Neutral Citation Number: [2010] IEHC 60

THE HIGH COURT

2007 2511 P

BETWEEN

RONBOW MANAGEMENT COMPANY LIMITED

PLAINTIFF

AND

SOROHAN BUILDERS LIMITED, JOSEPH SOROHAN, JOSEPH BOWE, CLAIRE M. CALLANAN, NIALL COLEMAN, MAIRE CUNNINGHAM, JOHN W. CUNNINGHAM, GABRIEL C. DALY, AISLING B. FOLEY, AISLING C. GANNON, AINSLEY P. HEFFERNAN, MARK J. HESLIN, RICHARD LIDDY, AIDAN C. MARSH, KATE A. O'CONNOR, MAITIU O'DONAILL, SHAUN G. O'SHEA, MARK PERRY-KNOX-GORE, IMELDA REYNOLDS, GARY RICE, PHILIP HOWARD SMITH, JOHN C. WHITE, CARRYING ON PRACTICE UNDER THE STYLE AND TITLE OF BEAUCHAMPS SOLICITORS, BRYAN O'ROURKE, AND PETER MORRISSEY CARRYING ON PRACTICE UNDER THE STYLE AND TITLE OF PETER MORRISSEY & COMPANY, SOLICITORS.

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 5th day of February, 2010.

Factual background

These proceedings arise out of the development and sale of houses in a residential development known as Elton Court, Sandycove, County Dublin, which comprises 37 townhouses. The plaintiff, being a company limited by guarantee not having a share capital, was incorporated on 23rd May, 2001. The main object of the plaintiff, as set out in its memorandum of association, is to "manage and administer the property known as Elton Court, Sandycove, County Dublin". It is provided in the memorandum that the liability of the members is limited and that, in the event of the plaintiff being wound up, every person who is a member of the company at that time or who has been within the previous year is liable to contribute to the assets of the company "such amount as may be required not exceeding £1". That provision is standard in a company limited by guarantee and it follows Table C of Schedule 1 to the Companies Act 1963 (the Act of 1963). The plaintiff was obviously incorporated as part of a scheme for the disposal of the houses in Elton Court, although the articles of association merely incorporate the articles contained in Table C and were not specifically adapted to the situation which was to prevail at Elton Court.

Two documents are at the core of the plaintiff's claim in these proceedings.

The first is an agreement, which is headed Management Company Agreement, made on the 30th April, 2001 between the first and second defendants, as vendors, and "Ronbow Limited", as purchaser. Although it is probably of no significance, I note that the Management Company Agreement pre-dated the incorporation of the plaintiff and that the company named as purchaser does not bear the name of the plaintiff. After reciting that the first defendant proposed to develop the lands delineated on the map annexed thereto and surrounded by a thick black line as Elton Court (which was referred to as "the Estate") by the erection of 37 townhouses and car parking spaces thereon and intended disposing of the townhouses and car parking spaces by way of individual conveyances, the first and second defendants agreed to sell and Ronbow Limited agreed to purchase for a nominal consideration of IR£10 "the Estate" and all appurtenances thereto subject to the conveyances of the townhouses and car park spaces thereafter granted to purchasers thereof and other easements, rights and privileges granted or reserved by the first and second defendants over "the Estate". It was provided that the title should consist of the documents specified in the schedule thereto. The schedule referred to a "Certified copy Booklet of Title Documents". It was further provided that the completion date should be at least 28 days after the completion of the sale of the last townhouse and car park space to be erected on "the Estate".

The second is a conveyance dated 31st January, 2005 made between the first defendant of the one part and the plaintiff of the other part (the 2005 conveyance). The 2005 conveyance was expressed to be made pursuant to the Management Company Agreement for the nominal consideration of €12.70. The first defendant conveyed and assigned "the Estate", which was depicted on a map annexed thereto and thereon outlined in red, but excluding houses 1 – 37 inclusive and the car park spaces assured with those houses, to the plaintiff in fee simple subject to and with the benefit of a lease therein referred to and also for the residue unexpired of the term of the lease. The lease referred to was the lease dated the 28th day of August, 1863 made between the Right Honourable Granville Leveson, Earl of Carysfort of the one part and Hugh O'Rorke of the other part (the 1863 lease), which had created a term of 200 years from 27th March, 1907. The conveyance was also expressed to be subject to with the benefit of the rights created in the conveyances of houses 1 – 37 and was also expressed to be subject to certain third party rights in favour of adjoining owners. Having regard to the manner of execution of the 2005 conveyance, it would appear that the directors of the first defendant were also the directors of the plaintiff at the date of the execution thereof. The map on the 2005 conveyance showed "the Estate", that is to say, Elton Court, outlined in red. Based on the 2003 Ordnance Survey map it showed Elton Court as developed and the location of the 37 houses and car parking spaces. Effectively what was conveyed to the plaintiff was the unsold land within Elton Court, namely, the common areas including the accesses from the public road. Two accesses are depicted, one from Breffni Road and the other from Castlepark Road.

Obviously, subsequent to the 2005 conveyance, the owners of houses in Elton Court took over the management company. At an extraordinary general meeting of the plaintiff held on 19th March, 2008 the company resolved by a majority of its members to commence legal proceedings against the first defendant and the third to twenty second defendants "in relation to defective title to the common grounds of Elton Court".

These proceedings, which had been commenced by plenary summons which had issued on 28th March, 2007, were served subsequent to that resolution on the third to twenty second defendants, who are the applicants on this application.

The current status of these proceedings vis-à-vis the various defendants is as follows:

> (1) The first defendant, which was the developer of Elton Court, and the second defendant, who participated in the Management Company Agreement as vendors, have been served and a statement of claim has been delivered to them, although, as I understand the position, they have not delivered a defence. These defendants are separately represented.
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> (2) The applicants, who are the members of the firm of Beauchamps, Solicitors, who acted for the first and second defendants in the sales of the houses in Elton Court were served with these proceedings on 26th March, 2008 and a statement of claim has been delivered to them.
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> (3) The twenty third defendant was the architect retained on behalf of the first and second defendants to furnish a statutory declaration of identity for the benefit of the purchasers of the 37 houses in Elton Court. The statutory declaration was dated 1st May, 2001. Although named as a party to these proceedings, the proceedings have not been served on the twenty third defendant. However, the proceedings against him have not been discontinued.
>
> (4) The twenty fourth defendant is a solicitor who formerly acted for plaintiff in connection with matters concerning Elton Court. While he has been named as a defendant, the proceedings have not been served on him. As I understand it, notice of discontinuance has not been served in relation to his participation.

In the statement of claim referred to later it is stated that the plaintiff "does not proceed against" the twenty third defendant and the twenty fourth defendant.

The application

On this application, the applicants seek an order directing the plaintiff to furnish security for costs pursuant to Order 29 of the Rules of the Superior Courts and/or s. 390 of the Act of 1963 in such amount and in such manner as may be determined by the Court. If appropriate, an order is sought directing the amount and form of security to be fixed by the Master of the High Court.

The claim against the applicants in the proceedings

In the statement of claim, having stated that the applicants' "assembled and presented title to the Plaintiff as the Management Company for the benefit of 37 houses" and that they also acted as solicitors retained for the first defendant and the second defendant and also for the plaintiff "until a handover of sorts of the common areas by a purported (2005 conveyance)", the following matters are pleaded as against the applicants:

> "7. [The applicants] acted in conflict of interest in so far as they preferred the interests of their developer clients to the interests of their Management Company client when they assembled and purportedly made title to the Plaintiff.
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> 8. The [applicants] owed a duty of care to the Plaintiff Management Company. They owed a duty in the scheme of title they assembled and presented, both a Solicitor own client duty and a duty arising out of the particular circumstances, viz., by the time of the [2005 conveyance], all and/or virtually all of the 37 houses had been bought, paid for and occupied.
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> 9. The [2005 conveyance] ought to have been a formality complying with the planning permission and Management Company Agreement for the Estate. What occurred was in effect, a defective title delivered to the Plaintiff Management Company.
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> 10. The 'title' to the laneways at Elton Court actually granted to the Management Company was defective – it is and was not a title 'in possession', causing foreseeable loss, damage, inconvenience and expense to the Plaintiff. Car parking, activities and blockages in the lanes are uncontrolable (*sic*) into the future until title is resolved.
>
> 11. Dunlaoghaire (*sic*) Rathdown County Council will not take the roads/lanes/drains into charge. The roads/lanes/drains need finishing and title presents a problem to same. …
>
> 12. Another area of title purportedly assured and in [the 2005 conveyance] was not the property of the [first defendant] to convey. This portion is indicated on the map annexed to the Plenary Summons.
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> 13. The Plaintiff was not informed and/or was misinformed by the Defendants of the nature of the interest of Thomas and Philomena Byrne which caused the Plaintiff the loss of and loss of amenity in respect of a laneway car parking space and the litigation in relation thereto in the Circuit Court in 2007 at which representatives of the defendant/defendants attended as witnesses or legal observers."

In the prayer for relief in the statement of claim the reliefs claimed as against the applicants were claimed in the following terms:

> (1) damages for breach of contract, on the basis that the applicants had a solicitor client retainer from the plaintiff;
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> (2) damages for negligence and breach of duty and "damages for acting in conflict of interest";
>
> (3) damages for misrepresentation and breach of title warranty.

What emerges from the statement of claim is that the basis of the plaintiff's claim against the applicants is that the applicants, acting as solicitors for the plaintiff, were negligent and in breach of contract in that the title to the common areas in Elton Court, which the plaintiff acquired from the first defendant by virtue of the 2005 conveyance, is defective. It is not possible to identify the area affected by the defect referred to in para. 12, nor is it possible to discern the nature or source of the defects in the title to the common areas which the plaintiff alleges exist from the statement of claim. The replies to a notice for particulars dated 7th November, 2008 served by the applicants, which replies were furnished by the plaintiff's solicitors with a letter dated 9th February, 2009, throw some light on the alleged defects. In response to queries by the applicants as to the nature of the title defects complained of in paras. 9 and 10 of the statement of claim, the plaintiff's solicitors responded:

> "The lane way title has an unexpired lease and does not fall into possession for *circa* 200 years. The strip at the entrance has no paper title at all. The planning permission is breached for the estate."

In response to a request that the "area of title" purportedly assured referred to in para. 12 be identified, the plaintiff's solicitors referred to a map which was supposed to be attached to the replies. As I understand it, the map was not attached but the map in question was subsequently produced. It is a map (drawing no. 2004 – 37-0015) (the Gibbons map) prepared by Declan Gibbons, Chartered Engineer, and it is based on an extract from the Ordnance Survey map revised in 1937. In other words, it depicts the relevant area of Sandycove prior to the development of Elton Court.

As I understand the position as a result of the information furnished at the hearing of the application, the plaintiff alleges that the title to the common areas at Elton Court furnished to the plaintiff by virtue of the 2005 conveyance is defective in three respects. It is important to emphasise that the title to Elton Court is extremely complicated and what I understand to be the alleged defects will only be outlined in general terms.

First, the title created by the 1863 lease in the areas coloured yellow on the Gibbons map is outstanding. Those areas, which are roughly "T" shaped, comprise a laneway which extends from Breffni Road along the rear of houses on Castlepark Road as far as No. 16 Castlepark Road and a laneway which extends from that laneway along the rear of the premises designated Breffni Terrace on the Gibbons map. The title position, as I understand it, is that both laneways were included in the 1863 lease but the first defendant had acquired only the freehold interest in both laneways subject to and with the benefit of the 1863 lease and had not acquired the leasehold interest created by the 1863 lease therein. Accordingly, by virtue of the 2005 conveyance, all the plaintiff acquired was the freehold reversion on the 1863 lease, which will fall into possession just under one hundred years hence. As I understand it, the applicants accept that such was the effect of the 2005 conveyance.

Secondly, there is an area coloured yellow and cross-hatched in black on the Gibbons map which extends from Castlepark Road along the side of what was formerly No. 16 Castlepark Road and further west along the rear of houses on Elton Park. On the Gibbons map this area is designated as "Elton Park lane". As I understand it, what was formerly No. 16 Castlepark Road and the part of this area contiguous with it now forms the entrance into Elton Court from Castlepark Road. The plaintiff's complaint is that the first defendant had no title whatsoever to this area when it executed the 2005 conveyance. Although, on a superficial comparison of the Gibbons map with the map on the 2005 conveyance, this area would appear to be within the area outlined in red and depicted on the latter map, on a superficial comparison of the Gibbons map and the map on the 1863 lease, it would appear that this area was not comprised in and demised by the 1863 lease. Therefore, for present purposes, I am assuming that the contention of the plaintiff is correct and that the first defendant did not have any title to this area at the date of the 2005 conveyance, because, so far as is relevant, its title, both freehold and leasehold, related to lands comprised in and demised by the 1863 lease.

Thirdly, by virtue of an order dated 18th July, 2007 made by Mr. Justice Smyth in the Circuit Court proceedings (Record No. 2005/05698) referred to in the statement of claim, being proceedings between Thomas Byrne and Philomena Byrne, as plaintiffs, and the plaintiff in these proceedings, as defendant, the Court made a declaration to the following effect:

> "… that the Plaintiffs, their heirs, assigns and successors in title are entitled to an easement to park and maintain one motor car at that part of the defendant's property contiguous to the Plaintiffs' property to a depth of 2.4 metres."

The 2005 conveyance was expressed to be made subject to "the verbal agreement with Mr. and Mrs. Thomas Byrne in respect of the area coloured blue on the map annexed hereto". The position adopted on behalf of the applicants in the affidavit sworn by Kate O'Connor on 26th June, 2009 grounding this application is that Mr. and Mrs. Byrne asserted a prescriptive right to park at a location within Elton Court and their right was upheld, but a finding in their favour on the basis of a prescriptive right would have arisen against the plaintiff irrespective of the nature of the interest held by the plaintiff in Elton Court. Adopting that position, it seems to me, misses a point. I would have thought the point is whether the order of the Circuit Court gave Mr. and Mrs. Byrne a greater interest, and thereby created a greater burden on the common areas in Elton Court, than would have arisen under the verbal agreement referred to in the 2005 conveyance.

The legal principles applicable to an application for security for costs

Section 390 of the Act of 1963 provides as follows:

> "Where a limited company is plaintiff in any action or other legal proceedings, 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."

The principles applicable to a determination by the Court as to whether to make an order under s. 390 are well settled. The matters to be proven by the applicant and where the burden of proof lies are succinctly set out in the notes to s. 390 in MacCann & Courtney *Companies Acts 1963 – 2006*, 2008 Ed., (at p. 661) as follows:

> "Firstly, there is an onus on the applicant to establish by credible evidence an inability, on the part of the respondent company, to discharge the costs of the applicant. Secondly, there is an onus on the applicant to satisfy the court that he has a *prima facie* defence. Once the court is satisfied of these two matters, the burden of proof is then placed on the respondent company, who must satisfy the court that 'special circumstances' exist, such that the court should exercise its discretion not to order security for costs. The court can take into account the strength of the plaintiff's case in determining whether to order security for costs. However, the strength of the plaintiff's case will not, on its own, be a ground for refusing an order for security for costs, unless the strength is such as to show that the defendant has no real defence."

Later, (at p. 662) the editors list examples of what the courts have considered constitute "special circumstances", some of which have been invoked by the plaintiff on this application, for example, that the conduct of the defendant applicant may be taken into account by the Court in considering how to exercise its discretion under s. 390; and that delay on the part of the applicant defendant in bringing the application under s. 390 may result in the Court ordering security for costs in a lesser amount, or in exceptional cases, refusing the application altogether.

The issue of delay was considered recently by the Supreme Court in *Hidden Ireland Heritage Holidays Limited v. Indigo Service Limited* [2005] 2 I.R. 115, in which Fennelly J. stated (at p. 122):

> "A review of the authorities shows that delay in applying for security may, depending on the circumstances, be a ground for refusing security. The court will look at the facts of the particular case, the impact of the delay, other surrounding circumstances and, in the end, will seek to find a fair balance."

The issues
Accordingly, the issues which the Court has to consider on this application are the following:

> (1) whether the applicants have established by credible evidence an inability on the part of the plaintiff to discharge the costs of the applicant;
>
> (2) whether the applicants have satisfied the Court that they have a *prima facie* defence to the plaintiff's claim;
>
> (3) if the answer to the first two questions is in the affirmative, has the plaintiff discharged the onus of satisfying the Court that "special circumstances" exist such that the Court should exercise its discretion not to order security for costs, in particular, on the alleged bases of delay, or the conduct of the applicants, or both,

I will consider each of the foregoing issues in turn.

Credible evidence of inability to pay
The applicants have put before the Court copies of the financial statements of the plaintiff for the years ended 31st December, 2007 and 31st December, 2008 filed in the Companies Registration Office and have drawn the Court's attention to the following matters: the balance sheet as at 31st December, 2007 shows net current assets at €609 and the corresponding figure in the balance sheet as at 31st December, 2008 is €4,390. As regards current assets, in the notes giving details of debtors and setting out amounts falling due within one year, a figure of €10,559 is given for fees collectable for the year ended 31st December, 2007, and the corresponding figure for the year ended 31st December, 2008 is €9,665. The notes also show cash at the bank at €6,366 on 31st December, 2007 and that the figure had reduced to €23 at 31st December, 2008. It emerged on the affidavits that the twenty fourth defendant, the plaintiff's former solicitors, issued proceedings on 2nd May, 2007 for the recovery of the sum of €16,573.12 in respect of professional fees. The twenty fourth defendant would appear not to have been treated as a creditor in the financial statements which have been put before the Court. The response on behalf of the plaintiff was that it has filed a defence and counterclaim in those proceedings, which the twenty fourth defendant has not set down for trial, suggesting a "severe reluctance" on the part of the twenty fourth defendant to pursue his claim.

There is no evidence that the plaintiff has any assets other than the ownership of the common areas of Elton Court which are subject to the rights of the house owners and the third party rights which affect the same, which, as a matter of common sense, has little or no value. Its source of income is the service charge payable by the owners of the 37 houses in Elton Court under the conveyances to the first house owners by the second and third defendants, in which the plaintiff participated. Unfortunately, there is before the Court only a truncated copy of one such conveyance which does not contain the most important element of the conveyance for present purposes, the Fifth Schedule, which sets out the obligations of the management company in respect of which the house owner is obliged to pay a service charge. Therefore, it is not possible to form a view as to whether each house owner would be bound by the covenant to pay the service charge to contribute to the legal costs of proceedings in the High Court of the nature of these proceedings.

The applicants have put before the Court a letter from William J. Brennan & Co., Legal Cost Accountants, in which the applicants' costs of defending the proceedings are estimated in the sum of €97,450 exclusive of VAT. The plaintiff did not take issue with the build up of that estimate, although the Court was asked to consider the figure "in the light of the fact that the case is in reality an assessment only". The reality is that the applicants seriously contend that they have no liability, so that liability will be an issue. On that basis, the estimate can be accepted as reasonable for present purposes, *i.e.*, for determining whether security should be ordered.

Having regard to the evidence which I have outlined above, I have come to the conclusion that there is credible testimony to give rise to reason to believe that the company will be unable to pay the costs of the applicants, if the applicants successfully defend the claim against them. In arriving at that conclusion, I have not been influenced by the undoubtedly complicating factor that other proceedings are pending in this Court, which have been initiated by certain of the house owners against some or all of the defendants in these proceedings and, as I understand it, in some actions, additional defendants, being the solicitors who acted for the house owners in the purchase of their houses in Elton Court.

The conclusion is based on the status of the plaintiff as a company limited by guarantee which has a legal persona distinct from its members, and which, on the evidence, does not have the resources out of which it could meet an award of costs in favour of the applicants.

However, I think it is important to record that the affidavits filed on behalf of the plaintiff and the submissions made by counsel for the plaintiff did not give the impression that the house owners, as members of the plaintiff, are hiding behind limited liability and would not contribute with a view to meeting an order for security for costs.

***Prima facie* defence?**
It is necessary to consider the position adopted by the applicants in relation to each of the defects in the title to the common areas of Elton Court for which the plaintiff contends the applicants are responsible.

First, as regards the outstanding leasehold interest created by the 1863 lease in the laneways coloured yellow on the Gibbons map, the position of the applicants is that the title which the first and second defendants had to "the Estate" and which they were in a position to transfer to the plaintiff in accordance with the Management Company Agreement was clear from the documentation furnished to the purchasers of the houses and their solicitors. It was a matter for the purchasers' solicitors to satisfy themselves as to the adequacy of the title of the first and second defendants to the laneways and the title the plaintiff would obtain from them. The applicants' only responsibility was to ensure that that title was transferred to the plaintiff. That was done and the position is that the plaintiff got the title which the purchasers of houses had bargained for.

Secondly, in relation to the title to the area coloured yellow and cross-hatched in black on the Gibbons map, the position adopted by the applicants is that their clients, the first and second defendants, retained an architect, the twenty third defendant, to advise and satisfy the purchasers that "the Estate" was within the area to which the first and second defendants had title. They rely on the statutory declaration of identity sworn on 1st May, 2001 by the twenty third defendant in which, after listing 18 title documents in relation to "the Estate" and declaring that, where there were maps annexed to the title documents he had inspected them, he declared as follows:

> "I say that the entire of the dwelling houses, associated car park spaces and common areas are totally within the Estate shown edged with a red verge line and entirely within the confines of the lands assured by the deeds at (i) to (xviii) (inclusive) above."

Thirdly, in relation to the fact that Mr. and Mrs. Byrne established in the Circuit Court proceedings the rights the subject of the declaration in the order of the Circuit Court which I have quoted above, as I understand the position of the applicants it is that, given that Mr. and Mrs. Byrne claimed prescriptive rights and were successful, those rights affected the title in any event. Either the basis on which the applicants seek to avoid responsibility for the increased burden on "the Estate" in consequence of the declaration in the Circuit Court order was not articulated clearly or I did not understand it. However, having regard to the position adopted by counsel for the applicants on the issue of the duty of care owed by the applicants to the plaintiff, I assume that it is that the solicitors acting for the purchasers of houses in Elton Court should have raised the issue in the investigation of title on behalf of the purchasers.

Turning to the more fundamental issue arising from the fact that the plaintiff is suing the applicants for professional negligence in connection with the title to "the Estate" in the circumstances which prevail here – the difficult and, perhaps, novel, issue as to the extent of the duty of care owed by the applicants to the plaintiff – counsel for the applicants did not contend that no duty of care was owed to the plaintiff. He contended that their duty of care did not extend beyond ensuring that the plaintiff got the title to the common areas which the first and second defendants had contracted to give in implementing the scheme of disposal and that it was a matter for the purchasers' solicitors to advise the purchasers on the adequacy of that title. He also contended that the applicants were entitled to rely on the appropriate professional advice furnished by the twenty third defendant in dealing with the issue of title identity. That last point, it seems to me, goes more to the standard of care owed by the applicants, rather than the question of the extent of the duty of care they owed.

In the affidavits filed on behalf of the plaintiff and in the submissions made by counsel for the plaintiff it was asserted that the applicants have no defence to the plaintiff's claim and it was further asserted, as I have indicated, that the action will involve only an "assessment". That is not the case. The applicants are strongly contesting liability and the plaintiff has to face up to that. In my view, the applicants have discharged the onus on them of satisfying the Court that they have a *prima facie* defence, which is all they have to do.

Delay as a special circumstance

As I have already recorded, although the plenary summons was issued on 28th March, 2007, it was not served on the applicants until almost a year later, on 26th March, 2008. The statement of claim was not delivered until 24th October, 2008 after an order made by the Master on 10th October, 2008, on foot of a notice of motion dated 12th June, 2008, ordering the plaintiff to deliver a statement of claim within two weeks. The costs of that motion were awarded against the plaintiff to the applicants. Within two weeks the applicants had requested particulars arising from the statement of claim. The particulars were not replied to until 9th February, 2009 following a motion issued by the applicants in January 2009. The enclosures referred to in the particulars (including the Gibbons map) were not furnished until 16th March, 2009. This notice of motion which initiated this application was dated 29th June, 2009.

Having regard to the foregoing chronology, I am absolutely satisfied that there was not delay on the part of the applicants in bringing the application under s. 390, which would justify refusing an order for security for costs.

Conduct of the applicants as a special circumstance

It is deposed to in the replying affidavits filed on behalf of the plaintiff and it was urged in the submissions of counsel for the plaintiff that the applicants have adopted an aggressive attitude to the plaintiff's claim and that this constitutes a special circumstance on the basis of which the application for security for costs should be dismissed.

It was alleged that the applicants were aggressive in the procurement of an insurance indemnity bond in respect of the defects in title and in attempting to force it on the plaintiff. It was also admitted that the applicants were aggressive in seeking to resolve the difficulties by having the accesses to and within Elton Court taken in charge by the local authority, Dun Laoghaire Rathdown County Council. Very serious allegations of professional negligence have been made by the plaintiff against the applicants in this case. Whether the applicants are contesting liability or not, it is understandable, and it makes good sense, that they should explore whatever avenues are available to remedy the title difficulties which have been exposed. I do not see the actions taken by the applicants with a view to remedying the defects in title as conduct which should militate against them obtaining an order under s. 390.

In his first replying affidavit, sworn on 27th July, 2009, the plaintiff's solicitor, Mr. Paul O'Sullivan, averred that the applicants are the persons "with the greatest liability legally, professionally and morally herein" and that they have taken the most aggressive stance. There followed an averment that the particulars raised "were so prolix and repetitive as to be almost an abuse of pleadings". That averment, in my view, is wholly unjustified. The extract from the statement of claim which I have quoted above and the response to the request for particulars in relation to the defects in title bear that out.

There were also allegations of something akin to dishonesty on the part of the applicants in that affidavit. For instance, it was averred that "it may well emerge in the trial that [the applicants] concealed the defect once they knew it". In relation to the allegation that there is no title to the area coloured yellow and cross-hatched in black on Mr. Gibbons map, Mr. O'Sullivan averred: "A line on a deed map was removed by someone". Whoever it is aimed at, that is a preposterous statement. As I have stated, on a superficial comparison, the boundary between "the Estate" and the rear of the houses on Elton Park as shown on the map on the 2005 conveyance does not appear to be consistent with the corresponding boundary on the map on the lease of 1863. The source of the inconsistency cannot be identified on the basis of the documentation before the Court. In all probability, it is a genuine mapping error, if it is an error.

Order

Taking into account all of the factors which the Court is required to take into account in determining this application under s. 390, I have come to the conclusion that the applicants are entitled to an order for security for costs.

As to the amount of the security and the manner in which it is to be provided, unless the parties indicate otherwise, the matter will be referred to the Master for determination.