THE COURT OF APPEAL

[2014 No. 903]

[2014 No. 1053]

The President

Finlay Geoghegan J.

Peart J.

BETWEEN

NEWLYN DEVELOPMENTS LIMITED

MARCHBURY PROPERTIES LIMITED

RESPONDENTS

AND

MURPHY CONCRETE (MANUFACTURING) LIMITED

TRD DEVELOPMENTS AND CONSTRUCTION LIMITED

APPELLANTS

JUDGMENT of the President delivered on 21st December 2015

Introduction

1. These are two appeals brought by Murphy Concrete (Manufacturing) Ltd. against orders made by the High Court refusing security for costs in respect of two High Court proceedings brought respectively by Newlyn and Marchbury. In the Newlyn case, the application for security was refused by Kearns P. in an ex tempore judgment of 7th June 2013. In the Marchbury case, the decision was by Gilligan J. on 12th November 2013. The cases were heard together on appeal in this Court because of the overlapping issues that arise, although there are some differences which will require to be considered.

2. A defendant applicant for security for costs against a plaintiff company under s. 390 of the Companies Act 1963 as amended is required to show:

(i) That the plaintiff will be unable to pay the costs if the defendant is successful;

(ii) that it has a prima facie defence to the plaintiff's claim, was, something more than a mere denial of the case pleaded.

If these two tests are satisfied by the defendant, then the burden shifts to the plaintiff to show that there are special circumstances to justify the court in refusing to grant the order. The court has a discretion in this evaluation. The questions that arise on the appeal are whether MCM has satisfied the prima facie defence test in the Marchbury case, and if so, whether there are special circumstances militating against ordering security for costs and this latter question also arises in the Newlyn appeal.

3. The cases as pleaded may be briefly summarised as follows. Newlyn and Marchbury were the builders and developers of housing estates in Balbriggan, County Dublin in respect of which Murphy Concrete (Manufacturing) Ltd. was the supplier of aggregate infill that was used in the construction of the houses, outbuildings and concrete surfaces. Newlyn built the estate at Moylaragh, comprising 559 properties between 2002 and 2005. Marchbury built the Newhaven estate between April 2003 and December 2007, comprising 234 houses and related infrastructure. A substantial number of householders in these estates have complained about structural defects in their houses and appurtenant concrete areas because, as they allege, of the presence of Pyrite in the infill material. Some have instituted proceedings against either Newlyn or Marchbury. In other cases, the Pyrite Resolution Board has issued proceedings on behalf of householders. A further cohort of plaintiff claims by householders is anticipated in respect of each of Newlyn and Marchbury.

4. In their separate proceedings, Newlyn and Marchbury seek a variety of reliefs including indemnity from MCM against any liability that Newlyn and Marchbury may have in respect of claims by householders arising from damage to their properties arising from the Pyrite-infected infill.

Newlyn's Statement of Claim

5. The Newlyn proceedings are brought against TRD Developments & Construction Ltd. as well as MCM. The case is that the first defendant, TRD, was the ground works contractor for the site and that MCM supplied the infill material to TRD for use on the sites of the houses. Newlyn submits that it has limited it claim for indemnity to those cases that have been instituted or which it is anticipated will be instituted.

6. Newlyn claims in tort against MCM on the basis of a breach of duty of care. Its case against TRD Developments is in contract and negligence and that defendant has served notice of indemnity and contribution on MCM.

MCM's Defence to the Newlyn Statement of Claim

7. MCM admits the plea, at para. 3 of Newlyn's statement of claim, that it is involved in the supply of infill material to the building industry. In respect of other pleas concerning the first defendant, TRD, MCM pleads that it is a stranger thereto. MCM does not admit that TRD purchased any of the aggregate allegedly used in the development from MCM, to the extent that TRD did purchase any of the aggregate by MCM pleads that it is a stranger to the use to which it was put. MCM denies that any of the quarry material was described as Clause 804 hardcore infill and/or was a standard product and/or was generally known to be used or purchased for any particular purpose, and also pleads that it was not aware of any particular purpose for which TRD purchased materials.

8. MCM denies that it knew or ought to have known of the purpose for which TRD purchased materials. It denies that MCM owed a duty of care to TRD or Newlyn or any other person. It pleads that there is no contractual or other relationship between MCM and Newlyn and without prejudice to that plea, denies that any relationship between MCM and Newlyn was such as to give rise to a duty of care or a duty in tort not to cause pure economic loss, and it is also denied that it would be just and reasonable to impose such a duty on MCM.

9. MCM denies that any materials it supplied were not fit for purpose or contained quantities of Pyrite or was not of reasonable quality or was defective. Alternatively, MCM exercised all reasonable care to be expected of a competent and prudent supplier. MCM denies that the material supplied resulted in heaving or expansion in the infill, as alleged, or at all.

10. MCM denies any negligence or breach of duty. MCM does not admit that any of the alleged claims by homeowners are in any way legitimate. It does not admit the particulars of additional loss and damage and awaits strict proof thereof. MCM denies that any liability resting on Newlyn has been caused by any wrongful acts or omissions of MCM. MCM pleads contributory negligence on the part of the plaintiff, Newlyn, and/or TRD and/or third parties involved in the design or construction of the property.

11. MCM pleads that the plaintiff's claim is one for pure economic loss and is therefore misconceived. It denies that the plaintiff is entitled to any indemnity or damages and makes no admissions. The defence denies that the declaration sought is or would be appropriate. It also pleads that Newlyn's claim is barred by the Statute of Limitations 1957 as amended. This is made on the basis that the relevant damage occurred and any cause of action in negligence accrued at the time when the material was incorporated into the buildings and/or shortly thereafter and/or in any event more than six years before the action was commenced.

12. MCM pleads that Newlyn has failed to mitigate its losses, that any such losses are not recoverable against MCM as being too remote or not being reasonably foreseeable and pleads that the plaintiff is not entitled to the relief claimed or any relief. The defence also contains a general traverse of everything pleaded except for express admissions.

13. The defence is therefore a comprehensive traverse of the pleas in the statement of claim, with the addition of specific pleas of the Statute of Limitations and that the claim represents pure economic loss that is not recoverable in law.

Affidavit of MCM in Newlyn Proceedings

14. The grounding affidavit in the Newlyn case is sworn by Mr. Seamus Murphy, director of Murphy Concrete (Manufacturing) Ltd. Mr. Murphy details his reasons for asserting the inability of Newlyn to pay MCM's costs in the event of the latter succeeding in its action. This is not a matter that is in dispute. He says that he believes that MCM has a good bona fide defence to the claims of the plaintiff, that MCM has a full defence on the merits to the plaintiff's claim and that "a detailed outline of MCML's defence is set forth in the already mentioned defence". Mr. Murphy says at para. 33 of his affidavit that his company "is satisfied that it has a reasonable defence to the plaintiff's claim". He refers to the development at Moylaragh comprising 559 residential units and claims that even if MCM supplied infill to TRD for the development, which he says is disputed, it is probable that another supplier or suppliers of aggregate was also involved.

15. He turns to the Newlyn allegations that MCM supplied the aggregate that was used as infill under the properties at the Moylaragh development and sets out his position as follows:

> (i) MCM does not admit that it sold any of the aggregate allegedly used in the development;
>
> (ii) it does not admit that if the aggregate was in fact purchased by TRD, it knew or ought to have known of any particular purpose for which TRD purchased it;
>
> (iii) MCM does not admit that the aggregate was described as Clause 804 hardcore infill and/or that it was generally known to be used or purchased for any particular purpose;
>
> (iv) MCM does not admit that it should have known that the materials would have resulted in any heaving or expansion in the infill.

This is a repetition of some of the contents of the defence as will be observed.

16. Mr. Murphy then repeats further pleas in the defence to the effect that there is no contractual relationship between MCM and Newlyn. The relationship does not give rise to a duty of care in tort and/or a duty of care in tort not to cause pure economic loss or to an indemnity situation as might arise in a contract-based relationship.

17. Mr. Murphy denies that the supply of quarry material which is the subject matter of the proceedings resulted in any heaving or expansion in the infill of the properties referred to in the statement of claim. In the circumstances, Mr. Murphy says and believes and he is advised that MCM has a substantive and bona fide defence to these proceedings and intends to defend every element thereof. Mr. Murphy says that "it must be established that the plaintiff's position is, at the very least, arguable. I say that the plaintiff's claim against the second defendant is unfounded as it has presented no evidence of any damage to the development as a result of Pyritic heave or otherwise". By this it would appear that the deponent means that Newlyn's claim is dubious or questionable.

Marchbury's Statement of Claim

18. Marchbury's claim against MCM is brought in contract and negligence in respect of the supply of specific stone infill known as Clause 804 which allegedly contained Pyrite and in respect of which claims have been brought or notified by and on behalf of householders in the Newhaven development that Marchbury built and developed.

19. Marchbury pleads that the defendant was a producer, for the purpose of the Liability for Defective Products Act 1991, of an aggregate marketed as Clause 803, 804 or 805 quarry material. Marchbury was engaged in the construction of a residential development comprising 234 houses and related infrastructure at Newhaven, Flemington, Balbriggan, County Dublin between April 2003 and December 2007. MCM represented to Marchbury and warranted that the quarry material produced and marketed by MCM conformed with the specifications for Clause 803, 804 or 805 and was fit for purpose, suitable for use as infill in the development, of merchantable quality, free from defect and in conformity with specification and Marchbury's requirements.

20. Marchbury purchased the infill material so described from MCM and that company was aware of the use to which the material would be put by Marchbury in the construction of the housing estate.

21. Marchbury pleads that the quarry materials supplied by MCM was defective, not in compliance with description, not of merchantable quality and not fit for purpose which occurred by reason of the breach of representation, negligence and fundamental breach of contract on the part of MCM.

22. Marchbury pleads particulars of defects and of breach of contract, breach of warranty, misrepresentation, negligent misstatement, negligence and breach of duty including breach of statutory duty.

23. Marchbury pleads that it may be liable by way of express or implied term or pursuant to its obligations as a member of the HomeBond scheme to remedy defects in the houses resulting from the defective material supplied by MCM.

24. Marchbury claims a declaration that it is entitled to an indemnity from MCM against any liability it may have in connection with the construction of the housing development by reason of the use of products supplied by MCM. It also claims a series of other reliefs, including damages for the several wrongs outlined above as well as costs.

MCM's Defence to the Marchbury Statement of Claim

25. MCM admits that it is a producer of quarry material within the meaning of the Liability for Defective Products Act 1991, and that it offers such material for sale in the course of its business. It puts in issue Marchbury's allegations or assertions about its marketing activities.

26. MCM admits that it described some of its quarry materials as Clause 803, Clause 804 and/or Clause 805, but it denies that it so identified any particular batch that Marchbury relies on in the proceedings. MCM pleads that it categorised quarry materials that it sold by reference to size of the stone rather than by reference to a specification as described.

27. MCM denies that it knew that Marchbury was purchasing the material for any particular purpose, including use in houses, roads, pavements, driveways, gardens, paths or any other purpose. It denies all of the representations alleged by Marchbury and that it knew or ought to have known that Marchbury would rely on any such representations. Neither was it reasonable for the same to have been relied upon. MCM denies any duty of care in respect of representations.

28. MCM admits that it supplied Marchbury with quarry materials on various dates from about March 2003, but it does not admit that it was aware of the purpose for which Marchbury intended to use the materials. It does not admit that it supplied any particular quarry materials the subject of the proceedings and it repeats its denial of representations or warranties.

29. MCM does not admit that it entered into any agreement for the supply of quarry materials which form the subject matter of these proceedings "pending proper particularisation". If MCM did enter into any such agreement, it is admitted that the agreements would have contained Sale of Goods Act terms, but not any implied terms other than those in the Acts of 1893 and 1930.

30. MCM denies that any quarry material that it supplied did not satisfy any specification or was not in accordance with description or was not fit for purpose or was unsuitable. Alternatively, it is pleaded that MCM did not know or ought to have known, but on the contrary, reasonably believed that its materials met all relevant standards and requirements.

31. MCM denies that it was negligent or in breach of contract or in breach of any representations, as alleged or at all. It pleads that the plaintiff's claim in tort is one for pure economic loss and is therefore misconceived. It denies that Marchbury has suffered any distress, inconvenience, loss, damage and/or expense on account of the alleged or any wrongful actions or omissions of MCM.

32. MCM denies that it was in breach of the Sale of Goods Act 1893. It also denies that it has any liability to the plaintiff under the Liability for Defective Products Act 1991. It pleads that any proceedings under the 1991 Act must be commenced within three years and that did not happen, and accordingly the claim is barred.

33. MCM pleads the Statute of Limitations. In respect of all other pleas and assertions, MCM either expressly denies them or pleads that it is a stranger thereto.

34. The MCM defence in the Marchbury claim is thus in all essential respects a traverse, either general or of the specific pleas in the statement of claim. There are express pleas as to time bars under the Statute of Limitations and the Liability for Defective Products

Act 1991, and it is also pleaded that any loss sustained is pure economic loss and thereby not claimable.

Affidavit of MCM in Marchbury Proceedings

35. Mr. Murphy deposes to the fact that Marchbury is not in a position to pay MCM's costs in the event of the latter succeeding in its defence. That is not in dispute. He also deals with his company's efforts to secure a voluntary agreement to provide security for costs. Then Mr. Murphy turns to MCM's defence to the plaintiff's claim. In regard to the allegations by Marchbury that MCM supplied the infill in the development at Newhaven Bay, Mr. Murphy says the following:-

> "(i) MCM does not admit that it sold Marchbury any of the infill allegedly used;
>
> (ii) MCM does not admit that it knew or ought to have known of any particular purpose of the infill, if infill was in fact purchased by Marchbury from MCM;
>
> (iii) MCM does not admit that the aggregate was described as Clause 803, Clause 804 and Clause 805;
>
> (iv) MCM does not admit that it made warranties or representations in respect of the aggregate;
>
> (v) MCM does not admit that it should have known that the infill would have resulted in any heaving or expansion;
>
> (vi) MCM does not admit that it marketed any of its quarry materials using those specifications or descriptions;
>
> (vii) MCM does not admit that it knew or ought to have known the quarry material might cause damage."

36. Mr. Murphy goes on to depose that MCM does not admit that Marchbury incurred loss or damage to houses numbered 51, 53 and 92, and claims that Marchbury has failed to particularise the alleged damage.

37. On this basis, Mr. Murphy deposes that he believes and is advised that MCM has a substantive and bona fide defence to the proceedings and intends to defend every element thereof. He says that Marchbury has presented no evidence of any damage to the three properties at the development caused by pyritic heave or otherwise.

38. It is clear that nothing in this affidavit consists of any specific averment, but that Mr. Murphy is relying on the denials contained in the defence and in his affidavit.

The Judgments

39. In his judgment in the Newlyn case on 7th June 2013, Kearns P. held that it was "a very straightforward matter" and he did not see how he could possibly direct security for costs. He held that special circumstances had been demonstrated as required by the case law. There was the intrinsic nature of the proceedings, namely, the multiplicity of house owners affected and the range and scope of the claim. A point of law of exceptional public importance arose that transcended the interests of the parties before the court. It would not be just that the proceedings would be halted because the plaintiff company is impecunious. The State had established a Pyrite Resolution Board in order to remedy defects caused by pyrite and there had been significant litigation through the courts concerning the extensive problems caused by building material containing it. Taking all those circumstances into account, Kearns P. was satisfied that the case had clear and sufficient special circumstances to justify withholding an order for security for costs. In view of his conclusion about special circumstances, the judge felt it unnecessary to consider the issue of delay, but left it open for consideration by this Court if that arose or was necessary.

40. In the Marchbury case, Gilligan J. delivered a written judgment on 12th November 2013 in which he refused the application for security for costs on the ground that MCM had not objectively demonstrated that it had a prima facie defence to the plaintiff's claim. He held in effect that the affidavits sworn on this defendant's behalf were matters of assertion only and were insufficient to set up a sufficient basis of defence to support the application. In those circumstances, the learned judge did not proceed or have to proceed to the question whether there were special circumstances present because MCM had failed to establish one of the two essential requirements for a costs order.

MCM's Submissions in the Newlyn Case

41. MCM submits that it is agreed that Newlyn is impecunious and that its financial plight was not caused by MCM. That is correct – this essential proof is agreed in the Newlyn case and in Marchbury. MCM also submits that it was also conceded in the High Court that it "had at least bona fide defence to the entire of the claim", namely, whether MCM owed a duty of care in tort to Newlyn in the absence of a contractual relationship, and also a bona fide defence to significant portions of the claim by reason of the Statute of Limitations. In those circumstances, it is submitted the issue was whether Newlyn could establish special circumstances. Indeed, it is the case that this was the ground on which Kearns P. addressed the issue and on which he based his rejection of the application by MCM for security.

42. MCM therefore relies on the undisputed fact of Newlyn's impecuniosity and also on what it asserts is agreement by Newlyn as to a prima facie defence in regard to the duty of care and a partial prima facie defence in regard to the Statute of Limitations.

43. MCM summarises its argument which it confines to the question of special circumstances as follows. This is not a homeowners' claim for damages arising out of defects, but rather an attempt by a developer to pass on a claim. The proceedings do not raise a point of law of sufficient importance to avert an order for security. On the authorities, the issue arising in pleadings between private entities will only in very rare circumstances be of sufficient importance to come into that category. The question of whether the quarry owner owed a duty to the developer is private and limited and local and not of national interest or importance. It is not sufficient that the points raised between the parties are themselves important because that will happen frequently in cases of civil litigation. This is merely one of a large number of cases arising out of damage from Pyritic infill. The contention that security for costs in this case would put the costs of remediation of householders' damaged properties onto the public at large through the Pyrite Resolution Board is not a factor which ought to be taken into account under the head of special circumstances. The plaintiff's claim will continue as against the first defendant, even if it is unable to put up security for costs and its claim is thereby struck out as

against MCM. If an order is not made, the second defendant will be exposed to a substantial expense in defending the claim without any risk to the insolvent plaintiff.

44. It is clear that when the first two limbs of the requirement on an applicant have been satisfied, the party resisting security for costs carries the onus of establishing special circumstances so as to justify withholding the order that would otherwise be made. MCM cites a series of cases in support of its argument that the circumstances as they obtain in this case are far from the special circumstances that have been recognised in the authorities as justifying a refusal.

45. MCM concludes on the basis of its citation of these authorities that no special circumstances within the meaning of the jurisprudence have been established, and that in circumstances where it is conceded that the plaintiff is unable to pay costs and "where it is conceded MCML has established a prima facie defence", the legal position is clear. MCM accordingly submits that this Court is obliged to discount the reasons advanced by the learned President and to overturn the refusal of its application for security for costs.

Newlyn's Submissions in Response

46. On the nature of the claim, Newlyn submits that it has limited its claim to an indemnity in respect of proceedings that have been or will be issued against it, which it says it has clarified in updated particulars of loss and damage. 17 proceedings have been issued by householders, 11 proceedings have been issued on behalf of householders by the Pyrite Resolution Board and the plaintiff anticipates a further 56 such claims will be issued by the Board.

47. Newlyn turns then to the question of a prima facie defence, citing the judgment of Finlay Geoghegan J. in the High Court in Tribune Newspapers (In Receivership) v. Associated Newspapers Ireland t/a Irish Mail on Sunday (25th March 2011). The judge held 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."

The court went on to say that a defendant had to "objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim".

48. Newlyn submits that the evidence in this case falls far short of the objective demonstration that is required, pointing out the features of Mr. Murphy's affidavit which merely echo the contents of the defence in not admitting or in traversing the Newlyn statement of claim. It then concludes that "there is no evidence at all put forward to support this traverse of the plaintiff's case".

49. Newlyn then turns to the concession that is relied upon by MCM:

> "While the plaintiff conceded at the hearing before the learned President that there was one issue on which a prima facie defence could be raised to the whole of the plaintiff's claim (the 'duty of care' issue) and one issue on which a prima facie defence could be raised to part of the plaintiff's claim (the 'Statute of Limitations' issue), the High Court (Gilligan J.) in *Marchbury Properties v. Murphy Concrete (Manufacturing) Ltd.* held that similar averments in the affidavits in that case were not sufficient to demonstrate the existence of a *prima facie* defence.

Therefore, if the Court of Appeal upholds the decision of the learned High Court judge in *Marchbury Properties v. Murphy Concrete (Manufacturing) Ltd*., it is clear that the appeal herein will be dismissed without any consideration of whether 'special circumstances' exist."

50. Counsel for Newlyn expressed his concession in oral argument on a conditional basis: insofar as the pure economic loss or duty of care point could amount to a full defence that represented a special circumstance that could be invoked to resist security. In exchanges with the court, Mr. Leonard S.C. responded to a question about the existence of a prima facie defence by saying "…it's a more nuanced argument. Yes, there may be a prima facie defence in the context of duty of care being the very point I seek to rely on a point of law of public importance so there is a direct link between the special circumstances and the prima facie defence". His acceptance of the validity of the defence for the purpose of the application was conditioned on the establishment of the proposition that it was a special circumstance and so in that sense his was a conditional acceptance.

51. Newlyn argues that MCM would have to put evidence before the court that it did not know or ought not reasonably to have known that the infill it was supplying was for a housing development. This is in regard to the substance of the plea that MCM did not owe any duty of care. Newlyn argues that the evidence, such as it was that was put before the High Court in Mr. Murphy's affidavit fell well short. Then, it goes on to make a different point. Newlyn says that there will be no benefit in reality to MCM even if it succeeds in getting security as sought and if Newlyn is unable to meet the terms. This is because Newlyn has a claim against the first defendant, TRD Developments and Construction Ltd., and that company has served notice of indemnity and contribution on MCM. Moreover, Newlyn is also entitled to claim against MCM for contribution under the Civil Liability Act in respect of any claims brought by householders or the Pyrite Board against Newlyn, accepting that such contribution proceedings would be subject to the discretion of the court to disallow recovery. In those circumstances, there is no practical benefit or reality to having MCM excluded from the claim.

52. In regard to the Statute of Limitations, Newlyn argues that this defence would only avail MCM in relation to some of the properties and only in very narrow circumstances. Assuming that the limitation period begins to run on the date when the damage becomes apparent or manifest or actually takes place as a result of Pyritic heave, the Statute of Limitations will not provide a defence for MCM. As to the relevant damage giving rise to a provable claim in negligence, Newlyn "accepts that this is a legitimate point for determination by the High Court, and has invited the second defendant to try a preliminary issue on this point". Newlyn also insists that a limitation defence is not open to MCM in respect of many of the properties concerned. Moreover, a limitation defence will not be available to MCM in respect of a statutory contribution claim under the 1961 Act.

53. On the question of special circumstances, Newlyn trawls the same cases as did MCM in search of suitable quotes to buttress its claim that the circumstances of this case support the findings of the learned President. Newlyn submits that the test to be applied for special circumstances is contained in the following questions:-

> (i) Do the issues raised transcend the interests of the parties before the court?

(ii) Does the public interest require the issues to be determined for the benefit of the community as a whole?

(iii) If not, are there other factors which should influence the manner in which the court ought to exercise its discretion?

Then, Newlyn seeks to identify points of law which give rise to special circumstances. They are whether a person in the position of MCM supplying material to a subcontractor on a building project owes a duty of care not cause loss to the builder/developer or the purchasers of houses from that party? If such a person does owe a duty not to cause loss, when does the cause of action for breach of that duty accrue? Newlyn submits that the application of these criteria to the circumstances of this case results in an affirmative answer to the question whether special circumstances exist which warrant the refusal of the application by MCM.

Discussion of Newlyn Application

The Law on Special Circumstances

54. The first principle on which this jurisdiction rests is, like other procedural rules, dependent on and subject to the interests of justice. To this effect, Charleton J. *in Oltech (Systems) Ltd. v. Olivettti UK Ltd*. [2012] IEHC 512 cited the (dissenting) judgment of Denham J. in 2006 in the Supreme Court, who in turn approved a statement by Kingsmill Moore J. in the same court in 1957:

> "Special circumstances, as an exception to the granting of an order for security for costs, exist in order to enable cases to proceed even where a defence is reasonably open despite the inability to pay such a costs order by plaintiff. This is because the justice of a case may require that notwithstanding that the defendant has a reasonable defence and that the plaintiff company is financially challenged the case ought to proceed. In *The West Donegal Land League Limited v. Udarás na Gaeltachta* [2006] IESC 29 (Unreported, Supreme Court, 15th May 2006), Denham J. quoted with approval an aspect of the decision of Kingsmill Moore J. in *Thalle v. Soares* [1957] I.R. 182:
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> '. . . it should be remembered that the essence of the order for security for costs (or not) is 'to advance the ends of justice and not to hinder them' per Kingsmill Moore J. above. It is for a court on such an application to consider, and to balance, the interests of the plaintiff company and those of the second named defendant in a fair and proportionate manner.'"

55. Morris P. in *Interfinance Group Limited v. KPMG Pete Marwick* (High Court, Unreported, 29th June 1998) said that "the list of special circumstances referred to is not, of course, exhaustive." In *County Monaghan Anti Pylon Limited v. Eirgrid* [2012] IEHC 103 Charleton J. said that a point of fact of national importance could arise in litigation that was central to the case and would settle a concern of great moment, in which circumstances security might be refused even though the other conditions were satisfied but that situation would be very rare:

> "A point of fact of national importance can arise in litigation that is inescapably central to a case and which will settle a concern of great moment. Such an issue will arise rarely, as suits between private entities are of their nature compensatory or restoratory in nature. It is only in the most extreme circumstances that the points of contention between litigants can keenly affect the public interest. Where that occurs, this can be a special factor in refusing to order security for costs. An example is the issue of pig feed contamination and the withdrawal of Irish pork products internationally that is part of the decision in Millstream Recycling v. Tierney [2010] IEHC 55 (High Court, Unreported, Charleton J., 9th March 2010)."

56. Laffoy J. in *Village Residents Association Ltd. v. An Bord Pleanála & Ors. (No.2)* [2000] 4 I.R. 321 identified the test from earlier authority as being:

> "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 . . ."

57. *In Webprint Concepts Ltd. v. Thomas Crosby Printers Ltd. & Ors*. [2013] IEHC 359, Finlay Geoghegan J. said that this was:

> ". . 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."

58. The present position is that, first, a special circumstance may come about by reason of a point of law of exceptional public importance. Secondly, an important an unusual point of fact may be sufficient. Thirdly, the categories are not closed. Fourthly, the fundamental criterion is the interest of justice.

59. Touching on the approach to be taken by this Court, the remarks of Fennelly J. in the Supreme Court in *Hidden Ireland Heritage Holiday Limited v. Indigo Services Limited* [2005] 2 I.R. 115 are pertinent:

> "I would add that this court will normally respect the discretionary character of a High Court decision under s. 390. It will be slow to set aside a decision arrived at by a judge who has considered the facts and weighed all the arguments appropriately."

60. In *Tribune Newspapers (In Receivership) v. Associated Newspapers Ireland t/a Irish Mail on Sunday* (25th March 2011) Finlay Geoghegan J. stated:

> "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."

61. The English courts permitted recovery in negligence for financial loss which was independent of personal injury or injury to property in *Junior Books Ltd v. Veitchi Co. Ltd.* [1983] 1 AC 520. The plaintiff did not have a contract with the sub-contractor who laid down defective flooring in the plaintiff's factory. The plaintiff succeeded in its claim in negligence to recover its financial losses. The English courts have since overruled the line of authority of which that decision was an important part: see *Murphy v. Brentwood District Council* [1991] 1 AC 69; *D & F Estates Ltd. v. Church Commissioners* [1989] AC 117.

62. *Junior Books* was followed in Ireland in *Ward v. McMaster* [1988] I.R. 337, but the position has become uncertain since the decision of the Supreme Court in *Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84, in which the court refused to allow an action for pure economic loss. Although negligent misstatement continues to be a cause of action, the law generally on economic loss remains uncertain, as Geoghegan J, acknowledged in *Beatty v. The Rent Tribunal* [2006] 1 ILRM 164 at 173.

63. Keane C.J. concluded his judgment in Glencar with the following observations:

> "There remains the question of economic loss. The reason why damages for such loss - as distinct from compensation for injury to persons or damage to property - are normally not recoverable in tort is best illustrated by an example.
>
> If A sells B an article which turns out to be defective, B can normally sue A for damages for breach of contract. However, if the article comes into the possession of C, with whom A has no contract, C cannot in general sue A for the defects in the chattel, unless he has suffered personal injury or damage to property within the Donoghue v. Stephenson principle. That would be so even where the defect was latent and did not come to light until the article came into C's possession. To hold otherwise would be to expose the original seller to actions from an infinite range of persons with whom he never had any relationship in contract or its equivalent.
>
> That does not mean that economic loss is always irrecoverable in actions in tort. As already noted, economic loss is recoverable in actions for negligence misstatement. In Siney, economic loss was held to be recoverable in a case where the damages represented the cost of remedying defects in a building let by the local authority under their statutory powers. Such damages were also held to be recoverable in Ward v. McMaster, the loss being represented by the cost of remedying defects for which the builder and the local authority were held to be responsible. In both cases, the loss was held to be recoverable following the approach adopted by the House of Lords in Anns. While the same tribunal subsequently overruled its earlier conclusion to that effect in Murphy v. Brentwood District Council [1991] 1 AC 398, we were not invited in the present case to overrule our earlier decisions in Siney and Ward v. McMaster.
>
> I would expressly reserve for another occasion the question as to whether economic loss is recoverable in actions for negligence other than actions for negligent misstatement and those falling within the categories identified in Siney and Ward .v. McMaster and whether the decision of the House of Lords in Junior Books Ltd. v. Veitchi Company Ltd. should be followed in this jurisdiction."

Conclusions on Newlyn Application

64. The authorities on special circumstances reveal that there is a wide variety of situations in which this exception has been applied. These cases arise out of circumstances of potential liability that apply more generally than the cases notified to date and beyond these parties to other contracting parties and quarry suppliers of infill. If the orders are made and one or both of the plaintiffs fail to provide security, which will inevitably be substantial, the actions may be dismissed against the defendant. The defendant will nevertheless continue to have potential liability in proceedings brought by householders or by way of contribution claim or on foot of notice of indemnity and contribution. There is a broader liability involved for the parties in these proceedings and parties in a similar situation to these litigants. It is improbable that the plaintiff is operating out of an altruistic sense of doing justice but the full web of relationships and interests that may be involved has not been revealed.

Although it was not argued at the hearing and so does not arise for consideration it may be noted that in Ireland and England in recent times there has been jurisprudence on the subject of enquiring into and following parties who may be funding litigation but standing outside it.

65. On 7th June 2013, Kearns P. held that this was a straightforward matter and he had no difficulty in finding that there were special circumstances. He considered that the multiplicity of house owners affected and the range and scope of the claim were relevant. There was a point of law of exceptional public importance that transcended the interests of the parties concerning the extensive problems caused by pyrite and the State had established the Pyrite Resolution Board. Fennelly J. observed in Hidden Ireland Heritage Holiday Ltd. that the appeal court ought to give considerable weight to the discretion exercised by the judge of first instance.

66. The issue of law concerning economic loss also features prominently and this area of important uncertain legal liability has implications far beyond the cases and the parties that are engaged in this litigation for other persons affected by pyrite in their houses who may have claims or of developers or contractors who have potential or actual liability in respect thereof. There is, therefore, in addition to the questions of fact that arise, an important and difficult area of acknowledgedly uncertain law.

67. In all the circumstances, it seems to me that Kearns P was correct in deciding that the case of Newlyn is one involving special circumstances such that it would not be appropriate and would not be in the interests of justice to order security for costs.

MCM's Submissions on the Marchbury Proceedings

68. MCM claims to have a bona fide defence to the claim. It denies that it made the representations and warranties alleged by the plaintiff and claims to have exercised reasonable skill and care in supplying the materials (which will be a matter of expert evidence). Insofar as the plaintiff claims losses, those are said to constitute pure economic loss and are not compensatable at law. The claim is statute-barred in any event. The plaintiff has failed to identify any loss or damage it has suffered and even if there was a breach of contract or of duty, a significant issue will arise as to whether Marchbury has any liability for defects.

69. They say there are no special circumstances that warrant the refusal of the security for costs, namely, there was no undue delay, and even if there was delay it has not prejudiced the plaintiff. It was submitted that the possibility of homeowners being left without a remedy does not constitute a special circumstance because it is not of fundamental public importance or such as would

transcend the interests of the parties.

Marchbury's Submissions in Response

70. Marchbury submitted that the defendant has not proved to the requisite standard that is has a prima facie defence to the plaintiff's claim for a number of reasons. Firstly, all of the infill used in constructing the development was sold by the plaintiff to the defendant; some of the houses comprised in the development have developed defects. Secondly, a sample of the infill used in the construction of one of the affected houses showed excessively high Pyrite content and the plaintiff was advised by an engineer that the damage to the various houses was caused by Pyrite- related heave. Thirdly, the defendant, who has not inspected any of the subjected properties or analysed any samples of the infill used therein, does no more than refuse to admit matters in question.

Discussion of Marchbury Application

71. In *Tribune Newspapers (In Receivership) v. Associated Newspapers Ireland t/a Irish Mail on Sunday* (25th March 2011) Finlay Geoghegan J. stated:

> "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."

72. There is nothing extraordinary about the case. The potential liability is simple and based on long established principles. Obviously, in the case of a contract, there is an action for breach if the facts warrant it. As to negligence, liability for a defective product that causes damage is not a new concept. The plaintiff in Marchbury has to prove the contract, the breach and damage resulting. The defence is a traverse of the allegations. It may or may not succeed, but that will depend on the factual evidence adduced at trial. But while it is incorrect to say that there is no defence, it does not follow that a sufficient defence has been shown to justify or warrant the making of an order for security for costs. My view is that pleadings containing no more than traverses of the allegations in the statements of claim and affidavits making the same defences do not reach the threshold.

73. In my judgment, security for costs should not be awarded on the basis that the defence essentially contains no more than general and specific traverses of the allegations contained in the statement of claim and that a prima facie defence has not been made out. I would affirm the judgment of Gilligan J. in refusing security for costs on that fundamental ground. The authorities are clear that it is not sufficient simply to deny the claims made by the plaintiff and that there is an obligation on a defendant seeking security to establish some basis over and above the mere denial of the claim in order to establish that there is a realistic defence. The burden is not a heavy one, but the defendant must establish a *prima facie* defence. This is discussed in some detail in the ex tempore judgment given by Finlay Geoghegan J. in which she reviewed the cases. The position in Marchbury is different and simpler than in Newlyn because Marchbury had a contract with the quarry supplier for the infill material that is alleged to have contained pyrite and that was used in the houses that were constructed by Marchbury. MCM does not have a *prima facie* defence in relation to liability in tort for pure economic loss.

Conclusion

74. I would dismiss these appeals.