Neutral Citation Number: [2010] IEHC 31

THE HIGH COURT

COMMERCIAL

2008 8540 P

BETWEEN

SALTHILL PROPERTIES LIMITED AND BRIAN CUNNINGHAM

PLAINTIFFS

AND

ROYAL BANK OF SCOTLAND PLC, FIRST ACTIVE PLC

AND BERNARD DUFFY

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 5th of February, 2010

1. Introduction

1.1 In this application, the first and second named defendants (hereinafter individually "RBS" and "First Active" respectively and collectively "the Banks") seek security for costs against both plaintiffs ("Salthill" and "Mr. Cunningham" respectively). The proceedings arise out of a re-financing agreement entered into on the 22nd April, 2008 between First Active and the third defendant, Mr. Duffy, in relation to the sale of a property at Baily Point, Salthill, County Galway (the "Property") by First Active, as mortgagee in possession, to the third named defendant, Mr. Duffy.

1.2 Salthill and Mr. Cunningham assert that the Banks agreed to take a secret profit out of the re-financing agreement concerned and are seeking to set aside the sale of the Property together with damages and an account. In addition, Mr. Cunningham seeks a declaration that he is entitled to an assessment of any guarantee liability which he might have to First Active taking into account the profit share alleged by the plaintiffs, Mr. Cunningham having provided a limited personal guarantee in respect of the debts of Salthill.

1.3 This is a further set of proceedings arising out of the long running dispute between companies associated with Mr. Cunningham ("the Cunningham Group") and its bankers, First Active. There has already been a trial of the main issues ("the main trial") arising between these parties generally, which is the subject of a judgment in *Moorview Developments Limited & Ors v. First Active Plc & Ors* [2009] IEHC 214 ("the main judgment"), where the majority of the Cunningham Group's claims were the subject of a non-suit. The background to the relationship between the parties generally and the issues which arose subsequent to the appointment of a receiver over significant assets of the Cunningham Group are fully set out in that judgment, and it is unnecessary to repeat them here.

1.4 An attempt by the Banks in April of this year to strike out these proceedings failed. In a judgment of 30th April, 2009, I held that, while Salthill and Mr. Cunningham had not established a *prima facie* case at that time, it was not appropriate to then dismiss the proceedings, see *Salthill Properties Ltd & Anor v. Royal Bank of Scotland & Ors* [2009] IEHC 207 ("the dismiss judgment").

1.5 The Banks now seek security for costs from both Salthill and Mr. Cunningham, that is to say, the lodgment of a bond or other form of security by the plaintiffs as a guarantee that the costs, or an agreed proportion thereof, will be paid. In this regard the Banks rely on s. 390 of the Companies Act 1963 (as against Salthill), O. 29 of the Rules of the Superior Courts (as against Mr. Cunningham) and the inherent jurisdiction of this Court (as against both Salthill and Mr. Cunningham personally).

2. Factual Background

2.1 The factual background to these proceedings has been set out in the main judgment and in my decision last year in the dismiss judgment and it is unnecessary to repeat same here.

2.2 As mentioned earlier, these proceedings arise out of a refinancing agreement entered into on the 22nd April, 2008, between First Active and Mr. Duffy. Salthill and Mr. Cunningham allege that the Banks and Mr Duffy arranged a secret profit in the following way:-

(a) First Active would take a share in Mr. Duffy's profits on the residential portion of the Property by way of an arrangement fee on a new facility dated 22nd April, 2008;

(b) First Active would repay Mr. Duffy's deposit on the commercial units of the Property to Mr. Duffy; and

(c) First Active would take a share in the profits on the sale of the commercial units of the Property without accounting to Salthill for same.

2.3 At the date of the appointment of a receiver to Salthill, the Cunningham Group's total indebtedness to First Active amounted to €31,583,561, €26,307,692.54 of which related to the indebtedness of Salthill. The current level of indebtness of Salthill to First Active is set at €25,192,196.40, according to the receiver's abstract filed with the Companies Registration Office on 4th June, 2009. As such Salthill's insolvency is not a matter of dispute between the

parties.

2.4 On 11th February, 2008, solicitors for First Active, Arthur Cox, wrote to the solicitors for the Cunningham Group, before the commencement of the main trial, and requested details of the funders of that litigation. No reply was received. Essentially the only admittance that this litigation generally has been funded by Mr Cunningham is a statement made by counsel for the Cunningham Group during the main trial where, on day 62, 2nd December, 2008, counsel stated:-

> "So far as my client's delay is concerned, and I know that I may be beginning to sounds a little bit like a cracked record repeating itself, but I am sure the Court is aware that we are effectively running a major and very complicated piece of litigation funded effectively by a private client on shoestring."

The Banks assert that this private client is Mr. Cunningham.

2.5 Pursuant to two orders of this Court dated respectively the 11th May, 2005, and 1st June, 2006, relating to interlocutory issues, First Active was awarded costs. Mr. Cunningham failed to satisfy all demands for the bills of costs requiring the solicitors for First Active to engage legal costs accountants to draft summonses to tax which ultimately resulted in the Taxing Master issuing Certificates of Taxation on 21st August, 2008, which were served on Mr. Cunningham's solicitor on 9th September, 2008. First Active then applied to the High Court for two orders of *fieri facias* pursuant to the Certificates of Taxation, which orders were granted on 15th January, 2009. On 10th February, 2009, the orders of *fieri facias* were sent to the Dublin County Sheriff for enforcement.

2.6 On a date between 12th and 24th February, 2009, and again on 13th May, 2009, an agent of the Dublin County Sheriff attended at the home address of Mr. Cunningham in Howth, County Dublin, in an attempt to enforce the orders but was unsuccessful in doing so. It is asserted by the Banks, in the affidavit grounding this application, that Mr. Cunningham made representations to the agent of the Sheriff that he, Mr. Cunningham, is not seized of goods or property of such value to satisfy the orders and more particularly that all goods and chattels are owned by Mr. Cunningham's spouse, Marian Cunningham, in accordance with an agreement dated 20th February, 2001.

2.7 By letter of 10th June, 2009, Arthur Cox wrote to the plaintiffs' solicitors requesting that Salthill and Mr. Cunningham provide security for costs on a voluntary basis. The solicitors for Salthill and Mr. Cunningham did not respond and on 24th June, 2009, Arthur Cox wrote to those solicitors indicating that the Banks would make an application for security for costs.

2.8 As has been pointed out there are, in substance, separate applications before the court seeking security for costs from, respectively Salthill and Mr. Cunningham. The legal basis for those separate applications and the criteria which are applicable to determining the entitlement of the Banks to such security, differs. In that context, I propose turning first to the legal principles relevant to the application in respect of Salthill.

3. Legal Principles relevant to Salthill

3.1 Section 390 of the Companies Act 1963 ("the Act") provides:-

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

3.2 There are a number of points to be made about s. 390 of the Act. The section only applies to proceedings where the plaintiff is a limited liability company. There must be 'credible testimony' to show that, if the defendant is successful in his defence, the plaintiff company will be unable to pay the defendant's costs. A *prima facie* defence is further required. After a prima facie defence has been established by the defendants, the burden shifts to the plaintiff company to assert circumstances that would justify the refusal of the order. The approach to ordering security for costs was summarised by Morris J. in *Inter Finance Group Limited v. KPMG Peat Marwick* [1998] IEHC 217 as follows:-

> "From these authorities it emerges that to succeed there is an onus on the moving party the defendant to establish (a) that he has a *prima facie* defence to the plaintiff's claim and, (b) that the defendant will not be able to pay the defendant's costs if successful in his defence.
>
> On establishing these two facts then the order sought should be made unless it can be shown that there was specific circumstances in the case which would cause the court to exercise its discretion not to make the order sought. Such special circumstances might be;
>
> > (I) that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the parties seeking the security, or
> >
> > (II) there has been delay by the moving party in seeking the relief now claimed.
> >
> > (III) some other circumstance which might arise in the case.
>
> Applying the foregoing tests it falls first to consider whether the defendant has shown that he has a *prima facie* defence to the plaintiff's claim."

3.3 In *Jack O'Toole v. MacEoin Associates* [1988] I.R. 277, the Supreme Court, per Finlay C.J. at p. 283, set out the following principle for the application of s. 390:-

> "…where it is established or conceded, as arises in this case, that a limited liability company which is a plaintiff would be unable to meet the costs of a successful defendant, that if the plaintiff company seeks to avoid an order for security for costs it must, as a matter of onus of proof, establish to the satisfaction of the judge the special circumstances which would justify the refusal of an order."

3.4 Where the proceedings involve a corporate plaintiff and an individual plaintiff, the existence of the individual plaintiff may amount to a special circumstance sufficient to prevent an order for security for costs being made against the corporate plaintiff. The existence of an individual co-plaintiff arose in *Bula Ltd v. Tara Mines Ltd* [1987] I.R. 494. One of the factors advanced to defeat the defendants' application in that case was the fact that there existed individual plaintiffs resident in Ireland who would be entitled in any event to maintain the proceedings in their own names irrespective of their financial status. Murphy J. referred to the general rule that insolvency is not a ground for requiring security for costs from a natural person and noted that this general rule was reversed in the case of corporate plaintiffs. Murphy J. went on to state, at p. 499, that:-

> "In the case of corporations the basic rule is reversed. It would seem to me, therefore, that the addition of individual plaintiffs should have no direct bearing on the question of whether a corporate co-plaintiff would be required to give security.It might be argued, however, that the position would be different if it was shown that the individual plaintiffs were a good mark because it is only in that way that their inclusion would provide an answer to the defendants' concern of facing proceedings against an impecunious corporate body."

3.5 That the making of such an order might mean the end of a plaintiff's action is not a factor to be considered. Keane J. stated in *Lismore Homes v. Bank of Ireland Finance* [1992] 2 I.R. 57, at p. 63:-

> "Section 390 of the Act of 1963 expressly envisages that an impecunious plaintiff company may be required to give security for costs and it may well be that in many cases this will mean the end of the action, unless someone other that the company itself is prepared to put up the security. To refrain from granting an order for security, save in the exceptional circumstances already referred to, simply because it might have the effect of stifling the plaintiff companies' actions would be to render the section nugatory. Nor am I prepared to assume that the various defendants have conspired with each other to stifle the claim of the plaintiff companies. Each of them was, in my view, perfectly entitled to invite the court to make an order under s. 390 and it was indeed almost inevitable that, in the circumstances of the present case, they would be advised so to do."

3.6 The test under s. 390 is not strictly speaking as to whether or not the company concerned is insolvent, but rather whether the defendant can produce credible testimony to show that the plaintiff company will be unable to pay costs should the defendant be successful. The position regarding security for costs where the plaintiff company is in liquidation was considered by the Supreme Court in *Comhlucht Paipear Riomhaireachta Teo v. Udaras na Gaeltachta.* [1990] ILRM 267. In refusing the application, McCarthy J. stated at p. 274 that:-

> "the overwhelming line of authority establishes that in cases such as the present, where an action is brought after liquidation, the costs of a successful litigant against the company appear to rank in priority to all other claims… [it would be] a great injustice if a company were free, after liquidation, to maintain an action for the benefit of the general body of creditors and, if unsuccessful, successfully contend that the costs of the successful litigant against the company should only rank in *pari passu* with the claims of the creditors."

3.7 As such where an action is brought after liquidation, the costs of a successful litigant against an insolvent company rank in priority to all other claims. Consequently where there are sufficient funds available to pay the costs of a successful litigant, an application for security for costs will fail *in limine*. This is not, however, such a case.

3.8 In relation to the amount of security to be furnished, s. 390 of the Act sets out that the court may require "sufficient security" to be given for costs. So far as corporate plaintiffs are concerned, the normal practice is that an estimate is made of the likely costs which would be awarded to the defendant in the event that the defendant was successful. That exercise is normally conducted by a consideration of the expert views of costs accountants which may be submitted by the parties. In passing it should be noted that the process contemplated by the Rules of the Superior Courts requires the court to consider whether, at the level of principle, security should be provided, with the amount normally being fixed by the Master. However, because of delay which is frequently experienced in obtaining a determination from the Master as to the amount of such costs, the practice has grown up in respect of cases in the Commercial list of the court fixing the amount of security itself in cases where it is considered appropriate to direct security. Counsel for Salthill and Mr. Cunningham indicated that he was not familiar with that practice. In the circumstances it was accepted by the parties that, in the event that I should, in principle, direct that security be provided, Salthill (or Mr. Cunningham in the event that security was also directed in respect of him) would be given an opportunity to file affidavit evidence from a cost accountant before the amount of any relevant security was fixed. It is next necessary to turn to the principles relevant to the question of whether security for costs should be ordered against a natural person.

4. Security for Costs against Natural Persons

4.1 Order 29 of the Rules of the Superior courts provides as follows:

> "1. When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security.
>
> 2. A defendant shall not be entitled to an order for security for costs solely on the ground that the plaintiff resides in Northern Ireland.
>
> 3. No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits.
>
> 4. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction.
>
> 5. If a person brings an action for the recovery of land after a prior action for the recovery of the same has been

brought by such person or by any person through or under whom he claims, against the same defendant, or against any person through or under whom he defends, the Court may at any time order that the plaintiff shall give to the defendant security for the defendant's costs, whether the prior action has been disposed of by discontinuance or by non-suit or by judgment for the defendant."

4.2 The rational of O. 29 is to protect defendants from spurious claims which may be brought against them by plaintiffs who reside outside the jurisdiction and who may be able to evade any subsequent order as to costs made against them. As Finlay P., commented in *Collins v. Doyle* [1982] ILRM 495, at p. 496:-

> "In general it would appear to me that the principles underlying the defendant's right to security for costs must be that he should not suffer from an inability to recover the cost of successfully defending the claim arising from the fact that the unsuccessful plaintiff resides and has his assets outside the jurisdiction."

Although Finlay P. refers to security for costs as a right, O. 29 cannot be seen as giving defendants a "right" to security for costs. Furthermore this procedure should not be used a tactical weapon in order to stifle a good claim brought by an impecunious plaintiff.

4.3 Usually in order for security to be ordered against an individual plaintiff, two conditions must be satisfied: (a) the plaintiff must be ordinarily resident outside of the jurisdiction; and (b) the defendant must have a *prima facie* defence on the merits of the plaintiff's claim. However, the court retains a discretion even when these two conditions are met.

4.4 In *Malone v. Brown Thomas & Co. Limited* [1995] 1 ILRM 369, the Supreme Court set out, at p. 372 of the judgement, the following principles in the context of providing security for costs for an appeal:-

> "(1) that the ordering of security for costs is a matter for the discretion of the Court;
>
> (2) that in the exercise of its discretion, the Court must consider all the circumstances of the case;
>
> (3) that neither mere residence outside the jurisdiction or the poverty of the Appellant is a sufficient justification for compelling an Appellant to lodge security for costs.
>
> (4) that the onus is on the applicant to establish reasonable grounds for his entitlement to the order."

It has been submitted that these principles apply in applications for security for costs under Order 29.

4.5 In relation to establishing a defence, a defendant is bound to lay before the court an affidavit setting out enough evidence to satisfy the court that there is a reasonable prospect of his establishing a *prima facie* defence*, Hidden Ireland Heritage Holiday Ltd v. Indigo Services Ltd & Ors* [2005] 2 I.R. 115.

4.6 Poverty on the part of the plaintiff is not automatically a reason for refusing or granting an order for security for costs, *Rashad Fares v. John Wiley* [1994] 1 I.L.R.M. 465. In *Heaney v. Malocca* [1958] I.R. 111, the Supreme Court , per Maguire J. in considering the position of an impecunious plaintiff resident in Northern Ireland stated, at p.115 of the judgment:-

> "…it would appear that mere poverty is not in itself a sufficient ground either for refusing or granting an order for security for costs…the facts of each case have to be considered fully in order that the discretion of the judge may be properly exercised."

4.7 As set out in O. 29, r. 7 the amount of security to be furnished is to be determined by the Master of the High Court in every case. Order 29 sets out no express statement as to the quantum of security which should be fixed in any case. Considering the predecessor of the relevant provision in *Thalle v. Soares* [1957] I.R. 182, Kingsmill Moore J. stated, at p. 193:-

> "Such indefiniteness cannot have been otherwise than deliberate...Security for costs must be so fixed as to advance the ends of justice and not to hinder them. If the amount is too small a plaintiff with a speculative or even dishonest case may be able to force a defendant into an unfavourable settlement by the threat of expensive litigation whose costs may be irrecoverable: if too large a defendant may be able to defeat an honest and substantial claim because the plaintiff cannot find the necessary security. Somewhere between Scylla and Charybdis a way has to be found but there can be no Admiralty chart, no succinct sailing directions"

In *Thalle v. Soares*, the Supreme Court referred to a prevailing practice whereby it was customary to require a security in an amount not more than about a third of the costs which would probably be incurred by the defendants. This was also applied in the relatively more recent decision of *Fallon v. An Bord Pleanala* [1992] 2 I.R. 380, where the Supreme Court indicated judicial reluctance to depart from this rule of practice.

4.8 Given that one of the grounds, as will be seen, for resisting an order for security for costs as against Salthill stems from the fact that there is a natural co-plaintiff (in the shape of Mr. Cunningham) against whom, it is said, security cannot be ordered, it seems to me that it is logically appropriate to deal first with the question of the application for security against Mr. Cunningham personally. I turn to that question.

5. The Application for Security from Mr. Cunningham Personally

5.1 As pointed out earlier the jurisdiction to order security against an individual plaintiff is found in O. 29 of the Rules of the Superior Courts. In their commentary on that rule in Delaney & McGrath *Civil Procedure in the Superior Courts*, the authors note that the rule:-

> "[M]akes provision for the making of an order requiring a plaintiff to grant security for costs to a defendant where

the plaintiff is resident outside the jurisdiction. As noted above the rationale of the order is to protect the defendants from spurious claims which may be brought against them by plaintiffs who reside out of the jurisdiction of the court and who, for this reason, may be able to evade any subsequent order as to costs made against them."

5.2 In more recent times there have been developments concerning persons who were residents not of this jurisdiction, but of other jurisdictions who were originally contracting parties to the Brussels Convention and who now are subject to its replacement, the Brussels Regulation. In *Pitt v. Bolger* [1995] 1 I.R. 108 it was held that O. 29 could not be used to grant an order for security against a plaintiff who was a national and resident of a contracting state to the Convention since the effect of making such an order would be to discriminate indirectly (by reference to residence) against such a plaintiff, contrary to the relevant provisions of the Treaty of Rome. To similar effect also see the judgment in *Maher v. Phelan* [1996] 1 I.R. 95 and *Protea v. Neill* [1996] 1 I.R. 100.

5.3 In addition, in *European Fashions v. Eenkhoorn* [2001] IEHC 181, Barr J., drew attention to the above jurisprudence to the effect that security could not be ordered against what were described as EU citizens, which persons were stated to have the same status as Irish citizens. However, Barr J. went on to say the following:-

"As to the defendants second point; *i.e.* whether in given circumstances an order for security for costs could be given against an Irish or EU citizen; Murphy J. makes clear in his judgment in *Protea v. Neill* at p. 104 that orders for security for costs under O. 29 may be obtained only against plaintiffs who are resident outside the EU and the right to seek security depends on that fact."

5.4 It seems clear, therefore, on all of the authorities that the courts have not, to this point, recognised any jurisdiction to make an order for security for costs against an individual plaintiff who is not resident outside of both Ireland and the states governed by the now Brussels Regulation. Even persons resident outside that area may not necessarily have an order for security for costs made against them. However, such external residence would appear, on the authorities to date, to be a condition precedent to the exercise of the power to order security for costs. It is true to say, as was pointed out by counsel for the Banks, that there does not appear to have been a case directly on point where it was suggested that an inherent jurisdiction to award security, or a like jurisdiction under O. 29, arose in special circumstances where the plaintiff concerned was within the jurisdiction (or, by necessary extension, and on like terms so as not to discriminate, within another country subject to the Brussels Convention or Regulation). However, the absence of any authority is almost certainly, as was pointed out by counsel for Mr. Cunningham, due to the fact that no one had considered that a jurisdiction existed so as to seek to invoke it.

5.5 It seems to me, therefore, that in order to determine that there should be a jurisdiction to make an order for security for costs against an individual plaintiff who is resident in the jurisdiction or within countries covered by the Brussels Regulation, it would be necessary to engage in a significant expansion of the traditional jurisprudence. It does not seem to me that it would appropriate to take that step without either legislative or rule change. It is possible to envisage circumstances where there might be some legitimate basis for such a change. Under the traditional jurisprudence persons needed to be both not resident in the relevant jurisdiction and not have sufficient assets within the jurisdiction as well. A case where a relevant person may reside within the jurisdiction but might be found to have placed their assets outside any relevant jurisdiction for the deliberate purpose of causing those assets not to be available in the event of a costs order, is one which would merit some consideration. The underlying rationale behind the rule might be said to cover such a situation. Against that it could be argued that, as long as the person concerned remains within the jurisdiction (or a relevant jurisdiction), then such person is amenable to any appropriate court process which can, at least in many cases, be made to apply to assets wherever situate. There would, in my view, be important policy considerations underlying any decision to extend the jurisdiction to order security for costs to cases involving persons resident in this jurisdiction or in Brussels Regulation countries. Such an expansion would, in my view, if desirable, be properly brought about by a change in the rules or legislative intervention. To embark on what would be a radical change in the relevant law on the basis of judicial decision would be going too far.

5.6 I am not, therefore, satisfied that there is a jurisdiction under the law as it currently stands to direct security for costs against an individual resident in the jurisdiction or in Brussels Regulation countries. For that reason, it does not seem to me that a jurisdiction exists to make the order against Mr. Cunningham personally. Having come to that conclusion it is necessary to turn, next to the application in respect of Salthill.

6. The Application in respect of Salthill

6.1 As pointed out earlier, the initial onus rests on the party seeking security to establish the inability of the relevant corporate plaintiff to pay that party's costs if successful, and the existence of a *prima facie* defence. If those two matters are established, then it is up to the corporate plaintiff concerned to establish any special circumstances which might be relied on to avoid an order for security.

6.2 The first question is, therefore, as to whether the Banks have discharged the onus which rests on them to establish impecuniosity and a *prima facie* defence. Impecuniosity is not disputed. However, counsel for Salthill argues that the Banks have not established a *prima facie* defence. In that context, counsel for the Banks relies on the findings in the dismiss judgment in which I expressed the view that, on the basis of the evidence then available, Salthill had not established a *prima facie* case, but that the possibility that other pre-trial procedures might lead to Salthill being a position to establish a *prima facie* case could not be ruled out. For that reason the proceedings were not dismissed as being bound to fail. Counsel for Banks says that the judgment, to which I have referred, goes more than enough down the road of establishing a *prima facie* defence. It seems to me that counsel for the Banks is correct in that proposition. The absence of a *prima facie* case on the part of a plaintiff is in itself a defence. A defendant does not need to put forward a positive defence if it can say that the plaintiff has made no more than a mere assertion. In that context it is only necessary to consider what would happen at a trial. If the plaintiff presents its evidence and it is found not to be sufficient to establish a *prima facie* case, then the proceedings will be dismissed. The defendant will not have to go into evidence. The defendant will succeed in its defence simply by pointing out that the plaintiff has not discharged the onus of proof on it. That is, in any reasonable terms, a defence. I have already indicated that I am satisfied that, on the evidence currently available, Salthill has not established a *prima facie* case. That alone would be sufficient, if that position remains the case, for the Banks to succeed. The Banks have, therefore, in my view, established a *prima facie* defence. In those circumstances it seems to me that the Banks have discharged the onus on them in relation to the two matters which are for the Banks to establish in order that the onus might shift to Salthill to establish special circumstances. In that context it is necessary, therefore, to turn to the question of whether Salthill have established

such special circumstances.

6.3 The matters relied on, in that regard, by Salthill are the following:-

> A. First, it is said that the existence of Mr. Cunningham as a co-plaintiff provides a full answer to an application for security for costs against Salthill on the basis that Mr. Cunningham is an individual plaintiff resident in the jurisdiction;
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> B. Secondly, it is said that any impecuniosity suffered by Salthill has been caused by the Banks; and
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> C. Finally, it is said that the proceedings involve an issue of public importance which could warrant the court declining to make an order for security for costs, even though the remaining circumstances would, in the ordinary way, warrant such an order.

6.4 I propose dealing with each of these matters in turn. I, therefore, turn first to the position of Mr. Cunningham as a co-plaintiff.

7. The Existence of a Personal Co-Plaintiff
7.1 For the reasons which I have already set out, I have come to the view that Mr. Cunningham can not be the subject of an order for security for costs as a personal plaintiff resident in the jurisdiction. In those circumstances it said that, because the costs of the action will be the same whether Salthill is involved or not, the court should exercise its discretion against ordering security for costs against Salthill. In that regard, counsel for Salthill placed reliance on *Pearson v. Naydler* [1977] 1 W.L.R. 899. However, the position in this jurisdiction seems to me to be as identified by Murphy J. in *Bula v. Tara* in the passage which I have quoted at para. 3.4 above. On that basis the existence of an individual co-plaintiff has no direct bearing on the question of whether a corporate co-plaintiff is required to give security. Murphy J. did go on to note that, in circumstances where it was "shown that the individual plaintiffs were a good mark", then the existence of individual co-plaintiffs is a significant factor to be properly taken into account. It seems to me that the obvious inference from the passage which I have just cited, is to the effect that it is for the party placing reliance on the existence of the individual co-plaintiff (in this case Salthill) to "show" that the individual plaintiff would be a good mark. Salthill has produced no evidence from which I could infer that Mr. Cunningham would be a mark for any costs awarded against him.

7.2 The fact that there are existing judgments, which the Sheriff has been unable to execute, with no other obvious way of recovering the sums due on foot of those judgments, tends to establish that Mr. Cunningham would not, personally, be a good mark for costs. I am, therefore, satisfied, in any event, that on the basis of the evidence currently before the court, Mr. Cunningham would not be a good mark. Even if the onus were on the Banks to satisfy me of that fact, I am satisfied that the Banks have produced sufficient evidence to establish a *prima facie* case so as to warrant such an inference. That evidence is sufficient to have shifted the onus onto Salthill.

7.3 Irrespective of on whom the onus rested, I am, therefore, satisfied that this is not the type of case where the existence of an individual co-plaintiff is material. It does not seem to me that this ground provides, therefore, a special circumstance to depart from the ordinary position. I turn next to the question of the assertion that Salthill's impecuniosity has been caused by the defendants.

8. Impecuniosity Caused by Defendants
8.1 It was accepted, as it would have to have been, that the undoubted inpecuniosity of Salthill cannot be attributed to the wrongdoing alleged in these proceedings. The events giving rise to these proceedings occurred in April, 2008. By that time Salthill was already significantly insolvent as a result of the circumstances analysed in the main judgment. In those circumstances any consequences of any wrongdoing such as is alleged in these proceedings, could not be said to have caused the impecuniosity of Salthill, which was hopelessly insolvent as of the time when the events, which are the subject of these proceedings, occurred.

8.2 Recognising that fact, counsel for Salthill argued that the court should also take into account the issues which were before the court in other aspects of the main proceedings. As has been pointed out, most of the claims contained within the main proceedings have been the subject of a non-suit. That decision is currently under appeal to the Supreme Court. In those circumstances it is said that it is arguable that the impecuniosity of Salthill is due to the actions of at least one of the defendants (that is First Active) on the basis of what was alleged in the main proceedings, which issues are, by virtue of the appeal, still alive.

8.3 It does not seem to me that the approach urged on behalf of Salthill is correct. These are stand alone proceedings deriving from a specific and separate cause of action arising at a time well after the main proceedings had been commenced. While both proceedings involve largely the same parties and arise out of the same general circumstances, the respective proceedings involve separate and distinct claims. It must, of course, be acknowledged, that the main judgment is under appeal and that the Supreme Court may come to a different view to the one which I took. However, that does not alter the fact that Salthill cannot establish that its inability to pay the costs of the Banks, in the event that the Banks should succeed in these proceedings, is in any way connected with the issues which Salthill seeks to raise in these proceedings. In the circumstances, it does not seem to me that special circumstances arising where the impecuniosity of a plaintiff is due to defendant's actions (on the assumption that the case succeeds) have been made out in this case. I turn finally, therefore, to the question of whether there is a point of law of exceptional public importance involved that ought lead to the court departing from what might otherwise be the appropriate course of action.

9. Point of Law of Public Importance
9.1 There is some authority (for example, *Moone & Ors v. Attorney General (No.2)* [1929] I.R. 544) which supports the view that the court may depart from what might otherwise be the normal course of action in relation to ordering security as to costs where a point of law of exceptional public importance is involved. The important point which is asserted to be involved in this case concerns the obligations of a bank which is, at the same time, acting as a vendor of property in its capacity as a mortgagee in possession (or, presumably, in principle, in any other capacity which would allow the bank to sell or cause to be sold a relevant property), but also as a lender to the purchaser of such property. That combination of roles can, as I have pointed out in other judgments in these proceedings, lead to a potential conflict of interest which requires a bank to act carefully.

9.2 However, for the avoidance of doubt, I asked counsel for the Banks as to whether the Banks would, in these proceedings, seek to contest a proposition which I have already identified in the context of the main proceedings, which is to the effect that, if it could be shown as a fact that a bank structured its arrangements with the purchaser/borrower in such a way that the bank obtained a benefit in its capacity as a lender which ought properly have gone to it in its capacity as the vendor of its customers property (and, thus, ought properly have accrued to the benefit of the customer in reduction of that customer's debt), then the bank would be liable. Counsel for the Banks did not dispute that proposition. It is clear, therefore, that the questions in these proceedings will not raise any great principle of banking obligation. Rather the case will turn on the facts as to whether the Banks, recognising a general principle such as the one which I have identified, have been in breach of any obligations that might thereby arise. There are, therefore, in my view, no issues of significant public importance likely to arise in these proceedings. In the circumstances, it does not seem to me to be necessary to address the question of the manner in which any discretion that might arise, in the event of there being a point of law of great public importance involved, should be exercised in the context of a trial at first instance which will, almost certainly, in the vast majority of cases, also involve contested issues of fact. I am not, therefore, satisfied that Salthill has made out special circumstances under this heading either. One final point arises as to the basis on which the costs, for which security is to be given, should be assessed.

10. Security for which costs?
10.1 In that context it is necessary to consider an additional point raised by counsel on behalf of Salthill which was to the effect, that security should now be directed only in relation to the costs that might reasonably be incurred by the Banks up to a point in time when discovery would have been completed and analysed by the respective parties. Counsel's reason for adopting that argument stems from what I have said in the dismissal judgment. As pointed out earlier in this judgment I indicated that, on the basis of the evidence currently available, it did not seem to me that Salthill had established a *prima facie* case, but that I could not rule out the possibility that evidence might emerge as a result of proper discovery or other pre-trial steps which might change that situation. On that basis, counsel suggests that it will be necessary for Salthill, when it has had a chance to obtain and analyse such discovery as might properly be ordered and engage in any other pre-trial proceedings which might gather evidence, to review its situation and determine whether the proceedings should go ahead.

10.2 On that basis, it is said that it would be appropriate to structure any order for security for costs in such a way as required security now to be put up only in respect of the reasonable costs that might apply up to the time when discovery would have been analysed by Salthill. It was accepted that such a course of action should be adopted on the assumption that, in the event that the plaintiffs went ahead with these proceedings, then further security would need to be provided at that time.

10.3 I am satisfied that such a course of action is appropriate in the unusual circumstances of this case. Normally there would be more injustice caused than justice served by a piecemeal approach to security for costs. However, there is a real "watershed" point in these proceedings which will occur after discovery (and any other pre trial steps) has been concluded. I am satisfied that a single order should now be made specifying that a first sum should in early course be put up as security with a further sum (to be specified in the order) to be put up as security within 6 weeks of the delivery of discovery to Salthill or such further time as the court might direct on an application made within that 6 week period. In the event that any security directed is not put up by the relevant respective dates the proceedings will be struck out automatically for want of prosecution. Obviously these comments apply only to the proceedings so far as Salthill is concerned.

11. Conclusions
11.1 For the reasons which I have sought to analyse, it seems to me that the Banks have established the two matters which it was for the Banks to demonstrate in relation to the Salthill application. On the evidence it seems clear that Salthill would not be in a position to meet the costs of the Banks in the event that the Banks successfully defend these proceedings. For the reasons which I have also sought to analyse, I am satisfied that the Banks have established a *prima facie* defence.

11.2 Likewise, for the reasons set out in the preceding sections of this judgment, I am not satisfied that Salthill has established any special circumstances that ought lead to a departure from the normal position where impecuniosity and a bona fide defence have been established and it, therefore, follows that Salthill must be ordered to pay security for costs, but should be allowed to do so in the two stage method set out at para. 10.3 above.

11.3 As indicated earlier I will put the matter back for a brief period of time to enable Salthill to put in whatever evidence it may wish concerning quantum.

11.4 Finally, for the reasons which I have analysed earlier in the course of this judgment it does not seem to me that I have any proper jurisdiction to direct security for costs against Mr. Cunningham personally in the circumstances of this case.