**THE HIGH COURT**

**COMMERCIAL**

**[2017 No. 1366 P]**

**BETWEEN**

**COOLBROOK DEVELOPMENTS LIMITED**

**PLAINTIFF/APPLICANT**

**AND**

**LINGTON DEVELOPMENT LIMITED AND**

**DAVY TARGET INVESTMENTS PLC**

**DEFENDANT/RESPONDENT**

**JUDGMENT of Mr. Justice David Barniville delivered on the 15th day of November, 2018**

**Introduction**

1. This is my judgment on applications brought by both defendants, Lington Development Ltd ("Lington") and Davy Target Investments plc ("DTI") for orders for security for costs against the plaintiff, Coolbrook Developments Ltd ("Coolbrook") pursuant to s. 52 of the Companies Act, 2014 (the "2014 Act"). While the notices of motion also seek orders pursuant to O. 29 of the RSC, the defendants confined their applications to s. 52. By separate applications, Lington and DTI seek orders directing Coolbrook to provide security for their costs, orders determining the form and amount of the security for costs to be provided and orders staying the proceedings until the security for costs has been provided by Coolbrook.

2. The authorities establish that an applicant seeking an order for security for costs pursuant to s. 52 of the 2014 Act must establish:-

> (1) a *prima facie* defence to the claim of the plaintiff company; and
>
> (2) that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendant, if successful in its defence.

3. If those two tests are satisfied by the applicant for security for costs, the authorities establish that the court ought to direct that security for costs be provided unless the plaintiff company can show that there are special circumstances why an order for such security should not be made. If the court decides that an order for security for costs should be made, an issue often arises as to the amount of such security.

4. In these applications, Coolbrook has conceded that Lington and DTI have each established a *prima facie* defence to its claim. Coolbrook does not, however, accept that Lington and DTI have established that there is reason to believe that it will be unable to pay their costs if they are successful in the proceedings. Therefore, Coolbrook contends that no order for security for costs should be made. Coolbrook does not seek to rely on the existence of any "*special circumstance*" in order to persuade the court to exercise its discretion not to direct it to provide security for costs.

5. In the event that the court decides to direct Coolbrook to provide security for costs, Lington and DTI contend that the amount of the security to be provided should be in accordance with the estimates which legal costs accountants for Lington and DTI have put before the court as representing the likely costs of the defendants in defending the proceedings.

6. Coolbrook has offered to lodge a sum of €250,000 in an escrow account held in the name of its solicitors pending the determination of the proceedings, which it submits constitutes the appropriate amount of security which it should be required to provide, in the event that the court decides to make orders for security for costs against it. Coolbrook submits that that amount represents roughly one third of the likely costs which may be incurred by Lington and DTI in defending the proceedings.

7. Lington and DTI have raised various issues in relation to this offer. They contend that the court has a discretion under s. 52 of the 2014 Act to direct full security and that the court is not bound by, and should not follow, any rule or practice which may indicate that the amount of security for costs to be provided should be in the region of one third of the total likely costs to be incurred in the defence of the proceedings. Coolbrook, on the other hand, supports the application of the so-called "*one third rule*" or "*practice*".

8. The essential issues, therefore, to be decided on these applications are:-

> (1) whether Lington and DTI have established that there is reason to believe that Coolbrook will not be in a position to pay their costs in the event that they are successful in the defence of the proceedings; and
>
> (2) if so, the amount which the court should direct Coolbrook to provide by way of security for costs.

9. While Coolbrook has accepted, solely for the purpose of these applications for security for costs, that Lington and DTI have established a *prima facie* defence to claims made by Coolbrook in the proceedings, it is nonetheless appropriate, in order properly to understand the circumstances in which these applications arise and in order properly to consider the respective positions of Lington and DTI, that I should set out briefly the claims being made by Coolbrook in the proceedings and the responses made by Lington and DTI to those claims.

**Background to the proceedings**

10. The proceedings arise from a dispute between Coolbrook, Lington and DTI concerning the sale by Lington to DTI of the 25% interest Lington held in a commercial property on Burlington Road, Dublin 4, known as the "Burlington Plaza" (the "Property") in February 2017. Prior to that sale, the Property was owned by the following companies in the following percentages:- Coolbrook (50%), Lington (25%) and another company, Percy Nominees Ltd ("Percy") (25%). Percy's 25% interest in the Property was acquired by Coolbrook in March 2017. As a consequence of that acquisition, Coolbrook now owns a 75% interest in the Property. The sale by

Lington to DTI of its 25% interest in February 2017 is challenged in the proceedings.

**The claims in the proceedings**

11. The proceedings commenced by a plenary summons which was issued by Coolbrook on 13th February, 2017. At that stage, the proceedings were brought against Lington only. DTI was joined as a co-defendant to the proceedings on 24th July, 2017. The plenary summons was then amended to reflect the joinder of DTI. A statement of claim was delivered by Coolbrook on 28th July, 2017. Thereafter, notices for particulars and replies to particulars were exchanged between the parties. Separate defences were delivered by Lington and DTI on 8th December, 2017. Lington and DTI are represented in the proceedings by different firms of solicitors and by different counsel.

12. Coolbrook alleges in the proceedings that the sale by Lington of its 25% interest in the Property to DTI in February 2017 was in breach of the provisions of an agreement dated 23rd February, 2011 which governed and regulated the relationship between the owners of the Property known as the Owners' Agreement (the "Owners' Agreement"). Coolbrook seeks to have that sale declared null and void and seeks an order rescinding or setting aside the sale. Specifically, Coolbrook contends that the sale was in breach of clause 6 of the Owners' Agreement which provides for what is to happen in circumstances where an owner wishes to transfer its interest in the Property. Coolbrook alleges that Lington failed to comply with the requirements provided for in clause 6. It alleges that in breach of the Owners' Agreement, Lington:-

> (a) failed to market its interest properly or at all;
>
> (b) in the alternative, failed to market its interest properly or at all with a view to securing an offer from any "*arm's length third party*";
>
> (c) in the further alternative, wrongfully sold its interest in the Property to a connected entity (DTI) rather than to an "*arm's length third party*" as required by clause 6 of the Owners' Agreement.

13. Coolbrook contends that Lington was not permitted to transfer its interest in the Property other than in accordance with the provisions of the Owners' Agreement and that its failure to comply with those provisions rendered the sale of its interest to DTI void and of no effect.

14. Coolbrook makes an alternative case against Lington. It says that Lington acted in breach of an express or implied term of the Owners' Agreement that required Lington:-

> (a) to allow Coolbrook to participate further in the sale process in respect of Lington's interest in the properties;
>
> (b) to allow Coolbrook to bid again for that interest,
>
> (c) to include Coolbrook as a recipient in any marketing of its interest during the transfer period provided for under clause 6,
>
> (d) to inform Coolbrook of the quantum of any offer made and
>
> (e) to inform Coolbrook of the identity of the person making such offer.

Alternatively, Coolbrook contends that Lington acted in breach of a duty to act in good faith towards Coolbrook (which duty is alleged to arise pursuant to clause 12.1 of the Owners' Agreement).

15. Coolbrook contends that the sale by Lington of its 25% interest in the Property to DTI was not a sale to an "*arm's length third party*" as required under clause 6 and that DTI is a company that was connected, directly or indirectly, to Lington or was a related company for various reasons. Coolbrook further contends that Lington acted in breach of the Owners' Agreement by wilfully concealing the identity of DTI from Coolbrook with a view to preventing Coolbrook from intervening to stop the sale.

16. Various other causes of action are asserted against Lington including alleged breach of confidence, alleged wrongful and unlawful combination or conspiracy with DTI to prevent Coolbrook from acquiring Lington's interest in the Property.

17. The case made by Coolbrook against DTI in the proceedings is that DTI wrongfully received confidential information in relation to an offer made by Coolbrook to acquire Lington's 25% interest in the Property in August 2016, that DTI wrongfully and unlawfully combined or conspired with Lington to prevent Coolbrook from acquiring Lington's 25% interest in the Property and that DTI, having actual or constructive notice of the provisions of the Owners' Agreement, wrongfully and unlawfully combined with Lington to prevent Coolbrook from exercising its rights and entitlements under that agreement.

18. Apart from seeking declaratory relief to the effect that the sale by Lington of its 25% interest in the Property to DTI was null and void and an order rescinding or setting aside that sale, Coolbrook seeks damages on various different grounds against Lington and DTI. As against Lington, it seeks damages for breach of contract. As against both Lington and DTI, Coolbrook seeks damages for breach of confidence, conspiracy and "*wrongful combination*" and for alleged wrongful interference with Coolbrook's contractual rights. As against DTI alone, Coolbrook seeks damages for unjust enrichment.

19. Full defences were delivered by Lington and DTI in response to the claims made by Lington in the proceedings. In addition, Lington and DTI explained the basis for their defences in affidavits sworn for the purpose of the applications for security for costs. It is not necessary to examine in any great detail the grounds of defence which are relied upon by Lington and DTI in light of Coolbrook's concession for the purposes of these applications that Lington and DTI each have a *prima facie* defence to the claims.

20. Briefly stated, however, Lington contends that it complied fully with the requirements of clause 6 of the Owners' Agreement and that there was no express or implied term of that agreement requiring Lington to market the sale of its interest in the Property to Coolbrook as alleged in the proceedings. It notes that while Coolbrook made an offer of €49,265,500 in August 2016 to purchase Lington's 25% interest in the Property, DTI had made an earlier higher offer (in July 2016) and another higher offer in January 2017 which was in the sum of €51,000,000 (plus an agreement to assume an additional cost of €900,000 in connection with the letting of a part of the Property to Amazon) and which Lington accepted. Lington rejects the contention that the sale of its interest to DTI was not an "*arm's length third party*" transaction for the purposes of clause 6 of the Owners' Agreement. Lington contends that DTI was not a connected or related party for various different reasons. Lington further denies any breach of an alleged duty of good faith or any alleged breach of confidence or unlawful combination or conspiracy.

21. DTI also rejects the claims made against it in the proceedings by Coolbrook. It contends that DTI and Lington are separate legal entities and are not related or connected as Coolbrook has alleged. DTI further rejects any alleged breach of confidence or unlawful combination or conspiracy.

22. It can be seen from this very brief account of the claims made by Coolbrook in the proceedings and the responses of Lington and DTI to those claims that the primary claim made by Coolbrook against Lington is for breach of the provisions of the Owners' Agreement together with certain additional claims of alleged breach of confidence and alleged unlawful combination and conspiracy. The case made by Coolbrook against DTI is a somewhat more limited claim. Since DTI was not a party to the Owners' Agreement, it is not alleged that DTI's purchase of Lington's interest amounted to a breach by DTI of the provisions of that agreement (although Coolbrook does allege against Lington and DTI a wrongful interference with Coolbrook's contractual rights). Rather, the main case made against DTI is that it acted in breach of confidence by receiving confidential information and that it unlawfully conspired or combined with Lington to damage Coolbrook and to prevent it from acquiring Lington's interest in the property.

**Requests for security for costs**

23. Owing to concerns which Lington and DTI had (and continue to have) in relation to the financial position of Coolbrook, both defendants corresponded with Coolbrook requesting security for costs.

24. DTI first corresponded with Coolbrook in relation to security for costs on 19th July, 2017, prior to its joinder as a co-defendant in the proceedings later that month. It sent further correspondence in August and September 2017 expressing its concern in relation to Coolbrook's financial position. Among the concerns raised on behalf of DTI in the correspondence at that stage was that it appeared from Coolbrook's abridged financial statements for the year end of 31st December, 2015 (the "2015 accounts") that, as of the end of December 2015, Coolbrook had assets of only €2.

25. Coolbrook's solicitors responded to the concerns raised by DTI in relation to Coolbrook's financial position in a letter dated 1st September, 2017. This is what they said:-

> *"As you know, our client, Coolbrook Developments Ltd, owns 75% of Burlington Plaza (the "Property") and receives 75% of the rent from same. You will of course be aware that this is an extremely valuable asset. While you state that you have reviewed the publicly available financial statements and that as at 31st December, 2015 Coolbrook appeared to have assets in the amount of €2, it is self-evident that circumstances have changed since then, more specifically since the plaintiff's loans have been assigned from NAMA and as the Percy Nominees Limited 25% stake in the Property was acquired by the Plaintiff.*
>
> *In the circumstances, it is clear that, while the Property is subject to a charge to the Plaintiff's lender, the Plaintiff owns a substantial asset with a significant income stream. In light of the foregoing, our client does not propose providing security for costs as sought by yours."*

26. DTI's solicitors corresponded further with Coolbrook's solicitors by letters dated 7th September, 2017, 25th September, 2017 and 23rd November, 2017. DTI noted in that correspondence that there were eight unsatisfied charges registered against Coolbrook in the Companies Registration Office (the "CRO"). DTI repeated its request for the provision of security for costs.

27. Lington sought Coolbrook's agreement to provide security for Lington's costs in a letter from Lington's solicitors dated 29th November, 2017. That letter also referred to the existence of eight unsatisfied charges registered against Coolbrook in the CRO and to the fact that Coolbrook's 2015 accounts indicated that Coolbrook had assets of only €2. The letter requested an explanation from Coolbrook, if it owned other assets and in particular, a 50% - 75% interest in the Property, why such asset does not appear on its balance sheet for the year end of 31st December, 2015. The letter further asserted that, if Coolbrook held such an interest in the Property, it appeared that such interest, and the rent derived from it, was fully charged and that, therefore, it appeared that Coolbrook would be unable to meet any award of costs against it. Security for costs was, therefore, requested.

**Applications for security for costs**

28. Coolbrook did not agree to provide the security for costs requested by Lington and DTI. In the circumstances, motions seeking orders for security for costs pursuant to s. 52 of the 2014 Act and for other consequential reliefs were issued by Lington and DTI on 13th December, 2017 and 11th December, 2017, respectively. Lington's application was grounded on an affidavit sworn by Robin Potter Cogan, a director of Lington, on 12th December, 2017. DTI's application was grounded on an affidavit sworn by David Goddard, a director of DTI, on 11th December, 2017.

29. As I explain in greater detail later in this judgment, those affidavits set out in some detail the basis upon which it was contended that:-

> (a) Lington and DTI had demonstrated that each had a *prima facie* defence to Coolbrook's claims;
>
> (b) there was reason to believe that Coolbrook would be unable to meet an award of costs in favour of Lington and DTI, in the event that they were successful in defending the proceedings; and
>
> (c) the amount of security which the court should require should be the amount put forward as the likely costs which Lington and DTI would each incur in defending the proceedings as set out in costs estimates provided by legal costs accountants retained by Lington and DTI.

30. A single replying affidavit was sworn by James Flynn, a director of Coolbrook, on 19th January, 2018 in response to both applications. In his affidavit, Mr. Flynn set out the basis on which it was contended that Coolbrook would be in a position to discharge the respective costs of Lington and DTI were they to successfully defend the proceedings. Mr. Flynn stated that Coolbrook was "*robustly solvent*". Mr. Flynn's affidavit sought to demonstrate that the rental income from the Property could, in certain circumstances, be made available to discharge any costs orders made against Coolbrook in the proceedings. Mr. Flynn further stated that Coolbrook was willing to lodge the sum of €250,000 in an escrow account held in the name of Coolbrook's solicitors pending the determination of the action and that this sum constituted an appropriate amount of security.

31. Further affidavits were sworn by Mr. Potter Cogan on behalf of Lington on 31st January, 2018 and by Mr. Goddard on behalf of DTI on 2nd February, 2018. In those affidavits, Mr. Potter Cogan and Mr. Goddard continued to express concern in relation to Coolbrook's financial position and its ability to meet any order for costs made in favour of Lington and DTI, if successful in their defence of the proceedings. Both deponents took issue with Mr. Flynn's affidavit and alleged that Mr. Flynn had provided no support for his contention that Coolbrook would be in a position to meet orders for costs in favour of Lington and DTI. They also rejected as

being insufficient the offer on behalf of Coolbrook to lodge the sum of €250,000 in an escrow account.

32. The affidavits rested with the supplemental affidavits of Mr. Potter Cogan and Mr. Goddard. The applications for security for costs were listed for hearing on 12th April, 2018. Written submissions were then exchanged by the parties. Written submissions on behalf of Lington and DTI were furnished on 14th February, 2018. Coolbrook's written submission were furnished on 9th March, 2018.

**Correspondence before the hearings**

33. Following receipt of Coolbrook's written submissions, DTI's solicitors wrote to Coolbrook's solicitors on 21st March, 2018. In that letter, they referred to para. 4 of Coolbrook's written submissions in which it was submitted by Coolbrook that Lington and DTI had failed to show that Coolbrook would be unable to pay their costs on the basis that Mr. Flynn's affidavit:-

> *"positively avers at para. 20 that the annual rent roll of €5.7 million that Coolbrook collects from 4, 6 and 8 Burlington Road ("the Property") is available to Coolbrook to meet any liability for costs in the event that the defendants succeed in defence."* (para. 4 of Coolbrook's written submissions)

34. The letter of 21st March, 2018 noted that Coolbrook's submissions did not address Mr. Flynn's acknowledgment (also at para. 20 of his affidavit) that Coolbrook's interest in the Property was (and is) secured in favour of Dengrove DAC ("Dengrove") and that the availability of any rental income to discharge the costs of Lington and DTI was "*subject to Dengrove's consent (as lender) at the appropriate time."* The letter then requested Coolbrook "*to confirm whether the funds from the above mentioned rent roll are in fact not available to it for purpose of satisfying a costs order in the Proceedings without the express consent of Dengrove DAC (which consent has not been sought or given)."* The letter indicated that, in the absence of a timely response, DTI intended serving a notice to cross-examine Mr. Flynn. There was no response to that letter.

35. However, the morning of the hearing of the applications for security for costs on 12th April, 2018, Mr. Flynn swore a supplemental affidavit. That affidavit was sworn for the purposes of exhibiting a letter received from Beauchamps, Dengrove's solicitors dated 11th April, 2018 (the "Beauchamps' letter"). While formally objecting to the late production of Mr. Flynn's supplemental affidavit and the Beauchamps' letter exhibited to it, counsel for Lington and DTI were in a position to make submissions in relation to the contents of the Beauchamps' letter. I have therefore, decided that I can consider the terms of that letter in adjudicating upon these applications for security for costs.

36. The Beauchamps' letter commenced by referring to "*your client's letter of even date*". No such letter from Coolbrook or its solicitors was exhibited by Mr. Flynn or otherwise provided by Coolbrook to Lington and DTI or to the court. The Beauchamps' letter went on to note that Coolbrook's proceedings against Lington and DTI "*could well add significant value to Coolbrook…*" (something apparently stated in the "letter of even date" which was not exhibited or otherwise provided) and to state that Coolbrook's "interests in the Property … *are fully charged and secured to Dengrove…*". The Beauchamps' letter then stated:-

> *"On that basis, we confirm that Dengrove would be willing to release its security over such portion of the rent collected by Coolbrook in relation to the Property on the following terms:-*
>
> *1. the Proceedings and any related appeals are conclusively determined; and*
>
> *2. there is a conclusively determined costs order in the Proceedings against Coolbrook…; and*
>
> *3. that any sum or sums to be released are released only from the rent collected by Coolbrook in relation to the Property and there will be no new advances made by Dengrove; and*
>
> *4. this letter is without prejudice to and shall not constitute a waiver of any other rights or remedies which Dengrove may have including, without limitation, in respect of sums payable by Coolbrook on any account whatsoever, including without limitation under the loans and security between Coolbrook and Dengrove or any other document from time to time."*

37. As noted earlier, all of the parties have advanced submissions on the basis of the Beauchamps' letter. Coolbrook submits that it supports its contention that orders for security for costs should not be made on the basis that the Beauchamps' letter demonstrates that Coolbrook would be in a position to meet any order for costs in favour of Lington and DTI, in the event that they are successful in the proceedings. Lington and DTI contend that the Beauchamps' letter supports their case that Coolbrook would be unable to meet any order for costs in that Coolbrook's interests in the Property are "*fully charged and secured"* to Dengrove and that in the Beauchamps' letter Dengrove was expressing a willingness to release its security over a portion of the rent on highly conditional terms and was not agreeing or undertaking to do so in any binding form which could be enforced by Lington and DTI. They submit, therefore, that the Beauchamps' letter demonstrates that Coolbrook is entirely beholden to Dengrove, which, of course, is not a party to the proceedings.

38. It is against that background that I will consider the legal test which I must apply in deciding these applications for security for costs and the particular aspects of that test which remain in issue between the parties to these applications. In that context, I will refer to the relevant aspects of the evidence as it appears from the various affidavits and exhibits which I referred to earlier in this judgment.

**Statutory basis for applications for security: applicable test**

39. The applications by Lington and DTI for security for costs are brought pursuant to the provision of s. 52 of the 2014 Act. This section replaced s. 390 of the Companies Act, 1963 (the "1963 Act"). Section 52 provides as follows:-

> *"Where a company is a 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."*

40. Section 52 of the 2014 Act is identical to s. 390 of the 1963 Act save in one respect. Section 390 required the giving of "*sufficient*" security whereas s. 52 of the 2014 Act merely refers to the requirement to give security, with no requirement that such security be "*sufficient*". The significance of the omission of the word "*sufficient*" is considered later in this judgment. This issue is relevant to the question of the amount of security which may be ordered, in the event that I were disposed to direct Coolbrook to provide security for costs to Lington and DTI. I will, therefore, consider it in that context.

41. The parties were agreed that the appropriate test for determining whether an order for security for costs should be made under s. 390 of the 1963 Act and now under s. 52 of the 2014 Act is that set out by Clarke J. in the Supreme Court *Usk and District Residents Association v. Environmental Protection Agency* [2006] IESC 1 ("*Usk*"). In his judgment in the Supreme Court in that case, Clarke J. approved and summarised the test for security for costs against a corporate plaintiff under the relevant statutory provision (which was then s.390 of the 1963 Act) which had been set out by Morris P. in *Inter Finance Group Ltd v. KPMG Peat Marwick [*1998] IEHC 217 . Clarke J. described the test as follows:-

> *"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 which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus vests upon the party resisting the order."* (per Clarke J. at para. 6.2).

That summary of the test which applies was also applied by Clarke J. (in the High Court) in *Connaughton Road Construction Ltd v. Laing O'Rourke (Ireland) Limited* [2009] IEHC 7 ("*Connaughton Road*") and in several other cases.

42. The onus, therefore, rests on Lington and DTI to establish that they have a *prima facie* defence to Coolbrook's claim and that Coolbrook will be unable to pay the costs of Lington and DTI in the event that they are successful in defending the proceedings. As noted earlier, Coolbrook accepts solely for the purpose of these applications for security for costs that Lington and DTI each has a *prima facie* defence to its claim. The onus remains, however, on Lington and DTI to demonstrate (in accordance with the statutory test now contained in s. 52 of the 2014 Act) that Coolbrook will be unable to pay their costs in the event that they are successful in defending the proceedings.

43. As is clear from the summary of the test set out by Clarke J. in the Supreme Court in Usk (and in the High Court in *Connaughton Road*), in the event that Lington and DTI discharge that onus, security for costs ought to be required unless there are "*specific*" or "*special*" circumstances which would persuade the court to exercise its discretion not to require security for costs to be provided. The onus of establishing such "*specific*" or "*special*" circumstances would rest on Coolbrook. However, Coolbrook does not assert the existence of any such circumstances in the present case. The question of "*specific*" or "*special*" circumstances, therefore, does not arise on these applications.

44. The issues, therefore, which do arise and require to be determined are:-

> (1) Whether Lington and DTI have discharged the onus of establishing to the appropriate statutory standard that Coolbrook will be unable to pay their costs if successful in defending the proceedings; and
>
> (2) If so, and security for costs is ordered in favour of Lington and DTI, the level or amount of such security which should be directed by the court to be provided.

45. I will deal with each of those issues in turn. When doing so, I will address various legal issues and principles which arise for consideration in determining those issues.

**Alleged inability of Coolbrook to pay Lington's and DTI's costs**

46. Lington and DTI contend that, on the basis of the evidence they put before the court on these applications, it is clear that Coolbrook will not be in a position to pay their costs, in the event that they are successful in defending the proceedings. Lington has provided evidence of its probable costs from Behan & Associates, legal costs accountants ("Behans"). Those costs are estimated at €400,828.00 (exclusive of VAT). DTI has provided an estimate of its probable party and party costs of defending the claim from Cyril O'Neill, legal costs accountant ("O'Neills"). DTI's estimated costs are put at €693,292.95 (which is a VAT inclusive figure). While it is a little difficult to follow from the estimate provided what the VAT exclusive amount is, it appears that the figure excluding VAT is in the region of €550,000. Lington and DTI submit that on the evidence before the court, Coolbrook is not in the position to pay either or both of those sums by way of costs.

47. Coolbrook says, at paras. 14 and 15 of Mr. Flynn's affidavit of 19th January, 2017 that it will be in a position to discharge the costs of Lington and DTI. At para. 14 of that affidavit, Mr. Flynn expressly asserts that:-

> *"Coolbrook will be in a position to discharge their respective costs."*

At para. 15 of the affidavit, Mr. Flynn refers to the disparity between the figure for estimated costs provided by Lington and that provided by DTI but then states:-

> *"However, I say and believe that this disparity is somewhat academic as Coolbrook is in a position to pay these estimated costs."*

48. It is necessary first to consider the standard by which the evidence must be assessed in determining whether an applicant for security for costs has discharged the onus upon it of showing that the plaintiff company would be unable to pay the applicant's costs if it is successful in defending the proceedings. It is then necessary to consider the evidence as it appears from the affidavits before the court by reference to that standard.

49. Section 52 of the 2014 Act requires an applicant for security to show that there is "*reason to believe*" that the company will be unable to pay the costs of the applicant if successful in its defence of the proceedings. The section requires that this be done by "*credible testimony*". That was also the test under s. 390 of the 1963 Act. It was considered in that context by the Supreme Court in *IBB Internet Services Ltd v. Motorola Ltd* [2013] IESC 53 ("IBB"). In delivering the judgment of the Supreme Court in that case, Clarke J. first considered the meaning to be given to the term "*credible testimony*". He held that those words did not add anything to the section. He stated:-

> *"If a court is required to be satisfied of something or to consider that there is a prima facie case for something or the like, then a court will, of course, only be able to form that view on the basis of testimony which the court finds to be*

*credible*." (per Clarke J. at para. 5.1, p.12).

50. Clarke J. went on to consider the real question which was "*what must appear to the court to be the case as a result of that credible testimony"*? He noted that the court must first consider whether there is "*reason to believe*" that the company will be unable to pay the defendant's costs. In considering how that question is to be approached by the court, Clarke J. referred to the interpretation given to almost identical wording in the relevant English provisions (Rule 25.13(2)(c) of the Civil Procedure Rules) by the Court of Appeal of England and Wales in *Jirehouse Capital & anor. v. Beller & anor.* [2009] 1 WLR 751 ("*Jirehouse*"). In her judgment in that case, Arden L J. commented, with regard to the appropriate standard to be applied, as follows:-

> *"I do not accept the argument…that the test of 'reason to believe' must be elevated to a test of balance of probabilities simply because the matter to which the test relates is something which… must be established and not simply identified as a possibility."* (per Arden L J. at para. 29).

51. Clarke J. was satisfied that the reasoning in *Jirehouse* represented an appropriate approach to the proper interpretation of s. 390 of the 1963 Act. He continued:-

> "*It must, of course, be taken into account that the court, in considering inability to pay costs, is, in a sense, predicting a future uncertain event. The question which must be considered concerns the ability of the corporate plaintiff to pay costs at the time when the proceedings have failed. That involves not only a consideration of the relevant plaintiff's current ability to meet an order for costs but also any likely change in that ability brought about by the passage of time and, of course, predicated on the failure of the proceedings*." (per Clarke J. at para. 5.8, p.15).

52. Clarke J. concluded that the balance of probabilities test would not be appropriate for the assessment of future uncertain or hypothetical events such as the precise position that a company may find itself in at a time when it might, hypothetically, be called upon to pay the costs of unsuccessful proceedings. He ended on this point by stating as follows:-

> *"All of this goes to show that an assessment of the ability of a company to pay costs after a loss of proceedings occurring at some future date involves a whole range of estimates and hypotheses which, in my view, would render attempting to reach an assessment on the balance of probabilities inappropriate in any event. For that reason, it seems to me that use of the term 'reason to believe' is appropriate. It is for that reason that I agree with the analysis in Jirehouse which suggests that 'reason to believe' differs from a matter being established on the 'balance of probabilities'. Indeed, I would go further and suggest that a test of 'balance of probabilities' would be inherently inappropriate to an assessment of a hypothetical future event redolent with estimates. As was pointed out in Jirehouse the fact that there must be reason to believe that the company 'will' be unable to pay necessarily implies that what must be established is something a lot stronger than a mere risk. The phrase 'reason to believe' should not be further defined, again for the reasons set out in Jirehouse, to avoid the risk of changing the test. While it does not require the court to assess the matter on the balance of probabilities, it does require the court to consider all material evidence and reach an assessment of the range of likely eventualities and thereby determine whether there truly is 'reason to believe' that the company 'will' be unable to pay costs should it lose. That requires that the evidence satisfy the court that there is something significantly greater than a mere risk of such an eventuality occurring."* (per Clarke J. at para. 5.16, pp.18-19).

53. The test, as so described by Clarke J. in *IBB*, was referred to and applied by Finlay Geoghegan J. who delivered the judgment of the Court of Appeal in *Flannery and Lexington Services Ltd v. Walters & Ors* [2015] IECA 147 ("*Flannery*") (at para. 20, pp. 8-9).

54. Therefore, while the court does not assess the evidence before it on the question of the alleged inability of the company to pay the defendant's costs on the balance of probabilities, the court is required to consider all of the material evidence and to reach an assessment of the range of likely eventualities in the case and thereby to determine whether it is truly the case that there is "*reason to believe*" that the company "*will*" be unable to pay the costs of the defendant should it successfully defend the proceedings. The evidence must satisfy the court that there is "*significantly greater than a mere risk"* of that eventuality arising (see *IBB*, per Clarke J. at para. 5.16, p.19).

55. That, therefore, is the approach which I must take in assessing the evidence. As to how that test is to be applied in a practical sense, the observations of Murphy J. in the High Court in *Bula Ltd (In Receivership) v. Tara Mines (No.3)* [1987] I.R. 494 ("*Bula (No.3)*") are particularly apposite. In considering the evidence put forward in that case to demonstrate that Bula Ltd would be unable to meet an order for costs in favour of the defendants, Murphy J. stated:-

> *"However, I do not think it is necessary for me to enter into a detailed analysis of the assets and liabilities of Bula Limited. All that the section requires is that it should appear by credible testimony 'that there is reason to believe that the company would be unable to pay the costs of the defendant if successful in his defence.' The defendants believe that to be the position and the fact that the company's bankers have been pressing unsuccessfully for some five years to procure payment of the monies due to them must surely justify the pessimistic views of the defendants*." (per Murphy J. at p.498).

56. Finlay Geoghegan J. referred to this approach in the course of her judgment in the Court of Appeal in *Flannery* and it was agreed by the parties in that case that that was the approach which the court had to take in considering the evidence put before it on the application for security for costs. On the facts of that case, the High Court had based its conclusion that there was no reason to believe that the plaintiffs would be unable to pay the defendants' costs on the fact that the relevant company's financial statements showed a positive net asset position and had expressed the view that that was the most relevant consideration in assessing the company's ability to meet a costs order. It was submitted by the defendants in that case on the appeal that the court should have considered not just the net asset position but whether, on all of the evidence before the court, there was reason to believe that the company would be unable to pay the costs of the defendants, if they were successful in defending the proceedings. The Court of Appeal concluded that the High Court was in error in considering only the net asset position disclosed in the financial statements. Finlay Geoghegan J. held that, even in the absence of expert evidence, the company's financial statements required explanation and there were uncertainties in those statements relating to the company's ability to meet the defendants' costs. She concluded that without further explanation the financial statements disclosed a significant risk that the company would not be able to meet such costs. Finlay Geoghegan J. held that the court is required to consider all of the material before it and that, on the evidence before the High Court, there was reason to believe that the company would not be able to meet the defendants' costs having regard to a number of matters which emerged from the relevant financial statements. In those circumstances, the Court of Appeal reversed the High Court and directed that the plaintiffs provide security for costs (by way of an analogous application of s. 390 of the 1963 Act).

57. The authorities do, however, demonstrate that while the court must consider all of the relevant evidence before it, the accounts of the company at issue are particularly relevant to the court's assessment as to whether the company would be unable to pay the defendant's costs of successfully defending the proceedings. This can be seen, for example, in the decision of the High Court (Binchy J.) in H*edgecroft Ltd t/a Beary Capital Partners v. HTREMFTA Ltd & Ors* [2017] IEHC 275 ("*Hedgecroft*") where Binchy J. noted that the last audited accounts of the company concerned showed a very small surplus of assets and the accounts for the previous three years showed a negative asset position. Further, no more recent accounts had been prepared and no indication had been given (whether in the accounts or otherwise) of the value of work in progress being undertaken by the relevant company. There was, however, cash in the bank as of a particular date but the court was satisfied that that proved very little in circumstances where an audit had not been carried out in respect of the affairs of the company.

58. The accounts of the relevant company were also considered by the High Court (Barrett J.) in *Fides Capital Ltd v. Alchemy Projects Ltd* [2017] IEHC 266 ("Fides") to be particularly relevant to the question of whether the company would be unable to pay the defendant's costs of successfully defending the proceedings. Barrett J. found that there was nothing in the plaintiff company's most recently publicly filed financial statements to suggest that it would be able to meet the defendant's costs of defending the proceedings. He noted that having regard to the latest filed accounts of the plaintiff company, it was evident that the company did not have the funds to pay the likely costs of the defendant of successfully defending the proceedings. He further noted that, while there was a time gap between the date of the application and the date up to which the company's latest filed accounts related, there was no evidence of any significant positive change in the company's fortunes since the latest accounts were filed (see para. 7 of the judgment of Barrett J. p.4).

59. It is also necessary at this point to refer to an additional principle of law which must be applied in assessing the evidence on the issue of the alleged inability of a company to pay the defendant's costs of successfully defending the proceedings which emerges from the case law. The principle is this. Where the evidence available to the court discloses circumstances in relation to the financial position of the company which calls for an explanation and where the company does not put that explanation and evidence supporting it before the court, the court should not resolve the uncertainty or fill the gap in favour of the company which could have provided the relevant explanation. This principle emerges from the decisions of Clarke J. in the High Court in *Parolen Ltd v. Doherty & Anor* [2010] IEHC 71 ("*Parolen*") and *James Elliott Construction Ltd v. Irish Asphalt Ltd* [2010] IEHC 234 ("*James Elliott*").

60. The principle was explained by Clarke J. in the High Court in *James Elliott* as follows:-

> *"I should also take into account, for reasons similar to those which I identified in Parolen Ltd v. Doherty & Anor [2010] IEHC 71, the fact that Elliott Construction has not chosen to put any more up to date figures before the court. It must, of course, be noted that in Parolen the last published statutory accounts of the company in question (which were before the court) showed an asset deficit. Against that fact, the relevant plaintiff argued that it had been able to meet its debts as they fell due and was, therefore, solvent. The principal focus in Parolen lay in the fact that a company might be solvent, in the sense that it can meets it debts as they fall due, but might not necessarily (in the absence of an explanation for that fact and the presence of an asset deficit which is consistent with there being monies available to meet costs in the event that the proceedings should fail), be able to meet costs should it lose. This case is, of course, very different in that the last published statutory accounts of Elliott Construction show a very significant surplus rather than the deficit which appeared in the relevant accounts in Parolen. Nonetheless the general point made in Parolen is of some relevance. 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."* (per Clarke J. at para. 5.2, p. 9-10).

61. This principle and the approach referred to by Clarke J. in James Elliott was approved and applied by the Court of Appeal in *Flannery*. Having referred in her judgment to the approach (at para. 12), Finlay Geoghegan J. then applied that approach at para. 24 of her judgment. She noted that certain of the statements contained in the relevant accounts of the company at issue required explanation in accordance with the principle identified by Clarke J. in *James Elliot* but no such explanation had been provided. Therefore, she concluded as follows:-

> *"In accordance with the judgment in James Elliott… any uncertainties in the financial statements relating to the ability of [the company] to meet the costs of the defendants if successful should not be resolved in favour of [the company]."* (per Finlay Geoghegan J. at para. 24, pp. 10-11).

62. Summarising the principles to be derived from the cases to which I have just referred, the position is as follows:-

63. First, the onus rests on the applicant for security for costs (in this case Lington and DTI) to persuade the court that there is "*reason to believe*" that the company, the subject of the application, will be unable to pay the costs of the defendant, if successful in its defence.

64. Second, the standard by which this inability has to be established is not the balance of probabilities as this would be inherently inappropriate for an assessment of a hypothetical future event which is full of estimates and uncertainties. However, as the requirement in s. 52 of the 2014 Act is to establish that there is reason to believe that the company "*will*" be unable to meet a costs order in favour of the defendant, something a lot stronger than a "*mere risk*" of this event happening must be established.

65. Third, the court must consider the issue on the basis of all of the material evidence and such evidence may emanate from both sides of the application. The evidence must be credible.

66. Fourth, while the accounts or financial statements of the company are very relevant to the issue which the court has to determine at this stage of the security for costs application and may afford a basis for deciding the application one way or the other, they are not necessarily determinative of the application. The accounts may disclose a positive net asset position and yet may raise other questions or issues requiring an explanation from the company. Depending on how those questions are explained or answered, the court may conclude that the true financial position of the company is very different to the financial position as it may appear in the accounts or financial statements. For example, a positive net asset position in the accounts may nonetheless, because of other questions raised by the accounts, not be sufficient to defeat the application for security for costs.

67. Fifth, it is material to the court's consideration of this issue to determine how up to date the accounts or financial statements provided actually are. It will be difficult for the court to rely on accounts or financial statements which are out of date in favour of the company against which the application for security is brought. Where they are out of date then it is for the company to explain why that is so and why a negative financial position disclosed in those out of date accounts does not represent the current and true financial position of the company as of the date of the application.

68. Sixth, where there are gaps or uncertainties in the accounts or in the evidence available to the court which could be filled or answered by the company resisting the application and where the company does not fill those gaps or answer those uncertainties, the court will lean against filling the unexplained gaps or resolving the uncertainties in a manner favourable to the company.

69. Applying those principles to the evidence adduced in these applications for security for costs, I am satisfied that Lington and DTI have clearly discharged the onus of establishing that there is reason to believe that Coolbrook will be unable to pay the costs of Lington and DTI, if successful in their defence of the proceedings. I have reached that conclusion for the following several reasons.

70. First, the most recent published financial statements available in respect of Coolbrook, being the abridged financial statements for the year end 31st December, 2016 (the "2016 accounts"), disclose that Coolbrook has net current assets of just €2. The notes to the accounts disclose that the €2 of net current assets is represented by "*other debtors*" who are not identified. The financial position of Coolbrook disclosed in the 2016 accounts is identical to that disclosed 2015 accounts. The 2015 and 2016 accounts were put before the court by Lington and DTI and not by Coolbrook. This is surprising as Mr. Flynn, who swore his first affidavit on behalf of Coolbrook in response to the applications for security for costs on 19th January, 2018, was one of the two signatories of the accounts for both years. The evidence establishes that Mr. Flynn signed the 2016 accounts on 16th December, 2017, a little more than one month before he swore his first affidavit on behalf of Coolbrook on 19th January, 2018. There is no dispute on the evidence, therefore, that Coolbrook's net current assets are just €2.

71. Second, no more recent accounts or other financial statements were put before the court by Coolbrook showing any change of a positive nature in Coolbrook's net asset position and none was outlined or explained by Mr. Flynn on behalf of Coolbrook in the affidavits which he swore in response to the applications for security for costs. Notwithstanding this, Mr. Flynn asserted (at paras. 14 and 15 of his first affidavit) that Coolbrook "*will be in a position to discharge*" the costs of Lington and DTI (para. 14) and that Coolbrook "*is in a position to pay*" the estimated costs put forward by Lington and DTI (para. 15). Those assertions are rather optimistic in light of the totality of the evidence available to the court on these applications.

72. Third, the 2015 and 2016 accounts do not disclose any income or revenue stream whatsoever for Coolbrook despite what was said in Coolbrook's solicitors' letter of 1st September, 2017. It does not appear from those accounts that Coolbrook has any income or revenue. The averments on affidavit on behalf of Lington to that effect were not disputed in the affidavits sworn on behalf of Coolbrook.

73. Fourth, the 2015 and 2016 accounts do not disclose the extent of Coolbrook's liabilities or indeed any liabilities. The evidence establishes that Coolbrook has very substantial liabilities to Dengrove. However, Coolbrook has not disclosed what the extent of those liabilities are. The evidence further establishes (and it is not in dispute) that Coolbrook's loans were among a portfolio of loans acquired by NAMA which were in turn acquired from NAMA by a Colony Capital entity as part of a loan portfolio (the Project Tolka Loan Portfolio) and are now held by Dengrove (an entity connected to, or otherwise associated with, Colony) (see para. 28 of the affidavit sworn by Mr. Goddard on behalf of DTI on 11th December, 2017; para. 11 of the affidavit sworn by Mr. Potter Cogan on behalf of Lington on 12th December, 2017; the letter from Coolbrook's solicitors to DTI's solicitors dated 1st September, 2017 and para. 18 of Mr. Flynn's affidavit sworn on behalf of Coolbrook on 19th January, 2018). Coolbrook's liabilities on foot of its loans are clearly very substantial as not only do they appear to relate to Coolbrook's acquisition of its initial 50% interest in the Property but also to its subsequent acquisition of the 25% interest in the property formerly owned by Percy. Mr. Flynn explained (at para. 8 of his affidavit on 19th January, 2018) that Coolbrook acquired Percy's 25% interest on 31st March, 2017 for €61,250,000 (and, in addition, discharged stamp duty of approximately €1,225,000 as well as other transaction costs). While not expressly stated on affidavit, it is clear from the affidavit evidence before the court that Dengrove (or some related or connected entity) advanced the funds to Coolbrook to acquire Percy's 25% interest in the Property. That this is the case is evident from what Mr. Flynn stated at paras. 8,19 and 20 of his affidavit of 19th January, 2018 where Mr. Flynn explained that (a) Coolbrook has a 75% interest in the Property (having acquired Percy's 25%), (b) Coolbrook "*collects*" 75% of the rental income received from the Property of in the region of €5.7 million per annum and (c) Coolbrook's interest in the Property is secured to Dengrove. It is also clear from the Beauchamp's letter where it was stated that Coolbrook's interests in the property are "*fully charged and secured*" in favour of Dengrove. While Coolbrook's liabilities to Dengrove are obviously very substantial indeed, Coolbrook has not stated what those liabilities are or provided any evidence from which they could be accurately or even roughly calculated. Nor are they referred to in the 2015 or 2016 accounts.

74. Mr. Flynn stated at para. 18 of his affidavit of 19th January, 2018 that Coolbrook's "*actual exposure to Dengrove is a matter of commercial sensitivity*" and that he is concerned that the applications for security for costs by Lington and DTI "*are an attempt to procure sensitive commercial information from Coolbrook*". However, the failure by Coolbrook to provide that information to the court creates yet another unexplained gap which it was open to Coolbrook to explain and fill. The court should lean against filling such an unexplained gap in a manner favourable to Coolbrook which could have provided the relevant explanation and information.

75. Fifth, a search in the CRO discloses that there are eight unsatisfied charges registered in respect of Coolbrook, with six of those charges being registered in favour of Dengrove (three of them created on 31st March, 2017). Mr. Flynn asserted (at para. 17 of his affidavit of 19th January, 2018) that of the other two charges, one (in favour Anglo Irish Bank Corporation plc ("Anglo")) was in respect of a property in Sandyford which has since been sold and the charge released and the other is a non-recourse charge in favour of Ulster Bank Ireland Ltd which arose in the particular context of Coolbrook selling its interest in the property in Sandyford. Mr. Flynn further stated in that paragraph of his affidavit that Coolbrook is currently in the process of arranging for a satisfaction of the charge in favour of Anglo to be filed in the CRO. However, the averments made by Mr. Flynn amount to no more than mere assertions which are not supported by any documentary evidence. Even assuming that those two charges are or will be satisfied or do not give rise to any liability on the part of Coolbrook, there remain six unsatisfied charges in favour of Dengrove. What does Coolbrook have to say about those? Mr. Flynn (at para. 18 of his affidavit of 19th January, 2018) stated that Coolbrook "*continues to enjoy a positive working relationship with Dengrove*". However, the existence of such relationship can afford little comfort to Lington and DTI and most certainly does not provide any evidential basis from which it could be concluded that Coolbrook will be in a position to pay the costs of Lington and DTI in the event that they are successful in defending the proceedings. Nor can the court fill in the gaps in terms of the relationship between Coolbrook and Dengrove which have been created by virtue of the failure by Coolbrook to provide full details of that relationship in the response to these applications.

76. Sixth, Mr. Flynn's assertion (in para. 20 of his affidavit of 19th January, 2018) in relation to the potential availability of rental income from the Property to meet the estimated costs of Lington and DTI is highly qualified and conditional in its terms and is entirely dependent upon Dengrove's consent. While noting that Coolbrook's interest in the Property is secured to Dengrove, Mr. Flynn's stated that "*subject to Dengrove's consent (as lender) at the appropriate time*" the rental income arising from the Property (which Coolbrook "*collects*") "*could be deployed*" to discharge a costs order in favour of Lington and DTI. The use of the word "*could*" is significant and indicates the qualified nature of Mr. Flynn's assertion. As is the fact that any potential availability of the rental income is entirely subject to Dengrove's consent. The assertion then made by Mr. Flynn (also at para. 20 of that affidavit) to the effect that those rents "*are available*" to Coolbrook to meet any liability Coolbrook may have on foot of costs orders in favour of Lington and DTI

is entirely unsupported by the averments made immediately earlier by Mr. Flynn in the same paragraph of his affidavit and is inconsistent with the true position as is evident from the affidavits. The rents are not actually available to Coolbrook to discharge any costs orders in favour of Lington and DTI. Any potential availability of those rents is highly qualified, conditional and restricted by virtue of what Mr. Flynn had sworn earlier in the same paragraph of his affidavit. Lington and DTI were rightly critical at the hearing of those averments contained in Mr. Flynn's affidavit. The suggestion that any of the rental income derived from the Property is available to Coolbrook to discharge costs order in favour of Lington and DTI is entirely unsupported by and is inconsistent with the totality of the evidence.

77. Seventh, Coolbrook then relies on the Beauchamps' letter in relation to the availability of the rental income in respect of costs orders in favour of Lington and DTI. However, that letter, which was provided on the morning of the hearing, is highly conditional, equivocal and ambiguous. It provides no comfort whatsoever to Lington and DTI in relation to the availability of the rental income for the payment of their costs. I have referred earlier to the fact that only part of the picture has been provided by Coolbrook in relation to the Beauchamps' letter and that the letter to which it was replying was not provided to Lington and DTI or to the court. However, leaving that gap aside, the confirmation provided is entirely insufficient to provide any degree of comfort to Lington and DTI or any basis on which the court could be satisfied that Coolbrook would be in a position to discharge a costs order in their favour. The Beauchamps' letter confirmed that Dengrove "*would be willing*" to release its security over a portion of the rent on certain terms which require the proceedings and any appeals to be "*conclusively determined*" and so on. However, Dengrove is obviously obliged to act in its own commercial interests and not in the commercial interests of other entities such as Lington and DTI. There would be nothing to stop Dengrove from changing its mind. The Beauchamps' letter contains no binding undertaking or other binding commitment by Dengrove on which Lington and DTI could rely in the event that they have to seek to recover costs on the successful defence of the proceedings. It was entirely within the control of Coolbrook (and indeed Dengrove) to put in place a binding contractual commitment or a binding undertaking which could be relied upon by Lington and DTI, if Coolbrook wished to rely on the availability of a portion of the rent for the payment of its costs. That was not done by Coolbrook (or by Dengrove). The Beauchamps' letter does not contain any such binding contractual commitment or undertaking. I am satisfied that it is appropriate, therefore, to approach very cautiously indeed the terms of the Beauchamps' letter in any consideration of the issue as to Coolbrook's ability to meet any costs order in favour of Lington and DTI.

78. Eighth, the financial information put before the court by Coolbrook in respect of these applications for security for costs is minimal in the extreme. While it is the case that the onus of proof rests on Lington and DTI to demonstrate that there is "*reason to believe*" that Coolbrook will be unable to pay their costs in the event that they successfully defend the proceedings, once Lington and DTI put credible evidence before the court that there is reason to so believe, it was incumbent upon Coolbrook to respond and to provide material in the form of credible evidence to refute that position. Coolbrook has not done so. One might have expected, for example, if they supported Coolbrook's position, that audited accounts or other financial information would have been provided. One might also have expected that a report of its auditor or of some other financial expert might have been furnished if it was going to be helpful to Coolbrook's position. None of that, however, was done. As explained earlier, the court is not in the position to fill that gap in the evidence on behalf of Coolbrook.

79. Ninth, Mr. Flynn's assertion (at para. 16 of his affidavit of 19th January, 2018) that Coolbrook is "*robustly solvent*" is entirely unsupported by the evidence he put before the court – such as the acquisition by Coolbrook in March 2017 of Percy's 25% interest in the Property and the possibility (in highly conditional and equivocal terms) that Dengrove might consent or be willing to consent to the release of a portion of the rent to go to the payment of the costs of Lington and DTI. However, the evidence is fundamentally inconsistent with Mr. Flynn's assertion in light of the very substantial but unquantified liabilities which Coolbrook has to Dengrove and the express acceptance that its interests in the Property are "*fully charged and secured*" in favour of Dengrove.

80. Tenth, the offer by Coolbrook to lodge the sum of €250,000 in an escrow account in the name of its solicitors pending the determination of the action is made in very unusual circumstances. No indication is given by Mr. Flynn as to the source of the €250,000. It is not at all evident from the 2015 and 2016 accounts how Coolbrook could provide such sum (or indeed any sum) from its own resources. Its interests in the Property are fully charged in favour of Dengrove. The only reasonable inference, therefore, from Mr. Flynn's affidavit and from the Beauchamps' letter is that Dengrove is prepared to provide this sum, or rather to allow the sum to be provided, from the rental income collected by Coolbrook in respect of the Property which is fully secured and charged in favour of Dengrove and that Coolbrook itself does not have the necessary funds. Therefore, the provision of the €250,000 for payment into the suggested escrow account is entirely dependent upon Dengrove providing it or agreeing for it to be provided from the rental income. Significantly, however, the offer to lodge the €250,000 is not referred to at all in the Beauchamps' letter and it is unclear, therefore, whether that sum could actually be provided for lodgement into the escrow account.

81. Eleventh, the total of the estimated costs of Lington and DTI (exclusive of VAT) is in the region of €950,000. There is no evidence at all before the court to suggest that Coolbrook could pay these costs or anything like them. On the contrary, the evidence establishes that Coolbrook will not be in a position to pay them. The assertions to the contrary made by Mr. Flynn at paras. 14 and 15 of his affidavit of 19th January, 2017 are not merely optimistic but, in my view, are not credible in light of all of the evidence.

82. For these reasons, I am satisfied on the basis of credible testimony that there is reason to believe that Coolbrook will be unable to pay the costs of Lington and DTI if successful in their defence of the proceedings. In those circumstances, orders for security for costs should be made in favour of Lington and DTI.

83. The next question to consider is the amount of the security for costs which should be directed. It is to that issue that I now turn.

**Amount of Security**

84. In approaching the determination as to the appropriate amount of security to be ordered, it is necessary again to refer to a number of cases in which the legal principles applicable to this part of the exercise have been considered. As of the date of the hearing of these applications, the parties could locate only one written judgment on the issue of the amount of security for costs required in the case of an order made under s. 52 of the 2014 Act. That was *Fides*. However, a few days after the hearing, another written judgment was delivered - by Baker J. in the High Court in *Werdna v. MD Insurance Services Limited t/a "Premier Guarantee"* [2018] IEHC 194 ("*Werdna*"). In *Werdna*, Baker J. touched on the issue of the approach to be taken to the amount of security to be provided under s. 52 of the 2014 Act. She also dealt with the relatively non-controversial issue of how VAT should be treated in determining that amount. *Werdna* did not alter or affect my view as to how these applications should be decided (as the parties did not have the opportunity of making submissions in relation to the case). However, for completeness, I do briefly make reference to the case later in the section of my judgment.

85. It is first relevant to bear in mind the objective of security for costs and in that context to consider the significance of costs orders in the Irish legal system. These questions were comprehensively addressed by the Supreme Court in *Farrell v. Governor and*

*Company of the Bank of Ireland & ors* [2012] IESC 42, [2013] 2 ILRM 183 ("*Farrell*"), where Clarke J. delivered the judgment of the court. Although that case concerned applications for security for costs under O. 58 of the RSC against a personal litigant in the context of appeals to the Supreme Court, the observations of Clarke J. on these two questions are of wider application, have relevance to applications for security for costs under s. 52 of the 2014 Act and are relevant to my determination as to the appropriate amount of security to be provided by Coolbrook in this case. I have sought to apply the Court's analysis of those issues in *Farrell* in my determination of the amount of security for costs which should be provided by Coolbrook.

86. The two relevant aspects of *Farrell* which are of particular relevance to these applications are, first, the balance which the Supreme Court stated is required to be achieved between the right of a defendant to recover costs on successfully defending the proceedings and the right of a plaintiff to have litigation fairly conducted. The second relevant aspect of *Farrell* is the court's observations on the importance of orders for costs in our legal system.

87. At para. 4.4 of his judgment in *Farrell*, in observations which were expressly stated to apply to security for costs in the various different contexts in which it arises, Clarke J. explained (by reference to the standard text on civil procedure, *Delany and McGrath Civil Procedure in the Superior Courts* (now 4th Ed.) ("*Delany and McGrath*")) as follows:-

> *"…the concept of ordering a party to provide security for the costs of an action effectively involves balancing the right of a defendant to recover costs if he successfully defends a claim against the right of a plaintiff, rooted in the Constitution, to have access to the courts (including, in most circumstances, a constitutional right of appeal). While it may, for reasons which I will shortly address, be more appropriate to analyse the relevant balance by reference to the right to have litigation fairly conducted (a right to fair process) rather than the right to have access to the courts, it seems to me that a starting point of any analysis of the jurisprudence in relation to security for costs has to be a consideration of such a balance."* (per Clarke J. at para. 4.4, p. 12)

88. At para. 4.11 of his judgment, Clarke J. referred to the importance of costs orders in the Irish legal system. He stated that costs orders play two roles. The first is that a successful party (a plaintiff who succeeds in its case or a defendant who successfully defends the case) should not be at a loss in having to bring or in having to defend the proceedings. Having referred to the position of a successful plaintiff, Clarke J. then turned to the position of a successful defendant and stated as follows:-

> *"Likewise it is unfair that a defendant should have to bear the costs of defending a claim which the court finds to be unmeritorious. Thus the first underlying rationale behind the award of costs is that justice requires that a successful party not be penalised in having to bear the reasonable costs of court proceedings*." (per Clarke J. at para. 4.11, p.16)

89. Clarke J. then referred to a second justification for costs orders, namely, the risk, in the absence of costs orders, that bringing or defending proceedings could be used "*as a form of unfair tactic little short, at least in some cases, of blackmail*" (per Clarke J. at para. 4.12, page 17). Clarke J. continued:-

> "*That analysis is designed to show that the power of the court to award costs is a very important aspect of the armoury of the courts designed to ensure that parties are treated justly and that the court process is not abused."* (para. 4.14, pp. 17 – 18)

90. Clarke J. then stated:-

> *"…However, the analysis in which I have engaged is designed to demonstrate that exposing a party to having to incur the costs of litigation in circumstances where there is no reality to that party recovering those costs on foot of a court order in the event of the party concerned being successful amounts to exposing the relevant party to a risk of injustice. It is that risk that needs to be set against the undoubtedly high constitutional value that is attributed both to the right of access to courts of first instance and to the right of appeal from the High Court to this court, or perhaps, in view of the earlier analysis in this judgment, to the right of all litigants to fair process in the conduct of proceedings. In attempting to strike a balance the court is required to act in a proportionate way."* (para. 4.16, p. 19)

91. The court then referred to the jurisprudence in relation to applications under s. 390 of the 1963 Act and to the underlying rationale behind that section which Clarke J. noted (at para. 4.18) as being described in some cases as "*the price paid for limited liability*" (see: Barrington J. in *Lismore Homes Limited v. Bank of Ireland Finance Limited (No. 2)* [1999] 1 I.R. 501; also *Mooreview Developments Limited v. William Flanagan Limited* (Unreported, Supreme Court, 9th June, 2004); *CMC Medical Operations Limited (in liquidation) t/a Cork Medical Centre v. Voluntary Health Insurance Board* [2015] IECA 68.)

92. Clarke J. continued (at para. 4.19):-

> *"The logic behind that rationale is that parties, such as shareholders, or in an appropriate case creditors, behind a company will get the benefit of the company being successful in litigation but will be spared the adverse cost consequences of the company being unsuccessful for the premis on which security for costs is ordered under Section 390 is that those costs will not, in practice, be paid if the company loses. Why should the parties who are going to benefit by a successful action not also be exposed to the costs of failure. That is the underlying rationale for corporate security for costs*." (per Clarke J. at para. 4.19, p. 20)

93. There is a further aspect of *Farrell* to which it is necessary to refer at this point. That is the discussion contained in the judgment of Clarke J. on the so called "*one third rule*" or "*practice*". Clarke J. referred to the fact that the Supreme Court had, in the past, identified a practice suggesting that security in the amount of one third of the likely estimated costs should be ordered and referred in that context to *Thalle v. Soares* [1957] I.R. 182 ("*Thalle*"), and *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380 ("*Fallon*"). However, Clarke J. referred to a previous judgment of his in the High Court in *Harlequin Property (SVG) Limited & anor v. O'Halloran* [2012] IEHC 13, [2013] 1 ILRM 124, ("*Harlequin*") in which he had indicated that it was not clear as to what the origins of that practice may have been. Clarke J. noted in Farrell that there might well be an argument that the court should not "*arbitrarily reduce the amount of security ordered, below a realistic estimate of the likely full costs …, without a sufficient reason to justify such a course of action*". However, he stated that the point had not been fully argued before the court in that case and that in light of the existing jurisprudence, the court should deal with the case in accordance with that jurisprudence and leave over to another case, the question of whether it needed to be revisited (see para. 7.5, pages 44 -45). Clarke J. did, however, point out that the existing jurisprudence does allow, in an appropriate case, a departure from the so called "*one third rule*". He continued:-

> *"It seems to me that, in determining whether there should be such a departure on the facts of an individual case, the court should attempt to fashion an order for security which is proportionate in all the circumstances…."* (para. 7.6, p.

45)

94. The court held in *Farrell* that an order requiring the appellant to provide security amounting to 50% of the likely estimated costs would be proportionate in that case.

95. The requirement to engage in this sort of balancing exercise was further considered by the Court of Appeal in *Flannery*. Part of the judgment of the Court of Appeal, which was given by Finlay Geoghegan J., dealt with an appeal by the counterclaim plaintiff, a company incorporated in Malta, from an order for security for costs made by the High Court pursuant to O. 29 of the RSC in circumstances where it had been agreed that, in order for such security to be directed, the test in s.390 of the 1963 Act had to be met. Having decided that the High Court had correctly ordered security for costs to be provided, Finlay Geoghegan J. then addressed the question of the amount of security. The High Court had fixed the security to be provided at the full amount of the estimated costs. The Court of Appeal held that the High Court was correct in concluding that its discretion to depart from the so called "*one third rule*" was not limited by the earlier Supreme Court cases, where the court had determined that a limited company registered outside the jurisdiction (but within the EU) should provide security for costs on the basis of an inability to pay the costs of the defendants. The High Court had not considered itself bound to make an order for security in the full amount but exercised its discretion to do so. It had not been suggested in the affidavit evidence that the company would be unable to proceed with its counterclaim if required to give the full amount of security. On the contrary (as in the present case) the contention was that the company was solvent. In referring to the balance required to be drawn in determining the amount of security, Finlay Geoghegan J. stated as follows:

> *"In an application for security for costs where the judge or court has discretion as to the amount of the security to be determined, the balance sought to be achieved should primarily be the balance between the right of a defendant to recover costs if he successfully defends a claim and the right of a plaintiff to have access to the courts or as suggested by Clarke J. in Farrell in relation to an appeal, the right to have litigation fairly conducted. Whilst in this case the trial judge did not expressly refer to such balance, nevertheless it appears to me that he did have regard to the particular factual circumstances of [the company] which is part of such balance."* (per Finlay Geoghegan J. at para. 56, pp. 21-22).

96. Finlay Geoghegan J. also regarded it as relevant that no case had been made that the company would be prevented from pursuing its counterclaim if security was ordered. The absence of an averment that the company would be unable to proceed with its claim if required to provide security was, therefore, clearly regarded as relevant by the Court of Appeal in *Flannery*. It was similarly regarded as relevant by the Supreme Court in *Hot Radio Co. Ltd. t/a Pulse FM v. IRTC* [2000] IESC 55 ("*Hot Radio*") in the context of an appeal from an order requiring security for costs made pursuant to s. 390 of the 1963 Act. In the course of his judgment in that case, Keane C.J. stated that:

> *"it was just in this case to order the full measure of security because there is no suggestion that the action would be stifled by the award of security for costs in the sum actually awarded as opposed to awarding security for costs in the more conventional measure of one-third."* (per Keane C.J. at p. 8.)

97. One of the issues on which it is necessary to express a view in the assessment of the appropriate amount of security to be ordered is the effect of the omission of the word "*sufficient*" in the context of the security required to be provided from s. 390 of the 1963 Act. Section 390 referred to the requirement to give "*sufficient security*" for the relevant costs. Section 52 of the 2014 Act omits the word "*sufficient*" and requires simply that "*security*" be given for the relevant costs. To put the issue in context, it will be recalled that the Supreme Court in *Lismore Homes Ltd v. Bank of Ireland Finance Ltd (No. 3)* [2001] 3 I.R. 536 ("*Lismore Homes (No. 3)*") confirmed that the plain meaning of the words "*sufficient security*" in s. 390 was that the security required to be provided had to be "*adequate or enough*" and that, therefore, "'*sufficient security' involves making a reasonable estimate or assessment of the actual costs which is anticipated that the defendant will have to meet.*" (per Murphy J. at p. 546). In other words, s. 390 of the 1963 Act required the amount of the security to be provided to be the likely costs which it was estimated the defendant would have to incur in its defence of the proceedings. Thereafter, companies ordered to provide security for costs under s. 390 of the 1963 Act were normally required to provide full security for the defendant's costs.

98. Coolbrook argues that the deliberate removal of the word "*sufficient*" meant that the Oireachtas must have intended to change the positon which had pertained up to the date of the enactment of s. 52 of the 2014 Act. Coolbrook relies in that regard on the decision of the High Court (Barrett J.) in *Fides*. In *Fides*, Barrett J. considered whether the omission of the word "*sufficient*" from s. 52 had the result that the court enjoyed a "*complete discretion as to the level of security to be ordered*". He concluded that the law should be viewed as having been restored to the position in which it was in before the word "*sufficient*" had been interpreted by the Supreme Court in the manner in which it was in *Lismore Homes (No. 3).* Therefore, Barrett J. concluded that the approach which the court should take in determining the appropriate amount of security for costs to be provided was that applied by the Supreme Court in *Thalle and in Framus Ltd v. CRH plc* [2004] 2 I.R. 20 ("*Framus*"). The relevant aspect of *Thalle* which Barrett J. considered particularly relevant was that part of the judgment of Kingsmill Moore J. in the case which referred to the earlier dicta of Fitzgibbon J. in *Perry v. Stratham* [1928] I.R. 580 ("Perry"). There, Fitzgibbon J stated:

> "*It must be borne in mind that security is not intended either as an indemnity against all costs which may be incurred or as an encouragement to luxurious litigation*" (quoted by Kingsmill Moore J. in *Thalle* at p. 194.)

99. The relevant aspect of *Framus* to which Barrett J. was referring was that part of the judgment of Murray J. where he stated:

> *"I think the authorities also demonstrate that the plaintiffs were incorrect when they submitted that security for costs pursuant to the inherent jurisdiction of the court should be confined to a maximum of one third of the estimated costs. In my view, the practice, and the expressions of approval of that practice, reflect what the courts have found to be a good compass point between Scylla and Charybdis in seeking generally to achieve a balance of justice between the parties with a view to ensuring that the security is not a mere token and at the same time not an obstacle to a full and fair disposal of the issues between the parties*." (per Murray J. at p. 60).

100. Based on the objectives set out in those dicta, Barrett J. stated:

> *"In reconciling these objectives, the usual approach prior to Lismore Homes was to order one-third of the amount of a defendant's likely costs, absent particular circumstances."* (para. 10, p. 6).

Barrett J. pointed out that the particular circumstance contended for in that case was that the plaintiff had never averred, and no case had been made, that if security for the full amount of the likely costs was ordered it would collapse the proceedings. However,

Barrett J. held that the plaintiff had proceeded on the basis that one third of the costs should be sufficient by way of security in the absence of special circumstances in light of the case law prior to *Lismore Homes (No. 3).* Barrett J. did, however, refer to the decision of the Court of Appeal *Flannery* where it was made clear that the court could (but was not required to) order security for all of the likely costs. (I should observe that while *Flannery* was decided by the Court of Appeal following enactment of s. 52 of the 2014 Act, it was not concerned with that provision but with the provisions of s. 390 of the 1963 Act which the parties had agreed should apply by analogy to the application for security for costs in that case which was in fact made pursuant to O. 29 of the RSC). Barrett J. rejected the submission that a failure to make an averment, or to make the case, that the provision of the full amount security would collapse the proceedings was a special circumstance which would justify the court ordering full security for costs. He felt that that would be to approach an order for security for costs as if it were "*an indemnity against all costs*" and that by setting the security at one third of the estimated likely sum in that case, in the particular circumstances of the case, it would be at a level which was neither "*an encouragement to luxurious litigation*" nor a "*mere token*" and would also not be an "*indemnity against all costs*" or "*an obstacle to a full and fair disposal of the issues between the parties"* (drawing on the dicta in *Thalle* and *Framus* referred to above). Barrett J., therefore, appeared to proceed in that case on the basis that following the coming into force of s. 52 of the 2014 Act, the normal position as to the amount of security for costs to be provided was that one third of the costs should be sufficient and that it would only be if special circumstances existed that full security for costs should be required. He also appears to have concluded that a failure to contend that the case would have to be abandoned if full security were ordered was not such a special circumstance justifying a departure from the normal position.

101. Baker J. considered s. 52 of the 2014 Act in her judgment in *Werdna*. She noted (at para. 75) that the provisions of s. 52 were different to those in s. 390 of the 1963 Act and referred specifically to the fact that s. 52 did not contain the word "*sufficient*" in the context of the security to be provided. She held, therefore, that the approach taken in *Lismore Homes (No. 3)* and in subsequent cases where the full amount of the estimated likely costs was generally ordered was "*no longer apposite*". She has stated that "*discretionary factors can be taken into account in fixing the amount of security*". She also referred to the required balance to be drawn between the interest of a plaintiff in continuing litigation and that of a defendant who has successfully defended proceedings brought by a corporate plaintiff (para. 77). Having regard to various factors which she addressed in her judgment, Baker J. directed that the amount of the security for costs to be provided in that case should be in the region of just short of two thirds of the defendants' estimated costs. Baker J. did not make reference to or apply any one third rule or practice and did not refer to *Fides*.

102. There has been some academic commentary on the impact of the change in wording in s. 52 of the 2014 Act from that contained in s. 390 of the 1963 Act. Coolbrook relies on Courtney, *The Law of Companies*, 4th ed. (2016) ("*Courtney*") where, having referred to the *Lismore Homes (No. 3)* and to the interpretation given by the Supreme Court to s. 390 in that case and subsequent cases, the author states (at para. 6.67) as follows:

> *"The status quo ante [Lismore Homes (No. 3)] …has now, however, been restored by s. 52 of the Act which departs from its predecessor, s. 390 of the Companies Act, 1963, by omitting the word 'sufficient'. Now, complete judicial discretion as to the quantum of the security to be provided has been restored and it is to be expected that the usual one-third of the estimated costs will again become the norm in orders for security for costs under s. 52 of the Act."* (para. 6.67, p. 359).

103. On the other hand, reliance is placed on behalf of DTI, in particular, on the commentary contained in *Delany and McGrath*, where, the authors state (at para. 13-139):

> *"So, in conclusion, some uncertainty surrounds the question of the extent to which the change in wording in s. 52 of the Companies Act, 2014 will lead to a different approach being adopted in practice. However, it can be said that at a minimum, the courts will be able to exercise their discretion in this regard with greater flexibility than heretofore and will no longer consider themselves bound by the dicta of Murphy J. in [Lismore Homes (No. 3)] which would have required full security to be provided."*

104. The authors then refer (at para. 13-140) to the rationale of s. 52 (and its predecessor s. 390) which is "*to seek to prevent abuse of limited liability status*", and state:

> *"For this reason it is likely that the courts may hesitate to depart from the practice of requiring full security for costs in the case of a limited liability company even though the change in wording in s. 52 will undoubtedly give them greater flexibility in this regard*." (paras. [13-139] and [13-140], p. 599).

105. My conclusion on this issue is that the removal of the word "*sufficient*" by s. 52 of the 2014 Act must have been deliberate. It must have, therefore, been the intention of the Oireachtas to change the law from that which existed under s. 390 of the 1963 Act. Therefore, I agree with Barrett J. in *Fides* and Baker J. in *Werdna* that the requirement to direct full security to be provided in the case of an order under s. 390 as interpreted by the Supreme Court in *Lismore Homes (No. 3*) and applied in subsequent cases no longer exists under s. 52 of the 2014 Act. The court now has a very wide discretion as to the amount of security which can be required in the circumstances arising in the application before it. In my view, the court has complete judicial discretion as to the amount of security to be ordered. In exercising that discretion in determining the amount of security to be provided, the court is required to carry out the balancing exercise described by the Supreme Court in *Farrell* and referred to and applied by the Court of Appeal in *Flannery* and by the High Court (Baker J.) in *Werdna*.

106. The court in exercising its discretion under s. 52 will, therefore, seek to achieve a result which is just and proportionate in the circumstances. That means taking account of the legitimate interests of the corporate plaintiff in pursuing its case and the competing legitimate interests of the defendant in being in a position to recover its costs if it successfully defends the proceedings. I would respectfully disagree, therefore, with the view expressed by Courtney that it should be expected that the "*one-third rule*" or "*principle*" will become the norm in orders for security for costs under s. 52 of the 2014 Act. The court has a full discretion as to the amount of security to be ordered and will determine the amount by reference to where it believes the justice of the case lies having regard to the balance which it is required to strike between the interests of the corporate plaintiff and those of the defendant who successfully defends the proceedings. I do not believe that that discretion is or should in any way be constrained by reference to any rule or practice that one third of the cost should be provided by way of security in the absence of special circumstances. The application of such a rule or practice in all cases, unless there are special circumstances to depart from it would not, in my view, normally, represent an appropriate or fair balance between the interests of the corporate plaintiff and those of a defendant who successfully defends the proceedings. It is not entirely clear whether Barrett J. in Fides intended to hold that the "*one third rule*" or "*principle*" should apply in all cases where security for costs is ordered under s. 52 of the 2014 Act unless there are special circumstances justifying a departure from the rule or principle. That may not have been his intention as he did indicate that the decision of the Court of Appeal in *Flannery* makes clear that the court could (but not must) order security for all likely costs. However, if it was his intention to so hold, I would very respectfully disagree with him having regard to the balance which the

Supreme Court in *Farrell* and the Court of Appeal in *Flannery* have indicated must be struck in determining the appropriate amount of security. Nothing much turns on this disagreement in light of my conclusions at para. 110 below.

107. It is also, I believe, relevant in carrying out that balancing exercise to consider whether the corporate plaintiff makes the case (whether on affidavit or by way of submission based on admissible evidence) that if the full amount of security is required to be provided, the plaintiff will be unable to proceed with the case. That was considered to be a material factor by the Supreme Court in *Hot Radio* and by the Court of Appeal in *Flannery*. While neither of those cases concerned s. 52 of the 2014 Act, in my view the considerations underlying the conclusions that this was a relevant factor apply equally to applications under s. 52.

108. I conclude, therefore, that a court determining the amount of security required to be provided under s. 52 of the 2014 Act has a full discretion as to the amount of such security and is not bound by any rule or principle that unless special circumstances are established the amount of costs to be provided by way of security should be one third of the likely estimated costs of the defendant. There is nothing in my view in s. 52 which would constrain or restrict the court in such a way. It must be borne in mind that the court will only be considering the amount of security for costs to be awarded where it has already accepted that there is reason to believe that the company will be unable to pay the costs of the defendant if it successfully defends the proceedings. Therefore, the essential question for the court to determine in fixing the amount of the security to be provided is whether it would be just to leave the defendant at risk on costs by not directing the provision of full security or whether it would be just in those circumstances to direct that a lower amount be provided by way of security. It may well, therefore, be the case that unless there are other factors present which may persuade the court to exercise its discretion to reduce the amount to be provided, the court will in most cases direct the provision of full security. I agree with the views expressed by the authors of *Delany and McGrath* that such an approach may well be more consistent with the rationale behind s. 52 which is essentially to prevent the abuse of limited liability status. However, the bottom line in my view is that the court has a full discretion in determining the amount of the security to be provided and must exercise that discretion in accordance with the sort of balancing exercise discussed and applied by the Supreme Court in *Farrell* and by the Court of Appeal in *Flannery*.

109. The cases show that where the court has a discretion in determining the amount of the security for costs to be provided, the court must seek to achieve a balance between the right of a defendant to recover the costs of successfully defending the proceedings and the right of a plaintiff (in this case a corporate plaintiff) to have litigation fairly conducted. As observed above it seems to me that in most cases fixing security for costs at a figure representing approximately one third of the estimated costs would not strike a fair or proportionate balance. Therefore, I do not believe that the so called "*one-third rule*" or "*practice*" does or should apply when fixing the amount of security to be provided on foot of an order for costs under s.52 of the 2014 Act. I agree, therefore, with the views expressed by the authors of *Delany and McGrath* (at para. 13-140, p. 599) that following the enactment of s. 52 of the 2014 Act in place of s. 390 of the 1963 Act, it is likely that courts will hesitate to depart from the practice which existed under s. 390 of requiring full security for costs to be provided in the case of a limited liability company plaintiff, although the change in the wording of s. 52 does give the courts considerable flexibility in that regard. That flexibility clearly envisages a discretion on the part of the court to fix the amount of security at a level which is less than the full amount of the estimated costs. That was done by Baker J. in *Werdna* where the court found that there was some delay on the part of the defendants in seeking security for costs, albeit that the delay was not culpable and was found to be reasonable in the circumstances "*although not wholly so*" (per Baker J. at para. 79). The court exercised its discretion by fixing the security for costs in the amount of approximately two thirds of the total estimated costs.

110. If I am wrong in my view that the "*one-third rule*" or "*practice*" does not continue to exist following the enactment of s. 52 of the 2014 Act, it is clear from the authorities discussed earlier (such as *Harlequin*, *Farrell* and *Fides*) that the court can depart from that rule or practice in the particular circumstances of the case before it. I would depart from it for reasons set out at paras. 112 to 127 below. Those reasons would clearly justify a departure from any such rule or practice.

111. I am satisfied that in the context of these applications for security for costs, in determining the amount of the security for costs to be provided by Coolbrook, a fair, reasonable and proportionate balance between the right of Coolbrook to have the litigation fairly conducted and the right of Lington and DTI to recover their costs in the event that they successfully defend the proceedings, requires that Coolbrook should be required to provide by way of security for costs the full amount of the estimated costs at the appropriate level. I will come back to what I mean by the appropriate level shortly. I have reached this conclusion for a number of reasons.

112. First, it is clear from the evidence that Coolbrook would not be in a position to meet any costs order made against it in the proceedings in favour of Lington and DTI from its own resources. This is clear from the 2015 and 2016 accounts which were put before the court by Lington and DTI and not by Coolbrook. It is also clear from the totality of the affidavit evidence, including the affidavits of Mr. Flynn sworn on behalf of Coolbrook.

113. Second, it is clear on the evidence that the offer by Dengrove, as set out in the Beauchamps' letter, to permit Coolbrook to use some of the rental income from the Property is highly conditional and equivocal and does not create any binding obligation on the part of Dengrove to make that rental income available which could be enforced by Lington and DTI.

114. Third, while Coolbrook has offered to pay the sum of €250,000 into an escrow account, as discussed earlier, the source for those funds has not been disclosed to the court. On the evidence, it is clear that the funds could not come from Coolbrook's own resources.

115. Fourth, the evidence establishes that Coolbrook's interests in the property are fully secured and charged in favour of Dengrove and that Coolbrook is essentially operating at the discretion of Dengrove in relation to the conduct of these proceedings in the sense of Dengrove having to agree (on the highly conditional terms referred to in the Beauchamps' letter and in Mr. Flynn's affidavit) to make available a portion of the rent payable in respect of the Property to enable Coolbrook to meet orders of costs in favour of Lington and DTI. There is nothing to prevent Dengrove from changing its mind or from ultimately deciding not to permit the rent to be used.

116. Fifth, the ultimate beneficiaries of the litigation, should Coolbrook succeed, will be the shareholders of Coolbrook and Dengrove, as the holder of its security over Coolbrook's interests in the Property. However, in the event that security for costs in the full amount is not ordered, the evidence clearly establishes that Lington and Dengrove will be at a loss in respect of the costs of the proceedings. They will never be in a position to recover those costs from Coolbrook. The position is, therefore, that if security for costs in the full amount is not awarded, Coolbrook and its shareholders and Dengrove would have the benefit of all of the upside in the proceedings but none of the downside risk.

117. For these reasons, therefore, I have concluded the appropriate balance lies clearly in favour of directing that the full amount of the security for costs at the appropriate level should be provided by Coolbrook.

118. The next issue is to consider what is that appropriate amount? As discussed earlier, Lington's estimated costs are €400,828.00 plus VAT. These are outlined in a short report prepared by Behans. DTI's estimated costs are €693,292.95 inclusive of VAT as set out in a report prepared by O'Neills. Coolbrook has provided no evidence from a legal costs accountant to contradict the cost estimates provided by Lington and DTI. In the absence of such evidence, Coolbrook nonetheless advances a number of arguments in relation to the amount of the estimated costs which I now consider.

119. First, Coolbrook contends that whatever the amount of security for costs ordered, it should be exclusive of VAT. There was no real dispute about this. It is clear from *Harlequin* (at para 3.3, p. 6-7) and *Werdna* (at para.79), and from O.99 r 1 (6) of the RSC, that the VAT amount of the estimated costs should be disregarded in circumstances where the defendants are registered for VAT and would, therefore, ordinarily be in a position to recover the VAT paid on their own costs. The amount of security for costs to be ordered, therefore, should exclude VAT.

120. The next point made by Coolbrook is that there is no reason why DTI's costs should be greater than those of Lington. Coolbrook points to the higher costs in the O'Neills' estimate attributable to solicitors, counsel and expert witnesses. It is fair to say, that the disparity between the two amounts for costs is not as great perhaps as it might initially appear in light of the fact that DTI's figure includes VAT whereas Lington's figure does not. DTI contends that in the absence of evidence, such as from a legal costs accountant, it is not open to Coolbrook to seek to challenge the quantum of costs set out in the estimate provided by DTI. It further submits that it would not be appropriate to allow evidence from Lington's application (where Lington's estimate of costs is provided) to cross-pollinate DTI's application. DTI argues that the evidence on foot of which its application for security for costs should be determined is the evidence in its application and not the evidence in Lington's application. Coolbrook argues that it is appropriate for reference to be made and for a comparison to be drawn between the amounts put forward in each application.

121. I am satisfied that it is open to Coolbrook to point to the disparity between the quantum of costs contained in the respective estimates of Lington and DTI, notwithstanding the absence of any expert or other contradicting evidence from Coolbrook. I am also satisfied that it is appropriate for me, in deciding how to exercise my discretion in relation to the amount of security which should be provided by Coolbrook, to have regard to the difference between Lington's estimate and that of DTI. It is unreal to suggest that I am precluded from considering the Lington estimate when determining the amount of security to be provided on foot of DTI's application. The applications for security for costs have been listed and heard together. Coolbrook has sworn a single replying affidavit in response to both applications. The difference between the estimates is, in my view, relevant to the task which I have to carry out in seeking to strike the appropriate balance between the competing rights of Coolbrook to have its case fairly conducted and DTI, in this case, to be in a position to recover its costs in the event that it successfully defends the proceedings. While it is not my task to review the estimate of costs put forward by DTI as would be done in the course of a taxation or costs adjudication, it seems to me that it is open to me to have regard to the difference between the two estimates. This is particularly so in circumstances where it could reasonably be argued that the case being made by Coolbrook against Lington is a more extensive case than that made against DTI. As I discussed earlier in this judgment, Coolbrook alleges a breach of the Owners' Agreement against Lington as well as other causes of action, some of which overlap with the causes of action alleged against DTI. Since DTI was not a party to the Owners' Agreement it is not alleged by Coolbrook that DTI breached that agreement. In those circumstances, it is somewhat difficult to see why the estimate of costs advanced by DTI is higher than that put forward by Lington for the purposes of security for costs, in any event.

122. Having regard to the extent of the discretion possessed by the court in determining the amount of security for costs to be provided, for the reasons I have just mentioned, I have concluded that it would be appropriate for the amount of security for costs required to be provided in favour of DTI to be no more than that required to be provided in favour of Lington.

123. The next point made by Coolbrook is based on the remarks of Fitzgibbon J. in Perry which were quoted with approval by Kingsmill Moore J. in *Thalle*, namely, that "*security is not intended either as an indemnity against all costs which may be incurred or as an encouragement to luxurious litigation…*". It is said that to require Coolbrook to provide security for costs in the amounts sought would be to provide an indemnity in respect of costs to Lington and DTI and would amount to an encouragement to them to conduct "*luxurious litigation*". I disagree. It is clear from the estimates provided by Lington and by DTI that the costs set out in the estimates are not put forward on the basis of an indemnity but are rather put forward as the probable party and party costs of the relevant defendant in defending the proceedings. Furthermore, there is, in my view, no basis for the contention that the costs put forward are such as to amount to "*an encouragement to luxurious litigation*". I have concluded that it is not open to Coolbrook to make such a case in the absence of any evidence from a legal costs accountant to dispute the estimates put forward by the legal costs accountants on behalf of Lington and DTI. In any event, I am satisfied from my review of the estimates provided by Behans and O'Neills that there is no basis whatsoever for Coolbrook's contention that the costs are in any way "*luxurious*" as alleged by Coolbrook.

124. The next point advanced by Coolbrook is that the court should take into account, in the exercise of its discretion in determining the amount of security, the fact that security for costs would have to be provided by Coolbrook to two defendants and not merely to one defendant. Coolbrook relies in this regard on the decision of Clarke J. in *Valebrook Developments Ltd (In Receivership) v. Keelgrove Properties Lt*d [2011] IEHC 173 ("*Valebrook*"). Coolbrook relies on this case not as supporting or establishing any principle of law that security for costs cannot be awarded against two defendants in a case but rather that, in the exercise of its discretion, the court should have regard to the fact that security will have to be provided to two defendants. There is no doubt that *Valebrook* deals with a very different situation to that which arises in this case and is not directly applicable to these applications. However, I agree that in the exercise of its discretion in determining the amount of the security to be provided and in seeking to strike the appropriate balance between the respective interests of a corporate plaintiff to have its case conducted fairly and of defendants to be paid their costs if successful in their defence of proceedings, it is relevant to take account of the fact that security has to be provided to more than one defendant. However, in most cases that will not lead to a reduction in the amount of security to be provided where the defendants are separate legal entities who are separately represented and who have to defend separate cases brought by a corporate plaintiff against them. That is the case here. I have, however, in any event already taken into account the fact that the estimated costs put forward by DTI are greater than those put forward by Lington and I have indicated that the amount of security for costs to be provided by Coolbrook to DTI should not be greater than that which it must provide to Lington. To that extent, therefore, I have had regard, in the balancing exercise I have had to carry out, to the fact that the security for costs will have to be provided by Coolbrook to more than one defendant.

125. The final argument advanced by Coolbrook is that if it is required to provide security for costs in the amount sought by Lington and DTI it will make it more difficult for Coolbrook to proceed with its case and the court can take that into account in the exercise of its discretion. It is certainly the position that Coolbrook has not said on affidavit or otherwise that, if required to provide security for costs in the amounts sought by Lington and DTI, it will be unable to proceed with the case. In my view, the absence of an averment to that effect is material. The absence of such an averment was regarded as material by the Supreme Court in *Hot Radio* (see the judgment of Keane C J. at p.8). It was also regarded as material by the Court of Appeal in *Flannery* (see the judgment of Finlay Geoghegan J. at para. 56 p. 22). While Barrett J. in *Fides* did not regard it as significant that the plaintiff had not made the case,

either on affidavit or in submissions, that if the full amount of the likely costs was directed to be provided by security, the case would collapse, it appears that he reached that conclusion on the basis of the facts of the case where he concluded that the plaintiff had proceeded on the basis that the amount of the security which would be ordered would be one third of the estimated costs unless there were special circumstances. That may have explained the absence of any averment or submission made on behalf of the plaintiff that the case would collapse if full security were ordered. In any event, I am satisfied that the absence of an averment by the plaintiff that, if ordered to provide security in the full amount, it will not be in a position to proceed with the case is material. An averment to that effect (provided there was a basis for it), would be a material factor in the balance which the court has to draw between the competing rights of the plaintiff and the defendant in terms of the amount of security to be provided. Equally, the absence of such averment must also be a factor material to that balance. While it may be the case that it will be more difficult for Coolbrook to proceed with its case if the full amount of the security sought is directed, I infer from the absence of an averment that the case will collapse and from the totality of the evidence in the case (including the Beauchamps' letter ) that the case is unlikely to come to an end if security for costs in the amount which I propose to require is directed.

126. Finally, I am not satisfied that the offer by Coolbrook to pay the sum of €250,000 into an escrow account affords a good reason for me not to direct security for costs at all or to fix that security in an amount less than the full amount (subject to my conclusion on the disparity between the level of costs of Lington and those of DTI). As I have outlined earlier in this judgment, is unclear where the €250,000 is to come from. On the evidence, Coolbrook is unable to provide the sum from its resources. Coolbrook has chosen not to disclose the source of these proposed funds. I infer that these funds will come from or with the permission of Dengrove. While there is some merit to the point made by Coolbrook that the source of the funds may not be particularly relevant in the event that the amount is regarded as being sufficient, since the proceedings will be stayed until the funds are lodged (or the security provided), I conclude that the amount is entirely inadequate and would provide insufficient security for the costs of Lington and DTI. It represents a sum of less than one third of the combined costs of Lington and DTI (based on those costs being at the same level). A payment of that amount into an escrow account, or the provision of security for costs in that amount, would not represent a fair, appropriate or proportionate balance between the right of Coolbrook to have its litigation fairly conducted and the right of Lington and DTI to recover their costs in the event that they successfully defend the proceedings. In particular, it would afford insufficient weight to the right of Lington and DTI to recover their costs.

127. For these reasons, I conclude that the appropriate amount of the security for costs which Coolbrook should be directed to provide to Lington is €400,828.00. I have also concluded that the appropriate amount of security for costs to be provided by Coolbrook to DTI is also €400,828.00. Both of those amounts are exclusive of VAT. For the reasons outlined earlier, VAT should be excluded from the amount of costs to be provided by way of security for costs.

**Conclusions**
128. In conclusion, therefore, subject to further discussion with counsel, I propose making the following orders pursuant to s. 52 of the 2014 Act on the respective applications of Lington and DTI:-

(1) Orders directing Coolbrook to provide security for the costs of Lington and DTI

(2) An order determining that the amount of the security for costs to be provided by Coolbrook to Lington in the amount of €400,828.00.

(3) An order determining the amount of the security for costs to be provided by Coolbrook to DTI in the amount of €400,828.00.

(4) An order directing Coolbrook to provide the security for costs in those amounts within such time as may be agreed between the parties or fixed by the court.

(5) An order staying Coolbrook's proceeding against Lington and DTI until the security for costs so ordered has been provided by Coolbrook to Lington and DTI

(6) Such other order or orders as may be appropriate following further discussions with counsel on behalf of the parties.