THE COURT OF APPEAL

CIVIL

[No Redaction Needed]

Court of Appeal Record Number: 2022/201, 2022/200

High Court Record Number: 2018/7009P

Costello J.
Donnelly J.
Pilkington J.

Neutral Citation Number [2023] IECA 128

BETWEEN

IEGP MANAGEMENT COMPANY LIMITED BY GUARANTEE

PLAINTIFF/
APPELLANT

- AND –

DENISE COSGRAVE IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH COSGRAVE (DECEASED), OONAGH COSGRAVE AND KELLY COSGRAVE IN THEIR CAPACITY AS THE EXECUTORS OF THE ESTATE OF PETER COSGRAVE (DECEASED), MICHAEL COSGRAVE, CROSGRAVE DEVELOPMENT UNLIMITED COMPANY, CROSGRAVE PROPERTY DEVELOPMENTS LIMITED, O'CONNOR SUTTON CRONIN & ASSOCIATED LIMITED, PAT DUNPHY KEANE MURPHY DUNPHY LIMITED TRADING AS KMD ARCHITECTURE, GARY O'HARE AND OLM SURVEYING LIMITED TRADING AS OLM CONSULTANCY

DEFENDANTS/
RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 25th day of May 2023

Introduction

1. On 21 June 2022 the High Court ordered the plaintiff to provide security for the costs of the eighth and ninth named defendants (hereinafter referred to as *"the Architect"* in this judgment) pursuant to s.52 of the Companies Act 2014. The plaintiff was ordered to pay

into court the sum of €265,250 to be available to meet an order for the legal costs of the Architect, which amount was intended to provide security for the Architect at least in respect of any contested application for discovery, the making and analysing of discovery and any mediation that may occur. The plaintiff was further ordered to pay into court before any other preliminary or interlocutory application or before service of a Notice of Trial, security for the costs of the Architect in the amount of €265,250 to be available to meet an order for the legal costs of the Architect. On 7 July 2022 the first sum was duly paid into court. The High Court made a similar order in respect of the sixth named defendant and a like sum of €265,250 was paid into court in respect of its costs. The plaintiff was ordered to pay the costs of the motion for security for costs of both the Architect and the sixth named defendant.

2. On 21 June 2022 the High Court refused the plaintiff's application under O.56A of the Rules of the Superior Courts, and s.16(1) of the Mediation Act 2017, to invite the Architect to consider mediation and awarded the architect the costs of the motion. The plaintiff has appealed in respect of both orders. The plaintiff has compromised its case against the sixth named defendant who is no longer a participant in the proceedings.

Background

3. The plaintiff (whom I shall continue to refer to as the plaintiff) is an owners' management company for the purposes of the Multi-Unit Developments Act 2011. It manages a development known as the Ivy Exchange, Parnell Street, Dublin 1 ("the development"). The Ivy Exchange is a substantial commercial and residential development comprising 198 apartments and 11 commercial units. The buildings were built pursuant to three grants of planning permissions dated between February 2004 and January 2005. Construction was substantially complete by late 2006.

4. The plaintiff has sued ten defendants in relation to the design and construction of the common areas of the development. The first three defendants are businessmen and property

developers (or their estates) and they are/were principals of the fourth and fifth named defendants. The fourth named defendant was the developer, and the fifth named defendant was the main contractor in the construction of the development.

5. The sixth named defendant is a firm of consultant civil and structural engineers who were engaged by the developer for the purposes of the construction project. The plaintiff has compromised these proceedings with the sixth named defendant. The seventh named defendant is a consultant mechanical and electrical engineer who was also engaged by the developer for the purposes of the construction project. The plaintiff has been unable to locate the seventh named defendant and the proceedings have not been served upon him.

6. The eighth defendant is a firm of architects of which the ninth defendant is a director, (together "the Architect"). The eighth defendant was engaged by the developer to provide architectural services in respect of the project as found by the High Court *"principally between 2002 and 2004"*. The ninth defendant provided a Certificate of Compliance with the building regulations in respect of Unit No. 171 of the development in July 2006.

7. The tenth defendant is a firm of consultant fire engineers. The High Court found that it *"apparently"* incorporates or included the firm of McBains Cooper and both were engaged for the purposes of the project. The tenth defendant made applications to Dublin City Council for Fire Safety Certificates at various stages of the development.

8. The underlying dispute in the case concerns liability for alleged fire safety defects in the construction of the Ivy Exchange development. The plaintiff is the owners' management company for the development and was incorporated for and in compliance with the terms of the Multi-Unit Developments Act 2011. It is a company limited by guarantee, as is required by s.1 of the Act. The common areas of the development were transferred by the first, second and third named defendants to the plaintiff on 13 January 2012.

9. The Plenary Summons in these proceedings issued on 31 July 2018, approximately 12 years after practical completion of the development. It is not clear from the papers when the Plenary Summons was served on the defendants. The Statement of Claim was filed on the 2 December 2019. Three months later, on 2 March 2020, before the Architect had an opportunity to raise particulars in respect of the case it was asked to meet, the plaintiff issued a motion returnable for 23 March 2020 for an Order of the Court inviting the first to sixth named defendant and the Architect to consider mediation as a means of attempting to resolve the dispute, the subject matter of the proceedings.

10. The Architect served a Notice for Particulars on 4 March 2020 and sought copies of the documents referred to by the plaintiff in its Statement of Claim, including the terms of the contract under which the Architect was employed, pursuant to O.31, r.15 of the Rules of the Superior Courts. This was replied to on 20 March 2020. The Architect maintains that the plaintiff has not properly particularised the claim against it. The Statement of Claim sets out the appointment and/or engagement of each of the professional defendants in virtually identical terms, save that the role or title of each defendant is inserted and the pleas modified to reflect their role. It is pleaded that, notwithstanding the issuance of certificates confirming compliance, the works were carried out in a defective manner and the defects are then set out. Generic particulars of negligence, breach of duty and misrepresentation are pleaded separately against each defendant, or group of defendants, but the pleas are to a very large extent repetitious. The Statement of Claim does not purport to link any of the defects pleaded to any specific defendant or to any particular default on the part of any specific defendant. As things stand, all of the defects are alleged to be the responsibility of all of the defendants who, in turn, are all alleged to have been negligent in almost exactly the same manner.

11. On 24 June 2020, the solicitors for the Architect issued a motion seeking an order pursuant to s.52 of the Companies Act, 2014 directing the plaintiff to provide security for

their costs in the proceedings; an order measuring the security to be given by the plaintiff and the form of the security; and an order staying the proceedings until such time as appropriate security for costs is provided by the plaintiff. On 1 February 2021 the sixth named defendant issued a similar motion. The two motions seeking security for costs, together with the motion seeking an order inviting the Architect to consider mediation, were heard and tried together before the High Court over four days.

The Decision of the High Court

12. The trial judge (Butler J.) outlined the facts of the case and the legal principles applicable to security for costs under s.52 of the Companies Act 2014. This 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 the proceedings until the security is given"*

13. The section requires the moving party to establish that (a) they have a *prima facie* defence to the plaintiff's claim and (b) the plaintiff will not be able to pay the moving party's costs if the moving party be successful (see *Usk and District Residents Association Limited v. Environmental Protection Agency* [2006] IESC 1). In the event that these two facts are established, security ought to be required unless the plaintiff can show that there are special circumstances which would cause the Court to exercise its discretion not to make the order. Butler J. noted that a moving party is required to demonstrate that:-

> *"If there is a legal defence that it is potentially sustainable on a practical view of the law or, if the defence is one of fact, that if what the defendant alleges in answer to the*

plaintiff is proven in court that would defeat the plaintiff's claim." (*Oltech (Systems) Ltd. v. Olivetti U.K. Ltd.* [2012] 3 IR 396, 402)

14. She then considered the second requirement by reference to *IBB Internet Services Ltd. v. Motorola Ltd.* [2013] IESC 53, *Jirehouse v. Beller* [2009] 1 WLR 751, *Greenclean Waste Management v. Leahy* [2015] 1 IR 106 and *Coolbrook Developments Limited v. Lington Development Limited* [2018] IEHC 634. The statutory test *"reason to believe"* requires *"something a lot stronger than a mere risk".* The Court must consider all of the material evidence and reach an assessment of the range of eventualities and then conclude whether or not there is reason to believe that the plaintiff will be unable to pay the costs of a successful defendant.

> *"While it does not require the court to assess the matter on the balance of probabilities, it does require the court to consider all material evidence and reach an assessment of the range of likely eventualities and thereby determine whether there truly is "reason to believe" that the company "will" be unable to pay the costs should it lose. That requires that the evidence satisfy the court that there is something significantly greater than a mere risk of such an eventuality occurring."* (*IBB Internet Services*).

15. The trial judge drew attention to the distinction between an insolvent company and an impecunious one and quoted from the decision of Clarke C.J. in *Quinn Insurance Ltd. (Under Administration) v. Price Waterhouse Coopers (a Firm)* [2021] IESC 15, [2021] 2 IR 70 :

> *"86. I have used the term impecuniosity in relation to the type of plaintiff against whom an order for security for costs might potentially be made so as to distinguish such a corporate entity from one which may be insolvent. The relevant test is that it must be demonstrated by the defendant that the corporate plaintiff concerned would not be*

able to pay costs in the event that the proceedings are unsuccessful and the defendant is awarded its costs. The plaintiff does not necessarily have to be insolvent for it to be in such a position. To take but the simplest example, it is only necessary to consider a company established with only nominal share capital. If that company has no liabilities, then it will not be insolvent but it clearly would be wholly unable to pay any costs awarded against it. It will be impecunious but not insolvent."

87. On the other side, it is possible to envisage a company which is insolvent but would ultimately be able to pay costs should they be awarded. A company which is unable to pay its debts as they fall due may well find itself committing an act of insolvency but there may be reason to believe that it would be able, nonetheless, to pay costs should it lose and have an award made against it. It might, for example, have non cash assets which would be likely to be capable of being realised in time to pay any costs award but not in time to pay its debts as they fall due in circumstances where its borrowings are at their limit."

16. The High Court judge noted that where the two statutory criteria are met then security should generally be granted unless special circumstances are shown. The onus shifts to a plaintiff to establish that such special circumstances exist such that, notwithstanding its likely inability to meet the defendant's costs, security should not be ordered. She noted that while the categories of special circumstances are not closed, the jurisprudence has recognised two strands of special circumstances. The first is where the plaintiff's inability to meet the defendant's costs results from the wrongdoing alleged against the defendant in the proceedings and the second where there is a public interest in having the issues raised in the litigation determined by a court notwithstanding the potential injustice to a defendant in permitting the plaintiff to proceed without providing security. As regards the first category,

she cited the well-known passage from *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7 from Clarke J. (as he then was) in the High Court:

> *"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.*
>
> *3.5 Given that, on a motion such as this, a plaintiff is only required to establish the special circumstances, arising out of its inability to pay costs being due to the alleged wrongdoing of the defendants, on a prima facie basis, then it follows that each of the above steps must also be established on such a prima facie basis only…*
>
> *3.6 It follows, in my view, that a plaintiff must at least establish a prima facie case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the*

defendant was successful…[A plaintiff company] must show, at least on a prima facie basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficient large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of Point (4) referred to above."

17. The trial judge emphasised that a plaintiff must adduce some evidence upon which the Court can conclude not just that there was actionable wrongdoing on the part of the defendant but also that the wrongdoing caused financial loss to the plaintiff which, in turn, has caused the plaintiff's inability to meet the defendant's costs.

18. The second category, the public interest category, usually arises in the context of litigation which transcends the facts of the particular case, though it will not always be so (see *Re Millstream Recycling Ltd v. Tierney* [2010] 4 IR 253 and *Quinn Insurance).* However, if the order to provide security will not prevent the plaintiff from continuing with his claim, the fact that the issue is of public importance should not operate to deprive the defendant of security to which he would otherwise be entitled. This was particularly emphasised by Clarke C.J. in *Quinn Insurance* at para. 110:-

"I would add that it seems to me that the question of whether the proceedings are likely to be actually stifled may play a very significant role in an assessment of whether the 'public interest' special circumstance has been established. The whole point about that special circumstance is that there may be cases where there is a genuine public interest in certain issues being litigated in open court. That public interest would be impaired if the proceedings were not to go ahead because security for costs was ordered. However, if the proceedings are going to go ahead in any event (or if that remains highly likely) then the weight to be attached to the public interest in the proceedings going ahead in the context of a security for costs application will be minimal."

19. The trial judge then considered the issue of the amount of security to be ordered by a court. She noted that s.390 of the Companies Act 1963 had been replaced by s.52 of the Companies Act 2014 and that the word *"sufficient"* was omitted from s.52. In *Coolbrook,* Barniville J. considered the impact of this legislative amendment and held that the Court:

> *"…has complete judicial discretion as to the amount of security to be ordered.*
>
> *108. ...the essential question for the court to determine in fixing the amount of the security to be provided is whether it would be just to leave the defendant at risk on costs by not directing the provision of full security or whether it would be just in those circumstances to direct that a lower amount be provided by way of security. It may well, therefore, be the case that unless there are other factors present which may persuade the court to exercise its discretion to reduce the amount to be provided, the court will in most cases direct the provision of full security. I agree with the views expressed by the authors of Delany and McGrath that such an approach may well be more consistent with the rationale behind s. 52 which is essentially to prevent the abuse of limited liability status.""*

20. Butler J. concluded her review of the case law by noting that there is authority to support the phasing of the provision of security by reference to two decisions of Clarke J., *Salthill Properties Ltd. V. Royal Bank of Scotland plc* [2010] IECA 31 and *Quinn Insurance.*

21. Having identified the relevant legal principles, the trial judge then applied them to the facts in the case. She held that the Architect has established two *bona fide* defences. First, whether the claim was statute barred and secondly whether the Architect had assumed responsibility for the fire safety element of the construction project. At paras. 56 and 57 she held:

"56. …As a starting point, the Statute of Limitations provides for a six-year limitation period for the institution of proceedings in contract and in tort and the works carried out by these defendants on the construction project took place some fourteen to sixteen years prior to the institution of the proceedings. Time begins to run for the purposes of the Statute at the point where the cause of action accrues so the key issue will be the determination of when the cause of action accrued. The defendants argue that this issue has been authoritatively determined in their favour by the Supreme Court in the recent decision Brandley v. Dean [2017] IESC 83. McKechnie J., speaking for the Supreme Court, held that in cases of latent damage the cause of action accrues at the point in time where the damage becomes manifest, meaning capable of being discovered and capable of being proved by the plaintiff. He attributed some lack of clarity in earlier cases to a failure to distinguish between defects per se and the physical damage caused by such defects in terms of the resulting claims being one for pure economic loss on the one hand as opposed to property damage on the other. This means that there are potentially two limitation periods in cases where defects in the construction of property are capable of causing property damage – one in respect of the defects themselves and the other in respect of any damage they cause. These limitation periods might overlap but might also run completely independently of each other. A claim for pure economic loss, being the cost of remedying defects (which may or may not go on to cause damage to the property) will exist, assuming the defects are capable of discovery, from the point at which the building was constructed. Thus the cause of action will accrue at the date of completion of construction. The other potential time limit, in respect of a claim for property damage resulting from defects in the constructed property, will run from a later date being the date on which any damage resulting from these defects becomes manifest.

57. Of course, the problem here is that the defects complained of relate to fire safety and, for obvious reasons, the plaintiff cannot wait for that damage to manifest itself before ensuring that the necessary remedial works are carried out. Although counsel for the plaintiff describes the works as "covered-up works", it seems the defects now complained of were apparent as soon as an inspection was conducted on behalf of the plaintiff. The reason why this inspection was carried out at that time has not been explained to the court. It may not even be correct to describe these defects as latent defects since it seems that they exist currently in the same form as they did at the time the building was constructed. Thus, the facts in this case give rise to somewhat different legal issues than those in Brandley v Dean where cracks appeared in buildings which had been constructed using inadequate materials such that there was a "manifestation" of the damage being caused by the defects complained of. These issues are undoubtedly complex and, whilst the plaintiff's arguments might well ultimately succeed, I have no hesitation in finding that the defendants have raised a prima facia (sic) defence on these grounds."

22. Earlier, she addressed the defence based on the scope of the responsibility of the Architect:-

"55. The architect defendants make a similar case in respect of the scope of their responsibility for fire safety under the contract on foot of which they were engaged. The plaintiff makes a number of evidential arguments as regards this defence to contend that it does not meet the requisite standard under the prima facia (sic) test. I accept that the evidence of the architect defendants in this regard is not as strong as that of the sixth defendant. For example, the RIAI contract under which the architect defendants were engaged is not exhibited and the grounding affidavits sworn on behalf

of these defendants are sworn by solicitors rather than by a member of the eighth defendant with personal knowledge of the contractual arrangements. Nonetheless I am satisfied that a prima facia defence has been shown on this ground. The RIAI services agreement is one commonly, if not invariably, used by architects in Ireland and its terms are widely known and understood by those in the construction industry. Further, the terms of the compliance certificate provided by the ninth defendant (which is exhibited) expressly references the provision of services under the RIAI Scope of Services Work Stages 1 – 5 and that fire safety design was provided by McBain's Cooper (subsequently part of the tenth defendant) who also acted as the project supervisor design and construction (PSDC). In any event, my conclusion on this aspect of the defence can be regarded as obiter in light of my conclusions on the Statute of Limitations defence."

23. She then considered whether there was reason to believe that the plaintiff would be able to meet the defendants' costs. She analysed the evidence of legal costs accountants and expert accountants from both sides. She noted that an intrinsic element of the case made by Mr. Myles Kirby, a chartered accountant and insolvency practitioner who gave evidence on behalf of the plaintiff, is that it would be open to the plaintiff to raise the funds necessary to pay the Architect's costs by means of a special levy on its members, the owners of the units within the developments. She noted that the plaintiff is undoubtedly not an insolvent company, and the issue is whether the plaintiff is impecunious in the sense that it would be unable to pay the undoubtedly substantial sum which would be due in respect of the defendant's costs in the event that the proceedings are successfully defended. She noted that it was acknowledged by counsel for the plaintiff that the plaintiff would never have on hand money to pay in excess of €1 million (being the estimated costs of both the six named defendant and the Architect) as that was not "what the company had been set up to do".

Counsel acknowledged that even without the damage the subject matter of these proceedings the plaintiff would simply never have that level of funds available. The plaintiff's argument was that the Court should look at how the company traditionally conducted its business and raised its funds. Therefore, the relevant issue was the ability of the company to raise funds necessary to pay the defendants costs in the event that the proceedings are successfully defended, and not whether it was in funds at the time of the hearing of the motion. She analysed the arguments and the facts from para. 58 to para. 81 in very considerable detail and concluded as follows:

> *"82. The issue for the court's consideration is whether, on the evidence, the defendants have established a reason to believe that the plaintiff will not be able to meet their legal costs or, conversely, whether the plaintiff has displaced that "reason to believe" by raising the possibility of a special levy being imposed by the plaintiff on its members. The starting point for the analysis of this issue is the acceptance by the plaintiff that it does not and would not normally have available to it the level of funding required to pay the defendants' costs. Therefore, on a prima facia(sic) basis there is reason to believe that the plaintiff will be unable to pay the defendants' legal costs. However, that is not the end of the matter because if there is a realistic prospect of the plaintiff being able to raise the funds necessary to pay the defendant's legal costs then, in my view, it would be unfair to treat it, as an owner's management company, as being unable to pay those costs without considering the basis put forward for the proposed funding. At the same time, it is important to bear in mind that the court's task is not simply to decide whether it is more likely than not that the plaintiff will be able to raise the level of funds required in the manner proposed. The question is whether, notwithstanding the plaintiff's proposal, there is still reason to believe that it will be unable pay the defendant's costs. In other words, whilst it may be more likely than not*

that the plaintiff can raise the funds in the manner proposed, there might still be sufficient doubt or uncertainty for there to be reason to believe on a prima facie basis that it will not actually be able to do so. In my view, having considered all of the evidence, I am satisfied that there is reason to believe that the plaintiff will be unable to pay the defendant's costs."

24. First, she rejected the argument made by counsel for the plaintiff that a special levy would fall within s.18(4) of the Act of 2011. This means that in the normal course a special levy imposed in respect of an adverse Order for Costs would have to be approved by the plaintiff company at an extraordinary general meeting of its members. She concluded that:

"I do not think that it is a given that, having lost the litigation against these defendants, members of the plaintiff company would automatically or even readily accede to the imposition of a levy on them in order to meet the costs due by the plaintiff company to the defendants. I also think that there is a difference between the likelihood that members would support a levy to provide for security for costs to enable litigation to continue (as they apparently have done in some form) and that members would support a levy to pay costs after the litigation has concluded unsuccessfully."

25. The second argument advanced by the plaintiff was that the Architect could place the plaintiff in liquidation. The argument was that the title to the common areas held by the plaintiff was essential to the title to each individual unit owner's property. Therefore, the individual members of the plaintiff would be compelled in their own self-interest either to pay the costs to avoid the winding up of the plaintiff or, having placed the plaintiff in liquidation, be forced to purchase the title from the liquidator of the plaintiff, thereby placing the liquidator in funds to pay the costs of the Architect. The trial judge dismissed this possibility in the following terms:

"84. ...It is not by any means a given that the defendants would move to wind up the plaintiff company in the event that their legal costs remained unpaid. The plaintiff company itself is not in possession of any substantial assets which would be available to a liquidator to disburse to the defendants in respect of their costs. Therefore, the only reason the defendants would move to wind up the plaintiff company is if doing so would impose sufficient pressure on the members of the plaintiff company to accept and pay a levy in order to avoid the difficulties a winding-up would create for their titles."

26. She was not persuaded that the winding up of the plaintiff would have the catastrophic effects predicted by the plaintiff's counsel, by reference to the decision *Re Heidelstone Co. Ltd.* [2007] 4 IR 175. She concluded:

"...I do not think that the detriment to the title of the individual apartment owners is so immediate or so clear-cut that it necessarily follows that they would vote, by whatever majority is required, to impose a special levy upon themselves in order to meet the defendant's legal costs."

27. She then considered the significant differences between the amounts of the costs estimates from the cost accountants which in turn would impact upon any assessment of how likely it is that the plaintiff will be able both impose and recover a levy to meet those costs. She analysed these differences from paras. 86-92, noting that she did not accept one of the major premises underlying the plaintiff's costs estimate, which is that the defendants would each only be engaged in the trial for two days. She concluded that it was likely to be a 16-day trial and that the defendants would need to be present for the entirety of the trial. She concluded that the plaintiff's ability to pay costs should be assessed by reference to a figure of €530,500 in respect of each defendant (sixth named defendant and the Architect). Based on this analysis, the plaintiff would have to show that it would be able to raise and recover a

special levy in the amount of €1,061,000 which would be *in addition* to the funding which would be required on an ongoing basis during the litigation to meet its own legal costs. She was not satisfied that the potential for the plaintiff to raise a special levy *"provides the necessary assurance that this levy will in fact be raised and, more importantly, collected, for there not to be "reason to believe" that the plaintiff will be unable to meet the defendant's costs."* She continued:

> *"94. ...The proposal is inherently uncertain as it requires a number of steps to be successfully taken by the plaintiff and the management of its implementation is outside the control of the defendants. Consequently, to echo the views of Kelly J in Greenclean and Barniville J in Coolbrook, the proposal is too conditional to provide the defendants with the necessary level of assurance as regards payment of their costs for the court to be satisfied that there is no reason to believe the plaintiff will not be able to pay them."*

28. She then turned her attention to the question of special circumstances. Counsel for the plaintiff accepted that it was not making the case that its inability to pay costs (assuming the Court rejected its argument to the contrary) was due to the alleged wrongdoing of these defendants and accordingly it was not necessary to consider any *Connaughton Road* analysis. The plaintiff's argument concerned the public interest of the proceedings.

29. Firstly, it was argued that the defendants had not disclosed material to the plaintiff's solicitors in response to their correspondence and on that basis, security should be refused. This argument was rejected by the trial judge on the grounds that this was private not public litigation and there was no duty of disclosure.

30. Secondly, it was urged that the plaintiff was an owners' management company and that it was required by law to be a company limited by guarantee. The trial judge held that this did not add an additional element to the public importance of the proceedings. She did

not believe it was the intention of the Oireachtas to provide the owners of properties within a multi-unit development with the benefit of limited liability without the burden of the protections usually afforded to third parties sued by limited liability companies. She accepted that the issues raised in the proceedings in relation to the accrual of a cause of action in the case of fire safety defects in buildings were capable of being characterised as issues of public importance. However, the plaintiff expressly did not say that security for costs would stifle the litigation. On that basis at para. 102 she concluded:-

> *"The public interest to be served by having an important legal or factual issue determined will not be hindered by a grant of security for costs if the corporate litigant accepts that it will pursue the case regardless, therefore the weight to be attached to that public interest will be minimal. As this is the factual position here, I do not think that I can or should refuse the defendants the orders they have sought on the basis that the underlying litigation raises important legal issues of potentially broad relevance when the granting of an order will not affect the determination of those issues."*

31. She acknowledged that the plaintiff argued that, while its ability to pursue the litigation would not be stifled, its financial position had been detrimentally affected by the increased insurance costs arising out of the defects, the subject matter of the proceedings. She held that this was not sufficient to constitute special circumstances as it must be such as to make a material difference to the plaintiff's ability to pay costs and this was not the case in the application before her. In addition, she was reluctant to treat an increase in expenditure which has impacted on the plaintiff's existing reserve as a factor which would justify refusal for an order for security. The evidence was that, as an owners management company, the plaintiff would not be expected to raise or maintain a large cash fund for which it had no immediate use. It followed that while the increase in premia depleted the existing reserves to a greater extent than would otherwise have been the case, this did not alter the fundamental

position in relation to its inability to meet the costs of the Architect. Therefore, the question of increased insurance premia could not amount to special circumstances which would justify the refusal of an order for security.

32. The trial judge then proceeded to assess the amount of security. Having considered the litigation from the perspective of both the moving parties and the plaintiff, she concluded that there were no particular factors which would justify the Court in ordering that security be provided at a level materially different to and less than the costs which are likely to be incurred by the defendants. She therefore concluded that the appropriate order was to direct the plaintiff to provide security in the amount of €530,500 in respect of each moving party.

33. She then considered whether the security to be provided should be phased. Counsel for the plaintiff had argued that there were potential watersheds in the litigation and that the plaintiff should only be required to lodge a proportion of the total security at each discrete interval. The trial judge accepted that there was merit in the contention that discovery may be a watershed in the litigation but pointed to the fact that there was no evidence as to the likely costs that would be incurred by the parties in getting to a point where discovery will be made and pursued, or, alternatively, in getting to and it through mediation. She pointed to the fact that she was left in the *"very unsatisfactory position of being faced with a proposal which is, of itself, meritorious but not being provided with the evidence which would be necessary in order to make a meaningful estimate of the amount of costs to be provided on a phased basis so that effect could be given to that in a court order."* She was not prepared to hold a further hearing of the motion to address this issue raised at the eleventh hour and instead directed that the plaintiff lodge 50% of the total amount of security in respect of each defendant to provide security for the defendants at least in respect of any contested application for discovery, the making, the analysing of discovery and any mediation that may occur. If the proceedings continue thereafter, then the plaintiff would be required to

lodge the balance, thereby bringing the amount lodged up to the full amount of the security, before any other preliminary application is made or a Notice of Trial is served by the plaintiff.

34. The trial judge then considered the plaintiff's motion seeking an order inviting the Architect to consider mediation pursuant to s.16(1) of the Mediation Act 2017. The trial judge noted that the Court either of its own motion or on the application of a party involved in the proceedings may:

> *"(a) invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute the subject of the proceedings."*

35. The trial judge noted that O.56A provides the procedural mechanisms through which applications can be made. The Architect opposed the motion on the basis it was premature in circumstances where the case against it had not yet been pleaded with particularity and the pleadings had not yet closed. Counsel argued that the Court cannot decide that mediation was appropriate without knowing exactly what case was being made by the plaintiff against the Architect and that could not be ascertained from the pleadings as they currently stood. The trial judge noted that each side sought the relevant documents from the other, but she placed some weight on the fact that the Architect was engaged as long ago as 2002 in respect of the pre-planning design of the development and it was unreasonable of the plaintiff to expect that documents which were then 20 years old would be immediately or even readily available to those currently working in the eighth defendant company.

36. She concluded that it cannot be said that an adequately particularised case had been provided to the professional defendants currently before the Court, in circumstances where the plaintiff had pleaded an identical case against all of the defendants and attributed liability for all of the damage to all of them notwithstanding their different roles in the development process. She concluded that the plaintiff cannot refuse to engage with the Architect's

reasonable request for particulars and at the same time seek to compel the Architect into a mediation process whereby it will likely be expected to make a financial offer in settlement of the plaintiff's case without knowing exactly what that case is.

37. On that basis she did not consider the stance taken by the Architect at that point in time to be unreasonable and by extension she did not think that it would be appropriate to make an order inviting the Architect to consider mediation pursuant to the Act at that stage and so she refused the plaintiff's relief on its motion.

The plaintiff's grounds of appeal

38. The plaintiff appealed the decision of the trial judge to direct it to provide security for costs to the Architect, the quantum of the security and the phasing of the lodging of the security. It also appealed to refusal to invite the Architect to consider mediation. It submitted that the Architect had not established that it had a prima facie defence to the plaintiff's claim or that there was reason to believe that the plaintiff would be unable to pay its costs should it successfully defend the proceedings.

39. The plaintiff argued that the trial judge erred in holding/inferring that counsel had conceded that the Architect had made out a *prima facie* defence. Secondly, it was submitted that the Architect's purported defence did not amount to a *prima facie* defence. It was contended that the defence in relation to the scope of the responsibility of the Architect was no more than mere assertion and there was no evidence to support the asserted defence. The solicitor swore the affidavit, not a member of the firm of architects, and she could not give evidence to support this alleged defence. The contract between the Architect and the developer was not exhibited and there was no evidence to support the contention that it did not assume responsibility for fire safety in the development. It had failed to put its cards on the table, as the Supreme Court in *Quinn Insurance* held was required. The solicitor had merely exhibited a draft defence and no defence had been filed.

40. In relation to the second asserted defence based on the Statute of Limitations, it was argued that the judgment did not adequately explain how *Brandley v. Deane* applied to fire safety defects in this case and thus that the claim could be said to be statute barred. It was asserted that this was a case involving economic loss which had been sustained with no physical damage in 2006. The damage was only manifest on discovery in and around 2018 and resulted in damage at that point as the insurance premia for the plaintiff were hugely increased pending the carrying out of the required remedial works.

41. As regards the trial judge's conclusion that there was reason to believe that the plaintiff would be unable to pay the legal costs of the Architect if it succeeded in the case, it was contended that she erred in this regard on two bases. Firstly, she failed to give adequate weight to the ability of the plaintiff to levy funds from its members to fund the litigation. The plaintiff had shown that it was able to do so and there was additional evidence to show that the company had raised the sum of €1,945,000 to fund the litigation. It was submitted that there was no reason to believe that if the plaintiff lost the case, it would not be able to raise the funds necessary to discharge orders for costs in favour of the Architect in due course.

42. Alternatively, it was contended that the trial judge had failed to give adequate weight to the fact that the Architect could threaten to liquidate the company. As the title to the common areas, which is owned by the plaintiff, is an essential element of the title of each unit owner, they would be compelled collectively, in order to secure their individual titles, to avoid the liquidation of the plaintiff. They would, therefore, be forced to discharge the Architect's costs. In the alternative, if the company were ordered to be wound up, the common areas of the development are valuable, and it would be necessary for the unit owners to purchase the common areas in order to perfect their respective titles. Therefore, they

would be required to purchase the title to the common areas from the liquidator who would thereby realise sufficient funds to discharge the costs due to the Architect.

43. In the event that this Court concluded that the Architect had satisfied the two statutory criteria (contrary to its denial that this is so), the plaintiff submitted that the High Court judge had erred in exercising her discretion to award security for costs in the circumstances of the case. Counsel confirmed that he was not arguing that the plaintiff's inability to meet the Architect's costs (assuming for the purposes of this argument that this were so) was due to the wrongdoing alleged against the Architect in the proceedings. The plaintiff claimed that special circumstances existed such that it would be unjust to order security for costs on broad public interest grounds. He described a number of factors which, he said, went *"into the mix"* when considering whether the plaintiff had established special circumstances.

44. Firstly, it was argued that the plaintiff was in a special category because the Multi-Unit Development Act, 2011 required that the common areas of multiple unit developments be owned by owner management companies (such as the plaintiff) and that those companies be limited liability companies. Thus, the plaintiff was required to be a limited liability company which, of its nature, would not be able to pay the costs of a defendant in substantial litigation (assuming its argument in relation to the ability to pay the costs of the Architect is rejected). It was submitted that defendants were *"weaponising"* applications for security for costs in multi-unit development construction cases. It was urged that fire safety defects in multi-unit developments gave rise to very serious claims which, by implication, ought not to be subject to the requirement to provide security for costs. Therefore, the category of the plaintiff's claim and the category of the plaintiff as an owner management company takes the case outside *"of the norm"* of *"normal commercial engagement"*. There was a real public interest which transcended the facts of this case in definitively determining the issues in the case and, in particular, when a cause of action for fire safety defects accrues.

45. As regards the quantum of the security directed to be provided by the High Court, it was said that the trial judge failed to consider whether an order of less than 100% was appropriate given that the plaintiff is an owners' management company suing in respect of fire defects in a multi-unit development. It was submitted that she failed accordingly to balance the risk of injustice when fixing the quantum of costs to be provided.

46. As regards the refusal to invite the Architect to consider mediation, it was submitted that a court should consider whether there is a realistic prospect of mediation either resolving the dispute or narrowing the issues. It was submitted that the trial judge erred in not properly considering the latter possibility and in regarding mediation as a threat or a risk based on potential costs consequences of an unreasonable refusal to participate in medication. It was urged that the application was for an invitation to the Architect, the Court was not requested to direct that the Architect participate in mediation. Mediation was not a threat; it is an opportunity. It was argued that this was an appropriate case in which to consider mediation because of the apparent impasse in relation to documentary evidence and the apparent lack of trust between the parties. It was urged that progress could be made in relation to each of these matters which, if it did not lead in the resolution of the dispute, would in all probability lead to the narrowing of the issues.

47. The Architect opposed both of the appeals and said the decision of the High Court should be upheld.

Discussion

48. The relevant authorities are not in dispute, nor is it alleged that the High Court failed properly to identify the principles applicable to applications of this nature. The appeal concerns the application of those principles to the facts and arguments in this case. The starting point of the discussion must also be the section under which the application is made, which I repeat here for convenience:-

"52. 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 the proceedings until the security is given"

49. It is for the defendant moving party to establish that it has a *prima facie* defence to the plaintiff's claim (*Usk*). If the defence is a legal defence, the applicant must demonstrate that it is potentially sustainable on a practical view of the law (*Oltech*). If it is one of fact, then it must establish that what it alleges in answer to the plaintiff's claim, if proven, will defeat that claim (*Oltech*). A mere assertion of a defence is not sufficient. The defendant must objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions which, if accepted, provide a defence to the plaintiff's claim against the defendant. (*Tribune Newspapers v. Associated Newspapers Ireland* (Unreported) High Court, Finlay Geoghegan J., 25 March 2011).

The existence of a prima facie defence not conceded

50. The argument that the appeal should be allowed because the trial judge erred in stating that counsel for the plaintiff had conceded the existence of a *prima facie* defence is easily disposed on. I have cited para. 56, 57 and 55 of the judgment of the High Court. It is clear that the High Court considered the defences raised and concluded on a *prima facie* basis that two had been made out. She did not determine the application on the basis that counsel for the plaintiff had conceded the existence of a *prima facie* defence. While the judgment adverts to a lack of clarity as to whether it was conceded, this disputed concession did not form the basis of the decision of the High Court.

Has the Architect established a prima facie defence to the plaintiff's claim?

51. Much of the debate before this Court turned on the question of whether the plaintiff's claim was statute barred. On the plaintiff's own case, the development was completed in 2006 and the Architect had no further involvement in the development. Its claim against the Architect was one in tort and contract. Such claims are governed by s.11 of the Statute of Limitations, 1957 (as amended) and the time for bringing such claims is six years from the date of accrual of the cause of action. Therefore, *prima facie*, the claim was statute barred as the Plenary Summons issued in 2018. The plaintiff countered this argument by asserting that the cause of action did not accrue in 2006 and accordingly the claim is not barred.

52. The first argument advanced was that the damage had not yet occurred and by implication that the tort had not been completed, so the time could not have run. But that point was not seriously pursued and, in fact, was inconsistent with the second argument, which was that the damage became manifest in 2018. If the tort was not complete when the proceedings were issued, then the Architect would *prima facie* have a different but complete defence to the plaintiff's claim: that it has no cause of action as it has suffered no damage. The tort/breach of contract is incomplete.

53. The plaintiff says that damage was suffered when Dublin Fire Brigade directed the plaintiff to carry out certain emergency remedial works and when its insurance premium was greatly increased. It is said that the Supreme Court in *Brandley* held that in cases of damage to buildings the cause of action accrues, and time starts to run for the purposes of the statute from the date of the manifestation of the damage rather than the underlying defect. The plaintiff argues this is a case to which *Brandley* applies as the damage manifested itself in 2018 and therefore the claim against the Architect is not statute barred. Accordingly, it is said, this refutes or rebuts the asserted *prima facie* case that the claim is statute barred and

therefore it follows that the Architect has not established a *prima facie* defence to the plaintiff's claim.

54. This argument did not find favour with the High Court judge, and I agree with her and her reasons for rejecting it. In *Brandley,* the Supreme Court held that in cases of latent damage to buildings the cause of action accrues when the damage becomes manifest, meaning capable of being discovered and capable of being proved by the plaintiff. Assuming for the purposes of this argument that the damage complained of is latent damage to a building, that is not the end of the analysis. The plaintiff has put no evidence before the court to explain how the defects manifested themselves in 2018 but had not done so before then. In response to a question from the Court, counsel could only reply that he had no instructions on this point. This is remarkable and is fatal to the plaintiff's argument on this point in my judgment. To succeed on its argument on this point it must show that the cause of action accrued in the six years prior to the issuing of the plenary summons and this in turn depends on showing that the damage manifested within the six years. Damage manifests not when the damage was actually discovered, but when it *was capable of being discovered and proved*. The evidence from the plaintiff suggests that some damage (there is a dispute as to the extent of the damage which was "covered up") at the very least was apparent from a walk-through inspection which did not involve opening up works. On the face of it therefore, the damage in question was there to be seen whenever the plaintiff inspected the buildings. This means the plaintiff must explain why the damage manifested in 2018 but was not manifest from any earlier date if it is to stand up its argument that the cause of action did not accrue until 2018. To date the plaintiff has not done so. This is not to say that it may not do so in the future, it is merely to hold that on the evidence before this Court the plaintiff has not made out a case which would displace the prima facie defence raised by the Architect that the claim against it is statute barred.

55. Secondly, it is not at all clear that this is not a claim for economic loss (arising from defects which require to be remediated) as opposed to a claim for damages for actual physical damage caused by the defects. If it is such a case, then the cause of action accrued from the date of the defect (in this case the date of construction) and it is not postponed until the damage becomes manifest. As the trial judge said at para. 56 quoted above "*A claim for pure economic loss, being the cost of remedying defects (which may or may not go on to cause damage to the property) will exist, assuming the defects are capable of discovery, from the point at which the building was constructed. Thus the cause of action will accrue at the date of completion of construction."* At para. 42 of the Statement of Claim, the plaintiff claims damages for fire safety related remedial works, in the sum of €6,943,978 which are described as unascertained and continuing. This would tend to support the Architect's contention that this is a claim for pure economic loss and therefore its asserted defence that the claim against it is statute barred.

56. It is not for this Court to resolve this issue: it is complex. The argument may go either way, but the Architect does not have to establish that it has a defence that will succeed. It is sufficient for the purposes of s.52 to show that it has a *prima facie* defence and I agree with the conclusions of the High Court on this issue.

Can there be a prima facie defence based on a draft defence?

57. The plaintiff argued that in the absence of delivering a defence, the Architect could not argue that it had established a *prima facie* defence based upon the Statute of Limitations as this is always a matter which a defendant must plead and there is no such pleading in this case. This argument is without merit. In *Greenclean*, Kelly J. (as he then was) speaking for this Court on an application under s.390 of the Companies Act 1963, referred to the fact that

a draft defence had been exhibited, and considered the issues raised in the draft defence without indicating that a defence could only be considered where it had been delivered. In that case, the Court of Appeal was satisfied that in the draft defence the defendant had demonstrated a *prima facie* defence. Clearly that decision was binding on the High Court and no reason had been advanced which would justify this Court in declining to follow that decision. There is no reason to believe that the defence will not be filed in due course, assuming the proceedings progress, and that it will include a plea that the claim is statute barred.

The defendant did not adduce evidence to support its asserted defence

58. It was submitted that the trial judge had erred in holding that the Architect had made out a *prima facie* defence to the plaintiff's claim as it was unsupported by any evidence and accordingly amounted to no more than a mere assertion. In addition, its failure to adduce evidence, in particular for a member of the firm to swear an affidavit concerning the scope of the engagement of the Architect and to exhibit the contract of engagement, amounted to the Architect failing to put its *"cards on the table"* as, it is said, was required by the decision of the Supreme Court in *Quinn Insurance.*

59. As regards the defence that the claim is statute barred, no case is made that the Architect was involved in the development after 2006. The plenary summons was issued in July 2018. It claims damages in tort and in contract for which the limitation period is six years. The requirement to adduce evidence in support of an asserted *prima facie* defence must be assessed by reference to the nature of the claim and the nature of the asserted defence. Where, as here, the defence asserted is a legal one and it is based upon facts which are either as pleaded by the plaintiff (the date of the engagement of the Architect and the last

date of its involvement) or are incontrovertible (the date of the commencement of the proceedings) there is no evidence material to the argument which the Architect is required to establish in order to make out a *prima facie* defence on this point of law.

60. As regards the alternative defence, the plaintiff's case is that the eighth and ninth named defendants were "Architects in respect of the Development". It does not plead the terms of their engagement and it explains this on the basis that it was not a party to the contract, and it does not have access to the contractual documents[1]. The plaintiff's case against the Architect is set out in para 30 (page 10) of the Statement of Claim:

> *"The Opinion on Compliance with Planning Permission and the Opinion of Compliance with Building Regulations for commercial unit 171 was executed by the Ninth Named Defendant on 19 July 2006. Both indicate that the following architectural services were provided by the Eighth and Ninth Named Defendants in connection with the relevant development stating RIAI scope of services work stages 1-5 including periodic inspections on site. The standard RIAI service would normally include for the preparation of detailed design documentation for the development and periodic inspection."*

61. While the plaintiff does not have the contractual documentation entered into between the Architect and the developer, the plaintiff's case against the Architect presumes that it involved the RIAI standard terms and that it extended to Stages 1-5 of those standard terms. To that extent it is not open to it to contend otherwise or to dispute that the standard terms of the RIAI contract governed the scope of the Architect's engagement and that it extended only to stages 1-5. It is therefore not open to it to complain that the Architect has not established the terms of the contract where the Architect accepts the terms as pleaded in para 30 of the Statement of Claim and bases its arguments on those very terms. Whether, after

[1] Its solicitors sought copies of these documents from the Architect who in turn says that it no longer has them. This is a matter of some dispute and criticism between the parties.

discovery, the plaintiff amends its pleadings to elaborate on its case against the Architect at some date in the future, is not for this court to speculate. This motion must be judged on the pleadings and the evidence in the case as they stand and not as they may possibly develop.

62. The argument ignores the fact that the certificate in respect of unit 171 was exhibited and this is admissible evidence which may be adduced at trial. The opinion states that it is issued solely for the purpose of providing evidence for title purposes of the compliance of the relevant building or works with the requirements of the Building Control Act and that it is not a report on condition or structure of the relevant building or works. It specifies the services provided by the Architect as *"RIAI Scope of Services Work Stages 1-5 including periodic inspections on site"*. In relation to Fire Safety it states *"I am of the opinion that the Fire Safety Certificate detailed at Schedule B hereto relates to the Relevant Building or Works and was obtained in accordance with the provisions of the Building Control Act and the Building Regulations."* The opinion refers to a visual inspection and gives as the author's opinion that *"the Construction of the Relevant Building or Works is in Substantial Compliance with the Building Regulations. I have received Confirmations from those detailed at Schedule A hereto that the Relevant Building or Works has been constructed in Substantial Compliance with the Building Regulations. This Opinion relies on Visual Inspection and on those Confirmations."* The schedule refers to fire safety certificates and identifies the tenth defendant as the specialist in respect of fire safety design.

63. Further, as the opinions are referred to in para 30 of the Statement of Claim, it is to be presumed that the plaintiff will adduce them in evidence. It will be for the trial judge to interpret the true meaning and effect of the opinions. For the purposes of this application, they constitute admissible evidence and they do not have to be exhibited by a deponent from the eighth named defendant (or by the ninth named defendant) before this court can consider them and assess whether the Architect has established, on a *prima facie* basis, a defence to

the plaintiff's claim based on the scope of its involvement in the development. The opinions of compliance of July 2006 are cogent evidence which, if accepted by the judge at trial, could support the asserted defence that the Architect assumed no responsibility in relation to fire safety in the development. Therefore, it cannot be said that this asserted defence amounts to no more than mere assertion, as contended by the plaintiff.

64. Therefore, in my judgment, the criticism that the Architect has failed to adduce evidence to support its argument regarding the scope of its retainer does not assist the plaintiff on this appeal.

65. Likewise, I am not persuaded that there is any merit in the complaint that the evidence in support of the motion was given by its solicitor and not by the Architect for the very reason that in this case there is very little by way of evidence in support of the motion which the Architect is required to establish. It was argued that the solicitor's evidence was hearsay, and that the affidavit ought to have been sworn by a member of the eighth named defendant who could, if necessary, have been cross examined on his or her affidavit. This may be so in theory and in many cases it will be necessary for there to be a deponent with direct knowledge of the facts, but on the facts of this case, as I have explained, this is not the case, as the facts are either those as pleaded by the plaintiff or are incontrovertible.

66. In *Quinn Insurance* Clarke C.J. emphasised that parties are required to *"put their cards on the table"* if they want the Court *"to take a particular factor into account"* (para. 126). They must do so to enable the Court properly to assess the factor the party relies upon. This applies to the defendant's contention that it has a *bona fide* defence to the full claim and a plaintiff's contention that its impecuniosity is due to the alleged wrongdoing of the defendant. In this case, given the nature of the defence asserted – that the claim is statute barred – the Architect was not required to engage with the merits of the claim and so was not required to put its cards on the table in relation to a particular factor for the court to

consider. In my judgment, Clarke C.J. was not establishing a general requirement that in a security for costs application each side must put all of their cards on the table about the entire case, but rather he was stating that where a party raised any particular factor on which the party places reliance, then, in support of that factor, it must place its cards on the table. Certainly, a party was not required to place evidence before the Court upon which it did not seek to rely and, furthermore, it could not be deprived of a relief to which it had otherwise satisfied the Court it was entitled for such a failure.

67. The observations of Clarke C.J. are most pertinent where the defendant seeks to rely upon facts which he asserts, and which are not accepted by a plaintiff. In this case the defence in relation to the Statute of Limitations is essentially based upon the plaintiff's own case. In this case, the nature of the case pleaded against the Architect and the undisputed relevant dates suffice to ground the argument that the claim is statute barred. Section 52 merely requires that the application be based upon credible testimony. The affidavit of the solicitor, the opinions of compliance, and the plaintiff's pleadings suffice for the purposes of this defence. Therefore, there was no requirement that the Architect put further cards on the table in relation to this defence.

68. For these reasons, I am satisfied that the trial judge was correct to conclude that the defendant had established a *prima facie* defence to the plaintiff's claim and therefore met the first criterion for an Order for Security for Costs.

Inability to meet an award of costs

69. The next question to be considered is whether there was reason to believe that the plaintiff would be unable to pay the costs of the Architect if it succeeded in its defence. There was considerable argument in relation to the trial judge's finding that the plaintiff

would be unable to pay the costs in the event that the Architect successfully defended the proceedings. Counsel argued that the plaintiff had shown that it could raise significant sums by a special levy imposed on the members of the plaintiff, the owners of the units. While the special resolution was not exhibited, the company had passed a special resolution and had raised €1.9 million from the owner members of the company to fund the litigation. In debate with the Court, counsel urged that the track record showed that if the plaintiff lost the case that nonetheless the company could pass a resolution to levy the members and would successfully recover the funds to pay those costs. Counsel did not contend that the sum already raised provided security for the Architect's costs, presumably on the basis that the plaintiff intended to utilise the monies in mounting its case. He did not – and could not – assert that as a matter of law there would be an obligation on the members to vote for such a levy in the future.

70. The Court must therefore assess whether there is reason to believe that they would do so again at a time when they would have lost the litigation (at least against the Architect) and be potentially faced with three very substantial bills – the estimated €10 million cost of remedying the defects in the development (on the basis that the plaintiff had lost its case), its own legal costs and the costs of the Architect (and possibly of other successful defendants). The Court must assess not only whether the members would vote for such a levy in those circumstances but also the likelihood of collecting from the owners' sufficient funds to actually discharge the Architect's costs. In other words, was there reason to believe that this would occur and that the costs awarded to the successful defendant would be paid so that, there was reason to believe that the plaintiff would be able to pay those costs?

71. The court is required to consider all material evidence and to reach an assessment of the range of likely eventualities (*Coolbrook*, para. 54) and *"the evidence must satisfy the court that there is something 'significantly greater than a mere risk'"* that the plaintiff

company will be unable to pay the costs of the successful defendant. (*IBB Internet Services* para 5.16). Here the evidence was that an owners' management company would not be expected to have sums to hand sufficient to meet the estimated costs of the Architect incurred in defending the claim and that the plaintiff did not have such sums. The monies raised by the recently passed special levy were not said to prove that it currently had sufficient funds to pay the costs. Reliance was placed on the levy as evidence of an ability to pass such a levy and to collect the funds so levied in the future.

72. While undoubtedly the members have shown that they are prepared to fund and support the costs incurred in mounting this litigation, and it will be *possible* for the directors of the plaintiff to call an EGM of the plaintiff and to seek to pass a special resolution authorising the imposition of a special levy to pay the costs of the Architect, the members of the plaintiff are under no *obligation* to agree to such a levy. It means that this possible source of finance is essentially speculative, and the Architect cannot have the requisite assurance that the plaintiff will be able to pay its costs in that eventuality.

73. In *Greenclean* Kelly J. considered whether an insurance policy taken out by the plaintiff to provide cover for the defendant's costs displaced the finding that the plaintiff was otherwise insolvent and unable to pay the defendant's costs. He approved as representing the law in this jurisdiction the observations of Akenhead J. in *Michael Philips Architects Ltd v. Riklin [2010] EWHC 834 (TCC)* that *"there must not be terms pursuant to which or circumstances in which the insurers can readily but legitimately and contractually avoid liability to pay out for the defendant's costs."* The legitimate ability of the members of the plaintiff to decline to vote in the future for a special levy to discharge the costs of the Architect seems to me to be closely analogous to this situation. In each situation, the defendant has no certainty that the party whom it is said will discharge the costs will do so. Kelly J. considered the terms of the policy and concluded that it was *"so conditional…that*

it does not provide a sufficient security to the defendant to warrant refusal of an order for security for costs. The policy is voidable for many reasons which are outside the control, responsibility or, by times, knowledge of the defendant… [The policy] does not, in my view, raise a sufficient inference of an ability to discharge the defendant's costs to justify the refusal [of the order]"

74. In *Coolbrook* Barniville J (as he then was) concluded that the defendants had established that there was reason to believe that the plaintiff would be unable to pay their costs in the event the plaintiff lost its case. To counter this, the plaintiff argued that rental income was potentially available to pay the costs. This was rejected by Barniville J as being *"highly qualified and conditional in its terms and is entirely dependent on [the secured creditor's] consent*" (para 76). The secured creditor was not bound to release its security and so the offer did not in fact provide any security to the defendants.

75. In my judgment, the submission of the plaintiff that the members of the plaintiff could pass a special resolution to levy the members of the plaintiff for the costs of the Architect in the event that it succeeds in the litigation is as uncertain and conditional as the ATE policy of insurance in *Greenclean* and the offer of rental income charged to a secure creditor who was under no obligation to release its security in *Coolbrook*. It does not enable me to conclude that there is reason to believe that the plaintiff will, on this basis, be able to discharge the costs of the Architect if it succeeds in its defence of the litigation.

Section 18(4) of the Multi-Unit Developments Act 2011

76. The plaintiff urges that the Court should have regard to the provisions of s.18(4) of the Act of 2011 when determining whether there is *"reason to believe"* that a special levy would

be passed and the sums collected to discharge a future award of costs in favour of the defendant. Section 18(4)(b) of the Act provides:

> *"Where the service charge proposed to the general meeting is disapproved by not less than 75 per cent of the persons present and voting, the proposed service charge shall not take effect but the charge applying to the previous period shall continue to apply pending the adoption of a service charge in respect of the period concerned."*

77. The plaintiff's case based on this provision is as follows. The possible future levy of the members of the plaintiff for the costs which might be awarded in favour of the Architect come within the scope of *"the service charge"* to be proposed to the general meeting of the members of the plaintiff. That service charge will be passed unless 75% or more of the persons present and voting reject it. This, it is said, gives a greater degree of assurance that a special levy to discharge the costs of the Architect will be adopted at a general meeting of the plaintiff in the future, as it may be difficult to muster the necessary number of members required to reject it.

78. I am not satisfied that this argument assists the plaintiff. In the first place, it does not alter the fact that there is no legal obligation on the members to pass the resolution and it accordingly remains entirely dependent on the consent of the members, of which there can be no assurance, and which is outside of the control of the Architect.

79. Secondly, I am not persuaded that the service charge referred to in s.18(4)(b) includes a levy of the kind which would be required to raise the funds to pay the costs of the Architect in these proceedings. Section 18 is concerned with the annual service charge from which the owners' management company *"may discharge ongoing expenditure reasonably incurred on the insurance, maintenance (including cleaning and waste management services) and repair of the common areas of the multi-unit development concerned and on the provision of common or shared services to the owners and occupiers of the units in the*

development." (Sub-section 1). Sub-section 2 requires that the members be provided with an estimate of the expenditure it is anticipated will be incurred by the company in relation to a particular period in advance of a meeting to consider whether to adopt the proposed service charge. The estimate must be broken down into nine categories set out in subs. (3) as follows:

> *"(a) insurance;*
>
> *(b) general maintenance;*
>
> *(c) repairs;*
>
> *(d) waste management;*
>
> *(e) cleaning;*
>
> *(f) gardening and landscaping;*
>
> *(g) concierge and security services;*
>
> *(h) legal services and accounts preparation; and*
>
> *(i) other expenditure arising in connection with the maintenance, repair and management of the common areas anticipated to arise."*

80. The plaintiff argues that the reference to legal services in (h) includes the costs which the plaintiff might have to discharge to the Architect. I am not satisfied that this is correct. This refers to an estimate for legal services, not legal costs. Quite clearly the legal costs incurred by the Architect cannot be regarded as legal services provided to the plaintiff. Furthermore, the matters listed in subs. (3) relate to the general running of the multi-unit development and not to a special levy for the costs of critical litigation. In my judgment, such costs would amount to special items of expenditure and would not therefore come within the scope of the annual service charge which is governed by s.18 of the Act of 2011. In passing I should note that all of the accountants who gave evidence agreed that the plaintiff

would be required to pass a special levy, and this appears to me to be different to matters included in the annual service charge levied pursuant to s.18.

An alternative means of discharging the costs

81. The Court asked counsel how it was asserted that the Architect would recover their costs if the owners did not agree to pass a levy or did not pay the sums levied upon them. Counsel replied that it would be open to the Architect to petition to wind up the company. Either the threat of the liquidation would force a change of heart on the part of the owners of the units and they would then voluntarily raise the money required in order to avoid seriously impairing the titles to their individual units by reason of the loss of the title to the common areas. Or, in the alternative, he suggested that if the company were wound up, that, as the title to the common areas was an essential element of each owner's title, they would, as a matter of practical reality, be forced to buy the title from the liquidator. This in turn would result in sufficient funds in the hands of the liquidator to discharge the Architect's costs. In debate with the Court, counsel for the plaintiff accepted that *"Well, sorting it out is going to be very, very tricky. I am not for a minute saying the successful defendant will have a home run in relation to it…"* This is an understatement in my view. The possibility that owners who, on this hypothesis, would not agree to pass and pay a special levy to discharge the costs of the Architect, would nonetheless effectively agree to do so because of the threat that the owners' management company would be wound up with all the greater and lesser inconvenience this would entail for them is far more uncertain than the first proposition. Having rejected the suggestion that security should not be ordered on the basis that a special levy could be passed as being too uncertain, this speculative chain of events cannot conceivably meet the required degree of certainty to meet the statutory test.

82. As regards the hypothetical where the plaintiff is actually wound up, counsel could point to no authority where the possibility of winding up the losing plaintiff and recovering the costs of defending the litigation through the process of liquidation had been held to refute the contention that the company would be unable to pay the costs of the successful defendant. The statutory test is whether there is reason to believe that the company will be unable to pay the costs of a successful defendant. I have no hesitation in concluding that this test is not met by winding up the company and realising the assets of an owners' management company whose only asset is the common areas of the development.

Owners' management companies of multi-unit developments and security for costs

83. Litigation is expensive, particularly litigation of the scale and complexity of these proceedings. It follows that in many cases there will be reason to believe that a company without significant resources will not be able to discharge the costs of a successful defendant. It has been stated on many occasions that the Oireachtas is presumed to know the law. The provisions of s.390 of the 1963 Act were re-enacted by s.52 of the 2014 Act with one change (the deletion of the word "sufficient"). Importantly, the section applies to all limited liability companies, and there are no carve outs for small companies with low turnovers or companies limited by guarantee. The Multi-Unit Developments Act, 2011 was enacted when s.390 of the 1963 Act was on the statute books. Except as otherwise provided, the 2011 Act applies to every multi-unit development. Under s.1, an owners' management company is required to be a company established for the purposes of becoming the owner of the common areas of a multi-unit development, and the management, maintenance and repair of the areas, and it is to be a company registered under the Companies Act. The 2011 Act does not disapply the provisions of s.390 of the 1963 Act for such companies and neither does the 2014 Act

disapply the provisions of s.52 in relation to such companies. It remains the law that if a company is a plaintiff in any action or other legal proceedings, the provisions of s.52 of the 2014 Act apply and the Oireachtas has not chosen to exempt owners' management companies of these provisions. It is not for the court to rewrite the statute in relation to owners' management companies.

84. This is significant given the nature of owners' management companies and, in particular, the manner in which funds are raised from owners of units in multi-unit developments, their non-trading status and the high cost of litigation. The legislature must be presumed to know that where an owners' management company institutes major litigation there will almost invariably be reason to believe that it will be unable to pay the costs of a successful defendant within the meaning of s.52. Nonetheless, s.52 applies to cases where owners' management companies are plaintiffs. They are not exempt from the provisions of the section.

85. For these reasons, given the impecuniosity of the plaintiff within the meaning of the jurisprudence- which is not disputed- in my judgment there is reason to believe that the plaintiff will not be able to discharge the costs of the Architect should it succeed it defending the claim and the plaintiff's arguments to the contrary do not displace that reason. I therefore would dismiss the appeal on this issue.

Special circumstances

86. The jurisprudence is clear that if these two gateway criteria are satisfied then the presumption is that security will be ordered. The onus then shifts to the plaintiff to establish that nonetheless the Court should exercise its discretion to refuse to so order. Normally this is done by reference to special circumstances which tilt the balance of justice against

ordering the provision of security notwithstanding the fact the moving party has satisfied the statutory criteria.

87. At the hearing of the appeal, counsel for the plaintiff made it clear that he was not contending that the wrongdoing alleged against the Architect had resulted in the plaintiff's inability to pay the costs of the Architect, should the plaintiff lose its case against it. This meant that he was not relying on what has come to be known as the *Connaughton Road* line of jurisprudence.

88. The plaintiff's argument in relation to special circumstances was based on the second strand; that it was in the public interest that the case should proceed to a trial on the merits and that security should not be ordered. Firstly, the problems in relation to fire safety defects in the development were not unique to the Ivy Exchange development. Difficulties of this nature were replicated across the State in many other multi-unit developments; therefore the resolution of the issues in this case would be highly relevant to the problems occurring in all the other developments suffering similar fire safety defects. The plaintiff said that there was a public interest in determining when a cause of action accrued in the circumstances of this case and secondly in determining when the continuing role of a developer of a multi-unit development under s.7 of the Act of 2011 *"expires"* and *"how it is to function in concert with Section 13 of the …Act."*

89. Secondly, an owners' management company should be regarded as being in a special category of company. It was not comparable with other limited liability companies which carried on business with the benefits of limited liability. The Act of 2011 required common areas of multi-unit developments to be held by an owners' management company. The unit owners had no option but to hold their common areas through a company and thus to enjoy limited liability.

90. Thirdly, it was submitted that the Court should have regard to the seriousness of the plaintiff's case. Essentially, the Court should consider the category of the claim and the category of the plaintiff and conclude that these proceedings therefore fall outside of *"the norm of normal commercial engagement"*. It was also said that the Court should have regard to the fact that defendants in cases such as this were *"weaponising"* applications for security for costs. Counsel submitted that all of these factors *"go into the mix"* when the Court is considering the balance of justice between the parties and whether to exercise its discretion to refuse the relief sought, notwithstanding the conclusion that the two gateway criteria had been met.

91. In *Quinn Insurance* at para. 100, Clarke C.J. held:

> *"On the basis of that analysis, it seems to me that it is appropriate to characterise the overall approach as being one where the Court should attempt to adopt the course of action giving rise to the least risk of injustice while recognising, for the reasons already set out, that there will inevitably be some risk of injustice no matter what course of action the Court determines on. Where, in accordance with Connaughton Road… the Court is satisfied that an appropriate prima facie case has been made out to the effect that the inability of the plaintiff to pay costs should it lose is due to the wrongdoing alleged, then that fact by itself will ordinarily tip the balance of justice against the making of an order for security for costs. The overriding injustice in such a case stems from the fact of a plaintiff being at risk of not being able to maintain a good claim in circumstances where there is an arguable basis for asserting that the impecuniosity of the plaintiff concerned is due to the wrongdoing in respect of which the very proceedings are brought. The risk of that injustice occurring outweighs any potential risk of injustice to the defendant concerned."*

92. Clarke C.J. then addressed the critical point whether the ordering of security would actually prevent the plaintiff from continuing the proceedings. At para. 110 he held:

> *"I would add that it seems to me that the question of whether the proceedings are likely to be actually stifled may play a very significant role in an assessment of whether the "public interest" special circumstance has been established. The whole point about that special circumstance is that there may be cases where there is a genuine public interest in certain issues being litigated in open court. That public interest would be impaired if the proceedings were not to go ahead because security for costs was ordered. However, if the proceedings are to go ahead in any event (or if that remains highly likely) then the weight to be attached to the public interest in the proceedings going ahead in the context of a security for costs application will be minimal"* (emphasis added)

93. This latter passage is extremely significant because counsel for the plaintiff confirmed that the making of the order would not stifle the proceedings and, in fact, the plaintiff lodged the security directed by the High Court. The security for costs lodged in respect of the claim against the sixth named defendant will be returned to the plaintiff as it has settled its proceedings with the sixth named defendant. This presumably means that the proceedings are even less likely to be stifled by the order in favour of the Architect as the money raised to fund the security for the sixth named defendant will no longer be lodged in court but is available to the plaintiff for the prosecution of the proceedings notwithstanding the existence of the order in relation to the Architect. It seems to me in the circumstances that the factors identified by the plaintiff to support the contention that the proceedings come within the scope of the public interest special circumstances are insufficient to justify this Court exercising its discretion to refuse to order security for costs where the litigation will not be

stifled, and the plaintiff will be in a position to continue the proceedings. The injustice to the defendant in those circumstances would far outweigh any injustice to the plaintiff.

94. Furthermore, while, as the trial judge accepted, there is a degree of public interest in the outcome of the litigation, these proceedings are not pathfinder or test cases. The case was not made that the outcome of these proceedings will determine the outcome of other litigation. They are not public interest proceedings is this sense. Neither may the court attach particular significance to the fact the plaintiff is an owners' management company, as the Oireachtas mandated that common areas on multi-unit developments must be held by owners' management companies and yet did not exempt such companies from the provisions of s.390 of the Act of 1963 or s. 52 of the Act of 2014 or otherwise provide that they should be treated differently to other companies. It is also not appropriate for the court to weigh in its considerations "the seriousness of the plaintiff's case" when determining whether it is just to award security for costs in all the circumstances. The courts have frequently cautioned that applications for security for costs should not become mini trials. Yet that is precisely what would eventuate if the court were to have regard to the alleged seriousness of a plaintiff's case, precisely because it would therefore be open to a defendant to contest any such assertion.

Quantum of security

95. The plaintiff contended that the trial judge did not consider whether it would be appropriate to order less than 100% of the estimated costs of the Architect; that in view of the nature of the plaintiff, and in balancing the risk of injustice, it would have been appropriate to order less than 100%.

96. This submission is without merit in my judgment. From paras. 107-111 the trial judge addressed the question of the amount of security. She correctly identified the fact that the Court has a wide discretion and that the overriding criteria is that both parties should be treated fairly. She formed the view there was no significant inequality of arms in this case. She noted that the Architect is a firm of professional persons and, leaving aside the question of whether they hold insurance, they do not themselves have *"deep pockets"*. At para. 109 she held:

> *"However, if they have not been negligent, then the successful defence of these proceedings, which is important to safeguard their professional reputations, will be a protracted and costly exercise. It is inherently unjust that they be required to undertake that exercise if there is no prospect of recovering the costs of successfully doing so at the conclusion of the litigation."*

97. She then considered the plaintiff as an owners' management company which owns the common areas of the development and carries out specific functions on behalf of the members. At para. 111 the trial judge concluded that:

> *"…the plaintiff has not made the case that the granting of security for costs will prevent it from pursuing the litigation nor from doing so in the manner in which it always planned and intended to do. In those circumstances there are no particular factors which would justify the court in ordering that security be provided at a level materially different to and less than the costs which are likely to be incurred by the defendants."*

98. Accordingly, she fixed the appropriate level of security at €535,500; the amount she estimated to be 100% of the estimated costs of the Architect.

99. In my judgment, there was no error in her approach to the issue; it was a matter within her discretion and the plaintiff has not pointed to an error of such magnitude that would

justify this Court interfering with her exercise of that discretion. Insofar as the argument is predicated on the special status of the plaintiff, I have already explained why, in my judgment, this is not so.

Phasing of security

100. The appeal in relation to this aspect of the judgment is noticeably weak. At para. 118 of her judgment the trial judge bemoaned the fact that the failure to adduce the necessary evidence effectively deprived her of the ability to make a reasoned informed decision on this matter. She said:-

> *"This leaves the court in the very unsatisfactory position of being faced with a proposal which is, of itself, meritorious but not being provided with the evidence which would be necessary in order to make a meaningful estimate of the amount of costs to be provided on a phased basis so that effect could be given to that in a court order…. How is the court in this case to assess the reasonable costs that might be incurred up to discovery or up to mediation?...Short of adjourning the matter to allow all fours(sic) sets of legal costs accountants to be instructed to provide these estimates and then holding a further hearing on the issue, which I am very reluctant to do in light of the four days' costs already incurred, the court is left in a bind."*

101. In those circumstances, using her experience and in considering the interests of justice between the parties, she directed the payment of 50% of the total amount of security in respect of each defendant to provide security for the defendants at least in respect of any contested application for discovery, the making and analysing of discovery and any meditation that might occur. Thereafter, the plaintiff will be required to lodge the balance, bringing the amount up to the full amount of security to be lodged before any other preliminary application is made or a Notice of Trial is served by the plaintiff.

102. Unsurprisingly, at the hearing of the appeal, counsel for the plaintiff did not press this ground of appeal. I have no hesitation in upholding the trial judge in the exercise of her discretion in those circumstances. Indeed, it would have been open to her to reject the possibility of ordering the phasing of security in the complete absence of any relevant evidence and she is to be commended for attempting to ease the burden on the plaintiff, rather than appealed for failing to make an order in absence of the evidence necessary to enable her to make an informed decision how justly to phase the provision of security.

Invitation to the Architect to consider mediation

103. Section 16 of the Meditation Act 2017 provides:

> *"16.(1) A court may, on the application of a party involved in proceedings, or of its own motion where it considers it appropriate having regard to all the circumstances of the case:*
>
> *(a) invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute the subject of the proceedings…"*

Order. 56A of the Rules of the Superior Courts governs applications under s.16(1) whether by motion of a party to proceedings or of its own motion, and no issue was taken in relation to compliance with the formal requirements of the rules. The decision under both the rules and the section whether to extend such an invitation to the parties is peculiarly a matter for the discretion of the trial judge, particularly as the Court is empowered of its own motion to extend the invitation to the parties. Accordingly, it falls within the type of discretionary order with which an appellate court should be very slow to interfere unless required to do so in the interests of justice.

104. This Court considered the principles applicable to applications of the rule in *Atlantic Shellfish Limited v. Cork County Council* [2015] IECA 283, [2015] 2 IR 575. Irvine J. (as she then was) speaking for the Court held as follows:

> *"33. It is also clear from the provisions of O.56A, r. 2 (1) that the court should only exercise its discretion if it considers it 'appropriate' to do so 'having regard to all of the circumstances of the case'. That begs the question as to the circumstances in which it is 'appropriate' to make the order.*
>
> *33. To my mind the court could not be satisfied that it would be 'appropriate' to make an order unless it was first satisfied that the issues in dispute between the parties were amenable to the type of ADR proposed. That being so I consider that this is the first issue that ought to be addressed by any judge when faced with an application of this type. It is only if satisfied on this particular issue that the judge need move on to consider any other 'circumstances of the case' that might weigh in favour or against the granting of the relief sought. It is obvious that it would be a waste of the court's time to consider any such ancillary circumstances unless first satisfied that the process to which its invitation is to be addressed would enjoy a realistic prospect of resolving or substantially narrowing the issues in dispute."*

105. She analysed the issues in the dispute in that case and was not satisfied that it was appropriate to make an order inviting the defendants to use ADR because the legal issues involved were not suited to such a process. In her judgment the opposition to the application was entirely *bona fide*. At para. 54 she again emphasised that before making an order under O.56A the Court must be satisfied that the issues in dispute are reasonably suitable for resolution by ADR and that there are not good reasons for refusing the relief sought.

106. In this case the trial judge concluded that it was premature to invite the Architect to consider mediation on the basis that the issues between the parties were not clearly defined. While it is broadly speaking correct to say that multi-party construction litigation may be suitable to mediation, normally this will only be so when the issues between the plaintiff and the defendant have been clearly delineated and also, in appropriate cases, the issues between the defendants. Given the wholly generic and undifferentiated claim against the Architect, I would agree with the trial judge that at this point in time the Court cannot be satisfied that the issues in dispute are reasonably suitable for resolution by ADR for the simple reasons that the issues in dispute are not sufficiently clarified to enable the Court to reach such a conclusion. Similarly, if the Court cannot identify the issues, it is equally difficult to see how the Court could properly conclude that there is a realistic prospect of substantially narrowing the issues between the parties. For this reason, I would refuse this appeal also. However, I would not wish this judgment to be read as dissuading the parties from pursuing mediation at a later stage in the proceedings. It is to be hoped that when the issues are clarified and defined as between all the parties in this case that the parties will again revisit the question of mediation which undoubtedly has great potential in appropriate cases to resolve disputes in a manner which is far less costly and time consuming to the parties than a full plenary trial.

Conclusions

107. The Architect has made out a *prima facie* defence that the plaintiff's claim against it is statute barred. It could do so by exhibiting a draft defence. It was not required to address the substance of the claim or, by extension, to adduce any evidence in relation to the substance of the claim. A *prima facie* defence based upon a plea that the claim is statute barred may, depending on the facts of the case, require very little in the way of factual evidence and therefore the failure of the defendant to adduce factual evidence over and above

that which is necessary to ground a defence on the statute does not amount to impermissible failure to place its cards upon the table and does not disentitle a defendant to security for costs which the court otherwise would order to be provided.

108. The Architect has also established a *prima facie* defence in relation to the scope of its engagement in the development and thus whether it could be liable for the defects as pleaded in the Statement of Claim based upon the plaintiff's pleaded case and the certificates of compliance which provide objective admissible support for its asserted defence as required by the authorities.

109. *Prima facie*, there is reason to believe that the plaintiff will be unable to pay the costs of the Architect if it succeeds in defending the case against it as, in the normal way, the plaintiff, as an owners' management company, would not have available on hand funds sufficient to satisfy the statutory threshold in relation to the costs of a defendant sued in litigation of this nature. The two alternative means whereby the plaintiff asserted that it would be able to discharge the costs of the Architect, in the event that its case against it failed, do not provide that degree of assurance as would justify the Court in concluding that it would be able to pay those costs. They are contingent and speculative and outside of the control of the Architect.

110. In these circumstances, security for costs ought to be ordered unless the plaintiff can establish special circumstances such that the balance of justice would tilt towards refusing security. The plaintiff asserted public interest special circumstances based upon the nature of the claim, the nature of the plaintiff and the many other multi-unit developments where similar fire safety issues have emerged. However, it did not assert that the order to provide security for the costs of the Architect would stifle the claim and so the weight to be attached to the public interest in the continuance of the proceedings does not require the court to withhold the order for security it would otherwise make.

111. The trial judge enjoyed a wide discretion as to the quantum of security to award the Architect and the plaintiff has not shown that she erred in identifying the issues to be weighed, her assessment of those issues or her fixing of the quantum to the extent as would warrant this court interfering with her exercise of her judgment and discretion in this regard. Likewise, having failed to provide any evidence upon which she could assess the quantum of costs in relation to the various asserted watersheds, the appeal in relation to her order as to the phasing of the security is unsustainable.

112. Finally, the court can only invite the parties to consider mediation if it can form the view that it would be appropriate to do so. This requires the court to be able to identify the issues so that it may properly conclude that there is a realistic prospect of either settling the proceedings or substantially narrowing the issues between the parties. The case as currently pleaded is simply too generic to enable the court to reach such a conclusion and accordingly the question of an application under O.56A is premature. When the issues are more clearly defined between all the parties, it may well be a case where it is appropriate to consider mediation, but the trial judge was correct to refuse to issue an invitation under O.56A at this stage of the proceedings.

113. For all of these reasons I would refuse the appeal.

114. As the Architect has been wholly successful in opposing the appeal, my preliminary view is that it should be entitled to its costs of the appeal. If the plaintiff wishes to contend for a different order, it should contact the office of the Court of Appeal within 14 days of the date of this judgment and ask the office to arrange a short hearing. It should be borne in mind that it may have to bear the costs of the additional hearing if the court does not make an order different to that indicated.

115. Donnelly and Pilkington JJ. have read this judgment in draft and have authorised me to indicate their agreement with the judgment and the proposed order.