COURT OF APPEAL FOR ONTARIO

CITATION: Davies v. Clarington (Municipality), 2023 ONCA 376
DATE: 20230526
DOCKET: C69978

Zarnett, Coroza and Favreau JJ.A.

BETWEEN

Bonnie Davies

Plaintiff

and

The Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Blue Circle Canada Inc., and Hydro One Networks Inc.

Defendants (Appellants/ Respondents by cross-appeal)

James M. Regan, for the appellants/respondents by cross-appeal Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Timothy Garnham

Alon Barda and Stephen Ross, for the appellant/respondent by cross-appeal The BLM Group Inc.

Luciana P. Brasil and Ruby Egit, for the respondent/appellant by cross-appeal BridgePoint Financial Services Inc.

Jeffrey Strype, for the respondent/appellant by cross-appeal Yorkfund Investment Inc.

Ron Aisenberg, for the respondent/appellant by cross-appeal Seahold Investments Inc.

Norman Mizobuchi, for the respondent/appellant by cross-appeal Lexfund Inc.

Shanti Barclay, for Via Rail Canada Inc. and Canadian National Railway Company[1]

Stephen MacDonald, for Hydro One Networks Inc.[2]

Heard: September 21, 2022

On appeal from the order of Regional Senior Justice Mark L. Edwards of the Superior Court of Justice, dated September 28, 2021, with reasons reported at 2021 ONSC 6449, and from the costs order, dated November 22, 2021, with reasons reported at 2021 ONSC 7717.

Zarnett J.A.:

A. OVERVIEW

[1] Are a plaintiff's lenders liable to pay costs to defendants for unsuccessful litigation financed by their loans?

[2] A version of this issue lies at the heart of this appeal. The respondents (the "lenders") separately made loans. The principal amount of all the loans, added together, was over $400,000. The loans bore interest, some at compound rates of up to almost 30% per year. The loans helped finance the pursuit by Christopher Zuber, a class member in a class proceeding, of an individual assessment of his damages.

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[1] Counsel appeared but made no written or oral submissions on behalf of Via Rail Canada Inc. or Canadian National Railway Company.
[2] Counsel appeared but made no written or oral submissions on behalf of Hydro One Networks Inc.

[3] Mr. Zuber sought $50 million for his claim. Prior to trial, he turned down an offer of $500,000, at a time when the loans, with interest, significantly exceeded that amount. He then recovered only $50,000 after a 106-day trial.

[4] The defendants to the claim were awarded costs against Mr. Zuber of more than $3.4 million, which he cannot or will not pay.

[5] The defendants sought an order that the lenders, as non-parties, pay the costs awarded against Mr. Zuber. The trial judge found that the loans bore onerous rates of interest and did not advance the goal of access to justice. Although he could not determine why Mr. Zuber's claim had not settled, he found that the indebtedness for interest under the loans constituted an impediment to settlement, as did Mr. Zuber's own unrealistic expectations about his claim. Nevertheless, the trial judge refused to order the lenders to pay costs. The appellants (who were some of the defendants) submit that he erred in doing so.

[6] For the reasons that follow, I would dismiss the appeal. Costs are discretionary. Although there are circumstances in which the discretion can be exercised to order a non-party to pay costs to the successful party, the circumstances are limited to cases in which either: (1) the non-party had status to bring the litigation, was the true litigant, and put forward the named party as a person of straw to protect the true litigant against liability for costs; or (2) the non-

party has initiated or conducted the litigation in such a manner as to amount to an abuse of process.

[7] The trial judge found that neither set of circumstances existed in this case. That finding was open to him on the record. None of the lenders instigated the litigation, were granted any share of its proceeds, nor given any control or direction over its conduct or settlement. I do not accept the appellants' arguments that, in effect, equates the aggregate effect that the separate loans had on Mr. Zuber's ability to accept the defendants' settlement offer without incurring a loss with an abuse of process by each of the lenders rendering them liable for Mr. Zuber's litigation conduct.

[8] On the basis that the issue of whether the lenders should be responsible for the costs was novel, the trial judge did not award costs of the motion. The lenders seek leave to cross-appeal that determination. In my view, the trial judge made no error in principle. I would deny leave to appeal.

B. BACKGROUND

(1) The Class Action

[9] On November 23, 1999, a Via Rail train travelling between Montreal and Toronto was involved in a collision with a tractor-trailer stopped on the railway track. The train derailed.

[10] In 2000, a class action was certified on behalf of all passengers who were on the train at the time of the derailment. The defendants to the class action included: the appellant Timothy Garnham who was operating the tractor-trailer at the time of the collision; the appellants Apache Specialized Equipment Inc. and Apache Transportation Services Inc. who were the lessees of the tractor-trailer and employer of Mr. Garnham; and the appellant BLM Group Inc. who was alleged by Mr. Zuber to be the registered owner of the tractor-trailer.

[11] All of the defendants in the class action except one (Blue Circle, the owner of lands adjacent to the railway crossing where the collision occurred) agreed as how to apportion, among themselves, liability to the class members. After a 47-day trial conducted between April and November 2005, Blue Circle was found to have no liability: see *Davies v. Clarington (Municipality)* (2006), 266 D.L.R. (4th) 375 (Ont. S.C.).

[12] In 2006, a settlement among the remaining defendants and the class was reached, and court approved. It provided for payment by the defendants of $252,000 for “aggregate claims of Class Members”, amounts ranging between $5,000 and $75,000 for claims of eight individual class members, and $330,000 for costs. The approval order provided that the class action settlement did not compromise the claims of two specific class members, Anne Pritchard and Mr. Zuber.

[13] Ms. Pritchard's claim was resolved in 2007, leaving Mr. Zuber with the only outstanding claim in the class action from that time on.

(2) The Zuber Damages Claim

[14] Mr. Zuber's claim − which was for an assessment of the damages to which he was entitled − was extensively litigated due to the size of the claim he chose to advance. He originally sought damages of $10 million; in 2010, he was granted leave to amend his claim to seek $50 million: see *Davies v. Corporation of the Municipality of Clarington et al.*, 2010 ONSC 418.

[15] After about seven years of pre-trial proceedings, Mr. Zuber's claim went to trial. The trial began in November 2014; evidence was completed in October 2016; and closing arguments were heard in May 2017. It consumed approximately 106 days.[3]

[16] The trial judge rendered his judgment in July 2018. Despite claiming millions of dollars, Mr. Zuber was awarded $50,000 for general damages together with pre-judgment interest. His claims for past and future loss of income and for past and future care costs were completely rejected: *Davies v. The Corporation of the Municipality of Clarington*, 2018 ONSC 4370, at para. 451 ("*Davies (2018)*").

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[3] The trial judge called it "probably one of the longest personal injury trials conducted in the Province of Ontario": *Davies (2018)*, at para. 460.

(3) The Costs Award Against Mr. Zuber

[17] The defendants made offers to settle in 2009 ($150,000 inclusive of pre-judgment interest, plus costs to be agreed or assessed), 2013 ($500,000 for damages and interest, plus $250,000 for costs), and 2014 ($500,000 for damages and interest, plus costs to be agreed or assessed). As the defendants "beat" their offers, they asked that Mr. Zuber pay costs.

[18] Mr. Zuber also made offers to settle. In November 2009, he offered to accept $35 million. In 2014, he offered to accept $26.2 million for damages and interest, plus costs which were to include interest on the litigation loans. This offer would have required an all inclusive payment to him that would have exceeded $30 million.

[19] In his costs decision, the trial judge decided that in light of the result at trial and the defendants' offers, Mr. Zuber should only be awarded costs up to the time of the defendants' 2009 offer, and that those costs would not include any interest on the litigation loans. He also ordered that Mr. Zuber pay the defendants' costs incurred after the date of their last offer in 2014. The net result was that he awarded costs of more than $3,434,000 to the defendants, payable by Mr. Zuber: *Davies v. The Corporation of the Municipality of Clarington*, 2019 ONSC 2292, at paras. 105-106, 131.

[20] It is common ground that Mr. Zuber cannot or will not pay the costs against him. Although Mr. Zuber had sought to appeal that costs order, we were advised at the hearing that his appeal was being withdrawn.

(4) The Litigation Loans

[21] During the course of the proceedings, the defendants learned of loans, the proceeds of which were used to finance the litigation.

[22] Mr. Zuber obtained loans from the respondent Seahold Investments Inc. ("Seahold") in 2007 and 2009; the respondent Lexfund Inc. ("Lexfund") in 2008 and 2009; and the respondent Yorkfund Investment Inc. ("Yorkfund") between 2008 and 2013.[4] In addition, between 2010 and 2015, the respondent BridgePoint Financial Services Inc. ("BridgePoint") advanced loans that were guaranteed by Mr. Zuber's counsel. Mr. Zuber was not a party to the loan documentation with BridgePoint.

[23] The total of the principal amounts of the loans exceeded $400,000; the rates of interest ranged between 15% and 29%. Some of the loans provided for interest to be compounded monthly.

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[4] The trial judge observed that the Yorkfund loans originated from Strype Management Inc. Mr. Strype was counsel for Mr. Zuber and also appeared for Yorkfund. The trial judge did not make any findings that this put Yorkfund in a different category than the other lenders. The appellants argued for the same treatment of all the lenders on this appeal.

[24] The loans were referred to when Mr. Zuber and the defendants argued about the costs of the action. In his costs submissions after the trial, Mr. Zuber's counsel stated that the defendants' offers should not be considered because Mr. Zuber could not have accepted them; his indebtedness under the loans, with interest, exceeded the amounts offered, which would have left Mr. Zuber with a net loss if he accepted the defendants' offers. Mr. Zuber also sought to recover, as part of his costs, the interest he had incurred on the litigation loans, which, by December 2018, amounted to over $2.9 million. In his costs decision, the trial judge rejected both of Mr. Zuber's positions.

[25] In that decision, the trial judge also referred to the fact that the defendants had indicated they might seek payment of the costs awarded against Mr. Zuber from the lenders. That issue came forward in a separate motion the trial judge heard in March 2021. At the time of that hearing, Mr. Zuber's aggregate debt to the lenders was in excess of $6 million taking into account principal and accrued interest.

C. THE DECISION UNDER APPEAL

[26] As noted above, the defendants moved for an order declaring that the lenders were liable to pay the costs awarded against Mr. Zuber. It was assumed that they would be unable to collect the costs from Mr. Zuber. The trial judge dismissed the motion.

[27] At para. 4 of his reasons, the trial judge described the length of time and amount of court resources expended on Mr. Zuber's claim as "a poster child for what our civil justice system can no longer accommodate". And he commented on the relationship between the loans and why Mr. Zuber's claim had never settled:

> Part of why this action never settled lay in the expectations of [Mr. Zuber] − expectations that bore no resemblance to the evidence. More importantly, part of why this action never settled can be found in the quantum of money advanced to [Mr. Zuber] as litigation loans which, with interest, created a massive impediment to resolution.

[28] The trial judge made the following observations about the loans: (i) their interest provisions are onerous; (ii) none provided that the lender would indemnify Mr. Zuber for any costs award against him; (iii) none gave the lender a share of any monetary award or settlement that Mr. Zuber might obtain and those of Seahold, Yorkfund, and BridgePoint were repayable regardless of whether Mr. Zuber succeeded in his claim[5]; and (iv) none gave the lenders direct control over the litigation or the acceptance of any settlement.

[29] The trial judge accepted that he had discretion under s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (the "*CJA*"), or as part of the court's inherent jurisdiction, to order costs against a non-party. He recognized that there were

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[5] Although the trial judge did not mention this, the loans of Lexfund were made on the basis that, in certain circumstances, Lexfund's recourse would be limited to the proceeds of the litigation. He did note that Lexfund was given security over Mr. Zuber's proceeds for his repayment obligation.

two circumstances in which he could do so, citing *1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, 134 O.R. (3d) 641. First, he noted that, under s. 131 of the *CJA*, costs can be awarded against a non-party if they meet the requirements of the "person of straw" test. Second, he stated that, pursuant to the court's inherent jurisdiction, costs can be awarded "where the non-party initiates or conducts the litigation in such a manner to amount to an abuse of process" and that this was a discretion to be exercised "sparingly and with caution": at para. 61.

[30] In the trial judge's view, neither circumstance was present. He held that the "person of straw" test was inapplicable to the lenders. And he concluded that, while the lenders advanced loans bearing what "many would describe as exorbitant rates of interest, it is difficult to see how the extension of such loans amounts to the type of abuse of process canvassed by the Court of Appeal in *Laval Tool*": at para. 67.[6]

[31] The trial judge was also of the view that Mr. Zuber should have obtained court approval of his litigation loans. Mr. Zuber was advancing a claim in a class action, even if it was the sole remaining claim, and he had essentially assumed the role of "Plaintiff in the class action and [his counsel] assumed the role of class counsel": at para. 93. Although the court approval requirement for "third-party funding agreements" under s. 33.1 of the *Class Proceedings Act, 1992*, S.O. 1992,

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[6] At paras. 68-71, the trial judge noted that a non-party is entitled to notice of a party's position that the non-party should be liable for costs as soon as reasonably possible. Had he determined this case was one that warranted the exercise of his discretion to hold the lenders liable for costs, he would have found that timely notice had been given to them.

c. 6 (the "*CPA*") was not in force when the trial took place, approval was required under the common law jurisprudence that preceded that section's enactment. The trial judge described the common law as requiring each loan agreement to "be a fair and reasonable agreement that facilitates access to justice": at para. 90. He held that "[a] loan agreement with interest rates comparable to those before [the] court, particularly interest rates which are compounded monthly [was] … in direct conflict with the principle of access to justice": at para. 92.

[32] However, the trial judge rejected the argument that this made the lenders liable in this case. The question of whether the litigation loans met the criteria for court approval was not determinative of the lenders' costs liability. The lenders could only be held liable if they satisfied the "person of straw" test or engaged in an abuse of process.

[33] The trial judge also rejected the argument that an approach adopted in England and Wales should be followed here. In *Arkin v. Borchard Lines Ltd. & Ors*, [2005] EWCA Civ 655, the English Court of Appeal held that a "professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds" should be potentially liable for costs of the opposing party "to the extent of the funding provided": at paras. 41-43. If a funder enters a champertous agreement, they could be liable for all of the opposing party's costs without limit should the claim fail: at para. 40. In *Chapelgate Credit Opportunity Master Fund Ltd. v. Money & Ors*,

[2020] EWCA Civ 246, the Court of Appeal confirmed that *Arkin* did not establish a binding rule and that judges retain the discretion to depart from such an approach: at paras. 34-39. Although he felt this approach may be worthy of further discussion by the Civil Rules Committee, the trial judge was of the view that *Laval Tool* provided the guidance necessary to determine the potential liability of the lenders.

[34] The trial judge concluded his reasons with the following observations on the issue of litigation loans: (i) a plaintiff should be independently advised and consider any and all other methods of funding before committing to a litigation loan with onerous interest rates[7]; (ii) litigation loan documents should be disclosed in Schedule B to a plaintiff's affidavit of documents (the list of privileged documents) to alert the defence to the existence of a litigation loan; and (iii) a plaintiff's actual disclosure of a litigation loan's details may trigger potential exposure to the defence for accrued interest as a disbursement. The trial judge further noted that the defendants could have applied for security for costs based on Mr. Zuber's non-residence, but did not.

[35] At para. 115, he made the following concluding comment:

> The argument and facts of this case demonstrate the need to seriously question how, if at all, a litigation loan

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[7] For example, where an advance payment under s. 258.5(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 is available (it was not in this case), a plaintiff should consider using the advance payment to finance the litigation.

> will provide access to justice to a Plaintiff in need of financial assistance. This court will never know if an out of court resolution could have occurred if Mr. Zuber did not have the massive interest debt he owed to the various litigation loan providers. We do know that his own counsel has expressed his view to this court that the defendants' offers to settle could never have been accepted by Mr. Zuber because of the debt owed to the loan providers. If he had accepted the defendants' offer Mr. Zuber would have been left with nothing for himself. Such an outcome is absurd … The loan agreements did nothing to advance the cause of justice in this case. The interest accrued and still owing by Mr. Zuber is unconscionable.

D. THE ISSUES ON APPEAL

[36] The court raised the question of whether the appeal properly lies to this court. I explain below why I conclude that this court has jurisdiction to entertain the appeal.

[37] I then turn to the two issues raised by the appellants on the appeal:

(1) whether the trial judge erred in law in failing to find that the conduct of the lenders amounted to an abuse of process within the meaning of *Laval Tool*; and

(2) whether the trial judge erred in law in failing to conduct an analysis of whether the loans advanced by the lenders constituted champerty and maintenance.

E. ANALYSIS

(1) Jurisdiction

[38] There are two concerns about whether the appellants' appeal is properly before this court.

[39] First, as a general matter, the *CPA* directs appeals from the determination of individual claims of class members to the Divisional Court: ss. 30(6)-(11). The trial judge was asked to award costs against the lenders in connection with the conduct and result of Mr. Zuber's individual claim in a class proceeding.

[40] Nevertheless, in my view, the *CPA* does not determine the appeal route for this appeal, which does not fit within any of the express categories of appeals that lie to the Divisional Court. This is not an appeal by a class member or representative plaintiff, therefore ss. 30(6), (7), (9), and (10) of the *CPA* are not applicable. And although this is an appeal by defendants, it is not an appeal "from an order … determining an individual claim made by a class member and awarding the member an amount", which is the precondition to the application of ss. 30(8) and (11).

[41] The appellants are not appealing anything about the damages award to Mr. Zuber or the costs award between themselves and Mr. Zuber. If they were, the appeal would lie to the Divisional Court. They are appealing a different order − the refusal to award costs against non-parties. Where an appeal from an order in a

class proceeding is not the subject of a specific route mandated by the *CPA*, the appeal route is governed by the *CJA*: *Fresco v. Canadian Imperial Bank of Commerce*, 2021 ONCA 46, at para. 19.

[42] Given the amount in issue and the fact that the order under appeal is final, not interlocutory, an appeal from it lies to this court under s. 6(1)(b) of the *CJA*.

[43] The second concern is whether the appeal requires leave. Section 133(b) of the *CJA* requires that leave be obtained for appeals “only as to costs”. However, that section does not apply in this case.

[44] An appeal from an award of costs against a non-party made pursuant to the court’s inherent jurisdiction does not require leave to appeal: *Hunt v. Worrod*, 2019 ONCA 540, 48 E.T.R. (4th) 177, at paras. 24-25, leave to appeal refused, [2019] S.C.C.A. No. 354. It follows that an appeal from a refusal to order costs against a non-party under the court’s inherent jurisdiction may also be brought without leave.

[45] Accordingly, the appeal is properly before this court.

(2) The Standard of Review

[46] The appellants accept that the trial judge’s decision is one to which deference would normally be owed, as it pertains to costs and hinges on a finding about abuse of process.

[47] Costs decisions, even those involving non-parties, are to be accorded a high degree of deference, and should be set aside on appeal only if there is an error in principle or the result is clearly wrong: *The St. James' Preservation Society v. Toronto (City)*, 2007 ONCA 601, 227 O.A.C. 149, at para. 34.

[48] A finding as to abuse of process is one of mixed fact and law. Such a finding is owed deference on appeal absent an extricable error of law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26, 36-37.

[49] The appellants argue that the standard of review is correctness because the trial judge erred in law or principle by incorrectly interpreting *Laval Tool* when deciding whether the lenders had engaged in an abuse of process, and by failing to conduct an analysis of champerty and maintenance. I discuss those alleged errors in my discussion of those issues.

(3) The Tests for Non-Party Costs Liability

[50] In *Laval Tool*, this court set out the two bases on which the Superior Court may order costs against a non-party.

[51] The first is the statutory jurisdiction under s. 131(1) of the *CJA*. That section provides that: "Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid".

[52] The court confirmed in *Laval Tool*, at paras. 59-60, that the discretion to order costs payable by a non-party under the statutory jurisdiction is limited to situations in which the "person of straw" test is met. That test requires three things to be established:

(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

[53] The trial judge held the person of straw test did not apply on the facts. The appellants do not challenge that finding in this court.

[54] The second basis discussed in *Laval Tool* for ordering costs against a non-party is the one that is germane to this appeal. That basis arises from a superior court's inherent jurisdiction to prevent abuses of its process.

[55] Abuse of process is a flexible doctrine that is concerned with proceedings that are unfair to the point that they are contrary to the interest of justice. An abuse of process involves oppressive or vexatious treatment that undermines the public interest in a fair and just trial process and the proper administration of justice: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at paras. 39-40.

[56] *Laval Tool* confirmed that "superior courts have inherent jurisdiction to order non-party costs, on a discretionary basis, in situations where the non-party has

initiated or conducted litigation in such a manner as to amount to an abuse of process”: at para. 66. The discretion is to be exercised “sparingly and with caution”: at para. 68.

[57] The following examples were offered in *Laval Tool*, at paras. 74-75, to illustrate non-party conduct that may attract a costs sanction: (a) a non-party initiating proceedings through a nominal plaintiff in order to oppress the defendant; (b) a non-party putting forward a nominal plaintiff to employ the court's processes as an instrument to defraud the defendant; and (c) a non-party engaging in conduct that amounts to the tort of maintenance or that “resembles a maintainer”. This court also stated that other “[s]ituations of gross misconduct, vexatious conduct or conduct by a non-party that undermines the fair administration of justice … can be envisioned”: at para. 76. This court then referenced how an order for costs against a director, shareholder or principal of a corporation who committed fraud or gross misconduct in the instigation or conduct of the litigation involving the corporation may be warranted in exceptional circumstances: at para. 77.

[58] Relying on inherent jurisdiction, the *Laval Tool* court made a non-party costs order against an individual who had caused his corporation to bring an action for payment for services against a person with whom the corporation had no contract and for whom it had performed no services. The action was fictitious, there was no good reason for it to have been brought in the company name, and the non-party’s

conduct resulted in a waste of the defendant's and the public's resources: at paras. 86-87.

[59] Two points from *Laval Tool* are fundamental. First, the court's inherent power to order costs against non-parties is discretionary. Second, because it derives from the court's power to prevent its process from being abused, it focusses on conduct of the non-party in instigating or controlling the litigation in a manner that results in such abuse. The examples of non-party conduct that were referenced in *Laval Tool* as potentially deserving of a costs sanction against a non-party, and the actual disposition made by the court on the facts before it, reinforce this. They are all cases where the non-party was actively involved in the instigation or conduct of the litigation or actively asserted a significant degree of control over it, and thus brought about the abuse of process.

[60] The reference to conduct resembling that of a maintainer is consistent with this theme, since the tort of maintenance is committed by a person who "for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which [they have] no interest whatsoever and where the assistance [they render] to one or the other parties is without justification or excuse": *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.), at paras. 26-27. The tort of champerty is a more egregious form of maintenance as the maintainer shares in the profits of the litigation: *McIntyre Estate*, at para. 26.

(4) The Trial Judge Did Not Err in His Application of *Laval Tool*

[61] The appellants argue that the trial judge erred in his analysis of whether the lenders' conduct amounted to an abuse of process. Specifically, they allege that he erred by confining the abuse of process doctrine to situations where the non-party directly controls the litigation. In their view, the lenders' "business decision to advance loans with uncapped compound interest exerted such an influence on Mr. Zuber and his counsel that their involvement should be seen as 'conducting' the litigation within the meaning of *Laval Tool*".

[62] The appellants point to three considerations in support of the argument that the lenders' conduct controlled the litigation in a manner that amounted to an abuse of process. First, the proceeds of the loan were used to fund Mr. Zuber's wildly exaggerated claims that occupied years of pre-trial litigation and 106 days of trial. Second, the high rates of compounding interest on the loans pushed the indebtedness of Mr. Zuber to levels that made it impossible to accept the defendants' offers to settle without incurring a loss. Third, the trial judge made a finding that the loans needed, but did not qualify for, court approval.

[63] I disagree with the appellants' position. The trial judge did not err by declining to accept these arguments.

[64] Before addressing each of the appellants' points, I would note that the appellants do not challenge the trial judge's findings of fact. Importantly, the trial

judge did not make any finding that the lenders instigated Mr. Zuber's litigation. The trial judge found that the loan documents did not give the lenders any control over the conduct of the litigation or its settlement, or a share of either, and he did not find that the lenders gave any direction to Mr. Zuber or his counsel as to how to conduct the litigation, or what settlement posture to take. The trial judge's abuse of process holding was grounded in these pivotal facts.

[65] As to the appellants' first point, there can be many situations in which a party to litigation (plaintiff or defendant) decides to incur debt to be able to meet the expenses of litigating a position which the party believes is legitimate. The mere fact that a loan's principal is used to fund unsuccessful litigation should not render the lender liable for the costs of that litigation absent evidence that the lender exercised control over the conduct of the litigation and did so in a way that constituted an abuse of process. To hold otherwise would expand the category of cases in which a non-party would be liable for costs in unpredictable ways. This would be the antithesis of a discretion that is to be exercised sparingly and with caution.

[66] In this case, Mr. Zuber made claims in extravagant amounts and litigated them in an outrageously time-consuming manner. Although the proceeds of the loans were used to fund some aspects of the litigation, the trial judge made no finding, and the appellants have pointed to no evidence, that the lenders controlled Mr. Zuber's litigation choices. Accordingly, I reject this argument.

[67] The appellants' second argument, which is based on the accrual of interest and its effect on Mr. Zuber's ability to accept the defendants' offers without incurring a loss, must also be rejected.

[68] It is true that the trial judge identified the excess of the aggregate debt with interest over the defendants' offers as creating a "massive impediment" to settlement. But he also noted that Mr. Zuber's unrealistic expectations were an obstacle to settlement. He concluded that "[t]his court will never know if an out of court resolution could have occurred if Mr. Zuber did not have the massive interest debt he owed to the various litigation loan providers": at para. 115.

[69] It is one thing to recognize that Mr. Zuber's debt was an obstacle to settlement on the terms the defendants offered because acceptance of the offers would have resulted in a loss to Mr. Zuber (assuming he paid the debt). It is another to say that the lenders were the cause of Mr. Zuber's refusal to accept the offers or of his choice to litigate his claim in the protracted way that he did. I do not read the trial judge as having made that latter finding, nor was he required to on the record.

[70] Indeed, there was no evidence from Mr. Zuber that, absent the debt, he would have accepted any of the defendants' offers. Those offers were reasonable, indeed generous, when assessed against what he was ultimately awarded, but they were a small fraction of what he was claiming. Nor could one infer from

Mr. Zuber's own offers that, absent the debt, he would have been willing to settle for amounts in the range of the defendants' offers net of what he owed the lenders. The defendants' last offer before trial was $500,000 plus costs, while Mr. Zuber's last offer, shortly before trial, would have required a payment to him of $26.2 million in excess of his debt to the lenders. The most likely inference from this is that Mr. Zuber's settlement goals far exceeded the total interest on the loans plus what the defendants were willing to pay.

[71] Although the appellants' argument fails as presented, it is worth noting two additional concerns about it. First, the appellants' argument lumps the lenders together and relies on the aggregate effect of Mr. Zuber's debt. There was no evidence that the lenders were acting together. They lent different amounts at different times, in some cases, years apart. According to the lender BridgePoint, it did not even lend to Mr. Zuber but provided what was effectively a line of credit to his counsel who alone decided to deploy some of those funds to Mr. Zuber's litigation. To find a lender committed an abuse of process, one would have to look to the conduct of the specific lender, not just to an aggregate effect on Mr. Zuber who, with his counsel, was the common element in the loans.

[72] Second, the impact on the defendants, and the judicial system, that arose from Mr. Zuber's pursuit of his claim was not just a function of the claim not settling; it was primarily a function of the way the non-settled claim was pursued, including through a 106-day trial after the defendants' 2014 offer was not accepted. There

was no evidence that the lenders had any input into what claim Mr. Zuber would advance, how he would advance it, or how long he would tie up the defendants and the court trying to prove his claim, if he did not accept that settlement offer.

[73] With respect to the appellants' third point, I disagree with their argument that the trial judge's finding that the loans required, but did not receive, court approval buttresses their point that the trial judge should have found the lenders "unreasonably controlled" Mr. Zuber's litigation. I note that some of the lenders quarrel with the trial judge's finding of the requirement for court approval.[8] I do not have to decide that question because even accepting that the trial judge was right in his conclusion that the loans required court approval, I disagree with the appellants that this advances their argument.

[74] Even though the loans preceded the enactment of s. 33.1 of the *CPA* which now governs court approval of third-party funding agreements for class proceedings, the trial judge was of the view that Mr. Zuber, or his counsel, was required to obtain approval under the common law. At common law, a number of factors were considered before a funding agreement for a class proceeding was

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[8] They point out that at least one of the principal concerns animating why third-party funding agreements in a class action require approval was not present in this case. The court, in assessing the terms of an agreement, will ordinarily be concerned as to whether the return, share, or compensation to the funder, in exchange for what the funder provides, takes too much away from the class who are not part of negotiating its terms, or otherwise subverts public policy purposes of class actions: *Houle*, at para. 80. Here, only Mr. Zuber's economic interests, not those of other class members, were affected by the interest rates he agreed to for the litigation loans.

approved: *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at paras. 63-65, aff'd 2018 ONSC 6352 (Div. Ct.), 29 C.P.C. (8th) 409. One factor was that the agreement could not interfere with the right of the representative plaintiff to control the litigation: *Houle*, at para. 64.[9]

[75] The appellants' argument on this point would be advanced if the trial judge had found that the loans would not have been approved because they did not comply with the non-control requirement. But he did not make that finding. He found the loans did not give the lenders control over litigation or settlement. The trial judge considered that the loans would not have been approved because of a different factor, the requirement that they provide access to justice which otherwise would be denied: see *Houle*, at para. 63. He stated: "A loan agreement with interest rates comparable to those before this court, particularly interest rates which are compounded monthly are, in my view, in direct conflict with the principle of access to justice". However, a finding that the loans did not provide access to justice is not a finding that the lenders controlled the litigation.

[76] I agree with the trial judge that the question of whether the loans should receive court approval and the question of whether the lenders engaged in an abuse of process are discrete questions. A failure to receive court approval of a third-party funding agreement does not necessarily mean the lenders engaged in

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[9] This requirement is now found in s. 33.1(9)(a)(ii) of the *CPA*.

conduct amounting to an abuse of process. Nothing in the case law preceding s. 33.1 of the *CPA* suggests that outcome. As the trial judge noted it was Mr. Zuber and his counsel who were required to seek approval, not the lenders.[10] Moreover, at common law, the result of failing to obtain court approval where required is that the funding agreement does not come into force: *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715, 25 C.P.C. (7th) 68, at paras. 89-90.[11] That would affect the enforcement of the loans as between Mr. Zuber and the lenders. It would not in and of itself justify imposing costs liability on the lenders in favour of the appellants.

[77] In conclusion, I am not persuaded by any of the appellants' arguments that the trial judge erred in his approach to *Laval Tool*. It was open to the trial judge to find that the lenders, although they advanced loans at onerous rates of interest which accumulated to amounts in excess of what was available as a reasonable settlement, did not instigate or conduct Mr. Zuber's litigation in a manner that constituted an abuse of process so as to attract costs liability as non-parties.

(5) The Trial Judge Did Not Fail to Consider Maintenance and Champerty

[78] The appellants argue that the trial judge failed to consider whether the lenders were engaged in maintenance, or in conduct that "resembled a

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[10] The same is true under s. 33.1(2) of the *CPA*.
[11] Section 33.1(3) of the *CPA* provides that a third-party funding agreement that is not approved is of no force or effect.

maintainer", an example mentioned in *Laval Tool* of a situation that might justify an award of costs against a non-party.

[79] In my view, the trial judge simply did not make this error. The trial judge carefully considered the terms of the loans, including that they did not give the lenders any share of the proceeds. He did not find that the lenders stirred up, or were motivated to stir up, Mr. Zuber's claims. He found that the lenders did not instigate or conduct Mr. Zuber's litigation in a manner that constituted an abuse of process.

[80] The trial judge reached that conclusion after instructing himself on the test in *Laval Tool*, and on the test for champerty and maintenance. His conclusion not to exercise his discretion to award costs against the lenders in these circumstances cannot be said to have arisen from a failure to consider either the *Laval Tool* test or the relationship of the concepts of champerty and maintenance to it.

[81] The appellants make the additional submission that developments in the law of England and Wales concerning liability of litigation lenders should have informed the trial judge's analysis. As noted, the trial judge considered that line of cases, but concluded, correctly, that *Laval Tool* provided sufficient guidance to decide this case. I would add that both litigation loans considered in *Arkin* and *Chapelgate* were loans in which the lender, contractually, was given a share of the proceeds

of the action: *Arkin*, at para. 13; *Chapelgate*, at para. 8. Additionally, in *Arkin*, the lender had control over the party's ability to settle: at para. 13. These two circumstances were not present in this case.

(6) Conclusion on the Appeal

[82] The trial judge correctly observed that Mr. Zuber's claim was conducted in a way that was "a poster child for what our civil justice system can no longer accommodate". And he found that the lenders advanced loans that bore interest at onerous rates and that would have left Mr. Zuber with a loss if he had accepted the defendants' offer to settle and then proceeded to pay the loans.

[83] But the trial judge did not find that Mr. Zuber would have accepted the defendants' offers but for the loans. And importantly, he did not find that the choices as to how the litigation was conducted, before or after the settlement offers, were made by anyone other than Mr. Zuber.

[84] The trial judge made important observations about litigation loans, and the desirability of a party considering one to be independently advised and to evaluate alternatives. But as his decision recognizes, the discretion to order costs against a non-party based on inherent jurisdiction exists to achieve a narrow but important goal − to visit the costs of a proceeding on a person who instigates or conducts litigation in a manner that abuses the court's process. A lender is not immune from that jurisdiction if its conduct falls within the parameters set out in *Laval Tool*. But

the jurisdiction to order non-party costs does not exist to regulate all practices or to respond to all concerns around litigation lending, where the lender does not instigate or assert a significant degree of control over the litigation in a manner that abuses the court's process.

[85] Mr. Zuber's litigation choices burdened the justice system and imposed costs on the appellants. But I see no reversible error in the trial judge's decision not to exercise his discretion to order non-parties to pay the costs of Mr. Zuber's litigation choices.

F. THE CROSS-APPEAL

[86] The lenders seek leave to cross appeal the trial judge's discretionary decision not to award them costs of the appellants' unsuccessful request that the lenders pay the costs of the action awarded against Mr. Zuber.

[87] Leave to appeal a costs order will only be granted where there are "strong grounds upon which [this court] could find that the judge erred in exercising his discretion": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92.

[88] The trial judge refused to award costs on the basis that the issue was novel, which is an accepted principle on which a judge may make a no costs disposition:

Przyk v. Hamilton Retirement Group Ltd. (The Court at Rushdale), 2021 ONCA 267, 70 C.P.C. (8th) 219, at para. 35.

[89] The trial judge referred to the correct principles about how to assess whether an issue is novel, and how to apply that assessment to a discretionary decision concerning costs, as articulated by this court in *Das v. George Weston Limited*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, leave to appeal refused, [2019] S.C.C.A. No. 69. As that decision explains, whether an issue is novel is not a bright line but a matter of degree, and the effect on costs is a question of where the court considers the case to fall along a spectrum. The trial judge was intimately familiar with the nature of the issues and arguments before him and thus well positioned to decide where on the spectrum of novelty this case fell.

[90] The lenders essentially argue that the trial judge should have concluded that the issue was not novel and should have exercised his discretion to award them costs. However, I am unable to identify any principle that the trial judge articulated incorrectly or any relevant factor that he failed to consider. It was open to the trial judge in his discretion to consider that the case fell at a point on the novelty spectrum sufficient to decline to award costs.

[91] In my view, the trial judge did not make an error in principle that would warrant this court’s interference with his discretionary decision as to costs.

G. DISPOSITION

[92] For these reasons, I would dismiss the appeal and refuse leave to cross-appeal.

[93] I would award costs of the appeal to each of the respondents fixed in the sum of $10,000 inclusive of disbursements and applicable taxes.

Released: May 26, 2023 “B.Z.”

“B. Zarnett J.A.”
“I agree. Coroza J.A.”
“I agree. L. Favreau J.A.”