THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 109
Appeal No.: 2018/70

Baker J.
Costello J.
McCarthy J.

BETWEEN/

QUINN INSURANCE LIMITED (UNDER ADMINISTRATION)

PLAINTIFF/
RESPONDENT

- AND -

PRICEWATERHOUSECOOPERS (A FIRM)

DEFENDANT/
APPELLANT

JUDGMENT of Ms Justice Baker delivered on the 21st day of April, 2020

1. The plaintiff company, Quinn Insurance Limited, is a company incorporated in 1995 and was part of the Quinn group, a group of companies incorporated in and operating in the State and in Northern Ireland. It had underwriting business of over €1 billion in the financial year ended 31 December 2013. It was placed under administration by order of the High Court on 30 March 2010 and joint administrators were appointed. The plaintiff company is insolvent and reliant to satisfy claims and to wind down its business on funding from the Insurance Compensation Fund ("ICF") established under the Insurance Act 1964, maintained and administered under the control of the Central Bank of Ireland, and funded through contributions from non-life insurance up to an aggregate of 2% of gross premia purchased in the State.

2. Much of the business of the company has now been sold off.

3. For convenience I will refer to the plaintiff company as "Quinn".

4. PricewaterhouseCoopers ("PwC") is an international firm of auditors and accountants and the firm sued in this litigation is the partnership operating in the State which, at all material times, acted as auditors to the Quinn group.

5. These proceedings commenced by plenary summons on 15 February 2012 and Quinn claims damages for alleged breach of contract, for negligence and breach of duty arising from the manner in which PwC conducted its audits of certain aspects of the Quinn

business and its meeting of certain regulatory requirements. The proceedings were admitted into the Commercial Court on 24 July 2013. The grounding affidavit of Michael McAteer, one of the joint administrators, avers that the action will be "very large and very complex", involving a pool of some 40 million documents.

6. That the litigation is likely to be lengthy, costly, and complex is not doubted. By way of illustration of the likely complexity of the litigation, the pleaded claim of 24 September 2013 runs to 133 paragraphs and the amended defence delivered on 31 July 2019, to 196 paragraphs. The litigation has been extensively case-managed and has reached the point where the pleadings have closed, and extensive particulars answered.

7. It should be said at the outset that the report of the independent cost accountant of PwC estimates the costs of defending the proceedings at somewhat more than €30 million exclusive of VAT. That estimate is not seriously in contention. Whether it has any consequence for the exercise of the discretion to refuse to make an order for security will be considered later in this judgment.

8. This appeal is from the decision of Haughton J. who, on 13 February 2018, refused the application of PwC that Quinn provide security for its costs pursuant to s. 52 of the Companies Act 2014 ("the Companies Act").

9. The hearing of the motion was conducted over four days in the High Court, following which Haughton J. delivered his detailed written judgment on 30 January 2018, *Quinn Insurance Ltd (Under Administration) v. PriceWaterhouseCoopers (A Firm)* [2018] IEHC 16, and concluded that exceptional circumstances existed which justified the refusal of the making of an order for security for costs.

General legal provisions

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

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

11. A number of principles developed by the authorities are not controversial. The section creates what has been described as the "initial onus" on the party seeking security to establish two cumulative requirements: that it has a *bona fide* defence to the claim of the plaintiff and that the plaintiff will not be able to pay the defendant's costs if it is successful in defending the action.

12. No dispute arises in the present case regarding these threshold or gateway elements. Quinn is insolvent, is not a trading entity and, for practical purposes, its only business is the prosecution of this litigation. PwC has pleaded a *bona fide* defence.

13. As is clear from a plain reading of s. 52 of the Companies Act, once the threshold or gateway requirements are met, while the court has a discretion, security is to be ordered unless it can be shown that special circumstances justify the exercise by the court of its discretion. This arises from the language of s. 52, which creates a discretionary and not mandatory power and the elements of that discretion have been the subject matter of a number of authoritative judgments of the Superior Courts.

14. The exceptions identified in the case law which permit a court to refuse to order a corporate plaintiff to provide security for costs derive from the discretionary nature of the statutory power. They are illustrations of the type of concerns that might be engaged in the exercise of the discretion and have as their ultimate objective the preservation of the interests of justice. The obvious case of an unmeritorious and insolvent plaintiff suing a defendant with a complete defence to the claim is not likely to give rise to much difficulty in the application of the statutory provisions. The interests of justice would not be served where a plaintiff's impecuniosity is actually caused by the wrongdoing for which damages are claimed in the proceedings, were the order that it provide security has the practical effect of denying it the right to pursue the wrongdoer to recoup those losses, as indeed the interests of justice would not be served were a defendant, who had caused damage by such wrongdoing, to be insulated against an action merely on account of the inability of an insolvent plaintiff to pursue an action without providing security for costs.

15. The exceptions found in the authorities have evolved in two separate strands, one where the inability to meet the costs is alleged to have been caused by the wrongdoing sought to be redressed in the litigation, and the other where the interests of justice in the broad sense and the general public interest in the resolution of a point of general importance or interest to the public at large justify the refusal of an order for security. Each strand has evolved at common law in the light of the circumstances giving rise to the exercise of discretion and the imperative that a balance be struck in the interests of justice.

16. The focus of this appeal is the conclusion of the trial judge that special circumstances did exist to justify the exercise of his discretion to refuse to direct security for costs.

17. The appeal centres on two aspects of the reasoning of the trial judge:

    1) that Quinn had made out a *prima facie* case that its inability to discharge costs flows from the alleged wrongdoing of PwC, and

    2) that the proceedings raise issues of general public interest and exceptional public importance justifying the refusal of the application.

18. The first of these two exceptional grounds has been considered in a number of the leading authorities, and I propose dealing first with the elements of that ground before moving to the less commonly litigated argument that the proceedings are of general and exceptional public interest and importance.

Impecuniosity

19. A plaintiff who can show that its admitted or established inability to pay the likely costs of the defendant stems from the wrongdoing alleged in the proceedings finds its clearest and most quoted source in the judgment of Clarke J., as he then was, in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7, 28 ILT 242, at para. 3.4, where he identified four elements which, logically, must be established to rely on the exception. It is convenient to quote them in full:

> "In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-
>
> (1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
> (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
> (3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and
> (4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."

20. The causal connection between the actionable wrongdoing the subject of the proceedings and impecuniosity of the plaintiff requires that a plaintiff establishes, on a *prima facie* basis, a connection between specific losses claimed and the likely inability to meet the costs of a successful defendant.

21. For present purposes, this requires an analysis of the quantum of the alleged losses the subject matter of the proceedings and whether these losses explain the inability to pay the likely costs of the litigation.

22. After an extensive review of the evidence, the trial judge concluded that Quinn had made out a *prima facie* case that its inability to discharge the likely costs of PwC flows from the alleged wrongdoing, the subject matter of the proceedings.

23. PwC argues on the appeal that the trial judge was incorrect in that Quinn has not made out anything other than bare assertions regarding the causal connection between the alleged wrongdoing and its inability to discharge an adverse costs order. It is also argued that the losses on which Quinn relies are too remote. Finally, it is argued that the claim, as pleaded and supported by the affidavit evidence, is for damages against PwC calculated at €900 million, and the current indebtedness of Quinn to the ICF, estimated at €1.1 billion, would leave Quinn with a deficit of €200 million even if the damages currently estimated are recovered in full.

Discussion: alleged causative connection

24. To establish a causative connection between an inability to pay and the asserted wrongdoing requires that the plaintiff credibly identify a recoverable loss sufficient to make the difference between the plaintiff being able to meet a costs obligation and not being so able. Clarke J. explained this at para. 3.5 *et seq.* of *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd*, where he gave as an example a calculation, what he called a "simple example", which involved an examination of the quantum of losses and the likely quantum of costs, but also required that the court would analyse whether the impecuniosity is likely to be fully accounted for by the pleaded quantified losses. Thus, the plaintiff would have to show *prima facie* that the damages award would reverse the current financial position to the extent necessary to put it in a position to discharge an adverse costs order. This was the language used by Mahon J. at para. 22 of his judgment in *National Private Hire and Taxi Association Ltd v. AXA Insurance Ltd* [2015] IECA 75.

25. I read that requirement as being that a plaintiff be able to show it would have been in a position to make provision for these costs, whether from income, reserves, or by borrowing.

26. The argument made by PwC is quite straightforward. It argues that even if Quinn recovers the entirety of the damages claimed in the proceedings, it would still be indebted to the ICF and there is a shortfall of at least €200 million between Quinn's claim and the anticipated ultimate call on the ICF. The figure could be higher, as in the 2014 financial statements Quinn's balance sheet deficit is somewhat over €1.2 billion, as evidenced in the second affidavit of Mr Joyce sworn on behalf of PwC on 30 June 2016, at para. 192.

Approach to calculations

27. Haughton J., at para. 79 of his judgment, expressed the view that the fourth limb of the test in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* was "*not to be treated as a simple mechanical arithmetical test*". He noted that in Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd the plaintiff company had no assets prior to the wrongdoing alleged in the proceedings and considered that to be relevant, presumably because the plaintiff's ability to meet any order for costs depended entirely on success in the litigation, and thus, the calculation was not complex.

28. A number of observations can be made. The fourth limb of the test in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* as expressed at para. 3.4 of the judgment of Clarke J. contained an example or an illustration to explain a principle, the principle being that a court assessing an argument of a causal connection had to be satisfied that the connection is credibly made, and that a sufficient causal connection is shown between the losses claimed and the inability to meet the likely costs.

29. The connection has to be credibly made and not based on mere assertions, so that the court has to scrutinise the quantum of the claim, the level of impecuniosity, possibly the other calls on any monies that might be recovered in damages, and the likely potential costs. This approach which now scarcely needs authority, is found in the earlier authorities from which the principle emerged and, to take an example, in *Jack O'Toole Ltd*

v. MacEoin Kelly Associates [1986] IR 277, at p. 284, Finlay C.J. said that "a mere bald statement of fact" would not suffice. This *dictum* was quoted with approval by Barron J. in *Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance Ltd* [1999] 1 IR 501, at p. 529. Finlay C.J. was not satisfied that the fact that the recovery of the amount claimed "would make a significant contribution towards the solvency of the company concerned" was sufficient to discharge the onus of proof on the corporate plaintiff resisting the making of an order that the inability to pay the costs had been caused by the wrong the subject matter of the claim.

30. In the recent judgment of this Court in *Welcome Ireland Hospitality Ltd v. Cedarcourt Developments Ltd* [2019] IECA 308, I said that this means a plaintiff must credibly point to some objective and ascertainable evidence.

31. I agree with the trial judge that the exercise to be engaged by a court is not a "narrow mathematical one". However, that is not, in my view, to say that an engagement and interrogation of the broad circumstances giving rise to the inability to pay costs does not require that the court would examine the quantum of the claim and whether, *prima facie*, the figures relied on credibly support an argument that links the inability to pay costs with the claimed losses. To that extent, while the exercise is not a "narrow mathematical one", to borrow the phrase used by the trial judge, some degree of analysis of the figures is required to take an argument outside the realm of mere assertion.

32. The test in the case law is that a plaintiff must show by *prima facie* and credible evidence, and not by mere assertions, that the wrongdoing caused the impecuniosity and that damages are recoverable as a matter of law and are not too remote. I do not consider that the Oireachtas intended, or that the analysis in the case law suggests, that a court would require anything more than evidence of a credible causative connection between the alleged losses and the pleaded wrongdoing, and accordingly, the court hearing the application is not weighing the competing arguments or attempting to form a view as to which analysis is more credible or more likely to be borne out at trial once it is satisfied the statutory threshold is met.

33. It bears comment that, in all, there are some 130 pages of affidavit evidence that go far beyond the type of detail that a court can properly resolve on affidavit evidence. The differing approaches for which the deponents contend, and the different factual basis from which their respective analysis stems, are matters that more properly belong at trial.

34. The trial judge considered that regard was to be had to what he described at para. 79 as "the broader circumstances said to give rise to the inability to pay costs". He quoted from para. 3.10 of the decision of Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd*, which it is useful to repeat:

> "As part, therefore, of the overall question of assessing whether it has been shown, on a *prima facie* basis, that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted, the court must look at all of the circumstances asserted on behalf of the parties."

35. In my view, the trial judge was correct in that the test explained by Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* is not to be applied by a mere mechanical or mathematical exercise and the calculations given by Clarke J. in his judgement were examples of how the test would be applied in the given case, not itself a formula for such application. Simple calculations posited by Clarke J. will sometimes provide the answer, but not always. His analysis explains the type of proofs required to establish special circumstances, not a statement of principle or a freestanding test.

Application of the test

36. There is no great difficulty in the present case in accepting, on a *prima facie* basis, the argument of Quinn that its insolvency stems from or flows from (both words were used by Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd)* the alleged wrongdoing, and that is merely a test of causal connection. The more difficult proposition is the assertion that, even were the case to be wholly successful, the claim as formulated in the statement of claim is exceeded by the current total call on the ICF by, at least, €200 million. The question is not one of causation in general, but whether the causative connection, *prima facie*, can be argued to be sufficient to reverse the financial position so that Quinn could discharge an adverse costs order.

37. In *Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd* [2013] IEHC 359, at para. 65, Finlay Geoghegan J. said:

> "Webprint, as plaintiff, is still obliged to establish at least a *prima facie* case that the quantum of damages which it might obtain in the event that it is successful is of an order of magnitude sufficient to reverse its current financial position whereby it would be unable to pay the defendants' costs in the event that the defendants were successful."

38. Finlay Geoghegan J. did not envisage a mechanical mathematical test but did envisage some analysis of the quantum or scale of the likely damages and whether that would be *prima facie* sufficient to enable the plaintiff to satisfy the exception.

39. The question is not whether the quantum of damages, as expressed in figures, would be sufficient to cover the estimated costs of the defendant, but rather whether, *prima facie*, a wholly successful claim by the plaintiff would sufficiently reverse its financial position where sufficiency must be measured as against the ability to fulfil the specific obligation to pay the costs of being unsuccessful in the litigation.

40. The difficulty I have in the present case stems from the nature of Quinn's current operations. Quinn is not a trading company, and the sole remaining purpose of its existence is to prosecute the present claim and, if it is successful, to recover a very substantial sum for reimbursement to the ICF. However, even a complete recovery of all the identified damages in the present case, would not render it in a position to continue trading, to borrow to meet the costs, or to otherwise rearrange its financial position so as to enable it to pay the costs were PwC to be successful.

41. But Quinn argues that the proper approach to causation is not confined to an analysis merely of the current financial state of the company and the quantified damages. The evidence of Mr McAteer on behalf of Quinn is contained in a number of affidavits before the court. In his first affidavit sworn on 6 May 2016 he states, in essence, that had the auditors conducted the audit with reasonable care and in accordance with the regulatory and contractual requirements, the slide in Quinn's fortunes would have been halted, the worst excesses of its losses would have been avoided, and Quinn would have been in a position to take steps sufficiently early to remedy its financial crisis. In general terms he says, at para. 29 of the affidavit, that had central issues (regarding guarantees and the provisions for losses) come to light sufficiently early, "the position would be very different to the position that exists now".

42. Quinn has delivered detailed replies to particulars and pleads that PwC should have identified and reported on the understatement of Quinn's technical provisions ("the technical provisions", *i.e.*, in broad terms, the estimated liability of Quinn for insurance claims), and on certain inter-company guarantees ("the Guarantees") when rendering its audit opinions in the financial statements for the year ended 31 December 2005 and the following years, 2006, 2007, and 2008. Mr McAteer, on affidavit, also says that had the Guarantees been brought to the attention of Quinn's board, they would have been released at no cost to Quinn "with the consequent saving of the ultimate cost on foot of those Guarantees of €201m", at para. 27 of his first affidavit. He also averred that a response to the under-reserving would have led Quinn not to make gifts totalling €175 million in the financial year 2006 and that would have replenished the level of free assets to meet the regulatory solvency margins. Pricing might also have been adjusted to decrease the amount of loss-making business written in the market from 2007 to 2010 (para. 27 of his first affidavit).

43. The first affidavit of Mr McAteer goes on, at para. 28, to argue, in the alternative, that if the Guarantees could not have been released, the authority which was then responsible for the regulation of financial institutions in Ireland pursuant to s. 33C of the Central Bank Act 1942, as inserted by s. 26 of the Central Bank and Financial Services Authority of Ireland Act 2003, the Irish Financial Services Regulatory Authority ("the Financial Regulator"), would have compelled Quinn to exclude the assets the subject of the Guarantees from the calculation of Quinn's technical reserves and this, in turn, would have meant that Quinn would not have made gifts totalling €385 million in the financial years 2006 to 2008 inclusive, and would have led Quinn to adjust its pricing model.

44. The first affidavit of Mr McAteer, therefore, avers, at para. 29, that Quinn "would have avoided the compounding of its difficulties in the subsequent years of the material period and would today be solvent".

45. In broad terms, Mr McAteer, at para. 31 of his second affidavit, says that had the technical provisions been properly stated, the lack of capital would have manifestly required Quinn to curtail its expansion and to increase its cost base.

46. There was an exchange of very substantial affidavits which dealt with the pleaded and argued connection between the alleged wrongdoing and the impecuniosity of Quinn. By way of illustration, I note the second affidavit of Paraic Joyce, audit partner at PwC, sworn on 30 June 2016, where he correctly says that any of the steps that might have been identified in the counter-factual could have had unforeseen consequences for Quinn's business more generally such that, as he put it, "even if all of these steps were taken, they would not necessarily have had the consequences for the Plaintiff's business that it asserts", at para. 110. He further makes the averment that "the number of steps required to be taken usefully illustrates the chasm between the Defendant's asserted breaches of duty and the Plaintiff's asserted losses."

47. The example given by Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd*, at para. 3.5, is a straightforward example where the figures did not suggest alternative causes of the loss and where it was relatively easy to assess the credibility of the causative connection. The present case cannot be so easily assessed and Mr McAteer, in his second affidavit sworn on 16 September 2016, at para. 29, suggests that the analysis "does not begin with the point of terminus that has now been reached in circumstances of PwC's wrongdoing" but is based on an assertion that the slide into insolvency could have been halted or, at least, ameliorated had certain steps been taken earlier in the process.

48. The trial judge considered the evidence of Mr McAteer and the pleas in the statement of claim and the replies to particulars which set out the steps that might have been taken by Quinn to avoid some of the catastrophic losses that occurred. He correctly noted, at para. 80 of his judgment, that whilst the exercise conducted by Mr McAteer resulted in his expressing an opinion, this was an opinion of an expert not to be characterised as mere speculation, as it was grounded on fact and not reliant on unreasonable inferences or conclusions.

49. He accepted the evidence, on a *prima facie* basis, that had Quinn been alerted by its auditors to the significant financial problems, including the existence of the Guarantees and the alleged understating of the technical provisions, it could have taken steps, and, at para. 82 of his judgment, that the hypotheses on which Quinn's experts relied was reasonable and supported by known facts.

50. The approach of the trial judge was to apply the legal test identified in the authorities to ask whether Quinn had established, on a *prima facie* basis and based on a reasonable analysis of the known facts and on reasonable conjecture and analysis, that the inability to discharge costs flows from the alleged wrongdoing. The trial judge was satisfied on that analysis that this was so, and therefore, that there existed a special circumstance sufficient to refuse the application.

Conclusion on the causative connection

51. A number of factors must be noted: the onus is on Quinn to establish, on a *prima facie* basis, that the quantum of its claim is sufficient to explain the inability to pay costs. The fourth limb of the test in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland*

*Ltd i*s not to be seen as absolute but as a reflection of the number of principles that have emerged from the authorities, including the fact that an order for security for costs is made in the interests of justice and that a defendant should not be forced to defend an action brought by a wholly impecunious corporate plaintiff which has the benefit of limited liability and where the jurisdiction to order security can be regarded as a "quid pro quo" for the limitation of liability: per Clarke J. in *Harlequin Property (SVG) Ltd v. O'Halloran* [2012] IEHC 13, [2013] 1 ILRM 124, at para. 4.9.

52. The exceptional circumstances identified in the authorities stem from the discretionary nature of the jurisdiction and are an attempt to state in concrete terms factors to which regard should be had in considering the balance of justice between a corporate plaintiff and a defendant. Those interests include the interests of a corporate plaintiff to have access to court to resolve genuine disputes, and also the interest of a corporate plaintiff to continue to have the benefit of limited liability, and those of a defendant which equally must be seen as entitled to access to court to defend an action but also not to find itself with a somewhat Pyrrhic victory, unable to recover its own costs of successfully defending an action.

53. Costs are such an intrinsic part of the administration of justice, and of how justice is distributed between plaintiff and defendant, that the ability to recover costs must be seen itself as a right, as an element of the entitlement to access due processes (see the observations of McKechnie J. in *Godsil v. Ireland* [2015] IESC 103, [2015] 4 IR 535, at paras. 19 *et seq*.).

54. In *Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd*, at para. 57, Finlay Geoghegan J. decided the matter ultimately on the basis that while the plaintiff could be considered as having established, on a *prima facie* basis, that it was entitled to damages and that the consequence of some of the alleged wrongdoing was to deprive it of the opportunity of other substantial business, it had not put before the court, even on a *prima facie* basis, evidence of the probable quantum of the loss by reason of lost opportunities. Thus, she considered that, in the absence of evidence which would permit her to assess, on a *prima facie* basis, the likely level of those losses, the plaintiff had not met the test in the authorities.

55. That analysis offers some assistance in the present application. I accept that Quinn's evidence and reasoned argument, *prima facie*, show that had the auditors identified the two major risk factors to its solvency at an early stage, Quinn might have recovered its financial position and avoided the catastrophic insolvency that ensued.

56. It could not be said, in my view, that any of these averments on affidavit are mere speculative assertions. They are concrete examples of the type of provision that Quinn says it could, and would, have made that would have reversed the slide towards insolvency.

57. This is a case that has been particularised and pleaded with great detail and care resulting in a total claim calculated at €900 million. But this maximum figure falls €200 million

short of the figure, even taking the amount of the call from the ICF as being the only call on its finances, of establishing the necessary connection between the insolvency of Quinn and the alleged wrongdoing of PwC.

58. I am prepared to accept that the figures and calculations, especially those relating to the Guarantees and the inter-company gift are not so generally stated as to be no more than conjecture or assertion but, nonetheless, there is no evidence which bears out the proposition that, on a *prima facie* basis, the estimate of losses would be sufficient to reverse the inability to meet the costs and to enable the costs to be recovered. But that is not sufficient to dispose of the argument of Quinn. This appeal depends on a different analysis, one that cannot be wholly conducted in the light of the figures, but which brings to bear an argument of a different nature, namely that the losses could have been stemmed in sufficient time and to a sufficient extent to have created a different financial landscape for the company.

59. *In Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd*, at para. 64, Finlay Geoghegan J. considered the application for security for costs also on the basis that, in the claim under consideration by her, the court was "at large" as to the quantum. Nonetheless, because she regarded the starting purpose of the damages claim to be compensatory, to attempt to place the plaintiff in a position it would have been in if the tort had not been committed, she considered the court would still have to assess the likely amount under that head. That would still leave the plaintiff in a situation where it has to *prima facie* establish to the satisfaction of the court hearing the application for security for costs the likely quantum of damages that it might obtain if it were successful, albeit those damages would be general damages.

60. Thus, a plaintiff must nonetheless establish on a credible basis that the damages it would recover would be sufficient to meet the test, or, to use the language of Finlay Geoghegan J. in *Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd*, at para. 65:

> "would permit the court on a *prima facie* [basis to] determine the probable order of magnitude of recoverable damages".

61. The test, as best explained in that paragraph, is that the plaintiff must show that it would be in a position to recover damages of an order of magnitude "sufficient to reverse its current financial position in which it is admitted that it would be unable to pay the defendants' costs in the event that the defendants were successful".

62. However, as explained in para. 58, this case is not one where an analysis of the current estimate of likely damages is sufficient to meet the test. In my view, Quinn has established, on a *prima facie* basis, that had PwC identified the likely impact of the combined effects of the Guarantees, the understatement of the technical provisions and the gifts, Quinn *could* have been in a very different financial position, and might have taken steps to halt the decline. I accept the analysis of the trial judge that the exercise of forecasting what would have happened is difficult, and I also accept that he correctly assessed the evidence, in particular that of Mr McAteer, and came to the correct

conclusion that Quinn had made out a *prima facie* case that it might have avoided the compounding of its difficulties had it known of the risks inherent in some of the commercial choices it made. On that analysis, Quinn has discharged the burden of showing, on a prima facie basis, that the losses it says are attributable to the alleged negligence and breach of duty could *prima facie* have led it to avoid the financial catastrophe that befell it.

63. A court hearing a motion for security for costs does not determine the matters more properly left for the trial such as complex questions of remoteness and causation. It must determine whether the resisting party can establish, on a *prima facie* basis, by credible evidence and argument, not mere assertion or speculation, that the inability to pay the costs flows from the very wrong the subject of the litigation, and that the wrong complained of is actionable.

64. The approach to be taken on appeal was recently considered by this Court in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27, at para. 79, where Irvine J. noted that whilst an appellate court will pay great weight to the views of the trial judge:

> "[…] the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

65. In my view, Quinn has arguably met the test that special circumstances exist which entitle the court to exercise its discretion to refuse to make an order for security, and the trial judge was not wrong in the view he formed on the evidence and argument. I am prepared to accept for the purposes of the appeal, that Quinn has shown that, *prima facie*, the claimed losses are not too remote or speculative. I am conscious too that the decision on the appeal ought not prejudice the trial of this central plank of Quinn's case.

66. But that does not mean that security will inevitably be refused. The exercise is a discretionary one that seeks to find the balance of justice between the parties. As stated by Costello J. in *Hedgecroft Ltd T/A Beary Capital Partners v. Htremfta Ltd* (Formerly Dolmen Securities Ltd) [2018] IECA 364, at para 57:

> "Even where the trial judge finds that the plaintiff has established the existence of special circumstances such as could justify withholding an order for security for costs, it is for the trial judge separately and in addition to that finding, to determine, in the appropriate exercise of his or her discretion whether to make the order sought or not. It is for the court to determine if the order would be fair or proportionate in all the circumstances."

67. For that reason, I propose now to consider the correct approach to the application in the light of the interests of justice.

Stifling

68. The making of an order that a limited liability company should provide security for costs may have, in many cases, the practical effect that that company's right of access to courts is curtailed or restricted, and the result would be oppressive or would "stifle a genuine claim", the language of Hogan J. in his concurring judgment in *CMC Medical Operations Ltd (In Liquidation) T/a Cork Medical Centre v. Voluntary Health Insurance Board* [2015] IECA 68, where he said, at para. 8, that access to courts is "fundamental to the constitutional order" and for the protection of fundamental rights in a democratic society, must inform any consideration of the statutory provisions.

69. The fourth limb of the test in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* is an exception to give concrete realisation to the constitutional right of access to courts and its importance in the legal order. Thus, it is closely linked to the general principle that the courts will be reluctant to make an order that would stifle a genuine dispute between parties to litigation.

70. The test is established in the authorities, and it is important to note that they are well settled, are illustrations or examples of how the discretionary power is to be applied, or, to put it another way, are illustrations of the kind of discretionary factors that have persuaded courts in a suitable case to refuse to order security notwithstanding that the gateway test is met.

71. In an application under the equivalent provisions in the Companies (Consolidation) Act, 1908 in *Peppard and Co. Ltd v. Bogoff* [1962] IR 180, at p. 188, Kingsmill Moore J., with whom the other members of the Supreme Court agreed, pointed out that while the relevant provisions did not make it mandatory to order security for costs in every case where a corporate plaintiff was unable to pay the costs of a successful defendant, the discretion of the court was one to be exercised in "special circumstances".

72. In one of the earlier judgments on the award of security for costs under the then relevant provisions of s. 390 of the Companies Act 1963, *Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance Ltd*, the Supreme Court rejected the argument that the mere fact that an impecunious plaintiff, once it is required to give security for costs, might find itself unable to continue an action was itself a special or exceptional circumstance giving rise to the exercise of discretion to refuse to make the order. As Keane J. said in his judgment in the High Court, *Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance Ltd* [1992] 2 IR 57, at p. 63:

> "To refrain from granting an order for security, […], simply because it might have the effect of stifling the plaintiff companies' actions would be to render the section nugatory."

73. Counsel for PwC argued that some difference of opinion seems to have emerged in the recent Court of Appeal judgments, in particular between the judgment of Costello J. in *Hedgecroft Ltd T/a Beary Capital Partners v. Htremfta Ltd* and the earlier judgment of Hogan J. in *Used Car Importers of Ireland Ltd v. Minister for Finance* [2017] IECA 327.

74. In *Hedgecroft Ltd T/a Beary Capital Partners v. Htremfta Ltd*, at para. 41, Costello J. expressed the view that the fact that the making of an order for security for costs might result in a permanent stay on the further progress of the proceedings "is not sufficient to answer an application for security for costs". She found that view in the majority of cases, and I accept her analysis.

75. If a difference is to be discerned in the approach in recent decisions in the Court of Appeal regarding this aspect of the exercise of the discretionary power, it does not need to be decided in the present appeal, as there is strikingly no evidence in the affidavits, and no argument made on appeal that the making of an order that security be provided for the costs of PwC would, or could, stifle the claim of Quinn.

The role of costs in the administration of justice

76. In *Godsil v. Ireland*, at para. 21, McKechnie J. pointed to the role that the established costs jurisdiction can play in the availability of justice. To borrow his language, it would be "inimical to justice" if issues arising in litigation which were of general public interest could not ever reach the point of adjudication on account of the financial frailty of a meritorious plaintiff.

77. As McKechnie J. said, at paras. 19 et seq. of his judgment, the rule that costs "follow the event", save in exceptional circumstances, is a rule that affords fairness to both parties and supports the high constitutional right of access to courts, the right of a plaintiff to sue and of the defendant to defend itself. As McKechnie J. went on to explain, that an impecunious plaintiff could pursue a claim entirely without risk and where it was clear from the outset that the defendant would be forced to discharge its own costs, even were it to be successful, offends a fundamental principle of access to justice and fairness to both parties to litigation.

78. Counsel for PwC argued that the result of the order made by Haughton J. is to create what he termed the "ideal plaintiff", a plaintiff who will not have to pay costs if it loses, no matter how long the case takes and how much the defendant has to pay to defend the claim.

No argument of likely stifling and discretion of the court

79. In the present case there is no evidence, and counsel for Quinn did not contend, that the making of an order for security for costs would bring an end to the litigation, and the case was not argued on the basis that the order for costs would, in its practical effect, stifle the claim.

80. No useful authority has been identified regarding the correct approach to the exercise of the discretionary power when the ordering of security would not stifle the claim. While the fact that the granting of security for costs is not, of itself, a sufficient reason to withhold the making of the order, the converse is not necessarily true. The fact that a corporate plaintiff will be in a position to continue to pursue the litigation notwithstanding the order for security for costs can be a very significant factor in balancing the rights of a corporate plaintiff to sue and the interests of the defendant with no prospect of having its

costs met in successfully defending a claim, even where a plaintiff has established special circumstances within the meaning of the jurisprudence.

81. The question of the amount of security which a court might order a plaintiff to provide also falls for consideration. I am mindful that the statutory provisions contained in s. 52 of the Companies Act do not require that "sufficient security" be provided by a plaintiff, but merely "security".

82. In *Fides Capital Ltd v. Alchemy Products Ltd* [2017] IEHC 266, at para. 10, Barrett J. held that following the removal of the word "sufficient", as contained in s. 390 Companies Act 1963, in s. 52 of the Companies Act, the law should be viewed as "restored to the position before that terminology moved centre-stage post-*Lismore Homes*". He therefore suggested that the court should follow the position in *Thalle v. Soares* [1957] IR 182, at p. 194, where Kingsmill Moore J. quoted with approval the judgment of FitzGibbon J. in *Perry v. Stratham Ltd* [1928] IR 580, at p. 583, where FitzGibbon J. held that security is not to be viewed "either as an indemnity against all costs which may be incurred or as an encouragement to luxurious litigation on the part of the respondent".

83. The amount of security was considered in detail in *Coolbrook Developments Ltd v. Lington Development Ltd* [2018] IEHC 634 by Barniville J. who, at para. 98 of his judgment, accepted that the removal of the word "sufficient" from s. 52 of the Companies Act 2014 was a "deliberate" move by the Oireachtas to change the law previously provided under s. 390 of the Companies Act 1963, and to grant full discretion to the court as to security for costs. However, at para. 106, he held that, in exercising this discretion, the court must balance the rights of both parties and seek to achieve a result which is just and proportionate in the circumstances:

> "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 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."

84. In *Hedgecroft Ltd T/A Beary Capital Partners v. Htremfta Ltd (Formerly Dolmen Securities Ltd)*, Costello J. accepted that these principles represent a correct statement of the law.

Consequence of order: conclusion

85. If the order to provide security will not stifle a claim, the court might consider that this fact alone could tip the balance: the plaintiff provides security but can still continue the action; the defendant's right to collect costs if it is successful is adequately protected. This approach might inform the discretionary process in a suitable case.

86. This, in my view, is such a case for a number of reasons: first, the agreed estimate of the likely costs is €30 million, and to expect PwC to bear the risk of having to meet costs of

that magnitude seems to be intrinsically unfair. In this regard, it is worth observing that while Quinn has the benefit of limited liability, PwC does not. The individual partners are liable for these enormous costs. Second, the granting of security does not create a form of injustice to Quinn as that regarded as problematic by Hogan J. in *CMC Medical Operations Ltd (In Liquidation) T/a Cork Medical Centre v. Voluntary Health Insurance* Board. Third, and in the light of the fact that the court has discretion as to the amount and mode of security, the balance may fairly be struck so as to support the respective interests of both parties to this litigation.

87. For these reasons, it seems to me that security for costs ought to be provided in this case. The factors identified by the trial judge, and considered in some detail in this judgement, do not fully answer the justice and the balance of interests in the present case in a proportionate manner. I am satisfied, because of the unusual factors at play, including the fact that Quinn has financial backing for its own costs, that the costs are likely to be of a very significant order of magnitude, that the litigation is likely to continue even if security is required to be provided, and that the correct order is that Quinn do provide such security as may be directed and in such form as shall seem appropriate to the High Court.

88. I would allow the appeal for this reason.

89. Because the trial judge also found that the litigation was of exceptional public importance, he refused to grant security for that reason also. I propose to briefly consider that aspect of the appeal now, although it is not strictly necessary to determine it in the light of my view that the appeal should be allowed for the reasons stated.

Exceptional public importance

90. The second aspect of the appeal concerns the decision of the trial judge that the circumstances were exceptional and that the case raised matters of general and exceptional public importance so that, notwithstanding the inability of Quinn to meet an adverse order for costs in favour of PwC, no order for security for costs should be made.

91. An insolvent plaintiff who cannot establish, for example, that its impecuniosity was caused by the wrongdoing claimed may still seek to argue that the interests of justice merit the continuation of the proceedings, but it is difficult to envisage circumstances where the interests of justice would warrant the exercise of a discretion to refuse security for costs when the litigation is wholly personal, or where the interest sought to be protected is a personal commercial interest of that plaintiff.

92. It is in that context that there has evolved a much less frequently engaged power, but one recognised nonetheless in the authorities, to refuse to grant an order for security for costs when the litigation is of general public interest. The interest of justice sought to be protected is not the personal commercial interest of the insolvent or impecunious plaintiff, but the general public interest in the continuation of litigation which, whether through happenstance or arising from a courageous instigation of proceedings by a corporate plaintiff, is of public importance. That exception is less frequently used because litigation

which is genuinely of general public interest is not common, and it is often the kind of litigation which is brought by natural persons or non-governmental organisations which usually operate as companies limited by guarantee.

93. In that context, the practical question arises as to whether the making of an order for security for costs might stifle the litigation, and if the litigation is genuinely of general public interest the stifling of the litigation would harm the general public or sectors of the community and would not be desirable in and of itself.

94. PwC does not deny that security for costs may be refused in the discretion of a court where a plaintiff has demonstrated the exceptional public interest of the case, nor that the threshold to be satisfied is a high one. PwC argues, however, that the trial judge misapplied the threshold or placed an erroneous and disproportionate weight on the fact that the administration of Quinn has resulted in a substantial cost to the Exchequer, and that a levy has been imposed on members of the public buying insurance.

95. Quinn denies that the trial judge fell into error in his acceptance that the proceedings raised matters of significant public interest on account of the involvement of the Exchequer in funding the administration of the winding down of the Quinn administration.

96. Again, the parties agree as to the broad parameters of the approach to this aspect of the matter and the case law does support the proposition that litigation which raises matters of significant public interest might lead a court to refuse to order security in the interests of justice on the ground that, to use the language of Clarke J. in *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50, at para. 6.7, there is "*significant public interest in having […] matters of high public controversy determined in a court of law*".

97. The same approach was taken by Barrett J. *in Dublin Waterworld Ltd v. National Sports Campus Development Authority* [2014] IEHC 518, at para. 36, where he considered that security should be refused because there was, as he put it, "*a public interest in knowing that a publicly-owned body can and will be held accountable in the public forum offered by the courts*" where what was in issue was the pursuit by a State body of an unmeritorious VAT claim. That litigation can fairly be distinguished, at least to some extent, on the grounds that the defendant was a public body.

98. The Court of Appeal refused security, affirming the decision of Kearns P. in the High Court, in *Newlyn Developments Ltd v. Murphy Concrete (Manufacturing) Ltd* [2015] IECA 294, a case concerning the construction of approximately 800 houses contaminated by pyrite. In the High Court, Kearns P. had considered that, because of the "intrinsic nature of the proceedings, namely, the multiplicity of house owners affected and the range and scope of the claim", security should be refused. Ryan P., who was also considering other similar appeals against the refusal by the High Court to grant orders for security for costs, held:

"Kearns P. was correct in deciding that the case […] is one involving special circumstances such that it would not be appropriate and would not be in the interests of justice to order security for costs."

99. Barrett J. also refused security for costs in *Euro Safety and Training Services Ltd v. An Foras Áiseanna Saothair* [2016] IEHC 161, where the claim was for negligence and breach of statutory duty against a public office which he described, at para. 42 of his judgment, as "exceptional in its own way" and where the allegations of misfeasance in public office were of sufficient public moment and interest to warrant a refusal of security.

100. The Court of Appeal, in *Stein v. Scallan* [2018] IECA 380, reversed the decision of the High Court, [2016] IEHC 683 *per* Eagar J., which had concluded that the application for security for costs should be refused in a defamation claim where the allegedly defamatory statements were made against the defendant who, at the time, was a candidate for the Presidency of Ireland.

101. In her judgment in the Court of Appeal, at para. 59, Whelan J. posited a test of whether what was in contention could be "said to so keenly affect the national interest as to amount to a matter of national importance". She regarded that litigation as one between private individuals who were close relatives with an origin in claims of sexual assault and that the issues were "deeply personal".

102. Even the fact that the State is a party is not sufficient to establish special circumstances justifying a refusal of security. An absolute rule to that effect, as PwC argued, is an approach akin to the principle of State immunity condemned by the Supreme Court in *Byrne v. Ireland* [1972] IR 241.

103. The trial judge considered that the public interest that fell for consideration in the present case was multifaceted. Having reviewed the arguments of the parties, he concluded that the following factors were relevant:

(a) Quinn had a wide and extensive underwriting business and its collapse led to administration under statutory powers and the supervision of the President of the High Court;

(b) the joint administrators have obtained funding through the ICF from the Exchequer estimated at €1.1 billion;

(c) a 2% insurance levy has been imposed on the purchase of insurance in the State and must, on that account, "affect a very large segment of the population";

(d) there is a significant public interest in ascertaining why Quinn collapsed and the regulatory framework in which it operated, as well as the broad question of the obligations of auditors of insurance companies.

104. He identified the public interest question as the ascertainment of "how the plaintiff could collapse notwithstanding the regulatory system, the role of the Financial Regulator, and

the need for public confidence in the proper regulation of the insurance industry in the future" at para. 93 of his judgment. He was careful to make it clear that the fact that Quinn is reliant for funding on the Exchequer is not sufficient to warrant a refusal of security for costs and he was mindful of the risk that his conclusion might be understood as a recognition of quasi *de facto* immunity to Quinn. He was influenced by the "exceptional and ongoing public impact of the collapse of the plaintiff", at para. 95 of his judgment.

105. A number of arguments are made by PwC in response. The Financial Regulator is not a party to the proceedings and, however the litigation resolves or evolves, it cannot lead to a condemnation of the Financial Regulator or the approaches of his Office, or indeed offer any analysis of any failures in the regulatory system itself. The role the Financial Regulator plays in the operation of the insurance industry and whether it had sufficiently robust responses and procedures in place, therefore, is not a part of the case and while it might play a part in evidence at trial, the present case does not require or permit any findings of failure on the part of the Financial Regulator or of the regulatory regime.

106. One of the reasons which led to the decision of the High Court, namely that it is in the public interest to ascertain how a large insurance company such as Quinn could collapse, is not capable of resolution in the present case, and regulatory enquiries through the Office of the Financial Regulator are the appropriate means by which this might occur.

107. This is private litigation, albeit between a State-funded company in administration against its auditors, for negligence. The result can only be a finding of negligence or breach of contract against the auditors and a consequential award of damages should this be established.

108. It is true that the European Communities (Non-Life Insurance) Framework Regulations 1994 (S.I. 359/1994) impose financial requirements on an insurer, including as to its technical provisions, its solvency margins, and the valuation of its assets. PwC played a role in estimating and calculating the data that made up financial statements submitted to the Financial Regulator and relied upon by his Office for regulatory purposes. However, the Financial Regulator is not bound by any valuations or statements by the auditors. While auditors might owe an obligation to the company under audit and may even owe certain obligations to the Financial Regulator, the public interest in resolving how the Financial Regulator omitted to apprehend the level of financial risk in Quinn is a question that might be resolved in litigation concerning the Financial Regulator and is not capable of resolution in the present proceedings.

109. That is notwithstanding the provisions of s. 35 of the Insurance Act 1989, as amended, by which an auditor is personally liable to report to the Financial Regulator any concern regarding circumstances which might materially affect the ability of an insurer to fulfil its obligations to policy holders. It appears that PwC did make such reports and no action seems to have been taken by the Financial Regulator on foot of those. Again, if the collapse of Quinn could have been averted, avoided, or rendered less catastrophic by any

action of the Financial Regulator, that fact or any consequential liability is not part of these proceedings.

110. The trial judge considered all of these factors and, at para. 87(4) of his judgment, noted that the regulatory system "did not identify the weaknesses in the plaintiff's finances and Technical Provisions" and formed the view that whether and to what extent the fault lay with PwC is a central issue in the proceedings. He is correct in this, but the lessons, if any, to be learned by the regulatory system, the Financial Regulator, or other bodies responsible for regulation are not to be learnt in this litigation, but in proceedings where the various regulatory bodies are parties.

111. It may be the case that the action against the auditors could result in clarification regarding the extent of the duty of care an auditor owes to a company under audit, or the nature of the contractual obligations deriving from the auditor/client relationship. It is also the case that the public generally, and business persons, accountants, and auditors in particular, might benefit from an analysis in a judgment of the Superior Courts. This can be said of many cases, and indeed it could be said that most cases that result in a written judgment of the Superior Courts advance the understanding of the common law, and many cases involving private persons can have a significant and far reaching effect on the development of the common law or the application of those principles. That does not make this public interest litigation, and the question is not, it seems to me, whether the result is likely to be of interest to members of the public generally, or to an identified and significantly broad cohort of members of the public, but whether the interest under consideration is, in a general way, broad and public in nature.

112. The litigation in *Newlyn Developments Ltd v. Murphy Concrete (Manufacturing) Ltd*, it is true, concerned individual house owners and was likely to affect a very large number of persons impacted by the presence of pyrite in the foundations of their properties, in many cases family homes of members of the public. The present case equally may, but will not necessarily, impact upon the imposition of the 2% insurance levy on members of the public buying insurance. But the connection is not direct here. The insurance levy has been in place for a long number of years and no evidence was adduced to suggest that members of the public might directly benefit from this litigation by the abolition of or reduction in the amount of the levy.

113. Ultimately, the trial judge took the view that the litigation could not be characterised as "a run-of-the-mill professional negligence suit", at para. 90. He regarded the quantum of the claim as relevant and was persuaded that the case was likely to assist the development of the law regarding the regulatory framework in the interplay between the Financial Regulator and the auditor of an insurance company. He regarded the litigation as being, for these reasons, of exceptional public importance sufficient to refuse security.

114. There may well be, in some cases, an argument that if the making of an order for security for costs would stifle an otherwise meritorious claim which has a public interest element, whether that be because the litigation is brought to assert a right of the public generally or of classes or categories of members of the public, or because the result is likely to be a

necessary clarification of a significant point of law which itself is of public interest and importance, the public interest in permitting the litigation to continue might prevail and lead to the exercise of discretion to refuse to make the order.

115. In *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2016] IESCDET 57, the Supreme Court granted leave to appeal from a decision of the Court of Appeal pursuant to Article 34.3 of the Constitution. The Court expressed the view that it was genuinely public interest litigation, as the resolution of the issue affected all the insurance companies which had underwritten road traffic insurance in Ireland, where the kind of liability was not contemplated, was never foreseen, and would have resulted in "unjustifiable calls on insurance companies" through the annual levy.

116. An argument related to public interest litigation made in an application seeking leave to appeal a judgment of the Court of Appeal to the Supreme Court must be seen as different from one made by an insolvent plaintiff resisting an application for security for costs. In the former case, the possibility that the litigation will not proceed and that the public interest will thereby not only not be advanced but might be prejudiced must also be taken into account, and the Supreme Court, while it imposes a high bar on an application for leave to appeal to it, focuses more on the general benefit to the public at large from the clarification of legal principles.

117. There is, in reality, no analogy between the general public importance test as applied by the Supreme Court in considering an application for leave to appeal and the private interests at issue in the present case, albeit that the present effect of the collapse of Quinn is that members of the public contribute to the ICF by means of paying the insurance levy and the ICF, in turn, has picked up the liabilities of Quinn and is funding this litigation.

118. The case law would suggest that the public importance must be at a level of exceptionality, but as with any discretionary power which relies on exceptionality or special circumstances, there can be a wide range in the kinds of exceptional circumstances with which a court can engage. The trial judge, at para. 83, regarded the litigation to be of "sufficient public interest", but I do not think that he meant by that anything other than a view that the public importance was sufficiently exceptional. He was not, in my view, positing a new and less stringent test of sufficiency.

119. It is true that there has been, as counsel for Quinn says, a "socialisation" of the Quinn's loss which has been spread across the community. I accept too that it might appear that there are interests being pursued in this litigation which do transcend the personal interests of Quinn, in that the State will recover some, at least, of the substantial money that it has afforded to the Quinn administration, should the litigation succeed.

120. It is important to recall, in that regard, that in *Alltech (Systems) Ltd v. Olivetti UK Ltd* [2012] IEHC 512, [2012] 3 IR 396, at para. 20, the public interest was identified as having to be "exceptional" and that a plaintiff bore a "heavy burden" to establish this, because the refusal to make an order for security for costs deprived a defendant of an

order that it would otherwise be entitled to. The fact that the taxpayer or the State coffers may get the benefit of the litigation is not, in itself, a matter that makes the litigation one of exceptional public interest. It is not infrequent that an action by a Minister results in the recovery of monies that may restore public finances, but that fact would not make the litigation of exceptional and general public importance.

121. For these reasons, and primarily because, in my view, the interests pursued in this litigation are wholly commercial, I do not consider that the trial judge was correct to treat this litigation as a public interest litigation of sufficient importance to justify a departure from the requirement that security for costs be provided.

122. I would, insofar as it is necessary for the purpose of this appeal, allow that aspect of the appeal.

Conclusion

123. For the reasons stated, I would allow the appeal and the amount and mode of security is a matter now for determination by the High Court.

As this judgment is delivered electronically, Costello J. and McCarthy J. have indicated their agreement in advance.