Neutral Citation: [2014] IEHC 536

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 8604P]

BETWEEN

MARTIN McADAM AND McADAM FOOD PRODUCTS LTD

PLAINTIFF

AND

ABP FOOD GROUP

DEFENDANT

JUDGMENT of Kearns P. delivered on the 14th day of November, 2014.

This is an application for security for costs brought by the defendant against the second named plaintiff under s.390 of the Companies Act 1963 in proceedings in which the plaintiffs claim damages for alleged defamation.

BACKGROUND

Both the second plaintiff and defendant companies are engaged in the beef industry. The first named plaintiff is a Director of, and the major shareholder in, the second named plaintiff which is based in Monaghan and which at all material times engaged in the purchase and sale of beef and pork. The company's business was established in December 2011 to trade in the market relating to the manufacture and processing of beef and sow products in Ireland and in EU export markets. It is a relatively small business operation by comparison with the defendant company, also known as ABP Foods, which is an unlimited company having its registered office in Ardee in Co. Louth. This company is part of the Goodman Group of companies and, as such, a major player in the purchase and sale of meat, specifically, beef. It is not in dispute in these proceedings but that the defendant company is a large and well funded operation, such that the conflict between the parties to these proceedings was, perhaps not unfairly, characterised by the plaintiffs' counsel as a "David and Goliath" contest.

Until April, 2013 the defendant owned the Silvercrest meat processing facility at Ballybay, Co. Monaghan where it employed 122 staff. Silvercrest produced processed food products including burgers. In April 2013 the defendant sold Silvercrest to Kepak Group.

In 2012 approximately 80% of the raw meat product processed by Silvercrest was sourced from within the ABP Group or from Irish or U.K. meat processors. Silvercrest also imported meat from BRC (British Retail Consortium), and approved third party processors in other jurisdictions, including approximately 5% from third party processors in Poland.

Silvercrest began buying meat from the first named plaintiff in or around July 2008. In 2012 Silvercrest bought 182.87 tonnes of beef from the first named plaintiff. Silvercrest's total beef purchases in 2012 were of the order of 18,000 tonnes so the purchases from the first named plaintiff represented approximately 1% of Silvercrest production in 2012.

In early 2003 a scandal of major proportions was visited upon the beef industry in Ireland when it became known that various meat products had tested positive for equine DNA. This discovery sparked a major media controversy in Ireland and internationally. Tests over the weeks and months that followed demonstrated that other leading international food processors' products also contained equine DNA.

On the 15th January, 2013 the Food Safety Authority of Ireland ("FSAI") announced that it had tested 27 beef burger products with 37% of these testing positive for equine DNA, including products produced at the Silvercrest premises which were then owned by the defendant. Mr. Finbarr McDonnell, deponent on behalf of the defendants in the grounding affidavit herein, states that this was a major concern to the defendant because it had never knowingly purchased horsemeat, nor were horses slaughtered in any of the defendant's abattoirs.

On the 4th February, 2003 the UK Foods Standards Agency ("FSA") announced on its website that it had tested meat contained in a cold store at Freeza Meats, Northern Ireland and that the samples tested were found to contain equine DNA. In addition, the FSA expressly stated that the meat which had tested positive for equine DNA was potentially linked to Silvercrest. The consignment of beef in question had been supplied by McAdam Food Products Ltd, the second named plaintiff herein.

The FSA announcement on the 4th February 2013 sparked extensive media comment, much of which referred to "McAdam Foods" which had supplied the product adulterated by horsemeat which was found at Freeza Meats. For example:-

> (a) At 11.23 on the 5th February, the Irish Examiner reported on its website that the "scandal" had spread to Rangeland Foods which it reported had been closed "after a sample at the factory tested positive with a reading of 75% horse DNA in raw ingredient, authorities said".
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> (b) The article then stated that meat at Freeza Meats "was 80% horse" and that the "same meat trader in Ireland" had supplied meat to Freeza, Silvercrest and Rangeland.
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> (c) The article then noted that Irish authorities had been examining the role Irish traders may have played and referred to how "McAdam Foods" had confirmed that a "team of special investigators from the Department of Agriculture" had been inspecting its premises and its deals with Polish suppliers.
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> (d) At 12.00 on the 5th February, 2013, the Telegraph reported on its website that the meat which had tested positive at Freeza Meats was sourced from Poland by McAdam Food Services and that it was due to be sent to Silvercrest but was

put into quarantine instead.

(e) The same article reported that McAdam Food Services had also supplied a shipment of beef to Rangeland Foods in Ireland which was found to contain 75% horse DNA and that the owner of "McAdam Food Services" "was yesterday cooperating with the authorities".

(f) At 15.10 on the 5th February, 2013, the BBC News reported online that Martin McAdam, "whose firm owned the meat" which was stored at Freeza Meats, had said that there was "clearly an issue" with their Polish supplier.

It was thus the case that various media reports had been put in circulation by the 5th February, 2013 to the clear effect that the first named plaintiff had supplied meat products containing horsemeat to both Freeza Meats and Rangeland Foods.

On foot of the foregoing, Mr. McDonnell deposes that the defendant received unsolicited media queries regarding its relationship with Mr. McAdam and the plaintiff company. For example, he deposes that a reporter with the Irish Daily Mail sought confirmation by email that "McAdam Food Services Ltd., based in Co. Monaghan, was the company which supplied Silvercrest Foods with product reportedly containing horse DNA". She also sought details in relation to the ongoing relationship between Silvercrest and McAdam.

In response to these queries and the FSA statement of the 4th February, 2013, the defendant company issued a press release on 5th February which reads in material part:-

> "ABP Food Group confirms that Silvercrest purchased beef products from McAdams (sic) Food Service (*circa* 170 tonnes out of a total beef purchases in 2012 of 18,000 tonnes). It appears now that, while Silvercrest purchased these beef products in good faith, horse DNA originating in Poland was present in some of these products.
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> ABP Food Group continues to cooperate fully with the competent authorities in the investigation."

Some months after the press release in question, the plaintiffs' solicitors sent a letter to the defendants on the 30th May, 2013 in which it was alleged that the press release was false on two points – "firstly our client did not supply the meat to Silvercrest which tested positive for horse DNA and, secondly, our client supplied only 60 tonnes of beef to Silvercrest in 2012".

The letter continued:-

> "These false and malicious allegations, made at a time when investigations were ongoing and no evidence had linked our client to the product at Silvercrest which was under investigation, was an attack on the good name and reputation of our client which has affected its business and reputation in the Irish beef and pork industry – a reputation Martin McAdam has spent a lifetime achieving and maintaining on behalf of himself and his company. As a result of these false allegations, our client's business has been brought to its knees with the loss of business contracts and withdrawal of loan facilities in excess of several million euros."

The letter proceeded to demand a full retraction together with proposals to compensate the plaintiff for loss as a result of the "defamatory statement".

A detailed letter in response was furnished to the plaintiffs' solicitors on the 1st July, 2013. The importance of its contents requires that it be recited in full:-

> "1. On 10 July, 2012 your clients attempted to sell a consignment of beef (14 pallets) to our client. Our client rejected this consignment as it did not comply with food safety standards. For example, some meat contained plastic and cardboard and some pallets were damaged. Our client has retained photographs of this consignment.
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> 2. On 17 September, 2012 a consignment of beef was quarantined in the premises of Freeza Meats, Newry, by the Environmental Health Office in Northern Ireland ('the Consignment'). Evidence given by Freeza Meats to DEFRA suggests that the consignment was the same as that your clients attempted to supply to our client on 10 July (although we understand your clients deny this). We understand that your clients also attempted to sell the Consignment to Rangeland, who rejected it.
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> 3. Separately, on 31 January, 2013, Rangeland notified the Department of Agriculture, Food and the Marine ('the Department') that it had suspicions about some of its beef products and/or of the finding of equine DNA in certain consignments of meat. Samples were taken from raw material provided by your clients to Rangeland ('Rangeland Meat'). The results received in early February 2013 revealed an extremely high equine DNA level – 75% - in two of the three samples.
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> 4. On 4 February, 2013 the Food Standards Agency ('FSA') announced that it had tested the Consignment and that it had been found to contain horsemeat. Our client was concerned that the FSA statement appeared to (unfairly in our view) link the Consignment to Silvercrest. Two samples taken from the Consignment and tested by the FSA contained exceptionally high levels of horsemeat (80%). Mr. McAdam later acknowledged (on RTE's Prime Time on 7 February 2013) that his name started appearing in the media regarding the equine issue on the evening of 4 February 2013.
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> 5. On 5 February, 2013, your clients publicly confirmed that a *'team of special investigators from the Department of Agriculture'* had been inspecting their premises and their deals with Polish suppliers. It was publicly reported that the Irish police had opened an investigation into whether your clients knew they were trading in horsemeat.
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> 6. We understand from media reports on 6 February 2013, including in the *Irish Independent*, that teams of veterinary and food safety officials seized files and computers from your clients' offices on 5 February. It was reported that your clients confirmed that the gardaí had visited the officers along with Department of Agriculture inspectors and the *Irish Times* elaborated that the *'surprise searches'* had unfolded from 7 a.m.
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> 7. On the same day, Freeza Meats released a public statement, which indicated that:
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> (i) your clients were the owners and suppliers of the equine contaminated product discovered at Freeza Meats;

(ii) your clients had attempted to sell the equine-contaminated Consignment to Freeza Meats;

(iii) Freeza Meats had declined to purchase the Consignment but agreed to store it for your clients.

8. Also on 5 February the *Irish Examiner* reported that your clients had identified themselves as the dealer at the centre of the horsemeat controversy. It was further reported that your clients confirmed that they (i) asked Freeza to store the Consignment (see, for example, *The Grocer* on 5 February) and (ii) supplied the Rangeland Meat (see, for example, the *Evening Echo* on 6 February referring to a statement the previous evening that your clients bought the Rangeland Meat from a company based in Poland). The Food Safety Authority of Ireland ('FSAI') stated that your clients supplied meat to Freeza Meats, our client and Rangeland and your clients confirmed that they were working with authorities including the FSAI.

9. Also on 5 February 2013 Mr. McAdam admitted in an interview with BBC News that there was *'clearly an issue'* with his Polish supplier.

10. It was in this context that our clients received enquiries from the media on 5 & 6 February. In response to such media queries, and in order to protect its business and the jobs at Silvercrest, our client released its statement on the evening of 5 February and on the following day.

11. On 7 February 2013, it was reported that the FSAI had confirmed that it had been acting on concerns about your clients as early as October, 2012.

12. On 14 March 2013, the Department published a report on its Equine DNA and Mislabelling of Processed Beef Investigation. Whilst the Government Report stated that there was no evidence that your clients did so knowingly, it confirmed that your clients had supplied or attempted to supply horsemeat:

12.1 Specifically, the Government Report found that a consignment supplied by McAdam Food Products to Rangeland and rejected by Rangeland was sent to a cold store/meat plant in Northern Ireland (presumably Freeza Meats).

12.2 The Government Report also concluded that:

12.2.1 meat supplied by your clients *'was discovered to contain Polish and Irish horsemeat'*.

12.2.2 ' *… it is evident that McAdam Food Products supplied adulterated processed meat products to Rangeland'*.

12.2.3 test results on raw material supplied by your clients to Rangeland showed 75% equine DNA in product labelled as frozen beef trimmings of Polish origin.

As far as we are aware, you clients have never disputed the Department's findings. To the contrary, it appears that your clients have admitted the allegations.

13. On 20 March, 2013 DEFRA – the House of Commons Committee investigating the issue – formally invited Mr. McAdam to testify before it. Mr. McAdam declined to do so. Instead he submitted a written statement (dated March 2013). In the statement, Mr. McAdam admitted that your clients (*i.e.*, the plaintiff company) had (unknowingly) *'imported some beef products into Ireland which were subsequently found to have contained equine DNA'*.

14. On 14 May 2013, James Fairbairn, Former Commercial Director of Freeza Meats gave evidence to a DEFRA Committee meeting. He testified that the Consignment received from your client was very badly wrapped, extensively freezer-burned and that some beef was exposed, sitting on splintered, dirty, wooden pallets. Mr. Fairbairn's testimony is consistent with our client's observations (see point 1 above) although we understand from media reports that your clients dispute Mr. Fairbairn's testimony. Mr. Fairbairn testified that Mr. McAdam advised him that the Consignment had been rejected by our client. He also testified that the Environmental Health Officer who inspected the meat in September 2012 stated that there was 'no way' the meat could be put into the food chain and that Freeza Meats agreed with this.

15. Our client has confirmed that samples from burgers produced at Silvercrest on 1 November 2012 using product supplied by your client tested positive for 60% to 100% equine DNA. Our client's records show that the product supplied by McAdam and used in these burgers was produced by a Polish supplier, Mipol. We note that (as reported by, for example, *The Anglo-Celt* on 6 February 2013) Mipol was one of two Polish suppliers identified by your clients to the Irish authorities at or around the same time as Mr. McAdam's concession that there was *'clearly an issue'* with his Polish supplier.

In the circumstances, and in the light of the facts as established by the Government Report and admitted by your clients, it is difficult to see any basis on which your clients could seriously hold our clients responsible for the damage to their reputation. Your clients' reputation was already irreparably damaged prior to the release of our client's statement. In particular, it had already been widely reported that your clients had supplied or attempted to supply equine-contaminated meat to Freeza Meats and/or Rangeland. The Government Report confirmed that your client supplied equine-contaminated meat to Freeza Meats and Rangeland and this has been admitted by your client in evidence to DEFRA.

In addition, the suggestion that our clients is the cause of your clients' financial issues is undermined by Mr. McAdam's public acknowledgement (as reported, for example, by the *Independent* on 6 February 2013) that he was already in significant financial difficulties, and that he had suffered a *'large six-figure sum loss'* in recent years.

In summary, it is not our client which was responsible for linking your clients with the supply of equine contaminated beef. Nor is our client the cause of your client's financial difficulties. Our client has never suggested that your clients knowingly purchased, supplied, or attempted to supply equine-contaminated meat. However, your clients

were obliged to provide our client with meat of merchantable quality which matched its description and any failure by your clients to do so was a breach of contract, whether intentional or not. Our client has suffered enormous loss arising from the equine issue. We reserve our client's right to claim against your clients without further notice in respect of its losses. These losses include the damage to our client's product, the investigations costs (which were very significant), and the loss of goodwill and reputational damage (which was greater). We would assume your clients have looked to their own suppliers in relation to any losses suffered by your clients. Please confirm what steps your clients have taken against their suppliers to recover these losses".

No reply to this letter was furnished until the end of March, 2014. The reply which only then issued stated as follows:-

"We refer to the above, to your correspondence of the 1st of July 2013 and to our correspondence of the 30th of May, 2013.

We reiterate that our clients have suffered grievous damage to their reputations and commercial interest as a result of the publication by your client of a press release concerning them on or about the 5th of February, 2013.

We wish to make the following points:

The consignment of beef delivered to your client on the 10th July, 2012 and rejected by Silvercrest was returned to Poland by Det Forenede DampskibsSelskab ('DFDS'). It did not enter the food chain in Ireland.

In regard to the consignment of beef delivered to your client on the 10th of July, 2012, our clients deny the claim that they attempted to sell the consignment to Freeza Meats, subsequent to its delivery to Silvercrest. As stated above, the consignment in question was returned to Poland by DFDS.

Our clients also reject as being without basis in fact the testimony given to DEFRA (to which your refer) concerning the claim that the consignment at Freeza Meats, which was quarantined on the 17th September, 2012, was the same consignment as our clients delivered to your client on the 10th July, 2012. Furthermore, our clients did not attempt to sell the said consignment of meat to Rangeland Foods.

You assert that on the 31st of January, 2013, Rangeland Foods notified the Department of Agriculture, Food and the Marine concerning some of its beef products and/or of the alleged finding of equine DNA in certain consignments of meat. Your correspondence contains claims relating to the results of tests, said to have been carried out on the said meat. If such tests were undertaken, our clients have not been provided with details of the scientific processes (or otherwise), used by, or on behalf of, Rangeland Foods to test the meat. Furthermore, our clients have not seen or been provided with the samples and/or laboratory reports concerning the test results to which you refer.

Contrary to the claim repeated in your letter, no files or records were 'seized', or otherwise taken, as was reported incorrectly by the Irish Independent on or about the 6th of February, 2013. On the contrary, our client willingly cooperated with the Department of Agriculture, Food and the Marine's investigation at all times and provided all documentation which was requested.

In addition, our client, Mr. Martin McAdam, did not identify himself as the trader at the heart of the meat scandal, as you claim. It appears that in regard to this claim, you are relying on a false and inaccurate report by the Irish Examiner.

Your claim that on the 5th February, 2013, Mr. McAdam 'admitted in an interview with BBC News that there was "clearly an issue" with his Polish supplier'. Our client made the said comment on or about the 5th of February, 2013 relating to the discovery of equine DNA found in meat imported to Ireland.

Our client Mr. McAdam was visited in early October 2012 by local health officer Mr. Brendan Smith concerning a consignment at Freeza Meats which was in storage. The said product was missing some labels on two pallets. It appears that the labels had become detached while the product was at Rangeland Foods. No further action was taken and our client subsequently registered his business with Monaghan County Council as requested.

Our client has never been provided with results samples or product that the Department of Agriculture found to have tested positive at Rangeland Foods. Please note, when Polish veterinary authorities visited and took samples at the Rangeland plant, their results came back negative.

In regard to point 12.1 of your letter, the product to which you refer was not accepted by Rangeland Foods. The size of the pallets did not fit into Rangeland's new racking system. This was confirmed by the Department of Agriculture Food and the Marine and by Rangeland Foods. As our client was on holidays in France at this time, the consignment was sent to Freeza Meats for storage.

Concerning point 12.2 of your letter, our client has stated publicly that he wished to verify results. He was advised by the Department of Agriculture, Food and the Marine not to do so.

Our clients have cooperated fully with all relevant State agencies and authorities in connection with inquiries into the identification of equine DNA in beef. Our clients have provided extensive information to the Department of Agriculture, Food and the Marine. For the avoidance of doubt, Mr. McAdam is not and was not obliged to give oral evidence to any inquiry conducted by authorities in the United Kingdom.

In addition, our client, Mr. McAdam, refutes the testimony of Mr. Fairbairn, to which you refer. Mr. McAdam has never met Mr. Fairbairn.

A second consignment of meat, delivered in December 2012 (as referred to in Mr. Fairbairn's statement to DEFRA) came to Freeza Meats from another supplier in Northern Ireland. The said consignment was found to contain horsemeat.

Finally and for the avoidance of doubt, our client did not supply any product from Polish supplier Mipol to Silvercrest."

It should be noted that, prior to sending this letter, legal proceedings on behalf of the plaintiffs had commenced without any attempt to address the contents of the letter dated the 1st July, 2013.

A further letter to the plaintiffs' solicitors, in which the defendant took issue with many of the points raised by the plaintiffs, contained a statement that, unless within fourteen days the plaintiff company agreed to furnish security for costs, an application for that purpose would be made to the High Court. As they declined to do so, the present application to the court duly followed.

RELEVANT LEGAL PRINCIPLES
Section 390 of the Companies Act 1963, sets out the relevant test on an application for security for costs. It provides that:-

> "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 there is reason to believe that the company will be unable to pay the costs of the defendant if successful in its defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

A recent comprehensive discussion of the appropriate tests and considerations on an application for security for costs is set out in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ltd*. [2009] IEHC 7 in which Clarke J. stated as follows:-

> "2.1 In *Usk and District Residents Association Limited v. The Environmental Protection Agency* (Unreported, Supreme Court, Clarke J., 13th January, 2006,) the Supreme Court approved what was described as a helpful summary of the law by Morris P. in *Interfinance Group Limited v. K.P.M.G. Pete Marwick* (Unreported, High Court, Morris P., 29th June, 1998,). As adapted by the Supreme Court in *Usk* the test set out by Morris P. in *Interfinance* is in the following terms:-
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> (1) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:
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> (a) that he has a *prima facie* defence to the plaintiffs' claim, and
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> (b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.
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> (2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case with ought to cause the court to exercise its discretion not to make the order sought.
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> In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiffs' liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.
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> The list of special circumstances referred to is not of course, exhaustive."

Each of these considerations will now be considered in turn.

PRIMA FACIE DEFENCE
The defendant's defence is as set in Mr. McDonnell's grounding affidavit as follows:

> i) The impugned press release refers to a company called McAdams Food Service and not to either of the plaintiffs. It is denied that it either referred, or could be understood to refer or was capable of referring or being understood to refer to either of the plaintiffs (in essence, the defence of identification);
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> ii) The defendant pleads truth in relation to the meaning at para. 5(1) of the statement of claim, namely that the plaintiffs did sell the defendant beef products that contained horsemeat;
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> iii) It is denied that the words bore or were understood to bear or were capable of bearing or being understood to bear the meanings alleged at para. 5(2)-(7) of the statement of claim;
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> iv) The defendant pleads that the impugned press release was fair and reasonable publication on a matter of public interest;
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> v) The defendant pleads that qualified privilege attached to the press release; and
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> vi) The defendant pleads that the press release was not calculated to disparage, nor was it capable of disparaging, the plaintiffs or of damaging the plaintiffs' reputation.

No suggestion has been made in the plaintiffs' replying affidavits in this case that the defendant does not have a *prima facie* defence. Mr. McDonnell's grounding affidavit, in relevant part, indicates that the defendants will plead truth in relation to their assertion that the plaintiffs did sell the defendant beef products that contained horsemeat. They further contend that the impugned press release was a fair and reasonable publication on a matter of public interest and further that the press release was not calculated to disparage, nor was it capable of disparaging, the plaintiffs or of damaging the plaintiffs' reputation.

INABILITY TO DISCHARGE COSTS
The defendants commissioned a report from an independent costs accountant, Mr. Michael Monaghan of Abacus, Law Costs Consultants, who have estimated the legal costs of the defendant in defending these proceedings at around €640,000.

As set out at para. 19 of the grounding affidavit of Finbarr McDonnell, the second named plaintiff filed its accounts on the 12th August, 2013 for the period covering its incorporation until the 30th November, 2012. Those accounts contain an abridged balance sheet showing net assets of €7,016. Against this background, Mr. McDonnell states his belief that the second named plaintiff would be unable to discharge any costs award made in favour of the defendant. In his replying affidavit dated the 30th May, 2014, Mr. McAdam does not dispute Mr. McDonnell's assertion in relation to the second named plaintiffs' inability to meet an award of costs. Rather, he states that:-

> "Any alleged inability of the second named plaintiff to provide security for costs in respect of the defendant is attributable to the actions of the defendant."

The defendants also commissioned a report from an independent accountant, Grant Thornton, and in that report, Mr. Patrick D'Arcy, a Director in the Forensic and Investigation Services of Grant Thornton, concluded that:-

> "We have been advised that the relevant costs are estimated to be in the region of €640,000. According to the latest set of financial statements provided to us, *i.e.*, at the 30th November, 2013, the second named plaintiff had cash of only €3,490 and had an excess of current liabilities over current assets (that excess or deficit was €107,271). In our opinion it is clear, based on latest information that we have been provided with, that the second named plaintiff would not be in a position to pay these legal costs from its present resources."

SPECIAL CIRCUMSTANCES

It is agreed by both sides that, in these particular circumstances, the burden of proof moves to the second named plaintiff to demonstrate that special circumstances exist to lead the court to exercise its discretion and not award security for costs. In this regard, three issues have been raised on behalf of the plaintiff company in the context of a consideration of special circumstances:-

> (a) The second named plaintiffs' insolvency was caused by the defendant.
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> (b) The second named plaintiff is seeking to vindicate the public interest.
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> (c) There is an individual co-plaintiff in this case which of itself demands that that fact be treated as a special circumstance.

Again, each of these contentions will be considered in turn.

(a) Insolvency allegedly caused by the applicant

In the *Connaughton Road* case, Clarke J. stated that in order for a plaintiff to succeed in proving that its inability to pay stems from the wrongdoing asserted, four propositions must necessarily be true as follows:-

> "1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
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> 2) That there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
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> 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
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> 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."

In making this application the defendant asserts that it is simply impossible for the plaintiff company to demonstrate that there is a causal connection between the defendant's press release and any practical consequences for the second named plaintiff. The defendant further contends that the second named plaintiff would not have been in a position to meet the defendant's costs prior to the publication of the defendant's press release.

In this regard the defendants point to Mr. McAdams own statement made to the news media at the time of the horsemeat controversy, as reflected in the *Irish Independent* article of the 6th February, 2013, in which he was quoted as having admitted suffering a "large six figure sum loss" in recent years. Secondly, the assertions made on behalf of the plaintiff company fail to take into account the impact that the FSAI's announcement on the 15th January, 2013 had on all entities involved in the production, supply and sale of beef and beef products. The court's attention was drawn to the fact that Silvercrest Foods suspended payments to all suppliers, including the second named plaintiff, while tests and investigations were being carried out. Notably and crucially, this suspension of payments occurred prior to the publication of the defendant's press release on the 5th February, 2013. The defendant further points to the fact that there had been widespread reports in the media prior to the publication of the defendant's press release to the effect that the first named plaintiff had supplied meat products containing horsemeat to both Freeza Meats and Rangeland Foods Ltd. Also, the final paragraph of an email dated the 1st March, 2013 sent by Mr. McAdam to Mr. Philip Farrelly of ABP states that he "would like to sit down, as we have been brought to the media's attention, to rectify/improve our business/brand and work together regarding our issues created by our Polish suppliers and the media". The defendant argues that it is utterly inconsistent with the position then adopted to argue now, after the event, that any of the plaintiffs' problems can be laid at the door of the defendants. Quite separately, Freeza Meats had published information indicating that it had stored meat contaminated with equine DNA at its premises in Newry in which they stated that they had been approached by "McAdam Food Services Ltd in Co. Monaghan to purchase a parcel of raw material, which we declined". The defendants further contend that it is inconceivable that Rangeland would have continued to deal with a supplier which had, deliberately or otherwise, supplied it with beef adulterated with horsemeat. The importance of Rangeland to the second named plaintiffs' profitability and projected expansion was evidenced in Mr. McAdam's first affidavit which stated that its proposed contracts with Rangeland at the planned de-boning plant were €6million per annum. The inevitable loss of a contract of this scale in light of the supply of contaminated product by the plaintiffs would have significantly impacted upon the supposed profitability of a de-boning plant with, as outlined in Mr. McAdam's first affidavit, projected sales of €2,450.000 in year 1 rising to €3,100,000 in year 3.

Thus it was the situation, the defendants contend, that a number of factors were at play which led to the second named plaintiffs' financial difficulties and most of these factors arose prior to the publication of the defendant's press release. In particular, the plaintiffs business was not in good health prior to the horsemeat controversy and was inevitably hugely affected by that controversy for a variety of reasons, none of which were attributable to the defendant. Even before the crisis the plaintiffs had been facing quality issues and supply chain problems. The plaintiffs' business had imported into Ireland and Northern Ireland the Freeza Meats and Rangeland consignments, both of which were found to have been contaminated by horsemeat and, as already indicated, Mr. McAdam had publicly acknowledged a problem with one of his suppliers, the Polish based firm Mipol.

The plaintiffs' response on these points is threefold:-

(a) Loss of grant assistance.

The second named plaintiff had planned to develop a de-boning plant at Lough Egish Food Park in Co. Monaghan. The de-boning plant

project was to be part financed by means of grant assistance from Monaghan County Enterprise Board. In a letter dated the 3rd January, 2013, the Monaghan County Enterprise Board had informed the plaintiff company that it had approved an offer of €75,000 in grant assistance for the project. This venture was supported by letters of commendation from Rangeland Foods Ltd., Mullagh Meats and the Feldhuesgroup in Germany, the latter being a major meat sector enterprise. Following publication of the defendant's statement and the embroiling of the plaintiffs in the horsemeat controversy, this proposal fell through.

(b) Loss of invoice discounting facility.

The first named plaintiff deposes that access to an invoice discounting facility is very important to a business such as that in which the second named plaintiff is engaged. The benefits of such a facility include, but are not limited to, providing a business with an effective means by which to manage its cash flow, which enables the ongoing development of the business. During the course of several months in late 2012, negotiations in respect of an invoice discounting facility took place with Bank of Ireland. A letter of offer, dated the 9th January, 2013, in respect of such an invoice discounting facility was issued by Bank of Ireland to the second named plaintiff. The letter indicated that the second named plaintiff had been approved for an invoice discounting facility. The debt purchase agreement relating to the said offer stated that the maximum finance available under the facility was €600,000. However, "following publication of the defendants statement", contact with the plaintiffs was, in effect broken off.

Further, in or around the end of January/beginning of February 2013, Silvercrest Foods wrote to its customers, including the second named plaintiff, stating that as a result of the ongoing investigation into contaminated beef burgers, Silvercrest Foods Product had been placed under review by the authorities and, while tests were being conducted, payments were put on hold. This had the effect that invoices in respect of sums due to the second named plaintiff, issued in January 2013 and having a combined value of €84,654 remained outstanding. All of these invoices issued by the second named plaintiff in respect of Silvercrest Food had been assigned to Bibby Financial Services (Ireland) Ltd. Bibby is a factoring and invoice discounting business.

(c) Destruction of relationship between second named plaintiff and Bibby Financial Services (Ireland) Ltd.

When Bank of Ireland did not proceed with the invoice discount facility it had offered, the second named plaintiff and Bibby agreed to continue their commercial relationship until August 2013. Their primary motivation for doing so was to facilitate the collection of the debts that the second named plaintiff had factored to Bibby and which remained outstanding. The acute financial pressure under which the second named plaintiffs' business was placed resulted in Bibby imposing fees and charges on its account. Ultimately, Bibby did not renew the contract with the second named plaintiff, citing issues that had arisen during the horsemeat controversy and stating that the firm no longer wished to work with meat sector companies.

In addition, and more generally, the second named plaintiff contends it has lost valuable customers following publication of the defendant's statement. This is evidenced by records relating to trading activity with certain firms in the months of November and December 2012 and January 2013.

DECISION
I am satisfied that the plaintiff company cannot sustain a credible argument in respect of any of these three propositions.

In relation to the loss of grant assistance, the documentation clearly shows that a number of conditions were attached to the offer from Monaghan County Enterprise Board. As indicated in the Grant Thornton financial review of the second plaintiff, there is no evidence that a signed acceptance of the offer was returned by the first plaintiff within the specified period of one month from the offer date, the latest date being the 3rd February, 2013. It is submitted that absence of such acceptance within the specified period would have caused the offer to lapse prior to the impugned statement of the defendant on the 5th February, 2013. The Court accepts the submissions of the defendant in this regard.

In relation to the Bank of Ireland invoice discounting facility, there is no evidence that the Bank's decision to review this arrangement was caused by the defendant's statement. Bank of Ireland required annual audited accounts within three months from the end of the financial year which, in the case of the second plaintiff, would be the 28th February, 2013. However, the relevant financial statements were only signed on the 30th July, 2013 meaning that five months had elapsed before they were finalised. It is also the case that the first plaintiffs' own affidavit indicates that Ms. Noreen Kelly of Bank of Ireland informed him by telephone that the Bank decided to review its offer in light of "current events" rather than anything to do with the defendant's statement.

Similarly, the documentation shows that, prior to the release of the defendant's statement, Ms. Aoife McGinley of Bibby Financial Services had enquired of the first plaintiff as to what the position of the second plaintiff was "in light of recent developments in the horse meat scandal". It is accepted between the parties that statements associating the plaintiffs with the scandal were made by a number of other organisations and reported in the media including, but not limited to, the Telegraph newspaper and BBC news.

Likewise the email exchange between the first plaintiff and Mr. Seán Kavanagh on the 22nd May, 2014 also demonstrates that the plaintiffs' loss of business with Dawn Farms was attributable to the contention that the plaintiff was a supplier of meat which turned out to be contaminated rather than anything to do with the defendant's statement.

Having considered the available evidence on each of the three matters relied upon by the plaintiff company I am satisfied that the material actually goes more in support of the defendant's case than that advanced on behalf of the plaintiff – that is to say, that the plaintiffs' admitted difficulties were attributable to multiple factors other than the defendant's press release. I do not believe the press release played a role of any significance in causing the plaintiffs' financial difficulties

ISSUE OF PUBLIC IMPORTANCE
The plaintiffs also submit that the matters giving rise to suit in this case constitute an issue of public importance. They say that the findings of the FSAI Meat Authenticity Survey resulted in the immediate launch of an official investigation. This investigation was expanded subsequently to include the Special Investigation Unit of the Department of Agriculture and the Garda National Bureau of Criminal Investigations. The disclosure in Ireland of adulteration of beef products with equine DNA prompted authorities in other jurisdictions to examine the issues. It then transpired that what had been discovered was a pan-European problem featuring the fraudulent mislabelling of certain beef products. Public confidence and trust in the integrity of products was undermined enormously by the controversy surrounding the adulteration of beef with equine DNA.

However, be that as it may, the plaintiffs' claim is no more than a civil claim in defamation. It does not in and of itself raise any issues of wider public importance. The reality in this case simply involves one company trying to vindicate its own commercial reputation for its own discrete reasons. In that sense it really is no different from a courtroom spat between media celebrities in which the public might be 'interested' but which otherwise is not a matter in which the public is impacted or in which it may be said to have a stake or

interest of any sort whatsoever. In my view the case does not raise any issues of wider public significance or impact. In short, the second named plaintiffs' claims do not in any sense raise a point of law or any issue which, in the words of Morris P. in *Lanceford v. An Bord Pleanála* [1998] 2 I.R. 511 at 516 is of "such gravity and importance that it transcends the interests and considerations of the parties actually before the court".

THE EXISTENCE OF A NATURAL CO-PLAINTIFF
The plaintiff further asserts that the existence of the first named plaintiff as a personal litigant in the proceedings was a matter that should be taken into account in an application for security for costs against a limited company. (See *Harlequin Property (SVG) Ltd. v. O'Halloran* [2012] IEHC 13, and *Bula Ltd (In Receivership) v. Tara Mines Ltd. (No. 3)* [1987] IR 494.

The defendant does not deny that the existence of an individual co-plaintiff in this case is a relevant consideration. In that regard, as Mr. McDonnell notes in his affidavit of the 6th May, 2014, there are serious questions in relation to Mr. McAdam's ability to satisfy any costs order on behalf of the second named plaintiff. In that regard, he set out the result of searches as to Mr. McAdam's personal position which revealed that a number of High Court and Circuit Court judgments remained unsatisfied against the first named plaintiff, together with various charges registered over certain of his properties. They range over a period from 2009 until 2013. Five of these judgments/charges registered against the first named plaintiff pre-date the publication of the defendants' press release.

Ultimately, the linking of the press release to Mr. McAdam's personal situation is not the relevant consideration for the court. Rather, the task, as enunciated in the case law, is whether or not Mr. McAdam, as an individual co-plaintiff, is a good mark. It seems clear that that is not the case and accordingly, while relevant as a consideration, it is not one which, on the facts of this case, is one of any significance whatsoever.

CONCLUSION
It has been established that the defendant has a prima facie defence to the second named plaintiffs claim herein. Evidence has also been placed before the Court that the second named plaintiff will not be able to pay the defendant's costs if the defendant is successful. Finally, the second named plaintiff has failed to discharge the onus on it to point to special circumstances which would lead the Court not to make an order for security. It cannot claim that its inability to pay was caused by the defendant. In that regard, it was already in a challenged financial position prior to the publication of the impugned press release. Nor can it be said that this claim is one which seeks to vindicate the public interest. On the contrary, it is seeking to vindicate a very specific interest. Finally, the fact that there is a natural co-plaintiff gives no comfort or protection to the defendant in circumstances where that co-plaintiff is clearly not a mark for any costs which might be awarded as against the second named plaintiff.

Whilst appreciating that the effect of this decision may be to preclude the plaintiff from proceeding further, the Court feels it has no alternative but to direct that the second named plaintiff do provide security for costs if the proceedings are to proceed further.