[2020] IEHC 153

THE HIGH COURT

[2004 No. 3166 P]

BETWEEN

**DRUMINISKIN DEVELOPMENTS LIMITED,
MATTHEW FARRELL, JAMES FARRELL AND EILEEN FARRELL**

PLAINTIFFS

– AND –

KEVIN O'GORMAN A SOLICITOR PRACTISING UNDER THE STYLE OR TITLE OF KEVIN O'GORMAN & COMPANY SOLICITORS

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 27th March 2020

Introduction

1. This is an application for security for costs pursuant to s.52 of the Companies Act 2014 ("Act of 2014") and/or Order 29 of the Rules of the Superior Court ("RSC"), directing the first named plaintiff, Druminiskin Developments Limited, to furnish security for costs. It is brought by motion of 23 July 2018 grounded upon the affidavit of Mr. John O'Brien, solicitor for the defendant. There is no question but that the first plaintiff will be unable to pay the costs of these proceedings, given its very substantial liabilities. The abridged accounts for the year ending on 31 December 2017 show that the first plaintiff had liabilities in the amount of €3,814,998. Further, there is a *prima facie* defence in that the defendant pleads a settlement agreement that prevents these proceedings being continued. The real dispute between the parties is accordingly the first plaintiff's claim that there are special circumstances indicating security should not be ordered due to (a) delay (b) the conduct of the defendant during the events which are the subject of these proceedings and (c) the cause of impecuniosity being the defendant's conduct.

2. The case arises in circumstances where the defendant, a solicitor, is alleged to have acted, *inter alia,* negligently, in breach of contract, in breach of fiduciary duty, fraudulently and in breach of the first plaintiff's legitimate expectation when acting for the plaintiffs in the context of the purchase and development of lands at Gortnakesh, Co. Cavan.

3. I should explain that there were originally four plaintiffs, but the second to fourth named plaintiffs settled their cases against the defendant two days into a hearing in June 2018. The first plaintiff could not participate in that hearing since at the time it had been struck off for failure to make returns to the Companies Registration Office ("CRO"). It sought an adjournment of the proceedings so that all the plaintiffs' cases could be heard together but the defendant objected and proceeded against the extant plaintiffs. The second named plaintiff gave evidence at that hearing, some of which is relevant to the matters I am required to resolve. There is a transcript of his evidence and I am treating same as *prima facie* evidence in deciding upon this application for security of costs, in the same way as the affidavit evidence before the court, conscious of course that the case settled before the defendant gave evidence and that his version of events was thus not before the court by way of oral evidence.

Factual Background to the Application

4. The facts of this case are involved and relate to events that happened many years ago. I set out below a regrettably lengthy chronology but given my conclusions on special circumstances, and particularly the defendant's conduct, it is necessary to go into events in some detail. There are many disagreements between the parties as to the precise chain of events but the chronology of events appears to be as follows.

5. Mr. Patrick Russell, formerly a barrister, was introduced to Mr. James Farrell, the third plaintiff (also known as Mr. Bobby Farrell) and the father of Mr. Matthew Farrell, the second named plaintiff ("Mr. Farrell"), sometime in 2002. Mr. James Farrell indicated to Mr. Russell that himself and his son Matthew were interested in doing a property deal to obtain land to build houses. In turn Mr. Russell appears to have introduced Mr. Farrell and Mr. James Farrell to a Mr. Thomas McFeely of 2 Ailesbury Road, Ballsbridge, Dublin 4. On 10 September 2002, a company, Druminiskin Developments Limited ("the first plaintiff") was incorporated for the purpose of creating a vehicle for the construction and sale of the houses on the lands at Gortnakesh, Co. Cavan.

6. In October 2002, the Farrells appear to have agreed in principle to buy a site in Gortnakesh, Co. Cavan from Mr. McFeely for the purposes of house construction by the Farrells. Mr. Farrell, a builder, went on to the site in what he describes as a "caretaker capacity" and commenced building works in October 2002.

7. The first appearance of Mr. Kevin O'Gorman, defendant and solicitor, in the documentation appears to be in a letter of 7 November 2002, where he is acting not for the first plaintiff but rather for Mr. McFeely in connection with the purchase by Mr. McFeely of the property at Gortnakesh. The letter refers to receipt of a contract for sale for the lands at Gortnehask (sic) from Mr. Cathal O'Sullivan (joint owner of the lands along with Mr. James McMorrow). Mr. O'Gorman notes that there is no purchase price or closing date and he asks Mr. McFeely to contact him to discuss the contents of the contract.

8. In a letter of 12 November 2002, Mr. O'Gorman writes to Mr. Russell asking whether the Farrells are purchasing what is described as "lands at Co. Cavan" from Mr. McFeely, thus suggesting that at this time, the Farrells were not clients of Mr. O'Gorman. However, around this time Mr. Russell appears to have introduced the plaintiffs to Mr. O'Gorman. Mr. O'Gorman had apparently acted for James and Eileen Farrell, the third plaintiff (also known as Ann Farrell), Mr. Farrell's mother, in respect of another property transaction. It is not clear precisely when Mr. O'Gorman started acting for the Farrells but by 6 December 2002 he was writing on behalf of James and Matthew Farrell to AIB in respect of a loan, *inter alia*, to purchase the lands at Gortnahask (sic).

9. On 20 November 2002, by which time Mr. Farrell had gone onto the lands at Gortnakesh, Mr. Farrell received a letter from Martin P. Crilly, Solicitors acting on behalf of Mr. McMorrow, who was stated to be the joint owner of the lands at Gortnakesh. That letter said that Mr. Farrell had entered into possession of the property without permission, had commenced work and had been told that he had no right of authority to enter onto the client's property and that, despite his client being assured by Mr. Farrell that he would

immediately leave, he had not done so and had continued to carry out work. The letter threatened that an injunction would be issued unless he immediately ceased all work and removed himself, his employees and his equipment from the property. In evidence given before the High Court on 5 June 2018 in the proceedings by the second to fourth plaintiffs, Mr. Farrell accepted that he had personally received that letter.

10. Correspondence then ensued between Mr. O'Gorman (acting on behalf of the plaintiffs) and Mr. Martin Crilly. It is clear from the documentation before the court that Mr. McFeely had no title to the lands in question at that point in time. Indeed, of critical importance to the determination of this motion is the fact that he did not obtain title until 6 May 2005, when a transfer took place from Mr. McMorrow and Mr. O'Sullivan to Mr. McFeely as original purchaser and, in the same transaction, from Mr. McFeely to the first plaintiff as sub-purchaser.

11. On 16 December 2002, Mr. O'Gorman wrote to Mr. John O'Connor, now solicitors for Mr. McFeely, stating that he had received a phone call from a man purporting to be Mr. McMorrow telling them that Mr. McFeely was not in a position to sell the property. In that letter, Mr. O'Gorman seeks a copy of the contract between Mr. McFeely and Mr. McMorrow and Mr. O'Sullivan. At latest from this point, Mr. O'Gorman was put on notice of the issues in respect of the title to the lands at Gortnakesh.

12. There appears to have been some type of agreement between the Farrells and Mr. McFeely to buy the lands in December 2002 as a document entitled "Memorandum of Agreement of the 20th December 2002" between Mr. McFeely and Mr. James Farrell and Mr. Farrell in respect of the first plaintiff has been exhibited, reciting a purchase price of €1.3 million and a deposit of €250,000 for the lands at Gortnakesh. This agreement was never completed.

13. From mid-December 2002 to 4 February 2003, there are various letters from Mr. O'Gorman to Mr. O'Connor, asking for an update on the position concerning the contract between Mr. McFeely and Mr. McMorrow/Mr. O'Sullivan. Then, on 17 February 2003, there is a letter from Martin P. Crilly, Solicitors to Mr. Farrell putting him on notice that he had again gone onto the site without permission and that injunction proceedings would be issued unless he left the site immediately.

14. Meanwhile, on 19 February 2003, a letter of sanction was issued by AIB ("the Bank") whereby the bank offered the first plaintiff two loan facilities, the first being in the amount of €1.65 million in order to fund the purchase of an 11-acre site with planning permission for 82 houses to be registered in the name of Druminiskin Developments Limited and the second of €1.23 million to fund the development of the first 10 houses at Gortnakesh. The security for the loan was stated to be a debenture over the assets of Druminiskin Developments Limited, including the 11-acre site with planning permission for 82 houses at Gortnakesh, Co. Cavan, letters of guarantee from James and Eileen Farrell to the value of €2.9 million and assignment of life cover over the life of Mr. Farrell to the value of €1 million. The security was required to be in place before drawdown.

15. On 21 February 2003, Mr. O'Gorman wrote to AIB stating that, in consideration of it releasing a sum of €450,000, Mr. O'Gorman undertook to register AIB's debenture against the property at Gortnakesh. On the same day, €450,000 of the first loan facility was drawn down.

16. On 20 March 2003, Mr. O'Gorman wrote enclosing what he describes as "*your undertaking duly completed*" and asking when he could expect to receive the loan cheque. A solicitor's undertaking of 10 March 2003 was provided by Mr. O'Gorman in his discovery (exhibited as MF4 to the affidavit of Mr. Farrell of 31 October 2018), whereby in consideration of present or future advances and/or in consideration of the Bank agreeing to the drawdown of the facility and the payment through Mr. O'Gorman of the loan cheque, Mr. O'Gorman undertook, *inter alia,* that the first plaintiff has, or will, acquire a good marketable title to the property in the sole name of the company, to apply all sums received towards the purchase of the property or the discharge of existing third party mortgages and not to negotiate the loan cheque until the security has been duly executed and to execute the bank's standard form of mortgage, to register the mortgage and to lodge with the Bank the original title deed/land certificate. A sum of €1.2 million was drawn down on the 21 March 2003, presumably on foot of this undertaking.

17. Those undertakings appear to have been replaced by an undertaking of 9 June 2003 given by Mr. O'Gorman. By the June undertaking, in consideration of present or future advances and in consideration of the Bank agreeing to the drawdown of the facility and the payment through Mr. O'Gorman of the loan cheque, Mr. O'Gorman undertook, *inter alia,* that the first plaintiff has, or will, acquire a good marketable title to the property in the sole name of the company, to apply all sums received towards the purchase of the property or the discharge of existing third party mortgages and not to negotiate the loan cheque until the security has been duly executed.

18. Early on in the hearing seeking security, counsel for the defendant informed the court that Mr. O'Gorman accepted that he was in breach of his undertaking of 9 June 2003. This position was also set out in a replying affidavit of Mr. O'Gorman sworn on 6 December 2018 in this motion, where he stated, at para. 25, that *"[t]he Plaintiffs correctly fault your deponent in relation to the undertaking given to AIB and while I acknowledge that these monies should not have been dispersed, they were dispersed to or on behalf of the plaintiffs and its directors and on their direction".* At para. 35, he avers:

> *"Finally, insofar as it [is] said that the Court has an inherent supervisory jurisdiction over your deponent, I fully accept this in relation to the issues arising from the undertaking. The First Named Plaintiff and the co-Plaintiffs were however the recipients or beneficiaries (direct or indirect) of the payments which were wrongly made and while I fully accept that these payments should not have been made to the Plaintiffs or on their direction, I respectfully suggest that the inherent supervisory jurisdiction cannot be called in aid by the very persons who benefitted from the breach and who were aware of the purpose of the advance. In saying this,*

I do not for one moment, seek to suggest that there was proper compliance with the undertaking but, if it is a complaint – it is a complaint by the Bank and not by the persons who instructed the disbursement of those monies".

19. I should observe at this point that, as noted above, there were in fact three undertakings to AIB by the defendant, the first by way of letter of 21 February 2003, the second on 10 March 2003 and the third on 9 June 2003. The acceptance of breach of undertaking was made in respect of the June undertaking but it seems likely that there was a similar breach in relation to the February and March undertakings. By the start of June 2003, the entirety of the sum of €1.65 million had been paid out by AIB and disbursed by Mr. O'Gorman in circumstances where he was aware that the first plaintiff did not own the lands at Gortnakesh, that he was not in a position to register the debenture against the property at Gortnakesh, that the first plaintiff did not have a good marketable title to the property, and that the security could not be duly executed.

20. By letter of 21 February 2003, Mr. O'Gorman wrote to Mr. McFeely enclosing what he described as a booking deposit of €450,000 and noting that it would be paid by way of three different cheques as per Mr. McFeely's request.

21. On 27 February 2003, Mr. McMorrow and Mr. O'Sullivan issued proceedings against Mr. Farrell in the High Court seeking an injunction restraining him from continuing construction or interfering with their lands at Gortnakesh and restraining him from continuing trespass and nuisance on those lands. An interim order was made on that date.

22. On 5 March 2003, a summons server, Mr. Durkin, served a copy of the notice of motion, grounding affidavit and exhibits, a copy of the Order made on 28 February 2003 and the plenary summons on Mr. Farrell, who acknowledged in his oral evidence in the June 2018 proceedings that he had received those documents.

23. On 27 March 2003, an affidavit of Mr. Farrell sworn 21 March 2003 was filed and served in the injunction proceedings. Mr. Farrell says that he was not told of the proceedings, he had no knowledge of this affidavit whatsoever and did not assist in the preparation of it and that the signature on the affidavit was not his (see para. 36 of his affidavit of 31 October 2018). I find the response of Mr. O'Gorman to this very serious allegation difficult to understand. In his replying affidavit sworn 6 December 2018, he avers as follows:

"26. I instructed the deponent in his affidavit and at paragraph 36 is referring to his affidavit of 21st March 2003. I note it is claimed he did not swear the contents of the Affidavit but this was sworn before a currently unidentified Commissioner for Oaths on the 21st March 2003.

27. Nowhere in the affidavit is any explanation provided by the Plaintiffs as to why works were commenced, having received originating letters of the type which

threatened an injunction, and which made clear that ownership of the land lay elsewhere".

24. I should add that in a motion to dismiss for want of prosecution brought by the defendant, a replying affidavit was sworn by Mr. O'Gorman on 12 July 2008 and he refers there to "*untrue and disingenuous allegations*" against him by Mr. Farrell which he says he will not respond to by reason of the settlement of the proceedings (discussed further below). However, he does aver at para. 4 that there is one allegation that cannot go unanswered being that the signature of Mr. Farrell was forged in his affidavit of 27 March 2003, and that he, Mr. O'Gorman, had some role or involvement in same. He says this is a "*scurrilous allegation and [he] categorically reject[s] any suggestion that* [he] *was involved in or aware of the alleged forging of the signature*."

25. It appears that the injunction proceedings were settled on 27 March 2003, and a settlement agreement in respect of the proceedings is exhibited to Mr. Farrell's affidavit of 31 October 2018.

26. Although Mr. Farrell had originally been the only defendant to these proceedings, by way of the settlement the Coalport Building Company ("Coalport") and Mr. McFeely were joined as defendants and a settlement was agreed as between the plaintiffs and Mr. McFeely and Coalport, which ultimately was ruled on 31 March 2003 by the High Court. However, Mr. Farrell is not a signatory to the settlement agreement. Mr. O'Gorman makes no reference to the agreement and there is no correspondence or minutes of meetings between Mr. O'Gorman and Mr. Farrell exhibited in this regard. Mr. Farrell gave evidence on Day 2 of the hearing in June 2018 that he had no knowledge of the High Court Order of 31 March 2003 (page 78, line 18 of the transcript referred to at para. 3 above).

27. That settlement ultimately broke down and the injunction proceedings were re-entered on 28 July 2003 with notice of re-entry of the proceedings served on Mr. O'Gorman. By letter of 9 August 2003, Mr. O'Gorman agreed to an adjournment of the injunction proceedings with Mr. Crilly for Mr. McMorrow. There is no evidence of any correspondence or notes of meeting between Mr. O'Gorman and any of the plaintiffs in respect of this adjournment.

28. Prior to those events, as noted above, various disbursements on foot of the monies that had been advanced by AIB of €1.2 million in March 2003 were made. The detail of those disbursements is recorded by Mr. O'Gorman in a letter of 12 January 2004 (after the relationship between the plaintiffs and Mr. O'Gorman had broken down). According to the account given by Mr. O'Gorman in that letter, the amount paid out totalled approximately €1.2 million and he asserts that all disbursements were done on Mr. Farrell's instructions. A sum of €330,000 was lodged to the account of a company called SCOSIM Limited in the United Kingdom. The circumstances in which this money was lodged are very unclear and Mr. Farrell says he knew nothing about it. There were other monies provided to Mr. McFeely in the sum of €28,500. An amount of just under €100,000 was paid to Mr. Russell. There was also a cheque for €62,500 in favour of Newgate Motors.

29. Payments of €234,128, €35,000, €125,000 and €237,500 were made to the first plaintiff. In Mr. Farrell's evidence in June 2018, he states that in respect of the cheque for €237,500 he was instructed by Mr. O'Gorman to lodge it to Ulster Bank and to write a cheque for €237,500 to Mr. McFeely. In respect of the payment of €234,128, Mr. O'Gorman writes on 14 May 2003 to the first plaintiff as follows:

> *"Dear Mathew and James,*
>
> *Further to our conversation of even date in the above matter please find enclosed herewith my cheque for €234,128 in your favour. Please note that this money is paid to you on the strict understanding that it will be immediately forwarded by you to the Vendor (Tom McFeely) by way of part payment of the purchase money in this instance."*

30. It is accompanied by a typed document to be completed by Mr. Farrell whereby he acknowledges the cheque, confirms he will pay it to Mr. McFeely by way of part-payment in the sale price of the lands at Gortnakesh and acknowledges that the payment of money is made against the advice of his solicitor. That document is undated and unsigned.

31. On 15 April 2003, a memorandum of agreement for the lands in Gortnakesh was concluded between Mr. McFeely and the first plaintiff in the amount of €1.9 million with a deposit of €240,000 and a closing date of 2 May 2003. The contract was signed by Mr. O'Gorman in trust for his client. In his evidence in June 2018, Mr. Farrell said that he knew nothing about this contract. However, at para. 29 of the affidavit of Mr. O'Gorman of 6 December 2018, sworn in the context of this motion, he avers he was instructed by his client to execute the contract dated 15 April 2003 signed in trust. No transfer of the lands took place pursuant to that agreement.

32. On 9 June 2003, the undertaking referred to above was given to AIB by Mr. O'Gorman in respect of the site at Gortnakesh.

33. On 30 September 2003, there was a letter to AIB from Mr. O'Gorman (see Mr. O'Gorman's discovery, exhibited by Mr. Farrell) where it was confirmed that substantial work had commenced on the first plaintiff's site and that, although legally binding contracts had not yet been implemented for the new houses, booking deposits had already been paid with respect to 24 houses and at least 12 of the purchasers were anxious to proceed as soon as possible.

34. An important letter in the context of this motion is sent on 28 November 2003 from Mr. O'Gorman to AIB where he confirms they have now received back signed contracts from purchasers in respect of 20 of the houses in the development. Mr. Farrell gave evidence on Day 2 to the effect that the letter came about because "*the bank gave us drawdown for ten houses but we actually built the 20 houses. When we got close to finishing off the 20 houses we were short, I can't remember whether it was 80 or 100,000, we looked for the bank to give us an extra payment. The bank agreed to give us the extra payment on foot of contracts being signed"*.

35. On the first day of the hearing counsel for the defendant informed the court that this letter was false and the representations in it were false. No explanation was offered for same. I address this issue further below when considering the conduct of the defendant.

36. In the discovery from Mr. O'Gorman exhibited to the affidavit of Mr. Farrell, there is also a letter of 3 October 2003 from Mr. O'Gorman to AIB stating that he can confirm they have now received signed contracts from various purchasers of 12 of the new houses belonging to the first plaintiff. It seems likely that the representations in that letter must also have been false given the position of counsel for the defendant in respect of the later letter.

37. Much reliance has been placed by the defendant upon a letter of 31 July 2015, from G.A. Byrnes and Associates, estate agents, furnished by the plaintiffs' solicitors as part of the replies to particulars where Mr. Byrnes says that he was heading up the sales and marketing programme for the properties being sold, being 3 and 4 bedroomed semi-detached properties in October 2003 and that after achieving sales in the first phase they were advising prospective purchasers that the next phase was under construction and would be released in January/February 2004. Mr. Byrnes states that there was a very strong interest from purchasers for the next phase, but they made the decision not to take any booking deposits to ensure they obtained the best possible sale price for their clients. This letter has been interpreted by the defendant to assert that there had been a deliberate decision by the plaintiffs to cease the sale of houses for pricing reasons and that therefore the defendant was not causative of any loss. This does not appear to be a correct interpretation of this letter. Whatever the reason given in that letter as to why sales were being deferred, sales could not have been completed by the first plaintiff since it had no title to the property, Mr. McFeely not achieving title until 2005 to the lands, when he in turn sold them on to the first plaintiff. In those circumstances I cannot conclude there was a deliberate decision of the first plaintiff not to sell the houses for commercial reasons, given the impossibility of the first plaintiff closing any sales at the end of 2003/2004 due to a lack of title over the land.

38. Meanwhile the proceedings between Mr. McMorrow and Mr. O'Sullivan and Mr. Farrell/Coalport/McFeely were still going on, with an order being made on the 19 December 2003 restraining Mr. McFeely from dissipating a particular asset other than for the purpose of complying with the Order of the High Court of 31 March 2003. No evidence has been given by Mr. O'Gorman identifying that he was keeping Mr. Farrell informed of the position in relation to the proceedings against him or in respect of Mr. McFeely's acquisition of interest in the property at Gortnakesh and no advice in that respect has been exhibited.

39. In his evidence in June 2018, Mr. Farrell gave evidence to the effect that in December 2003 he had 20 houses ready for sale in Gortnakesh, that he rang Mr. O'Gorman to finalise the contracts to get people into the houses and that he was told over the phone that there was no money left and that Mr. Farrell did not own the land (Day 2, page 45, line 14). Once this conversation occurred, there was an immediate discharge of Mr. O'Gorman's retainer by the plaintiffs and Mr. Thomas Colgan, solicitor, took over, with a

letter being sent on 6 January 2004 by Mr. Colgan to Mr. O'Gorman authorising him to hand over all documentation in relation to the first plaintiff in Mr. O'Gorman's possession. Mr. Farrell gave evidence that after he was told by Mr. O'Gorman the money was gone and the lands not in his possession, he never spoke to Mr. O'Gorman after that (Day 2, page 101, line 17).

40. On 3 February 2004, AIB wrote to Mr. O'Gorman identifying that the bank had become aware that there was a serious problem regarding the title of Druminiskin Developments Limited, the property referred to in Mr. O'Gorman's undertaking and that his undertaking to the bank was to acquire good marketable title to the property with the money advanced to his client and asking him to explain what the problem was with the title and why good marketable title had not been obtained. He was also asked why no mortgage debenture had been registered. A complaint was subsequently made by AIB to the Law Society of Ireland in February 2004 in respect of Mr. O'Gorman.

41. The within proceedings were initiated by way of plenary summons on 12 March 2004 and I address their progress below.

42. On 13 December 2004, a settlement agreement was concluded between Mr. Farrell, Mr. James Farrell and the first plaintiff on the one hand (described in the agreement as "parties of the first part") and Mr. O'Gorman, Mr. McFeely and Mr. Russell (described as "parties of the second part") on the other hand. This settlement agreement was signed by Mr. O'Gorman as well as by Mr. Farrell personally and on behalf of the first plaintiff. The terms of the settlement agreement included the following:

"a) Whereby a deal being done on the lands at Gortnakesh, Cavan Town, Co. Cavan between Druminiskin Developments Ltd, Mathew Farrell, James "Bobby" Farrell and Mr. Thomas McFeely.

b) All parties of the first part agree to cease all legal proceedings against Mr. Kevin O'Gorman and Kevin O'Gorman & Co. Solicitors… This to cover all extant proceedings and further to undertake not to issue any proceedings either individually or collectively at any time in the future.

c) All parties of the first part agree that Mr. Russell does not owe any money to any or all of any combination of the parties of the first part."

43. It was further agreed, *inter alia*, between the parties of the first part that all issues outstanding between them and Mr. Russell were resolved, that the parties of the second part undertook not to issue proceedings against all or any of the parties of the first part and that the parties of the first part instruct their lawyers to serve a notice of discontinuance in respect of the proceedings issued against Mr. O'Gorman, with all parties acknowledging they had received independent legal advice to enable them to enter this agreement in an informed mind.

44. In relation to the settlement agreement, Mr. Farrell said on affidavit, sworn 29 May 2008 in the motion to dismiss for failure to disclose a cause of action (exhibited as MFI to his replying affidavit of 31 October 2018), that he was coerced into signing the agreement, that he had no legal advice in relation to same, that he only signed same to complete the sale in respect of the lands at Gortnakesh and that the settlement agreement ought to be set aside. He further averred that the agreement was concluded in Devitts public house on Camden St., that Mr. O'Gorman was not at that meeting and the agreement was produced by Mr. McFeely already signed by Mr. O'Gorman.

45. In the replying affidavit sworn in the motion to dismiss sworn on 12 July 2008, Mr. O'Gorman avers that in respect of the majority of the allegations, he will not respond to same as the case has been settled but does make various points, including that the plaintiffs had legal advice, that they achieved a benefit from the agreement, that it was not procured under duress, that they had not made an application to set aside the agreement, and that they had delayed in the proceedings. Mr. O'Gorman does not explain his involvement in the settlement agreement, or why Mr. McFeely or Mr. Russell sought to ensure proceedings against him by the plaintiffs should be ended. It is difficult to understand the defendant's alignment with Mr. McFeely and Mr. Russell, given that Mr. McFeely was on the other side of the transaction where Mr. O'Gorman was acting for the first plaintiff.

46. On 30 March 2005, AIB issued a loan sanction letter for €4,683,948 to the first plaintiff, the purpose being to take over the existing borrowings in the company's name of €3,498,948 inclusive of interest to date with the repayment to be reduced initially from net sale of the proceeds of 20 houses. One of the conditions was that the bank would appoint a quantity surveyor/project manager to oversee the completion of 20 houses initially. The fifth condition was a written acknowledgment from the borrowers and guarantors that the new facility was, *inter alia*, in full and final settlement of all or any claims any of the parties may have against the bank.

47. On 6 May 2005, there is a transfer as between Mr. McMorrow and Mr. O'Sullivan (the first and second vendors), Mr. McFeely (the original purchaser) and the first plaintiff (the sub-purchaser), whereby the first and second vendor agree with the original purchaser for the sale to him of the property at Gortnakesh and the original purchaser in turn agrees with the sub-purchaser for the sale of the property for the price of €1.45 million.

48. It appears that the sale of the houses on the lands were completed sometime in 2007 and that ultimately AIB was paid off in full. At no point in the evidence or the submissions was it made clear when the houses were completed, how many houses were completed, on what dates the houses were sold, or the price for which they sold.

Pleadings

49. The plenary summons was issued on 12 March 2004. This application for security for costs was issued on 23 July 2018 and was heard on 14 January 2020. This is a remarkable delay by any standards. Before addressing the chronology of pleadings, I think it is useful to seek to summarise the contents of the (23 page) Statement of Claim

of 12 May 2004 filed by the plaintiffs (which presumably replaces that filed on 14 April 2004). At para. 14 it is pleaded that the defendant failed to have completed a proper and enforceable contract for the purchase of the property by the first plaintiff which would bind the owner and provide for an achievable closing date within a reasonable time. It is further pleaded that the defendant knew or ought to have known that Mr. McFeely was not the registered owner of the property (para. 15), wrongfully and deliberately concealed this information from the plaintiffs and failed to advise the plaintiffs of the identity of the true owners of the property (para. 16). At para. 18 particulars are given of the defendant's alleged failure to advise the plaintiffs of the legal implications of investing money in and carrying out costly development works on land other than land on which the plaintiffs had an interest or were in the process of acquiring interest. In relation to the McMorrow proceedings, it is pleaded that an affidavit purporting to be that of the second named plaintiff was sworn and filed by the defendant (para. 23), that the second named plaintiff was not consulted and did not give instructions to the defendant in relation to the content of same, that the signature on the affidavit was not that of the second named plaintiff and that the defendant failed to protect the second named plaintiff's interest in the proceedings (paras. 23 to 25). It is further pleaded that the defendant acted to the detriment of the plaintiffs by purporting to represent them in those proceedings entirely without instructions (para. 26). It is pleaded that the defendant did not advise the plaintiffs of the settlement of the McMorrow proceedings (para. 30). It is further pleaded that the contract for sale in respect of the property from Mr. McFeely to the first plaintiff came into existence on 15 April 2003 and was signed by the defendant in trust as purchaser for a purchase price in respect of which the defendant had not sought instructions from the plaintiffs (para. 31). It is pleaded by so doing the defendant wrongfully jeopardised the plaintiffs' position in relation to the acquisition of the property (para. 36), inter alia, by the defendant agreeing a purchase price of €1.9 million, being in excess of the purchase price previously agreed.

50. The plaintiffs identify the undertaking given by Mr. O'Gorman on 9 June 2003 (para. 37) already referred to previously in this judgment, and it is further pleaded that in failing to advise AIB or the plaintiffs that Mr. McFeely was not the vendor or registered owner of the property and was not in possession of a transfer of the property, having failed to meet the settlement agreement, the defendant jeopardised the plaintiffs' standing and reputation with AIB and AIB's confidence in the plaintiffs (para. 43). It is pleaded that contracts for end purchasers were negotiated by the second named plaintiff and the second named plaintiff advised the end purchaser that their solicitor should contact the defendant but that the defendant failed and neglected to procure that any such contracts were entered into and failed to inform the plaintiffs as to the true reason for such lack of progress (paras. 49 and 50). At para. 51 it is pleaded that the defendant wrongfully and deliberately fraudulently misrepresented and misstated to the Bank that there existed signed contracts in relation to 20 houses forming part of the plaintiffs' development on the property and wrongfully and deliberately led the plaintiffs to believe that such contracts were being entered into on an ongoing basis. It is further pleaded that on at least one occasion the defendant wrongfully and deliberately formally fraudulently misrepresented and misstated to the Bank that there existed signed contracts in relation

to 20 houses forming part of the plaintiffs' development on the property. At para. 52 it is pleaded that the emergence of the truth of the position and the fact that such representation was false has resulted in incalculable damage to the Bank's confidence in the plaintiffs and the plaintiffs' standing and reputation. It is pleaded at para. 55 that the plaintiffs, by reason of the defendant's actions, invested substantial sums in excess of €3.7 million in the construction of the residential development on the property. It is further pleaded at para. 56 that the defendant has made disbursements from the monies advanced of €1.65 million in breach of the undertaking other than in conformity with the terms of the undertaking. It is pleaded that the Bank has ceased the provision of all facilities to the plaintiffs and has called for the return of the advances. It has also called for the return of the advance of €1.65 million (paras. 57 and 58).

51. A very different approach to pleading is taken by the defendant. The defence consists largely of boilerplate denials with very few positive averments, save in respect of the settlement agreement and a minor number of other matters. At paras. 1 to 4 a preliminary matter is pleaded, whereby the defendant claims that by reason of a settlement it was agreed to cease/discontinue the proceedings issued against Mr. O'Gorman, that the agreement acknowledges that Mr. O'Gorman has no responsibility, liability or exposure, *inter alia*, to the first plaintiff and that the proceedings have therefore been compromised.

52. The only other positive averments are that the plaintiffs employed the defendant as their solicitor in connection with pursuit of lands, that the lands consisted of the development lands at Gortnakesh, that if the plaintiffs have a cause of action it is not against the defendant but against Mr. Russell (para. 24), that the proceedings between Mr. McMorrow and Mr. O'Sullivan and Mr. McFeely were compromised (para. 40), that the terms of the settlement as pleaded are admitted (para. 41), that the contract referred to at para. 43 of the Statement of Claim refers to a price of €1.9 million and deposit of €240,000 but it is denied that this is less than the actual deposit paid (para. 44), that the defendant admits he gave an undertaking to the bank on the 9 June 2003, and that on foot of the undertaking the bank advanced to the defendant the sum of €1.65 million and that a deposit of €265,000 was paid to Mr. McFeely (para. 54, 55 and 56), and that the second named plaintiff was a party to the proceedings referred to in para. 59 of the Statement of Claim, i.e. the McMorrow proceedings (para. 84). In respect of some other matters the plaintiffs are put on full proof. It is fair to say that Mr. O'Gorman has chosen for the most part not to reply to the detailed allegations made against him by the plaintiffs, despite the plea, *inter alia*, of fraud against him by his former clients in the discharge of his role as a solicitor.

Conduct of Proceedings

53. Following the delivery of the statement of claim, by notice of motion dated the 14 March 2008, prior to the delivery of the defence in 2009, the defendant brought an application to strike out the first, second and third named plaintiff's claim on the basis that it disclosed no reasonable cause of action and was frivolous and vexatious. That application was grounded upon the affidavit of Mr. Terry Leggett sworn 6 March 2008, and it was

based on (a) the existence of the settlement agreement and (b) delay due to the failure to serve a notice of intention to proceed. The application in respect of the settlement agreement was accepted not to be applicable to the fourth plaintiff, since she had not been a party to same. As referred to above, in Mr. Farrell's replying affidavit, he spent some considerable time explaining why, on his case, the settlement agreement was not valid and should not bar him from proceeding with his claim and he gives a full account of the circumstances leading up to the settlement agreement. Following the hearing of the motion, the reliefs sought by the defendant were refused.

54. On 19 February 2009, the plaintiffs motioned for a defence and this was delivered on the 22 June 2009. On 28 August 2009, a motion was issued seeking an order directing a trial of a preliminary issue in relation to whether the first, second and third named plaintiffs were bound by the settlement agreement on 13 December 2004. No replying affidavit to that motion is included in the court's book, but on 9 November 2009 McMenamin J. directed the trial of a preliminary issue. Points of claim and points of defence were issued but ultimately it was decided by the defendant not to pursue the motion.

55. There was also a motion by the plaintiffs' solicitors (Sheridan & Co.) to come off record and they were replaced by O'Rafferty Solicitors, who remain the first plaintiff's solicitor.

56. On 26 November 2012, the defendant brought a motion seeking to strike out the first plaintiff's claim for want of prosecution as the first plaintiff was dissolved on 15 July 2011. It is not clear what happened to that motion but I assume that the first plaintiff was reinstated to the Register of Companies and the motion struck out. I should add at this point that the first plaintiff has been struck off four times for failure to make returns to the CRO, most recently in January 2016. It was reinstated on 25 June 2018 by Order of McDonald J. There was a complaint by the defendant about the circumstances in which the first plaintiff was reinstated and this Court was asked to take into account those circumstances when determining this application. This seems to me to be a collateral attack on the Order of McDonald J. If the defendant had a concern about same, he could have sought to set aside that Order but no such action was taken. For those reasons, I do not further consider the points raised by the defendant in this respect and have not taken same into account in this decision.

57. A notice of intention to proceed was filed by the defendant on 10 February 2015 and four sets of particulars and further and better particulars were delivered by the plaintiffs between 6 August 2015 and 14 July 2016. There has been much focus by the defendant on the fact that, in the particulars of loss delivered in July 2016, the plaintiffs' claim is much reduced, going from almost €7 million in the particulars delivered in April 2016 to €2.2 million in the July particulars, but that, despite this, in the Expert Accountant's Report of Mr. Jim Stafford, forensic accountant, (exhibited to the affidavit of Mr. Farrell sworn 22 January 2019), Mr. Stafford identifies losses of €6,896,005. The defendant says this is impermissible where the plaintiff had moved away from the higher sum originally sought and reduced its claim in the July 2016 particulars.

58. Because the precise amount sought by the first plaintiff is not relevant to my decision in this motion, and because there is no application to deliver further particulars or amend the particulars provided in July 2016, I am not required to determine the question of whether it is permissible to adduce a report identifying losses substantially greater than those sought in the most updated particulars of loss, or the status of that report. That will be a matter for the trial judge and accordingly I do not consider it further.

59. By way of motion and Order of Gilligan J. on 11 March 2016, discovery was ordered as against the plaintiffs. The affidavit of discovery of Mr. Farrell was sworn on the 18 April 2016. An affidavit of Mr. O'Gorman was sworn on 28 April 2017. A notice of trial was issued on 12 September 2017 and a hearing date set for 5 June 2018.

60. As noted above, sometime in January 2016 the first plaintiff was again struck off the Companies Register. The plaintiffs' solicitor sought an adjournment of the hearing but no consent was forthcoming from the defendant, the court refused the application for an adjournment and the case went on as against the second, third and fourth named plaintiff on 5 and 6 June 2018 before Barrett J. The first day consisted of opening submissions on behalf of the plaintiffs and on the second day Mr. Farrell spent the day giving evidence. On the third day the trial judge was told that the proceedings had been settled and the settlement recorded that the proceedings were to be struck out as against the second, third and fourth named plaintiffs with the money lodged in court to be returned to the defendant, that there was to be no order as to costs and that the sum of €50,000 in total was to be paid to the second, third and fourth plaintiffs as a contribution to their costs.

61. As noted above, this motion for security was issued on 23 July 2018, grounded upon the affidavit of Mr. O'Brien, solicitor, on 10 July 2018. A replying affidavit was sworn by Mr. Farrell on 31 October 2018. A replying affidavit was sworn to this by Mr. O'Gorman on 6 December 2018. That was replied to by a supplementary replying affidavit of Mr. Farrell of 22 January 2019 to which a report of Mr. Stafford was exhibited. There was a supplementary replying affidavit of Mr. O'Gorman on 13 February 2019. That was replied to by Mr. Farrell on 7 March 2019 (not in the book of pleadings but provided to the court at the hearing). An affidavit of Mr. John Harding, accountant, was filed on 28 March 2019 on behalf of the defendant in response to Mr. Stafford's report. A replying affidavit of Mr. Stafford was sworn on 10 April 2019, replied to by Mr. Harding in a second affidavit sworn 30 April 2019.

Law in Relation to Security for Costs

62. This application is brought pursuant to s.52 of the Act of 2014, which provides as follows:

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

63. As observed in *Inter Finance Group Ltd. v. KPMG Peat Marwick* (Unreported, High Court, 29th June 1998), the overall approach to exercising the court's discretion in an application brought under s.390 of the Companies Act 1963 (the precursor to s.52) is that an order for security should be made once a defendant has established he has a *prima facie* defence to the plaintiff's claim and that the plaintiff will not be able to pay the defendant's costs if successful in his defence, unless special circumstances exist that might cause the court to exercise its discretion not to make the order sought. Those special circumstances might be (a) the plaintiff's inability to discharge the defendant's costs of successfully defending the action flowing from the wrong allegedly committed by the party seeking security; or (b) delay in seeking the relief claimed. Morris J. observed that the list of special circumstances identified was not exhaustive.

64. The legal principles applicable to security for costs are well-established and there is no substantive dispute on same between the parties. Both parties, at the court's request, provided written submissions as to the requisite degree of proof of special circumstances. The plaintiff makes the point that s.52 of the Act of 2014 requires credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence. It notes that in respect of the existence of a *prima facie* defence, case law requires that a defendant must objectively demonstrate the existence of admissible evidence and relevant arguable submissions (*Tribune Newspapers (In Receivership) v. Associated Newspapers (Ireland) Ltd.* (Unreported, High Court, 25th March 2011)) and that a mere assertion in a grounding affidavit that the defendant has a good defence will not establish a *prima facie* case to that effect (*Usk and District Residents Association Ltd. v. The Environmental Protection Agency* [2007] IEHC 30). It observes that there is an associated evidential threshold test when considering whether special circumstances are established and refers to the decision of Peart J. in *Tír na N-Óg Projects (Ireland) Ltd. v. P.J. O'Driscoll & Sons (A Firm) & Ors.* [2019] IECA 154, where he observes, at para. 31:

> *"It seems to me that in order to satisfy the requirement that special circumstances be established on a prima facie basis, as opposed to a balance of probabilities, the plaintiff must do more than merely assert the proposition on affidavit but must bring forth some evidence which is cogent and credible, which corroborates the contention being made…. [T]he trial judge's task remains to decide if prima facie evidence has been adduced, and not to determine as a matter of probability whether or not the impecuniosity of the plaintiff has or has not been brought about by the wrongdoing alleged against the defendant".*

65. The defendant, in his written submissions on this point (see para. 11), agrees that the prima facie test applies when the court is deciding whether special circumstances apply to justify a refusal to order security. The defendant also focuses, insofar as his conduct is put forward as a cause of the first plaintiff's impecuniosity, on the dicta of Clarke J., as he then was, in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7 (discussed below). Finally, the defendant submits that delay *per se* is not so much a reason to refuse security but rather that prejudice is the core issue and cites

Hidden Ireland Heritage Holidays Ltd. v. Indigo Services Ltd. [2005] 2 IR 115 and *Werdna Ltd. v. MD Insurance Services Ltd. t/a 'Premier Guarantee'* [2018] IEHC 194.

66. Following the case law, it seems clear that the requisite standard of proof in considering whether special circumstances apply is whether it has been shown, on a *prima facie* basis, that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted. That test is likely to be less relevant in a delay context. However, where a court considers security should not be ordered due to the conduct of the defendant *per se* (as opposed to as a cause of impecuniosity) I consider that the same test should be applicable, i.e. a court should be satisfied at least on a *prima facie* basis that the defendant has behaved in the manner identified.

67. In respect of the relevance of a defendant's conduct as a special circumstance, there is a line of case law identifying circumstances in which security may not be ordered due to the defendant's conduct in the proceedings, or the defendant's *bona fides* more generally. In *West Donegal Land League Ltd. v. Udaras Na Gaeltachta & Ors*. [2006] IESC 29, Denham J., as she then was, in a dissenting judgment, considered a lack of *bona fides* of the defendant in refusing an application for security, namely an attempt by the second defendant to deny his ownership of the land in question to avoid paying tax. Denham J. said it was appropriate to consider the justice of the case and the court's duty to advance the interests of justice and not to hinder them. The majority decision of the Supreme Court was to order security, with Geoghegan J. observing that the categories of special circumstances are not closed but that it did not mean that a court was wide open in its discretion as to whether to grant or refuse the order.

68. In *Tír na N-Óg Projects (Ireland) Ltd. v. P.J. O'Driscoll & Sons (A Firm) & Anor*. [2017] IEHC 640, Ní Raifeartaigh J. observed, at para. 48, that she did not understand Geoghegan J.'s judgment as disagreeing with the suggestion that the *bona fides* of a defendant may be taken into account by the court. In that case, Ní Raifeartaigh J. refused to order security on the basis that two different special circumstances were made out: first, that the plaintiff had established that its inability to meet the potential costs of an unsuccessful negligence action were due to the defendant's wrongdoing and second, that she had serious concerns about the bona fides of the defendants. In that case, the plaintiff applied for planning permission to Kerry County Council for 33 houses and a leisure centre at Cappanacush, Kenmare, Co. Kerry. The Council failed to make a decision within the statutory time period, thus entitling the plaintiff to a default permission. On three occasions, the plaintiff requested his solicitors, the defendants, to make an application for an order of mandamus. No advice was given to the plaintiff in respect of the applicable time limits for judicial review and no judicial review proceedings were ever brought. Proceedings for professional negligence were brought against the defendants. In respect of the conduct of the defendants, Ní Raifeartaigh J. observed, at para. 48 and 49, as follows:

> *"The specific matters relied upon by the plaintiff include that the defendant pleads and asserts that the plaintiff never instructed them to bring judicial review*

proceedings in circumstances where the correspondence clearly shows that he did; and that the defendants, who are professional solicitors, wrongfully continued to act for him after they became aware they had failed to institute judicial review proceedings within the appropriate period, and failed to advise him of their negligence/conflict of interest.

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

69. That decision was appealed to the Court of Appeal (cited above) and Peart J. gave judgment on 31 May 2019. He upheld Ní Raifeartaigh J.'s conclusion that the impecuniosity had been caused by the conduct of the defendant and in those circumstances held he did not need to address her decision to take into account the question of the *bona fides* of the defendant, observing, at para. 35:

> *"In such circumstances it is unnecessary to address the ground of appeal in relation to the finding of a lack of bona fides on the part of the appellants which the trial judge also had regard to in reaching her overall conclusion. The question whether a lack of bona fides on the part of an applicant for an order for security for costs should debar a party from obtaining an order to which it would otherwise have established an entitlement should await another case in which the matter directly arises. In the present case, for the reasons stated, I am not satisfied that the appellant has established that entitlement, and therefore the question of bona fides does not need to be determined."*

70. The question of the conduct/bona fides of the defendant as a factor to be taken into account when deciding whether to make an order for security, this time in the context of the proceedings, arose again in the recent Court of Appeal decision of *Hedgecroft Ltd. t/a Beary Capital Partners v. HTREMFA Ltd. (Formerly Dolmen Securities Ltd.)* [2018] IECA 364. Having referred to *West Donegal Land League*, Costello J. held as follows:

> *"57. Even where the trial judge finds that the plaintiff has established the existence of special circumstances such as could justify withholding an order for security for costs, it is for the trial judge separately and in addition to that finding, to determine, in the appropriate exercise of his or her discretion whether to make the*

order sought or not. It is for the court to determine if the order would be fair or proportionate in all the circumstances.

58. It was accepted, correctly in my view, that the trial judge was entitled to have regard to the conduct of the appellant and in particular to the series of affidavits sworn on its behalf by Mr Beary. The trial judge held as a fact, and this was not disputed, that the evidence was inaccurate and misleading and no explanation for the attempt to mislead the trial judge was offered to either the High Court or this Court.

59. it was argued that, but for the actions of Mr. Beary, the High Court acknowledged that it would have refused to make an order for security for costs and that reversing this intended decision and ordering the appellant to provide security for costs in the circumstances was a disproportionate and an excessive exercise of the court's discretion pursuant to section 52.

60. I am satisfied that this was a matter that fell within the discretion of the trial judge. It was not so disproportionate an exercise of his discretion as would warrant the intervention of this Court on appeal. …In my opinion he was entitled to take a very grave view of the manner in which the appellant, through Mr Beary, approached the application and repeatedly misled the court with either incomplete or misleading information. I am not satisfied that any error of principle has been demonstrated which would justify this court in reversing his decision, in accordance with the principles established in Lismore Homes and Collins v. The Minister for Justice, Equality and Law Reform."

71. That line of case law indicates that a trial judge can, in the exercise of her or his discretion in deciding upon security, take into account the conduct of the defendant, either in the course of the proceedings or in respect of events the subject matter of the proceedings. I propose to do so in this case, as discussed further below.

Inability of the First Plaintiff to Pay Costs

72. There is no dispute between the parties but that the first plaintiff would be unable to meet an order for costs in the within proceedings. An unusual feature of this application is that there has been no material put before this court identifying the level of costs at issue, either those incurred to date by the defendant or those likely to be incurred in a trial. However, I do not believe that this prevents the court from adjudicating on the application. Given that the liabilities of the first plaintiff at present exceeds €3 million, it will clearly be unable to meet any order for costs, irrespective of the level of same. The first condition is therefore established.

***Prima facie* Defence**

73. The next matter to be considered is whether a *prima facie* defence has been established. I have set out above the law in relation to same and concluded that it must be shown by way of credible evidence that the defendant has a *prima facie* defence. In this case, were it not for the plea in relation to the settlement, I would not hold that the defendant has a *prima facie* defence since, as identified above in my analysis of the defence, it consists

largely of denials with very few positive averments and more would have been required given the seriousness of the allegations against Mr. O'Gorman.

74. However, again as analysed above, there is a very detailed plea in relation to the settlement agreement. The first plaintiff's response to this plea (described by counsel for the plaintiff as a "*slam dunk point*") is that the settlement agreement and the plea in relation to the settlement agreement cannot be considered to be a *prima facie* defence because there is no consideration on the face of the settlement agreement and because there is no plea in the defence that the settlement agreement was made for valuable consideration. I do not believe that either of these points prevent the settlement agreement plea from constituting a *prima facie* defence. The settlement agreement has been exhibited. Mr. Farrell does not deny the validity of the document entitled *"settlement agreement*". Nor does he deny that two meetings took place, which ultimately led to a settlement. He does not deny that he signed the settlement agreement. Rather what he says is that he was forced to enter into the settlement agreement under duress and did so without the benefit of legal advice and therefore the settlement must be put aside. The first plaintiff may be successful on the point that the settlement agreement is void for a lack of consideration or for the other reasons identified above, but that is a matter for the trial judge. What is clear is that there will be a substantive issue in relation to the settlement at the trial of the action and the legal effect of same. If the defendant succeeds in establishing there is a valid agreement in place, that will constitute a full defence to the claim of the first plaintiff. The existence of the settlement agreement therefore constitutes a *prima facie* defence. As for the point that the plea at paras. 1 to 4 of the defence cannot succeed because it does not refer to consideration for the settlement, that is at best in my view a pleading point and not one which can be treated as meaning that the defendant does not have a prima facie defence in relation to the settlement.

75. In those circumstances I have no hesitation in concluding that the defendant has a *prima facie* defence insofar as it pleads the settlement agreement.

76. Where I have concluded that the first plaintiff is *prima facie* unable to meet the costs of the proceedings and that the defendant has a *prima facie* defence, the defendant is entitled to an order for security for costs unless special circumstances can be established by the first plaintiff.

Special Circumstances

77. The first plaintiff has pleaded the following special circumstances as set out in the replying affidavit of Mr. Farrell sworn to this motion:

    1) that the insolvent position of the first plaintiff is by reason of the acts and omissions of the defendant the subject matter of these proceedings;

    2) that by refusing to permit the hearing date to be adjourned to facilitate the reinstatement of the first plaintiff, the defendant has ensured the necessity for two trials and caused a duplication of costs;

3) that the defendant is guilty of inordinate and inexcusable delay in bringing the within application given that it could have been brought by the defendant at any time over the past 14 years before the accumulation of very significant costs. The first plaintiff argues that the existence of the personal co-plaintiffs up to 2018 (when they settled their cases) was not in itself a bar to bringing this application although he accepts it is a matter the court may have regard to; and

4) that the present case is an inappropriate one for relief in circumstances where the court has an inherent supervisory jurisdiction as to the conduct of the defendant as a solicitor and as an officer of the court.

Delay as a Special Circumstance

78. The defendant's response to the invocation of delay by the first plaintiff is threefold. First, he says that the question of delay is not being asserted (see defendant's written submission filed 23 January 2020). I can dispense with that argument swiftly. As summarised above, delay is asserted in some detail at paras. 49 to 50 in the replying affidavit of Mr. Farrell of 31 October 2018 and it was focused upon by counsel for the plaintiff, particularly in his reply to counsel for the defendant.

79. Next, he says that given the presence of the three personal plaintiffs up to the settlement of their cases in 2018, it would have been futile to bring any application for security for costs before 2018, since the defendant would still have been forced to meet the case brought against him by the personal plaintiffs even if he was successful in obtaining an order for security for costs from the first plaintiff. He says it was reasonable for him to wait until the personal co-plaintiffs were gone from the proceedings and that there was no delay in bringing the motion once settlement had been achieved with the personal plaintiffs. That latter statement is certainly true, the motion being brought a month after the settlement. However, the same cannot be said for the period of time that elapsed from the issuing of the plenary summons until the bringing of the motion.

80. I could see some merit in an argument that it was reasonable to wait 14 years to bring a motion for security for costs if the cause of action of the corporate co-plaintiffs was identical with the personal plaintiffs. That might dictate a decision not to seek security from a corporate plaintiff as the defendant would still be forced to meet precisely the same case even if the corporate plaintiff exited the proceedings (assuming an inability to put up the requisite security). Even then, an argument might be made that an application would still be of benefit in the event security was put up, as there would be a level of comfort at least in respect of the costs incurred by defending the case brought by the corporate plaintiff and same would be of value if the corporate plaintiff was unsuccessful (even if it would not avail the defendant in respect of the costs incurred in respect of the defence against the claims of the personal plaintiffs).

81. But here, the first plaintiff's case has features that differentiate it quite significantly from the cases made by the personal plaintiffs, particularly insofar as the quantum of damages is concerned. If one looks at the particulars of loss delivered by the plaintiffs, whether those delivered in July 2016 limiting the claim to €2.2 million or those in April 2016 which

put the claim at almost €7 million, it is clear that the vast majority of the loss alleged is that of the first plaintiff. It is the solely the first plaintiff that is seeking recovery for the alleged wrongful disbursement of payments by the defendant since that money was lent by AIB exclusively to the first plaintiff. The letter of sanction from AIB makes that clear. In relation to the alleged increased price of the purchase of the site, again that was a loss that could only have been suffered by the first plaintiff since the contract for sale was between the first plaintiff and Mr. McFeely. Similarly, the alleged lost profit on sales would have been suffered by the first plaintiff exclusively, since it was the first plaintiff who owned the land, owned the houses that were built on it and was the vendor of those houses. Equally, the claim in respect of additional interest paid is that of the first plaintiff. Similarly, professional fees are claimed as a head of loss exclusively by the first plaintiff. Indeed, the only loss that appears to have been claimed by the other plaintiffs is in relation to the guarantees put up by the third and fourth named plaintiffs. It was clear by 2007 no such losses had in fact occurred as AIB had been repaid in full. This was confirmed at the hearing in June 2018 where counsel for the plaintiff indicated this to be the case and further indicated that in respect of the second plaintiff, Mr. Farrell, an open letter had been sent prior to the trial date indicating that he would accept costs in his favour and would have the proceedings struck out. That offer was not accepted and, in those circumstances, counsel for Mr. Farrell indicated in his opening of the trial that Mr. Farrell was seeking exemplary damages. None of those matters are relevant to this decision except insofar as they demonstrate that the vast bulk of the damages sought in this case are those of the first plaintiff. This is unsurprising since it was the first plaintiff who was seeking to – and ultimately did – buy the land, who borrowed the money from AIB, who built the houses and whom ultimately sold the houses.

82. In those circumstances, if the defendant had obtained an order of security for costs, potentially preventing the first plaintiff from advancing its claim, the defendant's potential liability would have been vastly diminished. Indeed, by 2007, given that the loan was paid back in that year, thus ensuring the guarantees were not being called, his only liability might have been the claim for exemplary damages made by the second plaintiff. Alternatively, if an order had been made and security provided by the first plaintiff, the defendant would have had the benefit of this security.

83. There is some case law addressing the effect of the presence of personal plaintiffs in proceedings where an order for security is sought from a corporate plaintiff (see Hilary Biehler, Declan McGrath and Emily Egan McGrath, *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) at p. 593). In summary, the case law appears to suggest that while the presence of individual co-plaintiffs is a factor to be considered in all cases, it will only be relevant where the existence of an individual co-plaintiff was material i.e. where that may prevent security from being granted on the basis that the individual plaintiff would be a good mark (see para. 14.124). However, no argument was made to this effect by the defendant.

84. Accordingly, it does not appear to the court that there was an objectively justifiable basis for waiting to seek security until the other plaintiffs were no longer in the proceedings.

Indeed, the defendant had already differentiated between the plaintiffs in the context of the strike out application where he had sought to strike out the proceedings on the basis of the settlement agreement against the first, second and third named plaintiff while knowing he would still be left with the proceedings by the fourth plaintiff as she was not a party to the settlement agreement. A similar approach to an application for security could have been taken. In the circumstances I find that the presence of the personal plaintiffs up to 2018 does not justify the defendant's decision to wait 14 years to bring this motion.

85. Separately, the defendant submits that the case law is really about prejudice and it is only if one can demonstrate prejudice due to delay that the court should make an order that delay constitutes a special circumstance. In *Werdna Ltd. v. MD Insurance Services Ltd.* [2018] IEHC 194, Baker J., summarising the case law, noted that in an application for security, the focus is often whether the delay might have caused the other party to take steps in the litigation which it would not have taken otherwise (para. 59) and, quoting Dunne J. in *Ferrotec Ltd. v. Myles Bramwell Executive Services Ltd. t/a Slimming World* [2009] IEHC 46, identified as a relevant factor whether significant costs were incurred during the period of the alleged delay.

86. In this case, I find there was considerable prejudice to the first plaintiff in the defendant waiting till 2018 to bring the application for security. The chronology of the life of the case as between 2004 and 2018 demonstrates that the defendant brought four substantive motions – a motion to strike out the proceedings as disclosing no cause of action, a motion to have the question of the settlement agreement ruled a preliminary issue (relief granted but preliminary issue not proceeded with by the defendant), a motion to strike out for delay and a motion for discovery – all of which the plaintiffs had to meet. The first plaintiff had to motion the defendant for a defence, make discovery and deliver four sets of particulars. These time consuming and expensive steps could potentially have been avoided had the defendant proceeded to bring a motion for security close in time to the date on which the proceedings had been instituted.

87. The defendant further asserts that there was no particular prejudice to the first plaintiff in the delay since even if a motion had been brought early on, the other plaintiffs would have remained in the litigation and would have been obliged to engage with all the above steps. Therefore, the argument goes, no additional expense or detriment was suffered by the first plaintiff in remaining in the proceedings for so long. That argument fails to recognise the principle of separate corporate personality, distinct from that of its directors. It is in substance an argument that Mr. Farrell and Mrs. Farrell, the two directors, are, in reality, the first plaintiff and that, because they would in any case have been obliged to respond to all the defendant's motions and take other steps in the proceedings, there would have been no benefit in having the position as to security clarified early on in the proceedings. I am not impressed with this argument. The first plaintiff is a separate legal entity and its interests should not be treated as coterminous with those of its directors (the second and fourth plaintiffs). It would have benefited from

an early resolution of the security question. The position of the other plaintiffs does not alter that.

88. Further, even proceeding on the defendant's flawed premise that the interests of the other plaintiffs are identical to those of the first plaintiff, there was separate and distinct prejudice to the first plaintiff in the delay. It had to spend 14 years pursuing the case without being aware that the defendant intended to bring a security of costs application. Because the majority of the case related to the actions of the first named defendant, this necessitated instructions to be taken, affidavits sworn, materials exhibited, particulars answered and submissions made specifically in relation to the position of the first plaintiff. Had the action been stayed against the first plaintiff pending the provision of security, as noted when discussing the relevance of the presence of the personal co-plaintiffs above, the case would have significantly shrunk. In those circumstances it seems to the court that there was a significant prejudice to the first plaintiff in the delay in bringing the motion.

89. The first plaintiff asserts that there was prejudice to it in not having the presence of the personal plaintiffs in this application for security and that the delay of the defendant in bringing the case on caused this prejudice. No argument has been identified as to why the presence of the personal plaintiffs would have been relevant as a matter of fact to the application for security and therefore I think there is no additional prejudice in that respect.

90. Having regard to the above, I find that the 14 year delay in bringing an application for security is a special circumstance disentitling the defendant from obtaining an order for security for costs.

Conduct of Defendant as a Special Circumstance

91. As noted above, the first plaintiff asserts no security should be granted where the court has an inherent supervisory jurisdiction as to the conduct of the defendant as a solicitor and as an officer of the court, and in this regard points to the following conduct of the defendant:

- conducting the McMorrow proceedings without authority;
- admission of serious wrongdoing by a solicitor, involving breach of a solicitor's undertaking on 9 June 2003;
- the manner in which the loan cheque from AIB was disbursed;
- the letter to AIB of 28 November 2003 from the defendant stating that contracts had been signed when this was not the case;
- failure to respond to the detailed pleas of the plaintiffs, save in respect of the settlement, in the defence filed;
- failure to provide a narrative explanation of the events; and

- failure to explain the circumstances in which the settlement agreement came about where the defendant does not aver he signed the settlement agreement and was not present when the settlement was agreed and signed by the second and third plaintiff.

92. Counsel for the defendant submitted in response that there was no obligation to make a positive plea in the defence and offer a narrative account, that the breach of undertaking was a cause for complaint by AIB but was not relevant to security, that the plaintiff had told the court very little about his case and in particular how the houses were ultimately completed and the relationship with AIB, and that there were various wrongdoings on the part of the first plaintiff that should also be taken into account in deciding whether security should be ordered, including:

- the bouncing of cheques against parties other than the defendant; the fact that the first plaintiff was struck off on four occasions for failure to file returns with the CRO and had to be reinstated each time, including in 2018 where such reinstatement meant the first plaintiff's cause of action was not heard at the same time as that of the second, third and fourth plaintiffs;

- the way in which the application for reinstatement was presented to the court;

- the failure of the first plaintiff to identify how many houses were ultimately built by it at Gortnakesh;

- the fact that some of the evidence suggested that a payment may have been made to Mr. McFeely in respect of the purchase of the Gortnakesh upon which no tax was paid; and

- the fact that there was a significant VAT liability to the Revenue Commissioners without explanation as to the source of this liability.

93. No case law was cited to the court supporting the principle that the wrongdoings of a plaintiff can constitute a special circumstance justifying security. Moreover, this case is not about whether the first plaintiff committed any alleged wrongdoing but rather whether the defendant committed the wrongdoings that have been pleaded in very considerable detail by the plaintiffs *qua* clients of the defendant. There is no affidavit evidence in respect of any of the above wrongdoings. No wrongdoing on the part of the first plaintiff has been pleaded as part of the defence. As noted above, the defence is largely a bare traverse of the very specific allegations against the defendant save in respect of the settlement agreement. The defence does not in any way impugn the plaintiffs' conduct or plead contributory negligence or estoppel on the part of the plaintiffs because of acquiescence or conduct or identify any of the matters above identified during the hearing of this motion. The alleged wrongdoings of the first plaintiff identified above are not issues in the case. I therefore conclude that they are not relevant to the question of security in this case.

94. On the other hand, I am of the view that certain aspects of the matters identified by the first plaintiff in respect of the defendant's conduct give the court serious cause for concern in respect of the defendant's *bona fides* and dictate that I should exercise my discretion to refuse security, as per the jurisdiction identified above in *West Donegal Land League, Tír na N-Óg and Hedgecroft*. The conduct in question is central to the issues the trial judge will have to determine and has been pleaded and/or averred to on affidavit, and/or there is documentation exhibited to support same. I have only taken into account such conduct as appears to me to have a *prima facie* basis, having regard to the evidence and documents in the motion before the court. The conduct of concern is set out below. I should add that I am very aware that my conclusions are being made in the course of an interlocutory hearing and the trial judge may ultimately come to a different conclusion on same following the substantive hearing. Equally, insofar as my findings on the causal connection between the first plaintiff's financial state and the defendant's conduct are concerned, the trial judge may ultimately come to a different conclusion having heard all the evidence in the case.

95. First, there was an admission on the first day of the hearing by counsel for the defendant that the letter of 28 November 2003 by Mr. O'Gorman to AIB was "false". This was the letter (referred to in the chronology of events above) where Mr. O'Gorman had identified the existence of 20 signed contracts for the houses at Gortnakesh, apparently to persuade AIB to advance further monies. I set out below the exchange between counsel for the defendant and I in this respect as follows:

> **Counsel**
>
> Without prejudice to the foregoing please see the letter of the defendant to AIB Bank Dundalk dated the 28th November 2003 a copy of which is furnished herewith. And, we come to that.
>
> **Judge Hyland**
>
> I'm looking at that letter now. He simply says he's received signed contracts and purchases…
>
> **Counsel**
>
> That is false
>
> **Judge Hyland**
>
> I beg your pardon
>
> **Counsel**
>
> That is false
>
> **Judge Hyland**

It is false

Counsel

I don't think I can stand over that letter

Judge Hyland

Okay, just explain what you mean to me by that

Counsel

In that, I don't believe there were 20 signed contracts or indeed any signed contracts. There was one I think produced at the trial but I don't think that effects the overall effect of this letter.

Judge Hyland

And are you saying the letter was forged or that …

Counsel

No I don't say it was forged

Judge Hyland

Then how do you say it came about?

Counsel

It should not have been sent

Judge Hyland

I see. Why was Mr O'Gorman sending that letter? What date was the money drawn down?

Counsel

That letter was sent, I'm speculating here Judge I have to admit I don't have a direct answer to the question. That letter was sent in November 2003 and at that time my, I'm putting the facts together, yes the plaintiff says I think in the statement of claim that and in an updated statement of claim which you'll see in due course, exhibit MF3 that he needed a hundred thousand of working capital in and about this time. And that this letter was written the plaintiff says to assist in procuring that working capital from AIB.

96. This letter was identified in the Statement of Claim where it is pleaded that on at least one occasion the defendant wrongfully and deliberately formally fraudulently

misrepresented to the Bank that there existed signed contracts in relation to 20 houses forming part of the plaintiffs' development on the property and that the effect of this misrepresentation was to sustain a false confidence between AIB and the plaintiffs (see para. 51).

97. As with the issue regarding the breach of undertaking (dealt with below), the defendant presumably makes the case that any wrong on the part of Mr. O'Gorman in this respect was an issue for AIB and not the plaintiffs. However, it is specifically pleaded in the Statement of Claim that part of the damage caused to the first plaintiff was the effect on its relationship with AIB. In those circumstances it seems to me that the sending of an admittedly false letter by the defendant to AIB, whether with or without the authority of the first plaintiff, is likely to negatively affect relations with AIB and therefore within the scope of this case. It is of considerable concern to the court that the defendant sent an admittedly false letter to AIB on behalf of the first plaintiff apparently to procure funds from AIB without any explanation of same either on affidavit or even through counsel.

98. Second, the admission by Mr. O'Gorman through counsel and in his replying affidavit (referred to above in the chronology of events) that he had breached the undertaking of 9 June 2003. The clear breach of the undertaking by the defendant is a cause for concern where it goes to the heart of this case, being the failure to properly advise the plaintiffs of the consequences of building on, and borrowing money in respect of, a site where neither the first plaintiff nor the vendor had any title to the site. In those circumstances it seems that the admitted breach of the undertaking, although an undertaking to AIB and not to the plaintiffs, is a serious matter as it enabled the first plaintiff to obtain very significant sums of money from AIB on a false basis. Further, the disbursement of the loan monies in breach of that undertaking, including to Mr. McFeely, who at that stage had no title and was not therefore the vendor, is of significant concern. As noted above, earlier undertakings were also given to AIB in February and March 2003 by the defendant and although no explicit concession was made in relation to those undertakings by counsel for the defendant, it seems to me that there must be a question mark over the accuracy of those undertakings also. Finally, although there is a frank concession that there was a breach of undertaking, there is no explanation whatsoever either on affidavit or through counsel as to the circumstances in which the breach occurred.

99. Third, in relation to the McMorrow proceedings and the claim by Mr. Farrell that his signature had been forged and that an affidavit had been lodged in his defence without him being aware of same, I have summarised above the conflict of evidence in this respect. No affidavit was sworn in this motion to dispute the assertion of forgery. However, Mr. O'Gorman, in the context of the motion to dismiss, did swear an affidavit of 12 July 2008 where he rejects any suggestion that he was involved in or aware of the alleged forging of the signature. In those circumstances, I do not consider there is an evidential basis to conclude that the first plaintiff has made out a *prima facie* case on this issue relevant to special circumstances based on conduct.

100. Fourth, there are no letters of advice or notes of meetings or calls exhibited by Mr. O'Gorman or discovered by him or pleadings in his defence relating to the fundamental issue in this case, i.e. the actions of the first plaintiff in proceeding to borrow significant sums of monies against a site it did not own and to construct houses on that site, without any interest in, or permission to use the land, where the purported vendor, Mr. McFeeley, had himself no title to that land. Nor is there any explanation from the defendant as to why such advice was not clearly given to the first plaintiff. That is a significant and surprising omission, given the duties of a solicitor to advise his client of legal risk associated with any transaction. This duty arises irrespective of the conduct of, and level of knowledge of, the plaintiffs, including the first plaintiff, in this respect.

101. Fifth, there is no explanation on affidavit how the proceedings brought against the second plaintiff, Mr. Farrell, by Mr. McMorrow, could have been settled in March 2003 (which settlement later broke down), without the participation of Mr. Farrell in the settlement, in circumstances where the defendant was the solicitor on record for Mr. Farrell. The defendant does not refer to this settlement in his defence or explain in any affidavit or exhibit any documents in respect of how he discharged his professional duties to the second plaintiff in those circumstances. The second plaintiff's case has now been settled and only the first plaintiff is resisting this application. Nonetheless, because of the centrality of the second plaintiff's occupation of the lands at Gortnakesh to the issues in this case, the defendant's conduct appears relevant in this context.

102. Sixth, as noted above in the chronology of events, it was a condition of the settlement of the proceedings in December 2004 that Mr. O'Gorman would not be sued and that proceedings against him would be discontinued. It is unclear to the court why the defendant was included as a party to the settlement or why it was a term of the settlement that proceedings would be discontinued against him. There is no explanation proffered from the defendant as to his connection with Mr. McFeely and Mr. Russell, if any, in this respect. As noted above, there is a document demonstrating that back in 2002 the defendant acted as Mr. McFeely's solicitor. That retainer appears to have come to an end after the defendant started acting for the plaintiffs and Mr. McFeely retained a different solicitor, Mr. O'Connor. It is not clear whether that former retainer was relevant to his participation in the settlement and if so, how. Given those circumstances, I consider I am entitled to take into account the defendant's failure to explain his participation in the settlement in the exercise of my discretion in the context of this motion.

103. Many, if not all, of the above matters will very likely be issues at the trial of the action and my concern in respect of the above matters are not in any way determinative as to the ultimate outcome of these proceedings, or decisions on any of these events. They are identified solely to demonstrate the nature of the aspects of this case that concern this Court and indicate why I consider they constitute special circumstances that dictate that the first plaintiff should not be required to provide security despite its financial position and that the case against the defendant should go ahead so that the matters of concern identified above can be determined by the trial judge. In summary, I consider that the

above conduct constitutes special circumstances that warrant this Court refusing the order for security for costs in the exercise of my discretion.

Conduct of Defendant as Cause of First Plaintiff's Impecuniosity as Special Circumstance

104. The first plaintiff asserts that it is the conduct of the defendant that has caused its impecuniosity and that this constitutes a special circumstance leaning against security. In this respect, the first plaintiff says that the sale of the lands to it only finally closed in June 2007, although it was originally envisaged that the entire development at Gortnakesh would be completed and sold by late 2005. It says this was not possible by reason of the conduct of the defendant as there was no money available to the first plaintiff to complete the construction of the houses, the first plaintiff could not secure further finance, and the third and fourth named plaintiffs were obliged to sell assets and place this money with AIB as security. It is asserted that all those difficulties flowed from the defendant's failure to ensure that the first plaintiff attained good marketable title to the development lands at Gortnakesh, culminating in the insolvency of the first plaintiff. It is further said that the defendant's conduct resulted in a withdrawal of bank support and that the first plaintiff was required by AIB to sell off a partially built development, on a fire sale basis, as directed by AIB. Counsel for the plaintiff concluded that the only candidate responsible for the first plaintiff's financial position was the defendant.

105. In *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd*. (cited above), Clarke J., as he then was, held, at para. 3.4, that:

> *"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 proceed, and the plaintiff not being in such a position."*

106. Taking each of the steps in turn, when one looks at the pleas in this case and the evidence that has been adduced in the motion, I am satisfied that the first condition is met and *prima facie* that there is actionable wrongdoing on the part of the defendant.

107. The second condition, i.e. that there is a cause or connection between the actionable wrongdoing and a practical consequence for the first plaintiff, is considerably more difficult in this case. It is alleged by the first plaintiff that had the defendant not acted as he did, the first plaintiff would have obtained a title to the lands within a short period of time i.e. and that it could have sold the houses in a timely fashion. This approach is encapsulated in the plea at para. 14 of the Statement of Claim, where it is pleaded that the defendant failed to have completed a proper and enforceable contract for the purchase of the property by the first plaintiff which would bind the owner of the property and provide for an achievable closing date within a reasonable time. However, the core reason that houses were not sold in the time scale envisaged by the first plaintiff was because of a lack of title. That cannot be laid at the defendant's doorstep. The obvious cause of the first named plaintiff's failure to obtain title when he expected to do so was the fact that the vendor did not have title to sell on until mid-2005. That is not a matter in my view that could have been altered or changed by the defendant.

108. In this case, the practical consequences for the defendant were that the houses could not be sold between 2003-2005 and that the relationship with AIB was seriously impacted by the events of 2003, thus affecting the funding for the project and the ultimate sale of the houses in 2007. But those practical consequences were at heart caused by the fact that the first plaintiff did not have title to the lands when he built, or partially built, the houses in 2003 and borrowed money in the same year. All the other difficulties flowed from that fact. The defendant's conduct, while it facilitated the building of houses and borrowing of money, did not cause the inability to sell the houses. At best, it exacerbated the loss of the first plaintiff, as it permitted it to continue with the enterprise.

109. There is also a plea by the first plaintiff that, properly advised, they would have paid a lesser amount to Mr. McFeely. There has been no evidence presented to the court demonstrating that the defendant's conduct was the cause of the revised amount.

110. There is another hypothesis by the first plaintiff in relation to causation, i.e. that had the defendant acted properly, relations with AIB would not have been damaged in the way they were and that the first plaintiff would have been in a position to continue to borrow money from AIB and therefore to advance the development in the way it had hoped. However, that hypothesis is problematic because the core of AIB's complaint, when they realised that the undertaking was false, was that the first plaintiff did not have title to the land. There was a secondary complaint that they had not been told about the lack of title. However, irrespective of the defendant's conduct, the core problem would have remained since title could not be delivered at that point in time.

111. Further, in respect of the argument made to the effect that the damaged relationship with AIB resulted in a fire sale of partially completed houses at the behest of AIB, as pointed out by counsel for the defendant, there is simply no evidence of this. I would have to be satisfied at least on a *prima facie* basis that this was the case. Not only is this assertion not pleaded, there is no evidence at all in relation to the final sale of the houses and the circumstances in which they took place. The only evidence in this respect is the letter of

loan sanction from March 2005 where AIB advanced a loan of €4,683,948 to the first plaintiff, an event arguably incompatible with the theory advanced by the first plaintiff.

112. In circumstances where the preponderance of the first plaintiff's pleas are not that the defendant ought to have advised it against continuing with the enterprise but rather that the defendant should have ensured that the enterprise was carried out successfully, my conclusions above end the *Connaughton Road* analysis at the second stage, since there is no connection between the actionable wrongdoing and the consequences for the plaintiff. Irrespective of the defendant's conduct, the first plaintiff could not have sold the houses at the relevant time.

113. However, the Statement of Claim also contains some pleas to the effect that the first plaintiff was badly advised by the defendant. If one analyses the case by looking at the outcome had the defendant properly advised the plaintiff, my conclusions on the cause of the first plaintiff's inability to pay costs is the same.

114. Properly advised, the defendant would have advised the first plaintiff to remove itself from the lands to the extent it was already on them, not to continue construction and not to borrow money from AIB. Whether the first plaintiff would have taken that advice is another matter given that he had gone onto land and started building without any contract for sale or permission from the then owner. On this analysis, had the defendant performed his functions correctly, the first plaintiff would not have withdrawn from the site and would not have further proceeded with the building of houses or purchase. But this would not in fact have resulted in the first plaintiff being able to meet the costs of the defendant.

115. Applying the third and fourth tests in *Connaughton Road*, had the defendant advised the first plaintiff not to proceed with the borrowing and the building, and the advice had been taken, the first plaintiff would have been in the position it started out as i.e. as a company with no assets. The defendant's pleaded conduct might have facilitated the first plaintiff incurring significant losses but it did not result in a diminution of existing assets. Thus, any loss caused by the defendant did not make the difference between the first plaintiff being in a position to meet the costs or not. If the development at Gortnakesh had not gone ahead, there is no evidence before me that the first plaintiff would have made any money from any other business venture. In this respect the situation is somewhat like the example given by Clarke J., as he then was, in *Connaughton Road* of a plaintiff company with an excess of liabilities over assets of €200,000. If the high watermark for that claim is only for €100,000 then it follows that the inability to pay costs has not been caused by the defendant's wrongdoing since even if the plaintiffs were to succeed there would still be an excess of liabilities over assets of €100,000. In this case, appropriate advice by the defendant, followed by the plaintiff, would have meant no development would have gone ahead. The first plaintiff would still not have been able to meet the defendant's likely costs of a contested trial.

116. At heart, the first plaintiff's losses do not appear to the court to have been caused by the defendant's wrongdoing. Rather the losses were caused by the fact that the first plaintiff

proceeded to build houses for sale, and borrow money for that purpose, on a site where it had no title and no immediate prospect of obtaining same. The defendant's conduct simply meant the plaintiff was in a worse financial situation than it would otherwise have been. But that would still, at best, have left the first plaintiff with no assets and no liabilities and without an ability to pay the defendant's costs.

117. As noted above, I have before me reports and affidavits from two accountants Mr. Stafford and Mr. Harding. Given my conclusions above, I do not need to proceed to consider those reports in detail. But for the sake of completeness, I should add that in my view, the premise of the report of Mr. Stafford was misconceived. I understand that he was instructed to prepare his reports on the basis of specified assumptions, identified in the report. However, certain aspects of those conclusions are not borne out by the evidence as discussed above. If one looks at the projected profit and loss account of the report of Mr. Stafford at p. 1703 of his report, in the 26 months ending the 31 March 2005, he projects income from sale of the houses of some €10 million. The projected cash flow statement up to March 2005 identifies monies coming in by way of house sales from July 2003 up to the period of March 2005. However, for the reasons set out above in relation to Mr. McFeely's ownership of the site, the first plaintiff would not have been in a position to sell houses until earliest May 2005 when the conveyance of the site took place.

118. At para. 7.2 under the heading "Profit Lost on Sale of Houses", Mr. Stafford states: '*as a result of Mr. O'Gorman's negligence' AIB was concerned about the ability of the company to repay the bank loan and insisted that the company sold partially completed houses and sites. Accordingly, the company lost the profit it should have earned from completing the houses and selling them*."

119. As identified above, I can find no evidence for that statement. Mr. Stafford appears to have been instructed that the cause of the company's losses was Mr. O'Gorman's negligence (see para. 39 of his second report of 10 April 2019). At para. 23 he says that the company moved onto the site in October/November 2002 and had 20 houses completed by December 2003, the company at that stage had encountered no problems on site and everything was going to plan. He said that no external events had impacted on the company's plans. No such evidence has been provided to this Court and I do not know from where that statement comes. Mr. Stafford appears to be proceeding on the basis that the impossibility of selling the houses in December 2003 was caused exclusively by the negligence of Mr. O'Gorman and not by any other external factor. That analysis ignores the issues with causation identified above.

120. In all the circumstances, it seems to the court that the plaintiffs have not established on a *prima facie* basis that the acts and omissions of the defendant caused its inability to pay costs within the meaning of the *Connaughton Road* test. Accordingly, I find no special circumstances in that respect.

Hearing in 2018

121. The first plaintiff also sought to argue that the defendant's decision to oppose its application to adjourn the hearing of the entire case in 2018 until it was reinstated to the Register of Companies was a special circumstance justifying a refusal to order security since it had increased the costs incurred. I do not agree. The first plaintiff sought an adjournment, the defendant contested it and the judge in charge of the list directed that the case go on. The failure to make returns to the CRO, with the consequence that the first plaintiff was struck off, was that of the first plaintiff. The defendant was entitled to require the remaining plaintiffs to go on with their case even in the absence of the first plaintiff. I do not consider these factual circumstances come near to constituting special circumstances.

Conclusion

122. I refuse the application for an order for security for costs on the following basis:

i. Although costs have not been measured, I am satisfied that the defendant has demonstrated that the first plaintiff would be unable to pay the costs of these proceedings given that it has liabilities as of the year ending 31 December 2017 of €3,814,998.

ii. The defendant has demonstrated that it has a *prima facie* defence to these proceedings.

iii. The first plaintiff has sought to avoid the obligation to provide security by pleading special circumstances. I find that special circumstances exist disentitling the defendant to an order for security insofar as there is:

a. a 14 year delay on the part of the defendant in bringing the motion for security, causing the first plaintiff significant prejudice; and
b. conduct of significant concern of the part of the defendant *qua* solicitor in respect of the events giving rise to these proceedings.

iv. The first plaintiff has not made out a *prima facie* case to the effect that the defendant has caused its inability to pay costs and no special circumstances have been established in that respect.

v. Nor has the first plaintiff succeeded in its claim that the defendant's insistence on the 2018 proceedings going ahead constitutes special circumstances.