THE SUPREME COURT

[Supreme Court Appeal Nos. 81/2018 and 92/2018]

Clarke C.J.
O'Donnell J.
McKechnie J.
Charleton J.
O'Malley J.

BETWEEN:

W. L. CONSTRUCTONI LIMITED

RESPONDENT

AND

CHARLES CHAWKE & EDWARD JOSEPH BOHAN

APPELLANT

AND, BY ORDER OF THE COURT,

WILLIAM LOUGHNANE

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 31st day of October, 2019

Introduction

1. This appeal concerns the exercise of the jurisdiction to join non-parties to proceedings for the purpose of finding them liable for costs. Such personal costs orders are generally referred to as "Moorview orders", the jurisdiction of the Irish courts to make them having been confirmed in *Moorview Developments Limited & ors. v. First Active plc* ([2011] 3 I.R. 615, [2018] IESC 33). The fundamental basis for the exercise of this jurisdiction was described by McKechnie J. in *Moorview* as being the injustice which might result where an individual initiates litigation through an insolvent company for his own benefit but without any risk to himself if the litigation is unsuccessful.

2. In the instant case the plaintiff company's substantive claim was dismissed in the High Court. The defendants, Mr. Chawke and Mr. Bohan, subsequently sought and obtained an order for costs against Mr. Loughnane, who was the 99% shareholder in the company. He succeeded in setting it aside in the Court of Appeal, primarily on the ground that he had not previously been put on notice that such an application might be made.

3. The general issues arising are primarily the existence, or extent, of any requirement to give notice to the non-party that such an order may be sought; and whether the jurisdiction should be exercised only where the non-party concerned was set to directly benefit from the proceedings. There is also a case-specific dispute as to whether the trial judge should have made an order against Mr. Loughnane in all the circumstances of this case including what he characterises as the absence of notice and, if an order was indeed appropriate, whether it should have been a full costs order or partial only.

4. As there is an appeal and cross-appeal before the Court, I will for the sake of clarity refer to the parties as "Mr. Loughnane" and "the defendants" respectively.

Background – the High Court

5. The plaintiff company, W.L. Construction, took High Court proceedings against the defendants in respect of payment for work done by it on foot of a building contract entered into in 2005 and completed in 2006. The original summary summons, issued in April 2008, claimed the sum of €191,030.40. When the case was opened by counsel (on the 19th November 2015) the claim was set at €342,931. At one stage the evidence of the company's quantity surveyor placed the value as low as €28,691, but on his final figure it was €152,220.05. By the conclusion of the case in the High Court in 2016, the trial judge (Noonan J.) estimated that some 14 different versions of the figure had been presented to the court.

6. It is relevant to note here that part of the reason for the delay in bringing the matter to trial was a dispute about documentation. In October 2007 the plaintiff company's solicitors had furnished the defendants with books of invoices said to underpin the claim. Mr. Loughnane was subsequently to admit that many of those invoices were not relevant to the work done by the company for the defendants. In March 2015 the solicitors had furnished a further book of invoices which, according to the trial judge, largely if not entirely overlapped with those previously sent. These were said to underpin claims in relation to variations to the original contract. Mr. Loughnane then swore an affidavit of discovery in which he swore to the relevance of the invoices to the claim. He confirmed in evidence that he stood over them.

7. Mr. Loughnane and the quantity surveyor were the principal witnesses for the plaintiff in the hearing. It was agreed that the quantity surveyor took his instructions from Mr. Loughnane. At the close of the plaintiff's evidence (which ran for a total of 28 days) the defendants applied for a non-suit and dismissal of the claim. The application was made on the basis of two alternative arguments – that the claim was an abuse of process by reason of litigation misconduct to an extent justifying dismissal, and that the plaintiff had failed to establish that any debt was due.

8. The trial judge (Noonan J.) acceded to the application on both grounds. In a detailed reserved judgment delivered on the 3rd October, 2016 he was highly critical of the evidence given by Mr. Loughnane (see [2016] IEHC 539). He found, in brief, that Mr. Loughnane had deliberately and repeatedly lied on oath and had produced a number of invoices in support of the company's claim that were either fraudulently altered or not relevant to the work done. On one occasion Mr. Loughnane had admitted under cross-examination that he had altered a document, and was warned by Noonan J. in relation to the privilege against self-incrimination. On the following day he denied having made any admission, saying that he had misunderstood the question – this was found by the trial judge to have been a "blatant" lie. There was no suggestion at any stage that any other person could be responsible for the alterations to the documents. Mr. Loughnane also admitted having furnished invoices found to be fraudulent to the company's quantity surveyor, with a view to having them advanced as part of the company's claim. The quantity surveyor was found to have engaged in a process of "constantly altering, amending and reinventing", and his evidence was described as "confused and utterly confusing" and quite unreliable.

9. Having reviewed the judgments of this Court on the issue, Noonan J. concluded that the case fell within the rare and exceptional category, involving the power and duty of the court to protect its own process from abuse, where it was appropriate to strike out or dismiss a claim. On this question, he noted that the case had originally been called on for six days and had taken an inordinate amount of time, due in large measure to the way in which the plaintiff's ground had constantly shifted and also due to Mr. Loughnane's dishonesty and the time necessarily taken to expose it. It had, he found, been impossible for the defendants to know at any given time what case they had to meet – new claims were constantly being presented up to Day 25 of the trial. In his view this was "the clearest abuse of the court's process".

10. Separately, Noonan J. found that, taking the plaintiff's case at its height, the evidence of Mr. Loughnane and, for somewhat different reasons, the evidence of the quantity surveyor, was entirely lacking in credibility such that no *prima facie* case had been made out that any sum was due. Mr. Loughnane's evidence had been "grossly dishonest" in a number of respects. It was possible that some of it was truthful, but it was all but impossible to separate truth from fiction, and it was not the function or duty of the court to disentangle a case that had become entangled by lies. He considered the question whether the defendants should nonetheless be required to go into evidence, but came to the view that the justice of the case required that they should not have to proceed further. In this regard he was influenced by the fact that the costs to date would have been, by any standards, enormous. If the defendants' evidence were to take a similar length of time to that of the plaintiff, this would impose a further very significant costs burden on them in circumstances where the uncontradicted evidence indicated that the plaintiff was insolvent and there was no prospect of recovering the costs.

11. After that judgment was given the defendants applied, by way of motion on notice, to join Mr. Loughnane as a defendant to the proceedings for the purpose of making him liable for their costs. Relying upon the judgment of Clarke J. in *Moorview v First Active*, they argued that the costs incurred by them arose as a direct result of the litigation misconduct of the plaintiff, which, they contended, was solely and entirely orchestrated by Mr. Loughnane. It was not in dispute that there was no prospect of recovery of the costs from the plaintiff company, or that the company was effectively owned and controlled by him, or that he was the only person responsible for directing and controlling the proceedings.

12. The jurisdiction to make the order was not disputed by counsel who appeared for Mr. Loughnane. Rather, the submissions were directed towards arguing grounds for not making the order – that Mr. Loughnane would not have been the main beneficiary if the case had succeeded; that the proceedings were legitimate and it had been reasonable to bring them; that the plaintiff had engaged experts to assist in formulating its claim; that, while serious findings of misconduct had been made against Mr. Loughnane he should not be laden with all the blame; that there were other factors contributing to the delays in the case; and that Mr. Loughnane was not on reasonable notice that he would be joined for the purpose of costs.

13. Noonan J. acceded to the application (see [2017] IEHC 319). It is noted in the judgment that in Moorview Clarke J. had followed the decision of the High Court of New Zealand in *Carborundum Abrasives Limited v The Bank of New Zealand (No.2)* [1992] 3 NZLR 757 where it was held *inter alia* that there was no requirement to show impropriety, fraud or bad faith on the part of the non-party against whom the costs order was sought. It is also recorded that there was a dispute about the extent to which Mr. Loughnane might have a direct financial interest in the result of the proceedings, in circumstances where the company was insolvent. However, it had reduced its debt in recent times, had significantly expanded its workforce and appeared to be trading profitably.

14. Dealing with the grounds argued, Noonan J. was satisfied "for what it is worth" that Mr. Loughnane stood to benefit substantially in a personal capacity from the proceeds of any decree that might have been obtained. However, it is clear that while he acknowledged that this aspect might have been significant in the absence of any *mala fides*, in the circumstances he was more concerned with the findings that the entire case had been "permeated" by Mr. Loughnane's dishonesty, and that he was solely responsible for directing and overseeing a claim that ultimately transpired to be fraudulent and a manifest abuse of process.

15. Noonan J. accepted that the proceedings appeared reasonable on their face and that the defendants had indicated a willingness to meet any properly vouched and proved debt. There was never any denial that some money might be due. However, he could not accept the implication that it was reasonable to bring a claim based on, *inter alia*, invoices that had in many cases been fraudulently altered to show a liability where none had existed.

16. As far as the expert involvement was concerned, Noonan J. observed that the primary expert had been the quantity surveyor. In any event, an expert's evidence could only be as good as the instructions upon which it was based, and if such instructions turned out to be dishonest, the engagement of an expert could not be said to legitimise the proceedings.

17. Noonan J. made a specific finding that there was no person other than Mr. Loughnane who could be asked to shoulder any blame for the outcome of the proceedings. The quantity surveyor had been recruited some years after the proceedings had commenced, and had received all of his instructions from Mr. Loughnane.

18. While it was true, up to a point, that there had been other factors that caused delay in the litigation, there was no suggestion, and no basis for a suggestion, that the defendants had behaved improperly in any way that could relieve Mr. Loughnane of his responsibility.

19. Turning to the question of notice, Noonan J. accepted that in three previous High Court judgments on non-party costs orders (*Moorview v First Active* [2011] 3 I.R. 615, *Thema International Fund v. HSBC* [2011] 3 I.R. 654 and *Used Car Importers of Ireland Limited v. Minister for Finance* [2014] IEHC 256) it had been relevant to assess the extent to which the other parties must have known in advance the extent to which the litigation

was being underwritten by a non-party and, thus, whether it would have been reasonable to put that non-party on notice of a potential application. However, in the instant case, he considered that this consideration did not arise, since the defendants could not know what the findings of the court would be until the evidence had been given. They might have believed before the trial that Mr. Loughnane had falsified invoices, but they were entitled to keep their powder dry for the purposes of cross-examination. It could not reasonably be suggested that they should have notified Mr. Loughnane of their suspicions, for the purposes of a costs application, when to do so might have had a significant impact on the cross-examination. In such circumstances, which were factually different to those of the three cases referred to, Noonan J. considered that there was no requirement for advance notice.

20. It had been submitted on behalf of Mr. Loughnane that any order made against him should be limited. Noonan J. accepted that the cross-examination which unmasked his fraud had occupied only four or five days out of the 28 days at hearing. However, he felt that this missed the point, and rejected the submission in robust terms:

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

The Court of Appeal

21. Hogan J. gave the sole judgment in the appeal (see [2018] IECA 113), and it is clear that his primary concern was whether *Moorview* had been correctly decided. Having referred at length to the judgment of Clarke J., he raised a number of queries in relation to the reasoning in that judgment concerning the applicability of the Rules of the Superior Courts and s. 53 of the Supreme Court of Judicature (Ireland) Act 1877 to persons who were not party to litigation. Hogan J. tended to the view that the jurisdiction claimed did not exist, and that a defendant faced with an impecunious corporate plaintiff, against which there was no prospect of recovering costs, had an appropriate remedy in the form of security for costs as provided for in s. 52 of the Companies Act 2014. However, he expressed no concluded views on the matter, since counsel in this case did not seek to dispute the correctness of *Moorview*.

22. Hogan J. saw the essential question in the instant case as being whether the High Court had jurisdiction to award costs against a non-party witness *after* the conclusion of the litigation, where that person had not *previously* been put on notice that an application for costs might be made against him personally. Before determining this (the only substantive issue in the appeal), Hogan J. noted that there was no appeal against the findings made by Noonan J. to the effect that Mr. Loughnane had committed perjury and had sought to mislead the court by tendering fraudulent invoices. It was also accepted that Mr. Loughnane was to all intents and purposes the beneficial owner and controller of the company. This, Hogan J. observed, was conduct which was quite unacceptable and could not be condoned. The judgment then continues:

"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.

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 already know qua parties that they are exposed to the risk of costs in the event that they should lose in view of the provisions of Ord. 99, r.1 et seq.

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."

23. The appeal was therefore allowed on this ground.

Moorview v. First Active

24. The appeal by the person against whom High Court costs had been awarded in the *Moorview* case, Mr. Cunningham, was ruled on by this Court while the present proceedings were pending before this Court, (see *Moorview Developments Ltd. & ors v First Active plc & ors* [2018] 2 I.L.R.M. 403). The judgment was given by McKechnie J., who held that Clarke J. had been correct in finding that such orders were in accordance with law, founded upon either the 1877 Act or O.15, r.13 RSC. It was further ruled that the order made in the case was appropriate.

25. Without attempting to summarise the immensely complex *Moorview* litigation, it may be important to note that in that particular case a letter had been sent on behalf of First Active to the plaintiff companies, indicating that it would seek to make any identified party who was funding the litigation responsible for its costs, should it be successful in defending the proceedings. The letter was sent after the matter had failed to get on at a provisional listing, but before the actual hearing. At the close of the plaintiffs' case, which

lasted for 66 days, the defendants were granted a direction. First Active then sought to have Mr. Cunningham made personally liable for its costs.

26. In brief, Clarke J. found that there was a jurisdiction to make such an order, under O.15, r.13 RSC and also pursuant to s.53 of the Judicature Act 1877 (in the interpretation of which he considered authorities from the common law world dealing with similar legislation). Having reached that conclusion, he adopted the criteria for the jurisdiction set out in the New Zealand case of *Carborundum Abrasives v Bank of New Zealand* ([1992] 3 NZLR 187), considering the key factors for the exercise of the court's discretion to be (i) the extent to which it might have been reasonable to think that the company could meet an order for costs if the litigation failed; (ii) the degree of benefit to the non-party concerned if it was successful; and (iii) any factors touching upon whether the proceedings were pursued reasonably and in a reasonable fashion. He specifically found that a finding of bad faith, impropriety or fraud was not a pre-requisite.

27. One policy justification for the jurisdiction is described in paragraph 4.12 as being to prevent parties having a "free ride" as to how they conduct litigation designed for their benefit, without there being a risk of a meaningful costs order against them. It was noted that procedural failures by parties in the course of litigation are normally dealt with by costs orders, rather than by any order that might affect the substantive outcome of the case. This could be futile if parties were effectively absolved from the potential consequences.

28. On the evidence, Clarke J. found that Mr. Cunningham was the funder and moving party behind all of the litigation brought by the plaintiff companies, in circumstances where he knew that First Active, if successful, would nonetheless have to bear its own costs but that any benefit to the companies, if successful, would ultimately have passed to himself and his wife. The plaintiffs had ultimately been non-suited and the proceedings had not been conducted in a reasonable fashion.

29. At paragraph 4.15 Clarke J. dealt with the question of notice. It is clear that he did so because he found it to be a relevant factor in circumstances where there had been some doubt about the exercise of the jurisdiction identified in the judgment, and considered that it might continue to be relevant in, at least, cases initiated before the judgment. He found that the possibility of a non-party costs order had been raised at a "relatively early" stage in the case, before the bulk of the costs had been incurred.

30. On appeal this Court ruled (in a judgment delivered by McKechnie J*., nem. diss*.) that Clarke J. was correct in finding that the jurisdiction existed to make such an order. It was stressed that the order did not make the third party liable for the underlying debt of the company – rather, the person who was the "real party" to the litigation had an independent liability based on his, her or its own actions having led to costs being incurred by the successful party. The judgment also deals in detail with the factors which should be considered before the jurisdiction is exercised.

31. In the course of his judgment (at paragraphs 78 - 82), McKechnie J. referred to the Court of Appeal decision in the instant case. Hogan J.'s judgment had been delivered after the *Moorview* appeal had been heard in this Court and judgment reserved, and therefore was not addressed by the parties in *Moorview*. As McKechnie J. noted, it would be unusual for the Court to give consideration to a judgment in those circumstances. However, the Court found it appropriate to refer to the doubts expressed by Hogan J. as to the correctness of Clarke J.'s conclusions, since jurisdiction was very much a live issue in *Moorview* and it was to the benefit of Mr. Cunningham that those views should be considered.

32. McKechnie J. expressly disagreed with the *obiter dicta* of Hogan J. on the jurisdictional issue. It is not necessary to consider this aspect further at present, since the existence of the jurisdiction was never under question in this appeal. However, McKechnie J. also gave separate, detailed consideration (in paragraphs 111 – 121) to the issue of notice.

33. Ultimately McKechnie J. endorsed the view, taken in *Carborundum Abrasives*, and approved by Clarke J. in the High Court, that the giving of notice to the non-party was not an absolute pre-requisite to the exercise of the jurisdiction. He did agree with the judgment of Hogan J. to some extent, in that he stated that notice would always be an important consideration for the Court, and a lack of notice would present a strong argument for not making the order. However, at paragraphs 115-116 he observed that, while it might not have been quite accurate to say that notice had been given to Mr. Cunningham "early" in the proceedings, that fact could not greatly avail him.

> *"It is clear from Carborundum Abrasives, as approved by Clarke J. and now by this Court on appeal, that the giving of notice to the non-party is not an absolute pre-requisite to the exercise of the jurisdiction to make the costs order sought…*
>
> *…It is clear that insofar as Clarke J. found it necessary to consider notice as a factor in these proceedings, that was largely because there may have been "some doubt" as to the existence of the non-party costs order jurisdiction prior to the decision in this case. Such jurisdiction has since been established and has been exercised on a number of occasions, it now being recognised as a risk which a third party will have to be mindful of before embarking on litigation for his or her own benefit through a corporate entity, whether insolvent or not, which could not meet a costs order against it."*

34. At paragraph 118 McKechnie J. expressed the view that the question of notice, while important, was something better considered as part of an overall exercise based on the discretion of the court, rather than as a mandatory pre-condition to the making of an order.

> *"It must be recalled that the non-party costs jurisdiction will be exercised only in exceptional cases and in order to ensure that no injustice is done. Often it will be unjust to make such a non-party costs order where no notice has been given, but this is not necessarily so. I would not fetter a court's jurisdiction to make such an order by holding that it cannot be done save where the non-party has been put on*

notice, even if every other factor of potential relevance strongly suggested that justice lay in favour of such an order being made."

35. The passage continues by referring to an example of a case where a trial judge was held to have erred in not taking into account the lack of warning given to a liquidator that costs would be sought against him personally (*Metallov Supplies Ltd v. M.A. (U.K.) Ltd* [1996] 1 W.L.R. 1613). McKechnie J. envisaged that in some cases a judge might, taking account of all of the circumstances, make only a partial or restricted order limited to costs incurred after the third party had been put on notice.

> *"Such an approach would have the benefit of encouraging the potential applicant to notify their opponent at the earliest stage of the proceedings, which could in turn prevent wasteful costs from being incurred before any third party costs order was ever adverted to.*
>
> *In this context, normally one might expect that notification would be given at the first opportunity on which the intended applicant, if called upon, would be in a position to demonstrate reasonable grounds for the making of such an application. Such would not foreclose on subsequent events also being relevant to the final determination of the application."*

36. It is important to note that McKechnie J. stressed that the giving of notice was not to be used as form of illegitimate pressure on an opponent to abandon a reasonable claim or defence.

> *"Whilst one cannot be more precise than that, it must be that to give notification in the absence of such grounds, or for an improper purpose or motive, or as a means or tool for suppressing a legitimate claim, would be entirely abusive and would have to be dealt with as such by the trial judge."*

37. The emphasis in this part of the judgment is on the undesirability of fettering a court's discretion to make such an order. McKechnie J. expressly noted that the criteria set out in his judgment were not intended to be prescriptive. He endorsed the "broad, discretionary" approach demonstrated in the United Kingdom authorities, based on doing justice in all the circumstances, and stated that he did not believe that a trial judge's exercise of the discretionary jurisdiction should be burdened by an overly complex or unduly rigid set of principles. However, he set out, as follows, a number of factors that should be taken into account:

a. The extent to which it might have been reasonable to think that the company could meet any costs if it failed in the litigation;

b. The degree to which the non-party would benefit from the litigation if successful, including whether he, she or it had a direct personal financial interest in the result;

c. The extent to which the non-party was the initiator, funder and/or controller of, and moving party behind, the litigation;

d. Any factors which might touch upon whether the proceedings were pursued reasonably and in a reasonable fashion (a factor capable of leaning either way);

e. There was no requirement of bad faith, impropriety or fraud, though of course the same, if present, would support the ordering of costs against the non-party;

f. Whether the non-party was on notice of the intention to apply, and if so, at what point in the litigation;

g. Whether the successful party had applied for security for costs (a matter rarely likely to be decisive in itself); and

h. Most importantly, the discretion was wide but must be exercised judicially and must, in all the circumstances, give rise to a just result.

38. It is made clear that this list was not intended to be exhaustive.

Submissions in the appeal
Whether notice is a mandatory pre-condition

39. The defendants submit that the passages in question from the judgment of McKechnie J. should be regarded as constituting an integral part of the *ratio* in *Moorview*, in circumstances where the case being made by Mr. Cunningham related to the adequacy of the notice. It is argued that Mr. Cunningham could only have succeeded on this issue if the Court had found either that notice was required and the warning letter was insufficient, so that no order should have been made; or that notice was required but the letter was too late and so no order should have been made; or that the notice was sufficient but costs should only be awarded for the period of time *after* notice was provided. In the event, the Court had clearly decided that there was no mandatory notice requirement.

40. Alternatively, the defendants submit that if this Court were to hold that the comments in question were *obiter dicta*, they are nonetheless sound statements of the law and should be applied in the instant case.

41. It is also submitted that to elevate the giving of notice to the status of a mandatory pre-condition would be to fetter the discretion afforded to the courts in the Supreme Court of Judicature Act (Ireland) 1877 and O.15, r.13, Rules of the Superior Courts, and would amount to inappropriate law making, by introducing a limitation not provided for by the legislature. Further, it would be unjust in principle, since circumstances might arise where it would be just in the circumstances of the case to make a non-party costs order in the absence of such notice.

42. On the issue of notice, Mr. Loughnane's submission is that the "remarkable" jurisdiction in question can be fairly exercised only if the non-party is given notice. The Court of Appeal approach is described as flexible and minimal, in that it required only that notice be given, "however informally", at "some appropriate stage".

43. It is submitted that *Moorview* should be distinguished on the basis that the primary issue in that case was the existence of the jurisdiction, whereas Mr. Loughnane's argument is that the jurisdiction was not appropriately exercised against him. The factual situation in relation to the question of notice is said to be fundamentally different in that notice had in fact been given to Mr. Cunningham, whereas none was given to Mr. Loughnane. The dispute in relation to notice in *Moorview* was specifically about the form and timing of the notice, and therefore the Court merely had to determine whether the notice given was sufficient. In the circumstances, it was not necessary to consider whether there was a general requirement for notice, and the view of McKechnie J. to the effect that notice was not an absolute prerequisite was not part of the *ratio decidendi*.

44. It is further submitted that McKechnie J. should be seen as having approved of Hogan J.'s reasoning in holding that the question of notice was bound up in questions of procedural fairness. That being so, it is argued that it is difficult to envisage any scenario where it might be unjust not to make a non-party costs order in the absence of notice. Hogan J.'s suggested requirement of notice, "*however informal*", should therefore be applied.

Whether notice was required in the circumstances of this case

45. This question arises if the Court were to hold that the comments of McKechnie J. on the question of notice constitute part of the *ratio decidendi* of *Moorview*, or alternatively to uphold the reasoning while still deeming the observations to be *obiter dicta*.

46. It is submitted on behalf of Mr. Loughnane that the defendants were well aware of both the insolvency of W.L. Construction and his own beneficial ownership of the company. In those circumstances he should have been put on notice of the possibility of an application for a non-party costs order. Moreover, it is submitted that because of this financial reality, notice could have easily been provided to Mr. Loughnane without any need for the defendants to alert him to the possibility of cross-examination on the fraudulent nature of the invoices. In this context reliance is placed on the observation in *Moorview* that it would normally be expected that notification would be given at the first opportunity on which the intended applicant, if called upon, would be in a position to demonstrate reasonable grounds for the making of such an application.

47. Reference is made to the fact that the first six days of the trial were occupied by the opening of the case and Mr. Loughnane's evidence. At that point, on 27th November, 2015, it was necessary to adjourn the hearing, which had only been scheduled to last for six days. Noonan J. was not available again until 26th April, 2016. It is submitted that this provided the defendants with ample opportunity to put Mr. Loughnane on notice of the possibility of such an application on the grounds of his fraudulent behaviour. It is said to be unjust that he was not put on notice in these circumstances, and that no relevant countervailing considerations exist to justify the defendants' silence on the issue.

48. It is stressed that the defendants explicitly relied on the company's insolvency (and thus inability to comply with a costs order) during their application to dismiss the claim. During

this application they made no reference to the possibility of making Mr. Loughnane liable for the costs.

49. In response to an assertion by the defendants that Mr. Loughnane would not have changed his behaviour even if given notice, it is argued that since he had heeded Noonan J.'s incrimination warning, a logical inference is that he would have sought to minimise his potential liabilities if put on notice of a potential non-party costs order.

50. In reply to these submissions, the defendants rely on Noonan J.'s finding that, in the context of the trial, they "*were entitled to keep their powder dry*" until Mr. Loughnane gave evidence. They make the case that neither the precise extent of the plaintiff's claim nor the full extent of Mr. Loughnane's dishonesty, both of which were relied upon in the applications for a dismiss and for the costs order, were clear before the end of the plaintiff's case. They contend that Mr. Loughnane continued to behave in a fraudulent manner and persisted in altering the value of his claim, despite Noonan J.'s incrimination warning. It is suggested that, therefore, it is unlikely that he would have altered his behaviour if put on notice of a potential non-party costs order.

51. Finally, on this point, the defendants argue that it would be unjust to impose an obligation on them to provide notice when the obligation should, in reality, rest on Mr. Loughnane not to engage in fraudulent misconduct or to bring proceedings that constitute an abuse of process.

Whether there must be a direct benefit

52. On this issue it is submitted on behalf of Mr. Loughnane that due to the company's indebtedness (€106,214 as of 31st August, 2014 and €52,344 as of 31st August, 2015) it was clear that the immediate beneficiaries of any successful litigation would be the relevant creditors. However, it is stressed that he does not dispute Noonan J.'s findings to the effect that he would have benefitted from successful litigation, that the company's liabilities were going down and that it was trading profitably. The issue is not seen as having the same significance as the question of notice.

53. In reply, the defendants submit that personal benefit is a factor to be taken into account in the same manner as prior notice – that is, that it is not a mandatory requirement. Even if there were a finding that Mr. Loughnane was not to be a direct beneficiary of the litigation, this would not be sufficient grounds to refuse a non-party costs order.

54. It is also submitted that as the company was trading profitably, it was very likely that it was soon to return to solvency, thus giving weight to the claim that Mr. Loughnane sought to benefit from the proceedings.

Full or partial costs

55. The final submission on behalf of Mr. Loughnane is that, in the event this Court deems it appropriate for a non-party costs order to be made against him, that order should be a partial one only.

56. It is submitted that as it is possible to limit a costs order to the time subsequent to when notice was given, it should also be possible to limit the order to the time subsequent to when notice could and should have been given. This submission is based on the argument that the primary purpose of notice in such circumstances is to allow a party to minimise exposure to costs liability.

57. On the facts of this case, it is suggested that costs should not be awarded against Mr. Loughnane for the period after 27th November, 2015, when notice could and should have been given in the light of his evidence and cross-examination.

58. In reply, the defendants submit that the basis for the order of Noonan J. was not limited to the information that emerged from Mr. Loughnane's cross-examination, but evidence of misconduct and repeated alteration of the quantum of the claim that emerged throughout the trial as a whole.

Discussion and conclusions

59. To recap briefly, the Court of Appeal perceived that the trial judge erred in making the order against Mr. Loughnane because in so doing he breached Mr. Loughnane's right to fair procedures. In a concise and straightforward finding, the Court ruled that because he was not a party, and was not notified of their intention by the defendants, he could not have known that the defendants might seek to make him liable for their costs. He therefore did not know the case made against him, and was left exposed retrospectively to a significant claim for costs of which he had had no prior warning.

60. In my view, this analysis is mistaken.

61. The jurisdiction to make an order for costs against a non-party had been confirmed in 2011 in *Moorview*, which undoubtedly was a case that had attracted widespread attention amongst practitioners and was reported in the Irish Reports. Before the instant case came on for hearing, it had been discussed in at least three other written judgments from the High Court – *Thema International Fund plc v. HSBC* (also reported, in [2011] 3 I.R. 654), *Used Car Importers of Ireland v. Minister for Finance* ([2014] IEHC 256, where Gilligan J. exercised his discretion in refusing to make an order because the criteria had not been met) and *McCann v. Trustees of Victory Christian Fellowship* [2014] IEHC 655, where Donnelly J. considered an application for disclosure of the identity of third party funders, with a view to an application for costs against them). While *Moorview* itself was under appeal, it appears to have been the only case where the existence of the jurisdiction was in dispute. There could be no presumption that it was wrong. The jurisdiction was, therefore, an established part of the law in relation to costs. In those circumstances, it is in my view incorrect to say that Mr. Loughnane "could not have known" that he might be made liable if the criteria were met.

62. I do not consider that this is a situation that comes within the ambit of the right to know the case being made against oneself by an opponent. Mr. Loughnane was informed of the case to be made against him personally, as opposed to the case made by the defendants against the plaintiff in their defence to its claim, when the defendants decided to seek an

order against him. Prior to that, the case being made by them was against the company, in defence of its claim against them. It is not uncommon for applications to be made to trial judges in the light of developments during the course of a trial, or at the end, and a party to litigation is not obliged to notify the opposing party, in advance, of the course of action it will adopt in relation to all possible eventualities.

63. Potentially the strongest argument in the case, it seems to me, is that if Mr. Loughnane had been given some warning, whether formal or informal, at an earlier stage he could have minimised his own exposure and reduced the waste of court time by causing the company to withdraw its claim. However, it is clear from *Moorview* that this is no more than a factor to be taken into account in the exercise of the court's discretion.

64. In the circumstances of this case, for instance, it is suggested on behalf of Mr. Loughnane that an appropriate stage had been reached at the conclusion of his own evidence, when it was clear that there had been a level of fraud involved in the claim. That may be so, although it can be difficult for an appellate court to assess the dynamic of a witness action without over-reliance on hindsight. After all, it was Mr. Loughnane's choice to persist with the action even after it had been clearly signalled to him that he was at some risk of criminal prosecution. Presumably he had some hope that the other witnesses yet to be called by the plaintiff, and in particular the quantity surveyor, might rescue the case to the extent of presenting coherent, credible evidence that some figure was due from the defendants. By the same token, the defendants could not have been confident at that point that the rest of the plaintiff's evidence would be as unimpressive as Mr. Loughnane's, and that they would have grounds for a non-suit application. As noted above, they had been prepared for a finding that some level of award was due, if it was properly proved. Nor could they have been sure, until after the quantity surveyor's evidence, of the extent to which that witness was taking instruction from Mr. Loughnane.

65. I would further observe that the concept of an "informal" warning may need to be treated with some caution. It may happen that a legal representative will indicate to an opponent that a particular course of action will attract certain consequences, without formal correspondence being entered into. It would be highly undesirable if the content of such conversations then had to be given in evidence before the trial judge in order to support any subsequent application. It must also be remembered that the jurisdiction under consideration is one that is to be exercised only in exceptional cases, and is not one that should be routinely or lightly threatened against opponents on the basis that one part of the evidence appears to have collapsed.

66. The question of notice, therefore, as the Court made clear in *Moorview*, is one of many matters left to the discretion of the trial judge in the exceptional cases where such an order is contemplated. The existence of the jurisdiction is to remedy a potential injustice in such cases, and, obviously, it will not be utilised if to do so would be to visit injustice on the other party.

67. Noonan J. found that this was a truly exceptional case, permeated by the dishonesty of Mr. Loughnane. That is not to say that Mr. Loughnane was to be punished by an award of

costs that would otherwise be the liability of the company. The point was that he was the controller of the company, the moving party behind the litigation, the person who instructed the other principal witness and, most significantly, the person responsible for the fact that the plaintiff was non-suited for the twin reasons of litigation misconduct, amounting to abuse of process, and failure to prove that any debt was due. He was found to have been responsible, through that misconduct and failure, for the exposure of the defendants to very significant legal costs in circumstances where, plainly, the plaintiff would not be able to meet those costs. Had the company's claim been successful, on the other hand, it seems clear that he would have benefitted to some extent, depending on the scale of the award. This is, in my view, a clear example of the mischief aimed at by the exercise of the jurisdiction. In particular, the comments made by Clarke J. as to the need to prevent persons litigating on a consequence-free basis, with the aim of personal benefit, seem apposite in this case. I can see no grounds for interfering with the decision of the trial judge, and consider that the Court of Appeal erred in reversing him.

68. I would therefore allow the appeal.