THE HIGH COURT

Record No: 2012 1540P

Between:

QUINN INSURANCE LTD (UNDER ADMINISTRATION)

Plaintiff

- and -

PRICEWATERHOUSECOOPERS (A FIRM)

Defendant

Judgment of Mr Justice Robert Haughton delivered this 30th day of January, 2018.

1. In this application, the defendant seeks security for costs pursuant to Section 52 of the Companies Act 2014, which states: –

> "Where a 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 or her defence, require security to be given for those costs and may stay all proceedings until the security is given."

By agreement between the parties, this judgment deals only with the issue of entitlement to security for costs, and not with quantum of security.

Background

2. The plaintiff is a limited liability company incorporated in the State in 1995. It was a substantial insurance company underwriting business both inside and outside the State. By order of the High Court dated 3 March, 2010, it was placed under the statutory administration of joint administrators Paul McCann and Michael McAteer ("the joint administrators") in accordance with the Insurance (No. 2) Act 1983. Mr. McAteer has averred that the plaintiff is insolvent and has been reliant on obtaining funding from the Insurance Compensation Fund ("ICF") to satisfy claims and wind down the plaintiff's business, most of which has now been sold off.

3. The defendant is a professional services firm that provided auditing services to the plaintiff and related companies during the period 2005-2008.

4. The plaintiff issued the Plenary Summons herein on 15 February, 2012, claiming damages. It was served on 10 July, 2013, and an appearance was entered on 17 July, 2013. The proceedings were admitted to the Commercial Court on foot of an affidavit in which Mr McAteer averred that the action would be "very large and very complex", involving a pool of some 40 million documents which would need to be reviewed on discovery. A statement of claim was delivered on 24 September, 2013, and after extensive exchange of particulars a defence was delivered on 1 August, 2014. Thereafter, a motion brought on behalf of the defendant seeking to compel the delivery of particulars was heard by Costello J. Her order, requiring the plaintiff to provide certain particulars, was appealed by the plaintiff to the Court of Appeal, and in a judgment delivered by Hogan J. on 22 March, 2017, was successful in part only.

Main pleaded claims

5. In these proceedings the plaintiff claims damages for alleged breaches of contract, breach of duty and breaches of statutory duty, misrepresentation, negligent misstatement or unlawful interference with the plaintiff's business and economic interests, arising from the manner in which the defendant conducted its audits of the plaintiff's Financial Statements and audited certain Forms ("Regulatory Returns") statutorily required to be submitted to the Financial Regulator of insurance companies for the financial years ending 31 December 2005, 2006, 2007 and 2008 ("the material period"). The plaintiff's claim is that the Financial Statements did not show a true and fair view of the state of the plaintiff's affairs and/or that the Regulatory Returns did not disclose the true financial position, as a result of which the plaintiff did not maintain assets sufficient to cover the "Minimum Solvency Margin" or "Adequate Solvency Margin" required by the 1994 Regulations or 1995 Regulations, or did not take such steps as the Financial Regulator would have required had it been aware that the solvency margin was inadequate. There are two elements to the claims:

(1) Technical Provisions

i. In its Financial Statements the plaintiff was required to include Technical Provisions, that is to say, a total of the minimum levels of reserves that as a non-life insurance company it was statutorily obliged to maintain in order to ensure that claims would be covered . The estimation of Technical Provisions is complex and involves actuaries. In the first instance the estimation and "booking" of Technical Provisions was undertaken by the plaintiff, supported by the actuarial opinion of Milliman Advisors Limited ("Milliman").

ii. As part of this element it is alleged, *inter alia*, that there was significant underestimation of the level of reserves caused by deficiencies in the plaintiff's reserving department; by the methodology employed by Milliman, and/or the specific actuarial approaches adopted by Milliman in arriving at its best estimates which failed to take into account error or the likelihood of errors in the source date supplied by the plaintiff; by the percentage margins over Milliman's best estimates applied by the plaintiff to the Booked Technical Provisions; by the way in which the plaintiff incentivised its claims handling staff; and by the manner in which it appointed staff to technical positions without the requisite experience.

iii. It is alleged that the defendant failed to carry out appropriate tests to evaluate the Technical Provisions as estimated by Millimans and adjusted by the plaintiff, and failed to recognise or report to the plaintiff or the Financial Regulator on the inadequacy of the Technical Provisions. It is alleged that the opinion given in the accounts for the years 2005 to 2008 should have stated that the defendant had not reviewed the plaintiff's claims reserving methodology, or interrogated or reviewed the plaintiff's own assessment of the plaintiff's required technical reserves sufficient to discover significant underestimation.

iv. It is claimed that there was significant and material understatement of the Technical Provisions for the material period, such that the plaintiff's claim liabilities were materially underestimated in the audited Financial Statements for the material period, in Forms 6,10 and 11 audited by the defendant and comprised in the Regulatory Returns. The plaintiff relies on re-

estimation by its expert actuary Mazars LLP ("Mazars", a UK firm in the Mazars Group) of what it asserts should have been the Technical Provisions.

(2) Guarantees given by plaintiff's subsidiary companies

i. Guarantees were given during the material period initially by four direct or indirect subsidiaries of the plaintiff, being companies holding property assets forming part of the plaintiff's technical reserves, in favour of the wider Quinn Group of companies. In 2005, these guarantees covered €655 million of debt. The scope of the guarantees was extended in the years 2006 and 2007, and in 2007 the debt of the wider Quinn Group the subject of these guarantees increased to €1.29 billion. In 2008, the plaintiff authorised four additional subsidiary companies to grant guarantees over the same amount as had been guaranteed by the original guarantees in 2007.

ii. The defendant audited the four subsidiaries that originally provided the guarantees, and also audited the plaintiff's accounts, for the material years.

iii. It is pleaded that the defendant was aware or ought to have been aware of the existence of the guarantees but, in breach of duty, failed to recognise or identify the implications and consequences of them for the plaintiff's financial statements; failed to note the guarantees in the plaintiff's accounts; failed to qualify the accounts so as to give a true and fair view of the plaintiff's financial situation; failed to qualify its opinions in the financial years 2005 to 2008; and failed to report to the plaintiff's board and Financial Regulator on the significance and implications of the guarantees. In wrongly opining as to the propriety of the plaintiff's accounts, it is alleged that the defendant failed to alert the plaintiff's board or the Financial Regulator of deficiencies in the Technical Provisions.

6. As a result of the failure of the plaintiff to comply with the regulatory regime relating to reserves, the plaintiff claims that it has had to set aside approximately €800 million in additional reserves. Its damages claim in these proceedings is quantified in Replies to Particulars of 22 October, 2014, in the sum of €900 million.

7. Before addressing the defences raised by the defendant, and the evidence adduced to establish *prima facie* defences, it is appropriate to consider the legal principles that guide the court in considering this application.

Security for costs – general principles

8. For the purposes of this application, section 52 substantially re-enacts section 390 of the Companies Act, 1963. Accordingly the court has regard to the exhaustive jurisprudence that has built up over time in relation to the granting of security under the former section, and generally in relation to the granting of security of costs.

9. The courts apply a threefold test that is most usefully set out in the judgment of Clarke J. (as he then was) in *Usk District Residents Association Limited & Anor v Greenstar Recycling Holdings Limited* [2006] IESC 1:

"6.2 The overall approach to security for costs was helpfully summarised by Morris P. in *Interfinance Group Limited v. KPMG Pete Marwick* (High Court, Unreported, Morris J. 29th June, 1998) as follows:-

"1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:

(a) that he has a *prima facie* defence to the plaintiff's claim, and

(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful;

2. In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus [r]ests upon the party resisting the order.

The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendants costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.

The list of special circumstances referred to is not, of course, exhaustive."

10. The onus is on the moving party to establish a *prima facie* case. This is of particular relevance to the present case where it is contended that insufficient evidence has been adduced by the defendant to demonstrate a *prima facie* defence. As to what evidence is required, Clarke J. addresses this in *Usk*:

"7.6 The second issue concerns the materials which it is appropriate for the court to consider in determining whether Greenstar may be said to have established a *prima facie* defence. It is well settled that it is insufficient for a defendant, or a party in a position analogous to a defendant, to simply assert that he has a defence. It is necessary that he establish, by evidence, a *prima facie* defence. In plenary proceedings it is inevitable that the moving party will require to file an affidavit setting out sufficient facts to enable the court to conclude that he has a prima facie defence. The mere denial in pleadings (if the case has reached that stage) of the plaintiffs claim will not, obviously, be sufficient. A mere assertion in a grounding affidavit that the defendant has a good defence will not establish a prima facie case to that effect."

In combined appeals *Newlyn Developments Limited & Marchbury Properties Limited v Murphy Concrete (Manufacturing) Limited* [2015] IECA 294 at paragraph 71, Ryan P. quoted with approval from *Tribune Newspapers (in Receivership) v. Associated Newspapers Ireland t/a Irish Mail* (unreported High Court, 25 March, 2011) where Finlay Geoghegan J. stated: –

"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 those facts. Mere assertion will not suffice."

At p.9 of her judgment she added:

> "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. Insofar as the Plaintiff is submitting 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."

11. Clarke J. in *Usk* also considered a defence resting on legal argument, and stated: –

> "7.10 It seems to me, therefore, that [it] is open to a moving party seeking security for costs to rely, for the purposes of establishing a *prima facie* defence, on any factual matters which are properly before the court (including any matters which are contained in affidavits filed in the substantive proceedings) 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 properly before the court."

12. If a *prima facie* defence is established, it is no function of the court to "forecast the outcome of the litigation or to pre-judge the facts or express an interim view on the questions of law involved… or…to evaluate the prospects of success" (Murphy J. in *Bula v Tara Mines* [1987] IR 494 at p.501, approved by McCarthy J. *Comhlucht Paipéar Ríomhaireachta Teo v Údarás na Gaeltachta* [1990] 1 IR 320, at 331 and 332, and by Clarke J. in *Usk* at paragraph 8.7).

13. The second element of the test is that the defendant must then adduce "credible evidence" that the plaintiff will not be able to pay its costs if the defence is successful.

14. Although not stated in section 52, it is well established that if the first two parts of the test are satisfied, the court retains a discretion to refuse security for costs in "special circumstances". In *Hidden Ireland Heritage Holidays v Indigo Services Ltd* [2005] 2 IR 115, at page 121 the Supreme Court stated –

> "The court may have regard to any relevant circumstance which, as a matter of justice, would cause it to conclude that the order should not be made."

The burden of persuading the court as to special circumstances rests with the plaintiff. Several categories have been identified in the case law, two of which are relevant to the present case. The first is where the plaintiff demonstrates that its inability to pay security for costs has been caused by the defendant's wrongdoing. The second is where a point of significant public importance arises centrally in the case and is such that it is in the public interest that it be resolved and determined in a court of law. The plaintiff also raised in written submissions delay in bringing the application as a ground for refusing the order sought. This can be a "special circumstance", but this argument did not find favour with the Court on paper and was not pursued.

***Prima facie* defence – objections to defendant's affidavit evidence and absence of independent expert evidence**

15. This application of security for costs is grounded on five affidavits sworn by Paraic Joyce, an audit partner in the defendant. At the outset it is necessary to address objections taken to Mr Joyce's affidavits.

16. Counsel for the plaintiff in oral argument, as part of a wider objection that the evidence put before the court in support of the application is mere assertion, and not backed up by any audit papers or independent expert evidence, made the objection that nowhere in this or any subsequent affidavits does Mr Joyce state the source or means of his knowledge, as required by Order 40 rule 4.

Order 40 rule 4

17. For a number of reasons I am not prepared to rule out of consideration the contents of Mr Joyce's affidavits on the grounds of perceived non-compliance with Order 40 rule 4.

18. First, this point was not taken in any of the three replying affidavits sworn by Mr McAteer over a period of 17 months. Doubtless had it been raised, Mr Joyce would have dealt with it in a replying affidavit.

19. Secondly, it was not raised in the plaintiff's written submissions. This is an important point given that this is the commercial court, and one of the primary purposes of the exchange of written submissions is to set out and give notice of arguments that will be relied upon, and to avoid so far as possible the raising of new arguments or trial by ambush. In fact, in a move of which the court disapproves, the point was not raised until after counsel for the defendant had moved the application and sat down.

20. Thirdly in paragraph 1 of his principal affidavit sworn on 23 March, 2016, Mr Joyce states:

> "1. I am an audit partner at the firm of PricewaterhouseCoopers, the Defendant in the above entitled proceedings. I have an in-depth knowledge of financial reporting, regulatory and other market issues relating to the insurance industry in Ireland together with over 20 years' experience in auditing and advising companies in the insurance sector. I am a Fellow of the Institute of Chartered Accountants in Ireland. I have spent my entire career as an accountant specialising in insurance and working in PwC's specialist Insurance Audit Practice. In particular, I have extensive experience of auditing and advising non-life insurance companies in the Irish market who conduct the same type of business as that conducted by the Plaintiff. I am authorised to make this Affidavit on the Defendant's behalf and I do so from facts within my won knowledge save where otherwise appears and where so appearing I believe the same to be true."

It is clear from this that Mr Joyce is a senior representative of the defendant, and that he is a very experienced auditor with particular experience of auditing, regulatory and other matters relating to the insurance industry in Ireland. It may indeed be said that he has expertise, albeit that he is not independent, in relation to these matters. He also says in this paragraph that he makes the affidavit "from facts within my own knowledge save where otherwise appears", and similar averments appear in his later affidavit. To this extent he has disclosed the source of his knowledge.

21. Furthermore, having read all of Mr Joyce's affidavits they contain such detail and references that I am persuaded and infer that he must have had regard to the documents that he exhibits and to which he makes reference, including core documents such as the plaintiff's audited accounts for the period 2004-2008, the accounts of Quinn Group Limited for the period 2005-2008, the relevant Audit Committee Reports to the plaintiff's Audit Committee, the content of relevant banking facilities and the Guarantee Agreements at issue, and communications between the defendant and the Financial Regulator regarding the plaintiff. By virtue of his stated qualification, knowledge, practice and expertise, I infer that he is familiar with the statutory, regulatory and industry standards

governing audit, and governing Technical Provisions in the context of insurance company reserves, at the relevant times. While it does not appear that Mr Joyce was personally directly involved in any of the audits in question, this does not render his affidavit inadmissible.

22. I am satisfied that this objection, even if technically correct, is made too late in the day and lacks substance. Moreover, as Denham J. stated in S. *O'Connor & Son Ltd v Whelan* [1993] 1 I.R. 560, at p. 565, while O.40 r.4 would apply to the majority of cases "…it does not appear to be an immutable rule". It is not therefore necessary for Mr Joyce, as was proffered on his behalf, to swear a further affidavit deposing as to his means of knowledge in respect of the matters set out in his five affidavits.

Audit papers

23. In relation to the audit papers, Mr. McAteer suggests at para.16 of his affidavit sworn on 6 May, 2016, that "PwC's audit working papers will very likely constitute the single most illuminating body of information in these proceedings", and are governed by the International Standard on Auditing (UK and Ireland) ("ISA"), yet none are exhibited. At para. 20 (e) (i) he again criticises the defendant for not referencing any audit working papers to support its position in relation to the quantum of insurance claims in the context of the Technical Provisions. It was therefore argued that there was no objective demonstration of evidence showing what the defendant actually did take into account in carrying out the audits. In response to this Mr.Joyce does not say in his affidavits whether or not he has had regard to the working audit papers - he is vague on this at para. 96 of his Affidavit sworn on 30 June, 2016, suggesting that "the defendant's internal preparations for the defence of these proceedings are not of relevance to the Plaintiff and are not an appropriate subject of speculation and conjecture on Mr. McAteer's part."

24. Despite this unsatisfactory response I do not accept the proposition that the defendant is obliged to reference audit working papers in order to succeed in showing a *prima facie* defence. The obligation is limited to demonstrating the existence of some evidence to show *prima facie* a full defence. This can come from other sources and I have listed in paragraph 21 above some of the core documents exhibited and relied upon by Mr. Joyce . He also exhibits in support of his averments: evidence of media coverage, which while not admissible at trial as evidence of its contents does point to the existence of evidence supportive of the defence; Minutes of the plaintiff's board and its subsidiary companies; Minutes of directors' meetings; Guarantees arising from Note Purchase Agreements; a 'Multicurrency Revolving Facility Agreement' in respect of the Guarantees and related letters; Transcripts from a hearing of the defendant's motion to compel particulars; an Article published by Milliman Advisors Limited ("Millimans") the plaintiffs actuaries; and a report of a 'High Court Search'.

25. Furthermore, the court is entitled to have regard to standards referenced by Mr. Joyce insofar as these provide objective support and/or a legal basis for the defences advanced. These include the ISA, Practice Note 20(I) issued by the Auditing Practice Board, and guidance note GN20 (ROI) Statement of Actuarial Opinion on Non-Life Technical Reserves. The same applies to relevant legislation, and in particular the European Communities (Non-Life Insurance Accounts) Regulations, 1995 (S.I. 202 of 1995).

26. The court must also be cognisant of the nature of a security for costs application. It is not meant to be a review, much less a detailed analysis or assessment, of the evidence that may be adduced by a defendant at trial, such as would effectively require defendants in this case to adduce what are likely to be very extensive working audit papers. It is also generally sought pre-discovery. Thus the plaintiffs have not yet been required to discover their records, including their internal working documents relating, for instance, to actuarial calculations, claims forecasts, and the preparation of Financial Statements and Regulatory Returns. It could be anticipated that if the audit working papers were referenced and exhibited (even in part) the volume of the grounding affidavits, replying affidavits and exhibits, which is already substantial, would have grown exponentially. This would run the risk of changing the scale of security for costs applications, making them unwieldy, and causing such applications to take up excessive court time. Such applications should be dealt with expeditiously and cost-effectively. At risk of repetition, the court's task is to consider the evidence as presented, and the inferences or arguments that flow from that, in ascertaining whether there is a prima facie defence, and as Ryan J. stated in Newlyn and Marchbury, "the burden is not a heavy one" (para.73).

Expert evidence

27. It is also objected that the application, based as it is on Mr. Joyce's affidavits, is "mere assertion" because his averments, opinions and the inferences that he says should be drawn, are not supported by any expert evidence to the effect that the defendant was not negligent or in breach of contract. It is contended that in proceedings concerning professional negligence, in which expert evidence will be crucial to the determination of the claims which relate to the duties and standards of auditors, actuarial matters, and the regulatory regime relating to insurance companies, the defendant's needed to adduce expert evidence to support the existence of a *prima facie* defence. Thus, in *Pebble Beach Owners Management Company v Neville & Ors* [2016] IEHC 446, a claim for security for costs was supported by evidence from an independent expert auditor refuting negligence, and this was relied upon by Baker J. It is pointed out that although expert accountants have been engaged by the defendant to support the defence, not even a preliminary report or opinion is exhibited.

28. While it might be expected in a professional negligence case, there is no hard and fast rule that a defendant should adduce independent expert evidence to support the existence of a *prima facie* defence. In the present case the Estimate of Noel Guidan, Behan & Associates Costs Accountants, indicates that the defendants anticipate obtaining expert opinion across a range of disciplines – accounting, auditing, actuarial, governance, non-life insurance (pricing, underwriting, claims handling, adjusting and forensic investigation), external insurance markets, regulatory standards and compliance. The extent of the work becomes apparent when the fee of the main expert, Ernst & Young, U.K., is estimated at Stg£4.5 million. I accept that given the high cost, and the enormous volume of papers that will have to be considered by the experts, it is unrealistic to expect the defendants to have obtained a comprehensive expert opinion - or the several experts' opinions (and Mr. McAteer accepts that the expert evidence required is multi-faceted) that might be required - at this point in the proceedings. This in itself would have been an enormous task. It would have been disproportionately expensive having regard to the fact that this is an interlocutory application. I am also mindful that having regard to the vast quantity of documents that will require consideration preliminary or provisional opinions may be of little assistance to the court. Indeed, the work of the experts would have to be redone following discovery. Moreover the production of expert evidence by the defendant would have run the real risk that it would lead to further affidavits with expert evidence adduced by the plaintiff to counter the defendant's experts. Thus while there may be some validity to the argument that the defendant should at least have referred to an expert's preliminary report, ultimately this should not of itself defeat the application.

29. I also take the view that, while he is certainly not independent, Mr. Joyce's experience and expertise is such as to entitle him to identify documents relevant to the proceedings, and the documents relevant to the auditing/accounting standards, to point to elements from which the court can objectively identify evidence, inferences or arguments giving rise to a *prima facie* defence. The defences that he seeks to make out are not therefore to be dismissed simply because of the absence of independent expert opinion. However that is a factor that the court must bear in mind, and which leads the court to view his evidence with caution and in some instances circumspection. I also take into account that independent expert evidence was put before the Court by the defendant in pursuing its application to compel particulars, in the form of an Affidavit sworn on 3 March, 2015, by Richard Indge, a fraud

investigation expert with Ernst & Young. This affidavit was put before me. In it Mr Indge deals with the complexities and uncertainties that relate to the estimation of claims and Technical Provisions.

30. In finding that none of the preliminary objections are sufficient to defeat the application for security for costs, the court will now turn to the test which must be satisfied in this regard.

Limb 1: Is there a *prima facie* defence demonstrated?
31. In order for the defendant to be granted security for costs they must first satisfy the court that a *prima facie* defence to the action exists. Having carefully considered the affidavits on both sides, and the exhibits, I have come to the conclusion that *prima facie* defences are raised in the following areas:

(1) The plaintiff's claim that the Technical Provisions were so underestimated by Milliman as to fall outside the reasonable range of estimates is based on an exercise undertaken by the plaintiff's expert Mazars that is flawed and based on retrospectivity (using contemporaneous information/data), and assertion. If the Technical Provisions for the material years were underestimated, or seriously underestimated (which the defendants do not accept), this was not due to any fault on the part of the defendant. In the first instance the responsibility for estimation of the "Booked Technical Provisions" in the Financial Statements and Regulatory Returns rested with the plaintiff. The directors acknowledged their responsibility for true and fair presentation in the Financial Statements of the financial position and results of operations in conformity with accounting practice, the Companies Acts, and the EC (Insurance Undertakings: Accounts) Regulations, 1996 ("the 1996 Regulations"). The directors represented that they were satisfied with the claims provisions in the balance sheet. The defendant's audit review of the estimates and its assessment of the overall reasonableness of the Booked Technical Provisions accorded with prevailing audit standards. The defendant is not an actuary or other expert where estimating Technical Provisions is concerned, and was entitled to rely on experts contracted by the plaintiff (Milliman) or by it. The defendant utilised appropriately qualified actuarial resources as part of its audit team to evaluate the Statement of Actuarial Opinion (which is required to be addressed to the Financial Regulator) provided by Milliman, the actuaries engaged by the plaintiff, and the defendant discussed its findings with the plaintiff's audit committee, with Milliman and with the Financial Regulator. Under the ISA the defendant was entitled to rely on the work of Milliman.

(2) The plaintiff prepared the Financial Statements and the Booked Technical Provisions for determining the reserves.

(3) The plaintiff concealed or failed to disclose material documents to the defendant, in particular relevant board minutes and related documentation, and relevant information in relation to loans, claims/reserves. In the foregoing there is a prima facie defence that the plaintiff failed to comply with its common law, contractual and statutory duties, including the duties under the Companies Acts, to prepare Financial Statements giving a true and fair view of the financial affairs of the plaintiff, and the duty to provide annual returns to the Financial Regulator in accordance with the EC (Non-Life Insurance Accounts) Regulations, 1995, and acted contrary to representations made by its directors in the Financial Statements. The Financial Statements produced by the plaintiff "failed to give a true and fair account".

(4) If there were mistakes in the audited accounts or Regulatory Returns leading to understatement of the Technical Provisions they were those of the plaintiff or Milliman, its actuaries.

(5) Insofar as the mistakes were those of Milliman, the Plaintiff instituted proceedings against them in 2013, but these were not served, and any fresh claim against Milliman may now be statute barred. Accordingly as a matter of law the plaintiff may be liable for Milliman's negligence under section 35 of the Civil Liability Act, 1961.

(6) The defendant gave no assurances or opinions to the Financial Regulator, but only filled in the Returns; the accounts were audited for the plaintiff, not for the Financial Regulator.

(7) As a matter of law the Financial Regulator was responsible for the adequacy or otherwise of the Technical Provision, and had statutory powers to intervene.

(8) The plaintiff was under no obligation to include or make reference in the plaintiff's Financial Statements or the Regulatory Returns to the Irish subsidiary company guarantees in respect of the Multicurrency Revolving Facility Agreement entered into on 10 October, 2005, to Senior Loan Notes under Note Purchase Agreements issued in 2005, 2006 and 2007 to Quinn Group Limited, or to the foreign subsidiary company guarantees given to secure the extension of these facilities in June, July and August 2008. Such Financial Statements were not required to contain the plaintiff's consolidated financial information as the parent of a group, as the plaintiff was a subsidiary of a group for which consolidated financial statements were prepared. Nor did the defendant's duty extend to inquiring into the Irish subsidiary company accounts.

(9) The defendant was unaware of the guarantees given by the foreign subsidiaries, whose accounts it did not audit, and information on which was withheld by the plaintiff.

(10) The plaintiff's board or its directors or some of them including executive directors were or ought to have been aware of the guarantees given by all of the subsidiary companies.

(11) The defendant was under no obligation to draw the existence of the guarantees of the Irish subsidiaries (as auditor) to the attention of the plaintiff or its directors.

(12) The instruction that the plaintiff alleges the Financial Regulator gave to PwC UK in October 2001 did not have the status or effect asserted by the plaintiff, but permitted the plaintiff to include the appropriate value of assets of its subsidiaries in the calculation of its solvency margin on a "look through" basis.

(13) Following the making by the defendant of its report to the Financial Regulator on 15 February, 2008 if there was error or breach of duty the Regulator would or ought to have alerted the plaintiff and defendant, and the plaintiff thereafter had heightened duties to consider intercompany exposures.

(14) Section 391 of the Companies Act, 1963 (now section 233 of the Companies Act, 2014), which empowers a court to grant relief from liability, in whole or in part, to an officer of a company if satisfied that the officer acted honestly and reasonably.

(15) Losses deriving from gifts or loans made by the plaintiff were not caused by any negligence of the defendant. Gifts made by the plaintiff in 2008 were made with the knowledge of the Financial Regulator on the basis that they would be used to reduce outstanding loans of Barlo Financial Services Limited to the plaintiff. Gifts made to other companies within the wider Quinn Group involved decisions by the plaintiff's management.

(16) Losses arising more than 6 years prior to the institution of proceedings may be barred by section 11 of the Statute of Limitations 1957 (as amended).

(17) As a matter of law, loss is limited to the loss of the shareholder's equity in the plaintiff, and does not extend to creditor's losses.

32. In coming to this conclusion I have noted the facts deposed to by Mr. McAteer to counter Mr. Joyce's evidence, and to the counter legal arguments. However it is not for this court to attempt weigh the evidence and argument and still less so to adjudicate on the opposing positions. Nor is it appropriate for the court to give more detailed reasoning for finding that a prima facie defence is made out, or to express any views on the strength or weakness of the parties' respective claims and defences. Further while a defence such as that of contributory negligence may be partial only, I am satisfied that individually or cumulatively these prima facie defences relate to the entirety of the plaintiff's claim. Finally the fact that the court has not adverted to all defences canvassed on affidavit should not be taken as implying any view as to those defences.

Plaintiff's inability to pay the defendant's costs if the defendant succeeds

33. The second limb of the test for security for costs relates to the inability of a plaintiff to pay costs to a successful defendant. The onus is on the defendant to satisfy the court by credible testimony that there is reason to believe that the plaintiff may be unable to satisfy any adverse costs order made in favour of the defendant. In his principal affidavit sworn on 23 March, 2016, Mr Joyce exhibits an "Estimate of Defendant's Probable Party and Party Costs of Defending the Plaintiff's Claim Herein" prepared by Mr Noel Guiden of Behan & Associates. Mr Guiden's estimate is based on Discovery on the plaintiff's side in the range of 30 to 40 million documents, potentially up to 20 expert witnesses for the defence, and a trial lasting 150 days. He estimates solicitor's professional fees of €10.715 million, counsel's fees in the order of €4 million, expert witnesses with fees in the order of €6.5 million, and IT and Electronic Data services costing in excess of €7.5 million. His total estimate is for €30,138,200, exclusive of VAT.

34. By agreement between the parties at the hearing before this court I was not required to address the possible quantum of security for costs, but only the question of whether in principle security for costs should be ordered. Presumably for this reason the plaintiffs did not adduce evidence to counter Mr Guiden's Estimate. However I accept, as does Mr. McAteer on behalf of the plaintiff, that these proceedings will entail very extensive discovery, and if they proceed to trial will centre on expert testimony on *inter alia* insurance/technical reserves, the management and handling of insurance claims, auditing, and actuarial and regulatory matters concerning the insurance business. While it may be possible to agree some of the expert evidence it is likely that the core elements will be disputed and that there will be a lengthy trial. I accept for the purposes of present considerations that the defendant's costs and expenses could run into many millions.

35. As to the plaintiff's financial position, in the affidavit that he swore on 24 July, 2013, in support of the application to admit this matter to the Commercial Court, Mr McAteer at paragraph 45 avers as to his belief that the Plaintiff was insolvent for a significant period of time before it went into administration. From his later affidavits it appears that the joint administrators were obliged to obtain funding from the ICF to pay a sum of €201 million to the Quinn Group creditors in order to secure the release of the guarantees over the plaintiff's subsidiary companies. In order to satisfy its obligations to policy holders, further monies in excess of €1.1 billion were obtained from the ICF. As the ICF did not have sufficient funds, monies were made available to it by the Minister for Finance from the Exchequer. Using such funds the administrators dealt with claims and stabilised the plaintiff's insurance business prior to selling it off. The main sale of the plaintiff's general insurance business was to Liberty Insurance. The disposal of the last of the plaintiff's insurance liabilities (the run-off of UK and European policies, disposed of in "the Catalina transaction") occurred in July 2015 (following approval by the President of the High Court on 17 June 2015), and Mr. McAteer avers that "that transaction brought stability to the Plaintiff's affairs, which are no longer affected by liability under insurance policies" (para. 13 of his affidavit sworn on 6 May, 2016).

36. In the most recent Consolidated Financial Statements of the plaintiff for the year ended 2014, filed in the Companies Registration Office on 29 October, 2015, in relation to the cost to the ICF, the Joint Administrators state: –

> "As disclosed in the financial statements of the Company for the year ended 31 December 2012, the Joint Administrators estimated in July 2012 that the call on the ICF was likely to be in the range of €1.1 bn – €1.3 bn but that the total call could reach or exceed €1,650m. The Joint Administrators are currently of the view that the ultimate call on the ICF will be in the range of 1.1 bn – 1.3 bn."

At paragraph 5 of his first replying affidavit Mr McAteer avers that the "Joint Administrators estimate that the final cost to the ICF will be in the order of €1.1 billion".

37. Since the last disposal of the plaintiff's insurance business, the defendant became concerned that the Central Bank might initiate a winding up of the plaintiff, and that the defendant would be an unsecured creditor with little or no prospect of recovery of any costs awarded in its favour in these proceedings. Commencing with a letter of 16 June, 2015, the defendant's solicitors undertook correspondence with the plaintiff's solicitors seeking assurances that sufficient funds would be set aside. In its replies the plaintiff's solicitors contested that there was any basis for such assurances and contended that "if its financial condition were such as to warrant security, that condition would have been caused by your client's wrongdoing". Ultimately assurances formally sought in a letter of 29 February, 2016, were declined, and the plaintiff's solicitors Maples stated in their letter of 18 March, 2016 –

> "We pointed out in subsequent correspondence that there was no basis for such a request both *by virtue of the funds available* and the fact that were it the case that the plaintiff had any difficulty in meeting the costs, such financial position is, on the plaintiff's case, attributable to and directly caused by the negligence and other breaches alleged against the defendant." [Emphasis added]

38. It is apparent from the correspondence, in particular the phrase highlighted in this letter, that there is some equivocation or doubt as to the plaintiff's financial position, and no assurances were given. This last response prompted the defendants to bring the present application for security for costs the motion in which issued on 23 March, 2016.

39. In paragraph 14 of his replying affidavit sworn on 6 May 2016, at paragraph 14 Mr McAteer states: –

> "14. With the Catalina transaction the plaintiff definitively ceased to have any insurance business or activity. The Central Bank of Ireland, as regulator, has indicated that in those circumstances the plaintiff should not continue to hold an insurance authorisation. It is likely then that the plaintiff's insurance authorisation would be withdrawn at some point (yet to be determined) this year. With the withdrawal of that authorisation, the plaintiff would cease to be an authorised insurer, thus bringing the Administration to a natural conclusion (administration being a regime applicable only to authorised insurers). The natural next step would involve an application for the plaintiff's winding -up, in which it is anticipated that, with a view to continuity and good order in the conduct of the plaintiff's remaining affairs (primarily these proceedings), the creditors will wish the Joint Administrators to move to the role of liquidators (which we are willing to do). That would involve no dilution in the plaintiff's commitment to these proceedings."

This was the first time that the defendant became aware of the possible withdrawal of insurance authorisation. In his second affidavit Mr McAteer at para 28 states that "the Central Bank has concluded that the plaintiff's insurance authorisation can in fact remain in place. In those circumstances, the plaintiff envisages that it will remain in administration under the stewardship of the Joint Administrators."

40. However the Defendant's concerns over possible winding up and the lack of security in respect of costs remained and were further heightened by an answer given by the Minister for Finance to a Dail question on 16 June 2016, the relevant part of which states: –

> "The position to date is that a total of €1.333 million has been drawn down from the Insurance Compensation Fund (ICF) by the Joint Administrators. A total of €200 million has been repaid to the ICF by the Joint Administrators, leaving the current figure for the net cost to the ICF of the failure of QIL at €1.133 million. The Central Bank of Ireland has advised that it is not in the position to supply a definitive update regarding the cost of the collapse of QIL.
>
> I have been informed by the QIL Administrators that they do not envisage any further applications to the ICF for funding as they have sufficient finance to fund the last remaining significant task which is the litigation against PricewaterhouseCoopers (PwC). The ultimate final cost to the ICF will only be determined when the matter with PwC comes to a conclusion, as any successful recovery from this action will be paid to the ICF."

41. The content of this ministerial reply has not been denied in any of Mr McAteer's affidavits. Mr Joyce characterises this as credible evidence of the plaintiff's inability to satisfy any adverse costs order, and he invites the court to conclude that the Joint Administrators have not drawn down funds from the ICF to provide for the possibility of a costs order which may ultimately be made in favour of the defendant, and further, that they have no intention of doing so.

42. Mr Joyce also relies upon the fact that at its height, the estimated amount of the plaintiff's claim in these proceedings is €900 million, which is €200 million short of the amount claimed from the ICF, currently estimated to be in the order of €1.1 billion.

43. Payments from the ICF to the plaintiff are sanctioned from time to time by the President of the High Court to whom the joint administrators regularly report. In the affidavit sworn by Mr McAteer on 24 July, 2013, he avers:

> "98. I say and believe that, in order to fund those advances, the Government has imposed a levy of 2% on all non-life insurance policies written in the State. That levy is effectively a tax upon consumers of insurance services in the State and will remain in place until the full amount of the advances made by the Government to the Insurance Compensation Fund has been recouped by the Government. I say and believe that the Government also charges a commercial rate of interest on the sums that it has advanced to the Insurance Compensation Fund."

44. It is clear that Exchequer lending to the ICF has enabled the ICF, with the approval of the President of the High Court, to provide funding to the plaintiff, which in turn has enabled the Joint Administrators to undertake the administration of the plaintiff. But for this funding it is apparent that the plaintiff would be insolvent and would have been wound up. It is further apparent that at this point in time such funding is being used primarily to pursue these proceedings. It is therefore appropriate to consider the basis for the funding and whether further funding is or might be available to discharge the defendant's costs were it to succeed in its defence.

45. The ICF was a fund established under the Insurance Act 1964 ("the 1964 Act"). It's long title states that it is "An act to provide for the establishment of a fund to be known as the insurance compensation fund to meet certain liabilities of insolvent insurers, to provide for the making of a grant and loans to the fund by the Minister for Finance and contributions to the fund by insurers, and for those and other purposes to amend and extend the Insurance Acts, 1909 to 1961". Its primary purpose was to benefit persons entitled to sums due under a policy issued by the insolvent insurer whose claims would not otherwise be met. Under section 2(2) the ICF is maintained and administered under the control of the President of the High Court acting through the Accountant of the Courts of Justice. Under section 2(3) the Accountant "may borrow for the Fund and, for the purpose of giving security with respect to such borrowing, may charge investments of the Fund." Under section 5(1) the Minister for Finance is empowered, on the recommendation of the Central Bank to "advance from time to time to the Fund such sums as he thinks proper to enable payments out of the fund…".

The 1964 Act has been amended on several occasions and the most significant amendment was by the Insurance (Amendment) Act 2011, following the failure of the plaintiff's business. It is under the 1964 Act as amended that the insurance industry is required to make an ex post contribution by way of the 2% levy.

46. Under section 3C(1)(a) of the 1964 Act (as inserted by section 4 of the 2011 Act) the President of the High Court may sanction payments out of the ICF such as are, in the opinion of the court, "required to enable the administrator to carry on the business of the insurer and to perform his or her functions in relation to the insurer" . Under section 3C(2)(a) any sum paid out of the ICF under subsection (1) is deemed to be an unsecured debt of the insurer to the ICF. Under section 3C(2)(b) the Minister for Finance is empowered on behalf of the ICF to waive all or part of such debt.

47. In a "Review of the Framework from Motor Insurance Compensation in Ireland" (Department of finance, June 2016) there is a helpful review of "the Legislative Framework" in chapter 3, and the following is stated: –

> • "The Fund operates on an *ex-post* basis, meaning that the Fund is not built up in advance. If, when ICF funding is required, there is an insufficient balance in the Fund, the Minister for Finance may make a loan to the Fund so that it can meet the demands being placed on it. Such a loan is required to be reimbursed to the Exchequer.
>
> • The Central Bank may introduce an ICF levy to collect sufficient funding to repay the Minister for Finance and meet further expenses as required. The Central Bank may discontinue, increase or reduce the levy depending on the

level of receipts and the demands on the Fund.

• The legislation provides that the ICF levy cannot be set at more than 2% of non-life premiums received by the insurance companies. It is collected by the Office of the Revenue Commissioners and paid into the ICF account."

48. It may be possible that, notwithstanding the plaintiff's insolvency, the defendant, if successful in its defence of these proceedings, could have its costs discharged by funding made available to the plaintiff by the ICF under the 1964 Act (as amended). This would require that at the appropriate time the plaintiff make an application to the ICF, and that the ICF obtain the prior approval of the President of the High Court. Notwithstanding that the Review of the Legislative Framework indicates that in practice funding is sought ex-post, Section 3C does not appear to be prescriptive as to the timing of such an application or approval. In theory section 3C would not seem to preclude an application for funding that anticipates the need for funds.

49. This possibility of receiving funding, whether in advance or *ex post*, would be entirely outside of the control of the defendant, and would be dependent on the cooperation of the plaintiff and the ICF, and a favourable decision of the court. It is a possibility that it is more theoretical than real, and it is notable that no submission was made on behalf of the plaintiff that such possibility should deprive the defendant of an entitlement to security for costs. I also accept that it is clear from the Ministerial reply in the Dail mentioned earlier that the plaintiff has not in fact applied for or drawn down funds from the ICF to cover the possibility of a costs order ultimately being made in favour of the defendant, and nothing in the affidavits suggests any intention on the plaintiff's part to make such an application. It must be noted however that were the court to order security for costs it would be open to the plaintiff to apply to the ICF for further funding to cover the sum so ordered, and for the ICF to seek court approval.

50. There is a further possibility, namely that if the defendant succeeded in its defence it could seek to recover unpaid costs directly from the ICF or the Minister for Finance as the ultimate funders on behalf of the plaintiffs of the litigation . Such a claim against a non-party funder is contemplated by the decision of Clarke J. in *Mooreview Developments & Ors v. First Active plc & Ors* [2011] 3 I.R. 615 where he held that the court has jurisdiction *after the hearing* to join a non-party for the purposes of making that party liable for the costs of the proceedings. That decision was applied most recently by Noonan J. in *WL Construction Ltd v Chawke & Bohan* [2017] IEHC 319. Entirely understandably this also was not suggested as a possibility, or canvassed by the plaintiff, as a reason for refusing security for costs. While raising an interesting question, in the absence of argument I do not consider it further.

51. Taking into account the probable insolvency of the plaintiff when the joint administrators were appointed, the latest evidence as to the plaintiff's financial affairs, its reliance on the ICF for the funding of the administration to date, the reliance on such funding to bring these proceedings, the failure to provide assurances as to the retention of funds to cover a possible award of costs to the defendant, and the uncontested Ministerial statement that the plaintiff does not envisage any further application to the ICF for funding, I am satisfied that in the words of section 52 of the Companies Act 2014 there is "credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in [its] defence".

Moreover as matters currently stand it is quite clear that the plaintiff would not be in a position to discharge costs anywhere near the magnitude suggested in Mr Guiden's Estimate. The possibility that if security was ordered the plaintiff could apply to the ICF for funding is no more than a possibility, and would be subject to the approval of the President of the High Court, and is therefore not sufficient to defeat the credible testimony as to the present financial position of inability to pay the costs of the defendant if successful in its defence.

52. Accordingly the second element of the test under section 52 is satisfied. It is therefore necessary to consider whether there are circumstances which ought to cause the court to exercise its discretion not to make an order for security for costs.

Inability to pay caused by the defendant's wrongdoing

53. Inability to pay security for costs caused by the defendant's wrongdoing was considered by Clarke J. (as he then was) in *Connaughton Road Construction Ltd v Laing O'Rourke Ireland Ltd* [2009] IEHC 7. Emphasising that "…the court's assessment must be conducted on a *prima facie* basis", he stated: –

> "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 v CRH Plc* [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."

54. It is the plaintiff's case that as a result of the defendant's wrongdoing it suffered enormous losses. It is argued that these losses have resulted in the plaintiff's insolvency and hence the inability of the plaintiff to discharge an adverse costs order. It was argued that this special circumstance has been long established as a reason for refusing security for costs, because it would be unjust to reward a defendant for his own wrongdoing.

55. The defendant's response relies squarely on the *Connaughton Road* tests, and is threefold:

First, the plaintiff has failed to set out, beyond bare assertion, how the alleged wrongdoing of the defendant could be said to be the cause of the plaintiff's inability to discharge an adverse costs order. This focuses on the second proposition of Clarke J. in *Connaughton Road* that requires a plaintiff to show "that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff."

Second, it was argued that the losses claimed were too remote – this comes within the third limb of the test in *Connaughton Road*.

Third, it was argued that at its height the plaintiff's claim is for €900 million, but this is €200 million short of the estimated ultimate drawdown of €1.1 billion from the ICF, and thus fails to satisfy the fourth proposition in *Connaughton Road,* namely –

> "(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."

Causation and Remoteness– bare assertion

56. It is convenient to address these elements, which overlap, together. It was common case that the onus was on the plaintiff to satisfy the court on a *prima facie* basis of inability to pay caused by the defendant's wrongdoing, and that "mere bald assertion" as to insolvency being caused by the defendant would not suffice - see *Jack O'Toole Ltd v MacEoin Kelly Associates* [1986] I.R. 277, at 284 (Finlay CJ.). In *Inter Finance Group Ltd v. KPMG Peat Marwick* [1998] IEHC 217, Morris J. required that the plaintiff must support the assertion "with details", and in *Pebble Beach Owners Management Company Ltd v Neville* [2016] IEHC 446, Baker J. stated at para. 33:

> "…as with the burden on the defendants and moving party under the threshold test, it is not sufficient for the plaintiff to make mere bald assertions, and it must establish by evidence and argument that its impecuniosity was caused by the wrong the subject matter of the claim."

57. I consider that the plaintiff has satisfied the first limb of the test in *Connaughton Road* in that the affidavit evidence adduced by Mr. McAteer demonstrates on a *prima facie* basis that there was actionable wrongdoing on the part of the defendant in relation to the audit reports for the material years and the understating of the Technical Reserves, and in relation to failing to report the existence and import of the subsidiary guarantees to the non-executive members of the plaintiff's board in its financial statements, and to the Financial Regulator in regulatory returns on Forms 6, 10 and 11 audited by the defendant.

58. The question of causation of loss is covered by the pleas at paras. 28-31 of the Statement of Claim:

> "28. Had PwC identified (as it ought to have done) the material misstatement of QIL's Technical Provisions it would have been obliged to report this to the board of directors of QIL and to the Financial Regulator. The Technical Provisions would have been restated to comply with accounting and regulatory standards and/or alternatively QIL's Financial Statements would have been qualified. The true financial position of QIL for each of the years of the Material Period would have been identified as would QIL's failure to meet the relevant solvency requirements and in particular the Minimum Solvency Margin in its financial years 2007 and 2008 and the Adequate Solvency Margin in rach year of the Material Period.
>
> 29. The board of directors and/or the Financial Regulator would each have taken the necessary action to address QIL's very serious financial problems. In particular, and without prejudice to the foregoing, QIL would have been placed under administration at an earlier date. Further and in the alternative the actual losses being incurred by QIL on various lines of business would have been ascertained at an earlier date, and/or QIL would have been directed to cease writing such business. QIL would not have had the financial capacity to write all the new business which it wrote and would thereby have avoided substantial losses or, alternatively, would have had to reduce the amount of business it was writing because of capital restraints and would thereby have avoided losses on such business. Further and in the alternative QIL and/or the Financial Regulator would not have approved the making of gifts to Quinn Group Family Properties Limited and/or companies within the Quinn Group, and QIL would have been directed not to make such gifts. Alternatively, QIL would not have made loans (or loans in the amounts made) to other companies within the Quinn Group and/or would have been directed not to do so by the Financial Regulator.
>
> 30. Had PwC identified and reported to QIL's board of directors and Financial Regulator on the material misstatement in the regulatory returns and financial statements, arising from the guarantees and/or their non-disclosure, QIL's true financial state would have been discovered earlier than it was and the necessary action taken. In particular and without prejudice to the foregoing, QIL would have been placed under administration earlier than it was. Alternatively, QIL would not have had the financial capacity to write all the new business that it wrote and would thereby have avoided substantial losses. Alternatively, QIL would have had to reduce the amount of business it was writing because of capital

restraints and would thereby have avoided substantial losses on such business. Further and in the alternative, QIL's board of directors would not have approved the gifts and/or loans referred to above or QIL would have been directed by the Financial Regulator not to make such gifts and/or loans.

31. Further and in the alternative if PwC had identified and reported on the guarantees entered into by QIL's subsidiaries in 2005 QIL's subsidiaries would not have entered into the subsequent guarantees. Further and in the alternative, QIL would have avoided the payment of €201 million which the joint administration were obliged to pay to banks and bondholders in 2011 to secure release from the guarantees."

59. The quantum of losses claimed to result from the wrongdoing depends on the audit year in which it may be found that the defendant should have raised the problems in the audit report or regulatory returns. This is addressed in a series of Replies to Notices for Particulars . It is apparent - and accepted by Mr. Joyce - that the losses claimed in respect of under-statement of Technical Provisions have been calculated by the plaintiff's actuarial experts, Mazars. While Mr. Joyce takes issue with the methodology used by Mazars, it is not contested that the plaintiff's calculation of loss is based on the difference between, on the one hand, Milliman/the plaintiff's best estimates at the time, and for the purposes of the financial statements in the relevant year, of ultimate claims costs for each line of business, including the 'Margin Over Best Estimate' used by them to establish Technical Provisions, and on the other hand Mazars' re-estimation of such claims costs and the appropriate 'Margin Over Best Estimate' and what they opine should have been the Technical Provisions calculated in accordance with the extant actuarial standards, available information and data. Mazars' figures have been recalculated by them as further work has been undertaken to establish the claimed losses in respect of the different lines of insurance business undertaken by the plaintiff; these were furnished to the defendant's solicitors by way of further particulars.

60. Insofar as losses asserted from understatement of Technical Provisions are concerned, I am satisfied that there is evidence, from the accounts for the material years together with the expert evidence provided to the plaintiff by Mazars, that indicates a *prima facie* basis for such claims and provides a certain amount of detail.

61. It is sufficient for present purposes to refer to Further and Better Particulars dated 22 October, 2014, where at section C "Under-Reserving and Guarantees" estimated losses are set out depending on the year chosen as the one in which the defendant ought to have brought the under-reserving and the guarantees to the attention of the full board and/or the Financial Regulator. The highest estimated losses arise in section C2 as of the end of financial year 2006, and are pleaded as follows:

"Identification of the issues at the end of QIL's financial year 2008:-

i. The guarantees would have been released at no cost to QIL as pleaded above, with the consequent saving of 201m.

ii. Further, in order to address the under-reserving issue QIL would not have made gifts of €210m to Quinn Group companies that QIL made in its financial years 2007 and 2008 and would not have granted the loans to Barlo in financial year 2008 so avoiding the bad debts of €43m written off by QIL as a result of the said loans. These actions would have been necessary to replenish the level of free assets to meet the Adequate Solvency Margin. QIL would also have adjusted its pricing model to decrease the amount of loss-making business written by it in the market from 2008 to 2010 inclusive thereby avoiding substantial underwriting losses.

iii. Alternatively, if the guarantees were not released the Financial Regulator would have insisted that QIL exclude the assets the subject of the guarantees from QIL's Technical Reserves. The Financial Regulator would have successfully applied to the Court to place QIL into administration. Alternatively, QIL's Board would have taken the necessary steps to address QIL's financial position including liaising with the Financial Regulator with regard to placing QIL into administration and/or without prejudice, would have taken the necessary steps to address QIL's losses. The following steps would have been taken:

(a) Gifts totalling €210m would not have been made in 2007 and 2008.

(b) QIL would have exited the GB/NI business and generated substantial cost savings as a result of the consequent down-sizing of infrastructure and head-count.

(c) QIL would have increased its rates on loss-making lines of business and avoided substantial underwriting losses on business written by it in 2008/2009/2010; and

(d) QIL would not have made the loans to Barlo in financial year 2008 thereby avoiding the bad debts of €43m written off by QIL as a result of the said loans.

In conclusion therefore QIL would have had the benefit of up to an additional €900m if the under-reserving and guarantees had been brought to the attention of QIL's Directors and/or the Financial Regulator at the end of QIL's financial year 2006."

I am satisfied that *as currently pleaded*, and as calculated by the plaintiff's experts, the greatest amount that is claimed or can be recovered is in the order of €900 million (although aggregating the various figures in section C2 produces a somewhat lower total of €894 million). However, it is important to note that discovery has yet to take place and the plaintiff has reserved the right to revise its figures further based on additional contemporaneous information.

62. The essence of the plaintiff's argument on causation is that if either or both of the problems – the understatement of Technical Provisions and the Guarantees – had been raised properly by the defendants as auditors then the steps outlined in the Statement of Claim and Particulars would have been taken by the plaintiff and/or the Financial Regulator and the losses would have been avoided. In Replies to Particulars dated 14 March, 2014, in response to query 21 (12) 'Please specify how it is contended loss was caused by the alleged breach of each of the said contractual duties', causation is propounded as follows: –

"In particular, if the defendant had, as it ought to have done in respect of each financial year during the Material Period, drawn the attention either of the Board of Directors of QIL or of the Financial Regulator

i. to the existence of the guarantees;

ii. to the breach of the Financial Regulator's 2001 instruction ;

iii. to the significance of the existence of the guarantee for both the financial statements of QIL, and the regulatory returns which had to be made to the Financial Regulator (and in particular Form 6, 10, 11 and 14) by QIL;

iv. to the Quinn Group's potential ability or (more precisely lack of it) to comply with the covenants in the Facilities; and

v. to the fact that such guarantees over assets included in the Technical Reserve were impermissible as they had nothing to do with QIL' s business as an insurer;

then QIL' s Directors and/or the Financial Regulator would have taken the necessary action to avoid the losses incurred by QIL in connection with the same and/or to ensure that QIL's capital was maintained to meet the relevant solvency margins and/or to ensure QIL's solvency. This would have resulted in QIL not making gifts and loans to other Quinn Group companies which further depleted its assets over the Material Period and contributed to its substantial losses.

In addition and without prejudice, if the defendant had brought the significant claims under-reserving in respect of each financial year during the Material Period and its consequent impact on QIL's financial statements and regulatory returns to the attention of QIL's Directors and/or the Financial Regulator then the Directors and/or the Financial Regulator would have taken the steps necessary to address QIL's serious financial position. In particular, they or either of them would have taken steps to avoid the very substantial losses which were incurred by QIL in connection with loss-making business entered into and/or carried on during the Material Period.…"

63. The defendant denies that any loss or damage was caused by it, and rejects the contention that the Board of Directors of the plaintiff, or the Financial Regulator, had they been aware of the alleged material misstatement of Technical Provisions, would have taken the actions suggested by the plaintiff. In support of this Mr Joyce at paragraph 91 of his first affidavit relies inter alia on the following: –

"

1) The Defendant made three reports regarding the plaintiff to the Financial Regulator pursuant to Section 35(1) of the Insurance Act 1989, on or about 15 February 2008 , on or about 16 May 2008 and on or about 18 June 2010;

2) The Financial Regulator did not place the plaintiff under administration until March/April 2010;

3) The Plaintiff was permitted by the Financial Regulator to continue to trade for approximately two years following the reports made to the Financial Regulator by the defendant on or about 15th February 2008 and on or about 16 May 2008;

4) there was no reduction in the new business written by the plaintiff following the reports made to the Financial Regulator by the defendant on or about 15th February 2008 and on or about 16 May 2008

5) The Defendant will contend that gifts made in 2008 were made with the knowledge of the Financial Regulator and on the basis that they would be used to reduce loans outstanding from Barlo Financial Services Ltd to the plaintiff, the Financial Regulator having determined that such loans had a nil value for regulatory purposes;

6) The Defendant will contend that the making of loans to other companies within the Quinn Group involved decisions made by the plaintiff's management which cannot be attributed to the defendant's audits and that the scale of loans made by the plaintiff demonstrates that it made such loans without reference to its financial position; and

7) The Plaintiff did not rely on the defendant's evaluation of whether the plaintiff's Technical Provisions were reasonable in making its trading decisions and/or in deciding on the premiums that it intended to charge on the market."

64. In addition Mr Joyce suggests the degree to which the alleged losses post-date 2008 is an indicator that they arise from matters beyond the control of the defendant, and he points to factors such as "the ongoing deterioration in prevailing economic conditions in Ireland and the UK", organisational changes, changes in claims handling procedures and the sale of various assets of the plaintiff.

65. In his second affidavit Mr Joyce raises further counter-arguments: –

1) At paragraph 206 he suggests that the plaintiff's claim that "the guarantees would have been released at no cost to the plaintiff" is implausible and that there is no identified basis for such a contention.

2) At paragraph 207 he contends that the suggestion that the plaintiff "would have adjusted its pricing model" is mere assertion because during the material period the defendant prepared independent projections for the plaintiff's Technical Provisions, which were higher than the Plaintiff's Booked Technical Provisions, yet no action was taken by the plaintiff or its directors.

3) At paragraph 208 he challenges the assertion that "the plaintiff would not have made gifts…to the wider Quinn Group… in order to replenish the level of free assets to meet the regulatory solvency margins" had the guarantees been released, or if they had not been released "in order to meet the consequent deficit [in its technical reserves]" for the same reason as in paragraph 2007 and because of further matters "which demonstrate the pattern of behaviour at the plaintiff". He then refers to four matters: (1) non-notification of the financial regulator of intragroup commissions paid for the introduction of new insurance business during the year ended 31 December, 2003; (2) non-notification of the Financial Regulator of gifts to related companies during the years 2004 and 2005; (3) loans to Barlo in 2007 and 2008 which "effectively converted high quality and liquid assets (primarily cash) into illiquid loans"; and (4) loans totalling approximately €400 million to Quinn Property Holdings Ltd during December 2007 "not reported to the Board investment subcommittee or to the full board… [or] to the Financial Regulator". Mr Joyce states: –

"These examples illustrate that there was a pattern of behaviour over many years at the plaintiff in which transactions were undertaken by management and/or the directors or certain of them which were not for the benefit of the company or its policyholders and/or breached the defendants own policies and/or were not notified to the Financial Regulator and/or were concealed from some of the directors of the plaintiff. I say further that when these matters were reported by the defendant to the plaintiff's management and to its Audit Committee, they failed to respond adequately or at all to prevent similar occurrences thereafter. Such a pattern of behaviour undermines Mr McAteer's contentions that gifts would not have been made in the circumstances he outlines."

4) At paragraph 210 Mr Joyce states: –

"At paragraph 29, Mr McAteer refers to the "*near mechanical effect of the constraints that would have been imposed upon the plaintiff had its true lack of capital and the true effect of its underwriting to that time been made clear*" which would have prompted "*reform*" the effect of which is that the plaintiff "*would today be solvent*". This is a gigantic and unjustified leap. I have referred previously to the fact that it is unsupported on the plaintiff's own figures, but, in addition to that, I say that the principal causes of the insolvency of the plaintiff were its decision to charge prices that were too low for the risks concerned and an excessive concentration of its assets in property."

Discussion

66. In assessing the issue of causation, and the related issue of remoteness - some of the defendants arguments, for example in relation to the claimed loss of gifts made by the plaintiff, may more properly be characterised as arguments that the loss claimed is too remote – the court must proceed with some caution. This is an interlocutory application, and it is not appropriate for the court to prefer one piece of evidence over another. The same applies to inferences that may arise from facts, whether agreed or contested. Equally where the plaintiff pursues arguments in relation to causation which it asserts are plausible, but the defendant argues are "hypothetical" or "implausible", the court should be slow to prefer one argument or proposition over another unless it is manifestly untenable, or is a "mere bald assertion" for which there can be no rational basis. The onus is on the plaintiff to demonstrate a *prima facie* basis in fact and/or by argument for the losses claimed, but this does not mean that the plaintiff must satisfy the court as to the probability of such loss at this interlocutory stage.

67. This may be applied for example to the claim that the plaintiff could have obtained cancellation of the guarantees over subsidiary company assets at no cost, whereas ultimately the Joint Administrators had to pay €201 million. While the defendant argues that this claim is implausible and bare assertion, it was argued on the plaintiff's behalf that as the accounts showed a return to profitability in 2002, and continuing profitability between 2002 and 2006, it could have obtained relief from these guarantees if negotiating from a position of strength in the period 2005 - 2007. It is not possible or appropriate for this court at this interlocutory hearing to make a determination between these competing positions. However I do find on the evidence and argument presented on behalf of the plaintiff that it is *possible* that such a claim may succeed at a full hearing, and that a *prima facie* case in terms of causation is made out.

68. Similar considerations apply to the plaintiff's claims that gifts made by the plaintiff in the Material Period, or some of those gifts, and the loan of €43 million to Barlo, would not have been made because of the "near mechanical constraints that would have been imposed upon the plaintiff had its true lack of capital and the true effect of its underwriting to that time been made clear". I accept the submission on behalf of the plaintiff that the regulatory structure within which an insurance company operates, the oversight of the Financial Regulator, and the ultimate sanction of being put into administration, render stateable the plaintiff's claims under these headings. I do so notwithstanding the counter-factuals and counter-arguments made by the defendant outlined earlier in this judgment. Insofar as Mr Joyce deposes to a history or pattern of behaviour by the plaintiff which he suggests demonstrates that the plaintiff would have made these gifts and loans even if the audit reports and regulatory forms had referred to the guarantees, and even if the plaintiff had been aware that the Technical Provisions were, as is alleged, understated, he is asking the court to make determinations which are matters for the trial judge after a full hearing.

69. Equally in respect of the losses claimed to arise from the alleged understatement of the Technical Provisions, in my view the evidence adduced by Mr McAteer and the detailed calculations by Mazars furnished in the Replies to Particulars establish a *prima facie* case in respect of such losses and causation. This is so notwithstanding the evidence and argument presented by the defendant, including the expression by the defendant of its concerns in the 2008 reports to the financial regulator, the continued trading by the plaintiff pre and post-administration in loss-making insurance, other factors such as economic conditions and organisational changes/claims handling procedures that may have affected profitability, and the reliance on a "pattern of behaviour" that suggests the plaintiff would not have changed course in any event. Mr. McAteer comments on Mr. Joyce's averments on possible alternative causes and patterns of behaviour as "a series of speculations none of which stand up to scrutiny". In that the defendant relies on non-intervention by the Financial Regulator, despite the reports submitted by the defendant, the riposte is that at the time, because of the defendant's negligence the Regulator was not aware of the Guarantees, but did take action when becoming aware of the Guarantees and the sums guaranteed. As to plaintiff continuing to write loss – making business, the response is that such business would not have been continued if the understatement of the Technical Provisions had been properly identified and the extent of the losses in certain lines of business demonstrated. However the further scrutiny and weighing of these conflicting considerations in the assessment of causation and the quantum of any damages recoverable is clearly a matter for the trial judge.

70. I therefore accept that the plaintiff has made out, on *a prima facie* basis, a causal connection between the alleged wrongdoing of the defendant and losses claimed by the plaintiff which as currently pleaded amount at their height to €900 million. I am also satisfied on a *prima facie* basis that the claimed losses cannot be said to be too remote.

The fourth limb of Connaughton Road test - claimed loss of €900 million compared to estimated total call on Insurance Compensation Fund of €1.1 billion

71. Mr Joyce averred that if the figure of €1.1 billion is taken as the final cost to the ICF, such figure "vastly exceeds the plaintiff's estimated total losses arising from the alleged acts of the defendant, even when such losses are taken at their highest point" (Mr Joyce's second affidavit, para 193) of €900 million. At Para 197 he states: –

> "… It is clear that there is a shortfall of approximately €200 million between the sum claimed by the plaintiff and the extent of the plaintiff's insolvency. While presumably some of this figure is made up by the costs of the administration, it is hardly suggested that this could amount to €200 million, or anything close to it."

72. In their written and oral submissions counsel for the defendant argued that the plaintiff failed the fourth limb of the test in *Connaughton Road* and urged the Court to adopt as determinative the example given by Clarke J. of a plaintiff with liabilities of €200,000 and a claim limited to €100,000, such that even if the plaintiff were to succeed it would still have excess liabilities over assets.

73. Counsel also relied on the application of the test by Finlay Geoghegan J. in *Webprint Concepts Ltd v Thomas Crosbie Printers Ltd* [2013] IEHC 359. There the plaintiff contended that where a court is awarding damages for procurement of breach of contract, the damages are "damages at large". Finlay Geoghegan J. held at para 65 that even in those circumstances:

> "… Webprint, as plaintiff, is still obliged to establish at least a *prima facie* case that the quantum of damages which it might obtain in the event that it is successful is of an order of magnitude sufficient to reverse its current financial position whereby it would be unable to pay the defendants costs in the event that the defendants were successful."

74. In their written submission at paragraph 46 counsel argued: –

> "46. Thus, the question is not simply whether the claim in damages would suffice to cover the defendant's costs; rather what is required is a transformation in a plaintiff's financial position such that it would be solvent and in a position to discharge an adverse costs order. In other words, the comparison must be between the quantum of the damages claim and the plaintiff's total indebtedness."

75. In their written and oral submissions they argue that no *prima facie* basis is established for all or part of the damages claim because of difficulties of causation and remoteness. I have rejected these arguments, for the purposes of this application, earlier in my judgment. However, counsel for the defendant argued that the defendant cannot be held responsible for the residual gap of €200 million, and therefore the defendant is not the sole reason for the plaintiff's insolvency. Put another way, if the plaintiff recovered €900 million, it would still be indebted to the ICF in the sum of €200 million, rendering discharge of and the defendants costs and impossibility.

76. A number of points were made on the plaintiff's behalf in response to this contention:–

1) It was contended that the €1.1 billion is merely an estimate of the ultimate call on funding from the ICF. It is a figure that will change over time and is not relevant to the question of the plaintiff's inability to pay costs that might be awarded to the defendant in the event that it is successful.

2) The reason that the plaintiff can't pay such costs is that it is insolvent.

3) As counsel for the plaintiff argued (Day 3, p.129 et seq) the plaintiff –

> "… was profitable from 2001 onwards and we know the history that led to it becoming insolvent from about 2007 onwards. And it was a failure to reverse those trends we have identified about expanding into the UK, taking over BUPA Healthcare, and so on and so forth, which caused and tipped QIL to go into insolvency…
>
> The plaintiff's case is a very simple one: these problems should have been spotted by PwC when QIL was still running on land, as opposed to still running over the chasm. And it is their failure to spot that, that led directly to the insolvency. Because if these problems had been spotted in 2005 or 2006 when the relevant guarantees could either have been released for little or no money, or the assets could have been…the technical provisions and the liabilities in the loss-making lines could have been cut back and retrenched and the various other steps could have been taken. Or, alternatively, those steps could not have been taken, if that just wasn't possible to do. Then the business would have been closed or put into administration. But either way, to take it at its most simple, if the business had closed in 2005 then all the losses that occurred in 2006/2007/2008/2009 and so on would not have occurred. So there is a direct but – for causal connection between the two and it is caused by the insolvency of the company…."

4) Mr McAteer in his affidavit sworn on 6 May 2016 at para 29 deposes:

> "… Had that reform been prompted by PwC's audit reporting obligations as and when it should have been, the plaintiff would have avoided the compounding of its difficulties in the subsequent years of the material period, and would today be solvent. In those circumstances, any inability on the plaintiff's part to meet an adverse costs order in these proceedings flows from the wrongs done to it by PwC."

At para 29 of his affidavit sworn on 16 September, 2016, Mr McAteer addresses the €900 million claim and the €200 million estimated shortfall: –

> "29.… Here, however, Mr Joyce draws a false comparison between those two figures. The analysis of the plaintiff's loss does not begin with the point of terminus that has now been reached in circumstances of PwC's wrongdoing, but rather was carried out on the basis that the guarantees and inadequacies in the Technical Provisions had come to light when they ought to have. If those matters had come to light following the 2005 audit (as ought to have been the case), the position would be very different to the position that exists now. Thus, the losses are claimed on the basis that had these matters been disclosed to the directors and the Financial Regulator, steps would have been taken which would have avoided the losses which are the subject of these proceedings."

5) While recognising that in *Connaughton Road* Clarke J. introduced the quantum of a claim as an arithmetical issue in determining whether the inability to pay was caused by the defendant, counsel submitted that this should not be treated as a quasi-statutory test and that the focus should be on what caused the plaintiff's insolvency. This is consistent with para 2.3 of the judgment of Clarke J. where he stated –

> "… The special circumstances asserted in this case are, perhaps, the most common category of such circumstances where it is asserted that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the moving party."

Later in the same paragraph Clarke J. refers to comments of Finlay CJ. in *Jack O'Toole Ltd v MacEoin Kelly Associates* [1986] I.R. 277, a case in which the Supreme Court found that the plaintiff failed to discharge the onus of proof where there was a "mere bald statement of fact that the insolvency of the company had been caused by the wrong the subject

matter of the claim". Clarke J. went on to state that –

> "… The obligation of Connaughton Road, in those circumstances, is to establish a *prima facie* the case to the effect that its inability to pay the costs of the defendant, in the event that the defendant was successful, stems from the wrongdoing alleged in these proceedings."

6) Counsel did not consider that there was any material difference between Clarke J.'s use of the words "flow" and "stem" but submitted that they both conveyed the test to be applied in establishing the connection between the plaintiff's inability to pay costs and the defendants wrongdoing.

Counsel went on to argue that the application of the test by Clarke J. in *Connaughton Road* was not intended to alter or reformulate the fundamental principle as stated, and that it is not intended to be a "mechanical mathematical test" in the way the defendant urged the court to apply it. Counsel also differentiated the circumstances of that case. There the plaintiff was a shell company, and prior to the wrongdoing "had no significant assets". It was submitted that the present case is one in which the plaintiff had substantial assets that were depleted by the defendant's wrongdoing, but for which the plaintiff would have continued to trade, remained viable, and avoided insolvency.

Particular emphasis is placed on what Clarke J. had to say at para-3.10:

> "3.10 As part, therefore, of the overall question of assessing whether it has been shown, on a *prima facie* basis, that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted, the court must look at all the circumstances asserted on behalf of the parties. 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 alleged, it would have acquired net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant were successful."

7) The court was also referred to *CMC Medical Operations Limited (in Liquidation) v. VHI Board* [2015] IECA 68 in which the Court of Appeal allowed an appeal from a decision by Cooke J. granting VHI security for costs in the context of a claim that the defendant unlawfully refused to extend VHI coverage to the plaintiff's private hospital. The hospital had opened but closed a year later and went into liquidation. Cooke J. was not satisfied that a prima facie case had been made out as to the existence of a causal connection between the refusal of VHI to approve the hospital and claimed loss resulting from the cessation of operations. Mahon J. in the Court of Appeal disagreed and stated:–

> "25.… In reaching his conclusions it appeared to me that Cooke J. may have ventured too far and too deeply into issues which are more properly issues for determination as a full hearing of the action, particularly having regard to the fact that he accepted that the plaintiff had satisfied the first leg of the *Connaughton Road* test, namely that there was actionable wrongdoing on the part of the defendant."

In relation to the issue as to whether the loss claimed by the plaintiff was enough to account for the difference between the plaintiff's ability to meet an order for costs in favour of the defendant and not being so able, Mahon J. stated: –

> "23. Such loss as is suggested by CMC as being the consequence of the alleged abuse of its dominant position by VHI is likely to be significant in terms of quantum. As the amount of that loss may well have meant the difference between the clinic surviving or dying on its feet, as in fact may have occurred, it is not difficult to establish that the consequential loss is more than enough to account for the difference between the plaintiff's ability to meet an order for costs in favour of the defendant, and not being so able. This of course presumes that the security for costs would itself be a large sum. The evidence and clear declaration from CMC, which is accepted by VHI, is that CMC is now hopelessly insolvent and certainly unable to meet any costs bill from VHI. It is reasonable to assume that if its business had got off the ground as was intended and planned by CMC that it would have been able to pay its bills including a substantial bill for costs from VHI. By all accounts its access to bank finance would have continued. I think it is reasonable to answer that question in the affirmative. Regard must be had to the fact that the promoters behind this hospital were individuals who had a proven track record in establishing successful and profitable private hospital such as Blackrock Clinic and the Galway Clinic."

Discussion

77. On this issue I accept the submissions made on behalf of the plaintiff. It is instructive to return to the judgments in CMC. At the end of his judgment Mahon J. observed –

> "26. A court should be slow to take any step which has the effect of curtailing litigation or unduly restricting the constitutional right of access to the courts. The requirement that a party effectively defending an application for security for costs should be expected to delve unduly deeply into complex matters which constitute the subject matter of the litigation itself may produce this result."

Hogan J. agreed with Mahon J. In his judgment he stressed the constitutional right of access to justice as an "indispensable feature of the constitutional order" (paragraph 3). Commenting on section 390 of the Companies Act 1963, the precursor of a section 52 of the 2014 Act, he stated –

> "8. In my view, the whole object of the jurisdiction conferred by s. 390 of the 1963 Act is fundamentally to protect against the potential abuse of the privilege of limited liability. In addition, this section must also be construed and applied in a fashion which does not negate the substance of the right of access to the courts. As important decisions such as McCauley v. Minister for Posts and Telegraphs [1966] I.R. 345 and Blehein v. Minister for Health and Children [2008] IESC 40, [2009] 1 I.R. 275 have all made clear, this principle is fundamental to the constitutional order. Accordingly, I consider that the statutory power to order security should not be exercised where this would be oppressive or would stifle a genuine claim."

> These observations must apply equally to the jurisdiction conferred by section 52 of the 2014 Act.

78. Hogan J. then addressed the fourth limb of the test in Connaughton Road:

> "9. It is true that Clarke J. suggested in his judgment in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland* [2009] IEHC 7 that where, prior to the alleged wrongdoing, the plaintiff company had no significant net assets, it would need to establish that "in the absence of the wrongdoing alleged, it would have acquired the net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant was successful" in order to avoid an order for security for costs under s. 390 of the 1963 Act.
>
> 10. The effect of this test appears to be that an impecunious plaintiff company may face an order for security for costs even where the plaintiff could demonstrate that it would otherwise have a good cause of action. If, for example, the company has a deficit of €40,000 and the costs of the proceedings have been estimated at €60,000, does this mean that it should face an order for security for costs under s. 390 of the 1963 Act unless in that example it could show that it is likely to recover more than €100,000 damages? I cannot help thinking that as the application of s.390 of the 1963 Act in this manner could effectively stifle otherwise valid claims, the *Connaughton Road* test itself may have to be revisited in the light of the constitutional considerations I have just mentioned."

79. I accept the submission that the fourth limb of the *Connaughton Road* test is not to be treated as a simple mechanical arithmetical test, because to do so could unduly stifle claims and limit the constitutional right of access to the courts. It will be recalled that Clarke J. was there dealing with a company that had no assets prior to the wrongdoing that was alleged. Without necessarily revisiting the test in my view it is appropriate to emphasise his formulation of the test in paragraph 2.3 as being one where "…the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the moving party", or where and that inability "…stems from the wrongdoing alleged". Moreover, at para 3.10 of the decision Clarke J. states:

> "3.10 As part, therefore, of the overall question of assessing whether it has been shown, on a *prima facie* basis, that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted, the court must look at all the circumstances asserted on behalf of the parties."

It is clear from this that Clarke J. does not regard this exercise as a narrow mathematical one. It is necessary to have regard to the broader circumstances said to give rise to the inability to pay costs.

80. It also seems to me that inherent in the exercise of forecasting what would have happened to a company business *but for the alleged wrongdoing* is hypothesising on the facts or inferences from those facts as they are known or reasonably assumed. While the defendant/Mr Joyce characterise this as speculation, provided the exercise is grounded in fact (insofar as it can be) and not reliant on unreasonable inferences or conclusions, in my view it is a necessary and appropriate exercise and one from which the court may conclude that a *prima facie* case is made out that inability to discharge costs that may be awarded to a successful defendant arises from the defendants own wrongdoing.

81. Accordingly the plaintiff in the Statement of Claim and Replies to Particulars, and in the affidavits sworn by Mr McAteer, suggest what actions would have been taken and what would have occurred had there been no negligence or breach of duty, and had the plaintiff's board and the Financial Regulator been fully aware of the significance and existence of the Guarantees, and the (alleged) understating of the Technical Provisions. These steps and the losses which it is claimed were avoidable are set out with considerable detail in the Reply to Particulars at 21(12) and the updated/recalculated versions of that Reply, and do not need restating here. In undertaking this exercise the plaintiff/Mr McAteer are necessarily expressing their opinion as to the steps that would have been taken to deal with the problems faced by the plaintiff, the necessity for it to comply with the minimum solvency requirements of an insurance enterprise, and the likely reaction and directions of the Financial Regulator. This last aspect is lent some support by directions actually given by the Financial Regulator and contained in letters dated 20 February 2008, 3 April, 2009, and 6 April, 2009.

82. In overall terms I am satisfied for the purposes of this application that the exercise undertaken by the plaintiff is one of reasonable hypothesis that is supported by known facts. Mr McAteer expresses his conclusion at paragraph 29 of the affidavit which he swore on 6 May, 2016, where he states: –

> "29.… Had that reform been prompted by PwC's audit reporting obligations as and when it should have been, the Plaintiff would have avoided the compounding of its difficulties in the subsequent years of the material period, and would today be solvent. In those circumstances, any inability on the Plaintiff's part to meet an adverse costs order in these proceedings flows from the wrong is done to it by PwC."

For the purposes of this application I accept this conclusion as to the cause of the plaintiff's insolvency. Accordingly the plaintiff has made out a *prima facie* case that its inability to discharge costs that might be awarded to the defendant flows from the alleged wrongdoing the subject matter of the proceedings. This "special circumstance" leads me to refuse the application for security for costs.

Exceptional Public Importance

83. As to what matters of exceptional public interest may justify refusal of security for costs, there is, understandably, no general statement in the case law as to the circumstances in which this may arise. It is helpful to consider briefly some of the cases in which sufficient public interest was held to have been raised, usefully summarised in the plaintiff's written submissions:

> "(a) In *Comcast v Minister for Communications* [2014] IEHC 18, the plaintiffs alleged corruption in high office associated with the awarding of a mobile telephone licence. Addressing the application for security, Ryan J. noted (at page 25) earlier comments of the Supreme Court in the same litigation, emphasising that matters of public interest were materially at issue in the litigation, and the observation of Clarke J. that there was "…significant public interest in having these matters of high public controversy determined in a court of law", before concluding that there was "public value in having this controversy resolved" in the instant proceedings, and refusing security on that ground (and others). Notably, many material facts in the proceedings had previously been the subject of review by the Moriarty Tribunal of Inquiry into Payments to Politicians and Related Matters.
>
> (b) In *Dublin Waterworld Limited v National Sports Campus Development Authority* [2014] IEHC 518, the plaintiff alleged wrongdoing by the defendant public authority in pursuing an unmeritorious VAT-related claim against the plaintiff. Barrett J. noted that certain matters of fact, though less exceptional than those in *Comcast* and *Millstream*, would nonetheless be sufficiently exceptional as to warrant the refusal of security for costs. Refusing security, the Court went on to hold that:

> "There has to be, and it appears to the court that there is a public interest in knowing that a publicly-owned body can and will be held accountable in the public forum offered by the courts in circumstances where that body has initiated and maintained court proceedings to recover a purported VAT liability of the scale of ten million euro that, by law, ought never to have been sought, and the claim to which that body was only able to sustain on the basis of a self-serving and improper application of the law, the true requirements of which law, by that body's own admission, were known to it at all relevant times. The rule of law must prevail."

(c) In *Newlyn Developments Limited*, the plaintiff developers alleged that infill supplied by the defendant for use in the construction of ca. 800 houses, was contaminated by pyrite, causing structural damage to the houses and exposing the plaintiffs to liability to house buyers, for which the plaintiffs sought an indemnity and other relief. Kearns P. in the High Court, whose decision was affirmed by the Court of Appeal, held that security should be refused*, inter alia*, because of the "intrinsic nature of the proceedings, namely, the multiplicity of house owners affected and the range and scope of the claim."

(d) *Euro Safety and Training Services Ltd v An Foras Áiseanna Saothair* [2016] IEHC 161 involved allegations of negligence and breach of statutory duty stemming from the defendant's blacklisting of the plaintiff training firm. Refusing security, Barrett J. held allegations of misfeasance in public office to make it a case:

> "exceptional in its own way, albeit not exceptional in the same way as *Comcast* and *Millstream*, and a case where an airing of, and adjudication upon, those detailed allegations is a matter of significant public moment and interest."

(e) In *Stein v Scallan* [2016] IEHC 683, the plaintiff sought damages for defamation on foot of statements made by the defendant presidential candidate in relation to an intra-familial dispute involving allegations of historic sexual abuse. The court held that there was a "public value in litigating claims involving allegations of sexual abuse in a civil context, where the onus of proof, beyond reasonable doubt, was not established in a criminal trial."

84. I accept the defendant's argument that the threshold for demonstrating exceptional public importance is a high one. In *Oltech (Systems) Limited v Olivetti UK Limited* [2012] 3 IR 396 at page 409, Charleton J. stated, in respect of a point of law: –

> "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 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, the 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. in *Lancefort Ltd v. An Bord Pleanala* [1998] 2 IR 511 at p.516."

85. Addressing points of fact, Charleton J. went on to say: –

> "22.… 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 Ltd v. Tierney* [2010] IEHC 55."

86. Also the mere fact that a case excites public interest, or involves an attempt by the state or a government agency to recover assets or damages for the public benefit, does not of itself establish exceptional public interest. In this I adopt the following statement of Barrett J. in *Dublin Waterworld* at paragraph 34: –

> "It is trite to note that public and semi-state bodies are often sued for alleged or admitted wrongdoings… [All] such disputes are likely to be of interest to the public but that does not make the resolution a matter of public interest."

The Plaintiff's Contentions

87. The plaintiff contends that the court should exercise its discretion not to order security for costs because the proceedings involve circumstances of exceptional public importance. The plaintiff in Mr McAteer's affidavits and in argument relies on circumstances that may be summarised as follows: –

> 1) The demise of the plaintiff was one of the largest collapses in Irish corporate history. It is of general public interest to ascertain how this happened and who was responsible for it.
>
> 2) The plaintiff was a publicly regulated insurer. The European Communities (Non-Life Insurance) Framework Regulations 1994 (S.I. 359 of 1994) impose financial requirements on an insurer, including as to its technical provisions, its solvency margin, and the valuation of its assets. The defendant played a critical role in its regulation by auditing its financial statements which were submitted to the Financial Regulator, and relied upon by the Regulator in making decisions. Under article 7(1) of the European Communities (Non-Life Insurance Accounts) Regulations 1995 (S.I. 202 of 1995) ("the 1995 Regulations") the insurers' annual financial statements must be sent to the Regulator, and those must include the report of the insurer's auditor, confirming (or not) that they give a true and fair view of its financial condition.
>
> The importance of the role played by the defendant in the public regulation of the plaintiff is underscored by section 35 of the Insurance Act 1989, which imposes personally on the auditor of an insurer a duty to report to the Regulator without delay if he has any reason to believe that there exist circumstances which are likely to affect materially the insurer's ability to fulfil its obligations to policyholders, or that there are material defects in the financial systems or controls of an insurer, or where it decides to resign or not to seek reappointment as auditor and in other circumstances.
>
> 3) The Financial Regulator needs regular information as to an insurer's financial condition, and to monitor compliance with financial requirements. The 1995 Regulations require the insurer annually to produce to the regulator financial returns in a prescribed format and these included Forms 6, 10 and 11 submitted during the material period. The auditor's report on the

relevant regulatory returns is addressed by the auditor directly to the Financial Regulator. Form 17 scheduled to the 1995 Regulations provides that –

> "A statement attesting the correctness of the information appearing on the Balance Sheet, Profit & Loss Account, Asset Analysis, Assets/Liabilities Summary (as appropriate) should be signed by the insurers' auditor".

The Practice Note 20(I) issued by the Auditing Practice Board in August 2002 with specific application to the audit of insurers in Ireland deals with 'Reporting on Regulatory Returns' and states at paragraph 17: –

> "The 1995 Non-Life Regulations state that 'A statement attesting to the correctness of the information appearing on the Balance Sheet, Profit & Loss Account, Asset Analysis, Assets/Liabilities Summary (as appropriate) should be signed by the insurers' auditor. Auditors' examinations of regulatory reforms are of a similar qualitative standard to the requirement of company law that financial statements give a true and fair view of a company's state of affairs and profit and loss; hence, equivalent considerations of materiality apply. In evaluating whether the requirements of the 1994/1995 Regulations have been met, auditors therefore apply materiality in relation to the business as a whole, rather than in relation to the particular accounting class, business category or risk group within which a particular item is reported, except when considering figures which are required by the 1994/1995 Regulations to be derived from a prescribed source elsewhere in the return, or to be calculated on a specified basis, when other than rounding differences, no concept of materiality applies. Following this approach, reliance on analytical review techniques is normally appropriate in relation to the segmental information provided within the regulatory returns. "

While the plaintiff asserts that this places an obligation on the insurance auditor to express an opinion as to whether the forms provide a "true and fair view" of the insurer's affairs, Mr Joyce on behalf of the defendant disputes this asserting at paragraph 50 of his affidavit sworn on 17 November, 2016, that "It does not mean that an auditor is providing an opinion to the effect that Forms 6, 10 and 11 give a true and fair view." It is submitted by the plaintiff that the resolution of this issue is a matter of serious public interest.

4) The regulatory system did not identify the weaknesses in the plaintiff's finances and Technical Provisions, and the misstatements in its regulatory returns and financial statements. Whether and to what extent the fault for this should be attributed to the defendant is a central issue in the proceedings, and the answer to this question is likely to have serious implications for the design of the regulatory system and the role played by auditors within that system, all with a view to the effective regulation of insurers in future.

5) The proceedings provide an opportunity to test a "central" proposition relied upon by the defendant that, because the financial statements were prepared by, and were the responsibility of, the plaintiff, the auditor can have no liability in respect of misstatements that they contain.

6) The maintenance of public confidence in insurers and in the insurance market is a matter of serious public interest, akin to the public interest in a sound banking system.

7) The collapse of the plaintiff has resulted in a requirement of funding for the administration and discharge of underwritten claims, and the ultimate bill is likely to be in the order of €1.1 billion. This has been borne by the ICF, funded by the Exchequer. It is being recouped from insurance consumers by means of a 2% levy on their annual insurance premiums. This is described in the plaintiff's written submissions as "a matter of public scandal and controversy".

88. In its written submissions the plaintiff submitted that the proceedings raise questions of acute public interest "which are plainly at the *Comcast* or *Millstream* end of the spectrum of exceptionality, and more than warranted the refusal of security." Counsel also relied on a recent determination of the Supreme Court in *The Law Society v. MIBI* [2016] IESCDET 57 on an application by MIBI for leave to appeal a decision of the Court of Appeal. The issue upon which the MIBI sought leave to appeal was whether the MIBI Agreement should be construed so as to impose liability on insurance underwriters who are party to the MIBI Agreement to pay out in respect of claims against persons who were insured with Setanta at the time it went into liquidation in April 2014. Under Article 34.5.3 the Supreme Court only had appellate jurisdiction if satisfied that –

> i. the decision involved a matter of general public importance, or
>
> ii. in the interests of justice it was necessary that there be an appeal to the Supreme Court.

In deciding to allow an appeal to be made, the Supreme Court stated –

> "10. On the question of a matter of general public importance, it is clear that the resolution of this issue affects all of the insurance companies which underwrite road traffic insurance in Ireland. The complaint is made by the insurance companies contributing to the fund which administers the MIBI scheme, but this kind of liability was never contemplated, was never foreseen and will result in unjustifiable calls on the insurance companies through the annual levy. Whether that be right or wrong, it is clear that the issue involved is a very serious one and that it impacts upon the cost of insurance to the public generally and the manner in which insurance companies are able to foresee and to provide for their liabilities on a year-to-year basis. For the Law Society, it is argued that nothing of general importance is involved and that "the criterion of public importance is not dependent on the amount of money [that] is at stake in an individual case, but upon the issues of legal principle presented by the case." It is claimed by the Law Society that what is involved here is merely the application of "mundane legal principles of contractual interpretation". While it is certainly necessary to properly construe the MIBI Agreement, the background to that agreement, the contextual analysis of the various permutations argued by the parties, the influence of European Union law and the necessity to fit the agreement within a statutory context wherein there are varying interpretations as to why there is mention of, or provision for, the Agreement in particular pieces of legislation takes the matter outside the realm of what the Law Society vehemently and of particular length argue is not of general public importance. Moreover, the impact of a decision can affect whether the case is of general public importance as well as the principles applied to reach the conclusion in the case."

Although the test under Article 34.5.3 is of 'general public importance' rather than 'exceptional public importance', Counsel submitted that this analysis is helpful, and that the issue considered by the Supreme Court to be of general public importance has a parallel with the levy on insurance companies arising from the collapse of the plaintiff, with the significant impact on that wide segment of the

public obliged to pay the 2% levy which will continue for many years to come.

The Defendant's Response
89. The defendant in the affidavit of Mr Joyce and in written and oral submissions argued that there was a heavy burden on the plaintiff to satisfy the court of exceptional public importance. The defendant asserted the absence of exceptional public importance, and the arguments may be summarised as follows: –

1) It is incorrect to say that the defence "centrally relies" on the proposition that because the financial statements were the responsibility of the plaintiff, the auditor can have no liability for any misstatements. Rather the defendant's primary contention in defence of the proceedings is that the plaintiff's financial statements, and Forms 6, 10 and 11 of the regulatory returns which were audited by the defendant, were not materially misstated.

2) Insofar as the plaintiff contends that the role of the auditor of a publicly regulated entity, and the standard of performance of such an auditor, arise as issues, these questions are not unique or exceptional, but are concerned with basic principles of professional liability which are frequently litigated in the courts in this jurisdiction and elsewhere.

3) The proposition that these proceedings are being advanced in the public interest, in the sense that the ICF will be the ultimate beneficiary, is flawed. Firstly a point of law of exceptional public importance does not arise merely because of the involvement of the public body in the proceedings (see the observation of Barrett J. in *Dublin Waterworld* quoted in paragraph 86 of this judgment). Secondly such an approach would endorse discrimination between defendants to claims for a public body that will benefit from the funds recouped, and those not so placed.

4) Further such an approach would create a form of sovereign immunity on the part of state parties, who would be entitled to sue with impunity and without having to carry the usual costs risk that is associated with any proceedings. It was argued that such sovereign immunity has long been rejected in this jurisdiction – see *Byrne v. Ireland* [1972] IR 241, where the Supreme Court held that the former prerogative of immunity from suit did not exist in Ireland after the enactment of the Constitution of the Irish Free State, 1922. If the State was suing it would not be entitled to seek such immunity. Insofar as the plaintiff brings these proceedings to recover for the benefit of the ICF and the taxpayer it would equally not be in the interests of justice if the plaintiff obtained "a form of *quasi de facto* immunity" from payment of the defendant's costs in the event that it is successful in its defence. It is particularly unjust in the present case as the pursuit of these proceedings is effectively funded by the ICF, and the plaintiff can apply to the ICF to replenish its funds, yet the plaintiff refuses to provide security in respect of the defendants costs, and at no point has the plaintiff stated whether or not it has applied to the ICF, or intends to apply to the ICF for funding that would cover security for costs.

5) In support of this argument counsel relied on *Godsil v. Ireland* [2015] IESC 103. Those proceedings concerned the existence of a statutory prohibition on the eligibility of an undischarged bankrupt to run in a European Parliamentary election. Due to a change in legislation the proceedings became moot. The plaintiff was refused costs and appealed that decision to the Supreme Court. McKechnie J. addressed costs in our legal system at para. 19 – 22 of his judgment. At para 19 he emphasised the "high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other hand". At para 20 he stated:

> "20. A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so, but it is, with the "costs follow the event" rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process including over court participation or attendance. If however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him, to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff.

6) Furthermore at no point has it been suggested that the plaintiff will be unable to pursue the proceedings if security for costs is ordered; accordingly the court cannot be satisfied, even on a prima facie basis that special circumstances exist.

7) The assertion that the defendant "played a critical role in the regulation of the plaintiff" is incorrect. During the material period The Financial Regulator was the entity which had sole responsibility for determining what policies and processes were appropriate to the regulation of the plaintiff. The defendant occupied a private role as auditor. This role was distinct from that of in the Financial Regulator as regulator of the plaintiff.

7) Section 35 of the Insurance Act 1989 merely imposes a statutory duty on auditors – it does not thereby transform them into public regulators. Further the defendant did make reports under this section to the Financial Regulator on 15 February, 2008, and 16 May, 2008, but the plaintiff was not placed under administration until March/April 2010.

8) The present proceedings are private litigation, not an enquiry into the regulatory system for insurance companies.

9) There is no point of law of such gravity or importance as to transcend the interests of the parties actually before the court.

10) The *MIBI* case concerned a different test, that of "general public importance", as opposed to "exceptional public importance". Also the importance there was clear as it will affect thousands of cases in which plaintiffs' personal injury cases are not being concluded because it is unclear who will discharge the damages, the MIBI or the ICF, and at what level.

Discussion
90. This case does raise issues of great public interest and exceptional public importance. While they arise in the context of a dispute between a private insurance company and a private auditor, this could not be characterised as a run-of-the-mill professional negligence suit.

91. The plaintiff undertook a wide and extensive underwriting business, with a big interface within the public. Its collapse led to administration under statutory powers under the supervision of the President of the High Court. The Joint Administrators, in order to stabilise the businesses and sell them off, have been obliged to obtain funding from the ICF, provided in turn from the Exchequer, which will ultimately be in the order of €1.1 billion. In order to recoup this a 2% insurance levy has been imposed on members of the public purchasing insurance in the State. This levy is continuing, and must therefore affect a very large segment of the population. This does bear comparison with reasons of general public importance which the Supreme Court found to exist in the *MIBI* case.

92. There is undoubtedly a significant public interest in ascertaining why the plaintiff collapsed, and whether and to what extent its auditor, the defendant, should bear any responsibility. The size of the claim, at €900 million or thereabouts, is a factor which cannot be ignored.

93. I am also satisfied, notwithstanding the defendants arguments, that the case raises significant points of law relating to the regulatory framework and the extent of the obligations of auditors of insurance companies under the Insurance Acts, and the 1994/1995 Regulations, and the audit guidelines relating to those regulations. It is in this context that the court will have to determine whether there was misstatement or other wrongdoing on the part of the defendant. The public interest in this extends to how the plaintiff could collapse notwithstanding the regulatory system, the role of the Financial Regulator, and the need for public confidence in the proper regulation of the insurance industry in the future.

94. While I accept, as McKechnie J. stated in *Godsil*, a defendant is entitled to an expectation that he will recover costs if successful, and that it would be unjust for him to suffer a financial burden in defending a claim, it does not follow that there is an absolute right to such costs. This is simply an "important rationale for the existence of the costs jurisdiction". Part of that jurisdiction is section 52 under which any judge having jurisdiction "may" grant security for costs against a plaintiff company. The jurisprudence that gives a judge discretion to refuse security for costs for reasons of exceptional public importance is part of that costs jurisdiction.

95. Clearly the fact that a plaintiff is a state body cannot of itself be a reason for asserting public importance as a special circumstance. The present plaintiff is not a state body. The defendant contends in effect that the plaintiff's reliance on funding from ICF, in turn provided from the Exchequer, in order to bring these proceedings, puts it in a position analogous to that of a state company. It is argued that to refuse security for costs would be to grant *quasi de facto* immunity to the plaintiff, similar to the state immunity found to be unconstitutional in *Byrne v Ireland*. In my view this argument fails to take into account the exceptional and ongoing public impact of the collapse of the plaintiff, and the issues of exceptional public importance identified earlier in this discussion. I do not consider that the court should ignore these matters of exceptional public importance because of the funding obtained to date from the ICF.

96. The defendant argues that the plaintiff has received funding from the ICF to pursue this action to date, and hints that it could make further application to "replenish" its funds. It is said that the plaintiff has failed to state that it will be unable to pursue the action if security for costs is ordered, and that this precludes it from demonstrating a prima facie basis for the existence of special circumstances. It is argued that these factors give rise to "constitutional unfairness" if the plaintiff is entitled to rely on "exceptional public importance".

97. I do not accept these arguments. First, earlier in this judgment I concluded that as matters presently stand there is credible testimony that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the defendant is successful in its defence. I reached this conclusion following consideration of the circumstances under which the plaintiff has received funding to date from the ICF, following approval by the President of the High Court. There is no evidence that the plaintiff has applied or intends to apply for any further funding from the ICF, and were it to apply the outcome would be outside of its control being subject to the ICF and court approval.

98. Secondly, although in practice it may frequently be the case, it does not seem to me to be a prerequisite of reliance on special circumstances that a corporate plaintiff must demonstrate that it will be unable to pursue the action further if security for costs is ordered. For example, an impecunious company may rely on special circumstances to resist the application for security for costs, but if it fails and security for costs is ordered that plaintiff may still be able to prosecute its action using refresh earnings or funds borrowed from a bank or obtained from third-party sources.

99. Thirdly these arguments fail to recognise that if there is exceptional public importance there would be countervailing unfairness if the court were to order security for costs.

100. I conclude therefore that this is a case which raises issues of such exceptional public importance that the court's discretion should be exercised to refuse security for costs upon this further ground.