APPROVED **[2024] IEHC 637**

THE HIGH COURT

Record No.: 2012/2173P

Between:

ATLANTIS DEVELOPMENTS LIMITED (IN RECEIVERSHIP)

Plaintiff

-and-

PATRICK CONSIDINE and LISCANNOR DEVELOPMENT COMPANY LIMITED

Defendants

-and-

JOHN DECLAN FLANAGAN

Notice Party

JUDGMENT of Mr Justice Rory Mulcahy delivered on 8 November 2024

Introduction

1. This judgment concerns the first defendant's application that costs be awarded against the notice party, John Flanagan, notwithstanding that when the case was heard and determined, Mr Flanagan had not yet been joined as a party to the proceedings.

2. In the proceedings, the plaintiff claimed damages in relation to its purchase from the first defendant of certain lands in Liscannor, County Clare in 2005. The main issue

between the parties was whether the first defendant was the owner of all of the lands included in the sale and, if not, what the consequences were of the inclusion in the sale of lands of which he was not the owner. In this regard, the ownership of a portion of the lands included in the sale was in dispute ("**the Disputed Property**"). In 2010, subsequent to the plaintiff's acquisition from the first defendant, the second defendant had been registered as owner of the Disputed Property on foot of an application made to the Property Registration Authority ("**the PRA**"). That application was grounded on the affidavit of a director of the second defendant in which it was stated that the first defendant's predecessor in title, his father, had agreed to sell the Disputed Property to the second defendant in 1978, that the second defendant had entered occupation of the Disputed Property on foot of that agreement and had thereafter obtained a possessory title to the property.

3. In a judgment dated 10 November 2024 ("**the judgment**"), I rejected the plaintiff's claim, having concluded that, at the time of the sale, the first defendant was the owner of all of the lands included in the sale, including the Disputed Property. As emerged during the trial, the affidavit evidence relied on by the second defendant to register its ownership of the Disputed Property contained averments which were not consistent with the oral evidence given by the deponent of that affidavit in these proceedings. In particular, the deponent made clear that although a sale had been agreed for the Disputed Property, the purchase price was never paid by the second defendant. Moreover, he also made clear that the acts of exclusive possession relied on in the affidavit submitted to the PRA – the second defendant's use of the Disputed Property and the building of a wall around it – had been done with the first defendant's father's knowledge and consent.

4. By order dated 8 December 2023, I made an order that the plaintiff pay the first defendant's costs of the proceedings. In addition, I granted the first defendant liberty to issue a motion seeking an order joining John Flanagan, a director of the plaintiff, to the proceedings for the purpose of making him liable for the first defendant's costs.

5. By motion dated 15 May 2024, the first defendant brought an application to join Mr Flanagan to the proceedings for the purpose of seeking costs against him. On 1 July 2024, having been satisfied that Mr Flanagan had been served with the motion, I made

an order joining him to the proceedings as a notice party for the purpose of determining the substantive issue on the motion. I listed the motion for hearing before me on 22 October 2024.

6. For administrative reasons, the hearing of the motion was adjourned for a week to 29 October 2024. Mr Flanagan was notified of this fact both by the first defendant and the court. In his communications to the court, Mr Flanagan indicated that he did *"not consent to being, or wish to be, a Party to those proceedings.*" He did not appear in court on 29 October 2024. However, having been satisfied as to service of the court order joining him to the proceedings and that he had been notified of the return date for the motion, I permitted the first defendant to proceed with his application for an order for costs against Mr Flanagan.

The first defendant's application

7. The first defendant's application is grounded on an affidavit sworn by him on 9 May 2024. In that application, he describes the financial position of the plaintiff. In this regard, he explains that there are two shareholders and directors of the plaintiff, of which Mr Flanagan is one, each director holding one share. He avers that the other director was adjudicated a bankrupt on 9 February 2021. He notes that the plaintiff was in receivership at the commencement of the proceedings and has no less than fourteen charges registered against its assets and undertaking. It appears that there have been a number of changes of receiver and that the receiver most recently appointed, Mr Ken Fennell, has filed a Form E11 with the Companies Registration Office, giving notice of the termination of his receivership on 6 November 2023. That notice was accompanied by a letter pursuant to section 430(4) setting out that Mr Fennell was not in a position to form any conclusion as to the solvency of the plaintiff. The first defendant expresses the view that the plaintiff will be unable to discharge the costs order made against it. There is no reason to dispute this assessment.

8. His affidavit also details the history of the proceedings. In particular, he refers to the application for security for costs issued by him on 21 August 2019. That application was resisted by the plaintiff. Mr Flanagan swore an affidavit on behalf of the plaintiff

in that application in which he accepted that there was a risk that the plaintiff would not be able to meet an award of costs. However, he averred that the fact that the plaintiff was in receivership was always known to the first defendant and that he "*knew or ought to have known that the Plaintiff was in a precarious financial position as and from the entry of an Appearance*." The application for security for costs was refused.

9. The first defendant also refers to an application by him, made on 1 February 2022, to stay the proceedings pending amendment by the plaintiff of the proceedings to include a claim which, in the first defendant's view, had been advanced for the first time in a notice setting out particulars of further loss and damage. That application was also refused.

10. The affidavit then sets out various matters which the first defendant relies on in support of this application. In particular, he points to the fact that Mr Flanagan was the "moving force" in causing the proceedings to be issued and pursued. He avers to his belief that Mr Flanagan had a "*direct personal financial interest*" in the outcome of the litigation, although he does not explain that interest.

11. He asks the court to take into account the manner in which the proceedings were pursued by the plaintiff "*through the agency*" of Mr Flanagan. In particular, he relies on the fact that the plaintiff's claim was entirely premised on the second defendant's purported ownership of the Disputed Property and, in that regard, the plaintiff had solely relied on the affidavit evidence lodged with the PRA. However, as set out in the judgment, that evidence was shown to contain material factual errors which wholly undermined the plaintiff's case. The first defendant argues that the plaintiff and Mr Flanagan should have discovered the true position before the proceedings came to trial.

12. He also refers to the fact that, until the commencement of the trial, the plaintiff pursued a claim for damages by reference to the refusal of planning permission notwithstanding that it was perfectly clear that the refusal of permission had nothing to do with any issue about ownership of the Disputed Property. He describes this aspect of the plaintiff's claim as "*spurious and an abuse of process*."

13. Finally, the affidavit refers to various unrelated proceedings in which either the plaintiff or Mr Flanagan has been involved.

Jurisdiction to make costs orders against a non-party

14. The jurisdiction to make a costs order against a non-party to proceedings is now firmly established in Irish law. In *Moorview Developments Ltd v First Active plc* [2018] IESC 33; [2019] 1 IR 417, the Supreme Court rejected an appeal from the decision of the High Court (Clarke J) in which the court made a non-party liable for the costs of those proceedings despite the fact that he had never been a party to those proceedings. In his Supreme Court judgment, McKechnie J analysed in detail the jurisdiction to make such an order and concluded that it derived from both section 53 of the Supreme Court of Judicature Act (Ireland) 1877 and Order 15, rule 13 of the Rules of the Superior Courts.

15. He also considered the factors to which regard should be had in deciding whether to make such an order. He noted that the jurisdiction to make such an order would only be exercised in "*exceptional cases*". He referred to the decision of the UK Court of Appeal in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23 in which the court had indicated that each case must turn on its own facts and that the only "*immutable principle is that the discretion [to make such an order] must be exercised justly*". McKechnie J observed (at p. 472):

> "*125. In many respects there is much to commend this approach. I do not believe that a trial judge's exercise of the discretionary non-party costs jurisdiction should be burdened by an overly complex or unduly rigid set of principles from which no departure is permitted. It is the trial judge who is best placed to assess the overall circumstances of the case and to determine whether such an order is in the interests of justice. Having said that, however, it is evident that there are certain considerations to which the judge should have regard. Without being unduly prescriptive, I would consider that the following factors should be taken into account when making an order of this type:*
>
> > *a. The extent to which it might have been reasonable to think that the company could meet any costs if it failed*

b. The degree to which the non-party would benefit from the litigation if successful, including whether 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 may touch on whether the proceedings were pursued reasonably and in a reasonable fashion; the required assessment of the conduct of the proceedings may of course lean either in favour of or against the making of the order sought

e. There is no requirement that there be a finding of bad faith, impropriety or fraud, though of course the same, if present, will support the ordering of costs against the non-party

f. Whether the non-party was on notice of the intention to apply for a non-party costs order; at what point in the litigation such notice was communicated will also be a relevant consideration, as will the extent of the notice so provided

A further consideration to take into account, though rarely likely to be decisive in and of itself, will be:

g. Whether the successful party applied for security for costs in advance of the trial

Finally, and most importantly:

h. The Court's discretion is a wide one, but it must be exercised judicially and, in all the circumstances, must give rise to a just result."

16. While stressing that a broad discretionary approach based on doing justice in all the circumstances was the appropriate approach to such applications, he concluded as follows (at p. 474):

"*127. However, where the non-party not merely funds the proceedings but also substantially controls and stands to benefit from them, justice will typically require*

the making of the order sought. In other words, a non-party costs order will follow where the non-party was, in reality, the "real party" to the litigation. Thus although I am endeavouring not to set down a rigid rule regarding the weight to be assigned to each factor, it must be said that factors (a), (b) and (c), above, must always carry substantial weight."

Application to present case

17. It is clear from the foregoing that a holistic rather than mechanistic approach should be taken to the question of whether to make a non-party liable for the costs of proceedings. That said, it is helpful to consider the question by reference to each of the factors enumerated by the Supreme Court in *Moorview* when carrying out that holistic assessment.

18. As indicated in *Moorview*, the factors identified at (a), (b) and (c) above are likely to be the most significant. As will be apparent from the below, many of the factors identified in *Moorview* overlap or are interrelated, at least in the circumstances of this case.

19. It is clear that it would not have been reasonable for Mr Flanagan to have thought that the plaintiff would be in a position to meet a costs order if the proceedings failed. He made clear in the affidavit sworn in response to the security for costs application that there was a real risk that it would not be. But as he pointed out, this was also apparent to the first defendant from the outset, a factor no doubt relevant to the refusal of the application for security for costs.

20. Although the first defendant contends that Mr Flanagan has a "*direct personal financial interest*" in the litigation, this seems to be based on no more than assumption. It certainly appears that Mr Flanagan was the initiator and moving party behind the litigation, and indeed, from his evidence at the trial, that he was the moving party behind the plaintiff's attempts to develop the lands the subject of the agreement with the first defendant. But the first defendant has not established that Mr Flanagan was the only person with an interest in the proceedings. Indeed the evidence is that he holds an equal

shareholding with the other director in the plaintiff. That director had been adjudicated a bankrupt before these proceedings. Therefore, any interest that he had in the plaintiff or in any gain that the plaintiff might have achieved in these proceedings would have been to the benefit of the Official Assignee. The assets of the plaintiff are, moreover, heavily encumbered. Though the shareholders of the plaintiff might well have indirectly benefitted had the company succeeded in the litigation, it is not clear that this is so. There is no basis on which the court could conclude that Mr Flanagan would have directly benefitted had the plaintiff prevailed.

21. There was no evidence about how the litigation was funded by the plaintiff. As discussed below, the first defendant had not, prior to the filing of written submissions in this case, adverted to the possibility of seeking costs against Mr Flanagan. The cross-examination of him was, therefore, focussed on the matters in issue in the proceedings rather than the possibility of making him personally liable for costs.

22. In those circumstances, although Mr Flanagan was, no doubt, the driving force behind the proceedings, I am not convinced that the first defendant has established that he was the "real party" to the proceedings such that the interests of justice dictate that a non-party costs order should follow.

23. Nor, in my view, do the other factors identified in *Moorview* tilt the balance in favour of making such an order. Although there is some basis for the first defendant's criticism of the plaintiff, and in particular Mr Flanagan, for failing to determine that the true position in relation to ownership of the Disputed Property was not as set out in the affidavit grounding the second defendant's application to the PRA, and for failing to challenge that application for registration, it would be harsh to regard the plaintiff's conduct as unreasonable. Although, for the reasons explained in the judgment, section 31 of the Registration of Title Act 1964, as amended, did not, in the particular circumstances of this case, entitle the plaintiff to rely on the conclusiveness of the register – the second defendant's ownership having been registered after the date of sale by the plaintiff – it was not unreasonable for the plaintiff to have sought to rely on the fact that the PRA had registered the second defendant as owner of the Disputed Property on the basis of the evidence tendered by it in an affidavit sworn by a director in 2010. Moreover, the same director of the second defendant had sworn a joint affidavit in

response to the security for costs motion in 2019, together with other directors of the second defendant, which appeared consistent with the position as set out in the affidavit filed with the PRA in 2010.

24. I agree that the plaintiff's claim that the first defendant had caused its loss by reason of its failure to obtain planning permission was a very speculative claim, ultimately unsupported by the evidence, but it was not pursued at the hearing. Given the substantial value of the claim which *was* maintained at the hearing, it is not clear to me that it was so unreasonable to have included the claim arising from the refusal of planning permission that Mr Flanagan should be exposed to a costs order.

25. In assessing unreasonableness, regard must also be had to the fact that the plaintiff *did* establish that the first defendant had incorrectly stated that there had been no prior claims in relation to the Disputed Property. Although, for the reasons explained in the judgment, the plaintiff was not entitled to a remedy arising from that misstatement, it does illustrate that the plaintiff's complaints were not wholly without substance. Put simply, the fact that the plaintiff failed in its claim does not translate into a conclusion that it was unreasonable for it to have commenced and continued the proceedings.

26. Still less does it mean that there was any bad faith on the part of the plaintiff or Mr Flanagan. They could, it is true, have challenged the second defendant's application to be registered as owner of the Disputed Property but contended that this was not done because of Mr Flanagan's belief that the second defendant had been "*wronged*". As suggested in the judgment, there must be a suspicion that this was not the only motivation. Be that as it may, there was no evidence or even suggestion that the plaintiff or Mr Flanagan knew or ought to have known that the second defendant's application to the PRA was based on evidence which would be shown to be incorrect in these proceedings.

27. The last two factors identified in *Moorview* weigh heavily against the making of the order sought in this case. They can be dealt with together.

28. At no time prior to the conclusion of the hearing of evidence in these proceedings did the first defendant indicate an intention to seek to make Mr Flanagan personally liable for his costs. It was suggested for the first time in the first defendant's replying

written submissions, *i.e.* after all legal costs had already been incurred by the first defendant. This was so despite the fact that the first defendant was on notice of the plaintiff's precarious financial position and, indeed, had tried and failed to take steps to protect his own position by making an application for security for costs.

29. After the High Court decision in *Moorview*, but prior to the Supreme Court decision, the Court of Appeal dealt with an application for a non-party costs order in *WL Construction Ltd v Chawke* [2018] IECA 113. Despite some apparent reservations, Hogan J accepted that there was jurisdiction to make such an order in an appropriate case. However, he concluded that, in that case, the failure by the defendant to give any prior indication that it would make such a claim was fatal to its application:

> "*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.*"

30. The Supreme Court in *Moorview* addressed the Court of Appeal decision and made clear that the failure to put a non-party on notice should not be seen as a jurisdictional bar to the making of a non-party costs order, rather it was a factor to be taken into account (p. 469):

> "*118. Although the issue of notice will always be an important factor in a given case, and a lack of notice will present a strong argument not to make a non-party costs order, I am of the view that this matter is better considered as part of an overall exercise based on the discretion of the court, rather than being a mandatory precondition to the making of such 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."

31. Of course, in this case, "*every other factor*" does not "*strongly suggest*" that a costs order should be made against Mr Flanagan. The delay in putting Mr Flanagan on notice of this intended application is a particularly strong factor militating against the making of an order in this case where, as is apparent from the security for costs application, the first defendant was alive to the necessity to seek to protect his position but did not seek to do so by putting Mr Flanagan on notice that this type of application was contemplated. True it is, as McKechnie J observed later in his judgment, that the increased frequency with which non-party costs are made means that the moving parties behind litigation should be aware that there is a potential risk of such an order being sought, but the absence of notice remains, in my view, a strong factor suggesting that it would not be in the interests of justice to make an order here.

32. That is all the more so when it is considered that the first defendant was not only aware of the plaintiff's precarious position – as evidenced by his security for costs application – but also of the necessity to move promptly when making an application to secure some measure of costs protection. As counsel for the first defendant acknowledged, the application for security for costs was refused on the basis, *inter alia*, that it was made too late in the day. The last factor identified in *Moorview* is whether a security for costs application had been made. The non-party in that case had argued that the existence of the procedure for seeking security for costs precluded a jurisdiction to make a non-party costs order. This was rejected by the High Court and the Supreme Court on the basis that the jurisdiction to grant security for costs and the jurisdiction to make a non-party costs order operated at different stages in proceedings. However, the question of whether an application for security had been made remained a potentially relevant factor.

33. The cases discussed in *Moorview*, and indeed the judgment in *Moorview* itself, seem to have proceeded on the basis that the failure to seek security for costs might be

a factor which weighed against the making of a non-party costs order. Of course, an application was made here. However, it was rejected, in accordance with established principles, on the basis that it was made too late in the proceedings. It seems to me that the making of a non-party costs order in those circumstances, where no warning was given of the intention to make such an application even after the adverse decision on the security for costs application, would not be in the interests of justice.

34. The first defendant identifies a further factor which he says is relevant, which is that the plaintiff "*through the agency*" of Mr Flanagan has been involved in other proceedings which have been dismissed as frivolous or vexatious or as an abuse of process, and that Mr Flanagan himself has been involved in a variety of proceedings in which financial institutions have pursued claims against him. The fact that the plaintiff pursued unrelated proceedings which were dismissed as an abuse of process is not, in my view, a relevant consideration. These proceedings were not dismissed on that basis. Nor is Mr Flanagan's involvement in other proceedings relevant save to the extent that it tends to support the first defendant's apprehension, expressed in his affidavit, that obtaining a costs order against Mr Flanagan may be a "*fruitless exercise at present*".

Conclusion

35. Taking all the factors identified in *Moorview* together and in light of the overarching requirement to ensure that any order made meets the interests of justice, I refuse the first defendant's application for a costs order against Mr Flanagan.

36. In circumstances where Mr Flanagan did not participate in the application, I will make no order as to the costs of this application.

Rory Mulcahy