THE HIGH COURT

Record No. 2012/7091P

BETWEEN:

EURO SAFETY AND TRAINING SERVICES LIMITED

Plaintiff

– and –

AN FORAS ÁISEANNA SAOTHAIR

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 5th April, 2016.

Part 1: Overview

1. Euro Safety & Training Services wishes to sue FÁS for certain alleged acts of negligence and misfeasance, as well as certain alleged breaches of statutory duty. The basic facts are not especially complicated. However, it is estimated that the proceedings could take about€600,000 to bring to completion. To put matters differently it would take roughly 20 times the current median annual salary and about 30 times the present minimum annual salary to take the present proceedings from start to finish. This level of costs is now (regrettably) typical and inevitably throws up dilemmas of the kind now presenting. The dilemma is as follows. Euro Safety is aggrieved by FÁS's alleged wrongdoing and wishes to continue its proceedings. But it does not have anything close to€600,000 to hand – few do. Nor does it appear that it has any realistic means of raising it. FÁS, or SOLAS as it has now become, maintains, for its part, that it has done no wrong, and is concerned that if – it would say when – Euro Safety loses its case, any costs order that FÁS might then obtain against Euro Safety will be useless. Unsurprisingly, FÁS has come now to court asking that Euro Safety be required to pay several hundred thousand euro upfront by way of security for the costs of the within proceedings. Equally unsurprisingly, Euro Safety has indicated that if such an order is made, it will not be able to meet it, and that a case which it wants to bring, and believes it can win, will die a premature death. Both parties have some justice on their side and there is a body of case-law covering this manner of application which the court applies below to resolve the issues at hand. At a more general level, however, the case highlights, yet again, the need for a systemic solution to the present crushing cost of High Court litigation.

Part 2: Background Facts

2. Euro Safety is an approved training organisation which was authorised by FÁS back in 2002 to engage in the training and assessment of non-craft operatives within the construction sector. Since 2013, FÁS has stood dissolved and been replaced by SOLAS (An tSeirbhís Oideachais Leanúnaigh agus Scileanna) and it is, in truth, against SOLAS that these proceedings now continue, albeit that they continue nominally to be against FÁS and that it is therefore to FÁS that the court refers throughout this judgment.

3. In or about 2002, Euro Safety provided information to FÁS concerning the alleged unauthorised activities of a rival training company. Euro Safety alleges that it was following the provision of this information, and following certain concerns being raised regarding other activities of FÁS, that FÁS commissioned a review of its own activities that resulted in the so-called 'Spollen Report'. Euro Safety complains that, as a result of the foregoing, it was and has been 'blacklisted' by FÁS and denied the opportunity of providing training and assessment courses that it would otherwise have provided.

4. A long and detailed litany of the maltreatment that Euro Safety claims to have suffered at the hands of FÁS and its staff is provided in its statement of claim. Euro Safety maintains that the result of the alleged 'blacklisting' is that it has suffered a loss of reputation and consequent financial losses to its business, and will continue to do so. It claims that the actions of FÁS and its staff towards it do not just involve a breach of statutory duty and negligence but also, troublingly, misfeasance in public office. All wrongdoing is denied by FÁS and various defences are pleaded.

5. A brief summary of the proceedings to date follows:

18.07.12.	Plenary Summons issues.
07.08.12.	Appearance entered by FÁS.
23.07.13.	FÁS issues motion to dismiss for want of prosecution.
11.10.13.	Euro Safety delivers its statement of claim.
05.12.13.	FÁS files notice of change of solicitor.
04.02.14.	FÁS delivers notice for particulars.
27.06.14.	Warning letter issues from FÁS re. replies to particulars.
12.09.14.	Euro Safety delivers replies to particulars.
12.01.15.	FÁS delivers its defence.
09.02.15.	Solicitors for FÁS write to Euro Safety's solicitors seeking security for costs.
01.04.15.	Notice of Motion seeking security for costs issues.

Part 3: The Likely Cost of the Present Proceedings

6. It appears that there are two aspects of this case that will likely generate a significant level of fees. First, it is anticipated that there will be extensive discovery required by and of each side which may require a number of court applications. Second, the nature of the allegations made by Euro Safety regarding named individuals is such that it is anticipated by FÁS that at least 20 witnesses will be required to attend for FÁS, which generates an attendant need to interview those witnesses and obtain statements from them. A trial of about 20 days is contemplated, at least by FÁS, with two solicitors, as well as one senior and one junior counsel required to attend for FÁS. Based on the foregoing, it is anticipated by the costs accountants for FÁS that the following costs will arise:

		€	€
1.	***Solicitors' professional fees***		220,000
2.	***Postage and sundries***		2,500
3.	***Senior Counsel's fees***		
	- Proofs/consultations	2,000	
	- Brief fee	40,000	
	- Refresher fees (19)	66,500	108,500
4.	***Junior Counsel's fees***		
	- Proofs/consultations	1,500	
	- Brief fee	25,000	
	- Refresher fees (19)	44,650	71,150
5.	***Expert witness expenses***		
	Estimated fees for reports and attendances		35,000
6.	***Shorthand writer***		
	Estimated fees (20 days)		45,000
8.	***Solicitor outlays***		1,500
9.	***VAT*** (on fees @23%)		109,744.50
10.	***Total estimated costs***		***601,394.50***

7. Perhaps unsurprisingly, the cost accountants for Euro Safety have come back with a report in which it is suggested, for example, that the case may be shorter, discovery may be less time-consuming, and hence the level of fees payable may be lower. It may, it may, and they may. For its part, the court would be very surprised if the hearing of the case stretched to 20 days or if 20 witnesses should eventually prove to be required. However, the difficulty arising for Euro Safety is that even if the court was, say, to knock an unscientific 50% off the above-estimated costs, the present financial standing of Euro Safety is such that it would still face considerable difficulty in meeting the level of costs then arising. So the likelihood is that even allowing for such a massive discount, the costs of FÁS, in the event that it were successful in its defence, would still go unpaid.

Part 4: The Financial Position of Euro Safety
8. Euro Safety's balance sheet of 30th April, 2013 appears to have been the most recent balance sheet figures availableto FÁS when the affidavits in support of the present application were sworn. Those accounts indicate that, as of that date, Euro Safety had net assets of €57k. (All figures are rounded by the court to the nearest €1k). These comprised tangible assets of €50k and net current assets (i.e. current assets less current liabilities) of €7k.The company's abridged accounts indicated that in the 12 years since its incorporation Euro Safety had accumulated retained profits of €57k. The company was profitable in six of twelve years since 2002. A forensic accountant's report submitted by FÁS and accepted by the court as credible expresses the opinion that, even if Euro Safety could generate and retain profits annually at the highest annual rate in any year of its existence, it would require several years for it to generate the funds necessary to meet the likely scale of costs order that would issue in favour of FÁS in the event that Euro Safety is successful in its proceedings.

Part 5: Sections 390 and 52

9. Section 390 of the Companies Act, 1963 provided 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."*

10. Section 390 was repealed on 1st June, 2015, through a combination of s.4 and Sch.2, Pt.1 of the Act of 2014, and reg. 3 of the Companies Act 2014 (Commencement) Order 2015.

11. Section 52 of the Act of 2014, the replacement provision for s.390, now provides as follows:

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

12. As can be seen, the two provisions are essentially identical. It does not appear to the court that the Oireachtas intended to draw any distinction between the reference in s.390 to "*sufficient security*" and the reference in s.52 to "*security*". The Oireachtas hardly intended that by dropping the word "*sufficient*" the courts should set about ordering insufficient security. In any event, as will be seen hereafter, there is helpful precedent concerning what level of security a court should order, if minded to order security for costs.

13. All of the foregoing has the effect that the case-law relating to s.390 applies directly and *in toto* to applications under s.52.

14. Consistent with s.5 and the Sixth Schedule, para.8(1), of the Companies Act 2014, this Court is deciding the within application pursuant to s.52 of the Act of 2014. However, for the reasons just stated, this change of applicable provision has no impact on the outcome of the application.

Part 6: Applicable Law

A. Overview.

15. As always, counsel have laboured in the vineyard and plucked a rich crop of case-law from the ever-fruitful vine of precedent to guide the court in reaching its decision. These are considered below in chronological order.

B. Some Relevant Precedent.

i. Jack O'Toole Limited v. MacEoin Kelly Associates [1986] 1 I.R. 277

16. Jack O'Toole Limited, commenced damages for breach of contract against, *inter alia*, a firm of architects. In its statement of claim, the plaintiff company alleged that the architects, knowing of the former's weak financial situation had failed to adjudicate on amounts of claims it submitted, thereby causing the plaintiff company damage and loss. The High Court refused the application, stating that the plaintiff company had established a *prima facie* case that it had been put out of business by the wrong-doing of the both defendants and that its inability to give security for costs was a consequence of the alleged wrong-doing. This decision was successfully appealed to the Supreme Court, which offered a number of helpful observations regarding the onus on a plaintiff as regards proving the cause of its inability to pay. Thus, per Finlay C.J. (for the Court), at 283 *et seq*:

> *"It is clear that the making of an order under s.390 is a matter of discretion to be exercised having regard to all the relevant circumstances of the case….*
>
> *It is clear that there is no presumption, either in favour of the making of an order for security for costs or against it, but I am satisfied that where it is established or conceded, as arises in this case, that a limited liability company which is a plaintiff would be unable to meet the costs of a successful defendant, that if the plaintiff company seeks to avoid an order for security for costs it must, as a matter of onus of proof, establish to the satisfaction of the judge the special circumstances which would justify the refusal of an order."*

ii. Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd [2009] IEHC 7

17. Connaughton Road was involved in a development in Sligo. It claimed, *inter alia*, that Laing O'Rourke failed in a number of respects in relation to its obligations relating to the design and construction of the development. Laing O'Rourke brought an application under s.390 of the Act of 1963 seeking security for costs and consequential orders. In the High Court, Clarke J. acceded to the application brought, entered into a consideration of some applicable case-law and identified certain principles applicable to a s.390 (and hence now a s.52) application. These and certain other principles identified by Charleton J. in *Oltech (Systems) Limited v. Olivetti UK Limited*[2012] IEHC 512 are considered in detail later below.

iii. Pierse Desmond Limited v. McGinley Solicitors[2011] IEHC 145

18. This s.390 application arose from a professional negligence claim brought by Pierse Desmond Limited against a solicitor who, in the course of the proceedings, made a s.390 application. The reason it was drawn to this Court's attention was because of the contention made in that case that there had been a delay in bringing the s.390 application. In that case there was an almost 17-month, i.e. just under a year and a half's delay between the commencement of the proceedings and the issuance of the motion for security for costs. Here, by contrast, the gap in time between the commencement by Euro Safety of these proceedings and the issuance of the motion now under consideration was about 29½ months, i.e.about two and a half years. Per Hogan J., at paras.21–22:

> *"21. The plaintiff…contended that the defendant was precluded from seeking security by reason of delay. The present proceedings issued on 17th February, 2009, and the motion for security for costs was issued on 8th July, 2010. In the meantime, the defendant pursued the matter by raising a series of highly focused notices for particulars. It may be that there has been some delay on the defendant's part, but I would not see this delay as material. There is no suggestion that the defendant has been prejudiced. This is not, for example, a case where the application is made on the eve of the trial or where the belated nature of the application would have the effect of frustrating the capacity of the plaintiff to raise the necessary funds. Nor is it a case where contumelious [blameworthy] delay on the part of the defendant resulted in the effective forfeiture of that party's right to apply for security under s.390. On the contrary, the present case is several months away from a hearing date and…such delay as there has been is not material in the context of this application.*
>
> *22. In these circumstances I would reject the argument that any delay on the part of the defendant in applying for security for costs should be regarded as disentitling her to the relief to which she is otherwise entitled."*

iv. Oltech (Systems) Limited v. Olivetti UK Limited [2012] IEHC 512

19. The judgment of Charleton J in *Oltech*, yet another s.390 application, offers a helpful insight into such issues as to (i) what general approach the court ought to take in s.390 (now s.52) proceedings,(ii) what basic requirements must be met before the discretion to order security will be exercised,(iii) what exactly constitutes a '*prima facie* defence' (an issue that does not present in this case because it is accepted that such a defence presents), (iv) what amount of security ought to be ordered, if ordered, and (v) what kinds of special circumstances justify a refusal of an order for security for costs.

20. The decisions in *Oltech* and *Connaughton* (referred to above),when read together, appear to this Court to offer a near-definitive statement of the current law in this area, subject only to such nuances as have been identified in the still-later case-law to which counsel has referred the court and of which mention is made later below – though even had the court not been referred to those later cases, *Oltech* and *Connaughton* by themselves offer a generally adequate road-map for a court seeking to journey from the hearing of a s.52 application through to the issuance of an eventual judgment without straying inadvertently into the quicksand of legal error. Because of this the principles identified in those cases are considered in detail later below.

(v) Leftbrook Limited v. Canice Nicholas [2013] IEHC 643

21. This was a s.390 application that focused on the issues of delay and a claim that the alleged wrongdoing of the defendant led to the plaintiff's inability to discharge costs. It is a helpful example of the application of, in particular, the *Connaughton* principles in practice but does not add to the principles established thereby or to those recognised in *Oltech*.

(vi) Dublin Waterworld Ltd v. National Sports Campus Development Authority [2014] IEHC 518

22. The court's attention was drawn to this further s.390 application because it elaborates on what constitutes a point of law/fact of

such importance as to justify refusal of an order for security for costs, the court noting there as follows, at para.33:

> *"It is accepted in case-law that where a plaintiff has raised a point of law of exceptional public importance, this may constitute a special circumstance justifying refusal of an order for security for costs that might otherwise be warranted. (See, for example, Lancefort Limited v. AnBordPleanála [1989] 2 I.R. 511 and Village Residents Association Ltd. v. AnBordPleanála [2000] 4 I.R. 321). More recently, in Oltech, Charleton J. indicated…that a point of fact can also arise in litigation which so keenly affects the public interest as to merit refusal of an order for security for costs. Cases in which a point of fact of exceptional importance have been held to arise include Comcast v. Minister for Public Enterprise [2012] IESC 50 and Millstream Recycling Ltd. v. Tierney [2010] IEHC 55. In Comcast the court was presented with a case concerning the alleged corruption of a member of the Cabinet in the context of the awarding of the second mobile licence for Ireland. In the Supreme Court, Hardiman J., at para.3 of his judgment, describes the case as 'absolutely unique, without precedent or parallel in the ninety year history of the State'. The whole episode arising was a matter of public scandal and was the subject of a lengthy tribunal of inquiry. In Millstream, the proceedings were concerned with the public blaming of the plaintiff for a contamination-of-food scandal that rocked the agricultural sector of the Irish economy. In the present case, the core of the issue arising is, to use colloquial parlance, whether the Authority sought to 'pull a fast one' on DWW by deliberately charging to, and pursuing the payment by, DWW of VAT to the amount of €10m in circumstances where, by the Authority's own admission, its tax advisors had indicated that the method of VAT calculation required by law yielded a VAT liability of €0."*

23. The above-quoted text represents in truth little more than a re-statement of existing principle. The next succeeding paragraph of *Dublin Waterworld* represents perhaps a clarification and/or evolution of principle, recognising that (1) just because a particular case excites public interest does not make the resolution of that case a matter of public interest, and (2) that there can, of course, be gradations of exceptionality:

> *"34. It is trite to note that public and semi-state bodies are often sued for alleged or admitted wrongdoings and it cannot be, and it is not the case that their public character or ownership necessarily converts proceedings against them into proceedings in which refusal of an otherwise merited order for securityfor costs is invariably justifiable by reference to the public interest. All such disputes are likely to be of interest to the public but that does not make their resolution a matter of public interest. The present case is not one involving alleged Cabinet-level corruption or the reputation of a national industry. However, the Comcast and Millstream cases are perhaps at the extreme end of the spectrum of cases that raise issues so exceptional as to cause the court to exercise its discretion not to make an order for security for costs. Consequently they are not perhaps the most helpful of precedents insofar as illuminating what other categories of case may raise facts that will be considered exceptional, albeit not quite as exceptional – and even exceptionality has its gradations: one exceptional circumstance may not be as exceptional as another, yet both may still be exceptional."*

Part 7: Connaughton and Oltech Summarised

A. Overview.

24. The court has already indicated above that it considers that the decisions in *Connaughton* and *Oltech*, when read together, provide a quite comprehensive account of the current principles and practices that inform s.390 (and now s.52) applications. Combined into one, stripped of all commentary, and presented in what the court hopes is a coherent sequence, it appears to the court that those principles and practices can be summarised as follows.

B. Connaughton and Oltech Summarised.

25. 1. GENERAL APPROACH

2. BASIC REQUIREMENTS

3. SPECIAL CIRCUMSTANCES

i. General

ii. Alleged Wrong Engendered

Inability to meet Costs?

iii. Delay

iv. Important point of law

v. Adequately funded as co-plaintiff

vi. Constitution

vii. Point of fact of national importance

viii. Counterclaimants

4. QUANTUM

5. COMPANY WITH NO SIGNIFICANT NET ASSETS

BEFORE EVENTS IN ISSUE

6. AMOUNT OF SECURITY

1. GENERAL APPROACH

(1) To obtain security for costs, an initial onus rests on the moving party to establish (i) a *prima facie* defence to the plaintiff's claim, and (ii) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful. [*Connaughton*, para.2.1].

(2) If (1)(i) and (1)(ii) are established, security ought to be ordered unless it can be shown there are special circumstances in the case which ought to cause the court to exercise its discretion not to make such order. [*Connaughton*, para.2.1].

(3) It is no part of the task of a court on an application for security for costs to take a view as to who ought to win at trial. No assessment of liability ought to be made, much less any decision beyond stating whether there is a reasonable prospect of a defence succeeding at trial. [*Oltech*, paras.4-5].

(4) The task for the court, rather than to attempt to decide the case, is to apply the tests mandated by case-law. [*Oltech*, para.5].

(5) Section 390 (now s.52) expressly envisions that an impecunious plaintiff company may be required to give security for costs and that in many cases this may mean the end of an action, unless someone other than the company is prepared to put up the security. [*Oltech*, para.7].

(6) To refrain from granting an order for security, save in certain exceptional (and allowed) circumstances, just because it might stifle the plaintiff company's actions would render the section nugatory. [*Oltech*, para.7].

2. BASIC REQUIREMENTS

(7) There are two basic requirements to meet before the discretion of the court to order security for costs may be invoked: (i) the defendant must show it has a reasonably sustainable, i.e.*prima facie,* defence. Second, a defendant must show the plaintiff company is either (i) insolvent, or (ii) so financially challenged that it will not be able to pay the defendant's costs, if the defendant is successful. [*Oltech*, para.8].

(8) The reference to a *prima facie* defence does not just mean a barely arguable defence, since experience suggests that there is little that cannot be argued. [*Oltech*, para.8].

(9) A defendant seeking to establish a *prima facie* defence based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish those facts. Mere assertion will not suffice. [*Oltech*, para.9].

(10) If such objective evidence as is referred to in (9) is adduced, the defendant is entitled to have the court determine whether or not it has established a *prima facie* defence (on the assumption such evidence will be accepted at trial). [*Oltech*, para.9].

(11) A defendant such as is referred to in (9) and (10) must establish an arguable legal basis for the inferences/conclusions which it submits the court may arrive at based on such evidence. [*Oltech*, para.9].

(12) Section 390 (now s.52) contains no reference to the establishment of a *prima facie* defence. However, it requires a company to provide security where it would be unable to pay the costs of a successful defendant. It is therefore relevant to consider whether or not a defendant has a *prima facie* defence. Unless the defendant has a *prima facie* defence, the purpose of s.390 (s.52) would not come into play. [*Oltech*, para.9].

(13) A reasonably sustainable defence may be one in fact or in law. If in law, then even an affidavit is not required on an application for security for costs. [*Oltech*, para.10].

(14) The essence of the order for security for costs (or not) is to advance the ends of justice, not to hinder them. It is for a court on such an application to consider, and to balance, the interests of the plaintiff company and those of the defendant in a fair and proportionate manner. [*Oltech*, para.16].

3. SPECIAL CIRCUMSTANCES

i. General

(15) There is a multitude of special circumstances identified in case-law as allowing the court in its discretion to decline to make an order for security for costs. The terms of this discretion are wide and cannot be regarded as finally settled. [*Oltech*, para.15].

(16) The burden of proof of special factors rests on the plaintiff company once the defendant has shown a *prima facie* defence. [*Oltech*, para.16].

(17) Special circumstances exist in order to enable cases to proceed even where a defence is reasonably open despite the inability to pay such a costs order by the plaintiff. This is because the justice of a case may require that notwithstanding that the defendant has a reasonable defence and that the plaintiff company is financially challenged the case ought to proceed. [*Oltech*, para.16].

(18) The requirement that special circumstances be established by a plaintiff company, does not have to be complied with in any particular way. [*Connaughton*, para.4.11].

ii. Alleged Wrong Engendered Inability to meet Costs?

(19) Where it is asserted that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by same, (a) the onus of establishing this rests on the plaintiff, and (b) the obligation of the plaintiff in such circumstances is to establish a *prima facie* case that its inability to pay the defendant's costs of the defendant, in the event the defendant were successful, stems from the wrongdoing alleged in the overall proceedings. [*Connaughton*, para.2.3].

(20) For a plaintiff to be correct that his inability to pay stems from the wrongdoing asserted, four propositions, it seems, must necessarily be true: (i) that there was an actionable wrong on the part of the defendant; (ii) that there is a causal connection between the actionable wrongdoing and one or more practical consequences for the plaintiff; (iii) that the consequence(s) referred to in (ii) have given rise to some level of loss in the hands of the plaintiff which is recoverable as a matter of law; and (iv) that the loss concerned is sufficient to make a difference between the plaintiff being in a position to meet the costs of the defendant in the event

that the defendant should succeed. [*Connaughton*, para. 3.4]. Each of these steps falls to be established on a *prima facie* basis only. [*Connaughton*, para.3.5].

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

(22) Despite (18), when it comes to this form of special circumstance, *i.e.* that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted, in normal circumstances one would expect that a plaintiff company would put before the court (i) some evidence of its current financial position, (ii) some account of its financial position prior to the incident giving rise to the alleged wrongdoing, and (iii) some evidence to suggest that all, or a sufficient portion of, the difference in position can be attributed to the wrongful actions of the defendant. [*Connaughton*, para.4.11].

(23) If a plaintiff company seeks, without presenting approximate accounts, to assert that all of its current financial difficulties are attributable to a defendant's alleged wrongdoing (and thus that there is, in effect, an equivalence between the *prima facie* scale of the alleged wrongdoing and the said financial difficulties), it would be necessary (i) in addition to showing that the plaintiff company would have made profits in the first place, to demonstrate (ii) a *prima facie* basis for assuming that no other causes could be said to have generated the current inability to pay costs. [*Connaughton*, para.4.14].

iii. Delay

(24) An order for security for costs may be refused where there has been delay in bringing the application for such order. [*Oltech*, para.19].

(25) When it comes to instances of alleged delay: (i) any court considering delay as grounds for refusing an order for security for costs would need to analyse (a) the nature of the delay in light of the means of knowledge of the moving party (as to what that party knew or ought reasonably to have known), and (b) assess its impact on the course of the case in order to decide whether the order ought to be refused; (ii) the reason for the delay must be important; (iii) delay as a reason for refusing to make an order can be very important where the plaintiff company has acted to its detriment in incurring a level of costs that it would not have incurred had it known it would have been required to provide security. [*Oltech*, para.19].

iv. Important point of law

(26) An order for security for costs may be refused where a point of law arises for decision in the case that is so important that the process of the case should not be interrupted. [*Oltech*, para.20].

(27) The point of law in issue must not simply be any ordinary point of law that might be argued before the courts on a month-to-month basis; it must transcend the interests of the parties and require as a matter of public interest that it be decided for the benefit of the community as a whole. [*Oltech*, para.20].

v. Adequately funded as co-plaintiff

(28) Where there is a corporation as plaintiff and an individual as co-plaintiff, both are making the same factual case and the corporation is insolvent but the natural person is adequately funded to meet an eventual costs order against her or him, the order may be refused because the defendant, if successful, is not going to be impeded in recovering costs. [*Oltech*, para.21].

(29) The same point may apply where (a) where two corporations are co-plaintiffs, and one is adequately resourced and the other not, and (b) where there are two plaintiffs in similar circumstances, one within the European Union and the other not. [*Oltech*, para.21].

vi. Constitution

(30) The constitutional (though not absolute) entitlement of citizens to access to the courts applies to defendants/respondents as well as plaintiffs. A defendant ought not to be forced to forego (though one would imagine that generally a defendant would be delighted to forego) defending an action against which there is a stateable defence on the merits, out of the fear or being bankrupted by having to incur substantial costs which will be irrecoverable from an insolvent plaintiff. [*Oltech*, para.21].

vii. Point of fact of national importance

(31) A point of fact of national importance can arise in litigation that is inescapably central to a case and which will settle a concern of great public moment. Such an issue will arise rarely. Litigation between private entities is by nature compensatory or restorative. It is only in the most extreme circumstances that any fact in contention between litigants can keenly affect the public interest. Where such does present, this can be a special factor in refusing to order security for costs. [*Oltech*, para.22]. [The court notes in passing the somewhat more nuanced approach adopted in this regard by the court in *Dublin Waterworld,* at para.34 of its judgment, quoted elsewhere above].

viii. Counterclaimants

(32) A defendant may also be a counterclaimant on a subject-matter that identifies as the plaintiff's defence the same issues that the plaintiff company seeks to plead against the defendant. This could bring about the undesirable situation where an impecunious plaintiff could have its claim frustrated by the granting of an order for security for costs, yet would fall to defend the counterclaim on the very facts in issue in the claim. In such instances, the order for security may be granted on the giving of an undertaking that the defendant's counterclaim will not be pursued. [*Oltech*, para.23]. A further undertaking may be sought that the defendant will consent to dismissal of its counterclaim, should the plaintiff fail to lodge the sum ordered by way of security. [*Oltech*, para.27]. Of course, if the trial of a counterclaim would be substantially unaffected by the absence of a plaintiff's allegation against the defendant, there is no reason for the counterclaim not to proceed. [*Oltech*, para.25].

4. QUANTUM

(33) It is not correct that a court should have no regard to questions of quantum in a s.52 (s.390) application. A plaintiff must at least establish a *prima facie* case that the quantum of damages which he might obtain in the event that he is successful is of an

order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful. [*Connaughton*, para.3.6].

(34) It does not flow from (33) that it is necessary for a plaintiff to establish a precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a *prima facie* basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. [*Connaughton*, para.3.6].

5. COMPANY WITH NO SIGNIFICANT NET ASSETS BEFORE EVENTS IN ISSUE

(35) When it comes to a plaintiff company which had no significant net assets prior to the events which gave rise to the proceedings, there are no special considerations to be given to such a company one way or the other. [*Connaughton*, para.3.8].

(36) Unless such a plaintiff company (as referred to in (35)) can establish, on a *prima facie* basis that, were it not for the wrongdoing asserted, (i) it not only would not have lost the money, but (ii) would have made sufficient profits so as to be in funds sufficient to pay the likely costs of a successful defendant, then it will have been unable to show that its inability to pay costs is due to the wrongdoing at the heart of the proceedings. [*Connaughton*, paras. 3.8–3.9].

6. AMOUNT OF SECURITY

(37) If an order for security for costs is to be made, it must be for the full sum of the estimated costs: the court has no discretion to award merely a percentage. [*Oltech*, para.13].

(38) The courts have a discretion as to the awarding of costs; the lure of over-proofing can be factored into the court's estimation of costs (and hence the level of order for security made). [*Oltech*, para.13].

Part 8: Connaughton and Oltech Applied

26. Re.(1). It is accepted by the parties that FÁS has a *prima facie* defence to Euro Safety's claim. Accounts have been placed before the court which indicate that Euro Safety does not have the funds available to pay FÁS' costs if it is successful in its defence. The inability of Euro Safety to meet those costs in such an event is copper-fastened by its proper admission at the hearing of the present application that if the court orders security for costs, that will effectively end the present proceedings.

27. Re.(2). It follows from the conclusion re.(1) that security for costs ought to be ordered unless it can be shown that there are special circumstances in this case which ought to cause the court to exercise its discretion not to make such an order. The court may therefore skip to the fourteenth of the above-identified principles.

28. Re.(14).Noted.

29. Re.(15). There is no special circumstance alleged or identifiable in the within proceedings that does not come within a previously identified category of special circumstance.

30. Re.(16). This is accepted by the parties to the present application.

31. Re.(17).When it comes to the matter of justice, the court is mindful that Euro Safety has made serious and detailed allegations as to purported misfeasance in public office by certain persons within FÁS, though the court notes too that this alleged misfeasance is denied utterly by FÁS.

32. Re.(18). Noted.

33. Re.(19). The court has been presented with abrief financial report by afirm of accountants which seeks to establish profits that it is claimed would have been made by Euro Safety had it not been the victim of the 'blacklisting' that it claims to have suffered. The report appears to the court to be rather optimistic. Notably, however, no report has been produced to counter the figures therein. Moreover, the court is mindful that Euro Safety need merely establish a *prima facie* case that its inability to pay the defendant's costs of the defendant, in the event the defendant were successful, stems from the wrongdoing alleged in the overall proceedings. The foregoing report appears to the court to meet the relatively low threshold presenting.

34. Re.(20).It appears to the court that each of these propositions has been established on a *prima facie* basis.

35. Re.(21). This the court has done.

36. Re.(22). This Euro Safety has done.

37. Re.(23). This point is not applicable here.

38. Re.(24) and (25). There has been significant delay on the part of FÁS in bringing the present application. These proceedings were commenced on 18th July, 2012, and the present application was not commenced until 1st April, 2015. No convincing explanation has been offered for this delay and there has been no little 'to-ing and fro-ing' between the parties. It has been contended by FÁS that the present application could not have been brought until it had filed its defence, a contention that the court, with respect, considers to be entirely wrong. There is no reason why this application could not or should not have been brought after the delivery of the statement of claim, and every reason why it both could and should. As against the delay arising, the court is mindful that Euro Safety's principal actions to date in these proceedings comprise the issuance of a plenary summons, delivery of a statement of claim, delivery of replies to particulars, and its contesting of the present application. While there will have been a cost associated with all of this (the court has not been apprised of the cost), it will and does undoubtedly pale with the estimated €600,000 to which FÁS stands exposed should (a) these proceedings continue and (b) it triumphs in its defence, but (c) is unable to recover its costs. And still that considerable and unjustified delay on the part of FÁS presents.

39. Re.(26) and (27). There is no such point of law presenting

40. Re.(28), (29), (30). None of these issues present here.

41. Re.(31). Euro Safety has made serious and detailed allegations (all of which are denied) as to purported misfeasance in public

office by certain persons within FÁS. Misfeasance in public office is, of course, a profound wrong. We are fortunate to live in a State where, over successive generations, such misfeasance has proved relatively rare. Though there will always be occasional 'bad apples', government in this country is and has long been essentially honest, as well as a positive force when it comes to the advancement of the public good. By and large we trust in our government because it has proven itself worthy of that trust. But it is a truism that trust slowly won can be quickly lost. This has the result that when detailed and serious allegations are made as to misfeasance in public office, even when such allegations are denied, there is the strongest public interest in ensuring that such allegations are examined – if only to be dismissed – so that the popular belief in good government continues to be sustained, and to be properly sustainable. The present case is not one involving corruption or concerns as great as those which presented in *Comcast* and *Millstream* (referred to above). However, as was noted in *Dublin Waterworld*, at para.34, and referred to elsewhere above:

> *"[T]he Comcast and Millstream cases are perhaps at the extreme end of the spectrum of cases that raise issues so exceptional as to cause the court to exercise its discretion not to make an order for security for costs. Consequently they are not perhaps the most helpful of precedents insofar as illuminating what other categories of case may raise facts that will be considered exceptional, albeit not quite as exceptional – and even exceptionality has its gradations: one exceptional circumstance may not be as exceptional as another, yet both may still be exceptional."*

42. The detailed and serious allegations of misfeasance in public office made by Euro Safety make this a case that is exceptional in its own way, albeit not exceptional in the same way as *Comcast* and *Millstream*, and a case where an airing of, and adjudication upon, those detailed allegations is a matter of significant public moment and interest. Our continuing belief in good government is only properly sustainable for so long as substantial allegations of bad government are duly considered and adjudicated upon when raised, even if they are denied.

43. Re.(32). This is not applicable here.

44. Re.(33), (34) and (36). For the reasons stated re.(19), the court considers that such a *prima facie* case has been established here.

45. Re.(35). Noted.

46. Re.(37). Noted; the court has considered the estimated costs in Part 3 above.

47. Re.(38). Noted.

Part 9: Conclusion

48. Having regard to all of the foregoing, including most especially:

(1) that Euro Safety has

(i) established on a *prima facie* basis that its inability to discharge FÁS' costs of successfully defending these proceedings (if FÁS so succeeds) flows from the wrong allegedly committed by FÁS; and

(ii) made detailed and serious allegations of misfeasance in public office against FÁS (all of which allegations are denied), rendering this a case where, for the reasons stated above, an airing of, and adjudication upon, those detailed allegations is a matter of public moment and interest; and

(2) to a lesser but still significant extent, the notable delay that FÁS has manifested in bringing the present application,

the court declines to grant the order for security for costs now sought of it by FÁS.