



THE SUPREME COURT

[Appeal No: 72/2020]

**Clarke C.J.
O'Donnell J.,
MacMenamin J.,
Dunne J.,
O'Malley J.**

Between/

Quinn Insurance Limited (Under Administration)

Applicant/Appellant

and

PricewaterhouseCoopers (A Firm)

Defendant/Respondent

Ruling of the Court delivered by Mr. Justice Clarke, Chief Justice,
on June 25, 2021.

1. Introduction

1.1 The Court has already given judgment on the main issue involved on this appeal being the question of whether security for costs should be directed (see, *Quinn Insurance Limited (Under Administration) v PricewaterhouseCoopers* [2021] IESC 15) (“the principal judgment”). This ruling should be considered in conjunction with the principal judgment and the terms used in this ruling should be read in the same way as those defined in the principal judgment itself.

1.2 After judgment had been delivered, the parties were invited to seek to agree any outstanding matters so that final orders could be made. The parties were unable to agree on two questions so that a further oral hearing took place on 15 June, 2021 to hear submissions on those matters. This ruling is directed towards the two questions concerned.

1.3 A first, and relatively minor, issue concerns the precise order for costs which should be made. It was accepted by QIL that PwC, having succeeded in having the appeal dismissed, were entitled to their costs of the appeal and also to have the costs orders made in their favour in both the High Court and in the Court of Appeal affirmed. The only issue between the parties in that regard was as to whether, as QIL urged, a stay ought be placed on the enforcement of the costs order to be made in respect of the appeal to this Court until the proceedings as a whole are complete. It will be necessary to turn shortly to that question.

1.4 However, a second, and potentially more significant, issue arose as to whether the proceedings generally in the High Court should now be stayed until such time as QIL provides whatever security is ultimately determined to be appropriate.

2. The Costs Issue

2.1 As already noted, the only issue under this heading is as to whether the order for costs in respect of the appeal to this Court, which it is agreed should be made against QIL, should be stayed until the proceedings are complete. It should be recalled that QIL were unsuccessful both in the High Court and in the Court of Appeal. The High Court awarded costs against QIL. The Court of Appeal affirmed that order of the High Court and also made an order against QIL in respect of the costs of the appeal to that court. However, both of those sets of costs were ordered to be subject to a stay pending the completion of the proceedings. It is important to note the PwC does not suggest that the stay already placed on those orders for costs should be removed but rather suggests that no similar stay should be placed on the order for costs which it is agreed should be made in its favour in respect of the costs of the appeal to this Court.

2.2 It is not unusual, in the context particularly of lengthy litigation where there are likely to be a range of interlocutory orders, each potentially carrying with them an order for costs in favour of the party successful on the issues raised, for courts to make orders of the type adopted by both the High Court and the Court of Appeal in this case. The logic in so doing is that it may be considered more appropriate to allow all orders for costs to be dealt with together when the proceedings are at an end. Counsel for QIL suggests that it is appropriate to apply that practice to the order for the costs of this appeal in all the circumstances of this case.

2.3 Counsel for PwC, on the other hand, suggests that, while it was appropriate for both the High Court and the Court of Appeal to make such orders, such a practice should not be followed in respect of the costs of the appeal to this Court on the basis that his clients should not be out three sets of costs (to which it has been found to be

entitled) pending the final completion of these proceedings. For reasons which will need to be touched on in the context of the second issue arising, the completion of the proceedings will most likely take quite some time.

2.4 While there are arguments in favour of adopting either approach on this question, the Court, on balance, considers that it should follow the same course as was adopted in respect of the orders for costs made in the High Court and the Court of Appeal and will, therefore, place a stay on the order for costs to be made in respect of this appeal until the proceedings are complete. In that regard there will be liberty to apply to the High Court.

2.5 It is next appropriate to turn to the issue of whether the proceedings generally should be stayed.

3. Should the proceedings be stayed?

3.1 It is fair to say that it is the normal practice for proceedings to be stayed once security for costs has been ordered. Such a stay will last up to and until the time when security is actually put in place. The logic behind that common practice is that there would be a potential prejudice to a defendant which might arise in circumstances where, ultimately, the security directed was not put in place and the case did not proceed to trial, but where expense was incurred between the time security was ordered and the time when it became clear that the case was not going to proceed. There would be little likelihood of such costs being recovered.

3.2 Recognising that difficulty, QIL has put forward a proposal whereby the proceedings would not be stayed, but only on condition that QIL provide what might loosely be termed interim security in the sum of €5 million. In essence, the argument

put forward on behalf of QIL is that the normal prejudice, which might result from proceedings not being stayed and the defendant incurring costs but where security is not ultimately put up, would not arise in those circumstances. This is said to be so because it is argued that there would be significant security which would be more than sufficient to meet any likely costs which PwC might incur in the period up to full security being provided. Obviously if security is not in the end provided, the proceedings would come to a conclusion and the entitlement which PwC would have to costs would be limited to the costs to that time.

3.3 In that context, counsel for QIL draws attention to an earlier ruling given by this Court concerning whether the proceedings should be stayed pending the hearing of the appeal (Unreported Ruling, Supreme Court, Clarke C.J., 29 July, 2020). As appears from that ruling, the Court was persuaded that the least risk of injustice test would be met if security in the sum of €500,000 were put up, which sum was held to be likely to cover any costs which PwC might incur in continuing with the underlying proceedings while this appeal was pending. Counsel for QIL suggests that the same balancing of interests ought lead to the Court being persuaded to adopt the proposal which he put forward.

3.4 Counsel for PwC, on the other hand, argued that the context of that earlier ruling of the Court was different. Counsel relied on the fact that, at that time, the result of the appeal was, by definition, uncertain so that there remained a realistic possibility that QIL might succeed on the appeal and not be required to put up security at all. Counsel suggested that QIL, now having lost the appeal and it now being clear that it will have to put up security, there was no reason why the ordinary

practice, of staying the proceedings generally until security was provided, should not be followed.

3.5 Counsel for PwC also argued that no evidential basis had been put forward for the suggestion that a sum of €5 million might be sufficient to meet whatever costs PwC are likely to incur in running the proceedings during the period when the extent of the security required is ascertained and whatever security is directed is provided. As against that, counsel for QIL suggested that the amount of any such costs was particularly a matter within PwC's knowledge and that, if it wished to question the adequacy of the sum of €5 million, it should have put forward its own estimate. There was, amongst the papers before the Court, correspondence which suggested that the total cost to PwC of making discovery, reviewing the discovery provided by QIL and providing document management for such discovered materials as might be thought necessary for the trial, could be of the order of €10 million. Precisely how much of that sum would be incurred within any particular timeframe was not clear although counsel did suggest that much of the cost would be front loaded.

3.6 There had, at an earlier stage of these proceedings, been an estimate of the total costs which PwC were likely to incur if the case ran to trial which was in the sum of €30 million. Counsel said that those figures would need to be updated but he did concede that he would have difficulty arguing against a proposal whereby QIL now put up €30 million as a condition to the proceedings not being stayed but on the understanding that any appropriate portion of that sum would be repaid in the event that the ultimate level of security ordered by the Court was in a lower sum.

3.7 Counsel for PwC also sought to place reliance on what was said to be the substantial costs already incurred by PwC between the time when the application for

security was initiated and now. It is normal practice that the amount of security ultimately fixed will be the best estimate that the Court can reach as to the costs which have been, or are likely to be, incurred by the relevant defendant between the time of the initiation of the security for costs process and the end of the trial. It follows that it is likely that the security fixed in the circumstances of this case will include an estimate by the Court of the reasonable costs incurred by PwC between the commencement of the process and now. Counsel suggested that his clients should not be exposed to the risk of having to bear those costs without security and further suggested that the estimate put forward by QIL was only based on the costs likely to be incurred between now and the time when security would ultimately be put in place and thus did not cover the costs concerned.

3.8 On the other hand, counsel for QIL argued that an exposure to such costs without security already existed. The basis of the argument was that if, for whatever reason, security was not ultimately put in place and the proceedings did not go ahead, QIL would not, as of today, have security in respect of the costs incurred to date (with the exception of the sum of €500,000 to which reference has already been made) and would be exposed in respect of such costs in any event. Those costs might, it was said, be regarded as sunken costs in a sense.

3.9 Counsel for QIL also confirmed that it was the intention of QIL to invite the President of the High Court to authorise the payment of such security as might ultimately be determined out of the Insurance Fund. Counsel, of course, acknowledged that it could not be guaranteed that the President would agree to such a course of action. It was on that basis that it had to be accepted that there was at least some risk that any security directed might not be put in place. However, counsel

suggested that, if a decision were made today by the President to the effect that security could not be put up, the costs incurred between the initiation of the process and now would be unsecured in any event so that the only relevant potential injustice, it was argued, was in respect of the further costs that might be incurred should the proceedings be allowed to continue in the High Court pending the fixing of the amount of security and that security being provided. Obviously, if the President is not persuaded that security should be provided from the Insurance Fund, then the proceedings as a whole will come to an end although it will be a matter for the High Court to deal with any issues thus arising.

3.10 In light of those arguments it is necessary to analyse the competing positions.

4. Analysis

4.1 There are, in the Court's view, a number of factors which can properly be taken into account in assessing the order which should now be made.

4.2 There is a suggestion in the principal judgment that there may be cases where it might be appropriate to direct staged security in the sense that the plaintiff concerned would not be required to put up security for the entire costs of the case at the beginning but could be required to put up sufficient security to allow the case to progress to a certain stage with the matter to then be reviewed. However, counsel for PwC suggested that such a practice should not be introduced by, as it were, the backdoor in an application like this, but rather should be the subject of full debate in the High Court, which might begin to develop the principles by reference to which any such practise might be introduced. While such a practise may reduce the risk of injustice in certain cases, there could also be some downside. An excessive "salami slicing" of security might significantly add to the costs and duration of proceedings

with regular, potentially disputed, applications to the Court. The balance of justice, or more accurately, the requirement that a court attempt to adopt the course of action which will give rise to the least risk of injustice, will by no means always be met by permitting staged security to be put up. Doubtless, when the matter is fully analysed, other factors may also appear to be relevant. In those circumstances, the Court is of the view that counsel for PwC is correct in suggesting that this is not the time to introduce, in a somewhat unstructured way, such a practice.

4.3 However, that is by no means an end of the matter. The Court is mindful of the fact that these proceedings have been in being for a considerable period of time and are still a very long way away from trial. The Court understands and accepts that the proceedings are complex and is not in a position to indicate that any party is to blame for the lack of progress to date, let alone to apportion any such blame as might attach to the parties. In addition, it must be recognised that there is a lot at stake in a claim for approximately €800 million.

4.4 However, the very fact of the importance of this case means that the imperative to ensure that litigation is concluded within a reasonable timescale applies with force. The Court is anxious that, within the bounds of what is reasonable in a complex case, these proceedings get to trial as quickly as possible. That would lead the Court to lean against taking any course of action that might prolong the period before the trial can commence.

4.5 In those circumstances, the Court considers that it would be appropriate, in the particular circumstances of this case, to adopt the proposal put forward by QIL provided that the Court was reasonably satisfied that it would not create a significant risk of prejudice to PwC. It is, in that context, necessary to consider two elements of

the relevant equation, being the length of time during which the proceedings, in the absence of a stay, would continue until full security is put in place and the connected factor of the likely level of costs which PwC would incur during such period.

4.6 The initial suggestion put forward by QIL was that the sum of €5 million would be sufficient to cover costs for the next year. During the oral hearing the Court explored with counsel as to the likely length of time which it might take for security to be in place. The Court understands that there can be no certainty about this matter but the Court is strongly of the view that the greatest possible expedition should be exercised in reaching a final conclusion on the amount of security to be provided. While the numbers may be large, it does not follow that the task of estimating those costs is proportionately more complex than would arise in a case where the overall costs likely to be incurred might be significantly less.

4.7 While it is ultimately a matter for the High Court judge charged with case management (whom the Court understands to be McDonald J.), the Court suggests that both sides should urgently procure an up to date report as to the total sum which they consider appropriate as security. Those reports should be exchanged and a Scott schedule type document produced which identifies in a clear fashion the respective positions of the parties. The parties should use best endeavours to agree as much as possible and should, in particular, not adopt overly confrontational positions on aspects of the calculations which will not make a very great difference to the final result. These matters inevitably involve a significant amount of estimation. If the parties are not in a position to reach final agreement, then it might be appropriate to seek a hearing from the case management judge, but one where the outstanding issues had been clearly defined and refined by the process just identified so that short

affidavits could be filed on both sides setting out the basis for the opposing contentions on the issues remaining.

4.8 If these matters are attended to in an efficient way, it is difficult to see how the matter could not be finally determined some time during the next legal term. There is, obviously, the possibility that one or other party might appeal and that is a matter to which the Court will return.

4.9 The position in respect of the proceedings generally is that the parties are attempting to agree discovery with, it would appear, significant progress having been made but with some issues remaining. Depending on whether those outstanding issues can be resolved, it may or may not be necessary to make an application to the Court to resolve any outstanding questions.

4.10 In those circumstances, the Court does not consider that it is clear that the estimate of €5 million suggested by QIL is unreasonable. It is the only estimate which has been provided and, if PwC wished to contest it, then it would have been open to it to put in its own estimate which would include information from within its own knowledge as to precisely what work was likely to be done in the forthcoming months. PwC not having done so, the Court is prepared to accept QIL's estimate.

4.11 In that context, the Court takes the view that counsel for QIL was correct when he submitted that the costs between the initiation of the security process and now should not be taken into account in the relevant exercise. Obviously such costs will ultimately be taken into account in fixing the total amount of security to be provided. However, the potential injustice to PwC with which the Court is now concerned stems from the fact that, contrary to what might be regarded as the more normal practice, the proceedings will not be stayed so that PwC will continue to incur

costs. It is those costs, being the costs from this point onwards, which are the relevant prejudice so far as PwC is concerned. It is in that context that the Court considers that the suggestion of additional security in the sum of €5 million being put in place is not clearly unreasonable.

4.12 However, the Court taking that position is conditional on the process for determining the amount of security being progressed with all due expedition. In those circumstances the Court is prepared to decline to place a stay at this stage but would consider that a stay should be put on the proceedings as of January 1, 2022 unless security in an agreed or determined sum has been put up by then or unless the case management judge considers that QIL has acted with all appropriate expedition in the endeavours to have such security provided. The Court believes that this should provide an appropriate incentive to the parties to progress this aspect of the case with all due expedition. If the case management judge considers that QIL is at fault for any significant delay, then it will run the risk that a stay will then be imposed with effect from the beginning of next year. If the case management judge considers that PwC is at fault, then the proceedings will continue without a stay and PwC will run the risk of incurring additional costs without additional security.

4.13 Finally, there is the risk that events may conspire, through no fault of the parties, to it being the case that the process takes longer than envisaged. The possibility of an appeal arises in that context. In such a situation, it will be a matter for the case management judge to determine, in light of the position as then pertains, whether a stay should continue, having regard both to the further period of time then considered likely before the matter is finalised and any evidence as to the total amount of costs incurred between now and that time. For the reasons addressed earlier in this

judgment, the Court does not consider that, for the purposes of this exercise, costs incurred between the initiation of the security for costs process and today can or should properly be taken into account.

5. Conclusions

5.1 The court will, therefore, award the costs of the appeal to PwC but will place a stay on that order until the proceedings as a whole have been completed. In that context there will be liberty to apply to the High Court.

5.2 For the reasons set out in this judgment, the Court is of the view that the substantive proceedings should not be stayed pending the putting in place of whatever level of security may be agreed or directed. However, the Court has set out a regime which it hopes will lead to an expedited resolution of the amount of security which will require to be put in place. That should, in turn, reduce the period during which the proceedings are to continue in the High Court without full security being in place, which should, in turn again, reduce the costs likely to be incurred during that period. On that basis, the Court is prepared to accede to the suggestion put forward on behalf of QIL that a sum of €5 million in further security be put up as the price of the proceedings not being stayed. That sum should be lodged with seven days.

6. The Court has further put in place a regime whereby the matter will be reviewed by the case management judge in the High Court in the event that security is not in place by the end of this year.