THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 364

Record No.: 2017/225

Birmingham P.
Peart J.
Costello J.

BETWEEN/

HEDGECROFT LIMITED

T/A BEARY CAPITAL PARTNERS

APPELLANT

- AND -

HTREMFTA LIMITED (FORMERLY DOLMEN SECURITIES LTD), HTREMFTA CORPORATE FINANCE LIMITED

(FORMERLY DOLMEN CORPORATE FINANCE LIMITED) AND

CANTOR FITZGERALD IRELAND LIMITED

(FORMERLY DOLMEN STOCKBROKERS LIMITED)

RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 27th day of November 2018

1. On the 28th April, 2017 Binchy J. in the High Court made an order pursuant to s. 52 of the Companies Acts, 2014 directing the appellant to provide security for such costs as are likely to be incurred by the respondents in the proceedings with a stay on the proceedings pending the furnishing by the appellant of the security for costs, the amount of the security to be determined by the Master of the High Court in default of agreement. In addition, he struck out the claim as against the third named respondent on the basis that it was frivolous and vexatious and bound to fail. The appellant appealed the order and this is the judgment in respect of the appeal.

2. The parties accepted for, the purposes of the appeal, that the appellant has a *prima facie* case and the respondents have a *prima facie* defence, that the appellant would not be able to pay the estimated costs of the respondents if they were successful in their defence and that the appellant had established special circumstances, which usually leads a court to exercise its discretion to refuse to order the provision of security. The issue in the appeal was whether there were other circumstances present which outweighed the factors in the appellant's favour so that the trial judge could exercise his discretion to make the order sought.

Background
3. The appellant is a boutique corporate finance debt advisory firm which trades as Beary Capital Partners. Its principal shareholder and director is Mr. Kevin Beary. In or about 2006 Mr. Beary was a shareholder in the first and second named respondent. In addition, Mr. Beary acted as managing director of the second named respondent and had a service contract with the first named respondent.

4. These proceedings arise from an Asset Purchase Agreement entered into between Mr. Beary, the appellant, and the first and second named respondents. Mr. Beary joined in the agreement for the purposes of providing personal covenants to the first and second named respondents. Under the Asset Purchase Agreement, the appellant purchased certain assets of the first and second named respondents. Much of the consideration was deferred and made dependant on the appellant receiving income from certain projects. The appellant says that it has received no income from these projects and so has paid no consideration.

5. On the 16th December, 2014 the appellant instituted these proceedings and alleged that the respondents breached the Asset Purchase Agreement. The appellant's claim arises in respect of two elements of the Asset Purchase Agreement. One of the pipeline projects which was assigned comprised the fees to be earned from arranging mezzanine finance in respect of what was described as the "Mainstream Renewal Contract". The original mezzanine funding for this contract was put in place by the first and second named respondents in 2008 and was rolled over in 2011 and again in 2014. The appellant says that at the time of the Asset Purchase Agreement it was contemplated that this contract would be rolled over and it was a contract in respect of which the first and second named respondent had earned significant fees.

6. The second aspect of the case related to contracts with NAMA. The appellant asserts that the first and second named respondent agreed to seek the consent of NAMA to sub- contract the services to be provided under the existing NAMA contract. Instead the respondents told NAMA that they were no longer engaged in carrying out services of the nature covered by the NAMA contract. This had the effect of NAMA deciding not to proceed with awarding any contracts to the first and second named respondents thereafter which could be subcontracted to the appellant. The appellant's claim is for damages for breach of the Asset Purchase Agreement, negligence and breach of duty and misrepresentation and damages for wrongful interference with the economic interests of the appellant. It assessed the value of its claim at €6,000,000.

7. On the 15th June, 2015 the respondents counterclaimed against both the appellant and Mr. Beary as respondent to the counterclaim pleading that the appellant had failed to pay the consideration due under the Asset Purchase Agreement, that the appellant and Mr. Beary were in breach of a non-solicitation obligation, they had failed to repay loan amounts under the Asset

Purchase Agreement and had acted in breach of contract and/or covenant, breach of duty (including fiduciary duty), negligence and/or misrepresentation thereby giving rise to a claim by the first and second named respondents.

Motion
8. By notice of motion issued on the 24th June, 2015 the respondents sought an order pursuant to s. 52 of the Companies Act, 2014 directing the appellant to provide security for costs and a further order staying the proceedings pending the furnishing by the appellant of security for costs. They sought an order fixing the amount of security for costs or in the alternative, an order directing the fixing of the amount of such security by the Master of the High Court. In addition, the respondents sought an order striking out the claim of the appellant against the third named respondent pursuant to Ord.19, r. 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court on the grounds that the pleadings disclosed no reasonable cause of action and/or are frivolous and vexatious and/or the claims are bound to fail.

The judgment of the High Court
9. The High Court noted that for the purposes of the application for security for costs the estimate of the probable costs that will be incurred by the respondents in the proceedings was €236,507.50 and further that the appellant accepted for the purposes of the application that the respondents had made out a *prima facie* defence to the appellant's claim. The major dispute in the application was whether or not the appellant would, in fact, be able to meet an award of costs in the estimated amount if the respondents were successful in their defence. The matter was hotly contested and gave rise to an exchange of fifteen affidavits.

10. The trial judge referred to the fact that the accountant retained by the respondents for the purposes of the application, Mr Kieran Wallace of KPMG, consistently complained that it was not possible to form a view as to the financial standing of the appellant without current financial information. Despite this the appellant failed to adduce more up to date information than the 2014 accounts save "up to date workings" exhibited by Mr. Brian Hyland, accountant on behalf of the appellant. The single page document showed cash at the bank as at 25th January 2017 in the sum of €272,550 and debtors were stated to be €198,725. Creditors, including tax liabilities, are stated to be €252,536. Mr. Hyland also included as part of the assets of the company a loan advanced to a Belgian company in the sum of €40,000 and the value of a share holding of the appellant in a property investment which he estimated to be in the sum of €350,000. The judge noted that the updated workings fell a long way short of comprising accounts for the company, never mind audited accounts, and he said that the only proper accounts available for the appellant are the audited account for 2014 which were not filed until the 5th October 2016.

11. The trial judge said that the appellant advanced its case that it would be able to meet an award of costs made against it by referring to three specific assets. The first was a €40,000 loan to a Belgian company of which Mr. Beary was a 50% shareholder; the second was the sum of €157,500 "a success fee" which the appellant claims was due to it from a company known as Bray Primary Care Centre Limited, now referred to as BPC DAC. The third asset was the value of the appellant's shareholding in BPC DAC held through another company known as CD-BPC.

12. In his third affidavit sworn on the 4th April 2016 Mr. Beary described the €40,000 loan as an investment in an international property fund. It was not originally referred to in the draft audited accounts of the company at all. Subsequently, it was described in the draft audited account as a fixed asset of the company. Mr. Hyland described the €40,000 investment as being "an indefinite unsecured loan of €40,000 with an interest rate of 20% per annum". Following the retention of Mr. Hyland by the appellant, the sum of €40,000 was included in the draft audited financial statements of the appellant as a fixed asset of the appellant.

13. The trial judge concluded that notwithstanding the reliance placed by the appellant on this loan, nothing at all had been produced to prove it was due to the appellant and that the court could not possibly have regard to it without some documentation to vouch the advance of the loan, the terms of repayment, and some information as to the ability of the borrower to repay the loan.

14. In relation to the success fee, Binchy J. said that Mr. Beary averred (for the first time) in his third affidavit dated the 4th April 2016 that the appellant was entitled to a success fee of €225,000 as a result of an agreement entered into with BPC DAC. The success fee related to the grant of a planning permission to BPC DAC to develop a primary care centre in Bray. At para 4 of his affidavit Mr. Beary stated that the appellant is a 50% shareholder in BPC DAC. He said that the success fee was due to be paid to the appellant by BPC DAC by the end of April 2016. In a note to the draft accounts of the appellant for the year ended 31st December 2014 this fee was referred to under the heading 'Post Balance Sheet Events'.

15. The trial judge then noted that in a subsequent affidavit Mr. Beary reduced the value of this entitlement to €157,500 by reason of an arrangement entered into with his co-Director, Ms. Sighle Murphy. As a result of this arrangement, the success fee was to be split 70% to the appellant and 30% to Ms. Murphy by way of payment of salary to Ms. Murphy which had been deferred. Initially no evidence was produced from BPC DAC to demonstrate that it agreed to this liability. However, at the resumed hearing of the application Mr. Beary exhibited documentation circulated to the shareholders of BPC DAC on the 27th May 2016 which identified the fee as being due for payment and to the fact that the business plan for BPC DAC referred to the fee.

16. The trial judge pointed out that there was nothing to indicate that the shareholders who held 70% of the shares in BPC DAC accepted the fee and further that the fee was not reflected in the audited accounts of BPC DAC for the period ended the 30th September 2016. Having reviewed the evidence in relation to the history of the treatment by BPC DAC of the success fee that there was a definite reluctance on the part of BPC DAC to make the payment and that this had been deliberate. He said that this in turn created an uncertainty as to whether or not it would ever be paid and therefore he disregarded the claimed entitlement to the fee for the purposes of the application.

17. The main ground of contention in the application was the value of the appellant's interest in BPC DAC. The judge said that this issue had been the subject of an ever changing account strewn out across four affidavits sworn by Mr. Beary. Mr Beary referred to it for the first time in his third affidavit when his evidence was that the appellant was a 50% shareholder in BPC DAC. He explained that the company had an interest in the development of a primary care centre in Bray on behalf of the HSE. The matter was not fully explained on affidavit but counsel informed the court at the hearing of the motion that the project envisaged that the development will be undertaken by BPC DAC on property owned by the HSE. That property is to be acquired from the HSE by BPC DAC at a price of €1,250,100 and then developed by BPC DAC. It would then be leased back to the HSE. In his third affidavit Mr. Beary stated that:-

> *"A signed fully funded offer has been received which values BPC DAC's shares at €1.5m. and it is intended that this matter will be concluded in the coming months."*

This statement was later retracted and it was stated that an offer had been made but not accepted.

18. Mr. Hyland valued the appellant's claimed 50% shareholding in BPC DAC at €1,050,000 to take account of capital gains tax, down

from Mr Beary's €1,500,000. In his fourth affidavit of the 28th July 2016 Mr. Beary averred that the board of BPC DAC had decided to reject the offer of €3m. as they were of the view that the value of BPC DAC could be as much as €10m. He also explained for the first time that in order to procure investment in the project and to introduce new investors the appellant's beneficial interest therein was reduced to 30%. He also explained that the interest was held through another company, CG-BPC Limited, and that CG-BPC Limited held the shares upon trust for the appellant.

19. In an affidavit sworn on the same day, Mr. Hyland revised the value of the appellant's shares in CG-BPC Limited down to €500,000 net of tax, reflecting not just the reduced shareholding in the venture, but also that the interest of the appellant was now a minority interest.

20. The High Court noted that Mr. Beary explained in his fourth affidavit that this asset was not reflected in the accounts of the appellant because the appellant adopted a conservative approach and attached no value to the shareholding held by the appellant in BPC DAC until a final grant of planning permission had issued. Then in his fourth affidavit Mr. Beary averred that the appellant's interest in BPC DAC has been held in trust for some time:

> *"[the shareholding has been] held in trust for some time by CG-BPC and was recently transferred to the personal names of myself and the appellant's other former director for tax planning reasons. I hereby confirm that 70% of the above mentioned appellant's "A" ordinary share previously held in CG-BPC Limited are now held by myself personally in trust for the appellant. The remaining 30% of the appellant's shares are not held in trust for the appellant."*

21. The trial judge concluded that the appellant's shareholding in BPC DAC was apparently 70% of a 30% shareholding, i.e. 21%. However, he observed that the picture changed once again.

22. Mr. Beary delivered a sixth affidavit on the part of the appellant where he disclosed for the first time:-

> *"The shareholding in CG-BPC was held equally between the appellant and Collen Group. The issue share capital of CG-BPC is, and was, 1,000 "A" ordinary shares and 1,000 "B" ordinary shares. The "A" ordinary shares are held by the Collen Group Limited and the "B" ordinary shares were formally held by the appellant. I omitted to refer to the interest of Collen Group Limited in CG-BPC and I regret this omission. The net effect is that following the transfer of the shareholding in CG-BPC to me (70%) and Ms. Murphy (30%) I now hold, through CG-BPC a 10.5% interest in BPC-PAC. This is held by me in trust for the appellant. Having regard to the significance of the HSE transaction, the interest has a current value of at least €350,000 based on the value of a recent offer from a U.K. financial institution."*

23. The trial judge said that it would have been apparent to Mr. Beary from the 29th August 2014 (the date of completion of a shareholders' agreement to facilitate the introduction of new investors) that the appellant's indirect interest in CP-BPC was 15%, yet he clearly instructed Mr. Hyland that the interest was 50% and he also stated as much in his third affidavit. He noted that Mr. Hyland swore his third affidavit in which he valued the appellant's share in CG-BPC at €350,000, but that appeared to be based on an assumed shareholding of the appellant in that company of 21%, which suggested that Mr. Hyland was unaware of the 50% shareholding of Collen Group in CG-BPC. The trial judge said that it follows that the estimated value of the appellant's shareholding in BPC DAC held through CG BPC was €175,000.

24. In para 39 of his judgment in relation to this ever shifting evidence, Mr Justice Binchy held:-

> *"It was, to say the least of it, regrettable that the true facts relating to [the appellant's interest in BPC DAC] were not accurately set out from the outset, and even when issues regarding the same were raised by the respondents, inaccurate information was still provided…the unreliability of the information provided on behalf of the appellant inevitably gives rise to concerns that the evidence as it stands even at this stage, in relation to these matters, may be unreliable."*

25. Having reviewed the evidence, the court then considered the applicable principles and applied them to the evidence. There was broad agreement between the parties as to the principles applicable in respect of the application and he referred to the principles set out by Morris J. in *Inter Finance Group Limited v. KPMG Peat Marwick* [1998] IEHC 217 and by Clarke J. in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7. He held that the respondent had established a prima facie defence and he was satisfied that the appellant would be unable to pay the costs of the respondents if unsuccessful in the proceedings. He then considered in the test set out in Connaughton Road, which will be discussed further below, and held that the appellant had established specific circumstances which in the ordinary course ought to cause the court to exercise its discretion not to make the order sought. He went on at para 48 of the judgment to hold:-

> *"However, when considering whether or not to exercise a discretion, the conduct of the parties to the proceedings falls to be taken into account. I have remarked above how the appellant, on affidavit, provided misleading information as regards the extent of his interest in BPC DAC. Even after the respondents raised issues about the matter (in replying affidavits) the appellant failed to take the opportunity to provide the correct information, and it was not until his sixth affidavit that Mr. Beary made it clear that the appellant's interest in BPC DAC was 10.5%. Such conduct must have a consequence, otherwise unscrupulous parties to litigation may feel free to mislead the Court as they see fit, secure in the knowledge that they have nothing to lose by such conduct. The threat which that would pose to the proper administration of justice is obvious. In the circumstances therefore, I will not exercise my discretion in favour of the appellant and instead will make an order requiring it to provide security for such costs as are likely to be incurred by the respondents in the proceedings."*

26. The judge then considered the application to dismiss the claim against the third named respondent. He held that the claim pleaded against the third named respondent *"falls considerably short of an actual wrong on the part of [the third named respondent]"* and he ordered that the claim against them should be struck out.

27. The appellant then appealed against the entire order of Binchy J. I shall first consider the appeal against the order directing the appellant to furnish security for costs and staying the proceedings pending the fixing of the amount and the provision of that security.

The statutory provisions

28. Section 52 of the Companies Act, 2014, which replaced s. 390 of the Companies Act, 1963, provides:

> *"Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if*

it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."

29. The section applies where a company is plaintiff. The court may only act if it appears by credible testimony that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendant if the defendant is successful in his or her defence. If these two criteria are met, then the judge has a discretion whether to require the plaintiff to provide security for the costs of the defendant. The section is silent as to how the court is to exercise its discretion once the two threshold criteria are met.

The case law

30. The courts have developed legal principles applicable to applications for security for costs, both under the rules of the Superior Courts and under s. 390 of the Companies Act, 1963, the precursor to section 52. In *Thalle v. Soares & Ors.* [1957] I.R. 182 Kingsmill Moore J. emphasised the difference between an order for security for costs granted under Ord. 29 and an order under the then equivalent section to s. 390 of the Companies Act 1963. At p. 192 of the report he said:-

"The origin and history of the two jurisdictions are different, one being inherent and discretionary, the other statutory: the foundations are different, one being based on the local character of jurisdiction, the other upon the nature of limited liability: the underlying reasons are different, in the one case possible unwillingness to pay, in the other presumptive inability."

31. The courts have emphasised that the statutory jurisdiction reflects the decision of the Oireachtas that this special jurisdiction to order the provision of security for costs should apply to limited liability companies. In *Mooreview Developments Limited (in receivership) v. William Fanagan Limited* (Unreported Supreme Court, 9th June 2004, Keane J. *ex tempore*) at p. 9 of the judgment Keane J. said:-

"…the jurisdiction under s. 390 of the Companies Act is a specific jurisdiction in relation to security for costs which is quite different from the normal, wider jurisdiction under the Rules of Court. It is expressly predicated on the basis that the appellant company will not be in a position to pay the costs and it is accordingly intended to ensure that parties who have got the benefit of limited liability, which they are perfectly entitled to, do not fire proof themselves against the subsequent responsibility for costs in the event of the action failing, ensuring that they are not to be under any personal liability.

It is on that basis clearly that the legislature thought it proper that such parties should be required to furnish security for costs where the company itself was not in a position to pay the costs in the event of their losing the action."

32. In *Lancefort Ltd. v. An Bórd Pleanála* [1998] 2 ILRM 401 Keane J. in the Supreme Court recognised the rights of persons to organise themselves as a company with limited liability to shield themselves against an order for costs but he noted the existence of the equivalent of s.52 and the corresponding right of respondents to apply for an order for security for costs.

33. In *Harlequin Property (SVG) Limited & Ors. v. O'Halloran & Or.* [2012] IEHC 13 Clarke J described, at para. 4.9 of his judgment, the statutory provision as a quid pro quo for limited liability.

34. The courts have recognised that the implications of the jurisdiction to make an order under s. 52 (and its predecessor, s. 390) are that if the members of the company, who have obtained the benefit of limited liability, do not fund the litigation or if the company is not otherwise in a position to raise the funds to meet the security required in a manner which does not offend other legal principles, that the proceedings in which the limited liability company is a plaintiff may proceed no further. In previous cases it was accepted that potentially valid claims may nonetheless be prevented from proceeding to hearing by reason of the granting of an order for security for the costs of the defendant and the subsequent failure of the plaintiff to provide the security required.

35. In *Village Residents Association Ltd v. An Bord Pleanala and McDonald's Restaurants of Ireland Ltd.* [2002] 4 I.R. 321 the applicant was a company incorporated for the purposes of seeking judicial review of the first named respondent's decision to grant planning permission to the second named respondent. Laffoy J said that by its very nature the applicant can have no assets or finance other that those its members invest or procure for it. She noted that the members of the applicant company could finance the company to meet the order for security for costs and found that the action would only come to a halt if they failed so do.

36. There are other situations where, by reason of the fact that the party to litigation is a limited liability company, it is subject to legal restrictions which do not apply to natural persons. The Supreme Court has recently confirmed, in *Allied Irish Bank Plc v Aqua Fresh Fish Ltd* [2018] IESC 49, the decision in *Battle & Anor v Irish Art Promotion Centre Ltd* [1968] IR 252 and recognised that a company as a separate and distinct legal entity may not be represented in court by a director or shareholder, but must be represented by a solicitor and counsel. This decision stems from the nature of a limited liability company but it has the inevitable, incidental effect of limiting the right of access to the courts of limited liability companies who cannot afford such legal representation. This is constitutionally permissible and derives from the nature of limited liability. Similarly, the requirement that a company provides security for a defendant's costs where it has been shown by credible evidence that it may not be able to meet any award of costs, and its subsequent failure to provide such security, while this may result in a restriction on its ability to access the courts, derives from the nature of limited liability and is also constitutionally permissible.

37. Denham J (as she then was) was conscious of the fact that the granting of an order for security for costs and the stay of the proceedings pending the provision of the security so fixed has the potential to prevent the further prosecution of the proceedings as a matter of practicality. In her dissenting judgment in *West Donegal Land League Limited v Udaras na Gaeltachta* [2006] IESC 29 at page 12 of her judgment she said:-

"In considering the concept of 'special circumstances' it should be remembered that the essence of the order for security for costs (or not) is 'to advance the ends of justice and not to hinder them' per Kingsmill Moore J. above. It is for a court on such an application to consider, and to balance, the interests of the plaintiff company and those of the second named defendant in a fair and proportionate manner."

38. The majority judgment in *West Donegal Land League* Limited was delivered by Geoghegan J. He held that the case law on the jurisdiction to make an order for security for costs against companies established that notwithstanding the insertion of the word "may" in the section, the court, in the absence of special circumstances and as a matter of appropriate exercise of its discretion, will in a given case order security for costs in the circumstances provided for by the section. It is inherent in this judgment that the balance he envisages the court undertaking of the interests of the opposing parties is in fact carried out by firstly determining that

the plaintiff will be unable to pay the costs of the successful defence of the proceedings (and thus that the order ought to be made) and then considering whether the plaintiff has been able to establish countervailing special circumstances which will lead a court to exercise its discretion to refuse to make the order under the section. If the plaintiff fails to satisfy the court as to the existence of special circumstances such as would justify the court in declining to make the order, then the balance of justice lies in favour of granting the order, notwithstanding the effect this may have on the subsequent prosecution of the case.

39. Hogan J was also concerned that the discretion to order a company to provide security for costs should be exercised in a manner that was compatible with the constitutional rights of companies and persons who formed companies. In *CMC Medical Operations Ltd. (Liquidation) T/A Cork Medical Centre v the Voluntary Health Insurance Board* [2015] IECA 68 Mahon J gave the principal judgment of the court. Hogan J concurred with Mahon J.'s judgment and added some *obiter* comments of his own. He acknowledged that a requirement to provide security for costs serves a legitimate aim and purpose and he noted that the provision of security for costs has the potential to prevent otherwise genuine claims from being brought to trial. He acknowledged that the Oireachtas can regulate or control the privilege of limited liability enjoyed by corporate entities. Having so observed he then stated:

> *"…these companies must nevertheless in principle enjoy the constitutional right of access to the courts, even if that right can also be regulated by law in a manner which might not be permissible in the case of a private citizen: see, here by analogy, the comments of Keane J. in Iarnród Éireann v. Ireland [1996] 3 I.R. 321, 347-348 and those of McKechnie J. in Digital Rights Ireland Ltd. v. Minister for Communications [2010] IEHC 221, [2010] 3 I.R. 221.*
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> *8. In my view, the whole object of the jurisdiction conferred by s. 390 of the 1963 Act is fundamentally to protect against the potential abuse of the privilege of limited liability. In addition, this section must also be construed and applied in a fashion which does not negate the substance of the right of access to the courts. As important decisions such as McCauley v. Minister for Posts and Telegraphs [1966] I.R. 345 and Blehein v. Minister for Health and Children [2008] IESC 40, [2009] 1 IR 275 have all made clear, this principle is fundamental to the constitutional order. Accordingly, I consider that the statutory power to order security should not be exercised where this would be oppressive or would stifle a genuine claim."*

40. With respect to the observations of Hogan J, it seems to me that these observations may unduly limit the operation of the section enacted by the Oireachtas. The jurisprudence does not require that the applicant for security for costs establishes that the plaintiff company is abusing or potentially abusing the privilege of limited liability. Further, the essence of the section is that a company in practice may be halted in its access to the courts as an incidence of its status as a limited liability company. The courts have consistently granted orders notwithstanding this possible or even inevitable result of the making of such orders. To that extent I respectfully disagree that the discretion of the court is as circumscribed as Hogan J indicated.

41. In summary therefore I agree with the majority of the cases on s.390 that it is permissible to make an order directing a plaintiff company to provide security for costs even if it may, or indeed is highly likely, to result in the permanent stay on the further progress of the proceedings. It follows that a submission that the order ought not to be made because it would have that effect is not sufficient to answer an application for security for costs. A company opposing an application for security for costs must advance additional reasons, referred to as special circumstances in the case law, to persuade a court to exercise its discretion to refuse to grant the order sought. It has previously been stated that the list of what may constitute such special circumstances is not closed and this reflects the fact that the decision whether to grant or refuse the order is at the discretion of the court.

42. The principles applicable to an application for security for costs were summarised by Morris J in *Inter Finance Group ltd v. KPMG Peat Marwick* [supra] as follows:

> *"(1) In order to succeed in obtaining security for costs an initial onus rested upon the moving party to establish:*
>
> *(a) that he had a prima facie defence to the plaintiff's claim, and*
>
> *(b) that the plaintiff would 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 could be shown that there were specific circumstances in the case with ought to cause the court to exercise its discretion not the make the order sought.***
>
> *In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.*
>
> *The list of special circumstances referred to is not of course, exhaustive."* [emphasis added]

43. Thus if the defendant establishes the two matters identified by Morris J, then normally the court will make an order directing the plaintiff to provide security for his costs. However, in balancing the rights of both parties to the litigation, the plaintiff is afforded the opportunity of arguing that notwithstanding the fact that the defendant has satisfied the statutory criteria and has shown that he has a *prima facie* defence, the court nonetheless should decline to exercise its discretion in favour of the defendant. If the plaintiff establishes special circumstances which ought to cause the court to exercise its discretion not to make the order sought, then the court will decline to make the order sought. It is for the appellant to satisfy the court that there exist such special circumstances and what may constitute such special circumstances is not closed and may vary from case to case and remains a matter of discretion for the court. The statement of Morris J has been approved on many occasions, most recently by Clarke J (as he then was) in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd.* [supra]. He held that the plaintiff may seek to resist an order requiring it to provide security for costs on the basis that its inability to pay such costs is due to the wrongdoing of the respondent. In order for the plaintiff to be correct in its assertion four propositions must be true. These are:

> *"(1) that there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);*
>
> *(2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;*
>
> *(3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and*

(4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position"

44. If a plaintiff establishes these four points then the plaintiff will have proved that its inability to meet an award of costs is due to the wrongdoing of the defendant.

The role of an appellate court in relation to an appeal against a discretionary order
45. All of the authorities confirm that an order made pursuant to s. 52 of the Act of 2014 is at the discretion of the judge. In *Desmond v MGN Ltd.* [2009] 1 IR 737 Geoghegan J in the Supreme Court stated:-

"The expression "discretionary order" can cover a huge variety of orders, some of them involving substantive rights and others being merely procedural in nature including mundane day to day procedural orders, such as orders for adjournments etc. I think that in reality over the years since In bonis Morelli; Vella v. Morelli this court has exercised common sense in relation to that issue. The court would be very slow indeed to interfere with the High Court Judge's management of his or her list, but in a case such as this particular case where much more substantial issues are at stake the court, while having respect for the view of the High Court Judge, must seriously consider whether in all the circumstances and in the interests of justice it should re-exercise the discretion in a different direction."

46. In *Lismore Builders Ltd. (in receivership) v Bank of Ireland Finance Ltd.* [2013] IESC 6 MacMenamin J. considered the circumstances in which an appellate court might review an order made by a High Court judge in the exercise of his or her discretion and observed as follows:

"Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgment of Geoghegan J. in Desmond v. MGN [2009] 1 I.R. 737."

47. The approach to be taken by this Court was recently considered in *Collins v Minister for Justice Equality and Law Reform* [2015] IECA 27 where Irvine J. writing for the Court held that the High Court judge had fallen into error when he concluded that the plaintiff had not been guilty of inordinate and inexcusable delay and had refused to dismiss the proceedings on that basis. Having considered all of the evidence before the High Court judge and having given due weight to his conclusions, she was satisfied that the case must be dismissed on the grounds of delay. At para 79 of the judgment she held:-

"we consider that the true position is that set by MacMenamin J. in Lismore Homes, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting the court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

These authorities establish the correct approach to the appeal in respect of the order of Binchy J. in this case.

The findings of the High Court
48. In the High Court it was established that the appellant had a *prima facie* case and the respondents a *prima facie* defence, the appellant would be unable to pay the costs of the respondents in defending the claim and that its inability to pay those costs stemmed from the alleged wrongdoing of the respondents. At para. 48 of the judgment Binchy J. held:

*"It follows therefore that the appellant has established that there are specific circumstances which **in the ordinary course ought to cause the court to exercise its discretion not to make the order sought**. However, when considering whether or not to exercise a discretion, the conduct of the parties to the proceedings falls to be taken into account. I have remarked above how the plaintiff, on affidavit, provided misleading information as regards the extent of its interests in BPC DAC. Even after the defendants raised issues about the matter (in replying affidavits) the plaintiff failed to take the opportunity to provide the correct information, and it was not until his sixth affidavit that Mr. Beary made it clear that the plaintiff's interest in BPC DAC was 10.5%. Such conduct must have consequences, otherwise unscrupulous parties to litigation may feel free to mislead the court as they see fit, secure in the knowledge that they have nothing to lose by such conduct. The threat which that would pose to the proper administration of justice is obvious. In the circumstances therefore, I will not exercise my discretion in favour of the appellant and instead will make an order requiring it to provide security for such costs as are likely to be incurred by the defendants in the proceedings."*

The arguments on appeal
49. The appellant argued that despite finding that the appellant had a *prima facie* cause of action against the first and second named respondents and that the appellant was unable to meet the costs of the respondents and that the inability to do so stemmed from the very wrong doing about which the appellant complained, the trial judge nevertheless directed the appellant to provide security for costs and stayed the proceedings pending the provision of that security. It argued that the consequence of this determination is that the appellant is deprived of access to the courts to pursue what has been recognised as a legitimate claim. It argued, relying upon the observations of Hogan J. in *CMC Medical Operation Ltd*, that the effect of directing security in the present case is to stifle a genuine claim and therefore this court ought to intervene and reverse the decision.

50. As discussed above, I believe that the obiter observations of Hogan J would unduly restrict the proper operation of the section and do not correctly set out the test to be applied by a court considering an application under s. 52, whilst acknowledging that the court ultimately retains a discretion in the interests of justice. Insofar as the appellant's case is based upon the submission simpliciter that the trial judge erred in law because the effect of the order is to stifle a genuine claim by the appellant company, I reject this submission. The case law establishes that it is not sufficient to answer an application for an order under s. 52 by asserting (or even proving) that if an order for security for costs is made the company will be unable to provide the security ordered. In order to resist the application, the appellant must establish the existence of a special circumstance such as would satisfy the court that it ought not to make the order sought.

51. In this case there was no evidence that the consequence of the order is that the appellant will thereby be deprived of access to the courts and that its claim will be improperly stifled. That case was never made by the appellant either on affidavit or in argument. It does not flow logically from the fact that the trial judge was satisfied that there was credible testimony that there was reason to

believe that the appellant would not be able to discharge the costs of these respondents if they were successful in their defence. As was pointed out by Laffoy J. in *Village Residents Association Ltd*, it is open to the members of the company to provide the security for costs by way of investment in the company. Contrary to what was submitted by counsel, this is permissible under the Act of 2014 and very far from what was contemplated by Clarke J. in *Moorview Developments Ltd v. First Active Plc.* [2011] IEHC 117, which was recently upheld by the Supreme Court in *Moorview Development Ltd v First Active Plc* [2018] IESC 33. It is simply not open to the appellants to advance this case upon appeal.

52. The appellant argued in effect for a new special circumstance. It pointed to the fact that the first and second named respondents had brought a counterclaim in the proceedings seeking damages from the appellant and its director, Mr. Beary. Mr. Beary has been joined to the proceedings as a defendant to the counterclaim. It was submitted that if the appellant is unsuccessful in the proceedings and the first and second named respondents are successful in their counterclaim, Mr. Beary is a mark for the costs of the proceedings on the basis that the same issues that arise in the appellant's claim and the respondent's counter claim could be dealt with at the same time by the same judge. The appellant argues that, as Mr. Beary is a principal of the appellant company, the effect of the order requiring the appellant to provide security for costs is that Mr. Beary, as the principal of the appellant, is required to put up the security on behalf of the appellant. He would be required to do this while also funding the appellant's costs of the proceedings and himself being a mark for a potential costs order, were the respondents to succeed on their counterclaim.

53. It seems to me that the answer to this argument is to be found in the decision of LaffoyJ. in *Village Residents Association Limited* and Keane J.in *Lancesfort Limited* in which they expressly contemplate shareholders of a company resourcing the company so that it can provide security for costs if they, as the shareholders, wish the company to continue the litigation. The fact that a shareholder is also a respondent to a counterclaim does not to my mind alter this position. Furthermore, there is no evidence before either the High Court or this Court as to the resources of Mr. Beary.

54. In addition, it was argued that where there is a counterclaim that essentially deals with the same issues as those raised in the plaintiff's claim, then the court should be reluctant to make an order for security for costs. The appellant referred to the English decisions, *B.J. Crabtree v. GPT Communication Systems* (1990) 59 BLR 43 and *Anglo Petroleum v. TFB* [2003] EWHC 1177. In Crabtree the court held that it would not be fair and just to order the plaintiff to give security for costs because to do so would prevent the plaintiff from pursuing its claim but, in the course of defending the counterclaim, all the same matters would be canvassed as would be canvassed if the plaintiff were to pursue its claim. It followed that the costs incurred by the defendant for the purposes of the defence might equally and perhaps preferably be regarded as costs necessary to prosecute the counter claim. Bingham L.J. at page 49 of Crabtree stated:

> *"It cannot be too firmly emphasised that there can be no rule of thumb as to the grant or refusal of an order for security in these circumstances."*

He continued at page 53:

> *"It is a rule intended to give a measure of protection to a defendant who is put to the cost of defending himself against a claim made by an impecunious corporate plaintiff. It may in some case be fair and just to make such an order even though the defendant is himself counter claiming, but I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim."*

55. In the absence of any comparable evidence in this case it cannot be said that the trial judge erred in the exercise of his discretion in directing the appellant to provide security for costs to the respondents while the first and second named respondents were pursuing a counterclaim against the appellant and Mr. Beary.

56. Thirdly, the appellant argued that the trial judge had failed to exercise his discretion in a fair and proportionate manner as referred to by Denham J. in *West Donegal Land League Ltd.* It is of course to be borne in mind that she gave the dissenting judgment in that case and that the majority decision given by Geoghegan J. was that the order was properly made. At page 4 of his judgement he held:

> *"The case law under section 390 establishes notwithstanding the insertion of the word "may" the court in the absence of special circumstances* ***and as a matter of appropriate exercise*** *of its discretion will in a given case order security for costs in the circumstances provided for by the section." (emphasis added)*

57. Even where the trial judge finds that the plaintiff has established the existence of special circumstances such as could justify withholding an order for security for costs, it is for the trial judge separately and in addition to that finding, to determine, in the appropriate exercise of his or her discretion whether to make the order sought or not. It is for the court to determine if the order would be fair or proportionate in all the circumstances.

58. It was accepted, correctly in my view, that the trial judge was entitled to have regard to the conduct of the appellant and in particular to the series of affidavits sworn on its behalf by Mr Beary. The trial judge held as a fact, and this was not disputed, that the evidence was inaccurate and misleading and no explanation for the attempt to mislead the trial judge was offered to either the High Court or this Court.

59. The appellant argued that the High Court ought properly to have marked its displeasure with regard to Mr. Beary's evidence to the court by refusing to order the appellant to provide security for costs but awarding the respondents the costs of their unsuccessful motion. It was argued that, but for the actions of Mr. Beary, the High Court acknowledged that it would have refused to make an order for security for costs and that reversing this intended decision and ordering the appellant to provide security for costs in the circumstances was a disproportionate and an excessive exercise of the court's discretion pursuant to section 52.

60. I am satisfied that this was a matter that fell within the discretion of the trial judge. It was not so disproportionate an exercise of his discretion as would warrant the intervention of this Court on appeal. There was no evidence that the decision would bring the proceedings to a halt and therefore the argument that the exercise of the trial judge's discretion was disproportionate because it would result in the stifling of the appellant's claim cannot be approached on that premise. It was accepted by counsel for the appellant that it was open to the trial judge to have regard to the conduct of the appellant and the evidence of Mr. Beary in the exercise of his discretion. In my opinion he was entitled to take a very grave view of the manner in which the appellant, through Mr Beary, approached the application and repeatedly misled the court with either incomplete or misleading information. I am not satisfied that any error of principle has been demonstrated which would justify this court in reversing his decision, in accordance with the principles established in Lismore Homes and *Collins v. The Minister for Justice, Equality and Law Reform*.

61. It follows that I refuse the appeal against the decision to order the appellant to provide security for the respondents' costs and staying the proceedings pending the provision of the security as agreed or fixed by the Master.

The Quantum of the security
62. Section 52 of the Act of 2014 differs in one important respect from its predecessor, s. 390 of the Act of 1963. Instead of requiring "sufficient security" to be given (s. 390), s. 52 now requires *"security"* to be given. The amount of security awarded against corporate plaintiffs pursuant to s. 390 was treated differently to security to be provided by personal plaintiffs because of the specific statutory provision. In *Lismore Homes Limited v. Bank of Ireland Finance Limited (No. 3)* [2001] 3 I.R. 536, Murphy J. held that the words *"sufficient security"* in the section *"involved making a reasonable estimate or assessment of the actual costs which it is anticipated the respondent will have to meet"*. Arising from *Lismore*, it became the practice to assess the quantum of the security to be provided by a plaintiff pursuant to s. 390 as reflecting the estimated full costs of the defendants as determined by the Master of High Court. When the Companies Acts were codified in the Act of 2014, the word "sufficient" was omitted from s. 52. It has been argued by Courtney in the *Law of Companies*, 4th Edition, p. 359 that:-

> *"The status quo ante Lismore Homes Limited v. Bank of Ireland Finance Limited et al has now, however, been restored by Section. 52 of the Act which departs from its predecessor, Section 390 of the Companies Act, 1963 by omitting the words (sic) "sufficient". Now, complete judicial discretion as to the quantum of the security to be provided has been restored and it is expected that the usual one third of the estimated costs will again become the norm in orders for security for costs under Section 52 of the Act."*

63. The import of the amendment effected by s.52 was recently considered in *Coolbrook Developments Limited v. Lington Development Limited and Anor.*(unreported, High Court, Barniville J, 15th November, 2018). In a detailed judgment where he analysed all the recent case law and academic commentary, he concluded that the court has complete judicial discretion as to the amount of security to be ordered. At paragraph 106 of the judgment he said:-

> *"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 costs should be provided by way of security in the absence of special circumstances."*

I agree with this decision and accept it to represent a correct statement of the law.

64. The appellant did not dispute that the court has a complete discretion as to the quantum of the security to be provided. The appellant submitted that setting the security at one third of the proposed costs would be *"in the spirit of section 52 of the Companies Act 2014 and would reflect a "fair and proportionate" order in the circumstances of the case"*.

65. The argument that such an order reflects the spirit of s. 52 is not, in my opinion compatible with an acknowledgment that the section confers complete judicial discretion as regards the quantum. Barniville J in *Coolbrook* has clearly stated that the section confers complete discretion on the court as to the amount of security to be ordered. Any alleged norm (which has been rejected in *Coolbrook*) is no more than that, and is certainly not binding.

66. In this case there was no evidence that the appellant would be unable to provide security in the estimated full amount of the costs of the respondents but would be in a position to lodge security in respect of one third of that estimate. Therefore, the argument based upon the decision of Kingsmill Moore J. in *Thalle v. Soares* to the effect that if the amount fixed for security is too large the defendant may be able to defeat an honest and substantial claim because the plaintiff cannot find the necessary security is not open to the appellant to advance in this case. This has been considered to be a relevant factor in the earlier cases and Barniville J laid emphasis on it in *Coolbrook*.

67. Furthermore, by reason of the fact that the appellant accepted the proposed quantum of the respondents' costs for the purposes of the motion, it likewise may not now argue that fixing the costs at the level of the estimate provided by the respondents would amount to *"encouragement to luxurious litigation"*.

68. It is clear from the transcript of the exchanges between counsel and the trial judge that the trial judge considered the issue of the quantum and determined, in the exercise of his discretion, to direct the Master to fix the quantum by reference to the full costs of the respondents in defending the appellant's claim. It seems to me that this was a bona fide exercise by the trial judge of his discretion as conferred on him by the Statute and it is not one with which this court ought to interfere.

Application to dismiss the claim against the third respondent
69. The trial judge struck out the appellant's claim against the third named respondent on the grounds that the case as pleaded *"falls considerably short of an actual wrong on the part of the [third named respondent]"*. The appellant submitted that the pleadings disclose a cause of action and submitted that the trial judge did not have proper regard to the legal principles in assessing whether the claim against the third named respondent should be dismissed.

70. The appellant's case against the third named respondent is pleaded at para. 18 of the Statement of Claim as follows:-

> *"By reason of the breaches of the Asset Purchase Agreement and other breaches of duty set out therein, [the third named respondent] has unlawfully interfered with the economic interests of [the plaintiff]."*

The appellant pleads that one of the pipeline projects the subject of the Asset Purchase Agreement related to the provision of mezzanine finance by way of a Loan Note having a three year term to December 2011. The appellant's case is that it was envisaged that the Loan Note would be rolled over and at para. 20 of the Statement of Claim it pleads:

> *"20. Contrary to the terms of the Asset Purchase Agreement, in late 2011, [the third named respondent] entered into a new corporate advisory and fundraising letter of engagement with [the client] in order to manage the rollover of the 2008 mezzanine facility. In or about December 2011, a new three year mezzanine facility agreement of €40m. was entered into by [the client] and [the third named respondent] ("the 2008 mezzanine facility")…*
>
> *22. In the circumstances where [the client] was identified as a pipeline project and so sold to [the appellant] pursuant to the Asset Purchase Agreement, it was not open to[the first and second named respondents], or either of them, to cause or permit [the client] to engage in corporate finance related activity with the respondents and/or a related party,*

[the third named respondent]."

71. The respondents raised a notice for particulars dated the 8th May 2015 seeking particulars of each alleged unlawful act of interference said to have been carried out by the third named respondent and further particulars of the plea at para. 18 of the Statement of Claim.

72. The appellant replied on the 25th May 2015 stated:-

> *"As is clear from para 18 of the Statement of Claim it is alleged that the breaches of the Asset Purchase Agreement and the other breaches identified in the Statement of Claim represented the alleged acts of interference. The plaintiff can provide further particulars following discovery and/interrogatories."*

73. The appellant then delivered a reply to the defence delivered by the respondents. In para. 9 it pleaded:-

> *"By way of special reply…for a period of approximately two years post completion of the Asset Purchase Agreement, [the third named respondent] was 100% owned and controlled by [the first named respondent] in the circumstances and as set out at para 16 of the statement of claim [the first and/or second named respondents] caused or committed corporate finance business to be engaged in, inter alia, by [the third named respondent] in respect of pipeline projects. Further, [the first and second named respondents] caused or permitted [the third named respondent] to deal with clients listed in the pipeline's project scheduled. As a result thereof, [the third named respondents] interfered in the economic interests of the appellant."*

74. The appellant argued that it had pleaded a stateable case that the third named respondent had wrongfully interfered with his economic interests. It submitted that there was no requirement to plead its case with greater particularity by analogy with claims of fraud or undue influence. To the extent that the trial judge applied this test to its pleadings, he had erred in dismissing the claim. It was submitted that what was pleaded is sufficiently clear, the third named respondent knows the case it has to meet and the question the trial judge ought to have asked himself was *"is it bound to fail?".*

75. The High Court judge referred to the fact that the jurisdiction must be exercised sparingly and only when the court is satisfied that there is a clear case to justify the exercise of such discretion. He accepted that he must, in considering the application, *"treat the plaintiff's claim at its high watermark"*.

76. At para 56 of his judgment he held:-

> *"56. So what is the high watermark of the plaintiff's case as against [the third named defendant]? It is simply that by reason of alleged breaches of the Asset Purchase Agreement by the first and second named defendants, [the third named defendant] have unlawfully interfered with the economic interests of the plaintiff. In other words, because the first and second named defendants breached their obligations under the Asset Purchase Agreement, [the third named defendant], being aware of the terms and conditions of the Asset Purchase Agreement, unlawfully interfered with the economic interests of the plaintiff by providing corporate finance services to clients whose business had been purchased by the plaintiff from the first and second named defendants under the Asset Purchase Agreement, while fully aware of the terms of the Asset Purchase Agreement. But no conspiracy is alleged in the pleadings. It is not alleged that [third named defendant] solicited this business, and the allegation (such as it is made out in any detail at all) appears to be that it is guilty of the tort of unlawful interference with economic relations (which counsel for the defendants points out in this jurisdiction is more correctly known as the tort of causing loss by unlawful means), simply by accepting business which it was aware had been purchased by the appellant from the first and second named defendants. Additionally, the plaintiff relies upon the close proximity of relationship between the first and second named defendants on the one hand and [the third named defendant] on the other. This, in my view, falls considerably short of an actionable wrong on the part of [the third named defendant]. I agree with the submissions of counsel for [the third named defendant] that, as pleaded, and in particular absent a specific plea as to conspiracy, the case against [the third named defendant] completely disregards the separate corporate personalities of the three defendants. In effect, the plaintiff is seeking to hold [the third named defendant] responsible for the breaches of contract alleged against the first and second named respondents simply because of the close proximity of relationship between all three companies."*

77. As was pointed out by the High Court, there was no application to amend the proceedings to include a plea of conspiracy. This continued to be the case at the hearing of the appeal to this Court. Nonetheless the appellant submitted that the pleadings before the court clearly indicated that there was a conspiracy between the third named respondent and the first and second named respondent to interfere with the economic interests of the appellant. This is based on the common ownership and control of the respondents for a period of up to two years after the Asset Purchase Agreement entered into combined with the allegation that the third named respondent was aware of the terms of the Asset Purchase Agreement. It was said in the circumstances that the trial judge *"placed undue emphasis"* on the separate corporate personalities of the three respondents in disregard of the realities of corporate life.

78. I am satisfied that the trial judge correctly analysed the pleadings and applied the relevant legal principles to the application before him. For whatever reason, the appellant has elected not to seek to amend its pleadings and therefore the matter falls to be decided upon the pleadings as they now stand. I disagree with the submission that the trial judge placed undue emphasis on the separate corporate personalities of the respondents in disregard of the realities of corporate life. No basis was advanced which would entitle the trial judge to disregard their separate and distinct legal personalities. I am satisfied that he approached his task correctly and I see no error in his judgment. It is clear that in advancing a claim against the third named respondent the appellant is relying on acts committed by the first and second named respondents. I agree with counsel for the respondents that such a plea simply cannot sustain a cause of action against the third named respondent.

79. Accordingly, it follows that the trial judge was correct to strike out the claim as against the third named respondent on the ground that the pleadings disclosed no reasonable cause of action and/or are frivolous and vexatious and/or are bound to fail.

80. I would dismiss the appeal.