Neutral Citation Number: [2010] IEHC 524

THE HIGH COURT

2010 226 MCA

IN THE MATTER OF THE ARBITRATION ACTS 1954 TO 1998

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

FRANK MCGRATH CONSTRUCTION LIMITED

CLAIMANT

AND

ONE PERY SQUARE HOTEL LIMITED

RESPONDENT

Judgment of Miss Justice Laffoy delivered on the 9th day of September, 2010.

1. The application and its background

1.1 On this application the respondent seeks an order pursuant to s. 390 of the Companies Act 1963 (the Act of 1963) directing the claimant to provide security for the costs of the respondent in the arbitration referred to in the title hereof. The arbitration commenced in September 2009. Accordingly, it had commenced before the Arbitration Act 2010 (the Act of 2010) came into force on 8th June, 2010, so that, by virtue of s. 3 thereof, that Act does not apply to the arbitration. Section 22 of the Arbitration Act 1954, under which it is provided that the Court has the same power of making orders in respect of security for costs as it has for the purposes of or in relation to an action or matter in the Court, applies. It is common case that the Court has jurisdiction to determine the application.

1.2 The arbitration arises out of a building agreement entered into between the respondent as employer and the claimant as contractor in September 2006. The building agreement was in the Standard RIAI Form of Contract 2002 Edition (Revision 1, Print 2). Under the building agreement the claimant was engaged by the respondent to carry out certain works including the renovation and extension of existing buildings to create a new hotel at One Pery Square/9 Barrington Street in the City of Limerick. The contract sum was €3,698,500 (excluding VAT). The works commenced in September 2006 and the Certificate of Practical Completion issued on 28th October 2008. The claimant's claim in the arbitration is for €2,180,105.89. The respondent denies liability for any part of that sum and it has a counterclaim for €400,936.17.

1.3 The circumstances in which the application came before the Court are very unusual, in that they were prompted by the publication of an advertisement directed by the Court of an intended application by the claimant to the Court for an order under s. 201(1) of the Act of 1963. The financial status of the claimant, as disclosed in that application, and its progression are of crucial significance in determining this application. The claimant is represented by two different firms of solicitors in the

s. 201 proceedings (Sweeney McGann) and in the arbitration and this application (Maples &Calder).

2. Section 201 application

2.1 On 20th July, 2010 the claimant was given leave to issue an originating notice of motion returnable for 28th July, 2010 seeking an order pursuant to s. 201(1) of the Act of 1963 ordering meetings of the classes of creditors set out in the schedule to the notice of motion for the purpose of advancing a compromise or arrangement proposal pursuant to s. 201. That was the second such application which had been brought before the Court, but I am satisfied on the evidence that the respondent was unaware of the first application.

2.2 That s. 201 application was grounded on the affidavit of Jerry Murphy, a director of the claimant, which was sworn on 20th July, 2010. There was exhibited in that affidavit a document headed "Statement of Affairs as at 23rd April, 2010 and as per company records as at 20th July, 2010". That disclosed that the claimant had nett assets of €1,595,127. That figure was arrived at on the basis that the claimant had fixed assets of €51,742 and current assets, described as debtors and work in progress, in the sum of €6,427,342. Current liabilities amounted to €4,883,957.

2.3 The figure for current assets, that is to say, debtors, was analysed in a further exhibited document headed "Projected Income from Outstanding Debtors as at 23rd April, 2010 and as per the company records as at the 20th July, 2010". There were three categories of debtor disclosed in that document, being –

(a) debtors who had agreed accounts in respect of which payment was expected, which aggregated €630,849;

(b) two debtors with agreed accounts in respect of which payment was challenged, which aggregated €204,551;and

(c) seven debtors with accounts not agreed, which aggregated €5,591,942.

2.4 The respondent (by his former name, Boschurch Limited) appeared in category (c) in respect of a debt of €2,685,972. The respondent's counterclaim was not treated as a liability of the claimant in the statement of affairs.

2.5 Having averred in his affidavit, by reference to the statement of affairs, that the claimant was owed approximately €6.47m (6.427m?) as a result of works completed, and that in the normal course those monies would be adequate to discharge the full amount due to all of its creditors, including unsecured creditors, Mr. Murphy averred that, unfortunately, in the current economic climate the claimant cannot be complacent as regards discharging its creditors "in circumstances where monies remain owed to it". He

exhibited a further document, Annex 3, headed "Status of Accounts due to [the claimant]", containing a narrative of the current position in relation to monies owed to the claimant by different entities, i.e. the debtors in the three categories referred to above. He further averred that any dispute in relation to monies owed to the claimant would be the subject of arbitration or conciliation proceedings. For instance, in relation to the respondent debtor, it is disclosed that the respondent would not engage in conciliation, so that the matter had gone to arbitration and that the arbitration was fixed for 21st September, 2010. In relation to another corporate debtor, which appears in category (a), and which was highlighted by counsel for the respondent in querying what Annex 3 tells us about the ability of the claimant to pay the respondent's costs if it is successful, where the debt amounts to €100,000, the document discloses that a certificate is to hand but the debtor "is simply not in a position to pay at the moment and the matter is being pursued".

2.6 Later in his affidavit, Mr. Murphy exhibited a document entitled "Proposed distributions of monies received from debtors". In relation to that document he averred:

> "As can be seen from the said document, and in general terms, the proposal is based on all creditors obtaining the full amount of monies owed to them subject to successful recoupment from the [claimant's] debtors. Essentially, the creditors are being asked to take a proportionate reduction in the event that the [claimant] fails to recoup monies owed to it. The creditors, in their respective classes, are being asked to agree to accept the distribution among each group based upon the amount of money actually collected by the [claimant] from those who owe money to it."

2.7 The respondent was not treated as a creditor in the s. 201 application or in the lead up to it. For instance, the claimant's solicitors acting in the s. 201 application, Sweeney McGann, circulated creditors on 28th April, 2010 of the intention of the claimant to proceed with a s. 201 application. However, the respondent was not given notice. When the application under subs. (1) of s. 201 was before the Court on 28th July, 2010, counsel who appeared on behalf of the respondent claimed that the respondent was a creditor within the meaning of s. 201, relying on the decision of the High Court of England and Wales in *In Re T. & N. Ltd*. [2006] 1 WLR 1728. On that occasion, the Court directed that the respondent be made a notice party to the application under subs. (1) of s. 201. That application was adjourned until the vacation sitting on 25th August, 2010. It was then adjourned to 1st September, 2010 and, on that occasion, it was adjourned to 5th October, 2010. A stay on proceedings, other than this application, made under subs. (2) of s. 201 has been continued until 5th October, 2010.

3. Section 390: legal principles

3.1 It is convenient to consider the legal principles which are applicable to an application for security for costs under s. 390 before considering factual matters further. I propose to do so by reference to the recent judgment of this Court (Clarke J.) in *Connnaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd*. [2009] IEHC 7. In his judgment (at para. 2.1) Clarke J. quoted the test for determination of an application for security for costs set out by Morris P. in *Interfinance Group Ltd. v. KPMG Peat Marwick*, which was approved by the Supreme Court in *Usk and District Residents Association v. Environmental Protection Agency* [2006] 1 ILRM 363, in the following terms:

> "(1) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:
>
> (a) that he has a *prima facie* defence to the plaintiff's claim, and
>
> (b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.
>
> (2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case with ought to cause the court to exercise its discretion not the make the order sought.
>
> In this regard the onus rests upon the party resisting the order.
>
> The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.
>
> The list of special circumstances referred to is not of course, exhaustive."

3.2 In the *Connaughton Road* case, Clarke J. found that the defendant, who was seeking security for costs, had complied with the requirements set out at para. 1(a) and (b) of the test. However, the defendant asserted that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flowed from the wrong allegedly committed by the defendant. Therefore, Clarke J. considered the "inability due to wrongdoing" special circumstance stating (at para. 3.4):

> "In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-
>
> (1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
>
> (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
>
> (3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and
>
> (4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."

Earlier (at para. 3.1), Clarke J. had pointed out that there is a certain "superficial illogicality" in the Court having to embark on that exercise. He also emphasised that the various elements in the exercise are to be established on a *prima facie* basis. In relation to element (4) of the test, Clarke J. stated (at para. 3.6) that it is not necessary for the plaintiff to seek to establish the 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".

3.3 On the issue whether delay by a party seeking security for costs constitutes a reason for refusing to grant security, the Court was referred to the decision of Morris J. in *Re Blakeston Ltd; Beauross Ltd. v. Kennedy* (Unreported, High Court, 18th October, 1995), where the relevant principle was stated as follows:

> "If the party seeking security has delayed to such an extent as to commit the other party to an amount and level of costs which it would never have become committed to had it known that it was to be required to provide security for costs and thereby altered its position to its detriment, then the Court will not make the order."

However, Morris J. stressed that each case must be decided on its own separate facts and the Court must exercise its discretion having regard to those particular facts. The decision of Morris J. was one of the authorities reviewed by the Supreme Court in *Hidden Ireland Heritage Holidays v. Indigo Services Ltd. & Ors*. [2005] IESC 38. In his judgment, Fennelly J. stated:

> "A review of the authorities shows that delay in applying for security may, depending on the circumstances, be a ground for refusing security. The Court will look at the facts of the particular case, the impact of the delay, other surrounding circumstances, and, in the end, will seek a fair balance."

4. The issues

4.1 In my view, the issues which arise for determination on this application under s. 390 are as follows:

> (a) Has the respondent established that it has a *prima facie* defence to the claimant's claim?
>
> (b) Has the respondent established that the claimant will not be able to pay its costs if it is successful?
>
> (c) If the answers to questions (a) and (b) are positive, has the claimant established that there are specific circumstances in this case which militate against the Court exercising its jurisdiction to order security and, in particular:
>
> (i) Does the "inability due to wrongdoing" special circumstance arise?
>
> (ii) Was there delay on the part of the respondent which would render it unfair to make the order?
>
> (iii) Does any other special circumstance exist?

I will consider each of those issues in turn.

5. *Prima facie* defence to claimant's claim?

5.1 On this application, the claimant's claim against the respondent and the respondent's answer to it are set out in considerable detail in the grounding affidavit of Patricia Coughlan, the managing director of the respondent, sworn on 17th August, 2010 and the principal replying affidavit filed on behalf of the claimant, which was sworn by Frank McGrath, a director of the claimant, on 24th August, 2010. There is also before the Court an affidavit sworn by Dudley Solan, a partner in the firm of solicitors acting for the claimant in the arbitration, Maples & Calder, which has been filed in the s. 201 application. The pleadings in the arbitration proceedings have been exhibited.

5.2 In my view, the evidence before the Court, which I consider it is not necessary to outline, demonstrates that the claimant has a *prima facie* claim in contract against the respondent and that the respondent has a *prima facie* cross-claim in contract against the claimant. The respondent has a *prima facie* defence to the claimant's claim to the extent of that claim by way of set off and, beyond that, it has a counterclaim in the arbitration proceedings arising from its cross-claim. The issues on the claim and the defence to it and on the counterclaim and the claimant's response to it in the arbitration are addressed in considerable detail on this application. However, all the Court is required, and all it is appropriate, to do on this application is to determine whether there is a *prima facie* defence to the claim. I did not understand the claimant to seriously contend that there is not. Accordingly, I am satisfied that the respondent has established that it has a *prima facie* defence to the plaintiff's claim.

6. Inability of claimant to pay the respondent's costs in the event of the respondent successfully defending the claim?

6.1 In his replying affidavit Mr. McGrath has averred as follows:

> "Having regard to the fact that the claimant is pursing an application under s. 201 of the Companies Act 1963, I am advised and I so believe that it cannot refute the respondent's contention that it will be unable to discharge the full costs of the respondent in the arbitration in the event that it succeeds in its defence and counterclaim."

Later, in dealing with an averment by Ms. Coughlan that, in its letter of 28th April, 2010 to creditors, the claimant admitted that it is insolvent, Mr. McGrath averred that the claimant does not deny that it is currently unable to pay its debts as they fall due. That is undoubtedly the case on the evidence before the Court, although, of course, insolvency is not the issue here (cf. the judgment of Clarke J. in *Parolen Ltd. v. Doherty & Anor.* [2010] IEHC 71).

6.2 I am satisfied that the respondent has established that the claimant will not be able to pay its costs if it is successful in the arbitration.

7. Inability due to wrongdoing?

7.1 Dealing with the facts first, Mr. McGrath's affidavit is supported by an affidavit sworn on 24th August, 2010 by John O'Gorman, an accountant in the firm of Dennehy O'Gorman & Co., the claimant's auditors. Mr. O'Gorman has prepared a statement of assets and liabilities of the claimant as at 21st August, 2010. That differs from the statement of affairs exhibited in the affidavit of Mr. Murphy, which grounds the s. 201 application, in that it shows the net assets of the claimant as €1,024,764. A comparison of the two documents discloses a marginal increase of current liabilities, on my arithmetic in the sum of €64,497, as at 21st August, 2010. The significant difference between the two statements is that the current assets, that is to say, projected income from debtors, has decreased by €505,866 as at 21st August, 2010. Mr. O'Gorman has also exhibited a statement of projected income from debtors as at 21st August, 2010. The only difference between that and the corresponding document exhibited by Mr. Murphy in the s. 201 application is that the projected income from the claimant has been reduced to €2,180,106, which corresponds with the amount of the claim now being pursued in the arbitration. Therefore, apart from the slight increase in current liabilities, the major change in the

financial state of the claimant between 23rd April, 2010 and 21st August, 2010 has been the reduction of the claimant's claim against the respondent in the amount of €505,886. It is to be inferred from the evidence that, in that four month period, the claimant has not advanced its claims against its other debtors at all, or at any rate to the stage of collecting any of the amounts it contends are due.

7.2 It is asserted by Mr. McGrath in his affidavit, in reliance on Mr. O'Gorman's up to date statement of assets and liabilities, that "if the claimant is successful in the arbitration to the full extent of its claim in the sum €2,180,106, it will have net assets in the amount of €1,024,764, a figure which is comfortably more than the respondent's projection of costs (€745,200)". That is not correct because, to achieve a net asset status of €1,024,764, the claimant would have to collect the entire projected outstanding debts from the debtors, that is to say, debts aggregating €5,921,476. Mr. McGrath also averred that, of the current category (c) debtors, that is to say, debts where the accounts have not been agreed and are being disputed, which, aside from the amount due from the respondent, aggregate €2,905,970, the claimant has a good prospect of recovering most or all of those outstanding amounts.

7.3 Even if "the high water mark" of the claimant's claim, to use the terminology used by Clarke J. in the *Connaughton Road* case, is the entire amount claimed, that is to say, €2,180,106, that sum is not sufficiently large to justify a finding that the loss attributable to the respondent's wrongdoing can explain, by itself, the claimant's inability to pay costs. On the figures as at 21st August, 2010, even if the claimant recovered the full amount of its claim, there would still be a shortfall of €2,768,348 in meeting the claimant's current liabilities, which would have to be met by the projected income from the other debtors to balance current assets against current liabilities. It was submitted on behalf of the respondent that there is an inconsistency between the tenor of the affidavit of Mr. Murphy, which grounds the s. 201 application, and the tenor of the affidavit of Mr. McGrath grounding this application. Be that as it may, what is of significance is that, in order to be satisfied on a *prima facie* basis that the fourth proposition identified by Clarke J. in the *Connaughton Road* case is true on the facts of this case, one would have to prefer Mr. McGrath's optimism over Mr. Murphy's diffidence and one would have to assume that the claimant will recover, again on my arithmetic, in excess of 95% of the sum of €2,905,970 due from the other debtors.

7.4 Unlike the situation which prevailed in the *Connaughton Road* case, the Court does have a picture of the current financial state of the claimant because of the unusual circumstance that the arbitration proceedings are being prosecuted against the backdrop of the s. 201 application. However, the picture the Court has is based on the claimant's expressed belief that it has a good prospect of recovering most or all of the debts due by the other debtors. However, that belief has not been supported by evidence on the basis of which the Court could make even a tentative or *prima facie* assessment as to, first, whether the claimant may be able to recover from the debtors on foot of the undisputed debts and, if so, to what extent, and, secondly, whether the claimant will be able, in the conciliation or arbitration processes to which Mr. Murphy referred, to establish an entitlement to the disputed debts and, if so, will be able to recover from the debtors to the extent of its entitlement, or most of it, as Mr. McGrath has predicted. The fact that the status of the claims against the outstanding debtors has, apparently, not changed in the four months from April to August 2010, on the basis of a comparison of the statement of affairs exhibited in the s. 201 application and Mr. O'Gorman's statement of assets and liabilities as at 21st August, 2010, underlines the necessity for evidence, which is absent, to support the making of even a tentative or *prima facie* assessment in that regard.

7.5 If in due course an order is made under subs. (1) of s. 201 on foot of the claimant's application, it will be a matter for the creditors of the claimant to assess the scheme of arrangement and decide whether they wish to support it. Nothing I say in this judgment is intended to have any bearing on that matter. However, for the purposes of determining whether the Court should accede to the respondent's application for an order for security for costs, I am of the view that the claimant has not discharged the onus of establishing that its inability to discharge the respondent's costs of successfully defending the claim in the arbitration, if that were to happen, flows from the wrong alleged by the claimant against the respondent.

8. Delay on the part of the respondent in seeking security for costs?

8.1 The arbitration commenced when the claimant's solicitors issued a notice of arbitration to the respondent on 23rd September, 2009. It is not clear when or by whom the arbitrator, Mr. James O'Donoghue, was appointed, but he was in place by 2nd December, 2009, when a preliminary tele-conference took place with him. Thereafter, a very considerable amount of work was done by both sides preparing the matter for a hearing. Points of claim were delivered by the claimant on 29th January, 2010 and the claimant's contention that this was a substantial document which required significant input to complete is unquestionably true. The defence and counterclaim was not delivered in final form until 19th May, 2010, which was later than the period allowed by the arbitrator. The claimant's reply and defence to counterclaim was delivered on 29th June, 2010, at which stage the pleadings were closed. I accept as being true the contention of the claimant that the exchange of pleadings resulted in a significant expenditure of resources and money on the part of the claimant throughout the period.

8.2 The respondent did not raise the issue of security for costs until it was raised in Court on 28th July, 2010 in the context of the s. 201 application. The position of the respondent is that it was not aware of the parlous state of the claimant's finances until publication of the notice of the intended application on 28th July, 2010 in the s. 201 proceedings, which was advertised, *inter alia,* in the Irish Examiner on 22nd July, 2010. I am satisfied that the respondent was not aware through its own officers or through the solicitor acting for it in the arbitration, David Leahy of the firm Leahy & Partners, Solicitors, of the scheme of arrangement proposed by the claimant until July 2010, even though the firm of Leahy & Partners may have had contact with the firm of Sweeney McGann, in relation to the proposed scheme of arrangement prior to July 2010 in relation to a different client. I consider it of particular significance that an averment by Mr. Leahy that, having been told at a meeting with the respondent and its witnesses on 21st July, 2010 by one of the witnesses that he had some third party information regarding a notice in a newspaper in relation to a meeting of creditors of the claimant, he telephoned Maples & Calder to inquire whether there was any liquidation, receivership or anything of that nature occurring in relation to the claimant and was informed that Maples & Clader were not aware of any such matter, has not been refuted. In this regard, I also attach significance to the fact that, although the respondent was pursuing a counterclaim for in excess of €400,000 against the claimant in the arbitration proceedings, notice of the proposed application under s. 201 was not served on the respondent. Although I do not draw any inference of sinister motivation from the fact that such notice was not served or the fact that different firms of solicitors were instructed by the claimant in the s. 201 proceedings and the arbitration, as counsel for the respondent suggested should be drawn, the fact is that the respondent was not aware that a scheme of arrangement was proposed through no fault of its officers or of its solicitor.

8.3 In a second affidavit sworn by Mr. O'Gorman on 27th August, 2010 on behalf of the claimant, he has exhibited and commented on the abridged accounts of the claimant for the year ended 30th June, 2008 and the abridged accounts of the claimant for the year ended 30th June, 2009. The latter accounts were filed in the Companies Registration Office (CRO) on 24th May, 2010. The objective of exhibiting the abridged accounts was to demonstrate the claimant's contention that the respondent should have identified the parlous financial position of the company from those public documents and moved sooner on the application for security for costs.

8.4 In relation to the accounts for the year ended 30th June, 2008, I think it is wholly unrealistic to suggest that a litigant would carry out an analysis of the profit and loss account and the balance sheet of a company with which it was in litigation on the lines

suggested by Mr. O'Gorman. Even if the respondent's advisers had looked at the abridged accounts, what they would have seen was that the "bottom line" in the profit and loss account showed a retained profit carried forward of €1,507,365 and the balance sheet showed an excess of assets over current liabilities in the sum of €1,341,463. That overview could not have been a cause of concern.

8.5 In relation to the accounts for the year ended 30th June, 2009, which only became public at the end of May 2010, there is no doubt that they disclose a deteriorating financial situation. In the directors' report, which was signed off on 31st March, 2010 by Mr. McGrath and Mr. Murphy, they disclosed that the company was "currently in discussions with its creditors" regarding an arrangement under s. 201. They expressed confidence in relation to securing the required majorities of creditors to get the scheme of arrangement approved, which they anticipated, combined with agreed support from the claimant's bankers, would allow the claimant time to collect monies due and to continue to trade as a going concern. It was disclosed, however, that as regards debtors, an amount totalling €3,333,874 of the total amount due (€5,851,936) would not be recoverable within one year due to "actions being undergone comprising contractual arbitration and conciliation procedures and possible legal actions". However, later, in the notes to the financial statements, it was stated that the claimant would be "able to meet its liabilities as they fall due for the foreseeable future" (Note 1.1).

8.6 I have no doubt that, armed with the financial information contained in the abridged accounts for the year ended 30th June, 2008, which were in the public domain when the arbitration commenced, and nothing else, the respondent would not have been able to surmount the second hurdle on an application for an order for security for costs against the claimant – that the claimant would not be able to pay the respondent's costs if the respondent was successful. While the 2009 abridged accounts alone might have got the respondent over that hurdle, given the intensity of the engagement between the respondent's solicitors and the solicitors acting for the claimant in the arbitration proceedings, it is impossible to conclude that in late May and June of this year the respondent's advisers should have been conducting searches in the CRO to ascertain the claimant's current financial status. Given that I have found that the respondent was not aware of the intended s. 201 application until late July 2010 and, although it had a counterclaim against the claimant, was not put on notice of that application until the Court ordered that it should be on 28th July, 2010, in my view, it would be unfair to refuse to make an order for security on the ground that the respondent did not formally seek security until 3rd August, 2010. Therefore, the claimant's reliance on the special ground of delay fails.

9. Other special ground of refusal?

9.1 Counsel for the claimant suggested that, whatever the outcome of the arbitration, even if it were to be successful, the respondent might not be awarded its costs. The basis of that argument was that under Clause 38(a) of the building agreement there was an obligation to refer a dispute between the parties to conciliation. On 8th April, 2009 the architect who had been nominated to conduct the conciliation in accordance with the building agreement had expressed the opinion that, while the claimant had engaged in conciliation, the respondent had not and he was of opinion that conciliation had failed due to such lack of engagement and had been exhausted. Counsel for the claimant referred to the fact that there is authority for the proposition that an arbitrator may depart from the general rule that costs follow the event in the event of an unreasonable refusal to participate in mediation or conciliation by a successful party. The relevant authorities are considered in Dowling-Hussey and Dunne on *Arbitration Law* (Thompson Round Hall, 2008) (at para. 6.28). In my view, on the state of the evidence, it is impossible and, in any event, it would be wholly inappropriate in the context of this application, for the Court to speculate on the application of those principles in the event that the respondent is successful in the arbitration. Therefore, I express no view, and attach no weight, to the claimant's contention that the respondent did not engage in conciliation in accordance with Clause 38(a).

9.2 Counsel for the claimant submitted that a special circumstance exists in that sums aggregating approximately €500,000, which the respondent admits or acknowledges are due to the claimant under the building agreement, have been withheld by the respondent as against its claim to set off and its counterclaim. These sums relate to measured works, variations, works arising out of an insurance event, and the retention fund. If the respondent's set off defence and counterclaim fail, it was submitted that the claimant would be entitled to interest on those sums going back to the year 2008. In the context of seeking to achieve justice between the parties, it was submitted that that is a factor to be taken into account. However, counsel for the claimant properly emphasised that, on an application for security for costs, the Court cannot be concerned with forecasting the outcome of the substantive proceedings or the arbitration, as the case may be. As I have stated when dealing with the first hurdle, the respondent has a *prima facie* defence to the claimant's claim and a *prima facie* counterclaim. The largest elements in both the claimant's claim and the respondent's set off and counterclaim relate to delay in completion of the works. As Mr. Solan pointed out in his affidavit filed in the s. 201 proceedings, where contractual responsibility lies for that delay will be a pivotal issue in the outcome of the arbitration. However, as has been constantly reiterated in the jurisprudence of the Superior Courts, it is not the function of the Court on this type of application to evaluate where the fault lies and the prospect of success or otherwise in the substantive litigation or arbitration. That being the case, I cannot see how the Court could reach a conclusion as to whether the withholding of the sums aggregating €500,000 to meet the respondent's claim to set off and its counterclaim against the claimant is likely to constitute an injustice so as to militate against the Court exercising its discretion to order the claimant to give security for costs.

9.3 Counsel for the claimant submitted that the Court should attach significance to the fact that this application is being pursued in the context of the s. 201 application. What is of significance, in my view, is the fact that the claimant treated the respondent as a debtor only in the proposed scheme of arrangement. The outcome of the arbitration is a relatively substantial component in the scheme of arrangement and it has ramifications for the creditors of the claimant, so, presumably, the claimant intends to pursue it. In any event, the claimant initiated the arbitration and is pursuing its claim against the respondent. That being the case, the respondent is entitled to defend the claim in the usual manner, and to pursue any interim measure which is open to a litigant in the position of the respondent. Therefore, the respondent is entitled to ask the Court to make an order for security for costs applying the usual principles and without regard to the position of third parties.

9.4 I have come to the conclusion that no other special circumstance prevails in this case which would justify not making an order for security for costs.

10. Order

10.1 There will be an order directing the claimant to provide security for the costs of the respondent in the arbitration in such amount as the Court shall determine. In view of the imminence of the arbitration, which is scheduled for 21st September, 2010, I will adjourn the application to a vacation Judge to determine the quantum of the security.

10.2 I think it is appropriate to record that the claimant has taken issue with the respondent's estimation of the costs of the arbitration, which the respondent put at €745,200, and has contended that the costs would be substantially less than that figure.