



**THE COURT OF APPEAL**

Neutral Citation Number: [2022] IECA 12

**Appeal Number: 2018/354**

**Whelan J.  
Binchy J.  
Pilkington J.**

**BETWEEN/**

**DEMERAY LIMITED (IN RECEIVERSHIP)**

**APPELLANT**

**– AND –**

**WILLIAM F. O'GRADY KIRBY TARRANT AND STEPHEN T. NOONAN PRACTISING UNDER  
THE STYLE AND TITLE OF "O'GRADYS SOLICITORS"**

**RESPONDENTS**

**Judgment of Ms. Justice Máire Whelan delivered on the 25th day of January 2022**

**Introduction**

1. This is an appeal against the order of the High Court (Ní Raifeartaigh J.) made on 22 June 2018, perfected on 13 August 2018, following the judgment delivered on 22 March 2018 (revised on 27 April 2018), wherein the appellant was directed to furnish security for two-thirds of the respondents' costs pursuant to s. 52 of the Companies Act 2014, fixed at €112,334. In default thereof, the proceedings herein would be stayed. The appellant was further ordered to lodge in court to the credit of the action the said sum or, in the alternative, to enter into security by bond in the said sum with an approved guarantee society.
2. The motion for security for costs arose in the context of proceedings brought against the respondents, a firm of solicitors, by the appellant, an insolvent company. In the said proceedings, the appellant alleges that the respondents were negligent while acting on its behalf in relation to the conveyancing of four apartments within the appellant's construction project at Aubrey Court, Bray, Co. Wicklow.

3. In this appeal it is argued that the trial judge was incorrect to make an order for security for costs in circumstances where, the appellant contends, its inability to pay the respondents' costs was caused by the respondents' own wrongdoing, and in light of the respondents' delay in bringing the motion for security for costs.

### **Background**

4. From approximately 2005 to 2008, the appellant was engaged in developing lands on Parnell Road in Bray, Co. Wicklow with a view to constructing a residential and commercial development to be known as "Aubrey Court". In November 2006 the appellant retained the respondents to act as its solicitors in connection with the sale of the 34 apartments and 3 commercial units within the development. Construction of the development commenced on 8 January 2007.
5. The appellant's primary lender for the development was Bank of Scotland (Ireland) ("BOSI"). Following the collapse of the property market and the onset of the recession, the appellant encountered difficulties in discharging its liabilities. On 21 June 2011, Bank of Scotland, which by then had absorbed BOSI, appointed a receiver and manager over the assets of the appellant. The receivership ceased with effect from 14 October 2013.
6. The appellant was struck off the Register of Companies on 30 July 2014 but was restored on 15 July 2015.

### **Chronology of the pleadings**

7. The appellant issued a plenary summons on 31 October 2012 whilst in receivership, claiming damages for breach of contract, negligence and breach of duty. The respondents entered an appearance on 5 November 2013.
8. On 15 December 2015, the appellant delivered a statement of claim. In brief, it claims that prospective purchasers who signed contracts to purchase apartments nos. 20, 34, 33 and 25, Aubrey Court in 2006 (each of whom had paid a deposit) were able to reconsider their decisions to purchase and successfully withdraw from the contracts at a time when property prices were falling, by reason of the respondents' failure to ensure that binding or enforceable contracts were in place. It is further claimed that the respondents failed to inform the appellant that the said sales were vulnerable to withdrawal by the purchasers, in circumstances where the contracts had not been executed and exchanged by the appellant, thereby denying the appellant the opportunity to bring about their timely execution and render the contracts specifically enforceable or, otherwise, to procure other purchasers expeditiously. After the said sales fell through, the receiver disposed of the properties at far lower prices, representing an approximate loss of €1.69M.

### **Defence**

9. A defence was delivered on 10 June 2016. The respondents deny that the appellant suffered any loss or damage. It is contended that any loss or damage were incurred by Bank of Scotland, its subsidiaries, successors and/or assigns, and are not amenable to suit by the appellant.
10. At para. 14 the respondents plead, *inter alia*:-

“(a) According to the Plaintiff’s filed Accounts, construction of the development at Aubrey Court was not sufficiently advanced by mid-2008 to allow pressure to be brought to bear on purchasers to complete or enter into binding contracts;

...

(f) Had the sales of the four apartments completed in 2008, an additional €1,925,000 (less sales costs) would have been received by the Company in that year. As the Company had net liabilities of €2,439,399 at 30 September 2008, such sales would not have rendered the Company solvent, and such an amount would have been demanded by and paid to Bank of Scotland, reducing the money owed to it to €10,401,229;

...

(j) Had the sales taken place, nothing different would have happened between 2008 and 2013, except that instead of the Company receiving the benefit of a write off of €10,529,699 worth of loans, the write off would have been €8,604,699 and the Company would be in an identical position on completion of the receivership and the full and final settlement referred to in its Accounts.”

**Motion to dismiss**

11. On 27 April 2016, the respondents issued a motion seeking to have the proceedings dismissed for disclosing no cause of action. That motion has been adjourned to the trial of the action. The motion was grounded on the affidavit of William F. O’Grady sworn on 28 April 2016. Certain averments therein are relevant to the security for costs application.

12. At para. 11 of his affidavit Mr. O’Grady deposed that:-

“...while the development of the Premises was ongoing, the Company sought to sell some of the apartments from the plans. As was becoming usual by late 2006, various devices were employed to minimise stamp duty and to retain flexibility for the developer, in this case, the Company. The sales sought to be negotiated were by way of site sale and building agreement (which was at that stage quite usual) together with a ‘white goods’ or contents contract (which was very unusual). I say and believe that the sale required all three contracts (site sale, building agreement and white goods contract) were to be signed and binding before proceeding to completion.”

He continued at para. 13:-

“I say that when informed of the agreed sales, the Firm was instructed to send draft Site Sale Contracts and draft Building Agreements to Solicitors for each purchaser, but was not instructed to send any White Goods Contracts...I believe that the Company was content to have signed Site Sale Contracts and Building Agreements and relatively small deposits in preference to having all contracts signed and the usual 10% deposit, because if the values of property in the market continued to increase at the rates seen in 2005 and 2006, and the value of the apartments were

anticipated to increase during construction, that the Company could have rescinded or renegotiated the sales for a higher price.”

13. Thereafter, Mr. O’Grady referred in detail to the appellant’s filed accounts for the years 2006 to 2011 and 2014 in support of the respondents’ contentions that completion of the four apartment sales would have been impossible in 2008 because the development was not sufficiently advanced at that time, and that the sale proceeds would not have made a difference to the appellant’s financial circumstances.
14. By way of response, an affidavit was sworn by Paul Walsh, director and shareholder of the appellant, on 14 December 2016. At para. 6 thereof, Mr. Walsh disputed Mr. O’Grady’s reliance on the appellant’s audited financial statements for the years 2009 to 2014 on the basis that they were prepared in 2015 following the conclusion of the receivership, and so could not and did not “describe what might have happened had the Defendants not breached their contractual and professional duties to Demeray in the manner described in the Statement of Claim.”
15. At para. 7 Mr. Walsh took issue with the respondents’ contention that the appellant’s business “would have failed anyway”. He contended that the appellant had a very good working relationship with its principal funder, BOSI, which remained so “even when Demeray’s financial situation became challenging as the recession took hold.” He further deposed that the appellant could have worked through its financial difficulties on the basis of the goodwill that existed with the bank, but that:-

“...the loss of the four sales, which the Defendants had previously confirmed to the Bank as being unconditional and from which the bank must have derived comfort, tipped the balance against Demeray, undermined the trust that had hitherto existed and destroyed any prospect of the Bank permitting Demeray to work its way through the situation and/or reach an ultimate accommodation with the Bank.”

A letter dated 15 December 2006 from the respondents to BOSI was exhibited, wherein it was stated that the respondents had received unconditional signed contracts for apartment nos. 20, 33 and 34 Aubrey Court. Another letter of 26 October 2007 from the respondents to the bank was also exhibited with this affidavit, wherein it was represented that the respondents had received unconditional signed contracts for ten apartments within Aubrey Court, including the four units the subject of these proceedings. An email dated 8 December 2008 from the respondents to the bank was also exhibited, wherein it was stated that “All 7 contracts are unconditional”.

16. Mr. Walsh disputed Mr. O’Grady’s assertion that the appellant had come up with the idea of a separate contract for white goods, contending instead that same was raised by the respondents “as an incentive for the purchasers to sign their contracts promptly” (para. 11). Mr. Walsh further rejected the respondents’ contention that the appellant had preferred to leave the contractual situation open:-

"...There was never any discussion with the Defendants about the possibility of stringing the purchasers along in such a way that they could be discarded or bargained up if prices rose. Demeray intended and believed that both it, and the respective purchasers, was bound by the contracts." (para.12).

Mr. Walsh deposed that Mr. O'Grady was incorrect to say that the respondents were never instructed to send out white goods contracts, exhibiting letters from the respondents to the solicitors for the purchasers of apartment no. 20, dated 21 November and 18 December 2006, and the letter from the respondents to BOSI dated 15 December 2006.

17. Mr. Walsh accepted the statement of Mr. O'Grady that the respondents were not instructed to pursue the purchasers in respect of progressing contracts until summer 2008. He explained this was because at that stage the development was nearing its scheduled completion date. He exhibited the architect's certificate of practical completion and possession for the development dated 1 July 2008 in that regard.
18. The balance of Mr. Walsh's affidavit is focused on refuting the contention of Mr. O'Grady that the Aubrey Court development was a failure and that the sale of the four apartments would not have made a difference to the appellant's financial situation. Mr. Walsh referred to an August 2009 facility provided by the bank for a twelve-month term to demonstrate that the appellant still had a good working relationship with its lender even after the beginning of the recession.
19. Mr. Walsh then described the events of late 2010 which appear to have been a turning point in the appellant's relationship with Bank of Scotland. While considering a proposal made by the appellant during the review of the twelve-month facility, the bank enquired about the status of the four apartment sales. Mr. Walsh exhibited a letter dated 4 March 2009 from the respondents to the bank in which the respondents represented that they had sought counsel's opinion on whether the contracts for sale for apartment nos. 20 and 34 were binding and that "[a]s yet we have not received a definitive answer as to whether or not a binding Contract exists." However, counsel had previously provided a written opinion to the respondents under cover letter dated 15 January 2009 indicating that the said contracts were not enforceable. Mr. Walsh deposed that the bank "indicated that they felt they had been misled in relation to those sales" by the respondents' letter of 4 March 2009, by the letter of confirmation from the respondents dated 26 October 2007 and their email dated 8 December 2008. Shortly thereafter, Mr. Walsh deposed, the bank took the initial steps to appoint a receiver:-

"...The bank seems to have lost trust in the project after receiving counsel's opinion and thereafter it was always an uphill battle." (para. 27)

20. Mr. Walsh noted that the appellant's loan was called in on 24 May 2011. He outlined attempts by the appellant to bring in investors who were prepared to purchase the loan and security from Bank of Scotland. However, this proposal was rejected by Bank of Scotland and a receiver was appointed on 21 June 2011. Mr. Walsh reiterated his belief that the appellant's relationship with the bank became strained when the bank discovered that the

sale of the four apartments the subject of these proceedings “which had been confirmed to them by the Defendants as being unconditional, were now lost” (para. 30) and that this was:-

“...the catalyst that precipitated the refusal to engage with the investors, the appointment of the receiver and the consequent removal from Demeray of control over its own situation.” (para. 31)

21. At para. 34, Mr. Walsh refuted Mr. O’Grady’s suggestion that the appellant received a write-down of its debt from the bank and stated that the bank had instead sold the appellant’s debt to Kennedy Wilson, an international real estate investment and services company.
22. Mr. Walsh deposed that the respondents’ “want of care and breach of duty ultimately triggered the receivership that prevented Demeray from working its way out of difficulty” (para. 37).
23. Mr. Manus Quinn, chartered accountant, swore an affidavit on behalf of the appellant on 14 December 2016. Based on his analysis of the appellant’s books and records, he agreed with Mr. Walsh’s assessment of the appellant’s financial position and prospects during the period leading up to the appointment of the receiver by Bank of Scotland. He was also of the belief that the points sought to be made by Mr. O’Grady based on the appellant’s accounts were not well made as “they are advanced in the abstract and without regard to the important points set out in Mr. Walsh’s draft affidavit” (para. 4).

#### **Motion for security for costs**

24. The respondents issued a motion seeking security for costs on 23 November 2016. Relief was sought pursuant to s. 390 of the Companies Act 1963; s. 52 of the Companies Act 2014 or, O. 29, r. 1 of the Rules of the Superior Courts. The motion was grounded on the affidavit of Mr. O’Grady, sworn on 21 November 2016, together with an affidavit of Mr. Paul Conlon, costs drawer.
25. Mr. O’Grady reiterated the respondents’ defence; that construction work on the development had not completed by late 2008 and accordingly no enforcement of sales was possible, and had the sales completed, the sum of approximately €1.9M would have made no difference to the appellant since Bank of Scotland ultimately wrote-off approximately €10.5M of the appellant’s loans.
26. Mr. O’Grady referred to the appellant’s abridged financial statements for years ending 30 September 2014 and 30 September 2015 to support his contention that the appellant would be unable to pay the respondents’ costs if they were ultimately successful in their defence.
27. Although the affidavit of Mr. Conlon, the respondents’ expert, was not included in the books of appeal, at para. 36 of the High Court judgment, it is recorded that Mr. Conlon had estimated that on the information available to him, the total costs of defending the proceedings would be €168,500.

28. In response to the motion for security for costs, an affidavit was sworn on behalf of the appellant by Mr. Walsh on 8 February 2017. He placed reliance on his earlier affidavit sworn in connection with the motion to dismiss. He then outlined in detail three grounds on which the appellant was resisting the respondents' application, namely that:
- i. the respondents had not identified a stateable defence to the appellant's claim;
  - ii. the inability of the appellant to meet an award of costs was in fact caused by the acts of negligence and breaches complained of in the proceedings; and,
  - iii. there had been significant and prejudicial delay on the part of the respondents in bringing the security for costs motion.
29. With regard to the issue of delay, Mr. Walsh noted that the motion had issued on 23 November 2016 and the first indication that the respondents would require security was a letter sent a little more than a week prior, on 15 November 2016. He deposed that the accounts relied on by the respondents were filed in the Companies Registration Office on 15 July 2015 and had been available since then. He noted that the said accounts were relied on by Mr. O'Grady in his affidavit of 25 April 2016 and indicated his belief that the respondents were aware of same for at least seven months prior to their request for security.
30. Mr. Walsh averred that the respondents' delay had caused the appellant real and tangible prejudice since, during the period of delay, costs were incurred in prosecuting the case and in answering the motion to dismiss. He referred to a number of procedural steps taken in the proceedings which, he said, were of particular relevance in putting the respondents' delay in context. He also provided details of the costs involved in answering the motion to dismiss.

#### **Judgment of the High Court**

31. The trial judge noted that there is an onus on the defendant to establish that he has a *prima facie* defence, and that the plaintiff will not be able to pay the defendant's costs if successful in his defence. The order for security should then be made unless it can be shown that there are specific circumstances which would cause the court to exercise its discretion not to make the order sought, including delay on the part of the moving party in seeking the relief and/or the plaintiff's inability to discharge the defendant's costs owing from a wrong allegedly committed by the party seeking the security.
32. The court noted that it was not disputed that the appellant company was impecunious:-
- "...it is an insolvent company, as is clear from the company accounts exhibited to the Court. Accordingly, the live issues in this motion were whether the defendant has a *bona fide* defence and whether special circumstances exist such that, even if there is a *bona fide* defence, security for costs should not be ordered." (para. 42)

### ***Bona fide defence***

33. Noting that the threshold under this criterion is a low one, the trial judge was satisfied that there was sufficient evidence before the court to establish that the respondents had a *bona fide* defence within the meaning of that concept as deployed in applications for security for costs. The respondents had contended that the appellant had no arguable case since it did not suffer any loss in real terms because an amount equivalent to or greater than the alleged loss was ultimately written down in the course of the receivership, and any money received from the sales would have gone to Bank of Scotland rather than the appellant.
34. The trial judge considered that there was a *bona fide* defence arising out of two conflicts of fact to be resolved at trial; namely, (1) whether instructions were given, expressly or implicitly, by the appellant to the respondents to the effect that the contracts to be issued to the purchasers were to be unconditional contracts, and (2) whether construction of the development was at a sufficiently advanced stage to have enabled completion to take place.

### ***Impecuniosity caused by alleged wrongdoing***

35. The trial judge applied the four-factor test of Clarke J. (as he then was) in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7 ("*Connaughton Road*") that a plaintiff must satisfy in order to establish that its inability to pay stems from the wrongdoing of the defendant such that the court should refuse to order security for costs.
36. Clarke J. had observed that each step need only be established on a *prima facie* basis. He was also satisfied that the court can have some regard to the quantum of damages a plaintiff might obtain in the event he is successful since the plaintiff must show 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. The trial judge further noted that Clarke J. had stated that a court must look at all of the circumstances asserted on behalf of the parties.
37. The appellant had argued that the overall effect of the respondents' negligence was to destroy the trust the appellant enjoyed with its lender, BOSI, such that the bank withdrew from its relationship with the appellant, ultimately causing the appellant's failure. The trial judge noted that this claim went beyond the pleaded loss of the four contracts for sale the subject matter of the proceedings.
38. The trial judge accepted that there was *prima facie* affidavit evidence that the loss of the sale of the four apartments and/or the realisation by BOSI that the contracts in respect of those apartments were not unconditional constituted a turning point in the bank's relationship with the appellant. It also appeared to the court that it could be inferred on a *prima facie* basis that if the sale of the four apartments had proceeded, the bank may have continued to support the appellant, thereby increasing its likelihood of survival (para. 48).
39. However, the court identified a fundamental problem with the appellant's submission:-
- "...The causal link now alleged in response to the application for security for costs does not correspond with the case as pleaded in the statement of claim. The statement of claim does not plead that the negligence of the defendant caused the



company to fail, but simply pleads the (considerably smaller) loss arising out the loss of the sale of the 4 apartments. Further, the statement of claim does not refer in any way to communications between the defendant solicitors and the Bank, although the plaintiff now seeks to rely in this motion upon the defendant having allegedly misled the Bank in correspondence as to the true position concerning the contracts. This is an alleged wrongdoing which does not feature at all in the statement of claim.” (para. 48)

The court continued:-

“...I do not think that the jurisdiction to refuse the order for security for costs on the basis of an alleged causal link between the wrongdoing of the defendant and the impecuniosity of the plaintiff envisages a consideration of wrongdoing and losses entirely outside the parameters of the case as pleaded. Further, I do not think that what Clarke J. (as he then was) said in *Connaughten Road* with regard to taking all of the circumstances into account stretches this far.” (para. 49)

40. The trial judge was accordingly not persuaded that the appellant had made out the causal connection between the loss of the sale of the four apartments (if caused by the wrongdoing of the respondents), and the appellant’s insolvency and inability to discharge the costs of the proceedings if unsuccessful, absent the additional (not pleaded) assertion that the loss of the sales and/or the representations to the bank indirectly led to the failure of the company (para. 50). Accordingly, the court declined to refuse security for costs on the basis that the appellant’s impecuniosity had been caused by the respondents’ wrongdoing.

#### **Delay**

41. The trial judge observed that the previous authorities on delay in such applications did not require the court to automatically refuse the application, but rather established that the court had a discretion in light of all the circumstances. In the present case, she was satisfied that:-

“...refusing the application for security on the grounds of delay would seem to me to be a disproportionate response in light of the history of the proceedings...There seems to me to have been delays on both sides and this is not a ‘black and white’ situation of a plaintiff moving a case forward with expedition against a defendant who does little or nothing until a very late stage, before then issuing a motion for security for costs.” (para. 51)

The trial judge further observed that steps taken on behalf of the appellant did not appear to have been particularly complex or onerous in the period following the service of the statement of claim and the issuing of the motion for security.

42. The court was of the view that the question of the appellant being out of pocket by having dealt with various matters during the period before the issue of the motion for security for costs could more appropriately be met, if necessary, by adjusting costs at the conclusion of the proceedings, rather than refusing the application for security for costs in its entirety.

43. In an agreed note of the court's calculation of security for costs on 22 June 2018, it is recorded that the trial judge took the view (having considered decisions of Barrett J. in *Fides Capital Ltd. v. Alchemy Products Ltd.* [2017] IEHC 266 and Baker J. in *Werdna Ltd. v. MA Insurance Services Ltd. t/a Premier Guarantee* [2018] IEHC 194) that she was not bound to grant full security but rather had a full discretion in respect of determining the level of security, preferring the "flexible" approach of Baker J. in *Werdna*.
44. In exercising her discretion and having regard to the respondents' delay in bringing the application for security and various procedural delays, the court made a deduction of one-third from the full amount sought of €168,500 and ordered security in the sum of €112,334.

**Notice of appeal**

45. By notice of appeal dated 21 August 2018, the appellant contends that the trial judge erred in fact and/or in law in declining to exercise her discretion to refuse the respondents' application for security for costs by reason of special circumstances, namely:
- i. the delay on the part of the respondents in seeking such security;
  - ii. that the wrongdoing alleged against the respondents was the cause of the appellant's impecuniosity and the failure of its business. In particular it is contended that the trial judge erred in:
    - (a) failing to pay any or any sufficient regard to the evidence that the wrongdoing alleged against the respondents was the cause of the appellant's impecuniosity and the failure of its business;
    - (b) failing to regard the evidence as to the role played by the loss of the sales of the four apartments in causing the failure of the appellant's business and its ultimate impecuniosity as a "special circumstance" basis for refusing the application;
    - (c) finding that the appellant was obliged to have pleaded that the respondents' alleged wrongdoing was the cause of the appellant's impecuniosity and the failure of its business before it could rely on that factor as a special circumstances defence to an order for security for costs and in holding that it was insufficient for the appellant to set these matters out on affidavit; and,
    - (d) without prejudice to (c) above, confusing the loss and damage in respect of which the appellant sought to recover damages against the respondents (*i.e.* the loss of the sales of the four apartments), and the role which the respondents' wrongdoing (and the loss and damage thereby occasioned) played in causing the appellant's impecuniosity and the failure of its business which were matters on which the appellant also relied in resisting the application.
  - (iii) Without prejudice to the first two grounds of appeal, the appellant contends that the trial judge erred in law and/or in fact in refusing to exercise her discretion under s. 52 of the 2014 Act to fix the amount of security at one-third of the sum of €168,500 (rather than two-thirds as she had done) and in failing to have sufficient regard to the respondents' delay in seeking security for costs.

### **Approach of this court**

46. The decision and orders of the High Court were made in the exercise of the judge's discretion as arises in an interlocutory application such as under s. 52 of the Companies Act 2014. The hearing of an appeal from such an application does not involve a re-hearing.
47. The approach to be adopted by this court in reviewing the exercise of discretion by the trial judge is informed by the decision of this court in *Collins v. The Minister for Justice, Equality and Law Reform* [2015] IECA 27 where it was held at para. 79:-

"...the true position is that set out by MacMenamin J. in [*Lismore Builders Ltd. (in Receivership) v. Bank of Ireland Finance Ltd.* [2013] IESC 6], namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

48. In *Lawless v. Aer Lingus* [2016] IECA 235 Irvine J. (as she then was) reviewed the jurisprudence including her own decision in *Collins* and observed at para. 23:-

"...it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application *de novo* in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion."

49. As was observed by Collins J. in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 at para. 39, having reviewed the above jurisprudence:-

"...while as a matter of principle, 'great weight' is to be given to the views of the High Court judge, the ultimate decision on this appeal is for this Court."

### **Security for costs**

50. There have been statutory mechanisms in Ireland conferring jurisdiction on the courts to award security for costs against corporate plaintiffs since the 1860's. The current statutory iteration is found in s. 52 of the Companies Act 2014 which provides:-

"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."

51. The section re-enacted s. 360 of the Companies Act 1963 with one significant modification. The earlier provision expressly provided for “sufficient security”, whereas s. 52 merely refers to “security”. The Company Law Review Group in commentaries on the initial draft iteration of the provision that subsequently became s. 52, published in 2007, observed:-

“The word ‘sufficient’ has been deleted. The effect of this will be to give the court a discretion as to the amount of security that is required to be provided. The current position is that the court is required to order that ‘full security’ for costs is given; in other circumstances and, traditionally, one third of the costs was the norm.”

**Rationale of impecunious corporate plaintiffs providing security for costs**

52. Barrington J. observed in *Lismore Homes Ltd. (In receivership) v. Bank of Ireland Finance Ltd.* [1999] 1 I.R. 501 at p. 507 that “[i]nsolvent limited liability companies are in a different category simply because the liability of their shareholders is limited.” Hence, unlike private litigants, the risk of bankruptcy is not a consideration for them.
53. Subsequent to the hearing of this appeal, the Supreme Court delivered significant judgments on the issue of security for costs in *Quinn Insurance Ltd. (Under administration) v. PricewaterhouseCoopers (A firm)* [2021] IESC 15 (*Quinn Insurance*) and *Protégé International Group (Cyprus) Ltd. v. Irish Distillers Ltd.* [2021] IESC 16 (*Protégé*) on 22 March 2021. Commenting on the current statutory regime, O’Donnell J. (as he then was) in *Quinn Insurance* observed at para. 12:-

“...The fact that s. 52 and its statutory predecessors are included in the Companies Acts is a recognition that the benefit of incorporation with limited liability is capable of causing injustice. If a company can bring proceedings in circumstances where it will not be obliged to pay any award of costs if it loses, then there is an obvious injustice to the successful defendant. Costs will only be awarded if the action is not well founded. It adds insult to injury, therefore, if the defendant who *ex hypothesi* should not have been sued is not able to recover the costs of establishing that the plaintiff’s claim was without foundation. Anyone with experience of litigation will understand the distorting effect of the fact that a plaintiff is not a mark for an award of costs.”

The parties were afforded an opportunity to address the Supreme Court’s judgments in *Quinn Insurance* and *Protégé* and their supplemental submissions will be addressed below.

**Initial onus on the defendant**

54. The initial onus on a defendant who seeks security for costs was succinctly outlined by Morris P. in *Inter Finance Group Ltd. v. KPMG Peat Marwick* (Unreported, High Court, Morris P., 29 June 1998), an application pursuant to s. 390 of the Companies Act 1963. The said principles were restated and adopted by the Supreme Court in *Usk District Residents Association Ltd. v. The Environmental Protection Agency* [2006] IESC 1, [2006] 1 I.L.R.M. 363 at p. 368:-

“In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:

- (a) that he has a *prima facie* defence to the plaintiff's claim, and
- (b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.

2. In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus rests upon the party resisting the order."

55. In the first instance, therefore, the onus is on a defendant to establish two factors to a *prima facie* level and satisfy the court by "credible testimony" that (a) it has a defence to the claim and (b) there is "reason to believe" that the plaintiff company will be unable to discharge the defendant's costs at the conclusion of the proceedings in the event that its claim fails at the trial of the action.
56. Clarke C.J. in *Quinn Insurance*, emphasised the importance "for a court, faced with an application for security for costs, to scrutinise carefully the basis on which the defendant applying for security seeks to establish a *bona fide* defence" (para. 7.2). He further emphasised:-

"It is not unreasonable to require a defendant...to put forward its defence in sufficient detail to enable the Court (and, indeed, the plaintiff) to scrutinise the extent to which a *bona fide* defence has truly been established. It is not, of course, the case that the Court can or should form a view as to the likelihood of any asserted defence succeeding but nonetheless it does seem to me that it is incumbent on a defendant moving an application for security for costs to go well beyond mere assertion." (para. 7.2)

57. There was uncontroverted evidence before the trial judge in this case that the appellant company is impecunious and is indeed "an insolvent company" as it was characterised by the judge. At para. 42 of her judgment she observed:-

"...There is no dispute in the present case but that the plaintiff company is impecunious; it is an insolvent company, as is clear from the company accounts exhibited to the Court."

58. It will be recalled that the High Court determined "that sufficient evidence has been put before the court establishing that the defendant has a *bona fide* defence within the meaning of that concept as deployed in applications for security for costs" (para. 43). Thus, the initial onus of proof which operates to a *prima facie* level was discharged by the respondents. The appellant has not appealed from that determination and accordingly it is not in issue in this appeal.

#### **Balance of justice/Balance of injustice**

59. As Clarke C.J. reiterated in *Quinn Insurance*, the long established default position in an application for corporate security for costs where a defendant has met the two-pronged initial onus of proof of demonstrating the plaintiff company's inability to discharge costs

should its claim fail, and that the defendant has a *bona fide* defence, is that security for costs should be ordered unless the plaintiff company can establish special circumstances which warrant its refusal. The Chief Justice acknowledged there is a need to balance a company's right to sue with the interests of a defendant who has no prospect of having its costs met in the event that it succeeds in fully defending the claim. At para. 7.9 the Chief Justice assessed the competing detriments that will ensue where the order for security is either granted or refused:-

"...If the plaintiff puts up security and wins, then the security will be returned. The plaintiff will have been at the loss of whatever security has been put up for a period of time. That detriment cannot be ignored but it is nonetheless different in character to the loss which would be suffered by a defendant if security is not ordered. In the latter case, should the defendant succeed, the defendant will be at the permanent loss of whatever expense was incurred in defending the proceedings, as those expenses are likely to prove irrecoverable. It is easy to see how, ordinarily, the balance of justice in such circumstances might be said to favour the grant of security. However, that analysis assumes that the plaintiff can or will put up the security. There is, of course, the other important factor that the plaintiff may not be able (or may be unwilling) to put up security..."

60. In considering the circumstances of a company which was impecunious but not the subject of a liquidation, a position somewhat analogous to the instant case where the company is *de facto* insolvent, O'Donnell J. (as he then was) observed in *Quinn Insurance* at para. 18:-

"...It is relevant to ask in whose interests the proceedings are being pursued by a company which, on its face, is not in a position to fund the litigation. If it is clear that there are shareholders or backers who will likely benefit from the claim if successful, and who may be supporting the claim, then there is no reason why they should not also be expected to provide security. Even if it cannot be established that shareholders would provide security – and there is sometimes an unavoidable element of bluff and counter-bluff in such applications – a court should consider carefully whether such reluctance stems from nothing more than a realistic assessment of the chances of the claim succeeding, and the likelihood of an award of costs being made. But if the Court comes to the conclusion that security cannot be provided and that if an order is made that proceedings of some ostensible and substantial merit would not proceed, with the consequence that a wrongdoer who has caused damage should escape the consequences, then that is a feature which the Court may take into account in refusing security..."

He continued at para. 19:-

"I agree that a motion for security for costs should not ignore the fact that it is the limited company which is the plaintiff. The separation between the company and its shareholders must be recognised. However, it is not impermissible in my view – indeed it is only common sense – to have regard to the fact that if a company is

impecunious, the proceedings must normally be being pursued for some reason and that someone is supporting them and likely to benefit from them if successful...”

61. At para. 7.24 of his judgment Clarke C.J. observed:-

“...it seems to me that it is appropriate to characterise the overall approach as being one where the Court should attempt to adopt the course of action giving rise to the least risk of injustice while recognising, for the reasons already set out, that there will inevitably be some risk of injustice no matter what course of action the Court determines on. Where, in accordance with *Connaughton Road*, the Court is satisfied that the appropriate *prima facie* case has been made out to the effect that the inability of the plaintiff to pay costs should it lose is due to the wrongdoing alleged, then that fact by itself will ordinarily tip the balance of justice against the making of an order for security for costs...”

**Discretion exercisable in special circumstances**

62. That the court retains a discretion to refuse to make an order for security for costs notwithstanding that the defendant has met the initial onus encompassing the two threshold criteria adumbrated by Morris P. in the *Inter Finance* case has long been recognised. That principle was articulated thus in the judgment of Kingsmill Moore J. in the Supreme Court in *Peppard & Co. Ltd. v. Bogoff* [1962] I.R. 180:-

“I am of opinion that [s. 278 of the Companies (Consolidation) Act 1908] does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant but that there still remains a discretion in the Court which may be exercised in special circumstances.”

That view mirrored earlier decisions such as *Hogan v. Hogan (No. 2)* [1924] 2 I.R. 14 which in turn had cited *Furnell v. Stackpoole* Mil. R. 271. One of the special circumstances identified in *Peppard & Co. Ltd. v. Bogoff* by Kingsmill Moore J. at p. 188 was that “[t]he financial position of the plaintiff may, if he substantiates his case, be due to the very actions of the defendants for which they are sued”.

63. At para. 13-105 the authors of *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) note:-

“The meaning of ‘special circumstances’ in this context was considered in some detail by both Denham and Geoghegan JJ. in their judgments in *West Donegal Land League Ltd. v. Údarás na Gaeltachta* [[2006] IESC 21, [2007] 1 I.L.R.M. 1]. Denham J. stressed that the categories of ‘special circumstances’ are not closed and that no exhaustive list or definition of what these are in this context has been made. She stated that in considering the concept of ‘special circumstances’ it should be remembered that the essence of the order for security for costs is ‘to advance the ends of justice and not to hinder them’. In her view ‘[i]t 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.”

64. O'Donnell J. (as he then was) delivering his judgment in *Quinn Insurance* observed at para. 3:-

“It is well established that this section and its statutory predecessors, which can be traced to at least 1868, conferred upon the courts a discretion. Considerable case law has developed as to the circumstances in which such discretion should be exercisable. It is in the nature of an application such as this that courts will develop rules of thumb for the exercise of the discretion. This makes particular sense in this context since an application for security for costs must necessarily be made at the outset of the proceedings, and when it is difficult for a court to reach any concluded view as to the merits of the proceedings as it is faced not with witnesses who can be questioned, but rather with pleadings and affidavits, normally framed with an eye on the legal test involved. It is also desirable that interlocutory applications such as this should not become mini trials of the actions. Accordingly, it has come to be well accepted that, if it is established that there is reason to believe a company will be unable to pay costs if it is unsuccessful in the action, and if, moreover, a defendant establishes a *prima facie* defence to the plaintiff's claim, then security for costs ought to be required unless it can show that there are specific circumstances which ought to cause the court to exercise its discretion not to make the order sought. In this regard, the onus will shift to the party resisting the order.”

65. Two distinct “special circumstances” the subject matter of consideration and determinations in the High Court fall for consideration in this appeal; (1) whether the wrong alleged against the respondents caused the appellant company's impecuniosity and the failure of its business and (2) delay of the respondents.

**Special circumstance of defendant having caused impecuniosity of company**

66. The contention that the respondents caused the appellant's impecuniosity is further subdivided into two distinct propositions; (1) that the wrong alleged and pleaded against the respondents caused the appellant company's impecuniosity and the failure of its business and, further or in the alternative, (2) that wrongs deposed to on affidavit but not the subject-matter of any pleading or claim in the proceedings caused the appellant's impecuniosity and the failure of its business.

***Connaughton Road***

67. In his decision in *Connaughton Road* Clarke J. (as he then was) observed that for a corporate plaintiff to establish that its inability to pay stemmed from the wrongdoing of the defendant it was necessary to establish four propositions. The principles adumbrated in the decision, as reaffirmed and further recalibrated by the Supreme Court in *Quinn Insurance*, govern the position.



68. At para. 3.4 of his judgment in *Connaughton Road* Clarke J. identified four distinct elements which must be established by a plaintiff in order to rely on the impecuniosity special circumstance:-

“In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-

- (1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
- (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
- (3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and
- (4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position.”

69. As with the initial onus of proof on the defendant, the standard of proof imposed on a plaintiff to bring home a defence of “special circumstances” is to a *prima facie* level. The onus shifts to the plaintiff to establish to a *prima facie* level that its inability to pay costs was the result of the defendant’s alleged wrongdoing.

70. In supplemental submissions, the appellant contended that the judgments of the Supreme Court in *Quinn Insurance* and *Protégé* are consistent with its case that the jurisdiction to order security for costs is one to be exercised with flexibility and having regard to the overall justice of the circumstances of the particular case. It was submitted that *Quinn Insurance* in particular eschews a rigid application of the *Connaughton Road* criteria. In contrast, the respondents submitted that *Quinn Insurance* and *Protégé* supported their position that, in order to succeed in resisting an order for security for costs, the wrongdoing alleged to have caused the appellant’s impecuniosity must be part of the appellant’s claim as pleaded in the proceedings. Particular reliance was placed on the wording of para. 7.13 of Clarke C.J.’s judgment in *Quinn Insurance* and paras. 21 and 26 of O’Donnell J.’s judgment in *Quinn Insurance*. For the reasons outlined below, I am satisfied that the High Court judge was not confined to consideration of the claim as pleaded in the proceedings. However, as will be seen, that does not necessarily benefit the appellant’s position.

71. It is necessary to consider the High Court’s approach to the appellant’s two distinct bases – pleaded and unpleaded – offered by way of defence to the application for security for costs as constituting evidence that the respondents caused the appellant’s impecuniosity and caused the failure of its business. The evidence in respect of both the pleaded and unpleaded strands of the appellant’s claim that the respondents caused its impecuniosity and the loss of its business will be considered in turn having due regard to the jurisprudence.

### **Balancing of rights**

72. The exercise involves a careful balancing of the respective rights of the parties, for, as Clarke C.J. observed in *Quinn Insurance* at para. 7.5:-

“...Defendants are entitled to access to justice as well. A defendant has no choice about being sued. However, just as the cost of bringing certain types of proceedings may prove a barrier to those who might have a good claim being able to vindicate their rights, so also can the cost of defending proceedings be a barrier to the rights of defence and the ability of parties sued to vindicate their right to have the claim determined by a court of competent jurisdiction on the merits or at least not to be forced to compromise the case on a skewed basis because of their exposure to costs.”

### **The narrower pleaded claim**

73. This encompasses the claim pleaded in the statement of claim which is specifically directed to the loss of four conveyancing contracts for the sale of units 20, 25, 33 and 34 Aubrey Court, Bray, Co. Wicklow with a claimed consequential loss of approximately €1,700,000.

### **Realistic assessment of the narrower pleaded claim**

74. Clarke C.J. in *Quinn Insurance* suggested at para. 8.4 that the court should carefully interrogate a pleaded claim by a plaintiff who seeks to rely on the “impecuniosity due to alleged wrongdoing” special circumstance:-

“...The Court must take a realistic assessment of the claim as made and assess whether there is any real possibility of the claim being allowed in full. If not, then a court will be required to take that factor into account in assessing the real possibility that the alleged wrongdoing provides a complete explanation for the impecuniosity of the plaintiff concerned.”

75. Such an approach is not in any way novel and reflects existing jurisprudence. The authors of *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) observe at para. 13-103:-

“In *Irish Commercial Society Ltd. v. Plunkett* [[1988] I.R. 1] Costello J. suggested that as part of its overall approach to exercising its discretion in an application for security for costs, the court could take ‘all the circumstances of the case into consideration’ and these would include, in his opinion, ‘the strength of the plaintiff’s claim and the conduct of the applicant for security’...the onus lies on the plaintiff to establish these [special] circumstances and this may explain the suggestion that the strength of the plaintiff’s claim may play a role. However, the statements set out above as to the limited role which the merits of the respective parties’ claims should play at this interlocutory stage should be borne in mind.”

76. It is clear from the judgment of O’Donnell J. (as he then was) in *Quinn Insurance* that in evaluating the merit of proceedings the court has regard to pleadings and affidavits (para. 3). At para. 21 O’Donnell J. noted, in agreement with the Chief Justice, that:-

"...the question of whether it has been shown that the inability to pay costs is due to an alleged wrongdoing of which the plaintiff complains in the proceedings is something which a court should scrutinise with considerable care. Otherwise, it would become too easy to avoid an order for security for costs merely by skilful pleading and ingenious, if implausible, calculations of damages...This defence will apply most clearly in the situation, such as in *Peppard v. Bogoff*, where it was alleged that the defendants had conspired to deprive the plaintiffs of their business and there was thus a very clear and direct connection between the wrong alleged and the inability to pay..."

He observed that:-

"...even if a causal connection can be established between the conduct of the defendant and the financial position of the plaintiff...that conduct may not be established to be wrongful..." (para. 21)

In general the claim is assessed by reference to the four-factor *Connaughton Road* test with a consideration of any claim that the order will stifle the proceedings, if same arises. O'Donnell J. (as he then was) in *Quinn Insurance* warned against conducting a mini-trial in this regard.

***Approach of trial judge to pleaded claim***

77. Having evaluated the evidence the trial judge considered:-

"In those particular circumstances, it seems to me that the court, when taking into account the four matters set out by Clarke J. in *Connaughton Road* may only do so within the parameters of the pleadings. The question then is: whether the loss of the sale of the four apartments (if caused by the wrongdoing of the defendants) could be said to have caused the plaintiff to be in a situation where it is insolvent and therefore unable to discharge the costs of the proceedings if unsuccessful. I am not persuaded that this causal connection is made out, absent an additional (not pleaded) suggestion that the loss of the four apartments and/or what the bank was told about those contracts indirectly led to the failure of the company. Accordingly, it seems to me that the submission that the court should refuse to fix security for costs on the basis that exceptional circumstances exist must be refused." (para. 50)

***Assessment of the evidence in relation to the pleaded claim***

78. In the instant case the evidence suggests that even were the appellant to entirely succeed at trial, the full sum of damages would have been, at the relevant time, insufficient to restore the appellant to a position where it would be able to pay costs should they be awarded. It would appear that Bank of Scotland (which had acquired BOSI by absorption on 31 December 2010) wrote off approximately €10.5M worth of loans following the appointment of the receiver by it in June 2011. There is a note entered at para. 1.1 in the 2014 accounts stating:-

"...Post receivership, the directors have undertaken a comprehensive review of the company's prospects and have decided it is necessary to maintain the company for

the foreseeable future. The directors wish to consider pursuing a number of avenues in respect of potential legal claims by the company. Based on this, the directors and shareholders have undertaken to provide the company with the necessary financial funding to ensure that it is in a position to meet its working capital requirements for the foreseeable future.”

79. The respondents also exhibited abridged financial statements for the year ended 30 September 2015 which suggest that the appellant had no assets. They contain an entry that the company owed €765,281 to unidentified creditors as of that date. There is the following note attached:-

**“Going Concern**

The company has negative reserves of €765,682 (2014: €653,932). However the principal creditors of the company are the directors/shareholders and there is no reliance on third party debt. The directors/shareholders have chosen to support the company and have undertaken to continue to provide it with the necessary financial resources to meet its financial obligations as they fall due for the foreseeable future.

On this basis the directors consider it appropriate to prepare the financial statements on a going concern basis. Accordingly, these financial statements do not include any adjustments to the carrying amounts and classification of assets and liabilities that may arise if the company was unable to continue as a going concern.”

This is suggestive that the directors/shareholders may themselves be creditors of the company.

***Conclusions on pleaded impecuniosity***

80. In supplemental submissions, the respondents correctly noted that the judgment of the Chief Justice in *Quinn Insurance* emphasised that a key question is whether the quantum of damages claimed is sufficient to restore an impecunious plaintiff to a position where it would be able to pay costs should they be awarded.
81. Applying the *Connaughton Road* approach to the claim as pleaded and given that *prima facie* that claim discloses actionable wrongdoing on the part of the respondents and supports a causal connection between the actionable wrongdoing and the practical consequences pleaded and claimed by the appellant, parts 1, 2 and 3 of the test can thereby be considered to have been potentially met. However, taking the pleaded claim at its height, it is evident that the sums claimed, even if recoverable in full, would have been insufficient to reverse the parlous financial state of the company as is disclosed in the evidence. The sums pleaded and claimed were wholly insufficient 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” under the fourth limb of the *Connaughton Road* test. As was observed by Clarke C.J. in *Quinn Insurance*, determining whether alleged wrongdoing caused the inability to pay an adverse costs order is a mathematical exercise, even if it “is one which involves estimates and will rarely be

capable of exact calculation" (para. 7.27). The evidence adduced did not meet that threshold. The claimed sum at its zenith, as pleaded, was not of a magnitude which would render the otherwise insolvent appellant solvent having regard to its financial accounts and circumstances of the company as disclosed in the pleadings. The appeal fails in this aspect given the lack of cogent and credible evidence being adduced that corroborated the contentions made by the appellant in that regard.

**The wider and unpleaded claim**

82. As stated above, the affidavit of Mr. Walsh of 14 December 2016 contains a number of averments which in substance appear at least to suggest or imply that the loss of the four contracts in question precipitated the insolvency of the company. For instance at para. 18 he deposes:-

"...if the sale of the four apartments mentioned in the statement of claim had gone through, then the bank would have received a total of over €3,737,268 and Demeray would have been in a totally different position. The said sum...is comprised of the net proceeds of the first four sales, €1,466,268, €1,690,000 from the four sales the subject matter of these proceedings and €581,000 in respect of rent."

83. Mr. Walsh emphasises that the appellant:-

"...was in a position to develop a strong rental income from the unsold units. For example, Demeray's potential rental income in 2011 would have been €445,500 and even in the depths of the recession the rental market in Bray was relatively buoyant."  
(para. 20)

He also emphasises that in August 2009 BOSI extended the appellant's current facilities and advanced additional facilities to the company to finance the completion of the Aubrey Court development and payment to various contractors (para. 21). At para. 26 he deposes that "[i]f the negotiations with the bank had proceeded to completion it is clear that the project was viable and ultimately profitable." He deposes that BOSI:-

"...indicated that they felt they had been misled in relation to those sales by the defendants' email dated 4 March 2009 and by the letters of confirmation given to them by the defendant, the defendants' letters dated 26 October 2007 and 8 December 2008...I have since learned that it was shortly after this point that the bank had took the initial steps to appoint a receiver. The bank seemed to have lost trust in the project after receiving the counsel's opinion and thereafter it was always an uphill battle..." (para. 27)

84. At para. 31 Mr. Walsh deposes:-

"When the sales of the apartments mentioned in the statement of claim fell through the bank's attitude changed. This was the catalyst that precipitated the refusal to engage with the investors, the appointment of the receiver and the consequent removal from Demeray of control over its own situation."

85. Of course, whether the sales of the apartments in question or any one or more of them would have fallen through at that time in all the circumstances, even were binding contracts exchanged as represented in the correspondence by the respondent solicitors with the bank, remains to be determined at trial.

86. The actionable wrongdoing relied on in the appellant's affidavits as giving rise to "special circumstances" was succinctly characterised by the trial judge as follows:-

"...the thrust of the evidence of Mr. Walsh is that the negligence of the solicitors caused not only the loss of the four contracts the subject-matter of the proceedings but also, indirectly, the ultimate collapse of the company...Mr. Walsh says that a turning point in the relationship between the plaintiff company and its lender, the bank, arrived when the bank realised that the sale of the four apartments had fallen through and that the contracts upon which these sales had been based were not unconditional, contrary to what they had previously been told by the defendants. Essentially his case is that, if the relationship between the plaintiff and the bank had not been ruptured, the plaintiff company would likely have survived the recession and be solvent today..." (para. 47)

87. However, the appellant does not sue the respondents for the entire loss of the company's business. It will be recalled that on 21 June 2011 a receiver was appointed and all the unsold units (including the four the subject of the pleaded claim) were subsequently disposed of at very substantial discounts. The receivership ended on or about 14 October 2013. The appellant deposes that it holds the respondents responsible for the demise of the company and the failure of its business and asserts that the ultimate failure of the company and its current insolvency are "special circumstances" (albeit outside the pleadings) which warrant the court refusing to grant security for costs to the respondents.

***Representation to bank***

88. An aspect relied on by the appellant concerns a letter dated 15 December 2006 wherein the respondent solicitors expressly represented to the bank, "I confirm that we have received unconditional signed contracts for the following units together with an agreed €20,000 deposit in each case". The apartments identified included units 20, 33 and 34. There was a further communication of 26 October 2007 from the respondents stating, "I refer to the above and wish to confirm that we have received unconditional signed contracts for the following units". Those listed included apartments 20, 25, 33 and 34.

***Significant or high onus where unpleaded wrongdoing is basis of alleged impecuniosity***

89. In *Quinn Insurance* Clarke C.J. considered the entitlement of a plaintiff to invoke conduct *outside* the ambit of its pleaded claim and reached a nuanced conclusion. At para. 8.1 of his judgment Clarke C.J. observed:-

"...there may be cases where it is arguable that a company would not have gone into liquidation in the absence of the wrongdoing alleged even though it may be possible that the damages which could be recovered would not be sufficient to make up the larger shortfall which has now emerged because of the liquidation itself."

90. At para. 8.10 he observed:-

"...QIL are not asserting that they are entitled to claim, in these proceedings, damages in respect of the sums amounting to over €300 million on which reliance is placed. There may very well be good reason why damages in respect of those sums are not claimed but it seems to me to require some level of engagement with that question for those sums to be properly taken into account. There may be an answer to this rhetorical question but it still needs to be asked. Why, if those sums can be said to have been lost by QIL as a result of the wrongdoing alleged against PwC, can they not be claimed?"

91. Clarke C.J. considered that a rigorous process of enquiry was to be engaged in where a company ascribes its inability to provide security for costs on wrongdoing alleged against the defendant which wrongdoing is not itself the subject matter of any proceedings:-

"...it seems to me that a significant onus rests on a plaintiff in such circumstances to establish the real prospect that it could have avoided liquidation were it not for the wrongdoing sought to be litigated. A key question is as to why the shortfall between the maximum amount of the claim made and the deficit in the company cannot itself be recovered in damages if that shortfall is in fact due to the wrongdoing alleged. *Prima facie*, it would appear that a company which can only establish losses attributable to the alleged wrongdoing which fall short of its deficit cannot show that it would have remained capable of continuing in business if the wrongdoing had not occurred for there is, again, *prima facie*, an underlying deficit which would have led to it being insolvent anyway..." (para. 8.2)

92. At para. 8.3 he observed:-

"The question that must be asked on the facts of this case is how is it possible to reconcile the contention that QIL could have avoided administration but for the alleged wrongdoing of PwC if all of the consequences alleged of that wrongdoing amount to a significantly lesser sum than the shortfall which it now experiences. For that to be so then there must have been consequences of the wrongdoing which are not reflected in the damages claim, for if all of the consequences of the wrongdoing are reflected in the damages claim then it is impossible to see how QIL could have avoided being significantly insolvent even had it not suffered the alleged wrongdoing."

93. At the time of the hearing of this appeal the parties had available to them the decision of Baker J. in this court in *Quinn Insurance Ltd. (Under administration) v. PricewaterhouseCoopers (A firm)* [2020] IECA 109, delivered in August 2020, wherein it was observed:-

"28. ...The fourth limb of the test in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd.* as expressed at para. 3.4 of the judgment of Clarke J. contained an example or an illustration to explain a principle, the principle being that a court

assessing an argument of a causal connection had to be satisfied that the connection is credibly made, and that a sufficient causal connection is shown between the losses claimed and the inability to meet the likely costs.

29. The connection has to be credibly made and not based on mere assertions, so that the court has to scrutinise the quantum of the claim, the level of impecuniosity, possibly the other calls on any monies that might be recovered in damages, and the likely potential costs. This approach which now scarcely needs authority, is found in the earlier authorities from which the principle emerged and, to take an example, in *Jack O'Toole Ltd. v. MacEoin Kelly Associates* [1986] I.R. 277, at p. 284, Finlay C.J. said that 'a mere bald statement of fact' would not suffice. This *dictum* was quoted with approval by Barron J. in *Lismore Homes Ltd. (In Receivership) v. Bank of Ireland Finance Ltd.* [1999] 1 I.R. 501, at p. 529. Finlay C.J. was not satisfied that the fact that the recovery of the amount claimed 'would make a significant contribution towards the solvency of the company concerned' was sufficient to discharge the onus of proof on the corporate plaintiff resisting the making of an order that the inability to pay the costs had been caused by the wrong the subject matter of the claim.
30. In the recent judgment of this Court in *Welcome Ireland Hospitality Ltd. v. Cedarcourt Developments Ltd.* [2019] IECA 308, I said that this means a plaintiff must credibly point to some objective and ascertainable evidence."

Baker J.'s approach accords fully with the views of the Supreme Court in this aspect.

94. The counterfactual proposition advanced by the appellant as outlined above is that if the four contracts had not been lost, the appointment of the receiver and the subsequent insolvency and failure of the appellant's business would not have occurred.
95. Reviewing the evidence advanced by the plaintiff company in *Quinn Insurance*, the Chief Justice considered it "quite limited" (para. 8.11). At issue there was how the company could have remained solvent in the absence of wrongdoing by the defendant. The Chief Justice was of the view that the plaintiff had failed to demonstrate that it would have remained solvent in the absence of the defendant's wrongdoing. He also evaluated the prospects of the pleaded claim, considering it unlikely that the plaintiff would be awarded the entire claim for damages:-

"8.13 ...I am not satisfied that any sufficient evidence was given to meet what I have described as a heavy onus which lies on such a plaintiff to explain how there are unusual circumstances to justify the contention that it would nonetheless have been able to pay costs were it not for the wrongdoing alleged, but where, at the same time, the maximum quantification of its claim does not readily demonstrate that fact. When coupled with the fact that it would seem unlikely that the claim would be awarded in full, I have come to the conclusion that QIL have failed to establish the 'impecuniosity due to alleged wrongdoing' special circumstance."



96. In its affidavits, as distinct from the pleadings, the appellant maintained that but for the respondents' wrongdoing it would have remained solvent and discharged its liabilities to the bank. Its financial position would have been improved by the proceeds of sale of the four properties that would have been made available to Bank of Scotland. No claim in relation to the entire loss of the company's business forms part of the pleaded claim nor does it seek damages in respect of same.

97. It will be recalled that the trial judge's view of this aspect was as follows:-

"48. It appears to me it could probably be said that there is *prima facie* evidence on affidavit that the loss of the sale of the four apartments and/or the realisation by the Bank that the contracts in respect of those apartments were not unconditional constituted a turning point in the Bank's relationship with the plaintiff. It also seems to me that it is a reasonable inference, or at least an inference that reaches the threshold of a *prima facie* case, that if the sale of the four apartments had proceeded, the Bank might have continued to support the company thereby increasing the company's likelihood of survival...The causal link now alleged in response to the application for security for costs does not correspond with the case as pleaded in the statement of claim. The statement of claim does not plead that the negligence of the defendant caused the company to fail, but simply pleads the (considerably smaller) loss arising out the loss of the sale of the 4 apartments. Further, the statement of claim does not refer in any way to communications between the defendant solicitors and the Bank, although the plaintiff now seeks to rely in this motion upon the defendant having allegedly misled the Bank in correspondence as to the true position concerning the contracts. This is an alleged wrongdoing which does not feature at all in the statement of claim." (emphasis added)

As noted above, the trial judge considered that, in taking into account the four-factor test set out in *Connaughton Road*, the court may only do so within the parameters of the pleadings.

98. The appellant contends, on the basis of the reasoning of the trial judge in the judgment, that in order to have a prospect of succeeding in an impecuniosity special circumstance, a plaintiff must have specifically pleaded its own impecuniosity and the role of the defendant's wrongdoing in bringing about that state of affairs. The appellant argues:-

"...This would seem to be required even if (as here) the plaintiff actually wishes to advance a claim for monetary relief that is more immediate and confined than the ultimate financial consequences suffered, but nevertheless dwarfs by a multiple (here by fifteen) the amount of costs for which the defendant seeks security." (para. 4.4 of the appellant's written submissions)

It was contended that such an approach is not supported by authority.

99. Reliance was placed on the Supreme Court decision in *Irish Conservation and Cleaning Ltd. v. International Cleaners Ltd.* (Unreported, Supreme Court, 19 July 2001). Reliance in

particular was placed on the *dictum* of Keane C.J. where he had observed in relation to a summary summons claim:-

"The real dispute so far as the High Court and this Court were concerned was as to whether, given the plaintiffs are insolvent and will be unable to pay the costs of the defendants if the defendants are successful in the proceedings, this is an appropriate case in which to order security for costs, and was the High Court judge correct in exercising his discretion in the way that he did? That in turn depends effectively, and again there is not any great issue on this, as to whether the plaintiffs had before the High Court and this Court sufficient materials to enable the High Court and this Court to say that if the plaintiff's case was correct, there was a causal connection between the actions of the defendants, of which they complain in the proceedings, and their present inability to pay the security for costs."

100. Reliance was also placed on *Jack O'Toole Ltd. v. MacEoin Kelly Associates* [1986] I.R. 277 where it was held by the Supreme Court that special circumstances had not been established on the evidence even though loss of the plaintiff's business had been specifically pleaded. Finlay C.J. observed at p. 284:-

"...it does not seem to me a sufficient discharge of the onus of proof which I deem to be on a company against whom an application is made under s. 390, to make a mere bald statement of fact that the insolvency of the company has been caused by the wrong the subject-matter of the claim."

101. The burden that rests on the plaintiff is to prove that there is a causal connection between the loss suffered and the inability to pay. In *Quinn Insurance* Clarke C.J. did not specifically identify set rules for the evidence to be adduced on behalf of the plaintiff company or formulate a specific test based on the principles. As his comments at para. 7.33 (in regard to the question of stifling, considered in detail below) indicate, the formulation of a test risks rendering security for costs applications more onerous and complex with the ensuing concern of impeding access to justice.
102. The decision of the Supreme Court in *Quinn Insurance* clarifies and confirms that, where a corporate plaintiff seeks to resist an order for security for costs on the grounds that its inability to pay is caused in part by wrongdoing of the defendant and consequent damage, the court is not precluded from having regard to same, even if it has not been pleaded and is not the specific subject matter of a claim by the company in the first instance. Rather, where the wrongdoing has not been specifically pleaded and is not directly the subject matter of a claim within the suit, that contention and claim must be analysed closely by the court. The contention that the plaintiff company's impecuniosity was caused by the defendant's actions can give rise to complexities and additional evidential challenges where it is contended that wrongdoing on the part of the defendant extraneous to the pleadings caused the irreversible decline of the company leading to its current straitened position.
103. In light of the *dictum* of Clarke C.J. in *Quinn Insurance*, where a party claims that its inability to pay stems, at least in part, from wrongdoing and consequent damage that has

not been pleaded, such an assertion can be considered by the court but there is a significant onus on the claimant to tender an explanation as to why it is not pleaded and/or why the plaintiff has refrained from advancing any claim for the asserted loss. It is necessary for the court to carry out a close analysis of the rationale for the approach adopted.

104. In the *Protégé* decision Clarke C.J. observed at para. 6.7:-

"A different analysis arises in cases where the argument of the plaintiff is that it would have made money had the defendant not been guilty of wrongdoing and where it is asserted that the money which it would have made would have been sufficient to pay the relevant costs. In such a case, the plaintiff may not be able to show that it would have been in a position to pay the costs concerned before the alleged wrongdoing occurred but may seek to persuade the Court that the wrongdoing prevented it from bettering its financial position in a material way relevant to the analysis required in considering whether special circumstances have been made out. I do not rule out the possibility that such an argument may find favour in the circumstances of any individual case. However, it does seem to me that a court is required to carefully analyse such a contention, for the consideration starts with the proposition that the relevant plaintiff was not, prior to the alleged wrongdoing, in a position to pay costs should it lose and where it must now establish a credible basis for lost profits such as would have changed that situation. Here, again, the onus rests on the plaintiff to put forward sufficient clear evidence to enable the Court to conduct that analysis in a thorough fashion. Yet again, it must be observed that a failure by such a party to put forward clear evidence of that type can legitimately lead to the Court not being satisfied that it has discharged the onus on it." (emphasis added)

***Assessment of evidence in relation to unpleaded claim***

105. In his affidavit of 14 December 2016, Manus Quinn, accountant, deposes that his firm Woods & Partners Ltd. was first retained by the appellant on 21 May 2014 to bring the company's accounts, financial statements and returns up to date in the aftermath of the receivership and the striking off of the company on 30 July 2014. He deposes at para. 4:-

"...While the accounts record the economic reality of, *inter alia*, the asset values referred to therein, I believe that it is important to emphasise that this has been undertaken after the event. Furthermore, I would emphasise the obvious point that accounts cannot provide insight as to the relationship and level of understanding between Demeray and its lender at any particular point in time, or indeed the factors that caused Bank of Scotland to set its face against a potential rescue bid by investors and instead appoint a receiver. Accordingly, I believe that the points that Mr. O'Grady seeks to construct regarding Demeray's prospects of survival are not well made as they are advanced in the abstract and without regard to the important points set out in Mr. Walsh's draft affidavit."

106. The affidavit of Manus Quinn falls very far short of asserting that, on balance, conduct on the part of the respondents caused the failure of the appellant company's business or that it would have remained solvent and in a position to meet any costs order that might arise

but for the alleged wrongdoing of the respondents, notwithstanding that the maximum amount of the appellant's pleaded claim is confined to the value of the four apartments. There is no independent evidence of any kind to shed light on the relationship and level of understanding between the appellant and BOSI in 2009 or at any particular point in time, or the proximate or actual factors that caused BOSI to terminate the facility as it did or those that caused Bank of Scotland in 2011 to reject a potential rescue bid by investors and elect to appoint a receiver.

107. Mr. Walsh on behalf of the appellant contends that the company had a very good working relationship with its principal funder, BOSI, which remained good even when the company's financial situation became challenging "as the recession took hold". In his affidavit of 14 December 2016, he deposes at para. 7:-

"...While the situation was difficult and finely balanced, I have no doubt that it was one that Demeray could have worked through on the basis of the goodwill that existed with the bank. I also have no doubt that the loss of the four sales, which the defendants had previously confirmed to the bank as being unconditional and from which the bank must have derived comfort, tipped the balance against Demeray, undermined the trust that had hitherto existed and destroyed any prospect of the bank permitting Demeray to work its way through the situation and/or reach an ultimate accommodation with the bank...at the end of the day the defendants' breaches of duty lost Demeray the proceeds of four sales and contributed to Demeray being put into receivership by the bank and the present application is essentially premised on the defendants attempting to benefit from their own wrong in order to avoid responsibility. This is fundamentally unjust."

108. Two aspects are of particular note. Firstly, he deposes that Demeray "could" have worked through the situation, rather than that it "would" have worked through it. Secondly, he has no regard to the circumstances of BOSI in 2009 and 2010 leading up to its absorption into Bank of Scotland, nor is there any evidence from the latter that had the four sales the subject matter of the pleadings proceeded, Bank of Scotland would not have appointed a receiver. Hence, Mr. Walsh fails to advance any independent evidence to support his beliefs and injects a level of speculation into the broader proposition that in essence the company would have survived had the four sales proceeded.

***Conclusions on unpleaded impecuniosity special circumstance***

109. I differ with the trial judge's assessment and determination that in taking into account the four matters set out by Clarke J. in *Connaughton Road* the court was confined to doing so exclusively within the parameters of the case as pleaded by the appellant. That approach was unduly narrow. However, that does not ultimately alter the outcome.
110. As the decisions in *Quinn Insurance* and *Protégé* make clear it has always been open to a plaintiff to demonstrate that the conduct of the defendant not the subject of a specific plea is causative of the impecuniosity leading to its inability to meet an order for security for costs. However, as stated above, a higher, or in the words of Clarke C.J. in *Quinn Insurance* "a significant onus" (paras. 8.2 and 8.14) or "a heavy onus" (para. 8.13), is imposed on a

plaintiff who advances such an assertion but omits to plead and claim on foot of it. I am satisfied that the averments contained in the affidavits, including the excerpts quoted above are little more than bare assertions by a shareholder/director of the company that are unsupported by any cogent independent evidence. As such, they cannot be relied upon in support of a contention that that the alleged wrongdoing on the part of the respondents caused the appellant's impecuniosity and the entire failure of its business or that absent same, the bank would have reached a settlement or arrangement with the appellant and it would have survived the great economic crash and not have been placed in receivership or become insolvent.

111. In the absence of independent evidence to support such a contention, I am entitled to have regard to material facts in the public domain which offer independent evidence suggesting that irrespective of the views or understanding of BOSI and its Irish management in regard to that bank's own future and the prospects for this facility, by 2009 BOSI was already doomed as a viable banking entity and in its death throes.
112. Following orders made in the High Court in Dublin on 20 October 2010 and by the Court of Session in Scotland on 10 December 2010, a cross-border merger by absorption of BOSI into Bank of Scotland was effected pursuant to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (O.J. L310/1; 25 November 2005).
113. The actual fate of BOSI undermines the appellant's contentions as to the viability of the indebted company at a fundamental level. Suffice it to say, the appellant in the affidavits and submissions has not met the significant or high level of proof required to show that the conduct of the respondents caused the unpleaded failure of the company's business. At the relevant time in 2008, BOSI was financially impaired and would be the subject of a cross-border merger between BOSI and Bank of Scotland in December 2010. There is uncertainty as to whether the appellant would have been successful in renting out commercial and residential units completed in the Aubrey Court development and no evidence from auctioneers or otherwise is forthcoming to independently corroborate the various assertions as to its overall viability and prospects.
114. Further, reviewing the affidavits, and this court is in as good a position as the trial judge to do so, I must conclude that this proposition is highly speculative and the significant or high onus on the appellant was not met at any level to the standard required and as obtained in light of the authorities at the date of the appeal hearing, such as Baker J.'s judgment in *Quinn Insurance*.

**Will the claim be stifled**

115. In *Quinn Insurance* Clarke C.J. considered that even if the *Connaughton Road* special circumstances are not established, there may be a second stage to the process whereby the court can consider whether it is likely that the proceedings will be stifled and take the result of that consideration into account in assessing which course of action runs the least risk of injustice. He summarised his views on this issue as follows:-

"...It does, however, seem to me that there are, in effect, two stages to the process. The first is as to whether inability to pay costs should they be awarded has, on a *Connaughton Road* basis, been shown *prima facie* to be due to the wrongdoing alleged. If so, then security should not ordinarily be ordered. If not, then the Court should enter into an inquiry as to the likelihood of the proceedings actually being stifled if an order is made and take the result of that analysis into appropriate account in its overall assessment." (para. 7.25)

The Chief Justice noted that in considering the likelihood of the proceedings being stifled, the court will have to analyse any assertion put forward on behalf of the plaintiff concerned that it would not be in a position to put up security should it be ordered.

116. Clarke C.J. further observed in *Quinn Insurance* at para. 7.33:-

"...The fact that the Court may consider that the proceedings would be likely to be stifled if security is ordered is not a decisive factor but it must be taken into account in determining where the least risk of injustice lies..."

117. In supplemental written submissions, the respondents note correctly that in order to successfully rely on the special circumstance of stifling, a plaintiff must provide the court with sufficient detail as to whether the proceedings would in fact be stifled. In the instant case, there is scant evidence on affidavit as to how the insolvent appellant has financed this litigation to date. One is left with the impression, in light of Note 2 in the abridged financial statements for year ended 30 September 2015, that the directors/shareholders have chosen to support the company and have undertaken to continue to provide it with the necessary financial resources to meet its financial obligations as they fall due for the foreseeable future, and that such a commitment contained in the accounts extends to the defrayal of legal costs incurred by the appellant in the within litigation.

118. Nowhere is it asserted in the affidavits or in the written submissions that if an order for security for costs is made in this instance it will halt the within litigation *i.e.* that it will preclude the company and its shareholders and directors from pursuing the litigation and the claim further. Rather, reliance was focused on the contention that the special circumstance of impecuniosity caused by the conduct of the respondents offers a complete defence to the making of the order.

#### **Delay**

119. The other special circumstance relied upon was that of delay on the part of the respondents in seeking the order. Grounds 1 and 3(b) in the notice of appeal are directed to that issue. The delay specifically relied upon, however, appears to be measured at approximately seven months from 25 April 2016 to 23 November 2016. The trial judge correctly noted that there were delays on both sides. She further noted that "the steps taken on behalf of the plaintiff do not seem to me to have been particularly complex or onerous in the period following the service of the statement of claim and the issuing of the motion for security" (para. 51). As she correctly noted, the question of the appellant being out of pocket is a

matter which could be dealt with by adjusting costs at the conclusion of the proceedings, rather than refusing the application for security in its entirety.

120. The High Court in *Werdna Ltd. v. MA Insurance Services Ltd. t/a Premier Guarantee*, where the trial judge determined that there was some delay on the part of the defendants in bringing the application seeking security for costs, dealt with the matter on the basis that the threshold of special circumstance had not been met. The court considered that the delay was “not culpable” and was found to be reasonable in the circumstances – “although not wholly so” (*per* Baker J. at para. 79). The High Court proceeded to exercise its discretion in making the order for security for costs but fixing the amount at approximately two thirds of the total estimated costs.

121. Clarke J. (as he then was) in *Moorview Developments Ltd. v. Cunningham* [2010] IEHC 30 observed:-

“...the rationale behind the delay special circumstance jurisprudence is that a party is entitled (where security is to be ordered) to be able to include that factor in its judgment as to whether to progress the proceedings from as early a time as is reasonably practicable. The test is not as to whether the relevant plaintiff might not nonetheless have gone ahead with the proceedings even had security been ordered earlier and, thus, would have incurred any costs arising in the intervening period in any event. Rather it is that the plaintiff incurring costs in the intervening period ought to have been entitled to make its decision, as to whether to incur those costs, in the light of full information, including the fact that security for costs would have to be put up.” (para. 3.7)

122. It will be recalled that the within proceedings were instituted on 31 October 2012. In February 2015 the appellant attempted to deliver a statement of claim. That delay in itself was appreciable on the part of the appellant. The respondents objected by reason that the appellant had been struck off and the company dissolved with effect from 30 July 2014. Thereafter, following the restoration of the appellant to the Register of Companies on 15 July 2015, the statement of claim was delivered on 15 December 2015. Whilst on the other side there were delays in delivering a defence and indeed a motion for judgment in default had to issue twice, a defence was ultimately delivered on 10 June 2016. The special circumstance of delay was accordingly not established as the trial judge correctly found. Such a determination would have been inconsistent with the balance of justice on the facts of this case. Accordingly, that ground of appeal also fails.

#### **The quantum of security**

123. Clarke C.J. confirmed in *Quinn Insurance* that:-

“...the default position should continue to be that full security in monetary form should be provided but that the Court may depart from that position if it considers it necessary and appropriate so to do to minimise the risk of injustice across the board.” (para. 7.21)

He also emphasised that failure to require full security risked exposing a defendant to the likely consequence that a successful defence of the proceedings would still leave it with costs that could not be recovered.

124. The trial judge fixed the quantum of security at two thirds of €168,500 which the respondents had identified as the costs of defending the within proceedings. I find no reason to deviate from that sum. It is noteworthy that this ground of appeal states:-

“3. Without prejudice to 1 and 2 above, in directing the plaintiff to give security for costs in the sum of €112,333 the learned trial judge erred in fact and/or law in (a) refusing to exercise her discretion under s. 52 of the Companies Act 2014 regarding the amount of security to be provided so as to fix that sum at one third of the sum of €168,500 (being sum presented by the defendants as their costs of defending the proceedings)...”

125. It is manifest from the agreed note of the High Court’s approach to the calculation of security for costs of 22 June 2018 that the judge considered the provisions of the 2014 Act and jurisprudence including decisions of other judges of the High Court. The order was reasonable in the circumstances and represents a proper exercise of discretion by the trial judge and no error in that regard can be identified such as would warrant this court in interfering with same. It was also fair and proportionate having regard to the respective position of the parties and as reflected in the decision in *Coolbrook Developments Ltd. v. Lington Development Ltd.* [2018] IEHC 634. The trial judge expressly took into account the delays on the part of the respondents.

126. It was clear in all the circumstances that the justice of the case required that the appellant furnish security for the costs of the respondents. The approach adopted by the judge as to its quantum gave rise to the least risk of injustice in all the circumstances and having regard to the evidence. This ground of appeal does not succeed.

### **Conclusions**

127. I would dismiss this appeal and uphold the order of the High Court, albeit for reasons somewhat different to those identified by the trial judge. Further, no basis has been identified to interfere with the quantum of security for costs as fixed by the High Court.

### **Costs**

128. As to costs, the respondents have been wholly successful in opposing the appeal and in those circumstances my preliminary view is that an order for costs should follow in the respondents’ favour. There should be a stay on the execution of the said order for costs pending conclusion of the above entitled proceedings. If either party wishes to contend for an alternative order with regard to costs of the within appeal, they should provide written submissions to the Office of the Court of Appeal and the other side within 21 days of delivery of this judgment, with the other side providing a written response within a further 21 days.

129. Binchy and Pilkington JJ. concur with this judgment which is being electronically delivered.