THE HIGH COURT.

[2023] IEHC 85

Record No. [2022] 1192 P

Between

WOODSTOCK GOLF AND COUNTRY CLUB LIMITED

Plaintiff

And

PEPPER FINANCE CORPORATION LIMITED and KEN TYRRELL

Defendant

Judgment of Mr. Justice Dignam delivered on the 16th day of February 2023.

INTRODUCTION

1. The defendants seek an Order pursuant to section 52 of the Companies Act 2014 directing the plaintiff to provide security for the costs of the defendants and ancillary reliefs.

2. Section 52 of the Companies Act 2014 provides:

> *"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 for those costs and must stay all proceedings until the security is given."*

3. There is little disagreement between the parties as to the legal principles which apply to such an application. I return to these below. First, I should refer to some of the key features of the background.

4. The plaintiff company owns and operates a golf club at Woodstock in County Clare.

5. By facility letter of the 3rd June 2004 ACC Bank advanced a loan of €1,845,000 to a company, Duneside Services Limited, to refinance a prior debt in relation to the plaintiff company and to finance the costs of works in respect of the construction of twenty-four holiday homes at Woodstock.

6. That facility was in turn refinanced by a facility letter of the 14th October 2004. The plaintiff company also entered into a contract of guarantee and indemnity dated the 10th October 2004 pursuant to which the plaintiff agreed to pay to ACC Bank all monies and liabilities which had been advanced to, become due, owing or incurred by Duneside to or in favour of the Bank under or in connection with any of the facility documents. This guarantee was secured by a legal charge over a land folio which comprises of 45 hectares of the plaintiff's lands (approximately 70% of 12-13 holes of the golf course lands.

7. The interest rate provisions of the sanction letter and the associated guarantee, are at the centre of the dispute between the parties and I return to them in detail below

8. By letter of variation of the 13th March 2006 the term of the facility was extended to the 1st March 2007 but in all other respects the terms and condition of the facility letter of the 14th October 2004 would continue to apply.

9. By further letter of variation of the 9th June 2010 ACC Bank agreed to roll up the interest then due and to extend the term of the facility to the 31st December 2010. The letter of variation of the 9th June 2010 included a signed acceptance on behalf of the plaintiff, the guarantor, in the following terms:

> *"We Woodstock Golf and Country Club Limited acknowledge the within amendment of the existing facility and variation to the Sanction Letter and confirm that the Guarantee(s) dated 10 October 2004 provided by us pursuant to the Sanction Letter extend and are intended to extend to, and will constitute a continuing security for, all monies, liabilities and obligations owed by the Borrower* [Duneside] *to the Bank from time to time on foot of the Sanction*

Letter as varied by the within amendment of existing facility and variation to the Sanction Letter."

10. Duneside fell into arrears in respect of the loan.

11. As noted above, the interest provisions in both the facility letter and the guarantee are of central importance.

12. The specified interest rate payable on the facility was 2% per annum over the EURIBOR rate by reference to one month interest periods and otherwise in accordance with ACC Bank's general conditions.

13. ACC Bank's general conditions provided at clause 4.6:

"All interest and other payments of an annual nature under a Facility shall accrue from day to day and be calculated on the basis of the actual number of days elapsed and at 360-day year (or such other number of days in a year as the Bank uses as the basis of calculating interest on facilities of a similar type) and shall be due as well after judgement or demand as before."

14. Clause 4.6.5 provides:

"Interest will be debited to the Borrower's loan account or at such other intervals as the Bank in its absolute discretion shall from time to time decide. This means that if the Borrower does not pay the instalments on time the unpaid interest will be capitalised and the Borrower will pay interest on interest."

15. Clause 4.6.6 provides:

"Any sum payable by the Borrower under a Facility which is not paid on the due date shall bear interest at 0.5% per month above the rate otherwise applicable to the Facility from the due date to the date of actual payment."

16. Clause 1.2 of the Guarantee defines "*Interest Rate*" for the purpose of the Guarantee as meaning:

"4 per cent per annum above the Bank's cost of funding the relevant amount from whatever source the Bank may select upon such days and terms as the Bank may from time to time determine."

17. Clause 5 provides, inter alia:

"5.1 The Guarantor agrees to pay interest to the Bank at the Interest Rate on all sums demanded under this Guarantee from the date of the Bank's demand under this Guarantee or, if earlier, the date on which the relevant damages, losses, costs or expenses arose in respect of which such demand has been made, in each case until, but excluding, the date of actual payment.

5.2 The Guarantor agrees to pay interest to the Bank at the Interest Rate after as well as before judgment.

5.3 All such interest shall accrue on day to day basis and be calculated by the Bank on the basis of a 365-day year and interest shall be compounded in accordance with the usual practice of the Bank.

5.4 The Bank shall not be entitled to recover any amount in respect of interest both under this Guarantee and any of the Facility Documents in respect of any failure to pay any sum under any of the Facility Documents."

18. Clause 11.1 provides:

"Any demand, notification or certificate given by the Bank specifying amounts due and payable under or in connection with any of the provisions of this Guarantee shall, in the absence of manifest error, be conclusive and binding on the Guarantor."

19. The loan, together with the security, including the guarantee and charge, was subsequently acquired by the first-named defendant. A letter of demand dated the 1st October 2020 was sent to the plaintiff, stating, inter alia, that as of close of business on the 18th September 2020 the total amount due, comprising principal and interest, was €962,053.60 and demanding repayment within seven days. On the 18th February 2021, the first-named defendant appointed the second-named defendant as receiver of the lands.

20. There followed some engagement between the second-named defendant and financial advisors acting on behalf of the plaintiff and between solicitors acting for the plaintiff and the defendants respectively. A number of issues were raised in this correspondence including that the plaintiff was only liable on foot of the guarantee for the capital amount, that the surcharge interest provision (under clause 4.6.6) was a penalty provision, and a request for a formal computation and breakdown of the sums due. The first-named defendant's position was that they were not obliged to provide the calculations. The plaintiff, in this correspondence, offered to pay the principal amount due (and apparently an offer of €310,000 was made and declined by the first-named defendant).

21. On the 1st March 2022 the solicitors for the plaintiff wrote to the second-named defendant indicating that they had become aware that the lands were about to be put on the market and that any such step would have a serious and detrimental effect on the plaintiff's business and would lead to a claim for damages *"specifically arising from actions which are outside of your remit as a Receiver given that there is open correspondence and confirmation that our clients are in possession of such funds as necessary to discharge the claim for the capital sum in accordance with the guarantee executed."*

22. On the 24th March 2022 the property was put on the market by being placed on an auctioneer's website and on a property website. The plaintiff's solicitor called on the defendants through their solicitors to withdraw the property from the market, failing which an application for interim relief would be made.

23. The plaintiff issued these plenary proceedings on the 28th March 2022. The relief sought is:

> *"1. An Order providing for Redemption of Folio CE21169 Co Clare upon tender of the principal or proper sum in fact due.*
>
> *2.An Order directing the Defendants to specify the reckonable computation date from which the Defendants assert that the Principal has become due and owing.*
>
> *3.An Order discharging and/or cancelling the registered charge in accordance with s.65 of the Registration of Title Act 1964 (as amended).*
>
> *4. In default of proper accounts being rendered immediately or in early course by the Defendants as mortgagee to the plaintiff as mortgagor or as in such time as may be limited by this Honourable Court, liberty for further relief by way of*

interim or interlocutory injunction to prevent an unnecessary sale and all the costs and expenses thereby incurred.

5. In the alternative, upon the continuing wrongful failure to render proper accounts and breakdowns (the proper obligation for which has been absolutely disavowed by the defendants from the 17 December 2021) an Order that upon any sale unnecessarily incurred that its costs be subtracted from the sum due by the plaintiff.

6. If necessary a declaration that from the 17 December 2021 the defendants their servants or agents have wilfully and wrongfully fettered the Plaintiff's equity of redemption of Folio CE21169F Co Clare.

7. An Order providing for all necessary accounts and enquiries."

24. By ex parte docket, the plaintiff applied on the 28th March 2022 for short service of a motion seeking the following relief:

"1. An Order restraining the Defendant from taking any further steps in the marketing, unnecessary sale disposal of in Folio CE 21169F.

2.An Order for redemption of mortgage by legal charge of Folio CE 21169F upon tender or payment by or on behalf of the Plaintiff of the sums actually due and owing that is to say for principal, interest and eligible costs only.

3. An order restraining the defendants their servants or agents from repeatedly failing to specify the proper redemption sum, that is to say for principal, interest and eligible costs only, upon the mortgage by way of legal charge upon Folio CE 21169F.

4.An order restraining the defendants or agents from repeatedly failing to render proper accounts as mortgagee or legal charge holder to the Plaintiff as mortgagor."

25. The application for an interlocutory inunction came before Meenan J on 6th July and he granted an Order restraining the defendants from taking any further steps in the marketing, sale or disposal of the lands.

26. The plaintiff delivered an Amended Statement of Claim on the 8th July 2022 and the defendant delivered their Defence and Counterclaim on 29th August 2022. I refer to the contents of these pleadings below.

27. The defendants had issued their motion for security for costs on the 14th June 2022.

LEGAL PRINCIPLES

28. The applicable legal principles are well-established and there is little dispute between the parties.

29. The test was set down in *Usk and District Residents Association Ltd v Environmental Protection Agency [1006] IESC 1* (in the context of section 390 of the Companies Act, 1963, the predecessor to section 52 of the 2014 Act):

> *"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."*

30. The test was reiterated more recently in, inter alia, *Coolbrook Developments Ltd v Lington Development Ltd [2018] IEHC 634*.

31. The test is a graduated one. The defendant must establish that they have a prima facie defence to the plaintiff's claim. If that is established then they must establish that the plaintiff will not be able to pay the defendant's costs if they succeed in defending the proceedings. Of course, while it is put in those terms in the quote above, what the defendant must establish is that there is reason to believe that the plaintiff will not be able to pay the costs. If the defendant establishes those facts then the court should order security unless the plaintiff establishes specific circumstances which mean the Court should not direct security. I propose to consider the principles applicable to each of those steps and to then turn to the circumstances of this case.

Prima facie defence

32. The meaning of a prima facie defence has been considered in many cases.

33. In *Walker v Atkinson [1895] 1 IR 246* Walker C held:

> *"It is not necessary on an application of this kind that the Defendant should make out proof in a defence to the action, but…he must, at least, state facts which suggest some defence."*

34. Fitzgibbon LJ held in the same case:

> *"[w]hen a party comes in to get security he is not bound to prove his defence…it appears to me that when a Defendant applies for a security for costs, he must not merely swear that he has a defence on the merits, for that was the old requirement, but he must give some evidence to satisfy the Court that there is a reasonable prospect of his establishing some more or less specific or ascertainable defence."*

35. In *Denman v O'Callaghan [1897] 31 ILTR 141* Ashbourne LC held that an applicant was required to adduce evidence *"showing grounds on which [the Court] can arrive at the conclusion that he has merits."*

36. More recently, Finlay Geoghegan J held in *Tribune Newspapers v Associated Newspapers Ireland (Unreported, 25th March 2011) (page 9-10):*

> *"What appears from the judgments in a manner similar to the judgments in relation to summary judgment…, is that the Defendant seeking to establish a prima facie defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish these facts. Mere assertions will not suffice. This appears to me also to follow from the reference in the Superior Court Rules to a defence on the merits.*
>
> *If such evidence is adduced then the Defendant is entitled to have the Court determine whether or not it has established a prima facie defence upon an assumption that such evidence will be accepted at trial. Further the Defendant must establish an arguable legal basis for the inferences or conclusion which it submits the Court may arrive at based on such evidence. Insofar as the Plaintiff*

is submitting that the appropriate test includes an assessment by this Court on the application for security for costs as to whether the defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding, I reject that submission.

Such an exercise would inevitably require the Court at the introductory stage for the application for security for costs to assess the strengths and weaknesses of the respective parties' contentions and cases. The decision of the Supreme Court already referred to appears to me to clearly rule out such an approach. Accordingly, in my judgment, what is required for a Defendant seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submission applicable thereto which, if accepted by a Trial Judge, provide a defence to the Plaintiff's claim."

37. This passage was cited with approval *Olltech (Systems) Ltd v Olivetti UK Ltd [2012] 3 IR 396* and in *Webprint Concepts Ltd v Thomas Crosby Holdings [2013] IEHC 359*. Charleton J held:

"The Defendant must show, firstly, that it has a reasonably sustainable defence. This does not just mean a barely arguable defence, since experience demonstrates that there is little that cannot be argued. It has to be demonstrated, rather, that if there is a legal defence, that it is potentially sustainable on a practical view of the law or, if the defence is one of fact, that if what the Defendant alleges in answer to the Plaintiff is proven in Court that it will defeat the Plaintiff's claim."

38. What evidence will be required will, of course, depend on the circumstances of each case (*Power v Irish Civil Service (Permanent) Building Society [1968] IR 158*). It is also clear that the Court should not enter upon a consideration of the respective merits of the parties' cases once it is satisfied that the defendant has a prima facie case (*Philip Harrington Daly & Co (Dublin) Ltd v JVC (UK) Ltd (Unreported, O'Hanlon J, 16th March 1995)* and *Comhlucht Páipéar Ríomhaireachta v Údarás na Gaeltachta* [1990] 1 IR 320.

39. In *Comcast International Holdings Incorporated v The Minister for Public Enterprise [2014] IEHC 18* Ryan J held that:

"A mere assertion is not sufficient but neither is it necessary to have proof to the civil standard. In an action where summary judgment is sought, if the

defendant can establish that it might have a defence on some rational and credible basis, judged on a low threshold, the proceedings will be sent for plenary hearing and summary judgment will not be granted. If it is a conflict of fact, that cannot be resolved on affidavit."

40. In *Comcast*, the relevant defendant (the applicant for security for costs) simply denied the averments contained in the plaintiff's Statement of Claim and argued that he had thereby established a prima facie defence. Ryan J held that he had done so and said:

"It is true that the Defence can be described as a simple traverse. But it is also the very issue to be resolved in the action. There is a difference between a mere assertion and a straight conflict of fundamental fact.

…

There is room for concern about the baldness of the applicant's affidavit. I think that there is a validity in this criticism but ultimately it should not defeat the application. It is a matter more of form than substance. It is perhaps understandable that a Defendant whose legal position is one of denial might be concerned about just how far he would have to go in setting out his defence and possible consequences at trial but that is mere speculation."

41. In *Pagnell Ltd (trading as Snap Printing) v OCE Ireland Ltd [2015] IECA 40* Hogan J held that:

"It follows, therefore, that it is not sufficient for a Defendant merely to assert a defence. Recalling again the underlying objective of the section – namely, that Defendants should not have to face claims made by limited liability companies who would have insufficient assets to meet an order for costs – a Defendant must show that there are reasonable prospects that this is likely to occur unless security is ordered. In this respect and in this particular statutory context, it should be stressed that it is for the Defendant to establish a prima facie defence…After all, the prima facie defence requirement imposes a higher requirement on a Defendant than that required, for example, to establish a defence to an application for summary judgment where it is merely necessary to show that the defence is simply arguable…"

42. Clarke CJ stated in *Quinn Insurance Ltd v Pricewaterhouse Coopers [2021] IESC* 15 that:

> *"I would emphasise that it is important for a court, faced with an application for security for costs, to scrutinise carefully the basis upon which the defendant applying for security seeks to establish a bona fide defence. One of the consequences of the making of an order for security may be that the proceedings will not go ahead. While such an eventuality is an inevitable possibility of the security for costs regime, it does mean that a potentially good claim might not be prosecuted in the event that security is ordered. It is not unreasonable to require a defendant in such circumstances to put forward its defence in sufficient detail to enable the Court (and, indeed, the plaintiff) to scrutinise the extent to which a bona fide defence has truly been established. It is not, of course, the case that the Court can or should form a view as to the likelihood of any asserted defence succeeding but nonetheless it does seem to me that it is incumbent on a defendant moving an application for security for costs to go well beyond mere assertion."*

43. Clarke CJ added that "[p*]utting its cards on the table in that regard is the price which a defendant must pay for seeking the benefit of an order for security."* This was echoed by O'Donnell J in saying that *"[i]f a defendant does not wish to commit itself to the grounds in its defence, it need not seek security for costs" (*paragraph 21). He also agreed with Clarke CJ that it was important that a defendant seeking security should not be allowed to make its case on the basis of bare and unsubstantiated averments.

44. I accept the defendant's summary of the principles to be drawn from these authorities: (a) an applicant for security for costs must establish that it has a prima facie defence to the claim against it by adducing evidence or demonstrating the existence of evidence that would, if accepted, support a substantive defence; (b) a mere assertion by the applicant that he has a defence on the merits is insufficient; (c) a mere assertion that the applicant has a particular defence is insufficient if that assertion is unsupported by any evidence; (d) it is not sufficient for an applicant to simply defer to its defence (though this must be qualified by reference to Ryan's judgment in *Comcast*); (e) it is not, however, necessary for an applicant to prove his defence on the balance of probabilities at the application for security stage; and (f) it is unnecessary for the Court to consider the respective merits of the parties' competing contentions as the Court's concern is whether the applicant has established that it has a prima facie defence to the respondent's claim.

Inability to Pay

45. As is clear from the express terms of section 52, all that is required is that it should appear 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 defence. In relation to the evidence, Barniville J said in *Coolbrook Developments* that the Court must consider all of the material credible evidence and noted that the accounts of the company will be particularly relevant but not necessarily determinative because, while they might present a positive position, they may also raise other questions and the Court may conclude, depending on how those questions are answered, that the picture presented by the accounts is not sufficient to defeat the application.

Special Circumstances

46. That the Court has a discretion to refuse to order security for costs even if satisfied that the defendant has a prima facie defence and that there is reason to believe that the plaintiff will not be able to pay the defendant's costs is clear from the terms of the section 52 itself which provides that the Court may order security. (See *I.E.G.P Management CLG v Cosgrave [2022] IEHC 175*)

47. Certain categories of circumstances have long been accepted by the courts as capable of justifying the refusal of an Order. These, of course, include where the plaintiff's inability to pay the defendant's costs is caused by the defendant's wrongdoing and where there is a public interest in the substantive matter being determined by the Court notwithstanding the plaintiff's inability to pay the costs.

48. In *Connaughton Road Construction Ltd v Laing O'Rourke Ireland Ltd [2009] IEHC 7* Clarke J considered what might be considered 'special circumstances' and cited with approval the summary given by Morris P in *Interfinance Group Ltd v KPMG Pete Marwic (Unreported, High Court, Morris P, 29th June 1998):*

> *"(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 parties' costs if the moving party be successful.*

(2) In the event 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 rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability 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."

49. Clarke J also held at paragraph 2.3 that:

"It follows that security ought to be required unless [the Plaintiff] can show that there are special circumstances which ought to cause the Court to exercise its discretion not to make the order sought. Special circumstances asserted in this case are, perhaps, the most common category of such circumstances where it is asserted that the Plaintiff's inability to discharge the Defendant's costs of successfully defending the action flow from the wrong allegedly committed by the moving party. It is common case, and clear from the authorities, that the onus of establishing that fact rests on [the Plaintiff]. It is also common case, and clear from the authorities (see for example the comments of Finlay CJ in Jack O'Toole Ltd v McEoin Kelly Associates [1986] IR 277 at pp 284 and 285) that the obligation of [the Plaintiff], in those circumstances, is to establish a prima facie case to the effect that its inability to pay the costs of the Defendant, in the event that the Defendant were successful, stems from the wrongdoing alleged in these proceedings."

50. Butler J in *IEGP Management CLG v Cosgrave [2022] IEHC 175* referred to the types of circumstances which might arise and identified two typical categories which *"if established, have been accepted by the courts as justifying the refusal of an order."* She said:

"[t]hese are firstly, cases where the plaintiff's inability to meet the defendant's costs results from the wrongdoing alleged against the defendant in the proceedings and secondly, cases where there is a public interest in having the issues raised in the litigation heard and determined by a court notwithstanding

the potential injustice that may be caused to a successful defendant if it cannot recover its costs…

51. Butler J also went on the refer to more recent developments where it had been made clear that "*…the exercise of the court's discretion in circumstances where the threshold criteria for the grant of security have been met entails a "least risk of injustice" analysis of a type similar to that required in the case of interlocutory injunctions and other interlocutory applications.*

52. For example, that "*least risk of injustice analysis*" was referred to by Clarke CJ in *Quinn Insurance v PWC [2021] IESC 15* where he held:

"[i]n all of those circumstances, it does seem to me that there is at least some merit in considering the overall approach adopted in other cases (such as applications for interlocutory injunctions) where it is necessary to make a decision on limited information at an early stage of the proceedings and where it is clear that there is some risk that injustice on one side or the other will be an unavoidable consequence of the decision made. In those circumstances, it has been said in some of the injunction cases that a court should attempt to fashion an order which minimises the risk of injustice all round. It does seem to me that a similar broad approach is appropriate in the context of applications for security for costs. The simple black and white situation where security in cash for the full sum is either awarded or no security is put in place does not necessarily, and in all cases and in all circumstances, have to represent the only binary choice."

53. He also said at paragraph 7.25:

"[h]owever, even if the full Connaughton Road special circumstance is not established, it does not seem to me that that is the end of the matter. Thereafter the Court can also consider whether the proceedings would in fact be stifled and, in so doing, will have to analyse any assertion put forward on behalf of the plaintiff concerned that it would not be in a position to put up security should it be ordered. It does, however, seem to me that there are, in effect two stages to the process. The first is as to whether inability to pay costs should they be awarded has, on a Connaughton Road basis, been shown prima facie to be due to the wrongdoing alleged. If so, then security should not ordinarily be ordered. If not, then the Court should enter into an inquiry as to the likelihood of the

proceedings actually been stifled if an order is made and take the result of that analysis into appropriate account in its overall assessment."

54. The burden of establishing the existence of special circumstances or where the least risk of injustice lies is on the plaintiff who is unable to pay the defendant's costs. In relation to a claim that the inability to do so arises from the wrongdoing of the defendant he must do so on a prima facie basis: Clarke CJ *Quinn Insurance* and *IEGP Management*.

Quantum of Security for Costs

55. Barniville J in *Coolbrook Developments Ltd v Lington Developments Ltd [2018] IEHC 634* considered the Court's discretion in respect of the quantum of security where he had to consider whether there was a rule or practice that security should be limited to one third of the costs. He said:

> *"The court has a full discretion as to the amount of security to be ordered and will determine the amount by reference to where it believes the justice of the case lies having regard to the balance which it is required to strike between the interests of the corporate plaintiff and those of the defendant who successfully defends the proceedings. I do not believe that discretion is or should in any way be constrained by reference to any rule or practice that one third of the cost should be provided by way of security in the absence of special circumstances"* (paragraph 106).

56. He continued at paragraphs 108 and 109:

> *"…Therefore, the essential question for the court to determine in fixing the amount of the security to be provided is whether it would be just to leave the defendant at risk on costs by not directing the provision of full security or whether it would be just in those circumstances to direct that a lower amount be provided by way of security.*
>
> *…it seems to me that in most cases fixing security for costs at a figure representing approximately one third of the estimated costs would not strke a fair or proportionate balance. Therefore, I do not believe that the so-called 'one-third rule' or 'practice' does or should apply when fixing the amount of security to be provided on foot of an order for costs under s.52 of the 2015 Act. I agree, therefore, with the views expressed by the authors of Delany & McGrath (at*

para. 13-140, p. 599) that following the enactment of s.52 pf the 2014 Act in place of s.390 of the 1963 Act, it is likely that courts will hesitate to depart from the practice which existed under s.390 of requiring full security for costs to be provided in the case of a limited liability company plaintiff, although the change in the wording of s.52 does give the courts considerable flexibility in that regard."

57. He went on to hold that that "*fair, reasonable and proportionate*" balance between the rights of both parties required that the plaintiff should be required to provide the full amount of the estimated costs.

58. Costello J in the Court of Appeal in *Hedgecroft Ltd v Htremfa Ltd [2018] IECA 364* endorsed the principles in *Coolbrook* saying that the argument that setting security at one third of the estimated costs would be "*in the spirit of s.52*" was in her opinion not compatible with an acknowledgement that the section confers complete discretion as to the amount of security to be ordered.

59. Turning then to the circumstances of this case against that framework.

PRIMA FACIE DEFENCE

60. The General Indorsement of Claim is pleaded in broad terms as a redemption suit. The core dispute between the parties is the amount that is properly owing on foot of the underlying facility and the Guarantee and it is clear from the Amended Statement of Claim, the affidavits sworn on behalf of the plaintiff in this application and in the plaintiff's application for an interlocutory injunction, that in fact there is a single core claim made by the plaintiff: that the surcharge interest clause in the underlying facility and the interest charged thereunder is unenforceable. There was discussion during the hearing to the 4% interest clause in the Guarantee but the only surcharge interest actually charged was under the facility itself (clause 4.6.6). The Amended Statement of Claim does plead three elements to the plaintiff's claim: that the amount claimed by the defendant includes surcharge interest which constitutes penal interest (paras 11, 14, 18, 19, 20, 21, 22, 23, 24, 33 and relief 4); that the plaintiff's obligation under the Guarantee is limited to the principal and specifically excludes interest (para 26 of the

Amended Statement of Claim); and the defendant is obliged to provide a full breakdown of computation of the amount being claimed (paras 16, 17, 18, 25, 27).

61. However, it seems to me that the only real issue being pursued by the plaintiff is the first of these.

62. Firstly, while the plaintiff complains (in the paragraphs quoted above) that the defendant has failed to provide a full breakdown of the computation of the amount being claimed, and in fact deposes in paragraph 18, 20 and 43(b) of Ms. Guerin's replying affidavit of the 9th September 2022 that the defendants have failed to provide the plaintiff with a detailed breakdown of the sum being claimed, it seems to me that this is ancillary to the core issue of how much is owing under the facility and Guarantee and how much is accounted for by surcharge interest. More importantly the plaintiff's solicitor in fact stated in open correspondence (by letter of the 28th April 2022 (exhibited to the very affidavit in which the above averment was made) that the breakdown had been provided. They stated:

> "*Despite the Defendant, their servants and/or Agents having been called upon to provide a breakdown of the sum being claimed, it is disappointing that it took the issuance of the within proceedings for your clients to provide the breakdown. Despite this, our client and their advisors have had an opportunity to review the breakdown of interest and principal that has been provided at Tab 8.1 of your client's most recent Affidavit.*
> *It is clear from the figures that your client is claiming the sum of €983,181, two thirds of which alone is based upon 6% surcharge and consequential interest thereon.*
> *…*
> *In circumstances where our client is now in possession of the breakdown of the sum being claimed by our client is now in a position to ascertain the true sum of their liability arising from the guarantee in which they entered into or on behalf of Duneside.*"

63. It is also significant that in the Amended Statement of Claim delivered on the 8th July 2022 two of the reliefs relating to the alleged failure of the defendants to provide a breakdown (relief 5 and 6) were struck through.

64. In light of the express statements of the plaintiff, through its solicitors, and the withdrawal of those two reliefs, the claim for a breakdown of the figures could not be a live part of the plaintiff's claim. Even more importantly, however, is that the entirety of the plaintiff's claim is in fact advanced on the basis that they have the figures and that, on their analysis of those figures, they include the sum of €646,335 surcharge interest which, on their case, is penal in nature. The defendant does not challenge the figures or analysis (I return to this below) and responds by saying that the €646,335 is lawfully charged. Thus, the case, as it is currently advanced, is not about the delivery of a detailed computation but about the status or lawfulness of the amount charged as interest. That seems to be acknowledged by the defendants as Mr O'Dwyer in his grounding affidavit states at paragraph 28 that "*the sole issues herein appears to be (a) the amount of the sum due by the Borrower under the facility, (b) the breakdown of interest, surcharge interest, and principal and (c) the extent to which the guarantor is liable for the respective components of the overall sum claimed".*

65. Secondly, while the plaintiff includes a plea at paragraph 26 of the Amended Statement of Claim which references the fact that the plaintiff's solicitor had highlighted (in correspondence) that the plaintiff's liability under the Guarantee is limited to the capital sum, this is not pleaded as a claim in itself and, in fact, this case has not been advanced at all and seems, to the extent it was ever made, to have entirely fallen away or been subsumed into the core dispute about the enforceability of the surcharge interest. In paragraph 43 of Ms. Guerin's affidavit she responds to paragraph 28 of Mr O' Dwyer's grounding affidavit in the following terms, inter alia:

> *"43. Mr. O' Dwyer summarises the issues arising in respect of the proceedings at §28 of his Affidavit. Specifically, Mr. O' Dwyer avers that the 'sole issues herein appears to be (a) the amount of the sum due by the Borrower under the facility, (b) the breakdown of interest, surcharge interest, and principal and, (c) the extent to which the Guarantor is liable for the respective components of the overall sum claimed". Taking this summary of the case in turn, the Defendants have pleaded in respect of these issues within their Defence the following:*
>
> a. *In respect of the sum due by the Borrower under the facility, the Plaintiff has claimed that they are willing to discharge the principal debt along with simple interest and the reasonable costs of the Receivership. The Plaintiff has maintained that the imposition of surcharge interest is impermissible as a matter of law. To this, the Defendants merely deny that surcharge interest is unenforceable and stoically maintain that €962,053.00 remains due and owing by the Plaintiff (§17 Defence and Counterclaim).*

b. …

c. *In respect of this third core issue identified by Mr. O' Dwyer, akin to §(a), the Plaintiff maintains that surcharge interest is unenforceable, whereas, the Defendant denies the unenforceability of surcharge interest (§17 Defence and Counterclaim). Specifically, the Plaintiff has pleaded at §11 of their Statement of Claim that the sum being claimed by the Defendants includes a suspended surcharge interest of €646,335 or approximately 66% of the total claim. The Plaintiff has further pleaded at §§19-24 that the imposition of surcharge penalty interest is unenforceable."*

66. The significance of this is that the only point made on behalf of the plaintiff in response to Mr O' Dwyer identifying the plaintiff's liability "*for the respective components of the overall sum claimed"* as one of the sole issues was that the surcharge interest was unenforceable. The plaintiff said nothing about limitation of the plaintiff's liability in principal only.

67. Furthermore, the plaintiff, in its written submissions, does not engage at all with the issue of whether or not its liability under the guarantee is limited to the principal pursuant to Clause 5.4 of the guarantee.

68. Finally, Senior Counsel for the plaintiff told the Court at the hearing that the plaintiff accepted that it was liable for the "2% interest", ie the ordinary interest under the facility letter. The plaintiff is therefore contending that its liability is limited to the principal.

69. My view that the sole claim made on behalf of the plaintiff relates to the enforceability of the surcharge interest is reinforced by a consideration of the affidavits filed on behalf of the plaintiff in this motion and in the interlocutory application and of the submissions made in this motion. I do not propose to recite each relevant paragraph of the affidavits but they include paragraphs 14, 17, 19, 26, 31, 43, 45 and 46. The plaintiff's written submissions make no reference at all to the question of the limitation of the plaintiff's liability. The entire focus (at least in relation to the question of the case being brought and the prima facie defence) is on the surcharge interest issue. The opening paragraph of the submissions states "*…The only reason these issues remain before this court at all – is because the Defendants are persisting in wilfully, and unlawfully, inflating the redemption – its posited ransom price, by a multiple of three."* In paragraphs 10 and 11 they submit:

"10. The core issue to be determined in respect of these proceedings is the enforceability of penalty, surcharge interest.

11. The within proceedings were commenced by the Plaintiff, Guarantor against the Defendants arising from their insistence on seeking redemption inclusive of penalty, surcharge interest. The background to the within proceedings have already been set out in Ms. Guerin's Affidavit which is before the Court."

70. They went on to submit at paragraph 21:

"…The core issue for determination in these proceedings is the enforceability, or otherwise of surcharge, penalty interest. The Plaintiffs submit that this issue has been well ventilated in the Superior Courts, and the Defendants are not entitled, as a matter of law, to seek redemption of a sum including penalty interest. To this, the Defendants simply deny that such penalty interest is unenforceable. This does not constitute a positive Defence, nor does it constitute a meaningful defence to the Plaintiff's plea."

71. Thus, it seems to me that the sole claim advanced on behalf of the plaintiff is that the defendant is not entitled to claim the 6% surcharge interest. I must assess whether the defendants have a prima facie case to the claim that is in reality being brought by the plaintiff. The defendants also raise two overarching points of defence which I consider below.

72. As set out above, clause 4.6.6 of ACC's general conditions provides that "*Any sum payable by the Borrower under a facility which is not paid on the due date shall bear interest at 0.5% per month above the rate otherwise applicable to the Facility from the due date to the date of actual payment.*" The Guarantee also provides at Clause 1.2 that the "*Interest Rate"* for the purpose of the Guarantee means "*4 per cent per annum above the Bank's cost of funding the relevant amount from whatever source the Bank may select upon such days and terms as the Bank may from time to time determine."* It was expressly stated during the course of the proceedings that interest had not been charged under this provision of the Guarantee (this was in the context of clause 5.4). However, it is relied on by the defendants in their Counterclaim (though not expressly in their Defence) and was the subject of submissions at the hearing so I address this below.

73. The plaintiff claims that the amount of surcharge interest is approximately €646,335 or 66% of the total claim. The surcharge interest referred to is the 6% rate referred to under clause 4.6.6. The plaintiff's analysis of the figures is set out of paras 8, 11 and 13 of the Amended Statement of Claim. In paragraph 11 they say that:

> "*The sum demanded by the first Defendant by their statement furnished was €972,656 (again rounded). This sum included, and still includes, a suspended surcharge interest of €646,335, approximately 66% of the total claim upon a sum of €326,321 which included principal and interest (previously rounded).*"

74. They plead in paragraph 16 that they "*tendered*" €330,000 in satisfaction of and release of the fixed charge.

75. The primary point made by the plaintiff is that the surcharge interest is penalty interest and is unenforceable. The plaintiff pleads in paragraphs 19 – 24 of the Amended Statement of Claim:

> *"19. The Plaintiff contends that the imposition of surcharge and/or penal interest is impermissible in accordance with well settled jurisprudence of the Courts. On the basis of the Plaintiff's own calculations, they estimate that circa two thirds of the sum being claimed by the Defendants constitutes penalty interest that is being sought in terrorem. The precise amount of surcharge and/or penalty interest is circa €646,335. The Plaintiff reserves the right to amend this figure upon receipt of a proper breakdown of the sum being claimed from the Defendants. To date, the Defendants have failed, refused and/or neglected to provide such breakdown.*
>
> *20. The posited surcharge of 0.5% per month = 6% per annum is in addition to the original facility letter interest rate stipulated, viz "Euribor +2%." Such 6% surcharge was never at any time in 2004, that is to say neither June or October 2004, and especially in mere General Conditions across the board for every borrowing costumer of ACC Bank plc "a genuine pre-estimate of the probable loss by reason of the breach."*
>
> *21. The 6% interest penalty surcharge of approx. €646,335 still being claimed is an extortionate charge unconscionable in amount in comparison with the greatest loss that could conceivably be proven to have occurred to the Defendants, or their predecessors in title to the loan. This arises from the fact that the surcharge and/or penalty amount being claimed is circa 66.5% of the ransom sum sought by the Defendants.*

22. It is this legally unenforceable 6% surcharge by which the Defendants wrongfully (well knowing it to be legally impermissible) still continue to inflate the proper redemption by a multiple of no less than 3.

23. The surcharge and/or penalty amount still being claimed consists only in paying a sum of money, the said surcharge sum being greater than the sum which remains rightly due for redemption in full.

24. For the avoidance of doubt, the Plaintiff expressly pleads that it is impermissible for the Defendants and/or their predecessors in title to have imposed such surcharge and/or penalty interest. The Plaintiff therefore seeks a declaration from this Honourable Court that such surcharge and/or penalty interest is not recoverable by the Defendants and ought to be deducted from the sum being claimed."

76. The defendant pleads:

"12. It is admitted that ACC charged interest on the Duneside Services Limited loan pursuant to the terms and conditions of the loan, including for a period further interest pursuant to clause 4.6.6 of the general terms and conditions but it is denied that any interest charged was penal interest as alleged in the Statement of Claim or at all.

…

17. It is denied that the imposition of surcharge interest is impermissible in accordance with well settled jurisprudence of the Courts as alleged by the Plaintiff or at all. It is denied that any of the sum claimed by the Defendants constitutes a penalty interest.

18. It is denied that any amount being claimed by the Defendants of the Plaintiff is being claimed of the Plaintiff in terrorem.

19. It is denied that the precise amount of surcharge and/or penalty interest is circa €646,335.

…

21. It is denied that any of the interest claimed by the Defendants is an extortionate charge unconscionable in amount in comparison with the greatest loss that could conceivably be proven to have occurred to the Defendants or

their predecessors entitled to the loan by reason of the matters pleaded in paragraph 21 of the Statement of Claim or at all.

77. In *ACC Bank v Friends First [2012] IEHC 435* Finlay Geoghegan J had to determine whether ACC Bank was entitled to charge *"additional interest at 6% per annum or 0.5% per month on the amount of the Facility, including capitalised interest outstanding on 21st May, 2009, and thereafter.."* pursuant to a clause in ACC's general conditions which provided that on a default the borrower shall pay interest from the date of default to the date of actual payment at 0.5% per month above the rate otherwise applicable to the facility, i.e. similar in substance to the provisions at issue in this case.

78. There was no dispute that there was a default (as in this case) and Finlay Geoghegan J at paragraph 78 identified the issue as *"…whether or not the additional rate of interest of 6% per annum or 0.5% per month referred to as the surcharge rate is or is not a penalty. Friends First contend that it is a penalty. ACC contends that it is a contractual term of an agreement entered into between two equal parties to which effect should be given."*

79. Finlay Geoghegan J considered the law in relation to how the courts will determine whether a term in a contract is or is not a penalty clause and applied those principles to the facts of that case by reference to the expert evidence given in the case. In relation to the applicable principles she said:

> "*79. It is common case that the well-known principles according to which the courts in this jurisdiction will consider whether a term in a contract which provides for the payment of a sum of money on a default or breach of the contract is or is not a penalty are those set out by Dunedin L.J. in Dunlop Pneumatic Tyre Company Ltd. v. New Garage and Motor Company Ltd. [1915] AC 79, at p. 86, see Pat O"Donnell & Co. Ltd. v. Truck & Machinery Sales Ltd. [1998] 4 I.R. 191, per Barron J. at p. 214. In summary, they require the Court to determine whether or not the additional sum payable is a genuine pre-estimate of the probable loss by reason of the breach. The principles apply more generally than to the imposition of default or surcharge interest."*

80. She then considered the judgment of Colman J in the High Court of England and Wales in *Lordsvale Finance Plc v Bank of Zambia [1996] Q.B 752* and whether it signified a departure from the *Dunlop* principles and concluded:

> *" 81. The judgment of Colman J. was considered by the Court of Appeal in Murray v. Leisureplay plc. [2005] EWCA Civ. 963. Arden L.J. and Clarke L.J. referred with approval to the approach of Colman J., the latter doing so as the 'modern approach' to Lord Dunedin's test in Dunlop Pneumatic Tyre v. New Garage and Motor Company Ltd., [1915] A.C. 67, and stated at para. 106:*
>
> > *'It is perhaps no longer entirely appropriate to ask whether a payment on breach was stipulate in terrorem of the offending party but, as Colman J. put it in the Lordsvale case at p. 762G . . .*
> >
> > > *"whether a provision is to be treated as penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into, the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if a breach occurred".'*
>
> *82. In this jurisdiction, the High Court is bound by the applicable principles in accordance with the Dunlop Pneumatic Tyre Company case as determined by the Supreme Court [in Pat O' Donnell & Co Ltd v Truck and Machinery Sales Ltd]. However, I respectfully agree with Clarke L.J. in Murray v. Leisureplay [2005] EWCA Civ. 963, that the decision of Colman J. in Lordsvale Finance v. Bank of Zambia, [1996] Q.B. 752, may not be a departure from such principles, but rather, a modern application of them to the banking sector…*

81. Finlay Geoghegan J also went on to consider whether the approach of the Canadian Supreme Court - that the courts should be unwilling to interfere with the terms of a contract absent oppression – should be adopted and rejected that the courts were moving away from the position set out in *Dunlop* and adopting a broader discretionary approach.

82. Finlay-Geoghegan J then identified the question arising from these principles in the following terms:

> *"84. The onus of establishing that the imposition of a surcharge interest at 6% pursuant to clause 2.7.1 of the General Conditions is a penalty rests on Friends First. The parties to this agreement are both financial institutions capable of protecting their own commercial interests. The question to be determined, in accordance with the applicable principles in this jurisdiction i.e. Dunlop Pneumatic Tyre Company, is whether it represents a genuine pre-estimate of the bank"s likely loss upon default at the time the Facility Letter was agreed i.e. November, 2007. Friends First contends that it cannot be so considered on the evidence adduced and that the only reasonable construction is that it was intended as a deterrent against default in the payment of interest or principal. The onus is on Friends First to so establish if it is to be considered a penalty."* [emphasis added]

83. I return to the conclusion reached by Finlay Geoghegan J on the evidence because it is directly relevant to whether the defendants have established a prima facie defence but the applicable principles on the question of what constitutes a 'penalty clause' were also considered by the High Court and the Court of Appeal in *Sheehan v Breccia*. In the High Court (*[2016] IEHC 67*) It was argued on behalf of the plaintiff that the applicable law was as set out in *ACC Bank v Friends First* and the Court should follow it as having been decided on similar facts, being of recent origin and on the basis of the principles of judicial comity enumerated *In the Matter of Worldport Limited (In Liquidation) [2005] IEHC 189*. It was argued on behalf of the defendant that the Court should take a different approach and sought to distinguish *ACC Bank*. It was argued that the bargain that the parties had made should be respected, provided that the surcharge interest is not extravagant or unconscionable, because it is commercially justifiable. The defendant argued that *ACC Bank* was incorrectly decided because Finlay Geoghegan J had not afforded the defendant the "*latitude"* in respect of the surcharge rate that had been referred to by Barron J in the Supreme Court in *Pat O'Donnell & Company Ltd v Truck and Machinery Sales Ltd* when he adopted the principles in *Dunlop*. They also relied on a judgment of the UK Supreme Court given the day before the closing submissions were made in *Breccia – Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis [2015] UKSC 63*.

84. In light of the central role which the argument that *ACC Bank* was incorrectly decided because the necessary "*latitude*" referred to by Barron J played in *Breccia*

(particularly on the appeal) it is worth recalling what Barron J said. Barron J held that the principles to be applied in this jurisdiction are those set out in *Dunlop* and then quoted the famous passage from page 86 of Dunedin LJ's judgment. He also quoted from page 87 of Dunedin LJ's judgment where Dunedin LJ said:

> *"(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in Clydebank case).*
>
> *(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which sought to have been paid".*

85. Barron J went on to say:

> *"These two instances are quite different. In the first case, the damages would be uncertain and there may genuinely be a difficulty in a pre-estimate of the damage which would occur in the event of breach. A latitude is allowed, but even the sum agreed must not be extravagant or unconscionable in relation to any possible amount of damages that could have been within the contemplation of the parties at the time when the contract was made. If it is, it is regarded as a penalty, and the plaintiff is left to prove the actual damage."* [emphasis added]

86. Haughton J conducted a very detailed review of these arguments and of the authorities between paragraphs 75 and 96 of his judgment and ultimately followed Finlay Geoghegan J's approach in ACC Bank.

87. He said at paragraphs 118 to 123:

> "*118. It seems to me that, unless ACC can be distinguished, this court should, on the basis of Worldport, follow the decision of Finlay Geoghegan J. and approach this aspect of the case by determining whether the surcharge is a genuine pre-estimate of loss in the event of default. In my opinion the UK Supreme Court has now taken a divergent view in Cavendish. That decision gives even greater primacy to freedom to contract and the bargain reached between parties; it*

eschews the test of whether a clause is a genuine pre-estimate of loss in favour of a test of whether it imposes a detriment out of all proportion to the legitimate interest of the innocent party in the enforcement of the primary obligation. On the application of such a test there is no doubt that Anglo had a legitimate interest in ensuring performance by the plaintiff of his primary obligations under the Facility Letters. If the court accepted Mr. O'Malley's evidence that the expected loss could be in a range that far exceeds 4%, then under the Cavendish test it could well be that clause 5 would properly be regarded as proportionate and therefore lawful.

119. Cavendish is a very recent decision, so could not have been considered in ACC. However there is no doubt but that Finlay Geoghegan J. in ACC reviewed the existing significant case law on penalty clauses – including lengthy consideration of the decision of Colman J. in Lordsvale which in itself reviewed the law up to 1996 (and from which the UK Supreme Court took its lead in Cavendish in switching the emphasis to commercial justification). Finlay Geoghegan J. then applied the law as she found it to default interest provisions in this jurisdiction. Her decision was handed down on 26th October, 2012 and is therefore recent in origin.

120. As to counsel's suggestion that in failing to advert to or apply the "latitude' referred to by Barron J. in Truck and Machinery Sales the learned judge in ACC fell into error in addressing the question of pre-estimate in circumstances where the expected loss may be difficult to predict, I cannot agree. Truck and Machinery Sales was clearly argued before the court in ACC and cited in the judgment, and no suggestion was made before me that the argument in ACC was deficient."

88. This decision was appealed to the Court of Appeal. Initially Breccia sought to rely on the change of approach in England and Wales in *Cavendish* but ultimately focused on an argument about the correct application of the existing law in Ireland. In particular, they relied on the argument that the judgment in *ACC Bank* incorrectly applied the *Dunlop* principles, as adopted in this jurisdiction in *Pat O' Donnell Ltd v Truck and Machinery Sales Ltd*, in the question identified in paragraph 84 of Finlay Geoghegan J's judgment: "[*T]he question to be determined, in accordance with the applicable principles in this jurisdiction, i.e., Dunlop Pneumatic Tyre Company, is whether it represents a genuine pre-estimate of the bank's likely loss upon default at the time the Facility Letter*

was agreed…" In particular it was argued that the Court fell into error in this paragraph in failing to advert to the *'latitude'* that Barron J in *Pat O'Donnell Ltd v Truck and Machinery Sales Ltd* indicated should be applied in determining whether a clause is a penalty where it is genuinely difficult to pre-estimate the damage that could arise on breach.

89. Finlay Geoghegan J gave judgment on behalf of the Court of Appeal on this point and stated that in light of this argument it was "*necessary to reconsider the question as to what are the principles set out in Dunlop which have been adopted by the Supreme Court in Pat O'Donnell and are binding on this Court.*" She then considered the judgment in *Pat O' Donnell Ltd* v *Truck and Machinery Ltd* in paragraphs 25 to 29 and held at paragraphs 34 to 45:

> *"34. To return to the question as to the proper approach of a court in accordance with the Pat O'Donnell and Dunlop principles where it is contended that a contractual provision which provides for the payment of a sum of money upon breach of contract is a penalty. As already stated the principles indicate a binary approach. The clause is either agreed liquidated damages or, if it is not, then it is construed as being a penalty because its functional effect is not to compensate by payment of agreed liquidated damages, rather it is a clause whose functional effect is to deter the party from committing a breach of the agreement.*
>
> *35. Whilst I accept that it is probably more accurate to state that the question the Court must determine is whether the contractual provision is properly an agreement for the payment of liquidated damages, that question in turn normally falls to be decided by determining whether the clause is to be construed as a genuine pre-estimate of loss to be suffered by the innocent party by reason of the relevant breach of contract. Those questions must be determined by construction of the relevant clause of the contract. As was stated by Lord Dunedin in 1915, this question is to be decided upon the "terms and inherent circumstances of each particular contract judged as of the time of the making of the contract…" The principles according to which the courts will now construe a commercial contract such as that at issue are those set out by the Supreme Court in Analog Devices BV v. Zurich Insurance Company [2005] IESC 12, [2005] 1 I.R. 274.*
>
> …

37. As appears from the opinions of Lord Dunedin, Lord Parker and Lord Parmoor quoted by Barron J. the essential question of construction which must be determined by the Court is whether the clause is to be construed as an agreement for the payment of liquidated damages. In construing such a clause one of the factors a court may look at is the potential loss and damage which the innocent party may suffer by reason of the breach to which the payment relates. Where a court is considering that question then if there is a probable variation in the loss and damage to be suffered by the innocent party and the Court considers that there may genuinely be a difficulty in a pre-estimate of the damage suffered in the event of breach then, as indicated by Barron J., a latitude should be allowed in determining the question as to whether the clause is an agreement for the payment of liquidated damages. The relationship between the sum agreed to be paid and the probable or possible loss of the innocent party, envisageable by the parties at the time the contract was made is amongst the matters relevant to the construction issue.

38. The authorities further indicate that if the sum agreed to be paid is - as was stated by Lord Parker - "in excess of any actual damage which can possible, or even probably arise from the breach the possibility of the parties having made a bona fide pre-estimate of damages has always been held to be excluded…". It is correct to say that in such circumstances or, where as put by Lord Parmoor, if the amount "described in the contract as liquidated damages … is extravagant or unconscionable in relation to any possible amount of damages that could have been with the contemplation of the parties when the contract was made" then it will be considered to be a penalty.

39. However, it does not follow in my view that a party contending that the clause is a penalty must establish that either of the above thresholds is met. The relationship between probable damages and the sum agreed to be paid is a relevant factor and part of the circumstances which the Court must take in to account when construing the contract. It is, however, not a rigid threshold which must be met nor is it the only matter to be taken into account when construing the probable functional effect of the clause from the terms of the contract in its relevant factual matrix.

40. Accordingly, it appears to me that insofar as I stated at para. 79 of the judgment in ACC Bank that the principles in Pat O'Donnell adopting those in Dunlop "require the Court to determine whether or not the additional sum is

payable is a genuine pre-estimate of the probable loss by reason of the breach" that it may be more accurate to have stated that they "require the Court to determine whether or not the additional sum payable is a genuine agreement for the payment of liquidated damages". That question in turn, however, at least in part, may depends upon whether or not the additional sum payable represents in this instance, a genuine preestimate of the probable loss of Anglo by reason of the potential breaches of contract to which clause 5 of the general conditions refer. It is not, however, the only factor and it also appears that where the evidence establishes that such loss is uncertain, then a latitude is allowed to the parties in considering the question as to whether the clause is a genuine pre-estimate of a sum to be paid by way of liquidated damages the purpose of which is to compensate the innocent party for loss and damage.

41. Whilst I accept that there may have been some shorthand used by me at paras. 79 and 84 of the judgment in ACC Bank, it is also a shorthand that has been used elsewhere. In ACC Bank much reliance was placed on the judgment of Colman J. in the High Court in England in Lordsvale Finance plc v. Bank of Zambia [1996] QB 752. At p.763 he stated: "It is perfectly true that for upwards of a century the courts have been at pains to define penalties by means of distinguishing them from liquidated damages clauses. The question that has always had to be addressed is therefore whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss. That is because the payment of liquidated damages is the most prevalent purpose for which an additional payment on breach might be required under a contract. However, the jurisdiction in relation to penalty clauses is concerned not primarily with the enforcement of inoffensive liquidated damages clauses but rather with protection against the effect of penalty clauses. There would therefore seem to be no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could in the circumstances be explained as commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach." [emphasis added]

42. In a context where this Court continues to apply the traditional binary approach which follows from Pat O'Donnell and Dunlop for the reasons already explained then the question has, as is stated by Colman J., always been considered to be whether the alleged penalty clause "can pass muster as a genuine pre-estimate of loss". I would also like to draw attention to what was

termed "unsatisfactory distinctions between a penalty and pre-estimate of loss" by Lord Neuberger and Lord Sumption at para. 31 of their joint judgment quoted above.

43. In Durkan New Homes v. Minister for the Environment, Heritage and Local Government [2012] IEHC 265, [2014] 2 I.R. 440, Charleton J. in the High Court referred to an extract from Treitel – The Law of Contract (13th ed., 2011) at para. 20.131 in the context of the principles set out by Lord Dunedin in Dunlop. The passage from Treitel cited with apparent approval by Charleton J. and again set out with apparent approval by the Supreme Court per McKechnie J. in Launceston states:- "A clause is penal if it provides for 'a payment of money stipulated as in terrorem of the offending party', or, as it has been put more recently, if the contractual function of the clause is 'deterrent rather than compensatory'. If, on the other hand, the clause is a 'genuine' attempt by the parties to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. This is so even though the stipulated sum is not precisely equivalent to the injured party's loss…"

44. I would respectfully agree that expressing the question to be determined as to whether "the clause is a genuine attempt by the parties to estimate in advance the loss which will result from the breach" may be a better way of putting the question. This approach permits the courts to uphold a clause which is a genuine attempt by the parties to estimate in advance the loss which will result from the breach but where by reason of the uncertainty of the loss it may be a sum which differs from the actual loss anticipated.

Application of principles to Clause 5 of the General Conditions

45. For the reasons set out I do not consider that there was any error on the part of the trial judge in applying the principles set out in Pat O'Donnell by adoption of those in Dunlop in determining the penalty issue by a consideration of the question as to whether the surcharge interest provided for in clause 5 of the general conditions is a genuine pre-estimate of the probable loss to Anglo by reason of the relevant breach of contract. Subject to the reservation of "shorthand" already set out I also do not consider he was in error in following ACC Bank. The essential question to be determined is whether the clause in question properly construed is an agreement for the payment of liquidated damages. The courts have traditionally approached that question by asking the

question as to whether the sums stipulated are a genuine pre-estimate of the loss to the innocent party which would result from the relevant breach."

90. The point of dealing with these judgments at such length is to highlight the detailed consideration that has been given in very recent times to what is the correct approach to determining whether a clause is a penalty clause. Thus, subject to the caveats entered by Finlay-Geoghegan J in relation to "*short-hand*", the essence of the approach in ACC Bank has been approved by the Court of Appeal following detailed argument in both the High Court and the Court of Appeal. The question of whether a surcharge interest clause is a penalty clause is answered by determining whether the clause properly construed is an agreement for the payment of liquidated damages and the courts have traditionally approached that by asking whether the sums provided for in the clause are a genuine pre-estimate of the loss of the innocent party which would result from the default.

91. This is particularly significant because of the decision on the facts in *ACC Bank.*

92. In paragraphs 85 - 88 Finlay Geoghegan J considers the detailed evidence called on behalf of the parties (it is not necessary to recite all of that evidence) and concludes at paragraphs 89 to 91:

> "89. *I have concluded, having regard to the evidence of Mr. Fennelly and Mr. Bowen, that the 6% surcharge interest cannot be considered as a reasonable pre-estimate in November, 2007 of the likely loss of ACC if the Facility was to go into default such as to trigger the applicability of the 6% per annum pursuant to clause 2.7.1 of the General Conditions. My reasons for doing so are as follows. The 6% rate is set in the General Conditions and, as a matter of contract, applies where there is default in the payment, not only of principal but also of any sum for interest, costs or charges. It applies from the date the default occurs. I accept the evidence of Mr. Fennelly that it is not possible to make a generic pre-estimate of the cost of default for the purposes of Basel II at the time the Loan was entered into. I accept, as a matter of probability, if a loan goes into default (certainly if it remains in default for a period of 90 days), there will be increased costs to the bank. However, on the evidence, it appears that those costs will depend upon the nature of the default. Whilst Mr. Bowen expressed an expert view that 6% is a minimal reflection of the incremental costs of the type of defaults in relation to this Facility, it is disputed by Mr. Fennelly and Mr. Bowen did not support it by evidence. I cannot accept this*

view, having regard to the variety of defaults which may trigger the application of the surcharge of 6% pursuant to clause 2.7.1 of the General Conditions.

90. I am further influenced by the size of the increase and relationship between the agreed interest rate of Euribor plus 2% which in November, 2007 on the evidence, was an aggregate of 6.68% and the proposed increase of 6%. It increases the agreed margin in the Facility Letter by a factor of three or almost doubles the applicable interest rate in November, 2007. In accordance with clause 2.7.1, if enforceable, this is permissible once even one interest payment is in arrears. It cannot come within the category of minimal increase accepted as being enforceable by Colman J in Lordsvale Finance v. Bank of Zambia, [1996] Q.B. 752. Further, even if it is permissible for the High Court in this jurisdiction to follow the approach of Colman J., there is not in this case evidence which permits me to conclude that an increase of 6% in the rate of interest agreed in 2007 for the variety of defaults envisaged in clause 2.7.1 of the General Conditions is commercially justifiable.

91. *It follows from my conclusion that this cannot be considered as a genuine pre-estimate by ACC of its loss or the additional costs to it of providing capital in the event that there were to be a default. Hence, clause 2.7.1 of the General Conditions incorporated in the Facility Letter should be construed as a deterrent against default and a penalty. It follows that ACC is not entitled to recover surcharge interest herein.*"

93. Haughton J reached a similar conclusion on the facts and evidence in *Breccia* and was upheld on appeal.

94. Thus, there is a relatively recent judgment of the High Court *(ACC Bank v Friends First*) in which it was held that a very similar provision (if not identical in substance) in the applicable ACC general terms and conditions constituted a penalty clause and was therefore unenforceable. The principles in that judgment were followed by Haughton J in *Breccia* and he held that a provision which provided for a 4% surcharge interest was an unenforceable penalty. The Court of Appeal approved the approach in *ACC Bank*, albeit with some caveats in respect of the language used in *ACC Bank*. In light of the decision in *ACC Bank* (and it is significant that it concerned a similar, if not, identical provision) it seems to me that I am compelled to conclude that the defendants have not established a prima facie defence to the claim that the surcharge interest under clause 4.6.6 is penalty

interest, absent something new and, in particular, some indication of the evidence upon which the defendants will seek to rely in arguing that clause 4.6.6 provides for the payment of liquidated damages.

95. It is, of course, important to note that the decision in *ACC Bank* was based on the evidence in that case, which is set out at length in the judgment. It may be that the defendant will call evidence which will satisfy the trial judge that clause 4.6.6 is a "*liquidated damages provision or a genuine pre-estimate of the loss which the plaintiff might suffer*" but no evidence to that effect has been adduced to date and in those circumstances there is no basis upon which I can conclude that any different conclusion can be reached about the clause in this case. The defendant does, of course, plead that "*…it is denied that any interest charged was penal interest as alleged in the Statement of Claim or at all*" and that:

> *"17. It is denied that the imposition of surcharge interest is impermissible in accordance with well settled jurisprudence of the courts as alleged by the Plaintiff or at all. It is denied that any of the sum claimed by the Defendant constitutes a penalty interest.*
> *18. It is denied that any amount being claimed by the Defendant of the Plaintiff is being claimed of the Plaintiff in terrorem*"

96. However, as noted above, the authorities make clear that mere assertions are not sufficient. The defendant seeking security for costs must, at the very least, demonstrate the existence of evidence upon which the defence will be grounded. As it was put by Clarke CJ in *Quinn Insurance "…it is not unreasonable to require a defendant… to put forward its defence in sufficient detail to enable the Court… to scrutinise the extent to which a bona fide defence has been truly established…".* In light of the decision in *ACC Bank* there is a particular onus on the defendant to show that they will be able to adduce evidence which might allow a court to reach a different conclusion. No such evidence has been adduced. Nor is there any indication of what evidence might be called.

97. I have considered whether the possibility that the Supreme Court might reconsider the *Dunlop* principles, as adopted in *Pat O'Donnell Ltd v Truck and Machinery Sales Ltd*, in this or in some other case might allow it to be said that the defendant had a prima facie defence. I have done so, not least because it was submitted on behalf of the defendants that the issue is not closed, that there is academic commentary in respect of

the correct approach and that the defendants therefore have an argument on this point. Further, as noted above, Finlay Geoghegan J stated in paragraph 21 of *Breccia* that she did not wish to be taken as indicating that reconsideration of the *Dunlop* principles as adopted in *Pat O' Donnell & Co. Ltd. v. Truck & Machinery Sales Ltd. [1998] 4 I.R 191* in the 21st century may not be desirable but that this was a matter for the Supreme Court. In saying that she also referred to a statement by McKechnie J in *Launceston Property Finance Ltd v Burke [2017] IESC 62* in which he notes the new UK approach (in light of *Cavendish*) and, while expressing the obiter view that he was not immediately convinced that any change to the test is necessary or that the route taken by the UK Supreme Court is necessarily superior, said that its debate should be left over for a more suitable case. I do not believe that the possibility of a change of approach means that there is a prima facie defence on this point. The Court must apply the law as it stands. Any suggestion that the possibility that the Supreme Court might alter the law at some unknown point in the future or even that this defendant would intend to bring this matter to the Supreme Court for the purpose of asking it to do so would be speculative and would not amount to a prima facie defence. It may allow the Court to conclude that the defendant has an arguable case but, as held by Hogan J in *Pagnell Ltd* ("…*the prima facie defence requirement imposes a higher requirement on a Defendant than that required, for example, to establish… a defence to an application for summary judgment where it is merely necessary to show that the defence is simply arguable…"),* it is not sufficient to simply establish an arguable case.

98. I am, therefore, not satisfied that the defendant has established a prima facie defence to the plaintiff's claim in relation to the surcharge interest under clause 4.6.6. I feel I must emphasise that this does not constitute a final finding that the surcharge interest constitutes an unenforceable penalty clause, nor should it be interpreted as such. That is a matter to be determined at trial on the basis of the evidence that is called. The Court's function at this stage is to determine whether, on the basis of the evidence currently made available, a prima facie defence to the claim that clause 4.6.6 constitutes a penalty clause has been established.

99. I must also say that in the event that I am incorrect as to the actual parameters of the plaintiff's case and that it is proposed to pursue a claim in respect of the provision of a breakdown of amount due and/or in respect of the question of the limitation of the plaintiff's liability under the Guarantee the defendant must be free to renew its application for security for costs. It has required a degree of analysis of the papers to identify precisely what the plaintiff's case is and the issue of the plaintiff's liability under

the Guarantee for the ordinary interest was only clarified through Senior Counsel at the hearing.

100. As noted above, two other crucial aspects must be considered, which are, in fact, the defendants' overarching points of defence. The first is that while the plaintiff has admitted that there is a sum owed to the first-named defendant, that sum has not been paid. The second point has two limbs: (i) the amount claimed by the defendant to be owed includes ordinary interest and not just surcharge interest or, if surcharge interest is taken out, ordinary interest would still be chargeable, and (ii) if the 6% surcharge interest under clause 4.6.6 is not allowed the first-named defendant would be entitled to charge 4% interest under the Guarantee; and so, even if the plaintiff is correct that the surcharge interest in unenforceable, the amount owing is more than the sum calculated by the plaintiff.

101. Takin these in turn, the defendants' fundamental point is that it is beyond dispute that there is an amount due and owing, that the plaintiff accepts that; and that while the plaintiff has referred to its willingness to pay the amount which it believes it owes, it has not in fact paid even that amount. On that basis the defendant says that it has an unanswerable defence and not just a prima facie defence. They state at paragraph 21 of the written submissions:

> *"It is common case that Woodstock executed a guarantee supported by a legal charge over the Property at issue and that Pepper now owns same. Woodstock admits that €309,089.00 is unpaid following demand put (sic) disputes that any further sum is payable to Pepper. The terms of the loan, guarantee and particulars of debt at issue are set out in writing. On the undisputed facts alone it is submitted there is a prima facie defence to the Plaintiff's claim for redemption of its mortgage and vacation of the charge while an admitted charged debt remains unpaid."*

102. Essentially, this point is that where the plaintiff admits the amount of €309,089 that amount should be paid and that in circumstances where this amount is not paid the defendant must have a defence to the claim for redemption. This is a point which has very considerable merit in the context of a claim for summary judgment, where a creditor claims an amount and the debtor admits that part of that amount is owed but will not pay that amount because there is a dispute about the balance.

103. However, I do not think it is well-founded in the current context. The first relief sought in the General Indorsement of Claim is an "*Order providing for Redemption of*

Folio CE21169 Co Clare upon tender of the principal or ***proper sum in fact due***." [emphasis added]. Other reliefs are directed towards trying the issue of how much is in fact due and owing in order to redeem the mortgage. If it were the case that the defendants accepted that the amount which was due was €309,089 but the plaintiff refused to pay over the amount then the defendant's point would be well made.

104. Thus, in my view, it is not a prima facie defence to the plaintiff's claim for redemption of the mortgage "*upon tender of the principal or proper sum in fact du*e" to say that the plaintiff admits that it owes €309,089 but has not paid it, when the defendant does not accept that this is the amount due and does not accept that it would be sufficient to redeem the mortgage. The first issue which will have to be resolved by the Court will be the proper redemption sum and the Court will not be able to make an Order for redemption until that amount is ascertained. The calculation of that amount is, of course, the core dispute in the proceedings. I do accept, however, that the non-payment of an amount which is admitted to be owed would be a matter to be taken into account in the exercise of the Court's discretion

105. In relation to the second point, as noted above, the defendants submit that even if the 6% under clause 4.6.6 is held to be unenforceable the sum of €646,335 also includes ordinary interest or they would be entitled to ordinary interest in place of the surcharge interest and or would be entitled to 4% under the Guarantee and, therefore, the amount due would be greater than the amount identified by the plaintiff. On the basis of the 4% rate the amount owing would be €594,193.36. In fact the issue about 4% interest rate is not expressly pleaded in the Defence and is only raised in the Counterclaim. Nor was there any detailed consideration during the hearing as to whether the 4% rate might be a penal provision (though Counsel for the defendants did address the Court on the significance of the difference between primary and secondary clauses to the issue). Leaving those issues aside, it seems to me that there are fundamental evidential difficulties in relation to these points in the context of what the authorities quoted above say about what is necessary to establish a prima facie defence. Firstly, the defendants have placed no evidence before the Court that the plaintiff's calculation that €646,335 is surcharge interest is wrong, ie. that the figure contains ordinary interest as well as surcharge interest. Indeed, the contrary impression is formed by paragraph 30 of Mr. O'Dwyer's grounding affidavit where he says "*...It is clear that sufficient particulars are in the possession of the Plaintiff such that Ms. Guerin is in a position to assert that surcharge interest of 6% per annum in addition the contracted tracker interest rate has been charged since "as early as 2009", and that the Plaintiff has been able to calculate the quantum of what Ms. Guerin refers to as a "suspended surcharge interest of*

€646,335". Ms. Guerin also appears to have sufficient information to be in a position to assert that the principal sum on which the interest has been charged is €326,320.84." Of course, Mr. O'Dwyer was addressing the question of whether the plaintiff had sufficient information, but the defendants could easily have said through Mr. O'Dwyer at that point that Ms. Guerin was in fact wrong in her analysis of the figures – that €646,335 was surcharge interest. They did not do so.

106. Secondly, while it may be that some of the overall amount claimed to be owed is represented by ordinary interest, no evidence has been adduced by the defendant as to what that figure is and therefore what the debt or redemption figure would be if surcharge interest was stripped out. Similarly, there is no evidence of what the amount would be if the 6% surcharge interest were replaced by ordinary interest.

107. Mr. O'Dwyer exhibited a "*breakdown of the history of the loan facility*" which he says "*includes particulars of all payments and/or credits allowed and all interest and surcharge interest applied to the account*" in his affidavit in the injunction proceedings (though not in his affidavit dealing with this application). Mr. O'Dwyer does not say who prepared this document but I presume it was prepared by or on behalf of one of the defendants. Leaving these issues aside, it does not seem to me that this is sufficient to discharge the obligation on the defendants, as applicant for security for costs, of putting sufficient detail forward to enable the Court to scrutinise the extent to which a bona fide defence has been established (Clarke CJ in *Quinn Insurance*). For example, it is clear that a 6% interest rate was charged for certain periods but not others but it is not as simple as the Court simply disregarding the periods when 6% was charged because the Court does not know what the interest amount would have been for those periods if ordinary interest only had been charged.

108. Similarly, in relation to the 4% rate, there is no sufficient evidence supporting the claim that if 4% was charged rather than 6% then the amount owing would be €594,193.36. It was fairly accepted by Counsel for the defendants that the calculations for this figure are not set out anywhere in the evidence. The point was made that this could be done on the basis of the "breakdown" referred to above, that it could be done by anyone with the time or knowledge to do so and therefore there is sufficient evidence before the Court to establish a prima facie defence which will be proven at trial. I do not accept that this discharges the burden of proof in light of, inter alia, Clarke CJ's comment in *Quinn Insurance*. It is not sufficient to place raw figures (which are formulated on one basis) before the Court and say that at trial evidence will be given of different calculations which will show that a different amount is owed. There is an obligation on the part of the applicant for security for costs to place their cards on the

table. That is not to say that they must prove the correctness of the case which will be made but they must establish the evidential basis for a case which will be made. In my view, that burden has not been discharged at this stage.

109. In short, the burden of adducing the necessary evidence to establish a prima facie defence is on the defendants. In my view, they have not adduced any evidence as to what amount would be owing if surcharge interest 6% is stripped out and in those circumstances I am not satisfied that they have established a prima facie defence.

110. In circumstances where I am not satisfied that such a defence has been established it is not necessary to consider the second and third limbs of the test, ie. whether it appears by credible testimony that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant and whether there are specific circumstances in the case which mean that the court should exercise its discretion not to make the Order sought and I should simply decline the relief sought.