 The background to both applications is the long running litigation to which I have referred. Most of that litigation has now been determined, at least so far as this Court is concerned, with only a small number of tangential issues remaining for decision. In general terms Mr. Cunningham and companies associated with him ("the Cunningham Group") were unsuccessful in that litigation to the effect that there are a substantive range of orders for costs standing against the Cunningham Group together with substantive and costs orders against Mr. Cunningham personally. In some of the relevant litigation only companies within the Cunningham Group were parties so that the orders for costs made in favour of First Active in those proceedings are orders as against the companies concerned. In one relevant case Mr. Cunningham was himself a litigant so that an order on foot of a guarantee was made against Mr. Cunningham personally. There is nothing unusual in either of those situations. The orders for costs were made, in the ordinary way, against unsuccessful parties to the cases concerned. The order on the guarantee was made against Mr. Cunningham as guarantor.

1.3 Against that general background it is appropriate to turn to the issues which arise.

**2. The Issues**

2.1 The application on behalf of First Active seeking to have Mr. Cunningham made personally liable for costs which currently stand ordered to paid by companies within the Cunningham Group arises both in the case which first appears in the title to this judgment and a series of other connected cases, details of which are set out in a schedule hereto. There is no material difference between the position in any of the cases concerned. In each case there is already in being an order for costs against companies within the Cunningham Group. First Active seeks to make Mr. Cunningham personally liable for those costs.

2.2 Two real issues arise. The first is as to whether there is any jurisdiction to make an order of the type sought by First Active. Second, in the event that there be such a jurisdiction, issues arise as to the criteria to be applied by the court in deciding whether to make such an order and whether those criteria are met on the facts of this case.

2.3 The second motion is brought in the proceedings second mentioned in the title to this judgment. In that case, as pointed out, there already is an order against Mr. Cunningham personally. It is sought on behalf of First Active that Mr. Cunningham be required to disclose his assets or other sources of potential payment of his liability to First Active arising out of that order. Two bases are put forward, in general terms, on behalf of First Active. First, it is said that a jurisdiction to have Mr. Cunningham orally examined in relation to his debts arises under O. 42, r. 36 of the Rules of the Superior Courts. As part of such an examination in aid of execution, First Active asserts that it is appropriate for the court to make an order requiring Mr. Cunningham, in advance, to disclose his assets

or any other means which he might have to satisfy the relevant order. In addition, First Active asserts that it is appropriate to require Mr. Cunningham to disclose, in discovery form, any documents which he might have relevant to his assets or other means of satisfying the relevant order. Under this heading the primary dispute between the parties is as to whether the court has jurisdiction, or whether it is, in any event, appropriate, to make the ancillary orders to which I have referred.

2.4 A second basis is put forward on behalf of First Active for seeking similar relief. When the order against Mr. Cunningham personally was originally made, the question of a stay pending appeal to the Supreme Court was raised. For reasons set out by me in an *ex-tempore* ruling at the time in question, I came to the view that it would be appropriate to make an order in Mr. Cunningham's case similar to an order which I had made in *Danske Bank v. McFadden* [2010] IEHC 119. The substance of that order was to the effect that no stay would be given but that First Active would be required to give an undertaking similar to the undertaking as to damages which a plaintiff is normally required to furnish as a term of obtaining an interlocutory injunction. Thus, to the extent that First Active might actually collect monies due on foot of the relevant order in circumstances where that order was reversed on appeal, First Active would be required to pay back the monies concerned and compensate Mr. Cunningham in the event that he could establish any further losses associated with the recovery of the monies concerned by First Active. In addition, First Active was required to give an undertaking which prevents First Active from seeking to have Mr. Cunningham made bankrupt. As a *quid pro quo* Mr. Cunningham was required to give an undertaking, not dissimilar to the types of orders which are typically made when Mareva type injunctions are granted. Thus, Mr. Cunningham has given an undertaking not to deal with his assets so as to place them beyond recovery by First Active save to the extent that certain provision is made for living expenses and Mr. Cunningham is permitted to expend money pursuing his appeals in these proceedings generally together with any remaining elements of the proceedings in this Court which require to be determined.

2.5 On that basis it is said by First Active that that undertaking resembles a Mareva type order. In that context, it is argued that there is a jurisdiction to make the sort of additional orders concerning the disclosure of assets which are frequently made when Mareva injunctions are granted and that it is appropriate to exercise that jurisdiction in this case. While acknowledging that the undertaking bears some resemblance to a Mareva order, counsel for Mr. Cunningham asserts that it is not appropriate to go further than the terms of the existing order in the circumstances in this case (*i.e.* where the undertaking arises in the context of preserving the position pending appeal) and that no new order should, therefore, be made.

2.6 Against the background of those issues it is necessary to turn to the first question which relates to the application to make Mr. Cunningham personally liable and is as to whether a jurisdiction to make such an order exists.

**3. Is there a Jurisdiction to direct that Mr. Cunningham be personally liable?**
3.1 Two general bases are put forward on behalf of First Active for suggesting that a jurisdiction to make such an order exists. The first is based on the decision of the Supreme Court in *Byrne v. John S. O'Connor & Company* [2006] 3 I.R. 379. In that case an insurer repudiated a professional indemnity policy in the immediate run up to the relevant litigation coming to trial. Up to that point in time the litigation had been conducted on behalf of the defendant by the relevant insurers. This Court had to determine an application by the solicitors who had been nominated by the insurer to conduct the defence, who sought to come off record as a result of the repudiation of the relevant professional indemnity policy. While allowing that application, O'Donovan J., in this Court, required that the insurer be joined as a co-defendant and ordered to pay the costs incurred by the plaintiff up to that point. It is important to note that the order was solely concerned with the costs of the plaintiff rather than any damages which the plaintiff might secure against the defendant. The plaintiff had, of course, no direct claim against the insurer as such. The plaintiff's claim was against the defendant firm of solicitors. However, in substance, the view which this Court took was that the insurers had been inappropriately late in making a decision to repudiate and that, in those circumstances, the insurers should have to bear the plaintiff's costs up to that point in pursuing the litigation.

3.2 On appeal to the Supreme Court it was argued on behalf of the insurer that there was no jurisdiction to join a non-party to proceedings for the sole purpose of ordering that party to pay costs in circumstances where no underlying cause of action could be shown against the party concerned. In the course of his judgment, Kearns J. noted that:-

> "Where an insurer exercises its right of subrogation to take over the defence of legal proceedings, as occurred in this case, it effectively stands in the shoes of the party concerned, usually a defendant or third party. It makes all the decisions about the conduct of the case, including ultimate decision as to whether the litigation should be fully fought out or compromised."

Kearns J. further noted, at p. 386, the relevant provisions of O. 15, r. 13 of the Rules of the Superior Courts and expressed the view that the courts have jurisdiction to make an order under that rule for the purposes of joining a party solely to the intent that an order for costs be made against him.

3.3 First Active argues that a jurisdiction, therefore, exists to join a party, who has funded proceedings on behalf of a corporate entity, for the purposes of making that party liable to pay such costs as were or might be ordered against the relevant corporate entity.

3.4 As an alternative First Active argues that a similar jurisdiction exists under the provisions of s. 53 of the Supreme Court of Judicature (Ireland) 1877 ("the Judicature Act"). In that context, reference is made to decisions of the Courts of England and Wales, Australia and New Zealand where similar (although not identical) statutory provisions have been interpreted as conferring a jurisdiction to make an order of the type sought.

3.5 In simple terms, counsel on behalf of Mr. Cunningham asserts that jurisdiction does not arise under either of the bases suggested. Insofar as the exercise of any jurisdiction that might be said to arise is concerned, I think it is fair to characterise counsel's argument as being one which relies on the same sort of general factors that are put forward for suggesting that there is no jurisdiction in the first place.

3.6 Before going on to address the detailed arguments that arise as to whether jurisdiction can be said to exist on either of the bases put forward on behalf of First Active, it is appropriate to address some general issues raised on behalf of Mr. Cunningham. The points raised are, at the level of principle, equally applicable to the question of whether a jurisdiction can be said to exist under the rules or under the Judicature Act. It is said on behalf of Mr. Cunningham that, for the court to now deem a jurisdiction, of the type asserted by First Active, to exist would be to disturb what are said to be the reasonable and settled expectations of those involved in limited liability companies to the effect that such persons could not be exposed to the costs of litigation brought or defended by the company concerned. There are, of course, sound legal and policy reasons why the courts should not in substance amend the law by interpretation. First, the Constitution itself confers the sole law making power on the Oireachtas. It is not for the courts to legislate. While it is, of course, within the function of the courts to interpret the law, a point may be reached where it can be said that a

proposed interpretation amounts, in substance, to an amendment of the existing position. Indeed, it was for reasons such as that, that I was not persuaded that a jurisdiction to make Mr. Cunningham liable to put up security for costs in his personal capacity existed. See *Salthill Properties Ltd & Anor v. Royal Bank of Scotland & Ors* [2010] IEHC 31. Second, where significant change in the law is to come about, there are sound policy reasons why it is preferable that such change should be achieved by legislation (whether primary or secondary), rather than judicial interpretation. It is possible to manage the orderly transition from the former law to a new law in a much fairer and more effective way when the law is changed in a particular way as of a particular time by amending legislation. That does not, of course, mean that the courts may not have, by interpretation, to apply old principles to new circumstances or to allow for the evolution of jurisprudence in an area to meet modern needs.

3.7 However, it is important to recall that in *Salthill Properties* I was concerned with a situation where there was clear existing authority which rejected the proposition that a personal litigant, resident within the jurisdiction or the EU, could be amenable to an order for security for costs. To change that situation by recognising the existence of a relevant jurisdiction without the intervention of legislation or rule change would, in my view, have amounted to impermissible legislation by the courts. This is not, however, a situation where there is clear authority for the proposition that a jurisdiction to make a third party funder liable for the costs of the company concerned does not exist. Rather, I am faced with the situation where there is no Irish authority on the question of whether such a jurisdiction might be said to exist under the Judicature Act. Indeed, so far as a jurisdiction existing under the rules is concerned, such authority as there is (being *Byrne*) points in the opposite direction. While it is true that the funder in *Byrne* was an insurer rather than a shareholder, the existence of a possible jurisdiction in respect of shareholder funders must have been clear since *Byrne*.

3.8 I am not, therefore, satisfied that it would amount to an impermissible alteration in the existing legal regime for the court to interpret either the rules or the Judicature Act as conferring the jurisdiction asserted by First Active.

3.9 In that context I should touch on the question of security for costs. It is now so well settled that no authority needs to be cited for the proposition that the jurisdiction to award security for costs which derives from s. 390 of the Companies Act 1963, will not be exercised where there are special circumstances which would make it unfair to exercise that jurisdiction in the case in question. Special circumstances include a case where it can be shown that, on the assumption that the company's claim is valid, its impecuniosity stems from the wrongdoing alleged. It was argued on behalf of Mr. Cunningham that to attempt to impose a jurisdiction such as that asserted on behalf of First Active would be to bypass s. 390. I do not agree. An application for security for costs is brought before the proceedings reach any level of maturity. In many cases an application for security for costs is not brought (or if brought, fails) precisely because the plaintiff company can assert that its impecuniosity is due to the wrongdoing of the defendant. However, an application to make a third party funder liable for the costs of the company concerned comes into play when the proceedings are over and the company has failed in the litigation. The mere fact that it would be unfair to impose an obligation to put up security for costs in advance of a hearing (which might, of course, have the effect of chilling the proceedings) does not mean that it necessarily follows that it would be inappropriate to order costs against the third party funder when the proceedings are over and have failed.

3.10 Likewise, it does not seem to me that the argument put forward on behalf of Mr. Cunningham to the effect that the court should lean against making an order which would pierce the veil of incorporation is a good one. The court is not, by making a third party funder costs order, requiring the third party funder to take up any underlying liability of the company concerned. The insurer in *Byrne* did not have to pay any damages that might have been awarded against the defendant. The insurer only had to pay the costs. The third party funder is only exposed to paying the costs incurred by the opposing party in the litigation funded and not any other liability. The third party is not, therefore, strictly speaking, liable for the company's debts. Rather, the third party funder is independently liable because the third party funder has personally taken actions which have led to the costs being incurred by the successful party in the first place.

3.11 It must be remembered that the third party funder in *Byrne* was an insurer. The analysis of Tomkins J. in *Carborundum Abrasives Ltd v. Bank of New Zealand (No.2)* [1992] 3 NZLR 757, to which I will turn in early course, also makes clear that the third party funder concerned could be a financial institution who has put in a receiver. Such parties are not shareholders at all. Their liability does not derive from any attempt to pass on the liability of the company to its shareholders or its directors. Rather, the liability stems from the third party having, in effect, taken on the company's own litigation for its own benefit.

3.12 In the light of those general observations it is necessary, therefore, to address the specific arguments raised in relation to jurisdiction under both headings. So far as the possible jurisdiction under O. 15, r. 13 is concerned, the principal point made on behalf of Mr. Cunningham is that the companies for whose costs liability he is sought to be made liable, were plaintiffs. In that context it is suggested that there could be no basis for joining him personally as a defendant. In addition, attention is drawn to a later part of O. 15, r. 13 which provides that:-

> "No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto."

On that basis it is said that Mr. Cunningham cannot be joined as a plaintiff. Attention is also drawn to the fact that the rule goes on to require that any defendant added "shall be served with a summons or notice in the manner hereinafter mentioned… and the proceedings as against such party shall be deemed to have begun only on the making of the order adding such party". It is said that that provision does not sit happily with the joinder of Mr. Cunningham in the circumstances of this case.

3.13 So far as substantive relief is concerned, there is clear logic in those aspects of the rule which I have just cited. Persons cannot be made sue if they do not want to. Therefore, persons cannot be added as plaintiffs against their will. If it is necessary to join an additional defendant then that can be done, and the defendant will be served and brought up to date with the proceedings in accordance with the rules. There is no need to get a defendant's permission to join him as a defendant in the first place. There would be no logic in involving a potentially added defendant in the process of the decision making as to whether he should be added as a defendant for like reasons. The relevant defendant was not entitled to be consulted as to whether he should have been joined at the beginning. He is not entitled to be consulted as to whether he is added as a defendant.

3.14 The argument made by counsel on behalf of Mr. Cunningham is that Mr. Cunningham must be either added as a plaintiff or defendant. It is said that he cannot be added as a plaintiff against his will. It is said that it is illogical to join him as a defendant where the only order to be sought against him is an order making him responsible for costs already directed to be paid by plaintiffs. In the event that if, contrary to that submission, Mr. Cunningham were to be joined as a defendant, it is said that the provisions to which I have just referred concerning the service of papers, relating to the substantive case, on him would be irrelevant. On that basis it is said that the rule does not contemplate joining a person in the position of Mr. Cunningham as a defendant.

3.15 I am not sure that this latter point can be valid. If it were a good point then it would necessarily have led the Supreme Court to taking a different view in *Byrne*. The insurance company in *Byrne* was not being required to play any further part in the proceedings. Indeed, the whole problem stemmed from the very fact that the insurance company had repudiated its professional indemnity cover and was out of the picture. There is no doubt that the latter part of r. 13 does not sit particularly happily with a situation where a party is joined solely for the purposes of being made liable for costs. However, it sits equally unhappily with the situation which pertained in the *Byrne* case as it does in Mr. Cunningham's case. The existence of those additional provisions of the rule did not prevent the Supreme Court from construing the rule as conferring a jurisdiction to join the insurer in *Byrne*. I can see no logical basis why those provisions can be construed as preventing a jurisdiction to join someone such as Mr. Cunningham in a case like this.

3.16 So far as the "plaintiff" point is concerned I agree with counsel that Mr. Cunningham cannot be joined now as a plaintiff against his will. The real issue is, therefore, as to whether Mr. Cunningham can be joined as a defendant.

3.17 It is important to say something in this regard in relation to orders for costs. Costs are not treated in the same way, so far as parties and pleadings are concerned, as substantive relief. In the event that a defendant wishes to obtain substantive relief against the plaintiff, it is necessary for the defendant to file a counterclaim in addition to his defence. However, a defendant does not have to put in a counterclaim simply for the purposes of enabling that defendant, in the event that he should succeed, to obtain an order for costs against the unsuccessful plaintiff. Therefore, a successful defendant can simply claim costs without having included in his pleading any specific claim in that regard. So far as substantive relief is concerned there is, of course, a procedure whereby a defendant can join a non-party as a co-defendant to a counterclaim. Where the defendant claims against both the plaintiff and the non-party for the same or connected relief then the defendant can seek that relief by counterclaim against the plaintiff in the ordinary way but can join the non-party as a defendant to that counterclaim. So far as substantive relief is concerned it seems clear, therefore, that a non-party can be joined by a defendant as a defendant to the counterclaim. It would not, however, be appropriate to join such a party as a defendant to a counterclaim solely for the purposes of seeking costs for it would have been unnecessary to have filed a counterclaim against the plaintiff in order to be able to claim the costs of a successful defence against that party.

3.18 Against that background I can see no reason in principle why a non-party cannot be joined as a defendant solely for the purposes of that non-party being sought to be made liable for costs which might ordinarily be awarded against the plaintiff. The fact that the first port of call for seeking the defendant's costs might be the plaintiff and the fact that it might be because of a connection between the relevant non-party and the plaintiff that the order is sought in the first place, does not seem to me alter the basic position in principle. If it were a case of seeking substantive relief against the non-party, then he could be joined as a defendant to a counterclaim. There is no need for a counterclaim when only costs are sought. It would be strange indeed if a non-party could be joined as a defendant to a counterclaim in respect of substantive relief but could not be joined as a defendant at all simply for the purposes of seeking a costs order. It is clear from *Byrne* that a non-party can be joined for the purposes of seeking a costs order against him in favour of a plaintiff. What would be the logic in it being possible to join a party to make them responsible for costs which would ordinarily be awarded against a defendant but not in respect of costs that would ordinarily be expected to be awarded against a plaintiff?

3.19 Unless the wording of the relevant rule made it clear that such a distinction necessarily followed, I would be reluctant to place a construction on the rule which led to such an apparently absurd result. I am not satisfied that the rule compels such a view to be taken. In the light of the decision of the Supreme Court in *Byrne* it seems to me, therefore, to follow that a jurisdiction exists to add a party as a defendant for the purposes of seeking to have the party concerned made liable for the costs of the proceedings. I am satisfied that that jurisdiction exists whether the party who might be regarded as primarily responsible for the costs in question is a plaintiff, defendant, or indeed any other party (such as a third party, defendant to a counterclaim or the like).

3.20 Before going on to consider the basis on which any such jurisdiction should be exercised, it is also necessary to have some regard to the second possible basis for the relevant jurisdiction advanced on behalf of First Active.

3.21 That jurisdiction is said to derive from s. 53 of the Supreme Court of Judicature (Ireland) Act 1877. The relevant part of the section concerned states as follows:-

> "Subject to the provisions of this Act and of Rules of Court, the costs of an incident to every proceeding in the High Court of Justice and the Court of Appeal respectively shall be in the discretion of the court, but nothing herein contained should deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the Rules hitherto acted on in Courts of Equity:.."

3.22 A number of authorities from other common law jurisdictions with similar legislation were referred to. The Supreme Court of Queensland in *Forest Pty Ltd v. Keane Bay Ltd* [1991] 4 ACSR 107, held that s. 58 of the Supreme Court Act (Qld) 1867 which provided that the court "shall have power to award costs in all cases lawfully brought before it and not provided for other than by this section" conferred jurisdiction to make an order for costs against a non-party.

3.23 The case went on appeal to the High Court of Australia where it is reported as *Knight v. F.P. Special Assets Limited* [1992] 107 A.L.R. 585. The High Court of Australia took the view that the jurisdiction concerned derived from O. 91, r. 1 of the relevant Court Rules which provided that the costs of all proceedings "shall be in the discretion of the court or judge".

3.24 The New Zealand Courts in *Carborundum* took a similar view to that adopted by the Supreme Court of Queensland in interpreting the relevant New Zealand legislation. The New Zealand Judicature Act 1908, provides, in s. 51G, that:-

> "Where any Act confers jurisdiction on the High Court or a Judge thereof in regard to any civil proceedings or any criminal proceedings or any appeal, without expressly conferring jurisdiction to award or otherwise deal with the costs of the proceedings or appeal, jurisdiction to award and deal with those costs and to make and enforce orders relating thereto shall be deemed to be also conferred on the court or judge."

3.25 The High Court of New Zealand took the view that that section conferred a jurisdiction to impose costs on a non-party in an appropriate case.

3.26 Importantly, in my view, the decision in *Carborundum* contains an analysis of the decision of the House of Lords in *Aiden Shipping Company Ltd v. Interbulk Ltd* [1986] A.C. 965. That case involved a consideration of more modern English legislation being the Supreme Court Act 1981. Section 51(1) of that Act provided that "the court shall have full power to determine by whom…the costs are to be paid". In *Aiden* the House of Lords held that the section in question conferred a jurisdiction to award costs against a non-party. It is true that some reliance was placed in the speeches in the House of Lords on the presence of the phrase "by whom" in the section which I have just cited. However, the High Court of New Zealand in *Carborundum* did not regard the absence of the words

"by whom" in the relevant New Zealand legislation as being decisive.

3.27 While not identical, the key phrase in each of the pieces of legislation under consideration in those cases was largely the same. The Queensland legislation gave the courts "power to award costs". The New Zealand legislation gave the courts "jurisdiction to award". The United Kingdom legislation gave the courts "full power to determine" although qualified by the phrase "by whom". As already noted, the Irish legislation says that the costs shall "be in the discretion" of the court. It should also be noted that the decision of the High Court of Australia in the *Forest* case, being based on the relevant Queensland rules, relied on a provision to the effect that the costs were to be "in the discretion" of the relevant court.

3.28 It does not seem to me, therefore, that there is any real difference of substance in the language used in the various pieces of legislation to which I have referred. Is there, in truth, any difference between a court having power to award costs, full power to award costs, or the costs being in the discretion of the court? I think not. There has been a consistent tendency in the courts in common law jurisdictions to interpret both rules of court and underlying legislation, which confer a cost awarding function on the court in broad terms, to be such as to confer, in an appropriate case, a jurisdiction to award those costs against a non-party. I see nothing in the language of the Irish Judicature Act to lead to a different view. Like Tomkins J. in *Carborundum*, I find no reason for limiting the courts' jurisdiction to award costs to confine same to parties to the proceedings (by implying into the relevant provisions such a limitation). I agree that the reason for such an approach is as expressed by Lord Goff of Chieveley in *Aiden*. Like Tomkins J., I agree that such an approach accords with the view that the court should have full control over proceedings before it.

3.29 I am, therefore, satisfied that First Active is correct under both headings. There is a jurisdiction to join a party as a defendant for the purposes of making that party liable for the costs that might ordinarily be ordered against a plaintiff or a defendant (or indeed another party). Likewise, I am satisfied that a similar jurisdiction exists under the Judicature Act.

**4. How should the Jurisdiction be exercised?**

4.1 The next question which arises is as to whether such a jurisdiction should be exercised on the facts of this case. The basis put forward by First Active is to assert that Mr. Cunningham was the funder and moving force behind all of these proceedings, that the proceedings were conducted primarily for his benefit and that certain aspects of the way in which the proceedings were conducted ought also be taken into account by the court. It is first necessary to look at the evidence in favour of those factual propositions.

4.2 So far as Mr. Cunningham being the funder of the proceedings is concerned, First Active relied on a comment made by counsel on behalf of the Cunningham Group in the course of the trial of the main issues in these linked proceedings, which was to the effect that the proceedings were being privately funded and on a modest basis. The argument which was before the court on the occasion in question sought some procedural leeway in favour of the Cunningham Group based on what was said to have been a difference in resources between the Cunningham Group and First Active. Correspondence ensued in which the Cunningham Group and Mr. Cunningham were invited to identify the funder concerned and in which an intention to seek to have that funder made liable for costs was intimated. No substantive reply was given to that correspondence on the issue in question. There is no doubt that the companies concerned are hopelessly insolvent. Judgment has been obtained against each of the companies for a sum of the order of €60m. There is no basis on which the realisation of any assets available either to First Active, or the receiver appointed by First Active, could hope to recover even a significant fraction of those sums. In addition, the relevant companies do not appear to have any other assets which are not charged in favour of First Active. In those circumstances it is clear that any funding for the litigation could not have come from within the companies' own resources. Any funding must necessarily have been external. In addition, the only reasonable inference to draw from the comments of counsel, to which I have referred, is that there was some (albeit from counsel's point of view perhaps inadequate) funding available.

4.3 Indeed, while there may well be small scale litigation where an insolvent company may be able to persuade a legal team (and appropriate experts) to accept instructions without some guarantee of payment (on the hazard that if the proceedings are successful payment in full may be made on foot of a cost order), it would be surprising if litigation on the scale of this litigation could be pursued on such a basis. It seems to me, therefore, that there is more than sufficient evidence to establish a *prima facie* case to the effect that these proceedings were funded from a source external to the companies concerned.

4.4 What then was that source? It is asserted on behalf of First Active that there is no other realistic candidate but Mr. Cunningham. It is noted that Mr. Cunningham's replying affidavit in these applications does not deny that he was the funder but rather questions whether there is any evidence to establish that he was. In that context it is, it seems to me, also important to note one matter that is more relevant to the second motion to which I will shortly have to turn. In the context of putting forward argument as to why Mr. Cunningham should not have disclose his income on affidavit, counsel for Mr. Cunningham on that application (who was not the same counsel as represented Mr. Cunningham on the application with which I am now dealing) relied on the fact that Mr. Cunningham was concerned that disclosing any sources of income which he might have might make those income sources available to First Active in order to satisfy its judgment debt in such a way as would prevent Mr. Cunningham from being able to mount the appeals which currently lie before the Supreme Court. That point could be of no merit whatsoever unless Mr. Cunningham intended to fund those appeals. It is, to put it at its mildest, somewhat strange that, in two motions run consecutively before the same court, Mr. Cunningham swears an affidavit in one saying that there is no evidence to suggest that he is the funder of this litigation (without denying the fact) and in the other instructs counsel to urge on the court that putting income sources at risk to being the subject of execution might lead to depriving the relevant companies of what would otherwise be their right of appeal to the Supreme Court. It is difficult to reconcile both statements. If it were true that there were some mysterious benefactor who had funded the proceedings to date, but that it was intended that Mr. Cunningham would fund the appeals, then that is a matter that could, at least in some way, have been deposed to an affidavit. It was not.

4.5 In all the circumstances it seems to me that it is reasonable to draw the inference that Mr. Cunningham was the funder of all of this litigation. In addition, it is abundantly clear that Mr. Cunningham was the person who was the moving party behind the litigation whether the proceedings were brought or defended in the name of companies within the Cunningham Group or himself personally.

4.6 So far as the likely beneficiary of the proceedings is concerned, it seems to me that the evidence makes absolutely clear that Mr. Cunningham and his wife would have been, by an overwhelming margin, the main beneficiary had the proceedings been successful. There was always some doubt about the precise scale of the claims being advanced in these separate proceedings. At the time when the proceedings commenced the Cunningham Group owed First Active something slightly more than €30m. By the time an order against certain companies within the Cunningham Group was made in July, 2010 that sum had grown to just over €60m. An analysis of the statements of affairs of the various relevant companies suggests that much of their liabilities other than to First Active were, in fact, to other companies within the Cunningham Group. It would seem that liabilities of Cunningham Group companies to unconnected third parties did not exceed €3.5m. On any view, the Cunningham Group's claim was for a sum in excess of €150m.

4.7 It is clear, therefore, that any significant measure of success from the point of view of the Cunningham Group would have

benefited its shareholders to a degree which would hugely have exceeded any benefit to the unconnected, unsecured creditors. Had the Cunningham Group succeeded to the extent of only 50% of its claim, it would have obtained an award of in excess of €80m which, depending on the time one looked at the Cunningham Group's indebtedness to First Active, would have left the Cunningham Group with a value of between €20m and €50m. Even on that basis, it is clear that by far the preponderance of any benefit to be achieved by the successful prosecution of these proceedings would have gone to the shareholders. The evidence at the trial demonstrated that the sole beneficial owners of the shares were Mr. Cunningham and his wife. The only reasonable inference to draw is that Mr. Cunningham and his family would have been by far the main beneficiaries of any likely successful outcome to these proceedings (although it does have to be noted that the unsecured creditors to which I have referred could also have benefited).

4.8 In assessing the factors by reference to which the jurisdiction found to exist in New Zealand should be exercised, Tomkins J., in *Carborundum*, set out what, in my view, is a most helpful analysis which takes as its starting point the fact that the Master, in the case in question, had taken the view that there must be impropriety, fraud or bad faith on the part of the non-party before costs could be awarded. In that regard Tomkins J. said the following:-

> "In his judgment, the Master said that without in any way attempting to be exhaustive, it was his view that for an applicant to succeed to obtain an order for costs against a non-party the applicant must establish some form of impropriety, fraud or bad faith on the part of the non-party. With respect to the Master, I do not accept this limitation. Certainly, if a non-party who has been involved in or connected with the prosecution or defence of proceedings through an insolvent company has acted with impropriety or with *mala fides*, that could be a persuasive reason for the Court exercising its discretion to order costs against such a non-party. But a non-party could become liable for costs where he has acted without impropriety of *mala fides*. For example, in *Forest*, proceedings were commenced by a company that, on the same day, executed a mortgage in favour of certain banks who also on that day appointed a receiver. Ultimately, the proceedings were discontinued. The Court by a majority held that the receivers should be liable in costs. It was not suggested that the receivers had acted improperly or in bad faith. Ryan J. considered that it was proper that the costs should be ordered to be paid by the receivers when it was clearly established that they were incurred by the receivers primarily for the benefit of a non-party, the bank and with their support.
>
> Indeed, he went so far as to say that it would have been 'monstrously unfair' to confine the applicants to order against impecunious companies.
>
> Where proceedings are initiated by and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their result, such as a receiver or manager appointed by a secured creditor, a substantial unsecured creditor or a substantial shareholder, it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued. That will be so whether or not the person is acting improperly or fraudulently.
>
> In many cases a major consideration will be the reason for the non-party causing a party, normally but not always an insolvent company, to bring or defend the proceedings. If the non-party does so for his own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest, it may, depending upon the circumstances, be appropriate to make an order for costs against that person. Relevant factors will include the financial position of the party through whom the proceedings are brought or defended and the likelihood of it being able to meet any order for costs, the degree of possible benefit to the non-party and whether, in all the circumstances, the bringing or defending of the claim – although in the end unsuccessful – was a reasonable course to adopt.
>
> The directors of a company may frequently be in a position different from other non-parties with a direct financial interest in promoting or defending the proceedings. Even where a company is in receivership, directors may have a duty to prosecute or defend a claim through the company in the interests of creditors other than the creditor that had appointed the receiver, or in the interests of the shareholders. Other creditors and shareholders are entitled to expect that those responsible for the management of the company will use all proper endeavours to ensure that their financial interest are protected or that there is a fund out of which such creditors can be paid: see Newhart Developments Ltd v Co-operative Commercial Bank Ltd [1978] 2 All ER 896, Shaw LJ at p 900."

4.9 It seems to me that those factors are appropriate factors to be taken into account by the court in assessing whether it should exercise a jurisdiction to make a non-party liable for costs whether that jurisdiction can be said to derive from the rules of court or from the Judicature Act. 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.

4.10 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.

4.11 Is there anything, therefore, about the way in which these proceedings were conducted which ought weigh heavily one side or the other? A number of factors need to be recalled. First, the proceedings against First Active were the subject of a non-suit. Second, it is clear that there were a number of radical changes in the way in which the Cunningham Group sought to bring these proceedings which led to a significant number of judgments on procedural issues (both before and during the main trial). I have, on a number of occasions, expressed views quite critical of the way in which at least aspects of these proceedings were conducted. It should, in fairness, be pointed out that there was a significant change of legal personnel on the part of the Cunningham Group in the immediate run up to the trial. Why that happened I do not know, nor do I wish to know. There is no doubt that a new perspective on

the way in which the proceedings might be pursued seems to have come with that change. However, none of that change was due to anything done by First Active. That the way in which the proceedings were pursued added significantly to the costs cannot be doubted.

4.12 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. Courts have consistently expressed the view that procedural failures (even relatively serious ones) should not be met by orders which would affect the likely outcome of the proceedings *per se*, but rather should be dealt with by means of costs orders if at all possible. The deterrent of making a party have to pay any costs incurred by its own procedural failures is important. Likewise, it is important that procedural failures should not get in the way of coming to a just result for the case as a whole unless those procedural failures have made it difficult to give a fair trial. However, if parties are effectively absolved from the practical consequences of any costs orders, then it is difficult to see how a practice which confined the court to dealing with procedural failure through costs orders could be justified.

4.13 I would not like to exaggerate the extent to which it is possible to be critical of the Cunningham Group for the way in which these proceeding were conducted. However, I have little doubt but that the overall costs of the proceedings from the perspective of First Active were significantly increased by reason of serious procedural failures on the part of the Cunningham Group. Those failures are well rehearsed in the many judgments already delivered in these proceedings.

4.14 If anything, therefore, an assessment of the reasonableness with which the proceedings were maintained and progressed weighs against rather than for Mr. Cunningham who must be taken to have been the person who directed the proceedings.

4.15 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.

4.16 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) 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.

4.17 In all the circumstances I am satisfied that it is appropriate to make an order directing that Mr. Cunningham be personally liable for the costs which are the subject of the applications in the motions currently before the court. It is then necessary to turn to the second motion.

**5. Mr. Cunningham's Ability to Pay**

5.1 It is accepted on behalf of Mr. Cunningham that an "ordinary" order under O. 42, r. 36 can be made in this case. The first point made is that such an ordinary order normally requires a person to attend before the Master for the purposes of being cross examined. In this case what is sought is an order that Mr. Cunningham be required to attend before the court. The universal practice in the commercial list is that orders for cross examination in aid of execution are directed to cross examination before the court. As these proceedings have, by agreement of the parties, been conducted by analogy with the commercial list Rules, I see no reason to depart from the normal commercial list practice and direct that the examination of Mr. Cunningham be before the court. Indeed, the rule itself allows the relevant direction to require cross examination before either the Master or the Court.

5.2 There are, in reality, two issues of contention. The first is as to whether there is any jurisdiction on the part of the court to direct, in advance of cross examination, the filing of a sworn statement as to means and discovery of relevant documents. The second is as to whether the scope of the inquiry sought (whether proceeded by such orders or not) is too wide. I propose dealing with the issues in that order.

5.3 It is true that O. 42, r. 36 simply requires a relevant debtor to be "orally examined" as to means. There is no express provision requiring the debtor to make any information available before he is cross examined. It should be noted that it has become a common practice in the commercial list in recent times (without objection in most cases) for debtors to be required to make information available in advance of cross examination. The reason for this is obvious. Leaving aside for the moment the scope of the matters that can be inquired into under O. 42, r. 36, the fact is that a debtor can be required to answer any questions in relation to those matters and is required to bring along all relevant books or documents. It is, therefore, the case that a debtor can be asked about his means of satisfying a judgment in the witness box and can be required to produce in court any documents relevant to his answers. The jurisprudence makes it clear that it is and can be appropriate to ask searching questions of a debtor under such an examination in cases where any real doubt as to the debtor's means may emerge.

5.4 The case made on behalf of Mr. Cunningham is to the effect that the questioning on behalf of the creditor has to be done, in effect, although not put this way, "on the blind". In other words, the relevant debtor cannot be required to make any information available in advance. He simply turns up in court with his books and records and it is left to the creditor's advocate to examine him at length to find out the basic facts and to identify the documents that might be relevant to his means. There may well be straightforward cases where that will work. A person who does not have significant assets (or at least many types of assets) and a relatively straightforward income, may well be easily required to reveal all relevant information without any advance disclosure. However, it is only necessary to contemplate the type of complex interlocking asset ownership arrangements that many of those who now come before the courts have engaged in, to demonstrate that a huge amount of valuable court time would be wasted in requiring the relevant creditor to start with a blank sheet of paper. It would, in many cases, require days under cross examination before even a reasonable picture of the position of the debtor would emerge. Doubtless time would be spent searching amongst the undoubtedly large volume of books and records for appropriate items to be produced to verify the answers to questions legitimately put. It seems to me that such a course of action would amount to a way of conducting the court's business that would give rise to a serious waste of valuable resources. It is important to emphasise that it is not asserted on behalf of First Active that Mr. Cunningham be obliged to reveal, in advance, anything which he could not be obliged to reveal in the witness box. This is not a case where it is being suggested that the substantive obligations of disclosure go beyond what is set out in the rules. The only issue is as to whether it is

necessary to give prior disclosure of relevant matters so as to shorten the amount of court time that will be spent in the actual cross examination. I am more than satisfied that the court has a jurisdiction to order a debtor to disclose any matters that properly come within the scope of a cross examination under O. 42, r. 36 in advance of the hearing so as to enable the hearing to be focused on issues of real inquiry.

5.5 The rule allows all relevant matters to be explored under cross examination. Providing a practical way to make that cross examination more efficient seems to me to be encompassed within the rule. To exclude a jurisdiction to allow preliminary disclosure as an aide to effective and efficient cross examination would be a course which should only be adopted if the rule made absolutely clear that no such prior disclosure could be directed. The rule does not make that clear. It seems to me to be inherent in the rule that the court can adopt practical measures to ensure that the disclosure which the rule in any event requires is to be made in the most efficient and practical way possible.

5.6 Indeed, it is my experience that, in many cases, the length of cross examination that is needed has been greatly shortened by the fact that, not only has there been disclosure in advance, but also constructive correspondence between solicitors representing the respective parties, which has allowed the cross examination to be confined to issues of real controversy.

5.7 That leads to the second question. What are the parameters of the matters that can properly be inquired into under O. 42, r. 36? The rule is wide. The debtor can be examined in relation to debts owing to him, in relation to his property, and in relation to other "means of satisfying the judgment". It was suggested on behalf of Mr. Cunningham that the rule did not extend to Mr. Cunningham being examined as to his income. It is difficult to see how that could be so. Net income is a means of satisfying a judgment (or at least it is possibly so). Net income, therefore, comes within the scope of the rule. It is said that there is already a statutory basis in play for the making of appropriate orders in the District Court for the discharge of judgments by periodic payments out of income. While that is so, it does not seem to me that that statutory regime deprives a creditor, who has a judgment in the High Court, from seeking the broad ranging inquiry which O. 42, r. 36 allows. To say that one has to go to the District Court to inquire into a person's income but at the same time has to go to the High Court to inquire into their assets would create a potential duplication for which no justification can properly be offered. I am, therefore, satisfied that O. 42, r. 36 allows an inquiry into income and that the prior disclosure which is required to be made can properly apply to net income as well as assets. I am also satisfied that future income or future debts which might become owed to the debtor come within the same broad definition. The fact that someone may be about to earn income or may be about to be owed money at some stage in the future, potentially provides a means of satisfying an existing judgment. Both sources clearly, in my view, come within the scope of the rule.

5.8 The only other matter in respect of which complaint is made as to the scope of the prior disclosure application relates to the inclusion of valuations of any assets held by Mr. Cunningham. However, counsel for First Active made clear that it was not suggested that Mr. Cunningham had to obtain any up-to-date professional valuations if same were not already available to him. The basis for prior disclosure is, as I have indicated, co-extensive with the matters that can be inquired into in an oral cross examination. I am satisfied that Mr. Cunningham could be asked in the witness box for his estimate of the current value of any asset which he might have. There is no reason in principle why he cannot be asked that question in advance. His documentary disclosure obligations would also extend to any valuations material to the state of his current assets.

5.9 I am, therefore, satisfied that what is sought on behalf of First Active comes squarely within the boundaries of what is contemplated by O. 42, r. 36. I am satisfied that a jurisdiction to require prior disclosure both of assets, present and anticipated, and income, present and anticipated, is appropriate and I am also satisfied that prior disclosure of any documents relevant to those matters must also be made.

5.10 I should add that I am not satisfied that it would be appropriate to make any order in addition to the Mareva like provisions of the undertaking given pending appeal. As was, in my view, correctly pointed out by counsel for Mr. Cunningham, the underlying basis for most Mareva type injunctions is that there is evidence of potential wrongdoing on the part of the defendant such as justifies the court in taking the view that there is risk of dissipation. No such considerations necessarily apply in a case where an undertaking is sought pending appeal simply as a means of ensuring that there is no change in the circumstances of the appellant such as might deprive the respondent of the ability to enforce the respondent's entitlements in the event of an unsuccessful appeal. I am not, therefore, satisfied that it is appropriate to make any disclosure orders as part of the process of imposing terms pending appeal.

5.11 However, for the reason which I have already set out, I am satisfied that it is appropriate to make an order directing that Mr. Cunningham attend before the court for the purposes of being cross examined in accordance with O. 42, r. 36. I am also satisfied that it is appropriate to make an order requiring Mr. Cunningham, in advance of such examination, to disclose on oath any assets or entitlements, whether capital or income, and whether present or future, from which the judgment against him could be satisfied together with any documents relevant to those questions. In my view the terms of such disclosure order should be cast in a way which most closely resembles the terms of O. 42, r. 36 itself, for those orders are not stand alone orders but rather orders designed to make the process of the cross examination under O. 42, r. 36 more efficient. I will hear counsel for First Active further on the precise formulation of the orders in question. It seems logical that a date for the cross examination of Mr. Cunningham should be deferred until after he has complied with the disclosure orders to which I have referred.

5.12 Finally, it is necessary to return to the point, to which I have already adverted, that a concern was expressed on behalf of Mr. Cunningham that allowing First Active to have information about all his assets might allow First Active to execute against those assets (and in this context I use assets in a very broad sense so to include income, etc) such as would deprive him of the ability to pursue appeals before the Supreme Court. It is clear from the undertaking which I indicated Mr. Cunningham should give pending appeal that he is permitted to expend monies on pursuing the relevant appeal subject to notifying First Active and subject to First Active having the right to contest the quantum of any such expenditure on the grounds of reasonableness. The clear intent of the undertaking was that Mr. Cunningham was to be entitled to pursue his appeals in a reasonable way. If it is necessary to revisit the precise terms of the undertaking given and order made pending appeal, in order to ensure that Mr. Cunningham does have the opportunity to pursue his appeals in a reasonable way, then that is a matter which can be addressed in due course.

**6. Conclusions**

6.1 In summary, therefore, I am satisfied that it is appropriate to make an order directing that Mr. Cunningham be personally liable for the costs orders made against the corporate plaintiffs in the proceedings first mentioned in the title to this judgment and the other proceedings set out in the schedule.

6.2 Second, I am satisfied that it is appropriate to direct that Mr. Cunningham attend for cross examination in accordance with O. 42, r. 36 in respect of the judgment already given against him in the proceedings second mentioned in the title to this judgment. In advance of that cross examination an order will be made requiring Mr. Cunningham to disclose his means in the manner in which I have indicated in this judgment and to disclose any documents relevant to those means.