THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 113

Record No. 2017/303

Hogan J.
Whelan J.
Gilligan J.

BETWEEN/

WL CONSTRUCTION LIMITED

PLAINTIFF

- AND -

CHARLES CHAWKE AND EDWARD BOHAN

RESPONDENTS/

DEFENDANTS

- AND -

BY ORDER OF THE COURT, WILLIAM LOUGHNANE

APPELLANT/

DEFENDANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 26th day of April 2018

1. Does the High Court have jurisdiction to make an award of costs against a non-party witness *after* the conclusion of the litigation when that person had not *previously* been put on notice that such an application for costs might be made against him personally? This is essentially the issue which is presented on this appeal and it raises question of some considerable practical importance.

2. The plaintiff is a limited liability construction company and the two defendants are well known publicans. In 2008 the plaintiff which commenced summary summons proceedings claiming sums due under a building contract in respect of a public house known as the "Lord Lucan" at Finnstown Shopping Centre. Lucan. The hearing of those proceedings took place over an extended period before Noonan J. It is accepted that in the course of those proceedings Mr. Loughnane who is the principal and effective owner of the entirety of the company gave evidence in support of this claim which was dishonest and untrue.

3. At the close of the hearing Noonan J. acceded to an application made by the defendants to have the proceedings dismissed on the grounds of abuse of process. As Noonan J. was later to explain in the judgment under appeal (*WL Construction Ltd. v. Chawke* [2017] IEHC 319) the reason he took this step was because:

> "…first the entire claim had been tainted by the fraud and dishonesty of Mr. Loughnane and the lies which he told under oath and, secondly, because the manner in which the plaintiff's claim had been presented and prosecuted itself constituted an abuse of process."

4. At the close of the main action Noonan J. made an order on 26th October 2016 for the costs of the proceedings to be awarded against the plaintiff company. It is accepted that the plaintiff is not in a position to discharge those costs. No appeal has ever been taken against this decision and it is accepted that these very serious findings made by the trial judge in respect of Mr. Loughnane's testimony cannot now be put at issue.

5. The defendants then issued a motion dated 17th November 2016 seeking to have Mr. Loughnane joined as a co-defendant for the purposes of having an order for costs of the proceedings enforced against him personally. In a judgment delivered on 19th May 2017 Noonan J., acceded to that application and made the order requested.

6. Mr. Loughnane has now appealed to this Court on several grounds against that decision, one of which (ground 3.1.e of the notice of appeal) was that he had not been put on notice that there would be an application to join him as a defendant for the purposes of any costs award until the judgment dismissing the plaintiff's claim had been delivered.

7. Before considering the merits of this appeal it may be appropriate to make some comments regarding the very existence of this third party costs jurisdiction and, assuming that it exists, the manner in which it might properly be exercised in a case such as the present one.

Whether there exists a jurisdiction to make an order for costs against non-parties?

8. The first explicit recognition of a jurisdiction to make an order costs against a third party is to be found in the judgment of Clarke J. in *Moorview Developments Ltd. v. First Active plc* [2011] IEHC 117, [2011] 3 I.R. 615. In that case one of the parties, First Active, sought to make a principal of the plaintiff companies, a Mr. Cunningham, liable for the costs of the proceeding, even though prior to that point he had neither been a plaintiff or a defendant in the proceedings. Clarke J. nevertheless found in favour of the existence of such a jurisdiction to join a non-party for the purposes of making a costs order against that party, saying ([2011] 3 I.R. 615, 620-625:

> "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.

……3.10 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 [v. O'Connor* [2006] IESC 30, [2006] 3 I.R. 379] 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 t*hat 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.
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> 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.
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> 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.
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> 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."

9. I have taken the liberty of quoting this passage from the judgment of Clarke J. *in extenso* because it invites several comments. First, *Moorview* aside, I would have said that the entire premise of the Rules of the Superior Courts is that they apply only to the parties to the litigation, save where the contrary is expressly stated. This particular context cannot, I think, be ignored when the construction of the costs provisions of Ord. 99 of the Rules of the Superior Courts come for consideration. The parties to that litigation have either initiated proceedings in the manner provided for by, *e.g.*, Ords. 1-3 of the Rules or, conversely, have elected to defend the proceedings by, *e.g.*, entering an appearance in accordance with Ord. 12. It is the very act of either initiating or defending the proceedings that the parties have elected to take on the burdens and benefits of the proceedings, including the attendant costs risk.

10. It is true that the Rules also provide for cases where non-parties are made subject to the Rules, most notably in the context of non-party discovery. Yet it should be noted that the position of non-parties in respect of such discovery requests is itself expressly provided for by the provisions of Ord. 31, r. 29. No such express provision has been in the context of Ord. 99 for the making of costs orders against third parties. The jurisdiction asserted in *Moorview* is rather based on the construction of s. 53 of the Supreme Court of Judicature (Ireland) Act 1877 ("the 1877 Act"). In his judgment Clarke J. noted recent trends in the common law world whereby the existence of a jurisdiction to make costs orders against third parties was increasingly inserted and he saw nothing "in the language of the Irish Judicature Act to lead to a different view."

11. For my part, however, I would respectfully query whether this is correct approach to this issue of statutory interpretation, as the first question should surely be whether this jurisdiction is *permitted* by s. 53 of the 1877 Act as distinct from whether such an interpretation is positively *excluded* by the language of the section. After all, the very fact that in *Moorview* the existence of such a jurisdiction was recognised for the first time some 140 years after the legislation was first enacted should certainly give pause for thought as to whether such a jurisdiction was in truth ever permitted by the relevant section in the first place.

12. In any event, s. 53 of the 1877 Act is prefaced by introductory words which I have taken the liberty of highlighting:

> "*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…."

13. In other words, therefore, the general power to award costs is itself made subject to the relevant Rules of Court. Yet the entire context of Ord. 99 is that the power to award costs is against other parties to the proceedings and the rule says nothing at all about the award of costs as against non-parties. Thus, for example, Ord. 99, r, 1(2) provides that:

> "No party shall be entitled to recover any costs of or incidental to any proceedings from any other party to such proceedings except under an order or as provided for by these Rules."

14. One might likewise observe that Ord. 99, r. 7 expressly empowers the Court to make a wasted costs order against a solicitor by reason of any "default or misconduct" on the part of the solicitor concerned. Yet the Rules do not contain any other express provision dealing with misconduct on the part of witnesses and this omission might be thought to be material in the context of whether there is, in fact, any such *Moorview* jurisdiction.

15. Nor can I find myself persuaded by the reasoning of Lord Goff in *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965. In that case the House of Lords held that the language of s. 51 of the (U.K.) Senior Courts Act 1981 ("the 1981 Act") dealing with the power to award costs ("…the court shall have full power to determine by whom…the costs are to be paid…") empowered the courts to make costs orders against non-parties, even though it was acknowledged that this jurisdiction should be exercised only in exceptional cases. (It may be noted in passing that the language of s. 51 of the 1981 Act is, in any event, somewhat broader than s. 53 of the 1877 Act). In his speech Lord Goff held that earlier authorities (such as *John Fairfax & Sons Pty Ltd. v. EC de Witte & Co.* [1958] 1 Q.B. 323) which had held against the existence of such a jurisdiction had erroneously proceeded on the basis of an assumption of an "implied limitation" as to the scope of the 1981 Act (and its predecessors), namely, that the relevant statutory provisions and rules of court dealing with civil procedure applied only to parties, save where the contrary was expressly stated.

16. One can, I suppose, describe the entire corpus juris dealing with civil procedure as containing an "implied limitation" that it applies only to the parties to the proceedings. But in reality one is doing no more than applying the standard principle of statutory interpretation, noscitur a sociis ("known by its companions") and the rule as to context to the construction of s. 53 of the 1877 Act. The whole edifice of civil procedure – from the Common Law Procedure Acts of the 1850s onwards – has been based on the tacit assumption that these rules apply only to the parties to the litigation and that clear words would be required before that assumed legislative intention could be displaced.

17. It is also necessary to recall that the *Moorview* jurisdiction involves an expansion of the scope of s. 53 of the 1877 Act with the real potential to impose potentially large costs liabilities on non-parties for the first time. In this context, the presumption against unclear change in the law – articulated in cases such as *Minister for Industry and Commerce v. Hales* [1967] I.R. 50 – might well be relevant in any construction of s. 53 of the 1877 Act in any future case and would, in the absence of clear words, lean against any expansion of the costs jurisdiction directed at non-parties.

18. Nor can I agree that the Supreme Court's decision in *Byrne v. O'Connor* [2006] 3 I.R. 379, [2006] IESC 30 can be regarded as a general authority on this point. That was a case with particular facts where the insurers for the defendant repudiated liability late and in circumstances where Kearns J. said that they knew or ought to have known that the plaintiff had incurred significant legal costs prior to that late application. The Court upheld the decision of O'Donovan J. to join the insurance company for the purposes of making a costs award against them. Viewed thus, the case can be viewed as one where the insurance company was really one of quasi-estoppel by reason of the fact that insurance company knew that the plaintiff was incurring legal costs yet – as the Supreme Court found – unreasonably waited for the last minute before repudiating liability and through the exercise of its subrogation rights nevertheless caused the defendant's solicitor to make a last minute application to come off record.

19. One way or another, however, I do not, with respect, see that *Byrne* can be regarded as any wider authority on the existence of such a jurisdiction to make orders against non-parties. The existence of this jurisdiction was not discussed in *Byrne* and, in any event, given their contractual powers of subrogation, the position of insurers in litigious matters is a rather singular one and is not in any real sense comparable to the general class of non-parties.

20. Since, however, the existence of this jurisdiction was not put in dispute in the present case and counsel for the non-party, Mr. O'Flaherty, did not seek to dispute the correctness of the *Moorview* decision, it would not be appropriate to express any concluded view on this question. The correctness or otherwise of Moorview must, therefore, await another case where the matter can be fully argued and considered.

The manner in which the *Moorview* jurisdiction should be exercised in case such as the present one

21. Even if it is accepted that *Moorview* was correctly decided, it is nonetheless clear that the jurisdiction to make an order for costs against a non party should remain an exceptional one. It is, of course, true that it would harsh to expect that defendants should be exposed to major litigation at the hands of an impecunious corporate plaintiff when they had no prospect of ever recovering costs against that party. But the defendants were not without a remedy in such a case, since they could have sought an order for security for costs under the provisions of s. 52 of the Companies Act 2014.

22. The question, therefore, arises as to whether it would be appropriate to make an order against Mr. Loughnane personally in the present case. In view of the findings of Noonan J. in the main action – which, to repeat, have not been appealed – it is clear that Mr. Loughnane committed perjury and sought to mislead the court by tendering fraudulent invoices. It is equally clear that Mr. Loughnane is to all intents and purposes the beneficial owner and controller of the plaintiff company. This is conduct which is quite unacceptable and which cannot be condoned.

23. The fact remains nevertheless that Mr. Loughnane was not a party to this litigation. He could not have known – and did not in fact know - at any stage prior to the conclusion of the main action in October 2016 that the defendants might thereafter seek to make him liable as a non-party for the costs of that litigation. Yet knowing the case one's opponent seeks to make during the currency of that litigation is at the heart of our system of civil litigation and general principles of fair procedures. If the High Court order for non-party costs were to stand it would mean in effect that Mr. Loughnane would stand exposed retrospectively to a significant financial claim for costs in respect of which claim he had no prior warning (however informal) prior to the conclusion of that litigation – a state of affairs which is clearly contrary to the principles of due process and the rule of law based democratic values found in Article 5 of the Constitution when read in conjunction with the guarantee of fair procedures in Article 40.3.

24. If the *Moorview* doctrine is to be accepted – and it is not necessary to repeat the views I have already expressed on the topic – it must at a minimum be attended by appropriate procedural safeguards. One of them is that the non-party sought to be made liable for those costs must be put on notice (however informally) of the fact at some appropriate stage during the course of the litigation that those costs will be claimed against him by another party. Existing parties to litigation do not, of course, require such notice because they know qua parties that they are exposed to that risk of costs in the event that they should lose in view of the provisions of Ord. 99, r. 1 *et seq*.

25. As this never happened during the currency of the trial, Mr. Loughnane was deprived of any opportunity of altering his circumstances in order to minimise a potential costs exposure, by, for example, exercising his control over the company to ensure that the proceedings were halted or discontinued.

Conclusions

26. I would therefore allow the appeal on the simple ground, namely, that as the non-party to the action was never put on notice (however informally) prior to the conclusion of the litigation in October 2016 of the fact that the defendants might thereafter seek to recover the costs of the litigation against him personally, it would now be unfair to visit him with those costs. To do would mean in effect that Mr. Loughnane as non-party would stand exposed retrospectively to a significant financial claim for costs in respect of which claim he had no prior warning.