Neutral Citation: [2014] IEHC 74

THE HIGH COURT

Record No. 1998/11805P

1999/4233P

BETWEEN:

PHILIP SHIELDS AND HILLGRANGE SERVICES LIMITED

PLAINTIFFS

AND

INTERLINK IRELAND LIMITED TRADING AS INTERLINK EXPRESS

DEFENDANT

JUDGMENT of Mr Justice Ryan delivered on the 7th February, 2014

Introduction

1. The first plaintiff to these proceedings is a company director resident in Northern Ireland. The second plaintiff, Hillgrange Services Limited, is a limited liability company with a registered address in Northern Ireland. The defendant and the moving party in this application is a limited liability company registered in the State. By notice of motion dated 25th June, 2013, the defendant seeks orders dismissing the plaintiffs' claim for want of prosecution for failing to serve a Notice of Trial pursuant to Order 36, rule 12 of the Rules of the Superior Courts or an order dismissing the plaintiffs' claim for want of prosecution pursuant to Order 122, rule 11 of the Rules or pursuant to the inherent jurisdiction of the Court or, in the alternative, an order for security for costs pursuant to s.390 of the Companies Act, 1963 as against the second plaintiff.

History of Proceedings

2. The plaintiffs' claim relates to a franchise agreement which was signed by the first plaintiff and the defendant on 18th April, 1994. The business of the defendant company is to collect parcels in one location and deliver them overnight to another location. The business operates through a number of franchisees and network members which are located around the country and are linked together in a network which operates from the central hub of the defendant company in Athlone, Co. Roscommon. The franchisees use the trading name of the defendant company.

3. In 1994 the defendant extended its network of franchisees to Northern Ireland by recruiting the first plaintiff to operate on its behalf throughout Northern Ireland. It is not necessary for the purposes of this application to set out in detail the contents of the franchise agreement between the parties.

4. It appears that the agreement was signed by the first plaintiff and the defendant. In an affidavit sworn by the first plaintiff in the main proceedings on 2nd November, 1998, it is averred that the second plaintiff was in fact providing a similar service to local businesses in Northern Ireland when such services were inappropriate or uneconomic for the Interlink Network. The plaintiffs claim that the defendant company was either aware of or agreed to the second plaintiff operating this business alongside its commitment to the franchise. The defendant company is of the view that this was not the case and claims that the only party permitted, within the terms of the agreement, to operate the franchise was the first plaintiff.

5. According to the grounding affidavit of Mr. Brendan O'Neill, Chief Executive of the defendant company, the defendant was aware and agreed that the first plaintiff would carry out certain other services, namely a "trucking" service, which involves the provision of vehicles for transport, in a personal capacity by means of a company of which the first plaintiff was a director and entitled Direct Transport Services Limited, but that this was not unusual for the defendant's business model and did not come into conflict with the nature of the agreement between the first plaintiff and the defendant.

6. The main incident giving rise to the difficulties between the parties arose in October, 1998 when, according to its account, the defendant became aware that a consignment of goods which the first plaintiff franchisee had received for delivery appeared not to have been appropriately consigned through the network of delivery sites operated by the defendant. According to Mr O'Neill, this made the defendant company suspicious that the first plaintiff was operating a business in direct competition with the business of the defendant and in breach of the agreement. The first plaintiff avers that the contract for the delivery of the goods in question by the second plaintiff was fundamentally different in nature to the usual contract which would be signed for a delivery of goods through the defendant company's network and therefore no conflict arose with the content of the agreement. Correspondence ensued between the parties and meetings were held between representatives of the defendant company and the plaintiffs. At the end of October, 1998, it is alleged that the defendant company entered the premises from which the plaintiffs operated and took possession of all computers, files, diaries, correspondence kept therein. On 30th October, 1998, a letter was sent to all franchisees of the defendant stating that the plaintiff was no longer acting as a fellow franchisee and a further letter was sent to all customers stating that the plaintiff had been removed as a franchisee and that the service provided by Interlink would now be provided from a different location.

7. On 2nd November, 1998, O'Sullivan J granted the plaintiff an *ex parte* injunction restraining the defendant to these proceedings from trading as Interlink Northern Ireland. This injunction was discharged on 6th November, 1998, and directions were given in relation to the proceedings.

8. The plaintiffs issued plenary summonses in respect of two separate proceedings but nothing turns on that because it is agreed that the claims have to be tried together and that if one falls so does the other. Similarly with the security application.

9. On 2nd November, 1998, the plaintiff instituted what is referred to as the main claim. The summons seeks a declaration that the defendant wrongfully repudiated the agreement between the parties and an injunction restraining the defendant from acting in breach. The plaintiff seeks damages for breach of contract, breach of trust, conspiracy to induce breach of contract, misappropriation of confidential information, defamation, injurious falsehood, trespass, detinue and or conversion among other reliefs.

10. On 21st April, 1999, the plaintiffs issued a second plenary summons in what Counsel called the commission claim. This claims damages for breach of contract, payment of all sums due on foot of accounts owing to the plaintiff under the agreement and other ancillary reliefs. The facts upon which the two claims are based are similar though the chronology of events in each is slightly different.

11. The main claim was initiated by plenary summons issued on 2nd November, 1998. After the order of O'Sullivan J which was granted on 6th November, 1998, directions were given by the Court with regard to pleadings and the litigation ran its normal course in this regard, not being excessively delayed until the issue of discovery arose. The Reply was delivered on the 20th April, 1999.

12. The plenary summons in the commission claim was issued on 21st April, 1999 and pleadings were exchanged over the next number of years. The defendant raised particulars in this claim on 15th October, 2004 and this was replied to by the plaintiff on 4th March, 2011. It was during this period that the difficulties relating to the discovery issue in the main claim were being dealt with by the parties. The plaintiff served notice to proceed in this claim on 25th June, 2013 and notice of trial was served on 26th July, 2013.

13. Between September, 2000 and October, 2003 the solicitors for the plaintiffs wrote a number of times to the defendant's solicitors seeking voluntary discovery. An order for discovery was made on 28th October, 2003. In June, 2004 the defendant furnished an affidavit of discovery but the plaintiffs objected to it because it did not specify the documents. The plaintiffs brought a motion to strike out the Defence for failure to comply with the order, following which a supplemental affidavit was delivered on the 11th August, 2004. The plaintiffs' representatives including solicitor and counsel attended the defendant's premises on the 25th February, 2005 to inspect the discovered documents. They complain that they were presented with boxes of unclassified and disorganised papers which made it difficult if not impossible to carry out a thorough and proper examination. The plaintiffs once more sought further and better discovery by a motion dated 8th August, 2005 that was adjourned by the Master from time to time until February, 2007 when it was adjourned generally with liberty to re-enter but it was not re-entered.

14. The plaintiffs continued to complain about discovery and production of documents and there was correspondence in 2008 between the solicitors on that and on allowing a computer programmer on behalf of the plaintiffs to have access to the defendant's archived records with assistance from the latter's expert. The defendant complains that its offer was not taken up for some two years and even then not pursued. The plaintiffs' version of this exchange is that they continued to correspond about the programmer and outstanding discovery and in early 2010 proposed that an IT expert would attend. The defendant furnished another affidavit dealing with discovery on the 21st July, 2010 but there is dispute whether it is an affidavit of further and better discovery as the plaintiff expected. The defendant says that it was "a supplemental affidavit clarifying a number of matters raised in relation to discovery."

15. There was yet more correspondence about discovery in 2011 and 2012. On a different matter, in March, 2011 the plaintiffs sent replies to a Notice for Particulars from the defendant dated the 15th October, 2004. In the same month, the plaintiffs delivered a supplemental affidavit of discovery. On 17th December, 2012, the plaintiffs served their third notice of intention to proceed.

16. On the 9th April, 2013 the plaintiffs' solicitors sent updated particulars of loss and damage, asking the defendant's solicitors to "confirm that it is in order for us to seek to proceed with a trial of the matter as soon as possible." The latter responded firstly by saying that they were taking instructions on the particulars and reserved the right to raise particulars, querying how the claim could be advanced for losses over multiple years when the franchise agreement was terminable in any event by six months' notice. Secondly, they asked to see the documentation that formed the basis of the calculations. The final paragraph said: "While we look forward to hearing from you, we will be in contact once we have had our accountants' input on the further particulars. It would not be appropriate to seek a trial date at this time."

17. Inter-solicitor communication continued including a phone conversation about a meeting between the respective accountants. On the 13th June, 2013 the defendant's solicitors enquired about the financial status of the company plaintiff. On the 18th June, 2013 the plaintiffs' solicitors wrote that they were going to set the matter down for hearing in the next term. On the 25th June, the defendant issued their motion to strike out the actions for want of prosecution was. On 28th June, 2013, notice of trial was served by the plaintiffs.

18. I have tried in the above paragraphs to give a general picture of what happened between the closing of pleadings and the notice of motion that is now under consideration In summary, there were major disputes about discovery of documents that dragged on for years and that even now are not entirely resolved. The plaintiffs claim that when the defendant terminated the franchise agreement and sent in its personnel or agents to the plaintiffs' premises and removed their computers and records that left the plaintiffs at a severe disadvantage from which they are still suffering. They also complain that the defendant failed to store the records carefully and actually lost some of them. They attended at the defendant's premises in February 2005 to carry out an inspection with solicitor and counsel present but they say that the documents were presented to them in large boxes without order or arrangement, which made it next to impossible to examine them properly. They maintain that on this inspection they saw some documents which subsequently appeared to have gone missing.

Dismissal for Want of Prosecution

19. Mr Michael Howard SC for the defendant and Mr Peter Bland SC for the plaintiffs referred in their oral and written submissions to all the well-known cases in this area. The full range of authorities was cited from *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 and *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 to *Comcast International Holdings Incorporated & Ors v Minister for Public Enterprise & Ors* [2012] IESC 50, in addition to dicta from other earlier cases including *Dowd v Kerry County Council* [1970] IR 27. This is well trodden ground. Rather than repeating many familiar citations, I will endeavour to summarise and then apply the principles established by the jurisprudence.

20. Counsel submits that the cause of action in this case occurred fifteen years prior to the date at which the pleadings were closed, early in 2013, and therefore the delay could not but be seen as inordinate. It is submitted that the plaintiffs did not particularise their losses until 9th April, 2013, and have issued three notices of intention to proceed in the course of the proceedings which are currently before the Courts on 25th February, 2003, 20th May, 2009, and 17th December, 2012. During this time no notice of trial was served and counsel for the defendant submits that the issuing of a notice of intention to proceed did not precipitate the plaintiffs actually moving to seek a hearing date. Counsel for the defendant states that the defendant would be prejudiced by the mere fact of the lapse of time between the event which is the cause of the difficulties between the parties and the application currently before the Court.

21. Counsel for the defendant rebuts the contention that blame can be laid at the foot of the defendant in relation to the delay in this case. Counsel submitted that no notice of trial was served in these proceedings until after the motion for dismissal for want of prosecution which is currently before the Court was issued and therefore it is not possible to maintain the submission that the

defendant's application in this regard is merely reactionary. Counsel for the defendant also submits that the plaintiffs could, in relation to the problems which they submit arose from the defendant's treatment of the discovery aspects of these proceedings, have at all times brought a motion before the Court for further and better discovery or had recourse to the court in relation to compliance with the original order for discovery made by the Master of the High Court on 28th October, 2003. Since the plaintiffs did not do this counsel for the defendant submits that it is not open to them to now ventilate their grievances on foot of this application for dismissal for want of prosecution and inordinate and inexcusable delay. Counsel for the defendant also points to the fact that the plaintiffs themselves were delayed in dealing with their own discovery given that on 3rd November, 2005, they were ordered to make discovery within eight weeks of the date of the order but did not succeed in doing so until 4th September, 2007.

22. Counsel submits that the balance of justice in this instance favours the dismissal of the plaintiff's claim, alleging that it is now impossible due to the delay to ensure that the defendant will benefit from a fair trial.

23. Mr Howard argued that since a significant aspect of the plaintiffs' claim is related to defamation, there is an onus on the plaintiff to advance such proceedings without delay because of the nature of the wrong and its consequences, a point emphasised by Keane CJ in *Ewins v Independent Newspapers (Ireland) Ltd [*2003] 1 I.R. 583 at page 590.

24. In his responding submission, Mr Bland for the plaintiff argues that the periods of delay between February, 2005 and July, 2010 are directly attributable to the defendant's failure to furnish proper discovery and furnish the full documentation which was removed from the plaintiffs' premises in October 1998 when suspicion arose in relation to the plaintiffs' business operations and the terms of the Agreement. Counsel for the plaintiff also submits that the period of delay from July 2010 until the service of the notice of trial and this motion in June, 2013 was directly related to the retaining of an expert witness, a forensic accountant, to quantify the losses for the prosecution of the action. The delay was allegedly caused by the fact that the defendant had allegedly removed documents which would have aided this process from the plaintiffs' premises in 1998. It was decided early in the proceedings that the two claims would be heard together. The delay in this aspect of the case, in relation to the "Main" claim, has had adverse effects on the speed with which the prosecution of the other claim made by the plaintiff relating to the issue of whether any commission is payable to the plaintiff under the Agreement has been progressed. Counsel for the plaintiff therefore submits that the fault for the delay in prosecuting this case lies with the defendant rather than the plaintiff. In addition Counsel for the plaintiff submits that the need for a forensic accountant's opinion in the assessment of the quantification of the losses suffered by the plaintiff is derived from the plaintiffs' evidential deficit which was itself caused by the defendant due to the defendant's confiscation of documents from the plaintiffs' premises.

25. Counsel submits that this application for dismissal for want of prosecution comes late in the day in these proceedings and is merely a reaction of the defendants to the service of a notice of intention to proceed by the plaintiffs and the correspondence from the plaintiffs attempting to narrow the issues so that the matter may be set down for hearing. Counsel for the plaintiff submits that this application also comes after the defendant has spent considerable amounts of time encouraging the plaintiff to incur further expense by obstructing the discovery process and this is the first occasion on which delay has been mentioned by the defendant. Counsel for the plaintiff submits that the delay caused by the defendant must also be taken into account. Counsel submits that the defendant cannot point to any prejudice which it realistically is subject to as a result of any of the delays in this case and that the blame for the delay must also lie at the feet of the defendant.

26. Counsel says that in assessing where the balance of justice lies in any given case the contributions of both parties towards the delay must be taken into account. Counsel also places emphasis on the passage from *Anlog Irish Beef Processors Ltd v Montgomery* [2002] 3 I.R. 510 in which Fennelly J emphasised that the considerations relevant for this aspect of the test as set out in *Primor* should be seen as "related matters affecting the central decision as to what is just." It is the interests of justice which must be protected by the Courts on such an application.

Security for Costs
27. On this issue also, the familiar authorities were cited by counsel, who were in agreement on the principles to be applied.

28. Mr Howard submits that it is common case that the second plaintiff is unable to pay the costs of the defendant if the latter is successful in its defence of the plaintiffs' claim. He says that the defendant has established that it at least has a *prima facie* defence of the claims made against it and that the sole contractual relationship in this instance was between the first plaintiff and the defendant and did not involve the second plaintiff in any case.

29. He says that the test to be applied in relation to s.390 of the Companies Act, 1963, is stated in *Inter Finance Group Limited v KPMG Peat Marwick* [1998] IEHC 217 to the effect that the moving party must prove that it has a *prima facie* defence to the second plaintiff's claim and that the second plaintiff will not be able to pay the defendant's costs if the latter is successful in his defence. Counsel submits that this test is satisfied on the facts of this case. In relation to the "special circumstances" element of this test, he submits that the plaintiffs have been unable to point to any special circumstances which would be sufficient to dissuade the Court from granting an order and, specifically, that the plaintiffs have put forward no evidence to support their claim that the impecuniosity of the second plaintiff is the fault of the actions of the defendant. In addition, the plaintiffs failed to particularise their losses until more than 14 years after the issuing of the plenary summons in 1998. The replies to particulars were not furnished by the plaintiffs until 9th April, 2013.

30. Mr Howard argues that since the second plaintiff was not a party to the agreement in the first place any damage caused to the second plaintiff is not relevant to the issues to be decided by the court. Any delay in bringing the application for security for costs has not created additional costs and that the nature of the plaintiffs' conduct in the progression of these proceedings (long periods of complete inactivity being punctuated by short periods of activity in the exchange of pleadings) has contributed to the delay in bringing this application.

31. Mr Bland in reply says that the defendant has throughout the proceedings since issuing the plenary summons been aware of the financial situation of the second plaintiff and of the first plaintiff's contention that the second plaintiff was rendered impecunious by the actions of the defendant in 1998 and thereafter. It was only on 13th June, 2013 that the defendant solicitors wrote for the first time seeking clarification of the financial position of the second defendant. However the application currently before the Court seeks an order for security for costs from the first plaintiff.

32. Counsel cites special circumstances which dictate that the Court should exercise its discretion in favour of refusing the order sought. Such impecuniosity of the plaintiffs that the Court may find to exist is a direct consequence of the acts and omissions of the defendant complained of in the within proceeding. In making this submission Counsel relied on a statement by Kingsmill Moore J in *Peppard and Co Ltd v Bogoff* [1962] 1 I.R. 180 at page 187 to the effect that the Court should strive to avoid a situation where making an order for security for costs "…would be to allow the defendants to defend an action by reason of an impecuniosity which

they have themselves wrongfully and deliberately produced…" He also relied on the decision of the Supreme Court in *SEE Co. Ltd v Public Lighting Services Ltd* [1987] ILRM 255 in which the Court refused to make an order for security for costs where it found that accountants' and auditors' evidence linked the failure of certain equipment, in respect of which the claim was being made against the defendant, with the financial collapse of the company.

33. Counsel submits that any impecuniosity which may exist on the part of the second plaintiff flows from the defendant's alleged wrong doings which form the subject of these proceedings and this qualifies as special circumstances that favour the Court exercising its discretion so as not to make an order for security for costs.

34. It was also submitted that the defendant has been guilty of delay in bringing the application for security for costs. Counsel relies on the statement of Clarke J in *Farrell v The Governor and Company of Bank of Ireland & Ors* [2012] IESC 42 at paragraph 4.21 in support:

> "It is well settled that it is, in the absence of some significant excusing factor, essential that an application for security for costs before a court of first instance be brought at an early stage. It is rightly considered that inducing a party to expend its own time and resources in bringing litigation close to trial only to spring an application for security for costs at a late stage would in itself be an unfairness which may well disentitle a party, otherwise entitled, to an order for security."

35. Counsel also cites *Heritage Homes Ltd v Indigo Services Ltd* [2005] 2 I.R. 115 in which Fennelly J found that a delay of one year was fatal to the application for security for costs made in that case. The Court noted at p.123 that the moving party "[b]eing fully aware of the financial weakness of the plaintiff…allowed and even encouraged the action to proceed…"

Analysis and Conclusions

Dismissal for Delay

36. The ground advanced by the defendant for its application to strike out the claims is that the cases were initiated in 1998 and 1999 and that it is unsatisfactory, unreasonable and unjust that the defendant should have to face these actions some fifteen years after the events that gave rise to them occurred. It lays responsibility for the long delay at the plaintiff's door, arguing that the case law on delay supports its request. The defendant submits that the courts have exercised such a jurisdiction over many years but, in more recent times, have adopted a less indulgent posture in cases of dilatory processing of litigation. The defendant also argues that there is a claim for defamation in the proceedings and that that imposes an extra element of urgency.

37. The plaintiffs accept some significant elements of the criticism of delay. It is accepted that the period of fifteen years represents an inordinate period. The defendant seeks to excuse the long delay that has occurred, at least in part, by pointing to the discovery saga that has extended over the period from 2000 to 2010 and indeed for a time before that and later, if all the correspondence and complaints and issues are to be taken into account. The plaintiffs emphasise the necessity of discovery in this case over and above what would normally be important in litigation because the defendant took away the plaintiffs' computer records, files and documents in October 1998.

38. The defendant highlights the overall period, which is of course relevant but not, in my view, decisive. The plaintiff sets out the various transactions which took place, including not just formal pleadings or letters seeking and supplying particulars but also inter-solicitor communications concerning discovery and aspects of the preparation and management of the case.

39. The period is indeed long and it is less than satisfactory that a claim should be moving towards a court hearing at such a far remove from the events in issue. No less than three notices of intention to proceed were served. On the other hand, the time can be said to be explained, but whether it is to be excused is another question.

40. There are some unusual features about this case. It is not a situation in which there is silence for any long period, an important feature that is present in many of these delay cases. There is active correspondence by each of the solicitors. The fact that the defendant swore an affidavit of discovery in 2010, however it is to be characterised as to discovering new documents or merely clarifying or explaining previous affidavits, is nevertheless very significant. Then there is the subsequent exchange on the inspection of the defendant's computer records and how that would be affected. Finally, there is the defendant's solicitors' letter of April 2013 saying that it is inappropriate to set the case down for trial at that time, which on any view must be considered to be an unusual and surprising prelude to a motion to dismiss the claim entirely.

41. Let me turn to the law that is applicable. Mr. Howard SC for the defendant and Mr. Bland SC for the plaintiffs in their oral and written submissions referred to all of the authorities on delay and it is unnecessary to do more than to sketch the principles that have to be applied. They are as follows:-

> (i) Was the delay inordinate?
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> In this case it is conceeded by Mr. Bland that the delay considered as a whole is inordinate. In respect, however, of different specific phases, the position is less clear but it is more relevant to consider the issue under the next heading taking it as established that the delay or the individual delays taken together amount to an inordinate period. The time has been grossly excessive by reference to what is normal and acceptable.
>
> (ii) Was the delay inexcusable?
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> The word sets the bar high but its strict meaning of being quite unforgivable is not the sense in which it is used in this context. The question is whether any reasonable, credible explanation has been proffered for the delay overall or the particular periods. In this case, it seems to me that the crucial necessity of discovery for the plaintiffs, firstly in respect of their own seized documents and also as to the defendants records, seems to me to have justified the extended pursuit by the solicitors. The fact that another affidavit was sworn on behalf of the defendant as late as 2010 warrants the conclusion that the search by the plaintiffs was justified. The necessity for this saga of discovery dispute is debated in the affidavits and it is of course impossible to decide on factual disputes by reference to the affidavits. Having said that, the case made by the plaintiffs seems to me to be sufficiently made out, albeit on a prima facie basis, to justify the continued demands for more information about the documentary material.
>
> Following the last formal step in the discovery process, the arrangements that were discussed between the solicitors for the inspection of the defendants computer records furnished a justification. in my view, for the last period of delay,

between 2010 and 2013.

I am satisfied in these circumstances that the delay is not inexcusable.

(iii) I now look at the balance of justice, which falls to be considered if the plaintiffs' delays were both inordinate and inexcusable. This arises if there are features of the case that are in the plaintiff's favour. Clearly, if no such elements are present, the balance of justice favours the defendant and dismissal of the case. This is where the defendant's conduct of the litigation is more particularly considered and the issues include the following, bearing in mind that it is impossible to supply an exhaustive list of considerations for circumstances that are endlessly variable.

• Was the defendant responsible for all or part of the delay?

• Did the defendant condone the delay?

• Did the defendant intentionally or otherwise lead the plaintiff to believe that it was content to go along with the delay? This is where Clarke J's active and passive delays by the defendant are relevant..

• Prejudice to the defendant weighs heavily but any specific prejudice is absent in this case.

(iv) Would the exercise of discretion in favour of the plaintiff on the balance of justice offend another principle to which the court must have regard? This will depend on the particular circumstances of the case, just like all the other elements of the test, but there will be certain actions and occasions on which it will be legitimate to invoke for consideration another principle such as has been recognised by the courts in reference to the obligation under Article 6 of the European Convention on Human Rights and the interest of the courts, independent of the parties, in the efficient conduct of litigation.

On this question, the balance of justice weighs in the plaintiffs' favour by reason, in particular, of

(a) the defendants delay in making the application;

(b) the fact that the defendant is responsible for a significant part of the delay;

(c) the correspondence of April 2013 that gave the plaintiffs implicit comfort that they would not be exposed on this front.

42. The defendant's response to the applications for discovery – as established on a prima facie basis – represent a substantial reason under this head also for tilting the balance in favour of the plaintiffs.

43. There is no call in the circumstances of these actions for the invocation of an independent obligation on the part of the court to impose a sanction for delay.

44. I do not think that the presence of a claim for defemation alters the balance of the equation of justice in this case. Taking the claims made in the main proceedings and in the compensation action together, this is fundamentally an action about the alleged breach of an agreement and the consequences. Although I do not discount the head of defamation, I think it cannot constitute a special reason why a different aprocah should be taken to the assessment fo the respective rights of the parties.

45. Therefore the application to strike out fails.

Security for Costs

46. I also hold against the defendant on its application for security for costs. First, the application is made late. The plaintiffs have gone to substantial costs, as indicated above, and taken many procedural steps in preparation for the case. Whatever criticisms may be levelled at the pace of the progress of the actions, it is quite obvious that the plaintiffs' solicitors have been busily corresponding and debating over all of the period. This is one of the reasons why the courts do not look favourably on a late application for security for costs. An impecunious plaintiff might have decided, and would have had the opportunity to decide, not to pursue the action if it was faced with an obligation to put up a substantial sum to meet the opponent's costs. When the case has proceeded for a long time without such an application being made, the plaintiff can legitimately complain that it has lost that opportunity and has now incurred its own substantial costs which it would have avoided. On this ground alone, the application fails.

47. Another ground is the special circumstance where a plaintiff establishes by some credible evidence on a prima facie basis, that its impoverished condition is attributable to the matters that are in issue in the action in which the security is sought. That is the case here. The plaintiffs claim that the defendant swooped on their premises in October 1998, took away their records and notified their customers that they were no longer the defendant's franchisees. As a result of these actions, which the plaintiffs claim in the proceedings to have been grossly wrongful and for which they should be rewarded substantial compensation, the plaintiffs allege that the business was ruined and that that accounts for the condition of the second plaintiff. That claim is obviously one of the issues that must be determined in the proceedings but it does strike me as having been proposed with a sufficient underpinning of rationality and credibility to justify refusal on this ground.

48. Finally, the co-plaintiff is a personal litigant and that is also a reason for refusing an order against such a party and, in addition, for permitting a corporate co-plaintiff to be carried on the back of the personal litigant, so to speak.

49. For these reasons, I hold that the defendant is not entitled to security for costs.