THE HIGH COURT

[2015 No. 521 P.]

BETWEEN

TÍR NA NÓG PROJECTS (IRELAND) LIMITED

PLAINTIFF

AND

P.J. O'DRISCOLL AND SONS (A FIRM),

P.J. O'DRISCOLLS (A FIRM) AND FERGUS APPELBE

DEFENDANTS

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 6th day of September, 2017.

Nature of the case

1. This is an application for security for costs pursuant to s. 52 of the Companies Act 2014. It is not in dispute that the plaintiff company would be unable to meet the costs of the defendant if unsuccessful in the substantive proceedings. The issues raised are; (1) whether the defendant has a *prima facie* defence; and, (2) whether there are exceptional circumstances warranting a refusal of the order sought. The substantive proceedings involve a claim of professional negligence against a firm of solicitors who had been instructed by the plaintiff in relation to a planning matter. Because one of the issues in the case is whether there is a *prima facie* defence based on the statute of limitations, it is necessary to lay out the chronology of events in some detail.

Chronology of Events

2. In 1995, the plaintiff company obtained planning permission for a development comprising thirty-three houses and a leisure centre at Cappanacush, Kenmare, Co. Kerry. The construction was not carried out at this time and the planning permission lapsed.

3. In February 2002, the plaintiff again applied to Kerry County Council for planning permission in respect of the Cappanacush development. The Council did not make a decision within the statutory time period, which expired on the 15th June, 2002. As a result of the Council's failure to make a decision within the statutory time-frame, the plaintiff was entitled to a default planning permission unless the development constituted a material contravention of the Development Plan for County Kerry in force at the time the application was made.

4. In July 2002, the plaintiff instructed the defendant solicitors in relation to the matter. The firm has changed its name from the second defendant to the first defendant and the third defendant was a partner in the firm. The Court has seen a series of written exchanges dating from this month onwards. By fax dated the 19th July, 2002, Mr. Schoenmakers, a director of the plaintiff company, wrote to Mr. Fergus Appelbe, the third defendant, saying that he had been advised by an architect that they should to write to the Council requesting an immediate grant of permission, give them two weeks maximum, and in the event of refusal, to apply to the High Court for an order of *mandamus* against the Council. The letter continued:-

> "The above procedure seems simple, Fergus, and if you agree I would appreciate if you could find the time to write and send the registered letter to K.C.C. as soon as possible."

Thus, it is clear that, from the beginning, the plaintiff envisaged proceedings seeking *mandamus*, a fact which has been denied by the defendants in the present proceedings. By letter dated 23rd July, 2002, Mr. Appelbe replied, saying simply: "I would like to be positively advised by an expert in planning whether this amounts to a material contravention or not."

5. It seems that senior counsel was instructed at an early stage and, by letter dated 25th July, 2002, senior counsel enclosed an opinion, and stated:-

> "You should formally call on the County Council to acknowledge that a default permission has been deemed to be granted on the 15th June, 2002 and to issue the grant of permission forthwith."

The opinion itself stated that, in counsel's view, a decision to grant permission for the development must be regarded as having been granted on the 15th June, 2002.

6. By letter dated the 25th July, 2002, to Mr. Appelbe, a Mr. J.E. Keating, architect, set out his view that the proposed project did not materially contravene the Development Plan.

7. By letter dated the 2nd August, 2002, Mr. Appelbe wrote to the Council saying:-

> "As nothing has been heard in respect of this application, it appears to us that planning permission is deemed to have been granted on the 15th June, 2002, and we request you to issue the permission on that basis forthwith."

8. By fax dated the 31st August, 2002, Mr. Schoenmakers wrote to Mr. Appelbe referring to the sales documentation in respect of the first house in the development and asking that pressure be put on the vendor's solicitor. He added:-

> "Same goes for K.C.C. to which I hope you have sent a renewed registered letter. Possibly you might consider to gather all required information re. a High Court order of *mandamus*."

This was the second time he had referred to the seeking of *mandamus*.

9. On the 2nd October, 2002, more than a month after the last letter from Mr. Appelbe, the Council replied to him, indicating that the matter would be dealt with within a week. On the 10th October, 2002, the Council stated that the Cappanacush development would materially contravene the Kerry County Development Plan and that planning permission could not be granted by default. On the 30th October, 2002, the Council issued a formal refusal of planning permission.

10. By letter dated the 29th November, 2002, Mr. Appelbe wrote to Mr. Schoenmakers referred to discussions between themselves

and the architect and said: "we understand now that you are assembling information pertinent to the argument as to whether this was a material contravention or not" and "[w]e need details of all the planning history of the property so that I can put a case to [senior counsel]". It referred to the fact that a planning consultant was being employed and concluded: "I repeat, the kernel question is whether your recent application was a material contravention or not." There was no reference to judicial review proceedings.

11. By fax dated the 16th September, 2002, Mr. Schoenmakers referred to three parties immediately interested in the purchase of twenty-seven plots and the need for planning permission to be resolved. He said: "Could you let me know what timetable to expect and what we could possibly do to obtain the order as soon as possible?" By fax dated the 20th September, 2002, he again raised concerns about delay and said:-

> "Could you please let me know what the actions till now have been, whether you have either had any contact that indicates that a High Court order is not needed or have information on when a High Court order will be obtained."

Thus, it seems clear that he was anxious that progress be made quickly and was communicating this to Mr. Appelbe.

12. By fax dated the 9th November, 2002, Mr. Schoenmakers referred to a number of developers who wanted to purchase the plots and start the build but were only prepared to continue discussions if he could give them a copy of planning permission. He said that the delay was jeopardizing his chances and could not afford any further delays. He said:-

> "Unless [senior counsel] advises to the contrary I would appreciate you to immediately apply to the High Court for an order of *mandamus* regarding Kerry County Council to make the grant of permission."

This was his third explicit reference to seeking *mandamus*.

13. By letter or fax of December, 2002, Mr. Schoenmakers wrote to Mr. Farry (a planning consultant he had retained) enclosing documentation, saying that this was relevant to fighting the "material contravention" issue and "thus obtain an order of *mandamus* or equal from the High Court."

14. Despite the apparent pressure coming from Mr. Schoenmakers for matters to proceed to Court as soon as possible, no application for judicial review was brought on his behalf. Further, what is significantly absent from any of the correspondence during this period is any reference to any time limit in respect of judicial review proceedings. Mr. Schoenmaker does not appear to have been advised in this regard at all.

15. The next significant step appears to be that the planning consultant was retained and his report produced. This report in final form was available in August, 2003, and set out his view that the proposed development did not constitute a "material contravention" of the Development Plan. At this stage, 10 months had elapsed since the Council's refusal of planning permission.

16. By fax dated the 29th August, 2003, Mr. Schoenmakers wrote to P.J. O'Driscoll solicitors asking that the matter be given attention and saying "our potential customers for the sale of approx. twenty-five plots do not wish to wait much longer" and saying, *inter alia*:-

> "Please could you let me know who has to do what in order to have a High Court date set…could you please apply pressure to those who have to supply information so that we do not lose more time?"

17. By letter dated the 30th October, 2003, an opinion of (the same) senior counsel dated the 28th October, 2003, was sent to Mr. Schoenmaker. The defendants rely heavily upon this to support their argument that they have a *prima facie* defence that the present proceedings are statute-barred on the basis that any cause of action in professional negligence accrued on this date. After setting out the factual history of the case, senior counsel stated at the second page of his opinion:-

> "The position now is that, notwithstanding the scandalous disregard of Kerry County Council for the two-month period within which they must make their planning decision, its purported decision of the 30th October, 2002, is beyond the reach of judicial review."

He then set out the relevant statutory provisions with regard to time limits. He added:-

> "From the papers with which I have been briefed it does not appear that your client could successfully argue that there is good and sufficient reason to extend the time for the taking of judicial review proceedings of the Kerry County Council decision of October, 2002."

The opinion went on to refer to certain authorities on the appropriate time limit and pointed out that, even under a six-month time limit, if it applied, that deadline had expired in April, 2003. The opinion went on to say:-

> "On the other hand your client could issue proceedings seeking a declaration of the permission shall be deemed to be granted on the 15th June, 2002, and not seek to challenge the decision of the 30th October. That might be a useful tactic to employ but obviously Kerry County Council would in those proceedings use the argument that the development would be a material contravention of the development plan."

The opinion concluded:-

> "On balance I would favour the initiation of proceedings either in the Circuit Court or the High Court claiming a declaration that a default permission should be deemed to have been granted on the 15th June, 2002, combined with a fresh application for planning permission for a revised development"

18. The next significant step was a consultation with senior counsel in Dublin on the 10th March, 2004, attended by a solicitor from P.J. O'Driscoll and Mr. Fred Schoenmaker and Mr. Alex Schoenmaker. Again, significant reliance is placed upon this date by the defendant. The attendance note records that the client was advised that it would now be extremely difficult to insist that he had a default permission. There was discussion about possible variation of the plan and the client gave details of what had been done to date in respect of the building. He also indicated that he had been in discussion with the Council and had hoped for an informal compromise but that nothing had come of it. Counsel then advised that they should issue proceedings without further delay. They would be met with the claim that they had delayed and for some judges "this claim of delay will defeat us" and "even with others it would certainly be an issue." He said that "Normally if you are challenging you must move very quickly." He said that "the real weakness we have is the delay." This was a "clear case" and "the only problem is the delay" and "the best tactic" was to force the

Council's hand. The problem with delay in Mr. Farry (the planning consultant) giving his report was because certain files could not be found by the Council and had been lost. Counsel said "[w]e need to co-ordinate data on the delay for the court." Thus, it appears that delay as an issue was certainly emphasised to the client at this consultation.

19. Presumably a decision was made to issue plenary proceedings, as by letter dated the 7th April, 2004, Ms. O'Neill from P.J. O'Driscoll Solicitors wrote to Mr. Schoenmakers saying that counsel had been briefed and proceedings were drafted and sent to senior counsel for his approval. By letter dated the 12th May, 2004, Ms. O'Neill wrote to Mr. Schoenmakers saying that she had been speaking with junior counsel who had indicated that she had discussed the matter with senior counsel and that he "has decided not to proceed by way of judicial review but by plenary proceedings" and "this essentially means that time is no longer of the essence." However, junior counsel was going to speak to senior counsel "to speed the process up in any way she can." The only inference that can reasonably be drawn from this is that the client had again expressed a concern at the slow pace at which matters were proceeding. I note the reference to judicial review not being an option, so somebody had obviously asked about this, although it is not beyond doubt that it was the plaintiff who had done so.

20. On 9th June, 2004, a plenary summons was issued on behalf of the plaintiffs against the Council. On the 7th July, 2004, a statement of claim was delivered, seeking a declaration that that a decision was deemed to have been made granting permission on the 15th June, 2002, and seeking damages for negligence and breach of duty.

21. On the 11th February, 2005, the Council delivered an objection and defence in which it was pleaded that the plaintiff was not entitled to pursue the relief by way of plenary proceeding and should have brought judicial review proceedings which were now time-barred. It also pleaded that the granting of a planning permission would have been in material contravention of the development plan for Kerry.

22. Particulars were sought and given and an order for discovery was made by Clarke J., as he then was, on the 28th February, 2008.

23. Relations between Mr. Schoenmakers and the defendants deteriorated sometime after that and it appears to have arisen in connection with the payment of fees. By letter dated the 8th May, 2009, P.J. O'Driscoll solicitors wrote to Mr. Schoenmakers in connection with the payment of fees. It indicated that he had been advised at the meeting with counsel in October of the previous year that considerable outlays would be required for the High Court case and also that he had been advised at that meeting:-

> "that you have a risky case due to the items as set out to you that day, to include but two, first the material contravention of the County development plan if a default planning was allowed, and secondly the issue as to whether or not you should have taken a judicial review against Kerry County Council as opposed to plenary hearing in the High Court'.

It referred to the fact that the Council currently had a preliminary motion before the Court in relation to the latter issue; namely, "whether the case brought by you is in the correct forum as opposed to being brought by way of judicial review." The letter went on to discuss the matter of fees and concluded that if he refused to pay their costs they would be left with no alternative but to apply to come off record.

24. By email dated the 20th May, 2009, Mr. Schoenmaker referred to the letter dated 8th May, 2009 and says:-

> "What does utterly surprise us is the fact that you have decided in the past to go for a particular 'forum', as you describe, and all of a sudden during the last communications warn us that this choice is our weakness and even threat. Do we now have to conclude that not only you have led us on the wrong route but you also wish to be handsomely paid because you yourself no longer believe that the case might be won? And that consequently those costs might not be awarded?'

Later the email said:-

> "We understand and appreciate your company's conclusion to decide to cease representing us and to come consequently off record. We will deal with the consequences of your decision and consider our options with regards to the future…At this junction we wish to express our regret that the personal relationship of over fifteen years with Fergus Appelbe that we valued highly, in spite of our criticism towards the snail pace of his never ending professional activities for us, will no doubt end'.

25. By letter dated the 18th June, 2009, P.J. O'Driscoll solicitors replied:-

> "For the record, we did not decide in the past 'to go for a particular forum'. That decision was out of our control given that when you first instructed this office in the matter the deadline for potential judicial review had passed, and consequently there was only one forum in which this matter could go. Consequently, High Court plenary proceedings were issued as that was the only option available to you. This has already been explained to you."

It is difficult to reconcile this with the correspondence in 2002, set out earlier. The letter then went on to refer to fees and practical arrangements for terminating the professional relationship. A motion issued for the trial of a preliminary issue but it appears that this has not been heard and that the last return date on the motion was 9th November, 2009, and no further steps have been taken in relation to those proceeding since that date. The defendants came of record by order dated the 22nd February, 2010. The plaintiff's position (as will be seen below) is that those proceedings are doomed to fail in light of the *Shell E. & P. Ireland Ltd* [2013] 1 I.R. 247. The defendant disputes this and points to the fact that the proceedings are still in existence.

Present Proceedings Are Commenced

26. As a precursor to the present proceedings, by letter dated the 16th December, 2014, the plaintiff sent the defendants a letter stating that they had failed to advise the plaintiff that the judicial review proceedings should have been issued within two months of the refusal of the planning permission and that the plenary proceedings were doomed to fail. They sought compensation for loss caused by the defendants negligence.

27. The plenary summons in the present proceedings was issued on the 23rd January, 2015 and the statement of claim on the 13th October, 2015. The essential claims are:-

> (a) The defendants were negligent in failing to follow instructions to seek an order of *mandamus* to compel the Council to issue a grant of planning permission in circumstances where the Council had failed to issue a decision on the plaintiff's application within the statutory time limit;

(b) The defendants were negligent in failing to issue proceedings by way of judicial review to quash the decision of the Council purporting to refuse planning permission;

(c) The defendants were negligent in failing to advise the plaintiff of the need to challenge the decision of the Council;

(d) The defendants negligently advised the plaintiff to continue with plenary proceedings which had been issued and/or failed to advise the plaintiff to discontinue those proceedings on receipt of the Objection and Defence of the Council.

The relief sought consists of loss of profit alleged to have arisen from the failure to issue the correct form of proceedings so as to procure a grant of default planning permission for the development, together with the legal costs of the plenary proceeding which were "doomed to fail."

Motion for Security for Costs

28. The present motion seeking security for costs is dated 4th April, 2016, and was grounded upon an affidavit of Mr. Ted Hallissey, a solicitor in the defendant firm. He exhibited the report of a forensic accountant who estimated the costs of defending the proceedings at €232,800.00. He also exhibited the plaintiff's abridged financial statements for the period ended 31st December, 2014, which makes it clear that the plaintiff would not be in a position to discharge those costs in that the claim should be unsuccessful. This is not in dispute. In his affidavit, Mr. Hallissey asserts that the plaintiff's claim is statute-barred pursuant to s. 11 of the Statute of Limitations Act 1957.

29. In a replying affidavit, Mr. Fred Schoenmakers, a director of the plaintiff company, exhibits much of the correspondence between the parties as set out above and suggests, *inter alia*, that the impecuniosity of the plaintiff arises from the fact that the housing development was not able to proceed, which in turn was due to the defendants' negligence in failing to bring judicial review proceedings in respect of the Council's decision within the appropriate period.

30. In a replying affidavit, Mr. Hallissey disputes, *inter alia*, the alleged causal link between the impecuniosity of the plaintiff and the alleged wrong of the defendants. He says that the Folio shows that the plaintiff does not own the property for which it sought planning permission. He says that the company was in poor financial health prior to the planning application in 2002 and he exhibits the financial accounts for the years 2001 and 2002 in this regard. He asserts that the plaintiff did not have the resources to develop the project even if it did obtain planning permission. He points out that the plaintiff did not act upon the planning permission that was obtained in 1995.

31. Mr. Hallissey also exhibited a draft defence in which it is pleaded, at paragraph 4 thereof:-

> "It is denied that the plaintiff specifically instructed the defendants that no decision had been made in respect of the said planning application by Kerry County Council or that no decision had been made and duly notified within the time fixed by law and no admission is made that the said time limit expired on the 15th June, 2002, and it is denied that the plaintiff instructed the defendant to commence proceedings so as to procure the benefit of default planning permission either as alleged or otherwise or at all."

At paragraph 5 it is denied that the plaintiff specifically instructed the defendants to issue proceeding seeking an order of *mandamus* and/or compelling Kerry County Council to issue a grant of planning permission in the manner alleged or otherwise or at all. This is in line with the earlier correspondence from the company but is somewhat difficult to understand having regard to the correspondence between July and December, 2002, set out above.

32. In a further affidavit, Mr. Schoenmakers, *inter alia*, gave further information about the plaintiff company. He explains that he established the company P.C. & M. (Project Consultancy and Management Ltd.) with a wealthy Dutch national in 1993 for the purpose of pursuing development projects. They agreed to establish a subsidiary company as an operations company in relation to a Kenmare project, which was the plaintiff company, established in March, 1994. Each of them invested substantial portions of money in the parent company. He accepts that both companies are currently insolvent but believes that their personal losses and those of the companies were as a result of the defendants' negligence. He disputes the assertion that the plaintiff did not have the resources to develop the project in 2001-2002. He said that they built the first model house in 1998 and that, through 1998 market research, the German L.B.S. bank identified that some 41,000 Germans would be interested in buying in Ireland near or at the sea. They engaged in negotiations with them and L.B.S. developed a brochure with a financing plan in relation to the project which he exhibits to his affidavit. The plaintiff also sought professional assistance with regard to the financial and tax treatment for the project and he also exhibits a letter of advice in this regard. He says that they were offered loan finance from A.I.B. although they were not interested in this. He points out that the Irish economy was at the time on the "crest of a wave" and there would have been no difficulty selling the homes had they secured default planning permission through judicial review in 2002. He says that the planning permission would have provided for 28 standard villas on 22 acres at an estimated profit of €4,065,150.00, with P.C. & M. retaining a further 57-acre site for future projects. This €4 million figure is set out in a one-page exhibit and I will return to it below.

Overall Parameters

33. Section 52 of the Companies Act 2014, provides as follows:-

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

34. The overall approach to exercising this discretion in respect of security for costs in an application brought pursuant to s. 390 of the Companies Act 1963, the legislative precursor to s. 52 of the Act of 2014, was summarised by Morris P. in *Inter Finance Group Limited v. K.P.M.G.Peat MarWick* (unreported, High Court, Morris P., 29th June, 1998) as follows:-

> "to succeed [in obtaining security for costs] there is an onus on the moving party the defendant to establish:-
>
> (a) that he has a *prima facie* defence to the plaintiff's claim and
>
> (b) that the plaintiff will not be able to pay the defendant's costs if successful in his defence
>
> On establishing these two facts then the order sought should be made unless it can be shown that there are specific

circumstances in the case which would cause the court to exercise its discretion not to make the order sought. Such special circumstances might be:

> (i) that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flows from the wrong allegedly committed by the parties seeking the security; or
>
> (ii) there has been delay by the moving party in seeking the relief now claimed;
>
> (iii) some other circumstance which might arise in the case.

Have the Defendants a *Prima Facie* Defence to the Plaintiff's Claim?

35. In *Usk District Residents Association Limited v. Environmental Protection Agency* [2006] IESC 1, the Supreme Court considered the security for costs jurisdiction pursuant to s. 390 of the Companies Act 1963, the precursor to section s. 52 of the 2014 Act, in the context of judicial review proceedings brought by the applicant residents association. The court (Clarke J.) approved the overall approach set out by Morris P. in the quotation set out in the preceding paragraph of this judgment and went on to say the following with regard to the establishment of a *prima facie* defence at para 7.6:-

> "It is well settled that it is insufficient for a defendant, or a party in a position analogous to a defendant, to simply assert that he has a defence. It is necessary that he establish, by evidence, a *prima facie* defence. In plenary proceedings it is inevitable that the moving party will require to file an affidavit setting out sufficient facts to enable the court to conclude that he has a *prima facie* defence. The mere denial in pleadings (if the case has reached that stage) of the plaintiff's claim will not, obviously, be sufficient. A mere assertion in a grounding affidavit that the defendant has a good defence will not establish a *prima facie* case to that effect."

36. More recently, in *Tribune Newspapers (In Receivership) v. Associated Newspapers (Ireland) Ltd.* (unreported, High Court, Finlay Geoghegan J., 25th March, 2011), Finlay Geoghegan J. described the appropriate test as follows:-

> "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…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 my judgment, what is required is for a defendant seeking to establish a *prima facie* defence is objectively to demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by a trial judge, provide a defence to the plaintiff's claim."

37. The *dictum* of Finlay Geogheghan J. in the *Tribune Newspapers* case has been approved in a number of subsequent decisions including *Green Clean Waste Management Ltd. v. Leahy* [2015] IECA 97; *Mary and Joseph O'Brien Developments Ltd. (In Liquidation) v. Sobol and Allen* [2016] IECA 133; *Paulson Investments Ltd. v. Jons Civil Engineering* [2016] IECA 169.

38. The defendants in the present case argue that they have a good statute of limitations defence on the basis that the plaintiff's cause of action accrued on a date before the six-year period preceding the issue of the plenary summons, which issued on 23rd January, 2015. They point to a number of dates on which, they say, it must have been apparent to the plaintiff that the judicial review proceeding time-limit had lapsed; the 28th October, 2003, being the date on which senior counsel provided an opinion in which he stated that the time limit for judicial review proceedings had passed; the 19th March, 2004, being the date of the consultation at which senior counsel had explained that delay was a problem and that the time limit for judicial review proceedings had passed; and the 11th February, 2005, being the date on which the defence and objection of Kerry County Council had been delivered, which made it clear that their defence to the plenary proceedings was that judicial review proceedings should have been, and were not, brought to challenge the Council's decision. The plaintiff argues that s. 71 of the Statute of Limitations Act 1957 applies, which provides that the limitation period shall not be begin to run where the right of action is concealed by the fraud of the defendant until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. In this context, the plaintiff relies on *O'Sullivan v. Rogan* [2009] IEHC 456 for the proposition that fraudulent concealment in this context does not require the taking of active steps to conceal the wrongdoing and that it is sufficient that the defendant's failed to advise him that he had a cause of action against them in negligence. The plaintiff argues that the defendants wrongly continued to act for the plaintiff knowing that they had missed the important judicial review deadline and never told him, in terms, that they had been negligent in this regard and that it was not until they came off record and he instructed another solicitor that he realized that this was the case.

39. It seems to me that, having regard to the factual chronology in this case as described above and its interaction with the statute of limitations defence, as well as the decision in *O'Sullivan v. Rogan*, arguments can be made on both sides on this issue, but that it cannot be said that the defendant does not have a *prima facie* defence based on the statute of limitations defence, in the sense that the "*prima facie* defence" has been used in the authorities.

Has it been Established on a *Prima Facie* basis that the Impecuniosity of the Plaintiff was Caused by the Defendant's Wrongdoing?

40. One of the particular circumstances in which security for costs may be refused is where the impecuniosity of the plaintiff company arises from the wrongdoing of the defendant. In *Peppard Co. Ltd. v. Bogoff* [1962] I.R. 180, referring to the proceedings before him, Kingsmill Moore J. said as follows:-

> "Substantially the allegation is one of a conspiracy between the defendants to transfer the business of the plaintiff company to the two defendants, Reynolds and Peppard. If this be the case – and on an application for security for costs a Court cannot try the merits – to order security would be to allow the defendants to defeat an action by reason of an impecuniosity which they have themselves wrongfully and deliberately produced, a result which a Court would strive to avoid."

41. However, there is an evidential threshold to be reached before such this special circumstance can be said to exist, even in the context of a security for costs application. In *Jack O'Toole Limited v. MacEoin Kelly Associates* [1986] I.R. 277, the Supreme Court held that it was not a sufficient discharge of the onus for the plaintiff company to make a mere bald statement of fact that its insolvency had been caused by the wrong complained of and that in the absence of further evidence, such as financial accounts or records, the plaintiff had failed in that case to discharge the onus of establishing such a *prima facie* case. Similarly, in *Lough Neagh Exploration Ltd. v. Morrice* [1998] 1 I.L.R.M. 205, Laffoy J. held that the plaintiff had not established a *prima facie* case that its weak financial position flowed from the defendant's wrongdoing. The plaintiff company had been incorporated to carry out petroleum exploration activities in Northern Ireland. It was in substantially the same financial position prior to the commission of the acts of

which it now complained. She held that the suggestion that it would have been involved in an exploration venture which would have been successful but for the defendant's actions was too speculative, farfetched and remote to be tenable, and there was no evidence that the intangible assets referred to could ever be converted into an asset of substance to meet an award of costs made against the plaintiff.

42. A case of particular relevance, having regard to the facts of the present case, is *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7. In this case, the High Court (Clarke J.) said that, in order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, four propositions must necessarily be true:-

> "(i) that there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
>
> (ii) that there was a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
>
> (iii) that the consequence(s) referred to in (ii) had given rise to some specific level of loss in the hands of the plaintiff which loss was recoverable as a matter of law (for example by not being too remote); and
>
> (iv) that the loss concerned was 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."

On a motion for security for costs, a plaintiff was required to establish the special circumstances only on a *prima facie* basis and, therefore, it followed that each of the above steps must also be established only on a *prima facie* basis.

43. Clarke J. went on to consider the issue of quantum and said 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. He said it was not necessary to establish the precise quantum of damages which it might recover in the event of it being successful but 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. He said that in the case of a company which had no significant net assets prior to the events which gave rise to the proceedings concerned, the company would 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 was successful.

44. The analysis of the evidence put before the court in the Connaughton Road case is also particularly relevant for present purposes. The intention in that case was that the buildings, once constructed, would be sold, with part of the relevant price going to the plaintiff company and part of it going to Mr. Molloy, a principal in the company. The evidence put before the court as to the projections for the likely outcome of the project came by way of an exhibit in an affidavit sworn by a chartered accountant acting for the plaintiff company. The deponent noted that he himself did not prepare the projections in relation to the project but said that he received a summary sheet of the projected outcome from the bank who acted as bankers to the project generally; namely, A.I.B. These projections suggested that the company would make a profit on the development of €1,770,000.00. Clarke J. expressed reservations about this evidence. First, in circumstances where the bank was acting as lender both to the plaintiff company and Mr. Molloy and was to obtain a guarantee from Mr. Molloy personally, it was of little concern to the bank as to whether profits from the transaction as a whole ended up in the hands of the plaintiff company or Mr. Molloy. However, the apportionment of the profits were of particular relevance to the application for security for costs in respect of the plaintiff company. Secondly, he said it was difficult to see where the quoted figure came from, as it was by no means clear how it had been derived from any of the other figures in the paper. Thirdly, there was considerable doubt as to the position of the company's obligations in relation to social and affordable housing within the project and the financial consequences of this "important fact". This could have had a significant impact on the company's income and, on certain calculations, the asserted profit could have been "almost wiped out". Clarke J. also referred to the fact that different taxation regimes would apply to the company, on the one hand, and Mr. Molloy, on the other. Clarke J. reached the conclusion that the company had not discharged the onus on it to establish an "essential building block" of its case for special circumstances in the security for costs application, namely that, but for the wrongdoing, it would have had sufficient profits to meet the likely costs of the defendant, which were estimated by the defendant's legal cost accountants as being of the order of €632,500.00.

45. He went on to comment that a party in the position of the plaintiff in an application of this type, while required only to show matters on a *prima facie* basis, would normally be expected to put before the court evidence of its current financial position, an account of its financial position prior to the incident giving rise to the alleged wrongdoing, and some evidence to suggest that all, or a sufficient portion, of the current position could be attributed to the wrongful actions of the defendant. He said that in the present case, he did not have any clear picture of the current financial state of the company and by what margin could be said that the company was unable to meet the costs of the defendant in the event that the defendant should succeed, and that the precise scale of the company's claim had been put forward only in a "very sketchy way". In those circumstances, he concluded that the plaintiff company had failed to meet the onus to establish special circumstances.

46. The present case appears to me to be somewhat different from previous cases. For example, a project involving the building of holiday houses in 2002-3 in Kerry, a period of boom in the construction industry in this country, could not be described as 'speculative' in the same way as the petroleum exploration project at issue in the Lough Neagh case. Nor were any issues raised by the defendant similar to those which arose in the Connaughton Homes cases, involving apportionment of profits as between different parties (in that case, the company itself and a principal in the company), or whether social housing obligations might diminish profits to a highly significant extent, which also arose in that case. On the other hand, the plaintiff company appears to have had no assets at the time of the proposed project, and the evidence put forward on this motion in support of the suggested figure of €4million profit that was to be realized was thin. On the other hand, I note that the suggested costs figure put forward by the defendants was approximately €0.25 million, which allows for a considerable of margin. Not without some reservation, I have reached the conclusion that the plaintiff company has overcome the threshold for establishing that its inability to meet the potential costs of an unsuccessful negligence action was due to the defendant's wrongdoing, assuming that negligence in that regard is ultimately established.

Other matters going to special circumstances

47. It was further argued on behalf of the plaintiff that the categories of special circumstance were not closed, citing Charleton J in *Millstream Recycle Limited v. Gerard Tierney & Anor* [2010] IEHC 55, who said at para. 33:-

> "…it is important to note that the categories are not closed in respect of which a special reason for not ordering security as against a company likely to be unable to pay costs where the defendant has shown a real prospect of a defence."

In that case, he considered that the facts underlying the proceedings (the contamination of pig food products) had given rise to a significant level of public interest and disquiet, which warranted the refusal of the order for security for costs. Obviously, no such issue of public interest arises in the present case.

48. The plaintiff argues that there was an absence of good faith on the part of the defendant in the present case, and that this can amount to a special circumstance. In *West Donegal Land League Limited v. Údarás na Gaeltachta & Ors* [2006] IESC 29 Denham J., (as she then was), in her dissenting judgment, took into account what she considered to the lack of *bona fides* of the defendant in reaching a conclusion that security for costs should not be awarded in favour of the second defendant. The case concerned various issues relating to land in Co. Donegal. It was common case that the land was held as commonage but, while the plaintiff maintained that this continued to be the case, the second defendant maintained that he was the beneficial owner. The individuals involved in the plaintiff company had worked together previously as a group of graziers of the commonage with two trustees; one being the second named defendant. Evidence was put on affidavit on behalf of the plaintiff that the second named defendant had, at a previous time, in order to claim a benefit, namely to avoid paying tax, had claimed that he was not the owner of the land in question. Denham J. considered this to be an important factor in the assessment of the special circumstances. She said that it was appropriate to consider the justice of the case and the court's duty to advance the interests of justice and not to hinder them. Geoghegan J., delivering the majority judgment (Macken J. concurring), held that security for costs should be ordered. With regard to the matter identified by Denham J., he held that the moving party had relied upon being a trustee for tax purposes without legal advice, and that fairness and litigation dictated that this should not be regarded as a special circumstance of the purposes of the application for security for costs. He agreed with Denham J. that the categories of special circumstances are not closed but also said that it did not mean that a court was wide open in its discretion as to whether to grant or refuse the order. However, I do not understand his judgment as disagreeing with the suggestion that the *bona fides* of a defendant may be taken into account by the court. The specific matters relied upon by the plaintiff include that the defendant pleads and asserts that the plaintiff never instructed them to bring judicial review proceedings in circumstances where the correspondence clearly shows that he did; and that the defendants, who are professional solicitors, wrongfully continued to act for him after they became aware they had failed to institute judicial review proceedings within the appropriate period, and failed to advise him of their negligence/conflict of interest.

49. There is undoubtedly a danger in an application such as the present one of reaching conclusions which are properly matters for determination at the trial, if one is ultimately held. In this regard, I am mindful that no premature conclusion should be reached regarding the ultimate issue of negligence, nor indeed a final conclusion on the factual issue of whether the plaintiff company instructed the defendants to institute judicial review proceedings prior to the expiry of the relevant deadline. However, on the evidence currently available to the court, it does seem that the documentary evidence presented by the plaintiff, described in detail above, directly contradicts the defendants position that the plaintiff company did not instruct the defendants to institute judicial review proceedings prior to the expiry of the relevant deadline. Based on this evidence, I would have serious concern about the *bona fides* of the defendants and this is a matter which I am also taking into account.

50. In all of the circumstances, I refuse the application for security for costs.