Neutral Citation: [2013] IEHC 577

THE HIGH COURT

Record No. 9646P of 2012

BETWEEN

KIMPTON VALE LIMITED, LAWRENCE KEEGAN AND MAIREAD KEEGAN

APPLICANTS

AND

FEROX LIMITED T/A JOHNSTON REID & ASSOCIATES AND CONTROL AER LIMITED (IN RECEIVERSHIP)

JUDGMENT of Mr. Justice Keane delivered on the 21st November 2013

Introduction
1. By motion dated the 3rd May 2010, the first-named defendant seeks Orders pursuant to s. 390 of the Companies Acts 1963-2009 requiring the first named plaintiff to provide security for costs and staying the proceedings until that security is given.

Background
2. In the underlying proceedings, a Plenary Summons issued on the 26th September 2012, whereby the plaintiffs seek damages for breach of contract against the first-named defendant and damages for negligence and breach of duty against both defendants.

3. While no further pleadings have been exchanged between the parties since then, in the affidavit that he swore on the 2nd May 2013 to ground the present application, Colin Reid, a director of the first-named defendant, avers to the factual background to the dispute.

4. According to Mr. Reid, the relevant events are as follows. The second-named plaintiff Laurence Keegan retained the first-named plaintiff Kimpton Vale Ltd - a company of which Mr. Keegan is a director - to build a private dwelling at 32 Castleknock Village ("the house") for his own use. Kimpton Vale Ltd ("Kimpton Vale") contracted with the first-named defendant Johnston Reid & Associates ("Johnston Reid") to design a ventilation system for the house. Kimpton Vale contracted separately with Control Aer Limited ("Control Aer") to install that ventilation system.

5. Mr. Keegan was dissatisfied with that system, so that, when Control Aer sued Kimpton Vale in the Circuit Court for work done, Kimpton Vale counterclaimed for breach of contract and joined Johnston Reid to those proceedings as a third party.

6. Mr. Reid anticipates that the plaintiffs will apply to transfer the Circuit Court proceedings into the jurisdiction of this Court so that they might be consolidated with the present proceedings. Mr. Reid contends that Johnston Reid has a good defence to the plaintiffs' claims in that the ventilation system concerned was designed in accordance with the applicable building regulations and the plaintiffs' specifications and that any defect there may be in the system must therefore be attributable to the installation performed or the materials used, for which Johnston Reid has no responsibility. Mr. Reid further contends that Johnston Reid did not contract with Laurence or Mairead Keegan and did not owe either of those plaintiffs any duty of care, whereas Kimpton Vale has suffered no loss in circumstances where it emerged at the hearing of the present motion that Laurence and Mairead Keegan (who are husband and wife) are currently the joint owners of the property, the property having previously been owned solely by Mairead Keegan.

7. Laurence Keegan swore a replying affidavit on behalf of all of the plaintiffs on the 28th June 2013, from which it appears that the plaintiffs broadly accept the foregoing summary of the dispute between the parties, while wishing to emphasise a number of additional propositions for which they specifically contend. The first such proposition is that the design of the ventilation system was defective. The second is that Johnston Reid was not only responsible for designing the ventilation system but was also responsible for securing Control Aer to install it and for supervising Control Aer in doing so, so that Johnston Reid did owe each of the plaintiffs a duty of care. The third is that the ventilation system is entirely inoperable, rather than merely unsatisfactory, and therefore represents a dangerous defect in the construction of the house. The fourth is that Johnston Reid knew that the completed house was to be used as the family home of Laurence and Mairead Keegan, which emphasises the existence of a duty of care owed by the former to the latter.

Security for Costs
8. Section 390 of the Companies Acts 1963-2009 ("the 1963 Act") provides as follows:

> "Where a limited 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 defence, require sufficient security to be given for those. costs and may stay all proceedings until the security is given."

9. There is no dispute between the parties concerning either the proper interpretation of that section or the broad principles governing its application, as elucidated in numerous decided cases.

10. From those cases, the following propositions emerge:

> (i) Section 390 may impose a serious handicap on an impecunious limited liability company where lack of funds would not create the same problem for an individual litigant.
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> (ii) The power requiring security to be given is discretionary. The Court may refuse to grant security for costs depending on the existence of special circumstances, and the categories of special circumstances are not closed.
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> (iii) The defendant seeking security for costs must establish a *prima facie* defence.
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> (iv) There must be credible testimony to show that, if the defendant is successful in his defence, the plaintiff will be

unable to pay the defendant's costs.

(v) Once the matters at (iii) and (iv) above are established, the burden shifts to the plaintiff company to assert special circumstances that would justify the refusal of the order.

11. At paragraph 7 of the affidavit that Mr. Keegan swore on their behalf on the 28th June 2013, the plaintiffs have accepted that the first-named defendant has established a *prima facie* defence to the plaintiffs' claim, albeit one that they strongly contest in the circumstances already described.

12. As regards credible testimony that the first-named plaintiff would be unable to pay the first-named defendant's costs, Mr. Reid has exhibited to his affidavit the last audited accounts filed by Kimpton Vale for the year ended 30 June 2011. Those accounts demonstrate that Kimpton Vale had net liabilities at the balance sheet date (30 June 2011) of €12,215.92; a nil figure for cash at bank or in hand on that date; and the sum of €9,690,631 falling due to creditors within one year. On behalf of the first-named defendant, Mr. Reid draws attention to the directors' notes to the abridged financial statements for the year in question. In particular, those notes record that the company's borrowings were transferred to NAMA on the 20th December 2010 and that a business plan was submitted to NAMA at the relevant year end (30 June 2011), which had received the qualified approval of the latter and which in the opinion of the directors was then achievable. In those notes, the directors go on to acknowledge that the ability of the company to continue as a going concern is based on the company realising its property assets in a manner which allows it to clear its debt.

13. The first-named defendant contends that the relevant accounts make clear not only that the first-named plaintiff is extremely unlikely to meet a costs order against it, but also that it is in danger of ceasing to operate altogether. While Mr. Keegan is at pains to aver, in a second affidavit sworn on an unspecified date in October 2003, that the first-named plaintiff's trading position is significantly more robust than Mr. Reid asserts, the Court understands that the first-named plaintiff did concede for the purpose of the present application (though not in the written submissions filed in opposition to it) that there is credible evidence suggesting that the first-named plaintiff would be unable to pay the first-named defendant's costs.

14. Were the matter seriously in issue between the relevant parties, this Court would be inclined, *mutatis mutandis*, to the same view as that adopted by Hogan J. when presented with broadly similar facts in the unrelated case of *Kimpton Vale Developments Ltd v An Bord Pleanála* [2013] IEHC 442. In dealing with the "credible testimony of inability to pay costs" aspect of that case on the facts presented, Hogan J. assessed the position as follows:

> "4. .... It is not in dispute but that the company has significant bank liabilities (estimated to be just over €8m. in October 2011) and that its ability to pay this debt is dependent on its ability to realise its not inconsiderable property assets in a manner which would enable this to be done. It may be that its ability to do just this in the second part of 2013 might be slightly easier than might have been the case in 2011.
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> 5. Yet its ability to meet any award of the respondent's costs is likely to be dependent on the goodwill of NAMA. The costs themselves have been estimated at some €13,400 and are quite possibly likely to be higher. While one of the applicant's directors, Mr. Laurence Keegan, has stressed that the company is still trading and has not entered any insolvency process such as liquidation, receivership or examinership, this is not quite the same thing as saying that it would be able to meet any order for costs were it to lose the litigation. As Clarke J. so perceptively demonstrated in his judgment in *Parolen Ltd v Doherty* [2010] IEHC 71, there is a "real, and in some cases, a significant, distinction between the solvency of a company on the one hand and its ability to meet a significant costs order in the event that it should mount and lose significant litigation on the other hand."
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> 6. One must, of course, fairly acknowledge that this litigation is likely to be more modest and straightforward than many other contemporary items of commercial and planning litigation. The costs, accordingly, are likely to be at a level which could not be regarded as crushing. Yet the fact remains that the ability of the company to meet any such award presently remains contingent on the goodwill of NAMA. Certainly, there has been no unequivocal statement from NAMA that it would be prepared to underwrite any such award for costs.
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> 7. In these circumstances, if there was a real risk that an order for costs would be made against [Kimpton Vale Developments Ltd], then it would follow in turn that there is a real prospect that the company would not be able to meet the respondents costs. If, then, the ordinary costs rules applied to a case of this kind, then I would be prepared to make an order for security for costs pursuant to s. 390 of the 1963 Act."

15. In this case, it would appear to be the position that:

> (a) The first-named defendant had significant bank liabilities, comprising €8,160,331 in bank borrowings repayable on demand as of 30 June 2011. (b) The first-named defendant's borrowings were transferred into NAMA on 20 December 2010.
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> (c) As of 30 June 2011, the first-named defendant's directors acknowledged that its ability to continue as a going concern was based on the company realising its property assets in a manner that allows it to clear its debt.
>
> (d) It may be that the first-named defendant's ability to do just this in the second part of 2013 might be slightly easier than might have been the case in2011.
>
> (e) Yet its ability to meet any award of the respondent's costs is likely to be dependent on the goodwill of NAMA.
>
> (f) There has been no statement from NAMA that it would be prepared to underwrite any such award for costs.

16. The company's abridged financial statements for the year ended 30 June 2012 have since been exhibited to a second affidavit of Colin Reid, sworn on the smaller loss of €420,869 in that twelve-month period than the €6,882,505 loss it had made in the preceding one, its net liabilities had increased from €12,215,292 to €12,636,191 and its bank borrowings, repayable on demand, had increased from €8,160,331 to €8,497,354 during the same period.

17. In the premises, the Court is satisfied that there is credible testimony to show that, if the defendant is successful in his defence, the plaintiff will be unable to pay the defendant's costs.

Individual co-plaintiffs- a special circumstance?

18. Like the observations of Hogan J. in *Kimpton Vale Developments Ltd* already quoted, the foregoing observations are simply a prelude to the effective issue that the Court is required to determine. That issue in this case is whether the plaintiff company has established that the existence of individual co-plaintiffs, i.e. Laurence Keegan and Mairead Keegan, amounts to a special circumstance that would justify the refusal of an order directing it to provide security for the first-named defendant's costs. The Court has had the benefit of particularly helpful and concise submissions on this point from both parties to the present application.

19. That the existence of a co-plaintiff who is a natural person might constitute a special circumstance for the purposes of s. 390 is clear from the following passage of the judgment of Kingsmill More J. in *Peppard & Co Ltd v Bogoff* [1962] 1 IR 180 (at 188):

> "For the plaintiff it was argued also that an order for security for costs should not be made because there was a co-plaintiff, who was a natural person within the jurisdiction and who would be answerable for the costs of the defendants. There is no doubt that when an application for security for costs is made on the ground that a plaintiff is outside the jurisdiction it will be refused if there is another plaintiff within the jurisdiction who would be answerable for costs: *Winthrop v Royal Exchange Assurance Co; D 'Hormusgee v Grey* and the old Irish case of *Houlditch v Stackpoole*. There is, as far as I have been able to ground for seeking security was based on the section of the Companies Act and not on residence without the jurisdiction, but in principle the same arguments would seem applicable in both cases."

20. In *Bula Ltd (In Receivership) v Tara Mines* [1987] 1 I.R. 494, the High Court reaffirmed that the inclusion of individual co-plaintiffs resident within the jurisdiction is a factor that has been considered in the case-law as one capable of amounting to a special circumstance that could justify a refusal to direct the provision of security for costs. As Murphy J. pointed out (at 499):

> "The effect or relevance of individual plaintiffs being joined with the insolvent corporate plaintiff was considered at some length by Megarry V.C. in *Pearson v Naydler* [1977] 1 W.L.R. 899. At p. 904 of the report he pointed out the clear distinction in both the nature and origin of the rule with regard to security as if affected natural persons and limited companies. As he points out, the general rule is that insolvency is not a ground for requiring security from natural persons. In the case of corporations, the basic rule is reversed. It would seem to me, therefore, that the addition of individual plaintiffs should have no direct bearing on the question of whether a corporate co-plaintiff would be required to give security. It might be argued, however, that the position would be different if it was shown that the individual plaintiffs were a good mark because it is only in that way that their inclusion would provide an answer to the defendants' concern of facing proceedings against an impecunious corporate body. Of even less assistance to the defendants would be the additions of nominal individual plaintiffs willing to lend their name as parties perhaps in the confidence that they were so impecunious that an order for costs against them would no more increase their problems than solve those of the defendants. Let me hasten to add that it is not suggested that the individual plaintiffs in the present case have been joined for any improper purpose. Nor is it contended that they are anything other than persons who have distinguished themselves in commercial and industrial fields. It is merely pointed out that in their capacity as guarantors of the financial liabilities of Bula Limited, that substantial judgments have been recovered against them.
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> In the circumstances it seems to me that whilst the presence of individual co-plaintiffs is a factor to be considered in all cases, it is not, in the present case one of major significance. Less still is it of decisive importance."

21. The decision in *Bula Ltd (In receivership) v Tara Mines* just cited, was considered more recently by Clarke J. in *Salthill Properties Ltd v Royal Bank of Scotland plc* [2011] 2 I.R. 441 (at 465) in which, having quoted from the passage in the judgment of Murphy J. set out above, the court went on to state:

> "On the basis that the existence of an individual co-plaintiff has no *direct* bearing on the question of whether a corporate co-plaintiff is required to give security, Murphy J. did go on to note, at p. 499, that, in circumstances where it was "shown that the individual plaintiffs were a good mark", then the existence of individual co-plaintiffs is a significant factor to be properly taken into account. It seems to me that the obvious inference from the passage I have just cited, is to the effect that it is for the party placing reliance (in this case the first plaintiff) on the existence of the individual co-plaintiff to "show" that the individual plaintiff would be a good mark. The first plaintiff has produced no evidence from which I could infer that the plaintiff would be a mark for any costs awarded against him."

22. From the authorities just described, I derive the following propositions:

> (a) The presence of a plaintiff within the jurisdiction who would be answerable for costs is capable of constituting a special circumstance that would justify the refusal of an order directing the provision of security for costs.
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> (b) The addition of individual plaintiffs should have no direct bearing on the question of whether a corporate co-plaintiff would be required to give security, unless it was shown that the individual plaintiffs concerned were a good mark. From this it seems reasonable to infer that being "answerable for costs" should be construed as directly equivalent to "being a good mark for costs". The significance of the presence of an individual co-plaintiff (or co-plaintiffs) within the jurisdiction appears contingent on the extent to which any such person is a good mark for costs.
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> (c) It is for the party placing reliance on the existence of an individual co plaintiff within the jurisdiction to "show" that any such plaintiff would be a good mark for costs.

The different case being made by the first plaintiff

23. In *County Monaghan Anti-Pylon Ltd v Eirgrid plc* [2012] IEHC 103, Charleton J. noted:

> "16. A...factor can arise where there is a corporation as a plaintiff and an individual as a co-plaintiff. If both are making the same factual case, and the corporation is insolvent but the individual has sufficient funds to meet an eventual costs order against him or her, then the order may be refused because the defendant if successful is not going to be impeded in recovering costs; this aspect of the discretion of the court emerges from the judgment of Kingsmill Moore J in *Peppard v Bogoff* [supra]."

24. On behalf of the first-named defendant in this case, Mr. Lewis argues that a matter of particular concern for his client is that the first-named plaintiff makes a slightly different case against his client than do the second and third named plaintiffs, because the loss claimed by each of those plaintiffs, as yet unspecified, is most unlikely to be the same and also because the second and third-named defendants' case is brought solely in negligence, whereas the first-named plaintiff seeks damages for both breach of contract and

negligence. Mr. Lewis posits a situation in which the claims of the second and third-named plaintiffs succeed against the first-named defendant but that of the first named-defendant against it fails.

25. It is unnecessary for the Court to consider the significance of that issue since, on behalf of the second and third-named defendants, Ms. O'Brien has submitted; first, that in what is anticipated to be a relatively straightforward case in negligence and breach of contract, the presence of the first-named defendant is unlikely to add in any significant way to costs; and second, for the same reason, it is difficult to imagine there being any significant diminution in the costs to which the second and third-named defendants would be entitled as against the first-named defendant arising from the failure of the first-named plaintiffs case against the latter. Most significantly, Ms. O'Brien has indicated, on behalf of the second and third-named defendants, that she is instructed to furnish the undertaking of each, if required, to consent to a set-off of as between any order for costs that the second and third-named plaintiffs might obtain against the first-named defendant and any order for costs that the first-named defendant might obtain against the first-named plaintiff.

The evidence in relation to the special circumstance invoked
26. In his affidavit sworn on the 28th June 2013, Mr. Keegan avers:

> "Whilst the first-named defendant has made a case that that there is a risk that the first Plaintiff will not be able to meet an Order for costs, it [does not, and could not, make] any such argument in relation to the second and third-named Plaintiffs. We are both natural person resident in the State."

27. Of course, the foregoing formulation, if accepted, would reverse the test set out in the jurisprudence *i.e*. that it is for the party invoking the existence of an individual co-plaintiff as the relevant special circumstance justifying a refusal to direct the provision of security for costs to show that the co-plaintiff concerned is a good mark.

28. Mr. Keegan goes on to aver in the same affidavit that the house in which the ventilation system the subject of these proceedings was installed is owned jointly by him and his wife. Mr. Keegan avers that the house is "clearly worth very significantly more than the first Defendant's possible exposure in costs" but does not provide an estimate of its value, much less an independent expert valuation of it.

29. As noted earlier in this judgment, Mr. Reid subsequently exhibited- to his affidavit sworn on the 15th August 2013 -a copy of the first-named plaintiff's abridged audited accounts for the year ended 30 June 2012. As Mr. Reid avers, Note 3 to those abridged accounts records that the National Assets Management Agency holds personal guarantees in the amounts of€8,563,000 and €8,095,000 as security in relation to the first-named plaintiff's borrowings. Mr. Reid goes on to exhibit a letter from the plaintiffs' solicitors to the first-named defendant's solicitors, dated the 26th July 2013, in which the former confirm that the guarantees in question were provided by Laurence Keegan to the first-named plaintiff in respect of loans that have now been transferred to NAMA.

30. On the basis of the foregoing evidence, the first-named defendant submits that the relevant personal guarantees given by Laurence Keegan are contingent liabilities which, as the first-named plaintiff's solvency is contingent on the continuing goodwill of NAMA, raise questions over Mr. Keegan's personal solvency.

31. As noted above, Mr. Keegan swore a further replying affidavit on an unspecified date in October 2013. As already mentioned, in that affidavit Mr. Keegan avers that the first-named plaintiffs trading position is significantly more robust than Mr. Reid had asserted. Mr. Keegan goes on to aver to a number of matters in support of that contention. First, he asserts that the first named plaintiffs bank debt of approximately €8.5m is secured in the first instance against 18 properties owned directly by the first-named plaintiff and 65 further properties 'directly owned by the Kimpton Vale Partnership, which in turn is owned by this deponent and the first plaintiff.' However, no documentation is exhibited demonstrating such order of recourse, no valuations are provided in respect of the relevant properties, and no financial statements or ownership records are provided in relation to the Kimpton Vale Partnership.

32. Second, Mr. Keegan avers in relevant part that: "On a commercial basis it is reasonably expected that the security provided will easily meet any potential call from NAMA and that therefore it is highly unlikely that the personal guarantees will ever be enforced." No material whatsoever is provided that would allow that proposition to be tested, much less verified or confirmed.

33. While Mr. Keegan avers that the first-named defendant has "up to date commitments of continued support from NAMA", no such commitment is identified or exhibited.

34. Mr. Keegan avers that the first-named plaintiff "with the assistance of NAMA, will be appointed main contractor for a residential development project in Terenure in south Dublin." Once again, no confirmation of that proposed appointment is identified and no document evidencing it is exhibited, whether from NAMA or any other source.

35. Finally, Mr. Keegan avers as follows: that, aside from the contingent liability of the two personal guarantees (each for in excess of€8 million) that he has provided in respect of the first-named defendant's bank debt which currently stands at €8.5 million, neither he nor Mairead Keegan has any personal liability to any third party; that no judgment is registered against either of them; and that they jointly own the house in which the ventilation system at issue is installed, which property is unencumbered.

Conclusion
36. The Court is satisfied that the existence of two personal guarantees amounting to in excess of €8m each in respect of borrowings that currently stand at approximately €8.5m on the part of a company that had net liabilities on 30 June 2012 of €12,636,191, which company depends for its ongoing solvency on the continuing goodwill of NAMA, must inevitably raise substantial concerns about the status as a mark for costs of the individual co-plaintiff who has provided those guarantees. The bare assertion on oath that recourse to those personal guarantees cannot be had unless other property assets are realised and a shortfall remains does not allay those concerns in the absence of any meaningful evidence concerning the relevant agreement(s) and the nature and value of those assets. Nor are those concerns allayed by the bare assertion on oath that the unencumbered property jointly owned by the second and third-named plaintiffs is worth very significantly more than the first-named defendant's possible exposure to costs, when such assertion is made without reference to any valuation, much less any independent expert valuation.

37. While it is true that in *Bula Ltd (In receivership) v Tara Mines Ltd*, Murphy J. stated that the existence of outstanding judgments against an individual co plaintiff constituted "impressive evidence of insolvency" (at 498), it does not seem to me to follow that the absence of outstanding judgments constitutes evidence that a person is a mark for costs. In *Peppard and Co. Ltd v Bogoff*, Kingsmill Moore J rejected the contention that the only way of showing that a company would be unable to pay costs awarded against it was by showing that the company was in liquidation, stating (at 187):

> "I do not see any ground for distinguishing a case where inability to pay is shown by the fact of liquidation from one where the same inability can be shown by other evidence."

38. In my view, just as a company that is not in liquidation may nevertheless be unable to pay a successful defendant's costs, a person against whom a judgment has not been registered may be unable to do so. It is certainly the case that proof of the absence of outstanding judgments against a person does not establish that the person concerned is a mark for costs and, of course, in the context of proving the existence of an individual co-plaintiff who is a mark (as a special circumstance militating against an order directing the provision of security for costs), the onus of proof is on the corporate plaintiff seeking to resist that application.

39. Further, it seems to me that if, as Murphy J. held in *Bula* (at 500), bald statements that the insolvency of the corporate plaintiff has been caused by the defendant seeking security (as a special circumstance justifying a refusal to direct the provision of such security) are not sufficient for that purpose, then bald statements concerning the status of an individual co-plaintiff as a mark for costs must be treated with equal circumspection.

40. For these reasons, I have concluded that the presence of the second and third named plaintiffs as individual co-plaintiffs in this case is not a factor of sufficient significance to constitute a special circumstance justifying the exercise of the Court's discretion to refuse to make the Order sought pursuant to s. 390 of the 1963 Act.

41. It only remains to deal briefly with a rather novel argument made in submissions on behalf of the first-named plaintiff, whereby it is suggested that the status of the second and third-named plaintiffs as sole shareholders in the first-plaintiff render it questionable in principle that security should be available to the first-named defendant from the first-named plaintiff. In that regard, the first-named plaintiff relies on the following dictum of Barrington J. in *Lismore Homes Ltd v Bank of Ireland Finance* [1999] 1 I.R. 501 (at 507):

> "The mere fact that a plaintiff is impecunious has never, on its own, been a reason for awarding security for costs against him. Insolvent limited liability companies are in a different category simply because the liability of their shareholders is limited."

42. Of course, it must surely be accepted that the second and third-named plaintiffs elected to incorporate the first-named plaintiff or, at any rate, to use that corporate vehicle for their own commercial purposes as its directors and sole shareholders. The use of corporations entails certain obvious advantages, perhaps chief amongst which is the benefit of limited liability. The second and third-named plaintiffs are entitled to that benefit in the operation of that vehicle and have, no doubt, availed of it. As Barrington J. observed in *Lismore Homes*, that privilege comes with certain obligations, such as the potential requirement to provide security for costs in prosecuting an action to which there is a *prima facie* defence where there is also credible testimony that the company concerned is unable to pay the relevant defendant's costs if unsuccessful. No question arises on this application of either the second or the third-named plaintiff being required to provide security for costs. in any circumstances, nor could it. The fact that each of the plaintiffs is equally exposed to an order for costs if the action fails is a consequence of the decision by each plaintiff to join in the prosecution of the action. The Court cannot, and does not, view that fact as an injustice whereby the second and third named plaintiffs are wrongly deprived of the limitation of liability that is, as between the plaintiffs in this case, the sole prerogative of the first named plaintiff. Nor can the Court identify any objection in principle to the proposition that the corporate plaintiff in this case may be directed to provide security for costs in circumstances where the individual co-plaintiffs (who are the directors and sole shareholders of the corporate plaintiff) cannot be compelled to do so in their personal capacity. These distinctions simply reflect the logical consequences of the dictum of Barrington J. to which reference is made on behalf of the first named plaintiff.

43. The Court will accede to the first-named defendant's request for an order for security for costs under s. 390 of the 1963 Act.