

THE HIGH COURT

[2010 No. 4539 P.]

BETWEEN

RAYAN RESTAURANT LIMITED

PLAINTIFF

AND

GERALD KEAN, PRACTISING AS KEANS SOLICITORS AND FRANCIS MCGAGH

DEFENDANTS

JUDGMENT of Mr. Justice Michael White delivered the 12th June, 2013 following on from a judgment delivered the 17th January, 2012

1. This application comes before the court by way of three separate Notices of Motion by the defendants which are set out in the Court's judgment of the 17th January, 2012. These motions seek to strike out the plaintiffs proceedings or in the alternative seek security for costs.

2. The initial hearings took place on the 8th, 10th and 29th November, 2011.

3. The court made findings of fact on certain aspects, but lacked substantial information identified in the judgment of the 17th January, 2012.

4. The plaintiff company has been preserved for the purposes of litigation and is otherwise insolvent. The plaintiff is not able to discharge any award of costs if the defendants are successful in a plenary hearing, or in these motions.

5. This court retained seisin of the motion to await further substantial documentation and information.

6. Subsequent to the judgment of the court on the 17th January, 2012 further supplemental affidavits were filed as follows:-

- Supplemental Affidavit of Francis McGagh, the second named defendant, sworn on the 23rd day of March, 2012 with exhibits.
- Supplemental Affidavit of Gerald Kean sworn on the 23rd March, 2012 with exhibits.
- Supplemental Affidavit of Fatima Zohra Azizi sworn on the 27th march, 2012 with exhibits.
- Affidavit of Nick Linnane, Chartered Accountant, sworn on the 26th March, 2012 exhibiting a Financial Analysis Report and other exhibits.
- Affidavit of William McKeogh, Property Consultant, sworn on the 1st March, 2012.
- Affidavit of John Harding, Chartered Accountant, sworn on the 14th April, 2012 exhibiting an expert report.
- Supplemental affidavit of Nick Linnane sworn on the 11th of July 2012.

7. The court heard oral evidence when Mr. Nick Linnane and Mr. John Harding were cross examined on their affidavits. Their evidence was heard on the:-

12th July, 2012

19th July, 2012

18th February, 2013

19th February, 2013

8. The court heard closing submissions on the 19th February and 22nd February, 2013, and reserved judgment.

9. Subsequent to the judgment of this court on the 17th January, 2012, the parties to the proceedings agreed to prepare and exchange a comprehensive set of documents including all pleadings relevant documentation and correspondence. The court was informed this had been finalised. However on the 19th July, 2012, counsel for the plaintiff raised certain concerns about lack of documentation. The court directed Djemal Mennad to swear an affidavit setting out what primary documents he claimed to have sent to the first named defendant including any documents he claimed were absent from the exchange of documentation. The court also undertook to inspect the original file of Keans solicitors to make sure the documents exchanged and furnished to the parties were at one with the original file. The court did inspect the original file and did not see any documentation different from that exchanged. The court did note that there was no book of inter parties correspondence exchanged. No affidavit seems to have been sworn by Djemal Mennad dealing with the alleged absent documentation. If the affidavit was sworn it was not opened to the court. The Court in its judgment of the 17th January, 2012 sought the pleadings in High Court proceedings Record No. 2005/3548 P, *Rayan Restaurants Ltd v. Flynn & Ors*, which was appealed to the Supreme Court by notice of appeal dated 20th of November, 2006, and was the subject of a judgment of that Court delivered by Finnegan J. on the 27th March, 2009. These books of the appeal were exchanged which the Court inspected. The books included a number of invoices described as 'fit out' and 'set up' costs for Rayan Restaurants Ltd at High Street, Athlone, which are similar to those referred to in the financial analysis report of Mr. Nick Linnane.

The payment of the rental payments due on foot of the assignment of lease of the 1st August, 2002 in respect of the premises at High Street, Athlone, Co. Westmeath.

10. During the course of the original motion hearing before this Court, the status of the rent payments was unclear. This is referred to in paragraphs 108, 124 and 125 of the Court's judgment.

11. The Court can now establish as undisputed fact the following.

12. While the written agreement assigning the lease indicated a deposit of €11,250 was supposed to be paid on the signing of the agreement, a subsequent dispute emerged between the parties which was resolved at a meeting in the office of Mr. William McGeogh, property consultant, on the 15th January, 2003, when Mr. Barra Flynn, the landlord, agreed that the payment of €11,250, which had already been made, would represent the rent from the 1st January, 2003, to the end of March, 2003, provided that a standing order was put in place for the next payment due on the 1st April, 2013. A standing order was not put in place and the rent due on the 1st April, 2003, was paid by direct cash lodgement into the AIB account of the landlord. Fatima Zohra Azizi in her supplemental affidavit of 27th March, 2012, at paragraph 15 avers that it was lodged on 2nd May, 2003. The lodgement docket is illegible, although the letter from AIB of the 8th June, 2006, refers to a date between the 2nd and 4th April, 2003.

13. The next instalment was due on the 1st July, 2003. This was not paid on time but was offered by way of cheque on the 24th July, 2003, through Mr. McGeogh, who contacted Mr. Flynn who in turn refused to accept the cheque.

14. The lodgement in court by order of the Circuit Court of the 24th October, 2003, of €11,250 was in respect of the application brought by Mr. Flynn for summary judgment. Mr. Flynn alleged that the breach of the agreement by the plaintiff to pay by standing order meant the instalment due on the 1st January, 2003, was outstanding, as he was entitled to treat the original payment made by cheque on the 10th August, 2002, as a deposit. This was disputed by the plaintiff.

Assignment of lease Rayan Restaurant Limited to Julia's Company Restaurant Limited

15. The directors of Rayan Restaurant Limited were Fatima Zohra Azizi and her husband Djemal Mennad. Discussions took place with either one or both of the directors with one Miss Claudia Puscas. It was intended that she would become a business partner for the restaurant, to be opened at the premises. A company, Julia's Company Restaurant Limited, was incorporated on the 7th February, 2003 for this purpose. A written agreement between Djemal Mennad and Claudia Puscas was entered into on the 10th April, 2003. Subsequently, on the 23rd April, 2003, Patrick Hogan & Co., Solicitors, then acting for Rayan Restaurant Limited, wrote to Tormey Solicitors, acting for the landlord Barra Flynn, seeking consent to assign the lease from Rayan Restaurant Limited to Julia's Company Restaurant Limited. It was indicated that Djemal Mennad and his business partner Claudia Puscas were joint shareholders and sole directors of the company and that they intended to register the trading name "DiBella". Tormey's replied on the 28th April, 2003, stating that Barra Flynn was on annual leave. A number of reminders were sent by Hogan & Co., Solicitors and Tormey's replied on the 27th June, 2003, seeking further details as to the beneficial ownership of the company Julia's Restaurant Company Limited and seeking personal guarantees. Hogan & Co., replied on the 3rd July, 2003, advising that 50% of the shares in Julia's Company Restaurant Limited were held by Djemal Mennad and the remaining 50% shareholding was held by Claudia Puscas and they enclosed a draft guarantee for approval. There was no consent to any assignment of the lease prior to the re-entry on the premises by the landlord Barra Flynn on the 24th July, 2003.

The Conflict of Evidence between the Directors of Rayan Restaurant Limited and Claudia Puscas the Second Named Defendant in the Circuit Court Proceedings

16. In the original hearing of the motion the court did not have the exhibited affidavits of Claudia Puscas in the Circuit Court proceedings.

17. In the affidavit of Fatima Zhora Azizi, sworn on the 13th August, 2003, grounding an application for an injunction, it was alleged that Miss Puscas was to pay the sum of €70,000 to become a shareholder in the company Julia's Restaurant Company Limited and in default of this agreement she had paid €5,000; that she was allowed possession of the restaurant when it commenced business on the 20th May, 2003, as a manager at an agreed sum of €350 per week; that Miss Puscas had undertaken to discharge all the outgoing, that she had failed to lodge the takings into the bank account of the first named defendant Julia's Restaurant Company Limited and that lack of recourse to the restaurant takings due to financial pressures meant the plaintiff company had not been able to discharge the rental due as of the 1st July, 2003. In her replying affidavit sworn on the 22nd August, 2003, Miss Puscas stated she was introduced to Djemal Mennad in January, 2003. There was an agreement that she would pay the sum of €60,000; that a new company would be established, Julia's Restaurant Company Limited, and that Djemal Mennad would procure an assignment of the lease from Rayan Restaurant Limited to Julia's Restaurant Company Limited. She stated that in pursuance of the agreement the company was incorporated on the 7th February, 2003. In performance of the agreement she paid €7,000 to Djemal Mennad on the 27th January, 2003, €30,000 on the 13th February, 2003, and a business acquaintance of Miss Puscas Joanna Roosan paid €8,000 to Djemal Mennad on a date in March, 2003. Furthermore funds totalling €5,650 were paid by two cheques to the plaintiff company on the 28th March, 2003. Miss Puscas avers that the total sum paid to the plaintiffs was €52,000. She also states that the restaurant premises were opened on the 20th May, 2003, against her wishes because the refurbishment was incomplete. She stated the procedure in respect of the daily takings in the restaurant was that the money would be counted each night and then either herself, Yaseen Belkacmai a nephew of Djemal Mennad, Fatima Zhora Azizi or Djemal Mennad would take the money home. Thereafter all takings were presented at a weekly meeting which took place on the premises every Monday. At that meeting Djemal Mennad would pay the staff their weekly wages and he took the money that was left over from the weekly takings. She also averred that a manual machine for processing payments by way of visa credit cards was furnished by Djemal Mennad, but this was for another business run by him called Prego and the payments made via this machine were never recoverable by her or Julia's Restaurant Company Limited. She stated that early in the morning of the 24th July, 2003, Mr. Mennad aggressively forced entry into the premises, moved substantial items and replaced the locks on the premises. Ms. Fatima Zhora Azizi in her affidavit accepted that Mr. Mennad had entered the premises on the 23rd July, 2003, but stated that he had only removed the cash register. On the 24th July, 2003, the landlord, Mr. Flynn, re-entered and took possession of the premises for alleged breach of the terms of the lease for non payment of rent. Subsequently Miss Puscas remained as a caretaker of the premises running the restaurant. She asserted in her affidavit that while it was agreed she would be responsible for the day to day running of the restaurant she was unaware of any correspondence received at the premises.

18. In her replying affidavit Fatima Zhora Azizi denied the allegations of Miss Puscas.

19. There was a fundamental conflict of evidence between the shareholders in Julia's Restaurant Company Limited, which had to be resolved by Judge Reynolds at the plenary hearing of the action, where both Miss Puscas and Mr. Mennad gave evidence. On the version of the events put forward by Ms Azizi she accepted the plaintiff, although responsible for the rent under the lease, had ceded control of the restaurant either to Julia's Restaurant Company or to Miss Puscas, and did not have control over the takings of the restaurant.

The Allegations of Negligence in the Conduct of the Circuit Court Proceedings

20. I have already set out in my original judgment the allegations against the defendants in the plenary summons.

21. The first defendant did not come on record for the plaintiff until the 19th September, 2003, but began to act at the end of August, 2003. He instructed the second named defendant. The defendants had no involvement with the orders of Judge Buttimer at Carlow Circuit Court on the 15th August, 2003, or Judge Haugh's order of the 21st August, 2003. This Court has already referred in the previous judgment to a number of dates when the proceedings were adjourned. The delay between the 27th of August, 2003, and the hearing of the substantive Circuit Court proceedings on the 16th and 17th November, 2004, could not be attributed to the defendants.

22. This Court can see nothing untoward with the pleadings in the Circuit Court proceedings, a full copy of which were provided to the Court.

23. Judge Reynolds had to decide on the credibility of the evidence of either Djemal Mennad or Claudia Puscas. She also had to decide on the credibility of the invoices produced by Djemal Mennad in respect of the work undertaken at the restaurant premises. This Court appreciates that the plaintiff and the directors were aggrieved at the result of the Circuit Court proceedings and felt genuinely hard done by. The only note of the judgment of the court is exhibited in the affidavit of the first named defendant of the 23rd of March, 2012. The note is consistent with the order of the court of the 17th of November, 2004. The judge accepted the evidence of Claudia Puscas, and found in fact and in law the plaintiff had forfeited the lease.

The Appeal to the High Court and the Motion for Security of Costs in the High

24. The Court again has set out the history of the proceedings on appeal to the High Court in its previous judgment of the 17th January, 2012, and has distinguished it from the Circuit Court proceedings because it was based on affidavit evidence and a written judgment was furnished.

25. The negligence alleged is set out in the statement of claim delivered on the 23rd December, 2010 and summarised in the judgment of this Court of the 17th January, 2012.

26. A key issue in the motion for security for costs hearing in the High Court was the financial viability of the plaintiff company.

27. In this Court's judgment of the 17th January, 2012 at paragraphs 99, 100 and 101, the Court referred to the lack of financial information about the company exhibited which consisted of three daily reports and a spread sheet. This Court expressed surprise at this.

28. In paragraph 100 of the court's judgment it set out what financial information it expected to be exhibited.

29. In the course of the further hearings before this Court since its judgment, it has become apparent that the plaintiff company did not comply with its statutory obligations pursuant to s. 202 of the Companies Act 1990, as amended.

30. None of the following were produced to this court:-

1. Primary accounts of the company from its incorporation, showing initial capital investment and the disbursement of that capital through the company's accounts.
2. Tax returns.
3. Value added tax returns.
4. Audited accounts of the company.
5. Statutory or abridged accounts of the company for the relevant period, the subject matter of these proceedings, namely the date of the incorporation of the plaintiff company up to the 24th July, 2003.
6. No bank statements have been produced. Mrs. Azizi in her supplemental affidavit has stated, bank statements were sought from the Bank of Ireland, but were no longer available.
7. This court has been able to clarify the rent payments and date paid.
8. The court has been provided with information, the company drew down a loan from the Bank of Ireland of €82,000. There has been no supporting documentation showing its disbursement through the company's accounts.
9. There is no primary evidence produced to this court of the lodgement of monies received by the plaintiff company or its director Djemal Mennad in respect of the sale of the Prego restaurant or their disbursement displayed by way of audit or books of account.
10. The plaintiff company has provided a financial report prepared by Nick Linnane, which the court will refer to later.
11. The plaintiff company has not provided any details of payments made to the first and second named defendants in the circuit court proceedings Julia's Restaurant Company Limited and Claudia Puscas.

31. In her affidavit of the 11th April, 2005, filed in defence of the motion for security for costs, Fatima Zhora Azizi outlined that Nick Linnane & Company, Main Street, Moate, Co. Westmeath, were the accountants of the plaintiff company. She averred that no tax returns had been filed on behalf of the company and that no assets were held by the plaintiff other than the lease at issue in the original proceedings.

32. Djemal Mennad, the director with whom the first and second named defendants state they were interacting, has not sworn any affidavit in these proceedings.

The Legal Principles

33. The legal principles on the jurisdiction of the court to strike out proceedings pursuant to O. 19, rr. 27 and 28 of the Rules of the Superior Courts ("RSC") and the inherent jurisdiction of the court in a case where a party has failed to disclose a reasonable cause of

action or because the action is frivolous or vexatious, have been set out in the Court's judgment of the 12th January, 2012. The Court also summarised the law on security for costs.

34. It is useful however to consider in detail the law on "special circumstances" where a plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the defendants.

35. This case is unusual as the wrong alleged is once removed from the original wrong. The plaintiff argues that no security for costs should be fixed because the defendants acted negligently and thus deprived the plaintiff of rectifying the wrong of the alleged unlawful re-entry of the landlord, Mr. Flynn, to the premises.

36. Counsel for the plaintiff and defendant have made submissions, at variance from each other, on the appropriate date the financial viability of the company is examinable. Counsel for the defendants argued it is on or before the alleged wrong in this case the 24th July, 2003, whereas counsel for the plaintiff argued it is quite appropriate to examine and to take into account the future projected profits of the company if it had continued to run the restaurant.

37. As is clear from the Supreme Court judgment of Finlay C.J. in *Jack O'Toole Ltd v. MacEoin Kelly Associates* [1986] I.R. 277, at 283 the burden of proof rests on the plaintiff company in respect of establishing special circumstances justifying the refusal of an order for security for costs:-

"It is clear that there is no presumption, either in favour of the making of an order for security for costs or against it, but I am satisfied that where it is established or conceded, as arises in this case, that a limited liability company which is a plaintiff would be unable to meet the costs of a successful defendant, that if the plaintiff company seeks to avoid an order for security for costs it must, as a matter of onus of proof, establish to the satisfaction of the judge the special circumstances which would justify the refusal of an order".

38. In considering whether the plaintiff in that case had discharged this onus Finlay C.J. commented at p. 284:-

"Having regard to these circumstances, it does not seem to me a sufficient discharge of the onus of proof which I deem to be on a company against whom an application is made under s.390, to make a mere bald statement of fact that the insolvency of the company has been caused by the wrong the subject matter of the claim".

39. In holding against the plaintiff company in that case Finlay C.J. was critical of the fact that the plaintiff company did not adduce any accountant or auditor evidence to substantiate its claims that its inability to meet an order for costs arose from the alleged wrongs committed by the defendants which formed the subject matter of those proceedings. The learned Chief Justice stipulated the requirement to produce evidence to show that at the material time the company was in fact earning an income and could pay its liabilities and expenses as they fell due. At a minimum the learned Chief Justice expected accounts and statements of the plaintiff company to be adduced in evidence.

40. In *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7 (Unreported, High Court, Clarke J., 16th January, 2009) at para. 3.4 Clarke J. set out a four-step test in respect of which a plaintiff seeking to mount such an argument is required to satisfy:-

"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".

41. Furthermore, at para. 3.6 Clarke J. stated:

"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".

Again, at paras. 3.8 to 3.9 Clarke J. stated:

"... in attempting to show special circumstances, it was incumbent on such a company to show, at least to a prima facie level, that were it not for the wrongdoing asserted it not only would not have lost money, but would have made sufficient profits so as to be in funds sufficient to pay the likely costs of a successful defendant.

It seems to me that if a plaintiff is not in a position to establish such a fact (on a prima facie basis), then a plaintiff will not have been able to show that its inability to pay costs is due to the wrongdoing which is at the heart of the proceedings".

Clarke J. at para. 3.10 stated:

"In particular in a case where, prior to any possible wrongdoing, the plaintiff company had no significant net assets, it seems to me that it follows that such a company will need to establish that, in the absence of the wrongdoing, it would have acquired net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant were successful".

42. In this case as the defendants have established a *prima facie* defence, and that the plaintiff company cannot pay costs if

unsuccessful - the onus therefore rests on the plaintiff to establish the special circumstances. The plaintiff relies on the pleadings and the report of Nick Linnane in this respect.

Financial Analysis Report Nick Linnane

43. Nick Linnane, Chartered Accountant, prepared a financial analysis report and was cross examined in respect of same. He prepared the report on a reconstruction of the accounts of the plaintiff company based on information provided to him by the directors. He did not have any primary books of account or bank statements.

44. The documentation relied by him in compiling the report is as follows:

1. Invoices for the refurbishment of the premises due or paid at the date of re-entry, most of which were produced in evidence at the original Circuit Court hearing.
2. Information provided by the creditors of payment of the invoices.
3. Information from Bank of Ireland, Ballinasloe about a loan.
4. Information provided both orally and by Hogan & Son, Solicitors in respect of the sale of the Prego restaurant.

45. Mr. Linnane also attributed to the plaintiff company the restaurant earnings from the date of its opening on the 20th May, 2003, to the re-entry of the landlord on the 24th July, 2003.

46. For the purposes of the financial analysis report and for the preparation of the profit and loss account and statement of affairs, Mr. Linnane accepted as genuine all the invoices furnished to him by the plaintiff and did not take into account the decision of the Circuit Court on the 17th November, 2004. He estimated the business set up costs at €149,169. He stated these were funded by a Bank of Ireland loan of €82,000.

47. He also took into account the funding by way of the net proceeds of the sale of the Prego restaurant in the sum of €66,969. In respect of this sum he stated initially that it was a director's loan from Djemal Mennad to the plaintiff and that is how it is constituted in the written statement of affairs. He later stated in evidence that the plaintiff company ran the Prego restaurant and that the proceeds of sale were lodged directly to the benefit of the company. Mr. Linnane accepted that he had no independent means of verifying this flow of the monies. He stated that the net profit of the restaurant for the period 28th May, 2003, to the 23rd July, 2003 was €2,412.

The expert report of John Harding, Chartered Accountant 14th April, 2012

48. Mr. Harding prepared an expert report reviewing the report of Mr. Linnane.

49. Mr. Harding stated that an accountant was required to exercise professional scepticism where there was conflicting evidence and not to work on the basis of assumptions. He expressed the opinion that there was an over-statement in relation to the cost of the development of the high street restaurant premises because of the risk of expenditure being mixed up with that of the Prego restaurant which had been sold. He stated that verification would normally take place by examining the bank statements, if those were not available, the prime books of account, or, if those were not available, tax returns, VAT returns and also the annual statutory requirement of the company to produce annual accounts.

50. In respect of the statutory accounts which were prepared for the Companies Registration Office ("CRO") for the year end 30th April, 2006, Mr. Hayden stated that these were a carry forward from a previous set of accounts and asserted that there was a conflict between the statement in Mr. Linnane's statement of affairs of the value of the fixed assets of the company and the value of the assets as set out in the accounts for year end 30th April, 2006 lodged in the CRO. He also highlighted the conflict between the report of Mr. Linnane and the affidavit sworn by Ms. Azizi on the 13th August, 2003, in respect of access by Rayan Restaurant Limited to the takings of the restaurant. Mr. Harding at paragraph 6.12 to 6.18 of his report and in his evidence examined the exercise undertaken by Mr. Linnane in assigning all the vouchers claimed by the plaintiff as expenditure of Rayan Restaurant Limited. His conclusion was that if the plaintiff was relying only on the Bank of Ireland loan of €82,000, that from the end of March, 2003 it would have required more credit.

51. If the net proceeds of the sale of the Prego restaurant of €67,170 were made available to the company, it would have been in a position to match its operating funding requirements of €40,000 at the end of July, 2003 but only as a result of stalling payments to its trade creditors. He stated in his opinion the company was surviving on the basis of creditors standing back and the fundamental reason for the financial difficulty was under-capitalisation and a loss of control over the takings of the restaurant.

52. Mr. Hayden also gave an opinion as to the ability of the plaintiff to discharge a costs order in the sum of €100,000. He formed the opinion that to finance this payment of costs out of future profits of the company it would take approximately six year's profits based on Mr. Linnane estimate.

Decision

53. The Court has assessed the evidence separately in respect of the Circuit Court proceedings and the motion for security for costs in the High Court because of the different character of the proceedings. On the Circuit Court proceedings, the Court's decision is based on findings of fact which are evident from the documentation or are uncontradicted. This Court expresses no opinion on the validity of the invoices for work done to fit out and stock the Di Bella restaurant other than to state that at the Circuit Court hearing their validity was in dispute and that court did not find favour with the credibility of Djemal Mennad.

54. The plaintiff's action for negligence against the defendants on the conduct of the Circuit Court proceedings has all the hallmarks of a collateral attack on a previous judgment of a court of competent jurisdiction, namely the Circuit Court judgment of the late Judge Reynolds of the 17th November, 2004. The Court has already found that if Judge Reynolds so wished, she had the jurisdiction to restore the lease to the plaintiff. The Circuit Court action was properly pleaded. The defendants were instructed approximately one month after the re-entry when significant court orders had already been made and after a detailed affidavit had been sworn by Miss Claudia Puscas contesting the plaintiffs' version of events. The defendants anticipated an early hearing of the substantive proceedings and the delay in the hearing date was due to matters beyond their control. There was a full contested hearing in the Circuit Court when Djemal Mennad and Claudia Puscas gave evidence and were cross examined. There was a significant conflict of evidence between these two principal witnesses. There were significant shortcomings in the plaintiff company's bookkeeping and compliance with statutory requirements. The action was complex and involved a dispute between the directors or promoters of Julia's Restaurant Company Ltd, separate from the plaintiff company. This dispute lead directly to re-entry by the lessor in circumstances

where the lease permitted same without notice and within a short time frame after the rent became due, and in circumstances where the plaintiff had breached an agreement to pay quarterly rent by standing order.

55. In addition to doing justice between the parties there is an important public interest in ensuring that the decisions of courts of competent jurisdiction are not undermined.

56. The orders sought by the defendants to strike out the proceedings insofar as the Circuit Court proceedings are concerned are well merited.

57. In respect of the motion in the High Court for security of costs, assessment of the financial viability of the company is essential.

58. This court has serious concerns about the financial analysis report of Nick Linnane.

59. The failure of the plaintiff company to comply with s. 202 of the Companies Act 1990, as amended, and not to have provided any primary information whatsoever with the exception of the payment for two instalments of rent is significant.

60. The plaintiff company has been given significant concession by the Court, because the financial information exhibited during the course of the original hearings on the 9th, 10th and 29th November, 2011 could have led to an immediate order for security for costs.

61. It is also significant in the course of the High Court proceedings, record number 3548P/2005, in the appeal to the Supreme Court filed on the 20th November, 2006, there were no bank statements whatsoever exhibited in the book of appeal, at a time when they would have been readily available from the relevant financial institutions.

62. This Court readily understands the grievance felt by the plaintiff company where they assert that significant funds were invested in the fitting out of a restaurant, which ended up out of their control.

63. The report and the evidence of Mr. John Harding, and his critique of Mr. Linnane's report are credible.

64. On the plaintiffs own case the company did not have access to the restaurant takings but remained liable for the rent. The unfortunate dispute between Djemal Mennad, Fatima Zhora Azizi and Claudia Puscas had serious consequences for the financial health of the plaintiff company. This Court holds that the dispute was fatal to the financial health of the company and led directly to the re-entry by the landlord. While there is no doubt that monies were expended on the refurbishment of the High Street premises, the absence of any form of primary books of entry and bank statements is very unsatisfactory. This Court is satisfied that the plaintiff company was in a perilous financial position as of May/June 2003 and would not have been in a position to discharge a substantial order for costs. The plaintiff company has not discharged the onus placed on it to show that there are special circumstances which allows it to proceed without an order for security for costs in favour of the defendant.

65. Both the first named defendant and the second named defendant in their supplemental affidavits of the 23rd March, 2012, state that on numerous occasions the plaintiff company was advised of the need to provide evidential proof to substantiate its claims as to the monies expended in establishing the restaurant. Both are also adamant that the plaintiff was advised of the reason for defending the security for costs application in 2005, on the basis of the special circumstances defence and the reason why the plaintiff could not pay security for costs was owing to the very wrong it alleged against the defendants in the original proceedings. The first named defendant exhibits a number of letters and memos sent to Djemal Mennad in the course of the Circuit Court proceedings asserting the difficulty in getting the plaintiff company to provide financial information.

66. The second named defendant in the supplemental affidavit sworn on the 23rd March, 2012, has stated that he advised Djemal Mennad of the special circumstances defence and the requirement for financial information. This has not been contradicted by any affidavit evidence of Djemal Mennad or, for that matter, Fatima Zhora Azizi. The first named defendant in his affidavit of the 23rd March, 2012, also stated that both he and the second named defendant advised Djemal Mennad in respect of these requirements.

67. In respect of the first named defendant the court notes the letters and memos for file exhibited in the supplementary affidavit of Gerald Kean, the first named defendant, sworn on the 23rd March, 2012. The court regards the memos as minimum evidence and it is clear from the letters to Djemal Mennad, the director of the plaintiff company, that he was asked on numerous occasions to provide financial information and that he was slow to provide same. The motion for security for costs was issued by the third named defendant in the Circuit Court proceedings on the 9th February, 2004, returnable originally for the 21st February, 2004. The first named defendant wrote to Djemal Mennad on the 14th February, 2005, enclosing a notice of motion and affidavit seeking security for costs. A meeting was arranged with Mr. McGagh B.L. for the 17th February, 2005, at 4 o'clock. An affidavit was sworn by Fatima Zhora Azizi on the 18th February, 2005, and furnished to Marcus Lynch, Solicitors on the 18th February, 2005. There is also a memo to file of the 18th February, 2005, which states:-

"Please make sure that condition 7 is correct, my understanding is that we ran into problems in the Circuit Court because the clients produced receipts for equipment and/or renovations to the restaurant which subsequently to be incorrect. I want to make sure that the figure of €131,000 is in fact correct. Please check this with the client and with Francis. I have spoken with the clients and I am not at all satisfied we have any chance of success in relation to this matter. The company seems to have no assets and I have been furnished with no information that the company is in a position to pay any of its debts. For this reason I want to make sure that the figure is correct as I don't want the clients nor ourselves embarrassed again in court if the information given to us is incorrect".

68. Subsequently on the 1st April, 2005, Andrew Synnott of Kean Solicitors wrote to Mr. Nick Linnane sending a notice for particulars from Marcus Lynch Solicitors of the 25th February, 2005. Mr. Linnane applied immediately by letter of the 1st April, 2005, stating that he was not aware of the location of the statutory books, that he had not submitted any tax returns, he had not carried out any audit and that the 2002 and 2003 annual returns had been submitted but he had no audited financial statements. He indicated that he had some limited bank statements held at his office. He had no knowledge of current trade debts nor any detailed asset registered to hand. A further replying affidavit of Fatima Zhora Azizi was sworn on the 11th April, 2005.

69. It is clear from the judgement of Budd J. that the second named defendant argued before the court the special circumstances defence and made submissions on the law.

70. The second named defendant has not exhibited any written advices to the defendant on the special circumstances defence. However the court is satisfied there was a consultation on the 17th February, 2005 and that an affidavit was drafted and sworn the next day the 18th February, 2005, by Fatima Zhora Azizi. In that affidavit at paragraph 8 it states:-

"The plaintiffs financial difficulties are as a direct result of the defendant's actions, the subject matter of the within proceedings".

That asserts the special circumstances defence.

71. This court is satisfied that the allegation of negligence against the second named defendant is vexatious and frivolous in respect of his advice in defending the motion for security for costs in the High Court.

72. In respect of the first named defendant there is a stateable but tenuous case that the financial information then at the disposal of the first named defendant, namely the invoices and whatever limited bank statements were in the possession of Nick Linnane, could have been put on affidavit and exhibited before the High Court.

73. However as evidenced by the decision of this court on the merits of the motion for security for costs, even with that information at the disposal of Budd J., it is unlikely that the plaintiff could resist an order for security for costs.

74. While it is a stateable claim, even if tenuous, if the court refuses to grant relief to the first named defendant on the aspect of the statement of claim referring to the proceedings in the High Court, it would have to direct an order for security for costs.

75. In view of the finding already made by the Court in its judgment of the 17th January, 2012, that this company is insolvent and has just been continued for the purposes of litigation, I am of the view that I should exercise my discretion and relying on the inherent jurisdiction of this Court to ensure there is no abuse of process of the courts, strike out the plaintiff's action also in its entirety against the first named defendant.