

THE HIGH COURT

[2022] IEHC 35

RECORD NO. 2015/9898P

BETWEEN

MARLAN HOMES LIMITED

PLAINTIFF

AND

**FRANK EGAN, ADMINISTRATOR AD LITEM TO THE ESTATE OF THE LATE OWEN
O'BRIEN, DECEASED**

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 25 January 2022

Introduction

1. This is an application for security for costs brought by the defendant, the administrator ad litem for Mr. O'Brien, solicitor, who died in 2014. The plaintiff, Marlan Homes, is a family company that built small scale housing developments. It engaged Mr. O'Brien as its solicitor for the purpose, *inter alia*, of issuing proceedings against its former solicitor, Mr. Callan.
2. Mr. Callan had acted for the plaintiff in proceedings it brought in respect of a purchase it had made of development lands at Kilmore Rd. Artane, Dublin 5. The vendors were Mark Walsh and Gary Wedick and were the defendants in the proceedings brought by the plaintiff. The plaintiff was unable to develop the lands due to the refusal of Dublin City Council ("DCC") to consent to the transfer, in circumstances where the only interest transferred in one parcel of the lands was the benefit of a building licence conferred by DCC, and no consent from DCC was obtained in advance of the transaction to the transfer. It was not possible to obtain planning permission for the other two parcels of land due to the unavailability of the parcel the subject of the building licence. The plaintiff accordingly suffered the loss of the purchase price, being €4.925 million. The plaintiff alleges that the loss was caused by the negligence of Mr. Callan in carrying out the transaction.
3. Mr. Callan was struck off by the Law Society in 2007 for various breaches of the Solicitors Acts. Some weeks before that, in November 2007, the file in the case against Walsh and Wedick was transferred from Mr. Callan to Mr. O'Brien, initially so Mr. O'Brien could act in the Walsh and Wedick proceedings. However, by June/July 2008, the plaintiff had asked Mr. O'Brien to consider the question of Mr. Callan's negligence in the transaction concluded with Walsh and Wedick.
4. A letter of claim was written by Mr. O'Brien to Mr. Callan's insurers on 10 December 2008 and proceedings were issued on 5 May 2010. On 13 July 2010, following inquiries by Mr. O'Brien, the Law Society wrote informing him that Mr. Callan's insurance with the Solicitors Mutual Defence Fund ("the SMDF") had lapsed and that Mr. Callan did not maintain professional indemnity cover. This critical fact was not, on the plaintiff's case, disclosed to it and the professional negligence proceedings against Mr. Callan continued. In 2014, Mr. O'Brien died. In 2015, Miley and Miley solicitors were retained by the plaintiff to continue the litigation against Mr. Callan. It was only discovered at that point that Mr. Callan's insurance cover had expired on 30 November 2008. (I should observe at this

point that insurance for solicitors was at the relevant time regulated by statute and various statutory instruments made thereunder).

5. Following that unpalatable discovery, the plaintiff issued professional negligence proceedings against Mr. O'Brien on 26 November 2015. Because Mr. O'Brien had died, it was necessary to appoint an *administrator ad litem*. Mr. Frank Egan, solicitor, agreed to act and was furnished in November 2015 with the motion, affidavit and exhibits grounding the application to the probate list to have him appointed.
6. I set out the history of the proceedings below. However, in short, it was only in August 2020, four years and nine months after issuing the proceedings, that the plaintiff was faced with a motion for security for costs, with the motion having been intimated by letter of 22 July 2020. The plaintiff is resisting the application.

Procedural History of Motion for Security

7. The application was originated by notice of motion dated 4 August 2020 and is grounded upon the first affidavit of Frank Egan sworn 23 July 2020. An affidavit was sworn by Noel Guiden of 22 July 2020, cost accountant, and by John Harding, accountant of 23 July 2020 on behalf of the defendant. Mark Quinn, director of the plaintiff, swore a replying affidavit on 14 January 2021. Steven O'Halloran accountant swore an affidavit on 22 March 2021 on behalf of the plaintiff.
8. Frank Egan swore a second affidavit of 25 March 2021, which was replied to by an affidavit of Mark Quinn on 10 May 2021. Frank Guiden swore a second affidavit on 24 June 2021 and John Harding a second affidavit on 25 June 2021. A third affidavit was sworn by Frank Egan on 28 June 2021. A third replying affidavit was sworn by Mark Quinn on 8 October 2021, followed by a fourth replying affidavit on 20 December 2021. Michael Murphy, solicitor for the defendant, swore an affidavit of 12 January 2022. That was replied to by Mark Quinn on 14 January 2022.

Impecuniosity of the Plaintiff

9. The application is brought under s.52 of the Companies Act 2014. The evidence that the plaintiff is impecunious is uncontroverted. Mr. Harding, the accountant retained by the defendant, has identified in his report exhibited to his affidavit of 23 July 2020 that the plaintiff's liabilities exceed its assets by €3.618 million. Noel Guiden, costs accountant, has sworn an affidavit on behalf of the defendant, where he estimates that the defendant will incur costs in the region of €559,246.50 in defending the proceedings. Accordingly, Mr. Harding concludes that on available information, the plaintiff does not have sufficient assets to pay an award of costs of €559,246.50 or any award of costs should same be awarded to the defendant at the conclusion of the proceedings.

Bona Fide Defence

10. There was initially a debate about whether the defendant had established a *bona fide* defence. However, that is now accepted by the plaintiff for the purpose of this motion.

Special Circumstances

11. Given that the plaintiff is impecunious, and the defendant has a *bona fide* defence, according to well established principles, the defendant is, *prima facie*, entitled to security for its costs. It is only if the plaintiff can satisfy me that there are special circumstances that I may exercise my discretion to refuse security. As per the observations of O'Donnell J. in *Quinn Insurance Ltd (Under Administration) v PricewaterhouseCoopers (A Firm)* [2021] IESC 15, when considering special circumstances, I accept that parties in motions for security should not make their case on bare and unsubstantiated averments and that the Court must scrutinise the relevant evidence carefully.
12. Four different special circumstances are identified by the plaintiff. First it is alleged that the defendant's behaviour was the cause of the plaintiff's impecuniosity. Second, it argues that the delay of the defendant in bringing the motion has disentitled it to security. Third, it argues that were security to be granted, it would wholly stifle the plaintiff's claim. Finally, it argues that it would be contrary to public policy were security to be required. Overall, the plaintiff submits that it would be contrary to the interests of justice were the application to be granted.

Public Policy

13. I will deal with the last argument first. There is no basis in my view for concluding that there are any public policy reasons not to provide security. It is said by the plaintiff that the observance by solicitors of their professional obligations to the public is a matter of public policy, evidenced by the fact that the terms of their insurance are regulated by statute and statutory instruments. It is further said that, as a matter of public policy, there should be access to court for clients who allege a breach of those professional obligations.
14. I do not accept that the mere fact that solicitors' insurance cover is governed by statute means that professional indemnity litigation *per se* raises issues of public policy. There is a public policy objective of ensuring that solicitors have insurance cover on regulated terms. However, that does not mean that individual cases raise public policy issues. Here, there is no issue about insurance from a policy perspective; rather there is a question about whether Mr. O'Brien was negligent in failing to put the plaintiff in a position where it could avail of Mr. Callan's insurance cover. That question does not raise any public policy issues. The public policy lies in ensuring a regime of insurance for solicitors: the question as to whether in any individual case that insurance is available, and if not, where the fault lies, is not a question of public policy. Accordingly, no special circumstances arise in this respect.

Cause of Impecuniosity

15. In relation to the cause of the plaintiff's impecuniosity, the situation is also relatively straightforward. First, it must be observed that, taking the plaintiff's case at its height, certainly the initial cause of the plaintiff's impecuniosity was Mr. Callan's alleged negligence in relation to the transaction involving the lands at Artane. The defendant's conduct, on the plaintiff's case, prevented the plaintiff from recovering losses caused by that negligence.

16. In any case, at the height of the plaintiff's case, the loss caused to it by the alleged wrongdoing of Mr. Callan is €4.925 million, being the purchase price of the lands, plus additional consequential losses. It has been established to my satisfaction that the maximum sum capable of being recovered from Mr. Callan's run off insurance was €2.5 million including legal costs. The financial position of the plaintiff is that its liabilities exceed its assets either by €3.618 million (Mr. Harding's analysis) or by €4.104 million, taking the figure identified by Steven O'Halloran, the accountant retained on behalf of the plaintiff, who has identified additional liabilities owing by the plaintiff not recorded in the most recently available abridged financial statements. Therefore, even if the plaintiff had successfully sued Mr. Callan and recovered the entirety of its losses against him, Mr. Callan's insurance policy would only have paid out a maximum of €2.5 million. The company would therefore still have excess of liabilities over assets of more than €1 million.
17. The plaintiff argues that the amount it could have recovered from Mr. Callan were it not for the negligence of the defendant should not be capped at €2.5 million. It argues that it could go after Mr Callan personally for the balance of the amount it says is owing. However, I do not think it is open for the plaintiff to maintain that claim in this motion. In the first affidavit of Mark Quinn he avers at paragraph 19 as follows:

"Regrettably it does not appear that Mr Callan is personally a good mark for any substantial portion of its damages for his breach of professional duties to the plaintiff. This was abundantly clear to Mr O'Brien from the outset, and hence the plaintiff's concern to ensure that a claim involving his professional indemnifiers was instituted from the outset... Certainly Mr Callan does not appear to be in a position to meet any judgment entered against him from his personal assets".

18. That averment is not surprising in circumstances where it appears that Mr Callan was forced to cease practice by an injunction obtained by the Law Society and was ultimately struck off the roll of solicitors for various different wrongdoings. In those circumstances, I proceed on the basis that the plaintiff was highly unlikely to recover a sum over and above the amount covered by Mr. Callan's policy.
19. Separately, the plaintiff has argued that even if the amount recoverable from Mr. Callan is capped at €2.5 million, given that the majority of the debt is owing to family members, I should assume that family debt could have been forgiven and the sum of €2.5 million would have put the plaintiff in a position where it could meet its liabilities including security. But there is absolutely no evidence before me in that respect from the plaintiff's creditors, whether as to the fact of forgiveness or the nature of same. I cannot simply assume debt forgiveness without such evidence.
20. Accordingly, at its height, the alleged negligence of Mr. O'Brien was a contributing factor to the plaintiff's impecuniosity. It was certainly not responsible for the entire impecuniosity. In *Quinn*, Clarke J observes at paragraph 7.27 that when the court is seeking to identify the position the plaintiff may have found itself were it not for the wrongdoing:

"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.... Likewise the position in which the plaintiff might have been in were it not for the wrongdoing is essentially a mathematical exercise."

21. At paragraph 7.30, referring to the injustice of a plaintiff's impecuniosity preventing it from maintaining its claim where same was caused by the defendant's conduct, he noted:

"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 naught 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."

22. The alleged wrongdoing of Mr. O'Brien cannot on any analysis be considered to be the basis for all the impecuniosity of the plaintiff. Applying the approach in *Quinn*, I have no hesitation in concluding that the impecuniosity of the plaintiff has not been caused by the alleged wrongdoing of the defendant, even taking the plaintiff's case at its height. No special circumstance has therefore been made out in that respect.

Delay

23. I turn now to the question of delay. The case law on delay as a special circumstance identifies unambiguously that delay may indeed be a special circumstance, with more recent case law explicitly identifying that it will be necessary to identify that the delay has prejudiced the plaintiff. An obvious example of prejudice was identified in *Oltech v Olivetti* [2012] IEHC 512, i.e. where the plaintiff has acted to its detriment in incurring a level of costs that it would not have incurred had it known it would have been required to provide security. A similar observation was made in *Moorview v Cunningham* [2010] IEHC 30. In *Werdna v MA Insurance Services* [2018] IEHC 194, Baker J. noted similarly that the focus is often whether the delay might have caused the other party to take steps in the litigation which it would not have taken otherwise. In *Ferrotech v Slimming World* [2009] IEHC 46, Dunne J. considered the fact that no significant costs were incurred during the period of the alleged delay was a factor.
24. Before examining prejudice, I must consider whether there was any delay on the part of the defendant. It is helpful to set out the chronology of some relevant events.

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| Plenary Summons | 26 November 2015 |
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| Statement of Claim | 21 July 2017 |
| Motion for Judgment in Default of Defence | October 2017 |
| Notice for Particulars | 19 February 2018 |
| Defendant Motion for Third-Party Discovery | May 2018 |
| Relies to Particulars | 28 September 2018 |
| Plaintiff Motion for Third-Party Discovery | October 2018 |
| Motion for Judgment in Default of Defence | October 2018 |
| Discovery Order (Third-Party) | 10 December 2018 |
| Defence | 11 July 2019 |
| Reply | May 2020 |
| Plaintiff Letter Seeking Voluntary Discovery | May 2020 |
| Letter Seeking Security for Costs | 22 July 2020 |
| Motion for Security | 4 August 2020 |

Defendant's Explanation for Delay

25. The defendant says that if there was any delay, it was only from the date of delivery of its defence on 11 July 2019. It is said by counsel for the defendant that until third party discovery was made, the defendant could not form a view on its defence. It is further said that it could not satisfy itself it had a *prima facie* defence until it obtained the relevant documents and an expert report, and that it was reasonable to wait until after the filing of the defence.
26. It explains that it could not deliver its defence before July 2019 because the necessary information was only provided by way of third party discovery i.e. the two affidavits of Mr. Dorgan of R & Q Ireland Ltd., the successor to the SMDF, sworn on 5 November and 31 December 2018 respectively. (The SMDF was the insurer to Mr. Callan). Thereafter the material provided had to be analysed and considered by an expert. That took some time, because the first expert retained became unavailable in spring 2019 and the second expert had to be retained in late May 2019 and delivered its report on 3 July 2019, after which the defence was delivered on 11 July 2019.

27. The information in Mr. Dorgan's affidavit of 31 December 2018 focused upon by the defendant is the averment at paragraph 3 as follows:

"I confirm that run off cover was not provided pursuant to any specific run off policy. The SMDF was a mutual fund and as such, did not issue policies of insurance. Indemnity was granted upon the terms and conditions of membership of the fund. Run off cover was provided, upon payment of a contribution, for one year from 1 December 2007 to 30 November 2008 upon the same conditions of membership as were in place in the final year of cover being 1 December 2006 to 30 November 2007."

28. The defendant also focuses on the first affidavit of discovery made by Mr. Dorgan on 5 November 2018 where he discovered a letter of 13 July 2010 from the SMDF to Mr. O'Brien identifying that Mr Callan was not a member of the SMDF, and a letter of 17 December 2008 from the SMDF to Mr Callan where it is stated that his cover expired from 30 November 2008. But in respect of the letter of 13 July 2010, it may be seen from exhibit MQ14 to Mr. Quinn's second affidavit, being the index to Mr. O'Brien's file, that this crucial letter from the SMDF had already been provided to the defendant's solicitors on 10 April 2017 by the plaintiff's solicitors.

Finding on Delay

29. There is no entitlement per se permitting a defendant to file a defence before bringing a motion for security for costs. Indeed, in many instances the motion for security will be brought at a much earlier date in the proceedings as observed by Clarke J. in *Quinn* where he noted that often motions for security are brought at a time when much of the facts are not known (see para 7.29 in *Quinn* – "...not least because the application will be determined at an early stage in the proceedings when the Court will not have available to it all of the detailed evidence concerning losses which might become available during trial.") In *Werdna*, Baker J. agreed with the finding by Barrett J. in *Euro Safety v An Foras Áiseanna* [2016] IEHC 161, who had had rejected an argument by the defendant that it could not have brought the application until it had filed its defence.
30. The question of whether it is reasonable to wait to bring a motion for security until the defence is filed will depend on the facts of each case. There is no hard and fast rule. However, in this case, for the reasons I explain below, I do not accept the defendant was entitled to wait until July 2019 (when it filed its defence) to bring a motion. Still less was it entitled to wait, as it did, for another whole year before seeking security.
31. It was undoubtedly reasonable for the defendant to wait to bring its motion for security for costs until it was able to take a view on whether it had a *prima facie* defence and to formulate same. To identify what was required for that purpose, one must consider the nature of the claim made by the plaintiff. At paragraph 10 of the statement of claim, it is pleaded that Mr. O'Brien had been negligent because he had been instructed on 5 December 2008 to bring proceedings against Mr. Callan and those proceedings were not issued until 5 May 2010. At paragraph 12 it is pleaded that Mr. O'Brien should have made inquiries in relation to the status of the firm of Callan & Co., including in relation to

insurance cover. The nub of the claim is set out at paragraph 14 where it is pleaded that the failure of Mr. O'Brien to issue proceedings within time has ensured that the plaintiff cannot recover against any insurable interest of Callan & Co. solicitors.

32. To respond to these pleas, the defendant needed to know something of the insurance status of Mr. Callan. By 28 September 2018 the defendant knew - by virtue of the detailed replies to particulars from the plaintiff and the relevant correspondence provided with those replies - that, *inter alia*, according to the Law Society records, the last professional indemnity insurance policy enjoyed by Callan & Co. expired on 30 November 2007 and that having regard to the Solicitors Acts 1954 to 1994 (Professional Indemnity Insurance) (Amendment) Regulations 1999 (SI No. 362 of 1999) Callan & Co. were required to maintain run off cover for a period of 2 years expiring on 30 November 2009. The information provided in the replies to particulars was accompanied by a great deal of documentation, including letters and emails highly relevant to the insurance status of Mr. Callan at the relevant time. Because of the importance of the correspondence, I will set out the text of same.
33. The first letter referred to in the replies to particulars is that of 12 March 2015 from Nicola Kelly, practice regulation administrator, Law Society of Ireland, to Miley and Miley solicitors. In it she states as follows:

"According to the Society's records Ciaran Callan ceased to practice under the title of Callan & Co on 19 November 2007. At the time of the solicitor's cessation he was being provided with professional indemnity insurance (PII) for the indemnity period 1 January 2007 to 31 December 2007 by the Solicitors Mutual Defence Fund (SMDF) Limited.

The PII Regulations S.I. No.362 of 1999) governing the solicitor's cessation provided that run-off cover be maintained for a period of 2 years following the expiry of the PII policy at the time of cessation. Only the last insurer (SMDF Limited) can advise whether the solicitor maintained run off cover. According to the Society's records, the SMDF confirmed to the Society that the solicitor maintained run-off cover for the indemnity period 1 January 2008 to 31 December 2008 only.

The SMDF Limited is not part of the Society, it is a separate entity that provided PII cover to the profession until 30 November 2011. The SMDF Limited is contractable at Leeson Claims Services Ireland, No.68 Merrion Square South, Dublin 2, Ireland."

34. The next item is an email of 30 October 2015, again from Nicola Kelly to Sharon Dunning of Miley and Miley (p. 48 of the book of pleadings). She refers to their telephone conversation in relation to her letter of 12 March 2015 and then states;

"S.I. No. 312 of 1995 introduced the statutory requirement for solicitors in this jurisdiction to maintain professional indemnity insurance cover and run-off cover (for a period of six years once the solicitor has ceased to practice). S.I. No. 362 of

1999 amended the requirement to maintain the run-off cover from six years to two years on 1 January 2000.

Ciaran Callan was last provided with PII cover for the indemnity period 1 January 2007 to 31 December 2007 and therefore the governing run-off cover regulations in respect of his cessation is S.I. No.362 of 1999. The Society's records reflect the solicitor was provided with run-off cover from the Solicitors Mutual Defence Fund Limited for the practice year 1 January 2008 to 30 November 2008.

The requirement to maintain run-off cover from two years changed to six years on 1 December 2007 on the introduction of S.I. No.617 of 2007. These regulations would only have been applicable to any firm who renewed PII cover on 1 December 2007 or 1 January 2008 and subsequently ceased to practice.

Please contact me if you have any queries arising."

35. This email is unambiguous. It makes it clear that as far as the Law Society is concerned, Mr. Callan's cover ended on 30 November 2008. The matter is further explained in exchanges between Mr. Dunning and Ms. Kelly in November 2015, again included with the replies to particulars. In an email of 16 November 2015 (at page 68 of the book of pleadings), Ms. Dunning writes as follows:

"I refer to your email of the 30th of October in connection with this matter and I would be most obliged if you could confirm:

- A. That the reference to November as opposed to December is a typographical error in your email of 30/10/15 and that the Solicitors Defence Mutual Fund Limited provide run-off cover from 1st January 2008 to 30th December 2008.*
- B. In accordance with S.I. No.362 of 1999 Mr Callan was provided with two years run-off cover from the end of the practice year i.e. 31st December in respect of which he last had Professional Indemnity insurance in place i.e. 2007.*

We don't see how it is possible that he had cover to November as we understood it ran for the full year."

36. Ms. Kelly replied that afternoon as follows:

"The PII/run-off indemnity periods prior to 1 December 2007 expired on 31 October or 31 December. From 1 December 2007, indemnity periods expired on 30 November. Accordingly the Society's records show that Ciaran Callan was provided with run-off cover from the SMDF Limited from 1 December 2007 to 30 November 2008.

SI No.362 of 1999 provided that a solicitor maintain run-off cover for a statutory period two years, following the expiry of his/her last policy of PII cover. The Society

has no record that Mr Callan maintained any run-off cover from 1 December 2008 onwards."

37. The situation in relation to indemnity periods could hardly have been clearer at this point; from 1 December 2007, indemnity periods expired on 30 November.
38. Having regard to that correspondence, there could have been little doubt that Mr. Callan had no cover after 30 November 2008. Had the defendant relied on that correspondence to establish the relevant date in any affidavit identifying a *prima facie* defence, the plaintiff could hardly have controverted the position.
39. The position was confirmed on 5 November 2018 when the defendant received the affidavit of discovery of Mr. Dorgan and saw the correspondence between Mr. Callan and the SMDF where Mr. Callan indicated he could not fund the premium for the cover starting 1 December 2008 because his assets had been frozen by the Law Society for 18 months. That correspondence was merely confirmatory of what had been stated by the Law Society. The defendant did not learn anything new from the supplemental affidavit of discovery of Mr. Dorgan sworn 31 December 2018 since Mr. Dorgan simply confirmed that run off cover was provided from 1 December 2007 to 30 November 2008, precisely the same information as had been identified by the Law Society in the email from Ms. Kelly of 16 November 2015, provided on 28 September 2018.
40. The defendant had another clear indication that the date of 30 November 2008 was the correct one prior to Mr. Dorgan's affidavit. Mr. O'Brien's file was provided to the defendant's solicitors in 2017 and it included the letter of claim of 10 December 2008 from Mr. O'Brien to Mr. Callan's insurers. The defendant, as a solicitor, must be taken to have known or to have been able to find out, the terms and conditions offered by the SMDF. Those terms and conditions were exhibited at 3 FE1 to the third affidavit of Frank Egan. As he notes at paragraph 10, the fund provides for indemnity arising from any claims first made or intimated against the beneficiary during the stipulated period of protection. Therefore, the decision by the SMDF to refuse cover to Mr. Callan ought to have been treated by the defendant as sufficient confirmation for the purpose of a *prima facie* defence, along with the Law Society correspondence described above, that premiums were not paid after 30 November 2008.
41. The defendant relies upon its right to wait for third party discovery from the SMDF. Of course, discovery from the SMDF would put the question of the expiry of cover beyond all doubt, as indeed it did. However, if a defendant chooses the luxury of absolute certainty on a given point above expediting a motion for security, it cannot be surprised if it is found to have delayed unnecessarily.
42. Accordingly, I conclude that the defendant had the information required to identify a *prima facie* defence at latest from the date of the replies to particulars in September 2018. But in fact, a perusal of the pleadings discloses that the defendant had the necessary information in 2015, which if acted upon would have allowed it to seek third party discovery far earlier.

43. In November 2015, a notice of motion was brought by the plaintiff seeking an order pursuant to s.27(4) of the Succession Act 1965 appointing Mr. Frank Egan as administrator *ad litem* to the estate of Mr. O'Brien to defend proceedings intended to be commenced against Mr. O'Brien's estate by the plaintiff. That motion was grounded on an affidavit of Sharon Dunning sworn 16 November 2015 where she exhibited the letter of 12 March 2015 and email of 30 October 2015 from the Law Society, the terms of which are set out above. The correspondence in the book of pleadings discloses that Mr. Egan agreed to act as administrator in advance of the application and was furnished with the papers for same including the exhibits (pages 66 and 67). Therefore, the defendant had the relevant letters back in 2015. Given the information it had received in 2015, it could have sought third party discovery, retained an expert opinion and still have filed a defence significantly before mid-2019.
44. The defendant argues that after receiving the affidavit evidence from the SMDF in early January 2019, it was entitled to wait until it received a professional opinion as to liability. The defendant has averred to problems with the retention of experts that meant that after receiving Mr. Dorgan's supplemental affidavit in December 2018, the expert report was not produced until July 2019. Setbacks leading to delay are part of litigation, and allowance should be made for that. But the defendant is seeking security in circumstances where the plaintiff says the grant of same will end its claim. In those circumstances, it is inappropriate to adopt an over-indulgent attitude towards such setbacks. In the circumstances, I cannot accept that a six month period to obtain an expert report was reasonable. Taking the date of the provision of the relevant information as being September 2018, the defendant ought to have had its expert opinion at latest by December 2018, which would have allowed the motion for security to be brought in early 2019.
45. There is then a period of unexplained delay from the filing of the defence in July 2019 until the letter requesting security in July 2020, a full year later. No real effort has been made to explain that delay, although there is some attempt to assert that it was necessary to await the reply of the plaintiff. That explanation cannot be accepted. It was not necessary for the defendant to see the plaintiff's reply to evaluate whether it had a *prima facie* defence. As Clarke J. observed in *Quinn*, motions for security will often be taken when not all the facts are established. If a defendant holds off bringing a motion for security until it has the luxury of full information and absolute certainty, the ensuing delay might prove fatal to its claim for security.
46. In the circumstances, I conclude the defendant ought to have brought the motion by the end of 2018, rather than August 2020 and that the period of delay was therefore in and around 18 months.

Prejudice

47. Having concluded that there was delay on the part of the defendant, I must consider whether that delay prejudiced the plaintiff. Mr. Quinn has averred at paragraph 38 of his second affidavit that it took the following steps post the furnishing of the replies to particulars. It joined in the third-party discovery application and obtained the order of 10

December 2018, brought a motion seeking judgment in default of defence, delivered a reply to the defence, sent a letter seeking voluntary discovery and engaged with experts and counsel concerning the proofs for trial and engaged experts on quantum. In his exhibit MQ16, exhibited at paragraph 39 to his second affidavit, he refers to a book of *inter-partes* correspondence from 31 December 2018 to 3 August 2020. That runs to 29 pieces of correspondence from 9 January 2019 to 22 July 2020. That does not include any of the communications between solicitors and counsel, solicitors and the plaintiff, or solicitors and external experts. Suffice to say it is clear there has been a significant amount of activity in this case from December 2018.

48. The defendant objects to any assumption being made that the plaintiff has incurred legal costs during this time on the basis that it has not identified an amount incurred or evidence of monies paid out.
49. It would have been helpful if the plaintiff had identified the amount of costs it has incurred by the defendant's failure to bring its motion for security on in a timely fashion. However, the plaintiff has set out clearly the activity that it has engaged in during the relevant time. Moreover, Mr. Quinn has averred at paragraph 38 in his second affidavit that the plaintiff has incurred significant legal costs since the filing of the defence. At paragraph 39 of the same affidavit, he refers to the *inter-partes* correspondence referred to above and explains that this correspondence highlights "*...the legal services the plaintiff has had to avail of and for which the plaintiff will ultimately be liable to discharge if this application is granted and the plaintiff is forced to discontinue these proceedings*".
50. Given the evidence, I am prepared to accept that the plaintiff has been disadvantaged in being forced to take those steps, involving as they did the continued assistance of the plaintiff's solicitors. Counsel for the defendant was not able to reference any case requiring a plaintiff seeking to show prejudice by reason of delay to put on affidavit bills of costs or payment of legal fees. In each case, the nature of the evidence that the Court will require will vary. The core requirement is that the Court is satisfied that a plaintiff has been disadvantaged. I am so satisfied by the evidence here.
51. Moreover, I think I am entitled to infer prejudice not just because of the incurring of legal costs but also because of the very existence of the proceedings. Legal proceedings are by their nature demanding and difficult for all parties. Here the plaintiff is a family company in which the directors are two brothers. The existence of the proceedings for an additional period of 18 or so months cannot be treated as a matter of no import to the company and the directors giving instructions on behalf of the company.
52. In the circumstances I conclude that the plaintiff has been prejudiced by the defendant's delay in bringing this motion.

Relevance of Discovery Motion Brought by Plaintiff Post the Motion for Security

53. Finally, an argument was made by the defendant that because a motion for discovery was brought by the plaintiff after the issuing of the motion for security, this demonstrated that the plaintiff was deciding to continue the proceedings despite the application for security,

as per the test identified by Clarke J. in *Moorview*, thus pointing towards security being granted. Before the letter seeking security had issued, the letter seeking discovery had issued. The defendant did not substantively engage with that letter but rather brought the motion for security. It is true that shortly thereafter the plaintiff brought a motion seeking discovery, but in my view, it must be assumed that it did so in the knowledge that no further substantive steps in the proceedings were likely to take place until the motion for security was determined. The bringing of that motion does not seem to be decisive in relation to the plaintiff's approach to the security motion. To treat it as dispositive in the circumstances would be disproportionate.

Modified Order for Security

54. I turn now to the defendant's argument that I should address any prejudice not through refusing security but by reflecting it in a modified order for security. The defendant relied exclusively on the judgment of Baker J. in *Werdna* in that respect, where Baker J. held that any prejudice to the plaintiff caused by delay could be addressed by reducing the security sought by the sum incurred by the plaintiff in legal costs during the period of delay. The plaintiff identified a figure of just over €100,000 incurred during the relevant period. That costs figure was not broken down or explained but was accepted by Baker J.
55. It is worth noting that although it appears from that case that almost five years went by from the service of the plenary summons to the motion seeking security, in fact the Court held it was reasonable for the first defendant to wait to bring its motion because a motion for security for costs had been brought by another defendant which took three years to resolve.
56. Moreover, for the reasons I outline below, even if I reduced any security by the amount likely incurred by the plaintiff during the delay period, it would nonetheless stifle the plaintiff's claim as conclusively as if I made a full order for costs. In those circumstances I do not consider that the balance of justice will be served by making an order such as that made by Baker J. That brings me onto the final special circumstance identified by the plaintiff - a stifling of its claim should security be ordered.

Stifling of Claim

57. The defendant correctly points out that the Court retains a discretion to award security for costs even if special circumstances are established. It argues that because a grant of security will not stifle the plaintiff's claim, security ought to be granted. Conversely, the plaintiff argues that any security ordered will stifle its claim and therefore I should refuse the security.
58. I accept that as per the decisions of Clarke and O'Donnell JJ. in *Quinn*, the stifling of a claim is but a factor to be taken into account by the Court when exercising its discretion and cannot be treated as determinative. Nonetheless, it is clear from both judgments that it is appropriate for a court faced with an assertion of stifling to consider whether, on the evidence before it, it considers a stifling of the claim likely. That can only mean that a conclusion on the evidence in any given case that the claim will be stifled must be a relevant consideration for a court when deciding on security.

59. In this case, I am satisfied by the affidavit evidence before me that the claim will be stifled for the following reasons. First there is no doubt but that the plaintiff will be unable to raise the necessary amount sought, given that the plaintiff is already heavily indebted and there is no prospect of it being able to raise additional monies. However, the defendant argues that the plaintiff must exclude the possibility of a fortification of the undertaking i.e. a provision of funds by a third-party source and has failed to do so. In this respect, the defendant identifies that no affidavit has been sworn by either Sean or Antoinette Quinn, the parents of the two directors, and the principal creditors of the plaintiff. Given that they have a clear interest in the plaintiff recovering in these proceedings, the defendant argues that they should be treated as a possible source of any security ordered. He says they ought to have set out their financial situation so the question of fortification by them can be considered. Moreover, the defendant also questions the means of Mr. Mark Quinn, director of the plaintiff. Mr. Murphy, solicitor for the defendant, has filed an affidavit noting that Mr. Quinn, while averring to be in straightened financial circumstances, has averred to residing at Manderley in Malahide. Mr. Murphy exhibits a screen shot of the property taken from Google Maps and notes it is a substantial property in a prime residential area in Dublin that he suspects of being of considerable value.
60. In reply, Mr Quinn avers that the plaintiff's registered office is Manderley, that it is his parents' family home and is subject to a mortgage in favour of Bank of Scotland, now transferred to Pepper Finance. He notes he lived with his parents for some time but is now living in a rented apartment in Swords. He avers that Pepper agreed to a mortgage deferral of 12 months which will expire in August 2022 and that the balance of the mortgage is €500,000. A letter from Pepper in this respect is exhibited.
61. In summary, the relevant evidence establishes the following. Since the events in relation to the lands at Artane, Mr. Alan Quinn, director of the plaintiff and brother of Mark Quinn, has worked as a carpet fitter and has done bar cleaning and stewarding at football matches. He is now working as a sales manager for a shop fitting company. He has had a house repossessed by Bank of Scotland because he could not make payments. Attempts were made to repossess his family home.
62. Mr. Mark Quinn has worked as a barman in Reynards, Jack's Bar Skerries, Look Mam no hands café and the Plaza, Swords. He is now working as a carpenter. He has had an apartment repossessed. He is now living in a rented flat in Swords.
63. Alan and Mark Quinn's parents, Sean and Antoinette Quinn, who are in their eighties, have a €500,000 mortgage on their house in respect of which payments will recommence this summer, having been paused. That mortgage was incurred to meet previous legal costs of the plaintiff.
64. Mr. Quinn has explicitly averred in his affidavit of 20 December 2021 that neither he nor his brother nor his parents will be in a position to pay monies towards a security for costs order and that there are no other potential parties/benefactors who could advance monies to meet an order for security should such an order be made.

65. Having regard to that evidence, contrary to the submissions of the defendant, the fact that Mr. Quinn's parents live in a pleasant, encumbered house in Malahide does not appear to me to be a basis for concluding they can come up with over €500,000 to fund security. Nor is there any evidence to suggest that either director can put up the security. There is no other source of third-party funding identified by the defendant.
66. In the circumstances I am satisfied that if I order security, it is highly unlikely that either the plaintiff nor any third party will be able to put up the security. On the basis of the evidence before me, the strong likelihood is that the grant of security will end these proceedings.
67. Ultimately any court faced with an application for security must ensure that the interests of justice are to the fore when adjudicating upon the application, including in relation to a plea of stifling. In this case, that involves looking at the justice of the case in two alternative scenarios: the first being where the plaintiff is shut out from having its claim determined because it is unable to put up security ordered, and the second being where the defendant successfully defends the claim and is left with an irrecoverable costs order.
68. To assess the justice of the first scenario, it is necessary to highlight certain essential aspects of the plaintiff's claim, taking the claim at its height as I must do:
- It paid the sum of over €4.9 million for lands that it was never able to develop due to Mr. Callan's negligence (who was subsequently struck off by the Law Society for misconduct);
 - It instructed Mr. O'Brien, solicitor, to sue Mr. Callan for professional negligence in July 2008;
 - A professional opinion from Rory O'Donnell solicitor was obtained supporting such a claim by end August 2008;
 - Mr. O'Brien was either aware or ought to have been aware that Mr. Callan had been struck off by the Law Society for misconduct;
 - A letter of claim was not submitted by Mr. O'Brien until 10 December 2008;
 - Mr Callan's run off insurance expired on 30 November 2008 and was not renewed for the following year, because his assets had been frozen by the Law Society and he could not pay the premium;
 - Proceedings against Mr. Callan were not issued until 5 May 2010;
 - Mr. O'Brien was informed of Mr. Callan's lack of insurance by letter from the Law Society on 13 July 2010;
 - Mr O'Brien did not tell the plaintiff about the lack of insurance but rather allowed the proceedings to continue;

- The plaintiff only found out about the lack of insurance when a third set of solicitors, Miley & Miley, were appointed in 2015 to continue the proceedings against Mr. Callan after Mr O'Brien died in 2014.

Having regard to the history and nature of the present claim (taken at its highest), it seems to me it would be a very substantial injustice to the plaintiff to prevent the case going to trial.

69. Turning now to the possible injustice to the defendant i.e. an irrecoverable bill of costs if it is wholly successful in the proceedings, I bear in mind that costs up to July 2020 (the date of the request for security) will not in any case be covered by the application for security. The defendant will nonetheless be left with a substantial bill, on his reckoning in the sum of €559,246.50. That is a significant potential injustice to him.
70. It is never easy to balance competing injustices. However, in this case, given the nature of the claim made by the plaintiff and the sums involved, it seems to me that overall a greater injustice will be done if security is granted than if it is refused. Accordingly, I conclude the balance of justice lies in refusing the application.

Conclusion

71. For the reasons set out above, I refuse the defendant's application for security for costs. The parties should correspond with the registrar in relation to an agreed date upon which oral submissions on costs can be made.