

Between:

**PROTÉGÉ INTERNATIONAL GROUP (CYPRUS) LIMITED
AND AVALON INTERNATIONAL MANAGEMENT INCORPORATED**

Plaintiffs

– and –

IRISH DISTILLERS LIMITED

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 17th May, 2019.

1. Irish Distillers seeks security for costs against Protégé and Avalon, two companies registered outside Ireland, Protégé in Cyprus, Avalon in Panama. The application falls properly to be brought under O.29, r.1 RSC. The legal test applicable is similar, albeit not identical, to that pertaining under s.52 of the Companies Act 2014.

2. It was conceded at hearing that Irish Distillers has a *prima facie* defence. The court would anyhow have concluded so on the evidence. The court likewise accepts that, on the evidence, the plaintiffs have a *prima facie* case. Protégé's accounts and the evidence generally show it wants the assets/funding necessary to meet fully the likely costs if Irish Distiller's defence succeeds. As for Avalon, given that Irish Distillers has a *prima facie* defence and that Avalon is established outside the EU, a presumption arises that Irish Distillers is entitled to the requested order. The foregoing being so, the onus shifts to the plaintiffs to establish that the requested order should not be made (*O'Toole Ltd v. Mac Eoin Kelly Associates* [1986] IR 277). The plaintiffs contend that:

(i) any inability on their part to provide security is attributable to Irish Distillers. The plaintiffs have adduced no evidence that satisfies the test for causation of impecuniosity identified by Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7.

(ii) the case raises one or more points of law or issues of exceptional public importance. These proceedings concern a private competition law dispute between parties in the whiskey/spirits sector; if the plaintiffs succeed, damages will follow. That Ireland has a booming whiskey trade does not convert this private dispute into one raising one or more points of law or issues of exceptional public importance. Nor does the importance of the observation of competition law make this a case that raises one or more points of law or issues of exceptional public importance.

(iii) there is a European context to the case that should weigh against granting the requested order as, to make same, it is claimed, would deny the plaintiffs effective redress. The facts here offer a good example of what McKechnie J. contemplated when observing in *Digital Rights Ireland Ltd v. Minister for Communications, etc.* [2010] IEHC 221, para.106 that the involvement of EU directives (or, the court notes, other law informed heavily by EU law, such as competition law), while a relevant factor, "*could not...in and of itself, constitute a 'special circumstance' such that it would be determinative of the matter without more*", and here that "*more*" is absent. When it comes to *DEB Deutsche Energiehandels v Bundesrepublik Deutschland*, (Case C-279/09), on which the plaintiffs place some reliance, the court notes that: (i) Irish Distillers has a *prima facie* defence, (ii) the proceedings are complex, (iii) the respective parties have provided helpful but divergent costs estimates, (iv) Protégé's financial records do not evidence ability to meet a costs order (no financial records concerning Avalon are before the court), and (v) it is of little if any assistance to the plaintiffs that they have managed separately to fund separate trademark litigation concerning Irish Distillers.

3. Given the foregoing, the court will make the requested order. However, the court is mindful in this regard of: Kingsmill Moore J.'s observation in *Thalle v. Soares* [1957] IR 182, 194, that security should be viewed as not being an "*indemnity against all costs...or as an encouragement to luxurious litigation*"; and Murray J.'s observation in *Framus Ltd v. CRH plc & ors* [2004] 2 IR 20, 60, that the courts should seek to ensure "*that the security is not a mere token and...not an obstacle to a full and fair disposal of the issues*". Given the scale of the (disputed) potential costs, to order full security on the figures of Irish Distillers could yield an indemnity (or even over-indemnity) scenario and/or present the obstacle contemplated by Murray J. That said, the court notes the frail financial position of Protégé and that the financial position of Avalon is unknown to the court. The court will therefore order security for costs in the (discounted) amount of one million euro.