2005 IEHC 232

THE HIGH COURT

2004 No.45 P

BETWEEN

**SUPERWOOD HOLDINGS PLC, SUPERWOOD LIMITED,
SUPERWOOD EXPORTS LIMITED,
SUPERWOOD INTERNATIONAL LIMITED,
SUPERCHIP LIMITED AND SUPERWOOD (U.K.) LIMITED**

PLAINTIFFS

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr.Justice Murphy delivered on the 5th day of July, 2005.

1. Pleadings

1.1 This is an application by the defendant, Ireland and the Attorney General (the State) for an order pursuant to O.19, r.28 of the Rules of the Superior Courts dismissing and/or striking out the plaintiffs' (Superwood) claim and/or action against the State on the ground that the statement of claim therein discloses no reasonable cause of action against the State and/or is frivolous or vexatious.

In the alternative, the State seeks an order pursuant to the inherent jurisdiction of the court dismissing Superwood's claim against the State on the ground that the said claim as disclosed in the statement of claim has no reasonable prospect of success and/or is bound to fail.

In the further alternative, the State seeks an order pursuant to the inherent jurisdiction of the court dismissing Superwood's claim against the State on the ground that, as disclosed in the statement of claim, it is an abuse of the process of the court.

1.2 There is also an application by Superwood for an order for judgment in default of defence against the State.It is proposed to deal with the former application in the first instance.

2. Grounding Affidavit in the State's motion

The affidavit of John Kelly, solicitor and Assistant Principal Legal Executive in the office of the Chief State Solicitor, referred to the proceedings and to the advices of senior counsel that Superwood's claim disclosed no reasonable cause of action and had no reasonable prospect of success.

The plenary summons claimed a declaration that s.390 of the Companies Act, 1963 was invalid and repugnant to the Constitution and/or was incompatible with the European Convention on Human Rights.Superwood also claimed damages, *inter alia*, by virtue of the fact that the said section prevented Superwood from prosecuting their appeal against the judgment of Smith J.of 4th to 7th April and 24th May, 2001, in proceedings brought by Superwood against Sun Alliance and London Insurance Plc.and Others (No.141 of 2001) (the insurance case) for damages for having unlawfully repudiated their applications under an insurance contract for fire/consequential loss.

Mr.Kelly referred to the general endorsement of claim of 5th January, 2004 and the prayer in the statement of claim of the same date.

The statement of claim sought a declaration*, inter alia*, that, insofar as it was construed in Superwood's proceedings against Sun Alliance, the section was unconstitutional and was incompatible with the European Convention on Human Rights and in particular article 6(1) and paragraph 1 of the first protocol concerning the protection of property.Article 6(1) provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 14 prohibits discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Mr.Kelly outlined the background to the proceedings arising out of a fire which occurred in Superwood's premises in October, 1987, to an initial trial before O'Hanlon J.in the High Court and Supreme Court and the second trial to determine quantum before Smith J.The original claim amounted to IR£2 million.By the time of the trial before Smith J.the claim was IR£92 million.Smith J.delivered judgment in April, 2001 and awarded two of the plaintiff companies (Superwood Limited and Superwood Exports Limited) the sum of IR£314,940.20 in damages, inclusive of interest to 19th November, 2000.Pursuant to s.17(2) of the Civil Liability Act, 1961, Smith J.ordered that the sums so awarded be reduced by the amount of monies received by Superwood from one of the insurers by virtue of a compromise reached and concluded between Superwood and that insurer.The lodgement by Sun Alliance was ordered to be repaid.

The plaintiffs appealed to the Supreme Court by notice of appeal dated 14th May, 2001, detailing 336 separate grounds of appeal.

Sun Alliance sought an order directing Superwood to furnish security for costs pursuant to s.390 of the Companies Act, 1963.The Supreme Court, on 12th April, 2002, (Denham J., Murphy and Murray JJ.concurring) confirmed the order of the High Court in those terms against the plaintiff.Security was determined by the Master of the High Court.The Master's order was appealed to the High Court and heard and determined by Peart J., whose order was appealed to the Supreme Court who dismissed the appeal on 17th October, 2003 (Murray J., McGuinness and Fennelly JJ.concurring).

The amount of security for costs was assessed at €1,592,102.56.

The statement of claim asserts that Superwood are not in a position to pay "this or any comparable sum" and that "the reasons why Superwood are so impecunious as not to be able to prosecute their appeal under the conditions so imposed is on account of the wrongdoing to them by Sun Alliance, defendants, viz.unlawfully repudiating an insurance contract and not paying money that should have been paid on or before March, 1989".

The statement of claim alleges that the Supreme Court had "held (implicitly) that it was irrelevant that the appellants' impecuniosity was the consequence of the wrongdoing of the respondents; that a major theme in the appeal was that the law was fundamentally unfair in a variety of respects and that it fell below the standards required by the Constitution and article 6(1) of the European Convention on Human Rights, and that the appeal might have a very considerable prospect of success."

Mr.Kelly averred that neither the judgment of Denham J.nor Murray J.supported the claim that the State "do not … dispute these implicit findings as to the correct interpretation of s.390 of the 1963 Act" as asserted by Superwood in para.13 of the statement of claim.

The power to order for security for costs was discretionary and the onus lay to prove the existence of "special circumstances" to justify the court in exercising its discretion in favour of the plaintiff.The deponent referred to (*Peppard & Co.Ltd.v.Bogoff and S.E.E.Co.Ltd.v.Public Lighting Services Lt*d.The factors identified by McCarthy J.in the latter case were considered by Denham J.who expressly recited them as factors to be considered and who pointed out the reality of the matter, specifically referring to the upward revision by Superwood of their claim for damages to IR£92 million and the lengthy and expensive hearing.

He said that there was no basis for the assertion that the Supreme Court, in its judgment of 12th April, 2002, had held that it was regarded as irrelevant that the appeal had either a very considerable prospect of success or an arguable prospect of success.Denham J.expressly adverted to this factor in her judgment.No issue of constitutionality was raised at an appropriate time.Superwood had turned down a very substantial lodgement, being twice that of Superwood's original claim.The first named defendant had incurred costs which were estimated at IR£5 million in defending the proceedings.The time for raising issues regarding security of costs was at the first hearing of the Supreme Court when, on 12th April, 2002, that court, having taken account of the extremely protracted nature of the litigation, came to the conclusion that, in the exercise of its discretion, it should require the plaintiff to provide security for costs.

Mr.Kelly referred to the two grounds being relied on in the statement of claim.The first of these is that s.390 had been held to require that the estimated full costs of defending be furnished as security.Secondly, it was alleged that the Supreme Court had found that it was irrelevant as to whether the appeal had either a very considerable prospect of success or an arguable prospect of success.

Mr.Kelly believed that there was no basis whatsoever for the second of those grounds which was, in his view, simply unstateable having regard to the terms of the judgments of the Supreme Court.

With regard to the first of those grounds, Mr.Kelly averred, the legislature was entitled in balancing the rights of Superwood with the State to make provision for a requirement that corporate plaintiffs be required to provide security for costs in appropriate circumstances.

Mr.Kelly noted that no application had been received by the Chief State Solicitor in relation to the alleged intention of Superwood to bring proceedings before the European Court of Justice,

Moreover, the Supreme Court had already determined that it could find no basis to have the Attorney General joined as a notice party in Superwood's proceedings against Sun Alliance and Others.

3. Grounding affidavit in Superwood's Motion
3.1 By separate and earlier motion returnable on 1st March, 2004, Superwood had sought an order under O.27, r.8 for judgment in default of defence against the State.That application was grounded on the affidavit of A.Derek E.Burke, solicitor for Superwood, sworn 11th February, 2004, in which he referred to the proceedings issued on 5th January, 2004.Because of the unusual degree of urgency, he notified the Chief State Solicitor on 19th January, 2004 of his intention to bring a motion for judgment in default.Mr.Burke averred that to date no defence had been entered nor had there been a request for particulars of Superwood's claim.

3.2 Order 27, r.8, in the context of default of pleadings, provides that if a defendant, being bound to deliver a defence, does not do so within the time allowed, the plaintiff may, subject to the provisions of r.9, set down the action on motion for judgment etc.Rule 9 provides that no notice of motion for judgment in default of defence in actions claiming unliquidated damages in tort or contract may be served, unless the plaintiff has at least 21 days prior to the service of such a notice, written to the defendant giving him notice of his intention to serve a notice of motion for judgment and at the same time consenting to the late delivery of defence within 21 days of the date of the letter.

Where a defendant enters an appearance to a plenary summons he shall deliver his defence and counterclaim (if any) –

> (a) in case he does not by notice require a statement of claim, within 28 days from the entry of appearance; or
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> (b) in any other case within 28 days from the date of delivery of the statement of claim or from the time limited for appearance, whichever shall be later.

Superwood's motion for judgment in default was returnable on 1st March, 2004, while the State's motion to dismiss and/or strike out Superwood's claim was returnable on 22nd March, 2004.The State's appearance was entered on 7th January, 2004.

4. Submissions on behalf of Superwood
4.1 Dr.Forde S.C.counsel for Superwood, furnished skeleton arguments in relation to Superwood's appeal dated 14th May, 2001 to the Supreme Court in the insurance case (No: 141 of 2001); he also submitted written arguments in relation to the present proceedings and made oral submissions in relation thereto.

There was a degree of overlap in relation to the arguments and submissions and, indeed, as counsel acknowledged, many of the matters had been determined in the insurance case appeal.

4.2 Counsel, in the insurance appeal, had submitted that the decision which held that the award of IR£314,000 was extinguished by the IR£3 million settlement was incorrect as Sun Alliance, who indemnified 60% of the claim, and Lloyds, who indemnified 40% of the claim, were not concurrent wrongdoers.There were two separate policies.He submitted that the Supreme Court (Denham J.) overlooked the merits of the appeal on this point.

Counsel argued that the attempts by Superwood to reduce the appeal had been rejected by the Supreme Court.The court could reduce the scope of the appeal.It was wrong of the Supreme Court to refuse the narrower appeal with reasonable costs.

The main issues of law, in counsel's submissions, was that if the plaintiff was owed money under a contract and not paid then two claims arose: a money claim and a consequential loss claim (phase 1 and 2 of the case).The trial judge, Smith J., held that the plaintiff was not entitled to consequential loss and was entitled only to IR£314,000.

The Supreme Court did not regard the claim for consequential loss as distinct from the money claim.That court did not deal with the

merits of the appeal.

Counsel maintained that the State had an arguable case and that most of the State's affidavits comprised legal argument/submissions, much of it speculative.

The criteria was first that the cause of Superwood's impecuniosity was the insurer's wrongful repudiation and the consequent litigation thus incurred.The Supreme Court had already ruled that Sun Alliance had unlawfully repudiated the insurance contract and refused to pay such sum as was due at the time.Counsel submitted that the assertions in the pleadings, where not contradicted by affidavit, must be accepted by the court.

The reasons given by the court made no reference to the reasons why Superwood became impecunious let alone the assessment of the weight of this factor.This was not sufficient for Convention purposes.

The court did not address the grounds of appeal nor articulate any evaluation of those grounds and their prospects.

Dr.Forde submitted that it was misconduct of trial said that no consideration at all was given to the numerous grounds of appeal concerning how the trial had been conducted alleging, *inter alia*, flagrant denial of *audi alteram partem* in dealing with the concurrent wrongdoer point and the question of costs.In relation to the Constitution/Convention issue that this was, in counsel's submission, an extremely important factor that should have been taken into account and addressed in the reasoning if, notwithstanding, security was to be ordered.

4.3 Counsel maintained that the Strasburg application in respect of s.6 of the European Convention on Human Rights Act, 2003 was an application by Mr.Bunion, the principal of the plaintiff companies.

In respect of the security for costs provisions, Dr.Forde acknowledged that he could not argue that it was unconstitutional because of the decisions of Keane C.J.and Murray J.in the Supreme Court but maintained that he had an arguable case under the European Convention on Human Rights as claimed in para.13 of the statement of claim.This was a claim he could not have made before January of 2004 when the European Convention on Human Rights Act, 2003 came into force.Paragraph 13(ii) of the statement of claim stated as follows:

> "In deciding to require security of €1.6 million in order to prosecute the plaintiffs' appeal, the Supreme Court has held (implicitly) that it is irrelevant that –
>
> (ii) a major theme in the appeal is that the trial was fundamentally unfair in a variety of respects, that it fell far below the standards required by *inter alia* the Constitution and article 6(1) of the European Convention on Human Rights."

The appeal was still alive on 5th January, 2004 but was prevented by the s.390 order.Superwood had up to 17th January, 2004 to lodge the security.The appeal was struck out on 15th March, 2004.Between those two dates the appeal could have been saved if Superwood had €1.6 million.Such a requirement was incompatible with the Convention.

The Supreme Court was aware that there was an action against the State as referred to at p.7 of the judgment of the Chief Justice of 15th March, 2004.

4.4 Counsel referred to the *Tolstoy* case, to *McAteer and Beechfinch Ltd.v.Lismore* (No.2) [2000] NIChD 477, that all that the applicant needed to do was to show an arguable case.

Counsel submitted that the judgment of Denham J.of 12th April, 2002, at p.7, did not address anywhere the merits of the appeal other than saying that Superwood had an arguable case.Moreover, the English Court of Appeal in Tolstoy Miloslavsky v.United Kingdom [1995] 20 E.H.R.R.442, heard the merits of the appeal and give a reasoned decision before finding that an undertaking ought to be required before that case went ahead.It was submitted that under the Convention an adequately reasoned decision was a prerequisite of any fair hearing.

4.5 Dr.Forde submitted that there were three principal issues:

> (i) What criteria does article 6(1) of the Convention and/or the Constitution lay down when a court is being asked to require security for the costs of an appeal?
>
> (ii) Whether those criteria were applied to the facts of the present case
>
> (iii) Assuming that those criteria were not so applied, are Superwood precluded from seeking a remedy from the State?

4.6 In relation to the timing of Superwood's present action, counsel submitted that s.390 had the presumption of constitutionality and that statutes would not be constructed in a manner that put the State in breach of its international obligations.Until the sum for security of costs was determined (in the sum of €1.6 million) and the reasons given therefor, any constitutional action would have been properly rejected as premature.Moreover, in view of the decision in Kavanagh v.Governor of Mountjoy [2002] 3 I.R.97, any argument based on the Convention would have been futile prior to its coming into force on 1st January, 2004.On that day the fixing of security for costs stood in the way of Superwood' s appeal being heard.Superwood had made a reasonable offer to the State in this regard.There was an arguable case against the State for it having refused that offer.Moreover, s.390 is not compatible with the Convention.Superwood's endeavoured to reduce the ambit of the appeal should logically lead to the requisite security for costs being significantly reduced.The court had held that the orders made could not be varied and were, in effect, final orders.This further contravened article 6(1) of the Convention.

5. Submissions on behalf of the State

5.1 Mr.Mark Sanfey S.C., having referred the relevant factual background, summarised in Mr.Kelly's grounding affidavit, examined Superwood's claim and, in particular, para.13 (ii) (see 4.3 above).Counsel for the State parties submitted that the purported particulars set forth in that paragraph were plainly and demonstrably unsustainable from reading of the judgments of the Supreme Court on 12th April, 2002 by Denham J.and 17th October, 2003 by Murray J.

The judgment of Denham J.of 12th April, 2002 at p.7 referred to the tests laid down in *S.E.E.Company Limited v.Public Lighting Services Limited* [1987] I.L.R.M.255 per McCarthy J.was considered.At p.8 of that judgment Denham J.concluded:

> "The time has come when the defendants may properly ask the court to direct and the court should in its discretion direct that security should be given by Superwood for the cost of further litigation in pursuance of the enormous claim which has already involved such protracted and expensive litigation in which Superwood's claim to substantial damages was rejected."

The short *ex tempore* judgment of Murray J., delivered on 17th October, 2003, (McGuinness and Fennelly JJ.concurring) related to the appeal against the amount fixed by the High Court for security of costs.The court was satisfied that the matter had already been decided and that the plaintiff was bound to provide security for costs for the appeal.

The Supreme Court noted that an issue of constitutionality was raised, allied with the submission that this issue in the matter could be remitted to the High Court.The Supreme Court held that this must also fail, this question not having been raised in relation to the matter before now (which) could have been raised at an appropriate time in the proceedings if the plaintiff wished to rely thereon.

The Supreme Court did not find that any satisfactory grounds had been advanced to interfere with the findings of the High Court.

There was no application before the Supreme Court to reduce or curtail the grounds of appeal in the interests of either saving costs or the effective administration of justice.Accordingly, that could not have been a material factor in the consideration of the appeal which, for those reasons, the court disallowed and ordered that the costs be paid or provided by bond within three months from 13th January, 2004.The limiting of time within which an application could be made to the Supreme Court to narrow the grounds of appeal was set aside.

It would appear that no application was made to the Supreme Court to extend that period.In the present proceedings, issued on 5th January, 2004, nine days before the judgment of Murray J., no reference was made to an extension.

5.2 Counsel for the State noted that nowhere in the statement of claim did Superwood identify the relevant provisions of the Constitution with which s.390 is allegedly inconsistent or incompatible.Superwood did not specify the basis on which the section is incompatible with the European Convention on Human Rights.

5.3 Counsel referred to O.19, r.28 which, it was submitted was confined to considering the pleadings and, pursuant to *Barry v.Buckley* [1981] I.R.306 and *D.K.v.King* [1994] 1 I.R.166 precluded the court from taking into account claims not in the pleadings though asserted on affidavit.The statement of claim did not disclose any reasonable cause of action having regard to the judgments of the Supreme Court.

However, the court could take into account evidence on affidavit as well as the pleadings in exercising the inherent jurisdiction of the court to dismiss a plaintiff's action.

In *O'Neill v.Ryan* [1993] I.L.R.M.557, O'Flaherty J.stated:

> "It is clear that the jurisdiction to strike out proceedings based on a consideration of the pleadings, without a full plenary hearing, should only be taken in a clear case; but once it is manifest that the plaintiff cannot succeed on his pleadings in making out a case, the court should say so.It is a jurisdiction necessary to be exercised on occasion to preserve a proper discipline in the conduct of litigation."

In *Lac Minerals v.Chevron Corporation* [1995] 1 I.L.R.M.161, Murphy J.stated:

> "The judge acceding to an application to dismiss must be confident that no matter what may arise on discovery or at the trial of the action the course of the action will be resolved in a manner fatal to the plaintiff's contention."

Hardiman J.in *Supermacs Ireland v.Katesan* (Naas) Limited [2000] 4 I.R.273 at 277, referring to *Lac Minerals*, described that as being a very difficult hurdle for the defendants to clear.This was echoed in *Lawlor v.Ross* (Unreported, Supreme Court, 22nd November, 2001), where Keane C.J.stated:

> "Since the defendant who brings such a motion must satisfy the court that, even assuming that all the facts pleaded and relied upon by the plaintiff in a statement of claim are established in evidence, his or her action will nonetheless inevitably fail, the burden resting on the defendant in bringing such a motion is undoubtedly a heavy one."

Counsel for the State accepted that the test was a difficult one but submitted that defendant met the test in the present case.

5.4 Neither of the judgments of 12th April, 2002 nor 17th October, 2003 supported the claims made.The factors in determining whether an order for security of costs should be made were enumerated on pp.5 to 8 of Denham J.'s judgment in the first case and also by Keane C.J.in the second case [2004] 2 I.L.R.M.124 at 127-8.Denham J.took into account the factors identified by McCarthy J.; expressly took into account the claim that Superwood's impecuniosity was as a consequence of the wrongdoing of Sun Alliance and she pointed to Superwood's own actions in refusing to accept the lodgement as the cause of the difficulties in which Superwood found themselves.

The plaintiffs' contention that the trial in the High Court was "fundamentally unfair" was in a ground of appeal to the Supreme Court in relation to quantum.Counsel for the State submitted that this was clearly considered by the Supreme Court.

The judgment of Murray J.on 17th October, 2003 was in relation to Superwood's appeal from the order of the High Court fixing the *amount* of the security.The Supreme Court, in its judgment of 12th April, 2002, had already determined the *appropriateness* of the security.

5.5 It is clear from the judgment of 16th January, 2004, *per* Keane C.J., at p.7, that the relevant factors had been considered comprehensively by the Supreme Court:

> "[a]ll the issues which arise when a court is invited to require security for costs to be provided pursuant to s.390 of the Companies Act, 1963, all those issues were fully considered in a reserved judgment of this court and most certainly cannot now be dealt with again.While it is not a matter which strictly arises, I would wholly reject the suggestions made by Dr.Forde that this case was in some sense inadequately presented on his clients' behalf to this court on that occasion.On the contrary, the judgment of the court indicates that all matters which would normally arise in such an application under s.390 of the Companies Act, 1963 were canvassed before the court and were fully dealt with in the

> judgment of this court.I know of no basis for the suggestion that in some sense his client failed to obtain an adequate or proper hearing of the particular application because of the alleged inadequacy of the representation on his behalf on that occasion.I would deprecate any such suggestion."

It was further submitted that the Supreme Court did not in any of its judgments to which Superwood refer, construe s.390 in the manner alleged by them or imply that the matters referred to in the statement of claim were irrelevant.

5.6 With regard to the constitutional challenge, as has already been stated, Superwood do not identify the articles on which they rely.As construed by the Supreme Court in *Lismore Homes v.Bank of Ireland* [2001] 3 I.R.536 and, indeed, by the Supreme Court in relation to Superwood's appeal, the section does not breach either the Constitution or the Convention.Superwood had access to the courts and continue to have such access on their appeal to the Supreme Court.The exercise of the right to litigation had to be balanced against the legitimate rights of defendants to be protected from litigation from corporate bodies who are not a mark for the costs of such litigation.The constitutionality of the provisions was upheld by O'Hanlon J.in *Salih v.General Accident*, [1987] I.R.628 at 631, O'Hanlon J.stated:

> "With regard to the constitutional argument, it appears to me that any right of access to the courts to prosecute civil claims cannot be an unfettered right and I consider that the right to apply for security for costs in the very limited category of cases where this is recognised by our law to intend to do justice between the parties, is reasonable, and is not in breach of any constitutional rights that the plaintiff may be able to assert in the circumstances of the present case."

Moreover, in Lismore Homes the Supreme Court emphasised that the section applies only to limited liability companies which have various rights and privileges associated with that limited liability and must accept some of the consequential burdens (Murphy J.at 546-547.) The existence or otherwise of a potential injustice under the section is a matter which is considered by the court when deciding as to whether or not to make an order for security for costs in the first place, as was done in the present case – see judgment of Denham J.referred to above.

5.7 It was submitted that no explanation was given in the statement of claim as to how s.390 was incompatible with the European Convention on Human Rights.

The plaintiff's claim that the section is incompatible with the European Court of Human Rights and in particular article 6(1) which concerns the right to a fair trial, was considered by Superwood as not being relevant, given that no claim had been made.

Even if such application had been made, article 6(1) of the Convention that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal had been complied with.There was no question of Superwood being deprived of that right.Moreover, the European Court of Human Rights had rejected claims that national provisions regarding security for costs are incompatible with the Convention: Tolstoy v.The United Kingdom [1995] 20 E.H.R.R.442 at paras.59 to 67.

Paragraph 62 held:

> "62. Like the Government and the Commission, the court is unable to share the applicant's view that the security for costs order impaired the very essence of his right of access to court and was disproportionate for the purposes of article 6 …"

It is clear that the European Court of Human Rights took into account the entirety of the proceedings in that case, regarded the sum required as being very substantial and the time limit being relatively short but held that there was nothing to suggest that it was an unreasonable estimate and concluded:

> "65. In the light of the foregoing, the court does not find that the national authority overstepped their margin of appreciation in setting the conditions which they did for the applicant to pursue his appeal in the Court of Appeal.It cannot be said that those conditions impair the very essence of the applicant's right of access to court or were disproportionate for the purposes of article 6, paragraph 1.
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> The plaintiff relies on Article 14 which prohibits discrimination.There is nothing the State could claim which discloses a basis in relation to which s.390 is incompatible with article 14 which would appear to have no application or relevance whatsoever to the present case."

Finally, Superwood relied on Article 1, concerning the protection of property, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions.No-one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
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> The preceding provision shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

6. Decision of the Court

6.1 I have carefully considered the submissions made on behalf of Superwood, the respondents to this motion.I have had regard to the judgments of the Supreme Court of 12th April, 2002; 17th October, 2003; 19th December, 2003; 16th January, 2004; 23rd January, 2004 and 15th March, 2004.

There has been a confusing overlap in Superwood's submissions in relation to the present proceedings and proceedings in the insurance case against Sun Alliance and Others (No.141 of 2001).The court was furnished with the skeleton argument in relation to the appeal to the Supreme Court dated 5th February, 2004 against the High Court decision in the case against the insurance companies.

The present proceedings appear to raise similar claims against the State.These claims have already been determined by the Supreme Court.

It does not seem to the court that the skeleton argument in relation to the insurance matter is relevant to the present application.

If I am wrong in that finding then I should briefly consider the arguments in relation to that appeal and its application to the present proceedings.

In relation to the stay, Dr.Forde S.C.referred to the decision of 17th October, 2003 (per Murray J.) which suggested that a reduced appeal would be welcome; to the judgment of Keane C.J.of 16th January, 2004 that an application could be made "to substitute an amended notice of grounds of appeal" and to the decision of 23rd January, 2004 where, Dr.Forde submitted, the court radically shifted ground and held that "it had no jurisdiction whatsoever to entertain any application of any sort in this appeal until such time as the security for costs was provided".

What Murray J.did say at p.2 of the *ex tempore* judgment was as follows:

> "As regards a compromise solution as described by Dr.Forde, I think this court, as any court would, facilitate parties who wish to reduce or curtail their grounds of appeal in the interests of either saving costs or the efficient administration of justice.There is in fact, no such application before the court to do that and therefore that cannot be a material factor in the consideration of this appeal and for those reasons I would dismiss the appeal."

On 16th January, 2004, also in an *ex tempore* judgment, at p.5 that:

> "It is of course perfectly open to his clients if and when the appeal is heard to indicate to the court that one or more of the grounds of appeal are not being proceeded with and that quite frequently happens.Subject to any unnecessary costs that may have been incurred by a party not in default, that is not a matter which would create any problem ….Here we are asked to do something entirely different.We are asked effectively to allow the appellants to present a fresh and different appeal to the court and it is noteworthy that at no stage in this morning's hearing, did Dr.Forde indicate any intention on his clients' part to abandon the present notice of appeal and to treat the notice of appeal that he now seeks to lodge as the only notice of appeal.
>
> It is sufficient to say that the court has no jurisdiction whatever in my view to accede to that application.If Dr.Forde or his client wishes to abandon any of the existing grounds of appeal and indeed to substitute an amended ground of appeal, there are procedures of the court well established for taking the necessary steps in that regard, and they have not been taken.I know of no basis on which that relief could be grounded." (at p.6)

This would seem to be consistent with the third judgment, also *ex tempore*, of the Chief Justice, delivered 23rd January, 2004 at p.2 where the court held:

> "I am satisfied that this court has no jurisdiction whatever to entertain any application of any sort in this appeal until such time as the security for costs is provided.In any event, despite every effort from the court to obtain clarification in this matter from counsel for the applicant, it seems abundantly clear to me that this is an attempt to substitute a new notice of appeal for the existing notice of appeal simply by means of avoiding, or as counsel prefers to put it, 'addressing' the difficulties the appellants find themselves in, in relation to providing security for costs."

It is in this context that the court concluded:

> "It has no jurisdiction, in my view, to entertain any such application unless and until security for costs is provided in the sum already fixed by the High Court and upheld on appeal by this court.

I would therefore dismiss the application."The context in which the quotations referred to by counsel was not included in the submissions.

The skeleton argument in the appeal against the insurance company was in relation to s.390 which submitted that no authority existed under s.390 of the Companies Act, 1963 to "knock out" Superwood's application.Had the Oireachtas intended that s.390 should apply, *inter alia,* to appeals to the Supreme Court and also to authorise striking out such appeals, it would have provided so expressly.

This, of course, is a ground that is also raised in the present proceedings.

It seems to me that the matter has been dealt with by the Supreme Court and while it may be argued that it is not strictly res judicata in the present proceedings, the principle has been determined by that court.

Counsel submitted that the plaintiff has a constitutionally guaranteed right of appeal to the Supreme Court as stated in a number of authorities.Counsel further submitted that since the words contained in the section do not contain any explicit or unambiguous authority to dismiss strike out of Superwood's appeal that there was no jurisdiction to do so.

This is also a matter which would have been more appropriately dealt with in previous proceedings rather than in the present proceedings.

It was argued that, if s.390 authorises strike out proceedings, then Superwood sought to have the matter remitted to the High Court in order that it might challenge the constitutionality and European Convention compatibility of the section.

This is also a matter which was dealt with (as the previous matters) by the Supreme Court.To attempt to re-argue the matter before different defendants does not seem to me to be stateable.

Counsel argued that the prescribed time limit was not being disregarded and that there was "some reasonable prospect that security would be paid".It is clear from the judgments of the Supreme Court already referred to that there was no reasonable prospect that security would be paid and, that being a factor that the courts could take into account, that argument was not accepted.

Further arguments were made regarding the sufficiency of security which would not appear to be relevant.

The final argument related to the reduced/curtailed appeal by way of substituted notice of appeal of 16th January and amended substituted notice of appeal of 23rd January, 2004.

The judgment of the Supreme Court categorised the substituted or the amended substituted notice of appeal as a new appeal.In any event the Supreme Court was clearly of the view that the existing appeal was not being abandoned and, in that context, refused the appeal.

The judgment of Keane C.J.of 15th March, 2004 dealt with the application by the insurance defendants for an order dismissing or striking out the appeal of Superwood pursuant to the inherent jurisdiction of the court, Superwood failed to furnish the security for costs directed by the court.The Chief Justice detailed the context within which that application was made and referred to the judgments of the High Court and of the Supreme Court.

Previously, on 16th January, 2004 an application had been made to the Supreme Court on behalf of Superwood for, *inter alia*, orders extending the time for furnishing the security of costs and directing that the appeal should be heard in two stages and allowing Superwood to substitute for the existing notice of appeal and other notices of appeal in a shorter form.Those applications were unanimously rejected by the Supreme Court.*Lough Neagh Explorations Limited v.Morrice & Ors.*[1999] 4 I.R.515 applied.

The court had an inherent jurisdiction to strike out Superwood's claim.It was a jurisdiction which should be sparingly exercised and only for the purpose of ensuring that the orders of the court were complied with.

Hamilton C.J., (with whom Murphy J.and Barron J.agreed) said he was satisfied that the High Court judge had jurisdiction to make the order striking out Superwood's proceedings because of its failure to provide security for costs and that his discretion to make the order had been properly exercised in the circumstance of the case.

The Chief Justice held that it was beyond argument that the decision recognised that there is an inherent jurisdiction in the court to dismiss proceedings by a company which has been ordered to provide security for costs where that security had not been provided.It would be contrary to the general principle of public policy that litigation must terminate sooner or later.The indefinite continuance of litigation would mean that, in the case of corporate bodies, any contingent liability would have to be reflected in their reports and accounts year after year.

The Chief Justice was satisfied that there was no reasonable prospect that Superwood would furnish the sum required nor had they given any evidence for a realistic programme under which the necessary monies would be raised within a reasonable time, in which case the court would have been disposed to extend the time.They had chosen to reopen matters determined in the judgment of the Supreme Court of 12th April, 2002.In those circumstances he was satisfied there was no alternative to striking out the proceedings.He also dismissed an application by Superwood for orders that they had already furnished adequate security; that they should be allowed to amend their notice of appeal and that they should be permitted an extension of time to file a new notice of appeal.(p.18 of the Chief Justice's decision of 15th March, 2004)

The judgment of 12th April, 2002 held that the insurance parties were entitled to the order sought.Denham J.'s considered the factors which might arise in determining whether such an order should be made.There would appear to be no reference to any action against the State, contrary to the Superwood's submissions to the contrary.Indeed the court could find no basis to have the Attorney General joined as a notice party to those proceedings.

The context of the judgment of Denham J.of 12th April, 2002, to which Dr.Forde referred, to the effect that Superwood had an arguable case was qualified, Denham J.had stated:

> "The application of the other tests or guidelines is more difficult.In one sense (emphasis added) there is no doubt that the plaintiffs have an arguable case.The matter was remitted to the High Court solely for the purpose of assessing the damages payable by the defendants to the plaintiffs.The issue between the parties relates to quantum: not liability.Clearly the plaintiffs may argue that a more substantial award could have been made.In that sense and to that extent, an arguable right of appeal exists.However, the reality of the matter, and the circumstances in which the court in the present case must exercise its discretion, is that the plaintiffs, as has already been pointed out, revised upwards their claim for damages from £2 million to £92 million.The plaintiffs pursued that claim over a lengthy and expensive hearing, notwithstanding that the defendants had then lodged £4,752,761 to meet the claim."

The Supreme Court had not stated that the plaintiffs had an arguable case without qualification.

6.2 The Chief Justice referred to the present proceedings, which were commenced on 5th January, 2004, as independent proceedings instituted against Ireland and the Attorney General in relation to the incompatibility of s.390 with the European Convention on Human Rights and Fundamental Freedoms and its repugnance to the Constitution.The Chief Justice, at pp.15 and 16 of the judgment of 15th March, 2004, had dealt with the submissions regarding constitutional rights under Article 40.He stated:

> "it is sufficient to say that such an argument, if relevant, could and should have been advanced at the time this court was considering whether the plaintiffs should be required to furnish security for costs."

It seems clear that this argument was made, and was entitled to be made, in relation to the appeal against the insurers.It does not seem to me that the position would be any different, as in the present case, where the same argument is made as against Ireland and the Attorney General.Moreover, when an application was made to the Supreme Court to join the Attorney General as a notice party to the insurance proceedings, that application was refused.

It may, indeed, have been apparent that no claim under the European Convention on Human Rights could be maintained until 1st January, 2004.However, from that date to the date of the hearing of this motion no notification to the Human Rights Commission nor to the Attorney General as required by s.6 of the 2003 Act has been made.

6.3 Dr.Forde S.C., on behalf of Superwood, had submitted in the present proceedings that the jurisdiction to give security for costs derived solely from s.390 which provided that the proceedings might be stayed until the security was given.In the absence of any express power enabling the court to strike out proceedings where security had not been provided, to construe that provision as enabling the court to do so would be in conflict with Article 34.4.3 of the Constitution, which provides that the Supreme Court is to have appellate jurisdiction from all decisions of the High Court.

This submission ignores the judgment in *Salih v.General Accident* [1987] I.R.628 where, at 631, O'Hanlon J.in the context of the constitutional argument, held that any right of access to the courts to prosecute civil claims cannot be an unfettered right.He stated:

> "I consider that the right to apply for security for costs in the very limited category of case where it is recognised by our law to intend to do justice between the parties, is reasonable, and is not in breach of any constitutional right that the plaintiff may be able to assert in the circumstances of the present case."

6.4 The Supreme Court in its six judgments from 12th April, 2002 to 15th March, 2004, did consider the issue of its exceptional jurisdiction, the sparing nature of such order, the potential injustice arising, the impecuniosity and cause thereof of the plaintiff appellants and, indeed, in the first judgment of 12th April, 2002, having reviewed the authorities, considered the several factors referred to by McCarthy J.in *S.E.E.Company Limited v.Public Lighting Services Limited* [1987] I.L.R.M.255 including the "countervailing circumstances [which] would include the very fact that the insolvent company has lost the case in the High Court and is now an appellant" (p.6 of the judgment of Denham J.)

The Supreme Court had already decided that the issue between the parties related to quantum and not to liability.The issue of quantum was decided, on appeal, by the Supreme Court.

The reality of the matter, as identified by Denham J., was that Superwood had revised upwards their claim for damages from £2 million to £92 million and that the State had lodged over £4.75 million to meet the claim, the cost of which had been estimated at £5 million.The State was entitled to security for costs which was appropriately determined and confirmed by the Supreme Court.

6.5 After due consideration by the Supreme Court, Superwood were refused leave to revise the original 336 separate grounds of appeal served on 16th May, 2001 to "more manageable grounds", Superwood were refused leave to do so.

It seems to this court that, given the provisions of O'Hanlon J.'s judgment in *Salih General Accident* [1987] I.R.628, referred to above regarding the constitutionality of s.390, that Superwood are not entitled to raise the same issue before a different defendant.

There is, accordingly, no basis for Superwood's challenge to the constitutionality of s.390 of the Companies Act, 1963.

6.6 The claim under the European Convention on Human Rights and Fundamental Freedom requires a claim to be made under the European Convention on Human Rights Act, 2003.Section 6(1) is clear.

> "6.-(1) Before a court decides whether to make a declaration of incompatibility the Attorney General and the Human Rights Commission shall be given notice of the proceedings in accordance with the rules of court.
>
> (2) The Attorney General shall thereupon be entitled to appear in the proceedings and to become a party thereto as regards the issue of the declaration of incompatibility."The Human Rights Commission were not given notice of the proceedings in accordance with the rules of court.Accordingly, the court cannot decide to make such a declaration as is sought in the statement of claim.

Even if this were not a substantial or procedural bar, the statement of claim does not make out any cogent case in relation to the Convention.The plaintiff respondents have had access to the High Court and, indeed, to the six appeals to the Supreme Court in relation to matters which included the substance of the present claims against the State.

The court has considered the ambit of article 1 of the First Protocol to the European Convention on Human Rights which includes both natural and legal persons being entitled to the peaceful enjoyment of his possessions.Even if possessions were to encompass a right of action through the courts, such protection is limited by the phrase: "no-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".Moreover, it is clear that the protocol provides that the provisions shall not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.If property were to include the right of action then it seems to me beyond doubt that the State is entitled to regulate such right.

Given the balance between the rights of plaintiffs and of defendants and the rights of limited liability companies and their responsibility in providing security for costs as identified by Murphy J.in *Lismore Homes v.Bank of Ireland* [2001] 3 I.R.536, the State is entitled to distinguish between corporate bodies and individual persons and, in exceptional cases, to impose an obligation to give security for costs in circumstances of, *inter alia*, protracted, unsuccessful litigation.

Article 14 of the Convention, relied on by Superwood, prohibits "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." On the *ejusdem generis* rule "other status" cannot include any general grounds other than those referred to.The argument in Lismore is clear: companies enjoy privileges not available to individual persons.It is logical that the principle of limited liability demands that companies, as distinct from individual persons, who sue, may be required to give security for the reasonable costs of potentially successful defendants.

6.7 The matter is put beyond any doubt that might remain by the decision of the Court of Human Rights in *Tolstoy v.The United Kingdom* [1995] 20 E.H.R.R.442 at paras.59 to 67.

Article 59 of the decision of the Court is as follows:

> 59. The Court reiterates that the right of access to the courts secured by article 6, paragraph 1 … may be subject to limitations in the form of regulation by the State.In this respect the State enjoys a certain margin of appreciation.However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aims sought to be achieved …
>
> It follows from established law that article 6, paragraph 1 … does not guarantee a right of appeal … account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellant court therein …"

It seems to this court that the provisions of s.390 fall clearly within the margin of appreciation enjoyed by the State in legislating for a balance between litigants.The restriction does pursue a legitimate aim and there is a reasonable relationship or proportionality between the means employed and the aim sought to be achieved to regulate limited liability plaintiffs' right of action.Moreover, the courts have taken the entirety of the proceedings in the domestic legal order into account.

In the *Tolstoy* case it was held that it was not disproportionate to impose a total bar on the appellant's right to the Court of Appeal if the security required was not lodged within a mere fourteen days.

The European Court, as para.62, dealt with the essence of an appellant's right of access to court in the following terms:

> "Like the Government and the Commission, the Court is unable to share the applicant's view that the security for costs order impaired the very essence of his right of access to court and was disproportionate for the purposes of article 6."

The European Court concluded as follows:

> "65. In the light of the foregoing, the Court does not find that the national authority overstepped their margin of appreciation in setting the conditions which they did for the applicant to pursue his appeal in the Court of Appeal.It cannot be said that these conditions impaired the very essence of the applicant's right of access to court or were disproportionate for the purposes of article 6, paragraph 1."

Counsel for the plaintiff respondents argued that *Tolstoy* dealt extensively with the pleadings and arguments before it and, implicitly, criticised the High Court and the Supreme Court on appeal in not doing so and in not giving reasoned arguments in relation to the European Convention claims.

Apart from the fact that the claims were not properly constituted, it does not seem to this court that that argument is sustainable.While it would have been more appropriate to have dealt with these matters before security for costs was ordered, the court accepts that, as the Convention did not come into force in national law until 1st January, 2004, that the plaintiffs could not do so.However, arguments and, indeed pleadings, in relation to the Convention had been made in cases where there was a dual claim in relation to constitutionality and Convention rights.It would have been a matter for the State as to whether they might have relied on technical grounds in relation to Convention claims.No indication was given that the Convention would be relied on.More significantly, the arguments in relation to the Convention in the present proceedings are, to a large extent, unclear and, as already stated, are not properly constituted and lack cogency.

Section 390 has a reasonable and objective justification.Its aim is legitimate to balance the rights of access to court with the rights of a defendant to resist unstateable claims.

No ground of prohibited discrimination has been indicated by Superwood.It seems to the court that none of the recognised grounds of discrimination under the European Convention have any application (see Mullan, Grainne: chapter 8 of Kilkelly, Ursula: E.C.H.R.and Irish Law, 2004).

For these reasons, it seems to me that the principle and decision demonstrate that there is no basis for Superwood's claim that the section is incompatible with the European Convention.

6.8 Dr.Forde, SC had submitted (at 4.5 above) that there were three principal issues: what Convention/Constitution criteria applies to security for costs; were the criteria applied and, if not, is Superwood precluded from seeking a remedy from the State.The first two questions were, of course, matters for the appeal in the insurance case and not for the present proceedings.The decisions of the Supreme Court duly considered the arguments made by counsel and upheld the decisions relating to security for costs.

The Court, having considered the submissions made in the present proceedings and those made in the insurance appeal, can find no basis for Superwood's claims against the State.No case has been made out that the State is in breach of its international obligations.The awareness of the Supreme Court of a contemplated action against the State is irrelevant.

Counsel for Superwood accepted that, given the judgments of the Supreme Court, he could not argue that the security for costs provision was unconstitutional (see 4.3 above).

It is clear to the Court that, even if the facts pleaded and relied on in the statement of claim were established in evidence, the action cannot succeed as against the State.

In the circumstance the court, on the basis of the pleadings, will make an order pursuant to O.19, r.28 of the Rules of the Superior Courts, dismissing and/or striking out Superwood's claim and/or action against the State on the grounds that the statement of claim therein discloses no reasonable cause of action against the State.

It follows that Superwood's motion for judgment in default of defence under O.27, r.8 stands dismissed.