THE HIGH COURT

[2010 No. 7981 P]

BETWEEN

DEMERAY LIMITED

APPLICANT

AND

WILLIAM F.O'GRADY, KIRBY TARRANT, STEPHEN T. NOONAN, JENNIFER FAY AND ELIZABETH BURKE

Practicing Under the Style and Title

of

"O'Grady Solicitors"

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 22nd day of March, 2018

Nature of the application
1. This is an application for security for costs in the context of proceedings brought by an insolvent company against a firm of solicitors. In the substantive proceedings it is alleged that the solicitors were negligent while acting on behalf of the plaintiff company in relation to the conveyancing of premises arising out of a construction project engaged in by the plaintiff.

Chronology of the Pleadings/Events Leading to the Present Application
2. A plenary summons issued on the 31st October, 2012 claiming damages for breach of contract, negligence and breach of duty to include statutory and fiduciary duties. The events underlying this claim took place during the period 2006-2008.

3. An appearance was entered on the 5th November, 2013 and a statement of claim was delivered on the 20th February, 2015. The statement of claim indicated that the company had been in receivership at the time that the proceedings commenced. Complaints have been made on affidavit, on behalf of the defendants, to the effect that there should have been an amendment to the title of the proceedings to reflect this fact, but this issue was not canvassed at the hearing before me.

4. A notice of intention to proceed was served on the 13th November, 2015. On the 28th January, 2016 the plaintiff's solicitor wrote a letter threatening to issue a motion for judgment in default of defence. A motion to this effect was served on the 4th March, 2016. On the 1st April, 2016 the solicitors for the defendant wrote that it was their intention to bring a motion to dismiss the claim and requested an adjournment of the motion or judgment in default of defence. On the 4th April, 2016 the motion for judgment came before the Court. The Court rejected the defendant's request for an adjournment and extended the time for delivery of defence for a period of 4 weeks.

5. The defendant issued a motion on the 27th April, 2016 seeking an order dismissing the action on the ground that it disclosed no reasonable cause of action and/or that it was frivolous and vexatious and/or an abuse of process. This was grounded on an affidavit of Mr. William F. O'Grady, partner in the firm of O'Grady Solicitors, sworn on the 28th April 2016.

6. The defendants failed to deliver a defence within the 4 weeks that had been provided for by the court order and the plaintiff's solicitors served a second motion for judgment in default of defence, returnable for the 13th June, 2016. A defence was subsequently delivered on the 10th June, 2016.

7. The motion to strike out the proceedings was listed for hearing on the 1st December, 2016.

8. A notice of motion seeking security for costs issued on the 23rd November, 2016, grounded on a further affidavit of Mr. O'Grady, sworn on the 21st November 2016, together with an affidavit of Mr. Paul Conlon.

9. Mr. Paul Walsh, director and shareholder of the plaintiff company, swore an affidavit dated the 14th December, 2016 in response to the motion to strike out.

10. A further affidavit was sworn by Mr. Walsh, dated the 8th February, 2017, in response to the motion for security for costs. A further affidavit on behalf of the plaintiff was sworn by Mr. Manus Quinn, accountant, on the 14th December, 2016.

11. A further affidavit on behalf of the defendant was sworn by Mr. Kirby Tarrant, a partner in the defendant firm, on the 4th October, 2017.

The Substantive Case as Pleaded
12. The statement of claim indicates that the plaintiff's claim is essentially as follows. The plaintiff was involved in the business of construction and property development and in February 2006 acquired lands in Bray, County Wicklow with a view to constructing a residential and commercial development to be known as "Aubrey Court". The development consisted of 34 apartments and 3 commercial units, and building commenced on the 8th January, 2007. In November 2006 the plaintiff instructed the defendants to act as its solicitors in connection with the sale and conveyancing of these apartments and commercial units. On the 16th November, 2006, the plaintiff negotiated the sale of apartment number 20 to a couple, by the name of Flynn, at a price of €485,000. The defendants furnished to the solicitors acting on behalf of the Flynns a Combined Building Agreement/Contract for Sale which contained a clause stating that they had no authority to bind their client contractually and that "*no Contract shall be deemed to be in existence until such time as Contracts have been executed by both parties and exchanged and a full deposit paid*". On the 12th December, 2006, the solicitors for the purchasers returned the Combined Building Agreement/Contract for Sale as executed by their clients together with a cheque for a deposit in the sum of €15,000. At no time did the defendants return the part of the contract duly executed by the plaintiff necessitated to satisfy the condition precedent. By letter dated the 23rd May, 2008, the purchasers' solicitors asked for its return, stating *inter alia* "*In your letter you said that you were returning the Building Agreement/Contract for Sale…we do not appear to have same on file and we would be grateful if you would let us have one part of such Contract and in view of the fact that same is required by our client's lending agency…*", By letter dated the 17th July, 2008 the defendants stated

inter alia that they had no authority to "*bind our client contractually and no Contract shall be deemed to be in existence until such time as Contracts have been executed by both parties and exchanged and a full deposit paid*." In August 2008 the purchasers sought to withdraw from the purchase and the sale ultimately fell through. In 2012, the receiver subsequently negotiated the sale of this apartment for approximately €93,000, representing a loss of approximately €391,000 for the plaintiff.

13. A similar sequence of events took place with regard to apartment number 34. The purchasers were the same as for apartment number 20 and the agreed price was €545,000. The receiver ultimately negotiated a sale in 2012 for a price of approximately €94,000, representing a loss of approximately €450,000.

14. A similar sequence of events took place with regard apartment number 33, where the proposed purchasers were a couple by the name of McGovern. The agreed sale price had been €565,000 and the receiver ultimately negotiated the sale for a sum of €109,000, representing a loss of approximately €455,000.

15. A similar sequence of events took place with regard to apartment number 25, where the purchaser was a Ms. Edge. The agreed sale price was €420,000 and the receiver sold the apartment for approximately €89,000, representing a loss of approximately €395,000.

16. The substance of the plaintiff's case, set out in the statement of claim, is to the effect that the relevant proposed purchasers of these particular 4 apartments were able to reconsider their decisions to purchase the apartments and to successfully withdraw their offers at a time when property prices were falling, owing to the defendant's failure to ensure that binding contracts were in place. The plaintiff contends that the defendants failed to inform them that the sales were vulnerable to withdrawal, thereby denying them the opportunity to bring about the timely execution of contractual documentation or, failing that, the abandonment of the proposed transaction and the conclusion of a transaction with another purchaser willing to enter into a binding and enforceable contract at that time.

17. It may be noted that the loss pleaded in the statement of claim relates to the loss of the sales of these 4 apartments and smaller losses incidental thereto. Significantly, it is not pleaded that the company failed as a whole, directly or indirectly, as a result of this loss, or that the company failed, directly or indirectly, as a result of the plaintiff's negligence in this or any other regard.

18. The defence raises preliminary issues of delay on the part of the plaintiff and maintains that the proceedings are frivolous and vexatious and/or an abuse of process. Regarding the substantive matters, it is pleaded that the plaintiff's filed accounts show that construction of the development was not sufficiently advanced by mid-2008 to allow pressure to be brought to bear on purchasers to complete or enter into binding contracts. It is pleaded that the plaintiff wished to keep the contractual situation open to allow them to observe market movements with regard to the value of the apartments and, further, that it was favourable to the defendants not to have binding contracts in place. It is pleaded that in view of the level of the plaintiff's liabilities, the alleged loss of €1,900,000.00 would have been insufficient to render the company solvent and further that, had the sales been completed, and this sum made available to the plaintiff, it would immediately have been demanded by the Bank of Scotland (hereinafter "the Bank"). This would have resulted in a write down by the Bank but it would not have resulted in any cash gain for the company. Accordingly, there could not be any compensable loss. The defendant's position in this regard is, in my view, encapsulated in the following point pleaded at 14(j) of the defence:

> "Had the sales taken place, nothing different would have happened between 2008 and 2013, except that instead of the Company receiving the benefit of a write off of €10,529,699 worth of loans, the write off would have been €8,604,699 and the Company would be in an identical position on completion of the receivership and the full and final settlement referred to in its Accounts."

The Facts as Set Out on Affidavit

19. In his affidavit of the 28th April, 2016, Mr. O'Grady, a partner in the defendant firm, avers to the following details. He says that his firm acted for the principal director of the company, Paul Walsh Sr., and certain members of his family and their business pursuits for a number of years prior to 2005. He says that around September 2005 the Walsh family purchased another company known as A.J. Edge Limited, which owned a site in Bray, County Wicklow. He says that the Walsh family changed the name of that company to Aubrey Court Developments Limited. He says the company was incorporated in October 2005 for the purpose of constructing 34 apartments and 3 commercial units for sale and profit, and that it started borrowing from the Bank in 2005 for the purposes of this development.

20. He says that while the development of the premises was ongoing, the plaintiff company sought to sell some the apartments from the plans. He says that it was becoming usual by late 2006 to use various devices to minimise stamp duty and to retain flexibility for the developer. The sales sought to be negotiated were by way of site sale and building agreement, which he says was quite usual, together with a "white goods" or contents contract, which he says was very unusual. He says that the sale required all three contracts, (site sale, building agreement and white goods contract) to be signed and binding before proceeding to completion. He says that his firm was instructed to send draft Site Sale Contracts and draft Building Agreements to solicitors for the purchasers, but was not instructed to send any White Good Contracts. He says that he believes that the company was content to have these contracts signed together with relatively small deposits, in preference to having all contracts signed and the usual 10% deposit, because if the value of the property continued to increase in the market at the rates seems in previous years, the company could have rescinded or renegotiated the sales for higher prices.

21. Mr. O'Grady exhibited copies of the company's accounts as filed with the Companies Registration Office, for the years ended 30th September, 2006, 2007 and 2008. He says that these show that, as of September, 2006, the company owed the Bank of Scotland, €2,768,737. He says that the statements made it clear that an amount of "€91,159 in respect of the carrying value of development work in progress costs" were contained in the financial statements. He says that as the development progressed, further finance was required. By September 2007 the company owed the bank €6,327,254. This time the carrying value of the development work in progress costs refers to an amount of €3,725,847. He says that it is clear that by comparing the 2006 to the 2007 accounts relating to the sums owed to the Bank, approximately €2,600,000 of the borrowings was not for development costs and more likely was borrowed to purchase the company which owned the land. He then says that by letter of loan offer dated 12th November, 2007 the Bank offered to lend the company the sum of €12,553,000 (together with interest roll up of €457,000) for a term of 12 months, with repayment to be by way of one payment at the end of the term or some other date to be agreed with the Bank. This facility was specifically stated to include to refinancing of the company's debt of €6,727,000, the amount owed in accordance with the 2007 accounts, and to provide a further €5,324,000 "*to complete development at Aubrey Court, Bray, Co Wicklow*". He says that when the figures are analysed, this indicates that by November 2007, approximately 40% of the development costs had been incurred, that completion of the 4 sales was impossible because at that time 60% of the construction was remaining and that in those

circumstances, completion was some time away.

22. Mr. O'Grady also refers a letter of loan offer dated 10th August, 2009, wherein the Bank again agreed to refinance the company's debt. He says that the company accounts, which were prepared by Manus Quinn of Messrs Woods and Partners Limited, for 2009 were not filed until the 13th August, 2015, presumably to accompany the company's application to be restored to the Register of Companies. He says that these record the net liabilities of the company as of 30th September, 2009 as €10,680,682.

23. He points out that the balance sheet for financial year ended 30th September, 2014 showed net liabilities to amount to €653,932, reduced from €11,183,642, indicating a reduction of €10,529,699, a reduction he described as "astonishing". He observes that the accounting policies statement in the notes to the abridged financial statements record that the receiver, Tom Kavanagh, was appointed on the 21st June, 2011, on behalf of the Bank of Scotland and ceased on the 14th October, 2013; and that during the appointment, the company's assets were realised with a view to settling the borrowings outstanding with the Bank. Full and final settlement was reached with all of the company's principal creditors. He says that it is therefore clear that the company benefited from a write down of over €10,500,000 of its debts to the Bank.

24. In an affidavit dated the 14th December, 2016, Mr. Paul Walsh, director and shareholder of the plaintiff, replies to the affidavit of Mr. O'Grady referred to above. He says that Mr. O'Grady's reliance upon the audited financial statements for the years 2009 to 2014 is "an entirely flawed premise". He says that these statements were prepared and signed off in 2015 after the conclusion of the receivership and that they cannot and do not describe what might have happened had the defendants not breached their contractual and professional duties to Demeray. He says that he does not deny that the economic downturn from 2008 onwards left Demeray in a very difficult situation. However, he says that Demeray had a very good working relationship with the Bank, as its principal funder. and that the relationship remained good even when the financial situation became challenging as the recession took hold. He says that the situation was difficult and finely balanced, but that it was one that Demeray could have worked through on the basis of the good will that existed with the Bank. He says that the loss of the 4 sales the subject of these proceedings, which the defendants had previously confirmed to the Bank as being unconditional, tipped the balance against Demeray, undermined the trust which had existed and deprived the company of any prospect that the Bank would permit Demeray to work its way through the situation and/or reach an ultimate accommodation with the Bank.

25. He takes issue in the first instance with the suggestion that there was a prior long standing relationship with the defendants, and says that he himself first met that the defendants in April 2004 and the defendants were first instructed to act as their solicitors in December 2004.

26. Mr. Walsh also takes issue with Mr. O'Grady's affidavit insofar as it seeks to create the impression that Demeray came up with the idea of a separate contract for the white goods. He says that the idea was raised by the defendants as an incentive for purchases to sign their contracts promptly. He also says that there was never any discussion about the possibility of "stringing the purchasers along" in such a way that they could be discarded or bargained up if prices rose. He says that Demeray intended and believed that both it and the respective purchasers were bound by the contracts. He claims that the defendants were never instructed to send out a white goods contract and refers to certain correspondence in this regard.

27. Mr. Walsh draws attention in particular to a letter from the defendants to the Bank dated the 26th October, 2007, in which they stated to the Bank that they had received "*unconditional signed contracts for ten units*", including the 4 units mentioned in the statement of claim.

28. In general, Mr. Walsh disputes that the picture was as bleak as that painted by Mr. O'Grady. He says that the building was nearing its scheduled completion date as of the summer of 2008 and he refers to the architect's certificate of practice completion in respect of the development, dated 1st July, 2008, in support of this proposition. The Court has seen a certificate of practical completion dated 24th July, 2008, addressed to Demeray Limited in respect of the residential development at Parnell Road, Bray, Country Wicklow and issued by a Mr. Eoin Carroll of John Fleming Architects. It says, *inter alia, "that the entire works are now practically complete".*

29. Mr. Walsh says that by December 2006, 13 "off the plans" sales had been agreed; of those, 3 fell through because the purchasers could not get funding; 2 fell through because the Fire Regulations necessitated the relocation of a stairwell/lift shaft; 4 proceeded to completion, (apartment numbers 3, 11, 17 and 30 which were completed between January and April 2009); while the remaining 4 were lost and constitute the subject matter of these proceedings. He goes on to say that 10 of the unsold apartments were let to tenants between August 2008 and April 2009. He rejects the claim that the development was a failure by August 2009 because only 4 of the 34 apartments had been sold. He says that if the 4 sales in question had gone ahead, the situation would have been that 8 apartments would have been sold and 10 let and he further says that further arrangements were being made at the time with the Bank to rent more of the unsold apartments. He refers to the details of the rental income that Demeray had by September 2010 of €288,248.

30. Mr. Walsh says that Demeray had a strong and open working relationship with the Bank and that the Bank continued to support them even when the construction and development sector collapsed. He says that the good relationship was evidenced by the fact that in August 2009 the Bank extended the existing facility and indeed advanced additional facilities to Demeray to finance the completion of the development and related matters. He says that this demonstrates that the Bank had a very positive view of the company at the time. He gives further details of interactions between the company and the Bank throughout 2009 and 2010.

31. He describes in detail a particular proposal that was made to the Bank in September 2010 by the plaintiff. The proposal put to the Bank involved the Bank writing down the amount of the loan to the current market value of the property and, over a 5-year period, selling two apartments per year to reduce the loan capital sum and for the loan to be cleared completely by the end of 5 years. The Bank requested an independent valuation and, on the 29th October, 2010, Lisney valued the unsold parts of the development at €5,300,000.00. The Bank sent the proposal to its parent company in England, and later came back with queries, and specifically queried the 4 sales the subject matter of these proceedings.

32. He says that when Demeray told the Bank that those 4 sales were now lost, the information was not well received. The Bank asked to see the counsel's opinion which had been sought in respect of the contracts for the sales of the apartment which was unfavourable to Demeray, dated the 15th January, 2009 and this was furnished. The Bank then indicated that it felt it had been misled in relation to those sales correspondence (electronic and written) from the defendants. He says that after being furnished with the opinion from counsel, the Bank appears to have lost trust in the development. Early in 2011, the Bank informed Demeray that it was rejecting the proposal. He says that by March 2011, Demeray had managed to identify potential investors who were prepared to support Demeray, and that in June 2011 they offered the Bank €5,500,000.000 in respect of the loan and/or the underlying property development. However, the Bank ultimately rejected this proposal. Mr. Walsh says that it was shortly after this point that the Bank

took the initial step to appoint a receiver. He says that the Bank seemed to have lost trust in the project after hearing of the loss of the 4 particular sales. He says that Demeray's reputation as a customer of the Bank which delivered on its commitments had been destroyed.

33. Mr. Walsh then describes subsequent events. He says that a receiver was appointed on the 21st June, 2011. He explains that the Bank sold the Aubrey Court development to Kennedy Wilson, an international real estate investment and services company, as part of a larger deal. He says that the bank sold the plaintiff's debt to Kennedy Wilson and no write down was received from Bank of Scotland itself. Ironically, the potential investors who had been willing to invest in Demeray under the proposal rejected by the Bank ultimately proceeded to purchase the assets from the receiver acting for Wilson Kennedy.

34. Mr. Walsh also says he has been advised by estate agent Mr. Richard Mullan, of Murphy Mullan Estate Agents, that the current value of the Aubrey Court development would be in the region of €8,500,000.

35. Mr. O'Grady swore a further affidavit sworn on 21st November, 2016, (this one specifically in support of the motion for security for costs). He refers to the defence plea that by late 2008, the construction work on the development had not been completed and therefore no enforcement of the sales contract was possible. He says that the plaintiff was insufficiently capitalised to survive the downturn in the property market and by August 2009 had to refinance its debts of €13,000,000 to allow the development to be completed with a view to letting the apartments to provide some cash flow for its lender. He says that on the 30th September, 2009 the plaintiff had net liabilities of €10,680,682 and that when the receiver had sold the units within the development, Bank of Scotland wrote off approximately €10.5 million of loans. He says that had the sales been effected as had been hoped in 2007, the write off may have been €8.5 million instead, but the plaintiff would ultimately have been no better off. He refers to the plaintiff's abridged financial statements for the year ended 30th September, 2014 and a statement in accounts notes that "*the directors wish to consider pursuing a number of avenues in respect [of] potential legal claims by the company".* He says that the abridged financial statements for 2015 cause concern because it failed to recite the wording employed in 2014 accounts and instead says that the director/shareholders have told them to support the company and undertaken to continue to provide it with the necessary financial resources to meet its financial obligations and that they consider it appropriate to prepare the financial statement on a "going concern basis". He describes this note as "patent nonsense" because the plaintiff has no assets, does not trade and therefore is not a "going concern". It is insolvent and would be unable to pay the costs of the proceedings if unsuccessful. It has, in any event, not been disputed in the motion heard before me that the plaintiff is impecunious.

36. Mr. Paul Conlon, partner in the firm of Brehan & Associates, Legal Cost Accountants, was instructed on behalf of the defendant to prepare an estimate of the costs, and estimates that on the information available to him, the total estimated costs would be approximately €168,500.00

37. In an affidavit sworn on the 8th February, 2017 by way of reply, Mr. Walsh avers that the impecuniosity of Demeray on which the defendants seek to rely in seeking security was caused by the acts of negligence and breach of contract complained of in the proceedings. He also refers to significant and prejudicial delay on the part of the defendants in bringing the security motion, the motion having issued on 23rd November, 2016 and the first inclination of such a step having been a letter dated 15th November, 2016, a little more than a week before. He points out that the accounts relied on by the defendant were filed in the Companies Registration Office on 15th July, 2015 and were available since then. He says that the delay on the part of the defendants caused Demeray prejudice during that period in question insofar as costs were incurred in prosecuting the case and answering the strike out motion issued by the defendants.

Relevant Law on Security for Costs

38. Section 52 of the Companies Act 2014, provides as follows:-

> "Where a company is plaintiff in any action or other legal proceeding, any 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 in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."

39. In my judgment in the case of *Tír na nÓg Project (Ireland) Limited v. P.J. O'Driscoll & Sons* [2017] IEHC 640, I summarised the approach of the courts with regard to the exercise of discretion in respect of security for costs. The basic principles set out in *Inter Finance Group Limited v. K.P.M.G. Peat Marwick* (Unreported, High Court, Morris P., 29th June, 1998), make it clear that there is an onus on the defendant to establish that he has a *prima facie* defence and that the plaintiff will not be able to pay the defendant's costs if successful in his defence; and that the order should then be made unless it can be shown that there are specific circumstances which would cause the court to exercise its discretion not to make the order sought. Such special circumstances would include a delay on the part of the moving party in seeking the relief and/or the plaintiff's inability to discharge the defendant's costs owing from a wrong allegedly committed by the party seeking the security.

40. In the Tír na nÓg case, I discussed how the courts have approached the question of establishing a *prima facie* defence, including the discussion by the Supreme Court in *Usk District Residents Association Limited v. Environmental Protection Agency* [2006] IESC 1, and of the High Court in T*ribune Newspapers (In Receivership) v. Associated Newspapers Ireland Limited* (Unreported, High Court, Finlay Geoghegan J., 25th March, 2011), as applied in subsequent decisions of the Court of Appeal including *Green Clean Waste Management Limited v. Leahy* [2015] IECA 97, *Mary & Joseph O'Brien Developments Ltd. (In Liquidation) v. Sobol & Allen* [2016] IECA 133, and *Paulson Investments Ltd. v. Jons Civil Engineering* [2016] IECA 169.

41. Further, in the *Tír na nÓg* case, I discussed the authorities in relation to establishing that the impecuniosity of the plaintiff was caused by the defendant's wrongdoing, including such cases as *Peppard Co. Ltd. v. Bogoff* [1962] I.R. 180, *Jack O'Toole Limited v. MacEoin Kelly Associates* [1986] I.R. 277, *Lough Neagh Exploration Ltd. v. Morris* [1998] 1 I.L.R.M. 205, and *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7. The latter case, in particular, stresses the importance of setting out the relevant financial information by appropriate evidence to support the contention that, were it not for the alleged wrongdoing of the defendant, the plaintiff would be in a position to meet the costs of any unsuccessful proceedings. I also referred to the fact that the categories of special circumstances do not appear to be closed, citing Charleton J. in *Millstream Recycle Limited v. Gerard Tierney & Anor* [2010] IEHC 55 and the decision of the Supreme Court in *West Donegal Land League Limited v. Údarás na Gaeltachta* [2006] IESC 29.

42. The above authorities provide the appropriate parameters within which to locate the arguments of the parties within the present case. There is no dispute in the present case but that the plaintiff company is impecunious; it is an insolvent company, as is clear from the company accounts exhibited to the Court. Accordingly, the live issues in this motion were whether the defendant has a *bona fide* defence and whether special circumstances exist such that, even if there is a *bona fide* defence, security for costs should not be

ordered.

Does the Defendant Have a bona fide Defence?
43. The defendant submits that not only does it have a strong defence, but that the plaintiff actually has no arguable case in circumstances where an amount equivalent to the alleged loss (approximately €2,000,000) was ultimately written down in the course of the receivership. It is submitted that the plaintiff did not suffer any loss in real terms because even if it had received the money from the sales, the money would have gone to the Bank of Scotland and not to the plaintiff. Indeed, it was this view, adopted by the defendants, that had led to the issuing of a motion to strike out in the first place. The plaintiff put before the court a summary of the law on damages, contained in Butterworths Common Law Series *The Law of Damages* (2nd edition, pgs. 61-66), which, it was submitted, was the answer to the defendant's argument in this regard. It is not necessary for me to express a view on the strength of the arguments in this regard except to say that it seems to me that there is a *bona fide* defence in the sense described in the authorities referred to above, the threshold being a low one. However, it seems to me that in any event, having regard to the affidavits of Mr. Grady and Mr. Walsh, there is also a bona fide defence arising out of what appears to be a conflict of fact to be resolved at trial; this is the question of whether instructions were given, whether expressly or implicitly, by the plaintiff company to the defendants to the effect that the contracts to be issued to the purchasers were to be conditional contracts. If the plaintiff had given explicit or implicit instructions not to issue unconditional contracts, the defendant could hardly be found liable in negligence for engaging in that particular course of conduct on foot of the client's instructions. There is also a factual issue to be determined as to whether the construction was at a sufficiently advanced stage to have enabled completion to have taken place. Accordingly, for a variety of reasons, I am of the view that sufficient evidence has been put before the court establishing that the defendant has a *bona fide* defence within the meaning of that concept as deployed in applications for security for costs.

Are There Special Circumstances Warranting a Refusal of an Order for Security for Costs?
44. In *Connaughton Road Construction Ltd v. Laing Rourke Ireland Ltd.* [2009] IEHC 7, Clarke J. stated as follows: -

> "5 3.4 In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-
>
> (1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
>
> (2) that there is a causal connection between that 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.
>
> 6 3.5 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. …
>
> 7 3.6 …[A] plaintiff must at least establish a *prima facie* case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful.….It is not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a *prima facie* basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of point (4) referred to above. Even if, therefore, a plaintiff can show a *prima facie* case, it is also necessary to show a *prima facie* level of losses attributable to the defendant's wrongdoing so as to enable the court to assess whether, again on a *prima facie* basis, those losses are sufficient to justify attributing the plaintiff's inability to pay costs, in the event of losing, to the asserted wrongdoing. On that basis I am satisfied that the court can have some regard to quantum in an application such as this."

45. It may also be noted that Clarke J. further said:-

> "11 3.10 As part, therefore, of the overall question of assessing whether it has been shown, on a *prima facie* basis, that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted, the court must look at all of the circumstances asserted on behalf of the parties. In particular in a case where, prior to any possible wrongdoing, the plaintiff company had no significant net assets, it seems to me that it follows that such a company will need to establish that, in the absence of the wrongdoing alleged, it would have acquired net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant were successful."

46. The plaintiff relies upon two matters in suggesting that the relief sought on this motion should not be granted. First, the plaintiff says that the overall effect of the plaintiff's negligence was to destroy the trust it enjoyed with its lender, the Bank of Scotland, such that the Bank withdrew from its relationship with the plaintiff as a result of which the company ultimately failed. The detailed facts supporting this submission were described above, in my summary of Mr. Walsh's affidavits. Secondly, the plaintiff relies upon the delay of the defendant in bringing the motion for security for costs as reason to refuse the relief sought.

47. The most significant issue to be decided in this case, in my view, relates to the alleged causal link between the defendant's conduct and the impecuniosity of the plaintiff. As seen above, the thrust of the evidence of Mr. Walsh is that the negligence of the solicitors caused not only the loss of the four contracts the subject-matter of the proceedings but also, indirectly, the ultimate collapse of the company. As described above, Mr. Walsh says that that a turning point in the relationship between the plaintiff company and its lender, the Bank, arrived when the Bank realized that the sale of the four apartments had fallen through and that the contracts upon which these sales had been based were not unconditional, contrary to what had previously been told by the defendants. Essentially his case is that, if the relationship between the plaintiff and the Bank had not been ruptured, the plaintiff company would likely have survived the recession and be solvent today. Mr. Walsh contends that the analysis of Mr. O'Grady is unduly narrow, based as it is upon the Companies office figures, and says that it does not take into account the reality of how the maintenance of a positive relationship with the Bank could have altered the future course of the plaintiff company.

48. It appears to me it could probably be said that there is *prima facie* evidence on affidavit that the loss of the sale of the four apartments and/or the realisation by the Bank that the contracts in respect of those apartments were not unconditional constituted a turning point in the Bank's relationship with the plaintiff. It also seems to me that it is a reasonable inference, or at least an inference that reaches the threshold of a *prima facie* case, that if the sale of the four apartments had proceeded, the Bank might have continued to support the company thereby increasing the company's likelihood of survival. However, it seems to me that there is a more fundamental problem with the plaintiff's submission. The causal link now alleged in response to the application for security for costs does not correspond with the case as pleaded in the statement of claim. The statement of claim does not plead that the negligence of the defendant caused the company to fail, but simply pleads the (considerably smaller) loss arising out the loss of the sale of the 4 apartments. Further, the statement of claim does not refer in any way to communications between the defendant solicitors and the Bank, although the plaintiff now seeks to rely in this motion upon the defendant having allegedly misled the Bank in correspondence as to the true position concerning the contracts. This is an alleged wrongdoing which does not feature at all in the statement of claim.

49. In summary, I am faced with a situation where there may well be *prima facie* evidence before me which supports a causal connection between *an alleged wrongdoing* on the part of the plaintiff, and an *alleged loss* of the order which would satisfy the fourth part of the four-part test set out by Clarke J. in *Connaughton Road*, but which loss has not been pleaded in the substantive case itself, and some of which wrongdoing (the allegedly misleading communications from the defendants to the Bank) has not been pleaded either. I do not think that the jurisdiction to refuse the order for security for costs on the basis of an alleged causal link between the wrongdoing of the defendant and the impecuniosity of the plaintiff envisages a consideration of wrongdoing and losses entirely outside the parameters of the case as pleaded. Further, I do not think that what Clarke J. (as he then was) said in *Connaughten Road* with regard to taking all of the circumstances into account stretches this far. This is not to say that minor differences between the case as pleaded and the evidence on a costs motion would necessarily be fatal, but in the present case, there is a significant gap between the case as pleaded (alleged wrongdoing leading to the loss of the sale of four apartments) and the case put forward on the motion (alleged wrongdoing leading to the failure of the company as a whole). Further, this is in circumstances where there was no application to amend the pleadings.

50. In those particular circumstances, it seems to me that the Court, when taking into account the four matters set out by Clarke J. in *Connaughten Road*, may only do so within the parameters of the pleadings. The question then is: whether the loss of the sale of the four apartments (if caused by the wrongdoing of the defendants) could be said to have caused the plaintiff to be in a situation where it is insolvent and therefore unable to discharge the costs of the proceedings if unsuccessful. I am not persuaded that this causal connection is made out, absent the additional (not pleaded) suggestion that the loss of the four apartments and/or what the Bank was told about those contracts indirectly led to the failure of the company. Accordingly, it seems to me that the submission that the Court should refuse to fix security for costs on the basis that exceptional circumstances exist must be refused.

51. On the separate issue as to whether the application for security for costs should be refused by reason of the delay on the part of the defendants in bringing the motion, I have decided in the exercise of my discretion not to refuse the application on this basis. I do not understand the previous authorities on delay in such applications as requiring the Court necessarily and automatically to refuse the application, but rather that the Court has a discretion in the matter in light of all the circumstances. In the present case, refusing the application for security on the grounds of delay would seem to me to be a disproportionate response in light of the history of the proceedings as set out above from paragraph 2 onwards. There seems to me to have been delays on both sides and this is not a "black and white" situation of a plaintiff moving a case forward with expedition against a defendant who does little or nothing until a very late stage, before then issuing a motion for security for costs. Further, the steps taken on behalf of the plaintiff do not seem to me to have been particularly complex or onerous in the period following the service of the statement of claim and the issuing of the motion for security. In my view, the question of the plaintiff being out of pocket by having dealt with various matters during the period before the issue of the motion for security could more appropriately be met, if necessary, by adjusting costs at the conclusion of the proceedings, rather than refusing the application for security in its entirety. Alternatively, if there is power to do so under the current legislation, the quantum of security for costs ordered could be adjusted to take account of expenses incurred by the plaintiff during the relevant period.

52. It may be that the quantum of any costs to be fixed can be reduced by reason of the defendant's delay in bringing this motion, as a result of which the plaintiff incurred certain costs during the interim period. It is of note that the provisions allowing for the security of costs under the 2014 Act are different from those of its predecessor, the Companies Act 1963. Hogan J. noted this difference in *Used Car Importers of Ireland Limited v Minister for Finance, Revenue Commissioners, Ireland and the Attorney General* [2017] IECA 327, when he said that-

> "7. …What is clear…that if an order for security is made under s. 390 of the 1963 Act it applies to the full quantum of the costs… The wording of s. 52 of the 2014 Act is slightly different again from that of s. 390 of the 1963 Act and there is, accordingly, an argument that the full quantum requirements…no longer apply even where security is directed under the terms of the new s.52."

53. I therefore propose to hear submissions as to whether the quantum of costs to be fixed can and should be reduced in this case, and if so, by what amount.