**THE HIGH COURT**

[2020] IEHC 593

**[2018 No. 11047 P]**

**BETWEEN**

**TOM MCEVADDY PROPERTY LIMITED TRADING AS NEXUS HOMES (IN LIQUIDATION)**

**PLAINTIFF**

**AND**

**NATIONAL ASSET LOAN MANAGEMENT DAC**

**DEFENDANT**

**JUDGMENT of Mr. Justice Twomey delivered on the 20th day of November, 2020**

**SUMMARY**

1. What is at stake in this case is the right to effectively force a defendant by court order to 'lose' tens, if not hundreds of thousands, of euro in defending High Court litigation. This is because the plaintiff is insolvent, and as matters stand, irrespective of the outcome of the litigation, the defendant will *never* recover its legal costs. For a defendant to have to 'lose' (i.e. spend without any prospect of recovering) its legal costs whether it wins, loses or draws is a very serious situation for any defendant to face, whether a person or, as in this case, a company. The prospect of such an order arises because the insolvent plaintiff is resisting the defendant's application that the plaintiff provide security for costs before allowing the litigation to proceed. In essence, the plaintiff asserts that it should be entitled to litigate against the defendant on the basis of *win/win* for the plaintiff but *lose/lose* for the defendant.

2. This is because if the insolvent plaintiff wins, it will obviously not have to pay the defendant its costs (on the basis of 'the loser pays' principle), but in addition if the insolvent plaintiff loses, it will also end up not paying the defendant's legal costs, as it has no money. On the other hand, it is '*lose/lose'* for the defendant because if it loses, it will obviously have to pay its own costs, but also if it wins it will not get its legal costs as the plaintiff is insolvent.

3. In view of these consequences for the defendant of not getting security for costs from an insolvent plaintiff, very careful consideration must be given to the claim by an insolvent plaintiff that special circumstances exist such as to justify litigation being allowed to proceed on this lose/lose basis for the defendant.

4. While this case is concerned with a well-resourced defendant, the relevant principles are equally applicable to cases where an individual defendant of modest means might be forced to defend litigation on a *lose/lose* basis against an insolvent plaintiff, and thereby forced by court order to 'lose' a considerable sum in legal costs - perhaps his entire net worth or multiples of the average annual earnings.

**BACKGROUND**

5. This is an application by the defendant ("NAMA") against the plaintiff (the "Company") for security for NAMA's costs in this litigation instituted by the Company. The Company was voluntarily wound up on 14th September, 2009 by ordinary resolution after a meeting of creditors and these proceedings are being pursued by the Company, through its

liquidator, Mr. Conor O'Boyle ("Mr. O'Boyle"). The Company had a deficit of €11,861,401 at the time of its winding up.

6. The background to the substantive proceedings being taken by the Company is its claim that it paid €228,375.84 to Dun Laoghaire Rathdown County Council on 16th September, 2008 in respect of planning fees in relation to a property development at Robin Hill, Blackthorn Road, Sandyford, Dublin 18 (the "Property"). The Property was owned by Mr. Tom McEvaddy and his wife, Ms. Lorraine McEvaddy (the "McEvaddys"). The Company is owned and controlled by the McEvaddys.

7. The purchase of the Property had been funded by a loan from Allied Irish Banks plc to the McEvaddys and that loan and the security for that loan was subsequently transferred to NAMA. Thereafter, NAMA sold the loan and security over the Property to Promontoria (Gem) DAC ("Promontoria").

8. The Company's claim against NAMA arises because the Company claims that the €228,375.84 was paid by the Company to assist with the development of the Property on the basis that the McEvaddys would hold the proceeds of sale of the Property on trust for the Company to the extent of the said sum. The substantive proceedings issued by the Company therefore seek*, inter alia*, a declaration from the Court that NAMA holds the sum of €228,375.84 on trust for the benefit of the Company, since the Company asserts that NAMA has no entitlement to realise trust assets.

9. The Company claims that it is open to this Court to exercise its discretion to refuse the security for costs sought by NAMA as there are special circumstances which exist, namely that the impecuniosity of the Company was caused as a direct result of the wrongful actions of NAMA, i.e. its failure to account to the Company for the €228,375.84 in planning fees.

10. In summary, the Company claims that NAMA should have accounted to it for those monies expended on the development of the Property, as this money was not the money of the borrowers (the McEvaddys) but the money of the Company. It is also claimed that the proceeds from the sale of the Property, charged in favour of AIB/NAMA/Promontoria, were to be subject to the trust which was allegedly established between the McEvaddys and the Company, which trust was established when the Company paid that sum in planning fees.

**Section 52 Companies Act 2014 seeks to avoid 'consequence-free' litigation for a plaintiff**

11. Section 52 of the Companies Act, 2014 states:

> "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."

12. It appears to this Court that the purpose of the security for costs application pursuant to s. 52 of the Companies Act 2014 is, *inter alia*, to avoid a situation where an insolvent company could inflict considerable legal costs on a defendant, which has no hope of recovering those costs in the event that the defendant wins the litigation.

13. Another way to put this is that one of the aims of this section is to avoid a situation where there can be '*consequence-free'* litigation for certain litigants, or to ensure that such litigants have '*skin in the game'* before instituting litigation (which will oblige a third party to incur considerable legal costs). In the Supreme Court case of *W.L. Construction Limited v. Chawke* [2020] 1 I.L.R.M. 50, O' Malley J. made a similar point regarding the rationale for the jurisdiction which allows a court to join an individual to proceedings for the purpose of finding them liable for costs, where that individual will benefit from litigation initiated through an insolvent company. At para. 67 of her judgment, O'Malley J. stated:

> "This is, in my view, a clear example of the mischief aimed at by the exercise of the jurisdiction. In particular, the comments made by Clarke J. [in *Moorview Developments Ltd v. First Active plc* [2011] 3 I.R. 615] as to the need to prevent persons litigating on a consequence-free basis, with the aim of personal benefit, seem apposite in this case." (Emphasis -added)

14. It seems clear that if security for costs did not exist, then insolvent companies would have in effect consequence-free litigation (since they would never have to pay costs, win, lose or draw) and not only that, but the defendant would be faced with incurring considerable legal costs, which it has no hope of recovering if it wins.

**Exception to need for security for costs from a company which is unable to pay costs**

15. However, as is clear from the Supreme Court case of *Usk and District Residents Association Ltd v. The Environmental Protection Agency [*2006] 1 I.L.R.M. 363, the law in this area also recognises that it would be unfair to prevent a company (without the resources to pay security for costs) from litigating if it had a genuine claim against a defendant where the reason, it did not have sufficient funds to pay the defendant's legal costs, was the defendant's wrongdoing, which was the subject of the litigation it wished to pursue. For this reason, the law recognises '*special circumstances'* such as this in which a corporate plaintiff, even though it is insolvent, will not be required to provide security for costs before pursuing litigation.

16. It is clear from the *Usk* case that the Company bears the onus of establishing a *prima facie* case that there are special circumstances, i.e. that NAMA's alleged wrongdoing is the cause of the Company's inability to meet a costs order against it. At para. 6.2, Clarke J. (as he then was) quotes with approval from the judgment of Morris P. *in Interfinance Group Ltd v. KPMG Peat Marwick* (Unreported, High Court, Morris P., 29th June, 1998) wherein Morris P. summarises the '*overall approach'* to security for costs as follows:

> "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;

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 rests upon the party resisting the order.

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

17. Thus, there must be a *prima facie* defence to the plaintiff's claim and the plaintiff must not be able to pay the defendant's costs if the defendant wins the litigation. In this case, the Company accepts, for the purpose of this application only, that NAMA has an arguable defence to these proceedings and also that if the Company were to lose the substantive case against NAMA, that it would face a difficulty meeting an order for costs in favour of NAMA. This satisfies the first two pre-conditions referenced in *Usk*, which must be met for the within application to be made by NAMA and resisted by the Company.

18. As noted in *Usk*, the most common example of special circumstances which justify a refusal of security for costs is that the plaintiff's inability to pay flows from the alleged wrongdoing of the defendant. It is this special circumstance which is relied upon by the Company in this case.

19. It is common case that this claim (that the plaintiff's inability to pay costs is due to the defendant's wrongdoing), is to be considered on the basis of the four-part test laid down in the High Court case of *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7.

**Four-part test as to whether defendant's wrongdoing caused plaintiff's inability to pay**

20. At paras. 3.4 and 3.5 of the *Connaughton Road* case, Clarke J. (as he then was) stated:

"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.

Given that, on a motion such as this, the plaintiff is only required to establish the special circumstances, arising out of its inability to pay costs being due to the alleged wrongdoing of the defendants, on a *prima facie* basis, then it follows that each of the above steps must also be established on such a *prima facie* basis only. Items (1) and (2) do no more than state that the plaintiff must establish a *prima facie* case on liability and causation, for if such a case cannot be established, then there could be no basis for finding, even on a *prima facie* basis, that any lack of resources of the plaintiff are due to wrongdoing doing on the part of the defendant."

21. This Court will now proceed to apply this four-part test as laid down in *Connaughton Road* to the facts of the present application.

**Part 1 – Actionable wrongdoing?**

22. As regards the first part of that test, it seems clear that the alleged diversion by NAMA to itself of monies held on trust for the Company is capable of constituting actionable wrongdoing. However, it is not sufficient simply to assert a wrong. It is clear from the foregoing judgment of Clarke J. in *Connaughton Road* that there must be *prima facie* evidence to support the contention that there was actionable wrongdoing on the part of NAMA, and this will be considered further below.

**Part 2 – Causal connection between wrongdoing and consequences for the plaintiff?**

23. As regards the second part of the test, if the Company establishes at the trial that there has been a diversion by NAMA to itself of monies held on trust for the Company, then there is clearly a causal connection between NAMA's alleged wrongdoing and a practical consequence for the Company, namely its non-receipt of that sum of money.

**Part 3 – Consequences for plaintiff give rise to specific loss recoverable by plaintiff?**

24. As regards the third part of the test, it is clear that the practical consequence for the Company is a specific level of loss to that Company, namely a loss of €228,375.84, which is recoverable as a matter of law.

25. Thus, both the second and third parts of the test are satisfied. The remainder of this judgment will consider in more detail the first part of the test and then the fourth part of the test.

**Has the plaintiff established on a prima facie basis an actionable wrong by defendant?**

26. It is clear from Clarke J.'s judgment in *Connaughton Road* that the onus is on the Company to establish on a *prima facie* basis that each of the four parts of the test are satisfied. In this regard, all that there is to support the contention that there has been actionable wrongdoing by the defendant is an assertion by the liquidator that planning fees, when paid by the Company, were paid as part of the creation of a trust over the proceeds of sale of the Property and not paid, say as a loan to the McEvaddys. When particulars were raised with the Company (i.e. with its liquidator, Mr. O'Boyle) as to the

circumstances in which the Company had discharged the planning fees, the Company replied through Mr. O'Boyle that:

"(a) The contributions made by the Plaintiff amounts to approximately €228,375.84.

(b) The payments for May were made at the direction of, with the consent, knowledge and agreement of Mr. Tom McEvaddy and Ms. Lorraine McEvaddy. The Plaintiff is not privy as to what agreement existed other that they were done by the Plaintiff for and on behalf of Tom McEvaddy and Lorraine McEvaddy who were owners of and have full control of the Plaintiff Company."

It is clear therefore that the liquidator/the Company has no knowledge of the alleged trust which is an essential component of the alleged wrongdoing.

**Meaning of prima facie in the context of the four-part Connaughton Road test**

27. In the Court of Appeal case of *Welcome Ireland Hospitality Limited v. Cedarcourt Developments Limited* [2019] IECA 308, Baker J. dealt with the requirement under the Connaughton Road test that there be a connection between the alleged wrongdoing and the impecuniosity of the plaintiff. She makes clear that this part of the test, which must be established on a *prima facie* basis, is not met where a plaintiff makes a '*mere bald statement of fact'*. In her judgment, Baker J. clarifies that what is required is '*some evidence which is cogent and credible, which corroborates the contention being made'* (quoting Peart J. in *Tír Na nÓg Projects (Ireland) Limited v. P.J. O'Driscoll & Sons (A Firm)* [2019] IECA 154 at para. 31). At para. 27, Baker J. held that the requirement to establish a '*prima facie'* case meant that:

> "the evidence required must be such that enables a court to form a view as to whether the causative connection between the financial difficulties and the alleged wrongdoing can be established."

An example given by Baker J. of the type of *prima facie* evidence which might suffice was taken from the Supreme Court case of *Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance Ltd* (No. 2) [1999] 1 I.R. 501, namely '*credible expert evidence which had not been doubted by the defendant'.*

28. While Baker J. was dealing with the meaning of *prima facie* in the context of the causal connection between the wrongdoing of the defendant and the impecuniosity of the plaintiff, it seems to this Court that, since as noted each of the four parts of the test must be satisfied on a *prima facie* basis, there is no reason in principle why this meaning of *prima facie* should not equally apply to the other parts of the test and thus to the question of whether there was actionable wrongdoing on the part of the defendant.

**Is there prima facie evidence to satisfy first part of test?**

29. In applying these principles to the present case, it is this Court's view that there is nothing more than an assertion of a trust, by a liquidator who, on his own account, knows nothing of the basis upon which the money was paid by the Company, whether as a loan, on trust or otherwise. There is nothing close to cogent or credible evidence which

corroborates the contention made or evidence which is similar in cogency to say credible expert evidence which is not disputed by the defendant.

30. For this reason, this Court concludes that the first part of the test in *Connaughton Road*, for the refusal of a security for costs order, has not been satisfied. As noted by Clarke J. in *Connaughton Road* at para. 3.5, if a *prima facie* case of actionable wrongdoing cannot be established, then there is no basis for finding that the inability to pay costs is caused by the defendant:

> "Items (1) and (2) do no more than state that the plaintiff must establish a *prima facie* case on liability and causation, for if such case cannot be established, then there could be no basis for finding, even on a *prima facie* basis, that any lack of resources of the plaintiff are due to wrongdoing on the part of the defendant."

31. Since there is no basis for finding that the inability to pay costs on the part of the Company was caused by NAMA, there can be no basis for this Court *not* granting security for costs against the Company and thus no basis for permitting the Company to pursue '*consequence-free'* litigation.

32. However, if this Court is wrong in this regard, it is relevant to consider the fourth part of the test, which would also have to be satisfied for this Court to refuse to grant security for costs.

**Part 4 - Does loss make difference between plaintiff being able to pay costs and not?**

33. If the plaintiff had established a *prima facie* case of actionable wrongdoing against it on the part of the defendant, it must still establish on a *prima facie* basis that the loss which it is pursuing will make the difference between it being able to pay the defendant's legal costs (if it were to lose) and not being able to pay those costs.

34. In relation to this part of the test, it is clear from the judgment of Clarke J., that the Court should have regard to the quantum, i.e. the amount of money the plaintiff is due to recover if it wins the litigation on the one hand and the amount of its liabilities on the other hand as well as the likely costs, since as is stated by him at para. 3.5 *et seq*.:

> "To take a simple example a plaintiff company which has an excess of liabilities over assets of (say) €200,000 will manifestly be unable to pay the defendant's costs should the defendant succeed. If the high watermark of that plaintiff's claim is only for €100,000 then it equally follows that the plaintiff's inability to pay costs has not been caused by the defendant's wrongdoing in that, even if the plaintiff were to succeed, it would still be an excess of liabilities over assets of a €100,000.
>
> […]
>
> [the plaintiff] must show, at least on a *prima facie* basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs.

> […]
>
> [counsel for the defendant] did assert that, in attempting to show special circumstances, it was incumbent on such a company to show, at least to a *prima facie* level, that were it not for the wrongdoing asserted it not only would not have lost money, but would have made sufficient profits so as to be in funds sufficient to pay the likely costs of a successful defendant.
>
> It seems to me that if a plaintiff is not in a position to establish such a fact (on a *prima facie* basis), then a plaintiff will not have been able to show that its inability to pay costs is due to the wrongdoing which is at the heart of the proceedings." (Emphasis added)

35. Therefore, to answer the question raised in Part 4 of the test, this Court will consider the quantum involved, i.e. the liabilities of the Company (an apparent deficit of €2,301,107) on the one hand, and the amount of the sum it is claiming from NAMA (€228,375) on the other hand, bearing in mind the '*likely costs of a successful defendant'*. In this context, this Court will consider whether, if the Company were to succeed in the litigation, the Company would still be unable to pay NAMA's costs (*albeit* in the hypothetical scenario of NAMA being awarded costs, even though it had lost). In such a situation, i.e. if the Company were to be still unable to pay NAMA's costs, even after recovering the loss it seeks in the litigation, then the Company fails to satisfy the fourth part of the test and there is no basis for refusing security for costs.

36. In relation to the Company's financial position, the Statement of Affairs at the time of its liquidation dated 11th September, 2009 provides that it had a deficit of €11,861,401. A more recent Statement of Affairs, one dated 21st January, 2020, provides that the Company has a deficit of €2,301,107. On the basis of this Statement of Affairs, it would superficially seem that there is no way that the money which the Company claims it is owed by NAMA, some €228,375, would enable the Company to pay legal costs to NAMA, since the Company would still have a deficit of just over €2 million, even after receiving the money from NAMA.

**Impecuniosity of Company caused by failure of NAMA to pay it €228,375?**

37. However, the Company's position is that its impecuniosity was caused by NAMA. In this regard, the liquidator, Mr. O'Boyle, avers at para. 10 of his second affidavit that:

> "the Plaintiff's impecuniosity is attributable to the wrong of the Defendant which is the subject matter of the within proceedings and is not attributable to any claimed liabilities of the Company."

38. It is clear therefore that the liquidator is claiming that the Company's impecuniosity was not caused by the manner in which the Company was managed or otherwise, but rather by the alleged wrongful failure by NAMA to pay it €228,375. In considering this averment, it is important to note that the evidence before this Court is as follows:

- the Company expended just over €228,375 in planning fees in September 2008;

- the Company was wound up as insolvent in September 2009;
- it had a deficit at the time of its winding of in September 2009 of over €11 million;
- its most recent Statement of Affairs, in January 2020, shows a deficit of over €2 million.

39. The only evidence put forward by the liquidator to support his claim that the impecuniosity of the Company was caused by NAMA is a bald averment to this effect. No cogent or credible evidence is provided by him to support this assertion that the alleged wrongful failure of NAMA to pay €228,375 to the Company, which had been expended by the Company in September 2008, caused the impecuniosity of a company which was liquidated in September 2009 with a deficit of over €11 million.

**But what if all the debts of the Company are statute barred?**

40. However, in support of this claim that NAMA caused the Company's impecuniosity, is the claim by the Company that all, but €58,309, of the €2,301,107 deficit in the most recent Statement of Affairs, is statute barred. On this basis, the Company claims that the receipt of €228,375 by the Company, were it to be successful in its litigation, would in fact be the difference between the Company being able to pay the legal costs of NAMA and not being able to do so.

41. However, the liquidator has provided no detailed analysis of the debts that comprise this deficit and simply asserts that all these debts are statute barred. He avers at para. 8 of his second affidavit that:

> "I say and I believe and I am so advised that the Company is entitled to rely on the defence that the limitation period pursuant to the provisions of the Statute of Limitations 1957 (as amended) has expired in respect of these claims which are all more than a decade old. In the circumstances, the outstanding indebtedness of the Plaintiff Company which is not statute barred is now limited to the sum of €58,309.00."

42. However, again no cogent or credible evidence has been provided for this assertion that all of these debts are statute barred. Yet on this basis alone, the liquidator purports to say that the allegedly statute barred debts should be excluded from the Court's calculations in determining whether the payment of the disputed sum will lead to the plaintiff being able to pay the defendant's costs. On the basis of this bald assertion therefore, regarding the allegedly statute-barred debts, the Company claims to be entitled to undertake 'consequence-free' litigation, i.e. force, by court order, NAMA to 'lose' considerable legal costs.

**Surplus of €66,748 to pay legal fees?**

43. Furthermore, NAMA claims that the Company has omitted from its calculations, the sum of €103,318 owed by the Company to the Revenue, which would bring the total deficit to €161,627 versus a receipt of €228,375, even if the assertion regarding the Statue of Limitations were correct. The Company did not seriously dispute this claim by NAMA

regarding the Revenue debt, since the Company's only reply to this alleged omission by the liquidator in his calculations of the outstanding indebtedness is to submit that:

> "Even allowing for the Defendant's contention that the revenue debt of €103,318 should also be included in this figure, the sum claimed would still be sufficient to enable the Plaintiff to meet any adverse costs order."

44. Yet, this omission of the Revenue debt by the Company is a significant alleged oversight since it cuts the indebtedness of the Company by two thirds from €161,627 to €58,309 and thereby reduces the alleged surplus to (hypothetically) pay NAMA's legal fees from €170,066 to €66,748. This is hypothetical, since as previously noted NAMA will of course never receive these legal fees, even if it wins the litigation, since the plaintiff is insolvent and if the Company loses, NAMA will not be receiving any money from it.

45. The Company's position appears to be that if the Company receives €228,375 (the sum it is claiming) against a deficit of €161,627, this leaves a net sum of €66,748, which would be, it seems to be submitted, sufficient to meet a costs order against it (if it lost the litigation).

46. No submissions were received regarding the likely costs of the High Court proceedings if they were to run, and so this Court cannot make any determination whether the Company is correct in its apparent submission that a sum of €66,748 would be sufficient to cover the defendant's costs if the case was to be litigated to completion. Accordingly, this element of the case is not determinative in this application. However, it is to be noted that the costs for High Court litigation can often be many multiples of this figure. For example, in a recent case (*Waratek Holdings Ltd v. Waratek Ltd* [2019] IEHC 903) where security for costs was ordered, security for costs of €486,400 was ordered in proceedings concerning a challenge to the validity of a merger transaction, which was estimated to run for 16 days. In a recent application dealt with by this Court, there was evidence from legal costs accountants that costs for a straight forward three-day specific performance case would be €120,000 (see *Pumway Ltd v. Cahill Dunphy* (Record No. 2019/8389 P) in which an *ex tempore* decision was given by this Court on 6th November, 2020. It is not being suggested that the present case and those cases are comparable, but simply that it is not uncommon to see costs in High Court ligation amounting to several hundred thousand euro i.e. a lot more than €66,748.

**Stifling an otherwise valid claim by the Company?**

47. Against this background, it is relevant to consider that, if say the legal costs of NAMA in this litigation were to be in excess of €66,748, then it seems that the Company would not be able to meet the legal costs of NAMA, even if the Company won the litigation. This is exactly the type of situation which Hogan J. considered in *CMC Medical Operations Limited (In Liquidation) v. The Voluntary Health Insurance Board* [2015] IECA 69. The Company relies upon this case to resist the order for security for costs.

48. In the *CMC* judgment, Hogan J. detailed a hypothetical case of an impecunious plaintiff company with a deficit of €40,000 seeking to litigate against a defendant, who would

have to spend €60,000 in defending the litigation, meaning that the plaintiff company would have to win damages of €100,000 to be allowed proceed. In light of the constitutional right of access to the courts Hogan J. at para. 10 noted that:

> "I cannot help thinking that as the application of s. 390 of the 1963 Act in this manner could effectively stifle otherwise valid claims, the *Connaughton Road* test itself may have to be re-visited in the light of the constitutional considerations I have just mentioned."

49. The comments of Hogan J. were relied upon by the plaintiff in the Court of Appeal case of *Hedgecroft Limited v. Htremfta Limited* [2018] IECA 364, when the plaintiff/appellant appealed the decision to award security of costs against it on the basis that the ordering of security for costs would '*stifle a valid claim'*. Costello J. stated at para. 50 in relation to Hogan J.'s judgment that:

> "I believe that the *obiter* observations of Hogan J would unduly restrict the proper operation of the section and do not correctly set out the test to be applied by a court considering an application under s. 52, whilst acknowledging that the court ultimately retains a discretion in the interests of justice."

50. This Court shares the views of Costello J. regarding the *obiter* status of the comments of Hogan J. and concludes that the law as it currently stands is that the test to be applied is the four-part test set out in *Connaughton Road* and not whether the grant of security for costs would stifle a valid claim, whilst noting the discretion of the court in the interests of justice.

**Statute of Limitations does not extinguish a right, but it bars a remedy**

51. NAMA also claims that the liquidator's contention, that the allegedly statute barred debts can be discounted and that the indebtedness of the Company can simply be reduced to €161,627 (or even to €58,309) for the purposes of this application, is misconceived. This is because it claims that it is clear from the Supreme Court decision in *Clarke v. O'Gorman* [2014] IESC 72, that the effect of the Statute of Limitations is not to extinguish a right (so as to extinguish a debt so that the deficit can simply be regarded as reduced as is the Company's claim), but rather to bar *the remedy* related to that right, so that the debt continues to exist and is not reduced.

52. For this reason, NAMA asserts that the right holder is at liberty to avail himself/herself of that right by means which do not require him/her to take proceedings to enforce it. On this basis therefore, NAMA claims that it is incorrect for the liquidator to claim that the indebtedness of the Company has been reduced to €161,627 (or even to €58,309).

53. The Company in response argues that '*as a matter of practical reality'* these debts will not be enforceable against the Company.

**Limitation period stops running at the commencement of the winding up**

54. NAMA also claims that the reliance by the liquidator on the fact that some of the debts may be '*more than a decade old'* is not sufficient in itself to support the assertion that

the debts are statute barred, since it claims that the High Court decision of *Re Money Markets International Stockbrokers (In Liquidation)* [2012] IEHC 214 is authority for the proposition that the limitation period in respect of debts due by a company ceases to run on the date of the winding up of that company.

55. In this case the Company was wound up over ten years ago, on the 14th September, 2009 and thus NAMA claims that the limitation period stopped running on that date. NAMA also relies on the English High Court case of *Re Mixhurst Ltd* [1994] 2 BCLC 19 at p. 23, where Evans-Lombe J. states:

> "[…] periods of limitation cease to run once a winding up has commenced and the rights of those claiming in the liquidation therefore crystallise at the commencement of the winding up."

56. The Company for its part does not dispute that time does not continue to run once a winding up has commenced but it makes what appears to be a more general point that, where proceedings are issued against the Company in liquidation, after the time provided for in the Statute of Limitations has expired, those claims are not insulated from a defence under the Statute of Limitations.

57. It is in light of these claims that this Court must consider whether the Company has provided *prima facie* evidence that the loss which the Company seeks to recover will make the difference between the Company being able to meet an order for costs and not.

58. In weighing up these claims (and indeed in considering the claim that NAMA is *prima facie* guilty of actionable wrongdoing), it is important to note what is at stake here, when a Court is permitting an insolvent plaintiff to litigate *without* providing security for costs.

**Irrespective of the result of the litigation, the defendant will never recover its costs**

59. It is important to bear in mind that in the current case, the insolvent plaintiff has no *'skin in the game',* since win, lose or draw, it has no money to pay legal costs. In many ways, this litigation for an insolvent plaintiff is a '*free go'* in the sense that it has little to lose by trying to see if its claim will succeed before the High Court (in this case, its claim is that the money is 'trust' money rather than say a loan).

60. Yet crucially, in considering what is at stake for the defendant, it is anything but a 'free go'. This is because the insolvent plaintiff is seeking to inflict irrecoverable legal costs on that defendant. This is because a defendant in a case such as this, whether a corporate or an individual, will never be able to recover its costs – win, lose or draw.

61. This is because if the defendant wins the litigation, the insolvent plaintiff has no money to pay the defendant's costs. Yet it is important to remember that the entitlement to costs is just as much a part of the administration of justice as the right of access to the courts (to remedy an alleged wrong). This is particularly so where the value of the alleged 'wrong' may be less than the 'value' of the costs in defending that claim, although in this case it is not clear if the costs will or will not exceed the value of the claim, €228,375. As noted by

Baker J. at para. 53 in *Quinn Insurance Limited (Under Administration) v. PricewaterhouseCoopers (A Firm)* [2020] IECA 109:

> "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.)"

62. In addition to not getting costs if the defendant wins this litigation, it is also of course the case that, if the defendant loses the litigation, it would not normally be entitled to its costs. In this respect, it is '*lose/lose'* for the defendant while it is '*win/win'* for the plaintiff or perhaps more accurately the insolvent plaintiff has nothing to lose.

63. The courts are alive to the fact that a defendant against an insolvent company is in a '*lose/lose'* situation. In this regard, the Court of Appeal in the *Quinn* case recognised that in general a defendant should not be forced to defend an action brought by an insolvent plaintiff, when it noted that the requirement that an insolvent company provide security for costs is the '*quid pro quo'* for the law granting the privilege of limited liability to companies. At para. 51, Baker J. stated:

> "The fourth limb of the test in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* is 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." (Emphasis added)

**What's at stake? – the right to force by court order a defendant to lose money**

64. While it is well settled that there is a right of access to the courts, it is equally well settled that the right of access to the courts is not absolute. The right of a plaintiff to access the courts and to pursue litigation must be balanced with the rights of a defendant (see, for example, *O'Reilly McCabe v. Minister for Justice* [2009] IESC 52). This Court must therefore consider not only the right of the plaintiff to pursue the within litigation but must also ensure that the property rights of the defendant are protected.

65. In considering in this instance whether the Company's right of access to the courts should take precedence over NAMA's property rights, this Court cannot lose sight of what is at stake in this application - it is in real terms a case in which the insolvent plaintiff seeks to force a defendant to 'lose' significant sums of money in defending litigation, whether that defendant wins or loses that litigation. This is a very significant order for a court to make – to effectively order that the defendant 'lose' i.e. spend legal fees which it will never recover even if it wins the litigation.

66. In this instance, this Court is not dealing with a natural person, but a legal person as a defendant. However, it is relevant to bear in mind that the principles regarding an insolvent plaintiff not having to provide security for costs are equally applicable where the defendant is an individual who is being forced to 'lose' tens, if not hundreds, of thousands of euro, i.e. multiples of the average annual earnings in the State and perhaps that defendant's entire net worth.

67. It seems clear to this Court that something considerably more is required, than a mere assertion by a liquidator that certain debts are statute barred to thereby force that defendant to lose considerable sums of money defending High Court litigation. Instead, the plaintiff must establish, *inter alia*, a '*prima facie'* case in this regard.

68. This Court has already referenced the *Welcome Ireland* case and noted what is required in order to establish that there is *prima facie* evidence of an actionable wrongdoing on the part of the defendant.

69. Similar principles apply to establishing that there is *prima facie* evidence that the payment of the disputed sum would enable the plaintiff to meet the defendant's costs. It is clear from the *Welcome Ireland* case that an insolvent plaintiff cannot force a defendant to 'lose' considerable sums by mere assertion, but must provide cogent and credible evidence.

70. In summary, this evidence must be cogent and credible to convince a court that it is appropriate to require a defendant to 'lose' money defending litigation, irrespective of the outcome of the litigation. It is this principle which is at issue here.

71. In this context, it is notable that the Company has provided no evidence, to enable the Court to form a view as to whether it can be established that the vast majority of the deficit of €2,301,107 is in fact statute barred as it claims, other than an assertion by the liquidator that some of the debts are '*more than a decade old'*.

72. In the Court of Appeal decision in *Quinn* Baker J. stated at para. 63 that:

> "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." (Emphasis added)

73. In this case, there is mere assertion that the inability to pay the costs flows from the non-payment of the alleged trust money, because it is asserted that virtually all the other debts of the Company are statute-barred and therefore it is asserted that the Company is otherwise solvent.

74. This is not sufficient for this Court to deprive NAMA of its security for costs and to oblige it to 'lose' considerable sums of money in defending High Court litigation. If it were

sufficient, it would be an easy matter for insolvent companies to seek to inflict losses on defendants by simply asserting, without evidence, that the debts which the insolvent company owes, which render it unable to pay legal costs, are in fact statute barred or otherwise unenforceable (so as to enable the insolvent company satisfy Part 4 of the *Connaughton Road* test).

**Conclusion**

75. This is a case which considers the principle that an insolvent plaintiff can in certain instances force by court order a defendant (including an individual) to 'lose' tens, if not hundreds, of thousands of euro (i.e. possibly multiples of the average annual earnings).

76. However, before an insolvent company can engage upon such '*consequence-free'* litigation (since it has no assets to lose) and before it can force a defendant to 'lose' considerable sums in defending that litigation, there must first be cogent and credible evidence, and not mere assertions, to support the plaintiff's claim that it has an actionable wrong to litigate.

77. Secondly, there must be cogent and credible evidence, and not mere assertions, that the amount which the plaintiff anticipates receiving if it wins the litigation, would be sufficient to enable the plaintiff to pay the defendant's costs once account is taken of the plaintiff's liabilities (in the hypothetical scenario of the plaintiff losing that litigation).

78. In this case however, there are just assertions of an actionable wrong and assertions that the millions in debt owed by the Company are statute-barred, without cogent and credible evidence to support same.

79. Accordingly, this Court can see no basis for making a court order which would result in the somewhat extreme circumstances that the defendant would be required to 'lose' (i.e. spend with no prospect of recovering) money in defending the plaintiff's proposed litigation.

80. Therefore, there is no basis for refusing to grant the defendant security for its costs, before allowing the plaintiff to proceed with litigation. This Court will therefore grant the reliefs sought by the defendant in its Notice of Motion.

81. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be put in for mention one week from the date of delivery of judgment, at 10.45 am.