Neutral Citation Number: [2009] IEHC 7

THE HIGH COURT
COMMERICAL

2007 No. 7114 P

BETWEEN

CONNAUGHTON ROAD CONSTRUCTION LIMITED

PLAINTIFFS

AND
LAING O'ROURKE IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 16th January, 2009

1. Introduction

1.1 The plaintiff company ("Connaughton Road") was involved in a development at Connaughton Road in Sligo. The principal of Connaughton Road is a John Molloy ("Mr. Molloy"). Mr. Molloy owned the lands in question and proposed a scheme whereby the lands would be developed by the construction of both residential and retail elements. The intention was that the construction would be carried out by Connaughton Road, but the ownership of the land in question would remain in the hands of Mr. Molloy. When sold, the purchase price would be divided between Mr. Molloy (in respect of the land) and Connaughton Road (in respect of construction). There is no doubt but that the defendants ("Laing O'Rourke") were engaged in relation to the development. The precise extent of that engagement is one of the matters in dispute between the parties.

1.2 In any event, Connaughton Road has brought these proceedings claiming that Laing O'Rourke failed in a number of respects in relation to its obligations relating to the design and construction of the development. The claim is strenuously denied, both as to the extent of Laing O'Rourke's obligations (and in particular whether Laing O'Rourke had any obligation in respect of design), the contract price (whether it was a fixed sum or otherwise), and whether there was culpable delay on the part of Laing O'Rourke in completing the construction of the development in question.

1.3 Laing O'Rourke have brought an application under s. 390 of the Companies Act 1963, seeking security for costs and other consequential orders. This judgment is concerned with that application.

1.4 Subject to some matters concerning the precise application of the relevant principles, the legal basis on which the court should consider an application for security for costs in a case such as that with which I am concerned were not in dispute between the parties, and in those circumstances it seems appropriate to deal with those principles first. I, therefore, turn to the relevant legal principles.

2. The Legal Principles

2.1 In *Usk and District Residents Association Limited v. The Environmental Protection Agency* (Unreported, Supreme Court, Clarke J., 13th January, 2006,) the Supreme Court approved what was described as a helpful summary of the law by Morris P. in *Interfinance Group Limited v. K.P.M.G. Pete Marwick* (Unreported, High Court, Morris P., 29th June, 1998,). As adapted by the Supreme Court in *Usk* the test set out by Morris P. in *Interfinance* is in the following terms:-

> "(1) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:
> (a) that he has a *prima facie* defence to the plaintiff's claim, and
> (b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.
>
> (2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case with ought to cause the court to exercise its discretion not the make the order sought.
>
> In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.
>
> The list of special circumstances referred to is not of course, exhaustive."

2.2 Neither counsel disagreed that the principles are correctly summarised in the passage which I have just cited. It should also be noted that counsel for Connaughton Road helpfully and properly accepted that the evidence before the court established both of the matters set out at paras. (1)(a) and (1)(b) above. Thus, the two matters which Laing O'Rourke were required to establish are accepted as having been so established.

2.3 It follows that security ought to be required unless Connaughton Road can show that there are special circumstances which ought to cause the court to exercise its discretion not to make the orders sought. The special circumstances asserted in this case are, perhaps, the most common category of such circumstances where it is asserted that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the moving party. It is common case, and clear from the authorities, that the onus of establishing that fact rests on Connaughton Road. It is also common case, and clear from the authorities (see for example the comments of Finlay C.J. in *Jack O'Toole Ltd v. McEoin Kelly Associates* [1986] I.R. 277 at pp 284 and 285) that the obligation of Connaughton Road, in those circumstances, is to establish a *prima facie* case to the effect that its inability to pay the costs of the defendant, in the event that the defendant were successful, stems from the wrongdoing alleged in these proceedings. I will shortly turn to an assessment of that issue on the evidence. However, two questions concerning the precise way in which that test ought be applied did arise for debate in the course of the hearing before me. The issues raised do not go to the underlying principles which must now be taken to be well settled. Those issues do, however, concern the precise way in which a court should approach an application where there is a significant contest between the parties as to whether the type of special circumstances asserted in this case have been shown to exist to the necessary *prima facie* level. Before going on to the application of the relevant principles to the evidence in this case I should, therefore, briefly touch on certain aspects of what might be called the "inability due to wrongdoing" special circumstance to which I now turn.

3. Inability Due to Wrongdoing

3.1 As I have already noted, there is ample authority for the proposition that the court retains a discretion not to order security for costs where the plaintiff concerned can establish, on a *prima facie* basis, that his inability to pay the costs of the defendant concerned (in the event that the defendant might succeed) is due to the wrongdoing which he asserts in the proceedings. It has, of course, been pointed out that there is a certain superficial illogicality about the court considering such an eventuality. The defendant would only become entitled to its costs if it wins. By definition if it wins then the plaintiff's inability to pay costs cannot have been due to any wrongdoing on the part of the defendant, because the court will have found either that there was no such wrongdoing or no losses (or indeed both).

3.2 On the other hand the court is faced with being unable, at the stage at which the application must necessarily be brought for it to have any practical effect, to reach a view as to which party is going to win. It must, therefore, take the rather superficially illogical step of assuming, for the purposes of the defendant recovering costs, that the defendant will win, but also

assuming, for the purposes of determining whether any inability to pay those costs is attributable to the wrongdoing asserted, that the plaintiff will win.

3.3 I am mindful of the fact that all of the authorities make clear that the court's assessment must be conducted on a *prima facie* basis. As was pointed out in *Irish Conservation and Cleaning Ltd v. International Cleaners Ltd* (Unreported, Supreme Court, Keane C.J., 19th July, 2001) to do otherwise would be to invite the court, on a preliminary motion, to decide the case. Everything which I say hereafter should, therefore, be subject to the qualification that I am referring, even if not expressly stated, to the various necessary matters being established on a *prima facie* basis.

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

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

3.5 Given that, on a motion such as this, a plaintiff is only required to establish the special circumstances, arising out of its inability to pay costs being due to the alleged wrongdoing of the defendants, on a *prima facie* basis, then it follows that each of the above steps must also be established on such a *prima facie* basis only. Items (1) and (2) do no more than state that the plaintiff must establish a *prima facie* case on liability and causation, for if such a case cannot be established, then there could be no basis for finding, even on a *prima facie* basis, that any lack of resources of the plaintiff are due to wrongdoing on the part of the defendant. Item (3) is of some relevance to the first of the matters which was debated in the course of the hearing before me. In response to some of the points made by counsel for Laing O'Rourke, it was responded on behalf of Connaughton Road that those matters "only went to quantum". The implicit suggestion was that the court was not concerned, on an application such as this, with quantum. That may be true to an extent, but it seems to me that it is not correct to state that a court should have no regard to questions of quantum in an application such as this. To take a simple example a plaintiff company which has an excess of liabilities over assets of (say) €200,000 will manifestly be unable to pay the defendant's costs should the defendant succeed. If the high watermark of that plaintiff's claim is only for €100,000 then it equally follows that the plaintiff's inability to pay costs has not been caused by the defendant's wrongdoing in that, even if the plaintiff were to succeed, there would still be an excess of liabilities over assets of €100,000.

3.6 It follows, in my view, that a plaintiff must at least establish a *prima facie* case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful. That this is so can be seen from the comment of Murray J. (speaking for the Supreme Court) in *Framus Ltd & Ors v. CRH Plc & Ors [*2004] 2 I.R. 21 at pp. 61 and 62, where it was noted that the plaintiff in that case had shown some evidence of wrongdoing on the part of the defendant but not, even on a *prima* facie basis, that its impecuniosity was due to that wrongdoing. It is not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a *prima facie* basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of point (4) referred to above. Even if, therefore, a plaintiff can show a *prima facie* case, it is also necessary to show a *prima facie* level of losses attributable to the defendant's wrongdoing so as to enable the court to assess whether, again on a *prima facie* basis, those losses are sufficient to justify attributing the plaintiff's inability to pay costs, in the event of losing, to the asserted wrongdoing. On that basis I am satisfied that the court can have some regard to quantum in an application such as this.

3.7 The second point that arose for some debate concerns the position of a company which, on any view, had no significant net assets prior to the events which gave rise to the proceedings concerned. As will be seen that is, in fact, the case here. It is not unusual for parties to procure the establishment of a so called "special purpose company" which is set up solely for the purposes of a single transaction, or series of connected transactions, or a single item of business or a series of connected items of business. Nor is it entirely unusual for the direct equity capital of such a company to be of a wholly nominal variety (such as for example €2). While not insolvent, such a company clearly would not have the means to meet the costs of any unsuccessful litigation which it might mount. The question which arose for debate is to what the proper approach of the court should be to such a company in an application for security for costs.

3.8 Counsel for Laing O'Rourke suggested, correctly in my view, that there were no special considerations to be given to such companies one way or the other. However, he did assert that, in attempting to show special circumstances, it was incumbent on such a company to show, at least to a *prima facie* level, that were it not for the wrongdoing asserted it not only would not have lost money, but would have made sufficient profits so as to be in funds sufficient to pay the likely costs of a successful defendant.

3.9 It seems to me that if a plaintiff is not in a position to establish such a fact (on a *prima facie* basis), then a plaintiff will not have been able to show that its inability to pay costs is due to the wrongdoing which is at the heart of the proceedings. Again a simple example will illustrate. A company with only nominal share capital might acquire an asset worth €200,000 with wholly borrowed money. It might assert that, due to wrongdoing on the part of the defendant, it had lost that asset so that it no longer had any assets, but retained a liability of €200,000 to the lender. It might sue the defendant for the €200,000 concerned, being the value of the asset which it says was lost by the defendant's wrongdoing. However, even if it be correct in that assertion, success in the proceedings would simply restore the company to a position where it had broadly matching assets and liabilities, so that the consequences of the alleged wrongdoing could do no more than explain the reason why the company was in debt to the tune of €200,000 rather than having broadly equivalent assets and liabilities and thus no net assets. In neither circumstance would the plaintiff company concerned be in a position to pay the costs of a successful defendant.

3.10 As part, therefore, of the overall question of assessing whether it has been shown, on a *prima facie* basis, that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted, the court must look at all of the circumstances asserted on behalf of the parties. In particular in a case where, prior to any possible wrongdoing, the plaintiff company had no significant net assets, it seems to me that it follows that such a company will need to establish that, in the absence of the wrongdoing alleged, it would have acquired net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant were successful.

3.11 With those observations I propose to go on now to consider the facts of the case in question.

4. <u>Application to Facts of Case</u>

4.1 As indicated earlier, it appears that what was intended on the part of the Connaughton Road was that the buildings, once constructed, would be sold with part of the relevant purchase price going to Mr. Molloy as landowner and part to Connaughton Road. I will return to the detail of the evidence in due course, but is fair to state that, at this stage, there is very limited evidence as to the precise way in which the breakdown of the sale price as and between Mr. Molloy and Connaughton Road was to be governed. Furthermore, the only evidence put before the court as to projections for the likely outcome of the project, in

the absence of the alleged wrongdoing on the part of Laing O'Rourke, came by way of an exhibit in an affidavit sworn by Tony Porter, Chartered Accountant, who is the principal of the firm of Porter and Company which firm act as accountants and auditors for Connaughton Road. Mr. Porter noted that he did not prepare formal projections in relation to the project. He does refer to the fact that he received a summary sheet of the projected outcome from Allied Irish Banks ("the bank") (who acted as bankers to the project generally). That summary sheet was exhibited in his affidavit. He notes that those projections suggested that Connaughton Road would in fact make a profit on the development of €1,770,000.

4.2 A number of matters need to be addressed in relation to this evidence. Firstly, Mr. Porter does not purport to give any evidence himself concerning the likely profits to be made by Connaughton Road. All he does is to refer to a bank assessment. The bank sheet is the only evidence put forward. While such a third party document might not ordinarily be of central importance, as it is the only evidence tendered it must be subjected to some scrutiny. The bank assessment needs, in my view, to be treated with some very considerable degree of caution. Firstly, it is important to point out that the bank was acting as lender both to Connaughton Road and to Mr. Molloy personally. The bank was to obtain (and as I understand it did obtain) a guarantee for the liabilities of Connaughton Road from Mr. Molloy personally. It was, therefore, a matter of little concern to the bank as to whether profits from the transaction as a whole ended up in the hands of Mr. Molloy or Connaughton Road. Even if it were to transpire that Connaughton Road was unable to repay its debts, the bank would have been able to look to Mr. Molloy on his guarantee, provided that the project as a whole was successful. For understandable reasons therefore, the bank do not appear to have been particularly concerned with whether profits from the project as a whole were directed towards Mr. Molloy or Connaughton Road.

4.3 Secondly, it is difficult to see where the quoted figure of €1,770,000 comes from. There is no doubt that such a figure is mentioned in the paper concerned. It is stated to be the profit of the company. It is, however, by no means clear how that figure is derived from any of the other figures in the paper.

4.4 A further point of some considerable significance concerns the position of Connaughton Road's obligations in relation to social and affordable housing. In Mr. Molloy's own affidavit he draws attention (at para. 5) to the fact that, although one building, the development concerned was split into two parts. One part (known as Milligan Place) comprised 33 apartments or townhouses which were constructed as so called section 50 student accommodation together with associated facilities. The second part (called Milligan Court), consisted of 15 section 23 apartments and one commercial retail unit. Mr. Molloy goes on to state that six units in Milligan Place and two units in Milligan Court had been allocated as part V social and affordable housing as required by the relevant planning permission.

4.5 Nowhere in either Mr. Molloy's affidavit or in Mr. Porter's affidavit does anyone seek to address the financial consequences of this important fact. It would appear that different local authorities have dealt with the social and affordable housing obligations of developers of residential property in different ways. However, a typical such method adopted is that which I had to consider in *Cork County Council v. Shackleton* [2007 IEHC 241. In such cases (and a similar arrangement was also entered into on the facts of *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* [2007] IEHC 241) the arrangements between the developer and local authority concerned were as follows. A calculation of the relevant planning gain was made. This resulted in the local authority concerned obtaining their statutory entitlement to that planning gain by means of obtaining free of charge an appropriate number of units, calculated in accordance with the provisions of the relevant legalisation, so as to give the local authority concerned the same gain as that authority would have obtained had the authority elected for the default provision of receiving 20% of the land concerned at its pre-development use value. It is by no means clear whether an arrangement of that type was entered into by Connaughton Road (neither Mr. Molloy nor Mr. Porter deal with the question), but if the arrangement concerned was of that type, then it is clear that eight of the units in the development would have had to have been handed over to the relevant local authority free of charge. Mr. Porter draws attention to the fact that the bank summary to which I have already referred suggests that the residential units were to be marketed at a price of €325,000 being €280,000 plus VAT. On that basis it was suggested that €200,000 would go to Connaughton Road and a site fine of €80,000 would be paid to Mr. Molloy. If the above analysis of the position in respect of social and affordable housing is correct, and if it were the case that eight units would have to be handed over to the local authority free of charge, then it is clear that that fact alone would have diminished the company's income by €1.6m. This would have almost wiped out the asserted profit. If a different arrangement had been entered into between Connaughton Road and the local authority then it follows that the local authority would, nonetheless, have had to have received an entitlement to the same financial gain in some fashion and that, in turn, would also have led to a similar impact on the company's accounts (perhaps not an identical impact because the means of calculating the value of properties to be handed over under the provisions of part V involve a calculation in accordance with the statutory process rather than necessarily applying the open market value).

4.6 When taking those factors in conjunction with the fact that the profit of €1.77m envisaged in the AIB paper does not appear to flow from any calculation based on the other figures in that paper, it is very difficult to see how that paper can be used to justify any assumption that the company was going to make significant profits at all.

4.7 While such a situation (i.e. no projected profits for a company on a large transaction) might seem to be strange in general terms, it is also necessary to have regard to the fact that, it would appear, the relevant taxation regimes applicable to profits in the hands of Mr. Molloy on the one hand and Connaughton Road on the other hand, in the particular circumstances of the development with which both were concerned, was such that a higher rate of tax would apply to profits in the hands of Connaughton Road than would apply to profits in the hands of Mr. Molloy personally. In those circumstances there would be nothing surprising in the arrangements between the parties being designed such that the overwhelming majority of the profits would be directed towards Mr. Molloy rather than Connaughton Road, and thus incur a lower rate of tax.

4.8 This fact is also relevant to a further consideration which was the subject of some debate at the hearing before me. There is certainly evidence that, prior to difficulties being encountered (the reasons for those difficulties are at the heart of the issues between the parties), certain agreements for sale had been entered into which reflected a sale price somewhat above that envisaged in the bank paper. However, no evidence was put before the court on behalf of Connaughton Road to suggest who the beneficiary of any such uplift would be. The sales concerned appeared to be at a minimum of €30,000 (inclusive of VAT) above that envisaged in the bank paper. Counsel for Connaughton Road invited me to assume that the uplift (net of VAT of the order of €26,000) would have been for the benefit of Connaughton Road rather than Mr. Molloy. Firstly, there is no evidential basis for making that assumption. Secondly, having regard to the fact that directing the uplift to Connaughton Road rather than Mr. Molloy personally, would have exposed the additional profits earned by the uplift to a higher rate of tax leads to the view that such an eventuality was less likely. In addition it is also possible that the uplift might have been divided but this, again, was not addressed in the evidence.

4.9 On the basis of all of that evidence (or, in many respects the lack of any such evidence) it does not seem to me that Connaughton Road has established, even on a *prima facie* basis, what is, in my view, an essential building block of the special circumstances in a case such as this. Connaughton Road was a €2 nominal capital company. Unless it were to make profits on its sole transaction then it would not, whether there was wrongdoing or not, have ever been in a position to pay the defendant's costs in the event that the defendant was successful. In order to be able to establish, in the circumstances of a case such as this, that Connaughton Road would, on a *prima facie* basis, have been able to pay the costs of the defendant but for the defendant's wrongdoing, it would be necessary for Connaughton Road to show a *prima facie* case to the effect that, but for that wrongdoing, it would have had significant profits sufficient to meet the likely costs of Laing O'Rourke. Those costs were estimated by Laing O'Rourke's legal cost accountants as being of the order of €632,500.

4.10 I am not, therefore, satisfied that Connaughton Road has discharged the onus on it to establish that the reason for its undoubted inability to pay the defendants costs in the event that the defendant be successful, is attributable to the alleged wrongdoing of Laing O'Rourke. It has failed to do this because it has failed to establish a *prima facie* case to the effect that, were it not for the alleged wrongdoing of Laing O'Rourke, Connaughton Road would have made significant profits out of the only transaction with which it was concerned, sufficient to put it in a position to pay such costs. That failure leaves the situation in the "speculative" or "remote" category found not to be a tenable basis for establishing special circumstances in *Lough Neagh Exploration Ltd v. Morrice & Ors* (Unreported, High Court, 27th August, 1992, Laffoy J.). That alone, in my view, is sufficient to dispose of this application.
4.11 However, there is a further reason for coming to the same conclusion. I am mindful of the fact that a party in a position such as Connaughton Road, faced with an application of this type, is only required to establish a *prima facie* case to the effect that the special circumstances relied on in this application are present. The requirement that those circumstances be established (again on a *prima facie* basis) does not have to be complied with in any particular way. However, in normal circumstances one would expect that a company such as Connaughton Road would put before the court some evidence of its current financial position, some account of its financial position prior to the incident giving rise to the alleged wrongdoing, and some evidence to suggest that all, or a sufficient portion of, the difference in position can be attributed to the wrongful actions of the defendant. See the comment of Finlay C.J. in *Jack O'Toole Ltd* cited at para. 2.3 above. I should emphasise that the way in which a plaintiff may seek to establish those matters is not prescribed in any way, and it is open to a plaintiff in such circumstances to attempt to establish the special circumstances in whatever way it can.
4.12 However, it is important to note that, in this case, no evidence as to the current financial position of Connaughton Road was put before the court. Likewise, very little evidence as to its position prior to the alleged wrongdoing of Laing O'Rourke was put before the court. The only accounts of Connaughton Road which were put in evidence, were accounts which were formulated on the basis of assuming that the value of the work in progress of Connaughton Road (i.e. the partially built building), was exactly equivalent to the amounts spent on the construction. As all of those amounts were borrowed, it follows that there was exact equivalence between the value of work in progress and the borrowings of the company. On that basis the company was not shown as having made any profit or loss. It was asserted (and it does not seem to me to be an unreasonable assumption) that in all likelihood the true commercial value of the property concerned at the time of any of the relevant accounts, was probably higher than the amount that had been spent. However, this fact itself is coloured by the question, which I have already considered in some detail, of the distribution of the likely purchase price to be paid by any purchasers of units within the development, as and between Connaughton Road on the one hand and Mr. Molloy on the other. The extent to which the value of the partly built development could properly be regarded as a valuable asset in the hands of Connaughton Road was, of course, dependent on the extent to which Connaughton Road could expect to receive the receipts of the sale of that property, and was thus dependent on the division of the purchase price between Mr. Molloy and Connaughton Road. As previously pointed out there is no evidence as to how that division was to take place other than the reference contained in the bank paper to which I have already referred.
4.13 I do not have, therefore, any clear picture of the current financial state of the company, and by what margin it can be said that the company is unable to meet the costs of the defendant in the event that the defendant should succeed. Likewise, the precise scale of Connaughton Road's claim, even on a *prima facie* basis, is only put forward in a very sketchy way. The normal basis for approaching a test such as that which I have to apply in this case is not, therefore, possible. There just is not enough information to value the high watermark of the plaintiffs claim on a *prima facie* basis, to compare it with the current state of the company, and to form a conclusion as to whether that comparison can give rise to the reasonable inference that a *prima facie* case has been made out to the effect that the inability to pay costs is attributable to the alleged wrongdoing.
4.14 It might be said on behalf of Connaughton Road that all of its current difficult financial position is attributable to the wrongdoing of Laing O'Rourke, and that, therefore, there is, in a way, an equivalence between the *prima facie* scale of the consequences of Laing O'Rourke's alleged wrongdoing and, the scale of the current financial difficulties of Connaughton Road. However, to make the case in that way it would, in my view, have at least been necessary (in addition to showing that Connaughton Road would have made profits in the first place – a point I have already dealt with) that there was a *prima facie* basis for assuming that no other causes could be said to have generated the current inability to pay costs. I should emphasise that these latter comments are only directed towards a situation where the plaintiff concerned does not take the ordinary course of putting at least some approximate accounts before the court, to allow the court to carry out the exercise of comparing the high watermark of the plaintiffs claim with its current financial position, and draw inferences from that comparison. These comments are concerned with the situation where a party, for whatever reason, does not take that normal course but seeks to suggest that the entirety of its perilous financial state is due to the wrongdoing alleged against the defendant. In such a circumstance it seems to me to logically follow that the party concerned would need, again on a *prima facie basis*, to produce some evidence on which the court could be satisfied that there were no other causes of its disadvantageous financial position which could not be attributed to the wrongdoing of the defendant. For example pre-project projections would need to be accompanied by some evidence that the projections would, in the absence of the alleged wrongdoing, have at least been met or that any shortfall would not have affected the position of the plaintiff concerned to a material extent sufficient to alter the position in a way which would no longer support the proposition that there was a *prima facie* case, to the effect that inability to pay costs was attributable to the alleged wrongdoing.
4.15 It is in that context that the argument put forward on behalf of Laing O'Rourke to the effect that Connaughton Road had not established that all of its current adverse consequences were attributable, even on a *prima facie* basis, to the wrongdoing which is alleged in these proceedings needs to be considered. I am satisfied that that point is well made. There just is not enough information put before the court to enable even a tentative and *prima facie* analysis to be conducted, so as to form a view as to whether the losses which are said to be attributable to the claims made could provide a complete explanation for the financial difficulties in which the plaintiff now finds itself (or at least could do so to a sufficient extent to warrant a finding that, but for that wrongdoing, a *prima facie* case had been established, to the effect that Connaughton Road would have been in a position to meet Laing O'Rourke's costs in the event that Laing O'Rourke was successful).
4.16 On that basis also, I am satisfied that Connaughton Road has failed to meet the onus on it to establish the special circumstances asserted in this application.

5. Conclusion

5.1 As pointed out earlier it was, quite properly, accepted on behalf of Connaughton Road that the first and second element of the test, i.e. its inability to meet costs in the event that it should lose and the existence of a *prima facie* defence on the part of Laing O'Rourke, had been established on the evidence. It follows that security for costs should be directed unless special circumstances are made out. For the reasons which I have sought to analyse I have come to the view that Connaughton Road has failed to meet the onus on it to so establish special circumstances. It follows that security for costs must be directed.
5.2 I propose to hear counsel further on the precise amount of the security that should be directed. Having regard to the need for these proceedings to be progressed in the timely fashion contemplated by the Rules of the Commercial Court, it seems to me that I should fix the amount of security myself. I have already noted the figure for costs put forward by Laing O'Rourke on the basis of the advice of their cost accountants. I am minded to give Connaughton Road a brief opportunity, if they wish, to seek to contest that figure. I should, however, comment that the estimate for the length of the case upon which Laing O'Rourke's costs accountants have based their figures seems to me, if anything, to be an underestimate. Having regard to the wide range

of matters and issues addressed in the affidavits filed on this application (and on the assumption that all of those issues remain live as of the time of trial), it would seem to me that the case could well take eight to ten days. It would not, however, be appropriate at this stage to allow Laing O'Rourke to put in an increased estimate. However, I am currently minded, subject to what counsel may have to offer, to take into account, in the event that there may be a contest, the fact that the estimate of the length of time on which Laing O'Rourke's cost accountants based their figures may be an underestimate.