Neutral Citation [2012] IEHC 116

THE HIGH COURT

COMPETITION

[2010 No. 10685 P]

BETWEEN

GOODE CONCRETE

PLAINTIFF

AND

CRH plc, ROADSTONE WOOD LIMITED AND KILSARAN CONCRETE

DEFENDANTS

JUDGMENT of Mr. Justice Cooke delivered the 21st day of March, 2012

1. By a plenary summons issued on the 19th November, 2010, the plaintiff commenced this action seeking a large number of declaratory orders together with damages (including exemplary damages), based on claims of infringement by the defendants of ss. 4 and 5 of the Competition Act 2002 (as amended) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). A statement of claim was delivered on the 5th April, 2011.

2. Those claims of infringement of those provisions are made in respect of agreements and conduct alleged to have been made and taken place in the State in the markets for cement and for readymix concrete in the Dublin area. The plaintiff and the defendant companies are said to have been engaged in these markets at the times alleged to be relevant, that is, during the years 2007 to 2010. Further ancillary causes of action including conspiracy are also advanced in the statement of claim.

3. The plaintiff is an unlimited company incorporated in the State and claims that at the relevant periods it was engaged in the manufacture. sale and distribution of readymix concrete, concrete blocks, sand and gravel and quarrying products.

4. The first named defendant ("CRH") is a public company incorporated in the State, and the holding company of a large number of subsidiaries operating in the State, elsewhere in the European Union and in other countries, both in the above relevant markets and in other related markets. It is alleged by the plaintiff to be in a dominant position in the State as the dominant supplier of cement to the construction sector. The second named defendant ("Roadstone") is a wholly owned subsidiary of CRH.

5. The third defendant ("Kilsaran") is an unlimited company incorporated in the State and is said to be engaged in the production and supply of concrete and concrete products throughout the State and particularly in the Dublin area.

6. Although the plaintiff is described in the pleadings as carrying on an "independent family run business" the shares of the company are in fact held by Cliodna Limited, a limited company incorporated in Jersey in the Channel Islands, and by Magic Potion, an unlimited company also incorporated in Jersey, the share capital of which is held by Cliodna Limited. The shares of Cliodna Limited are apparently held by two further limited companies, Clarendon Nominees Limited and Portman Nominees Limited, also incorporated in Jersey. Thus, the ultimate beneficial owners of the plaintiffs business have put in place an elaborate off-shore corporate structure, the purpose of which would appear to be to limit accounting disclosure obligations in this jurisdiction, while preserving for themselves the protection of limited liability for their trading activities.

7. The plaintiff company ceased trading on the 18th February, 2011. The Court has been informed that a receiver was subsequently appointed to the assets and undertaking of the company. It is not disputed that it is insolvent, but the claims made in the proceedings are based upon the allegation that it was forced out of business by the illegal activities of the defendants. It is in these circumstances that by notices of motion dated the 18th January, 2011 and 2nd February, 2011 respectively, CRH and Roadstone on the one part, and Kilsaran on the other, brought the present applications for orders directing the plaintiff to provide security for their costs in the proceedings under s. 390 of the Companies Act 1963, or in the alternative, under Order 29 of the Rules of the Superior Courts, or in the further alternative, under the inherent jurisdiction of the Court.

8. Whilst acknowledging that the plaintiff is no longer trading, and would be unable to meet the likely costs of a full plenary action in the event of the claims failing, the applications for security for costs are met by a straightforward assertion by the plaintiff namely, that the Court has no jurisdiction to make the orders sought. This proposition can be bluntly stated. First s. 390 applies only to "limited companies" and the plaintiff is an unlimited company. Second, Order 29 applies only to parties ordinarily resident out of the jurisdiction and the plaintiff is incorporated, registered and resident in this jurisdiction. Third, the defendants have not demonstrated the existence of any inherent jurisdiction of the High Court for this purpose.

Section 390 of the Companies Act 1963

9. It is appropriate to deal first therefore with the submissions made in relation to s. 390 of the Companies Act 1963 in the particular context of this action. That provision provides:-

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

10. The plaintiff is an unlimited company. The word "company" is defined in s. 2 of the Act of 1963 as meaning "a company formed and registered under this Act, or an existing company" while the terms "company limited by guarantee" and "company limited by shares"

have the distinct meanings given to them in s. 5(2) of that Act. Section 20 of that Act also provides distinctly for the registration of an unlimited company as limited and for a limited company to re-register under that Act. Accordingly, it is clear that it would fly in the face of the explicit provisions of the Act and the express terms of the wording ins. 390 to treat that section as applicable to anything other than a limited company as so registered under the Act. (See ss. 52 and 53 of the Companies Act of 1983.)

11. It must also be borne in mind that the mischief which s. 390 is designed to address is the abuse by corporate plaintiffs of the immunity afforded by the statutory construct of limited liability to the unjust detriment of defendants who would otherwise be unable to recover costs incurred in defending unfounded claims by limited companies. This is, of course, the major distinction between corporations and natural persons as litigants: in the case of the latter, poverty alone is no reason for ordering security to be given.

12. Notwithstanding the clear terms of s. 390, however, the Court has been urged on behalf of the defendants to take a "purposive" approach to the section as had been done, for example, by Clarke J. in *Usk District Residents Association v. EPA* [2006]1 I.L.R.M. 363, where he construed the terms "plaintiff' and "defendant" by reference to the expression "other legal proceedings" as extending the scope of the section to applicants and respondents in judicial review proceedings.

13. In the view of the Court it is questionable whether the plaintiff's submission can properly be described as adopting a purposive approach. In the understanding of the Court this principle of interpretation is based upon the presumption that the legislator intends an enactment and each of its provisions to have some purpose and effect so that interpretations which give a provision meaning and effect consistent with the apparent scheme or objective of the enactment are to be preferred over those which would render it ineffective or frustrate its purpose. Accordingly where a provision lacks clarity or is ambiguous, the construction which gives the enactment effect consistent with the aim of the enactment is preferred. In interpreting an ambiguous provision in the Local Government (Dublin) Act 1930 in *Carlisle Trust Ltd v Dublin Corporation* [1965] IR 456, Davitt P, said:

"Consideration of the language alone does not enable me to say that it clearly means either one thing or the other. It is capable of being understood in either sense and is therefore ambiguous and obscure. I believe I am acting well within the accepted canons of construction in preferring an interpretation which I believe to be at once more consistent with justice and with the purpose of the enactment in question."

14. In considering a provision in the Courts Act 1971 which required that rules of court should be made for the conduct of certain proceedings under the Illegitimate Children (Affiliation Orders) Act 1930 in the High Court, when none had been adopted, the Supreme Court (Henchy J.) said: "A purposive interpretation of the Act of 1971 carries out the aim of that Act [of 1930]: a literal interpretation frustrates it." He added:" The jurisdiction of the High Court created by the Constitution is not dependent upon rules of court: when that court was given full original jurisdiction in all matters and questions by the Constitution, the People intended it to be exercised and did not intend it to be conditional upon the action or inaction of a subordinate body" ([1982] I.L.R.M. 234).

15. In the judgment of the Court however, the adoption of a "purposive approach" to the interpretation of a provision cannot be resorted to in order to override the clear and obviously deliberate terms in which the statutory provision has been cast. The meaning and purpose of s. 390 admits no lack of clarity or ambiguity. It is directed, as already mentioned, at the mischief of the abuse of limited liability. It was not an oversight on the part of the Oireachtas that entities other than limited companies were omitted. To interpret the section by reference to its plain words and obvious meaning does not therefore frustrate the intended effect or purpose of the provision.

16. It might possibly be argued in an appropriate case that the Court should look through the corporate character of an unlimited company at limited companies which are its members. That however is not the adoption of a purposive approach to interpretation so much as an application of the principle well established in company law which may justify a Court in "lifting the corporate veil'" so as to prevent the corporate personality of a company being exploited to the unjust disadvantage of parties dealing with it. The principle was stated by Costello J. (as he then was), in *Power Supermarkets Limited v. Crumlin Investments Limited* (Unreported, High Court, 22nd June, 1981) and subsequently approved by the Supreme Court in *Re. Bray Travel Limited and Another* (Unreported, Supreme Court, 13th July, 1981). It was described by Costello J. as follows:-

> "It seems to me to be well established from these as well as from other authorities ... that a Court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group or another member of the group, if this conforms to the economic and commercial realities of the situation. It would, in my view, be very hard to find a clearer case than the present one for the application of this principle."

17. That was a case in which separate limited companies had been employed within a group to operate individual supermarket outlets. Upon the acquisition of a shopping centre by the holding company of the group, an individual unit within the centre had been transferred to a distinct limited company in order to avoid a covenant in the head lease held by the holding company which restricted the sale of groceries and food products in outlets to a given maximum area within the shopping centre.

18. As indicated above, although in the present case the plaintiff was originally the trading company, it is now admittedly an empty shell and the beneficial interest, if any, in the present proceeding presumably inures to the ultimate owners of the shares in Cliodna Limited. Had it been necessary, therefore, the Court considers it would have been permissible, in order to do justice, to treat the plaintiff and the limited companies in its chain of ownership as a single entity for the purposes of section 390, but in this case such an approach would still not avail the defendants, because the relevant limited companies do not come within the definition of "company" in the Act of 1963, being foreign companies.

Order 29 R.S.C.

19. In the judgement of the Court however, it is unnecessary to surmount the obstacles posed by the literal wording of s. 390 because it is clear that an order for security for costs can be made in an appropriate case against an unlimited company plaintiff, including one resident within the jurisdiction, under O. 29 of the Rules of the Superior Courts for the following reasons.

20. The Court first notes however that an assumption seems to have arisen, acknowledged by both sides in this case, that security for costs can only be required under the Order from a party ordinarily resident out of the jurisdiction. This assumption evolved in part because, as a matter of practice, it was only against such parties that orders were invariably made, and in part because of an implication drawn from rules 2, 3 and 4 of the Order. It does not appear to have been based on the ratio of any decided authority to that precise effect, although it is certainly true that there are many reported cases both in this jurisdiction and in England and Wales since at least the Judicature Acts which turn on issues as to whether a plaintiff against whom security is sought is to be treated as ordinarily resident abroad for the purpose. As pointed out by counsel on behalf of the plaintiff, in *Proetta v. Neil* [1996] 1 I.R. 100, Murphy J. said:-

> "The claim for security for costs is brought under Order 29, Rule 1 of the Rules of the Superior Courts. That Order does not express in positive terms a requirement that a foreign resident may be required to give security for costs. Rather, the rule proceeds on the footing that such is the case and the detailed provisions are expressed as limiting or modifying the application of the assumed provision."

21. That was, however, a case in which both parties to the application were resident out of the jurisdiction so that the above observation of Murphy J. cannot be said to form a part of the ratio of the judgment. In Pitt v Bolger & Barry [1996]2 ILRM 68, that assumption was again adverted to by Keane J.: "As to the general nature of the jurisdiction exercised by this court under Order 29, the language of the order as noted by Murphy J in Proetta v Neil, assumes the existence of an existing practice rather than defining it in precise terms." In *Harlequin Property (SVG) Ltd & Anor v O'Halloran* (Unreported, 19th January, 2012) Clarke J. said "The jurisdiction under Order 29 is based on the practical difficulty of enforcing an award of costs outside the jurisdiction (or nowadays outside the European Union) rather than anything else." Thus the assumption is recognised as part of the existing practice but there does not appear to have been any explicit finding that the Order is applicable to non-resident plaintiffs alone. Moreover, as explained below, there appears to have been at least one category of cases in which it has been held that Order 29 or its predecessors did permit such orders to be made against parties resident within the jurisdiction.

22. The rules of Order 29 relevant to the issues of jurisdiction with which the present applications are concerned (as opposed to the rules governing the procedures for fixing and giving security when ordered,) are as follows:

"1. When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security.

2. A defendant shall not be entitled to an order for security for costs solely on the ground that the plaintiff resides in Northern Ireland.

3. No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits.

4. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction.

5. If a person brings an action for the recovery of land after a prior action for the recovery of the same has been brought by such person or by any person through or under whom he claims, against the same defendant, or against any person through or under whom he defends, the Court may at any time order that the plaintiff shall give to the defendant security for the defendant's costs, whether the prior action has been disposed of by discontinuance or by non suit or by judgment for the defendant."

23. The evolution since the Judicature Acts of the rules now contained in Order 29 can be traced back to their statutory origin in section 52 of the Common Law Procedure Amendment Act (Ireland) Act 1853 which provided:

> "Any Defendant served with any Writ of Summons and Plaint in any Action shall thereupon be deemed to be in Court for the Purpose of making an Application to the Court or a Judge to compel the Plaintiff to give Security for Costs, and for other like Purposes: Provided that no Order for Security for Costs shall be made by reason of any Plaintiff being resident out of the Jurisdiction of the Court, at the Instance of any Defendant, unless upon a satisfactory Affidavit that such Defendant has a Defence on the Merits."

It will be noted that the first part of that section is of general application: it is not reserved to a particular category of plaintiff. The Proviso makes it clear that in the case of one category of plaintiff, namely one resident out of the jurisdiction, a condition is imposed namely, the requirement to show a defence on the merits.

In the Rules under the Supreme Court of Judicature Act (Ireland) 1877 Order LV was in general terms without reference to any condition as to residence or non-residence:

"In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form as the Chief Clerk in actions assigned to the Chancery Division and the master in actions assigned to the Queen's Bench, Common Pleas, and Exchequer Divisions, shall direct."

In the Rules of the Supreme Court (Ireland) 1891, O. XXIX,- Security for Costs- took on the form now more familiar in Order 29. It provided as follows:-

> "1. When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within twenty four hours after service thereof, undertake by notice to comply therewith, the party requiring the security, shall be at liberty to apply for such security by summons, grounded upon affidavit; and every such application shall be made before the party seeking the security takes any step, save entering an appearance, in the cause of matter after his right to such security shall have arisen, unless the Court or a Judge shall, under special circumstances otherwise order.
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> 2. A defendant shall not be entitled to an order compelling the plaintiff to give security for costs solely on the ground that the plaintiff resides in England or Scotland.
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> 3. No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits.
>
> 4. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction."

24. Thus, rule 1 prescribed the procedure for making an application for security for costs in general terms without limiting the type of party against whom security can be sought. Rules 2, 3 and 4 prescribed particular terms or conditions governing the circumstances in which security may be sought against a plaintiff out of the jurisdiction.

25. Those rules were readopted without material change in O. xxix of the Supreme Court (Ireland) Rules 1905.

26. In 1926, High Court and Supreme Court Rules were adopted under s. 36 of the Courts of Justice Act 1924, which included at Order XII very brief provisions as follows:-

> "1. Where a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within 24 hours after service thereof, undertake by notice to comply therewith, the party requiring the security should be at liberty to apply to the Court for an Order that the said party do furnish the security as aforesaid.
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> 2. Where the Court shall have made an Order under the preceding Rule that a party do furnish security for costs, the amount of security and the time or times at which, and the manner and form in which, and the person or persons to whom the same shall be given shall be determined by the Master in every case."

27. In the 1926 Rules, therefore, the particular provisions of the preceding rules 2, 3 and 4 were not repeated and no limitation was placed upon the grant of security for costs by reference to the residence of the party concerned, whether within or without the jurisdiction.

28. On the face of it, therefore, an exclusion from the jurisdiction of the courts of the competence to require security to be given by a resident plaintiff does not appear to have been a permanent or necessary characteristic of the rules at any time. Nor does the present Order 29 according to its wording, exclude from the jurisdiction of the Court the making of an order for security against a plaintiff ordinarily resident within the jurisdiction. It is true, of course, that it has always been a principle of court practice that the poverty or insolvency of a plaintiff who is resident within the jurisdiction is not a ground for the grant of such an order. (See, for example, *Stad v. Williams* 5 C.B.528; *Kenealy v. Keane* [1901]2 I.R. 640; *Cook v. Whellock* (1890) 24 Q.B.D. 658).

29. Rules 2, and 3 of the Order therefore, define particular conditions applying to orders for security for costs against a plaintiff who is outside the jurisdiction. Residence in Northern Ireland alone is not a reason. In circumstances where residence out of the jurisdiction is relied upon, there must be an affidavit disclosing a defence upon the merits. Rule 4, on the other hand, does permit an order to be made against a plaintiff who is fact resident in the jurisdiction although that residence is temporary and the plaintiff is ordinarily resident outside the jurisdiction. Furthermore, rule 5 supplies a particular rule for actions for the recovery of land and it clearly permits an order to be made against a plaintiff resident within the jurisdiction.

30. Apart from these indications that a plaintiff resident within the jurisdiction may, in certain circumstances, be required to provide security for costs, the case law demonstrates that there is at least one further category in which orders have been made under the precursors of the present O. 29. These are cases where the plaintiff is a nominal plaintiff as, for example, where an action is continued after the plaintiff has disposed of his interest in the subject matter of the action. In *Cowell v. Taylor* [1885] 31 Ch.D 34, the Court of Appeal of England and Wales had to consider an issue which arose as between the established practice of not requiring security to be given by a plaintiff suing as a trustee in bankruptcy or liquidation on the one hand, and the authority for the proposition that security could be required of a nominal plaintiff. Bowen L.J. summarised the position:

> "The general rule is that poverty is not bar to a litigant, that, from time immemorial has been the rule at common law, and also, I believe in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow."

31. Later in the same judgment Bowen L. J. quotes from the judgment of Bovill C.J. in the pre-Judicature Act case of *Sykes v. Sykes* (Law Rep. 4 C.P. 645) where the Chief Justice said:

> "To entitle a defendant to security, he must shew not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action. In that case the Court would stay the proceedings until security is given. That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt."

32. The proposition that a plaintiff suing in a representative capacity who is shown to be without visible means can be ordered to give security though resident within the jurisdiction is also illustrated by the case in *A.G. (Cahill) v. Allman and Others* [1906] 1 LR. 473. The action there had been brought by a relator at the suit of the Attorney General to have a public trust carried out or a charitable scheme settled. Holmes L.J. described the principal concern in these terms:-

> "The foundation of the principle of ordering security for costs is that there must be a defence to the action or some question to be tried in the action; and I can understand that, in a case where there must be a judgment of some kind against the defendants, security for costs would not be ordered. In this case, if nothing had been done with the money since 1896, if the money had been left in the bank, I entertain grave doubt if the Master of the Rolls would have made the order. But where there is a question to be tried, it is necessary that the plaintiff should prove to the satisfaction of the Court that he is a person who can reasonably be trusted with the prosecution of the case; and if the action is brought improperly, so that it may injure the defendants or the charity, there ought to some security for the costs of suit."

33. In his judgment in that case, Walker C.C. cited Daniels *Chancery Practice* (7^{th} Ed.) where the rule was stated:

> "As the principle object in having a relator is that he may be answerable for the costs of the proceedings, in case the action shall appear to have been improperly instituted or conducted, it follows, as a matter of course, that such relator must be a person of substance, and if it is made to appear to the Court that the relator is not a responsible person, all further proceedings in the information will be stayed, until a proper person shall be named as relator."
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> He added:-
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> "Here a person was named, but it appears he is not a person from his position and means really responsible for costs. That being so, the Master of the Rolls came to the conclusion that the relator should give security for costs. In my opinion that order was right."

These authorities in support of the proposition that security can be required of a nominal plaintiff shown to be without means are

further confirmed by later caselaw (see for example, Greener v E.Kahn & Co (1906) KB 374; *Blair v Crawford and Millikin* [1907] 41 ILTR 5; *Semler v Murphy* [1967]1 Ch 183 and *George Bell Ltd v Nethercott* N.I.299).

Moreover, although the issue arose in the Supreme Court under Order 58 r.17, in *Fallon v An Bord Pleanala* [1992] 2 IR 380, that Court considered it a relevant factor that the appellant had been chosen as a nominal plaintiff for the purpose of the High Court action. Finlay C.J. said (at p.385) "...I am driven to the conclusion that the probability is .... that this appellant was chosen as a man of straw by a number of other people, many of whom might have been a mark if they had been the plaintiffs, and that he probably has not got any very special, he clearly has no special material interest in the result of the action, and he may not have any very special aesthetic or general interest, and he certainly has failed to meet the challenge contained in the affidavit in this application and explain to this Court why a young man of 27 or 28 years of age, starting into his career in a modest way, should imperil his entire financial future by taking on litigation of this description."

34. In the judgment of the Court, therefore, neither the wording of O. 29, r. 1, nor the long standing practice of the courts justify the assertion relied upon by the plaintiff namely, that it is a complete answer to an application for security for costs for a plaintiff to demonstrate that it is resident within the jurisdiction.

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

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

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

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

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

38. It is not disputed that the plaintiff company is insolvent and ceased trading on 18th February, 2011. It is clear from the affidavits filed on behalf of the plaintiff in this proceeding to date that the case is effectively being prosecuted by Mr. Peter Goode and his brother Mr. Barry Goode. They are directors of the plaintiff.

39. According to draft accounts of the plaintiff company as at the 31st October, 2010, its balance sheet disclosed a deficit of €679,484. The appointment of the receiver took place after the present proceedings had been commenced. No information has been put before the Court as to the basis upon which the action is continued by the company or as to whether it is prosecuted with the support and approval of the receiver. It follows that it is necessary to conclude that the plaintiff company is effectively lending its name to permit the directors to pursue this action. They do so in the interests of the creditors of the company, on the basis that the proceeds of any successful claim for damages will be recoverable in the first instance by the receiver, with any surplus accruing to the benefit of the members of the company, and ultimately to the beneficial owners of those companies. In these circumstances the Court is satisfied that the plaintiff can be characterised as a nominal plaintiff and that an order for costs under O. 29, can be made against it on that basis notwithstanding its residence within the jurisdiction.

40. There remain therefore the two further issues. First, have the defendants demonstrated that they have a defence to these claims and, secondly, if so, has the plaintiff made out a case that its inability to pay costs has been brought about by the wrongdoing of which the defendants are accused?

41. With regard to the first of these issues it is not in dispute that the onus lies on the defendants to show that they have a stateable or *prima facie* defence to the claims made. Furthermore, a bald assertion that such a defence will be forthcoming is not sufficient. The defendants must point to evidence which, if adduced and accepted, would deprive the plaintiff of its entitlement to the reliefs sought. Because the matter is considered at an interlocutory stage, the Court makes no decision as to whether such a defence will succeed, nor is it engaged in any comparison between the relative strengths of the cases advanced by the plaintiff and the defendant. The Court is concerned only to verify that the defendants genuinely intend to defend the action and that they have a stateable basis for doing so.

42. The claims advanced allege infringements of both competition rules under the Competition Act, 2002. The plaintiff alleges that the defendants operated a cartel and that they abused dominant positions in particular markets. These claims, which constitute the central thrust of the grievances expressed on behalf of the plaintiff, can be summarised as follows:

(a) CRH plc (including its wholly owned subsidiaries Roadstone and Irish Cement Limited) held a dominant position in the cement market in the State and abused that position by below cost selling in the market for concrete and concrete products in the Dublin area;

(b) The defendants are alleged to be part of one and the same undertaking for the purposes of s. 4 of the Competition Act 2002, and Article 101 TFEU;

(c) The three defendants are, as such, said to be in a position of collective dominance' in the market for readymix concrete in the Dublin area and have abused that position by below cost selling of concrete with a view to eliminating the plaintiff from that market;

(d) The CRH group infringed s. 4 of the 2002 Act and Article 101 TFEU by collusive tendering for contracts in the concrete market in the Dublin area and by concluding agreements between them to sell products at below cost.

43. So far as the evidence to be given on behalf of the plaintiff in support of these claims can be gauged from the particulars given both in the statement of claim and in replies to requests for particulars and in the averments of the affidavits sworn in the proceeding to date, the directors and other witnesses will testify to specific incidents in the form of collusive tenders for particular contracts in the construction sector and specific conversations of meetings involving representatives of the defendant companies at which it is claimed exchanges took place which will substantiate the allegations of infringement.

44. Apart from the allegations as to what was done and said at a particular meeting, the central proposition upon which the plaintiffs claims of unlawful conduct on the part of the defendants is based, is that during the relevant years the defendants embarked upon a strategy, either collectively or as a matter of agreed or concerted practice, which was designed to drive the plaintiff out of these markets, by selling and offering to sell the products at below cost. The plaintiff was thereby increasingly deprived of successful tenders for contracts commensurate with the market share it had previously enjoyed. In particular, it is asserted that the defendants deliberately undercut the plaintiff by selling at prices which would be below "average variable cost" (AVC)

45. In substantiating the proposition that the plaintiffs inability to pay costs is the result of this unlawful conduct on the part of the defendants, calculations and estimates are put in evidence which are designed to show that but for the below cost selling, the plaintiff company would have been able to maintain a 5% margin on the volumes of concrete it actually sold during those years. It is also put in evidence that the plaintiff would have avoided collapse had it retained its 17% market share and recovered a 5% market on the sales which that share would have represented. Instead, because of the low cost selling, the plaintiffs volumes of concrete sold between 2007 and 2010 declined from 362,139m^2 to 49,075m^2.

46. The defendants strenuously deny all of the allegations of unlawful conduct, collusive tendering and abuse of the alleged dominant positions. Kilsaran denies that it had any of the alleged links with CRH or its subsidiaries, that it is part of the same group or entity, or under its influence.

47. The defendants also dispute the proposition that the plaintiff was forced to cease trading as a result of any below cost selling or other anti-competitive conduct. In particular, on behalf of Roadstone a series of points are made relating to the dramatic economic downturn generally and the sharp contraction of the construction sector in particular, during the years in question, and suggests that on the available information the plaintiff company was very badly positioned to deal with these events. Amongst the points made by the defendants in relation to the plaintiff are the following:

(a) When the financial position of the plaintiff as disclosed in accounts for 2002/2003, prior to its being converted to unlimited status, are compared with the information relied upon in the plaintiff's affidavits, it is said to be apparent that the plaintiffs difficulties had begun before 2007.

(b) Its net debt at the end of 2003 was €13.1 million or 172% of equity, but at the end of 2006 had risen to €27 million or 389% of equity.

(c) Accordingly, before the collapse of the construction industry in 2007/2008, the plaintiff company was already a '"high debt, high fixed cost, low margin" company, particularly vulnerable to the downturn.

(d) Its basis of operation was also inefficient and vulnerable. A key competitive factor in the relevant market is the ready access to aggregates in each concrete plant. The plaintiffs one plant, situated in a quarry, was closed in 2009 and its remaining plants had to incur the higher cost of hauling aggregate.

(e) It also operated its own fleet of haulage trucks driven by its own employees with the resulting costs and overheads involved. Other operators including the defendants had significant advantages by sub contracting haulage.

(f) The allegation that the defendants introduced concerted price increases following the plaintiffs exit from the market is also contradicted. Such prices did come about, but for all remaining operators and were caused by extraordinary increases in oil and diesel prices in world markets.

(g) All operators in the relevant markets were faced with the same problems. The second named defendant was obliged to close 33 of its 69 operations nationally. The plaintiffs estimated 69% drop in volumes of sales is not inconsistent with the estimated degree of contraction of the market as a whole at 60%.

48. On behalf of Kilsaran, it is also denied that the plaintiff's difficulties were caused by anything other than its own inability to meet the challenges of the market contraction. It is accepted that Kilsaran did increase its prices and that it issued a notification to that effect. This, however, was brought about by the extraordinary increases in input costs and, in any event, does not necessarily represent actual price increases achieved as most sales are concluded on the basis of individual contracts for particular building projects. It is also pointed out that the plaintiffs allegations are based upon an assumption that Kilsaran's AVC for the relevant products must be the same as that of the plaintiff. This assumption is said to be wholly unjustified. (While the evidential position has since moved on in this regard, the Court drew attention to the inherent difficulties of assessment presented by these disputes at paragraph 32 of its judgment of 20 January 2011 on the plaintiffs application for an interlocutory injunction.)

49. The points referred to above from the submissions made on behalf of the defendants are by way of summary, and are intended to illustrate some of the key factors advanced in the course of more comprehensive and detailed submissions. The defendants will also rely upon technical reports, both in respect of the financial circumstances of the plaintiff. And technical aspects of the commercial

operation in the relevant markets, particularly those which serve to dictate or influence the costs and prices. Such a summary appears to the Court to be sufficient and appropriate having regard to the interlocutory character of the applications now before the Court and the need to avoid making any premature assessment of the merits of either the claims or the proposed defences. It is clear, however, from the summary and the nature of arguments proposed to be raised on foot of the evidence on behalf of the defendants which the arguments foreshadow, that issues of considerable financial and commercial complexity are anticipated in the trial of the proceedings. On that basis the Court is satisfied that the defendants have substantiated to a sufficient degree for this purpose the existence of a basis which will constitute the *prima facie* defence to the claims.

50. There remains, therefore, the issue which it falls to the plaintiff to establish namely, the existence of "special circumstances" which should incline the Court against requiring security for costs to be given. As indicated, the plaintiff alleges that its insolvency and its resulting inability to meet an order for costs is entirely attributable to the wrongful conduct of the defendants which form the basis of the proceedings. As Finlay P. (as he then was) said in *Collins v. Doyle* [1982] I.L.R.M. 495: "Amongst the matters to which the Court may have regard in exercising a discretion against ordering security, is if a *prima facie* case is being made by the plaintiff to the effect that his inability to give security flows from the wrong committed by the defendant".

51. As already mentioned above, the issues in dispute between the parties in this action are of obvious financial and commercial complexity. The assessment of this issue, therefore, as a ground for resisting an order for security differs from that in a case in which a plaintiff sues to recover a debt and pleads that his impoverishment is the result of the defendants' wrongful refusal to pay what is owed. As is already clear from what is summarised in para s. 45-48 above, one of the central areas of controversy in the present case is that of the cause or causes of the plaintiff's insolvency and inability to continue trading. That assessment is rendered all the more difficult because the period in respect of which the allegations of wrongdoing are made, coincides very largely with what both sides accept was a dramatic economic downturn that was particularly focused on the collapse of the entire construction sector in the State. In addition, the ultimate success of the plaintiffs assertion on this issue is faced with the obstacle posed by the criticisms made of its pre-existing financial vulnerability and indebtedness and by the uncertainty surrounding the calculation of the AVCs of each of the defendants, upon which may ultimately turn the plausibility of the argument that the plaintiff lost out on contracts because the defendants were offering to sell below cost.

52. In these circumstances the Court considers that it is not possible to conclude that the plaintiff has established to the degree of a *prima facie* case that the insolvency of the company and its inability to provide security for costs has been brought about as a result of the alleged unlawful conduct of the defendants. In the judgment of the Court, accordingly, it is appropriate to accede to the applications made by the defendants that security for costs be given.

53. The applications for security have been approached, however, by the defendants upon the basis that the Court would or should make a single order requiring security to be given on the basis of the estimated costs of an entire and lengthy trial lasting some six to eight weeks. Legal costs accountants on behalf of CRH have estimated the likely costs on that basis as a figure in excess of €1 million. Even in advance of the delivery of defences, however, it is clear from the arguments that have been exchanged in the course of this application and the earlier application for an interlocutory injunction brought by the plaintiff, that it will fall to the Court to give directions in relation to the trial of these proceedings and these directions will include, in all likelihood, the trial of a number of preliminary issues designed to define with greater precision the issues requiring a full witness trial. It is clear, for example, even at this stage, that Kilsaran does not appear to be involved in the market in the State for cement other than as a consumer of that product, and that it is not alleged to occupy any dominant position in the relevant markets in its own right. It seems likely, therefore, that there is a preliminary issue to be tried as to whether the proposition of the existence of a position of "collective dominance" on the part of the three defendants is well founded. Furthermore, it is clear on the face of the statement of claim that the plaintiff relies heavily on its intention to discover documents. It also seems equally obvious from the arguments advanced as to the history of financial vulnerability of the plaintiff company, that the defendants will similarly seek discovery of documents from the plaintiff.

54. In these circumstances it would appear to the Court to be in the interest of fairness to both sides not to make an immediate order requiring security on the basis of the estimated exposure in costs represented by a full trial of the entire action. Subject to hearing the parties, the Court proposes to make an order requiring security to be given to both sets of defendants by the plaintiff but on a phased basis. The Court will propose, as a first phase, to require security to be given, limited to a sum appropriate to the completion of the exchange of pleadings and the making of discovery on either side. The Court will then review the position at the conclusion of that phase and, if appropriate, consider making a further order for a second phase which might cover a trial of preliminary issues.