Neutral Citation Number: [2012] IEHC 13

THE HIGH COURT

COMMERCIAL

2010 6443 P

BETWEEN

HARLEQUIN PROPERTY (SVG) LIMITED

AND

HARLEQUIN HOTELS AND RESOURCES LIMITED

PLAINTIFFS

AND

PADRAIG O'HALLORAN AND DONAL O'HALLORAN

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 19th day of January, 2012

1. Introduction

1.1 These proceedings were admitted into the Commercial List by order of Kelly J. on 6th July, 2010, the day on which the plenary summons issued. The plaintiffs ("Harlequin" and individually "SVG" and "Hotels" respectively) make serious allegations, including fraud, against the defendants arising out of a significant construction contract entered into between Harlequin and a number of companies incorporated in the Caribbean region by the first named defendant ("Mr. O'Halloran"). It is said that monies paid by Harlequin to those companies was misapplied by Mr. O'Halloran. The second named defendant ("Mr. O'Halloran Snr") is the father of Mr. O'Halloran. The claim against him is narrower in that it is said that a limited amount of those monies was inappropriately paid out of the relevant companies in favour of Mr. O'Halloran Snr. in circumstances where it is claimed that Harlequin is entitled to trace or follow those monies into the hands of Mr. O'Halloran Snr.

1.2 Amongst other things, an application for a Mareva injunction against Mr. O'Halloran was brought by Harlequin but was refused by Finlay Geoghegan J. by order of 10th September, 2010, a similar application as against Mr. O'Halloran Snr. having been abandoned. The basis for that refusal was that Finlay Geoghegan J. was not satisfied, on the evidence placed before her, that Harlequin had made out a sufficient *prima facie* or arguable case.

1.3 Thereafter, the pleadings were largely completed in the latter part of 2010. A request by both defendants (collectively "the O'Hallorans") for security for costs was made on 7th December, 2010. An application for security for costs (which issued on the 3rd March, 2011) then came before the court and was first heard by me in June 2011. In an *ex-tempore* judgment delivered by me on 23rd June, 2011, and for the reasons set out in that judgment, I ruled as follows:-

> A. That, by virtue of the fact that the Companies Act 1963 ("the 1963 Act") did not apply to either of the plaintiff companies (both being foreign companies), the application fell to be considered under O. 29 of the Rules of the Superior Courts ("Order 29").
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> B. That the parties agreed that, in all the circumstances of the case, the question of whether Harlequin should be required to provide security for costs under Order 29 fell to be considered by reference to the same principles as would, in fact, apply in an application for security for costs under s. 390 of the 1963 Act;
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> C. That, on that basis, and it being accepted on behalf of Harlequin that the O'Hallorans had established a *prima facie* defence and that there were no special circumstances, it followed that the question of whether or not Harlequin should be required to provide for security for costs turned on whether there was evidence that Harlequin would be unable to pay the O'Hallorans' costs if the O'Hallorans were to be successful.
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> D. That, on the basis of the evidence then currently available, and having regard to an analysis conducted of that evidence in the course of the relevant ex-tempore judgment, I was not persuaded that Harlequin could meet an order for costs in favour of the O'Hallorans in the event that the O'Hallorans could succeed but that, lest an injustice be done, I felt it appropriate to give Harlequin an opportunity to put further evidence before the court or, in the alternative, to consider whether it was possible to put in place a legally enforceable agreement between Harlequin and the ultimate UK parent company of Harlequin, which would have the effect of giving the O'Hallorans priority to the indebtedness of Harlequin to its UK parent in the event that costs were awarded in favour of the O'Hallorans.

As matters transpired, it did not prove possible for Harlequin to put forward any relevant additional evidence or to put in place arrangements of the type described and it followed that, on 22nd November, 2011, I ordered Harlequin to provide security for costs and directed that the amount of that security be, in accordance with the practice in the Commercial List, fixed by the court rather than the Master.

1.4 It is of some relevance to also note that the O'Hallorans sought, at the same time as bringing an application for security for costs, in the alternative, an order that Harlequin's proceedings be dismissed as being bound to fail. That application was not ultimately pursued.

1.5 However, a number of issues of principle arose between the parties as to the proper method to be adopted in the calculation of the amount of security to be provided. Against that background, the issue of the quantum of security was listed for further hearing which took place before me in Cork on 12th January last. This judgment is directed to the issues which arose. In that context, it is appropriate to start by setting out the separate issues which were the subject of dispute between the parties.

2. The Issues

2.1 In the course of written submissions filed by both sides, three issues were identified. Furthermore, in the course of argument, a fourth issue arose although it is also fair to say that one of the three issues originally identified was largely resolved.

2.2 The three issues identified in the written submissions can be briefly stated in the following terms:-

> A. Whether, given that the order for security for costs made was under Order 29 rather than under s. 390 of the 1963 Act, it is appropriate to follow the common practice in orders made under Order 29 to direct security at one third of the total amount of costs estimated as being likely to arise;
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> B. Whether, and if so to what extent, in estimating the costs in respect of which security is to be ordered, it is appropriate to have regard to costs already incurred; and
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> C. Whether, in estimating the costs in respect of which security is to be ordered, it is appropriate to have regard to Value Added Tax ("VAT").

2.3 It is fair to say that the VAT issue was, while not conceded, not vigorously pursued on behalf of Harlequin. On the other hand, there did emerge in the course of argument a difference between the parties as to the scale (and thus the likely costs) of the litigation, both as to the amounts at stake, the likely evidence (most particularly expert evidence) likely to have to be called, the likely length of the proceedings and the effect of all those matters on the costs which it might be reasonable to assume would be incurred by the O'Hallorans in defending the litigation. That issue in turn gave rise to a debate about the appropriate approach which the court should adopt in circumstances where such a dispute arose and in particular, the proper approach of the court where the court was satisfied that there were *bona fide* differences of opinion as to matters that might have a significant effect on the total costs likely to be incurred.

2.4 I propose dealing first with the question of VAT as it was a matter, as pointed out, which was not the subject of great controversy.

3. VAT

3.1 The question of VAT on costs in the context of an application for security for costs was touched on by McCracken J. in *Windmaster Developments Limited v. Airogen Limited & Anor* (Unreported, High Court, McCracken J., 10th July, 2000). While there does not appear to have been a full debate in that case as to the propriety of the addition of VAT to the fees in question, McCracken J. noted that one of the two defendants in favour of whom security was to be ordered was registered for VAT, while the other was not. In commenting on the estimate of costs put forward on behalf of the plaintiff by its cost accountant, McCracken J. noted that the cost accountant concerned had assumed "wrongly as it turns out, that both defendants were registered for VAT and that therefore, there should be no allowance under this heading". The cost accountant for the defendants had applied a VAT rate at half the then current rate to reflect the fact that only one of the defendants was registered for VAT.

3.2 It is implicit, therefore, in *Windmaster* that McCracken J. considered it appropriate that VAT be included in the calculation of costs for the purposes of determining the amount of security to be put up. It is difficult to disagree in any way with the view of McCracken J. in that regard. Order 99, r. 1(6) of the Rules of the Superior Courts provides as follows:-

> "An award of costs pursuant to sub-rules (1) to (5) of this rule shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where an only where such party establishes that such sum is not otherwise recoverable."

3.3 The relevant provision of the rules is entirely logical. A party who has to avail of the services of lawyers, or to arrange for the instruction of expert witnesses, will, in most cases, be liable to pay VAT on any fees properly charged by those providing such services. The cost of going to court will include the cost of paying the lawyers or experts concerned and that cost will include the amount of VAT properly arising. It is, of course, the case that many commercial entities, themselves registered for VAT, will be able to recover any VAT paid as part of the calculation of their own VAT liability. Such entities do not ultimately suffer the cost of VAT for they get it back in the manner just described. That is why O. 99, r. 1(6) provides that, where VAT is recoverable, it should not be allowed in the recovery of costs on foot of a relevant order.

3.4 Where, however, VAT is not recoverable, the appropriate amount of VAT is allowed as part of the costs for the reasons just analysed. It would, in my view, be wholly irrational if a court, in assessing an amount properly to be put up as security for costs, were to disregard irrecoverable VAT. The relevant party will have to pay the VAT concerned and will not be able to recover it. If that party wins, then any costs awarded will be calculated by the inclusion of the VAT concerned. To say that the party putting up security should not have to make adequate provision for any VAT that would arise in the event that the other side won would be to leave the winning party without security for a significant part of the actual cost of defending the proceedings, that is the VAT that it will have to pay on legal and other relevant services necessarily rendered in the course of the litigation and which will, on the assumption which I am making for the purposes of this argument, be irrecoverable.

3.5 It follows that irrecoverable VAT forms part of the proper calculation of costs for the purposes of determining the amount of security to be provided. It was not disputed on the facts of this case that the O'Hallorans would have to pay VAT and that any VAT so paid would be irrecoverable. It seemed to me that counsel for Harlequin was, therefore, correct when he did not significantly press the VAT issue. I therefore propose to calculate the amount of security to be provided by including VAT (the amount of which, obviously, itself depends on an estimate of the costs which are likely to be incurred which will attract VAT). It is next necessary to turn to the so-called "one-third rule".

4. The One-Third Rule

4.1 That there is a practice of requiring as security an amount not more than about one-third of the costs which would probably be incurred by the relevant defendant, where security is ordered under Order 29, cannot be doubted. The practice is referred to in *Thalle*

v. Soares & Ors [1957] I.R. 182. In that case, O'Daly J., in this Court, had ordered full security. However, the Supreme Court, on appeal, took a different view. Kingsmill Moore J., speaking for the Supreme Court, rejected the view that there was no difference between the measure of security to be given under the then equivalent section to s. 390 of the 1963 Act, on the one hand, and where a plaintiff is resident out of the jurisdiction and is subject to an order under Order 29, on the other hand. Kingsmill Moore J. went on, at p. 192, to describe his reasons in the following terms:-

> "The origin and history of the two jurisdictions are different, one being inherent and discretionary, the other statutory: the foundations are different, one being based on the local character of jurisdiction, the other upon the nature of limited liability: the underlying reasons are different, in the one case possible unwillingness to pay, in the other presumptive inability. These may be distinctions rather than differences, rendered unimportant by the common feature that in each case legal process is powerless to enforce payment. The deciding factor, to my mind, is the wording of the section when contrasted with the rule. The statute lays down reasonably precise instructions as to the measure of security while the rule makers and the judges seem studiously to have avoided any approach to definiteness, leaving each case to be decided by an uncontrolled discretion. Those judges who have considered the matter appear to have realised that different considerations applied to cases under the statute from the considerations relevant to cases under the inherent jurisdiction."

4.2 Having engaged in an exhaustive review of many authorities, Kingsmill Moore J. went on, at pp. 194 and 195, to say the following:-

> "Finally, if I may rely upon my own experience of the practice which has prevailed in Ireland from 1919 until recent years, it was customary to require as security an amount not more than about a third of the costs which would probably be incurred by the defendants.
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> We are not given any exact details of the means of the plaintiff in the present case but he is described as a 'constructors' foreman' which does not suggest any degree of affluence. The defendant has not suggested in his affidavit that the plaintiff is well off, a fact which was considered as relevant by O'Byrne J. in *Guion v. Heffernan* [[1929] I. R. 487]. Undoubtedly, there is a large sum at stake and the costs of the trial will be heavy but we must be careful not to fix a sum which will shut out the plaintiff from such rights as he may have. On a full consideration of the facts it seems to me that the sum of £1,000 would be reasonable to fix as security."

4.3 Harlequin places particular reliance on *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380. That case concerned security for the costs of an appeal to the Supreme Court in a case where this Court had upheld an order giving retention permission in respect of a planning permission. The case is highly unusual, for the plaintiff was resident in the jurisdiction, but nonetheless, an order for security for costs was made in circumstances where the Supreme Court was satisfied that, as a matter of probability, the plaintiff had been selected precisely because he was not a mark for costs, had no special interest in the result of the action, and was in substance, a representative of other parties who were not before the court, together with the fact that the plaintiff had failed to contradict an allegation that the proceedings had been taken with the intention of preventing the completion of the development in question. In those highly unusual circumstances, security for the costs of an appeal to the Supreme Court was ordered even though the relevant plaintiff/appellant was resident in the jurisdiction. It should be noted that the question of security for the costs of an appeal to the Supreme Court is governed by O. 58, r. 16 of the Rules of the Superior Courts rather than Order 29.

4.4 When it came to fixing the amount of security, three different judgments were given by the members of the court, being Finlay C.J., Hederman and McCarthy JJ. Both Hederman and McCarthy JJ. (following *Thalle v. Soares*) confirmed the ordinary practice of requiring security in an amount not more than about one-third of the costs likely to be incurred. Both Finlay C.J. and Hederman J. accepted that the court could, in the exercise of its general discretion, depart from that ordinary practice, but appear to have noted (certainly as per the judgment of Hederman J.) that in departing from customary practice, the court would have be satisfied that the interests of justice could only be served by increasing the amount of security for costs to a sum substantially in excess of one-third of the costs to be incurred. An example was given of a case where an appeal could be shown to be bordering on vexatious.

4.5 From those authorities, it seems clear that a general practice exists in this jurisdiction which confines, ordinarily, security for costs, in cases where same is directed under Order 29, to approximately one-third of the costs likely to be incurred. However, there clearly is a discretion to depart from that practice. It is argued on behalf of Harlequin that Fallon is authority for the proposition that the discretion to depart from the so-called one-third rule is one which requires significant countervailing factors.

4.6 In passing, it is of some importance to note the United Kingdom jurisprudence in this area. Insofar as any practice might be said to have existed in the United Kingdom, it seems to have been one which reduced the amount of costs by one-third rather than to one-third. However, in *Procon (Great Britain) Limited v. Provincial Building Company Limited & Anor* [1984] 1 W.L.R. 557, Cumming-Bruce L.J., speaking for the Court of Appeal, took the view that the security awarded should be such as the court, in all the circumstances of the case, thought just and that any purported practice of making an arbitrary deduction of one-third of the estimated party and party costs was unsupported by either statutory provision or authority. The analysis conducted in that case seems to suggest that a number of factors were properly, at least in the United Kingdom, to be taken into account in calculating the appropriate deduction including the possibility that the case might settle or otherwise come to an early end with a significant reduction in costs and the fact that the amounts claimed, even if *bona fide*, on the part of a successful defendant were likely to be reduced somewhat on taxation. The inference that it seems appropriate to draw from *Procon* is that a practice had evolved of estimating the deduction that required to be made, to reflect factors such as those which I have noted, in the amount of one-third. What the Court of Appeal said in *Procon* was that those factors should be taken into account, but their conversion into a fairly standard practice of reducing by one-third ought not be followed. Indeed, it was strongly suggested by Cumming-Bruce L.J. that a note in the then current edition of the annual practice ought be changed in all future editions to remove any suggestion that there is a rule of thumb.

4.7 It does seem, therefore, that the jurisprudence in this area in the United Kingdom differs significantly from the jurisprudence in this jurisdiction which can be found in *Thalle v. Soares* and in *Fallon.*

4.8 It is, however, also necessary to note that the jurisprudence in this jurisdiction suggests that, where the court orders security against a company under the provisions of s. 390 of the 1963 Act, the amount of security should be estimated on the basis of the full costs likely to be incurred (see *Lismore Homes Ltd v Bank of Ireland Finance Limited* [2001] IESC 79).

4.9 Against that background it is, perhaps, important to return to the basis for the distinction between the proper approach under Order 29, on the one hand, and under s. 390 of the 1963 Act, on the other hand, as identified by Kingsmill Moore J. in *Thalle v. Soares*. As pointed out in the relevant passage cited, the foundation of the two jurisdictions is different because the jurisdiction

exercised under the Rules is one that applies, at least ordinarily, to foreign based plaintiffs, whereas the jurisdiction under the 1963 Act derives from the nature of limited liability. It has frequently been pointed out that the obligation to put up security for costs in the circumstances to which s. 390 of the 1963 Act applies, is a *quid pro quo* for the benefit of limited liability. There are at least circumstances where the beneficiaries of a company should not be able to escape from the practical consequences of having brought unsuccessful litigation by hiding behind limited liability.

4.10 On the other hand, the jurisdiction under Order 29 is not based on the fact that a relevant plaintiff may be unable to pay costs in the event of losing, but rather the jurisdictional difficulty of recovering those costs if the plaintiff is based in another jurisdiction and has no assets in this jurisdiction. Indeed, that position has, in substance, been significantly altered by the membership of Ireland of the European Union and the availability of improved methods of judgment enforcement within the European Union arising from measures such as the Brussels Regulation (Council Regulation (EC) No 44/2001 of 22nd December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). It is also important to recall, as McCarthy J. noted in Fallon, that the constitutional right of access to the courts needs to be given all due weight. It is for that reason that a personal plaintiff resident in the jurisdiction cannot have security ordered against him (see *Proetta v Neil* [1996] 1 I.R. 100, at 104; *Pitt v Bolger* [1996]1 I.R. 108, at 120 and *Salthill Properties Ltd & Anor v Royal Bank of Scotland & Ors* [2010] IEHC 31). That jurisprudence also makes it clear that that principle applies to all EU nationals. It should be noted that the unique circumstances under the consideration in *Fallon* involved security not for an original claim, but rather for an appeal, and in the wholly exceptional circumstances where the court was satisfied that the plaintiff was, in effect, a nominated man of straw put up to represent the interests of others. The jurisdiction under Order 29 is based on the practical difficulty of enforcing an award of costs outside the jurisdiction (or nowadays, outside the European Union) rather than anything else.

4.11 Against that background, it is relevant to look at the position in this case. Both Harlequin companies are limited liability companies, albeit not ones registered in this jurisdiction, being instead registered in the Caribbean. It would be a strange result if a foreign company could maintain proceedings in Ireland on easier terms than an Irish company. It must be recalled that, when the question of whether the O'Hallorans were entitled to security was first raised, it was agreed that the proper way to approach the case, Harlequin being a corporate entity, was by applying principles analogous to those which would be applied in a successful application under s. 390 of the 1963 Act. It follows that the finding which led to the direction that security be made was the same as the finding that would occur in a successful application under s. 390 and was, in substance, a finding that a *prima facie* defence had been established, that there was evidence from which it could be concluded that Harlequin, if it lost, could not pay costs, and that none of the special circumstances noted in the s. 390 jurisprudence applied. If a similar set of findings were made against an Irish company then there is no doubt but that an order under s. 390 would be made and that security in the full amount of the costs estimated as being likely to arise would be directed. Why should Harlequin, simply because it is registered in a different jurisdiction, expect to do better?

4.12 I am, of course, bound by the jurisprudence of the Supreme Court in cases such as *Thalle v. Soares* and *Fallon* which establish that the one-third practice should not lightly be departed from. However, that jurisprudence evolved in cases involving personal plaintiffs rather than corporate ones. The balance of rights involved differs between the two cases. A personal plaintiff, typically resident outside the jurisdiction, nonetheless has a right of access to the Irish courts. That right should not lightly be trammelled. In directing security for costs, the court has to have regard not just to the problems which the defendant, if successful, might encounter in enforcing any order for costs, but also to the entitlement of the foreign resident plaintiff to pursue proceedings in the Irish courts without undue barriers being placed in the way. It is appropriate, in that context, to note the reference by Kingsmill Moore J., in *Thalle v. Soares*, to the judgment of O'Byrne J. in *Guion v. Heffernan* [1929] I.R. 487, and the fact that the means of the foreign-based plaintiff concerned might be considered relevant. It is easy to see how that should be the case. If a foreign based plaintiff was unlikely to have any difficulty in putting up full security so that making an order for full security would not, in practice and on the facts of the case in question, operate as any real barrier to the access of the plaintiff concerned to the Irish courts, then those circumstances might well provide a basis for departing from the ordinary practice. In one sense, it is appropriate to look at the jurisprudence under Order 29 as giving due regard to the fact that a personal Irish plaintiff cannot be directed to give security for costs no matter how impecunious. That fact must influence the way in which the court deals with security applications in respect of foreign personal plaintiffs who should only be disadvantaged in a proportionate way in comparison with an equivalent Irish based plaintiff (having regard to the need to give some added protection to a defendant who may find himself with an order for costs which is difficult to enforce, even against a foreign plaintiff who has some assets, but not in this or other easily accessible jurisdictions).

4.13 However, that logic has little application in the case of a foreign corporate plaintiff. If such a corporate plaintiff is required to give full security (rather than one- third), then that corporate plaintiff is in no worse position than an Irish company in exactly the same circumstances. There would be no different barrier to access to the courts applicable as and between Irish and foreign corporate entities. As pointed out by Kingsmill Moore J. in *Thalle v. Soares*, the logic behind the different approach under s. 390 of the 1963 Act is that security under that section is part of the consequences of limited liability.

4.14 In that context it is, perhaps, appropriate to note that there may well be an argument to the effect that an appropriate and proportionate response to an application for security for costs against an Irish corporate plaintiff (assuming that the circumstances justify the making of an order having regard to the existing jurisprudence) would be to put in place an appropriate measure which ensured that all those who might benefit by the successful conduct of the relevant proceedings are exposed to any costs which might arise if the proceedings were unsuccessful as an alternative to putting up security in the traditional way. It makes sense to take, perhaps, the most simple example of a small company in the entire beneficial ownership of an individual and in respect of which no other party (such as a major creditor) has any real interest. If the principal of such a company were to give an appropriate form of personal guarantee in respect of any costs which might be incurred there is, in my view, a strong case for suggesting that the court should at least consider whether such a guarantee might amount to appropriate security even though the individual concerned might not have sufficient assets to meet the likely quantum of any costs that might be incurred. Given that the relevant individual could bring personal proceedings arising out of analogous circumstances without having to put up security, but on the basis that he would be personally liable for any costs arising, then there is at least an argument for the proposition that it is a sufficient and proportionate reflection of the consequences of limited liability that such a proprietor be simply exposed at a personal level to the costs of any litigation pursued through his corporate vehicle (of course, provided that the conditions identified in the jurisprudence are met). In such circumstances, a defendant would be in no worse position than if an analagous claim were brought by a personal plaintiff who, if resident in the jurisdiction or other relevant jurisdictions, could bring the claim without putting up any security at all.

4.15 Be that as it may, such analysis seems to me to support the view that the justice of an application for security for costs under Order 29 made against a corporate foreign plaintiff should lead to that corporate foreign plaintiff being required to put up the same type of security as an Irish corporate plaintiff would have to. I should emphasise that the logic of that position only holds true in circumstances where the court makes the order for security for costs against the foreign corporate plaintiff on the same grounds as the court would make an order for security for costs against an Irish corporate plaintiff, i.e., that the relevant corporate plaintiff would be unable to pay costs in the event of losing. There may well be circumstances where an Irish court would direct security

against a foreign corporate plaintiff solely on the basis that that foreign corporate entity was based outside the jurisdiction and had no assets inside this or any other relevant jurisdiction. In such a case, it is difficult to see how any legitimate distinction could be drawn between a foreign corporate plaintiff and a foreign individual plaintiff. Where, however, as here, the court has already been satisfied that the tests for the making of an order for security under s. 390 of the 1963 Act were met, save only for the fact that the corporate entity concerned was not Irish, then it seems to me that there is a compelling logic in applying the same regime for the calculation of the amount of security required as would apply arising out of a successful application for security under s. 390 of the 1963 Act.

4.16 For that reason alone, I am satisfied that it is appropriate to approach the fixing of security on the facts of this case on the basis of full security rather than by the application of the one-third practice. However, lest I be wrong in that view, it seems to me that I should also consider the point made on behalf of the O'Hallorans which places reliance on the fact that Finlay Geoghegan J. concluded that Harlequin had failed to put before the court sufficient evidence to establish a *prima facie* case for the purposes of the interlocutory Mareva order sought. In that context, reliance is placed on the comments of Hederman J. in *Fallon*, to which reference has already been made, which suggest that one of the bases for departing from the one-third practice might be where an appeal was bordering on the vexatious. There is, of course, a difference between the type of case where the court may not be satisfied, on the evidence put forward on an interlocutory application, that a prima facie or arguable case has been made out, on the one hand, and the type of case where the court will dismiss the proceedings as being bound to fail, on the other hand (see, for example, *Salthill Properties Ltd*.).

4.17 The difference stems, in significant part, from the onus of proof. A party who seeks an interlocutory order must place before the court sufficient evidence to satisfy the court that it has an arguable case. On the other hand, a defendant who seeks to have a plaintiff's claim dismissed as being bound to fail cannot simply assert that the plaintiff has no evidence, but rather, must seek to positively establish that the plaintiff cannot succeed. A plaintiff who, for example, puts forward a credible basis for there being a realistic possibility of obtaining evidence (even though it not be currently available), might well be able to resist an application to dismiss under the inherent jurisdiction of the court which, as all the authorities assert, is a jurisdiction to be sparingly exercised (see *Sun Fat Chan v Osseous Ltd*. [1992] 1 I.R. 425). In that context, and on the facts of this case, it is illustrative to note that the O'Hallorans did not pursue their application to have Harlequin's claim dismissed as being bound to fail.

4.18 On the other hand, it does need to be noted that Hederman J. in Thalle v. Soares spoke of a case which "bordered" on the vexatious which implies that the discretion to depart from the normal practice may arise, not just in cases where the plaintiff's claim could be dismissed as being bound to fail (for in such cases there will be little need to apply for security for costs), but in cases where the plaintiff's claim was highly speculative and, while not bound to fail, bordered on being vexatious.

4.19 That these proceedings raise very unusual points cannot be doubted. In substance, what Harlequin alleges is that its construction contract with Mr. O'Halloran's companies required the funds paid over by Harlequin to those companies to be used solely in the construction projects contracted for, so that it was unlawful for Mr. O'Halloran to procure that any of those monies be otherwise dealt with. Such a case obviously involves difficult legal and factual issues. Having conducted a careful review of the evidence then available and the arguments then put forward, Finlay Geoghegan J. was not satisfied that Harlequin had established a sufficiently arguable case for the grant of a Mareva injunction. While it would be wrong to conclude, on the basis of that finding, that the proceedings must necessarily fail, it does seem to me that, in the absence of additional evidence or different argument, it follows that Harlequin's case must currently be assessed as being extremely weak and, therefore, the conditions which Hederman J. thought were required, as stated in Thalle v. Soares, so as to depart from the ordinary one-third practice, arise in this case as well. Therefore, even if I am wrong in my view that a foreign corporate plaintiff should, where the conditions necessary for the making of an order under s. 390 of the 1963 Act have been made out (save that the company concerned was not Irish), be required to provide full security, I would, on the facts of this case, also have been prepared to direct full security on the basis of the established extreme weakness of Harlequin's case.

4.20 It is next necessary to turn to the question of costs already incurred.

5. Costs already Incurred

5.1 The issue which arises under this heading is easily stated. Harlequin argues that it is inherent in the use of the term "security" that what is contemplated must relate to prospective costs, that is, all costs postdating the request for security. The O'Hallorans, on the other hand, argue that the court should, by analogy with the jurisprudence under s. 390 of the 1963 Act, order full security, that is, security based on a reasonable estimate of the total amount of all costs that would be awarded in the event of the proceedings being found in favour of the O'Hallorans and costs awarded to them. There is no direct Irish authority on the point. Insofar as English authority is concerned, there are, perhaps, conflicting indications. In '*The Supreme Court Practice'* (London Sweet & Maxwell 1988) (published before the commencement of the Civil Procedure Rules in the United Kingdom) (the "White Book"), it is stated that "security for costs is not necessarily confined to future costs, but may, when applied for promptly, be extended to costs already incurred in the suit". In that context, the White Book cites *Brocklebank v. Kings Lynn Steamship Company* [1878] 3 C.P.D. 365, *Massey v. Allen* [1879] 12 C.H.D. 807, and *Procon.* It is certainly true that in *Procon*, the most recent of the cases cited, the court had regard, in assessing the security to be put up, to costs already incurred. Indeed, having regard to the fact that any estimate made of costs at the normal time when security is directed, that is, at an early stage of the proceedings, will necessarily be speculative to some extent, the court took into account the fact that it was possible to estimate the extent of costs already incurred with greater certainty so that that factor should also be taken into account. Likewise, in *Al-Koronky & Anor. v. Timelife Entertainment Group Limited & Anor*. [2005] EWHC 1688, Eady J. in granting the application, took into account "the evidence of the enormous expenditure which the defendants have already had to incur".

5.2 However, in *Penny v. Penny* [1996] 1 W.L.R. 1204, Butler-Sloss L.J. indicated that "in general" security for costs "looks to protect costs to be incurred in the future". It is true that the issue in *Penny* concerned costs of previous proceedings and the case turned on, and, therefore, the analysis was directed towards, the extent to which concluded applications in Family Law proceedings could be taken to be part of the costs of the same case or of what in substance was a new case. Nonetheless, the general principle adopted by Butler-Sloss L.J. was as I have cited.

5.3 Against the background of the fact that there does not seem to be any direct Irish authority on the point, it is necessary to approach the question from first principles but with the aid of the principles identified in the United Kingdom jurisprudence to the extent that they may be persuasive. It is, perhaps, important to note that delay in seeking security can, in itself, be a ground for refusing an otherwise appropriate order (see the judgment of Fennelly J. in *Hidden Ireland Heritage Holidays Ltd. v Indigo Services Ltd.* [2005] 2 I.R. 115). In those circumstances, it is normal that an application for security for costs is brought at a very early stage in the proceedings. It was, in my view, correctly noted by counsel for Harlequin that the operative time, in any event, for deciding what might be treated as pre-application costs and post-application costs was the time when, in accordance with the Rules (O. 29, r.

1) an originating notice seeking security was served (provided, perhaps, that the application itself followed within a not unreasonable period of time) for after that time the plaintiff is on notice that any further costs to which the defendant is put may be the subject of an order for security.

5.4 Given that state of affairs, it seems likely that in a vast majority of cases, very little costs will be incurred by a defendant prior to sending such a notice so that there will, in practice, in very many cases, be little or no practical difference between the amount of security that will be directed whether or not costs prior to the initial notice are included. That fact may explain why there is limited authority on the point.

5.5 However, it seems to me that there is considerable logic in the position adopted by Harlequin, relying on the dicta of Butler-Sloss L.J., to the effect that the principal purpose of security is to provide a defendant with an ability to recover costs not yet incurred as of the time when the question of security is first raised. The facts of this case provide an appropriate illustration. The main reason why substantial costs were incurred by the defendant prior to the issuing of the relevant notice seeking security for costs was the existence of the highly contentious Mareva application, to which reference has already been made. The costs of that process have already been awarded to the O'Hallorans with a stay on execution pending the completion of these proceedings. It is inevitable, therefore, that the O'Hallorans will retain an order for those costs, in that the only purpose of the stay is to allow the court, at the end of the proceedings, if it turns out to be appropriate, to set off costs in respect of different aspects of the case which may be awarded to, respectively, Harlequin and the O'Hallorans. If some costs are awarded in favour of Harlequin, then those costs may be set off against the costs already awarded to the O'Hallorans in relation to the Mareva application. There is, however, no question of any reversal of the order for costs already made in favour of the O'Hallorans. To what extent then is it appropriate that the O'Hallorans have security in respect of those costs already awarded but stayed in the limited circumstances to which I have referred, as a price of the proceedings going ahead? If the case were to end today, then Harlequin would be obliged to immediately pay those costs (once taxed and ascertained) because the stay would automatically be lifted. The O'Hallorans would then have to pursue Harlequin in the ordinary way.

5.6 I agree with counsel for the O'Hallorans that it is not necessarily inconsistent for the court to order security in respect of costs which have already been the subject of a court order for there is, as she pointed out, a difference between an order for costs and security for the same costs. However, it seems to me that any costs incurred by a party during a period prior to the intimation by that party of an intention to seek security for costs, can properly be characterised as costs which that party incurred "on the hazard". It is not that there is culpable delay on the part of the O'Hallorans in seeking security. If there were, then that would have been a reason for declining to order security in the first place. However, it seems to me that, ordinarily, it should only be those costs which postdate the request for security that should be taken into account in assessing the amount to be fixed as security. As pointed out earlier, in the vast majority of cases, that will make no difference. In cases where it is anticipated that significant early costs will be incurred, it may well, therefore, be prudent for a defendant to at least initiate the security process by notifying the party from whom security is sought under O. 29, r. 1 of the Rules of the Superior Courts. Unless there was some good reason (and, perhaps, a reason at least in part attributable to actions of the relevant plaintiff) why such a step might not have been taken, then it seems to me that, ordinarily, the costs in respect of which security should be ordered are those costs which postdate the requisition made under O. 29, rule 1.

5.7 In that context, it is appropriate to refer to Buttimore on '*Security for Costs'* (Dublin Blackhall Publishing 1999) at p. 74, where the author proceeds on the basis that the contemporary practice in Ireland is not to make an order for security in relation to past costs. While it may be correct, as counsel for the O'Hallorans points out, that the reliance by the author on Penny may not be entirely accurate, given that Penny related to the costs of previous proceedings rather than earlier costs in the same proceedings, nonetheless, it seems to me that the author is correct in identifying the current Irish practice and, for the reasons which I have sought to analyse, I am satisfied that that practice corresponds with a proper application of the law in this area.

5.8 It follows that the question of an assessment of the amount of security which should be ordered must be conducted on the basis of including VAT, assessing the full likely costs to be incurred, but disregarding any costs which had been incurred prior to the service of a notice under O. 29, rule 1. Even allowing for those determinations, there still remains a significant difference between the parties as to the amount of costs likely to be incurred. I, therefore, turn to the costs of this case.

6. The Costs of this Case

6.1 The principal difference between the parties on the proper approach to estimating the costs of this case stemmed from a dispute both as to the overall scale of the case and the extent to which expert evidence might be required to be led. In that context, it is important to note that there are proceedings in being in the Caribbean which may well have an effect on at least some of the issues which arise in this case. Depending on the time at which various issues arising both in these proceedings and the Caribbean proceedings come to be determined, it may well be that some issues arising in either jurisdiction may be governed by questions of issue estoppel and may no longer continue to be at issue in the second jurisdiction. It follows that it is very difficult, at this stage, to predict with any degree of accuracy, the precise issues which will ultimately go to trial in these proceedings. In addition, an estimate of what may truly be at stake in these proceedings is difficult for many of the same reasons. The primary cause of action, at least as I currently understand it, maintained by Harlequin in these proceedings, is that money was taken out of Mr. O'Halloran's companies and paid either to Mr. O'Halloran or Mr. O'Halloran Snr. in circumstances which were unlawful. *Prima facie* the primary remedy for any such breach would be that the monies would be repaid or traced into whatever assets currently represent the monies concerned. It is, however, also fair to say that the case made by Harlequin against Mr. O'Halloran (but not Mr. O'Halloran Snr.) contains a wider range of issues including claims for damages for fraud and the like which might, at least on one view, give rise to larger damages. The claim for damages included in the statement of claim is general and no request for particulars of damage arising out of the claim for damages for breach of contract and negligence or the claim for exemplary damages for fraud have yet been sought. Furthermore, it is possible that in the light of the relative timing of the proceedings in this jurisdiction and the proceedings in the Caribbean, the scope of any damages which could properly be claimed may become clearer before this case goes to trial.

6.2 In the ordinary way, it seems to me that the amount of security that should be provided needs to be determined once and once only and at an early stage in the process. Any minor advantage that might arise, in most ordinary cases, from attempting to fine-tune that amount as the process continues will be more than outweighed by the disadvantage of repeated applications to the court (each with their own costs and delay and each with their own capacity to deflect the parties from bringing the real issues to trial). However, there can be cases where there is likely to be a major watershed event at some stage during the process which can have a very large effect on the likely costs that will be incurred at trial. One such case was *Salthill Properties Ltd.* where, on the facts, I was satisfied that the plaintiff would have to make a very critical decision as to whether the proceedings should be continued once discovery had been obtained and considered. In those circumstances, I was prepared to direct security to cover the reasonable costs up to that point in time and leave over the provision of additional security to cover the trial until it was decided that the plaintiff was to proceed. It is interesting that in *Al-Koronky*, Eady J. similarly directed that security be provided in the sum of STG£375,000.00

"down to completion of the disclosure process".

6.3 There may, therefore, be cases where the justice of the situation does require the court to depart from the normal practice of making a single and early estimate of the total costs and provide for security on a structured basis. I am satisfied that this is one such case. It seems to me that the likely progress of this case is that all interlocutory steps, such as discovery and, if thought appropriate, interrogatories, will need to completed. The court will then need to consider pre-trial directions. At that stage, it will be possible for the court to adopt a clearer view as to the interaction between the issues which arise in these proceedings and the analogous issues which arise in the proceedings being maintained in the Caribbean, the likely timescale for those issues coming on for hearing in the ordinary way in the courts of both jurisdictions, the extent to which it may be appropriate for this Court to stay consideration of some issues until the courts in the Caribbean have had an opportunity to deal with them and, doubtless, other questions. When those matters have been determined, it will be possible to have a much clearer view of the likely scale of these proceedings, both as to the extent to which monies may truly be said to be at stake and the likely length of the proceedings and the expert witnesses, if any, who will be required. It seems to me that the justice of this case, therefore, requires that security be ordered to cover this process up to the time when all necessary pre-trial directions have been given and to leave over the question of the amount of any further security that will be required until that stage.

6.4 It is not particularly easy to extract out from the reports of the cost accountants supplied, the total amount which the respective costs accountants would consider to be attributable to costs on the basis already identified (that is, including VAT, excluding costs to the date of initial requisition, but estimating the costs on a full value basis from the time of that requisition to the time when the case will be listed for trial in whatever mode is directed). However, doing the best I can, I have come to the view that a sum of €150,000.00 inclusive of VAT is the appropriate measure of those costs. I therefore propose directing that Harlequin now put up that sum as security. When the precise scale and scope of the trial has become clear, as a result of the process already identified, I will direct further security. To that end, I will require, at that stage, the cost accountants on both sides to file revised reports in the light of the best estimate that can then be made as to the scope and scale of the trial covering only costs attributable to the period from the initial requisition but on a full value basis and including VAT. In the light of whatever figure can be arrived at in considering such revised costs accountants reports, I will direct a top-up amount of security to be lodged so as to bring the total amount of security provided up to the sum arrived at as a result of that process.

7. Conclusions

7.1 In summary, therefore, I am satisfied that it is appropriate to include irrecoverable VAT in the calculation of an amount of security for costs to be directed by the court. As VAT will arise in this case and will not be otherwise recoverable, it is appropriate to include VAT on the facts of this case. In the absence of significant countervailing factors, it seems to me that the court should ordinarily calculate the amount of security by reference only to costs arising after the initial requisition under O. 29, rule 1. There being no such countervailing factors on the facts of this case, the amount of the security should be so confined. Finally, I am satisfied that, ordinarily, and again in the absence of significant countervailing factors, the security to be directed against a foreign corporate plaintiff under Order 29 should be full security rather than one-third of the amount of the costs likely to arise, provided that the conditions necessary for the grant of security under s. 390 of the 1963 Act, other than the nationality of the company, are present. Again, there being no countervailing factors present in this case, security should be awarded on such a full basis.

7.2 Finally, having regard to the important watershed event likely to occur when a final decision is taken as to the sequencing of the trial of issues between these proceedings and the parallel proceedings in the Caribbean to which reference has been made, it is appropriate to only direct security at this stage to cover events up and until the court has had the opportunity to make all pre-trial directions. On the facts, security in the sum of €150,000.00 inclusive of VAT will be directed in early course (I will hear counsel further on the precise time and method) with the balance of the security to be put in place when the pre-trial directions to which reference has been made have been determined. The process for calculating the amount of additional security to be provided at that stage is as set out earlier in the course of this judgment.