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Do Unto Thy Neighbour

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Costs are the ultimate deterrent to frivolous litigation. The risk of exposure to a costs award should lead the prudent litigant to honestly assess the pros and cons of pursuing, or resisting, a claim. Because of this, Courts will always be concerned about "shadow masters" controlling litigation from behind the scenes in order to avoid personal risk.

There has long been uncertainty about whether authority to order costs against a non-party arises only out of statute, or whether there is a broader remedy arising out of a court's inherent jurisdiction to control its own process. In *1318847 Ontario Limited v Laval Tool & Mould Ltd.*, 2017 ONCA 184, the Ontario Court of Appeal decided to resolve that uncertainty for good.

Azzopardi, the controlling mind of 1318847, commenced two actions against Laval Tool in connection with services allegedly provided to the defendant. In one action, he was the sole plaintiff, while in the other he sued on behalf of both himself and the corporation. The actions were tried together and dismissed together, with the key finding being that 1318847 had never performed any services for Laval Tool.

The question that then arose was whether Azzopardi should be personally responsible for costs of the action brought on behalf of 1318847 alone. The trial judge concluded that costs could not be ordered against him under subsection 131(1) of the *Courts of Justice Act* since that provision applied only to parties to the litigation, unless the non-party was a "person of straw" put forward to insulate the true party from a costs award.

Azzopardi was not such a person as he did not sue on the company's behalf in order to avoid costs, but rather because he had a "misguided view" that 1318847 had a cause of action against the defendant. The Court of Appeal set out the test for ordering costs against a non-party under the *Courts of Justice Act*:

1. The non-party has status to bring the action;

2. The named party is not the true litigant; and

3. The named party is a person of straw put forward to protect the true litigant from liability for costs.

The non-party's intention, purpose or motive matters, and the Court agreed with the trial judge that costs avoidance had not been Azzopardi's goal; rather, he had commenced the litigation on behalf of the company through honest error. There was therefore no authority to order costs against him under the *Courts of Justice Act*.

The Court of Appeal, however, concluded that a court also has an inherent jurisdiction, independent of statute, to order costs against a non-party. This inherent jurisdiction cannot be exercised in a way that is contrary to statute, and the *Courts of Justice Act* does not in fact explicitly prohibit such orders against non-parties.

Such costs orders can be made in actions which are an abuse of process. The Court cited the Supreme Court of Canada in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, in characterizing abuse of process as "the bringing of proceedings that are unfair to the point that they are contrary to the interest of justice", or "oppressive" or "vexatious" treatment that undermines "the public interest in a fair and just trial process and the proper administration of justice".

The trial judge should have asked whether there was broader discretion to order costs against Azzopardi for abuse of process. This was an error in principle, so the Court exercised its discretion and conducted the analysis for him. Motive is irrelevant in this analysis, and the Court concluded that Azzopardi's decision to bring a separate action in the company's name was an abuse of process as it forced Laval Tool to defend two "equally fruitless" actions, thereby driving up its costs, as well as squandering public and judicial resources. The matter was sent back to the trial judge to decide what those costs against Azzopardi should be.

The Court provided a helpful practice note for any party wishing to seek costs against a non-party. To ensure procedural fairness, a non-party must be given notice as soon as reasonably possible prior to a hearing of the intention to seek costs against it. This notice is obvious in situations such as motions under Rule 30.10 of the *Rules of Civil Procedure*, where the intention to seek costs can be clearly set out in the Notice of Motion. Careful attention needs to be paid to this issue in less obvious situations involving corporate litigants.