Neutral Citation: [2014] IEHC 518

THE HIGH COURT

2013/4621P

BETWEEN:

DUBLIN WATERWORLD LIMITED

PLAINTIFF

AND

NATIONAL SPORTS CAMPUS DEVELOPMENT AUTHORITY

DEFENDANT

Judgment of Mr. Justice Max Barrett delivered on the 7th day of November, 2014

1. This is an application for security for costs brought by the National Sports Campus Development Authority in the context of the within proceedings. Any views expressed in the judgment that follows are tentative in terms of the strength or weakness of any case that might be made by either side at plenary hearing.

I. Facts.

Background

2. Dublin Waterworld Limited ("DWW") is a limited liability company incorporated in Ireland. The National Sports Campus Development Authority ("the Authority") is a statutory authority established by the National Sports Campus Development Authority Act 2006. It is the legal successor of Campus and Stadium Ireland Development Limited ("CSID"). CSID was a private limited liability company established by the Government in or around 2000 to develop a sports campus at Abbottstown, Co. Dublin. It was owned by the Minister of Sports, Arts and Tourism (50%), the Minister of Finance (25%) and An Taoiseach (25%).

3. In or about 2000, CSID put development of the first element of the National Sports Campus, the National Aquatic Centre, up for tender. The successful bidder was a consortium comprising Rohcon Limited, as design and build contractor, and Waterworld (UK) Limited, as aquatic centre operator. It subsequently transpired that Waterworld UK was not in a position to enter into the desired 30-year lease of the proposed aquatic centre. So between 2001 and 2002, DWW entered into negotiations with CSID to enter into the 30-year lease as the aquatic centre operator. Heads of agreement were signed between CSID, Waterworld UK and Rohcon on 22nd February, 2001. A project agreement was then entered into between these parties and DWW on 7th February, 2002. This project agreement obliged DWW to enter into a 30-year lease and to operate the National Aquatic Centre on agreed terms following practical completion of the centre by Rohcon. On 30th April, 2003, DWW and CSID entered into the lease ("the Lease") in relation to the National Aquatic Centre for a term of 30 years from 30th April, 2003. Pursuant to the Lease, DWW was obliged to pay to CSID all VAT payable on the grant of the Lease. It was also a term of the Lease that the parties would deal with each other in good faith as regards complying with their obligations under the Lease. A dispute subsequently arose between the parties as to whether VAT was payable on the grant of the Lease. It is necessary to describe this dispute in some detail.

The VAT dispute

4. The Lease was subject to s.4(3A) of the VAT Act, 1972. This provision was introduced on the passing of the Finance Act, 2002, and brought in an anti-tax avoidance measure known as the 'economic value test'. The effect of this test was that where the market price of a potentially VAT-able interest, such as the Lease, was less than the "*economic value*", being the total development cost of that interest, the transaction would be VAT-exempt and the person transferring the interest, here CSID, would not be entitled to charge VAT. Under s.10(9) of the Act of 1972, the value of the potentially VAT-able interest being transferred pursuant to the Lease was defined as "*the open market price*" of the Lease. The "*open market price*" was the price which "*the right to receive an unencumbered rent…for the period of the interest would fetch on the open market at the time that that interest [was]…disposed of*". Separately, s.32(1)(t) of the VAT Act, 1972, empowered the Revenue Commissioners to make regulations to give effect to that Act in relation to "*the valuation of interests in or over immovable goods*", a phrase that would include the Lease. Pursuant to that section, the Revenue Commissioners adopted reg.19 of the VAT Regulations 1979 (S.I. No. 63 of 1979, as amended). Regulation 19 sets out mathematical methods for calculating the value of the rent which must be used for the purpose of ascertaining the "*open market price*". However, reg.19 specifically states that these methods are only to be used "*in the absence of other evidence*" of the open market price. A valuation of the Lease by a competent valuer would be "other evidence" of the open market price of the Lease.

5. CSID requested a valuation of the Lease for VAT purposes from the Valuation Office, the State's property valuation agency. On 25th October, 2002, CSID received a report from Mr. Liam Cahill, a professional valuer within the Valuation Office. Mr. Cahill confirmed the unencumbered rent to be €3m per annum and the open market price of the Lease to be €35m for VAT purposes. (All figures in this judgment are rounded to the nearest whole number). The total development cost of the Centre, as calculated by Mr. Cahill, was €68m. As the open market price of the Lease (€35m) was less than the total development cost of the centre (€68m), these valuations had the result that CSID could not, pursuant to the economic value test, charge VAT on the Lease.

6. Notably, and of central importance to these proceedings, on 27th November, 2002, CSID was advised in writing by the tax advisory division of Price Waterhouse Coopers ('PwC') that, notwithstanding a then practice to the contrary, the VAT Regulations only permitted the mathematical methods of valuation contained in the Regulations to be employed "*in the absence of other evidence*" as to the open market price of the Lease. PwC confirmed that Mr. Cahill's estimation of €35m constituted such evidence. This being so, the mathematical methods of calculation contained within the Regulations were closed to CSID. A reference to the advice appears in an affidavit sworn by Mr. Barry O'Brien, the CEO of the Authority, on 8th November 2013. In that affidavit Mr O'Brien avers, *inter alia*, that:

> *"It is undeniably the case that PwC noted in email correspondence, particularly the email dated 27 November 2002…that notwithstanding what they stated was the accepted practice and their advice as to the course of action which the*

Defendant should take, the VAT Regulations did state that the mathematical methods of valuation…could only be used in the absence of other evidence. PwC also noted in the same email correspondence that the valuation from the Valuation Office of c€35m was evidence."

7. The court returns to the substance of the above averment at a later point in this judgment. Suffice it for now to note that the correctness of PwC's advice as to the law was subsequently confirmed by no less an authority than the Supreme Court. Be that as it may, what matters most in the instant proceedings is that on and from 27th November, 2002, CSID, had been formally advised by prominent tax consultants as to what the law required of it and had no reason to doubt that the advice so tendered was correct. From that date, all of CSID's actions fall to be considered in the context of the advice received from PwC. It is only fair to CSID to note that PwC also drew attention to the fact that notwithstanding what the law required, the Revenue Commissioners treated the various methods of valuation as co-equal, leaving it to taxpayers to choose the method that best suited them. However, it is only fair to the Revenue Commissioners to note that the Revenue guidance which allowed for such an approach stated itself to be subject to the applicable law – and CSID had been left in no doubt as to what the law required of it in this regard.

8. Moving on with an account of the facts arising, around late-2002, DWW began to seek sight of Mr. Cahill's valuation report. However, this was not disclosed at that time by CSID. Instead, in an apparent bid to improve the tax position for itself, CSID appears to have decided to utilise the alternative mathematical methods of valuation set out in reg.19. Initially it appears that CSID intended to rely upon reg.19(1)(c)(ii) but this yielded a similarly unsatisfactory result whereby the open market price was €65m, so still less than the total development cost of €68m. Subsequently, and at the time that the Lease was signed, CSID apparently determined to rely upon the mathematical formula in reg.19(1)(c)(i); this yielded an open market value of €77m, an amount which exceeded the total development cost of €68m, and thus exposed DWW to an ostensible VAT liability of €10m when, under the Act of 1972, its liability was €0.

9. As support for this last approach, CSID relied upon a letter from a tax inspector from the Revenue Commissioners wherein the inspector stated that the last-mentioned methodology (the one that created a VAT liability for CWW) was satisfactory. However, the inspector queried whether DWW had accepted Mr. Cahill's calculations – the question that would immediately arise, if DWW had accepted Mr. Cahill's valuations, was why on earth it would be prepared to accept the imposition of a €10m VAT liability when Mr. Cahill's valuations necessarily yielded a VAT liability of €0? As it happens, DWW had not yet seen Mr. Cahill's report. So it did not know that Mr. Cahill had given the Lease an open market valuation of €35m. All DWW knew was that Mr. Cahill had provided a valuation of the unencumbered rent at €3m per annum.

10. Despite operating to some extent in the dark, DWW maintained that the €3m valuation of the unencumbered rent was unrealistic, particularly as the projected annual turnover of the Centre was 'only' €4m and the actual agreed rent between the parties was (a) for the first five years, €127k per annum, plus 10 per cent of the net profits, and (b) thereafter, 10 per cent of the net profits. So there was a very great differential between Mr. Cahill's figures and those that had been arrived at between DWW and CSID, both of whom were professionally advised. However, DWW was not only concerned about the level of Mr. Cahill's valuation of the unencumbered rent. It was also concerned that if it accepted a VAT liability, it might not be able to recover this VAT on a subsequent disposal by it of the Lease. Its particular concern was that it might not be entitled at that future time to adopt the method of valuation that was being taken by CSID. This would have the effect that DWW would have sunk a lot of money into the Aquatic Centre that was irrecoverable. This prospect was referred to at the hearings of these proceedings as "*trapped VAT*". Compounding DWW's concern in this regard was the fact that the VAT Interpretation Branch within the Revenue Commissioners was not prepared to provide any assurances to DWW or CSID on this issue.

11. A further issue of contention between the parties was CSID's desire that DWW invoke what is known as the 'Section 4A procedure'. This is a procedure under VAT legislation which minimises the impact of significant VAT liabilities by facilitating the making of simultaneous VAT accounts by a landlord and tenant. However, the process can only be used with Revenue approval and is only applicable where the tenant has full VAT recovery. The relevant form must be lodged with the Revenue before the tenant goes into occupation of the premises and requires a tenant formally to accept and certify that VAT is due, here on the Lease. As it happened, DWW went into possession of the Aquatic Centre in February 2002 and the Lease was not signed until 30th April, 2003. Because of this sequencing of events the Revenue Commissioners confirmed in writing to CSID that the 'Section 4A procedure' was not available in this case.

12. On 15th May, 2003, CSID issued an invoice to DWW claiming the sum of €10m in VAT due to CSID. The invoice stated that it had been calculated in accordance with reg.19 of the VAT Regulations. By December, 2003, the invoiced amount remained unpaid and CSID's solicitors issued a demand letter seeking payment of the VAT. Clearly the VAT dispute between the parties had significantly hardened by this time.

13. In late-2004 and early-2005, CSID met with a cool reaction from certain State entities (the Comptroller and Auditor General and also the Office of the Attorney General) as to the manner in which the VAT dispute with DWW had been managed, the perception being that there was no net benefit to the Exchequer in the pursuit of the VAT claim. The Office of the Attorney General expressed the view that Mr. Cahill's valuation of the Lease meant that the economic value test was not satisfied and that the sensible approach was to take no further action.

14. In February 2005, PwC, acting for CSID, corresponded with the Revenue Commissioners, indicating that CSID wished to withdraw the claim for VAT and seeking, firstly, confirmation from the Revenue Commissioners that there would be no interest and penalties applied, and, secondly, the approval of the Revenue Commissioners to CSID's so proceeding. Such approval was neither required nor forthcoming as VAT is a self-assessment tax and thus was a matter for CSID. This liaison between the Revenue Commissioners and PwC was still ongoing in May, 2005, a month after CSID had issued proceedings claiming VAT of some €10m from DWW.

15. In March 2005, CSID was advised by its legal advisors and was aware that the VAT dispute was covered by the arbitration clause in the Lease and that if the VAT proceedings were brought in the High Court they were likely to be stayed in favour of the arbitration. CSID was also made aware that the inclusion of the VAT claim would assist it in crossing the financial threshold necessary for the transfer of proceedings to the Commercial Court and the 'fast-tracking' of the case that its listing before the Commercial Court would entail.

The arbitration proceedings

16. On 3rd June, 2005, pursuant to an application brought before the High Court by DWW to have the VAT dispute referred to arbitration, the High Court determined that the dispute between the parties ought to be referred to arbitration. Thereafter, Mr. Dermot O'Brien was appointed as arbitrator and written submissions were made to him by the parties during the course of June 2005. On 1st July, 2005, Mr. O'Brien published his award; he decided that VAT of €10m was due from DWW to CSID. In his award, Mr O'Brien found, *inter alia*, that (i) Mr. Cahill's valuation as to the open market value of the Lease was not evidence of same but merely an

estimate, with the result that CSID was entitled to apply a mathematical formula to the unencumbered rent figure, and (ii) in his view, there was no reason why DWW would not get a full deduction for the amount of the VAT on the Lease.

The High Court challenge
17. On 14th July, 2005, CSID issued High Court proceedings seeking an order permitting it to enforce Mr. O'Brien's award. DWW in turn applied to have Mr. O'Brien's award overturned *inter alia* on the basis of misconduct, *viz.* that Mr. O'Brien's finding that Mr. Cahill's open market valuation of the Lease was not evidence of same but merely an estimate was an issue that had not been canvassed before him. DWW's challenge was rejected in the High Court on 28th September, 2005. In particular, the High Court found that CSID had argued before the arbitrator that the open market valuation of the Lease did not constitute "*evidence*" for the purpose of reg.19 and thus that the arbitrator was entitled to come to the conclusion that he did.

The 'section 214 notice'
18. On 4th October, 2005, the solicitors for CSID issued what is known as a 'section 214 notice' to DWW. This notice was issued pursuant to s.214 of the Companies Act 1963 which allows a creditor to serve three weeks' notice on a company for payment of debts in excess of a prescribed amount; if payment is not made within the notice period, then a circumstance in which the company is unable to pay its debts (one of the statutorily prescribed circumstances in which a company may be wound up) is deemed to have arisen; thereafter liquidation of the company can be sought on this ground. The form of notice that issued to DWW gave it 21 days to pay €10m, in default of which CSID indicated that it would seek to have DWW wound up.

The Supreme Court appeal
19. DWW appealed the High Court decision to the Supreme Court. While the hearing of that appeal was awaited, CSID was replaced legally by the Authority. Consequently, in this description of the facts, the Authority is hereafter referred to in place of CSID. DWW's appeal was heard by the Supreme Court in January, 2010, and judgment was given on 30th April, 2010. The Supreme Court unanimously overturned the High Court judgment. Specifically, the Supreme Court found, *inter alia*, that: (i) the absence of other evidence of the open market value of the Lease was a pre-requisite to use of either of the mathematical formulae provided for in reg.19; (ii) Mr. Cahill's expert opinion as to the open market value of the Lease was evidence of the value of that Lease; (iii) Mr. O'Brien was incorrect in concluding that Mr. Cahill's opinion was not evidence for the purpose of reg.19; and (iv) neither Mr. O'Brien nor the Revenue Commissioners had paid sufficient attention to the presence in reg.19 of the phrase "*in the absence of other evidence*".

20. On 11th May, 2010, DWW's case went before the Supreme Court again for a determination on costs, and to decide how the issue arising between the parties ought now to be resolved. Given the results of the Supreme Court appeal, a second arbitration hearing was now in contemplation. The Authority argued that no order as to costs should be made as if the Authority was successful in the second arbitration, it would effectively be penalised by virtue of the costs order. This argument was rejected by the Supreme Court which awarded DWW the costs of the High Court and Supreme Court proceedings. The Authority applied to have the matter arising between the parties remitted back to Mr. O'Brien. This was opposed by DWW. The Supreme Court decided to remit the matter back to arbitration, though not to Mr. O'Brien.

The second arbitration and related matters
21. From May to July 2010, the Authority took various positive steps in terms of advancing the second arbitration, including seeking to agree a mutually acceptable arbitrator with DWW and also raising an objection to the individual ultimately appointed by the relevant nominating body. Then, on 26th July, 2010, the Authority indicated to DWW that it did not intend to contest the matter any further. On 10th August, 2010, the Authority agreed to pay DWW's "*reasonably incurred*" costs of the first arbitration, and also withdrew the 'section 214 notice'.

The Freedom of Information process
22. DWW, through an extensive freedom of information process, that continued to 9th November, 2012, obtained correspondence between CSID, PwC and the Revenue Commissioners for the period between November 2002 and May 2003. It claims that this correspondence reveals that, contrary to the position adopted by CSID in the High Court proceedings and thereafter, CSID had not formed a *bona fide* opinion that it had calculated the value of the Lease in accordance with the VAT legislation and the relevant regulations. The documentation shows that CSID was aware, and had been advised by PwC, on 27th November, 2002, that the market price valuation provided by Mr. Cahill amounted to "*evidence*" of the open market value for the purposes of reg.19.

The instant proceedings
23. On 8th May 2013, the plenary summons in the instant proceedings issued. The summons indicated that, arising from the above-stated facts, DWW was proceeding against the Authority for, *inter alia*: (i) damages for the tort of abuse of civil process; (ii) damages for interference with DWW's business relations and economic interests; and (iii) damages for breach of contract, misrepresentation, negligence and breach of duty. In its statement of claim of 1st July, 2013, DWW has claimed, *inter alia*, the following loss, damage, inconvenience and expense arising from all that has transpired between the parties, *viz.* (a) the issuance of the 'section 214 notice', (b) the fact that the High Court refused a stay on its judgment pending the Supreme Court appeal which had the effect that DWW was exposed to a €10m liability for a protracted period, (c) the consequent decision by DWW's directors that in the face of this liability it would be inconsistent with their fiduciary duties to involve DWW in certain further projects, pending a resolution of its dispute with the Authority, (d) the related unwillingness of third parties, in the context of the 'section 214 notice' and potential insolvency of DWW, to do business with and/or finance DWW; (e) pursuant to (c) and (d), the disengagement of DWW from certain international construction projects; and (f) the costs and out-of-pocket expenses allegedly incurred by DWW in relation to the VAT dispute, including, DWW claims, substantial legal costs, expert advisor costs and internal management time.

24. On 9th September, 2013, the Authority issued a notice of motion seeking, *inter alia*, the following reliefs: (i) an order pursuant to s.390 of the Companies Act 1963, as amended, directing DWW to provide sufficient security for the Authority's costs in the proceedings commenced by DWW against the Authority; (ii) an order fixing the amount and form of such security; (iii) an order staying the said proceedings pending the furnishing of such security; and (iv) in the alternative, an order that all parties funding DWW in relation to the proceedings be identified and made liable to the Authority for any orders for costs that might be made against DWW.

25. In addition, on 16th September, 2013, a Defence was delivered by the Authority in which it denies in full the claims made by DWW in the statement of claim, and sets out the core facts as it perceives them. In particular, the Authority denies that it brought proceedings to recover VAT in the absence of reasonable or probable cause. Rather it maintains that it brought such proceedings on foot of its understanding and belief, which it claims were reasonably held, that it was entitled to charge VAT on the Lease and to recover same from DWW. Moreover, the Authority denies the presence of any malicious intent or *mala fides* in the bringing and prosecution of the proceedings to recover VAT. Furthermore, the Defence denies in full the allegation that DWW has suffered any loss as pleaded or that the Authority has any liability for same. Lastly, the Defence includes a plea that DWW's claim is statute-barred.

II. Section 390 proceedings.

26. Under s.390 of the Act of 1963, when a limited company, such as DWW, is the plaintiff in legal proceedings, a judge having jurisdiction in the matter, may:

> *"if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful…require sufficient security to be given for those costs and may stay all proceedings until the security is given".*

27. Section 390 falls to be applied in accordance with principles that were approved by the Supreme Court in *Usk and District Residents Association Limited v. The Environmental Protection Agency* [2006] 1 I.L.R.M. 363, and applied by Clarke J. in *Connaughton Road Construction v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7. In that later case it was alleged that Laing O'Rourke had failed in a number of respects in relation to its obligations relating to the design and construction of a particular development. This was denied by Laing O'Rourke which applied for relief under s.390. In concluding that security for costs should be directed, Clarke J. indicated, at para. 2.1, that the test which arises to be applied when the court is determining a s.390 application is as follows:

> *"(1) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:*
>
> *(a) that he has a prima facie defence to the plaintiff's claim, and*
>
> *(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.*
>
> *(2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought.*
>
> *In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.*
>
> *The list of special circumstances referred to is not of course, exhaustive."*

28. Thus in deciding whether to direct security for costs in the instant proceedings the decision in *Connaughton* suggests that the court must ask itself three questions. First, has the moving party (here the Authority) established that it has a *prima facie* defence to the claims made by the resisting party (here DWW)? Second, has the moving party established that the resisting party will not be able to pay the moving party's costs if the moving party is ultimately successful? Third, if the answer to both of the foregoing questions is 'yes', has the party resisting the order shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order for security for costs?

29. What is meant by the term "*prima facie defence*" referred to in *Connaughton*? Useful guidance in this regard is to be found in the *ex tempore* judgment of Finlay Geoghegan J. in *Tribune Newspapers (In Receivership) v. Associated Newspapers Limited* (High Court, unreported, Finlay Geoghegan J., 25th March, 2011). That case arose out of various claims in tort that arose from the publication by *The Irish Mail on Sunday* newspaper of a special edition that, it was claimed, resembled a copy of the *Sunday Tribune* newspaper. In the course of a related s.390 application, Finlay Geoghegan J. observed as follows:

> *"What appears from the judgments…is that a defendant seeking to establish a prima facie defence, which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish these facts. Mere assertion will not suffice…If such evidence is adduced then the defendant is entitled to have the court determine whether or not it has established a prima facie defence upon an assumption that such evidence will be accepted at trial. Further, the defendant must establish an arguable legal basis for the inferences or conclusions which it submits the court may arrive at based upon such evidence. In so far as the plaintiff is admitting that the appropriate test includes an assessment by this Court on the application for security for costs as to whether the defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding, I reject that submission…The decisions of the Supreme Court already referred to appear to me to clearly rule out such an approach. Accordingly, in my judgment, what is required for a defendant seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim."*

30. This approach was subsequently endorsed by Charleton J. in *Oltech Systems (Ltd.) v. Olivetti UK Limited* [2012] IEHC 512, at para. 9. In determining therefore whether the moving party in a s.390 application has established a *prima facie* defence based on fact to the claims made by the resisting party, the court must determine a single key matter, viz. has the moving party objectively demonstrated the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim?

31. By way of recapitulation, the decision of Clarke J. in *Connaughton* suggests that in deciding whether to direct security for costs in s.390 proceedings the court can usefully ask itself three questions:

> (1) Has the moving party established that it has a *prima facie* defence to the claims made by the resisting party?
>
> (2) Has the moving party established that the resisting party will not be able to pay the moving party's costs if the moving party is ultimately successful?
>
> (3) If the answer to both of the foregoing questions is 'yes', has the party resisting the order shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order for security for costs?

The decision of Finlay Geoghegan J. in *Tribune Newspapers* suggests, in effect by way of supplement to Question (1), that in determining whether a moving party has established a *prima facie* defence based on fact to the claims made by the resisting party, the court can usefully ask the following question:

(4) Has the moving party objectively demonstrated the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim?

Insofar as something being 'arguable' is concerned, as Charleton J. notes in *Oltech*, at para. 8, albeit in a slightly different context, "*… experience demonstrates that there is little that cannot be argued*" – though not quite nothing. In passing, for the sake of completeness, the court notes Charleton J.'s observation, also at para. 8 of his judgment in *Oltech*, that among the requirements to be met before the discretion of the court to order security for costs may be invoked is the requirement that, if there is a legal defence raised it must be "*potentially sustainable on a practical view of the law".* Reducing this to the form of a supplementary question to Question (1), it would appear that in determining whether a moving party has established a *prima facie* defence based on law to the claims made by the resisting party, the court can usefully ask itself:

(5) Has the moving party advanced a legal defence that is potentially sustainable on a practical view of the law?

III. Application of s.390 tests.

32. Of the five questions (Questions (1) to (5) referred to above), the resisting party in the instant application (DWW) has indicated that for the purposes of this application the court should assume that the Authority has a *prima facie* defence to the claims made by DWW. In effect, therefore the answer to Question (1) is 'yes' and there is no need to explore the issues raised by that question or Questions (4) or (5). Moreover, DWW acknowledges that the answer to Question (2) is 'yes', so the Authority does not need to establish this fact. The effect of the foregoing is that the court need only address the issue raised by Question (3), namely has DWW shown that there are specific circumstances in the case now arising which ought to cause the court to exercise its discretion not to make the order for security for costs?

1. Public interest

33. It is accepted in case-law that where a plaintiff has raised a point of law of exceptional public importance, this may constitute a special circumstance justifying refusal of an order for security for costs that might otherwise be warranted. (See, for example, *Lancefort Ltd. v. An Bord Pleanála* [1998] 2 I.R. 511 and *Village Residents Association Ltd. v. An Bord Pleanála* [2000] 4 I.R. 321). More recently, in *Oltech*, Charleton J. indicated, at para. 22 of his judgment, that a point of fact can also arise in litigation which so keenly affects the public interest as to merit refusal of an order for security for costs. Cases in which a point of fact of exceptional importance have been held to arise include *Comcast v. Minister for Public Enterprise* [2012] IESC 50 and *Millstream Recycling Ltd. v. Tierney* [2010] IEHC 55. In Comcast the court was presented with a case concerning the alleged corruption of a member of the Cabinet in the context of the awarding of the second mobile phone licence for Ireland. In the Supreme Court, Hardiman J., at para.3 of his judgment, describes the case as "*absolutely unique, without precedent or parallel in the ninety year history of the State".* The whole episode arising was a matter of public scandal and was the subject of a lengthy tribunal of inquiry. In *Millstream*, the proceedings were concerned with the public blaming of the plaintiff for a contamination-of-food scandal that rocked the agricultural sector of the Irish economy. In the present case, the core of the issue arising is, to use colloquial parlance, whether the Authority sought to 'pull a fast one' on DWW by deliberately charging to, and pursuing the payment by, DWW of VAT to the amount of €10m in circumstances where, by the Authority's own admission, its tax advisors had indicated that the method of VAT calculation required by law yielded a VAT liability of €0.

34. It is trite to note that public and semi-state bodies are often sued for alleged or admitted wrongdoings and it cannot be, and it is not the case that their public character or ownership necessarily converts proceedings against them into proceedings in which refusal of an otherwise merited order for security for costs is invariably justifiable by reference to the public interest. All such disputes are likely to be of interest to the public but that does not make their resolution a matter of public interest. The present case is not one involving alleged Cabinet-level corruption or the reputation of a national industry. However, the *Comcast* and *Millstream* cases are perhaps at the extreme end of the spectrum of cases that raise issues so exceptional as to cause the court to exercise its discretion not to make an order for security for costs. Consequently they are not perhaps the most helpful of precedents insofar as illuminating what other categories of case may raise facts that will be considered exceptional, albeit not quite as exceptional – and even exceptionality has its gradations: one exceptional circumstance may not be as exceptional as another, yet both may still be exceptional.

35. In the present case the court is presented with facts that appear to be, certainly one can but hope that they are, unique and uniquely egregious. Here, a semi-state body, by its own admission, deliberately settled on a self-serving course of action which it had been expressly advised was contrary to law so as to seek to charge a ten million euro VAT liability of a private company in circumstances where the semi-state body (a) knew that by law the VAT liability arising for that other company was nil, and (b) sought by every legal means possible to recover the purported liability arising, offering as an excuse for its pursuit of that purported liability, that it had been told that the relevant law was more honoured in the breach than the observance. Insofar as it is suggested that the Authority in its application of the VAT legislation did nothing that other people did not do, the court notes, by way of analogy, that it is of no avail to a man who is stopped after doing 150km/h down the M50 motorway for him to contend that everyone else was driving at the same speed. Nor, is it of any avail to a man, if he gets involved in a Saturday-night brawl outside his local pub, for him to contend that he was not the only person who threw a few punches. Likewise, it appears to the court that it is of no avail to the Authority that its conscious violation of the law was no more than what other people were doing. Neither, in the circumstances arising, does it assist the Authority that the Revenue Commissioners knew or tolerated what it was doing. The Authority was required to comply with the requirements of VAT law and, by its own admission, did not. The fact that other people might also have acted in contravention of the law is an irrelevance. The Revenue guidelines pursuant to which this deviant behaviour apparently arose were expressly stated to be subject to the law, and the Authority had been expressly advised by prominent advisors as to what the law required. The Revenue Commissioners do not enjoy a power to waive the requirements of VAT legislation, they have never purported to enjoy such a power, and there is no suggestion that the Authority understood them to have such a power.

36. Gone are the days of 'Morton's Fork' when no matter how one treated with the State or its emanations, with their almost limitless resources, one could end up with a purported tax liability and have to suffer all manner of related consequences without meaningful hope of relief. There has to be, and it appears to the court that there is a public interest in knowing that a publicly-owned body can and will be held accountable in the public forum offered by the courts in circumstances where that body has initiated and maintained court proceedings to recover a purported VAT liability of the scale of ten million euro that, by law, ought never to have been sought, and the claim to which that body was only able to sustain on the basis of a self-serving and improper application of the law, the true requirements of which law, by that body's own admission, were known to it at all relevant times. The rule of law must prevail. Our republican Constitution demands too that the law's levelling influence must apply: just as the man on the M50 motorway has to pay a speeding fine, just as the man outside the pub must take his legal medicine, so too a semi-state body must be capable of being held to account in the courts when, by its own admission, it knowingly acts in contravention of what the law requires and seeks payment of an unmerited charge of ten million euro from another person. As the then Judge Denham noted in the penultimate paragraph of her dissenting judgment in *West Donegal Land League v. Udarás na Gaelteachta* [2006] IESC 29, when it comes to the question as to

whether there are special circumstances that would justify not making an order for security for costs that appears otherwise to be merited *"it is appropriate to consider the justice of the case and the court's duty to advance the ends of justice and not hinder them."* In this case, justice would be hindered, not advanced, if the order that is sought in this application were to issue.

2. Impecuniosity

37. There is ample authority for the proposition that the court retains a discretion not to order security for costs where the plaintiff concerned can establish, on a *prima facie* basis, that its inability to pay the costs of the defendant concerned (in the event that the defendant might succeed) is due to the wrongdoing asserted in the proceedings. That said, the courts must be careful not to show such reluctance to ordering security for costs that this reluctance itself becomes a weapon whereby an impecunious company can use its inability to pay as a means of putting unfair pressure on a more prosperous company. In *Connaughton*, Clarke J. identifies at para. 3.4 *et seq*. of his judgment a four-prong test to be applied when determining whether a plaintiff is correct in the assertion that a claimed inability to pay stems from the wrongdoing suggested:

> *"[I]t seems to me that four propositions must necessarily be true:*
>
> *(1) That there was an actionable wrongdoing on the part of the defendant (for example a breach of contract or tort)*
>
> *(2) that there is a causal connection between the actionable wrongdoing and a practical consequence or consequences for the plaintiff.*
>
> *(3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and*
>
> *(4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position.*
>
> *…Given that, on a motion such as this, a plaintiff is only required to establish the special circumstances, arising out of its inability to pay costs being due to the alleged wrongdoing of the defendants, on a prima facie basis, then it follows that each of the above steps must also be established on such a prima facie basis only."*

38. DWW has established that there is an actionable wrongdoing on the part of the Authority, specifically as regards the various grounds of action identified in its notice of motion of 9th September, 2013. Moreover, it has adduced evidence in the form of an expert report from Mr. Andrew Brown, a chartered accountant and partner in the renowned accounting firm of Deloitte, that the court is satisfied establishes on a *prima facie* basis the various other limbs of the four-prong test to which Clarke J. adverts in the above-quoted extract. Mr. Brown concludes that although the financial position of DWW has improved since the VAT claim was withdrawn in 2010, it remains the case that it is not in a position to meet the full costs arising in the instant proceedings in the event that it loses same. He details specific losses arising, analyses same, and indicates his expert view to be that *"it does not seem to me to be an exaggeration to say that the VAT dispute which is the subject matter of the current proceedings is the reason why DWW is not in a position to demonstrate an ability to meet an award for [the estimated costs of the proceedings]".* Nor does it appear to the court that the losses claimed are too remote to be recovered. At the hearings of the instant application, a considerable portion of the argument was focused on the scale of damages in issue, and the adequacy of the receipts and other details supplied by DWW to support its claim for the amount of damages that it is seeking. It may be that DWW has not suffered the precise scale of damages that it has claimed. It may be that at the trial it will have to establish its losses with greater definition. It may even be that the shortfall between DWW's available assets and the likely potential costs of the within proceedings are not as great as was initially contemplated. However, in this application and at this time, DWW is merely required to satisfy on a *prima facie* basis that its inability to pay the costs is due to the wrongdoing asserted in the within proceedings. Having had due regard to the propositions formulated by Clarke J. in *Connaughton*, the court is satisfied that DWW has done so.

39. The court notes in passing the reference by the Authority to the fact that back in 2006, DWW agreed to provide security for costs in the context of other proceedings. It is perhaps in the nature of litigation that opposing parties will hurl at each other every missile that they can find. However, the court considers that this particular missile is something of a dud. When it comes to 2006, that was then and this is now: the court must decide the issue of impecuniosity by reference to the present, not the past. It may be that DWW had the necessary resources to come up with security for costs in other proceedings several years ago. However, DWW has established on a *prima facie* basis that it does not have the necessary resources now, that it satisfies the various criteria established by *Connaughton*, and so that no order for security costs should issue at the present time in the instant proceedings, having regard to the factors just considered.

40. The court notes also the assertion by the Authority that there may be some unknown third party funding the present proceedings for DWW, so that even if an order for security for costs is refused, this will not lead to the collapse of DWW's proceedings. In this regard it seems to the court that DWW cannot 'have its cake and eat it'. That is to say, it cannot claim that there is a public interest in having its dispute with the Authority proceed to judgment, yet expect that the court will not consider the entirety of the public interest presenting in this case. Here, it seems to the court, the public interest includes avoiding a situation in which the cost of the proceedings between DWW and the Authority might fall ultimately to the taxpayer to meet by way of Exchequer contribution to the Authority in circumstances where DWW may, in and of itself, be impecunious but nonetheless has ready access to the financial wherewithal necessary to meet any order for costs that it might ultimately be ordered to pay, if unsuccessful in its action against the Authority. It seems to the court that the most expedient means of ensuring that justice is done between the parties and also that the public interest is fully and roundly served is for the court to include among any orders it makes in these proceedings an order that DWW disclose at this time the identity of any person who, orally or in writing, and whether by means of a legally binding agreement or otherwise, has agreed to fund or indicated a willingness to fund, directly or indirectly, all or any of the proceedings arising at this time between DWW and the Authority.

IV

Mr. O'Brien's affidavit

41. It will be recalled from the introductory outline of facts that in an affidavit sworn on 8th November, 2013, Mr. Barry O'Brien, the CEO of the Authority, avers, *inter alia*, that:

> *"It is undeniably the case that PwC noted in email correspondence, particularly the email dated 27 November 2002…that*

notwithstanding what they stated was the accepted practice and their advice as to the course of action which the Defendant should take, the VAT Regulations did state that the mathematical methods of valuation…could only be used in the absence of other evidence. PwC also noted in the same email correspondence that the valuation from the Valuation Office of c€35m was evidence."

42. In effect, the above averment makes the point that the Authority, in seeking to charge and recover the purported VAT liability that it once claimed of DWW, was doing nothing more than acting consistently with such advice as it had received from PwC. The next step logically is that, this being so, there is really nothing exceptional in the Authority's actions that merits the refusal of an order for security for costs: not being expert in tax, the Authority sought expert tax advice and then acted in accordance with same, nothing more. The court has already considered the exceptionality issue in Part III of this judgment. However, it considers that the substance of the above averment and the rationale underpinning same merit separate consideration. In essence, the Authority's case in this regard is that in the course of its deliberations as to whether and how to levy VAT on DWW, it arrived, Robert Frost-like, at two diverging roads and was told by PwC that, while it was required by VAT law to travel one road, "*accepted practice*" indicated that there was another road that "*the Defendant should take*". These are serious contentions for the Authority to make regarding PwC. In effect, the Authority contends that regulated professionals encouraged a semi-state body to engage in behaviour that those advisors had advised was contrary to what the law required, and of course PwC continued to act for the Authority even as it proceeded in a manner contrary to what the law required. As PwC is not a party to these proceedings and has had no opportunity to respond in court to the allegations raised by the Authority, the court does not consider it appropriate to reach any conclusions or make any comment as to PwC's actions. The court would simply note, again, that this line of argument is of no avail to the Authority. The unavoidable truth in these proceedings is that on and from 27th November, 2002, the Authority knew what the law required it to do. One does not need top-flight advisors to know that one ought generally to seek to comply with the law, even if an alternative course of action is pressed or there are others who do not attempt to so comply. The man in the street, the woman on the *Luas*, the speeding driver on the M50 motorway, even the rowdy punter outside his local pub, they all know that one should at least strive to act in accordance with the law, that risks arise if one does not, and that unpleasant consequences may sometimes follow such failure. The decision-makers in the Authority undoubtedly knew this too. The Authority may or may not feel ill-served by its tax advisors but it ill-serves the Authority to claim in court that it could properly elect to act in contravention of what VAT law expressly required and what the Authority had been expressly advised it to require. *Lex non a rege est violanda*. 'The law must not be violated even by the King'. Or, it might be added, by a semi-state body.

V. Conclusion

43. Returning again to the five questions that the court has identified above as arising from the *Connaughton*, Tribune Newspapers and *Oltech* cases, the court would answer them as follows:

(1) ***Has the moving party established that it has a prima facie defence to the claims made by the resisting party? (Connaughton).*** In the present case and for the purposes of the instant application only, the resisting party, DWW, has indicated that the court should proceed on the basis that this has been established, *i.e.* on the basis that the answer to this question is 'yes'.

(2) ***Has the moving party established that the resisting party will not be able to pay the moving party's costs if the moving party be successful? (Connaughton).*** In the present case, DWW acknowledges that this is so. Thus again, in effect, the court must treat the answer to this question as 'yes'.

(3) ***If the answer to both of the foregoing questions is 'yes', has the party resisting the order shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order for security for costs? (Connaughton).*** The answer to both of the foregoing questions falls to be treated as 'yes'. Consequently the court has considered whether there are such specific circumstances arising and has concluded by reference to the relevant case-law that there are public interest and impecuniosity grounds that justify the refusal of an order for security for costs in the instant application.

(4) ***Has the moving party objectively demonstrated the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim? (Tribune Newspapers).*** This is a refinement of Question (1) and only ever falls to be answered if that question falls to be answered. For the reason stated above, there is no need to address Question (1) in these proceedings.

(5) ***Has the moving party advanced a legal defence that is potentially sustainable on a practical view of the law? (Oltech).*** This is a refinement of Question (1) and only ever falls to be answered if that question falls to be answered. For the reason stated above, there is no need to address Question (1) in these proceedings.

44. For the reasons stated above, the court declines to grant any order pursuant to s.390 of the Companies Act, 1963, as amended. However, for the reasons detailed above the court orders that DWW disclose at this time the identity of any, if any, person who, orally or in writing and whether by means of a legally binding agreement or otherwise, has agreed to fund or indicated a willingness to fund, directly or indirectly, all or any of the litigation proceeding from the dispute arising at this time between DWW and the Authority.