

THE HIGH COURT

[2021] IEHC 535

[Record No. 2009/3035 P]

BETWEEN

SAVANNE LIMITED

PLAINTIFF

AND

**IRISH BANK RESOLUTION CORPORATION (IN SPECIAL LIQUIDATION)
(FORMERLY IRISH NATIONWIDE BUILDING SOCIETY)**

AND MICHAEL FINGLETON

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 29th day of July, 2021

Introduction

1. This is an application by the first named defendant for an order directing that the plaintiff should provide security for costs, in respect of the its costs between 12th June, 2018 and the hearing of the action, in the sum of €162,996.
2. It has not been seriously disputed by the plaintiff that the first defendant has established (i) that the plaintiff company would be unable to pay costs if unsuccessful at the trial of the action, and (ii) that the first defendant has a *prima facie* defence to the plaintiff's action against it.
3. The essential issue for the court is whether the plaintiff has established special circumstances which would persuade the court that the order for security for costs should not be made. In particular, the plaintiff alleges that the delay of approximately five years by the defendant in seeking security for costs from it, is sufficient to disentitle the first defendant to the reliefs sought in this application.
4. In the alternative, the plaintiff argues that its inability to pay costs was due to the wrongdoing on the part of the first defendant, which is the subject matter of the proceedings herein. It is submitted that in these circumstances the court should lean against directing that security for costs be provided.
5. In response to those assertions, the first defendant argues (i) that when one looks at the history of the litigation to date, there was no undue delay by it in seeking the order for security for costs; (ii) even if the court were to hold that there was some delay on the part of the defendant, that of itself should not prevent the order being made, because no additional costs of any substance were incurred by the plaintiff between the time when the first defendant delivered its defence and the first request that security for costs be provided by the plaintiff, which request was made by letter dated 12th June, 2018; (iii) it is submitted that the plaintiff company's accounts clearly show that the company is insolvent, with a number of judgments registered against it. The main creditors of the company are the investors, who had lent sums to the company, which sums appear as loans owing by the company in its accounts. It was submitted that there is no evidence that the company's impecuniosity, or its inability to provide security for costs, was due to any alleged wrongdoing on the part of the first defendant.

6. Thus, the two issues for determination on this application are; (a) whether delay on the part of the defendant in bringing this application should prevent an order for security for costs being made and (b) whether the plaintiff has established on a *prima facie* basis that its inability to meet any order for costs that may be made against it, was due to the wrongdoing of the defendant, such that it would be unjust that an order for security for costs should be made.

Background to the Proceedings

7. It is only necessary to give a very brief summary of the background to the substantive proceedings. The plaintiff company was originally owned and controlled by a Mr. & Mrs. Desmond. The company had a number of loan facilities with Irish National Building Society (hereinafter 'INBS'). These loans were secured by mortgages over three properties: Ramelton Fishery in Ramelton, Co. Donegal; the Carraig Rua Hotel; and Molly's Bar, both in Dunfanaghy, Co. Donegal.
8. When the company could not meet its obligations under the loan agreements, it surrendered the hotel and bar premises to the bank by separate deeds of surrender dated 15th November, 2004.
9. The hotel and Molly's Bar were listed for sale at auction on 13th December, 2005. However, the previous owners of the plaintiff company, Mr. & Mrs. Desmond, secured an injunction from the High Court preventing the sale, on the basis of an allegation that the deeds of surrender had been executed without the benefit of legal advice. That injunction was subsequently lifted. On 24th January, 2007 the hotel was sold for €2,250,000. Molly's Bar was sold for €710,000 on 23rd November, 2007.
10. On 6th July, 2006, the bank had appointed a receiver over Ramelton Fishery. On 2nd February, 2007, the plaintiff made an offer of €2,579,203 to INBS to redeem the security at Ramelton Fishery. That offer was accepted by INBS. Upon payment of that sum by the plaintiff to INBS, the secured property was released back to the plaintiff.
11. In these proceedings, the plaintiff claims the following: (a) that in breach of agreement, the first defendant, or more particularly INBS, did not maintain the hotel or Molly's Bar and allowed them to become dilapidated; (b) that the bank sold the two premises at a gross undervalue. It is not exactly clear from the pleadings what case the plaintiff is making about the fishery. It is not clear if the plaintiff is alleging that the receiver appointed by INBS, in some way mismanaged the fishery in the period before the loan was redeemed by the plaintiff.
12. There are a number of ancillary claims pleaded in the statement of claim concerning the provision of redemption figures for the loans. They do not appear to be the main elements in the plaintiff's action against the first defendant. There was also a claim in respect of the alleged wrongful withholding of a sum of approximately €65,000 by the first named defendant, but that allegation has been withdrawn.

13. In its statement of claim, the plaintiff alleges that there was an undervaluation of the hotel of approximately €1.5m and an undervaluation of Molly's Bar of €100,000.
14. In its defence, the first defendant denies that it mismanaged the properties, or allowed them to fall into disrepair. The first defendant further denies that it sold either of the two properties at a gross undervaluation, or at any undervalue. They plead that the properties were put on the market and sold at values that had been advised to the first defendant by an independent firm of estate agents. The first defendant denies that there was any wrongdoing by it in relation to the provision of information in respect of redemption figures in respect of the loans.
15. That is a very brief summary of the issues in the substantive proceedings.

Chronology of the Litigation to Date

16. As delay is the primary ground on which the plaintiff resists the defendant's application, it is necessary to set out a chronology of the proceedings to date. Unfortunately, these proceedings have had a torturous progress since their commencement in 2009.
17. The plenary summons issued on 1st April, 2009. On 20th May, 2010 the plaintiff issued a motion seeking judgment in default of appearance against the defendants. That motion was returnable for 11th October, 2010. It appears that at that time, the plaintiff filed a document in the Central Office purporting to be a "statement of claim", but it was clearly a draft document, as there were many gaps and omissions therein. On 6th October, 2010, an appearance was filed on behalf of the first defendant.
18. On 8th February, 2011, the assets of INBS were transferred to Anglo Irish Bank Corporation Limited. By special resolution made on 14th October, 2011, Anglo changed its name to Irish Bank Resolution Corporation Limited. On 7th February, 2013, the Minister for Finance made an order providing for, *inter alia*, the orderly winding up of IBRC and for that purpose, Mr. Eamon Richardson and Mr. Kieran Wallace were appointed as joint special liquidators to IBRC.
19. On 26th June, 2013, an order was made by the High Court on the *ex parte* application of the plaintiff, lifting the stay on the proceedings against IBRC. The order also gave liberty to the plaintiff to amend the title to the proceedings.
20. On 26th November, 2013, the plaintiff issued a motion for judgment in default of defence against the first defendant. This was done even though the plaintiff had not delivered any statement of claim to the defendant at that time. The motion was returnable to 20th January, 2014. At the hearing of the motion, the judge ordered the plaintiff to deliver a statement of claim within three weeks and allowed three weeks thereafter for delivery of a defence.
21. On 27th January, 2014, a statement of claim was served on the first defendant. On 30th January, 2014, the first defendant served a notice for particulars on the plaintiff arising out of its statement of claim. A defence was filed on behalf of the first defendant on 17th February, 2014.

22. On 24th June, 2015, the plaintiff sent a letter to the first defendant seeking voluntary discovery of documents. That letter was not in compliance with the rules. The first defendant's solicitors pointed that out in a letter dated 24th September, 2015. By letter dated 19th June, 2016, the plaintiff's solicitor sent a further letter seeking to remedy the defects in its previous request for voluntary discovery. The first defendant's solicitor responded thereto by letter dated 8th September, 2016.
23. On 10th October, 2017, a motion was issued by the first defendant seeking to have the plaintiff's action against it struck out for want of prosecution. That motion came on for hearing before the Master of the High Court on 16th May, 2018, at which time, the Master made an order dismissing the plaintiff's action against the first defendant.
24. On 28th May, 2018, the plaintiff appealed the decision of the Master of the High Court to the High Court.
25. By letter dated 12th June, 2018, the first defendant sent a letter to the plaintiff's solicitor, calling on the plaintiff to provide security for costs. The plaintiff's solicitor responded thereto by letter dated 14th June, 2018, pointing out that given the pending appeal in relation to the dismissal of the action, the question of security for costs did not arise.
26. On 16th July, 2018, the plaintiff's appeal against the order made by the Master of the High Court was heard by O'Hanlon J. The learned judge set aside the Master's order, on the plaintiff's undertaking to furnish replies to the defendant's notice for particulars of 30th January, 2014, within two weeks and on its undertaking to issue a motion for discovery returnable for 26th November, 2018.
27. On 1st September, 2018 the plaintiff furnished replies to the defendant's notice for particulars dated 30th January, 2014.
28. On 30th July, 2018, the plaintiff issued a motion for discovery against the first defendant returnable for 26th November, 2018. The first defendant filed an affidavit in reply thereto. The motion was adjourned for hearing to 25th February, 2019, on which date the motion was struck out on consent, with no order as to costs.
29. On 13th August, 2018, the first defendant sent a second letter seeking security for costs. The plaintiff replied thereto by letter dated 20th August, 2018. A third letter seeking security for costs was sent on 16th October, 2018; to which a response was furnished on 19th October, 2018, which stated that the plaintiff's solicitor would take instructions from his client.
30. On 18th October, 2018, the first defendant made limited voluntary discovery to the plaintiff. The remaining categories remained in dispute to be determined at the hearing of the motion on 25th February, 2019. However, as already noted, the plaintiff did not proceed with that motion and it was struck out on consent.

31. On 18th June, 2019, a fourth letter was sent by the solicitor for the first defendant seeking security for costs from the plaintiff. That letter indicated that if no positive response thereto was furnished by 25th June, 2019, the necessary motion would issue.
32. On 2nd July, 2019, the first defendant issued its notice of motion seeking an order that the plaintiff provide security for costs.

Submissions of the Parties

33. Notwithstanding that this is an application by the first defendant seeking an order that the plaintiff provide security for costs, given the essential issues that are in dispute between the parties, it is appropriate to begin by setting out the submissions made on behalf of the plaintiff, as to why the first defendant's application should be refused.
34. Mr. Lyons SC on behalf of the plaintiff submitted that it was established in the case law that delay on the part of a defendant in seeking security for costs from a plaintiff, could constitute a special circumstance which would justify the court in refusing to grant the order. He submitted that in this case, a delay on the part of the defendant in bringing this application, of approximately ten years from the commencement of the proceedings, or approximately five years from the date of delivery of the defence, was much longer than the periods of delay which in previous cases had been deemed to be of such magnitude as to warrant a refusal of the orders sought by the defendant. It was submitted that in those cases, delays of the order of a year, or even months, had been held to be too long. The courts had refused to make the order in such circumstances: see *SEE Company Limited v. Public Lighting Services* [1987] ILRM 255; *Beauross Limited v. Kennedy* [1995] WJSC-HC 3854; *Hidden Ireland Heritage Holidays Limited v. Indigo Services Limited* [2005] 2 IR 115; *Dublin International Arena Limited v. Campus and Stadium Ireland* [2008] ILRM 496 and *Moorview Developments Limited v. Cunningham* [2010] IEHC 30.
35. Counsel submitted that it was established that an application for security for costs should be brought at an early stage: see *Quinn Insurance Limited v. PWC* [2021] IESC 15, in particular, the dicta of Clarke CJ at para. 7.8 and O'Donnell J at para. 3. Counsel further referred to *Moorview v. Cunningham*, where it was stated that the application should be brought by a defendant in or around the time of the filing of its defence.
36. It was submitted that in this case a delay of five years was grossly excessive. During that time the plaintiff had incurred the costs of proceeding with the litigation. It was submitted that it was well established that where a plaintiff had incurred costs as a result of the delay of a defendant in bringing the application, that was an appropriate basis on which the court should refuse to make the order sought.
37. In the alternative, counsel submitted that the plaintiff alleged that the level of its losses, which were pleaded at circa. €1.6m, which arose on the sale of the properties at an undervalue by the first defendant, were such that it was clear that if that wrongdoing had not happened, the plaintiff company would have been able to pay the sum estimated as

being the likely costs which would be incurred by the first defendant, in the order of €162,996.

38. It was submitted that the circumstances of the case outlined in the pleadings and in the affidavits before the court, established that the plaintiff had satisfied the test in respect of this special circumstance as laid down in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7, as interpreted in the *Quinn Insurance v. PWC* case.
39. Counsel submitted that on this basis also, the court should decline to grant the orders sought by the first defendant herein.
40. In the affidavits filed on behalf of the plaintiff, there had been some reference to the public interest issue constituting a special circumstance, however that matter was not relied upon by the plaintiff at the hearing.
41. In response, Mr. Gardiner SC submitted that what might at first sight be regarded as inordinate delay, was not that excessive when one had regard to the conduct of the litigation from its inception. Counsel pointed out that the plaintiff had delayed in a number of significant respects. Firstly, it delayed in serving a complete version of the statement of claim on the first defendant, which was only done on 17th January, 2014 in compliance with a court order, which was approximately five years after the issuance of the plenary summons.
42. Secondly, it was submitted that the plaintiff had delayed for over four years in furnishing replies to the defendant's notice for particular raised on 30th January, 2014, which were not replied to until 1st September, 2018.
43. It was submitted that it was these periods of delay and inaction on the part of the plaintiff that had led to the first defendant issuing its motion on 10th October, 2017 seeking to strike out the plaintiff's action for want of prosecution. That application had been successful before the Master of the High Court, which order had been made on 16th May, 2018. The plaintiff had been successful in having that order overturned by order of the High Court made on 16th July, 2018.
44. Counsel also pointed to the fact that the plaintiff had prevaricated in its response to the first three letters from the first defendant's solicitor seeking security for costs from the plaintiff. The first defendant had had to write a fourth letter indicating that if agreement to provide security for costs was not forthcoming by 25th June, 2019, the necessary motion would issue; which had happened on 2nd July, 2019.
45. It was submitted that the case law established that it was reasonable for a defendant to have until the time for filing of its defence, to consider the issue of security for costs. The time would stop running at the date of the request for security for costs. Thus the relevant period in question was from 17th February, 2014, to 12th June, 2018. Within that period, the first defendant had successfully brought its motion seeking to have the

plaintiff's action against it dismissed for want of prosecution. It was submitted that it was reasonable for the first defendant to await the outcome of that application, before considering the necessity for seeking security for costs.

46. It was submitted by counsel that the case law referred to by the plaintiff, established that delay was only relevant if a plaintiff had incurred a reasonably substantial amount of costs in the period between the time when the defence was filed and the date of the first request for security for costs. It was submitted that in this case, the only additional expense incurred by the plaintiff in that period, were the costs associated with the plaintiff's motion for discovery, which had not been proceeded with at the hearing.
47. It was pointed out that the plaintiff had not furnished any evidence to the court as to what additional costs or expenses had been incurred by it during this period. This contrasted with the circumstances in *Werdna Limited v. MA Insurance Services Limited* [2018] IEHC 194, where the plaintiff had established that it had incurred approximately €100,000 in the relevant three-year period; yet the trial judge directed that security for costs be provided, but at a lesser amount than had been sought by the defendant.
48. It was submitted that in the unusual circumstances of this case, there was either no appreciable delay, having regard to the other aspects of the litigation; or if the court held that there was delay, it was not relevant, as very little additional costs had been incurred by the plaintiff in the relevant period.
49. It was submitted that in effect, what was happening in this case was that the investors were having a "free run" in the litigation via the plaintiff company. They were attempting to recoup some of their investment by means of a weak cause of action, safe in the knowledge that if the plaintiff was unsuccessful in the action, they would not be liable for costs. It was submitted that where it had been established that the plaintiff would be unable to pay any costs if unsuccessful at the trial of the action, the balance of justice rested in favour of the court making the order sought herein.
50. It was pointed out that there was no averment in the affidavit filed on behalf of the plaintiff in response to this application, that the granting of security for costs would have the effect of stifling the action. The plaintiff did not assert that if security for costs were ordered to be provided by it, it would not be in a position to proceed with the action.
51. In relation to the second argument put forward on behalf of the plaintiff, to the effect that its impecuniosity and inability to pay costs if unsuccessful in the action, was due to the wrongdoing of the defendant, which was the subject matter of the proceedings; it was submitted that that assertion could not be maintained on the evidence before the court.
52. Counsel referred to the matters set out in the affidavit of Kieran Wallace sworn on 2nd July, 2019 at paras. 28 and 29 thereof, which clearly established that the company was heavily insolvent.

53. Counsel pointed to the fact that while the affidavit sworn on behalf of the plaintiff by Mr. McAteer had characterised the analysis of the plaintiff's accounts as carried out by Mr. Wallace as being "inaccurate, flawed and incomplete", he had accepted in his affidavit that the analysis carried out of the plaintiff's balance sheet position was "mathematically correct". It was submitted that Mr. McAteer had offered nothing to support his general assertions that Mr. Wallace's analysis of the accounts had been incorrect.
54. It was submitted that even taken at its height, the plaintiff's action could only yield it damages of circa. €1.6m, while the company's balance sheet dated 28th February, 2018, included within the list of the plaintiff's creditor's "other loans" in the amount of €3,384,939. It was submitted that the evidence before the court as contained in Mr. Wallace's two affidavits, clearly established that the plaintiff was insolvent and was heavily loss making. It was submitted that it was also telling that Mr. McAteer had not exhibited anything by way of updated accounts for the plaintiff company.
55. It was submitted that having regard to the evidence before the court, the plaintiff had not established that its inability to pay costs was due to the wrongdoing of the first defendant; nor had it complied with the test set down in the *Connaughton Road* and *Quinn* cases.

Conclusions

56. This is an application pursuant to s.52 of the Companies Act 2014 and/or pursuant to O.29 of the Rules of the Superior Courts (as amended), requiring that the plaintiff should be directed to provide security in respect of the costs likely to be incurred by the first defendant in the within proceedings. In an application for security pursuant to these provisions, the test that has to be applied is: (i) has the defendant established on a *prima facie* basis that it is likely that the plaintiff will be unable to meet an order for costs if it is unsuccessful at the trial of the action and (ii) has the defendant established, on a *prima facie* basis, a defence to the plaintiff's claim against it. If so, the case law establishes that an order should be made directing that the plaintiff should provide security for costs, unless the plaintiff can establish that there are special circumstances why the order should not be made: *Coolbrook Developments Limited v. Lington Development Limited* [2018] IEHC 634.
57. In this case, it was accepted by counsel on behalf of the plaintiff that the defendant had established the first two limbs in the test. In light of the matters set out by Mr. Wallace in his affidavits and having regard to the state of the pleadings, and in particular, the defence of the first named defendant, I am satisfied that these two aspects have been established by the first defendant. Accordingly, the order for security for costs should be made, unless the plaintiff can establish special circumstances why this should not be done.
58. In essence, the plaintiff relies on two matters as constituting special circumstances: (i) delay in bringing the application and (ii) that the plaintiff's impecuniosity and inability to pay costs, was caused by the wrongdoing of the first defendant.

59. That delay in seeking an order for security for costs can be a ground justifying the refusal of such an order, was recognised by the Supreme Court in the *SEE Company Limited v. Public Lighting Services Limited* case in 1986. In that case it was held that a delay of seven months was sufficient to deprive the defendant of an order in its favour.

60. In *Beauross v. Kennedy*, decided in 1995, Morris J (as he then was) stated that each case must be decided on its own separate facts and the court must exercise its discretion having regard to those particular facts. In considering a delay of three months in that case, he stated as follows:-

"If the party seeking security has delayed to such an extent as to commit the other party to an amount and a level of costs which it would never have become committed to had it known that it was to be required to provide security for costs and thereby altered its position to its detriment, then the Court will not make the order".

61. In the case before him, Morris J held that a delay of three months was excessive and should deprive the defendant of an order in its favour. He held that a significant element was the fact that comprehensive legal costs had been incurred in that short period of time by the appearance before the Master and the cross-examination of the defendant.

62. In the *Hidden Ireland Heritage Holidays v. Indigo Services* case, Fennelly J giving the judgment of the Supreme Court, reviewed the authorities on delay and stated as follows:-

"A review of the authorities shows that delay in applying for security may, depending on the circumstances, be a ground for refusing security. The court will look at the facts of the particular case, the impact of the delay, other surrounding circumstances, and, in the end, will seek to find a fair balance."

63. Fennelly J went on to hold that in that case, a delay in seeking security amounting to approximately one year, was a material matter. He found that being fully aware of the financial weakness of the plaintiff, the defendant allowed and even encouraged the action to proceed. He held that the defendant had delayed to such an extent and had otherwise behaved in the conduct of the litigation, so as to deprive it of the entitlement to ask the court to exercise its discretion in its favour.

64. In *Dublin International Arena Limited v. Campus and Stadium Ireland*, the court held that a four-month period of delay was sufficient to disentitle the defendant to an order for security for costs. However, that case concerned not only a judicial review application, but was concerned specifically with the review of the award of a public contract provided for under O. 84A of the Rules. In her consideration of the general principles, Denham J (as she then was) stated that the nature of the delay, in order to be a basis for refusing to grant security for costs against a corporation, must be of an undue and substantial kind.

65. In *Moorview Developments Limited v. Cunningham* [2010] IEHC 30, there had been a delay of approximately three years, during which time the plaintiff had made discovery of documents. Clarke J (as he then was) noted that it was clear from the *Hidden Ireland* case, that the incurring of expenditure by a plaintiff during a period of delay in bringing an application for security for costs was a relevant factor. He went on to describe the relevant test in the following way:-

"The test is not as to whether the relevant plaintiff might nonetheless have gone ahead with the proceedings even had security been ordered earlier and, thus, would have incurred any costs arising in the intervening period in any event. Rather it is that the plaintiff incurring costs in the intervening period ought to have been entitled to make its decision, as to whether to incur those costs, in the light of full information, including the fact that security for costs would have to be put up."

66. He went on to hold that in the case before him there was a not insignificant prejudice on the part of the plaintiff in having incurred the expense of making discovery against a background of not having been told that security for costs was going to be sought and in circumstances where, therefore, any decision as to the merits or otherwise of progressing the proceedings was made, due to the delay in moving for security for costs, without the benefit of full information. He held that there had been a significant "although partly explained", delay and a not insignificant degree of prejudice to the plaintiff. On this basis he held that the plaintiff had made out special circumstances such as would warrant not ordering security for costs.

67. Finally, in *Werdna Limited v. MA Insurances Services Limited*, Baker J (then sitting as a judge of the High Court) had to consider a delay of approximately three years in bringing the application; during which time the plaintiff had produced evidence showing that it had incurred costs of circa. €100,000. The judge held that the delay had been partially explained by the fact that it had been reasonable for the first and second defendants, being the moving parties, to have awaited the outcome of a similar motion which had been brought seeking security for costs by the third defendant. However, unknown to the moving parties, the plaintiff had withdrawn its claim against the third defendant prior to that motion being heard and did not inform the first or second defendant of this fact. The judge further ruled that the fact that the plaintiff had taken significant steps and incurred expenditure in the intervening period did not mean that an order could not be made. She stated as follows at para. 66:

66. The plaintiff has taken a number of costly steps in the proceedings to date. A plaintiff would not be justified in slowing down preparations for hearing merely on account of the fact that a defendant was seeking security for costs, and the fact of such expenditure of itself does not preclude the making of an order for security."

68. The judge held that delay in seeking security for costs is a factor that may be taken into account in the calculation of the amount that should be ordered to be provided by way of security. She went on to hold that the circumstances of the delay in the case, were nothing like those which were determinative in the application before Barrett J in *Euro*

Safety v. FÁS [2016] IEHC 161 where there had been little or no engagement between the parties in the three-year period.

69. Having regard to the facts of the case before her, she was not satisfied that the delay had been such as would disentitle the first and second defendants to the reliefs sought, save with regard to the amount in respect of which security was to be provided. She went on to note that the fact that security was to be given only for post-request costs and delay was a relevant discretionary factor, if it could be shown that the delay caused detrimental loss or expenditure, which would not otherwise have been incurred. The amount of the security sought was in the order of €330,000 and in the circumstances, the judge directed that the plaintiff should provide security for costs in the sum of €200,000.
70. I turn now to deal with the issues that arise for consideration in this case. In the course of argument at the bar, Mr. Lyons SC submitted that the case law established that an application for security for costs should be brought at an early stage in the proceedings. In support of that proposition he relied on certain dicta of Clarke CJ and O'Donnell J in the *Quinn Insurance Ltd.* case at paras 7.8 and 3 respectively. The court does not agree with the submission that those dicta support the proposition that the defendant must move to seek security for costs at an early stage. Having read the relevant paragraphs, the court is of the view that the two judges were dealing with a separate issue, which was the difficulty of accurately assessing the merits of the case, given that applications for security for costs tend to be made at an early stage in the proceedings.
71. That, of course, is entirely understandable. Normally, once a defendant becomes aware that the plaintiff would not have the financial means to satisfy an award of costs against it and is satisfied that it has a prima facie defence to the plaintiff's claim, it would be in the best interests of the defendant to obtain security for costs at the earliest point in the litigation, because an order that security be given is prospective only, i.e. it only covers costs likely to be incurred by the defendant subsequent to the date of its first request that security for costs be furnished. Hence it is in a defendant's interest to move quickly with its application. That is a long way from supporting the proposition that a defendant must seek security for costs at the earliest opportunity.
72. The court finds that the dicta of Clarke J in the *Moorview* case are more apposite in relation to the time when a request for security for costs should be made. In that case, the judge stated that if the defence was filed in a timely fashion, then it seemed that the time for seeking security should be in or around the same time as the defence is filed. That seems entirely logical, because it is only when a defendant is fully aware of the case that is made against it, that it can assess whether it has a good defence to the plaintiff's claim. That is normally done at the stage where the defence is drafted.
73. In the present case, the defence was filed within a matter of weeks of the completed statement of claim being served upon it. Accordingly, the court finds that for the purposes of this application, time began to run against the defendant from the date that it filed its defence on 17th February, 2014. The delay on the part of the first defendant must be

considered in the period commencing at that date and ending with the first letter seeking security for costs issued by the first defendant on 12th June, 2018.

74. Having regard to the dicta in the case law outlined above, and applying them to the facts in this case, I am not satisfied that the delay between February 2014 and 12th June, 2018, being the date of the first letter seeking security for costs, is of sufficient magnitude, or effect, to warrant a refusal of the order sought by the first defendant.
75. I have reached that conclusion for a number of reasons. Firstly, the plaintiff has delayed inordinately in the prosecution of its action herein. There was a delay of approximately four years between issuance of the plenary summons and service of a completed statement of claim on the first defendant. There was a further delay of over four years in furnishing replies to the first defendant's notice for particulars.
76. In the period between 10th October, 2017, when the first defendant issued its motion seeking to strike out the plaintiff's action for want of prosecution, to 16th July, 2018, when the High Court order was made on appeal from the Master's order, it was reasonable for the first defendant to proceed with its motion to strike out the proceedings and then to rely on the order that it had obtained in its favour before the Master of the High Court.
77. The court has also had regard to the fact that the plaintiff prevaricated in its response to the requests for security for costs that had been made by the defendant between the dates of the first letter and the fourth letter seeking security for costs, i.e. in the period 12th June, 2018 to 18th June, 2019.
78. Another significant factor, is that during the period of delay, the plaintiff did not incur any significant costs, bar the costs of a motion for discovery, which it did not proceed with and the costs of resisting the defendants' motion to strike out the claim for want of prosecution. The order for security for costs will only relate to the costs likely to be incurred as and from the date of the first request for security for costs on 12th June, 2018. Thus, where the plaintiff has not incurred substantial costs in the period between the date of delivery of the defence in February 2014 and the date of the first request for security for costs in June 2018, it is not in a worse off position in considering the matter whether it will proceed if security for costs is granted. This is a significant factor in this case.
79. Furthermore, the court is satisfied that there is no question that if security for costs were granted, that this would stifle the action. That has not been asserted by the plaintiff in its affidavit. Accordingly, it is not a factor to be taken into account.
80. The court has also had regard to the fairness of making an order in this case. Here, investors have invested in the company. They are seeking to recoup the losses allegedly caused by the defendant, but are using a vehicle, namely the plaintiff company, which will enable them to have a "free run" in their claim against the defendant. If they win, they will recover some of their investment in the company and will also recover their costs;

whereas if the plaintiff loses the action, the investors will suffer no adverse consequences, but the first defendant, while having an order for costs against the plaintiff, in reality it will be left with a bill for its own costs. In such circumstances, the court is satisfied that the making of an order for security for costs is in accordance with general notions of fairness in litigation.

81. For all of these reasons, and looking at the application in the context of the overall progress of the litigation, the court is not satisfied that such delay as there was on the part of the first defendant, is such as to justify the refusal of an order for costs in its favour.
82. I turn now to the second ground put forward by the plaintiff, which is to the effect that an order for security for costs should not be made because the impecuniosity and inability of the plaintiff to meet an award of costs, was due to the wrongdoing on the part of the first defendant, which is the subject matter of the proceedings.
83. In this regard, the test which the court must apply is the well-known test set down in *Connaughton Road Construction Limited v. Laing O'Rourke Limited*, at para. 3.4 of the judgment of Clarke J. That test is well-known and need not be restated here.
84. This issue was recently revisited by the Supreme Court in the Quinn Insurance case where Clarke CJ, delivering the lead judgment, stated that where this issue was raised as a special circumstance by a plaintiff to persuade the court not to order that security for costs should be made, it was appropriate for the court to carefully scrutinise the proposition put forward on behalf of the plaintiff to the effect that there was a good *prima facie* basis for suggesting that, but for the alleged wrongdoing, the plaintiff concerned would be in a position to meet an adverse costs order. The judge further elaborated on the appropriate test at para. 7.29:-

"While acknowledging that the point identified by Hogan J. is a valid consideration, it is also open to the view that it fails adequately to acknowledge the potential interference with the right of defence which may arise where a court does not make an order for security for costs. It follows that I remain of the view, which I expressed in Connaughton Road, that it is necessary for the Court to analyse the basis put forward by the plaintiff for suggesting that it has prima facie established that its inability to meet a costs order was arguably due to the alleged wrongdoing. That exercise may not be capable, in many cases, of an exact mathematical calculation, not least because the application will be determined at an early stage in the proceedings when the Court will not have available to it all of the detailed evidence concerning losses which might become available at a trial. The Court will have to make estimates based on the evidence. But it remains an exercise which is fundamentally rooted in reasonable estimates about numbers, even if those numbers are not capable of exact calculation. It is also an exercise where a plaintiff seeking to rely on that particular special circumstance must itself decide just how much evidence it wants to put up and, inevitably, run the risk that, if it fails to put

up sufficient evidence, the Court may not be persuaded that it has met the threshold of establishing the special circumstance concerned.”

85. In the present case, there are merely the assertions that the first defendant mismanaged the two properties, being the hotel and the bar, and that as a result thereof, the properties were sold at an undervalue. There is no evidence before the court of either mismanagement of the properties, or of their being sold at an undervalue. Nor is there any credible evidence that it was the wrongdoing of the first defendant which has led to the inability of the plaintiff to be in a position to pay costs in the event that it is unsuccessful at the trial of the action.
86. More importantly, the evidence of Mr. Wallace, as set out in his two affidavits, has not been contradicted by evidence led on behalf of the plaintiff.
87. The court is not satisfied that the plaintiff has established, even on a *prima facie* basis, that its inability to pay costs is due to the wrongdoing on the part of the first defendant. Furthermore, even if the plaintiff was totally successful in the action and recovered damages of approximately €1.6m, it would still be insolvent, having regard to the level of loans outstanding to the investors, as disclosed in its accounts and thus would still be unable to pay any award of costs.
88. Having regard to these matters, I am not satisfied that the plaintiff has established this ground as a special circumstance which would justify the court in refusing to make an order for security for costs in favour of the first defendant. The court is satisfied that it should make such an order in favour of the first defendant.
89. The estimate of the costs likely to be incurred by the first defendant, has not been disputed by the plaintiff. The court is satisfied that given the complexity of the claim, such costs could be incurred in defending the action, from the date of the first request for security for costs to the trial of the action.
90. Accordingly, the court proposes to make an order (i) staying the action herein pending lodgement of €162,996 by the plaintiff as security for costs; (ii) such security to be lodged within eight weeks of perfection of the final order of the court.
91. As this judgment is being delivered electronically, the parties will have a period of four weeks within which to deliver brief written submissions on the terms of the final order, and on costs, and on any other matter that may arise.