THE HIGH COURT

[2009 No. 861 S]

BETWEEN

RALF DITT

PLAINTIFF

AND

MICHAEL KROHNE

DEFENDANT

JUDGMENT of O'Neill J. delivered on the 20th day of July, 2012

1. In this motion, the defendant seeks pursuant to O. 29 of the Rules of the Superior Courts, an order directing the plaintiff to provide security for costs of the action.

2. In the action, the plaintiff, by way of summary summons, seeks to recover from the defendant a sum of €109,638.03 as money which the plaintiff claims is owed by the defendant to the plaintiff on foot of an agreement between the plaintiff and the defendant in respect of work done and professional services rendered by the plaintiff at the defendant's request. The professional services in question were architectural services allegedly provided by the plaintiff to the defendant in respect of properties owned by the defendant in Ireland, specifically a dwelling project for the defendant at Mageragh, Mount Shannon, County Clare, and a property development of the defendant at Rahena Moore, Ogonnelloe, County Clare, and a property at 3, Moynoe, Scariff, County Clare.

3. The defendant fully contests the plaintiff's claims and avers that he has a full defence to these claims. The summary proceedings were remitted for plenary hearing and a statement of claim was delivered by the plaintiff on 14th March 2011, a defence was delivered on 24th May 2011, and a reply to that defence was delivered on 12th July 2011.

4. Subsequently, by notice of motion dated 7th June 2011, and returnable for 18th July 2011, the defendant sought an order for security for costs pursuant to O. 29 of the Rules of the Superior Courts and a further order staying any further steps in the proceedings until that security was provided.

5. The affidavits filed in support of and opposing the motion reveal that the plaintiff is a German national and EU citizen, that he resided in Germany since birth, and worked in Germany and Ireland. The plaintiff is now resident in Switzerland and does not have any valuable assets apart from a boat valued at between €5,000 and €8,000, which is situated at Mount Shannon Harbour, County Clare. The plaintiff also has a lease of a residential property at 2, Moyne Marina, Scariff, County Clare. The plaintiff is currently employed by Zurich Insurance Company as a project manager in corporate real estate and facility management and earns €78,000 *per* annum gross. The leasehold interest which the plaintiff has in the property in County Clare does not appear to have any capital value.

6. Order 29, rules 1 to 4 of the Rules of the Superior Courts 1986 make provision for the granting of orders for security for costs 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. .. "*

7. A curious feature of these Rules, noted by Murphy J. in *Proetta v. Neil* [1996] 1 I.R. 100, was that the Rules do not expressly set out the basis of an entitlement to an order for security for costs and seem to proceed upon the assumption that foreign residence is the factor which leads to the entitlement .

8. Finlay P. as [he then was], in *Fares v. Wiley* [1994] 2 I.R. 379, said the following concerning the basis of entitlement to an order for security for costs at p.495:

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

9. Thus, it is clear that notwithstanding the absence of express provision in that regard in O. 29, the determinative factor entitling a defendant to seek to an order for security for costs in Irish law is that the plaintiff both resides and has his assets outside of the jurisdiction of the Irish courts, or to put it another way, does not have assets within the jurisdiction.

10. In this respect, it is to be noted that the corresponding provisions in the English Rules of Court have been interpreted by the Court of Appeal in *Berkeley Administration Inc. v. McClelland* [1992] 2 Q.B. 407, as postulating foreign residence as a precondition to the invocation of the jurisdiction created in the Rules rather than the basis of entitlement to an order for security for costs.

11. When considering this matter in *Proetta v. Neil* at p. 104, Murphy J. said the following:

> *"Under the Irish rule, residence abroad is not merely a precondition but it is of itself the factor which gives the right to demand security subject only to the qualification that the right is not absolute and falls to be exercised having regard to all of the appropriate matters which the court would take into account in exercising its discretion ... "*

12. Thus, whilst foreign residence may be the necessary basis which must be laid by a defendant in order to claim an order for security for costs, of itself, foreign residence does not give rise to a "*right*" to such an order, all the authorities making it clear that the court retains a wide discretion as to whether to grant or refuse the order. That being so, whether foreign residence is to be seen as the basis for the claim for an order for security for costs, or a precondition to invoking O. 29 jurisdiction would appear to me to be immaterial.

13. The Supreme Court in *Malone v. Brown Thomas & Company Ltd*. [1995] 1 ILRM 369 at p. 372, set out the following principles as applying to the provision for security for costs in an appeal:

> *"(I) That the ordering for security for costs is a matter for the discretion of the court;*
>
> *(ii) that in the exercise of its discretion, the court must consider all the circumstances of the case;*
>
> *(iii) that neither mere residence outside the jurisdiction or the poverty of the appellant is sufficient justification for compelling an appellant to lodge security for costs;*
>
> *(iv) that the onus is on the applicant to establish grounds for his entitlement to the order . . . "*

14. An additional requirement, is that expressly stated in r. 3, namely, that the defendant disclose on affidavit that he has a defence upon the merits. In this case, as noted earlier and as set out in the affidavits, the claim, having been made by way of summary summons, was remitted for plenary hearing and a statement of claim and defence have been delivered. I am satisfied from all of this that the defendant in this case has satisfied the requirement of demonstrating on affidavit a *prima facie* defence on the merits.

15. If residence outside the jurisdiction and impecuniosity are not of themselves the factors which entitle a defendant or respondent to an order for security for costs, but are merely matters to be taken into account by the court in exercising its discretion, what then is the decisive or determinative factor which establishes a threshold or test which will lead the court to exercise its discretion in favour of the granting or refusing of the order.

16. In my opinion, this can only be the impossibility of enforcement of a costs order against the plaintiff in question; or substantially increased difficulty or expense in enforcing such costs order as compared to the enforcement of such an order against a plaintiff resident in Ireland or who had sufficient assets in Ireland.

17. In this context, it is to be observed that impecuniosity would have to be considered an irrelevance because if impecuniosity of an Irish resident plaintiff is not a ground for security for costs, then impecuniosity of a foreign resident should, in like manner, be discounted. To do otherwise is to risk breaching the principle of equality before the law as set down in Article 40.1 of the Constitution.

18. The foregoing, is, I hope, a reasonably accurate description of the state of the law on the question of security for costs prior to the introduction of European Union law by way of the decision of the European Court of Justice in the case of *Mund & Fester v. Hatrex International Transport* [1994] ECR 1-467, and hopefully represents the state of the law currently in force where no International Treaty obligations or unilateral enforcement provision in the country of residence of a plaintiff, intervene.

19. In the *Mund & Fester* case, the issue before the European Court of Justice concerned whether the following provision in the German Civil Code offended Article 7 of the EEC Treaty read in conjunction with Article 220 of the Treaty and the 'Brussels Convention'. The relevant provisions of the German Code is para. 917 of ZPO as follows:

> *"(i) An order for seizure of assets shall be made when it is to be feared that enforcement of the judgment would otherwise be made impossible or substantially more difficult.*
>
> *(ii) The fact that judgment is to be enforced abroad shall be considered sufficient grounds for a seizure order."*

20. In that case, an order had been made by a German court directing the seizure of a lorry belonging to the respondent who were international carriers whose registered office was in the Netherlands. In the main proceedings, the applicants claimed damages in respect of goods transported by the respondents from Turkey to Hamburg which were damaged in transit by moisture allegedly arising from failure to make the lorry transporting them watertight. In reliance upon the foregoing provision of the ZPO, the German court made an order for the seizure of the lorry of the respondents used in that transportation which was still in Germany on the grounds that if the applicants were successful in the case, they would have difficulty in recovering on foot of their judgment against the respondent in the Netherlands. The matters came before the European Court of Justice on foot of a reference under the then Article 177 of the EEC Treaty in which the question was as follows:

> *"Does the need to enforce a seizure order abroad (paragraph 917(2)) of the Zivil Prozess Ordnung) also constitute grounds for seizure where such enforcement would take place in a State which has adhered to the EEC Convention on Jurisdiction and the Enforcement of Judges in Civil Commercial Matters of 27th September 1968 (The Brussels Convention)?"*

Article 7 of the EEC Treaty, now Article 12 of the Treaty, establishing the EC provides as follows:

> *"Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited."*

21. Article 220 of the EEC Treaty reads as follows:

> *"Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."*

22. As noted in the judgment of the ECJ, the Brussels Convention was concluded within the framework defined by Article 220 of the EEC Treaty. Consequently, the court concluded that the provisions of the Brussels Convention and national provisions to which that Convention referred were linked to the EEC Treaty. The court went on to consider whether the impugned seizure order at issue in the main proceedings introduced discrimination on the grounds of nationality prohibited by Article 7 of the Treaty. They observed that this Article forbade, not only overt forms of discrimination based on nationality, but also covert forms of discrimination, which by the application of other criteria of differentiation led in fact to the same result. They concluded that the national provision at issue, namely, the seizure order, did not overtly discriminate on the basis of nationality, but it did entail covert discrimination because the great majority of enforcements abroad were against persons who were not German nationals, leading to a conclusion that the national provision in question led in fact to the same result as discrimination based on nationality.

23. They went on to consider whether the foregoing discrimination was justified by objective circumstances. The court noted that para. 917(2) of the ZPO presumed that enforcement of a judgment would be made impossible or substantially more difficult, merely by virtue of the fact that enforcement was to take place in a State other than the Federal Republic of Germany. The court concluded as follows:

> *"While such a presumption is justified where the subsequent judgment is to be enforced in the territory of a non-Member country, it is not justified where enforcement is to take place in the territory of the Member States of the Community. All those States are contracting parties to the Brussels Convention whose territories may be regarded as forming a single entity as indicated in the report on the Brussels Convention (Official Journal 1979 C59, p. 100, particularly at p. 13)."*

24. Accordingly, they concluded that the national provision at issue in that case was not justified by objective circumstances. The impact of that decision was first felt in this jurisdiction in three cases decided in close proximity in time to each other. The first of these was the case of *Maher v. Phelan* [1996] 1 I.R. 95, in which Carroll J. delivered judgment on 3rd November 1995, and at p. 98 said the following *apropos* the *Mund & Fester* judgment:

> *"Considering the effect of that judgment within this jurisdiction, as the law stands it is not possible to get an order for security for costs against an individual plaintiff resident in the jurisdiction regardless of circumstances. Different considerations apply to companies which are not relevant to consider here. So if it were possible to get an order for security for costs against a plaintiff resident abroad but within the E.U if circumstances so justified it, this would constitute covert discrimination on the grounds of nationality.*
>
> *Since an individual litigant, being a plaintiff resident in Ireland, cannot be ordered to give security for costs, therefore a plaintiff resident outside Ireland within the E.U should not be so ordered.*
>
> *The English Court of Appeal took a different view in De Bry v. Fitzgerald [1990] 1 W.L.R. 552 and Berkeley Administration Inc. v. McClelland [1990] 2 Q.B. 407, but that was before judgment was handed down in the Mund & Fester v. Hatrex Internationaal (Case C-398/92) [1994] I E.C.R. 467 case. The judgment of the European Court of Justice in my opinion puts the matter beyond doubt ..."*

25. Carroll J. went on to say the following:

> *"In case I am wrong in that view, I must add that I would not in any case grant an order for security for costs. Since the Act of 1988, the rationale for granting such an order, namely difficulty, whether in relation to time or money, in enforcing an order for costs in a foreign country no longer exists so far as the E.U is concerned. Judgments are enforceable within the E.U. with comparative ease under the Brussels Convention..."*

26. I will return to this aspect of the judgment of Carroll J. in due course.

27. The second case in the series was that already mentioned, namely, *Proetta v. Neil* in which Murphy J. delivered judgment on 17th November 1995, in the course of which the learned judge at pages 105 and 106 considered in detail the findings of the European Court of Justice in the *Mund & Fester* case and in respect of the court's conclusion on the issue of covert discrimination based on nationality he said the following:

> *"It seems to me that that conclusion is at least equally applicable to the Irish rule dealing with security for costs."*

Murphy J. then went on to consider the European Court's findings on objective justification and said the following:

> *"Accordingly, the European Court rejected the contention that the national provision was justified by objective circumstances. In my view that conclusion too is equally applicable to the present case."*

28. In the third case in the series, namely, *Pitt v. Bolger* [1996] 1 I.R. 108, in which Keane J. (as he then was) delivering judgment on 2nd February 1996, considered the judgment of the European Court in the *Mund & Fester* case and also the opinion of Mr. Advocate General Tesauro which was subsequently upheld by the court. Keane J. went on to consider the judgments just mentioned of Carroll J. and Murphy J. in *Maher v. Phelan* and *Proetta v. Neil* and concluded by saying:

> *"I respectfully agree with and adopt the principles of law laid down in the decisions of Carroll and Murphy JJ. and by the Court of Appeal in England in the case just mentioned. It follows that the undoubted discretion under the rule should never be exercised by an Irish court to order security to be given by an individual plaintiff who is a national of and resident in another member state which is a party to the Convention, subject to the possible qualification referred to in the judgment of the Master of the Rolls"*

29. In the case of *European Fashion Products Ltd. and Robert Mura and David Mura v. Rudolf Theodorr Eenkhoorn & Others* in which Barr J. delivered judgment on 21st December 2001, where security for costs was sought, he said the following:

> *"First, that the personal plaintiffs are Dutch citizens resident in Holland, and therefore, within the ambit of Order 29 of the Rules of the Superior Courts. Secondly, that the second and third plaintiffs appear to have hidden substantial personal assets with a view to frustrating the defendants in the event that they obtain an order for costs against them."*
>
> *I am satisfied that neither of the foregoing grounds are sustainable. It has been held by the High Court in a series of*

judgments - see Pitt v. Bolger [1996} 1 I.R. 108 (Keane J. as he then was); Maher v. Phelan [1996] 1IR. 95 (Carroll J.) and Proetta v. Neil [1996] 1 I.R. 100 (Murphy J.) that EU citizens have the same status as Irish citizens vis a vis security for costs and are not within Order 29. All three cases were decided in the light of the judgment of the European Court of Justice in Mund & Fester v. Hatrex [1994} EU 3 p. 467."

30. The learned judge goes on to say:

> *"As to the defendant's 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 Proetta v. Neil at p. 104 that orders for security for costs under Order 29 may be obtained only against plaintiffs who are resident outside the EU and the right to such seek security depends upon that fact."*

31. That theme is echoed in the judgment of Clarke J. in *Salthill Properties & Another v. The Royal Bank of Scotland and Others*, judgment delivered 5th February 2010, where he said:

> *"Such external residence (i.e. outside the area governed by the Brussels Regulation) would appear on the authorities to date to be a condition precedent on the exercise of the part order security for costs."*

Later, at para. 5.5 in the judgment, the learned judge says:

> *"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. .. "*

32. In that case, Clarke J. had to deal with a somewhat different issue to anything encountered in this case, namely, whether or not there was a jurisdiction under O. 29 to order security for costs in any circumstances against a plaintiff who was a resident either in this jurisdiction or another Member State of the European Union, thus, subject to the provisions of the Brussels Regulation. The case is, of course, of relevance insofar as it sounds a wise note of caution against the overly adventurous exercise of discretion in effecting change by judicial decision where the entire ambit of political, social and commercial consequences might not be readily apparent to a court.

33. In this case, the plaintiff is resident in Switzerland. Switzerland is not in the European Union and is not a party to the Brussels Regulation. Switzerland is, however, party to the Lugano Convention which, *inter alia*, in Title 3 thereof provides for the recognition and enforcement of judgment given by a court or Tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court, as provided for in Article 25 of the Convention. Three countries, namely, Switzerland, Iceland and Norway, which are not members of the European Union, are parties to this Convention, as are several of the Member States of the EU, including Ireland. This Convention makes provision for the recognition and enforcement of judgments in a manner similar to the Brussels Regulation as between members of the European Union. It is common case that under the Lugano Convention, any judgment for costs obtained by the defendant in this case can be enforced against the plaintiff in Switzerland where he is resident.

34. For the defendant, it was submitted that until the *Mund & Fester* case, an order for security for costs under O. 29 could be obtained against a plaintiff who was resident outside of Ireland and did not have assets within Ireland. The *Mund & Fester* case had the effect of extending to citizens of the European Union the same status as plaintiffs so far as the operation of O. 29 was concerned as citizens of Ireland. It is submitted by the defendant that because the plaintiff was resident in Switzerland which is not in the European Union, no question of discrimination contrary to Article 12 of the EC Treaty arises and, hence, the reasoning which underpins the *Fester & Mund* case does not apply in favour of the plaintiff in this case. Furthermore, notwithstanding the Lugano Convention, the extension to the plaintiff in this case of the status enjoyed *vis a vis* O. 29 by plaintiffs who are citizens of the European Union, similar to Irish citizens, would involve an extension of the law which it was submitted following upon the approach taken by Clarke J. in the *Salthill Properties Ltd.* case, should not be done by judicial decision but should be left to be effected by either a change in the Rules of the Superior Courts or by legislation.

35. For the plaintiff, it was submitted that because the Lugano Convention provides for the enforcement of any judgment obtained by the defendant for costs in this case against the plaintiff in Switzerland, there is no impossibility of enforcement, and there are no substantial difficulties in terms of delay or expense in so doing. Thus, it was argued that the plaintiff, in respect of O. 29, should be treated in the same way as a resident of a country other than Ireland that is a party to the Brussels Regulation.

36. In attempting to resolve the contentious issues in this case, I am very mindful of the fact that the jurisdiction to order security for costs under 0. 29 involves essentially the exercise of a discretion by the court. As discussed earlier, the authorities satisfy me that the starting point is foreign residence which I would accept is a trigger point or precondition to the exercise of the jurisdiction conferred by Order 29. The same authorities make clear, in my opinion, that foreign residence does not entitle a defendant as of right to an order for security for costs but is a factor to which the court must have regard in its assessment of how its discretion is to be exercised. As indicated earlier, in my view, the impecuniosity of a personal plaintiff resident abroad should be discounted as it is in respect of a plaintiff resident in Ireland.

37. Clearly, the harm sought to be prevented by a costs security order, is that a defendant would be compelled to defend a claim against a person resident abroad where it would be impossible to recover costs if successful against the plaintiff or where a recovery of costs would be fraught with very substantial difficulty, delay or expense. It necessarily follows, in my view, that the factors which must weigh heavily in the exercise of the court's discretion must be related to the prospect of recovery of costs against the plaintiff in his country of residence.

38. If it is accepted in this case, that by virtue of the Lugano Convention the defendant's costs can be enforced against the plaintiff in Switzerland in the same way as if he was resident in a country governed by the Brussels Regulation, the question arises as to why a court should exercise its discretion in favour of an order for security for costs, when a real risk attached to that, would be to prevent the plaintiff litigating his claim.

39. I am persuaded that the court's discretion, because of the Lugano Convention, must be swayed in favour of refusing the order sought. In this regard, I am somewhat reinforced by the passage from the judgment of Carroll J. in the *Maher v. Whelan* case, where the learned judge says that apart from consequence of the *Mund & Fester* case, she would have refused the order anyway, because

of the availability of an enforcement process in that case as provided for under the Brussels Convention. As there is little or no difference between the Brussels Regulation process of enforcement and that available under the Lugano Convention, and as the core issue in the application relates to difficulties in enforcement, the balancing exercise inherent in the exercise of the court's discretion tilts against granting security for costs as sought.

40. I am further persuaded to refuse the order sought by a judgment of the Court of the European Free Trade Area (EFTA) cited by the plaintiff which in many ways was very similar to the *Mund & Fester* case, but involved Article 4 of the Agreement on the European Economic Area which is in terms similar to Article 7 of the EEC Treaty and contains a prohibition on discrimination on the grounds of nationality. The European Economic Area includes the countries of the European Union and Norway, Iceland and Lichtenstein. The agreement on the European Economic Area provides for a single market encompassing the parties to the agreement. In the case of Dr. *Joachin Kottke & Prasidial Anstalt and Sweetyle Stiftung*, in which judgment was delivered on 17th December 2010, the issue before the court was whether a provision of Lichtenstein law to the effect that a plaintiff in a suit in Lichtenstein who was not resident in Lichtenstein was obliged, at the request of a defendant, to provide security for costs simply on the basis of not being a resident within Lichtenstein, infringed the prohibition on discrimination on grounds of nationality in Article 4 of the EEC, and if so, could it be justified on objective grounds. A secondary question posed was to the effect that if the provision of Lichtenstein law which required security for costs as aforesaid was not discriminatory contrary to Article 4 of the EEA Agreement, did another provision of the Lichtenstein Code of Civil Procedure whereby a waiver of the obligation on plaintiffs who reside in another State, to provide security, which was conditional upon the possibility of enforcement in the country of residence of that person, breach the prohibition on discrimination in Article 4.

41. The EFTA Court found, and in summary form expressed its conclusions as follows:

> *"(i) A provision of national law pursuant to which non-resident plaintiffs in civil litigation must provide security for costs of court proceedings, while resident plaintiffs are not obliged to provide such security entails indirect discrimination within the meaning of Article 4 EEA.*
>
> *(ii) In order for such a discrimination to be justified on the basis of public interest objectives, the provision of national law must be necessary and not excessive in attaining them.*
>
> *(iii) The latter condition is not met in cases where the State in which the plaintiff is resident allows for the enforcement of a court's award, whether on the basis of Treaty obligations or unilaterally . ..*
>
> *(iv) It is for the national court to determine in a particular case whether the conditions for justification are satisfied."*

42. As is apparent, the approach adopted by the EFTA Court was very similar to that of the ECJ in *Mund & Fester* case. Additionally, in assessing justification for a discriminatory national provision, the EFTA Court specifically used a proportionality test. If one were to apply a proportionality test in assessing whether or not the defendant in this case should have an order for security for costs, the answer would be emphatically, a rejection of the defendant's application on the basis that the Lugano Convention does provide an effective enforcement procedure in the event that the defendant obtains an order for costs against the plaintiff, and hence, an order for security for costs is not necessary to attain the objective of protecting the defendant from the harm of an unenforceable costs award and manifestly in that regard would be excessive.

43. In my opinion, a proportionality test in these circumstances is a useful tool to enable the court to exercise its discretion in a predictable and consistent manner.

44. I do not see the approach adopted by me as changing the law in the way envisaged or apprehended by Clarke J. in the *Salthill Properties Ltd*. case, as requiring either legislation or a rule change. All that is involved here is no more than a recognition by this court of the existence and legal effect in the domestic law of this State of the provisions of the Lugano Convention as is required by law under s. 18 of the Jurisdiction of Courts and Enforcement of Judgments Act 1998, which reads as follows:

> *"18- The Lugano Convention shall have the force of law in the State and judicial notice shall be taken of it."*

45. Far from extending the law, as was submitted by the defendant, this court is merely complying with its obligation under the foregoing statutory provision to give force and effect in our domestic law to the Lugano Convention. If I were to accede to the defendant's submission, that would necessarily involve excluding a consideration of the Lugano Convention in the exercise of the court's discretion which, of course, would be an obvious and impermissible failure on the part of the court to comply with s. 18 of the foregoing Act of 1998.

46. The Lugano Convention involves reciprocal recognition and enforcement of judgment obligations on the Contracting States. This imposes upon Ireland the obligation to recognise and enforce within its jurisdiction the judgments and orders provided for in the Convention, of the other contracting parties. It also means, manifestly, in my opinion, that the obligations under the Convention of the other Contracting States to recognise and enforce judgments and orders of the Irish courts must be taken into account, when, as in this case, the court is asked to grant or refuse an order for security for costs, where the primary consideration for that purpose are the processes of enforcement in another State that is a contracting party to the Lugano Convention. To do otherwise, would, in my opinion, be a failure to "*take judicial notice*" as is required by s. 18 of the foregoing Act of 1998, of the operation of the Convention in these other States, and in this case, Switzerland.

47. The use of a proportionality test as a tool in the exercise of the court's discretion to grant or refuse the order sought, might in the context of applications of this sort be perceived as novel, but these tests are, and have been for some time, established in our jurisprudence and the application thereof comfortably within the competence of the court and clearly would not require any legislative or rule change.

48. For all of the foregoing reasons, therefore, I have come to the conclusion that I must refuse the defendant's application for security of costs.