Neutral Citation: [2012] IEHC 541

THE HIGH COURT

[2005 No. 3623P]

BETWEEN

PAULSON INVESTMENTS LIMITED AND ALBERT ENTERPRISES LIMITED

PLAINTIFFS

AND

JONS CIVIL ENGINEERING LIMITED AND P.J. EDWARDS & COMPANY LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham dated the 2nd day of November, 2012.

1. Before the court are a number of motions – a motion dated the 24th November, 2010, by which the plaintiffs seek to strike out the defence of the first named defendant, Jons Civil Engineering Limited ("Jons") for failure to comply with an agreement to make discovery dated the 10th January, 2008 and the 15th May, 2008 and motions brought by each defendant pursuant to s. 390 of the Companies Act 1963, as amended, requiring the plaintiffs to provide security for costs. The motion brought by the first named defendant was dated the 27th April, 2011 and that brought by the second named defendant dated the 20th May, 2011.

Background to the Proceedings

2. The plaintiffs are related companies involved in property development. Both companies form part of what is known as the Mirella Group and each is a wholly owned subsidiary of Mirella Investment Limited. Mr. Willie Smyth is a director and is the principal shareholder of both plaintiff companies and also of Mirella Investments Limited.

3. The first named plaintiff, Paulson Investments Limited ("Paulson") is the owner of a site at Dyer Street, Drogheda, which is bounded to the south by the River Boyne. In 2000, it was decided that the site would be developed and that the development would take place through the second named plaintiff, Albert Enterprises Limited ("AEL"). The development was intended to consist of a three storey basement, with six over ground floors offering office, retail, commercial and residential elements. The first named defendant, Jons carried on a civil engineering business, while the second named defendant, P.J. Edwards & Company Limited ("Edwards"), is a specialist piling contractor.

4. Beginning in or around 2000, Mr. Willie Smyth entered into discussions, with a view to entering into a fixed price contract with Jons to construct the three storey basement element of the development. However, it is a significant feature of the case that at no point was a written contract actually entered into by the plaintiffs or indeed by Mr. Willie Smyth with the first defendant. While, as we will see, there is some dispute about whether at particular stages, the first named defendant was dealing with the plaintiff companies or whether it was dealing with Mr. Willie Smyth personally, I will for convenience refer to the plaintiffs without regard to this controversy.

5. The plaintiffs retained consulting engineers, Hendrick Ryan and Associates ("Hendrick Ryan") to advise in relation to the construction of the development. Hendrick Ryan issued drawings, specifications and instructions for the construction of the basement and the piling and ground works associated with this. In preparing its specifications, Hendrick Ryan contemplated the use of what is known as secant piles in constructing the basement retaining wall. This is described as involving bored and case in situ piles which would be constructed using rotary bored piling techniques and, if necessary, would use support fluids to support collapsing or unstable blowing ground. In essence, the Hendrick Ryan specifications contemplated the use of conventional or traditional methods involving as it did large diameter bored cast in place piles, using temporary casing and a support fluid to maintain the stability of the bore if necessary.

6. The tendered documentation was furnished to Edwards, which responded and ultimately took on the task of piling. It is a matter of some controversy as to who actually engaged Edwards to carry out the pile driving. The plaintiffs allege and it is their case that the second named defendant, Edwards was engaged by the first named defendant, Jons, to carry out the piling works. However, this is disputed by the first named defendant who contends that the second named defendant was nominated by the plaintiffs and/or by Mr. Willie Smyth.

7. Of note is that Edwards had worked previously in Drogheda and indeed had worked in very close proximity to the proposed Dyer Street site. On that occasion they had not used the traditional secant pile method of piling but an alternative method which has the capacity to be quicker and more economical known as "Continuous Flight Auger" ("CFA"). In broad terms CFA piling is a replacement piling technique where the boring operation removes matter and replaces it with concrete.

8. By tender dated the 15th July, 2000, accompanied by a letter dated the 17th July, 2000, Edwards tendered for the piling aspect of the contract at a price of €1,082,700 plus VAT. This tender was based upon using the CFA piling method. Edwards qualified its tender in the following manner:-

> "We have based our tender on being able to use CFA bored piles which has never been a problem in Drogheda where we have worked literally less than 50 metres from the site. However, we do note the very long chiselling times recorded below 11 metres which would cast some doubt on the use of CFA methods. It would be prudent therefore to qualify our tender which would be subject to test boring, which we would carry out at our own expense."

9. Hendrick Ryan accepted the tender. In doing so, it specified that the concrete CFA secant piling should be carried out within specified limits of "settlement" or ground movement.

10. In September 2000, seemingly in anticipation of the execution of a written contract incorporating the terms and conditions of the Institute of Engineers of Ireland ("IEI") standard contract, Jons entered on and began levelling the site. In January 2001, Edwards entered on site and commenced piling work. Problems quickly emerged and these initial problems were addressed at a meeting on the

11. Shortly after the commencement of piling operations, the ground in the vicinity of the piling became unstable resulting in ground movement or settlement exceeding the stipulated maxima. On the 2nd March, 2001, Hendrick Ryan instructed that piling should cease. Edwards contends that the piling difficulties encountered were due to unforeseen ground conditions which were not suitable for the CFA piling techniques. In that regard, the second named defendant and its experts are very critical of the soil evaluations that had been carried out prior to its involvement. Following discussions, there followed attempts at site improvements involving in particular engaging in a process known as "grouting" in an effort to stiffen the ground. However, these efforts failed to keep settlement within the specified parameters. Hendrick Ryan were not prepared to relax the parameters or tolerances and work was then suspended in September 2001 at which stage the defendants were requested to leave the site.

12. Subsequently, the plaintiffs proceeded with a modified development consisting of a seven storey over ground structure with the basement that had been proposed omitted.

13. On the 1st November, 2005, the plaintiffs commenced the present proceedings. The claim against Jons, involves allegations of breach of contract and also involves claims in tort, while the claim against Edwards is brought entirely in tort. In the proceedings the sum of approximately €2 million is claimed for wasted professional fees and in addition there is a claim for approximately €22 million in respect of the reduced capital value of what was actually constructed when compared with what had been intended.

14. In terms of the procedure that had been followed in dealing with these applications, while the plaintiffs' motion to strike out the defence of the first named defendant came first in time, it was agreed between the parties that the security for costs motions should proceed first. As further information about inadequacies in relation to discovery emerged during the course of the hearing, the motion in relation to discovery acquired a greater significance. However, in a situation where the complaints made about the adequacy of discovery are also relevant in addressing the security for costs issue, it is convenient to turn first to that aspect.

Security for costs

15. There is little if any dispute between the parties as to the relevant legal principles applicable to the security for costs application, rather, it is as to how those principles are to be applied to the facts of this case that results in disagreement. In addition, the parties have, at least for the purposes of the present applications, reached agreement on a number of factual matters including (i) The defence costs of trial, it is agreed, can be estimated at €784,983 plus VAT in the case of Jons and €769,000.73 plus VAT in the case of Edwards calculated on the basis of a twenty day hearing amounting in total to €1,553,983.73 plus VAT, (ii) The aggregate value of the plaintiffs by reference to the accounts filed by them for year ending the 31st March, 2010, amounts to €830,579, while the accounts for year ended the 31st March, 2011, show aggregate net asset values of €158,859. Accordingly, it is not in dispute that the plaintiffs will be unable to pay the costs of either defendant if both defendants are successful in their defence.

16. The applicable legal principles, are as I have indicated, not seriously in dispute. The applications are made pursuant to s. 390 of the Act of 1963, which 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."

17. It is agreed that there is an onus on an applicant to show that it has a *prima facie* defence to a claim and that the applicant for security must then establish by credible evidence that the respondent will not be able to meet an order for costs. This aspect as we have seen is not in dispute in the present case. Once these two elements are in place an order for security for costs will follow almost as a matter of course (*see Hidden Ireland Heritage Holidays Limited t/a The Hidden Ireland Association v. Indigo Services Limited & Ors* [2005] 2 I.R. 115) unless the plaintiff can prove the existence of some special circumstance that would justify the refusal of an order for security for costs.

18. In circumstances where the plaintiffs are not in a position to dispute that it would have difficulty in meeting the costs of the defendant if successful, opposition to an order for security for costs is based on two grounds:- (i) it is said that the defendants have failed to establish the existence of a *bona fide* defence and (ii) it is said that, in any event, there are special circumstances present such as would lead the court in the exercise of its discretion to decline to order security for costs. These special circumstances it is contended are to be found in the fact that there was inordinate delay on the part of the defendants in seeking security for costs, during which period of delay the plaintiffs incurred considerable costs particularly in relation to discovery and secondly, that there has been default on the part of the first named defendant in complying with the agreement in relation to discovery. The default is such that it is contended that the defence of the first named defendant should be struck out, but if that is not done, then in any event the order for security for costs should be refused.

19. The plaintiffs argue that neither defendant has established a *bona fide* defence to the plaintiffs' claim, that the case is in effect an assessment and that the live issue in the case is to determine which defendant carried responsibility. In contrast, each defendant says that it has established not just a *bona fide* defence but that each is in a position to point to several different defences, any one of which would entitle them to an order for security for costs unless the plaintiffs can establish special circumstances to the contrary.

20. Finlay Geoghegan J. succinctly described what a defendant seeking to establish a *bona fide* defence in order to mount an application for security for costs must do in *Tribune Newspapers v. Associated Newspapers Ireland t/a The Irish Mail on Sunday* (Unreported, High Court, Finlay Geoghegan J., 25th March, 2011) where she observed as follows:-

> "…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."

21. Once the Court is satisfied that a defendant has provided a *prima facie* defence, it is not the function of the court to engage in an exercise of assessing the strength or weakness of that defence unless it can be established on the facts or the law that in truth the defendant has no real defence. The matter is put as follows in Delany and McGrath, *Civil Procedure*, 3rd Ed., (Dublin, 2012) at para. 13-70:-

> "While the strength of the defendant's case will clearly be a factor in considering an application for security for costs, it is accepted as a general principle that in most cases it will not be appropriate to weigh up the strength of the plaintiff's case provided it has an arguable case. Although the issue has not been entirely unproblematic, it now appears to be

reasonably well accepted that the court should not attempt to predict the outcome of the case in determining whether security should be ordered. As O'Hanlon J. stated in *Phillip Harrington Daly & Co. v. JVC* (UK) Ltd, the court cannot be expected to embark upon 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, although it will be necessary for the plaintiff to establish that it does have an arguable case. In *Bula Limited v. Tara Mines* (No. 3) Murphy J. stated as follows:

> '[I]t is no part of my function as I see it to forecast the outcome of the litigation or to prejudge the facts or express an interim view on the questions of law involved. On behalf of the defendants it was argued that the weakness of the plaintiffs' case is a factor to which regard should be had. Whilst it must be established that the plaintiffs do have an arguable case it does not seem to me that it is either necessary or proper to evaluate the prospects of success.' "

22. The statement of Murphy J. was endorsed by McCarthy J. in *Comhlucht Páipéar Ríomhaireachta Teo. v. Údarás na Gaeltachta and Ors* [1989] 1 I.R. 320. There, he also made clear that the fact that the plaintiff had a very strong case was not an appropriate consideration unless it could be shown that the strength was such that there was no real defence in which case the application for security should be refused.

23. The issue was also considered in the course of the judgments in *Lismore Homes Limited v. Bank of Ireland Finance Limited* [1999] 1. I.R. 501, where Lynch J. in the course of his judgment observed at p. 513 as follows: "[t]he strength or otherwise of the party's case is not an appropriate consideration unless the plaintiff's case is unanswerable in which circumstance security should be refused…". At p. 530, Barron J. commented as follows: "[o]nce an arguable case has been established the strength of that case is immaterial unless it leads to showing that in reality the defendant has no real defence."

24. On the basis of these authorities, it seems that the defendants have a low threshold to cross in order to be permitted to proceed with their application for security. Counsel for the first named defendant has on a number of occasions drawn the analogy of a defendant seeking to resist summary judgment and seeking leave to defend. It is a useful analogy but like many analogies requires a degree of caution. Barron J. in *Lismore Homes Limited v. Bank of Ireland Finance Limited* observed that what may or may not be an arguable case has not been precisely defined but that it seemed to him that since the application is heard on affidavit that there must "…at least be a case which would be sufficiently strong as that which would entitle a defendant in a motion for liberty to enter final judgment to be permitted to defend". It is the reference to "at least as strong" which indicates the need for some caution. It is worth noting that in a motion for judgment if the defendant crosses the low threshold then the effect of that is that the case proceeds to a hearing in the ordinary way and the defendant has his opportunity to present his defence in court. In the case of a security for costs application, if the defendant crosses the low threshold and other elements are in place then major and very possibly insurmountable obstacles are placed in the way of the plaintiff accessing the courts. It is a distinction which merits careful consideration and should be borne in mind throughout.

25. In light of these criteria, it is necessary to consider the various defences that have been canvassed by each of the defendants. The first named defendant raised the following points:-

> (i) It says that it contracted with Mr. Willie Smyth personally rather than with the plaintiffs in respect of the works at Dyer Street and that it has no contractual nexus with the plaintiffs.
>
> (ii) If there was a contract in existence then the first named defendant says that there was agreement that the relationship between it and its employer would be governed by the terms and conditions of the IEI standard form of contract. Pursuant to these terms and conditions, the employer's engineers were responsible for the design and specification of the permanent works to be carried out. In the circumstances, the first named defendant pleads that it cannot be held accountable for any deficiencies in the design of the work or any inherent difficulties with the specifications provided.
>
> (iii) The first named defendant says that in carrying out the works ground conditions were encountered which were unforeseen by the plaintiffs or their engineers, or by the defendants which were not reasonably foreseeable. The result was an unexpected degree of settlement. The plaintiffs and their engineers failed to instruct the defendant as to how the physical conditions on site were to be dealt with so that the piling could be carried out within required parameters. The first named defendants points to the provisions of clause 12(1) and clause 13 of the IEI contract and argues that the excessive settlement was caused by adverse ground/soil conditions within the meaning of clause 12(1) and says that these adverse ground/soil conditions could not have been foreseen by the defendants. These adverse physical conditions rendered it physically impossible, within the meaning of clause 13 of the IEI standard form contract for the first defendant to carry out the works in accordance with the specifications prepared by the plaintiffs' consulting engineers. In the circumstances, the first named defendant submits that it was discharged from any liability to the plaintiffs by reason of the provisions of clause 13. It is convenient at this stage to set out here the relevant provisions of clause 12 and 13.

26. Clause 12 (1):-

> "If during the execution of the Works the Contractor shall encounter physical conditions (other than weather conditions or conditions due to weather conditions), or artificial obstructions which conditions or obstructions he considers could not reasonably have been foreseen by an experienced Contractor and the Contractor is of the opinion that additional cost will be incurred which would not have been incurred if the physical condition or artificial obstructions had not been encountered he shall if he intends to make any claim for additional payment give notice to the Engineer pursuant to Clause 52(4) and shall specify in such notice the physical conditions and/or artificial obstructions encountered and with the notice if practicable or as soon as possible thereafter give details of the anticipated effects thereof the measures he is taking or is proposing to take and the extent of the anticipated delay in or interference with the execution of the Works.
>
> (2) Following receipt of a notice under sub clause (1) of this clause, the engineer may if he thinks fit, *inter alia*:
>
> (a) require the Contractor to provide an estimate of the cost of the measures he is taking or is proposing to take
>
> (b) approve in writing such measures with or without modification
>
> (c) give written instructions as to how the physical conditions or artificial obstructions are to be dealt with and

(d) order a suspension under Clause 40 or a variation under Clause 51.

(3) To the extent that the Engineer shall decide that the whole or some part of the said physical condition or artificial obstruction could not reasonably have been foreseen by an experienced Contractor the Engineer shall take any delay suffered by the Contactor as a result of such conditions or obstructions into account in determining any extension of time to which the Contractor is entitled under Clause 44 and the Contractor shall subject to Clause 52(4) (notwithstanding that the Engineer may not have given any instruction or orders pursuant to sub clause (2) of this Clause) be paid in accordance with Clause 60 such sum as represents the reasonable cost of carrying out any additional work done and additional Construction Plant used which would not have been done or used had such conditions or obstructions or such part thereof as the case may be not been encountered together with a reasonable percentage addition thereto in respect of profit and the reasonable costs incurred by the Contractor by reason of any unavoidable delay or disruption of working suffered as a consequence of encountering the said conditions or obstructions of such part thereof.

(4) If the Engineer shall decide that the physical conditions or artificial obstructions could in whole or in part have been reasonable foreseen by an experienced Contractor he shall so inform the Contractor in writing as soon as he shall have reached the decision, but the value of any variation previously ordered by him pursuant to sub clause (2)(d) of this Clause shall be ascertained in accordance with Clause 52 and included in the Contract Price.

13. (1) Save insofar as it is legally or physically impossible, the Contractor shall construct complete and maintain the Works in strict accordance with the Contract to the satisfaction of the Engineer and shall comply with and adhere strictly to the Engineer's instructions on any matter connected therewith (whether mentioned in the Contract or not). The Contractor shall take instructions only from the Engineer or (subject to the limitations referred to in Clause 2) from the Engineer's Representative. Any instruction of the Engineer which is the subject of a subsequent claim under sub clause (3) of this Clause shall be either an instruction in writing or an oral instruction subsequently confirmed in writing. If within twenty working days the Contractor shall confirm in writing to the Engineer any oral instruction and such confirmation shall not be amended or contradicted in writing by the Engineer within a further period of five working days from receipt of the Contractor's confirmation it shall be deemed to be an instruction in writing by the Engineer.

(2) The whole of the materials, plant and labour to be provided by the Contractor under Clause 8 and the mode manner and speed of construction and maintenance of the Works are to be of a kind and conducted in a manner approved of by the Engineer.

(3) If in pursuance of Clause 5 or sub clause (1) of this Clause the Engineer shall issue instructions (excluding those to remedy a breach of contract by the Contractor) which involve the Contractor in delay or disrupt his arrangements or methods of construction so as to cause him to incur cost beyond that reasonably to have been foreseen by an experienced contractor at the time of tender then the Engineer shall take such delay into account in determining any extension of time to which the Contractor is entitled under Clause 44 and the Contractor shall subject to Clause 52(4) be paid in accordance with Clause 60 the amount of such cost as may be reasonable. If such instructions require any variation to any part of the Works, the same shall be deemed to have been given pursuant to Clause 51".

27. The second named defendant for this part says that it too has a number of defences open to it, on which it is entitled to rely. These include:-

(i) That no duty of care is owed by Edwards to the plaintiff. In that regard, Edwards says that its status on the Dyer Street site was intended to be as subcontractor of Jons and that it is accordingly entitled to the benefit of such contractual terms as existed between Jons and the plaintiffs.

(ii) That the claim against it discloses no cause of action. The argument made is that the plaintiff is pursuing a claim for economic loss and that such a claim cannot be maintained having regard to established legal principles. The second named defendant has gone to the extent of bringing a motion seeking to have the plaintiffs' claim dismissed as disclosing no cause of action. While at one stage, it was envisaged that the motion would come on at the same time as these three motions, it has in fact been adjourned to the trial of the action.

(iii) The second named defendant denies the negligence alleged against it. The particulars of negligence alleged against it have been submitted to an appropriately qualified piling consulting, Mr. Michael Turner. His conclusions, set out in a detailed report which has been exhibited are that there is no negligence on the part of Edwards. In particular there was no negligence such as would have caused the problems which led to work on the Dyer Street site coming to a halt. PJE does accept that the plaintiffs have produced reports from two experts which are very critical of it, but while challenging some aspects of these reports, says that the court on an interlocutory application such as this cannot choose between the experts.

(iv) Edwards makes the point that it is entitled to the benefit of the Jons' contract. It asserts that it was always the intention of the parties that a contract would be executed, which would incorporate the standard IEI terms. In particular, the second named defendant says that by reason of the provisions of clauses 8, 12 and 13 of the contract, it has no liability. I have referred to the terms of clauses 12 and 13 earlier. Clause 8(ii) which is the sub clause on which reliance is placed provides as follows:-

> 'The Contractor shall take full responsibility for the adequacy, stability and safety of all site operations and methods of construction provided that the Contractor shall not be responsible for the design or specification of the Permanent Works (except as may be expressly provided in the Contract) or of any Temporary Works designed by the Engineer.'

A major area of disagreement between the parties is as to whether what was underway at Dyer Street is to be regarded as permanent works or temporary works.

28. The second named defendant says that the plaintiffs could have proceeded with the original development and that accordingly, the major element of the plaintiffs' claim in the amount of approximately €22m cannot arise because there was nothing to prevent the plaintiffs proceeding with the original plans and in that regard, they pointed to certain observations in the expert's reports obtained by the plaintiffs. Thus they say the plaintiffs' claim is vastly inflated.

29. A feature of the case has been the reliance placed by both sides on the reports of experts that were presented by the second named defendant and by the plaintiffs. The first named defendant has not presented a report of its own but has relied on aspects of the Turner reports. The initial engagement between the experts was renewed and intensified when additional materials relating to computer records referable to one of two rigs that was on site became available during the hearing. The documentation that became available is also said to be relevant to the permanent/temporary issue.

30. At this stage, it is important to note that the plaintiffs place great significance on one aspect of the report of Mr. Luby of SLR Global Environment Solutions ("SLR") being his conclusion that the ground conditions on site were not (unforeseen) and say that conclusion has not been contradicted. Accordingly, the plaintiffs say that the entire substructure of the defendants' defence falls away in its entirety. The plaintiffs pointed to one paragraph in particular which was in these terms:-

> "The construction of the bored pile foundations for the existing mixed use scheme in late 2002 and early 2003 did not encounter or reveal any unexpected characteristics of the natural ground. The ground conditions encountered during the piling contract were similar to those described in the original ground Investigation reports. The weight of available evidence therefore indicates that there is no basis for any contractual claims in relation to unforeseen ground conditions at this site."

31. The plaintiffs say that this is a critical observation which the defendants were obliged to meet head on and which they have singularly failed to do. The plaintiffs say that the defendants' failure in that regard is comparable to the failure to engage on the part of the second named defendant in the case of *Hidden Ireland Heritage Holidays Limited t/a The Hidden Ireland Association v. Indigo Services Limited & Ors* [2005] 2 I.R. 501, which was regarded by the Supreme Court as a proper matter to be taken into consideration by the court in determining the application for security for costs.

32. Before considering the defences that have been canvassed further, it is useful to remind ourselves of the exercise in which we are engaged. The concern that has led to the motions brought by the defendants is that if the plaintiffs fail and an order for costs is made against the plaintiffs that the plaintiffs would be unable to comply with the order. Such a situation would only arise if the plaintiffs fail against both defendants. If the plaintiffs were to succeed against one defendant, but fail against the other, then while the successful defendant would obtain an order for costs, the plaintiffs could expect to benefit from an order over. Accordingly, it seems to me proper to approach the case on the basis that even if it were the case that each defendant, viewed individually, had a *bona fide* defence but the situation was that the plaintiffs were bound to succeed against one or other defendant and that one or other set of defences was bound to fail, then in the circumstances of this case that would be a reason not to order that security for costs be provided.

33. So far as the defences raised by the first named defendant are concerned, perhaps the most straightforward is the contention that any contract it had was with Mr. Willie Smyth personally and not with either of the companies named as plaintiffs. Ordinarily, one has to say, a defence based on a contention that a plaintiff has sued the wrong party or in this instance that the wrong parties are plaintiffs is one that would be greeted with scepticism or a lack of enthusiasm. It is most frequently encountered when an individual defendant says that he is not responsible for a debt but that responsibility rests with a limited company. However, there are some factors present that might suggest that on this occasion, the point may have some substance. It is a matter of interest, if no more than that, that the first shot in this litigation was fired by the first named defendant issuing proceedings by way of summary summons for an amount of approximately €600,000 in 2001 against Mr. William Smyth. These proceedings were issued at a time when the Mirella Group was a strong one and when there was no doubts about any of the companies within it, so there would have been no particular tactical advantage in pursuing Mr. Smyth personally. Now, it is the case that Mr. Smyth's response to the proceedings was to say, *inter alia*, that the proper defendants in those proceedings were Paulson and AEL and that the response of the plaintiff in those proceedings was to join those companies. Nevertheless, the fact that the first instincts of the plaintiffs in those proceedings was that they had been dealing with Mr. Smyth is of interest. Counsel for the plaintiff is dismissive of the suggested defence and points to the fact that invoices were issued to AEL. However, in turn, counsel for the defendants' points to the summary summons proceedings and the contention there, that after work had been carried out that the plaintiffs in those proceedings were asked to issue invoices to a particular company and complied with the request that was made of them. It seems to me that the point raised, while manifestly by no means guaranteed to succeed cannot be dismissed.

34. The first named defendant makes the point that the IEI contract was intended to apply. On that aspect there is a measure of agreement between the parties because it is accepted that it is proper to approach the present application on the basis that the likelihood is that the IEI contract will be found to apply. On that basis, the first named defendant contends that clause 8 of the contract comes to its aid and that by reference to that clause, the employer's engineer was responsible for the design and specification of the permanent works to be carried out. In these circumstances, Jons says that it cannot be held to account for any deficiencies in the design of the works or problems with the specifications. It goes without saying that the plaintiffs take an entirely different position and say that a perusal of the available documentation, including most significantly documentation that was discovered only after the motions were at hearing showed that the works in question including the secant piled wall had been designed by AGL Consulting Geotechnical Engineers ("AGL") in conjunction with Alpha Engineering Services on behalf of the defendants and were temporary works.

35. However, it emerged clearly from the cross examination of Mr. Pentony, Managing Director of Jons, (which was permitted in the context of the dispute in relation to discovery) that the parties remain in total disagreement on this aspect. Mr. Pentony rejected propositions put to him by counsel for the plaintiffs as being totally incorrect and continued to maintain stoutly that the secant pile wall was part of the permanent works at Dyer Street designed by Hendrick Ryan. This is an issue of considerable complexity. However, as a layman in this area, it would seem to be the case that the individual secant piles that eventually form a wall are intended to remain in place and to become part of the basement wall. In these circumstances, the defendants, and this is an argument relied on by both defendants, have a case to make. At this stage, one would not like to have to predict how the issue will be determined but that there is an issue which might be decided in favour of the defendants seems clear.

36. So far as the defence which both defendants seek to make in relation to unforeseen adverse ground conditions is concerned, (which they contend meant that it was not physically possible to carry out the work in accordance with the specifications provided by Hendrick Ryan) and that the plaintiffs and their engineers failed to provide instructions as they were required to do is concerned, the plaintiffs say that this defence is unstatable in light of the report of Mr. Luby of SLR, which remains uncontradicted and unchallenged. The defendants for their part challenge how much weight the observations of Mr. Luby carry, pointing out that his conclusions were based on what was subsequently encountered during the work on a very different development which omitted the three basement floors. In that regard, insofar as Mr. Luby was present for the second development and offered geotechnical advice in relation to it, his views are likely to carry significant weight. However, the question of the ground conditions actually encountered by the second named defendant and how that compared with what everyone expected having regard to site investigations carried out on behalf of the plaintiffs before the involvement of the defendants remains central. The defendants' case is that the initial

specifications stipulated by Hendrick Ryan and the relaxed tolerances to which they were prepared to agree could not have been achieved having regard to the prevailing ground conditions. Mr. Turner's reports are critical of the site investigations carried out between September and November 2009 by Site Investigations Limited on the instructions of Hendrick Ryan concluding that it was likely that the alluvial sandy soil found on the site was denser and more compact than the site investigations reports suggested. Mr. Turner points out that site investigations on a nearby site at Laurence Street, Drogheda, recorded the presence of what he describes as dense conditions. The relevance of this being that such conditions would require more effort to drill than anticipated. Notwithstanding the confidence with which Mr. Luby has expressed his opinion, it does seem to me that there remains a major issue as to whether the soil conditions on site accorded with the information provided to the second named defendant as part of the tendering process or whether the conditions actually experienced were foreseen and were such as to make it physically impossible to achieve the specifications demanded. In my view, this is an issue that remains live and remains to be determined and has not been conclusively disposed of by the report of Mr. Luby. Insofar as there is disagreement between the experts, this is a matter that requires to be explored through oral evidence and cross examination. It is not a matter that can be resolved by identifying selected extracts from reports.

37. Jons has pleaded that Edwards was nominated by the plaintiffs, and that in those circumstances it has no responsibility for the actions of a specialist piling contractor. It has indicated that it intends to rely on cases such as *Norta Wallpapers Ireland Limited v. John Sisk and Sons Limited* [1978] I.R. 114. In that case, the Supreme Court had decided that while normally a term would be implied in a building contract between a builder and employer making the builder liable to the employer for loss and damage suffered as a result of goods, materials or work supplied or constructed by a subcontractor not being fit for purpose but that such a term would not be implied in that case in relation to the fitness of the design of roof lights in a situation where as Henchy J. put it Sisks were put "… in the position of being little more than ordering agents for a roof that had already been vetted and passed by Norta's engineer".

38. It will not be easy for Jons to succeed in that regard. It appears that its view of the nature of its relationship with Edwards is not shared by the plaintiffs or, perhaps more significantly not shared by Edwards. Insofar as it seeks to draw an analogy with the position of the builder in *Norta Wallpapers Ireland Limited v. John Sisk and Sons Limited* they will have to acknowledge that *Norta v. Sisk* was a case that was very much an exception to the norm. However, notwithstanding the difficulties that may lie ahead, the first named defendant has a case to make and it is not one that can be said to be doomed to failure. However, from the point of view of the plaintiff, this argument, even if successful would leave their case against Edwards unaffected. However, Edwards has its own arguments to make. In particular, it has indicated that it intends to argue that no duty of care was owed to the plaintiffs in a situation where, from its perspective, it was a subcontractor to Jons and therefore entitled to the benefit of whatever contractual terms existed. Edwards will contend that there is an emerging legal consensus that in complex building contracts, the parties can be expected to intend that their relationship will be governed by contract and that such intention will normally have the effect of displacing any concurrent duty in tort. Edwards will seek to rely on cases such as *Robinson v. PE Jones (Contractors) Limited* [2011] 3 WLR 815, a decision of the Court of Appeal. The defendant will draw comfort from passages such as the following which appears in *Keating Building Contracts*, 9th Ed., (London, 2012) at para. 7.003:-

> "A builder who builds defectively will ordinarily be liable for breach of contract to the employer with whom it contracts. But a builder will not normally be liable in negligence to the employer, nor to a third party with whom it did not contract on account of a mere defect, even if the third party now owns the building. Such a liability would only normally arise if, for example, the building collapsed and caused physical injury to the third party personally or to his property other than the building itself. Equivalent considerations will normally apply as between an employer and a sub-contractor with whom the employer has no contractual relationship."

39. It does seem that there are serious issues to be resolved, and it cannot be assumed that the plaintiffs are entitled to maintain a claim based on economic loss in negligence. In that regard, the defendants' position is that both aspects of the plaintiffs' claim, the wasted professional fees element and the loss of profits element form part of an economic loss claim.

40. As we have seen, the second named defendant contends that the claim is inflated and that the loss of profits element of more than €22m is unsustainable in a situation where the plaintiffs' experts are prepared to accept that it would have been possible to proceed without the three storey basement. However, it seems to me that this defence of itself is a partial one only and would not provide an answer to the plaintiffs' claim for €1.9m in respect of fees. If that was the only defence relied on, it would not be sufficient to force the plaintiffs to provide security for costs, but as we have seen it is only one of a number of points that the second named defendant makes.

41. Most fundamentally, the defendants through Mr. Edwards, supported by Mr. Turner have rejected in some detail the allegations of negligence that have been laid down. Now, it is true that the plaintiffs have succeeded in pointing to areas which have the potential to cause embarrassment or difficulty for the second named defendant in particular in the context of a trial. I am thinking in particular of the fact that no specific test boring was carried out despite the reference to an intention to undertake this when the qualified tender was submitted. Furthermore, piling information records indicate areas of concern in relation to a number of bores. However, what has to be asked is whether it been established conclusively that the problems which emerged and led to the abandonment of the original development design were attributable to shortcomings on the part of the second named defendant and it seems to me that remains very much an open question.

42. I have referred to some though perhaps not all of the issues canvassed by the defendants as providing a defence and which they pointed to as establishing a *bona fide* defence at this stage. For my part, I find myself in a position very similar to that described by Clarke J. in *ParolenLimited v. Doherty & Lindat Limited* (Unreported, High Court, Clarke J. 12th March, 2010). In the course of his judgment, Clarke J. had this to say:-

> "There are very many issues both of law and fact which will need to be resolved before the case can come to a proper conclusion. It does not seem to me appropriate to enter into anymore detailed analysis of the legal principles at this stage for the trial is the best place to come to a fair conclusion on these matters. Suffice it to say that I am satisfied that there is a possibility that Mr. Doherty may succeed in persuading the court that, both on the law and on the facts, circumstances are such that he is not obliged to account to Parolen for the option agreement which he has entered into with the purchaser. In these circumstances, I am satisfied that Mr. Doherty has made out an arguable case or *prima facie* defence.

43. As Clarke J. was, I am of the view that there are very many issues both of law and fact which will need to be resolved before the case can come to a proper conclusion. Like him, I am of the view that it is not appropriate to enter into any more detailed analysis of the legal principles at this stage for the trial is the best place to come to a fair conclusion on these matters. It is possible that the defendants will succeed on the law and the facts and possible that the plaintiff's claim will fail. In the circumstances, I am satisfied that both defendants have made out an arguable case and accordingly, it is necessary to consider whether the plaintiffs have

established special circumstances by virtue of which they ought not to be required to provide security for costs.

44. Two areas have been identified by the plaintiffs. One is delay in making the application which it is contended has caused prejudice to the plaintiffs and two, the default of the first named defendant in complying with its obligations in relation to discovery.

45. I will deal with each of these issues in turn and when dealing with the issue in relation to discovery will deal also with the plaintiffs' application to strike out the defence of the first named defendant. In that regard, I indicated during the course of the hearing of the motions that I would be extremely reluctant to strike out the defence and that I felt that the real significance of the complaints made as to discovery was whether they provided a basis for refusing to order the provision of security for costs. So far as the question of delay is concerned, the basic case made by the plaintiffs is that their precarious financial position could and should have been ascertained by the plaintiffs in January 2010, and that it was then that an application for security for costs should have been made, if one was to be made. Instead the defendants stirred themselves only in 2011, a full year later. In the intervening period work had continued on the plaintiffs' affidavit of discovery, a mammoth task. The plaintiffs incurred costs of €125,000 in preparing discovery. This happened because of the tardiness of the defendants in bringing their applications, and it would, in the circumstances, be unfair to require the plaintiffs to provide security for costs at this late stage.

46. That argument has to be seen against the background that the plaintiffs' cause of action arose in March 2001, at which stage the plaintiffs were financially strong. The proceedings were launched in 2005 at which stage the plaintiff companies remained in robust shape. Until 2008 there would have been no basis for any particular concern about an inability to meet a costs order on the part of the plaintiffs. Accounts for the year ending the 31st March, 2007, which became available in the Companies Registration Office, might initially have given rise to some concern, but any such concerns would have been dispelled by the accounts for the year ending the 31st March, 2008, which became available on the 27th January, 2009, which showed total net assets of both plaintiffs of €3.859 million, up from €1.185 million the previous year. However, although at one stage it appeared that the plaintiffs were intending to make the case that the application for security for costs could or should have been made in 2008, this position has not been maintained and the period in dispute is confined to the twelve month period, February 2010, to February 2011. The parties and their accountants, Mr. Liam Dowdall in the case of the defendants and Mr. Liam Grant in the case of the plaintiffs are in disagreement as to whether the plaintiffs' inability to meet a costs order was apparent in 2010.

47. In a situation where the deterioration between the accounts for the year ending the 31st March, 2008, which had shown combined net assets of €3.859 million to a position of €1.231 million for the year ending the 30th March, 2009, could certainly have given rise to concern, but where the situation revealed by the accounts for the year ending the 31st March, 2010, was altogether more stark, I do not find it necessary to decide whether the published accounts would have supported an application during 2010. This is because it is accepted that the defendants did not access the plaintiffs' accounts for the year ending the 31st March, 2009, which were filed with the Companies Registration Office on the 26th January, 2010, at any time during 2010. In fact it was only early in 2011 that the defendants became aware of reports which were circulated that the affairs of the plaintiffs and of the Mirella Group had been transferred to NAMA. Indeed it appears that when the information about NAMA began to circulate that the accounts that were available for perusal were only those for the year ending 31st March, 2009. The question arises as to what degree of delay and what nature of delay would cause a court not to make an order for security of costs when it might otherwise have done so. In *S.E.E. Company Limited v. Public Lighting Services Limited* [1987] I.L.R.M. 255, McCarthy J. at various stages in his judgment spoke of undue delay or culpable delay. In a more recent Supreme Court decision *Dublin International Arena Limited v. Campus and Stadium Ireland Development Limited & Ors* [2008] 1 I.L.R.M. 496, Denham J. (as she then was), spoke of the fact that in order for delay to be the basis for refusing to grant security for costs, it would have to be of an undue and substantial kind.

48. In the present case the defendants were not actually aware of the plaintiffs' situation until February 2011. Assuming for this purpose that the accounts of 2009, which became available at the end of January or early February 2010, would have given rise to concern, are the defendants to be disentitled to relief because of their failure to investigate the accounts in 2010? Ordinarily one would think not. I would be very slow indeed to conclude that there is a general ongoing obligation on the part of a defendant to keep checking up from time to time on the financial health of a plaintiff, an exercise which might well involve the necessity to engage the services of an accountant. However, there is an additional factor present here by reason of the fact that the plaintiff companies are property companies. As is now all too well known, the property and construction sector experienced a catastrophic decline in 2008 and subsequent years. In these circumstances anyone having dealings with any property company might have had reason to wonder about the financial health of the company being dealt with. Had such inquiries been made during 2009, as they might have been, they would not have given rise to concern. Only if during 2010, inquiries were made might they have raised concern. In truth, I think it likely and I proceed on the basis that there would have been concerns, because of the deteriorations in the accounts for 2009 when compared with 2008 against a background of general economic decline. However, I do not believe that I would be justified in refusing security for costs on the basis of inquires that might have been made. What is wholly lacking here is anything in the nature of acquiescence to an insolvent plaintiff pursuing litigation or anything in the nature of standing idly by and allowing a plaintiff to proceed with litigation in the belief that security for costs would not become an issue.

49. If one looks at the other side of the equation that is at the question of prejudice, that in my view reinforces the impression that the delay between February 2010 and February 2011 does not constitute a special circumstance. The suggested prejudice pointed to is the fact that the plaintiffs have incurred costs in excess of €125,000 in preparing an affidavit of discovery. However, the plaintiffs were first asked to provide discovery in March 2008 and agreed in October 2008 to do so within twelve weeks and eventually provided discovery on the 29th October, 2010. In other words, the discovery process was already well underway, and indeed should long since have been concluded when the 2009 accounts became available for inspection in February 2010. It does not, therefore, seem to be a case of the plaintiffs making a decision to take on fresh obligations, which would involve incurring significant additional expense having been misled by the defendants' inaction into making the calculation that the question of security for costs would not arise. In all the circumstances, I am of the view that even assuming that it would have been possible to bring an application in 2010 that does not constitute a special circumstance.

50. I turn now to the question of discovery. This issue began when the plaintiffs issued a motion dated the 24th November, 2010, to strike out the first named defendant's defence by reason of a failure to make discovery as required by an agreement of the 15th May, 2008. This was the first in time of the series of motions with which the court has been concerned. That strike out motion may fairly be described as a routine one or a traditional motion in that there would initially have been no expectation on any side that the defence would be struck out or indeed any expectation that any serious efforts would have been made to have the defence actually struck out. The motion was in substance if not in form a motion to compel the first named defendant to comply with the terms of the agreement and make discovery. The motion had the desired effect and an affidavit of discovery sworn by Mr. Pentony on the 15th February was delivered on the 24th February, 2011. However, it soon became apparent that there were issues in relation to the adequacy of the affidavit. These issues related to the fact that the individual documents on which privilege was being claimed were not listed and there were other issues raised relating to certain categories of documents. In correspondence, the solicitors for the plaintiff asserted that 318 documents had been omitted and provided a schedule listing these. That assertion was never really

disputed. In these circumstances, a supplemental affidavit was sworn on the 24th June, 2011, by Mr. Pentony.

51. In terms of the controversy that was to develop later, it was of some significance that on the 29th November, 2011, the solicitors for the plaintiff wrote to the first named defendant's solicitors pointing out that they had been informed by Hussey Fraser, solicitors for second named defendant that their clients had not retained hard copies of the job specific printouts of the CFA 26 rig and that Hussey Fraser had further advised that the second named defendant had passed copies of the rig printouts to the first named defendants and their designers. The plaintiffs now highlight references to the designers of the first named defendant. It seems to me that the point made by the plaintiffs in that regard is a valid one and that the comments of Hussey Fraser should have alerted the first named defendant and the solicitors for the first named defendant to the possibility that rig records might be held by designers.

52. According to Mr. Gogarty, solicitor for the first named defendant, the letter of the 29th November, 2011, prompted a further review of the documentation that had been raised. An affidavit sworn by Ms. Rowland on the 16th February, 2012, prompted further discussions with Mr. Pentony, who assured his solicitor that the first named defendant did not receive and did not have in its possession copies of the piling rig printouts. Mr. Gogarty requested a further review and when Mr. Pentony did so over the course of the 18th and the 19th February, 2012 that confirmed that the first named defendant did not have the documentation referred to and Mr. Pentony told his solicitor that to the best of his knowledge, the first named defendant had not received any such documentation. At this stage, Mr. Gogarty also spoke to a Mr. Barry Mathers, the first named defendant's site agent at Dyer Street who informed Mr. Gogarty that to the best of Mr. Mathers's knowledge and recollection, he had not received any such documentation. Following on from these inquiries, Mr. Gogarty in the course of an affidavit sworn by him on the 20th February, 2012, stated that in the circumstances, he believed and he was advised that the documents referred to in the affidavit of Ms. Rowland, solicitor for the plaintiff, had not at any stage been in the possession of the first named defendant or under the control of the first named defendant.

53. There matters rested and the hearing of the three motions commenced on the 22nd February, 2012. I think it right to comment that Mr. Paul Gardiner, S.C., counsel for the plaintiffs was quite open in accepting that at that stage it was not a case where there was any expectation that the defence of the first named defendant would be struck out and indeed that application was not being pressed. However, it was contended that the approach of the first named defendant to the discovery issue was a relevant consideration when the application for security for costs came to be decided upon. However, on Tuesday, the 28th February, 2012, on the fourth day and what had been expected to be the last day of the motion hearing there was a dramatic development when counsel for the first named defendant at the outset of proceedings informed the court that the missing records for the Casa Grande Rig 26 which had been the subject of much discussion and comment had been found. This led to the adjournment of the hearing and the motions did not resume until mid June after the documentation had been produced and been studied by experts on both sides. When the hearing resumed, counsel for the plaintiffs reactivated his motion stating that he was now seeking to have the first named defendants' defence struck out or alternatively, if his primary relief was not granted and if the defence was not struck out, that the application for security for costs should be refused by reason of the default in relation to discovery. Counsel for the plaintiffs also sought and was granted leave to cross examine Mr. Pentony and Mr. Gogarty.

54. From affidavits sworn by Mr. Pentony and Mr. Gogarty and from the cross examination, the sequence of events which led to the late emergence of documentation becomes apparent.

55. It appears that during the course of the hearing of the motions, Mr. Gogarty telephoned Mr. Pentony to investigate whether the parties might be confused or be at cross purposes in relation to monitoring records. Arising from that conversation, Mr. Pentony decided to speak to Mr. Edwards of the second named defendant in an effort to clarify matters. Mr. Edwards stated that his belief was that the Rig Monitoring records had been created and sent by email to the first named defendant. There was further telephone contact between Mr. Gogarty and Mr. Pentony which saw Mr. Gogarty advising his client to make contact with Mr. Conor O'Donnell of AGL to see whether they might have received the documentation in question. Mr. Pentony rang Mr. O'Donnell immediately, who indicated that he would have to look into the situation and would have to retrieve documentation from the AGL archives and review them. Mr Pentony was requested to ring back at lunchtime the following day, which he did, but Mr. O'Donnell had not yet received documentation from the archives, but was hoping to do so shortly after lunch. Later that afternoon, Mr. O'Donnell rang Mr. Pentony to say that he had now received the material that he had requested and that he had located monitoring records from the second defendant's Rig. A meeting was arranged for later that evening between Mr. O'Donnell and Mr. Pentony at which Mr. O'Donnell indicated that he had received the documents in hard form on site, but could not recall from whom he obtained them.

56. In the course of his cross examinations and in submissions, counsel for the plaintiffs repeatedly contended that no explanation had been given and that the situation was unexplained. In truth I do not believe that it is the situation. What is being offered by way of explanation may not have impressed the plaintiffs, but there has been an explanation in terms of the fact that through oversight or inadvertence the possibility of documents being held by AGL was overlooked. That this was overlooked is an unsatisfactory state of affairs. The obligation was to make discovery of all the documentation in the possession, power or procurement of the first named defendant. That obligation was not met by assembling all the documentation in the actual possession of the plaintiffs and setting about scheduling them. Even if the possible involvement of AGL as a source of documentation was initially overlooked, inquiries of it should certainly have been triggered by the letter of the 29th November, 2011, from Hussey Fraser, with its reference to designers. However, while the explanation may be far from satisfactory, it is an explanation nonetheless. I am convinced that the explanation for what has transpired is indeed to be found in oversight and inadvertence. In particular, having had an opportunity to observe the cross examination of Mr. Gogarty and Mr. Pentony, I am convinced and find as fact that there was no element of deliberate suppression of documentation or any deliberate attempt to disadvantage the plaintiffs by withholding documents until late in the day. What occurred happened as a result of human error, culpable error certainly, but not as a result of the pursuit of an intentional strategy. While the error is unfortunate and not just unfortunate, but culpable, I think it right to say that the clear view I have formed is that the first named defendant was aware of and did take its responsibilities in relation to discovery seriously. The extent of contact between Mr. Pentony and Mr. Gogarty, the fact that Mr. Gogarty insisted on speaking to the site agent personally, the fact that a decision was taken to appoint a documents junior counsel all point in that direction. In particular, the fact that even while the motions were at hearing, Mr. Gogarty was still pursuing the missing documentation shows clearly that there was no question of bad faith on the first named defendant's side.

57. It is very much to the credit of Mr. Gogarty that in the affidavit he swore following on the reactivation of the motion to strike out the defence he shouldered responsibility for failing to apprise the documents junior counsel who had been instructed of the identity of the various consultants who worked on the project and the role played by each of them. He commented specifically that he could not escape the conclusion that had he given the matter more consideration at the outset that the AGL file would long since have been discovered.

58. The primary relief sought in the notice of motion is to strike out the defence. During the course of the hearing I indicated that was a course of action I was unlikely to take. That remains my position and I should explain why that is so.

59. In my view, striking out a defence or striking out proceedings is a very extreme measure which is likely to be justified only on rare occasions. There are two factors present in particular, that convince me that it would not be an appropriate response in the present case, but would be quite disproportionate. I have referred to the fact that I am convinced that what has transpired was due to human error rather than bad faith. It is possible to imagine cases, where even absent deliberate concealment or bad faith, a court would feel compelled to strike out a pleading, but ordinarily the fact that there was no intentional wrongdoing would lean heavily in favour of allowing the litigation to proceed in the ordinary way. The outcome of an application to strike out the defence in the case of *Murphy v J. Donoghue Limited & Ors* [1996] 1 I.R. 123, is instructive. This case arose out of the celebrated Fiat Mirafiori fire litigation. In the High Court, Johnson J., (as he then was), had found that the second named defendant (Fiat Auto Ireland Limited) had failed to disclose a number of fires of which it must have known, including fires that had resulted in litigation and that the interpretation put on the order for discovery was little short of casuistry, it had not given clear evidence of whatever documents it ever did have , had treated the court in a way that was little short of contumely and that the performance of the second and fifth defendants led to the conclusion that they could not be trusted to make an honest effort to comply with an order for further and better discovery. The second and fifth defendants appealed, and before the appeal came on, prepared a further affidavit of discovery. The Supreme Court took the view that the willingness of the second and fifth named defendants to make further and better discovery together with two other factors it identified, should have saved them from the ultimate fate of having their defences struck out.

60. That was a case where the arguments for striking out the defence appeared a great deal stronger than exist in the present case and yet that did not happen. In this case, discovery of the documents in issue have now been made, even if very late in the day, albeit that either 19 or 28 documents have not been located, as there is some uncertainty about the number of the document records.

61. It is the situation that if the case comes on for trial that the delay in making discovery will not affect the outcome. The integrity of the trial process will not be affected and all parties will be in a position to put their case and the ability of the court to adjudicate will not be impaired. In these circumstances notwithstanding the significance of the documentation in question and there can be no doubt that the documentation is by any standard highly significant, being potentially significant to two issues; the permanent works/temporary works controversy and also casting light on how the work was carried out on the site, I nonetheless decline to strike out the defence. The alternative relief sought by the plaintiffs is that the order for security for costs should be refused. It is accepted that there does not appear to be any direct precedent for refusing to order security for costs because of failures in relation to discovery.

62. While the existence of special circumstances is usually to be found in undue delay in moving the application on the fact that the plaintiffs' insolvency was caused by the defendants the list of special circumstances is not closed and accordingly it is necessary to consider the plaintiffs' proposition. When examined, what emerges is that what they propose is that a solvent defendant should be required to take on the task of defending lengthy and complex proceedings at considerable expense without any prospect of being able to recover its costs from the plaintiffs if successful in its defence. It is suggested that because the first named defendant delayed in making proper discovery that it should be refused the order that it would otherwise have been entitled to. In effect it is said that because of the default in making discovery the first named defendant should be punished by being denied its order and should thereby be exposed to lengthy, complex and expensive litigation. So stated it is clear how bold the assertion of the plaintiffs is.

63. The Supreme Court was clear in *Murphy v. J. Donohue Limited* [1996] 1 I.R. 123 that the aim of O. 31 is to secure compliance with court orders not to punish. The order exists to facilitate the administration of justice by ensuring compliance with the orders of the court. Similar remarks were to be found in the earlier case of *Mercantile Credit v. Heelan* [1998] 1 I.R. 81 where Hamilton C.J. at p. 85 commented:-

> "The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."

64. More recently the matter was considered by Clarke J. in the case of *Dunnes Stores (Ilac Centre) Limited v. Irish Life Assurance Plc.* [2010] 4 I.R. 1. At para. 20 of his judgment, he commented as follows:-

> "I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned."

65. In this case there is an application that the first named defendant should be punished. Given the length and complexity of the litigation to which the first named defendant would be exposed, the application is not just that the first named defendant be punished but that it be punished very severely indeed. In my view, having regard in particular to the very specific comments of Clarke J., the suggestion of punishing the first named defendant would not be an appropriate response. Even if punishing or sanctioning the first named defendant by withholding an order might in other circumstances be considered in the present situation it would, in my view, be an entirely disproportionate response. I will, however, consider how the question can be addressed when dealing with the question of the costs of these motions. However at this stage, I am of the view that the appropriate course of action is to direct the provision of security for costs and I will do so on foot of the applications of each of the defendants and I will also refuse to strike out the defence of the first named defendant.