Neutral Citation Number [2009] IEHC 46

THE HIGH COURT

2007 377 P

BETWEEN

FERROTEC LIMITED

PLAINTIFF

AND

MYLES BRAMWELL EXECUTIVE SERVICES LIMITED
TRADING AS SLIMMING WORLD

DEFENDANT

JUDGMENT delivered by Ms. Justice Dunne on the 5th day of February 2009

Background

These proceedings arise out of an agreement entered by the plaintiff and the defendant on or about the 6th October, 2005, whereby the plaintiff undertook to design develop and manufacture and deliver a number of data management systems complete with specialised software for the defendant consisting of weigh pads, printers and cables. The contract price for the delivery of 3,000 systems was €3,090,000.00. On foot of this agreement, the defendant issued a purchase order No. PR3295 on the 26th January, 2006, for 3,000 systems. At the time of entering into the agreement it was agreed that the defendant would pay to the plaintiff a deposit of 10% of the total order value and this was done by payments on the 4th November, 2005, the 29th November, 2005 and the 2nd of February, 2006. A further payment of €300,000.00 was made by the defendant to the plaintiff on the 6th July, 2006. There is some dispute between the parties as to the circumstances in which that payment came to be made. The agreement between the parties was terminated by the defendant by letter dated the 18th August, 2006.

Application

The application before the court is an application for an order pursuant to
s. 390 of the Companies Act 1963 requiring the plaintiff to furnish to the defendant herein security for costs in respect of this action. Section 390 of the Companies Act 1963 provides as follows:-

> "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."

The Affidavits

I propose to refer to a number of the affidavit sworn herein in respect of this application. The grounding affidavit is an affidavit of David Rathbone sworn herein on the 30th November, 2007. Having set out details of the agreement, he referred to the defendant's defence to these proceedings, namely, *inter alia,* denying that the money as claimed by the plaintiff herein in the sum of €2,781,000.00 is due; that the defendant lawfully terminated the agreement; that the plaintiff misrepresented its ability to design and manufacture the systems required by the defendant and tried to sell the defendant a pre-existing system which it had developed for a competitor of the defendant without making the necessary or any software changes to reflect the rules and terminology used by the defendant. A number other issues of contention are set out in the affidavit and it is claimed that the inability of the plaintiff to develop the required system has led to losses on the part of the defendant due to the failure of the plaintiff to provide the system as ordered and the significant delay suffered by the defendant in the completion and incorporation of appropriate systems in its ongoing operations. These are calculated in the amount of St£1,700,000.00. On that basis the defendant seeks to set off any monies due and owing to the plaintiff against those losses should any sum be found to be due. It is also claimed that the sum of €609,000.00 already paid is adequate to discharge any claim that the plaintiff may have against the defendant. Thus, Mr. Rathbone makes it clear that not only will the defendant be defending these proceedings, there will be a substantial counterclaim.

Mr. Rathbone then goes on to deal with the assets of the plaintiff. In that regard he has referred to copies of the financial statements of the plaintiff for the years ending the 31st July, 2005, and the 31st July, 2006. Those accounts have been reviewed by Mazars Ireland on behalf of the defendant herein and it is the conclusion of Mazars that the plaintiff would not be in a position to pay any costs of the defendant if successful in defending the present proceedings. Mr. Rathbone further pointed out that there is no up to date information in relation to the financial status of the plaintiff.

Mr. Rathbone also indicated that he has been advised by Behan and Associates, Legal Costs Accountants, by letter dated the 27th November, 2007, that the hearing of these proceedings will involve significant expense for all the parties. Behan and Associates have advised that the approximate costs of the defendant in defending the proceedings would be a sum of €362,333.32 (excluding VAT). By letter dated the 21st November, 2007, the defendant's solicitors sought confirmation from the plaintiff's solicitors that the plaintiff would provide security for the costs that may be incurred in these proceedings. A response dated the 28th November, 2007, was received from the plaintiff's solicitors, but the letter did not provide security for costs although it indicated that the plaintiff has always been able to meet its liabilities. Given that response, this application was commenced.

Affidavit of John Ferrie Sworn on the 12th March, 2008.

John Ferrie is the Managing Director of the plaintiff company. In his replying affidavit, he dealt comprehensively with the meeting that gave rise to the agreement between the parties. He exhibited in his affidavit the pleadings herein together with the defendant's request for particulars and the plaintiff's replies to those particulars. The replies to particulars are extensive and were accompanied by twenty books of correspondence and e-mails passing between the plaintiff and the defendant during the course of the agreement. The twenty books of documents are set out in such a way as to deal with specific items and issues that arose between the parties over the course of the agreement. One of the issues raised and dealt with extensively by Mr. Ferrie in the course of his affidavit and in the twenty books referred to above is the extent to which he claims that the project was delayed by the defendant "vacillating in making decisions and reversing the decisions it did make, regarding its rules". In addition, Mr. Ferrie referred to the meeting between the parties on the 6th October, 2005, during the course of which he states that Mr. Rathbone requested a private meeting with Mr. Ferrie when he (Mr. Rathbone) expressed concern as to the plaintiff's ability to complete the contract having regard to the plaintiff's financial position. Mr. Ferrie states that he discussed the background to the plaintiff's financial position and the fact that a timely completion of the defendant's contract would restore the plaintiff's position to one that was completely solvent.

It is not necessary to set out in detail the contentions of Mr. Ferrie as to the extent of the difficulties in preparing the system for the defendant which he states were caused by the defendant's requests for changes to the system being prepared, their request to remodel the outer case of the product and an issue that was raised in relation to a standard grey display screen in the unit. Suffice it to say that this is an area of significant dispute between the parties.

The next issue dealt with by Mr. Ferrie in his affidavit relates to the issue of solvency of the plaintiff. It is noted by Mr. Ferrie that prior to the letter terminating the agreement on the 18th August, 2006, no complaint was made by the defendant in relation to any default on the part of the plaintiff and indeed, a further payment of €300,000.00 was made by the defendant to the plaintiff in July 2006. It is contended by Mr. Ferrie that the plaintiff's current financial situation is directly the result of the defendant's breach of its contractual obligations. He also reiterates that the defendant was fully aware of the plaintiff's financial position before entering into the contract. Complaint is also made that at the time of entering into the agreement with the defendant, the plaintiff was in talks with other parties in respect of other contracts. As a result of entering into the agreement with the defendant, negotiations with

another important client in relation to a similar product were terminated. Mr. Ferrie states that the contract was entered into by the defendant when the defendant was well aware of the plaintiff's financial position and knew that the bulk of the plaintiff's resources were required to deal with the contract and that the position of the plaintiff was exacerbated by the delay in the completion of the contract. Thus he contended that the plaintiff's inability to discharge any costs it may be ordered to bear was caused solely by the defendant's action.

Affidavit of John Behan

John Behan is the auditor to the plaintiff company and he deals with the report prepared by Lorcan Colclough, Chartered Accountant, of Mazars, referred to above. In essence he takes issue with certain conclusions of the report furnished by Mr. Colclough to the defendant. On his view of the audited accounts for the plaintiff company, he comes to the conclusion that the accounts for the year ended the 31st July, 2006, show a net asset amount of €10,713.00. He also criticises the assessment by Mr. Colclough that the intangible assets of the company have no value.

Second Affidavit of David Rathbone

In his second affidavit, Mr. Rathbone takes issue with the extent to which Mr. Ferrie analysed the matters in dispute between the parties. He stated the Mr. Ferrie was, in effect, attempting to try the issues in dispute on affidavit. He identified factual matters in dispute between the parties, the reason for the delays in the completion of the contract, whether the plaintiff actively and deliberately mislead the defendant as to the potential functionality of the product, whether the plaintiff deliberately mislead the defendant in the course of the performance of the contract, what precisely was agreed at the meeting of the 6th October, 2005, whether the plaintiff represented to the defendant that the plaintiff's product could easily be adapted to the needs of the defendant with only minor changes, whether or not there was an agreed specification for the product which could ever properly reflect the Slimming World operation and method of doing business. Mr. Rathbone then proceeded to deal with the issues raised by Mr. Ferrie in his affidavit. I do not propose to deal with those matters in any detail save to say that it is clear that there is a significant dispute between the parties on the manner in which the plaintiff set about performing the agreement and the manner in which the defendant sought to have the agreement performed. Mr. Rathbone deals with the issue of the meeting on the 6th October, 2005, and the issue in relation to the financial circumstances of the plaintiff company at that time. He states that he has no specific recollection of that meeting to discuss the accounts of the plaintiff but that even if Mr. Ferrie's recollection is correct, it does not alter the nature of the application being made herein. All that it does is to confirm that at the time that the agreement was entered into by the parties, the plaintiff was in a weak financial position. Its position remains the same. He takes issue with the assertion that had the project been completed within an agreed timetable the plaintiff would have been in a significantly improved financial position by March 2006. He reiterates that the failure to complete the contract was the fault of the plaintiff rather than due to any neglect on the part of the defendant. He also deals with the construction to be placed on the payment of the further sum of €300,000.00 by the defendant to the plaintiff in July 2006. In his affidavit Mr. Ferrie contended that that payment was made in acknowledgment that the defendant had delayed the completion of the project. Mr. Rathbone states that the payment was not made for that reason, but was made as a result of extreme pressure being placed on the defendant by the plaintiff. He set out details of a phone message on the 28th June, 2006, from John Ferrie indicating that they were reaching a "crisis situation" and following discussions at a meeting the payment of €300,000.00 was agreed.

Other Affidavits

A number of other affidavits were exchanged between the plaintiff and the defendant and I do not propose to refer to those in detail save to refer briefly to an affidavit of Connor C. Quigley, Solicitor, of McCann Fitzgerald, the solicitors for the defendant herein. In that affidavit, sworn herein on the 18th July, 2008, Mr. Quigley set out the details of a search of High Court proceedings involving the plaintiff as a party. He indicated that a summary summons issued against the plaintiff on the 7th April, 2008, in proceedings entitled "Tom Connolly v Ferrotec Limited and John Ferry, Record No. 2008/790S". Those proceedings appear to be in relation to a claim for a liquidated sum in respect of rent owing by the defendant's to the plaintiff. Mr. Quigley was unable to ascertain the amount of the claim in that case. He also indicated that proceedings entitled "Tanita International Limited v. Ferrotec Limited, Record No. 2007/77MCA" were issued on the 11th July, 2007. Those proceedings seek an application for recognition of a foreign judgment obtained in the United States against the plaintiff in the sum of $1 million. An order was granted to the effect that the judgment would be recognised in this jurisdiction, but the proceedings are apparently under appeal to the Supreme Court and a stay on enforcement of the judgment has been granted pending the determination of the appeal. On that basis Mr. Quigley concluded that the plaintiff is indebted to third parties for substantial sums and that accordingly it is clear that the plaintiff is insolvent and not in a position to meet the costs of theses proceedings in the event that the defendant successfully defends the proceedings.

Principles of Law

I have already set out the provisions of s. 390 of the Companies Act 1963. The application of s. 390 of the Companies Act 1963, has been considered in a number of cases. In the course of the submissions herein I was referred to a number of authorities and it will be necessary to refer briefly to some of those. The leading Irish case is *Peppard and Co. Ltd v Boghoff* 1962 I.R. 180 which predates the coming into operation of s. 390 and dealt with the provisions of s. 278 of the Companies (Consolidation) Act 1908 and in the course of his judgment in that case Kingsmill Moore J. stated at p. 188 of his judgment:-

> "I am of opinion that the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the court which may be exercised in special circumstances. In this case I find two special circumstances. The financial position of the plaintiff may, if he substantiates his case, be due to the very actions of the defendant for which they are sued; and there is a co-plaintiff within the jurisdiction to whom the defendant may look for payment of their costs."

In the case of *Hidden Ireland Heritage Holidays Limited v. Indigo Services Limited* [2005] 2 I.L.R.M. 498 the Supreme Court in an application for security of costs under s. 390 of the Companies Act 1963 held that an applicant for an order must establish a *prima facie* defence to the plaintiff's claim. The incompleteness of the second named defendant's response to allegations raised on affidavit was a matter to be taken into consideration by the court in determining the application for security for costs. It was also held that delay in applying for security for costs might, depending on the circumstances of the case, be a ground for refusing the application, where the applicant's delay had caused the other party to commit itself to a level of costs to which it would not otherwise have become committed thus altering its position to its detriment. In the instant case, the defendant's actions in allowing the case to proceed for one year before seeking security for costs, while aware of the plaintiff's financial weakness, constituted special circumstances disentitling them to the order sought. In the course of his judgment in that case Fennelly J. stated:-

> "The principles governing an application such as the present have been well settled by a number of decisions of this court over a considerable number of years.
> One point should be addressed at once. Section 390 of the Companies Act 1963, unlike O. 29, r. 3 of the Rules of the Superior Courts 1986, dealing with a plaintiff residing outside the jurisdiction, does not make it a precondition of the grant of security that the applicant swear 'a satisfactory affidavit that such defendant has a defence upon the merits'. Nonetheless, it is customary for defendants to produce evidence of at least a *prima facie* defence. It was not seriously contested on behalf of the second and third defendants in this case that the court should look for such evidence. I think that is obviously right. The order under s. 390 is

> discretionary. I find it difficult to imagine circumstances where a court would grant an order pursuant to the section where the defendant failed in any way to address the merits. I am satisfied that an applicant for an order must show something of the nature of a *prima facie* defence."

Fennelly J. then went on to consider the decision of the Supreme Court in the case of *Peppard and Company Limited v. Boghoff* referred to above and quoted with approval the passage referred to above from that decision.
Bearing in mind those decisions, it seems to me that the following principles are applicable to such cases.
(1) Has the defendant established a *prima facie* defence.
(2) Is there credible evidence giving reason to believe that the company will be unable to pay the costs of the defendant if the defendant is successful in its defence.
It is clear that even if it is established that the defendant has a *prima facie* defence and that there is credible evidence giving reason to believe that the plaintiff company is unable to pay the defendant's costs if successful in its defence, there remains a discretion in the court which may be exercised in special circumstances not to make an order for security for costs. It is clear that the onus of establishing such special circumstances rests on the plaintiff. As Fennelly J. put it at p. 121 of the judgment in *Hidden Ireland Heritage Holidays Limited v. Indigo Services Limited*:-

> "Where a defendant can produce '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' and evidence of a *prima facie* defence, I believe the order will follow almost as a matter of course. Both cases show that the court retains discretion to refuse to make the order. However, that will depend on a showing of special circumstances. In that respect, as Finlay C.J. said, [in *Jack O'Toole Limited v. MacEoin Kelly Associates* [1986] I.R. 277, at p. 283], the burden of proof falls on the plaintiff."

A number of other authorities were opened in the course of argument, namely, *Pearson v. Naydler* [1977] 1 W.L.R. 899, *Philip Harrington Daly and Company v. J.V.C. (UK) Limited,* (Unreported, High Court, 16th March, 1995), *Comhlucht Paipear Riomhaireachta Teo v. Udaras na Gealtachta* [1991] I.R. 320, *Bula Limited v. Tara Mines Limited (No. 3)* [1997] I.R. 494, *Inter Finance Group Limited v. K.P.M.G. Peat Marwick* (Unreported, High Court, 29th June, 1998), *O'Toole Limited v. MacEoin Kelly Associates* [1986] I.R. 277, *Framus Limited and Others v. C.R.H. Plc and Others* (Unreported, Supreme Court, 22nd April, 2004) and *Rayanne Restaurant Limited v. Julie's Company Restaurant Limited and Others* (Unreported, High Court, 18th April, 2005). I was also referred to *Usk District Residents Association v. E.P.A.* (Unreported, Supreme Court, 13th January, 2006) and *Boyle v. McGilloway* (Unreported, High Court, 19th January, 2006). I do not propose to refer in any detail to those authorities save and insofar as they may be of assistance in dealing with the application of the principles involved to the facts of this application.

Application of Principles of Law to the Facts

The first question I have to consider therefore is whether or not the defendant has established that there is a *prima facie* defence to the plaintiff's claim. I have carefully read and considered the plenary summons and statement of claim herein, the request for and replies to particulars and the various affidavits sworn herein. I am mindful of the comment made by O'Hanlon J. in the case of *Philip Harrington Daly and Company Limited v. J.V.C. (UK) Limited*, unreported, High Court, 16 March 1995, in which he stated at p. 17 of his judgment:-

> "Neither, however, can the court be expected to embark on a full and final assessment of the issue of liability for the purpose of deciding whether it is appropriate to make an order for the giving of security for costs. The decided cases warn against the danger of prejudging the issue on the hearing of such a preliminary application."

In the course of submissions to me on this point, counsel on behalf of the defendant, Mr. McCarthy, commented that in considering the question as to whether a *prima facie* defence has been established by the defendant, the court should have regard to the same factors applicable when considering whether a defendant on an application by a plaintiff for summary judgment has established a *bona fide* defence. Undoubtedly, similar considerations apply. Mr. Ferrie in his affidavits in this case has gone to considerable trouble to attempt to establish that the delays in the performance of the agreement and the completion of the project herein should be attributed to the conduct of the defendant in supplying information to the plaintiff, changing its requirements, contradicting and countermanding decisions already made and so on. This is contradicted on behalf of the defendant in strong terms. On a hearing such as this it would not be possible or appropriate for the court to embark on the exercise of weighing up the respective merits of the cases put forward by the defendant and the plaintiff respectively. The one question I have to consider is whether a *prima facie* defence has been established by the defendant. I note the terms of the draft defence and counterclaim exhibited herein together with the pleadings and affidavits sworn herein and I have no hesitation in coming to the conclusion that the defendant has established a *prima facie* defence.
The second issue I have to determine is whether on the evidence before this Court there is reason to believe that the company will be unable to pay the costs of the defendant if successful. I have had the advantage of seeing the abridged accounts of the plaintiff company for the years ended the 31st July, 2005 and 2006. I note the views of Mazars Accountants as expressed by them in their letter to the defendant in respect of those accounts. I have also seen the affidavits of John Behan sworn on the 7th April 2008, and the affidavit of Lorcan Colclough sworn on the 20th May, 2008, in respect of the plaintiff's accounts. Finally in this regard I have referred already to the affidavit of Connor C. Quigley, detailing the search against the plaintiff's name in respect of proceedings in which the plaintiff is involved. It is true to say that the plaintiff company was in a weak financial position at the time when the agreement between the plaintiff and the defendant was entered into. It is clear that on the face of the abridged accounts available for the year ended the 31st July, 2006 and from the position of the plaintiff company on the figures disclosed in those accounts the plaintiff remained at that stage in a weak financial state. I think it is noteworthy that in the auditors report dated the 30th April, 2007 attached to the abridged accounts for the year ending 31st July, 2007, John Behan and Company, the auditors for the plaintiff noted as follows:-

> "The net assets of the company as stated in the balance sheet on page 8 are less than half of the amount of its called up share capital and, in our opinion on that basis there may exist at 31st July, 2006, a financial situation which under s. 40(1) of the Companies (Amendment) Act 1983, may require the convening of an extraordinary general meeting of the company."

Although the time has now passed for the filing in the Companies Registration Office of the abridged accounts for the year ended the 31st July, 2007, it is surprising to note that they have not been filed and further it is surprising that the plaintiff has not sought on affidavit or otherwise to put before the court any up to date financial information in relation to the plaintiff and has not sought to explain or deal with the matters set out in the affidavit of Connor Quigley herein. On the facts and figures before me I have come to the conclusion that the plaintiff is not in a position to pay the costs of the defendant if it is successful in its defence and counterclaim herein.

Special Circumstances

A number of matters are relied on by the plaintiff in seeking to persuade the court to exercise its discretion not to make the order sought herein. They can be summarised as follows:-

1. The plaintiff's financial position was caused or at least contributed to by the wrongdoing of the defendant in repudiating the contract.
2. The plaintiff was in difficult financial circumstances at the time the contract was entered into.
3. That the plaintiff has made efforts to bring the matter to finality by bringing an application to have the action admitted to the commercial list of the High Court and its offer to have the matter submitted to mediation.
4. Delay.

Delay

I think it would be helpful to deal with the question of delay at this point. The first point to note in regard to this issue is that there is no complaint made of any kind whatsoever in any of the affidavits sworn herein on behalf of the plaintiff making any complaint as to delay in bringing this application. This notice of motion was issued on the 3rd December, 2007. Prior to that, the sequence of events was that the plenary summons herein was issued on the 18th January, 2007, the appearance was entered on behalf of the defendant on the 23rd March, 2007, and the statement of claim herein was delivered on the 3rd April, 2007. There is a delay of some eight months. There is nothing in any of the affidavits sworn on behalf of the plaintiff to suggest that the delay has had any impact on the plaintiff's position. This was fairly conceded by Mr. Barr, S.C. on behalf of the plaintiff at the hearing before me. In those circumstances, it does not seem to me that the delay is such as to warrant the court refusing the application for security for costs.

Weak financial position

Mr. Ferrie in the first affidavit sworn herein stated that at the meeting on the 6th October, 2005, and before the contract of agreement was entered into:-

> "Mr. David Rathbone requested a private meeting with me, at which he said had obtained a copy of the plaintiff's accounts and was concerned at the plaintiff's ability to complete the contract as the accounts showed the company to be at a financial low ebb. I discussed the background to the plaintiff's financial position and the fact that a timely completion of the defendant's contract would restore the plaintiff's position to one that was completely solvent."

Later in the same affidavit dealing with the payment that was made in July of 2006, it was stated as follows:-

> "David Ferrie explained that this was delaying revenue to the plaintiff, which was causing great financial pressure on it. Arising from this it was agreed at that stage that in order to assist with the said financial problems being experienced by the plaintiff, the plaintiff would receive a further advance payment of €300,000.00 from the defendant in acknowledgement that the defendant had delayed the completion of the project and that the completion date was now being changed to March 2007, one year later than originally agreed."

Dealing with these issues, Mr. Rathbone states in his second affidavit as follows:-

> "Mr. Ferrie states that I requested a private meeting with him at which I presented to him a copy of the plaintiff's accounts which showed that the company was not financially stable. I have no specific recollection of this meeting, but even if Mr. Ferry's recollection of events is correct, I fail to understand how this altered the nature of the application made here. It appears clear that at the time that the defendant entered into the contract with the plaintiff that the plaintiff was in a weak financial position. The defendant paid a significant deposit prior to delivery of the system."

He also dealt with the payment of the further sum of €300,000.00 made in July 2006, and stated as follows:-

> "Mr. Ferrie seems to suggest that this payment arose from an acknowledgement by this deponent that the delay was solely due to the defendant's delay. This is not true. The payment of €300,000.00 was made in July 2006, due to extreme pressure that was placed on the defendant by the plaintiff. On the 28th June, 2006, this deponent received a telephone message from John Ferrie stating that they were reaching a 'crisis situation' which was supported by David Ferrie saying it was 'very urgent' situation with their suppliers and after further discussions in a meeting a payment of €300,000.00 was agreed. It was on this basis that the payment was made."

It is clear from the passages to which I have referred that at the time the agreement was entered into, the plaintiff was in a weak financial position and during the course of the agreement the position did not change. It is noteworthy that over the course of the contract a payment of €609,000.00 was made to the plaintiff company. I note the comment of Morris P. in the case of *Inter Finance Group Limited v. K.P.M.G. Peat Marwick Trading as K.P.M.G. Management Consulting,* (Unreported, High Court, 29th June, 1998), where having reviewed the authorities on security for costs, he stated at p. 4:-

> "From these authorities it emerges that to succeed there is an onus on the moving party the defendant, to establish (a) that he has a prima facie defence to the plaintiff's claim and (b) that the defendant will not be able to pay the defendant's costs if successful in his defence.
> On establishing these two facts then the order sought should be made unless it can be shown that there are specific circumstances in the case which would cause the court to exercise its discretion not to make the order sought."

Assuming for the sake of argument that Mr. Ferrie's recollection of the meeting of the 6th October, 2005, is correct (and I note that whilst Mr. Rathbone states that he has no recollection of any such meeting, he does not deny that such a meeting could have taken place) then taking the plaintiff's position on this issue at its highest point to the effect that the defendant was aware of the plaintiff's weak financial position, the plaintiff was nonetheless able to satisfy the defendant that it was able to perform the contract notwithstanding it's weak financial position. It is difficult to understand why if a potential contracting party expresses concern as to the ability of the other party to perform the contract but is persuaded that the other party is in a position to perform the contract that the state of knowledge of the weak financial position of the other party should subsequently amount to a special circumstance such as to preclude an order for security for costs being made. It might be otherwise if it could be shown that the potential contracting party knew or ought to have known that the other party could not by reason of it's financial position have completed the contract. That is not the position here.

There is, as I have pointed out, a further dispute as to the circumstances in which the further sum of €300,000.00 was paid.

Assuming for the sake of argument that the plaintiff is correct in saying that that payment was made "in acknowledgement that the Defendant had delayed the completion of the project", it is clear that the plaintiff continued to have financial problems. I do not see how that situation can be laid at the door of the defendant. The plaintiff was in a weak financial position at the time of entering into the contract and indeed during the course of the contract. It's position at the start of the contract had nothing to do with the defendant and insofar as the defendant may have had anything to do with the difficulties of the plaintiff during the course of the agreement and I am far from satisfied that this is so, the defendant made a substantial payment to the Plaintiff during the course of the contract when asked to do so. In the circumstances I am not of the view that the plaintiff's weak financial position at the time of entering into the contract or during the course of the contract is such a special circumstance as to warrant the court exercising its discretion in favour of the plaintiff.

Inability to pay attributable to the defendant

The final issue I want to deal with is the question of whether or not the inability of the plaintiff to provide security is attributable to the actions of defendant. In this context the authorities such as *S.E.E. Company Limited v. Public Lighting Services* referred to above, *O'Toole Limited v. MacEoin Kelly Associates* also referred to above and *Framus Limited and Others v. C.R.H. Plc and Others* make it clear that it is not sufficient for a plaintiff merely to assert that the inability or insolvency of the company has been caused by the wrong allegedly committed by the parties seeking security. In *Framus Limited and Others v. C.R.H. Plc and Others* the following comment was made by Murray J. (as he then was) at p. 43 of the judgment:-

> "As regards the circumstances in which the party seeks to resist such an application on the grounds that they are impecunious and that this impecuniosity has been caused or substantially contributed to by the wrongful acts of the other party which is the subject matter of the proceedings, I agree that such impecuniosity must be established as a matter of probability. Where an application is made for security of costs on the basis that the other party would be unable to meet the relevant costs because of its impecuniosity in the event of the applicant being successful in the substantive proceedings, and satisfies the court of that fact, that may be sufficient to establish impecuniosity without the other party having to call any further evidence. As already indicated, the next step for the party resisting the application for security for costs is to show that the impecuniosity was caused by the wrongful acts of the applicant. The learned High Court Judge was correct in stating that this causal connection should be established *prima facie* and not simply by mere assertion. . . . In his judgment the learned High Court Judge makes reference at one or two points to the causal connection being established as a matter of probability, although reading his observations on this matter in their totality I think it is clear that he did not intend to hold that the party concerned had to prove, on the balance of probabilities, that the wrongful acts of the other party had caused their impecuniosity. Taken literally, this would suggest that the party resisting the application for security for costs had to prove the substance of their case on its merits. I think it is clear that the learned High Court Judge did not intend this and that he addressed this issue on the correct principle, according to which, the party concerned is only required to establish a *prima facie* causal connection."

From that case it is clear that what has to be established by the plaintiff in this case is that there is a *prima facie* causal connection between the breach of contract alleged and the impecuniosity of the plaintiff.

I have given careful consideration to this aspect of the case. To some extent, the comments I made above in connection with the argument as to the plaintiff's weak financial position are relevant to this issue. It is clearly not in dispute that at the time of the entry into the agreement, the plaintiff company was in a weak financial position. It is also the case that the plaintiff company was still in a weak financial position in July 2006, whatever the cause may have been. The abridged accounts of the company for the year ending 31st July, 2005, and 31st July, 2006, make it clear that throughout that period the company was not trading profitably. I have already referred to a number of matters relevant to the financial position of the plaintiff in the context of considering whether or not the defendant had made out the case that the plaintiff company could not discharge the costs of the defendant if successful herein and I do not think it is necessary to reiterate those matters at this stage. The question I have to consider is whether or not the plaintiff has established a causal link between its financial situation at this stage and the alleged wrongdoing of the defendant. It is undoubtedly true that had the agreement reached fruition and had the plaintiff been paid the amount agreed on foot of the contract between the parties, its position would now be better. That fact alone does not demonstrate that it is the wrongdoing of the defendant that has brought about the present position. In this context I think it is important to remember that as previously mentioned, the plaintiff has not put before the court any up to date information on its financial circumstances and has not dealt with the two issues raised by Connor Quigley in his affidavit. The position unfortunately appears to be that at all relevant times, the plaintiff company was in an impecunious state and nothing the defendant did or did not do in the course of the period of time before the termination of the contract occurred appears to have altered that position. On the contrary, the defendant made a payment of €300,000 to the plaintiff at a time and in circumstances where there was no obligation to make such a payment. The plaintiff company was and remains in a difficult financial situation. On the facts of this case, I do not think that the plaintiff has succeeded in making out a prima facie causal link between the impecuniosity of the plaintiff and the alleged wrongful acts of the defendant.

Plaintiff's conduct of the proceedings

The final matter raised as a special circumstance is that the plaintiff has made efforts to bring the matter to finality by bringing an application to have the action admitted to the commercial list of the High Court and its offer to have the matter submitted to mediation. The manner of the conduct of litigation may be a special circumstance such as to allow the court to exercise its discretion not to order security for costs. As noted above, delay in making an application for security could be such a special circumstance. However, the option, in an appropriate case, of applying to have a case admitted to the Commercial list or an offer to have the action submitted to mediation does not seem to me to be a special circumstance. It is simply the use of the procedures available to parties to litigation.

In the circumstances I feel that I have no option but to make an order for security of costs.