THE HIGH COURT

[2008 No. 809 S.]

BETWEEN

W.L. CONSTRUCTION LIMITED

PLAINTIFF

AND

CHARLES CHAWKE

AND

EDWARD JOSEPH BOHAN

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 19th day of May, 2017

1. I delivered judgment ("the principle judgment") in these proceedings on 3rd October, 2016. I dismissed the plaintiff's claim for the reasons set out therein. On 26th October, 2016, I awarded the costs of the proceedings to the defendants. The defendants' counter claim was struck out with no order as to the costs.

2. The motion that is now before the court is an application by the defendants to join William Loughnane as a defendant to the proceedings for the purposes of making an order rendering him liable for the defendants' costs of the proceedings. The plaintiff's claim was dismissed on essentially two grounds. The first was that I concluded that the claim was an abuse of process for two reasons, first that the entire claim had been tainted by the fraud and dishonesty of Mr. Loughnane and the lies he had told under oath and secondly, because the manner in which the plaintiff's claim had been presented and prosecuted in itself constituted an abuse of process.

3. The second ground upon which the claim was dismissed was that at the end of the plaintiff's case, the plaintiff had not established that there was any sum due to it and it was thus appropriate to grant the defendants' application for a non-suit.

4. The defendants' application is grounded upon an affidavit of Neal Boland, a solicitor in Smith Foy and Partners Solicitors, who represent the defendants. In essence, the basis upon which this application is brought is that the costs incurred by the defendants in these proceedings arose as a direct result of the litigation misconduct of the plaintiff which was solely and entirely orchestrated by Mr. Loughnane. Mr. Boland avers that there is no prospect of recovery against the plaintiff, a contention which is not disputed either on affidavit or in submissions by counsel for Mr. Loughnane. It is also not disputed that Mr. Loughnane is the holder of 99% of the issued share capital of the plaintiff company which is effectively owned and controlled by him.

5. It is further not disputed by counsel for Mr. Loughnane that the court has jurisdiction to make an order of the kind sought in these proceedings on the basis of three judgments of this court in *Moorview Developments Limited v. First Active Plc.* [2011] 3 I.R. 615, *Thema International Fund Plc. v. HSBC* [2011] 3 I.R. 654 and *Used Car Importers of Ireland Limited v. Minister for Finance & Ors.* [2014] IEHC 256.

6. In his judgment in *Moorview*, Clarke J. followed the decision of the New Zealand High Court in *Carborundum Abrasives Limited v. the Bank of New Zealand* (No. 2) [1992] 3 NZLR 757. That was an appeal from a judgment of the Master in which the Master had held that there must be impropriety, fraud or bad faith on the part of the non party before costs could be awarded. In dealing with this issue, Tomkins J. said (at page 764):

> "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 non party. But a non party could become liable for costs where he has acted without impropriety or *mala fides*."

7. As appears from this passage, approved in *Moorview*, the issue with which the New Zealand court was concerned was whether the jurisdiction could be extended to cases where there had been no impropriety. Similarly in *Moorview*, it was not suggested that the party who was sought to be joined for the purposes of being made amenable to a costs order, Mr. Cunningham, had been guilty of *mala fides*. It was however suggested that he was a funder and potential beneficiary of the litigation and as such should be made liable. In treating of this issue in *Carborundum*, Tomkins J. said (at page 764):

> "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."

8. In the present case there is some dispute as to the extent to which Mr. Loughnane may have had a direct personal financial interest in the result of these proceedings. It is certainly not disputed however that he was the only party responsible for directing and controlling the proceedings. Counsel for Mr. Loughnane made the submission that the plaintiff company is clearly insolvent on the basis of the accounts exhibited in Mr. Boland's affidavit obtained from the Company's Registration Office for the years 2014 and 2015 respectively. Although by no means complete, it might be said that these accounts suggest that the plaintiff is insolvent but on the other hand, they tend to show that the historic debt of the plaintiff, from whatever source, has been very substantially reduced during the course of those two years with the work force having been substantially expanded in 2015, all of which tends to suggest that the company is trading profitably and may well now or in the near future be solvent.

9. However, it seems to me that this is only of marginal materiality to the issue that I have to decide. For what it is worth however, I am satisfied that Mr. Loughnane stood to benefit substantially in a personal capacity from the proceeds of any decree that might have been obtained against the defendants. As I say, this might be an important consideration in the absence of *mala fides* by Mr. Loughnane but of course that does not arise. As the principle judgment makes clear, the entire case was permeated by Mr. Loughnane's dishonesty and he was solely responsible for directing and overseeing a claim that ultimately transpired to be fraudulent and a manifest abuse of process.

10. As the *Carborundum* case makes clear, there can be no doubting the court's jurisdiction to make a party such as Mr. Loughnane amenable for the costs of the proceedings in the presence of such bad faith, whatever about in its absence.

11. In *Moorview*, Clarke J. summarised his conclusions on this issue in the following way (at page 63):

> "[47.] It seems to me that those factors [*identified in the judgment of Tomkins J. above referen*ced] 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."

12. Counsel for Mr. Loughnane submitted that there are six grounds upon which the application should be refused and these are as follows:

> (a) *Mr. Loughnane was not going to be the main beneficiary if the proceedings were successful – I have already dealt with this*.
>
> (b) *The proceedings issued on behalf of the plaintiff were legitimate proceedings which were reasonable to bring* – it is certainly true to say that on their face, the proceedings appeared reasonable and as has been pointed out by both parties, when the claim was initially made the defendants' solicitors indicated that the defendants were perfectly prepared to meet any legitimate debt due provided it was properly vouched and proved. Thus there was never any denial that there might be money due and it is suggested that this points to the underlying reasonableness of bringing the claim. I cannot accept this proposition implying as it does that it was reasonable to bring a claim based on, *inter alia*, invoices that where in many cases fraudulently altered in an effort to show a liability on the part of the defendants which never existed.
>
> (c) *The plaintiff engaged experts to assist in formulating the claim* – the primary expert in this case was Mr. O'Kane, the plaintiff's quantity surveyor, and the principle judgment deals extensively with his evidence and the conclusions I reached on that evidence. However, quite apart from those conclusions, any expert's evidence can only be as good as the instructions upon which it is based and if those instructions turn out to be dishonest and untruthful, then I do not see how the engagement of an expert can in any sense be said to legitimise the proceedings.
>
> (d) *While there have been serious findings of misconduct against Mr. Loughnane, he should not be laden with all the blame* – to my mind, there is no party other than Mr. Loughnane who can be asked to shoulder the blame for the outcome of these proceedings. Mr. O'Kane was recruited as an expert by Mr. Loughnane many years after the conclusion of the works and indeed some years after the proceedings had commenced. Mr. O'Kane received all his instructions from Mr. Loughnane and whatever about the shortcomings in Mr. O'Kane's evidence which I identified in the principle judgment, there is in my view no basis for suggesting that he is somehow, as a witness, blame worthy to an extent that could relieve Mr. Loughnane of any of the responsibility.
>
> (e) *There were other factors in the conduct of the proceedings which contributed to the delay* – that is true up to a point but it has not been suggested, nor could it be, that the defendants behaved in any way improperly so as to relieve Mr. Loughnane for overall responsibility for the outcome.
>
> (f) *Mr. Loughnane was not on reasonable notice that he would be joined as a defendant for the purposes of costs* – this submission stems from the three decisions of this court to which I have already referred. In each of those cases, it was relevant to assess whether a party who had funded the litigation ought find himself in a situation where he may be liable, without any prior notice, for the costs of that litigation. One can readily understand the rationale for such an approach. A relevant factor in those cases was of course the extent to which the other parties must have known in advance the extent to which the litigation was being underwritten by the non party and thus whether it was reasonable that the non party should have been put on notice of the potential for an application for costs being made against the non party. None of that can arise in the circumstances of this case because until the evidence had been given, in particular by Mr. Loughnane, the defendants cannot have known what the findings of the court would be in relation to that evidence. It may well be the case that the defendants before the trial commenced believed that Mr. Loughnane had falsified a number of the invoices but they were in my view perfectly entitled to keep their powder dry in this respect until the actual cross-examination. I do not think it could reasonably be suggested that they should have notified Mr. Loughnane in advance of their suspicions for the purposes of a potential costs application where such notice could have had a potentially significant effect on the impact of the cross-examination. The factual matrix here was very significantly different from that arising in the cases to which I have referred and I therefore do not believe that there was any requirement for advance notice before this application was brought.

13. Counsel for Mr. Loughnane further submitted that the defendants had not met the test required to invoke the exceptional jurisdiction for an order of the kind sought here to be made. I cannot accept that submission. The principle judgment makes clear in my view that this case was wholly exceptional in many ways and for that very reason I concluded that its dismissal at the conclusion of the plaintiff's evidence was warranted.

14. It was also contended that since one of the grounds successfully relied upon by the defendants in support of their application for a non-suit was that the plaintiff company was insolvent and it would be unjust to require them to go into evidence and incur further unrecoverable costs, it would now be unfair to allow them to resile from that position by seeking to make Mr. Loughnane liable.

15. However, that is to ignore the fact that the primary reasons for the failure of the claim were the abuses of process to which I have already referred and the plaintiff's insolvency was a merely incidental factor in the secondary non-suit issue.

16. Finally it was said on behalf of Mr. Loughnane that his exposure to the costs should be limited. Although not explicitly stated, I think the basis for this contention is that Mr. Loughnane was not solely responsible for the length of time the case took and there were many factors unrelated to his dishonesty. It is certainly true to say that the cross-examination of Mr. Loughnane which ultimately unmasked his fraud only accounted for perhaps four or five days out of the 28 days the case was at hearing. However I think that somewhat misses the point.

17. Nobody other than Mr. Loughnane was responsible for bringing this claim and nobody other than Mr. Loughnane was responsible for the result. I am therefore satisfied that there is no basis upon which I could or should limit the costs order I propose to make.

18. For these reasons therefore, I am satisfied that the defendants' application must succeed and I will make an order joining Mr. Loughnane as a co-defendant and directing that he be liable for the costs of the defendants.