Neutral Citation Number: [2010] IEHC 71

THE HIGH COURT

2009 8473 P

BETWEEN

PAROLEN LIMITED

PLAINTIFF

AND

PATRICK DOHERTY AND LINDAT LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 12th of March, 2010

1. Introduction

1.1 This judgment relates to one of what is a growing number of applications coming before the courts in corporate litigation in which security for costs is sought. Doubtless that trend reflects the current general economic conditions and the understandable concern of defendants to such litigation that, should they be successful in defending proceedings brought by a corporate plaintiff, there may be no, or no sufficient, assets available to pay their costs.

1.2 Be that as it may the basic principles by reference to which the court considers an application for security for costs in such circumstances are now very well established although, as here, there may always be some novel or unusual issues arising in the context of the application of those principles to the circumstances of a particular case.

1.3 Against that background, I turn to the general principles and the specific issues which arise in this case.

2. The Test and the Issues

2.1 The relevant test, which has developed in the course of case law over a number of years, is frequently identified by reference to the judgment of Morris J. in *Inter Finance Group Ltd v. KPMG Pete Marwick* (Unreported, High Court, Morris J., 29th June, 1998) as applied by the Supreme Court in *Usk and District Residents Association Ltd v. Environmental Protection Agency* [2006] IESC 1.

2.2 Under that test the moving party must establish two matters:-

A. That there is a prima facie defence to the plaintiff's claim; and

B. That the plaintiff would not be able to pay the moving party's costs if the moving party be successful.

2.3 If both of those matters are established, then the onus shifts on to the relevant plaintiff to show that there are specific or special circumstances involved which should cause the court to exercise its discretion not to make the relevant order. There is, of course, a significant jurisprudence as to what might amount to such special circumstances.

2.4 Unusually, this is not a case concerning special circumstances. Rather it is a case in which the plaintiff ("Parolen") asserts that the defendants have failed to discharge the onus which undoubtedly rests on them (a) to establish that Parolen would be unable to meet their costs in the event that they were successful and (b) to establish that the defendants have a *prima facie* defence. I should in passing note that the second named defendant is a company owned and controlled by Mr. Doherty and that there is, for the purposes of this application, no material difference between them. I will, therefore, refer to the defendants as Mr. Doherty.

2.5 The two issues on this application are, therefore, as to whether Mr. Doherty has established a *prima facie* defence and has established that Parolen would not be in a position to pay costs in the event of Mr. Doherty being successful. Save for one matter to which I now turn, the issues which arose under both of those headings were very much specific to the circumstances of this case and of limited general application.

2.6 It is, however, important to note that the matter which a defendant, such as Mr. Doherty, needs to establish so far as recovery of costs is concerned, is that the relevant plaintiff will not be able to pay that defendant's costs if the defendant be successful. In applications for security for costs there is often, in my view, a tendency to confuse that test with the question of the solvency or otherwise of the relevant plaintiff company. There is, of course, a close connection between the two concepts. Both involve an identification of a company which has financial problems. In some cases there may not, in practice, be any difference. However, it is important to emphasise that the test is not as to whether the relevant plaintiff company is insolvent in the sense in which that term is used in relation to winding up or other similar areas of law. It has to be said that where parties in security for costs applications place before the court the expert views of accountants there has been an unfortunate tendency for those accountants not to identify the difference between insolvency in the proper sense of that terms and the test on an application for security for costs and, thus, to give an opinion as to a matter which is not, strictly speaking, relevant.

2.7 In order to explain the importance of the difference in some cases it is appropriate to mention a small number of examples. In *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7, I had occasion to consider a so called special purpose company which is set up solely for the purposes of a single transaction of series of connected transactions or the like. As I pointed out at para. 3.7 of the my judgment in *Connaughton Road*, where such a company is established with nominal capital, such company is not insolvent but clearly would not have the means to meet the costs of any unsuccessful litigation which it might mount. It is important to emphasise that what a defendant is required to establish is that the plaintiff would not be in a position to pay costs should the litigation be successful. Where

the costs would be significant, it is insufficient for the plaintiff concerned to say that it is not insolvent, if it is clear that it would not have available resources to meet those costs should it lose. A plaintiff, for example, which only had available to it a sum of €50,000 would manifestly not be able to pay €250,000 costs in the event that significant litigation mounted by it, where the relevant defendant was likely to incur costs of that order, was under consideration. Such a plaintiff company would undoubtedly be solvent. However, its solvency would not prevent it being properly described as being in a position where it would be unable to pay the likely costs of a successful defence to its litigation.

2.8 Likewise, many companies are, properly speaking, solvent because they have the continued support of backers of one sort or another (including bankers to the relevant company). Very frequently start up companies require working capital which is supplied by the company's backers often in the form of directors' loans. As long as the directors remain willing to continue to supply such working capital to the extent needed by the relevant company, then the company will be solvent in the technical sense because it will be able to meet its debts as they fall due. However, on the assumption that the company concerned has no significant net assets, then a very different situation would apply in the event that the relevant company mounted and lost significant litigation such that it faced a large award of costs. Its ability to meet that award would, in those circumstances, be wholly dependent on the willingness of its backers to make further funds available to pay the relevant costs. In the absence of security there would, of course, be no obligation on those backers to make any such funds available. It is certainly possible to envisage circumstances where it would be most unlikely that the backers concerned would be prepared to fund such costs in the event that the company had lost a significant piece of litigation.

2.9 It is possible to specify many other examples. All such examples demonstrate, in my view, that 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. That distinction is, for reasons to which I will turn, of some importance in relation to this case. It is, however, also important to note that plaintiffs opposing applications for security for costs on the basis, *inter alia*, of arguing that the relevant defendant has failed to discharge the onus of proof in relation to inability to meet costs, need to address the correct question, most particularly in respect of any evidence which is put before the court. Evidence from accountants which address the insolvency test applicable to, for example, a winding up, but which does not address what the position would be likely to be in the event that the proceedings failed and the plaintiff concerned was faced with a significant costs bill, is of limited value.

2.10 Having dealt with that general issue, I propose to turn, first, to the application of that financial test to the facts of this case and to address the question of whether Mr. Doherty has discharged the onus on him of showing that Parolen would not be in a position to meet the costs of a successful defence by Mr. Doherty of these proceedings.

3. Parolen's Financial Position

3.1 The initial means adopted by Mr. Doherty in seeking to discharge the onus of proof on him under this heading was to produce to the court the latest publicly available accounts of Parolen. A number of comments need to be made about those accounts and Parolen's business. Parolen is a property company. Like all property companies its position is, at least to a significant extent, dependent on the state of the property market. It is clear from its accounts that it has significant property assets. The valuation of those assets appears to be a matter of some doubt.

3.2 The relevant accounts were for the year ending the 31st March, 2008. No more recent accounts were available. The balance sheet showed, as of the 31st March, 2008, a net deficit of just short of €4.3m, which deficit had increased by over €1.3m from the equivalent balance sheet in the accounts to the 31st March, 2007. In substance, the balance sheet is dominated by two very large entries being a current asset described as "stocks and work in progress" and creditors being amounts falling due within one year. So far as the stocks and work in progress heading is concerned the relevant note to the accounts (note 1.4) suggests that work in progress represents the costs incurred by the company on land acquisition and development that have not been invoiced at the year end. It is said that work in progress is valued at the lower of cost and net realisable value. Cost is said to represent acquisition price plus development expenditure, while net realisable value is said to represent the net selling price less all costs of completion and sale. It would also appear that the overwhelming majority of the creditors were bank borrowings. Thus, the balance sheet position of Parolen is that it has substantial land assets but equally substantial borrowings.

3.3 There is, however, an important qualification included in the auditors report. The following is said:-

> "In respect solely of the limitation on our work relating to the assessment of the appropriateness of the valuation of stock and work in progress in the financial statements, we have not obtained all the information and explanations we consider necessary for the purposes of our audit. In our opinion proper books of account have been kept by the company. The financial statements are in agreement with the books of account."

3.4 That qualification is somewhat cryptic. I did, however, enquire as to what was, in fact, meant by it. In substance, counsel for Parolen, speaking from his instructions, indicated that the position was that the auditors, for very understandable reasons, did not feel that it was possible to obtain a realistic assessment of the current net realisable value of the property assets of Parolen. As has often been commented, both in court and elsewhere, in recent times, there is a very real sense in which there is no market for certain types of land and property assets at the moment such as would allow any realistic estimate of the sale price that could be obtained being arrived at. In those circumstances counsel informed me, again speaking from his instructions, that the proper way to interpret the accounts was that the value of work in progress had been taken to be the cost of land acquisition and development expenditure without reference to the net realisable value of the relevant land assets on the basis that the auditors had formed the view that they could not assess that net realisable value.

3.5 A number of points need, therefore, to be noted about the financial position as disclosed in Parolen's accounts. First, Parolen did not put before the court any more up to date accounts than those to which I have referred and which reflect the position in March, 2008. Parolen would, indeed, be a unique property company if its financial position looked more healthy today than it did at that time. Second, no evidence was put before the court by Parolen which would have allowed any assessment as to the extent to which the value of work in progress as recorded in its accounts represents a realistic value of its assets. As pointed out earlier, the work in progress was land and developments which had not been invoiced by Parolen. It appears from the evidence that it is the practice of Parolen, at least in some cases, to transfer on developed property to other connected companies in which circumstances the relevant property ceases to be an asset of

Parolen but that it receives monies from those related companies. The work in progress appearing on Parolen's accounts is, therefore, by definition, property which has not reached that stage. It would, again, be a most fortunate property company which, in the current climate, was able to say that the current value of its assets was equal to or exceeded the cost of acquiring those assets and the cost of any works carried out by way of development on the lands which represent those assets. No information was placed before the court on behalf of Parolen which would suggest that it was in such a fortunate position.

3.6 In addition, even if it were the case that the true value of Parolen's land assets was roughly what had been paid for them and what had been spent on their development, Parolen still had an asset deficiency of in excess of €4m.

3.7 Against that background, it is appropriate to turn to Parolen's case. The evidential case made on behalf of Parolen concentrated, in my view, on an incorrect assumption that the test is as to whether Parolen is solvent in the company law sense of that term. For the reasons which I have already sought to analyse that is not, in my view, the correct test. Evidence was presented, which I have no difficulty in accepting, that Parolen has to date met all of its liabilities as they fell due. There is, therefore, no basis for suggesting that Parolen is currently insolvent. Precisely how it maintains that position is only partly clear. It would appear that Parolen has, at least in one sense, significant positive cash assets, well in excess of €1,000,000, held with its bankers. It would appear (from comments to be found in the relevant accounts) that, as of March, 2008, Parolen's liabilities with its bankers had placed it very close to the limit of its facilities. It does seem that Parolen's bankers are, at least in general terms, happy to allow Parolen to continue with its business. Precisely what view that demonstrates that Parolen's bankers take of its situation is not, however, clear. Banks, particularly in the current climate, may well take the view that allowing a company to continue in existence rather than precipitate a fire sale of its assets, may be the least bad option. A bank being happy to allow a company to continue with its business does not necessarily imply that the bank concerned considers that the relevant company will recover to a point where its assets exceed its liabilities.

3.8 It is also necessary to deal with a specific issue which arose in the course of the hearing. For reasons which I will touch on later, the hearing, although mainly complete, was adjourned to permit Mr. Doherty to put in further evidence and argument on the question of whether a *prima facie* defence had been established. While those matters were pending, the solicitor for Mr. Doherty was alerted to the registration by Parolen's bankers of a charge over a bank account which had been registered in the company's office. It is important to note that the existence of this bank account, together with the fact that it had a substantial credit balance, was a matter that was significantly emphasised both in the evidence tendered by Parolen and in argument addressed to the court. No mention was made of the fact that the bank concerned had a right of set off in respect of any sums standing to the credit of that account, not only in relation to other accounts of Parolen but also in respect of the accounts of other connected companies. I do have to record that the failure to bring that matter to my attention was a significant omission on the part of Parolen. It was Parolen who chose to place significant emphasis on the relevant account and to make the point that it demonstrated that Parolen had significant cash sums which would be available to it to meet any costs of successful litigation. In so doing, Parolen did not inform the court that those sums were the subject of a charge (as yet unregistered but subsequently so registered) in favour of its bankers so as to permit a set off in relation to a range of other companies. No information was put before the court as to the position of those other companies. The availability or otherwise of the cash balance concerned to meet the costs of Mr. Doherty in the event that he should be successful would, of course, be wholly dependent on the extent to which the relevant bank might not require to exercise its entitlement to set off in circumstances where Parolen would have suffered a significant reversal in the event that it had lost the proceedings. The extent to which any such risk of the bank exercising its right of set off to an extent that would extinguish or greatly reduce the relevant balance is, of course, dependent on the extent to which the other accounts in respect of which the bank holds the right of set off are likely to be overdrawn or in debit to a material extent. There was just no evidence on which I could form any assessment in respect of those matters.

3.9 In assessing all of the relevant information, it seems to me that Mr. Doherty did discharge the initial onus on him to produce evidence to the effect that Parolen would be unable to meet the costs of a successful defence by Mr. Doherty of these proceedings. While there was some dispute between the parties as to the broad order of magnitude that any such costs might run to, it seems clear on any view that these proceedings involve claims for many millions of euro or property to like value and involve undoubtedly complex issues of law and, on one view, of fact (an issue to which I will have to turn). In those circumstances it follows that these proceedings would be likely to involve very significant costs running to many hundreds of thousands of euro. Mr. Doherty established that, by its latest published accounts, Parolen had a net deficit of in excess of €4,000,000. It also seems probable that that stated deficit flatters Parolen in that it is calculated without reference to the current net realisable value of Parolen's property assets which, in the absence of any evidence to the contrary, are more likely, in the current climate, to be less valuable than the cost of acquisition and development. Against that background it was, in my view, necessary for Parolen to point to a basis on which it would, notwithstanding a significant asset deficit, be nonetheless in a position to pay the significant costs that would arise in the event that it lost. Pointing to the fact that it has, to date, been able to meet its debts as they fell due, without producing up to date management accounts showing the current position or some other additional information to provide a basis for suggesting that it would have available to it sufficient unencumbered and liquid assets to pay significant costs in the event that it lost, means, in my view, that Parolen has not displaced the prima facie position that derives from the asset deficiency to which I have referred. Given the charge over its cash balance and the absence of any evidence as to what other overdrawn accounts might have to set off against that balance, it seems to me that evidence of a cash balance, in itself, does not demonstrate that that balance is likely to be there to meet Mr. Doherty's costs in the event that these proceedings should fail.

3.10 In all the circumstances I am satisfied that Mr. Doherty has met the test of establishing that, on the basis of the evidence currently available, Parolen would not be in a position to meet the significant costs which would undoubtedly arise in the event that Parolen should fail in these proceedings. In those circumstances it is necessary to turn to the other major issue which arises which is as to whether Mr. Doherty has established a *prima facie* defence.

4. Is there a Prima Facie Defence

4.1 In order to approach this question it is necessary to start with a brief description of the case which Parolen makes. In that context it is important to note that, at one time, Mr. Doherty was a shareholder in and director of Parolen. Parolen owned a property which carried with it certain tax benefits. It was desired to realise the value of those tax benefits by disposing of the property concerned in circumstances where the purchaser would, in accordance with the relevant tax law, obtain the tax benefits concerned. In those circumstances it was, not unreasonably, anticipated that a suitable purchaser would be willing to pay a premium on what might otherwise be the purchase price to reflect the fact that the

purchaser would not only obtain the property but the relevant tax benefit. Such a purchaser was sourced and an agreement was entered into.

4.2 In the meantime, it would appear that Mr. Doherty entered into a number of separate agreements with the relevant purchaser. It would appear that those separate agreements were designed first to allow the purchaser to obtain an indemnity from Mr. Doherty in the event that, due to a change in tax law, some or all of the relevant tax benefits were to disappear. In addition, a "put" and "call" option were put in place which allowed both Mr. Doherty and the purchaser to require the transaction to be reversed at a point in time defined by reference to the expiry of the relevant tax benefits. Mr. Doherty says that those arrangements were put in place as a result of the requirements of the purchaser who would not otherwise have been willing to enter into the relevant arrangements. In fairness it was conceded by counsel in the course of argument that the arrangement whereby Mr. Doherty became entitled to require the purchaser to re-transfer the property back to him was not, in all probability, a requirement of the purchaser but rather a *quid pro quo* on the part of Mr. Doherty for undertaking the obligations which he undoubtedly did to indemnify the purchaser against a change in tax law and to allow the purchaser, when the relevant tax benefits had been exploited, to reverse the transaction.

4.3 Be that as it may Parolen asserts that, in those circumstances, Mr. Doherty is required to hold the relevant agreement for the benefit of Parolen, given that the agreement was entered into at a time when he was a director of Parolen.

4.4 There would appear to be significant factual differences between Parolen and Mr. Doherty arising out of some of the circumstances surrounding the arrangements to which I have referred. It was, quite properly, accepted by counsel on behalf of Parolen that, for the purposes of an application such as this, I must assume that Mr. Doherty's account will be accepted for it would be impossible to conclude on an affidavit application, such as that with which I am concerned, that the facts are as Parolen asserts rather than as Mr. Doherty avers. However, it is argued by counsel on behalf of Parolen that, even on the basis of the facts as asserted by Mr. Doherty, Parolen is bound to succeed and that Mr. Doherty has not, therefore, asserted or substantiated a *prima facie* defence.

4.5 It is accepted by Mr. Doherty that he did not inform Parolen (which in substance means that he did not inform Mr. Maguire who was the only other shareholder and director of Parolen), at the relevant time, of the arrangements entered into with the purchaser. As a matter of fact it is clear, therefore, that Mr. Doherty entered into the relevant collateral arrangements with the purchaser without the knowledge of Parolen and that Mr. Doherty was, at that time, a director of Parolen. It is said that, in those circumstances, there is a clear breach of trust or fiduciary duty, on the part of Mr. Doherty, which requires him to hold the benefit of any of the relevant contracts on trust for Parolen. In the circumstances that have happened it seems that the tax benefits all ultimately accrued to the purchaser. Thereafter, on the current state of the evidence, it would appear that the purchaser indicated an intention to exercise his option but that, in fact, Mr. Doherty responded by exercising his option so that the property has now been transferred, at Mr. Doherty's nomination, to the second named defendant. In those circumstances it is said that the property is held on trust for Parolen.

4.6 Before turning to the relevant legal principles, it is also important to record certain facts which are asserted by Mr. Doherty and which, it is argued, will, or at least could, be relevant to the court's ultimate determination. First, it is asserted that, at the time when the original arrangements were entered into, the purchaser would not have bought the property (and thus paid the relevant premium to Parolen) unless it had the benefit of the tax indemnity to which I have referred and an entitlement to reverse the transaction when the relevant tax benefits had been obtained, with such contracts being with an entity with sufficient financial substance such as would give the purchaser comfort that it could rely on the relevant contracts should it feel it necessary to do so. It is said that neither Parolen nor Mr. Maguire were of such financial substance at the time in question and that, in those circumstances, the original deal could only have been put in place with the benefit of Mr. Doherty entering into the relevant collateral agreements.

4.7 Second, it is said that Mr. Maguire, or entities controlled by him, own a neighbouring property to the one which is the subject of these proceedings. It is said that, for a number of years, there were discussions and proposals (including contact with the relevant planning authorities) passing between Mr. Doherty on the one hand, and Mr. Maguire on the other hand, concerning a possible joint venture to procure a significant interlocking commercial development of both properties. In those circumstances it is asserted by Mr. Doherty that Mr. Maguire (and thus Parolen) must have known that Mr. Doherty had an interest in the property the subject matter of these proceedings for, it is said, Mr. Doherty could not otherwise have been engaged in negotiations about a joint development of the relevant properties. It is said, therefore, that the extent of Mr. Maguire's knowledge of these matters over the last number of years is a matter of some relevance. Mr. Doherty asserts that Parolen is now seeking to obtain the benefit of the entire development (having previously entered into negotiations concerning a joint venture) by means of these proceedings. It should be noted that Mr. Maguire asserts that he only became aware of the method by which Mr. Doherty came to have an interest in the property, the subject of these proceedings, at a much later stage and that, thus, Mr. Maguire and through him Parolen had no knowledge of the possibility of this cause of action arising until a late stage.

4.8 Finally, so far as the facts are concerned, there is a suggestion on the part of Mr. Doherty that Parolen, knowing of the possibility of having a cause of action such as that which is currently being pursued, waited until Mr. Doherty exercised the option and acquired the property before commencing these proceedings. In those circumstances it is said that Parolen is debarred by laches or estoppel, having allowed Mr. Doherty to alter his position at a time after Parolen was aware that it might have a cause of action.

4.9 Turning to the law it was accepted by counsel on behalf of Mr. Doherty that the jurisprudence of the courts in this jurisdiction has tended to impose a strict obligation on directors which would preclude directors, ordinarily, from obtaining a collateral benefit arising out of a contract entered into with the company concerned, save in circumstances where there was a full disclosure of all material matters to the company (*i.e.* the shareholders). It is clear that there was not, on the facts of this case, any such full disclosure. In those circumstances the question which arises is as to whether, as Parolen suggests, the jurisprudence to which I have referred is absolute or whether, as Mr. Doherty suggests, there are exceptions or other circumstances which can properly be brought into account. In particular, Mr. Doherty suggests that in circumstances where:-

> A. Parolen obtained, it is said, a premium by virtue of the fact that Mr. Doherty was willing to enter into the relevant collateral arrangements, which premium would not have been available to it by any other means;

B. It is asserted that Mr. Maguire, and through him Parolen, was or must have been aware of the existence of a possible cause of action at a much earlier stage than is admitted; and

C. The assertion that Mr. Maguire, and through him Parolen, deliberately allowed Mr. Doherty to change his position by exercising the relevant option at a time when Parolen was, it is said, aware of the possible cause of action,

the court can properly take into account such factors as a basis for departing from what otherwise might be a strict rule. In those circumstances a key question arises as to whether there may be any departure from the strict rule.

4.10 The most rigorous application of the strict rule that directors must account to a company for any gain which they make is to be found in *Regal (Hastings) Limited v. Gulliver* [1942] 1 All E.R. 378. However, both academic commentators and the courts of other common law jurisdictions (not least the Canadian Courts – see *Canadian Aero Services v. O'Malley* [1974] S.C.R. 592) have criticised an over strict approach whose application might have the potential to create an inequitable situation whereby the relevant company obtained a windfall gain.

4.12 A full consideration of the precise circumstances, if any, in which it might be appropriate to depart from a strict application of the rule is something which, in my view, could only be determined after a full trial. At the level of principle I cannot conclude, therefore, that the law in this jurisdiction, properly analysed, may not include some exceptions to the strict rule and that should the facts turn out to be as Mr. Doherty asserts them to be, this case might not come within such a legitimate departure from the strict rule. Likewise, I am not satisfied that Mr. Doherty may not be able to rely on the doctrine of laches or other equitable principles in support of his defence.

4.13 There are very many issues both of law and fact which will need to be resolved before this case can come to a proper conclusion. It does not seem to me to be appropriate to enter into any more detailed analysis of the legal principles at this stage for the trial is the best place to come to a fair conclusion on those matters. Suffice it to say that I am satisfied that there is a possibility that Mr. Doherty may succeed in persuading the court that, both on the law and on the facts, circumstances are such that he is not obliged to account to Parolen for the option agreement which he entered into with the purchaser. In those circumstances, I am satisfied that Mr. Doherty has made out an arguable or *prima facie* defence.

5. Conclusions

5.1 For the reasons which I have sought to analyse I am, therefore, satisfied that Mr. Doherty has discharged the onus of proof that was on him to show that Parolen would not be in a position to meet his costs in the event that he should succeed. Likewise, I am satisfied, for the reasons which I have already identified, that Mr. Doherty has established that he has an arguable or prima facie defence.

5.2 It follows that Mr. Doherty has met the onus which is on him in an application such as this. There being no special circumstances asserted, it follows that an order for security for costs should be made. I will give the parties a further opportunity to be heard on the question of the amount of any such security. In that context it is important to note that, at the time when this application was first moved, the claim made by Parolen included an allegation of fraud against Mr. Doherty. In the light of the acceptance by Mr. Doherty that he did not inform Parolen of the fact that he intended entering into the relevant collateral agreements, counsel for Parolen indicated an intention to drop the claim in fraud and to confine Parolen's claim to an assertion that those circumstances alone entitled Parolen to succeed. Mr. Doherty obtained an adjournment to allow him to put in further submissions and evidence in relation to the question of whether there had been shown to be a *prima facie* defence to these proceedings. During that adjournment Parolen produced amended pleadings, which I allowed, designed to exclude the fraud claim.

5.3 The proceedings are, therefore, now somewhat different in character than they were at the time when this application was first brought. On the other hand, it is now clear that certain factual issues (some of which I have referred to), which will form part of the factual context in which Mr. Doherty seeks to argue that these proceedings should not succeed, have now been set out in more detail and it would seem likely that those facts may need to be explored at the hearing. Both sides and their advisers have now a better opportunity to assess the likely length of any proceedings and it follows that it may be appropriate to afford the parties and their advisers an opportunity to file further expert views from cost accountants with the benefit of an updated assessment of the scope of the likely hearing.

5.4 In those circumstances, I propose directing that Parolen provides security for costs, that, in accordance with the practice in the Commercial Court, the court, and not the Master, will fix the amount of any such security, but that I will afford the parties an opportunity to file such further evidence as they may be advised before fixing the relevant amount.