

THE HIGH COURT

IN THE MATTER OF GREEN LABEL SHORT LETS LIMITED

AND

IN THE MATTER OF SECTIONS 671 AND 672 OF THE COMPANIES ACT, 2014

[2024] IEHC 425

[Record No. HCOS2023/256]

BETWEEN

LIZET PENA-HERRERA

PLAINTIFF

AND

GREEN LABEL SHORT LETS LIMITED

FIRST NAMED RESPONDENT

AND

MARC GODART

SECOND NAMED RESPONDENT

Judgment (No. 2) of Mr. Justice Cregan delivered on the 11th day of July, 2024

Introduction

1. In my first judgment in this matter, delivered on 13th May, 2024, I concluded that this was an appropriate case in which the Court should summon Mr. Marc Godart for examination under sections 567 and 671 of the Companies Act, 2014. I also indicated that I would hear the parties further on the form of the order and on the issue of costs. This judgment deals with the issue of costs.

2. The matter came back before the Court on a number of occasions to consider the manner in which the applicant could carry out her inspection of the books and records of the first named respondent and also to consider the manner in which Mr. Marc Godart would be

examined by the Court in respect of the assets and liabilities of the company with a view to determining to what extent the company could comply with the order of the District Court, ordering it to pay to the Applicant the sum of €16,633.00 approximately.

3. However on 12th June, 2024 the first named respondent's solicitors wrote a letter to the applicant's solicitors stating:

“As you are aware the respondent does not have sufficient assets to make any payment to your client. However with a view to bringing some finality to the matter, the respondent will procure and borrow sufficient money to pay the applicant the full sum sought in the order of the District Court dated 2nd June, 2023 being the sum of €15,433.50 along with District Court costs in the amount of €1,200.”

4. The letter also stated that the sum would be paid within fourteen days by bank draft. This money was subsequently paid to the applicant.

5. The applicant has applied to make Mr. Godart personally liable for her costs. In the circumstances, I made an order joining Mr. Godart as a second named respondent under Order 15 rule 13 of the Rules of the Superior Courts.

6. The application to have Mr. Godart made personally liable for the applicant's costs is contested by Mr. Godart. Legal submissions were filed by both sides. In the circumstances it is necessary to consider the legal principles which are applicable to an application of this nature.

Legal principles governing such applications

7. Order 99 of the Rules of the Superior Courts provides at Rule 2: *“Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:*

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.”

8. Order 99 rule 3 (1) provides that the High Court in considering the awarding of costs shall have regard to the matters set out in s.169(1) of the 2015 Legal Services Act.

9. Section 169(1) of the Act also provides as follows: “ (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) *Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.*

(3) *Where a party succeeds against one or more than one of the parties to civil proceedings but not against all of them, the court may order, to the extent that the court considers that it is proper to do so in all the circumstances, that—*

(a) the successful party pay any or all of the costs of the party against whom he or she has not succeeded, or

(b) the party or more than one of the parties against whom the successful party has succeeded pay not only the costs of the successful party but also any or all of the costs that the successful party is liable to pay under paragraph (a).”

10. The circumstances in which a court could consider making non-parties be joined to proceedings in order to make such a party liable for costs was considered by the High Court in *Moorview Developments & Ors v. First Active Plc & Ors* [2011] 3 IR 615 and by the Supreme Court in the same case on appeal in [2019] 1 IR 417.

11. Clarke J. (as he then was) stated in the High Court (at para. 50 of his decision):

“ One of the policy reasons why it is said that it is important that a jurisdiction of the type which I have identified exists, is to prevent parties having a ‘free ride’ as to how they conduct litigation, designed for their benefit, without there being any real risk of a meaningful costs order being made against them.

12. In the Supreme Court, McKechnie J. giving judgment on behalf of the court stated at para. 125 of his judgment: *“ 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.”

Background

13. I turn now to consider the application of these principles to the present case. I have set out the background to this application in my first judgment. It is not necessary for me to set this out again in detail. However it is of relevance to set out a summary of the background facts leading to this application for the purposes of considering the application of the *Moorview* principles to this case.

14. The applicant entered into a tenancy agreement with the first respondent for premises at 8 Vintage Court, Cork Street in Dublin. The rent was €470 per month and the tenancy was for an indefinite duration. However, on 28 March, 2022, after living in the premises for 15 months, the applicant made a complaint to Dublin City Council about a number of health and safety issues in the house (including overcrowding) and requested that it inspect the building. An inspection was subsequently carried out by Dublin City Council on 6 April, 2022. Within one week, on 14 April, 2022, Mr. Marc Godart directed the company to serve the applicant with a notice of termination of her lease. The following day the applicant complained to the Residential Tenancies Board (RTB) alleging that her notice was invalid. The Residential Tenancies Board agreed and the RTB made a determination that the respondent should pay the amount of €1,000 to the applicant. No appeal was made by the company to this adjudication.

15. On 3 August, 2022, two days after the adjudication of the first complaint and twelve days before the termination date on the invalid notice, the company, again at the direction of Mr. Godart, unlawfully evicted the applicant from her home by packing up her possessions and taking them to a storage unit while she was away from the house at work. In substance, due to the unlawful actions of the respondents, the applicant was made effectively homeless.

The applicant filed a second complaint with the RTB on 4th August, 2022. A second adjudication was heard on 19th October 2022. The adjudicator of the RTB again held in favour of the applicant and directed that the first respondent should pay a sum of €14,443.93 to the applicant within 21 days. No appeal was made by the first respondent against this decision.

16. The applicant then applied for, and obtained, judgment in the District Court in the sum of €15,433.50 together with costs in the sum of €1,200 plus VAT. No appeal was lodged against this decision. On 1st August, 2023, the sheriff attempted to execute the said judgment but the execution order was returned with a letter from the sheriff marked “*Nulla bona – no goods*”.

17. The applicant has therefore obtained a judgment in the sum of €15,433.50 (plus costs) in the District Court and this judgment was still unsatisfied prior to, and during, this application.

18. It is clear that the first respondent, through its controlling director, Mr. Godart, has behaved in a completely unlawful manner towards the applicant. It is also clear that the first respondent has no defence to the allegations made by the applicant.

19. The applicant then brought an application before this Court seeking to have Mr. Godart examined on oath about the ability of the company to satisfy this court order. At one of the first hearings on this application, the applicant sought leave to amend her notice of motion to add various other grounds. I granted an adjournment to ensure that all appropriate matters were before the Court. The first respondent complained on certain occasions that they did not have time to consider new matters brought before the Court and I adjourned the matter on a number of occasions also, in fairness to the respondent, to allow them time to consider the amended case being brought by the applicant. Legal submissions were filed by both parties and after a hearing on the issue, I gave my decision on 13th May, 2024.

20. I would emphasise that the applicant was successful in her primary application which was to seek an order directing Mr. Godart to give evidence on oath before the High Court as to the assets and liabilities of the respondent company and to show why the respondent had not complied with the District Court order. However the applicant did not succeed on all the legal arguments which she made before me, and I declined to make an order compelling the examination of Mr. Godart under Order 42 rule 36 of the Rules of the Superior Courts on the basis that the applicant was a judgment creditor who had a judgment in the District Court.

21. Counsel for the respondent company submitted that the applicant had also failed in her argument that she was entitled as a creditor to seek to examine Mr. Godart personally. However, the applicant was successful in persuading the Court that the Court should exercise its jurisdiction under s.567 and s.671 of the 2014 Act and should, of its own motion, direct Mr. Godart to appear for examination. I am satisfied therefore that the applicant was successful in obtaining her primary objective which was to obtain an order directing that Mr. Godart appear for cross-examination.

22. It is also relevant that once this order had been made, Mr. Godart effectively “*threw in the towel*” and wrote to the applicant to indicate that the respondent company would find the funds to pay her the full amount due under the District Court order. It is the case therefore that the applicant was not only successful in her application to examine Mr. Godart but that her successful application to examine Mr. Godart brought about the result that she obtained full payment pursuant to the District Court order.

Application of the *Moorview* principles to this case

Could the company pay the costs?

23. The first issue that a Court should consider, under the *Moorview* principles, is “*the extent to which it might have been reasonable to think the company could meet any costs if it failed*”. It is clear in this case that the company is not, and never was, in a position to meet

any costs order if a costs order was made against it. In Mr. Godart's first affidavit, he stated at para. 11: "*The respondent does not own any assets and merely acts as a letting agent. The only assets in the company for a year ending 31st December, 2022 were the earnings for that year.*"

24. He also stated at para. 12 that there were no earnings by the company for the year ended 31st December, 2023 and that "*on account of this the respondent company's operation has in effect ceased.*" It is clear therefore that the respondent company was never in the position to pay the legal costs of this application if it were unsuccessful.

Did the non-party benefit?

25. The second issue which the Court must consider under the *Moorview* principles is "*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*". I am satisfied that Mr. Godart, as the non-party, was the only person who would have benefited from successfully resisting the application. The application was to seek to have Mr. Godart cross-examined about the ability of the company to pay the District Court order. In the normal course of events, one would have expected that a director of a company would have no difficulty in coming to give evidence about the poor financial condition of the company and the reasons why the company could not pay the debt. However Mr. Godart, for his own reasons, ensured that the company contested this application from the very start. It is clear therefore that he saw a personal benefit in contesting this application. There was no benefit to the company in contesting this application – as far as the Court was made aware.

Non-party as a moving party

26. The third issue which the Court must consider is the extent to which the non-party "*was the initiator, funder and/or controller of, and moving party behind, the litigation*". It is clear from the affidavits filed in this matter that the initiator and moving party of the decision

to contest the application was Mr. Godart as he was the only director and he swore all the affidavits in this application.

27. It is also clear that the company contested each and every hearing and retained a full legal team of a solicitor, junior counsel and senior counsel to contest this application strenuously. It is of course the right of the company to do so but it was never made clear how the company obtained the funds to pay its own legal counsel to defend this application. In addition the company paid the costs of a stenographer to take a record of every appearance in this matter. Again it was never made clear to the Court how the company obtained the funds to pay for this stenography service.

28. Mr. Godart is the sole director and the guiding hand behind the company. It is also clear that it was Mr. Godart who was the moving party behind the contesting of this application. It is also the case that Mr. Godart would be the beneficiary if the application was successfully resisted as he would not be personally examined about the assets and liabilities of the company. As the company has ceased to trade, it is clear that the funding for contesting this application was external to the company. Clarke J. concluded in the High Court in *Moorview* that it was reasonable to draw the inference that the appellant was the funder of the litigation in that case. I am satisfied in all the circumstances of this case that it is also reasonable to draw the inference that Mr. Godart (and/or other companies controlled by him) was the funder of the costs of resisting this application.

Factors which touch on whether the proceedings were pursued reasonably

29. The fourth issue that the Court has to consider is – *“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”*.

30. I am of the view that Mr. Godart did not resist this application reasonably and in a reasonable fashion. It seems unreasonable to get the company to bear the costs of resisting this application when those costs could be used to pay, in full or in part, the District Court order. It is clear that his entire motivation from start to finish was to avoid an order compelling him to come before the High Court to give evidence about the assets and liabilities of the company. It is difficult to see why he would seek to avoid such a direction. As stated above, in the normal course of events, a director would simply give evidence about why the company is insolvent and explain to the Court why it cannot comply with a court order. However it is clear that Mr. Godart contested this application at every turn. It was only when the decision was made, that he decided to arrange for the payment by the company to Ms. Herrera of the lawful sums she was due to ensure that he would not face such an examination. (However I am satisfied that his legal team pursued the legal arguments reasonably and in a reasonable fashion).

Bad faith or impropriety

31. The fifth ground to be considered is the issue of bad faith or impropriety. As McKechnie J. stated in *Moorview*: “*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*”.

32. I am satisfied that Mr. Godart has acted in bad faith and with impropriety from start to finish in the conduct of these proceedings. Apart from his actions in terminating the applicant’s lease and removing all her belongings, Mr. Godart has sworn a number of affidavits in these proceedings, which set out a false, incomplete and misleading impression of the situation. In his first affidavit sworn on the 16th February 2024 he states at para. 11: “*The respondent company does not own any assets and merely acts as a letting agent*”.

33. It is clear from that averment that Mr. Godart was confirming on affidavit that the respondent company did not own any assets, including the property which was rented out to Ms. Herrera at 8 Vintage Court, Cork Street, Dublin 8. There is no other interpretation of that averment.

34. However in Ms. Lizet Peña-Herrera's final affidavit sworn on the 1st May, 2024, she states, at para. 7 of her affidavit that she only "*became aware of the respondent as a legal entity and as the supposed landlord when I was served with a notice of termination and the accompanying statutory declaration on the 14th April, 2022.*" She exhibits this statutory declaration. In this statutory declaration, signed by Mr. Godart, Mr. Godart declared that:

"The property is owned by Green Label Short Lets Ltd a company of which I am a director. I, Marc Godart do solemnly and sincerely declare that I intend within a period of nine months after the termination date, to enter into an enforceable agreement to transfer to another, for consideration, the whole of my interest in the dwelling or the property containing the dwelling".

35. This statutory declaration was made on 13th April, 2022 at Amiens Street, Mountjoy, Dublin 1 and was witnessed by a solicitor. Mr. Godart in making this statutory declaration states:

"I make this solemn declaration conscientiously believing same to be true and by virtue of the Statutory Declarations Act, 1938.

36. Despite the fact that the applicant raised this in her affidavit, it was never replied to by Mr. Godart. Moreover, despite the fact that the Court raised it with counsel for both respondents on a number of occasions, no explanation was forthcoming. Indeed counsel for the first and second named respondents indicated in court that, in fact, his instructions were that the property was owned by a woman in County Wexford.

37. The averment at para. 11 of Mr. Godart’s affidavit and the declaration set out in Mr. Godart’s statutory declaration cannot both be true. One of them is false. Given that counsel for Mr. Godart stated in court that the property was owned by a woman in Wexford, then it can only be the case that the statutory declaration sworn by Mr. Godart is a false statutory declaration. I am of the view that the behaviour of Mr. Godart in swearing this false statutory declaration was an act of bad faith and impropriety. He clearly signed the statutory declaration in order to find a pretext, – a false pretext – under which to terminate the lease of the applicant.

Notice

38. The sixth consideration to be considered by the Court was whether the non-party was on notice of the intention to apply for a non-party costs order and at what point in the litigation such notice was communicated.

39. The issue of notice was also considered by the Supreme Court in *WL Construction Ltd v. Chawke and Others* [2019] IESC 74 in which O’Malley J., giving the judgment of the court, stated at para. 66 of her decision:

“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.”

40. It does not appear that notice was given by the applicant to Mr. Godart that she would apply to have him made personally liable for the costs of this application. However, I do not believe that this should be a decisive consideration as it would visit an injustice on the applicant.

41. I would also note that the application was *inter alia* for an order under s.671 of the Companies Act, 2014 to summon an officer of the company before the High Court to examine such a person on oath. Section 671(6) provides that the court may direct that the costs of the examination be paid by the person examined if it is just and equitable to do so. It would have been clear therefore to Mr. Godart that if the examination proceeded, then it was a possibility that he could be made personally liable for the costs of the examination. Whilst I realise of course this does not mean that it follows that he could be made personally liable for the costs of the application to have him examined, it is not a huge leap for him to consider that such an eventuality could arise.

42. I am also of the view that since the *Moorview* decision, a non-party to litigation, who is the moving party behind an insolvent company contesting litigation, should be regarded as being on notice from the very start that they could face applications to have them joined as parties for the purposes of costs applications – if the conditions in *Moorview* are fulfilled, as they are in this case. Mr. Godart clearly believed that he could avail of the “free rider” situation about which Clarke J. warned (i.e. that if he won the company would get its costs and if he lost the company would be unable to pay costs.) However as Clarke J. said this is one of the reasons why a jurisdiction to make such parties personally liable for the costs exists.

A just result

43. Finally, I also note that McKechnie J. in *Moorview* stated that, most importantly, the the circumstances must give rise to a just result.

44. I am satisfied that an order that Mr. Godart be made personally liable for these costs is a just result for the following reasons:

1. Mr. Godart’s behaviour (in his actions taken through the company) towards the applicant was unacceptable and unlawful;

2. Neither Mr. Godart nor the first named respondent ever appear to have apologised to the applicant for their wrongdoing;
3. The respondent, at the direction of Mr. Godart, consistently refused to obey a court order directing the company to pay the award to the applicant and it is clear that Mr. Godart intended the company to brazen it out – until they were called to account by the applicant;
4. Mr. Godart resisted this application “tooth and nail” thereby putting the applicant to increased costs;
5. If Mr. Godart were not made personally liable for the costs of this application then it is reasonable to consider that the applicant’s legal costs will not be paid by the company, and she would have to pay those legal costs herself. This would almost certainly entirely consume the money which she has received on foot of the judgment and would mean that she would only have achieved a pyrrhic victory in bringing this application.
6. I am satisfied that it was only when the Court made an order that Mr. Godart be examined in the High Court, that Mr. Godart ensured that the company obtained the funds to pay the applicant the full amount of her award.
7. It is clear that Mr. Godart is the “real party” to this litigation, as that term has been used in the case law.

45. I am satisfied in all the circumstances of this case that the justice of the case requires that Mr. Godart be made personally liable for the applicant’s costs.

An exceptional case

46. I would also say that I am of the view that this is an exceptional case. It is exceptional (1) because of the ruthless and unprincipled way in which Mr. Godart moved to terminate the applicant’s lease when she complained to Dublin City Council

about overcrowding and other health and safety issues in her rented accommodation;

- (2) because of Mr. Godart's ruthless and unacceptable behaviour in evicting the applicant "bag and baggage" by seizing her personal belongings and putting them into storage whilst she was at work effectively rendering her homeless because she had the temerity to complain about it to the RTB;
- (3) because the company at the direction of Mr. Godart clearly decided that the company would defy the law and disobey a District Court order.

A proportion of the costs

47. I have considered Mr. Godart's legal submissions, and those of the company, that a proportion of the applicant's costs should not be allowed because the applicant was not successful in all of her legal arguments before the Court. This is true. It is clear from my first judgment, delivered on 13th May, 2024, that the applicant was successful in seeking an order under s.684 of the 2014 Act (an order for inspection of the books and records of the company) (although this was belatedly on consent) and an order that the court should summon Mr. Godart for examination before it of its own motion. However the applicant was not successful in her argument under s.671 of the 2014 Act (permitting her as a creditor of the company to summon Mr. Godart), and was not successful in her argument under Order 42 rule 36 of the Rules of the Superior Courts.

48. I am satisfied therefore that fairness requires that Mr. Godart not be personally liable for the entirety of the plaintiff's costs.

49. The question then is what percentage would represent a fair and reasonable allocation. In considering this matter, I am of the view that the Court must balance (i) the fact that the applicant was successful in her primary application which was to obtain an order directing Mr. Godart to give evidence about the financial position of the company (2) that the making

of this order brought about a situation where the company decided to pay the debt in full and (iii) that the applicant was unsuccessful in some of her arguments thereby lengthening the time taken to consider these issues. In the circumstances I am of the view that Mr. Godart should only be liable for 80% of the applicant's costs.

Conclusion.

50. I would therefore conclude that this is an appropriate case in which to order Mr. Godart to be personally liable for 80% of the applicant's costs, such costs to be taxed in default of agreement.
