THE HIGH COURT

2016 No. 11479P

BETWEEN:

MARIA KEENA

Plaintiff

– and –

THOMAS COUGHLAN, RAY DONOVAN, MICHAEL DEMPSEY, PROMONTORIA (ARAN) LIMITED AND LUKE CHARLETON

Defendants

– and (by order) –

SEAMUS WALSH

First Co-Defendant

– and (by order) –

KILKENNY WALSH LIMITED

JUDGMENT of Mr Justice Max Barrett delivered on 21st December, 2017.

I

Key Issue Arising

1. Is Ms Keena a nominee plaintiff? The co-defendants maintain that she is. This being so, they have come to court seeking an order requiring that Ms Keena furnish security for the costs of the co-defendants in the within proceedings.

II

Some Case-Law on Nominal Plaintiffs

(i). Introduction.

2. The leading case on the issuing of orders for security for costs against impecunious nominal plaintiffs is the relatively recent decision of the Supreme Court in *Mavior v.* Zerko *Ltd* [2013] 3 I.R. 268. In that case, the Supreme Court, *inter alia*, confirmed that by way of long-established exception to the general rule that an order for security for costs pursuant to O.29 of the Rules of the Superior Courts (1986), as amended, will not be made against a natural plaintiff who is resident in Ireland or the European Union, security for costs can be ordered against a nominal plaintiff who is a natural person. Thus, per Clarke J., at 279-280:

> *"The jurisdiction to order security against an impecunious nominal plaintiff, even though that plaintiff be resident in the jurisdiction, is…well established*….[Clarke J. moves on to refer to certain recent Irish case-law and then continues as follows.] *The comments in those cases which refer to the limitations on the jurisdiction to direct security against plaintiffs who are* [Ireland-/European Union-] *resident natural persons must, therefore, be read as referring to such plaintiffs who sue in their own right and not to such plaintiffs who can be shown to be acting as a nominee in accordance with the existing jurisprudence."*

3. The court turns to consider the substance of the judgment of Clarke J. in greater detail later below. However, it is useful, before proceeding with a consideration of *Mavior*, to consider a number of much older cases which receive the imprimatur of Clarke J. in his judgment in *Mavior*. These are considered hereafter in chronological order.

(ii). Sykes.

4. In *Sykes v. Sykes* (1869) L.R. 4 C.P. 645, the underlying proceedings comprised an action by the executors of the late Ms Sykes against the sheriff of Yorkshire and one other for seizing and selling certain goods belonging to Ms Sykes as testatrix. An application by the defendants for security for costs was initially successful, but the order so obtained was subsequently rescinded by the Court of Common Pleas (which court was later incorporated into the High Court by the Supreme Court of Judicature Act 1873). In his judgment, Bovill C.J. refers to that notion of being 'beneficially interested in the result of the action' which, as will be seen hereafter, also informs the much later judgment of Clarke J. in *Mavior*. Thus, per Bovill C.J., at 647-8:

> *"By the law of this country a party is not precluded from enforcing his rights in a Court of law by reason of his poverty. In many cases, no doubt, the inability of an unsuccessful litigant to pay costs to his successful adversary works hardship; but it is for the legislature to provide a remedy, not for us….To entitle a defendant to security, he must shew not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action…..That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt. The distinction is manifest; for, though there may be legatees or creditors, it does not follow that they will receive their legacies or a dividend on their debts; and so there is no person interested to give, or who would be willing to give, security for costs. No authority has been or could be produced in which security for costs has been ordered to be given by a plaintiff suing as executor or as assignee, simply on the ground that he is not in a position to pay costs. On the contrary, where an application was made for security in an action brought by an executor, he was treated as being in the position of an ordinary plaintiff, and, being resident abroad, he was ordered to give security...".*

5. In a separate judgment, Brett J., then but one year into an illustrious judicial career, joined his fellow judges in reversing the order for security for costs that he himself had originally granted in chambers, observing, *inter alia*, as follows, at 650:

> *"Insolvency alone is not a ground for compelling security. But an exception has been engrafted on that rule, where the*

> *plaintiff is merely lending his name for the benefit of another person, and is therefore not the real plaintiff in the action; as where he has assigned his interest in the debt to another. There is no authority, however, for extending that exception to the case of an executor or assignee of a bankrupt. They are not within the same principle; they do not lend their names for the benefit of third persons in this sense."*

6. The court notes the informative references by Bovill C.J. and Brett J., respectively, to the concept of a plaintiff being nominal "*in the sense of another person being beneficially interested in the result of the action*" and, per Brett J., to such a plaintiff being a plaintiff who

"is merely lending his name for the benefit of another person, and is therefore not the real plaintiff in the action". These are statements which foreshadow the assertion of Clarke J., in *Mavior*, at 281, that "[T]*he key question is…whether the plaintiff is the true person in whom, as a matter of substance, the beneficial interest in the cause of action lies.*" And all of these statements, it seems to the court, point to its being a not un-challenging proposition for a defendant to come before a court with an application such as that now presenting, and establish, on the balance of probabilities, by reference to *Mavior*, and the longstanding case-law by which it is informed, that the plaintiff in a given set of proceedings, is a 'nominal plaintiff' in the sense in which that term has come to be understood.

(iii) Cowell.

7. In *Cowell v. Taylor* (1885) 31 Ch.D. 34, a Mr Holt, in April, 1875, entered into possession of certain premises in Lancashire, under an agreement with Mr Taylor for the purchase of the property. By another agreement, of September 1875, a power of re-entry was given to Mr Taylor in certain circumstances. In August 1876, Mr Taylor re-entered and remained in possession. In September 1876, Mr Holt's creditors passed a resolution for liquidation of his affairs by arrangement. Mr Cowell was subsequently appointed trustee in the liquidation and, in 1882, initiated proceedings in the Court of Bankruptcy to recover the property. Mr Taylor sought that Mr Cowell be ordered to give security for costs. The Court of Appeal decided that no order for security for costs should be made, Bowen L.J. observing, *inter alia*, as follows, at 38-40:

> "[T]*he line we ought to take is clear. The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow. The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest and handed it over to someone else that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit. Those are the common cases, I do not say that there may not be others….In the present case we have to determine whether security is to be required in the case of a plaintiff who is himself insolvent and sues as the trustee in bankruptcy of an insolvent estate. Are the doors of the Court to be closed against such a plaintiff till he gives security? It seems to me that such a case does not come within the principle on which the exception from the general rule is based, nor within the definition of that exception, so far as a definition can be extracted from the language of the Courts. It cannot be said that a trustee in bankruptcy is a mere nominal plaintiff, he is the person whose statutory right and duty it is to get in the assets. Nor does he come within the mischief against which the exception is intended to guard. He is not a mere shadow, he is a person who has a duty to perform, that of getting in the estate. It is not necessarily his duty to carry on litigation, but it is his duty to do so where litigation is requisite. I think, then, that there is good sense is not requiring him to give security…*
>
> *…*
>
> *So stands the practice at common law. Is there any different practice in equity? No authorities have been cited to shew that there is any conflict."*

8. Perhaps a couple of aspects of the just-quoted observations ought to be highlighted in the context of the proceedings at hand.

9. First, Bowen L.J.'s observation that "*The general rule is that poverty alone is no bar to a litigant*". This finds echo in the later observation of Clarke J., in *Mavior*, at 281, that "[P]*overty alone is insufficient*" to ground an order for security for costs.

10. Second, "[t]*here is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere* **shadow***."* [Emphasis added]. This wording is expressly approved by Clarke J. in *Mavior*, at 280. Bowen L.J.'s observations are made in the context of insolvency law but apply more generally. They find echo in the observation of Clarke J. in *Mavior*, at 281 (echoing in part certain earlier observations of Kenny J. in his turn-of-the-20th century decision in *Kenealy* (considered below)) that "[A]*n order for security can be made against a nominee or '***sham***' plaintiff*". [Emphasis added]. It seems to the court, having regard to the approval given by Clarke J. to such terminology in *Mavior*, that the words 'shadow' and 'sham' can usefully be borne in mind when deciding whether one is treating with a nominee plaintiff. They may not be legally precise words but they still manage to capture the essence of what is in issue.

(iii). Rhodes.

11. In *Rhodes v. Dawson* (1886) 16 Q.B.D. 548, Mrs Dawson entered into a contract with Mr Rush for the execution of certain repairs to her residence at Wimbledon. Mr Rush employed Mr Rhodes, a decorator, to do the work. Afterwards a petition under the Bankruptcy Act, 1883 was presented against Mr Rush, and a receiving order made. Mr Rhodes thereafter commenced proceedings to recover the cost of the work done by him. Mrs Dawson having interpleaded, it was ordered that the amount in dispute should be paid into court, and an interpleader issue was directed in which Mr Rush was to be the plaintiff and the plaintiff in the action Mrs Dawson. The creditors of Mr Rush accepted a composition in satisfaction of their claims, and he was not adjudged a bankrupt. The Queen's Bench Division ordered that Mr Rush should give security for the costs of the interpleader issue. This was successfully appealed to the Court of Appeal, Lindley L.J. observing, *inter alia*, as follows, at 553-5:

> "[I]*f an action is brought by a person against whom a receiving order has been made under the Bankruptcy Act, 1883, but who is not adjudicated bankrupt, can he be properly ordered to give security for costs? The law upon this subject is well summed up in the last edition of Chitty's* Archbold…*'The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent*[']….*Notwithstanding a receiving order, the debtor is the only*

person who can sue for the recovery of what belongs to him; and if he does so sue, he cannot be regarded as the mere instrument of some other person or persons, and so be brought within the principle applicable to cases of that kind, unless and until he becomes bankrupt. What the plaintiff recovers in the action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors if he does not pay or compound with them. It may be that his property and right to sue never will be divested from him; and until it is, he is in no worse position as regards suing than any other plaintiff in embarrassed circumstances, and who may be made bankrupt at any moment if proper proceedings are taken against him. Upon principle, therefore, it appears to me that no security for costs ought to be ordered in such a case as this.

…

[T]*here is nothing in my opinion to take this case out of the general rule, that the poverty and possible or probable bankruptcy of a plaintiff is not a ground for requiring him to give security for costs*."

12. In his judgment in *Mavior*, Clarke J. does not deal at length with the decision of the Court of Appeal in *Rhodes*, observing simply, at 280, following mention of Cowell and Sykes, that "*Similar quotes which make clear that a plaintiff will not be compelled to give security merely because he is insolvent but can be where he is a mere nominal plaintiff can be found in* Cook [considered below] …*and* Rhodes". Yet, given this approval of the judgment in *Rhodes*, it seems to the court that reliance can properly be placed on Lindley L.J.'s reference in the above-quoted text to a person being "*the* **mere instrument** *of some other person or persons*" [emphasis added], terminology which harks back again to the words 'shadow' and 'sham', as considered previously above, and terminology which, to the court's mind, can usefully (and consistent with the judgment of Clarke J. in *Mavior*) be brought to bear when deciding whether one is treating with a nominee plaintiff. Again, the concept of someone being the 'mere instrument' of another is not legally precise wording but it still manages to capture the essence of what is in issue.

(iv). Cook.

13. In *Cook v. Whellock* (1890) 24 Q.B.D. 658, an action was brought was brought to recover rent due in respect of a warehouse and premises let by the plaintiff to the defendant. It appeared that, at the time when the agreement of tenancy between the plaintiff and defendant was entered into, the plaintiff was an undischarged bankrupt. Upon application by the defendant, the master had ordered the plaintiff to give security for costs. The plaintiff successfully appealed against this order, Vaughan Williams J. observing, *inter alia*, as follows, in the High Court, at 659-660:

"The question for our determination is whether, where the plaintiff is an undischarged bankrupt suing in respect of a cause of action accruing subsequently to the bankruptcy, he can, simply because he is an undischarged bankrupt, be called upon to give security for costs. I think that he cannot. This is entirely different from the case where an action is brought in respect of a cause of action arising prior to the bankruptcy, for in that case the bankrupt would properly be called a nominal plaintiff; he would have no beneficial interest whatever in the action….[A] *cause of action arising after the bankruptcy stands upon a wholly different footing….In* Buchan v. Hill [(1888) W.N. 233]…*North, J…held that an undischarged bankrupt could sue without his trustee…and that, unless there was a suggestion that the action was being really brought on behalf of the trustee by the bankrupt, no order ought to be made for security for costs….The judgment of Lindley, L.J., in* Rhodes v. Dawson [(1886) 16 Q.B.D. 548]…*lays down the plain rule that the order as to security for costs only applies where the plaintiff is merely a nominal plaintiff suing for the benefit of others…*[I]*n a case like the present, where the bankrupt has a good cause of action as against all the world, unless his trustee intervenes, he can in no sense be called a nominal plaintiff; he is a real one. He may be likened to an agent suing on a mercantile contract in his own name; his undisclosed principal would have a right to intervene, but until such intervention the agent would be able to sue."*

14. That judgment was appealed unsuccessfully to the Court of Appeal. There, Bowen L.J. considered that the defendant, having been let into the possession of tenanted premises by the undischarged bankrupt, was estopped thereafter from claiming that the trustee in bankruptcy was his landlord. That estoppel aside, Bowen L.J. observed, *inter alia*, as follows, at 661-2:

"[A]*ssuming that* [the defendant]…*may be allowed to shew in the present proceeding that the plaintiff is an undischarged bankrupt, does that entitle him to have security for costs from the plaintiff? It is quite clear that mere poverty is not a sufficient ground for making a plaintiff give security for costs. It is alleged here that the plaintiff is a mere nominal plaintiff. This cannot be said of him in the usual sense in which it is said in these cases*, viz., *that he is a person really put forward by some other person behind him to bring an action on behalf of that person. It is said that he is a nominal plaintiff, because, if he recovers the money claimed, he will hold it as trustee for his trustee in bankruptcy….*[S]*uppose it could be said that the plaintiff would be a trustee of the money recovered, would it follow that he could be said to be a mere nominal plaintiff in the sense that is requisite for this purpose? Suppose he succeeded in the action and were forced to pay over the money to the trustee; there is an order of the Bankruptcy Court suspending his discharge until he has paid five shillings in the pound, which by implication means that, when he has paid that amount, he is to get his discharge. So, even if the money has to be handed over as assets in the bankruptcy, the plaintiff gets a benefit from it, although his creditors get a benefit too. If he gets benefit from it, he is not a mere nominal plaintiff."*

15. *Cook* is an interesting decision because it addresses the perhaps-more-likely-to-arise-in-practice scenario where a court is confronted with a plaintiff who is (i) not a 'shadow', a 'sham', the 'mere instrument' of another or, to borrow from Bowen L.J.'s wording "*a person really put forward by some other person behind him to bring an action on behalf of that* [other] *person*", but rather (ii) a person bringing an action from which others might benefit, indeed in which another might even have a right to intervene. The question that arises in the context described at item (ii) is at what point does that type of plaintiff, being a person who is not a shadow, a sham, *etc*., but also not a free-standing person to whom every last benefit of the litigation might ultimately and solely accrue, become someone against whom an order for security for costs can issue on the grounds that s/he is but a nominee plaintiff. On this last point the judgment in *Mavior*, as will be seen later below, is particularly helpful.

(v). Kenealy.

16. In *Kenealy v. Keane* [1901] 2 I.R. 640, a decision of the pre-Independence Irish High Court, the plaintiff was the editor of the *Kilkenny Journal* newspaper. He commenced an action under then local government legislation to recover monies from the defendant for having acted as a member of Kilkenny Corporation while disqualified from so acting. The defendant, who was joint proprietor of the *Kilkenny People* newspaper maintained that he had a good defence to the action and that the action had been brought out of a sense of rivalry and malice and for the purpose of ruining the defendant and his newspaper. However, his action for security for costs was eventually fought solely on the issue of the plaintiff's poverty. Proceeding on the assumption that plaintiff was a person who had not the means to pay the defendant's costs in the event of the plaintiff's failing in the action, Kenny J. observed, *inter alia*, as follows, at

> *"It is every-day practice in this Court under the Judicature Act, where **collusion** is shown or where a **sham** plaintiff, or a person acting as trustee or assignee for the real plaintiff, who is outside the jurisdiction, is put forward, to make an order staying proceedings until security for costs be given. But it is opposed to the practice of the Courts, and to the course of legislation, to order that any person against whom the only allegation is that he is a pauper, should be obliged to give security for costs; and, in no case that I know of, under the Judicature Act, where the only allegation is that a plaintiff living within the jurisdiction has no means, has such an order been made. There must be something more to lead the Court to the conclusion that security should be given. If the plaintiff be an undischarged bankrupt – if he be a mere **stalking-horse** for another – the Court might order security; but…poverty alone is not sufficient to justify the order being made…". [Emphases added].*

17. It is from the above-quoted text that Clarke J. derives the word 'sham' that he invokes in *Mavior*, at 281, when summarising the above-quoted text as follows: "*Thus poverty alone is insufficient, but an order for security can be made against a nominee or 'sham' plaintiff*". Notable too, it seems to the court are the references to "*collusion*" and "*stalking-horse*". As with the word 'shadow', the concept of being 'the mere instrument of some other', and the concept of 'a person really put forward by some other person behind him to bring an action on behalf of that other', this again is all terminology that, to the court's mind, can usefully (and consistent with the judgment of Clarke J. in *Mavior*) be brought to bear when deciding whether one is treating with a nominee plaintiff.

(vi) Mavior.

18. As touched upon previously above, a key contribution made by the Supreme Court in *Mavior* is the clarity it brings to the issue as to when an order for security for costs might properly issue against a plaintiff who is not a shadow, a sham, *etc*., but who is also not an island onto himself on which all the fruits of litigation are bestowed exclusively. In that case Zerko entered into an agreement with MJBCH Ltd to run and manage two hotels. MJBCH then entered into an agreement with *Mavior*, an unlimited company, to carry out repair works at the hotels. After those works were done *Mavior* claimed certain monies directly of Zerko (on the grounds that MJBCH had authority as agent of Zerko to enter into an agreement with *Mavior*). Zerko brought application for security for costs which failed in the High Court, an appeal to the Supreme Court likewise proving unsuccessful.

19. As mentioned previously above, the Supreme Court indicated in *Mavior* that the general rule is that security for costs will not be ordered against a natural plaintiff who is an Irish-resident (or European Union-resident) plaintiff but noting that there is a long-established exception to that rule, viz. that security for costs could be ordered against a nominal plaintiff. Under the heading "*What is a nominal plaintiff?"* Clarke J., at 281 *et seq*., having touched upon the pre-Independence English and Irish case-law mentioned above, turns to the distinction that falls to be made "*in the context of identifying who may or may not be a nominal plaintiff, between* [i] *the person in whom the beneficial interest in the cause of action asserted properly lies, as opposed to* [ii] *persons who may, indirectly, benefit by the success of litigation.*" In this regard, Clarke J. observes, *inter alia*, as follows, at 281-2:

> **"[36]** *…An impecunious plaintiff may have creditors who are unlikely to be paid unless that plaintiff successfully mounts litigation on foot of a cause of action which is his own. It may…be…that some, or…most, of the fruits of the successful pursuit of the relevant litigation may inure to the benefit of creditors….It also…would benefit the impecunious plaintiff to win the case for in so doing he would be able to…be relieved of those liabilities. However, on any true analysis of such cases, the cause of action is the plaintiff's own and the fact that others may, indirectly, benefit from the success of the litigation does not take away from that fact*.
>
> **[37]** …[T]*he key question is…whether the plaintiff is the true person in whom, as a matter of substance, the beneficial interest in the cause of action lies. If that is so then it is hard to see how such a plaintiff can be regarded as a nominal plaintiff or a "mere shadow" or a "sham plaintiff". The fact that, if successful, others may indirectly benefit does not alter that fact….*[I]*n many cases it will only be the true person in whom the beneficial interest in the cause of action lies that can sue. However, there are circumstances in which that may not be the case*. Cook v. Whellock *(1890) 24 Q.B.D. 658 is a good example….That, and other examples, suggest that the broad approach which has historically applied in respect of the nominal plaintiff category is to identify cases where a third party had a beneficial interest in the cause of action itself. It seems to me that such is the sense in which the term "nominal plaintiff" is used in the security for costs jurisprudence. The term refers to cases where the plaintiff is simply a nominee who is, for whatever reason, entitled to maintain the proceedings but where a third party has a beneficial interest in the outcome. Such a situation is to be distinguished from one where the plaintiff is beneficially entitled to the cause of action but may, as a matter of practicality, because of independent legal obligations attaching to that plaintiff, be required to deal with the proceeds in a way which benefits a third party or third parties…*
>
> **[38]** …[S]*uch is the scope of the nominal plaintiff exception. It applies…where the plaintiff either never had, or has divested himself of, the beneficial interest in the cause of action but is still legally entitled to sue. It does not apply to cases where the plaintiff retains the beneficial interest in the cause of action but may be obliged, on foot of an independent obligation, as a matter of practice, to transfer any benefit accruing to a third party or third parties….".*

20. It seems to the court that three key points arise from the foregoing, , *viz*:

> (1) The nominal plaintiff exception applies where a plaintiff either (i) never had, or (ii) has divested himself of, the beneficial interest in a cause of action but is still legally entitled to sue.
>
> (2) It follows that in deciding whether a plaintiff is a nominal plaintiff, the key question is whether the plaintiff is the true person in whom, as a matter of substance, the beneficial interest in the cause of action lies. (If the answer to that question is 'yes, it is hard to see how such a plaintiff can be regarded as a nominal plaintiff).
>
> (3) A plaintiff is not a nominal plaintiff where he is beneficially entitled to the cause of action but, because of independent legal obligations attaching to that plaintiff, is required to deal with proceeds in a way which benefits one or more third parties.

III

The Facts at Hand

(i) The Essence of the Principal Dispute.

21. In the substantive proceedings:

> – Ms Keena seeks a decree for specific performance of an alleged agreement between her and the defendants for the purchase by Ms Keena from the defendants of the Ard Rí Hotel in Waterford for €1.6m. Ms Keena claims that the purchase agreement was executed on 21st November, 2016, and that in accordance with same she paid over, on or about 21st November, 2016, a non-refundable deposit of €160k. On 22nd November, 2016, the defendants sought proof of funds from Ms Keena, which she claims was not a part of the agreement between her and the defendants. Regardless, Ms Keena provided the requested proof of funds on 28th November, 2016. Ms Keena claims that on 30th November, 2016, in alleged breach of the purported agreement advised that they would not be selling the hotel to her and would instead be selling it to another.
>
> – the co-defendants claim that by memorandum of agreement dated 16th March 2017 between the defendants, as vendor, and Kilkenny Walsh Limited, as purchaser, the defendants agreed to sell and the first and/or second co-defendants agreed to purchase the Ard Rí Hotel for a purchase price of €1.5m. A contract of sale has been executed and the full purchase price paid by the co-defendants to the defendants.

(ii) The Substance of the Motion at Hand.

22. By notice of motion of 1st November, 2017, the co-defendants now seek (1) an order pursuant to O.29 of the Rules of the Superior Courts 1986, as amended, directing Ms Keena to furnish security for the co-defendants' costs of the within proceedings; (2) such further order as the court shall deem necessary, and (3) costs.

(iii) Factual Basis for Security for Costs Order Sought.

a. Overview.

23. Various documents have emerged in the course of discovery that have led to the within application. The substance of the key documents is considered hereafter.

b. The Letter of 28th November, 2016.

24. Among the documents discovered is a letter of 28th November, 2016, from James Wallace & Co., Accountants, to Mr Chris Allen of Ernst & Young, acting as a receiver. The main text of this letter reads as follows, under the heading "*RE: THE ARDREE HOTEL, WATERFORD":*

> *"Further to our telephone conversation this morning, we enclose herewith bank statements (to hand) which total in excess of the money required.*
>
> *In addition, several children of the Treacy family would have €200,000 each, as they all received €250,000 in recent times.*
>
> *As I have assured you earlier, there is absolutely no issue at all with the Treacy Group having funds to close this arrangement.*
>
> *You will note in the bank statements of Timbertoes, has the money for some considerable time, despite the fact that we withdrew €2.25 million from it since it commenced trading in 2013.*
>
> *Please confirm that you are satisfied that funds are in place."*

25. The co-defendants draw the especial attention of the court to the fact that the letter (i) refers to "*the Treacy Group*" and "*several children of the Treacy family*", (ii) refers to Timbertoes Ltd, (iii) does not mention Ms Keena by name, and (iv) does not state Ms Keena to be one of the people funding the alleged agreement. Ms Keena's response to the foregoing is simple: (i) her chosen married name is 'Keena'; her maiden surname is 'Treacy' and she is a one of the "*several children of the Treacy family*" to which the letter refers; and (ii) Timbertoes is a Treacy-family owned company in which she is a shareholder.

26. The above-quoted letter can be read to suggest that the acquisition of the Ard Rí Hotel is to be made by Treacy family-companies and certain Treacy family members. However, it can just as easily be read as suggesting that some of the funding for Ms Keena's acquisition of the Ard Rí Hotel (if she has a contract to buy it) is to be sourced from within her wider family and certain family-owned companies. And the notion that Ms Keena would want to invest in a hotel by and for herself, albeit using some monies borrowed from others, is not a fanciful notion. As Ms Keena avers in her sworn affidavit evidence:

> *"I have worked in the hotel business all my life and I continue to work in the business. I entered into an agreement to purchase the Ard Rí Hotel Waterford as I considered it to be a good investment with potential as a hotel in Waterford. Furthermore, as I am a resident of Waterford I considered it a suitable investment and opportunity to expand my business interests in Waterford, where I already hold an interest in the Treacy Hotel Waterford."*

c. The Bank Draft and Receipt for €160k.

27. Among the discovery documents is (i) an Ulster Bank bankers' draft dated 21st November, 2016, payable to Ernst & Young, and (ii) an undated receipt signed by Ms Keena, Mr Allen and a Mr Robert Lanigan. The bankers' draft is signed by some unknown persons, presumably the officials who issued the draft. Though the handwritten receipt is certainly not a model of drafting, it states that "*This deposit is non-refundable…*", it is not disputed that it is signed by the parties just named, and any reasonable reading of the single-page receipt, into which a photocopy of the draft is incorporated is that it is a receipt for that draft. Ms Keena avers simply that "*I personally attended at the offices of EY to deliver the bank draft on the 21st November 2016 and I signed the non-refundable deposit receipt there and then".* It is not clear why anyone other than Mr Allen needed to sign the receipt as it was him who was doing the receiving. However, the fact that Ms Keena attended at the offices of Ernst & Young and signed the receipt suggests that she has a close and direct involvement in the claimed contractual arrangement that she relies upon.

d. E-mails of 28th November, 2016.

28. Among the discovery documents are a number of e-mails of 28th November, 2016, attaching banking documentation which suggests that the funding for the acquisition of the Ard Rí Hotel pursuant to the alleged agreement of 21st November, 2016, comes from a number of Treacy-related sources. This banking documentation includes AIB bank statements in the name of 'Treacys Wfd Ltd…', 'Leisure Centre Devel' (which appears to be a reference to a Treacy-owned leisure centre), 'Treacy J&B Farm', 'Treacy J&B No 3', a list of accounts in the name of Combray Ltd (a Treacy family company in which Ms Keena appears not to be involved as director or shareholder), Mr Anton Treacy, and Mrs Yvonne Treacy, and Ulster Bank account statements, one of which appears to be an account in the name of Ms Keena and two other people, including a Mr Treacy, and another in the name of Timbertoes Ltd (another Treacy family company in which Ms Keena appears not to be involved as director or shareholder).

29. The response of Ms Keena's counsel to the just-mentioned documents was, in essence, 'They don't prove anything', and, with respect, he is right in this. The documents certainly suggest that Ms Keena may be sourcing, from a number of family members or family-owned companies, the funds for the acquisition which she hopes to effect. But what of it? There can be few property acquisitions that are entirely self-funded from own resources. Ms Keena may have elected to draw on family resources in preference to borrowings from one or more financial institutions. But it requires a huge and hugely speculative leap of logic to go from these financial documents to the end-conclusion that, as averred to by Mr Walsh in his grounding affidavit "*the documentation included in the Plaintiff's Discovery prima facie confirms that the beneficial interest in the subject matter of the alleged agreement between the Plantiff and the Defendants…and the beneficial interest in the cause of action brought by the Plaintiff rests not with the Plaintiff herself in whose name these proceedings are brought*". That is a possible conclusion to be drawn, it is not the only conclusion that can be drawn, and the court does not accept that it is the likely or probable conclusion to be drawn.

(iv) Application of Mavior et al.

30. It follows from the foregoing that the court cannot properly conclude on the evidence before it that Ms Keena is a plaintiff who either (i) never had, or (ii) has divested herself of, the beneficial interest in her cause of action but is still legally entitled to sue. It seems to the court to be more likely than not that she is the true person in whom, as a matter of substance, the beneficial interest in her cause of action lies. It may be, to borrow from the phraselogy of Clarke J. in *Mavior*, that "*the fruits of the successful pursuit of the*…[within] *litigation may inure to the benefit of creditors* [of Ms Keena, which may include one or more members of the wider Treacy family or the Treacy family-owned group of companies]", but such a possibility of itself does not suffice to convert Ms Treacy from a true plaintiff into a nominal plaintiff. There is little to suggest, and nothing close to confirming the conclusion that Ms Keena, to borrow from the phraseology of pre-*Mavior* case-law is a 'sham' plaintiff, the 'shadow' of some other, a 'stalking-horse', 'the mere instrument of some other', 'a person put forward by some other person behind her to bring an action on behalf of that other' or that she is engaged in some form of collusion. To the extent that the within application is founded on the notion that Ms Keena is a nominal plaintiff it must therefore fail.

IV

An Impecunious Nominal Plaintiff?

31. Even if the court is completely wrong in the foregoing conclusion (and it does not consider that it is), the within application would in any event have failed because the court would have moved on to conclude that the co-defendants, even assuming they have a *prima facie* defence to Ms Keena's claim, have not established that Ms Keena will not be able to pay the co-defendants' costs if the latter are successful at the ultimate trial of action. The co-defendants have engaged cost drawers to estimate the cost to the co-defendants of defending the within proceedings. Mr Walsh avers, *inter alia*, in his affidavit evidence that "[T]*he Costs Drawers estimate that the co-defendants' costs of these proceedings will amount to €137,950.00 plus VAT*". Ms Keena for her part avers that "*I am not a person of straw and I have sufficient assets to meet the…costs of this case, if I am unsuccessful in this matter. In this regard I beg to refer to a statement of assets and liabilities from my accountant*". That statement of assets and liabilities states Ms Keena to have "*Net Assets in Excess of Liabilities*" of €1,280,114.

32. The co-defendants complain that the assets mentioned in the statement of assets and liabilities include the estimated value of Ms Keena's share in her family home (estimated by her accountant to be €150,000) and certain shares in private companies (estimated by her accountant to be worth €576,100). (They also complain that certain apartments listed as assets are subject to borrowings; however, those borrowings feature in the liabilities portion of the statement of assets and liabilities). Even if the court entirely discounts those assets to which objection has been taken (and whatever about it being difficult to force the sale of a family home, a shareholding in private companies does have worth), that would reduce the amount of Ms Keena's "*Net Assets in Excess of Liabilities*" to €554,014. That reduced sum is a multiple of the amount that the co-defendants' cost drawers estimate will be the cost to the co-defendants of defending the within proceedings. (In truth, though the court accepts that it does not have evidence before it of the costs to the defendants other than the co-defendants of defending the within proceedings, it is a sum that, offhand, seems likely to be enough to cover the costs of all of the defendants, were Ms Keena to lose her action, especially when one bears in mind the excessive discounting that the court has engaged in to arrive at the figure of €554,014). However, all of this is academic in light of the court's conclusion, for the reasons stated previously above, that Ms Keena is not a nominal plaintiff.

V

Delay

33. In the context of applications brought for security for costs against corporate plaintiffs under the companies code, delay by the moving party has long been established as a special circumstance that may influence the exercise of a court's discretion not to make an order for security. (See, *e.g., SEE Co. Ltd v. Public Lighting Services Ltd* [1987] ILRM 255). It has been urged upon the court that there has been delay on the part of the co-defendants in the within proceedings as regards the bringing of the within application. The court sees no reason in logic or law why delay cannot also be a factor to which a court can have proper regard when considering an application for security for costs brought against a plaintiff who is a natural person. However, in the within case it is clear that it is the documentation supplied with the affidavit of discovery that prompted the application to which this judgment relates. That affidavit of discovery was sworn on 30th August, 2017; and the notice of motion relating to the within application issued on 1st November, 2017. Given that it would have taken time for (i) the lawyers to the co-defendants to read the discovered documentation and take a view as to the possible significance of same, (ii) the co-defendants to have been given legal advice concerning the possibility of bringing the within application, (iii) the instructions to bring the within application then to issue, and (iv) the notice of motion to be drafted and issued, the court does not consider that any blameworthy delay presents on the part of the co-defendants in the fact that just over eight weeks elapsed between the swearing of the affidavit of discovery and the issuance of the notice of motion grounding the within application.

VI

Conclusion

34. For all of the reasons aforesaid, the court respectfully declines to make the order for security for costs now sought.