THE HIGH COURT

[2014 No. 10605 P.]

BETWEEN

HEDGECROFT LIMITED

T/A BEARY CAPITAL PARTNERS

PLAINTIFF

AND

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

(FORMERLY DOLMEN CORPORATE FINANCE LIMITED) AND

CANTOR FITZGERALD IRELAND LIMITED

(FORMERLY DOLMEN STOCKBROKERS LIMITED)

DEFENDANTS

AND

KEVIN BEARY

DEFENDANT TO COUNTERCLAIM

JUDGMENT of Mr. Justice Binchy delivered on the 28th day of April, 2017.

1. The defendants have two applications before the court.

> (i) An application pursuant to s. 52 of the Companies Act 2014, requiring the plaintiff to give security for the costs that would be incurred by the defendants in these proceedings, and further an order staying the within proceedings pending the furnishing by the plaintiff of such sum as may be fixed by the court as security for costs.
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> (ii) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts 1986 (as amended) striking out the claim of the plaintiff against the third named defendant on grounds that the pleadings disclose no reasonable cause of action and/or are frivolous and vexatious and/or the claims are bound to fail.

2. These applications were initially heard over two days on 15th February, 2017 and 16th February, 2017. For reasons that I will explain later it was then adjourned to 5th April, 2017. Any reference in this decision to the "resumed hearing" refers to the latter date.

3. The proceedings arise out of an Asset Purchase Agreement ("APA") entered into between Dolmen Corporate Finance Limited ("DCF"), Dolmen Securities Limited ("DSL"), Hedgecroft Limited t/a Beary Capital Partners ("the plaintiff or BCP") and Kevin Beary ("Mr. Beary") dated 31st December, 2010. Under this agreement, BCP purchased certain business and assets of the first and second named defendants for the considerations set out therein. Much of the consideration was deferred and depended on BCP receiving income from contracts referred to in the agreement therein described as "mandated contracts" and the "Pipeline Projects". The consideration was divided into two parts, therein referred to as the "initial consideration" and the "further consideration".

4. The initial consideration was to be an amount equal to 80% of fees and income received by the plaintiff in respect of the mandated contracts and the pipeline contracts up to a maximum of €450,000 and the further consideration was to be calculated as an amount equal to 10% of all fees and income paid to the purchaser during the period of 24 months after the completion date once the aggregate amounts so received exceeds €2million, but subject to a maximum further consideration of €100,000.

5. The plaintiff claims that it received no income of any kind arising out of the mandated contracts or the pipeline projects, and as a consequence he has not paid either the initial consideration or the further consideration. The failure by the plaintiff to pay either the initial consideration or the further consideration has given rise to a counterclaim on the part of the defendant in the proceedings. The plaintiff further claims that the first and second named defendant caused the third named defendant to deal with and profit from pipeline projects purchased by the plaintiff under the APA and in particular refers to one such project involving an entity known as Mainstream Renewal Power in respect of which it is claimed would have received very substantial fees, including management fees arising out of the rollover of mezzanine finance that had previously been raised on behalf of that client. A specific sum of €143,386 is claimed in respect of the management fees in the statement of claim, but in his first replying affidavit on behalf of the plaintiff, Mr. Beary claims additional losses in relation to this contract in the sum of €2m.

6. At the time of completion of the APA, the second named defendant was a member of a panel advisers appointed by NAMA for the purposes of providing services described as initial borrower reviews of business plans submitted by borrowers to NAMA. The second named defendant was a party to an agreement with NAMA which set out the terms upon which such services would be provided by the second named defendant to NAMA, if called upon to do so. While this agreement was specifically excluded from the assets sold to the plaintiff under the terms of the APA, there was a specific section in the agreement which provided that, subject to the consent of NAMA, the second named defendant would subcontract any work it received under its agreement with NAMA to the plaintiff. In such event, the purchaser was to receive all of the income arising out of any such referrals. It is the plaintiff's claim that when NAMA purported to award a specific contract to the second named defendant, it responded to NAMA simply by saying that it, the second named defendant, was no longer involved in the corporate finance business, and did not seek the consent of NAMA to the work being undertaken by the plaintiff. As a consequence, the plaintiff alleges that not only did it lose that contract, which it claims would have yielded a fee of €400,000, but it also lost the benefit of other referrals. The plaintiff estimates that there might have been ten such other referrals and that each contract would have been worth approximately €400,000 in fees to the plaintiff.

Application for Security for Costs
7. The notice of motion is grounded on the affidavit of Ronan Reid sworn on 24th June, 2015. I will deal first with the application for security for costs. Mr. Reid is Chief Executive Officer of the third named defendant, Cantor Fitzgerald Ireland Ltd., and is also a director of the first and second named defendants, DSL and DCF. The application has given rise to an exchange of no less than thirteen affidavits and a further two affidavits for the purpose of the resumed hearing. In his first affidavit, Mr. Reid exhibits an estimate of the costs of the defending the proceedings procured from Behan and Associates, Legal Costs Accountants in which they estimate the total probable costs that will be incurred by the defendants in the proceedings in the sum of €236,507.50. For the purpose of this application, that estimate is accepted by the plaintiff. In his first affidavit in reply to that of Mr. Reid, Mr. Beary, principal shareholder and director of the plaintiff, accepts, for the purpose of this application that the defendants have made out a *prima facie* defence to the plaintiff's claim.

8. The plaintiff company was incorporated on 2nd December, 2010, shortly prior to the execution by the parties of the APA on 31st December, 2010. In an email dated 30th December, 2012, from Mr. Beary to Mr. Shawn Matthews and Mr. Steve Cantor, Mr. Beary describes the plaintiff as being a "boutique corporate finance debt advisory firm". In his first affidavit, Mr. Reid exhibits the plaintiff's financial statements for the year ending 31st December, 2011; 31st December, 2012; and 31st December, 2013, as filed in the company's registration office. Each of these financial statements indicates that the plaintiff recorded a net negative asset position in each of those years.

9. What may be described as a draft of the accounts for the year ended 31st December, 2014, was first produced and exhibited by Mr. Beary in his first affidavit of 23rd September, 2015. This draft indicated shareholders' funds in the sum of €123,293, but in the accounts as finalised and filed in October 2016, this reduced to €14,427. There were also other changes in the accounts as finalised over the draft originally exhibited by Mr. Beary to which I will return later. No further accounts, whether in draft or final form, have been produced by or on behalf of the plaintiff for the purpose of resisting this application. Nor have any management accounts been produced.

10. The plaintiff retained a Mr. Brian Hyland, accountant and partner in the firm of Baker Tilly Ryan Glennon who swore three affidavits in support of the plaintiff's case. He appended to his third affidavit (dated 2nd February, 2017) what he described as "updated workings" relating to the finances of the plaintiff. This was a single page document which shows cash at bank as at 25th January 2017 in the sum of €272,550. Debtors are stated to be €198,725. Creditors, including tax liabilities, are stated to be €252,536. Mr. Hyland also includes 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 shareholding of the plaintiff in a property investment (both of which I deal with in detail below) which he estimates to be in the sum of €350,000. He estimates the net assets of the plaintiff as of the in the sum of €608,740. If the latter two items are ignored, this results in the net assets of BCP reducing to €218,740.

11. Comforting and all as the "updated workings" of Mr. Hyland may be, it need hardly be said that such a document falls a long way short of comprising accounts for the company, never mind audited accounts. It remains the case that the only proper accounts available for BCP are the audited accounts for 2014, which were not filed until 5th October, 2016, although Mr. Beary did exhibit a draft of the same with his affidavit of 4th April, 2016. The accountant retained by the applicant for the purpose of this application, namely Mr. Kieran Wallace of KPMG (who also swore three affidavits in the matter) consistently complained that it is not possible to form a view as to the financial standing of BCP without current financial information. Nonetheless, the plaintiff failed to bring forward any more up to date information than the 2014 accounts, other than the "updated workings" exhibited by Mr. Hyland.

12. However, in resisting this application, Mr. Beary places very significant emphasis on three specific assets which of which he alleges the plaintiff has the benefit:

> (1) a €40,000.00 loan to a Belgian company of which Mr. Beary is a 50% shareholder;
>
> (2) the sum of €157,500 which the plaintiff claims is due to it by a company known as BPC DAC in respect of a success fee relating to the development of a primary care centre on behalf of the HSE; and
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> (3) the value of its shareholding in BPC DAC (which is held through another company known as CG-BCP). The extent and value of this interest was the subject of considerable discussion at both the initial hearing and the resumed hearing .

The €40,000 loan to the Belgian Company
13. In his third affidavit sworn on 4th April, 2016, Mr. Beary described this as an investment in an international property fund. It was not originally referred to in the draft audited accounts of the company at all, but was subsequently described therein as a fixed asset of the company. In a report appended to his first affidavit, Mr. Hyland describes the €40,000 investment as being "an indefinite unsecured loan of €40,000 with an interest rate of 20% per annum", the purpose of which was to assist a Belgian company in which Mr. Beary is stated to hold a 50% shareholding in legal proceedings against a German fund company. Mr. Hyland states in this report that "settlement talks are at an advanced stage and this is considered fully recoverable". Following the retention of Mr. Hyland, the sum of €40,000 was included in the draft audited financial statements of the plaintiff as a fixed asset of the plaintiff. Notwithstanding the reliance placed by the plaintiff on this loan, nothing at all has been produced to prove it is due to the plaintiff. 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 same.

The Success Fee
14. Mr. Beary avers (for the first time) in his third affidavit dated 4th April, 2016, that the plaintiff is entitled to a success fee of €225,000 as a result of an agreement entered into with a company called Bray Primary Care Centre Limited. This is the company referred to above as BPC DAC and I will hereafter refer to it as such. This success fee relates to the grant of a planning permission to that company to develop a primary care centre in Bray. He states in paragraph 4 of that affidavit that the plaintiff is a 50% shareholder in BPC DAC Limited. He says that the success fee is due to be paid to the plaintiff by BPC DAC by the end of April 2016. He also exhibits a copy of the decision of An Bord Pleanála whereby planning permission was granted. In that affidavit, he also exhibits a draft of the accounts of the plaintiff for the year ended 31st December, 2014, wherein at note 15, under the heading "post balance sheet events" there is reference to this fee.

15. In a subsequent affidavit, Mr. Beary reduces 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% thereof to the plaintiff and 30% thereof to Ms. Murphy, by way of payment of salary to Ms. Murphy, which had been deferred.

16. While initially no evidence was produced from BPC DAC to demonstrate its agreement as to this liability, at the resumed hearing Mr. Beary did produce on affidavit documentation circulated to the shareholders of BPC DAC on 27th May, 2016, which identifies the fee as being due for payment, in a statement of projected cash flow. He also draws attention to the fact that the business plan for BPC DAC, which is a schedule to the shareholders' agreement executed by the shareholders of that company, refers to the fee. Counsel for the applicant objected to Mr. Beary exhibiting these documents at this stage in the proceedings, because I had adjourned the application for the express purpose of permitting the plaintiffs to adduce further evidence in relation to the applicant's interest in BPC DAC, and no other. Be that as it may, I do not believe the plaintiffs are prejudiced by the admission of this additional evidence, and indeed they have had an opportunity to respond to the same, so I rule in favour of its admission.

17. While I am satisfied that this documentation indicates that BPC DAC is aware of the fee claimed by the applicant, and that at least one other shareholder (Collen Group, which is actually a 50% shareholder, together with the plaintiff in CG-BCP) is accepting of the fee, there is nothing to indicate that the other shareholders (who hold 70% of the shares in BPC DAC) are accepting of the fee. It is not reflected in the audited accounts of BPD DAC for the period ended 30th September ,2016 , which is a surprising omission. Moreover, one would have to be very concerned that a fee which it is claimed was payable upon the grant of a planning permission which issued in March, 2016, remains unpaid. In his third affidavit, Mr. Beary stated that he expected the payment to be received by the end of April, 2016. In his fourth affidavit delivered three months later, he says that payment is expected to be made over a period of four months in three tranches, but does not explain the delay in payment or give any indication as to when the three tranches are likely to be paid. In his fifth affidavit Mr. Beary states that the plaintiff decided not to demand payment of the success fee as a good will gesture because of a delay on the part of the HSE in vacating the property on which the Bray Primary Care Centre is to be constructed, and he says that he expects the fee to be paid by the end of 2017. In his sixth affidavit he avers that the payment was one of a number of items earmarked for "immediate" payment in the cash flow projections referred to above, but that was on 27th May, 2016. This is against the background that BPC DAC received a loan from one of its shareholders of €1,162,300 on 30th September, 2016, and according to the plaintiff the company still has of the order of €0.56 million in cash at bank. All of this indicates a definite reluctance on the part of BPC DAC to make the payment for whatever reason. It may well be the case that BPC DAC is reluctant to make the payment until it is clear that the development of the primary care centre goes ahead, or the project is sold onwards, but whatever the reason may be, I can only conclude that at this point in time the fact that the payment has not been made is deliberate, and this in turn creates an uncertainty as to whether or not it will ever be paid. Accordingly, I must disregard the claimed entitlement to this fee for the purposes of this application.

The value of the plaintiff's interests in BPC DAC

18. The most significant item of all upon which the applicant relies in resisting this application is the value of its interest in BPC DAC. This issue has been the subject of an ever changing account strewn out across four affidavits sworn by Mr. Beary. In this third affidavit, (where he mentions it for the first time) Mr. Beary avers that the plaintiff is a 50% shareholder in BPC DAC. He explains that that company has an interest in the development of a primary care centre in Bray on behalf of the HSE. Although not indicated in the affidavit, the court was informed at hearing that the project envisages the development will be undertaken by BPC DAC, on a property owned by the HSE. That property is to be acquired from the HSE by BPC DAC at a price of €1,250,100, then developed by BPC DAC and leased back to the HSE, In his third affidavit Mr. Beary says that:-

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

This was based on an offer which Mr. Beary says was made for all of the shares in BPC DAC in the sum of €3million. So Mr. Beary was clearly asserting that the plaintiff owns 50% of BPC DAC. In the report exhibited by Mr. Hyland in his affidavit of 4th April, 2016, on the basis of this offer, he reduces the value of the plaintiff's 50% shareholding to €1,050,000.00 to take account of capital gains tax.

19. In his fourth affidavit of 28th July, 2016, Mr. Beary avers that the Board of BPC DAC had decided to reject the offer of €3 million, being of the view that the value of BPC DAC in the Bray Primary Care Project could be as much as €10 million. He also explains that in order to procure investment for the project, and to introduce new investors, the plaintiff's beneficial interest therein was reduced to 30% and further that that interest was held through another company, CG-BCP Ltd. and is held upon trust for the plaintiff. In an affidavit sworn on the same day, Mr. Hyland then revises the value of the plaintiff's shares (in CG-BCP) downwards to €500,000.00, net of tax, reflecting not just the reduced shareholding in the venture, but also that the interest of the plaintiff was now a minority interest.

20. Mr. Beary also explains in his fourth affidavit that this asset was not reflected in the accounts of the applicant because:-

> *"adopting a conservative approach, no value is attached to the shareholding held by the plaintiff in BPC DAC in the audited accounts as at that stage planning permission for the Bray site did not exist and the HSE agreement to lease was conditional on a final grant of planning permission."*

21. In his fifth affidavit, Mr. Beary avers:-

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

The plaintiff's shareholding in BPC DAC is now, apparently, 70% of a 30% shareholding, i.e. 21%. It transpires however, that is not so either.

22. Because of all uncertainty regarding the extent of the plaintiff's interest in BPC DAC and the value thereof, and its potential significance to the outcome of this application, I afforded the plaintiff the opportunity to adduce further evidence and adjourned the hearing of the application, which was otherwise concluded. This gave rise to the delivery of a sixth affidavit by the plaintiff, and a third affidavit by Mr. Reid In his affidavit Mr. Beary discloses for the first time that:-

> *"The shareholding in CG-BCP was held equally between the plaintiff and Collen Group Ltd. The issued share capital of CG-BCP is, and was, 1,000 "A ordinary shares" and 1,000 "B ordinary shares". The "A ordinary shares" are held by Collen Group Ltd. and the "B ordinary shares" were formerly held by the plaintiff. I omitted to refer to the interest of Collen Group Ltd. in CG-BCP and I regret this omission. The net effect is that following the transfer of the shareholding in CG-BCP to me (70%) and Ms. Murphy (30%) I now hold, through CG-BCP, a 10.5% interest in BPC DAC. This is held by me in trust for the plaintiff. Having regard to the significant value of the HSE transaction, the interest has a current value of at least €350,000.00 based on the value of a recent offer from a UK Financial Institution. CG-BCP is essentially an*

investment holding company. In that regard I beg to refer to the Directors' report and financial statements for the y-e 30th September, 2016 upon which marked with the letters "6KB10" I have endorsed my name prior to the swearing hereof. As the investment in BPC DAC has not yet been realised, the value of the investment is shown at cost in the accounts."

So the interest of the applicant in the Bray project through CG-BCP is 10.5%, a far cry from the 50% originally asserted by Mr. Beary. The transfer of shares to Ms. Murphy is of relevant recent origin, but it would have been apparent to Mr. Beary from 29th August, 2014, (the date of completion of a shareholder's agreement to facilitate the introduction of new investors referred to above) that the plaintiff's indirect interest in BPC DAC was 15%, yet he clearly instructed Mr,. Hyland that the interest was 50%, and also stated as much in his third affidavit.

23. Mr. Hyland swore a third affidavit in which he values the applicant's share in CG-BCP at €350,000.00, but this appears to be based on an assumed shareholding of the applicant in that company of 21% i.e. 70% of 30%, suggesting that he was unaware of the 50% shareholding of the Collen Group in CG-BCP. Accordingly it follows that the estimated value of the plaintiff's shareholding in BPC DAC, held through CG-BCP, is €175,000.

24. Also in his sixth affidavit, Mr. Beary exhibited a number of documents including: a tender submitted by the applicant for the Bray project; the acceptance of that tender by the HSE; an agreement for lease entered into with the HSE; a letter from the plaintiff making payment of a deposit of €125,000.00 and a shareholders' agreement between CG-BCP Ltd. and other investors in relation to BPC DAC. On the basis of all this documentation, there can be no doubt but that the plaintiff was the promotor of a tender, which has been accepted by the HSE, to develop a primary care centre in Bray. The agreement for lease was conditional upon planning permission, which issued some two months after the final date contemplated by the agreement, but Mr. Beary avers that the HSE has taken no issue with that delay; indeed, according to Mr. Beary, the HSE itself was only recently in a position to vacate the property, which is owned by the HSE, to enable the development of the primary care centre by BPC DAC to proceed.

25. The Court was informed however, by counsel for the plaintiff that the acquisition of the property by BPC DAC from the HSE has not yet taken place, some fifteen months after the grant of planning permission for the development. This may be on account of the delay averred to by Mr. Beary on the part of the HSE in vacating the property. In his sixth affidavit, Mr. Beary states that it is anticipated that the sale of the property will be completed by the end of May 2017.

26. Mr. Beary places great emphasis on offers received for the interest of BCP DAC in the project, as does Mr. Hyland, who avers that he has seen the offers. According to Mr. Beary, several offers have been received. One, the offer referred to above was for €3 million (it is unclear as to the date on which this offer was made – Mr. Beary at one point says May 2015 and at other says March 2016) which was rejected. Another offer was made in September 2016, the amount of which is not stated, but which Mr. Beary states in his affidavit of 2nd February, 2017, is still under consideration. Both these offers are stated to be from substantial investment funds in the United Kingdom. However, nothing at all is exhibited to prove the terms of these offers. Given the reliance placed upon these offers by Mr. Beary, this is surprising. Even allowing for confidentiality considerations, one would have thought that the offers could have been exhibited, redacted as appropriate, to protect matters of commercial confidentiality. Finally, as regards this aspect of the matter, it is of some relevance to consider the shareholders' agreement governing the relationship of the shareholders in BPC DAC. Subject only to pre-emption rights, there are no restrictions on the ability of CG-BCP Ltd. to dispose of its shares in BPC DAC. Clause 14 however deals with the realisation of the investment and it is clear that such realisation is envisaged at any time between four years and seven years from the date of the agreement, which is 29th August, 2014. It is apparent from this clause that the parties to this agreement would intend to dispose of their interest in the development of the Bray Primary Care Centre, at an opportune time over the next few years.

27. No shareholders' agreement was exhibited in relation to CG-BCP Ltd. Accordingly, no conclusions or assumptions can be made as regards the ability of the applicant to drawdown monies from that company following upon any sale of BPC DAC or the shares of CG-BCP Ltd. in BPC DAC.

28. While I have (eventually) been satisfied that the plaintiff put together a successful tender for the Bray Primary Care Project, and that this has been brought to the point of an agreement for lease, that agreement has no value until such time as BPC DAC acquires the property for the development from the HSE. Additionally, there are conditions relating to the project that will have to be met. For example, there is a requirement that a successful tenderer should provide a minimum number of seven general practitioners for the care centre, and while that condition was met at the time of the Tender in 2012, it could not be ruled out that difficulties might be encountered in meeting this requirement in 2017 or later. I mention this only by way of an instance as to the type of problem that could be encountered in bringing the project either to fruition or to the point where a third party might be willing to purchase the benefit of the project from BPC DAC.

29. While the plaintiff has put forward evidence of significant funding for the project, through the investors ,it is clear that such evidence as has been adduced to the Court is not sufficient to complete the entire development, and that significantly more funding will be required. Mr. Beary confirms that bank funding is required. Furthermore, it seems very unlikely that the HSE would agree to a third party acquiring the benefit of this project from BPC DAC at least until such time as the project has been constructed and is operational (though it must be observed that there was nothing in the documentation produced to the Court to suggest that the HSE could exercise such a veto).

30. In short, I consider that the Bray Primary Care Project, while at an advanced stage, is not sufficiently advanced for this Court to place any reliance upon it as a potential source of income from which the costs of the defendants could be discharged. While I feel that it is likely to yield a dividend, when and how much remains uncertain.

Applicable Principles

31. Applications for security for costs are now governed by s. 52 of the Companies Act, 2014, which provides as follows:-

"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."

32. This section is in all most identical terms to s. 390 of the Companies Act, 1963, which had previously governed such applications. The main difference between the two sections is that s. 390 referred to the provision of "sufficient" security to be given, which requirement is not required by s. 52 of the Act of 2014. It is accepted by the parties that invariably that requirement led the Court, where it considered that there was reason to believe that a plaintiff company would be unable to pay the costs of the defendant, if

successful, to require security to be given for the entirety of the costs likely to be incurred.

33. There is broad agreement between the parties as to the principles applicable on such applications. They were summarised by Morris P. in *Interfinance Group Limited v. K.M.P.G. Peat Marwick* (unreported High Court, Morris P., 29th June, 1998) and set out by Clarke J. in *Connaughton Road Construction Ltd, v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7 in the following terms:

> *"(1) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:*
>
> *(a) That he has a prima facie defence to the plaintiff's claim, and*
>
> *(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.*
>
> *(2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case which 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 ability 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."*

34. The plaintiff accepts, as indicated above, that the defendants has a prima facie defence to the claim. The plaintiff also accepts the costs estimated as put forward by the defendants in the sum of €236,507.50 as being a reasonable estimate of the likely cost of defending the proceedings.

35. Accordingly, the first issue for determination on this application is whether or not there is reason to believe that the plaintiff will be unable to pay the costs of the defendants, if the plaintiff is unsuccessful in the proceedings.

Is there reason to believe that the plaintiff will be unable to pay the costs of the defendants, if unsuccessful in the proceedings?

36. In resisting this application, the plaintiff has relied very heavily upon the three specific items which I have referred to above and which I have already held must be disregarded for the purposes of considering this application. As to the state of affairs of the company generally, it is difficult to take any comfort from the information furnished. The last audited accounts of the company show a surplus of assets of just €14,427.00. The previous three years of accounts showed a negative net asset position. No accounts of any kind have been prepared since and no indication has been given as to the value of work in progress currently being undertaken by the plaintiff. The only comfort to be gleaned from the information furnished is that Mr. Hyland was able to affirm from the bank statements of the company that it had cash at bank on 25th January, 2015 in the sum of €272,550.00, but that really proves very little and Mr. Hyland was careful to say that he had not conducted an audit of the affairs of the company.

37. Moreover, in paragraph 12 of his fifth affidavit, Mr. Beary explained that Ms. Murphy was to receive 30% of the success fee of €225,000.00 in the sum of the €67,500.00 "as remuneration for deferred salary." Apart altogether from the fact that the success fee belongs to the plaintiff and not the shareholders or directors personally, this indicates a difficulty on the part of the company in meeting Ms. Murphy's salary.

38. All of these factors strongly suggests that the plaintiff company has very little to rely upon in resisting this application other than the three "headline" items discussed above. Since I have already found that these items should be disregarded for the purposes of considering this application, it follows that I have reason to believe that the plaintiff will not be able to meet an adverse costs order.

39. I should also add that in considering the likelihood of whether or not the plaintiff will receive the return that it claims that it will from the three "headline" items discussed, or any return at all on the same, I have been influenced by the manner in which information in relation to these items was placed before the Court, in particular the value of the plaintiff's interest in the BPC DAC. It was, to say the least of it, regrettable that the true facts relating to this company were not accurately set out from the outset, and even when issues regarding the same were raised by the defendants, inaccurate information was still provided. While it will be apparent from the above that this is not the only reason that I have concluded that these items should be disregarded, the unreliability of the information provided on behalf of the plaintiff inevitably gives rise to concerns that the evidence as it stands even at this stage, in relation to these matters, may be unreliable.

Is the plaintiff's inability to pay costs owing to the wrongdoing of the defendant?

40. The plaintiff contends that if the Court finds there is reason to believe that it will be unable to discharge an adverse costs order, this is owing to the wrongdoing of the defendants, as alleged in these proceedings and accordingly these are special circumstances such that the Court ought not require the plaintiff to provide security for the defendant's costs.

41. In *Connaughton Road*, Clarke J. stated:-

> *"In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:*
>
> *(1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);*
>
> *(2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;*
>
> *(3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and*
>
> *(4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."*

42. In order to avail of the "special circumstances" relief, it is incumbent on the plaintiff in the first place to establish that it has a *prima facie* case as to items (1) and (2) above. In that regard, I do not think there can be any doubt but that the plaintiff has established such a case. The plaintiff has alleged specific breaches of contract on the part of the defendants and losses flowing from the same. While these are robustly contested by the defendants, and the outcome of the proceedings will obviously be determined upon the evidence, at this remove there can be little doubt that the plaintiff has a *prima facie* case. Furthermore, the losses claimed by the plaintiff are clearly recoverable as a matter of law.

43. Accordingly, it only falls to be determined whether the loss concerned is, as the plaintiff claims, 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. The plaintiff has already quantified its claim at approximately €6m. The defendant contends that there is no reality to these figures and very correctly points to the fact that the plaintiff has claimed fees in relation to the NAMA contract at the uppermost end of the scale allowable in that contract, and that it is highly unlikely that the plaintiff would have recovered anything like that amount if the plaintiff had received work from NAMA. This is because the €400,000 fee to which the plaintiff has referred is only payable in cases involving business reviews of more than €1billion. Right down at the other end of the NAMA scale of fees, there is provision for fees on a business review in the sum of €32,048 per review. Apart from that, the defendants point out, the plaintiff is merely surmising that it might have received ten referrals from NAMA.

45. As to the Mainstream Renewable Contract, the defendants maintain the plaintiff is not entitled to any income at all under this heading, because the contract about which the plaintiff complains is a new contract, not relating to a project purchased by the plaintiff under the APA.

46. However, even assuming that the defendants are correct in all of the above, one only has to look at the terms of the APA itself to see the kind of income that was envisaged. This is to be found in the section that deals with both the initial consideration and the further consideration, referred to above. It can be seen from that that it was contemplated that the plaintiff might have to pay as much as €450,000, and quite possibly more, to the defendants, representing 80% of fees received by the plaintiff. Accordingly, the agreement itself contemplated that the plaintiff might receive, at least, €112,500 of income for itself i.e. if the plaintiff received income of €562,500, 80% (€450,000) will be payable to the first and second named defendants and the balance would be retained by the plaintiff.

47. Perhaps more significantly, however, is the provision for further consideration. This provides that the plaintiff shall pay an additional 10% of income received by the plaintiff to the first and second named defendants, "once the aggregate amounts so received exceeds €2m". So the agreement itself contemplated the possibility of fee income of this order. It can, therefore, hardly be disputed that the breaches of contract alleged, if proven, could well give rise to losses sufficient to make the difference between the plaintiffs 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.

48. It follows, therefore, that the plaintiff 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 his interest 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 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 plaintiff 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.

Application to dismiss proceedings against the third defendant

49. There is just one allegation of negligence, breach of duty, misrepresentation and breach of contract alleged on the part of the third named defendant in the statement of claim. At para. 18 thereof it states:-

> *"By reason of the breaches of the Asset Purchase Agreement and other breaches of duty set out herein, Stockbrokers have unlawfully interfered with the economic interests of BPC."*

50. The reference to "stockbrokers" is to the third named defendant. All of the other allegations in the statement of claim are made against the first and second named defendants. Stockbrokers are mentioned in these allegations, but only in the context that the first and second named defendant caused or permitted stockbrokers to provide services to clients whose business was to transfer to the plaintiff under the terms of the APA.

51. By notice for particulars dated 8th May, 2015, the solicitors for the defendants sought further particulars of each unlawful act of interference alleged by the plaintiff against stockbrokers. The replies to those particulars delivered on 25th May, 2015 are not very illuminating. At paragraph 18.1 it is 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 represent the alleged acts of interference. The plaintiff can provide further particulars following discovery and/or interrogatories."*

52. Stockbrokers argue that the claim as pleaded discloses no alleged unlawful interference, on its part, with the economic interests of the plaintiff. While stockbrokers originally were part of the same group of companies as the first and second named defendant, it was acquired by Cantor Fitzgerald Ireland Ltd. on 30th November, 2012. Mr. Reid, who swore the affidavits on behalf of the defendants, acknowledged that he has a connection with both the first and second named defendants and with stockbrokers in that he remains a shareholder of the first named defendant (which owns the second named defendant) and he is employed by stockbrokers. However, he avers that in his capacity as director of the first and second named defendants, he cannot instruct stockbrokers to do anything. He further avers that once stockbrokers were sold, the first named defendant relinquished all control over stockbrokers.

53. In reply, Mr. Beary points to the fact that for a period of two years after the execution of the APA, stockbrokers was owned and controlled by the first named defendant and had common directors. It is plain that the plaintiff's case against stockbrokers is based upon its close association with the first and second named defendants for almost two years after the date of the APA and thereafter

the ongoing connection between the parties through Mr. Reid. However, no claim is made on the pleadings that stockbrokers acted in conspiracy, with the first and second named defendants, against the plaintiff.

54. It is clear that the claim being made against stockbrokers is based upon the close connection that it has with the first and second named defendants, and in particular for the period of almost two years following the execution of the APA. Additionally, counsel for the plaintiff submitted that at all times stockbrokers were aware of the APA and therefore the obligations of the first and second named defendants thereunder. Counsel for the plaintiff also made the point that a single defence has been delivered on behalf of all three defendants. On the other hand, counsel for stockbrokers submits that such close connections as there were or are as between the first and second named defendants on the one hand and stockbrokers on the other do not of themselves give rise to a claim against stockbrokers, where the claim arises out of alleged breaches of an agreement to which stockbrokers was not a party. It is submitted that the claim as against stockbrokers completely disregards the separate corporate personalities of the three defendants, contrary to the rule in *Salomon v. Salomon*.

55. In considering this application, I am very mindful that the jurisdiction of the Court, which is set out in Order 19, rule 28 of the Rules of the Superior Court must be exercised sparingly and only when the Court is satisfied that there is a clear case to justify the exercise of such discretion. Furthermore, in considering the application, the court must, in the words of Clarke J. in *McCourt v. Tiernan* [2005] IEHC 268, "treat the plaintiff's claim at its high water mark".

56. So what is the high watermark of the plaintiff's case as against stockbrokers? It is simply that by reason of alleged breaches of the APA by the first and second named defendants, stockbrokers 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 APA, stockbrokers, being aware of the terms and conditions of the APA, 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 APA, while fully aware of the terms of the APA. But no conspiracy is alleged in the pleadings. It is not alleged that stockbrokers 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 plaintiff 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 stockbrokers on the other. This, in my view, falls considerably short of an actionable wrong on the part of stockbrokers. I agree with the submissions of counsel for stockbrokers that, as pleaded, and in particular absent a specific plea as to conspiracy, the case against the stockbrokers completely disregards the separate corporate personalities of the three defendants. In effect, the plaintiff is seeking to hold stockbrokers responsible for the breaches of contract alleged against the first and second named defendants simply because of the close proximity of relationship between all three companies.

57. While counsel for the defendants pointed out that it has been held that proceedings should not be dismissed if the pleadings can be amended in such a manner as to save the action, no indication has been given at any time to the court that the plaintiff wishes to amend its pleadings as against stockbrokers. In the circumstances, therefore, the claim as against stockbrokers should be struck out.