Neutral Citation: [2014] IEHC 18

THE HIGH COURT

[2001 No. 9288 P.]

[2001 No. 15119 P.]

BETWEEN

COMCAST INTERNATIONAL HOLDINGS INCORPORATED, DECLAN GANLEY, GANLEY INTERNATIONAL LIMITED AND GCI LIMITED
PLAINTIFFS

AND

THE MINISTER FOR PUBLIC ENTERPRISE, MICHAEL LOWRY, ESAT TELECOMMUNICATIONS LIMITED, DENIS O'BRIEN, IRELAND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Ryan delivered the 24th January, 2014

This is an application by the fourth defendant, Denis O'Brien, pursuant to Order 29 of the Rules of the Superior Courts. He seeks orders that the first plaintiff, Comcast International Holdings Inc, and the third plaintiff, Ganley International Ltd, furnish security for his costs in these actions. The fourth plaintiff, GCI Limited, is no longer in existence, having been dissolved on the 18th September, 2003 and it is agreed that it may be struck out of the action without further order. Mr O'Brien does not seek an order for security for costs against Mr Ganley.

The basis of the application is that these two companies are out of the jurisdiction, have no assets and will not be able to meet any order for costs in favour of Mr O'Brien if he wins the case.

Order 29 is 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.
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> 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.
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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.

The background to this application and these claims is well known to everybody living in Ireland who has taken any interest in public affairs over the past 20 years. Following a tender process that began in March 1995, the State's second GSM licence was awarded in May, 1996 to ESAT Digifone, a company in which the fourth defendant Mr. O'Brien had a major financial stake. The corporate plaintiffs were parties with others to a joint venture agreement that submitted a tender for the licence in August 1995 under the name Cellstar. On the 4th February, 1997, the fourth plaintiff assigned all of its rights arising out of the Cellstar consortium to the second plaintiff, Mr. Ganley.

There are two sets of proceedings that are in very similar terms except that No. 9288 P seeks "a declaration that the decision of the 16th June, 1995, whereby the deadline of the 23rd June, 1995, for the receipt of tenders for the award of the second GSM Mobile Telephone Licence was extended, is null and void and of no effect". It goes on to claim damages. In proceedings No. 15119 P, the first claim is for "a declaration that the decision, announced on the 25th October, 1995, to award the second GSM Mobile Telephony Licence to ESAT Digifone Limited is unlawful, null and void and to no effect". That summons also proceeds to claim damages.

The plaintiffs' complaint is expressed as follows at para. 15 of the statements of claim:-

> "Wrongfully, and in breach of contract, breach of duty and breach of statutory duty, the Minister interfered with the integrity of the tender process. He abused his public office by intervening in the tender process to ensure that the licence would be awarded to ESAT. He accepted payments made by or on behalf of ESAT and/or Denis O'Brien to ensure the award of the licence to ESAT and/or as a reward for having intervened to ensure the awarding of the licence to ESAT. In so doing, he breached the Prevention of Corruption Act 1906. In representing the tender process and the award of the licence to ESAT as having been the result of a fair and honest tender process, he engaged in fraud and deceit and abused his office."

The paragraph then proceeds to give particulars of the misconduct alleged.

The plaintiffs claim to have suffered loss and damage in amounts to be ascertained in respect of loss of opportunity to have been awarded the licence, loss of profits in respect of the operation of the licence, tender costs and miscellaneous.

The plenary summons in No. 9288 P. was issued on the 15th June, 2001, and in No. 15119 P. on the 10th October, 2001. Appearances were entered, but there was a long delay before statements of claim were delivered on the 3rd June, 2005. The procedural history may be briefly summarised but nothing turns on it in this application except to a limited degree in respect of a point made by the plaintiff against Mr. O'Brien that he delayed in bringing his motion for security for costs. The proceedings lay dormant for a period of years pending the publication of the report of the Tribunal to inquire into certain payments to politicians (the Moriarty Tribunal). When the plaintiffs served notice of intention to proceed and followed with statements of claim, the defendants moved to strike out the

proceedings on the grounds of delay. By order of this Court, the defendants' applications were successful and the actions were ordered to be struck out but on appeal to the Supreme Court, by order of the 17th July, 2012 (the reasons for which were given in judgments of the 17th October, 2012) the decision of this Court was reversed and the actions were permitted to proceed.

Mr. O'Brien's claim as presented by Mr. Jim O'Callaghan S.C. can be summarised as follows:

> 1. The motion seeks security for costs against the first and third plaintiffs.
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> 2. The first plaintiff is a company incorporated in the USA and the third plaintiff is a company incorporated in the United Kingdom.
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> 3. Each of these companies has very little assets: the first plaintiff appears to be a $100 company which is part of a large and asset rich network of corporations, but the first plaintiff is the poor relation, having no apparent activity and no existence except for its function as plaintiff in this case and as part of the application that was made for the GSM licence. In the affidavit of Mr. Block, General Counsel and secretary of the Group of which the first plaintiff is a small part, he says at para. 15 that funds will be made available to the first plaintiff to enable it to prosecute the action. But Mr. O'Callaghan points out that such an undertaking if reliable is of no value to his client in the event that the defendants succeed and are awarded costs. There is no undertaking to put money into the first plaintiff in order to meet a liability for costs that is imposed by this court.
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> 4. As to the third plaintiff, it has been dormant for many years and such accounts as were filed, before the relief of not having to file returns because of dormancy, was invoked were entirely pro forma and precisely the same year on year.
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> 5. Since these companies are located outside of the State, the defendant Mr. O'Brien is *prima facie* entitled to an order for security of costs. They are at best impecunious and at worst either insolvent or close to that condition. Either way, there is no way that they would be in a position to meet an award of costs of the kind likely to result from the unsuccessful prosecution of this action.

The resistance to the motion as presented by Mr. Brian O'Moore S.C. on behalf of the plaintiffs is as follows. He claims that the plaintiffs' application is unsound and essentially unfounded in that Mr. O'Brien has not complied with the necessary proofs in bringing his application. He has not made out any substantial defence on the merits as he is required to do. In fact the defence is a traverse essentially of the allegations contained in the statements of claim and there is also a counterclaim in which Mr. O'Brien seeks damages for malicious prosecution in challenging of the process by which he was awarded the licence and he claims that such activity and related conduct were actuated by malice toward him and that he is entitled to damages in consequence. Mr. O'Moore's first point therefore is that Mr. O'Brien has failed to establish a necessary element of proof. He challenges the proposition that Mr. O'Brien is entitled simply to refer to his defence and counterclaim and to assert baldly that he has a good defence to the claims based on the pleadings.

Then Mr. O'Moore refers to special circumstances as recognised by the authorities which operate to defeat a claim for security that would otherwise be ordered and which are considered in sequence below.

The issues that arise for consideration fall into two categories;

> (a) Has the fourth defendant Denis O'Brien met the criteria for a person looking for security? The plaintiffs contend that he has failed to do so, specifically in not setting out his defence in a way that satisfies O. 29, r.3, which requires a satisfactory affidavit as to his defence. His response to this is that he has pleaded his defence and it is obvious that there is a major conflict over the issues and that was what he fought over the months and years of the Moriarty Tribunal. Therefore, he says, in the particular circumstances of this case, it is perfectly obvious what his defence is. In addition, the plaintiffs allege delay on the applicant's part in bringing this application as another ground of failure to meet the requirements.
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> (b) If so, are there present in the case some special circumstances that deprive the applicant of security as a matter of the balance of justice between the parties?

The Affidavits

The grounding affidavit is dated 4th December, 2006 and sworn by Mr Colman Candy, a solicitor in the firm of Meagher Solicitors who are on record for the fourth defendant. Mr. Candy sets out the background to the claim which was the award of the GSM II phone licence on the 16th May, 1996 which award followed a competitive application process conducted in 1995. The fourth defendant, Denis O'Brien was chairman of ESAT Digifone Limited, which was granted the exclusive right to negotiate for the licence. The Cellstar application, in which the first and third plaintiffs participated, came last of the six applicants.

Mr. Candy says that Comcast International Holdings Incorporated "is of very limited solvency, and is incorporated in the US", in which circumstances he seeks an order providing security for costs. In respect of Ganley International Limited, Mr. Candy deposes that it was incorporated as a shelf company called Acegrind Limited in the UK on the 1st February, 1994 with an issued share capital of £100 of which two shares were taken up. He gives a history of this company, asserting that it is in significant financial difficulty. He states that the directors made an application for voluntary strike off on the 31st October, 2000 but that did not go ahead. On 7th May, 2002 the company was struck off the register and dissolved because it had failed to make annual returns. The company was restored on the 18th March, 2004 but he asserts that it is dormant and in obvious penury as shown from the abbreviated accounts and its history and it has sought and obtained leave to provide limited information based on its non-trading condition.

In his replying affidavit sworn on 25th February, 2013 Mr Block says that the first plaintiff is a wholly-owned subsidiary of Comcast but ownership and control of the first plaintiff is not held by Comcast directly but rather through another wholly owned subsidiary. Mr. Block says, at para. 12 of his affidavit:-

> "So far as the solvency of CIHI [the first plaintiff] is concerned, I say that the position is that, whilst CIHI does not presently have liquid assets available to it, it is in a position to obtain finance by way of inter-company loans or otherwise so that it may prosecute its claims in the within proceedings."

Mr. Block goes on to make four points that he says are special circumstances relevant to the question of security for costs.

(a) The first plaintiff's impecuniosity is because its consortium did not get the licence,

(b) The applicant, Mr. O'Brien, has delayed,

(c) Mr. Declan Ganley, the second plaintiff, is a citizen and resident of Ireland,

(d) It is a matter of public concern that the issues in contention in the action should be determined.

In an affidavit sworn on 27th February, 2013 Mr Declan Ganley says first that Mr. O'Brien has failed to deliver as required by O. 29, r. 3 "a satisfactory affidavit that such defendant has a defence upon the merits." Second, he complains that the affidavits filed on behalf of the applicant do not outline the amount of security sought. He then goes on to make the same four points as Mr. Block.

Mr Paul Meagher, the principal of the firm acting for Mr O'Brien, in his affidavit sworn on 13th March, 2013 addresses the affidavit of Mr. Block and says that he does not make an averment that finance will actually be forthcoming from the other entities that Mr. Block mentions. He states simply as to the four points that Mr. Block makes that they are without merit and foundation, and are more properly a matter for legal submission. In another affidavit, sworn on the 13th March, 2013, Mr. Meagher responds to Mr. Ganley's affidavit and the points that he lists. He deposes that the fourth defendant does have a good defence on the merits and that Ganley International is aware of that defence. He says that the amount of security for costs only arises at a later stage. He repeats his comments about the four points.

Mr. Denis O'Brien, the fourth defendant, in his affidavit of the 20th March, 2013, says: - "I say and believe and am advised, that I have a good defence on the merits in this action and that this defence is set out in detail in the Defence and Counterclaim dated 15th May, 2006."

In another affidavit dated 20th March, 2013 Mr. Meagher deals with the fact that there are two actions in being, explaining that the plaintiffs issued separate proceedings by way of two summons and he seeks that the affidavits in the motion should be treated as applying to both cases.

The issues are as follows:-

A. (1) Are the plaintiff companies impecunious?

(2) Has the applicant complied with O. 29 insofar as r. 3 requires "a satisfactory affidavit that such defendant has a defence upon the merits"?

B. Are there any special circumstances in the case as follows?

(1) Was the incapacity of the first and third plaintiffs to discharge costs was caused by the wrongful acts of the defendant/applicant and/or the other defendants?

(2) Is the fourth defendant disentitled to security by reason of delay?

(3) Is the personal co-plaintiff Mr. Ganley's availability as a mark for damages a reason for refusing the order?

(4) Is there a public interest in the litigation that the corporate plaintiffs can invoke to resist the application?

(5) Does the fourth defendant's counterclaim disentitle him from getting security?

Before considering these questions, it may be worthwhile recalling the courts' views of the principles underlying the jurisdiction to order security for costs. In *Collins v. Doyle* [1982] I.L.R.M. 495, Finlay P commented as follows in a case concerning a plaintiff outside the jurisdiction in a passage that has been cited with approval in cases too numerous to mention:

"From these decisions the following principles of law appear to arise.

(1) *Prima facie* a defendant establishing a *prima facie* defence to a claim made by a plaintiff residing outside the jurisdiction has got a right to an order for security for costs.

(2) This is not an absolute right and the court must exercise a discretion based on the facts of each individual case.

(3) Poverty on the part of the plaintiff making it impossible for him to comply with an order for security for costs is not even when *prima facie* established, of itself, automatically a reason for refusing the order.

(4) Amongst the matters to which a court may have regard in exercising a discretion against ordering security is if a *prima facie* case has been made by the plaintiff to the effect that his inability to give security flows from the wrong committed by the defendant."

The judge said that the underlying principle was that a successful defendant should not find himself unable to recover costs because the unsuccessful plaintiff resides and has his assets outside the jurisdiction of the court. However, it would obviously be a gross injustice to require security if a plaintiff had been injured or damaged or put to loss to such an extent that he was not in a position to meet costs and he could reasonably claim that the wrongdoing alleged in the proceedings had brought that situation about.

The default setting is not to order security for costs so that the onus is on the applicant. As Clarke J. said in *Mavior v. Zerko Limited* [2013] IESC 15

". . . the jurisprudence in relation to all of the areas where security for costs is considered starts from the position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. An alternative approach would have the effect of shutting out impecunious parties from bringing cases which approach would be both untenable and disproportionate."

In *Oltech (Systems) Limited v. Olivetti UK Limited* [2012] IEHC 512 Charleton J. held that "Since *Peppard v. Bogoff* [1962] I.R. 180 it has been clear that it is not mandatory for a court to order security for costs in every case where the plaintiff company appears to

be unable to pay the costs of a successful defendant." para 29.

The plaintiffs submit that section 390 of the Companies Act does not apply because the two companies are registered outside the State and that the discretion under Order 29 should not be exercised against a European Union company, which is the case of UK registered Ganley Intl, when there is no basis for suggesting that there is any difficulty in enforcing judgments in that jurisdiction. The applicant bases his claim to security on Order 29. On the interaction of the Act and the Rules the following decisions of Cooke J and Clarke J are helpful. In the case of *Goode Concrete v. CRH Plc and Others* [2012] IEHC 116, Cooke J. considered O. 29 in some detail and traced its history.

> "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:
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> > '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'." Para 23
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> Cooke J concluded on this point at para 34:
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> "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."

Clarke J addressed the question of applying s.390 to non-Irish companies, whether they were registered in the European Union or outside in *Mavior* [above] in *obiter* remarks, saying [at para 4.9] that "a natural person or any form of corporation which is not caught by s.390, is subject to the potential for security for costs being ordered under the rules." And

> "I would leave over to a case in which the issue specifically arises the question of the proper approach in the case of a limited company registered outside Ireland. It is arguable that s.390 of the Companies Act, 1963 only applies to Irish registered companies. If that be correct then the only basis for directing security against a non-Irish registered limited company would be under the rules. Different questions might arise depending on whether the company was an EU resident company or one resident outside of the EU."

In *Tribune Newspapers (In Receivership) v. Associated Newspapers Ireland (t/a The Irish Mail on Sunday)* (Ex Tempore, High Court, 25th March 2011) Finlay Geoghegan J referred to "a number of decisions of the Supreme and High Court which emphasised the similarity of applications under section 390 of the Companies Act and Order 29 of the Rules of the Superior Courts. Those decisions included *Collins v. Doyle* [1982] ILRM 495 and *Lough Neagh Exploration Ltd v. Morris* [1998] 1 ILRM 205." The judge noted that in the latter case "Laffoy J. indicated that in broad terms the same principles govern the determination of whether a plaintiff should be ordered to furnish security for a defendant's costs under section 390 and Order 29."

These authorities and the others cited in submissions and argument, to which this brief survey does not pretend to do justice, lead to the following conclusions:

1. The provision is of general application.

2. Security is not limited to cases where the plaintiff is out of the jurisdiction; rules 2 and 3 have specific application respectively for a plaintiff in Northern Ireland (not a reason) and otherwise outside the jurisdiction.

3. It is an unusual order: the default position is not to order security.

4. A defendant has to prove a significant level of risk that the plaintiff will not be able to pay.

5. Whatever proofs or circumstances are present, the court always has a discretion.

6. The question is whether it is fair and reasonable in balancing the interests of the parties for the court to make the order.

7. A defendant seeking security must demonstrate a defence on the merits.

8. The tests to be applied in applications under section 390 of the Companies Act and Order 29 are the same.

Issues Considered in turn

Plaintiff companies' finances
The two companies can be taken for the purpose of this application to be unlikely to be able to meet an award for costs. It was not suggested otherwise in the course of argument.

The first plaintiff was set up for the purpose of participating in the consortium that was Cellstar. Cellstar is not an incorporated body but merely the name of a group of companies that came together to put in the bid. This Comcast Company, the first plaintiff, does not appear to have any assets or any commercial activity and its only purpose was to participate in the bid and its only continuing function is to pursue this litigation. Comcast Inc. is a subsidiary company of a successful and rich corporate conglomerate but this particular entity is not rich in assets.

This company was funded by its sibling/parent corporations for the purpose of the application and is drip-fed such funds as are necessary for the purpose of this action. In those circumstances, I am led to the conclusion, first that the company has little or no assets of its own, which does not appear to be in dispute. Secondly, that there is little prospect of funds being provided to the company simply for the purpose of being paid out in costs and I frankly do not see how a parent or sibling company would conceive it to be in its own interest to provide money for that purpose. There is no evidence of any intention to do so.

As to the third plaintiff, this company has been dormant for years and it would appear from its accounts and such information as we have about it that it would have no prospect of paying costs in the event that it lost the action and suffered an order for costs against it.

A. 2 Satisfactory Affidavit as to Defence
The plaintiffs submit that the fourth defendant has failed to comply with an essential requirement. The test is expressed in different ways in the many cases down through the years. Walsh J in *Power v. Irish Civil Service (Permanent Building Society)* [1968] I.R. 158 said at 163

> "What will amount to a satisfactory affidavit that a defendant has a defence upon the merits in any particular action must necessarily depend upon the circumstances of the case and upon the nature and details of the claim and the allegations made."

In *Tribune Newspapers (In Receivership)* [ref above] Finlay Geoghegan J said that the courts adopted a similar approach to a proposed defence in a case of summary judgment. "Mere assertion will not suffice." The court concluded:-

> "Accordingly, in my judgment, what is required for a defendant seeking to establish a *prima facie* defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by a trial judge, provide a defence to the plaintiff's claim. I propose applying this test."

In the case of *Goode Concrete v. CRH Plc and Others* [2012] IEHC 116, Cooke J said 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."

The plaintiffs argue that Mr. O'Brien has failed to provide a specific and definite defence. Not only that, he has not furnished any means by which the Court could infer the existence of such a defence from facts deposed to in his affidavit. They complain that he only swore an affidavit when Mr. Ganley in his affidavit drew attention to the fact that he had not done so. He has given particulars only in respect of his counterclaim but not to his defence. In response, Mr. O'Brien contends that he has satisfied the requirements in that he has filed detailed defences and counterclaims and has sworn an affidavit averring that he has a good defence.

The central issue in each of these cases is whether this defendant and one or more of the others behaved in the corrupt manner that the plaintiffs allege. He has spent years denying the allegations in the Moriarty tribunal. It is obvious that he will continue to do so in these proceedings. He denies the charges. The question is whether the plaintiffs can prove what they allege. That is what the case is about.

It is true that the defence can be described as a simple traverse. But it is also the very issue to be resolved in the action. There is a difference between a mere assertion and a straight conflict of fundamental fact.

A mere assertion is not sufficient but neither is it necessary to have proof to the civil standard. In an action where summary judgment is sought, if the defendant can establish that it might have a defence on some rational and credible basis, judged on a low threshold, the proceedings will be sent for plenary hearing and summary judgment will not be granted. If it is a conflict of fact, that cannot be resolved on affidavit.

In light of recent history, it is obvious that the fourth defendant is going to defend this action to the end. It is vital for him that he should do so. There is no question of his determination to defend himself against these extraordinarily serious allegations. In the circumstances of the case, i.e., the background to the action and particularly the long period of public inquiry carried out by Moriarty J, it is manifest that Mr. O'Brien maintains his innocence of the allegations levelled against him in this action.

There is room for concern about the baldness of the applicant's affidavit. I think that there is validity in this criticism but ultimately it should not defeat the application. It is a matter more of form than substance. It is perhaps understandable that a defendant whose legal position is one of denial might be concerned about just how far he would have to go in setting out his defence and possible consequences at trial but that is mere speculation.

In my view the essential requirement of setting up a defence is satisfied in the particular and very unusual circumstances of this dispute. In this I follow the view of Walsh J quoted above and the other authorities when understood in context. I also think that this approach is in accord with the jurisprudence of the Supreme Court on summary judgment in *Aer Rianta v Ryanair* [2001] 4 I.R. 607.

Inability to pay caused by defendants' actions
The plaintiffs invoke this well established principle citing *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7, where Clarke J. held:-

> 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:-
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> (1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
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> (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
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> (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
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> (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."

The plaintiffs argue that other factors are also relevant, namely whether the defendant has put forward incomplete answers to the plaintiffs claims; secondly, it is not necessary to show that the impecuniosity was caused wholly by the wrongful actions but the evidence should reveal that it was largely caused and, thirdly, that the Court should be careful not to determine an issue at the interlocutory stage that falls for determination at the full trial. See *S.E.E. Co. v. Public Lighting Services* [1987] I.L.R.M. 255, and *Irish Conservation and Cleaning Limited v. International Cleaners Limited* (Unreported, Supreme Court, 19 July 2001).

Comcast claims that it was impoverished by the wrongful acts of the defendants, including the applicant Mr. O'Brien. It is a defence to an application for security for costs to say that the very things the plaintiff is complaining about in the action have put it into a position where it is unable to provide security for costs. Comcast invokes this principle as does Ganley International but the argument does not stand up in my view. The reason is not that the consortium of which the two companies were members came last out of six in the competition, which is the applicant's point; on that it is reasonable for these plaintiffs to argue that their case is that the process was corrupt. But it cannot be assumed for the purpose of this motion that they were in a better position than other competitors in the process with a potential to be awarded the licence. It is just as illogical for them to demand that the Court assume they would have won the competition – or even more illogical – than to say that they had no chance because they came last. A person with a one in six chance cannot be considered to have lost profit based on an assumption that he would have succeeded.

The fact that the companies did not suffer loss is obviously relevant. But I think that the real point is not that they suffered loss but that they did not enjoy gain. If they had been awarded the licence, they would have enjoyed a benefit and that would have reflected itself in financial terms in their balance sheets. That is a reasonable proposition as it seems to me. A person whose opportunity to win a competition has been interfered with can sue for damages for the loss of the chance.

I baulk at the idea that they could establish for present purposes that they would have won. It seems to me that they will be claiming damages for the loss of the chance of winning and how good their bid was or might have been if it had been assessed by comparison with the other bids and if that had been honestly is obviously a very difficult question. I think that is essentially what the court may be asked to do in the event that the plaintiffs are able to establish the corruption that they allege.

Mr. O'Callaghan says that these two companies have no more and no less assets than they ever had and there is no question of it being able to be said on their behalf that they suffered loss as a result of not getting the licence or not being part of the consortium that got the licence. He also says that neither of these plaintiffs actually applied for the licence and nor were they even part of a corporate entity that made the bid. They came together with other companies including RTE and Bord na Mona to put together a bid under the name Cellstar. I do not think that point makes any difference because if they had been granted the licence, then they would have moved to incorporate a vehicle, namely a company to carry out the next phase of the operation to exploit the licence commercially.

These companies can say that they would have made profits if their consortium had won. They may complain that they spent money in participating in a process that they condemn. But those arguments do not advance a case that the companies were impoverished by the wrongs that they allege in their pleadings. Therefore, this special circumstance does not apply.

Delay
The plaintiffs rely on the following chronology;

(1) 25th October, 2002 – Appearance by Mr. O'Brien

(2) 8th October, 2004 – Notice of intention to proceed

(3) 15th May, 2006 – Defence and counterclaim

(4) 5th December, 2006 – Application for security for costs

This chronology applies to both sets of proceedings but the motion for security in respect of 2001-9288P was only brought in March 2013. The plaintiffs say that they have taken steps in the proceedings and incurred substantial costs with respect to a detailed statement of claim, replies to notice for particulars, considering the defence and counterclaim, delivering a defence to the counterclaim and preparing notice seeking particulars of the counterclaim. In these circumstances they say that Mr. O'Brien's delay, coupled with the steps they took and expense incurred, are reasons to deprive him of the security he seeks.

In *Moorview Developments Ltd v. Cunningham* [2010] IEHC 30 Clarke J said that a plaintiff incurring costs in the period of delay ought to have been entitled to make its decision, as to whether to incur those costs, in the light of full information, including the fact that security for costs would have to be put up.

The unique features of the case make it difficult to apply the ordinary delay jurisprudence so as to defeat the applicant on this ground. The plaintiffs waited for the Moriarty Tribunal to report before proceeding further with the litigation. The delay in question happened some 13 years ago. The sponsors of the corporate plaintiffs are and were in a very different position to a plaintiff who commits to substantial expense only to find confronting him an insurmountable barrier of cost. The logic is that if the person knew that security for costs would be sought, he would not have spent his money pursuing the claim and that it is unfair that he should have been lulled into a false sense of security in that regard.

I do not find anything of that kind in the conduct of these plaintiffs. Moreover, the fact that there is a personal co-plaintiff, a ground of resistance to be considered below, also militates against this objection succeeding.

Individual co-Plaintiff Mr Declan Ganley is a mark for damages.
The case will continue to be made by Mr. Ganley and the argument is that his presence is a reason for witholding security for costs against the other plaintiffs.

In *Bula Ltd & Ors v. Tara Mines Ltd & Ors* [1987] IR 494 at 499 Murphy J. addressed the association of a personal co-plaintiff with an impecunious company in comments that were analysed by Clarke J in a subsequent case in which he sought to draw out the implications of Murphy J's judgment. Murphy J said

> "In the case of corporations the basic rule is reversed. It would seem to me, therefore, that the addition of individual plaintiffs should have no direct bearing on the question of whether a corporate co-plaintiff would be required to give security. It might be argued, however, that the position would be different if it was shown that the individual plaintiffs were a good mark because it is only in that way that their inclusion would provide an answer to the defendants' concern of facing proceedings against an impecunious corporate body."

Clarke J in *Harlequin Property (SVG) Ltd v. O'Halloran* [2012] IEHC 13 wher Clarke J first cited and adopted the above passage, then he said [para 40]

> "It seems to me that the obvious inference from the passage which I have just cited, is to the effect that it is for the party placing reliance (in this case the first plaintiff) on the existence of the individual co-plaintiff to 'show' that the individual plaintiff would be a good mark. The first plaintiff has produced no evidence from which I could infer that the second plaintiff would be a mark for any costs awarded against him."

In *Re Goods of Mooney* [1938] IR 354 is a case where Hanna J said:-

> "Having regard to these authorities I am of opinion that it is the law, that the ordinary and normal rule is that security for costs will not be ordered against a plaintiff out of the jurisdiction when there is joined with such a plaintiff another *bona fide* plaintiff, or plaintiffs, residing within the jurisdiction; but that the Court can, within its jurisdiction, deal with the plaintiff, or plaintiffs, within the jurisdiction if of opinion that such plaintiff, or plaintiffs, are not real and substantial plaintiffs in the action, or are not entitled to the relief claimed therein, or that they have been joined merely to oust the jurisdiction to order security for costs against the foreign plaintiff….."

> Similarly, Charleton J In *Oltech (Systems) Limited* said [at para 21] that

> "Where there is a corporation as a plaintiff and an individual as a co-plaintiff, if both are making the same factual case, and the corporation is insolvent but the individual has sufficient funds to meet an eventual costs order against him or her, then the order may be refused because the defendant, if successful, is not going to be impeded in recovering costs; see the judgment of Kingsmill Moore J. in *Peppard v. Bogoff* [1962] I.R. 180. There, the Supreme Court held that the situation at that time of one plaintiff being in the jurisdiction and one outside would be the same as if one plaintiff were a company and the other plaintiff an individual. At page 187, Kingsmill Moore J stated that "the same arguments would seem applicable in both cases".

The situation here is that there is a personal plaintiff in a position to meet the costs and that is a reason for not imposing security for costs orders on the corporate co-plaintiffs. Mr. O'Callaghan has complained that there is no clear evidence of the extent of Mr. Ganley's wealth on affidavit, but I am not required or entitled to investigate that in circumstances where he has asserted that he is in a position to meet costs and that has not been challenged by affidavit. Indeed, even if it were to be asserted, there would be a heavy onus on the opposing party to establish probable inability to meet a costs order. A personal litigant is in a different position to a company.

The risk that is at the heart of this balancing process in an application for security for costs is that a successful defendant will be left without remedy. If that threat is removed, it adjusts the balance of interests and rights that the court has to hold equal. The principle identified by the then President of the High Court, Finlay J, is not invoked because the defendant is protected to a very substantial degree.

On the face of it Mr. O'Brien appears to have a strong case suggesting that these companies have no prospect of paying costs in the event that they lose the case and he succeeds. However, the principle that disallows an application for security when there is a co-plaintiff mark applies and is decisive. If there is somebody who is able to pay the costs, that protects the impecunious co-plaintiff. Now there may appear to be some rough justice in this rule and no doubt it cannot be considered an absolute answer to every application—discretion must always be exercised. This rule, like every other rule in law, is a matter of a balance being struck between competing rights and obligations. There may therefore be occasions when a plaintiff or a number of plaintiffs will not be permitted to cling to the coat-tails of the only plaintiff who has money but that is not a case that arises here or that has been made by Mr O'Brien.

Accordingly, this application cannot succeed because Mr Ganley is a co-plaintiff who is apparently a mark for costs. I say apparently not to indicate any uncertainty about the matter or any decision on it one way or the other but merely to indicate that it is sufficiently established in my view for the purpose of this application.

In this regard, I note that Clarke J adopted the view of Murphy J that the presence in the case of a personal litigant was a matter that could be taken into account in an application for security for costs against a limited company.

It follows from this logic that the situation would change if Mr Ganley were to cease to be a plaintiff, in which case it would be possible to renew the application.

On this point, I find myself persuaded by the plaintiffs' argument and that is fatal to the applicant's motion for security.

Public Interest
The plaintiffs submit that the issues in these cases are of exceptional public importance and it would therefore be inappropriate to order security for costs. In *Millstream Recycling Limited v. Gerard Tierney and Newtown Lodge Limited and another* [2010] IEHC 55 Charleton J. held that the public importance of the issues transcended the claims and counterclaims of the litigants and refused to order security.

In the judgments in the Supreme Court holding that these proceedings should not be struck out for delay, *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50, the judges highlighted the gravity of the issues. Denham CJ referred to the:

> "Public interest in determining such a claim of corruption in high office. It is a matter of public interest as to whether a Minister of Government corrupted a State process. This is an important aspect of the case.".

Hardiman J. said that the case was "absolutely unique, without precedent or parallel in the ninety year history of the State." And Clarke J observed the

". . . significant public interest in having these matters of high public controversy determined in a court of law."

These judicial observations in this very case afford considerable support to the objections of the plaintiffs to an interlocutory measure that would reduce the plaintiffs' capacity to continue their roles in the litigation. They have an identifiable common interest as participants in the licence competition. It might be said that the plaintiff companies are unlikely to attach importance to the public interest in the State but, of course, that is not the point. There is public value in having this controversy resolved.

On this ground also, I propose to exercise the court's discretion in refusing the order sought.

B. 5 Counterclaim
On this point, the plaintiffs invoke a decision and a principle identified by Charleton J. in *Oltech (Systems) Limited v. Olivetti UK Limited* [2012] IEHC 512 in which he decided that where there was a counterclaim involving the same issues between the parties, it could be unfair, and was in the circumstances of that case unjust, to order security for costs against the plaintiff which, if the plaintiff was unable to meet, would leave him defenceless against a counterclaim originating out of the very same circumstances that gave rise to the claim. The plaintiffs admit that the claim and counterclaim here "are not entirely intertwined".

Charleton J said that "In recent similar cases before the High Court, an undertaking has been sought and given by a defendant that its counterclaim on the same subject matter as plaintiff's claim would not be pursued. This principle is persuasively established in case law from the neighbouring kingdom."

I would follow this policy and if ordering security would require an undertaking from the fourth defendant not to pursue the counterclaim against a party that was unable to make its claim by reason of inability to put up security for costs.

Conclusion
I propose accordingly to refuse the fourth defendant's application for security for costs.