THE HIGH COURT

[2012 No. 6355 P]

BETWEEN

WERDNA LIMITED

PLAINTIFF

AND

MD INSURANCE SERVICES LIMITED T/A "PREMIER GUARANTEE"

AND

LIBERTY SYNDICATE 4472 AT LLOYD'S

AND

WILLIS RISK SERVICES (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered the 17th day of April 2018

1. The first and the second defendants seek an order pursuant to s. 52 of the Companies Act 2014 ("the Act") that the plaintiff should give security for their costs of successfully defending the proceedings.

2. The proceedings arise from the development by the plaintiff of a mixed residential and commercial development known as "Timber Mills" at Kilmore Road, Artane, Dublin 5, and the refusal by the first and second defendants to indemnify the cost of remedying defects in the structure of the buildings.

3. The first defendant is the scheme administrator of the "Premier Guarantee" structural warranty and at all material times acted as agent of the second defendant, an insurance underwriter and part of the Lloyd's Syndicate.

4. Proceedings were commenced by plenary summons on 12 June 2013, and defences were delivered by the second defendant on 18 September 2014, and by the first defendant on 2 March 2015. The first and second defendants are now represented by the same firm of solicitors. The discovery process has concluded.

5. The action against the third defendant was discontinued in 2016 after that defendant issued a motion seeking security for its costs, and before the motion was heard.

6. The second defendant made a formal request that the plaintiff provide security for its costs on 20 October 2016 based on the filed accounts for the year 2014 and 2015. After the second defendant agreed to indemnify the first defendant in respect of the plaintiff's claim, a further formal request for security was made by letter on 16 January 2017 in respect of the costs of both defendants.

7. The estimate of the likely costs of €540,000 has since been reduced considerably.

The statutory basis of the application

8. The jurisdiction to require that security be provided by a corporate plaintiff is governed by s. 52 of the Act:

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

9. The principles are well established and as stated by Ryan J. in *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2014] IEHC 18, "the default setting is not to order security for costs, so that the onus is on the applicant".

10. The right of access to the courts is not to be lightly restricted and the Supreme Court explained the starting point in *Mavior v Zerko Ltd* [2013] IESC 15, [2013] 3 IR 268, at para. 4.10 as:

> "… the jurisprudence in relation to all of the areas where security for costs is considered starts from the position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. An alternative approach would have the effect of shutting out impecunious parties from bringing cases which approach would be both untenable and disproportionate".

11. In order to succeed in an application that security be provided the moving party must show a *prima facie* defence to the plaintiff's claim and that the plaintiff will not be able to pay the costs of a successful defence. Only the second factor arises in the present case as the plaintiff accepts that the defendants have a *prima facie* defence to its claim. The application is defended on the ground that the defendants have not established that the plaintiff will not be able to meet their costs of successfully defending the claim. The plaintiff also argues discretionary factors.

12. I turn now to consider the arguments and evidence.

The ability of the plaintiff to meet a costs award: analysis of the accounts

13. In the five years 2012 to 2016 the audited accounts show net liabilities of the company have increased in every financial year.

14. The filed accounts show net loss for the year ended 31 December 2014 of €193,686, and total net liabilities of €16,421,983, €15,784,505 whereof was owed to group companies.

15. Net liabilities for the year ended 31 December 2015 were €16,547,748. Losses for that year were €125,767.

16. The financial accounts for the year ending 31 December 2016 show a net liability of €16,624,977.

17. On the last morning of the hearing there was exhibited an analysis of trading figures for the 9 month period from the last audited accounts to 30 September 2017 which show net liabilities of €16,670,818 and a trading loss of €45,841. The figure for net liabilities is increased somewhat (by approximately €50,000) from the figure for the last full year for which figures are available.

18. However the plaintiff also provided a report from Grant Thornton exhibited in the second affidavit sworn on behalf of the plaintiff, and that analysis shows a net liability of €15,049,654 on account of a stated improvement in the value of the real property assets estimated at €1,621,164.

19. Were the liabilities to the group companies to be disregarded, the net liabilities of the company were €637,478 in the year 2014, €763,243 in the year 2015, €840,472 in the year 2016, but for the 9 month period up to 5 October, 2017 the company shows assets of €734,851 based on the improved valuations.

20. The auditors' note to the 2015 accounts makes the following observation under the heading "emphasis of matter"

> "The company incurred a net loss of €125,767 during the year ended 31st December, 2015, and as that date, the company had net current liabilities of €16,547,748. These conditions, along with the matters explained in note 4 to the financial statements indicate the existence of a material uncertainly which may cast doubt on the company's ability to continue as a going concern".

21. Note 4 reads as follows:

> "The future of the company is dependent on the continued support of its bankers. The directors are in ongoing discussions with the company's bankers and based on the discussions to date the directors are satisfied that the outcome of these discussions will be favourable.
>
> The directors recognise that in the current economic environment risks regarding the achievability of broadcast sales and margins and the timing and accounts of forecast cash flows".

22. A similar note is contained in the 2014 audited accounts, but not in those for 2016 although there does not seem to be a material difference in the financial position of the company.

The inter-company liabilities

23. The evidence as it evolved in the course of the affidavits shows that the inter-company liability is unsecured, and that no interest obligation is accruing. The obligation was described as "open-ended" and there is no agreed date for payment. The plaintiff therefore says that while the inter-group liability is correctly entered in the audited accounts, no present obligation to pay exists and that therefore the company cannot be said to be unable to pay the costs of a successful defendant. In addition, the plaintiff offers an agreement by the parent company that its claim would be subordinated or postponed to any costs order in favour of the defendants that might be made by the court in these proceedings.

24. By letter dated 17 October 2017 to the plaintiff James McMahon Limited, part of the group undertaking, has agreed to subordinate its debt in the manner therein set out:

> "We confirm our agreement to subordinate the Indebtedness [already identified as referring to as the group liabilities] behind any sum and in respect of the legal costs of either or both of the defendants that you become liable to pay to either of both of the defendants pursuant to the Proceedings [already defined as the present proceedings] in the event that both or either of the defendants successfully defend the proceedings at the trial hearing of the Proceedings and either or both of the defendants is awarded legal costs against you. This subordination shall automatically cease upon all such legal costs being discharged and/or in the event that you are successful against the defendant in the Proceedings".

25. The plaintiff argues that this subordination or postponement affords sufficient comfort to the defendants regarding the ability of the plaintiff to pay its costs.

26. The defendants are not satisfied with the offer of subordination as by its nature the agreement proffered is inferior to the giving of security. Further, the defendants argue that there is insufficient information reading the related companies to permit me to take a view as to the risk of a creditor impacted by the postponement, or a liquidator, challenging the postponement. It is also argued that the defendants might find themselves in a dispute with the related companies regarding the postponement.

Conclusion on subordination offer

27. The subordination or postponement agreement is offered by James McMahon Limited, not identified as the parent company in the accounts. The complex company structure is not clear but I am prepared to assume for the present application that James McMahon Limited is the ultimate owner of the company debt and has authority to bind the group undertakings or relevant intercompany creditor.

28. What is also not clear, and is not explained to my satisfaction, is whether the subordination agreement as set out in the letter of 17 October 2017 to Werdna from James McMahon Limited is capable of challenge by any of the creditors of James McMahon Limited, and in principle it seems to me that a challenge to the agreement as a preference is possible, as it is an argument that it does not bind any secured creditors or a liquidator. A fully operative agreement to postpone would require the consent of the relevant creditors. The offer to postpone is made to the plaintiff and not to the defendants, although I consider that this difficulty could be overcome by the giving of a formal undertaking to the court, and the argument regarding the form of the undertaking is not one that would bear much on my consideration.

29. The supplemental letter furnished by James McMahon Limited dated 8 November 2017, confirms that the letter of 17 October 2017 is "binding on James McMahon Limited" and that James McMahon "will not withdraw or vary the terms of the subordination agreement prior to the cessation of such subordination as set out in the letter [of 17 October 2017]." This confirmation does not deal with what I regard as a real risk that the subordination agreement could give rise to further litigation.

30. I am persuaded by the approach taken by Kelly J. in *Greenclean Waste Management Limited v. Leahy* [2015] IECA 97, [2015] 1 IR 106, where he approved the approach of Akenhead J. in *Michael Phillips Architects Limited v. Riklin* [2010] EWHC 834 (TCC) that an insurance policy could in some circumstances provide sufficient protection and security for a defendant's costs, but would not be as

good as a bond or payment into court, because, amongst other things, a policy could be voidable, is subject to cancellation, and because the defendant applicants were not named as beneficiaries under the policy. The fact that the insurance policy was conditional and could be voided for a number of reasons was sufficient for Kelly J, at p. 122, to tip the balance in favour of granting security, as it fell "far short of providing as good a security as a payment into court or a bank or insurance bond".

31. In *Fides Capital Ltd v. Alchemy Products Ltd* [2017] IEHC 266, Barrett J. having concluded that the defendant had established a *prima facie* defence and an inability on the part of the plaintiff to meet the likely costs of the defendant, rejected an offer of a personal guarantee by a director of the company because he was not satisfied that he had sufficient evidence of the personal financial position of the proposing guarantor. More importantly, however, he regarded at para. 8 the offer of a personal guarantee as running "against the basic thrust of a security for costs application", because he considered that the guarantee might be enforceable only through a separate action against the guarantor in the event that he refused to pay on foot of the guarantee.

32. A similar argument could be made with regard to the subordination agreement, but with more force. Should James McMahon Limited seek payment of the inter-company liabilities or any part of them prior to the conclusion of this litigation, or should James McMahon Limited refuse to accept the validity of that agreement, the successful defendants would find themselves in litigation against James McMahon Limited, and perhaps even against the creditors of that company or even against a liquidator. For reasons similar to those expressed by Barrett J. in his judgment, I am not satisfied that the subordination agreement sufficiently deals with the issue of the standing of the inter-company loans, and whether a third party might challenge the validity of the postponement of the subordination agreement. No evidence of the financial position of James McMahon Limited has been furnished, and I am not satisfied that sufficient evidence has been adduced so that I may be reasonably sure that the agreement would bind a creditor of the related companies or a liquidator.

33. Accordingly, I am not satisfied that the subordination agreement is sufficient to avoid a conclusion that the plaintiff would be unlikely to be in a position to meet the costs of a successful defence of the proceedings.

An improvement in the plaintiff's financial positon?
34. The plaintiff also argues that its financial position has improved as a result of two factors not apparent from the filed accounts. In the past few months Circuit Court proceedings taken by the plaintiff against the Management Company for the Timber Mills development were compromised. The plaintiff argues that the compromise has resolved to its satisfaction a title difficulty in the common areas. The Circuit Court proceedings were not exhibited, but counsel advises that the action sought declaratory and mandatory orders against the Management Company to "facilitate" the sales of the remaining units in the title of the plaintiff.

35. It is further contended that the value of the plaintiff's property portfolio has increased and as a consequence its financial position has "improved considerably". The residential and commercial units at the Timber Mills development are shown to have now a combined "recommendation guide price" of €7,902,500 in a valuation report described as "an informal estimation of likely sale prices" prepared for the plaintiff by Hooke & MacDonald on 4 October 2017. The valuation is based on the stated assumption that the apartments and common areas "are compliant with building regulations, redecorated to a good standard", "in good structural repair and condition" and available with vacant possession.

36. The report makes clear that the valuation did not follow an inspection of all of the individual units and the assumption regarding the condition and repair may not therefore be borne out. No comparators are provided. The price is inclusive of VAT, and the net realisable value of the properties is therefore to be treated as a smaller figure.

37. The property of the plaintiff includes also development lands at Marsh Road, Drogheda, County Louth is valued at €1,180,000, and 3.5 acres at Station Road, Portarlington, County Laois at €430,000. Property at Newport, County Tipperary is valued by the plaintiff at €120,000 but without independent evidence.

38. The first and second defendants dispute the valuations by reference to information regarding sale prices of units at the development in Timber Mills from the Property Price Register and from asking prices on Daft.ie. The lowest price achieved for a unit in 2017 was €177,000. The Hooke & MacDonald valuations give an estimated range of between €230,000 and €245,000, the lowest 6 valued at €225,000, and none is valued at a figure as low as the actual selling price shown on the Register.

39. Of concern too is the fact that the case pleaded by the plaintiff is that the remedial works required to be done to its properties are estimated in a figure of over €6,500,000 which would suggest that the bases of the valuations prepared by Hooke & MacDonald may not been borne out by the facts.

40. The valuation evidence is not sufficiently fact specific to enable me to take any considered view as to the true value of the company's assets. The first and second defendants propose a valuation of the units of approximately €6,600,000, the plaintiff contends for a value of €7,900,000, and I am unable to resolve the conflict.

41. In the circumstances, the argument of the plaintiff that its asset base is considerably better than that shown on the filed accounts is difficult to accept without reservation. Furthermore, the company assets are held as security in the manner I now turn to examine.

Security held over company assets and undertaking
42. The defendants have exhibited a printout form the CRO showing details of sixteen registered charges, seven of which remain live.

43. The most up to date audited accounts up to 31 December 2016 identify a Bank of Ireland loan of €6,915,858 secured by way of a first legal charge on all properties owned by the company. That charge has not been satisfied. The secured liabilities especially those of Bank of Ireland which has a charge to cover almost €7 million could entirely absorb the assets of the company, unless the plaintiff's valuation evidence is accepted.

44. Provision is made for possible liability to AIB in a sum of €1,050,000 relating to a put and call option agreement to which the Plaintiff is a party with investors, albeit in the circumstances this may be a remote risk.

Conclusion on financial position of the plaintiff
45. When considering whether a corporate plaintiff is likely to be able to meet the costs of a successful defendant the test to be applied is not whether the company is insolvent as a matter of company law, but whether the presently known facts suggest the company has an ability to meet further costs. I am satisfied that the subordination agreement would have the effect for which the plaintiff contends, the net financial position of the plaintiff would be significantly improved and it would be likely to be in a position to meet the costs of a successful defence of the action.

46. The plaintiff asserts that it now is in a "positive solvent" net asset position of *circa* €734,000, while the defendants argue that up-to-date figures suggest a net liabilities figure of approximately the same amount. Much of the difference is made up from the different approach to valuation in respect of which I am unable to take a firm view, for the reasons explained.

47. The burden of proof is on the person seeking security for costs to establish that on the evidence a corporate plaintiff is unlikely to be able to meet the future costs. The default position is not that security for costs will be given, and the purpose of an order directing that security be provided is not that the defendant be provided with an indemnity in regard to costs, but rather that there be comfort for such costs.

48. The current position of Bank of Ireland is less then clear. While it would appear, although this is not quite explained, that the liabilities to Bank of Ireland must be less than €1,000,000 having regard to the stated figure for net liabilities as at the 31 December 2016 the loan to Bank of Ireland would wipe out almost entirely the net assets of €734,000 for which the plaintiff contends.

49. Furthermore, the plaintiff company continues to trade at a loss, albeit the loss for the period January to September 2017 (9 months) was relatively small at €45,841.

50. In *James Elliott Construction Ltd v. Irish Asphalt Ltd* [2010] IEHC 234, Clarke J. took account of the fact that the plaintiff had not put up-to-date figures before the court for the purposes of the assessment of its financial status. At para. 5.2 Clarke J. explained the correct approach to an evidential deficit that might arise thereby:

> "Where there are circumstances that require explanation and where a company does not put before the court evidence sufficient to give such an explanation, the court should lean against filling in such unexplained gaps in a manner favourable to the party who could have provided the relevant explanation".

51. Clarke J. was prepared to draw an inference that the financial position of the plaintiff was worse than that represented in the last filed accounts, and because there had been a significant deterioration in the financial position of the plaintiff he regarded it as incumbent on the plaintiff to put evidence before the court to displace the concerns expressed by the defendant.

52. I take a similar view with regard to two factors that continue to concern me in the present case. I am not in a position to resolve the conflict of evidence with regard to the current valuation of the real property assets of the plaintiff, and I consider that the concerns raised by the defendants regarding the enforceability of the subordination agreement, and the existence of the unsatisfied Bank of Ireland charges would suggest that an increase in the value of the real property assets of the plaintiff would not of itself improve its ability to discharge the costs of the defendants were they to be successful in the action. The Bank of Ireland has security over the real property assets and *prima facie* that includes the assets the valuations of which are argued to have improved. I am therefore not satisfied that even if there has been an increase in the value of the plaintiff's assets, that the evidence points to a sufficient ability to meet the claim of the defendants. The plaintiff was in a position to further explain the Bank of Ireland securities, and indeed to deal with the concerns raised with regard to the subordination agreement, but has chosen not to do so. The burden of showing that the company is likely to be unable to meet the costs of a successful defendant lies on the moving parties but the matters of fact peculiarly within the knowledge of the plaintiffs have not fully been explained to my satisfaction.

53. Therefore, it seems to me that the first and second defendants have established to my satisfaction that the plaintiff would not be in a position to meet its likely costs should they be successful in the proceedings.

Special circumstances

54. The plaintiff argues that first and second defendants have delayed in bringing the motion to such an extent that there exists a special circumstance that must bear on the discretion to make the order.

55. The court has a discretion to refuse to direct that security be provided if "special circumstances" exist and Morris J., in *Interfinance Group Limited v. KPMG Pete Marwick* [1998] IEHC 217 (Unreported, High Court, 29 June 1998) included delay as a relevant discretionary factor.

56. Approximately three years have elapsed since the service of the plenary summons and the issue of the present motion, and the plaintiff argues the defendants have delayed in bringing the application, that it has taken substantial steps in the proceedings which are now well advanced, and that the true purpose of the motion is to frustrate the plaintiff in its claim. It is argued that the delay is sufficiently prejudicial to require me to exercise my discretion to refuse the order.

57. Delay is a factor that may be relevant to the exercise of discretion generally, and with regard to an application for costs, as explained by Charleton J. in *Oltech (Systems) Ltd v. Olivetti UK Ltd* [2012] IEHC 512, [2013] 3 IR 396, at p. 409:

> "Any court considering this alleged special factor would need to analyse the nature of the delay in the light of the means of knowledge of the moving party, as to what that party knew or ought reasonably to have known, and assess its impact on the course of the case in order to decide whether the order should be refused. The reason for the delay may be important. Delay as a reason for refusing to make the order can be very important where the plaintiff company has acted to its detriment in incurring a level of costs that it would not have incurred had it known it would have been required to provide security".

58. Hogan J. considered delay to be a factor too in *Pagnell Limited (t/a Spam Printing) v. OCE Ireland Limited* [2015] IECA 40 as later did Barrett J. in *Euro Safety and Training Services Ltd v. An Foras Áiseanna Saothair* [2016] IEHC 161.

59. In an application for security for costs the focus is often whether the delay might have caused the other party to take steps in the litigation which it would not have taken otherwise. In *Ferrotec Ltd v. Myles Bramwell Executive Services Ltd (t/a Slimming World)* [2009] IEHC 46, Dunne J. considered that the fact that no significant costs were incurred during the period of the alleged delay was a factor and asked whether the delay has had any impact on the plaintiff's position.

60. Barrett J. in *Euro Safety v. An Foras Áiseanna* regarded the delay as being notable and unexplained, and rejected an argument by the defendant that it could not have brought the application until it had filed its defence, an observation with which I agree. Barrett J. considered at para. 38 that there was "every reason why it both could and should" have brought the application after the delivery of the statement of claim. He regarded the costs incurred by the plaintiff as paling in comparison with the estimated costs that the defendant was likely to incur, but still regarded the delay was both considerable and unjustified, primarily because there had been no or little engagement between the parties in the three-year period between the commencement of the proceedings and the application for security.

61. The delay of which the plaintiff complains is a delay of more than three years from the service of the plenary summons on the first defendant on 12 June 2013, and the letter seeking security for costs sent on 20 October 2016. The first and second defendant's motion issued on 23 March 2017, was first returned on 8 May 2017, and adjourned thereafter until it was finally heard before me on 31 January 2018.

62. The plaintiff argues that it has incurred costs in the period between 28 June 2012 and 20 October 2016 of €95,862 and from 20 October 2016 to 6 April 2017 of €7,650. These costs are not broken down sufficiently to enable me to understand the costs incurred since the first letter on behalf of the second defendant seeking security for costs on 20 October 2016.

63. One of the reasons given for the delay in bringing the present motion was that the third defendant sought security for its costs by motion on 22 July 2013. That application was adjourned from time to time and the plaintiff filed a notice of discontinuance against the third defendant on 5 May 2016, before the application came on for hearing on that date. The notice of discontinuance was not sent to the other defendants, who did not become aware that the action had been discontinued against the third defendant until October 2016. The first and second defendants argue that had the third defendant's application for security for costs proceeded on 5 May 2016, when it was listed, or soon thereof, the present application may not have been necessary. It is accepted that any application brought by the third defendant would not enure for the benefit of the other defendants, but the determination by a court of the application by the third defendant could have provided sufficient clarity to the first and second defendants regarding the ability of the plaintiff to pay the anticipated costs, or at least provide some clarity as to the financial position of the plaintiff.

64. The existence of a motion seeking security brought by the third defendant would reasonably have impacted upon the decision of the first and second defendants to seek security from the plaintiff. Further, it might arguably have been oppressive to require the plaintiff to meet an application by all three defendants at the same time, and I consider that it was reasonable for these defendants to await the conclusion of the motion by the third defendant before proceeding to bring its motion.

65. I take note of the fact that the second defendant sought security for costs after the third defendant had brought a motion seeking security for costs, but I do not accept the argument of the plaintiff that the request was a "copycat" and must on that account be rejected.

66. The plaintiff has taken a number of costly steps in the proceedings to date. A plaintiff would not be justified in slowing down preparations for hearing merely on account of the fact that a defendant was seeking security for costs, and the fact of such expenditure of itself does not preclude the making of an order for security.

67. I do not accept that argument of the plaintiff that delay is a factor which disentitles the defendants to the relief sought or that the active participation of these defendants in the proceedings over a period of three years is enough in itself to tip the balance. However, I do accept that the delay in seeking security for costs and thereafter issuing the motion is a factor that might be taken into account in the calculation of the amount to be provided by way of security, and the plaintiff is entitled to a discount for expenditure it has incurred up to the time the request was made by the defendants jointly on 16 June 2017. As I have said, the plaintiff has not broken down nor explained the costs figure, but nonetheless expenditure of approximately €100,000 since the proceedings commenced seems to be broadly speaking what would be expected.

68. However, the expenditure by the plaintiff of the sum of €221,521 in remediation works is not a matter that bears on my discretion as the carrying out by the plaintiff of remediation works might have happened as a result of a request by the owners but also, on the plaintiff's evidence, it has improved the value of its real property portfolio. It is therefore not expenditure that constitutes a detrimental step that would not otherwise have been taken.

69. I accept also that if security is to be awarded, the first and second defendant ought not to have security for those costs incurred up to the date when they issued a formal letter seeking security for costs.

70. The circumstances of the delay in the present case are nothing like those which were determinative in the application before Barrett J. in *Euro Safety v. An Foras Áiseanna¸* where there was little or no engagement between the parties in the three-year period. Pleadings have progressed in the present case and it is to the benefit of the plaintiff that its case is ready or close to being ready to proceed. Unless the plaintiff can say, which it has not said, that it would not have commenced or continued these proceedings had it known that an application for security for costs would be brought by any of the defendants, I am not satisfied that the delay has been such as would disentitle the first and second defendants to the reliefs sought, save with regard to the amount in respect of which security is to be provided.

71. Clarke J., in *Moorview Developments Ltd v. Cunningham* [2010] IEHC 30, considered that the test was not whether a plaintiff would discontinue an action in the light of a request for security for costs but whether the plaintiff would have made a decision to continue with full information that an application would be made for security (at para. 3.7). That means that the amount of the claim, and whether the amount directed to be secured is disproportionate to the amount of the claim, are relevant factors.

72. The plaintiff also argues that the application is opportunistic and brought on the "coat tails" of the application brought by the third defendant. That argument is not based on any evidence, but rather on an argument that the purpose of the application is to stifle the claim of plaintiff and to deny the plaintiff access to justice. Laffoy J. considered in *Village Residents Association Limited v. An Bord Pleanála (No.2)* [2000] IEHC 34, [2000] 4 IR 321 that such motive alone could not justify refusing an application for security for costs, as the proceedings would come to a halt only if the plaintiff choose not to provide security. A similar consideration arises in the present case, especially when one bears in mind the quantification of the losses of the plaintiff pleaded as €6,573,560.66 in the statement of claim, and the cost-benefit analysis is a matter for the plaintiff or indeed of its holding company or companies.

73. The expenditure incurred by the plaintiff in bringing the case on for hearing including the expenditure on discovery and other pre-trial litigation costs must be balanced against the fact that security is to be given only for post request costs, and delay is a relevant discretionary factor if it can be shown that the delay caused detrimental loss or expenditure which would not have otherwise been incurred. One discretionary factor is not sufficient to wholly disentitle the defendants to the order and I consider that justice can be done by making an order for an amount less than that claimed.

Decision and amount of security

74. In all the circumstances I am satisfied that I ought to make an order that the plaintiff should furnish security for costs, and I turn now to consider the amount of such a security.

75. The provisions of s. 52 of the Act are different from those in the old s. 390 of the Companies Act 1963 which required that "sufficient security" be given for the costs. The jurisprudence, therefore, in particular the judgment of the Supreme Court in *Lismore*

Homes Limited v. Bank of Ireland Finance Limited (No.3) [2001] IESC 79, [2001] 3 IR 536, where the court was asked to grant an order that security be given for the full costs, is no longer apposite and discretionary factors can be taken into account in fixing the amount of security.

76. It is clear also from the judgment in *SEE Company Limited v. Public Lighting Services Limited* [1987] ILRM 255, that a party is entitled to security only for costs incurred after the demand for security. In *Paulson Investments Ltd v. Jons Civil Engineering Ltd* [2016] IECA 169, Geoghegan J. was dealing with an application pursuant to s. 390 of the Companies Act 1963 and considered that there had been delay by both defendants and that the appropriate measure was to estimate the costs incurred after the date of application for security.

77. The court must consider the interests of both parties, the interests of a plaintiff in continuing the litigation, and the interest of a defendant having successfully defended an action by a corporate plaintiff not to be without recourse to satisfy a costs award. That security for costs would be awarded against a corporate plaintiff is recognised in the statute and is derived in part from the limited liability of corporate plaintiffs and must be seen as a legislative response to the need to afford litigation fairness to all parties concerned.

78. Having regard to the factors identified in this judgment, the quantum of the plaintiff's claim, the fact that the plaintiff has very substantial liabilities, and that the claim is fully defended, I consider that the justice of the case requires that the plaintiff do furnish some security for the costs of the first and second defendants.

79. The likely costs have now been estimated at €330,000 plus VAT. I purpose disregarding the VAT amount having regard to the decision of Clarke J. in *Harlequin Property (SVG) Limited v. O'Halloran* [2012] IEHC 13, [2013] ILRM 124, as the defendants are registered for VAT, and would in those circumstances be in a position to recover the VAT paid on their own costs. Having regard to the delay, albeit not culpable delay, and having regard to the fact that I consider that the delay was reasonable in the circumstances, although not wholly so, I consider that the correct approach is to direct that the plaintiff should furnish security for costs in the sum of €200,000, such sum to reflect the expenditure by the plaintiff of the sum of approximately €100,000 in the proceedings since they commenced, and noting too these costs would probably have been incurred by the plaintiff once it had made a decision to litigate, and that some of the costs must have been incurred in the now discontinued action against the third defendant.

80. In those circumstances I propose to make an order pursuant to s. 52 of the Act that the plaintiff do provide security for costs in the sum of €200,000 in respect of the costs of the first and second named defendants jointly, and I will hear counsel as to the means by which the security is to be provided.