Neutral Citation Number: [2012] IEHC 512

The High Court

Commercial

Record number 2012/6910P

Between

Oltech (Systems) Limited

Plaintiff

And

Olivetti UK Limited

Defendant

Judgment of Mr Justice Charleton delivered on the 30th day of November 2012

1. This is a motion for security for costs. As in many of these motions, numerous authorities have been referenced. This application took three hours. Other such applications have taken several days. Since success in this application will often mean the end of any litigation, this perhaps explains the lush profusion of authorities that has grown up. It is therefore intended herein to summarise many of the usual points made and the case law that support same.

2. For 20 years the plaintiff company was the distributor in Ireland of the well-known Olivetti office equipment produced in Italy by the parent company of the defendant. The plaintiff claims that in 2009 it placed an order with the defendant for 707 printers capable of monotone and colour reproduction. According to the specification for these printers, it is alleged by the plaintiff, a certain number of pages would be produced before the toner cartridge would need replacing. After negotiating a commercial agreement, the plaintiff supplied 381 of these printers to a gambling firm called Paddy Power Ltd. Under that contract, the plaintiff was to replace toner cartridges as an integral part of the consideration paid to it by that firm. Having made a calculation on the basis of the specification for the printer, a price was set by the plaintiff. This did not prove profitable. The plaintiff claims to have lost money. It is claimed that many more toner cartridge replacements were needed than what the manual accompanying the printers, and what the representations made by the defendant to the plaintiff, would warrant. In consequence, the plaintiff claims to have lost business in the marketplace; claims to have lost the value of these printers; and claims to have had to order and pay for many more toner cartridges than would have been anticipated. The plaintiff, having ordered the printers and thousands of extra toner cartridges from the defendant, refused to pay and, consequently, ran up a large debt of some €2.3 million to the defendant.

3. In these proceedings, the defendant is claiming against the plaintiff for that amount by way of counterclaim. In the statement of claim, the plaintiff is claiming against the defendant for €2.8 million in extra costs that it asserts were occasioned by this breach of contract. In addition, because the plaintiff would not pay what it ostensibly owed the defendant, its distribution agreement with the defendant was terminated. The plaintiff, therefore, also claims against the defendant for damages equivalent to wrongful dismissal; the damage whereof is to be calculated, the plaintiff argues, by reference to the length of time that the relationship persisted for and by reference to the importance of the position held. This, the plaintiff calculates at one year's profits from the arrangement, amounting to about €200,000.

Approach

4. It is no part of the task of a court on an application for security for costs to take a view as to who ought to win at trial. In *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd*. [2009] I.E.H.C. 7 (Unreported, High Court, 16th January, 2009) this principle was emphasised at para. 3.3 by Clarke J. thus:

> I am mindful of the fact that all of the authorities make clear that the court's assessment must be conducted on a prima facie basis. As was pointed out in *Irish Conservation and Cleaning Ltd v. International Cleaners Ltd* (Unreported, Supreme Court, Keane C.J., 19th July, 2001) to do otherwise would be to invite the court, on a preliminary motion, to decide the case. Everything which I say hereafter should, therefore, be subject to the qualification that I am referring, even if not expressly stated, to the various necessary matters being established on a prima facie basis.

5. The task for the court, rather than to attempt to decide the case, is to apply the tests mandated by the case law. This approach emphasises that no assessment of ultimate liability ought to be made, much less any decision beyond stating whether there is a reasonable prospect of a defence succeeding at trial. Consequently, these motions should be brief applications. The special circumstances which mandate a court, in its discretion, to refuse to make an order securing the costs of a defendant in advance of trial are, however, the essential complicating factors in such applications that extend their duration. These special circumstances may apply notwithstanding that the defendant has shown that it has a defence which may reasonably be anticipated to succeed and that the plaintiff lacks the funds to discharge the costs order against it, should that come to pass.

6. The jurisdiction to order costs to be lodged in favour of a defendant in advance of a trial arises under s. 390 of the Companies Act 1963. That section provides:

> Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.

7. The existence of such jurisdiction may hit hard at an impecunious plaintiff company. As Keane J. noted in the High Court decision in *Lismore Homes Ltd (in receivership) v. Bank of Ireland Finance Ltd* [1992] 2 I.R. 57 at 63:

> Section 390 of the Act of 1963 expressly envisages that an impecunious plaintiff company may be required to give

> security for costs and it may well be that in many cases this will mean the end of the action, unless someone other than the company itself is prepared to put up the security. To refrain from granting an order for security, save in the exceptional circumstances already referred to, simply because it might have the effect of stifling the plaintiff companies' actions would be to render the section nugatory.

Basic requirements

8. As indicated, there are two basic requirements to meet before the discretion of the court to order security for costs may be invoked. The defendant must show, firstly, that it has a reasonably sustainable defence. That does not just mean a barely arguable defence, since experience demonstrates that there is little that cannot be argued. It has to be demonstrated, rather, that if there is a legal defence that it is potentially sustainable on a practical view of the law or, if the defence is one of fact, that if what the defendant alleges in answer to the plaintiff is proven in court that it will defeat the plaintiff's claim. The second requirement is that a defendant must show that the plaintiff company is either insolvent or is so financially challenged that it will not be able to pay the defendant's costs if the defendant is successful; *Connaughton Road Construction Ltd*., cited above.

9. What is a reasonably sustainable defence or, in more arcane language, a prima facie defence? In *Tribune Newspapers (In Receivership) v. Associated Newspapers Ireland* (Unreported, High Court, 25th March, 2011) useful guidance was offered as to the level of sustainability of defence that will be required to invoke the security as to costs jurisdiction. In the course of an ex tempore ruling, Finlay Geoghegan J. analysed the nature of what had been considered to be a *prima facie* defence in prior case law. From the transcript, I quote her conclusion on this issue:

> … both the Supreme and High Courts have used slightly different terminology to describe the nature of the defence which must be established on an application for security for costs. Whilst there is generic use of prima facie defence there is it appears also references, apparently in the alternative, to good defence, real defence or even to the plaintiff's case as being required to be unanswerable, with the consequential impact on the defendant's defence. What appears from the judgments, in a manner similar to the judgments in relation to summary judgment [cases], is that a defendant seeking to establish a prima facie defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish these facts. Mere assertion will not suffice. This appears to me also to follow from the reference in the Superior Court Rules to a defence on the merits. If such evidence is adduced then the defendant is entitled to have the court determine whether or not it has established a prima facie defence upon an assumption that such evidence will be accepted at trial. Further, the defendant must establish an arguable legal basis for the inferences or conclusions which it submits the court may arrive at based upon such evidence. In so far as the plaintiff is admitting that the appropriate test includes an assessment by this Court on the application for security for costs as to whether the defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding, I reject that submission. Such an exercise would inevitably require the court at the interlocutory stage of the application for security for costs to assess the strength and weakness of the respective parties' contentions and cases. The decisions of the Supreme Court already referred to appear to me to clearly rule out such an approach. Accordingly, in my judgment, what is required for a defendant seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim. I propose applying this test. Further, it appears to me that such a test is supported by section 390 as enacted by the Oireachtas, which I am applying in this application for security for costs. The section as enacted contains no express reference to the establishment of a prima facie defence. The application of the prima facie defence test is applicable for the purposes of this section, in the sense that the section requires the company to provide security where it would be unable to pay the costs of the defendant if successful in its defence. It is therefore relevant to consider that, or whether or not, a defendant has a prima facie a defence in the sense that he might succeed but [this jurisdiction] does not warrant the imposition of a higher threshold. Unless the defendant has a prima facie defence the purpose of this section would not come into play.

10. I adopt this reasoning as to the nature of the defence that must be established before the discretion of the court to order security for costs may be invoked. A reasonably sustainable defence may be one in fact or in law. If it is the latter, then even an affidavit is not required on an application for security for costs. In *Usk District Residents Association Limited v. The Environmental Protection Agency* [2006] I.L.R.M. 363, Clarke J., for the Supreme Court, indicated at p. 372 that it was open to a defendant seeking to establish a prima facie defence to rely on "any factual matters which are properly before the court" by way of affidavit or exhibit "and also to rely on any legal argument which may be open on the basis of the facts asserted by the plaintiff or facts which have been prima facie established in the materials before the court." As well as by assertion of fact, therefore, the existence of a *prima facie* defence may be established by reference to legal argument alone.

11. In this application, the defendant has shown that it has a defence to the plaintiff's claim. This is demonstrated through an acknowledgement of the debt due by the plaintiff to the defendant for the printers and toners in a letter dated the 5th August, 2011. In part, this letter, which was signed by all the directors of the plaintiff, reads:

> As at 31 July 2011 [Oltech] has outstanding debt to [Olivetti] of €2,109,966.39 and £12,000 839.70 of which €1,609,990.75 and £6,652.85 is overdue for payment. [It is accepted] that, of these figures approximately €500,000 is disputed due to [the] claim [of Oltech] for toner over-usage. This matter will be addressed at a meeting with our technical department on 9th August.

12. In addition, the defendant has demonstrated that should the case proceed to trial and the defendant successfully defends that case, the plaintiff is unlikely to be able to pay any order for legal costs against it. This much is admitted by the plaintiff.

Amount

13. If an order for security for costs is to be made, then it must be for the full sum of the estimated costs: the court has no discretion to merely award a percentage; *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd. (No. 3)* [2001] 3 I.R. 536. The amount to be set may be subject to conflicting estimates by costs drawers. In this application, the estimate of costs on behalf of the defendant is based on two senior counsel being engaged, because of the inherent complexity of the case, so it is said, and on the case lasting 10 days. The amount is therefore estimated at €407,000 plus VAT at 23%. The plaintiff takes a more real view as to what the case involves. On that side, the estimate involves the retention of one senior counsel with the case to last for six days. Consequently, the amount suggested is €175,000 plus VAT at 23%.

14. Apparently, experts on printing machines are to testify. As with many other instances where experts have been invoked, they may find it impossible to agree on even basic facts. A potentially alarming aspect of this case is that it might get out of control. That could happen were every printing machine to be forensically examined by an expert, and contradicted by another expert opposing

that viewpoint. Some hint of this has already been given. The courts have a discretion as to costs and this extends to the understandable lure of over-proofing. The essence of this case is that the manual accompanying the printers promised a particular output of pages per toner cartridge. That promise, the plaintiff claims, was not met. The defendant claims that in dealing with the gambling company and in incorporating a deal which included the replacement of printer cartridges for whatever price was agreed, the plaintiff acted foolishly. What is at issue, therefore, is how the printers were supposed to perform and how, as a matter of fact, these performed. This requires merely the examination of a representative sample of the printers as to their performance. Were the case to last longer than is reasonably necessary because of over-proofing, the losing side should not be required to pay the costs of that exercise. Nor is there anything about this case which, because it concerns printers and toner cartridges, requires the retention of two senior counsel. Therefore, should an order for security for costs be made, it would be on the basis of the lower estimate.

Special circumstances

15. Jurisdiction has been established in this application whereby the court may make an order for the security for the defendant's costs. A reasonably sustainable defence has been established and, in addition, the financial situation of the plaintiff makes the payment of any ultimate costs order problematic. That is not, however, the end of such an application. There are a multitude of special circumstances which have been identified in various aspects of the case law as allowing the court in its discretion to decline to make an order for security for costs. The terms of this discretion are wide and, while they have been described in various principles and decided cases, they cannot be regarded as finally settled. For instance, as a matter of its overall approach to such an application, a court may take into account the strength of the plaintiff's claim and the conduct of the applicant for security for costs; *Irish Commercial Society Limited v. Plunkett* [1988] I.R. 1. In that case Costello J., at p. 5, noted that in exercising the discretion of the court all of the circumstances of the case can be taken into consideration.

16. It is appropriate to now briefly note the relevant principles identified as special circumstances entitling a court to refuse to order security for costs; but in doing so, it must again be remembered that no judge has an entitlement at an interlocutory stage to decide facts. Instead, the function of a court is to attempt to discern what is potentially, and on a reasonable basis, capable of proof at trial. As to the burden of proof of special factors, it is clear that the burden of demonstrating such is on the plaintiff company once the defendant has shown a *prima facie* defence and that the plaintiff company is not capable of meeting a costs order against it; *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd*. [1999] 1 I.R. 501. Special circumstances, as an exception to the granting of an order for security for costs, exist in order to enable cases to proceed even where a defence is reasonably open despite the inability to pay such a costs order by plaintiff. This is because the justice of a case may require that notwithstanding that the defendant has a reasonable defence and that the plaintiff company is financially challenged the case ought to proceed. *In The West Donegal Land League Limited v. Udarás na Gaeltachta* [2006] I.E.S.C. 29 (Unreported, Supreme Court, 15th May, 2006), Denham J. quoted with approval an aspect of the decision of Kingsmill Moore J. in *Thalle v. Soares* [1957] I.R. 182:

> ... it should be remembered that the essence of the order for security for costs (or not) is "to advance the ends of justice and not to hinder them" per Kingsmill Moore J. above. It is for a court on such an application to consider, and to balance, the interests of the plaintiff company and those of the second named defendant in a fair and proportionate manner.

17. The first special factor enabling a court to decline to grant security for costs is the one most often argued in these applications: the plaintiff may be able to reasonably contend that the damage which it has sustained in terms of its solvency, or the individual in terms of his or her ability to pay costs in the event of unsuccessfully perusing the case, was sustained in consequence of the actions of the defendant - in other words that it was ruined in consequence of the action in suit; Usk and Interfinance Group Limited v. K.P.M.G. Pete Marwick (Unreported, High Court, Morris P., 29th June, 1998). In the latter case Morris P. referred to a commonly occurring special circumstance as that "where the plaintiffs inability to discharge the defendants costs of successfully defending the action flow from the wrong allegedly committed by the parties seeking the security". If so, the application may be properly refused; see also Framus Ltd. & Ors v. C.R.H. plc. & Ors [2004] 2 I.R. 20. In Connaughton Road Construction Ltd, cited above, Clarke J. identified at para. 3.4 that to invoke this principle there must be: an actionable wrong such as a breach of contract or a tort on the part of the defendant; a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff; a resulting level of specific loss which is recoverable in law by the plaintiff; and a demonstration that the loss alleged suffices to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed and the plaintiff not being in such a position. This is how Clarke J. put the matter from para. 3.4:

> 3.4 In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-
>
> (1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
>
> (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
>
> (3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and
>
> (4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position.
>
> 3.5 Given that, on a motion such as this, a plaintiff is only required to establish the special circumstances, arising out of its inability to pay costs being due to the alleged wrongdoing of the defendants, on a *prima facie* basis, then it follows that each of the above steps must also be established on such a *prima facie* basis only. Items (1) and (2) do no more than state that the plaintiff must establish a *prima facie* case on liability and causation, for if such a case cannot be established, then there could be no basis for finding, even on a *prima facie* basis, that any lack of resources of the plaintiff are due to wrongdoing on the part of the defendant. Item (3) is of some relevance to the first of the matters which was debated in the course of the hearing before me. In response to some of the points made by counsel for Laing O'Rourke, it was responded on behalf of Connaughton Road that those matters "only went to quantum". The implicit suggestion was that the court was not concerned, on an application such as this, with quantum. That may be true to an extent, but it seems to me that it is not correct to state that a court should have no regard to questions of quantum in an application such as this. To take a simple example a plaintiff company which has an excess of liabilities over assets of (say) €200,000 will manifestly be unable to pay the defendant's costs should the defendant succeed. If the high watermark of that plaintiff's claim is only for €100,000 then it equally follows that the plaintiff's inability to pay costs has

not been caused by the defendant's wrongdoing in that, even if the plaintiff were to succeed, there would still be an excess of liabilities over assets of €100,000.

3.6 It follows, in my view, that a plaintiff must at least establish a prima facie case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful. That this is so can be seen from the comment of Murray J. (speaking for the Supreme Court) in *Framus Ltd & Ors v. CRH Plc & Ors* [2004] 2 I.R. 21 at pp. 61 and 62, where it was noted that the plaintiff in that case had shown some evidence of wrongdoing on the part of the defendant but not, even on a *prima facie* basis, that its impecuniosity was due to that wrongdoing. It is not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a *prima facie* basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of point (4) referred to above. Even if, therefore, a plaintiff can show a *prima facie* case, it is also necessary to show a *prima facie* level of losses attributable to the defendant's wrongdoing so as to enable the court to assess whether, again on a *prima facie* basis, those losses are sufficient to justify attributing the plaintiff's inability to pay costs, in the event of losing, to the asserted wrongdoing. On that basis I am satisfied that the court can have some regard to quantum in an application such as this.

18. In this application there has been detailed argument as to the relevant accounts of the plaintiff company. In summary, whereas turnover in 2008 was around €5.1 million, it has since declined in 2011 to €3.5 million. Profits have apparntly always been small; at €23,000 in the earliest year and in or around €10,000 in subsequent years. In the relevant accounts, provision has been made for an award of damages against the plaintiff in favour of the defendant. Once this provision is removed, which it must be given the uncertainties of the litigation and the obligation of a court hearing such a motion not to decide facts, the company is shown to be solvent. It is not, however, so solvent as to be confident of meeting the costs of the defendant if successful. What is heavily in dispute in this case, more importantly, is the degree to which the wrong attributed to the defendant is, in fact, that of the plaintiff itself. I am not satisfied that a sufficient demonstration of this factor has been made in this application.

19. Secondly, an order for security for costs may be refused where there has been delay in bringing the application. In *Interfinance Group*, Morris P. referred to delay by the moving party as being among the most common examples of special circumstances for refusing to make the order. Any court considering this alleged special factor would need to analyse the nature of the delay in the light of the means of knowledge of the moving party, as to what that party knew or ought reasonably to have known, and assess its impact on the course of the case in order to decide whether the order should be refused. The reason for the delay may be important. Delay as a reason for refusing to make the order can be very important where the plaintiff company has acted to its detriment in incurring a level of costs that it would not have incurred had it known it would have been required to provide security; *S.E.E. Co. Ltd. v. Public Lighting Services Ltd*. [1987] I.L.R.M. 255. In this application, proceedings were issued on the 13th July, 2012, the case was admitted to the commercial list on the 3rd September, 2012 and a request by way of letter asking for security for costs was made on the 3rd October, 2012. It is groundless to even suggest that there was any delay in the making of this application.

20. A third special factor disentitling a defendant, in the court's discretion, to an order for security for costs is that a point of law for decision in the case may be so important that the process of the case should not be interrupted. To establish this special factor, a heavy burden is undertaken by the party seeking to invoke this. A point of law necessary to exercise the discretion against the order must not be simply be any ordinary point of law that might be argued before the courts on a month to month basis. Instead, to refuse an order on this basis, a point of law must be identified which transcends the interests of the parties and requires as a matter of public interest that it should be decided for the benefit of the community as a whole; see the decision of Morris J. *Lancefort v. An Bord Pleanála* [1998] 2 I.R. 511 at 516.

21. A fourth factor can arise where there is a corporation as a plaintiff and an individual as a co-plaintiff. If both are making the same factual case, and the corporation is insolvent but the individual has sufficient funds to meet an eventual costs order against him or her, then the order may be refused because the defendant, if successful, is not going to be impeded in recovering costs; see the judgment of Kingsmill Moore J. in *Peppard v. Bogoff* [1962] I.R. 180. There, the Supreme Court held that the situation at that time of one plaintiff being in the jurisdiction and one outside would be the same as if one plaintiff were a company and the other plaintiff an individual. At page 187, Kingsmill Moore J stated that "the same arguments would seem applicable in both cases". That might also be argued in respect of two corporations as plaintiffs. If one is financially buoyant and the other challenged, an order for security for costs may arguably be refused. It might also be argued, and this matter is merely being mentioned in this context and not decided, that if there are two individual plaintiffs in similar circumstances where one is outside the jurisdiction of the European Union, for the purposes of Order 29 rule 1 of the Rules of the Superior Courts, and the other is within, the same rule may be claimed to apply. In addition to the jurisdiction, under the Companies Act, and the Rules of the Superior Courts as that jurisdiction applies in the High Court, the Supreme Court under Order 58 rule 17 on an appeal may order security for costs. The factors applied are similar; *West Donegal Land League Limited v. Udarás na Gaeltachta* [2006] I.E.S.C. 29 (Unreported, Supreme Court, 15th May, 2006) and *Moorview Developments and Others v. First Active plc and Others* [2012] I.E.S.C. 22 (unreported, Supreme Court, 23rd February, 2012). As was pointed out, however, by Cooke J. in *Goode Concrete v. CRH plc, Roadstone Wood Ltd and Kilsaran Concrete* [2012] I.E.H.C. 116 (unreported, High Court, 21st March, 2012), what was thought to be the rule that once a plaintiff is a natural person resident in Ireland an order for security for costs can never be made has a questionable validity and, in any event, is subject to constitutional principles. After a comprehensive review of the authorities, Cooke J. put the matter thus at paras. 35-37:

35. There is one further factor which the Court considers should be taken into account. It is an elementary principle of the Constitution that Article 40.3 guarantees a right of access to the Courts to vindicate and to defend legal rights (see *McCauley v Minister for Posts and Telegraphs* [1966] IR 345). It falls to the High Court as the Court exercising full original jurisdiction under the Constitution to guarantee and facilitate that right. As Henchy J. said in Re. *The Illegitimate Children (Affiliation Orders*) Act 1930, already referred to above:

"The jurisdiction of the High Court created by the Constitution is not dependent upon rules of court: when that court was given 'full original jurisdiction in all matters and questions', by the Constitution, the People intended it to be exercised and did not intend it to be conditional upon the action or inaction of the subordinate body." Similarly, in *Dome Telecom Limited v. Eircom* [2008] 2 I.R. 726, when considering the Court's jurisdiction to grant an order for discovery of documents in the form of electronic data which would require documents to be created in order to be discovered, Geoghegan J. said:-

"My starting point would be that I would reject any idea that the right to discovery of documents should be

> exclusively based on an interpretation (literal or otherwise) of the relevant rule of court.... In modern times, courts are not necessarily hidebound by interpretation of a particular rule of court. More general concepts of ensuring fair procedures and efficient case management are frequently overriding considerations. The Rules of Court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure and even if there was a rule applicable, the court is not necessarily hidebound by it."

> 36. In the view of the Court, the entitlement of citizens to access to the Courts applies to defendants or respondents as well as to plaintiffs. A defendant ought not to be forced to forego defending an action against which there is a stateable defence on the merits out of fear of being bankrupted by having to incur substantial costs which will be irrecoverable from an insolvent plaintiff. A plaintiff's right of access to the Courts is not absolute and the Court has jurisdiction to prevent the right being abused by, for example, dismissing a case for inordinate delay or as frivolous, vexatious or bound to fail in order to prevent injustice to a defendant (see *Barry v Buckley* [1981] IR 306). The Court's jurisdiction to make a so-called "Isaac Wunder" order is based upon the same principle. (See the judgment of this Court in *Kenny v. An Bord Pleanala* [2010] IEHC 321). Accordingly, although the cases may be rare, the Court has jurisdiction to strike a balance between on the one hand, depriving an insolvent plaintiff of a right of access to the Court and on the other, exposing a defendant to an unreasonable or disproportionate degree of financial risk by not requiring an insolvent plaintiff to give security for costs because of the plaintiffs residence within the jurisdiction.

> 37. It follows therefore in the view of the Court that in the absence of any express prohibition in Order 29 on requiring security from a resident plaintiff, it is appropriate to adopt a similar approach in order to ensure that the procedure is conducted fairly in the interests of both parties.

22. There can also be a fifth factor. A point of fact of national importance can arise in litigation that is inescapably central to a case and which will settle a concern of great public moment. Such an issue will arise rarely. Litigation between private entities is by nature compensatory or restoratory. It is only in the most extreme circumstances that any fact in contention between litigants can keenly affect the public interest. Where that occurs, this can be a special factor in refusing to order security for costs. An example is the issue of pig feed contamination and the withdrawal of Irish pork products on the world market that was part of the decision to refuse security for costs in *Millstream Recycling v. Tierney* [2010] I.E.H.C. 55 (Unreported, High Court, Charleton J., 9th March, 2010). The result of that contamination was the condemnation throughout international markets of Irish pork products as unfit for human consumption. An important industry was affected and not just in a manner confined to an individual sector. The entire reputation of Ireland as a source of healthy agricultural food was undermined for a substantial time by the circumstances that led to that case.

23. Of special relevance to this case, there is a sixth factor identified in the authorities. A defendant may also be a counterclaimant on a subject matter that identifies as the plaintiff's defence the same issues that the plaintiff company seeks to plead against a defendant as establishing an entitlement to damages. To take a plain example; a baker may sue a manufacturer of flour and claim that the poor quality of the flour has caused a loss of trade or the ruination of a retail business. In those circumstances, the baker is highly unlikely to pay the miller. If the baker sues first, the miller may counterclaim for the price of the unpaid flour. If the baker is an impecunious individual, or operates through a limited liability company of stretched means, the defendant miller may seek an order for security for costs and counterclaim for the price of the flour. Were the action by the baker to be stayed on the basis that a reasonable defence by the miller was in prospect and that the baker was impecunious, an undesirable situation would result. The counterclaiming case of the defendant would be defended by the plaintiff on the basis of the quality of flour but because the case of the plaintiff had been stayed, even were that defence to counterclaim to be sustained, the plaintiff would not be entitled to damages. In recent similar cases before the High Court, an undertaking has been sought and given by a defendant that its counterclaim on the same subject matter as plaintiff's claim would not be pursued. This principle is persuasivly established in case law from the neighbouring kingdom.

24. In *BJ Crabtree v. GPT Communication Systems* (1990) 59 B.L.R. 43 the claimant was a building contractor which claimed £78,000 for additional works which it said it was instructed to undertake by the defendant. In reply, the defendant denied the claim by alleging that it had not authorised the variation to the programme of works. The defendant also counterclaimed by seeking damages in the sum of £105,000 for the cost of rectifying what was claimed to be defective work and for the cost of completing work that had been left unfinished. Bingham L.J. at pp. 52-53 elucidated the similarity of counterclaim and claim exception in this way :

> It is, however, necessary, as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear and, indeed, was not I think in controversy -- that in the course of defending the counterclaim all the same matters as would be canvassed if the plaintiffs were to pursue their claim, but on that basis they would defend the claim and advance their own in a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back. I have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation…It may in some cases be fair and just to make such an order even though the defendant is himself counterclaiming, but I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim."

25. If, however, the trial of a counterclaim would be substantially unaffected by the absence of a plaintiff's allegation against the defendant, the principle is not applicable. This exception to the special principle is established in *Anglo Petroleum v. TFB* [2004] E.W.H.C. 1177 (Ch). In that case, Park J. elucidated at paras. 32-33 that the principle applied where:

> [A respondent] could, and presumably would, defend… [the applicant's] claim by advancing essentially the same arguments as those which he, [the respondent], wanted to advance in his own claim. It would in my view be largely pointless for the court to have ordered [the respondent] to provide security for the costs of his own claim. In general, the courts recognise that, where there are cross-proceedings, the position is as I have described, and the courts do not order a person in the position of [the respondent] to provide security for the costs of the claim he is making himself.

26. In *Ali Burak Dumrul v. Standard Charter Bank* [2010] E.W.H.C. 2625 (Comm) this principle was again applied by Hamblen J. He noted that the mere existence of a claim and counterclaim are not enough to establish the principle; the subject matter of each may be different, thus there may be no substantial overlap. At para. 8 he stated:

Not every case in which there is a claim and counterclaim falls within the Crabtree principle. In particular:

(1) Where the claim raises substantial factual inquiries which are not the subject of the counterclaim, an order for security may be appropriate notwithstanding the fact that the claim provides a defence to the counterclaim: see *Shaw-Lloyd v ASM Shipping* [2006] EWHC 1958; *Newman v Wenden* [2007] EWHC 336. In those circumstances, an order for security will normally be limited to the costs of addressing additional issues raised only by the claim.

(2) In cases where the claim and counterclaim raise additional issues, it may also be relevant to consider whether the quantum of the claim in respect of which security is sought is substantially greater than the applicant's claim: see *Newman v Wenden; Hutchison Telephone v Ultimate Response* [1993] BCLC 307.

27. It is to be noted as well, that in making a partial order on a security for costs motion, the court in that case insisted at para. 20 that the defendant bank should undertake to consent to the dismissal of the counterclaim in the event of the claimant's case being dismissed for failure to lodge the relevant sum.

28. Such an undertaking has not been forthcoming in this case. Apparently in some other cases recently, such an undertaking by a counterclaiming defendant has been given. Such an undertaking could not be reasonably expected in this case. The defendant counterclaims against the plaintiff on the simple basis that it has sold 707 Olivetti printers to the plaintiff together with thousands of toner cartridges in an amount of approximately €2.3 million. The plaintiff claims against the defendant on the basis that these printers were defective in the sense of unexpectedly guzzling up toner cartridges. The plaintiff defends the counterclaim of the defendant on the same basis. There is a complete interlinking between the weave of the case made against the defendant by the plaintiff and the weft of the counterclaim for goods sold and delivered made by the defendant against the plaintiff. If would be contrary to good sense and the interests of justice to stay the plaintiff's case and thus allow the defendant what would effectively be a free run at its counterclaim. This is the crucial factor in the exercise of my discretion as to an order for security for costs in this case.

29. Apart from those outlined herein, other special factors may be identified. The categories of special circumstance are not closed. Other factors may be isolated whereby, in the interests of attempting to see justice done, the court will decide against ordering security for costs notwithstanding that a company is shown not to be able to pay the costs of a successful defendant which demonstrates a *prima facie* defence. That is because the jurisdiction to make this order, whether under s. 390 of the Companies Act 1963 or under Order 29 rule 1 of the Rules of the Superior Courts, is a matter of discretion to be exercised in all the circumstances of a case. As regards the jurisdiction under the Rules, this was established in *Collins v. Doyle* [1982] I.L.R.M. 495 where Finlay P. stated that prima facie there is a right to an order for security for costs where there is a defence demonstrated and an inability to pay; however, the right is not an absolute one and the court must exercise its discretion based on the facts of each individual case. In the company law jurisdiction, the judgment of Costello J. in *Irish Commercial Society Ltd,* analysing the nature of the plaintiff company's claim and the conduct of the defendant, demonstrates the discretionary nature of the relief; see *Comhlucht Páipear Riomhaireachta Teo (in voluntary liquidation) v. Údaras na Gaeltachta* [1987] I.R. 320.

Result

30. The Court will not make an order that the plaintiff lodge to the credit of the defendant a sum sufficient to cover the costs of the defendant at trial. The claim made by the plaintiff is about the defective performance of 707 printers. The defence of the defendant is that the printers performed to specification, or would have so performed if properly used. As a counterclaim the defendant demands the cost of the printers ordered from it and the thousands of toner cartridges that the printers needed. The defence to that by the plaintiff is the very claim made in the statement of claim. It would lack any constitutional fairness, in accordance with the principles invoked by Cooke J. in *Goode Concrete*, were the plaintiff's aspect on this case to be stayed as that would prevent any proper analysis at trial of the performance or non-performance of the printers.