



THE HIGH COURT

2018 No. 9442 P

BETWEEN

NOBIL FOOD LIMITED

PLAINTIFF

AND

CAMPION INSURANCE LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 28 October 2021**

**INTRODUCTION**

1. This judgment is delivered in respect of an application for security for costs. The application is made pursuant to the provisions of section 52 of the Companies Act 2014.
2. It is common case that (i) the defendant has a *prima facie* defence to the proceedings, and (ii) the plaintiff would be unable to pay the legal costs of the defendant if the proceedings are successfully defended. The disagreement between the parties centres, instead, on the question of whether there are any “*special circumstances*” such as to persuade the court to exercise its discretion against directing the provision of security for costs. Two matters are relied upon as special circumstances as follows. First, it is said that the defendant has delayed in seeking security for costs. Secondly, it is said that the

plaintiff's admitted inability to meet an order for costs has been caused by the defendant's wrongdoing.

### **PROCEDURAL HISTORY**

3. The plaintiff is a limited liability company and had operated a restaurant for a number of years. The defendant is also a limited liability company and carries on business as an insurance policy broker. The gravamen of the claim made in the proceedings is that the defendant acted negligently and in breach of contract in the putting in place of a contract of insurance with a third party, Allianz plc, in respect of the plaintiff's premises. It is alleged, in particular, that the defendant failed to ensure that the claims history of the plaintiff had been disclosed as part of the renewal of the policy of insurance.
4. It is pleaded that a fire occurred in June 2016 at the premises which the plaintiff leased for use as a restaurant. The insurer, Allianz plc, avoided the policy for insurance for non-disclosure of previous claims. The plaintiff was thus unable to recover under the policy.
5. The particulars of loss and damage pleaded in the statement of claim are as follows:

Loss of machinery, fixtures and fittings	€310,000
Loss of stock (to include wine)	€15,000
Loss of profits (per annum and ongoing)	€70,000
Salaries and expenses	To be ascertained
6. The defendant has delivered a full defence to the proceedings. It is pleaded, in particular, that one of the directors of the plaintiff company, Mr. Nabil Cherif, had completed the insurance proposal form on behalf of the company. Mr. Cherif had declared that the statements and particulars contained therein were, to the best of his belief and knowledge, true, and further declared that no material facts concerning the insurance had been

withheld. It is pleaded that this declaration was false, and was known to Mr. Cherif to be false.

7. Given that the plaintiff relies on delay on the part of the defendant as a special circumstance to resist the application for security for costs, it is necessary to consider the chronology of the proceedings in a little detail. The dates of the key events are as follows.

8 <sup>th</sup> June 2016	Fire at restaurant premises
7 <sup>th</sup> November 2016	Policy of insurance avoided
30 <sup>th</sup> October 2018	Plenary summons issued
6 <sup>th</sup> November 2018	Statement of claim delivered
20 <sup>th</sup> December 2018	Defendant's notice for particulars
17 <sup>th</sup> April 2019	Plaintiff's reply to notice for particulars
15 <sup>th</sup> January 2020	Motion for judgment in default of defence issued
9 <sup>th</sup> June 2020	Defence delivered
22 <sup>nd</sup> June 2020	Letter from defendant seeking security for costs
14 <sup>th</sup> September 2020	Motion for security for costs issued
14 <sup>th</sup> October 2021	Hearing date for motion

8. As appears, the plaintiff had issued a motion for judgment in default of defence in January 2020. In response to that motion, the defendant's solicitors had written on 20 February 2020 noting that the plaintiff company had been struck off the register of companies on 9 March 2019 and dissolved on 14 March 2019. The letter went on to state that the plaintiff company no longer had the requisite legal personality to maintain the proceedings and that the proceedings should now be struck out.
9. In response to that letter, the plaintiff's solicitors wrote on 21 February 2020 stating that their client was in the process of applying, pursuant to section 737 of the Companies Act 2014, to restore the plaintiff company to the register. In reply, the defendant's solicitors

wrote on 25 February 2020 asking that they be kept informed of the progress of the application for restoration. By letter dated 13 May 2020, the plaintiff's solicitors wrote to the defendant's solicitors and confirmed that the company had been restored to the register. The motion for judgment in default was struck out, with the costs of the motion reserved to the trial judge.

## SECURITY FOR COSTS

10. Section 52 of the Companies Act 2014 provides as follows:

“Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given.”

11. The legal principles governing an application for security for costs are well established, and require the court to undertake a stepwise approach, whereby various criteria are considered in sequence. The criteria, as stated by the Supreme Court in *Usk District Residents Association Ltd v. Environmental Protection Agency* [2006] IESC 1; [2006] 1 I.L.R.M. 363 (at paragraph 6.2), are as follows:

“The overall approach to security for costs was helpfully summarised by Morris P. in *Interfinance Group Limited v. KPMG Pete Marwick* (High Court, Unreported, Morris J. 29th June, 1998) as follows:-

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

sought. In this regard the onus vests upon the party resisting the order.

The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.

The list of special circumstances referred to is not, of course, exhaustive.”

12. In the present case, the plaintiff has conceded that the first two criteria have been met, i.e. the defendant has a *prima facie* defence to the plaintiff's claim, and the plaintiff will not be able to pay the defendant's legal costs. Instead, the plaintiff seeks to resist the application for security for costs by reference to the following two “*special circumstances*”. First, it is said that the defendant has delayed in seeking security for costs. Secondly, it is said that the plaintiff's admitted inability to meet an order for costs has been caused by the defendant's wrongdoing.

## **QUANTUM OF LEGAL COSTS**

13. The legal costs of the defendant have been estimated at €194,909.50. This figure is inclusive of VAT in circumstances where the defendant is not registered for VAT nor in a position to recover the VAT element of the legal costs other than from the plaintiff company. The plaintiff has not sought to question this figure, and has not filed a report from its own legal costs accountants.

### **(1). ALLEGED DELAY IN SEEKING SECURITY**

14. It is well established that delay in making an application for security for costs may be a discretionary ground for refusing such relief (*Hidden Ireland Heritage Holidays Ltd v. Indigo Services Ltd* [2005] 2 I.R. 115).

15. The approach to assessing delay has been set out in detail in the judgment of the High Court (Clarke J.) in *Moorview Developments Ltd v. Cunningham* [2010] IEHC 30. The judgment identifies the following as factors to be taken into account: (i) the extent of the delay; (ii) any explanation or reason for the delay; (iii) any prejudice (and the degree thereof) which may have been incurred, for example, by additional costs having been incurred by the relevant plaintiff; and (iv) any other factors that may arise.
16. The judgment addresses the timing of an application for security for costs relative to the state of the pleadings as follows (at paragraphs 3.3 and 3.4):

“[...] It does seem to me that it is reasonable for a defendant to wait until the pleadings in the relevant proceedings are or should be closed before seeking security for costs. In the ordinary way, security will be ordered, based on an assessment of the likely costs which the relevant defendant would incur in defending the proceedings. It would be very difficult to assess those costs until such time as some degree of understanding of the issues, whether of fact or law, which are likely to arise at the trial, has been arrived at.

However, it should be said, in that context, that where the pleadings close some considerable time after the statement of claim has been filed due to tardiness on the part of the defendant concerned, it can hardly be that too much reliance can be placed on the period between the filing of the statement of claim and the defence. In the ordinary way, a defendant should be reasonably clear as to the issues which are likely to arise in the proceedings when it has had the opportunity to consider the plaintiff’s statement of claim together with any reasonable particulars sought and answered. If the defence is filed in a timely fashion, then it seems that the time for seeking security should be in or around the same time as the defence is filed. If the defence is filed late, then it may well be open to the plaintiff concerned to point to any prejudice in the form of additional expenditure incurred after the time when it might have been expected that the defence would have been filed and, thus, the defendant be broadly aware of the parameters of the case that was likely to go to trial.”

17. As appears, it is suggested that if the defence has been filed in a timely fashion, then security for costs should be sought in around the same time as the defence is filed. It is important to observe, however, that it does not follow automatically from the fact that a defendant has delayed in seeking security for costs that a belated application for same

must be refused. It is still necessary for the plaintiff to point to prejudice arising from the delay.

18. It follows, therefore, that the court must consider, first, whether there has been culpable delay on the part of a defendant in seeking security for costs; and, secondly, in the event of such delay, it is then necessary to consider whether, during the period of culpable delay, the plaintiff altered its position to its detriment.
19. The plaintiff in the present case submits that the defendant, upon receipt of the replies to its request for particulars, would have had a sufficient understanding of the factual and legal issues in the proceedings to make an informed decision as to whether to seek security for costs. An intention to seek security for costs should, therefore, have been notified shortly after April 2019. In the event, it was not until June 2020 that a request for security for costs was first made.
20. In response, the defendant draws attention to the fact that the plaintiff company had been struck off the register of companies in March 2019. The plaintiff company was ultimately restored to the register in May 2020. The defendant submits that during this period the company stood dissolved and the proceedings could not be pursued in its name.
21. The parties are in disagreement as to the implications for the proceedings of the company having been struck off and dissolved. Counsel on behalf of the plaintiff company submits that the appropriate response on behalf of the defendant would have been to put the (dissolved) company's solicitors on notice that, in the event the company was restored, the defendant intended to pursue an application for security for costs. Counsel submits that the defendant should have assumed that it would be "*likely*" that the company would be restored, and that the question of security for costs should have been expressly raised

by the defendant in or about June 2019, notwithstanding that, as of that time, the company did not exist and the proceedings were accordingly not properly constituted.

22. Counsel on behalf of the defendant submits that this posited approach is incorrect. It is said that the inevitable consequence of the company having been dissolved is that it could not maintain the proceedings (unless restored) and thus the question of security for costs simply did not arise until such time, if any, as the plaintiff company was actually restored.
23. Counsel helpfully referred me to the relevant extracts from Courtney, *The Law of Companies* (4th ed., 2016, Bloomsbury Professional) which address the legal consequences of a company being dissolved. Counsel relied, in particular, on §27.044 as follows:

“Where a company has been struck off the register and dissolved, it ceases to exist in law: its corporate personality is no more and as an artificial legal person, a dissolved company is, as far as the law is concerned, ‘dead’. [...]”

***Findings of the court on delay***

24. The striking off and dissolution of the plaintiff company was a very significant event. During the relevant period, the proceedings could not properly be maintained, and the dissolved company could not have given instructions to deliver a reply to particulars (17 April 2019) nor to issue a motion for judgment in default of defence (15 January 2020). No explanation has been provided on affidavit as to how it is that the directors of the company did not inform the company’s solicitors of the strike off.
25. It was entirely proper for the defendant to adopt the position that a dissolved company could not maintain the proceedings. It was only when the company was restored to the register, in or about May 2020, that the proceedings could be further pursued. The defendant was not obliged to assume that the restoration of the company was a foregone conclusion. It might be, for example, that the members of the company did not pursue the application or that the application would be unsuccessful. It was only when the



company was restored that the proceedings were properly in being once again and the issue of security then arose.

26. The defendant's solicitors had put the plaintiff on notice, by letter dated 22 June 2020, of an intention to apply for security. It is entirely proper that a letter should be written in advance of the issuing of a motion and a reasonable time allowed for a response.
27. The delay, if any, thus falls to be measured between the date that the defendant was notified of the restoration of the plaintiff company (May 2020) and the sending of the letter (June 2020). This alleged delay is measured in weeks, and cannot be regarded as culpable or unreasonable.
28. If insofar as any complaint is made that the formal motion seeking security was not issued until September 2020, the lapse of time is explicable by the fact that it was necessary, first, for the defendant to obtain a detailed report from a legal costs accountant setting out the quantum of costs; and, secondly, to obtain a report from an independent accountant analysing the newly filed accounts of the plaintiff company. The period of time taken, namely some three months, was entirely reasonable in all the circumstances.
29. I am satisfied, therefore, that an intention to seek security for costs was notified, and a formal motion issued, within a reasonable period of time.
30. In any event, even if there had been culpable delay on the part of the defendant, the plaintiff has not identified any prejudice or detriment suffered by it during the alleged period of delay. The only two factors relied upon as supposedly detrimental are as follows. First, it is said that the plaintiff company incurred the costs of issuing a motion for judgment in default of defence. With respect, these costs cannot have been properly incurred in circumstances where the dissolved company would not have been in a position to instruct the bringing of such a motion. Such costs would, in any event, be

minimal and would not be comparable to the type of costs, for example, in relation to the discovery of documents, referenced in the earlier case law and regarded as prejudicial.

31. Secondly, it is said that the company incurred the cost of restoration. The reliance on this as a factor is misconceived. The company simply could not have pursued the proceedings without making this application and same cannot be blamed or visited upon the defendant.
32. For the sake of completeness, it should be noted that counsel on behalf of the plaintiff suggested in submission that had the company known that an application for security for costs would be made it might not have incurred the costs of restoration. With respect, no evidential basis was laid for this submission. There is nothing in the affidavit of the principal of the plaintiff company which supports the submission.
33. In summary, therefore, there has been neither culpable delay on the part of the defendant nor a reckonable prejudice to the plaintiff. The alleged delay does not, therefore, represent a special circumstance such as to justify the refusal of security for costs.

**(2). CAUSE OF INABILITY TO DISCHARGE COSTS**

34. It is submitted on behalf of the plaintiff that its inability to pay any order for costs is as a result of the wrong allegedly committed by the defendant. More specifically, it is said that the consequence of the alleged wrongdoing on the part of the defendant is that the plaintiff had been unable to recover under the policy of insurance. Had it been entitled to recover, it is said that it would have received a sum in the order of €325,000 from the insurance company.
35. It is well established that a court retains a discretion to decline to direct the provision of security for costs where the plaintiff concerned can establish, on a *prima facie* basis, that their inability to pay the costs of the defendant is due to the wrongdoing of the defendant.

It would be unjust were a plaintiff 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.

36. The approach to be adopted in assessing whether the inability to pay costs is due to the relevant defendant's wrongdoing has been summarised as follows by the High Court (Clarke J.) in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7 (at paragraph 3.4):

“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.”

37. Clarke J. went on then to state as follows (at paragraph 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. That this is so can be seen from the comment of Murray J. (speaking for the Supreme Court) in *Framus Ltd & Ors v. CRH Plc & Ors* [2004] 2 I.R. 21 at pp. 61 and 62, where it was noted that the plaintiff in that case had shown some evidence of wrongdoing on the part of the defendant but not, even on a *prima facie* basis, that its impecuniosity was due to that wrongdoing. It is

not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a *prima facie* basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently 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. Even if, therefore, a plaintiff can show a *prima facie* case, it is also necessary to show a *prima facie* level of losses attributable to the defendant's wrongdoing so as to enable the court to assess whether, again on a *prima facie* basis, those losses are sufficient to justify attributing the plaintiff's inability to pay costs, in the event of losing, to the asserted wrongdoing. On that basis I am satisfied that the court can have some regard to quantum in an application such as this."

38. The principles in *Connaughton Road Construction Ltd* have recently been reaffirmed by the Supreme Court in *Quinn Insurance Ltd v. Pricewaterhousecoopers (A firm)* [2021] IESC 15; [2021] 1 I.L.R.M. 253. Clarke C.J. made the following general observations (at paragraphs 7.26 and 7.27 of his judgment):

"I now return to make some general observations about the *Connaughton Road* jurisprudence. It is true that *Connaughton Road* itself concerned a claim by a company which only had a single purpose and where it was, therefore, necessary to show that there was some reality (even on a *prima facie* basis) to the contention that the party concerned could have met a costs order were it not for the relevant wrongdoing. Just as I have emphasised that it is important for the court to carefully scrutinise the question of whether the defendant truly has a *bona fide* defence (including, in appropriate cases, just how far that defence might go in meeting the plaintiff's claim), so also is it appropriate for the court to carefully scrutinise the proposition put forward on behalf of a plaintiff to the effect that there is a good *prima facie* basis for suggesting that, but for the alleged wrongdoing, the plaintiff concerned would be in a position to meet an adverse costs order. It seems to me to be again appropriate to comment that it is for the plaintiff to put up whatever evidence it wishes in that regard. It is not for a defendant to 'raise particulars' about the evidence but it is open to a defendant to seek to persuade the court that the evidence is inadequate. Mere assertion is certainly impermissible. Whether some level of even limited expert evidence may be required is a matter which will depend on the circumstances of the individual case.

There are undoubtedly proceedings where it would be impossible for the court to reach any sustainable conclusion on the extent of the position in which the plaintiff might have found itself were it not for the relevant wrongdoing without some expert testimony. While it

may be true to say that the exercise is not a purely mathematical one, I do think there is a danger in failing to recognise that mathematics do form a central role. The reason is obvious. Whether a plaintiff has the money to provide for an adverse costs order is a mathematical exercise. It is one which involves estimates and will rarely be capable of exact calculation, but its fundamentals are essentially based on sums of money. Likewise, the position in which the plaintiff might have been were it not for the wrongdoing is essentially a mathematical exercise. Again, it is one which may well involve estimates and may not be capable of exact calculation. It remains the case, however, that it is still broadly a numerical exercise.”

39. The Chief Justice elaborated on the nature of the exercise to be carried out as follows (at paragraph 7.30):

“The question might be asked as to why it is necessary for a plaintiff seeking to establish the relevant special circumstance to show that its claim is, by itself, sufficient to make the difference between being able to pay costs should it lose and not being in such a position. There is, of course, the problem identified in *Connaughton Road* itself which draws attention to the fact that both sides of the equation, as it were, are based on contradictory assumptions. In order to show, on a *prima facie* basis, that the plaintiff would have been able to pay costs were it not for the alleged wrongdoing, it is necessary to assume that the wrongdoing occurred and that the plaintiff will succeed. However, of course, the plaintiff would only be obliged to pay costs should the claim fail. However, it seems to me that the answer to that conundrum stems from the fact that the court is considering where the least risk of injustice lies against a potential background of a case where it is at least arguable that the impecuniosity of the plaintiff, on which the defendant relies in bringing the application for security, is due to the wrongdoing at the heart of the proceedings. However, for that injustice to be potentially present it does seem clear that the consequences of the wrongdoing must be shown, on a *prima facie* basis, to be sufficient to make the difference. Every plaintiff who has a *prima facie* claim for money will be able to demonstrate that at least some of its impecuniosity is potentially due to the alleged wrongdoing of the defendant. If that were to be sufficient then it would set at nought the regime for security for costs and would give rise to the potential for significant injustice to defendants which I have already sought to analyse. The balance is only tipped where it can be shown that, rather than the alleged wrongdoing only forming part of the shortfall giving rise to the impecuniosity, it is arguable that it forms all of it.”

40. I turn now to apply these principles to the facts of the present case.

41. The application for security for costs is supported by an expert report prepared by an independent chartered accountant. The independent accountant's report concludes, on the basis of a review of the plaintiff company's historic financial performance, that there is no link between the company's current financial position and the fire (and the subsequent avoidance of the policy of insurance). It is stated that the company was insolvent before the fire, and that there has been no marked deterioration in its financial position since. The company is described as having been a consistently loss-making business since its incorporation, and is said to have been balance sheet insolvent at both the 2014 and 2015 financial year ends. The company was subsidised by a large director's loan which steadily increased from 2012 to 2015. In 2012, the director (Mr. Cherif) had loaned €147,619 to the company in order to subsidise the loss making. The abridged financial statements filed for the year ended 31 December 2018 disclose the existence of an outstanding director's loan by Mr. Cherif in the amount of €190,984.
42. The independent accountant's report notes that the abridged financial statements filed for the year ended 31 December 2018 record fixed assets on the balance sheet with a net book value of €139,804. The report indicates that this will not be sufficient to meet any legal costs for two reasons as follows.
- a. In my experience from liquidations over many years, used restaurant fixtures/fittings, and equipment have little or no realisable value relative to their book value. Such assets are installed in the existing premises and require a significant cost to remove. There is a limited market for such second-hand assets.
  - b. Based on the pleadings, the fire destroyed these fixtures, fittings, and equipment. If this is the case, then these assets should have been written off in the 2016 financial statements and debited to the profit and loss in that year. In any event, the auditor has disclaimed his opinion on the financial statements and the net book value attributed to these fixed assets is entirely unreliable."

43. The replying affidavit sworn on behalf of the director of the company (Mr. Cherif) fails to engage in any meaningful way with the independent accountant's report. The director has exhibited a letter from the company's own accountants dated 10 April 2017. The purpose for which this letter had been written is not disclosed. The letter makes reference to a meeting shortly before the fire at which, it is reported, that the managing director of the company had expressed his opinion that turnover was beginning to show a steady increase and that the director was very confident that 2016 was going to be the best trading year to date. A second letter from the company's accountant, dated 13 November 2020, has also been exhibited. This letter makes a number of general observations in relation to the establishment of new businesses. It is stated that the excess of liabilities over assets in the balance sheets was exceeded by the director's loan amount which meant that, with the director continuing to support the company into the future without requesting a repayment of the director's loan, the company could continue as a going concern.
44. These observations have been addressed in a second affidavit sworn by the independent accountant retained by the defendant. It is averred that the company's own accountant's assertions are not supported by the company's historic financial performance in the year prior to 2016 nor by any financial documentary evidence. The company sales had halved between 2012 and 2014 and the company was loss-making. The company had incurred trading losses in every year from incorporation to the date of the fire. It is also stated that the company was a well-established business and had been trading for five years by the time of the fire. The company incurred losses for those five years and continued to do so long after any initial establishment period. The independent accountant expresses his opinion that, irrespective of the fire, the company could never have been in a position to discharge the estimated legal costs.

***Findings of the court on cause of impecuniosity***

45. As observed in *Connaughton Road Construction Ltd*, the assessment of whether a plaintiff's inability to satisfy an order for costs is attributable to the wrongdoing of the defendant requires the court to engage in a "*superficially illogical*" exercise. The court must assume, for the purposes of the defendant recovering costs, that the defendant will win; but also assume, for the purposes of determining whether any inability to pay those costs is attributable to the wrongdoing asserted, that the plaintiff will win.
46. The judgment goes on to hold that, in order to establish a special circumstance based on the cause of its impecuniosity, a plaintiff must show, at least on a *prima facie* basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs.
47. The principal argument advanced on behalf of the plaintiff at the hearing before me had been to the effect that if the company succeeded in these proceedings, it would recover a sum of €325,000. This sum is said to be sufficient to discharge both the director's loan and the defendant's legal costs. It is said to follow that the plaintiff's present inability to satisfy an order for costs must be attributed to the wrongdoing of the defendant.
48. With respect, this submission is not supported by the evidence. There is no evidence before the court which suggests, even on a *prima facie* basis, that the value of the plaintiff's claim (if successful) is likely to be €325,000. The plaintiff has not, for example, taken even the basic step of exhibiting a copy of the policy of insurance setting out the maximum amount recoverable under the policy and the basis on which it would be calculated. Nor has the plaintiff adduced any evidence as to the value of the fixtures and fittings.



49. Moreover, the suggestion that the fixtures and fittings destroyed in the fire are likely to be valued at €325,000 is not borne out by the plaintiff's own abridged financial statements. The financial statement for the year prior to the fire, i.e. the financial year ending 2015, valued the company's fixed assets at €147,852. Presumably, this figure would have included the actual value of the fixtures and fittings since destroyed in the fire. (See note 10 to the reports and financial statements for the year ended 31 December 2014). No attempt has been made to explain the discrepancy between the figure of €325,000 and the figure in the financial statement.
50. Even more surprisingly, the loss of the fixtures and fittings does not appear to have been reflected in the financial statements for the years *subsequent* to the fire. The value of the fixed assets is consistently recorded in these statements as €139,804. As noted earlier, the independent accountant retained by the defendant has queried why the value of the fixtures, fittings, and equipment in respect of which damages are sought has not been written off in the company's accounts. It is also observed that the company's auditor has disclaimed an audit opinion on the financial statements for the years 2015 to 2018.
51. Counsel did not address the priority between the existing director's loan and an order for costs. It is to be noted, however, that it is incorrect to suggest that a payment of €325,000 by way of damages would be sufficient to discharge both. The legal costs of the defendant have been estimated at €194,909.50. The abridged financial statements filed for the year ended 31 December 2018 disclose the existence of an outstanding director's loan by Mr. Cherif in the amount of €190,984. The aggregate of these figures is well in excess of €325,000.
52. The evidence before the court establishes that the plaintiff company had been operating at a loss consistently since it commenced trading in 2012. Indeed, it appears that the financial position in 2015 was, if anything, worse than that in 2014. It also appears that

the plaintiff company was only able to remain in business on the basis of a significant director's loan. The filed financial statements indicate that the company was balance sheet insolvent for each of the two financial years prior to the fire. There has been no marked deterioration in its financial position since which might reasonably be attributable to the inability to recover under the policy of insurance.

53. In summary, therefore, the plaintiff has failed to discharge the onus upon it to demonstrate on a *prima facie* basis that its inability to discharge the costs is caused by the alleged wrongdoing of the defendant.

#### **EXTENT OF SECURITY TO BE PROVIDED**

54. Having regard to my findings above, it is next necessary to consider the extent of the security to be provided. The principles governing the exercise of the court's discretion have been explained in the judgment of the High Court (Barniville J.) in *Coolbrook Developments Ltd v. Lington Development Ltd* [2018] IEHC 634 and are not in dispute.
55. Applying those principles to the facts of the present case, there is no reason that the defendant should not be entitled to security in an amount which would cover the entire of the costs it would be likely to recover on adjudication under Part 10 of the Legal Services Regulation Act 2015. The claim is a relatively straightforward one, and there is no basis for dividing the costs into separate phases. The trial of the action is likely to take no more than two or three days. The plaintiff company is insolvent and is not trading. There is a real risk that the defendant would not be able to recover any costs in the absence of security being put in place for the full amount.
56. There remains, however, a separate issue as to quantum. To date, the plaintiff has not engaged with the quantum of the costs. It did not, for example, file its own report from a legal costs accountant setting out an alternative estimate of the legal costs. Rather, the

plaintiff conceded, for the purpose of the motion, that it would not be able to pay the defendant's costs. This was not an unreasonable approach for the plaintiff to adopt pending the determination of the question of principle as to whether it should be required to provide security for costs. Now that this question has been decided, the plaintiff should be allowed a short period of time within which to address the issue of quantum if it so wishes. The plaintiff has liberty to file an affidavit addressing the quantum of costs by 1 December 2021. The matter will then be listed before me, for mention, on 8 December 2021 at 10.30 am. I will hear submissions from the parties as to whether this court should assess the quantum itself or whether the assessment should be remitted to the Master.

57. I will also hear the parties on that date as to the appropriate costs order to be made in respect of the application for security for costs.

*Appearances*

David Kent for the plaintiff instructed by Vincent Toher and Co (Cork)

Joe Jeffers for the defendant instructed by Ronan Daly Jermyn Solicitors

Approved  
Gemma S. Mans