[2020] IEHC 277

THE HIGH COURT

[2017 No. 4639 P.]

BETWEEN

3V BENELUX BV

PLAINTIFF

AND

SAFECHARGE CARD SERVICES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 29th day of May, 2020

Introduction

1. This is an application for the costs of a motion for security for costs which has been the subject of two written judgments, the first given on 16th October, 2019, [2019] IEHC 675 on the substance of the application and the second given on 6th March, 2020, [2020] IEHC 139 on the amount of the security.

2. In the earlier of those judgments I decided that the defendant had established that it had a *prima facie* defence to the plaintiff's claim; that the defendant had established that there was reason to believe that the plaintiff would be unable to pay the costs of the action if it were to fail; and that the plaintiff had failed to establish on a *prima facie* basis that the cause of the apprehended inability to pay costs was actionable wrongdoing on the part of the defendant.

3. In the later judgment I decided that the amount of the security should not be limited to a fraction or percentage of the estimate and that the defendant was entitled to security by cash or bond.

4. The question which I must now decide is where the very considerable costs of the application should lie.

5. Order 99, r. 1(4A) of the Rules of the Superior Courts, which was introduced by the Rules of the Superior Courts (Costs) 2008 (S.I. No. 12 of 2008) provided:-

> *"(4A) The High Court or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."*

6. This provision is now to be found in O. 99, r. 3 of the new O. 99 substituted by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019).

7. Mr. Michael Howard S.C., for the defendant, argues that the order for security for costs constitutes an event, and that the costs should follow that event. Mr. Declan McGrath S.C., for the plaintiff, argues that the critical issues argued and decided on the motion will be revisited and finally decided at the trial of the action and that the appropriate order is to make the costs of the motion costs in the cause.

The arguments

8. The starting point, I think, is to identify the approach in principle that ought to be taken to an application for the costs of a successful motion for security for costs. On the one hand, the defendant has achieved what it long ago asked for and the plaintiff declined to provide. On the other hand, the plaintiff may win the case. In that event, so the argument goes, the fundamental premise of the order for security for costs – that the defendant has a *prima facie* defence to the action – would be shown to have been wrong. Moreover, it is said, the assessment by the trial judge of the damage suffered by the plaintiff by reason of any breach of contract that may be established will effectively revisit the issue as to the cause of the plaintiff's impecuniosity.

9. The foundation stone of Mr. McGrath's argument is the decision of Clarke J. (as he then was) in *ACC Bank plc v. Hanrahan* [2014] 1 I.R. 1 in which the Supreme Court laid down the correct approach to be taken to the costs of motions for summary judgment. The principle established or applied by that decision, it is said, is that if the outcome of an interlocutory motion turns on the assessment of the merits of the action and the court at trial will be revisiting the merits, the appropriate order – unless in a case where there has been particularly unreasonable behaviour - is to either reserve the costs or to make the costs costs in the cause.

10. To persuade the court to make the order for security for costs, it is said, the defendant had first to satisfy the court as to the merits of its defence. The defendant, it is said, did so in part based on its version of events but those events will be revisited at the trial. It is submitted that if the action should succeed, it will follow that the order for security should not have been made in the first place and that it would be unjust that a plaintiff who has won his case ought to have to pay the costs of a motion for security for costs that ought not to have been made.

11. It is acknowledged that the court at trial will not revisit the precise issue as to the ability of the plaintiff to meet an order for costs but – it is said – the issue as to whether the defendant has a *prima facie* defence will be revisited, as – it is said – will the causation issue as to the financial impact of the defendant's actions on the plaintiff.

12. Mr. McGrath argues that if the costs of the motion are made costs in the cause and the defendant wins, the defendant will have those costs and will have security for those costs.

13. Mr. Howard, respectfully, disagrees. The issue on the motion for security for costs, he says, is whether the court should make an order for security for costs. That issue, he says, will never be revisited.

14. The judgment on the substantive application, it is submitted, identified three issues (1) whether the defendant has established that it has a *prima facie* defence, (2) whether the defendant has shown that there is reason to believe that the plaintiff will be unable to pay the costs if the action were to fail, and (3) whether the plaintiff has established on a *prima facie* basis that any inability to pay the costs is attributable to the alleged wrongful actions of the defendant. On each of these issues – says Mr. Howard – the defendant prevailed.

15. It is submitted that applications for security for costs fall to be determined on a very discrete basis. On a motion for summary judgment the court is concerned with the existence or possible existence of a legal right which, in an appropriate case, will be decided at trial. If, in an action for debt, the conclusion of the trial judge is that the money is owing, summary judgment ought to have been entered. If the decision is that the money is not owing, the defendant must in justice have the costs of defending the motion as well as the action. On a motion for security for costs, by contrast, the context in which the merits of the claim will be examined is quite different to that at trial. The issue on the motion is whether the defendant has established a *prima facie* defence. The issue at trial will be whether the plaintiff has made out its case on the balance of probability.

16. To reserve the costs, it is submitted, would mean that the trial judge would have to trawl back through the judgment on the application for security for costs to see how it fits with findings made in a wholly different context. To make the costs costs in the cause, it is submitted, would be an invitation to every plaintiff in every case to fight every request for security for costs tooth and nail.

Legal principles

17. As I have said, the argument made on behalf of the plaintiff draws very heavily on the decision of the Supreme Court in *ACC Bank plc v. Hanrahan* [2014] 1 I.R. 1. That was an appeal against a costs order made against the plaintiff on a motion for summary judgment on which the defendant had secured leave to defend. For reasons to which I will come in due course, I believe that motions for summary judgment are likely to give rise to issues which are less likely to arise as frequently on applications for security for costs but, again for reasons to which I will come, I believe that the principles laid down in *Hanrahan* are principles of general application in dealing with the costs of interlocutory motions.

18. In *ACC Bank plc v. Hanrahan* the Supreme Court approved of the statement of the law at para. 26-87 of the third edition of Delany and McGrath *Civil Procedure in the Superior Courts* (2012) where it was suggested that:-

> *"Where the motion for judgment is unsuccessful and the defendant obtains leave to defend, the court's discretion is circumscribed by Order 99, rule 1(4A) which requires the court, upon determining any interlocutory application, to make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. It can be argued that a defendant should be entitled to costs on the basis that he has been successful in defeating the motion for summary judgment. However, given that an application for summary judgment is an integral part of the summary summons procedure, that the threshold for being granted leave to defend is relatively low and that the plaintiff may well succeed at the full hearing, it would seem that the best course of action in most cases is to make the costs of the application for summary judgment costs in the cause."*

19. In *ACC Bank plc v. Hanrahan* Clarke J., having noted the introduction of O. 99, r. 1(4A) of the Rules of the Superior Courts, continued, at para. 8 of the judgment:-

> *"The reason for the introduction of that rule seems to me to be clear. While, historically, there had been a tendency to reserve the costs of most motions to the trial judge, a view has been taken that this can lead to injustice for, at least in very many cases, a judge who has heard a motion is in a better position than the trial judge to consider the justice of where the costs of that motion should lie. This will be especially so in cases where the trial court will not have to revisit the merits or otherwise of the precise issue that was raised by the motion."*

20. Clarke J. gave as examples of interlocutory issues that would not be revisited at trial disputes over discovery or particulars and continued at para. 9:-

> *"9. It is, of course, the case that such motions are very much 'events' in themselves. There are issues as to the appropriate scope of discovery or particulars. They are decided once and for all on the motion. The merits of the results of those motions are not, in the vast majority of cases, in any way revisited at trial.*
>
> *10. Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. As I noted in Allied Irish Banks v. Diamond [2011] IEHC 505, [2012] 3 I.R. 549 and as approved by Laffoy J. in Tekenable Limited v. Morrissey & ors [2012] IEHC 391, (Unreported, High Court, Laffoy J., 1st October, 2012) somewhat different considerations will, to use the language which I used in Allied Irish Banks v. Diamond [2011] IEHC 505 and which Laffoy J. cited in Tekenable Limited v. Morrissey & ors [2012] IEHC 391 'turn on aspects of the merits of the case which are based on the facts'. It is true that both of those cases concerned the costs of an interlocutory injunction. One of the issues which, of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has established a fair issue to be tried and, indeed, whether the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on those questions is dependent on facts which will not be determined at the interlocutory stage save for the purposes of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence."*

21. At para. 11 of his judgment, Clarke J. explained the basis of his judgment in *Allied Irish Banks v. Diamond*:-

> *"11. However, the point made in Allied Irish Banks v. Diamond [2011] IEHC 505, [2012] 3 I.R. 549 is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim*

is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the court at the interlocutory stage, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts as finally determined by the court at trial. It follows that in such cases there may be good grounds for not dealing with the costs at the interlocutory stage, for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie. It is not necessarily just that a plaintiff who secures an interlocutory injunction on the basis of putting up false facts should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted."

22. Clarke J. then went on to explain how like considerations could apply to motions for summary judgment where a material part of the defence asserted is based on assertions of facts which are contested by the plaintiff.

23. The fourth edition of Delaney and McGrath reproduces, at para. 27-122, the passage from the third edition which was endorsed by the Supreme Court *in ACC Bank plc v. Hanrahan* and in the following paragraphs goes on to summarise the judgment in that case.

24. While the High Court in *Allied Irish Banks v. Diamond and Tekenable Limited v. Morrissey & ors* was immediately concerned with the question of the costs of applications for interlocutory injunctions, and the Supreme Court in *ACC Bank plc v.* Hanrahan was immediately concerned with the approach that ought to be taken to dealing with the costs of a motion for summary judgment, I do not understand the authorities to suggest that the nature of the interlocutory application is *per se* material to the approach that is to be taken to the costs. In the ordinary run of applications for interlocutory injunctions and motions for summary judgment there will be many cases in which there are contested questions of fact that cannot be resolved on affidavit. The fact that such cases often throw up similar issues is abundant justification for contemplating – as Delany and McGrath do in the fourth edition at paras. 24-86 to 24-95 in the case of applications for interlocutory injunctions, and at paras. 24-96 and again at 27-121 to 27-125 in the case of motions for summary judgment - the approach that will often be appropriate to particular kinds of applications but the authorities (and the authors) are clear that what is relevant is not the nature of the application but the issue on which it turns.

25. The headnote to the report of *ACC Bank plc v. Hanrahan* [2014] 1 I.R. 1 suggests that the Supreme Court found:-

"1. that while the general rule of O. 99, r. 1(4A) required the court to separately decide on the costs of each interlocutory application unless it was not possible to adjudicate in a just fashion on liability for costs at that stage, different

considerations applied in cases where the interlocutory application turned on aspects of the merits of the case that were based on the facts."

26. That, in my view, is not quite correct. The distinction drawn by Clarke J. in *Allied Irish Banks v. Diamond* was not between applications to which O. 99, r.1(4A) applied and applications which "*turn on aspects of the merits of the case which are based on the facts*" but between motions which are determined upon issues decided once and for all, and motions decided upon issues which are likely to come back before the court at the trial. Order 99, r. 1(4A) applies to all interlocutory applications. It is the fact that some applications turn on aspects of the case that are based on the facts that has the consequence that it may not be possible at the interlocutory stage to adjudicate in a just fashion on the liability for costs.

27. While Mr. Howard apprehends that to reserve the costs of this application would mean that the costs of every motion for security for costs would have to be reserved, and that to make the costs of this application costs in the cause would be an invitation to every plaintiff to fight every motion for security for costs tooth and nail, I do not understand Mr. McGrath to argue that motions for security for costs (or applications for interlocutory injunctions or summary judgment) fall into any special category. Rather, if I have understood it correctly, the argument is that the issues addressed on the motion for security for costs will be revisited by the trial judge who will be better placed to decide where the justice of the case lies.

28. Mr. Howard urges that if it is not dispositive then great weight ought to be attached to the difference between the onus and burden of proof on the interlocutory application and at trial. The premise of this argument appears to me to be that if the onus and burden of proof at trial are different, then it is more likely that the court will be in a position to decide the costs of the interlocutory application at that stage. On this motion for security for costs, it is said, the onus is on the defendant to establish a *prima facie* defence, while at trial the onus will be on the plaintiff to prove its case on the balance of probabilities.

29. I am unconvinced that a comparison or contrast of the burden of proof applicable on an interlocutory motion and at trial will readily assist in determining whether the case is one in which it is possible to justly adjudicate the costs of an interlocutory application at the interlocutory stage. The risk of injustice identified in the cases is the possibility that the asserted facts upon which the interlocutory application turns may transpire to have been incorrect. The key to identifying any such risk of injustice is to identify first the issue on which the interlocutory application turns and then to determine whether precisely the same issue (*ACC Bank plc v. Hanrahan*, para. 8) or some of the issues, to a material extent (*ACC Bank plc v. Hanrahan*, para.10) will or are likely to arise again at the trial of the action. It seems to me that it is only after the common issue has been identified that any sensible comparison or contrast can be made of the onus or burden of proof. If there is a common issue that will come before the trial judge, it stands to reason that the standard of proof will inevitably be different at trial. Contrary to Mr. Howard's argument – if I have understood it correctly – it seems to me that a difference in the onus or burden

of proof on the same issue will make it more likely, rather than less likely, that the trial judge will be better placed to come to a just conclusion than the judge who has dealt with the interlocutory application.

30. Delany and McGrath in the fourth edition of their work on *Civil Procedure* (2018) at para. 13-01 offer the view that:-

> *"The concept of ordering a party to provide security for the costs of an action effectively involves balancing the right of a defendant to recover costs if he successfully defends a claim against the right of a plaintiff, rooted in the Constitution, to have access to the courts and to have his claim determined."*

31. The same proposition in the third edition of that valuable work was considered and commented upon by the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 42, [2013] 2 ILRM 183. In a footnote to the fourth edition the authors record that Clarke J. in *Farrell* has "*suggested*" that it is more appropriate to conduct a balancing exercise as between the rights of the respective parties by reference to a right to fair process rather than on the basis of the right to have access to the courts *per se.* *Farrell v. Bank of Ireland* was a decision of the Supreme Court. While Clarke J., at para. 4.4 of his judgment, having referred to the proposition in Delany and McGrath said that "*… it may, for reasons which I will shortly address, be more appropriate to analyse the relevant balance by reference to the right to have litigation fairly conducted (a right to fair process) rather than the right to have access to the courts*…" [emphasis added] I do not understand the Supreme Court to have been suggesting a possible alternative approach but rather to have decided that the issue ought to be approached as one of fair process rather than access to the courts.

32. When, immediately, Clarke J. comes to the reasons he gives for the analysis of the balance, he starts by accepting a submission that had been made on behalf of Bank of Ireland that with rights come obligations, and that with the right of access to the courts comes an obligation to use best endeavours to conduct the process in accordance with procedural law and in a manner that does not add unnecessarily or inappropriately to the length or costs of the process. At para. 4.5 Clarke J. points to the clear distinction that must be drawn between restrictions on the right of access to the courts (for example the requirement, condemned in *MacAuley v. Minister for Posts and Telegraphs* [1966] I.R. 345, for the fiat of the Attorney General before an action could be brought against a Minister of the Government) and restrictions on the conduct of litigation.

33. Clarke J. continued at para 4.6:-

> *"Where, however, a party has had access to the court, but where, as part of the administration of justice, decisions are taken by the court which affect that party's ability to pursue the litigation, then it seems to me that such questions are more properly viewed in the context of the right to fair process being the right to have litigation fairly conducted (whereby the court is required to balance the rights of all*

parties to litigation in a fair, balanced and proportionate way) rather than on the basis of a right of access to the court per se."

34. Clarke J. in *Farrell* went on to illustrate the difference between the right of litigants to access to the courts and the right and obligation of the court to manage the progress of litigation by giving the examples of the distinction between the right to apply for short service of a notice of motion and the entitlement of the court to decide whether the order sought was appropriate (*Slattery v. An Taoiseach* [1993] 1 I.R. 286); the jurisdiction of the court to dismiss proceedings as being bound to fail (first identified in *Barry v. Buckley* [1981] I.R. 306); the right of a litigant to make, and the obligation of the court to adjudicate upon, an application leave to seek judicial review; and so forth, and continued:-

"4.9 It does, of course, have to be acknowledged that the courts, in exercising inherent, rule made or statutory powers which influence the course of proceedings, are required to act in a proportionate way so as to ensure that the rights of all litigants are balanced and are, so far as practicable, preserved. However, where the decision which has the effect of restricting the course of the proceedings is made by a court, having given the relevant litigants an opportunity to be heard, it does not seem to me to be accurate to characterise that decision as being one which involves a restriction on the right of access to the courts but rather one which might be said to affect the right of the relevant party to ensure that litigation is conducted in a fair way so that the court is required to ensure that any procedural measures imposed do not disproportionately and inappropriately affect the rights of that party.

4.10 Like considerations appear to me to apply to an application for security for costs. The party against whom the application is brought has the right to be heard and to put forward whatever evidence and argument they wish. In considering whether an order should be made the court needs to make a determination which is proportionate to the legitimate interest of all of the litigants."

35. The next step in Clarke J.'s analysis was to recall the role of costs in our legal system, and the importance of that role. The first role identified was to ensure that a successful party should not be at a loss in having to bring or defend proceedings. The second was to deter unmeritorious, unscrupulous or unfair claims or tactics. Both tended to ensure that the parties to litigation are treated justly and that the court's process is not abused. As to the costs of interlocutory applications, Clarke J. said, at para. 4.13:-

"Furthermore the courts have become more prepared, in recent times, not least because of changes in the Rules of Court, to look at individual elements in the conduct of proceedings to ascertain whether parties have acted in such a way as has, irrespective of the ultimate outcome of the case, led to additional and unnecessary costs being incurred. Apart from the undoubted justice of that approach same has the added advantage of discouraging parties from bringing unnecessary and unmeritorious applications, resisting appropriate applications or

adding unnecessarily and inappropriately to the complexity (and the cost) of proceedings by adding a multiplicity of claims or a multiplicity of defences."

36. Returning at para. 4.14 to the importance and role of orders for costs generally, Clarke J. continued:-

> *"That analysis is designed to show that the power of the court to award costs is a very important aspect of the armoury of the courts designed to ensure that parties are treated justly and that the court process is not abused. Indeed, in that context, it is worthy of some note that the court's normal response to a procedural failure is to see, first, whether it is possible to remedy that procedural failure by an appropriate award of costs. If it were not possible to order costs as a means of dealing with a procedural failure then the court might, in balancing any rights involved, be constrained to take some more significant action which might affect the result of the case as a whole. That would be a highly undesirable development but one which would come into much greater focus in the event that the court was unable to deal with procedural failure on the basis of remedying the wrong arising from that failure (where possible and adequate as a remedy) by an award of costs."*

37. The correct starting point, then, is that an order directing a plaintiff to provide security for costs is not to be seen as an interference with his constitutional right of access to the courts but as part of the process of the court for the fair and just disposal of litigation in which a balance must be struck between the rights of the parties in a fair, balanced, and proportionate way. Part of the process is that in certain circumstances a corporate plaintiff may be ordered to provide security for the defendant's costs. Where the security sought is security for the costs of the action, as opposed to an appeal, the balancing exercise will be undertaken at an early stage of the proceedings by the exercise of a discretion by reference to well settled principles. The court must assess first whether the defendant has established that there is reason to believe that the plaintiff will be unable to pay the costs, and that it has a *prima facie* defence. If the moving defendant has made out such a case, the order will usually be made unless the plaintiff has established that there are special circumstances why the order should not be made. Significantly, the balance is struck on the evidence and arguments put before the court by the parties and the decision is made once and for all.

38. It seems to me that the superficial attractiveness of the argument that the justice of whether a corporate plaintiff ought to provide security for costs depends on whether the action is won or lost wanes when the issue is seen as part of the checks and balances calculated to ensure fair process as opposed to a fetter on the plaintiff's right of access to the courts. The Rules of the Superior Courts provide that the first step to be taken by a defendant who claims to be entitled to security for costs is that a request should be made. If the requested party does not agree to provide the requested security within the very short time provided, an application may be made to court. Plaintiffs will often be heard to say that the defendant's object in seeking security is to stifle the claim. In truth, I think, many defendants may hope that the effect of an order will be that the claim

will go away if only – as the evidence is in this case – that the cost of successfully defending the action will inevitably outstrip any assessment of the costs that would ultimately be allowed on a party and party adjudication: but the object of the exercise is to adjust the parties' respective positions with a view to a fair contest.

39. In my view the key to understanding the decision in *ACC Bank plc. v. Hanrahan*, as well indeed as the decisions in *Allied Irish Banks v. Diamond* and *Tekenable Limited v. Morrissey & ors,* is to identify that those were cases in which the outcome of the interlocutory application was seen to "*turn on aspects of the merits of the case which are based on the facts"*. It was not so much that the plaintiff who secures an interlocutory injunction, or a defendant who obtains leave to defend, might not ultimately win the case but that the decision was based on balancing as best could be done the rights of the parties until the true facts could be finally determined at a trial. Variously, in Hanrahan Clarke J. contemplates that the trial court may have to *"revisit the merits or otherwise of the precise issue that was raised by the motion" or that "to a material extent, some of the issues which are before the court at an interlocutory stage arise or are likely to arise again at the trial in at least some form".*

40. Almost but not absolutely invariably the premise of an application for an interlocutory injunction will be that the plaintiff is entitled to a permanent injunction in the same form. Invariably in the case of an action for a debt or liquidated demand the issue will be whether the defence offered can be made out. In either case, the substance of the dispute will have to be sent for trial for a final determination. I pause to observe that apart from the merits of the case which may be based on the facts, the determination of the substantive dispute may depend on the resolution of a contested issue of law of such substance that it cannot be decided summarily. In each case, however, the trial judge will be revisiting precisely or substantially the same issue and will be in a better position than the motion judge to determine the true facts or the question of law on which the substantive dispute turns.

41. While I accept that in principle the considerations identified in *Allied Irish Banks v. Diamond, Tekenable Limited v. Morrissey & ors* and *ACC Bank plc. v. Hanrahan* may arise on applications for security for costs, it seems to me that they may not arise as frequently as on applications for interlocutory injunctions or motions for summary judgment.

42. The first issue on an application for security for costs is whether the defendant has established that there is reason to believe that the plaintiff, if unsuccessful, will be unable to pay the costs. That issue will be decided once and for all by the motion judge. The second issue is whether the defendant has put forward a prima facie defence. That issue, too, will be decided once and for all by the motion judge. The defence put forward on the motion may ultimately be rejected but it does not in my view necessarily follow that there was no prima facie defence, still less – which would be the case if the costs had been made costs in the cause – that it will always be just that the defendant who has failed in his defence of the action should have to pay the costs of the motion on which he succeeded. It may very well be that in a particular case, or indeed in many cases, the

prima facie defence relied on by the applicant for security for costs will itself turn on disputed facts. In such a case it may very well be said that the interlocutory order was based on assertions of fact that remain to be determined so that it would not be just to make an award of costs but in principle, in my view, the core issue in making or postponing the decision in relation to costs is not whether the defence put up will ultimately be made out but the basis on which it may succeed or fail.

43. If the defendant applicant for security for costs has discharged the onus that is upon it in respect of the two questions in relation to which it bears the burden, the onus will shift to the plaintiff to establish special circumstances. The issue as to whether special circumstances have been established will be decided by the motion judge once and for all. That decision may or may not turn on issues that may have to be revisited by the trial judge. In a case, for example, where the plaintiff makes, but fails to make out, the case that security ought not to be ordered by reason of delay on the part of the defendant in seeking security, or that the case raises a point of law of exceptional public importance, it is difficult to see why the motion judge should not make an award of costs. Different considerations may apply where the special circumstance relied on is that the plaintiff's impecuniosity is attributable to the wrongful acts of the defendant but not, I think, by reference to the nature of the special circumstance relied upon, but by reason of underlying contested issues of fact the truth of which will not be determined until after the trial. A plaintiff seeking to establish on a *prime facie* basis the existence of special circumstances must bring forth some cogent and credible evidence. If he does, and that evidence is contested, the motion judge may very well be in a position that he cannot justly adjudicate on the question of the costs of the application. But if the plaintiff fails to adduce cogent and credible evidence which corroborates an assertion, for example that the impecuniosity is referable to the alleged wrongful acts complained of, it may not be just that the defendant who has succeeded in his application for security for costs should not have the costs of the interlocutory application, still less be exposed to paying his opponent's costs of unsuccessfully defending the motion just because he might lose the action. It seems to me that if the motion for security turns upon whether the defendant has brought forth cogent and credible evidence, it will be the motion judge, rather than the trial judge, who will be better placed to deal with the costs.

44. Over the last 30 years or so the complexity and expense of litigation has increased enormously. This application was unquestionably complex, and the costs of the motion have mushroomed since the legal costs accountants were first asked for their estimates.

45. The initial estimate of the defendant's party and party costs of the motion for security for costs was €35,400. That estimate was later revised to €205,664.55, which is more than half of the defendant's initial total estimate of €394,700 for the costs of the motion – estimated to be dealt with in a day - and action, estimated to take six days at trial. The costs incurred and paid by the defendant for the motion, only, are now said to be €319,450. The plaintiff's estimate of what the defendant's costs should be is lower – and perhaps the plaintiff's costs were lower –but all the appearances are that this application has burned up something in the order of €500,000 and four days of court time which –

leaving to one side for the moment the rights and wrongs of the situation – would have been avoided if the plaintiff had agreed to the request.

46. Mr. Howard argues that to routinely make the costs of a motion for security for costs costs in the cause would be to encourage every plaintiff to fight every application tooth and nail, on the basis that if he wins the action he will recover the costs of the motion. I do not understand Mr. McGrath to argue for any general principle or practice that the costs of a motion for security for costs should be made costs in the cause but only that they should be in this case. The overarching issue is whether it would be just, in the event that the plaintiff ultimately succeeds in the action – as Mr. McGrath says it inevitably must – that the defendant should have to pay the costs of the motion for security, on which it has succeeded.

47. More than once in the course of argument reference was made to the *dictum* of FitzGibbon J. in *Perry v. Stratham* [1928] I.R. 580 that the amount of security for costs is not intended to be an indemnity against all costs or an encouragement to luxurious litigation. It seems to me that the undesirability of luxurious litigation is something that must be borne in mind in deciding where the costs of failed or unsuccessfully resisted applications should lie. I am unconvinced that there is necessarily anything wrong with litigants fighting litigation tooth and nail, but it would, I think, be wrong to allow them to do so without regard to the outcome, or to visit the consequences of their having done so on their opponent. However confident a litigant may be that he will ultimately prevail, he must take care that he does not add unnecessarily to the complexity, duration and cost of the proceedings. With the right of access to the courts comes the obligation to observe and abide by the process, so that the rights of the opposing party are respected.

48. The plaintiff has a right of access to the courts which must be exercised in accordance with the rules of process. One of the rules of process is that a corporate plaintiff, where there is reason to believe that it may be unable to pay the costs, must, if requested, and unless it can establish the existence of special circumstances why it should not, put up security for costs.

49. The obligation of a party to conduct litigation in such a way as avoids additional and unnecessary costs means that he must carefully assess the validity of any request made by his opponent, specifically whether, by the rules of process, he is required to do what he has been asked to do.

50. In the case of a request for security for costs, the bar for the defendant to establish that there is reason to believe that the plaintiff will be unable to pay the costs, and that it has a *prima facie* defence, is a low one and to refuse the request and defend a consequent motion may add significantly to the costs of the motion. The onus of proof, of course, is on the defendant but realistically, as in this case, the plaintiff may be unable to resist the motion otherwise than by making the case that it will be able to pay the costs, or that the defendant has no arguable defence. The request for security may be refused – as it initially was in this case – and a motion defended by reference to special circumstances, such as – as in this case - that any risk of an inability to pay the costs is attributable to

the wrongful actions which are the substance of the action. In such a case the plaintiff assumes the onus of establishing such a special circumstance and the outcome of the motion will depend, to a greater or lesser degree, on whether that onus has been discharged. It seems to me that the proper, efficient and cost effective conduct of litigation requires that each party in turn must dispassionately assess the prospect that the other will succeed in meeting the threshold requirements established by the rules of process.

51. In *ACC Bank plc v. Hanrahan* Clarke J. contemplated that on a motion for summary judgment – which is an integral part of the procedure for the recovery of a debt or liquidated demand – it might be necessary to consider whether a plaintiff has acted "*unreasonably*". In *Farrell v. Bank of Ireland* Clarke J., in contemplating the approach to be taken to costs more generally referred to the litigation which has so been conducted as to lead to additional and unnecessary costs being incurred and spoke of "*unnecessary and unmeritorious*" applications or answers. I discern a difference in the view that may be taken of issues which go to the heart of the substantive dispute and procedural issues. I do not understand *ACC Bank plc v. Hanrahan* to subordinate the outcome of an interlocutory application as an event to the reasonableness of the application or the opposition to the application. If on the evidence and arguments put forward by the parties it is possible for the court to justly adjudicate on the costs, it should do so by reference to the outcome and not the reasonableness of the arguments which, in the event, have failed.

The principles applied

52. By letter dated 17th October, 2017, the defendant made a demand for security for costs in accordance with O. 29, r. 1 of the Rules of the Superior Courts. The request was fended off in correspondence for upwards of three months before eventually, by letter dated 7th February, 2018, it was declined on the ground that any inability on the part of the plaintiff to provide security (*sic*.) was principally due to the wrongful actions of the defendant in wrongfully terminating the services agreement.

53. On 16th October, 2019, following an exchange of nineteen affidavits and comprehensive written submissions, and a three day hearing, the defendant established its entitlement in principle to the security it had requested; and on 6th March, 2020, following the exchange of further extensive written submissions and a further half day of legal argument, the defendant established its entitlement to security in more or less the full amount of its estimate, and by cash or bond.

54. Mr. Howard submits that there was one motion for one relief, upon which he has succeeded, and that the costs should follow the event. Before I heard counsel on the question of costs, I anticipated an argument on behalf of the plaintiff by reference to *Veolia Water UK plc v. Fingal County Council (No. 2*) [2007] 2 I.R. 81, [2006] IEHC 240 that the defendant's costs should be limited rather than the argument which was made. I am persuaded that the question is more complex.

55. The essence of Mr. McGrath's submission is that if the costs are made costs in the cause and the defendant wins the action, it will recover the costs of the motion. On the other hand, it is said, if the plaintiff wins the action the order for security for costs ought never to have been made. I am not persuaded that the question is so simple.

56. I should note at this stage that while the plaintiff's primary submission is that the costs of the motion in their entirety should be made costs in the cause, there is a further or alternative argument that the motion was complicated and the hearing prolonged and made more expensive by two issues on which the defendant lost, namely, that at the first hearing the defendant had not made out a *prima facie* defence that the contract had been frustrated, and at the second sought to re-open the quantum of the estimated costs. It seems to me that these are by no means necessarily alternative arguments and in fairness to Mr. McGrath I understand his position to be that if the court were persuaded by his principal argument he would not press the other. In practice it can happen that motions and actions can be made more complex and protracted and expensive by the introduction by one side or the other – sometimes by both – of issues on which they are found to fail. When the focus is fixed on the reason why it may not be possible to justly deal with the costs of an interlocutory application rather than the nature of the application, it seems to me that there is no reason in principle why the court – if asked to - should not first examine whether the costs are greater than they ought to have been before deciding whether it can make a just award in relation to the costs reasonably and necessarily incurred.

57. The substantive dispute between the parties, as I have observed in my previous judgments, is complicated and the motion has been fought on every issue.

58. The answer to the request for security for costs, is will be recalled, was that any inability to provide security (*recte* to pay the costs?) was attributable to the wrongful actions of the defendant. The answer to the motion was by no means so confined.

59. The first issue on the motion was whether there was reason to believe that the plaintiff would be unable to pay the costs if the action were to fail. This was vigorously contested by the plaintiff who asserted that it would be able, or at the very least was likely to be able, to pay the costs. For the reasons given in my first judgment, I came to the conclusion that that argument fell apart. The issue as to whether the defendant had made out a *prima facie* case that there was reason to believe that the plaintiff would be unable to pay the costs is not one which will be revisited at trial.

60. The second issue on the motion was whether the defendant had established a *prima facie* defence. Intriguingly, it will be recalled, it was said on the one hand that the contract alleged to have been broken had been discharged by frustration and on the other that the defendant had continued to provide the services which it would otherwise have been required to provide. For the reasons given, I came to the conclusion that the first line of defence had not been made out but the second had.

61. My conclusion that the defendant had failed to establish, even on a *prima facie* basis, a defence of frustration was based on the established and accepted principles of law applied to the facts asserted and accepted by the defendant. Mr. McGrath now argues that the frustration issue has been finally disposed of and will not be revisited at trial. That, as a matter of practicality, may be so but it is not necessarily so. In principle, a finding on an interlocutory motion that a party has not adduced or pointed to the reasonable prospect of credible evidence in support of a position or proposition will be no bar to his maintaining that position in the substantive action. The principle is neatly illustrated by the recent decision of McDonald J. in *Paddy Burke (Builders) Limited v. Tullyvaraga Management Company* [2020] IEHC 199, (Unreported, High Court, McDonald J., 4th April, 2020) where McDonald J. set aside an interlocutory injunction which had been granted by the Circuit Court on the ground that the plaintiff had failed to make out either a strong case or even a serious issue sufficient to sustain an application for an interlocutory injunction, but nevertheless recognised that the plaintiff might, at trial, be able to adduce evidence to prove the pleaded case. The issue for the trial judge will be whether the evidence adduced at trial supports the assertion. The trial judge will not reassess the evidence adduced on the motion, or the decision of the motion judge as to whether it was or was not sufficient to sustain the motion.

62. My conclusion that the defendant had established on a *prima facie* basis that it had provided the services it was, or would otherwise have been, required to provide was based on an analysis of the evidence offered by the defendant and the plaintiff respectively and the assertions as to what had or had not been done. The defendant's case was that it had continued to provide services after the date of termination of the agreement. The evidence of the plaintiff's managing director, and the instruction to the forensic accountant engaged on behalf of the plaintiff, was that the services had entirely, or more or less entirely, ceased but in the end, it was accepted that this was wrong. As explained in my earlier judgment, the focus of the statement of claim is on the termination of the services agreement by the defendant on 4th December, 2015 rather than what the defendant did or failed to do thereafter. For the reasons given, I concluded that the plaintiff had not adduced evidence or pointed to the availability of evidence that there was a causal connection between the alleged wrongdoing and a practical consequence or consequences for the plaintiff. Subject, perhaps, to amendment of the statement of claim and the furnishing of particulars, the plaintiff, of course, is perfectly entitled to make its case at trial that it suffered loss by reason of the defendant's alleged breach of contract, but it is clear that the case which will be made at trial will not be the same as that made on the motion.

63. The third issue on the motion was whether the risk that the plaintiff might be unable to pay the costs was attributable to the defendant's alleged breach of contract. For the reasons given, my conclusion was that the plaintiff had failed to establish on a *prima facie* basis that there was any causal connection between the defendant's alleged breach of contract and any practical consequence for the plaintiff, or any specific level of loss recoverable as a matter of law. I found that the plaintiff's evidence on the motion was inconsistent, and in the course of argument it was eventually acknowledged that the

evidence, and the instructions to the plaintiff's forensic accountant – on which the various projections were based – were wrong.

64. It is now said that if the action succeeds and the plaintiff recovers a substantial award of damages that will go to show that the cause of the plaintiff's impecuniosity was the defendant's breach of contract. I accept that that is so, but it seems to me that the argument fails to recognise or to engage with the fact that the motion for security for costs is part of the process directed at ensuring a fair trial rather than resolving the substantive dispute.

65. In the event, the defendant was found to be entitled to the order for security for costs which it sought and absent special circumstances, the costs should follow that event.

Whether the costs should be adjusted

66. I come then to the argument offered in the alternative that the costs of the motion were significantly increased because the overall successful defendant raised issues on which it lost.

67. The principles are well established and were not in dispute. The *locus classicus* is *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81, [2006] IEHC 240. Mr. Howard appeals to the rule that applies, in the ordinary way, that a litigant who secures a contested procedural entitlement should be regarded as having succeeded, even if not successful on every point. Mr. McGrath argues that the duration and cost of the motion was significantly increased by the defendant's insistence that it had a *prima facie* defence that the contract had been frustrated, which was not made out.

68. I accept the submission on behalf of the defendant that the evidence was directed as much to the issue as to whether the defendant had continued to provide the services as to the issue as to whether the contract had been frustrated. The proof of this, I think, is that the legal argument that the contract was frustrated foundered on the defendant's evidence as to the level of service provided after it declared the contract to have been impossible to perform. That said, I am satisfied that the issue did significantly add to the duration of the hearing as well as the necessary preparation and written submissions. The motion was altogether four days at hearing, of which three were devoted to the substantive issue. The frustration issue unquestionably added to the length of the hearing, but not as much as a whole day. Even if this issue had not been argued, I do not believe that the hearing could have concluded in two days.

69. In making allowance for the costs of the issue pursued but lost, I must not only disallow those costs to the overall successful defendant but provide, by way of set-off, for the costs of the overall unsuccessful plaintiff. Taking into account that the issue added to the cost of preparation as well as presentation, I consider that this is most justly to be done by identifying a proportion of the overall costs, rather than a fraction of the time spent at hearing. I think that the frustration issue probably accounted for about 20% of the overall costs of the initial three day hearing. A reduction of the defendant's costs by that much, and an equivalent allowance to the plaintiff, leaves the defendant with 60% of

the costs of the first hearing. Subject to one adjustment, the defendant succeeded on the issue argued at the adjourned hearing and should have the costs of that. Accordingly I find that the defendant is entitled to 70% of the costs of the motion.

70. The adjustment which is required in relation to the adjourned hearing is for the costs incurred in relation to the revised costs estimates. Before I embarked on the initial hearing I was asked by the parties to deal with the question as to whether, in principle, the plaintiff should be ordered to give security for costs and to stand over the issue as to whether any security to which the defendant might be found to be entitled should be for the full amount of the estimate or only a fraction or percentage. In the last paragraph of my judgement on 16th October, 2019 I said – perhaps infelicitously – that the "*amount*" of the security would be left over.

71. When the motion came back into the list for argument in relation to the issue which had been left over, it transpired that further affidavits had been filed which sought to reopen the amount of the estimates. The defendant sought to make the case that the previous estimate of its party and party costs of the security for costs application of €35,400 should be revised to €205,664.55, and the initial overall estimate of €394,700 to €688,214.55. This put the plaintiff's solicitors in something of a bind. On the one hand they were adamant that the defendant was not allowed to re-open the costs estimates but on the other a timetable had been agreed and a date fixed for the hearing of the outstanding issue. Against the possibility that they might have been mistaken, and in order to ensure that the hearing could be resumed on the date which had been fixed, the plaintiff's solicitors commissioned a revised costs estimate on the same basis as the defendant had. When the hearing resumed I ruled that the defendant was not entitled to revisit the costs estimates on which the judgment of 16th October, 2019 was based, and I heard, and on 6th March, 2020 gave judgment on, the percentage or fraction issue.

72. The costs incurred by the defendant in connection with its attempt to re-open the costs estimates are, in the language of Clarke J. in *Veolia*, a discrete item of expenditure incurred solely in relation to an issue upon which it has failed and must be disallowed. While the plaintiff's solicitors were clear as to remaining issue and the purpose of the resumed hearing, I think that it was reasonable that they should have prepared to meet any case that the defendant might have been permitted to make. The plaintiff's costs in relation to the revised costs estimate are also a discrete item of expenditure in relation to an issue on which the defendant has failed and should be allowed.

Summary and conclusions

73. The rule that a corporate plaintiff may in certain circumstances be ordered to provide security for the defendant's costs is not to be seen as an interference with the plaintiff's right of access to the courts but as part of the process of the court for the fair and just disposal of the litigation in which a balance must be struck in a fair, balanced, and proportionate way between the rights of the parties.

74. Where security is sought for the costs of the action, the balancing exercise will be conducted at an early stage of the proceedings by the exercise of a discretion by reference to well established principles.

75. That balance will be struck by reference to the evidence and arguments put before the court on the motion and the decision as to whether the plaintiff is obliged to provide security will be made once and for all.

76. Whether, immediately following the determination of a motion for security for costs, it will be possible for the court to justly adjudicate upon liability for costs, will depend upon the issue or issues on which the decision turned. It may be that the outcome may turn on aspects of the case that are based on contested issues of fact which will be revisited and finally decided at the trial: in which event the trial judge may be in a better position to decide where the costs of the application should justly lie.

77. The issue, following a trial, as to whether the plaintiff has made out its case on the balance of probability, is not necessarily the same as the issue as to whether the defendant, on a motion for security for costs, has established that it has a *prima facie* defence.

78. The fact that a plaintiff may, following the trial, secure a substantial award of damages does not necessarily go to the issue on an application for security for costs whether the plaintiff has made out a *prima facie* case that any impecuniosity on its part is attributable to the wrongful acts complained of.

79. *ACC Bank plc v. Hanrahan* [2014] 1 I.R. 1 does not establish any general principle that liability for the costs of interlocutory applications depends on the reasonableness of the conduct of the parties, as opposed to the outcome of the application. It is no answer to a claim for costs for the unsuccessful party to say that the application or opposition, although it has failed, was nevertheless reasonable.

80. In the instant case, the first issue on the motion was whether the defendant had established that there was reason to believe that the plaintiff, if unsuccessful, would be unable to pay the costs. That issue was determined against the plaintiff by reference to the evidence and arguments put forward on the motion and will not be revisited.

81. The second issue on the motion was whether the defendant had established that it had a *prima facie* defence. On the evidence adduced and arguments made, I concluded that the defendant had not made out a *prima facie* defence on the ground of frustration but had done so on the basis that the services it was or would have been required to provide had been provided. The fact that the defendant failed on the motion to make out a *prima facie* defence of frustration does not, in principle, preclude it from attempting to do so at trial. The issue as to whether the defendant has made out a *prima facie* defence is not to be conflated with the issue as to whether that *prima facie* defence will ultimately be made out.

82. The third issue on the motion was whether the plaintiff had established on a *prima facie* basis that the apprehended inability to pay the costs was attributable to the defendant's breach of contract. On the evidence, I found that it had not. An initial conflict of evidence as to whether, after the services agreement was terminated, the defendant had altogether ceased to provide services evaporated when it was shown, and eventually accepted, that the defendant had, after all continued to provide services. The plaintiff, at trial, will not be confined to the case which it failed to establish on the motion but the issue at trial will be whether there was a shortfall, rather than a total withdrawal, of services. In this case, a substantial award of damages will not vindicate the plaintiff in the position it took on the motion for security for costs.

83. This is not a case in which the issues raised on the motion will be revisited at trial, or a case in which the trial judge will be in a better position to adjudicate on the liability for the costs of the interlocutory application. I am satisfied that this is a case in which I can justly adjudicate upon the liability for the costs of the motion.

84. Absent special circumstances, the defendant having been put to establish its entitlement to security for costs and having done so, the costs should follow that event.

85. However, for the reasons given, the costs on both sides were greater than they needed to be by reason of the introduction by the overall successful defendant of issues on which it did not succeed.

86. The appropriate order is that the defendant should have 70% of the costs of the motion, specifically excluding the costs incurred by it in connection with the proposed revision of the estimate of the amount of its costs, and less the costs incurred by the plaintiff in connection with that proposed revision.

87. There will be a stay on execution of the order for the costs of this application pending the final determination of the action.

88. In ordinary times I would have afforded the parties time for consideration of this judgment and listed the matter for mention in case anything might be said to arise or remain. Instead, I will give liberty to the parties to make any further application in writing within fourteen days of the electronic this judgment.