

Costs Against Non-Parties

Alexander Gay, Department of Justice¹

The recent decision of *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184 (“*1318847 Ontario Limited*”) is a case that deals with the power of the court to award costs against non-parties. This is an important legal issue in a context where cases are increasingly funded by third parties. However, while the Court of Appeal has confirmed that it has the power under both the *Courts of Justice Act* and its inherent jurisdiction as a superior court to order costs against non-parties, the decision creates unnecessary rigidities. To the extent that a non-party is not caught by the “person of straw” test or the egregious circumstances under which the court is prepared to invoke its inherent jurisdiction, the conduct remains outside the grasp of the court.

The Court of Appeal in *1318847 Ontario Limited* held that an assessment of the appropriateness of ordering non-party costs begins with section 131 of the *Courts of Justice Act*. The court held that section 131 of the *Courts of Justice Act* limits the court’s discretion to order costs against unnamed parties unless the “person of straw” test is satisfied, namely: (a) the non-party has status to bring the action; (b) the named party is not the true litigant; and (c) the named party is a person of straw put forward to protect the true litigant from liability for costs. The Court confirmed that the words “the court may determine by whom and to what extent the costs shall be paid” found in section 131 must be read narrowly and do not include non-parties, unless the “person of straw test” can be satisfied. The Court of Appeal also stated that the “person of straw” test had to be assessed by deciding whether the “intention, purpose or motive of the non-party in putting the named party forward was to avoid liability for costs”. In so doing, the court must assess whether the non-party is the “real” or “substantial” litigant, controlling the proceedings and advancing the named party for the purpose of deflecting liability for costs. However, the problem is that the “person of straw” test is restrictive and not one that is necessarily supported by the broad wording of section 131 of the *Courts of Justice Act*. The Court of Appeal simply accepts the legal test and the body of case law that has limited its application to only named parties.

However, as we turn to other common law jurisdictions, we quickly realize that the language in section 131 of the *Courts of Justice Act* has deep historical roots and is in fact replicated in, for example, section 51 of the UK *Senior Courts Act*, 1981 c. 54. The same language is also found in Australia and New Zealand. Interestingly, the courts in these jurisdictions have not fashioned a narrow test around the words “the court may determine by whom and to what extent the costs shall be paid” and have instead opted for broad principles that provide broad discretion to the courts to impose legal risk on non-parties based on involvement in the conduct of the litigation. To the extent that it affects the right of a non-party, notice is required. The

¹ The views expressed by the author are not those of his employer the Department of Justice.

leading decision in the UK is that of *Dymocks Franchise Systems (NSW) Pty Ltd. v Todd* [2004] UK PC 39 (“*Dymocks*”), where Lord Browne held that although costs orders against non-parties are to be regarded as “exceptional”, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such “exceptional” case is whether in all the circumstances, it is just to make the order. Lord Browne also held that generally speaking, the discretion should not be exercised against “pure funders”, that is, persons with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course. In their case, the court’s usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his or her rights. Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party’s costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is “the real party” to the litigation. The approach taken in *Dymocks* is far more malleable and less restrictive than that of the “person of straw” test where a party is required to show, for example, that the non-party has status to bring the action.

The Court of Appeal in *1318847 Ontario Limited* also confirmed that, in addition to what is found in section 131 of the *Courts of Justice Act*, superior courts have inherent discretionary jurisdiction to order non-party costs where the non-party has conducted litigation in a way that amounts to an abuse of process. The court, however, cautioned that the court’s jurisdiction cannot be exercised in a manner contrary to statute, or where the legislature has used “clear and precise statutory language” to exclude it. The court held that the power to order non-party costs does not conflict with the statutory power granted under section 131 of the *Courts of Justice Act* because the language found in section 131 is “permissive”. Although not exhaustive, the Court of Appeal provides some examples where the court can order non-party costs, including where (a) non-parties engage in an abuse of process; (b) where non-parties have engaged in conduct that amounts to the tort of maintenance; and, (c) exceptional circumstances where non-party directors, shareholders or principals of corporations commit an abuse of process. However, the threshold for meeting these exceptional circumstances is high and it is only in the rarest of cases where the court will exercise its inherent jurisdiction and award costs against a non-party.

The decision of *1318847 Ontario Limited* is only marginally helpful to parties who find themselves defending an action that is being orchestrated by a non-party. The Court of Appeal adopts the “person of straw” test which is disconnected from the wording of section 131 of the *Courts of Justice Act* and at odds with the approach taken by other common law jurisdictions. The court has broad powers that extend well beyond the “person of straw” test under section 131 of the *Courts of Justice Act*, yet it chose to adopt a narrow reading of this provision. The motivator behind these decisions is that a broad reading of section 131 would give the courts the right to order costs against non-parties without notice. However, this does not appear to

be a problem in other common law jurisdictions where notice is required and part of the legal test developed under the case law. As for the court's inherent jurisdiction, this covers only exceptional circumstances where the court must guard against abusive conduct. The decision, however, potentially leaves out a swath of cases that do not fall under either the "person of straw test" or the circumstances necessary for the court to invoke its inherent jurisdiction. In a context where litigation is increasingly funded by third parties, the Court of Appeal does not go far enough in creating a mechanism that can hold non-parties accountable.