Neutral Citation: [2013] IEHC 359

THE HIGH COURT

COMMERCIAL

[2013 No. 2662 P]

[2013 No. 37 COM]

BETWEEN

WEBPRINT CONCEPTS LIMITED

PLAINTIFF

AND

THOMAS CROSBIE PRINTERS LIMITED, THOMAS CROSBIE HOLDINGS LIMITED, BONTURY LIMITED (trading as LANDMARK MEDIA INVESTMENTS), ALLIED IRISH BANKS PLC, KIERAN WALLACE, IRISH TIMES LIMITED, THOMAS PATRICK CROSBIE AND ALAN CROSBIE

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 28th day of June 2013

1. Webprint Concepts Ltd., the plaintiff in these proceedings ("Webprint") has, since 2006, been printing the publications of a group (the "TCH Group") led by Thomas Crosbie Holdings Ltd the second named defendant ("TCH"), pursuant to a print contract ("the Print Agreement") entered into with the first named defendant, Thomas Crosbie Printers Ltd. ("TCP") on 21st December, 2005.

2. The fourth named defendant, Allied Irish Banks plc. ("AIB"), was a secured lender to the TCH Group since 2010. On 6th March, 2013, the fifth named defendant, Kiernan Wallace ("Mr. Wallace") was appointed by AIB as receiver to certain of the companies within the TCH Group. On the same day, by a series of transactions, the print titles then held by the TCH Group were sold to the third named defendant, Landmark Media Investments ("Landmark") and/or subsidiary companies of Landmark, either by way of an asset sale or the sale of shares in subsidiaries of the TCH Group. On 7th March, 2014, the sixth named defendant, the Irish Times Ltd. ("the Irish Times") commenced printing the publications formerly owned by the TCH Group and printed by Webprint pursuant to the Print Agreement. The seventh named defendant, Thomas Patrick Crosbie ("Mr. Tom Crosbie") is a director of TCP, TCH and Landmark and is sued in that capacity. The eighth named defendant, Alan Crosbie ("Mr. Alan Crosbie") is a director of TCP and TCH and Chairman of the TCH Group.

3. Webprint makes multiple claims against each of the defendants in the proceedings. Central to the claims are the transactions which took place on 6th March, 2013, described as a 'pre-pack' receivership and alleged to constitute a premeditated and carefully orchestrated plan, the principal purpose of which was to enable TCP and the TCH Group evade their existing obligations to Webprint under the Printing Agreement. Claims for breach of contract, breach of duty, including breach of fiduciary duty, procurement of a breach of contract, intentional interference with business and economic relations and conspiracy and claims to be entitled to pierce the corporate veils of TCP, TCH and Landmark are made in the proceedings. The amended statement of claim sets out the precise claims against each of the defendants in 63 paragraphs.

4. Each of the defendants has brought an application for security for costs from Webprint pursuant to s. 390 of the Companies Act 1963. TCP, TCH, Landmark, Mr. Tom Crosbie and Mr. Alan Crosbie are collectively represented by counsel instructed by Ronan Daly Jermyn, solicitors. Insofar as I refer to them collectively, I will do so as the "TCH defendants". There was separate representation by counsel and solicitors for each of AIB, Mr. Wallace and the Irish Times. There are differences between the positions of the defendants in this application arising out of their different roles in the transactions to which the claims relate and the nature of the claims made against them. There is substantial agreement on the legal principles applicable between the defendants, and in relation to the principles applicable to security for costs, only some differences in nuances contended for by counsel for Webprint.

5. I propose, firstly, setting out the basic principles which, it is agreed, govern the determination of the defendants' applications for security for costs against Webprint.

Section 390 of the Companies Act 1963

6. The application is made pursuant to s. 390 of the Companies Act 1963, which provides:

> "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."

7. The parties are agreed that s. 390 falls to be applied in accordance with the well established principles summarised by Clarke J. in the High Court in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7 at para. 2.1, 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 which ought to cause the court to exercise its discretion not to 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."

8. In this application, Webprint, prior to the hearing, accepted that it will not be able to pay the defendants' costs, if they are successful, and that on the affidavits delivered, AIB, Mr. Wallace and the Irish Times each have established a *prima facie* defence to its claim. Webprint does not accept that the TCH defendants have established *prima facie* defences to the majority of its claims. The first issue, therefore, to be considered is whether TCH defendants have established a *prima facie* defence.

9. The approach to determining whether or not a defendant has established a prima facie defence on an application for security for costs was considered by me in an ex tempore judgment delivered in *Tribune Newspapers (In Receivership) and Associated Newspapers Ireland trading as Irish Mail on Sunday* (Unreported, the High Court, Finlay Geoghegan J. 25th March, 2011). Counsel for all parties herein did not seek to dispute the approach taken in that judgment. Having considered certain earlier judgments of the Supreme Court and High Court in relation to the issue I said:

> "What appears from the judgments, in a manner similar to the judgments in relation to summary judgment, is that a defendant seeking to establish a *prima facie* defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish those facts. Mere assertion will not suffice.
>
> If such evidence is adduced, then the defendant is entitled to have the Court determine whether or not it has established a *prima facie* defence upon an assumption that such evidence will be accepted at trial. Further, the defendant must establish an arguable legal basis for the inferences or conclusions which it submits the Court may arrive at based upon such evidence."

In the same decision, I rejected a contention that the Court should assess the strength or weaknesses of the respective parties' cases upon an application for security for costs. Such an approach was not in dispute in this application.

The Facts and Claim

10. Prior to considering whether the TCH defendants or any of them have established a *prima facie* defence to the claims of Webprint, it is necessary to set out in summary form the facts giving rise to the claim. The affidavit evidence on the application for security for costs and documents exhibited is extensive. The Court is not required, or indeed permitted to make findings of fact on an application such as this. It is required to consider most factual issues on a *prima facie* basis and, hence, I propose recording in the judgment only the essential core facts of which there is prima facie evidence necessary to explain my conclusions. It is only on such a basis I am setting out the facts and not making any findings of fact. I have considered carefully the entire of the affidavit evidence adduced by the parties.

11. On 22nd April, 2005, Webprint, then a start-up company, entered into the Overall Agreement with TCP, according to which printing facilities were to be built on land acquired for this purpose by TCP at Mahon Point, Cork, and to be leased by TCP to Webprint and used by it for the purpose of printing newspapers for the TCH Group. On 21st December, 2005, TCP, as landlord, demised the Mahon Point property to Webprint for a term of 21 years. Its acquisition by TCP was funded by Ulster Bank Ltd. which took a charge over the property. Ulster Bank was also a lender to Webprint.

12. Pursuant to the Overall Agreement, Webprint entered into the Printing Agreement on 21st December, 2005, with TCP, which is referred to in the Agreement as the Publisher. TCP appointed Webprint as its "sole and exclusive printer" to print the Newspapers (Clause 2). The Newspapers are defined in clause 1 as meaning "all Republic of Ireland newspapers and magazine titles (other than the 'Irish Post') owned directly or indirectly by the Publisher, its Associated Companies or Members of its group including the 'Newry and Down Democrat' or which the Publisher is entitled to publish within the Republic of Ireland and 'Newspaper' shall be construed to mean any one of them". The term of the Printing Agreement was 15 years and could be renewed (Clause 3).

13. Printing commenced pursuant to the Printing Agreement in January, 2006. The Printing Agreement was amended by agreement between the parties subsequently, and the amendments took effect from 12th December, 2008.

14. From January, 2006 until 6th March, 2013, Webprint printed all print titles owned by the TCH Group pursuant to the Printing Agreement. The financial strength of Webprint was heavily reliant upon the income and profit earned by it from printing done pursuant to the Printing Agreement. Webprint adduced evidence from Mr. Stewart Dunne, of BDO its auditors,. In 2012, the income earned by Webprint from the TCH Group represented 69.35% of its total income. Webprint contends that on 6th March, 2013, TCP owed it, after set-off of sums due by it to TCP, €2,830,800 pursuant to the Printing Agreement.

15. AIB was lender to the TCH Group prior to 2009. In August 2009, the TCH Group informed AIB it was experiencing financial difficulties and requested a moratorium on an obligation to make a capital repayment of €3 million in March, 2010. AIB was an unsecured lender at that time. Following subsequent negotiations, AIB obtained guarantees and debentures creating charges from companies within the TCH Group in April, 2010.

16. In March, 2011, the TCH Group was again unable to make a capital repayment due to AIB. AIB required, as a condition of a further moratorium, that the TCH Group complete a full strategic business review. In December, 2011, AIB agreed a further moratorium and required a third party review of the TCH Group business plan. In June 2012, AIB engaged KPMG and commenced significant discussions with them in relation to the TCH Group in July, 2012. KPMG carried out an analysis of the TCH Group's business plan, trading performance, financial position, cash flows and projections. Mr. James Nolan of AIB has deposed that in May, 2012, the TCH Group had completed its business plan from which it was "apparent that the TCH Group had identified approximately €7.4 million of potential savings that the group was seeking to achieve over the next number of years, with printing costs, rental costs and a detailed and extensive centralisation and IT project forming the key areas for savings". He also deposes that at that time, AIB was advised that negotiations had been taking place with Webprint and advisors in relation to printing costs since November, 2011.

17. Mr. Donagh O'Doherty of Webprint and Mr. Tom Crosbie deposed in some detail as to the negotiations which took place between Webprint and the TCH Group between September, 2011 and February, 2013. There are certain matters in dispute which it is not possible to resolve on this application. From approximately December 2011, there were professional advisors and bankers of each

party also involved. Contemporaneous notes of certain of the meetings, emails and offers made are exhibited.

18. At a meeting of 4th November, 2011, with representatives of Webprint and its external investors, Mr. Tom Murphy, CEO of TCH, sought a reduction of €3 million in the printing costs. Mr. Crosbie deposes that at that meeting, a summary of the financial position of the TCH Group was presented and TCP's desire for consensual solution with Webprint was discussed. Negotiations appear to have continued inconclusively throughout 2012. The recognised need of the TCH Group to reduce print costs remained central to negotiations. Consideration was given to Webprint taking a stake in the TCH Group. In August, 2012, Webprint proposed a reduction of printing costs of €1 million per annum for three years. Further proposals by Webprint were made at the end of August 2012, and on 23rd November, 2012, Webprint put a further proposal to TCP, recorded in writing and dated 22nd November, 2012, which was exhibited. That document, entitled 'Heads of Agreement between Webprint and TCH' states:

> "• Webprint reduce annual print bill by €2m a year from current annual print bill achieved by reducing the cost per copy.
>
> • Webprint to buy the land and building at Mahon from TCH for €5.5m.
>
> • Webprint to forgive the €2.6M of outstanding/past due print charges.
>
> • TCH to forgive the €0.9M outstanding rental charges.
>
> • Contract moves from TCP to TCH and is guaranteed by Ultimate Holding Company.
>
> • Confirmation of funding into TCH.
>
> • Webprint and TCH enact these variations to the current agreements.
>
> [Nine matters listed]"

19. In December, 2012, there appear to have been some further conditions added, and then, on 12th February, 2013, Mr. O'Doherty sent to Mr. Tom Murphy, CEO of TCH, a letter with further arguments in favour of the offer which had been made. This was rejected by Mr. Murphy by email of 21st February, 2013. *Inter alia*, the reason given was that the proposal could only be valued by TCP, in reality, as a net cost reduction of €1.12 million annually. Mr. O'Doherty responded on 22nd February, 2013, disagreeing with the position taken by TCP and expressing concern about payments due and then outstanding, making threats if the payment was not made, but also indicating that that was a road he did not wish to travel and then stating "[w]hat we wish to do is sit down with you and your bankers and with our bankers as all the stakeholders to try and work out a commonly acceptable way forward".

20. Webprint contends that the unpaid debt due to it by TCP increased between September, 2011 and March, 2013 by €831,031. An increase of that order is not disputed. However, it is deposed that TCP paid Webprint approximately €12.3 million and that confidential financial information relating to the TCH Group was shared with Webprint during the same period.

21. On 6th March, 2013, without prior notice to Webprint, the following relevant transactions took place. In recording them, I emphasise that I make no finding as to the order in which or the precise nature of the transactions which took place:

> (i) AIB contends that on 6th March, 2013, it was owed by companies within the TCH Group, either as borrower or guarantor, a sum of €17,917,649. It made demand on several companies within the TCH Group. It made no demand on TCP, notwithstanding that AIB held a guarantee and debenture from TCP.
>
> (ii) AIB appointed Kieran Wallace as receiver to the companies within the TCH Group upon which it had made demand. Mr. Wallace was not appointed as receiver of TCP.
>
> (iii) AIB, as mortgagee, sold to a newly incorporated subsidiary of TCH, Sappho Ltd. ("Sappho"), assets of some companies within the group and shares in other subsidiary companies. The assets and shares were sold for amounts specified in accordance with a valuation of KPMG aggregating approximately €18.5 million.
>
> (iv) TCP sold to Sappho its 85% interest in 97, South Mall, Cork, in consideration of €1,020,000.
>
> (v) AIB provided facilities to Sappho to purchase the assets and shares from AIB as mortgagee and the 85% interest in the property at South Mall from TCP.
>
> (vi) TCH (acting through Mr. Wallace as Receiver) sold the entire issued share capital of Sappho to Landmark for a consideration of €1. AIB provided finance to Landmark to refinance the earlier facilities granted to Sappho and to provide additional funding for working capital. Landmark is owned 50% by each of Mr. Tom Crosbie and his father, Mr. Ted Crosbie. Mr. Ted Crosbie and Mr. Tom Crosbie also invested monies in Landmark.
>
> (vii) The directors of TCP resolved to cease to trade with immediate effect and recommended to its shareholders that it should petition for the winding up of the company. A written resolution of TCP's shareholders was passed to petition the High Court to wind up TCP.

22. On 7th March, 2013, the print titles formerly published by the TCH Group, including the 'Sunday Business Post', and formerly printed by Webprint pursuant to the Printing Agreement, were provided to the Irish Times by Landmark for printing in accordance with a contract concluded between Landmark and the Irish Times.

23. On 7th March, 2013, also, Post Productions Ltd. ("PPL"), a company formerly in the TCH Group, which is the publisher of the 'Sunday Business Post', presented a petition pursuant to the Companies (Amendment) Act 1990, and an interim examiner, Mr. Michael McAteer, was appointed. He was subsequently appointed as examiner. By an agreement reached between Mr. McAteer and Webprint, Webprint is printing the 'Sunday Business Post' for the period PPL is under protection of the Court. The petition to wind up TCP was also presented on 7th March, 2013.

24. It is not in dispute that the transactions which took place on 6th and 7th March, 2013, were a carefully planned and executed scheme ("the Scheme"). There is some dispute as to the person or persons by whom the relevant decisions were taken and precisely what occurred and the order in which the transactions took place, as well as a significant dispute as to the purpose of the Scheme and its lawfulness.

25. Webprint contends, and it does not appear to be disputed, that the following is, *inter alia*, the factual consequence of the Scheme:

> (i) The print titles formerly held by the TCH Group are published under the same titles; and
>
> (ii) the print titles are published by the same employees, under the direction of the same CEO; and
>
> (iii) the corporate group headed by Landmark operates from the same registered office as the TCH Group; and
>
> (iv) Mr. Tom Crosbie is a director of TCP, TCH and Landmark;
>
> (v) the CEO of the TCH Group is also CEO of Landmark and is a director of Landmark; and
>
> (vi) Landmark is funded by the same lending institution, AIB, as the TCH Group; and
>
> (vii) the print titles formerly held by the TCH Group and acquired by Landmark are (with the exception of the 'Sunday Business Post') now printed by the Irish Times.

This is *prima facie* the factual background giving rise to the claims and the context in which the TCH defendants' contention that they each have a prima facie defence to the claims made against them must be considered.

Claims against TCH Defendants

26. In my judgment, the claims against TCP and the remaining TCH defendants must be separately considered. This arises primarily by reason of the fact that TCP is the party to the written Printing Agreement with Webprint pursuant to which it has express contractual obligations.

27. Webprint makes essentially two claims against TCP:

> (i) A claim for €2,830,800 as a debt due by TCP to Webprint (after setting off sums due by Webprint to TCP) pursuant to the Printing Agreement as of 6th March, 2013; and
>
> (ii) Damages for breach of contract and breach of duty. The particular provisions of the Printing Agreement of which it is pleaded TCP is in breach are Clauses 8(7) and 21. In submission, reference was also made to Clause 9(3) which requires notice to Ulster Bank. The claim for breach of duty was not separately emphasised in submission and so is not being separately considered.

28. Counsel for TCP correctly conceded that it had not established a *prima facie* defence to a claim for arrears in the order of the amount claimed. There may be some detailed dispute on the figure. However, he submitted that TCP had made out a *prima facie* claim on the evidence adduced in this application that it was not now in breach of Clause 8(7) or Clause 21 of the Printing Agreement. In doing so, he sought to rely upon Clause 11(1) and *force majeure*.

29. Clauses 8(7) and 21 of the Printing Agreement provide:

> "8(7) The Publisher agrees to give the Printer a minimum of two (2) months' notice of the removal by the Publisher of any one of the regional Newspapers published by the Publisher at the date hereof due to discontinuance, sale or merger. In such event, no printing charges shall be payable by the Publisher in respect of this Newspaper once discontinued, sole or merged. However, the Publisher agrees to use its best endeavours to procure that the new owner of the sold or merged regional Newspaper shall continue to use the Printer for printing. For the elimination of doubt the term 'regional' excludes daily Newspapers (which expression includes the Irish Examiner and the Echo and the Sunday Business Post which newspapers the Publisher shall not remove from its requirements under this Agreement whether by discontinuance, sale or otherwise.
>
> …
>
> 21. CO-OPERATION
>
> The Printer and the Publisher shall each act reasonably and in good faith in relation to their and each of their rights and obligations under this Agreement."

30. Clause 11(1) and (2) provides, in relation to *force majeure*:

> "(1) Save as set out in this Clause 11, neither the Printer nor the Publisher shall in any circumstance be liable to the other for any loss or damage of any kind whatsoever (whether direct or indirect but save in respect of the Publisher's obligation to make payment on issued invoices or invoices which the Printer is entitled to issue) suffered by the other by reason of any failure or delay in the performance of the obligations provided for by this Agreement which is solely or mainly due to an event of Force Majeure and any failure or delay occasioned thereby shall not be (and shall not be deemed to be) a breach of this Agreement.
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> (2) The party affected by Force Majeure shall notify the other by fax and post of the event of Force Majeure and of the circumstances concerning it as soon as they come to its attention."

Force majeure is defined in Clause 1 as meaning, insofar as relevant, "any circumstances or cause beyond the reasonable control of the party affected by it (not being directly attributable to the act or neglect of the party so affected, its servants, agents or sub-contractors or the failure by it or them to take all reasonable precautions insofar as it is within their power of procurement reasonably to do so)".

31. On the relevant evidence adduced on this application (primarily the affidavits of Mr. Tom Crosbie), I have concluded that TCP has not put before the Court facts which, if accepted at trial, establish a *prima facie* defence, whether in reliance upon Clause 11(1) and *force majeure* or otherwise, to the claim of Webprint that TCP is in breach of contract in failing to give two months notice of the removal of the regional Newspapers, as defined, or in failing to use its best endeavours to procure that the new owner *i.e.* Landmark, continued to use Webprint for printing. I am also not satisfied that TCP has established a prima facie defence to its alleged breach of

Clause 21 of the Agreement in relation to the obligations imposed on it by Clause 8(7), and in particular, the notice and best endeavours obligations. I am not satisfied that TCP, on the evidence before me, has made out a *prima facie* defence to be entitled to rely upon Clause 11 of the Printing Agreement in relation to *force majeure* to preclude liability for loss and damage for such alleged breaches of contract. There is no evidence of any facts sought to be relied upon as *force majeure* and no evidence of a notification of any event of *force majeure* as required by Clause 11(2) of the Printing Agreement. I have noted, but it is not determinative to my conclusion, that paragraph 28 of the defence of the TCH defendants, in pleading to the alleged breach of contract by TCP, does not expressly rely upon *force majeure*.

32. Accordingly, I have concluded that TCP has not made out a *prima facie* defence to the above substantial claims of Webprint against it in these proceedings.

33. There is also an alleged breach of a further obligation in Clause 8(7) on TCP not to "remove from its requirements under this Agreement whether by discontinuance, sale or otherwise [the daily Newspapers as defined]". TCP has, in my judgment, established a *prima facie* defence to that element of the claim by reason of the evidence of its insolvency and steps taken by AIB. However, having regard to the absence of a prima facie defence to the substantial claims of Webprint in relation to the breaches of the notice and best endeavours provisions, it follows that TCP's application for security for costs pursuant to s. 390 of the Act of 1963 should be refused.

***Prima Facie* Defences of TCH, Landmark, Mr. Tom Crosbie and Mr. Alan Crosbie**

34. The claims made by Webprint against these defendants pleaded in the amended statement of claim have been summarised on its behalf in written submissions as being:

> (a) Against TCH, that it is guilty of a breach of contract, breach of duty (including breach of fiduciary duty), procurement of a breach of contract, intentional interference with business and economic relations and conspiracy.
>
> (b) Against Landmark, that it is guilty of a breach of contract, procurement of a breach of contract, intentional interference with business and economic relations and conspiracy.
>
> (c) Against Mr. Tom Crosbie and Mr. Alan Crosbie, that they are guilty of procurement of a breach of contract, intentional interference with business and economic relations, breach of duty (including fiduciary duty) and conspiracy.

35. The claims that TCH and Landmark are each guilty of breach of contract are based upon an allegation that they should be treated with TCP as a single economic entity, or, as alternatively put, that the Court should lift the corporate veil, and hence, hold that each is contractually bound to Webprint by the Printing Agreement. This appears intended, both to apply to the alleged breach of contract in failing to pay the arrears due under the Printing Agreement and the alleged breaches of contract by TCP of Clauses 8(7) and 21 of the Printing Agreement by reason of the transactions entered into on 6th/7th March, 2013. There is a further specific claim that TCH is liable for the arrears due under the Printing Agreement by reason of a guarantee given pursuant to s. 17(1)(b) of the Companies (Amendment) Act 1986. Webprint accepts that TCH has established a *prima facie* defence in relation to that specific claim. In my judgment, there is evidence before the Court which, if accepted by a trial judge, would constitute a *prima facie* defence to the claims that each of TCH and Landmark are bound by the terms of the Printing Agreement to Webprint on any of the grounds alleged. I only propose referring to two relevant pieces of evidence. In relation to TCH, it is the memorandum dated 22nd November, 2012, from Webprint already referred to, entitled 'Heads of Agreement between Webprint and TCH' which, *inter alia*, proposes "Contract moves from TCP to TCH . . ." Counsel for the TCH defendants submits that this is evidence of a recognition by Webprint as late as November 2012, that the company within the TCH Group with which it had a contractual relationship was TCP and that it did not, at that time, have a contractual relationship with TCH. Without making any finding at this point in the proceedings, I am satisfied that this memorandum is objective evidence of facts, which, if accepted by a trial judge, provides an arguable basis for the defence, contended by counsel for the TCH defendants. There is also evidence adduced by Webprint which, if accepted, provides a *prima facie* basis for its claim that TCH is contractually bound to Webprint by the Printing Agreement.

36. In relation to Landmark, there is objective evidence that it is a company incorporated in February 2013. Further, Mr. Tom Crosbie has deposed to the differences between the shareholdings and directors in TCH and Landmark. They are matters within his own knowledge by reason of his association with each of the companies and are facts which, if accepted by a trial judge, provide an arguable basis for a defence to its operation as a single economic entity with TCP and/or its contractual nexus with Webprint.

37. The claim for procurement of breach of contract is made against TCH, Landmark and both Mr. Crosbies. Webprint's claim is that the intent of the Scheme and transactions which took place on 6th/7th March, 2013, was to cause TCP to break its contractual obligations to Webprint pursuant to the Printing Agreement. It is claimed that each of these four defendants had knowledge of the Printing Agreement and intended to procure a breach of that contract by TCP.

38. Counsel for Webprint relied upon the description of the tort in Dugdale and Jones (ed.s), *Clerk & Lindsell on Torts*, 20th ed. (London, 2012), at p. 1608, para. 24-14, where it states that, "[k]nowingly to procure or, as it is often put, to induce a third party to break its contract to the damage of the other contracting party without reasonable justification or excuse is a tort".

39. Webprint also relies upon the general principles applicable to this tort as set out by the House of Lords in *OBG Ltd. v. Allan* [2007] UKHL 21, [2008] 1 A.C. 1, and in particular, upon the speech of Lord Hoffmann at paras. 39 to 43. Insofar as relevant in those paragraphs, he stated:

> "Inducing breach of contract: elements of the *Lumley v. Gye* Tort
>
> 39. To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so.
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> . . .
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> 40. The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions. In *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 . . . . Lord Denning MR said at pp; 700-701:

> 'Even if they did not know the actual terms of the contract, but had the means of knowledge - which they deliberately disregarded - that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not'.
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> 41. This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469.
>
> . . .
>
> 42. The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach . . .
>
> 43. On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been 'targeted' or 'aimed at'. . ."

40. In my judgment, the real issue between the parties is whether Webprint can establish at trial that TCH, Landmark and the two Mr. Crosbies had the requisite intention to procure a breach of contract by TCP insofar as each of them participated in or cooperated with the Scheme and transactions which took place on 6th/7th March, 2013. On the evidence adduced on this application, including, in particular, the evidence on affidavit from AIB and the evidence of Mr. Tom Crosbie, I am satisfied that there is evidence which, if accepted by a judge at trial, provides an arguable basis for a defence to this claim. The evidence of Mr. James Nolan sworn on 20th May, 2013, at para. 48, is to the effect that it was AIB which "elected to implement the transaction" which he describes at paras. 16 to 27of his affidavit "in order to protect its position". Mr. Crosbie's evidence in his second affidavit, in particular, at para. 44, is to the effect that once AIB decided to demand repayment and enforce its rights as a secured lender, that the TCH defendants (other than Landmark) "were compelled to acknowledge AIB's rights as secured lender and to cooperate with AIB's enforcement plan and did so with the intention of preserving to the fullest extent possible the relevant undertakings and the employment and services that they provided".

41. It must be recalled that for the purposes of this application, it was accepted that AIB, the Receiver and the Irish Times had established a *prima facie* defence to the claim that they also are guilty of procuring a breach of contract by their involvement in the Scheme and transactions of 6th/7th March, 2013. In my judgment, on the present evidence before the Court, whilst Webprint may be considered to have established a *prima facie* claim against the second to eighth named defendants for procuring breach of contract (in respect of at least the notice and best endeavours obligations), in my judgment, there is also evidence before the Court which, if accepted, forms an arguable basis for a defence, *inter alia*, by TCH, Landmark and Mr. Tom Crosbie and Mr. Alan Crosbie to this claim. Accordingly, I am satisfied that they have established a *prima facie* defence to the claim in accordance with the relevant principles.

42. The remaining claims made against these defendants are for breach of duty, including breach of fiduciary duty, intentional interference with business and economic relations and conspiracy. The absence of a *prima facie* defence to these claims was not separately pressed at the hearing of the application for security for costs, correctly, in my view. In my judgment, it follows from my conclusions that each of TCH, Landmark, Mr, Tom Crosbie and Mr, Alan Crosbie have also made out a *prima facie* defence to those claims.

43. It follows from this conclusion and the admissions made by Webprint in relation to the prima facie defences of the remaining defendants that each of the second two eighth named defendants have discharged the onus of establishing a *prima facie* defence to the claims against them by Webprint. In accordance with the principles already set out, the Court must conclude that security is to be provided pursuant to s. 390 of the Companies Act 1963, unless Webprint can show special circumstances which would cause the Court to exercise its discretion not to make the order sought.

Special Circumstances

44. Webprint relies upon the following special circumstances in this application:

> (i) A contention that its inability to meet the defendants' costs has been caused by the wrongs alleged against the defendant in the proceedings.
>
> (ii) The claims made in the proceedings raise points of law of public importance such that the Court should exercise its discretion to refuse security for costs.
>
> (iii) The conduct of the defendants, in particular, the TCH defendants, prior to the proceedings and all defendants during the proceedings is such that the Court should exercise its discretion to refuse an order for costs.

In addition, counsel for Webprint relied upon the principle that the Court should exercise its discretion in the interests of justice but did not contend that this gave rise to a free standing discretionary jurisdiction, rather, that in determining whether or not to exercise its discretion under one of the three grounds relied on it should do so in the interests of justice.

45. Each of the defendants estimated their costs. The aggregate is taken by or on behalf of Webprint to be €3.1 million. No evidence has been adduced to dispute this figure and this is the figure used for the purposes of the financial analysis carried out. It is also the figure which I propose taking as the aggregate probable costs in this judgment. Having regard to the fact that TCP is represented by the same firm of solicitors and counsel as TCH, Landmark and both Mr. Crosbies, it does not appear to me that the exclusion of work done in relation to the defence of TCP would materially alter the aggregate amount.

Inability to Pay Costs Caused by Alleged Wrongdoing of Second to Eighth Named Defendants

46. The first special circumstance relied upon by Webprint is that its admitted inability to meet the costs of the defendants if successful in their defences flows from the wrongs allegedly committed by the defendants. The parties were again in agreement that the principles set out by Clarke J. in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7, and in particular at paras. 3.3 to 3.10 inclusive, are those to be applied in determining this question. There he stated:

"3.3 I am mindful of the fact that all of the authorities make clear that the court's assessment must be conducted on a prima facie basis. As was pointed out in *Irish Conservation and Cleaning Ltd v. International Cleaners Ltd.* (Unreported, Supreme Court, Keane C.J., 19th July, 2001) to do otherwise would be to invite the court, on a preliminary motion, to decide the case. Everything which I say hereafter should, therefore, be subject to the qualification that I am referring, even if not expressly stated, to the various necessary matters being established on a *prima facie* basis.

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.

3.5 Given that, on a motion such as this, a plaintiff is only required to establish the special circumstances, arising out of its inability to pay costs being due to the alleged wrongdoing of the defendants, on a *prima facie* basis, then it follows that each of the above steps must also be established on such a *prima facie* basis only. Items (1) and (2) do no more than state that the plaintiff must establish a *prima facie* case on liability and causation, for if such a case cannot be established, then there could be no basis for finding, even on a *prima facie* basis, that any lack of resources of the plaintiff are due to wrongdoing on the part of the defendant. Item (3) is of some relevance to the first of the matters which was debated in the course of the hearing before me. In response to some of the points made by counsel for Laing O'Rourke, it was responded on behalf of Connaughton Road that those matters 'only went to quantum'. The implicit suggestion was that the court was not concerned, on an application such as this, with quantum. That may be true to an extent, but it seems to me that it is not correct to state that a court should have no regard to questions of quantum in an application such as this. To take a simple example a plaintiff company which has an excess of liabilities over assets of (say) €200,000 will manifestly be unable to pay the defendant's costs should the defendant succeed. If the high watermark of that plaintiff's claim is only for €100,000 then it equally follows that the plaintiff's inability to pay costs has not been caused by the defendant's wrongdoing in that, even if the plaintiff were to succeed, there would still be an excess of liabilities over assets of €100,000.

3.6 It follows, in my view, that a plaintiff must at least establish a *prima facie* case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful. That this is so can be seen from the comment of Murray J. (speaking for the Supreme Court) in *Framus Ltd & Ors v.CRH Plc & Ors* [2004] 2 I.R. 21 at pp. 61 and 62, where it was noted that the plaintiff in that case had shown some evidence of wrongdoing on the part of the defendant but not, even on a *prima facie* basis, that its impecuniosity was due to that wrongdoing. It is not, of course, 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. That is, in substance, the requirement of point (4) referred to above. Even if, therefore, a plaintiff can show a *prima facie* case, it is also necessary to show a *prima facie* level of losses attributable to the defendant's wrongdoing so as to enable the court to assess whether, again on a *prima facie* basis, those losses are sufficient to justify attributing the plaintiff's inability to pay costs, in the event of losing, to the asserted wrongdoing. On that basis I am satisfied that the court can have some regard to quantum in an application such as this.

3.7 The second point that arose for some debate concerns the position of a company which, on any view, had no significant net assets prior to the events which gave rise to the proceedings concerned.

. . .

3.10 As part, therefore, of the overall question of assessing whether it has been shown, on a prima facie basis, that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted, the court must look at all of the circumstances asserted on behalf of the parties. In particular in a case where, prior to any possible wrongdoing, the plaintiff company had no significant net assets, it seems to me that it follows that such a company will need to establish that, in the absence of the wrongdoing alleged, it would have acquired net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant were successful."

47. In this application, the quantum of damages to which Webprint can establish a *prima facie* entitlement is strongly in dispute between Webprint and all the defendants. Hence, in addition to setting out the principles, the above considerations given by Clarke J. to this issue are of assistance and relevant.

48. As appears from the principles set out above, Webprint, on the facts herein, must establish a *prima facie* case that the quantum of damages which it may obtain in the event that it is successful in its claims for alleged wrongdoing against the second to eighth named defendant, inclusive, will be of an order of magnitude sufficient to reverse its current financial position in which it admits it would be unable to pay the defendants' costs in the order of €3 million if they were successful.

49. Consideration of the issue is complicated by the multiplicity of defendants, the undisputed insolvency of TCP and TCH and the conclusion that TCP has not made out a *prima facie* defence to the claim for arrears of €2,800,000 or for damages for breach of certain provisions of the Printing Agreement. There is no evidence upon which the Court could find a *prima facie* case that Webprint will recover the arrears of any amount from TCP which may be taken into account in considering the financial position of Webprint for the purposes of the remaining applications. Further, the Supreme Court in *Lismore Homes v. Bank of Ireland* Finance [1999] 1 I.R.

501, expressly rejected a plaintiff's entitlement to have potential damages recoverable from a defendant taken into account in determining the security for costs applications of co-defendants.

50. In its statement of claim, Webprint pleads in a composite way the loss and damage it alleges it suffered by reason of the alleged wrongdoings of all the defendants under three headings:

> (a) Loss of anticipated profits under the Printing Agreement estimated in the Statement of Claim at €22,220,000.
>
> (b) Arrears due and owing by TCP to Webprint on 6th March, 2013, in the sum of €2,830,800.
>
> (c) Exceptional employee costs by reason of staff redundancies resulting from the alleged breach of the Printing Agreement. These have been estimated at €400,000.

51. Insofar as the claim for arrears is concerned, in my judgment, Webprint has not made out, even on a *prima facie* basis, that any of the alleged wrongdoing of each of the third to eighth named defendants is a cause of the failure of TCP to pay to it arrears which are the aggregate of monies going back several years. The evidence is that already in June, 2011, there were arrears in the order of €2 million. The figure then fluctuated in the subsequent period. In my judgment, Webprint has established a *prima facie* case to recover this amount from TCH. For the reasons already stated, it does not appear that the Court can take into account this amount in considering the financial position of Webprint for the purposes of determining that the quantum of damages it might obtain, if successful in its claims against the third to eighth named defendants, is of an order of magnitude to reverse its present financial position and admitted inability to pay.

52. Within the claim for arrears is the claim for €831,031, the amount by which the arrears increased between September, 2011 and March, 2013. That is a claim pursued against all the defendants, as is the claim for €400,000 for staff redundancy costs. Those are amounts which the Court should take into account in determining whether Webprint has established a *prima facie* case in relation to the quantum of damages it might obtain, if successful in its claims against the second to eighth named defendants.

53. Apart from the claims for arrears (either the full amount or the increase form September, 2011 to March, 2013) and redundancy, the only attempt to quantify the probable damages recoverable by Webprint for all its claims is in relation to the loss of anticipated profits under the Printing Agreement as modified by the evidence of Mr. Stewart Dunne of the accountancy firm BDO, auditors to Webprint. These are the damages claimed for the alleged breaches of contract (by TCP, TCH and Landmark), procuring breach of contract (by the second to eighth named defendants) and breaches of duty including fiduciary duty and conspiracy.

54. The primary claim made by Webprint, which is common to the second to eighth named defendants and which is also the fundamental claim in the proceedings, is the procuring of a breach of the Printing Agreement by TCP. I propose, therefore, considering it first. There is a separate claim made against the Receiver for alleged breaches of his duties, but for reasons explained below, it appears to me that the practical consequences for Webprint, which have been established on a *prima facie* basis, of both these claims are similar. There has been no separate quantification done by or on behalf of Webprint in this application for the claim for damages against the Receiver. Evidence has been given, primarily by Mr. Stewart Dunne of BDO, auditors to Webprint, in relation to Webprint's quantification of its claim for damages as pleaded in relation loss of anticipated profits under the Printing Agreement. In the statement of claim, it is claimed that "assuming that the earnings under the Printing Agreement would have remained constant over the remainder of the term of the agreement, the net present value of that agreement to Webprint (applying a discounted cash flow model) is approximately €22,220,000".

55. Mr. Stewart Dunne of BDO, auditors to Webprint, analyses the basis for the figure claimed of €22,220,000 by reference to Webprint's management accounts for the year ended December 2012, its projections for 2013 and the offer of a €2 million price reduction to TCP. He makes the point that Webprint had taken account of falling volumes of printing under the Printing Agreement in its projections for 2013. He concludes at para. 10 of his first affidavit in the last indent:

> "• Therefore, assuming that earnings under the Printing Agreement would have remained constant over the remainder of the term of the agreement with this price reduction [€2m] the net present value of the agreement to Webprint amounts to €17,452,000."

56. The detail of Mr. Dunne's figures is disputed on evidence adduced on behalf of the defendants. In particular, affidavits from two accountants, Mr. George Maloney and Ms. Deirdre Carwood have been filed. However, independently of the criticism of the individual figures and certain financial assumptions made by Mr. Dunne, the defendants all make a more fundamental submission in opposition to the submission that there is *prima facie* evidence that a court would assess the quantum of damages to which Webprint may be entitled at the level claimed if it were established that each or any of the second to eighth named defendants are guilty of the tort of procuring breach of contract. The defendants submit that there is no evidence before the Court on this application which permits the Court to form a view that Webprint has established a prima facie entitlement to have damages for procuring breach of contract assessed upon the basis that the Printing Agreement with TCP would have continued for the balance of the 15 years, or even any significant period of time, even with a reduction of €2 million *per* annum. The defendants submit that it is the undisputed insolvency of TCP and of the TCH Group that has brought the Printing Agreement to an end in the sense that TCP's inability to discharge its financial obligations under the Printing Agreement arose from its financial position and that of the TCH Group. The Court should not resolve this issue on this application but must take into account the defendants' submissions to decide whether Webprint has made out a *prima facie* claim on causation for damages in the order of the amount for which it contends.

57. In my judgment, the defendants' submissions are correct to this extent. Even on a *prima facie* basis, Webprint has not made out a claim that any damages to which it may be entitled by reason of the alleged tort of procuring a breach of contract by the second to eighth named defendants could be assessed upon a basis that Webprint would have continued to have had the benefit of revenues from the Printing Agreement (even with a reduction of €2 million *per* annum) for the unexpired approximately eight years of the 15-year Agreement or any significant period after March, 2013. The undisputed evidence of the insolvency of TCP and TCH and the unwillingness of AIB to continue to support the TCH Group does not permit the Court to so hold.

58. As already stated, the breaches of contract primarily alleged against TCP and the clauses of the contract of which it is alleged the second to eighth named defendants procured a breach are those in Clauses 8(7), 9(3) and 21. They include, in particular, the notice provisions and obligations to use best endeavours to have the purchaser of certain of the titles use Webprint to print same. Webprint contends that if notice were given to it and TCP's best endeavours used, then it has a *prima facie* claim that it would have achieved one or other of the following:

> (i) It could have sought to enter into a new agreement to print the titles (albeit at a reduced rate) with the purchaser,

whether that be Landmark or some other purchaser; or

(ii) Webprint itself might have acquired some or all of the titles.

59. Whilst Webprint, for the purpose of this application, may be considered as having established on a *prima facie* basis a claim to be entitled to damages for the commission by the second to eighth named defendants of the tort of procuring a breach by TCP of its obligations under Clauses 8(7), 9(3) and 21 of the Printing Agreement, and also to have established on a *prima facie* basis that the consequences for it of such breach is that it was deprived of the opportunity of entering into new printing agreements with Landmark or other purchasers of the titles or seeking to acquire the titles from the Receiver, it has not put before the Court any even *prima facie* evidence of the probable quantum of the loss allegedly suffered by Webprint by reason of these lost opportunities. Insofar as Webprint adduced evidence of a revenue stream from printing the transferred titles and its impact on Webprint's current financial position, it confined itself to the revenue stream under the Printing Agreement with the reduction of €2 million *per* annum. There is, in my judgment, no prima facie evidence on this application which would permit the Court to conclude that if notice had been given to Webprint of the proposed sale of titles, that it would have achieved, either with Landmark or any third party, an agreement to print the titles into the future with only a reduction of €2 million on the revenue to which it is entitled under the Printing Agreement. The evidence is that TCH Group had sought a reduction of €3 million in printing costs from Webprint. Further, whilst the agreement between the Irish Times and Landmark is not disclosed, Mr. Crosbie states that it is at a level which would have given TCP more than the net annual savings of €3 million *per* annum sought. I am not making any findings that such is the position.

60. However, at this stage of the application, the onus is on Webprint to establish a *prima facie basis* for obtaining the quantum of damages for which, it contends it would be entitled, if successful. Insofar as its contention on this aspect of the case is that by reason of the absence of notice and/or best endeavours by TCP to procure that it print the titles after their sale, or even to be entitled to print the daily Newspapers, the onus is on it to establish, at least on a *prima facie* basis, that it might have entered into a print agreement that would give it revenues, which, either on a capitalised basis or having regard to a probable current income stream, would reverse its present financial position. Mr. O'Doherty, at para. 78 of his first affidavit, in setting out what he considered might have happened if Webprint had been given notice and the "requisite procedural safeguards had been afforded to Webprint" states that "this would have allowed Webprint the time and negotiating opportunity to partner with potential acquirers, so as to continue to print the Newspapers, albeit on revised terms". However, he does not offer any evidence as to what those revised terms might be. References are also made to market prices but no indication given as to what these figures might be. Further, the only other evidence available to the Court as to what may have occurred if Webprint had been given notice or by some other means an opportunity to negotiate new print agreements with a purchasers of the titles is, as Mr. O'Doherty explains at para. 25 of his second affidavit, Webprint reached agreement with the Examiner of PPL to print the 'Sunday Business Post' "albeit at a reduced price". Again, no evidence is offered as to the reduced price.

61. It must be recalled that on this aspect of the application, the onus is on Webprint to establish a *prima facie* case that the quantum of damages it might obtain, if successful, are of an order of magnitude to reverse its present financial position and admitted inability to pay the defendant's costs. This places on Webprint in the first instance an onus to establish a *prima facie* case as to the quantum of damages it might obtain, if successful. As pointed out by Clarke J. in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7, this does not require a detailed quantification of probable damages but it does require, in my judgment, *prima facie* evidence upon which Webprint can make an arguable case for damages of an approximate amount or order of magnitude. This appears to require it to establish, at least on a *prima facie* basis, that if given the opportunity, it might have entered into print agreements with estimated revenues, which would reverse its present financial position. The only evidence offered by Webprint to the Court relates to revenues under the Printing Agreement which, for the reasons already stated, do not appear to constitute, even on a prima facie basis, an estimate of losses which Webprint may have suffered by reason of its inability to have been given an opportunity of entering into print agreements with either Landmark or third parties.

62. The alternative claim is that Webprint may have purchased some or all of the titles. Mr. O'Doherty, in his affidavits, refers to proposals made with the assistance of Capnua, corporate finance advisors to Webprint, and subsequently Better Capital in the UK, to purchase the TCH Group in 2012. Several of the defendants, in replying affidavits, make the point that Webprint has provided no evidence that it was in a position to raise capital in March 2013 for the purchase, either of the TCH Group or any of its titles. No such evidence was adduced by Webprint in reply. In the absence of any evidence from Webprint, where the onus is on Webprint, it does not appear to me that there is a basis upon which the Court could conclude on this application that it has established on a *prima facie* basis that it has suffered significant financial loss by reason of its failure to be given an opportunity to purchase some or all of the titles published by the TCH Group or the assets of the TCH Group. Further, no evidence has been adduced even if finance were available on a prima facie basis of the financial impact on Webprint of purchasing the titles and printing.

63. The final submission on this aspect of the application to which I need to refer is the submission made by counsel for Webprint that where the Court is awarding damages for procurement of breach of contract "the damages are damages at large". He did so in reliance upon a number of English cases which follow a judgment of Lord Esher M.R. in *Exchange Telegraph Company Limited v. Gregory & Co.* [1896] 1 Q.B. 147 at p. 153. The principles applicable to damages for the tort of inducement of breach of contract are summarised by McGregor in *McGregor on Damages*, 18th Ed. (London, 2012) at pp. 1634 to 1635, paras. 40-004 and 40-006:

> "**40-004** A massive enlargement of the action for enticement of a servant was made in 1853 in *Lumley v. Gye*. This famous decision ushered in a new tort, that of inducement of breach of contract which makes actionable the inducing by the defendant, intentionally and without lawful justification, of any person to break any contract made by him with the claimant, if the claimant is thereby damaged.
>
> **40-005** Although damage is the gist of the action, little exact detail can be given as to the measure of damages, as the courts have consistently endorsed Lord Esher M.R.'s pronouncement in *Exchange Telegraph Co v Gregory* that 'it is not necessary to give proof of specific damage' because 'the damages are damages at large'. Neville J. in *Goldsoll v Goldman* stated the position in somewhat more detail. 'The damage,' he said,
>
> > 'may be inferred, that is to say, that if the breach which has been procured by the defendant has been such as must in the ordinary course of business inflict damage upon the plaintiff, then the plaintiff may succeed without proof of any particular damage which has been occasioned him'.
>
> **40-006** The type of damage is likely to be inferred by the court is loss of profits. This may be the profit that the claimant would have made on the contract the breach of which the defendant has induced. Alternatively, it may be the profit that the claimant is prevented from making on other contracts."

Later, at p. 1636, para. 40-008, McGregor makes clear that although damages are at large, the only loss which the Court is prepared to infer is a pecuniary loss, pointing out that the primary protection afforded by the tort is against business losses.

64. Whilst there was some dispute by counsel for the defendants as to precisely the applicable principles, for present purposes, I am satisfied that Webprint has established a *prima facie* case that if it were to succeed against the second to eighth named defendants in its claim that they (or some of them) procured a breach by TCP of its obligations to Webprint under Clauses 8(7), 9(3) or 21 of the Printing Agreement in relation to the notice, best endeavours or good faith provisions, that those breaches are such that in the ordinary course of business it must have inflicted damage on Webprint by reason of the missed opportunities to seek to reach agreement to print the titles with Landmark or some other purchaser or an opportunity to purchase some or all of the titles. I am also satisfied that Webprint has put before the Court an arguable case on the law that it would not have to prove actual loss, but that the Court could measure damages having regard to the type of damage which it is prepared to infer on the facts of the case. In that sense, the damages may be at large.

65. However, damages to be awarded are damages for the commission of a tort. The primary purpose of such damages is compensatory and to attempt to place Webprint in the position it would have been if the tort of procurement of breach of contract were not committed. In measuring the damages to be awarded, a Court would have to, on the basis of the evidence presented, attempt to measure damages in an amount which would compensate Webprint for probable losses it may have suffered by reason of the tort committed. Applying principles set out by Clarke J. in *Connaughton Road*, Webprint, as plaintiff, is still obliged to establish at least a *prima facie* case that the quantum of damages which it might obtain in the event that it is successful is of an order of magnitude sufficient to reverse its current financial position whereby it would be unable to pay the defendants' costs in the event that the defendants were successful. In my judgment, even taking into account that if a Court ultimately were to award damages to Webprint against the defendants for procurement for breach of contract, it would, in the sense set out above, be determining "damages at large", the onus remains on Webprint, in accordance with the *Connaughton Road* principles, to establish in this application a *prima facie* case that the quantum of damages so measured would be of an order of magnitude described. For the reasons already set out in this judgment, Webprint has not offered evidence, even on a *prima facie* basis, of the order of the financial damage it may have suffered by reason of loss of opportunity to acquire some or all of the titles or seek to reach agreement to print the titles either with Landmark or a new purchaser which would permit the Court on a *prima facie* basis determine the probable order of magnitude of recoverable damages. Accordingly, I have concluded that it has not discharged the onus, even on a *prima facie* basis, of establishing that the quantum of damages which it might obtain in the event it was successful is of an order of magnitude sufficient to reverse its current financial position in which it is admitted that it would be unable to pay the defendants' costs in the event that the defendants were successful.

66. Webprint has failed to establish a *prima facie* case as to the quantum of damages it might obtain if successful in its claims for damages for procuring breach of contract against the second to eighth named defendants. It did not submit an entitlement to damages in respect of its other claims against the second to eighth named defendants in respect of the transactions on 6th/7th March, 2013, on any different basis. Hence it appears to me that the only recoverable damages of which there is *prima facie* evidence of quantum to which Webprint has made out a claim on a *prima facie* basis are the following:

> (i) Against TCH for €2,830,800 in respect of the arrears; and
>
> (ii) Against the third to eighth named defendants for €1, 231,031 (being the sum of €831,031 and €400,000).

67. Webprint, while it made an admission of inability to pay the defendants' costs if successful, has not adduced evidence of its financial position since it ceased printing pursuant to the Printing Agreement. It is stated to be continuing to trade with the support of its Bankers. However having regard to the evidence of Mr. Dunne in relation to the financial position of Webprint and his conclusion, in particular at para. 28 of his first affidavit, even on an assumption that Webprint continued to have the benefit of the Printing Agreement, it does not appear to me that there is *prima facie* evidence that damages in either of the above amounts is on a *prima facie* basis of an order of magnitude to reverse the present financial position of Webprint and its admitted inability to pay aggregate costs in the order of €3 million. Mr. Dunne, at para. 10 of his affidavit, sets out the projections of Webprint for 2013 with the €2 million price reduction factored in and indicates that the Printing Agreement would contribute €3,413,000 to EBITDA. Upon that assumption, then in para. 28, he concludes:

> "In all the circumstances, I am satisfied that if the plaintiff had not suffered the wrongs complained of in the proceedings and continued to have the benefit of the Printing Agreement, it would, in all likelihood, have comfortably been in a position to meet an unbudgeted liability of €3.1 million. If the plaintiff had the benefit of the Printing Agreement but had agreed a reduced price with TCP, then it would have had greater difficulty in meeting such an unbudgeted liability, but I believe it still would likely have been able to do so given its profitability, projected business, net asset position, and supportive relationship with its bankers. Even then, it would have had net assets of over €7 million. Moreover, if the plaintiff had not suffered the increase in arrears from September 2011 to March 2013 plus the redundancy costs, which together total €1.23 million, then it would have been correspondingly even better placed to meet an unbudgeted liability even if there had been an agreed price reduction."

Mr Dunne's conclusion is based upon the continuation of revenues from the Printing Agreement. For the reasons explained, Webprint has not established a *prima facie* case to be entitled to damages on such a basis. Hence, it does not appear to me that the above conclusion of Mr. Stewart constitutes even *prima facie* evidence that if Webprint were to be awarded damages, either of the order of €2.8 million or €1.4 million, that it would reverse its present financial position and inability to pay the aggregate costs of the second to eighth named defendants.

Points of Law of Public Importance

68. It is well established that one of the special circumstances in which a Court may exercise its discretion to refuse to grant an order for security for costs is where the case involves or raises a point of public importance. On the question as to how the Court should determine whether the points of law identified by counsel for Webprint constitute points of law of public importance which would entitle the Court to exercise its discretion against ordering security for costs, a number of authorities were opened to me which broadly follow one another but which attempt to formulate criteria according to which the Court should determine this issue in slightly different ways. It appears to me, respectfully, that the formulation suggested by Laffoy J. in *Village Residents Association Ltd. v. An Bord Pleanála & Ors. (No.2)* [2000] 4 I.R. 321 at p. 333, is of particular assistance. There, she stated:

> ". . . I am of the view that the criteria for determining whether a question of law of public importance exists which can be extrapolated from the judgment of Morris J. in *Lancefort Ltd. v. An Bord Pleanála* [1998] 2 I.R. 511 - whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered, not only in the instant

case but in future cases also - . . ."

Whilst, as indicated, I find this formulation of assistance, it is not the only permissible formulation of how the Court would identify what has been sometimes referred to as "a point of law of exceptional public importance" as *per* Charleton J. in *Millstream Recycling v. Gerard Tierney and Newtownlodge Ltd.* [2010] IEHC 55.

69. Central to all the formulations is that both the point of law and the requirement or desirability that it be determined must transcend the interests of the parties before the Court. The Court may also take into account whether the law relating to the alleged point of public importance is in a state of uncertainty such that it is in the common good that the law be clarified so as to enable the courts to administer justice, not only in the present case but also future cases.

70. The points of law identified by counsel for Webprint are:

> (a) The extent to which the various insolvency procedures invoked in this case gave rise to an abuse of process; and
>
> (b) The procedural rights and protections which ought to be afforded to a creditor involved in the restructure of a corporate group by way of pre-pack receivership.

71. In submission, counsel placed particular reliance upon the UK Statement of Insolvency Practice 16 (known as "SIP 16") which is stated to have entered into force in the UK on 1st January, 2009, and to provide some guidance for insolvency practitioners in relation to pre-pack administrations. It is not submitted to be binding on the Receiver in the present proceedings, but rather to set standards which the Court might consider applicable. Counsel, as part of (b) above, also identified the potential breach of duty of the Receiver and failure to comply with the requirements of s. 316A(3)(a) of the Companies Act 1963, and the public importance of the nature and extent of the duty owed by a receiver pursuant to the section.

72. In my judgment, Webprint has not identified a point of law in this case of such gravity and importance as to transcend the interests of the parties actually before the Court which could be considered in the interests of the common good to require clarification. Whilst pre-pack receiverships may be relatively novel, the term is not a definition of any one type of transaction. It covers many different potential factual situations. In any so called pre-pack receivership the obligations on the participants will depend upon the facts and nature of the transactions. The determination of what were or were not the obligations of the Receiver herein will fall to be determined by applying well-established principles or provisions in the Companies Act (about the construction of which no uncertainty was identified) to the particular facts of this case. There may well be points of importance which, if determined in this case, might affect subsequent transactions. However, that is the position in many cases which come before the courts and in my judgment, falls short of the necessary characteristics to constitute a question of law of public importance in accordance with *Village Residents Association Ltd. v. An Bord Pleanála & Ors.* and the other decisions referred to in this judgment.

Conduct of the Proceedings

73. The manner in which a defendant conducts litigation prior to the application for security for costs may also constitute a special circumstance which justifies the Court exercising a discretion to refuse security: *Heritage Holidays Ltd. v. Indigo Services Ltd.* [2005] 2 I.R. 115. Delay in making an application has been found in several cases to constitute a special circumstance. In the present case, no delay is alleged. Rather, Webprint contends that the reluctance on the part of the defendants to disclose precisely what transpired in the transactions the subject matter of the Scheme and produce copies of the relevant documents has resulted in a far more extensive exchange of affidavits in respect of the application for security for costs which has resulted in additional costs for Webprint.

74. All defendants submit that no aspect of their conduct of the litigation to date is such as to warrant the Court considering that a special circumstance exists not to exercise its discretion in favour of an order for security for costs. They rely upon the fact that they indicated as early as the application for entry in the Commercial List that they proposed making applications for security for costs. Those applications were brought on promptly and in the intervening period they have complied with directions in relation to pleadings and replies for particulars.

75. It does not appear to me that there has been any conduct on the part of the defendants which would warrant the Court considering that special circumstances exist such that it should exercise its discretion against awarding security for costs. Insofar as there may have been any reticence on the part of the defendants in disclosing the documents relevant to the transactions which necessitated additional affidavits on the application for security for costs, that is a matter which would go to the costs of the motion for security for costs. Accordingly, I reject that ground.

76. Counsel for Webprint also sought to rely upon alleged conduct of the defendants in relation to the transactions the subject of Webprint's claim. Such alleged conduct does not fall to be considered under this heading but rather, goes to the question as to whether a defendant has established a *prima facie* defence.

Interests of Justice

77. Mr. O'Doherty, on behalf of Webprint, has averred that if security is ordered against it, it will not be able to proceed with the action. Counsel for Webprint submits that this is a matter to be taken into account where the Court should exercises its discretion in the interests of justice. However, he correctly does not submit that the fact that the making of an order for security for costs would bring to an end these proceedings of itself amounts to a special circumstance. As pointed out by Keane J. in the High Court in *Lismore Homes Ltd. (In Receivership) v. Bank of Ireland Finance Ltd.* [1992] 2 I.R. 57, at p. 63:

> "Section 390 of the Act of 1963 expressly envisages that an impecunious plaintiff company may be required to give security for costs and it may well be that in many cases this will mean the end of the action, unless someone other than the company itself is prepared to put up the security. To refrain from granting an order for security, save in the exceptional circumstances already referred to, simply because it might have the effect of stifling the plaintiff companies' actions would be to render the section nugatory."

I respectfully agree. As has often been stated, the ability to trade with the benefit of limited liability is a privilege. That privilege brings with it certain limitations. One of those is pursuant to the express provisions of s. 390 of the Act of 1963. Its purpose is to create a fair situation for both plaintiffs and defendants. It does not preclude a limited company which may be unable to meet the costs of defendants, if successful, from proceeding, but it does require that absent special circumstances, it provide security for costs to do so. In practical terms, this means that those persons who may have an interest in or potentially may benefit from successful proceedings by an impecunious limited company must put the company in a position to provide security if the action is to proceed. Were that not so, an impecunious limited company could pursue a claim, as plaintiff, with no risk to those (creditors or

members) who might benefit if the company succeeded whilst the defendant must incur the cost of defending and would have no way of recovering its costs, if successful, in its defence.

Conclusion

78. My decisions on the issues in dispute in this application are:

(i) The application of the first named defendant, Thomas Crosbie Printers Ltd., is dismissed.

(ii) The other TCH defendants *i.e.* the second, third, seventh and eighth named defendants have made out a *prima facie* defence.

(iii) Webprint has not discharged the onus of establishing special circumstances for which orders for security for costs in favour of the second to eighth named defendants should not be made against it.

(iv) The second to eighth named defendants are entitled to orders for security for costs. I will hear counsel as to the precise form of the order, having regard to the joint representation of the second, third, seventh and eighth named defendants and separate representation of each of the remaining defendants and separate estimates of costs for the defendants separately represented. The Supreme Court decision in Lismore Homes suggests that there should be separate orders for those separately represented with reference to the individual costs estimated.