



**THE COURT OF APPEAL
CIVIL**

**Neutral Citation No. [2021] IECA 128
Court of Appeal Record No. 2020/224
High Court Record No. 2015/1418 P**

NO REDACTION NEEDED

Murray J.

BETWEEN

CHRIS GORDON

PLAINTIFF/RESPONDENT

- AND -

THE IRISH RACEHORSE TRAINERS ASSOCIATION

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Murray dated the 27th day of April 2021

This application

1. In these proceedings the plaintiff seeks damages for defamation. In respect of five of the seven alleged publications grounding the action, his claim was met with a defence of qualified privilege. The matter came for hearing before Barton J. and a jury on February 4 2020. In the course of the trial, the claim in respect of one of the allegedly privileged publications was withdrawn from the jury by direction of the trial judge ([2020] IEHC 425). Following a hearing lasting thirty days, the jury found that the remaining six publications were defamatory of the plaintiff and that in the case of four of the five remaining statements in respect of which a plea of qualified privilege was advanced, that malice was proved. It awarded the plaintiff damages of €300,000, comprising general damages of €200,000, aggravated damages of €50,000 and

exemplary damages of €50,000. The defendant has appealed this decision, certain rulings made in the course of the trial and the subsequent judgment of Barton J. ordering the defendant to pay the plaintiff's costs of the action in full ([2020] IEHC 446). The plaintiff now seeks security for the costs of the appeal.

The context

2. The plaintiff is the head of security at the Irish Horse Racing Regulatory Board (the 'IHRB', previously known as the Turf Club). His role includes the investigation of the use of anabolic steroids and breaches of the rules of horseracing within that industry. The defendant (a company limited by guarantee) is the representative body for racehorse trainers. The plaintiff's essential case was that the allegedly defamatory statements were made in the course of a campaign against him orchestrated by the defendant. He said that the object of this campaign was to have him removed from his post as head of security of the IHRB, and that each of the alleged statements presented him as a wholly dishonest individual who should not have been permitted to hold the position he did in that organisation.

3. Of the six alleged defamations considered by the jury two (alleged defamations one and two) arose from instructions given by the defendant to its solicitor and/or in authorising him to send a letter to a Neville O'Byrne, one (alleged defamation three) arose from statements ascribed to Noel Meade (then chairman of the defendant) contained in an article in a newspaper, the *Irish Field*, one (the fifth alleged defamation) arose from the repetition of allegations made by a Liz Doyle and Avril Doyle to senior members of the Turf Club at a meeting at a hotel in Newbridge and two (the sixth and seventh alleged defamations) were alleged to have been

made by Michael Grassick (the Chief Executive of the defendant) to a Denis Egan. The latter concerned complaints received from two trainers, a Mr. McGuinness and a Mr. Flood.

4. In the case of the first, second and fifth publications the defendant was found by the jury to have published the words having no honest belief in their truth. In the case of the sixth alleged defamation, the speaker was found to have acted in bad faith and for the purposes of injuring the plaintiff. The jury answered a specific question on the issue paper to the effect that some of the publications were made maliciously and knowing the words to be false or reckless as to whether or not they were true, and that those publications constituted an ‘*orchestrated and severe campaign*’ by the defendant against the plaintiff’s good name.

5. The essential grounds of appeal on the merits (there being separate complaints made in relation to the costs ruling) are this:

(i) The judge erred in refusing the defendant’s application to have the *Irish Field* publication withdrawn from the jury ([2020] IEHC 425) and/or that the jury erred in finding that the defendant was liable for the comments of Mr. Meade in giving an interview to that newspaper and/or the judge erred in relation to the wording on the issue paper in relation to the *Irish Field* publication.

(ii) The judge erred in allowing the fifth alleged defamation to go to the jury (because *inter alia* there was no evidence of the defendant having said anything possibly defamatory at that meeting) and/or erred in allowing the alleged defamations alleged to have been made at that meeting to go the jury in circumstances in which (it is said) *inter alia* that no specific words were pleaded in relation to those alleged defamations.

(iii) The judge erred in his decision ([2020] IEHC 425) not to withdraw the entire case, or more of the case than he did, from the jury. Here the defendant alleges the trial judge erred in his conclusions with regard to the fifth defamation insofar as he held that the defendant adopted without question the beliefs of the Doyles, was wrong in his treatment of malice and erred in concluding that the sixth and seventh defamations were interrelated and interconnected, and in failing to withdraw the fifth, sixth and seventh alleged defamations from the jury on the basis that no specific words were pleaded in relation to them.

(iv) The jury inappropriately heard evidence and were given documentation that comprised hearsay with prejudicial remarks thereby giving rise to a real risk of contaminating the jury's consideration of the case and/or which rendered the verdict unsafe.

(v) The judge erred in his charge to the jury in *inter alia* failing to explain to them the onus that lies on a party claiming malice, regarding the alleged fault on the part of the plaintiff and regarding the matter of damages.

(vi) The jury erred in its verdict *inter alia* because the award was not proportionate and/or there was no basis for awards of aggravated or exemplary damages.

(vii) The judge erred in constraining questioning by the defendant's representatives or in constraining evidence led by the defendant.

(viii) The judge erred in failing to adjourn or to abandon the trial having regard to the lockdown arising from the Covid-19 pandemic announced on March 12.

The general principles

6. While the application for security for the costs of the appeal was brought under two provisions, it is accepted that one (s. 52 of the Companies Act 2014) is of no application where the limited liability company against which the security for costs is sought is not the plaintiff in the case (see *O'Donnell v. Saltan Properties Ltd.* [2020] IECA 226). That being so, the relevant provision is Order 86 Rule 9 Rules of the Superior Courts. This confers the power on the Court 'under special circumstances' to direct that 'a deposit or other security in the amount fixed by the Court of Appeal be made or given for the costs to be occasioned by the appeal.'

7. Clearly, the Court has an overriding discretion in granting or refusing such an order, and equally clearly that discretion must be exercised judicially having regard to all the circumstances of the case (see *Malone v. Brown Thomas and Co. Ltd.* [1995] 1 ILRM 369, at p. 372). It is obvious that the onus is on the respondent to the appeal to establish grounds for his entitlement to the order (*id.*). The case law suggests that the following principles should guide the exercise of that discretion:

(i) It is a pre-requisite to the making of such an order that the respondent establish that in the event that it is successful in its appeal the appellant will not be in a position to discharge the costs of the appeal (*Midland Bank Ltd. v. Crossley-Cooke* [1969] IR 56, at p. 61).

(ii) Moreover, the respondent to the appeal must establish that *prima facie* it has a defence to an appeal (*O'Donnell v. Saltan Properties Ltd.* at para. 18).

(iii) The court may decline to make such an order if the appeal involves an issue of law of general public importance (*Moore & ors. v. Attorney General & ors. (No. 2)* [1929] IR 544).

(iv) While poverty or insufficiency of assets on the part of an appellant is a necessary precondition to the making of such an order, it is not in and of itself grounds for directing security (*Midland Bank Ltd. v. Crossley-Cooke*). The court must in addition find that there are '*special circumstances*' that justify the making of such an order.

(v) In gauging whether there are such '*special circumstances*' the court is ultimately concerned to ascertain – having regard to the fact that the respondent will not recover the costs of the appeal from the appellant and to the fact that the appellant may, if security is granted, be precluded from proceeding with its appeal - whether there are circumstances which demonstrate a risk of additional or unnecessary injustice in the bringing of the appeal such as to justify the ordering of security (*Farrell v. Bank of Ireland* [2012] IESC 42 [2013], 2 ILRM 183 at para. 4.34).

(vi) The categories of '*special circumstances*' are not closed (*O'Donnell v. Saltan Properties Ltd.* at para. 18). The case law to date has accepted as falling within this description cases in which the appellant has conducted the proceedings oppressively, where they are resident outside the jurisdiction, where there are no *prima facie* grounds of appeal, and where the appellant is merely a nominal appellant.

(vii) Even if the court determines that the appellant is impecunious, and that there are special circumstances justifying the grant of security for costs, the court must both in determining whether to grant security and, where it determines to do so, in fixing the amount of that security, seek to make an order which is proportionate to the legitimate interests of all the litigants (*Farrell v. Bank of Ireland* at para 4.10).

The issues in this application

8. The defendant accepts that it will not be in a position to discharge the costs of the appeal in the event that it is unsuccessful. Apart from the award against it of €300,000, it presently faces a liability for the full costs of the appeal which, the action having lasted for thirty days, will clearly be substantial. As of its 2019 accounts the defendant (whose income derives from a membership fee of €100 paid by each of its four hundred members together with a percentage of trainer's winnings which is calculated and distributed by Horse Racing Ireland) had net assets of €252,173. The plaintiff's cost accountants have estimated the plaintiff's costs of the appeal as being in the region of €250,000. If the defendant prevails in its appeal it will not necessarily be *insolvent* – at least on the evidence presently before the Court. It is, however, *impecunious* as that term is used in the relevant case law. If it loses the appeal it will not be able to pay the costs together with the judgment against it and the costs ordered in the High Court. Moreover, the defendant accepts that the plaintiff has a *prima facie* defence to the appeal, while the plaintiff accepts that the defendant's appeal is not unstateable.

9. This leaves, having regard to the relevant factors as I have identified them, three issues. The first is whether the appeal presents a question or questions of law that preclude the grant

of security. The second is whether the plaintiff has established ‘*special circumstances*’ so as to justify the making of what is an exceptional order. The third arises from a particular contention advanced by the plaintiff in the course of its submissions. He says that the Court in determining an application for security for the costs of an appeal must take into account whether the effect of an order for the provision of such security would or would not be to ‘*stifle*’ the appeal, submitting that the defendant here must, and has failed to, establish that the ordering of security would in fact prevent it from exercising its right to appeal.

Issue of law of public importance

10. The defendant points to three issues arising from the appeal which, it says, are of such importance as to displace any entitlement the plaintiff might otherwise enjoy to obtain security. These points are said to arise from (a) the criteria by reference to which statements made by an officer of a body corporate are attributed to that entity for the purposes of the tort of defamation, and the allied question of what aspect of those criteria fall to be decided by the jury or by the trial judge and/or (b) the threshold of proof that must be surmounted before a finding of malice could be reached in a defamation action and/or (c) the applicable principles governing costs.

11. The case law makes the following clear:

- (i) The reason appeals that present certain questions of law will not be the subject of an order for security is that there are some issues the resolution of which is so important to the public interest that a party who might otherwise be entitled to obtain security for the costs of its appeal will be denied them (Walsh J. in *Midland Bank v. Crossley-Cooke* at p. 61).

- (ii) Therefore, in order to preclude an order for security the issue must be one that transcends the interests of the parties before the court (*per* Finlay Geoghegan J. in *Webprint Concepts Ltd. v. Thomas Crosbie Printers Ltd.* [2013] IEHC 359 at para. 69).

- (iii) This means that the point must be such that the public interest requires that it should be decided for the benefit of the community as a whole, (*Oltech (Systems) Ltd. v. Olivetti UK Ltd.* [2012] IEHC 512, [2012] 3 IR 396 at para. 20). It is to be distinguished from an ordinary point of law of the kind frequently argued before the courts (*id.*).

- (iv) The point of law in question must be uncertain and it must be clearly identified. A point arising from a series of complex facts in a particular case might not meet the test (*Fallon v. An Bord Pleanála* [1992] 2 IR 380, at p. 384).

12. The issues as to (a) whether a person was speaking with the authority of a group or on its behalf so as to expose that group to liability in defamation is a jury question or a question for the trial judge, (b) what legal test should be applied to that question, and (c) the threshold by which malice must be established in an action of this kind, may all be capable of being reduced to net issues of law. However, the burden of establishing that, exceptionally, these are issues of law of such importance as to preclude a party otherwise entitled to security from obtaining it is high (*Oltech (Systems) Ltd. v. Olivetti UK Ltd.* [2012] IEHC 512, [2012] 3 IR 396 at para. 20). Every appeal to this Court should present at least one issue of law, such question or questions will be by definition of importance to the parties to the appeal and, as with any

question of law that is arguable either way, it may be said to be in the interests of the legal system generally and of parties to future disputes in which those questions may arise that the issues be decided. None of this is enough to trigger the exception to the rules that would otherwise apply in the determination of an application for security for costs. That is why the refusal of security on this ground most usually arises in cases presenting issues of constitutional law or European law of fundamental and systemic importance (see for example *Moore & ors v. Attorney General & ors (No. 2); Digital Rights Ireland Ltd. v. Minister for Communications* [2010] IEHC 221, [2011] 1 ILRM 258).

13. The issues identified by the defendant do not meet this threshold. They are issues relevant to the parties and may be of relevance in other cases in defamation. They are not questions of such fundamental or systemic significance as to displace any entitlement a party might otherwise have to obtain security. Moreover, the test for attribution and for malice are likely to be so heavily dependent on the facts of the case that it is questionable whether their resolution in this case would necessarily produce a clear principle applicable to future proceedings.

14. The point made by the defendant in relation to costs is that it says that the trial Judge erred in concluding that s. 169 of the Legal Services Regulation Act 2015 does not apply to actions of the kind referred to in s. 94 of the Courts of Justice Act 1924 (which addresses costs of actions before juries). It further contends that the plaintiff was only partially successful in the action and that accordingly he should not have obtained all of his costs. In circumstances where all costs are ultimately a matter for the discretion of the court and in which a party who is *partially successful* within the meaning of s. 168 of the Legal Services Regulation Act 2015 may obtain an order for payment of all their costs, I do not believe that the issues identified by

the defendant will either inevitably be decided or, if they will inevitably be decided, are of sufficient importance to other cases to justify in and of themselves the deprivation of a party otherwise entitled to security of an order to that effect. The decisions of a court on questions of costs are inevitably a product of the particular facts and circumstances of the specific case in which they are reached.

‘Special circumstances’

15. In the written submissions delivered by him for the purposes of this application the plaintiff says that there are four *‘special circumstances’* which, when combined with the impecuniosity of the defendant, justify the grant of the security for which he contends. He says that these arise from the following:

- (i) What the plaintiff describes as *‘the peculiar nature of an action in defamation in general and this case in particular’*.
- (ii) What is said to be *‘the unreasonable and oppressive conduct of the proceedings to date by the defendant’*.
- (iii) The fact (as the plaintiff contends) that the defendant’s appeal does not have reasonable prospects of success.
- (iv) The fact that the defendant has consistently maintained that it cannot and will not pay for the costs of these proceedings and will not discharge any award made against it.

16. Clarke J. (as he then was) in *Farrell v. Bank of Ireland* at para. 4.34 explained the focus of the court's inquiry when determining whether there exist '*special circumstances*' such that in combination with the impecuniosity of the appellant, it would be appropriate to direct security for the costs of an appeal. He said:

'... the overall question which the court must ask itself is as to whether the special circumstances or circumstances identified by the respondent demonstrate a sufficient risk of added and unnecessary injustice (beyond the inevitable injustice that will apply to any respondent who successfully defends and appeal brought by an impecunious plaintiff) such as warrants the proportionate response of directing security for costs of a type or extent which itself is proportionate to the circumstances warranting the order in the first place'.

17. The rationale for the requirement of '*special circumstances*' as thus understood is important. Every respondent to an appeal brought by an impecunious party faces - by definition - a potential loss if they prevail in their appeal. They will have incurred the cost of defending the appeal, and yet will find that by reason of the financial position of the appellant that that cost is irrecoverable. The law, however, deems this fact alone insufficient to displace the constitutional right of the appellant to prosecute its appeal and its right to fair process in pursuing such an appeal. There must therefore be an additional feature of the case that tips the balance in favour of the respondent in obtaining an assurance in respect of its costs. Because the effect of the balance being tipped in this way may be that the appellant is precluded from proceeding with its appeal, that additional feature must be such as to create an unfairness above and beyond the fact that the respondent may be forced to defend an appeal when it will

not be able to recover its costs of so doing. This is the benchmark against which every alleged special circumstance must be measured.

(a) The fact that these are defamation proceedings

18. As to the first ground relied upon by the plaintiff, he says that defamation is an unusual cause of action to the extent that it is actionable *per se* with the consequence that once the plaintiff establishes publication and a defamatory meaning the onus shifts to the defendant to prove one of the statutory defences. Thus, it is said, the defendant has ‘*a peculiar degree of control as to the manner in which the case progresses*’. I have some difficulty in understanding the end point of this submission. If it is that the appellant controlled the trial, that is neither here nor there – the same could be said of any *plaintiff* in a case who fails in their claim and proceeds with an appeal. However, it is clear that the rules of security for costs of an appeal are neutral as between plaintiffs and defendants: in *Midland Bank v. Crossley-Cooke* at p. 62 Walsh J. specifically observed that ‘*the fact that the party moving for security on the appeal is the plaintiff is not a matter to be taken into consideration in ease of the appellant or defendant*’. Neither the nature of an action for defamation in general, nor the fact of control of the High Court proceeding in particular, affects the balance of justice in ordering, or not ordering, security. Thus, it cannot be a ‘*special circumstance*’ for the purposes of the applicable test.

(b) The conduct of the proceedings

19. The second circumstance identified by the plaintiff is what he describes as the ‘*unreasonable and oppressive conduct of the proceedings*’. The decision in *Farrell v. Bank of Ireland* makes it clear that this is a ground on which the court might find that security is

warranted. In placing reliance upon that case, the plaintiff makes several points directed to his general complaint that (as he expresses it in the affidavit grounding this application), the defendant conducted the proceedings so as to *‘prolong and attempt to collapse the trial in order to grind me down’*. He complains in that regard that he was kept in the witness box for seven days while one of his principal witnesses was kept in the witness box for four days. He says in his affidavit that the manner in which the defendant approached the trial resulted in *‘countless rulings in relation to the admissibility and proof of documents and numerous rulings in relation to the defendant’s failure to put their case to witnesses’*. It is said that the defence case was opened on a wholly incorrect premise regarding the honest belief of the Doyle’s leading to a ruling and consequential direction to the jury to disregard any evidence tending to suggest that the defamations were true and resulting in both an application to strike out part of the defence of qualified privilege and an application to amend the defence for the second time. Complaint is made (as the plaintiff puts the matter in his grounding affidavit) that when *‘it was clear to all where the case was going the Defendant opted to adjourn or abandon the trial’*. He contends that further damaging allegations were made against him or his witnesses in the course of the trial, and that all of his witnesses (save for one) were subjected to what he describes in his affidavit as *‘burdensome and oppressive cross-examination and [were] challenged as to their credibility’*. One of the defendant’s witnesses was, he says, forced to apologise to the court for intimidating one of his witnesses in the face of an earlier warning by the judge following similar behaviour by another witness for the defendant at the start of the trial. He stresses that the jury were invited to and did award aggravated damages on foot of *inter alia* the manner in which the trial was conducted. Finally, he says that the defendant has acted unreasonably in refusing to confirm whether or not the defence of the proceedings (including the prosecution of the appeal) have been funded by a third party. He notes that the defendant was represented throughout and continues to be represented by a legal team of two

senior counsel, one junior counsel and solicitors. He concludes his affidavit asserting that '*the appeal has no merit but shall expose me to further and unreasonable costs in defending the appeal.*'

20. These allegations are denied by Mr. Grassick in the affidavit sworn on behalf of the defendant for the purposes of resisting this application. He says that no instruction was given to counsel to prolong the case and that insofar as certain matters took time this was because senior counsel considered that there were various important matters which warranted examination. He says that at no point did the trial Judge indicate that any aspect of the cross-examination or submissions conducted on the defendant's behalf should proceed more quickly, noting that the plaintiff also made unsuccessful applications in the course of the hearing and indeed that the judge ruled that he would withdraw one of the seven alleged defamations from the jury. He says that the application to adjourn the trial was made on account of the serious concerns arising from the Covid-19 pandemic, emphasising that one of the defendant's two senior counsel did not attend closing aspects of the trial because of concerns relating to the pandemic. He explains that counsel for the defendant '*have yet to be paid in full for their work on the High Court litigation*' and that '*the defence, including the prosecution of the appeal, are and were funded out of the IRTA's own resources ... I confirm that there is no such funding arrangement ...*'

21. The grounds relied upon by the plaintiff in this regard do not, in my view, meet the threshold that must be established before the conduct by an impecunious appellant of a trial at first instance will present a '*special circumstance*' such as to enable a respondent to obtain security for the costs of an appeal. The finding in *Farrell* that the appellant (a solicitor who represented herself throughout) had conducted herself so as to justify the making of such an

order arose in circumstances that were exceptional in every sense. The appellant had nine appeals before the Court and had conducted the underlying proceedings in a vexatious manner. That had manifested itself in proceedings against judges, in attempted criminal prosecutions against officers of the respondent bank and their solicitor, and in multiple failures to comply with procedural rulings. The reason Clarke J. granted security in those circumstances was that the appellant's behaviour was abusive of the court processes and seemed destined to continue. Indeed he stressed the inability of the appellant to focus on the issues arising in the appeal, her inability to avoid unnecessary diversions into areas with which she was unfamiliar and the fact that on a very significant number of occasions she had failed to comply with procedural directions and that this was likely to continue on appeal.

22. In that context, he explained that the evidence disclosed that it was *'reasonable for the court to infer that the respondent will not just be put to the ordinary costs of the appeal, but will be put to larger costs that might reasonably arise by the likely continuing failure of the appellant to progress the appeal in an appropriate, focussed and reasonable manner in accordance with procedural law'*. The case was very much concerned with conduct that was *'improper'* or *'abusive'*. This was central to Clarke J.'s analysis of the behaviour of the appellant in that case (see para. 4.36 of his judgment).

23. None of this can be said in the instant case. There was no suggestion that the defendant breached procedural rulings of any kind. The incidents involving the plaintiff's witnesses were the subject of an apology and, in any event, no basis has been suggested on which it could be concluded that these arose from actions authorised by the defendant. The application for an adjournment on account of the Covid-19 pandemic was not, in so far as I can ascertain, the subject of any criticism by the trial judge and appears, in the circumstances, understandable.

The duration of cross examination is a matter for counsel and it is not obvious from anything I have seen in this interlocutory application that it can be the subject of criticism in the context of a claim involving seven distinct alleged defamatory statements. It cannot be said on the evidence that the duration of the cross examination was the product of any direction by the defendant to prolong the proceedings.

24. Critically, the trial Judge did not reproach counsel at any point for the manner in which the hearing was conducted. The farthest the plaintiff can put the matter is to observe that an award of aggravated damages was made by the jury. Putting to one side the fact that this award is under appeal, such an award does not establish that the appeal will be conducted in an improper manner or such that is likely to increase the costs of the appeal. There is, in my view, no comparison between the behaviour of the appellant here and that in issue in *Farrell* and no basis on which it could be said that the matters of which the plaintiff complains in this application could constitute a '*special circumstance*' for the purposes of Order 86 Rule 9.

(c) The merits of the appeal

25. From there it is said by the plaintiff that the defendant's appeal has no reasonable prospect of success, and that this is a '*special circumstance*' for the purposes of an application of this kind. Specific reference is made in this regard by the plaintiff to an observation by Clarke J. at para. 6.2 of this judgment in *Farrell v. Bank of Ireland* where he noted that while the respondent in that appeal did not invite the Court to consider any specific weakness in the appellant's appeals, '*such consideration is a matter that can, properly, be taken into account by this court in considering whether to order security*'. The plaintiff also stresses para. 4.23 of the judgement in that case, where Clarke J. noted that one of the differences between an

application for security for costs at first instance and on appeal, is that it was easier for the Court to form some view on the likely chances of success or failure of an appeal.

26. As I have previously noted, the fact that an impecunious appellant cannot establish that it has an arguable appeal will point strongly towards security being granted. Conversely, a respondent who cannot establish a *prima facie* defence to an appeal cannot obtain security. However, beyond those two inquiries (neither of which arise in this application) the authorities have consistently emphasised that the court on an application for security for costs cannot embroil itself in an assessment of the merits of the appeal. It was made clear in the first application for security for the costs of an appeal to the former Supreme Court that it could not enter into a discussion of the merits of the appeal upon a preliminary application, (*Perry v. Stratham* [1928] IR 580, at p. 583). This has been repeated since (see *Malone v. Brown Thomas and Co. Ltd* ‘*the court cannot enter into consideration of the merits of the appeal ... as to do so would involve a more or less complete hearing of the appeal*’).

27. I do not believe that in making the *obiter* comments in the course of his judgment in *Farrell* upon which the plaintiff relies here, Clarke J. was intending to suggest either that these firm statements of principle were wrong, or that the merits of an appeal which is accepted as being stateable constitutes a ‘*special circumstance*’ for the purposes of an application for security. His comment at para. 4.23 noted as one of the differences between an application for security for the costs of an appeal and an application for security for costs in the High Court that in the case of the former it will be easier to form a view as to the merits. That observation is relevant to the ease with which the court could determine if the appeal was stateable. What he said at para. 6.2 was this:

‘... *Bank of Ireland did not invite the court to consider any alleged weakness in Ms Farrell’s appeals as a special circumstance or countervailing factor. **For the reasons already analysed** such a consideration is a matter that can, properly, be taken into account by this court in considering whether to order security for costs.*’

(Emphasis added.)

28. Noting the comment I have highlighted, the only point in the judgment prior to that statement at which Clarke J. considered the possible relevance of the merits of the appeal was at para. 4.32, where he addressed the relevance of whether the appellant had ‘*any arguable grounds of appeal*’. He was at pains to say that such a circumstance did not involve the court in finally determining the appeal ‘*for it may be that some ground might emerge at the trial of the appeal itself*’. It seems to me to be clear that the potential relevance of the merits being considered by Clarke J. was exclusively at the point of determining whether there was an arguable (or as he put it later at para. 4.23) *prima facie* ground of appeal.

29. Given that it is accepted that the defendant has a *stateable* appeal and that the plaintiff has a *prima facie* defence to that appeal it follows that the Court should not inquire any further into the merits of the proceeding. However, in the course of oral submissions counsel for the plaintiff made another related but different point. He said that it is a special circumstance that even if the defendant were to succeed in the appeal, this would not dispose of the appeal. Thus, it is suggested, the best outcome the defendant can hope for is that the case is remitted to the High Court, and that this will mean that the plaintiff will – if the defendant succeeds in its appeal – be facing further costs again and that, it is said, is a matter that ought to be taken into account in deciding whether security should be directed.

30. I do not believe that this argument withstands scrutiny. The purpose behind the ordering of security is to provide the respondent to an appeal with some assurance that if it *prevails* in its appeal it will have secured for its benefit at least a portion of the costs it has incurred. One of the *effects* of the ordering of security is that the appeal might not proceed at all and that, indeed, is what many parties bringing such an application hope will happen. However, this is in no sense the object of the order. It follows that it cannot be permissible to base the grant of an order for security on the assumption that the plaintiff will sustain a prejudice of the kind suggested here if the appeal is permitted to proceed and if the plaintiff fails in that appeal. That, however, is the terminus of this argument.

(d) The corporate status of the defendant

31. The fourth '*special circumstance*' relied upon by the plaintiff in its written submissions was the subject of considerable focus at the hearing of this application and was subtended by a novel argument. It arises from the fact that in the course of correspondence with the plaintiff's solicitors and in public statements following the trial the defendant relied upon its status as a company limited by guarantee in asserting that members of the defendant would not face a liability for any award made in the proceedings. Specifically, on 30 January 2020 the defendant's solicitors – shortly before the trial – wrote a letter stated to be '*without prejudice save as to costs*' to the plaintiff's solicitors. In that letter, reference was made to an error originally contained in the proceedings whereby it had been assumed that the defendant was an unlimited company, resulting in an application and ruling by Barton J. on 22 July 2019. The letter continued as follows:

'In fact, our company is a company limited by guarantee The amount of the guarantee in question is €1,500 and accordingly that is the maximum amount which your client would be in a position to recover by way of damages and costs against our client in the (unlikely) event that he were successful in these proceedings.

For this reason alone, and quite apart from the merits of our client's defence it is abundantly clear that your proceedings should not be maintained and indeed should never have been brought'

32. This position was re-iterated in the course of the plaintiff's application for the costs of the proceedings following the trial. The correspondence from which I have quoted was relied upon in that context, and (as recorded in the judgment of the trial Judge on costs – [2020] IEHC 446 at para. 5) the defendant submitted from there that because the liability of the members of the defendant was limited to €1,500, no more than this could be recovered by way of damages and costs and that, accordingly, the proceedings ought to have been commenced in the Circuit Court.

33. This was not correct. A company limited by guarantee may, as with any other limited company, suffer a judgment and the person in whose favour that judgment is entered may proceed to enforce the judgment against its assets. If the company is wound up that person will be a creditor to the extent the judgment had not been met. The plaintiff points to the position thus adopted by the defendant and says that this shows that the defendant has no intention of honouring the judgment or the costs order. He stresses that in public statements following the verdict, the defendant was quoted as stating that its members were not liable for the damages or costs arising from the case.

34. The plaintiff proposes a number of consequences which, he says, follow from this. He points to the fact that the defendant intends to run a three day appeal in this Court retaining the services of a highly qualified legal team. That being so, it is submitted that it may reasonably be inferred on the balance of probabilities that if notwithstanding its impecuniosity the defendant has access to resources such as to enable it to instruct solicitors and counsel then it also has the resources to provide reasonable security for costs to the plaintiff.

35. Moreover, it is said, the fact that the defendant has stated that it will not meet any award of costs or damages above €1,500 is such that the continuation of the appeal without an order for security for costs creates a sufficient risk of added and unnecessary injustice to the plaintiff which goes beyond the inevitable injustice that will apply to any respondent that successfully defends an appeal brought by an impecunious appellant. Thus, it is said, the defendant is *‘hiding behind its corporate veil and is thereby causing added and unnecessary injustice to the plaintiff’*. Finally, in this context he submitted that the defendant was no more than a *‘nominal appellant’* noting that the cases hold that the fact that a limited liability company is used to shield its members against an order for costs has been held to constitute a special circumstance for the purposes of an application for security for the costs of an appeal. The plaintiff broadened this argument in the course of the hearing of this application, contending that the fact that the defendant was a limited liability company was itself a special circumstance which, when combined with its impecuniosity, meant that security should be directed.

36. In this regard, the plaintiff placed some reliance on the provisions of s. 52 of the Companies Act 2014. It states 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.'

37. The plaintiff's counsel also pointed in the course of his oral submissions to comments of Clarke C.J. in *Quinn Insurance Limited (Under Administration) v. Pricewaterhouse Coopers (A firm)* [2021] IESC 15. That appeal concerned an application under s. 52 and in the course of his judgment – and in explaining the context of the provision – Clarke C.J. noted the different considerations that might apply where security for costs was sought as against an individual when compared with such an application against a limited company. In the passage relied upon by the plaintiff for this purpose Clarke C.J. said (at para. 7.7):

'However, the position of an impecunious corporate plaintiff brings with it additional difficulties. In such a case, a defendant not only has to take into account the ordinary factors which any litigant must evaluate but also has the additional difficulty that, even if the proceedings are successfully defended and an order for costs made in its favour, there will be no prospect of recovering those costs. It must, of course, be also acknowledged that similar problems can be encountered by defendants sued by impecunious natural persons. There are, however, it seems to me, significant differences between the position of an impecunious plaintiff who is a natural person and an impecunious corporate entity. First, and importantly, the impecunious plaintiff who loses the case and has costs awarded against him or her nonetheless will have an adverse costs order in place and will in practice potentially be liable for those costs should their

financial fortunes change during any relevant limitation period. Second, it may be possible for the defendant to at least recover some of their costs (subject to the financial position of the plaintiff concerned) including by the utilisation of various procedural devices designed to arrange for periodic payments. There is, therefore, at least some prospect of an at least partial recovery of any costs awarded in favour of a successful defendant in such cases and also a risk to the unsuccessful plaintiff that their financial position may not be clear for quite some time after the proceedings have completed. These considerations will hardly ever apply in the case of an impecunious corporate plaintiff which is likely to be liquidated should it fail in its proceedings or, perhaps, left to wither on the vine if there is little perceived benefit in liquidation. In those circumstances, the prospect of any recovery of costs by the defendant will be very small indeed and there will be no continuing financial risk for stakeholders in the corporate entity concerned.'

38. Provision for directing security for costs against a plaintiff company with limited liability was first introduced in the Joint Stock Companies Act 1857 (s. 24). The language of the applicable sections had been changed in only minor respects since then, but the essential concept and test remains the same. The reason for the establishment of a power to direct such security is to prevent the injustice that would otherwise follow were an insolvent corporate plaintiff effectively immune from an order for costs. The provisions of s. 52 thus operate to ensure that those behind an insolvent company – be it the shareholders or creditors – do not obtain the benefit of the company being successful in litigation while at the same time being spared the adverse cost consequences of its being unsuccessful (*Farrell v. Bank of Ireland* at para. 4.19).

39. The jurisdiction only exists in respect of corporate *plaintiffs* and may not be deployed against a corporate *defendant* irrespective of its insolvency. The reason for this distinction was explained by Millett LJ in the course of his consideration of the history of these provisions in *CT Bowring v. Corsi* [1995] 1 BCLC 148, as follows (at p. 163):

‘... a plaintiff institutes proceedings voluntarily. If he chooses to bring proceedings against an insolvent company with limited liability he does so with his eyes open: he takes the risk that he may not recover his costs even if successful, but it is his own decision to take that risk. The defendant, however, has no choice in the matter. He is compelled to litigate or submit to the plaintiff’s demands. He must be allowed to defend himself without being subjected to the embarrassment of having to provide security for the plaintiff’s costs.’

40. It has been held that the jurisdiction to order security under s. 52 may be invoked against a corporate plaintiff which proceeds with an appeal for the purposes of ordering security for the costs of that appeal (see *Rayan Restaurant Ltd. v. Gerald Kean p/a Keans Solicitors and anor.* [2015] IECA 264). It has also been held that, having regard to this provision, the fact that an insolvent corporate plaintiff is an appellant is a ‘*special circumstance*’ for the purposes of Order 86 Rule 9 (*Used Car Importers of Ireland Ltd. v. Minister for Finance and ors.* [2017] IECA 327 at para. 18). However, Costello J. in *O’Donnell v. Saltan Properties Ltd.* held that s. 52 could not be deployed against a corporate defendant which appealed against an adverse High Court judgment. This conclusion was held by Costello J. to follow from the language of the section, but it also reflects its purpose and deliberate limitations. Thus, if security is to be sought against a corporate defendant which brings such an appeal, the application must be

brought pursuant to Order 86 Rule 9, and the generally applicable test governing the application of that provision must be met.

41. In my view it follows that fact that a defendant/appellant is a limited liability company is not itself a ‘*special circumstance*’ that would fulfil the relevant part of the test applicable to this provision. If such a company is not impecunious, clearly an application of this kind would fail at the first hurdle. To hold that where a limited liability company appellant which was the defendant in the proceedings is impecunious its corporate status alone is a ‘*special circumstance*’ would, in effect, be to hold that Order 86 Rule 9 imported s. 52 of the Companies Act 2014 into the Rules of the Superior Courts with the modification that it applied wherever a corporate defendant appealed an adverse decision. This would defeat the purpose of excluding a corporate defendant from the scope of s. 52 and would effect a radical redesign of Order 86 Rule 9, meaning that in respect of this class of appellant the requirement of ‘*special circumstances*’ did not actually apply at all. Not only was no authority opened to the Court supporting this proposition, but it would – if correct – fly in the face of the clear conclusion reached by Costello J. in *O’Donnell v. Saltan Properties* that, absent the application of s.52, it was not appropriate to apply different principles to applications for security for costs of an appeal under Order 86 Rule 9 to different appellants depending on whether they are natural or corporate persons (at para. 31). I do not believe that it is open to the Court to construe the provision thus, and no authority to the effect that it could was identified by the plaintiff. The comments of Clarke C.J. in *Quinn Insurance Limited (Under Administration) v. Pricewaterhouse Coopers (A firm)* explain why the position of an insolvent individual plaintiff and an insolvent corporate plaintiff are different and, to that extent, why the legislature has distinguished between the two for the purposes of security for costs generally. They do not afford a basis for concluding that corporate status is itself a ‘*special circumstance*’ within the

meaning of the Rule. If anything they highlight the fact that, notwithstanding the difference referred to, neither the legislature nor the Rules Committee has provided for a distinct rule requiring, by reason of its corporate status alone, an impecunious corporate defendant which appeals an adverse decision of the High Court to provide security

42. Nor is it evident to me that defendant has conducted itself in a manner that brings the facts of this case into the category of special circumstances. The plaintiff chose to proceed against a limited liability company and, as the consideration I have outlined above shows, the law holds that he must take the consequences of that election. For this reason alone it is wrong to suggest that the position of the defendant is akin to that of a nominal plaintiff: the defendant here did not choose to become involved in court proceedings.

43. Moreover, insofar as the plaintiff relies upon correspondence from and statements issued on behalf of the defendant and its agents, these are all ultimately manifestations of the defendant's impecuniosity. The fact of the matter is that if the plaintiff succeeds in his appeal his recourse is limited to the assets of the defendant. To treat these statements as special circumstances for the purpose of the Rule would achieve the very outcome that the authorities decry: it would mean directing security because and only because the defendant does not have the means to satisfy the award if it fails on its appeal. The case law without exception makes it clear that '*poverty alone was not sufficient to warrant the making of such an order*' (*Midland Bank Ltd. v. Crossley-Cooke* at p. 61 *per* Walsh J.). The rationale for this has been clearly stated: a rule which enabled the obtaining of security on the grounds of impecuniosity alone '*would be untenable and disproportionate*' (*Farrell v. Bank of Ireland* at para. 4.17).

Stifling

(a) *The argument.*

44. As is clear from the foregoing, the plaintiff describes as a special circumstance the fact (as he claims) that because the defendant has retained solicitors and counsel for the appeal that it may be inferred that it has the resources to provide reasonable security for costs to the plaintiff. This overlaps with a distinct argument advanced by him. He contends that as part of its ‘*overall assessment*’ the Court is required to consider the proportionality of any order for security that it might make. He says that relevant to this is the question of whether the effect of an order for security for costs will be to shut out the appellant from its appeal. Citing the decisions in *Goldtrail Travel Ltd v. Onur Air Tasikacilik AS* [2017] 1 WLR 3014 and *Xenos v. FAL Healthy Beverages Pty. Ltd.* [2017] NSWCA 240 he says that discharging that onus requires more from the appellant than the assertions to that effect appearing in the affidavit upon which it relies for the purposes of defending this application.

45. The defendant’s submissions engage shortly with this aspect of the plaintiff’s application. They describe as ‘*mere conjecture*’ the plaintiff’s claim that because the defendant has retained lawyers, it has the resources to pay reasonable security for costs. They say that the plaintiff has failed to apply the principles established by the case law he cites to the facts of the case saying ‘*the Plaintiff appears to have added to the Defendant’s case that an order for security of costs will stifle its appeal*’. Pointing to the evidence before the Court of the estimate of costs and the net current assets of the defendant (as of 2019), the defendant says that the plaintiff’s estimate of the costs is over 96% of its net current assets and, therefore, an order for security of costs would indeed stifle the defendant’s ability to proceed with the appeal.

(b) *Quinn Insurance*

46. The importance of the question of whether security will ‘stifle’ a claim has been brought into focus by the decision in *Quinn Insurance Ltd. (Under Administration) v. PricewaterhouseCoopers (A firm)*. That was, as I have earlier noted, an application for security under s. 52 of the 2014 Act. The test developed by the case law for such applications is clear – if the defendant establishes that a limited liability plaintiff will be unable to discharge the costs of the proceedings if unsuccessful in the action and that it has a *prima facie* defence to the claim, security for costs will be required unless it can be shown by the plaintiff that there are particular circumstances requiring that the court exercise its discretion not to make the order sought. One of the particular circumstances which the cases have decided will justify refusing to order security even if an inability to pay and a *prima facie* defence are established, is the prospect that the inability of the plaintiff to discharge the costs is attributable to the wrongdoing giving rise to the proceedings.

47. In *Quinn Insurance*, this Court being satisfied that the plaintiff had established to the requisite *prima facie* standard such a special circumstance, it declined to order security because it had been neither established nor asserted that the imposition of a requirement to provide security would ‘stifle’ the plaintiff’s claim. The issue arose in that case because the plaintiff was a company under administration supported by the Insurance Fund to which, it was suggested, the plaintiff might have recourse in obtaining any security ordered by the court. The plaintiff contended that once the test developed by the case law addressing s. 52 and its predecessors was applied, and if it were determined that there were special circumstances within the meaning of that case law, there was no room for a consideration of whether the claim would or would not be stifled if security were granted.

48. This argument was emphatically rejected by the Supreme Court. Clarke C.J. explained the position as follows (at para 7.23):

'The making of an order runs the risk that a good claim may actually be stifled. The refusal of the order runs the risk that the defendant's right of defence may be materially compromised. Both of these are significant considerations which lead me to the view that the Court should err on the side of greater inquiry and should thus place at least some weight on an assessment of the extent to which ordering an appropriate form of security may actually stifle the claim'.

49. The Court determined that the issue of stifling should be approached in applications under s. 52 as follows. If the plaintiff established on an arguable basis that the inability to pay costs was attributable to the wrongdoing for which it sought relief in the action, the court should ordinarily refuse security without inquiring into whether the claim would be stifled. However, if these circumstances were not established the court held that the appropriate course of action was to proceed to consider whether the proceedings would be stifled if security was ordered (at para. 7.25). This *'second leg of the test'* (at para. 7.31), was said to be engaged only if the plaintiff had failed to establish the required level of arguability that the wrongdoing the subject of the proceedings was the reason for its impecuniosity and imposed an onus on the plaintiff, requiring it to give *'reasonable detail as to whether the proceedings will actually be stifled'* (at para. 7.33). The fact that the court concludes that the proceedings would be likely to be stifled if security were ordered, whilst not decisive, *'must be taken into account in determining where the least risk of injustice lies'*.

50. O'Donnell J. described the issue of whether the making of an order for security would stifle the claim as *'the single most significant aspect of this case'* (at para. 11). In looking to the *'balance of injustice'* referred to by Clarke C.J. in his judgment in the case, O'Donnell J. compared the respective positions of the parties where an insolvent plaintiff was and was not required to provide security which it could obtain. If security *was not* ordered this would mean that the defendant, if successful in its defence, would be deprived of the benefit of its cost order. If it *was* ordered, and the plaintiff had access to resources and could provide security for costs, there might be inconvenience and some cost in being deprived of the use of those funds for the duration of the case, but *'the potential injustice to such a plaintiff is not of the same level as that which a defendant runs when faced by a corporate plaintiff that will be unable to pay costs'* (at para. 13). He continued: *'the risk of stifling of a claim is therefore an ever-present aspect of the balance which a court must make'*.

51. O'Donnell J. throughout his judgment made it clear that the court in adjudicating upon such an application should not act on bare assertion. He said (at para. 27):

'... a plaintiff which seeks to escape an order for security for costs must give a detailed account of why, for example, it is said the deficiency in its assets can be attributed to the defendant's wrongdoing, and provide a plausible explanation for the apparent anomaly that it can incur the costs of pursuing the litigation, but not risk an adverse costs order.'

52. Ultimately, *Quinn Insurance* was decided on the basis that the plaintiff had not established to the required level that the wrongdoing in respect of which it brought its claim

was the cause of its impecuniosity, the court also determining that the plaintiff had failed to establish that there was any likelihood that the proceedings would be stifled.

(c) Application of Quinn Insurance to applications for security for the costs of an appeal

53. The question of whether, and if so how, the issue of *stifling* fits into the test for security for costs of an appeal has not featured prominently in the authorities addressing that jurisdiction (but see *Used Car Importers of Ireland Ltd. v. Minister for Finance* at para. 19, where it was noted that the appellant did not suggest that it would not be able to proceed with the appeal if security were directed). Those cases, in formulating a rule whereby ‘*poverty*’ is at the same time both a necessary precondition to an order for security, but not a sufficient requirement for that purpose, do not expressly address the prospect that circumstances will arise in which an appellant is both unable to pay the costs of an appeal if it is unsuccessful in that appeal yet may be able to pay security in advance of the hearing of that appeal. This could arise for a variety of reasons. Security may be less than the full costs of the appeal: traditionally this was fixed at one-third of the costs, although the continued vitality of that rule was questioned in *Farrell* where Clarke C.J. held that as the issue was not argued in full it should be dealt with in another case (however, see para 7.6, in which Clarke C.J. ordered security for costs be fixed at 50% as a ‘*proportionate response*’ to the claim). In many cases the issue of paying the security will arise before the judgment of the High Court will have taken effect. It may be possible to obtain funding for the security either by borrowing on foot of the security of present or future assets or from a third party such as a shareholder or creditor.

54. One decision in which the issue was touched upon was *O'Donnell v. Saltan Properties*. That was a case involving the appeal of an interlocutory order in which the appellant did not say it could not proceed with the appeal if security for costs was ordered (see para. 27 of the judgment). Costello J. nonetheless refused to order security. She said (at para. 33):

'The plaintiff was required to sue an insolvent limited company and to take with it the attendant disadvantages. The fact that the appellant is an insolvent company cannot mean that it is not entitled to defend the litigation, nor can it mean that it is improper for it to be funded in so defending the litigation.'

55. Obviously, the circumstances of an appellant who will not be able to pay either security for costs of an appeal or the costs of an appeal if unsuccessful, is quite different from that of a party who can pay security but not the ultimate costs if they fail. Insofar as the recent cases, in particular, direct themselves to seeking to strike a proportionate balance between the right of the appellant to pursue its appeal and that of the respondent to recover its costs if successful in that appeal, the fact that an order for security can be made that does not in fact prevent the appeal from proceeding, is of vital importance. In order to accommodate the issue of '*stifling*' it may in due course be necessary for the court to review in the light of *Quinn Insurance* the test governing security for costs of an appeal and to determine how precisely that common-sense consideration should be built into the relevant test. It will be noted that the Court in *Quinn Insurance* viewed this issue as requiring consideration – in the context of applications under s. 52 of the 2014 Act - under a distinct heading. The best way to treat the question for the purposes of the different test applied to applications for security for the costs of an appeal may well be to view the situation of an appellant that is impecunious but who would be able to fund proportionate security as presenting '*special circumstances*' within the meaning of the

Rule although perhaps with the onus on the appellant where this issue is raised by the respondent to establish by evidence (and not assertion) that an order for security will in fact stifle its appeal. This is, I note, how the matter appears to have been approached in the case of *Xenos v. FAL Health Beverages Pty. Ltd.* to which the plaintiff referred in his submissions (see paras. 27, 28 and 51 of the judgment).

(d) *The evidence*

56. In this case, Mr. Grassick has averred that an order for security for the costs of the appeal would in fact stifle the appeal. The plaintiff points to the fact that in other jurisdictions it has been said that such assertion is not sufficient to discharge the onus on an appellant to prove that if security is ordered it will not be able to proceed with the appeal and, indeed, it might be said that this is the consequence of the decision in *Quinn Insurance*. However, for a number of reasons and even if the burden is on the appellant to prove by affirmative evidence that an order for security will in fact prevent it from proceeding with its appeal, I am of the view that this burden is discharged here. I say this having regard to the following.

57. Mr. Grassick's averment is clear, and unqualified. He said '*if an order for security for costs is granted this will have the effect of shutting the Appellant out of bringing this appeal ... this would in effect amount to the Appellant being prevented from exercising its constitutional right to appeal ...*'. I see no reason not to act on this. The plaintiff in his replying affidavit did not challenge that averment and identified no source of finance to which the defendant might have recourse to fund security. Nor do I think it correct to say that the averment is a mere assertion. It was accompanied by a specific refutation of each point the plaintiff did make in this regard in his affidavit. Questioning the defendant's claim of

impecuniosity, the plaintiff observed that the defendant ‘*appeared to have no difficulty keeping its legal team of solicitors together with two senior and one junior counsel engaged for 31 days*’. Mr. Grassick responded averring that in fact the defendant’s solicitors and counsel have ‘*yet to be paid in full*’ for their work on the High Court litigation. The plaintiff questioned whether the litigation had been funded by a third party, and Mr. Grassick responded by confirming unequivocally that it had not.

58. Furthermore, while the defendant’s 2019 financial statements record net assets of €250,000, the reality is that the costs of a thirty-day trial in the course of 2020 were likely to have been extremely high. The fact that the defendant’s lawyers have not been paid in full when combined with the evidence of Mr. Grassick that the income of the defendant has been adversely affected by the Covid-19 pandemic goes some distance in substantiating his averment that that an order for security would, indeed, preclude the defendant from exercising its right of appeal. Thus, even if one assumes that the onus is on the defendant to establish this matter (and I express no view on that question), it has in my view adduced sufficient evidence to do so, at least in the absence of any evidence from the plaintiff that the defendant in fact has another source of funding available to it.

59. In future applications of this kind appellants should consider whether it is prudent to adduce evidence of their precise financial position, assets and liabilities at the time of the application and should consider whether they have established by clear evidence that they cannot fund (whether from their own assets or otherwise) security at the level likely to be ordered if the respondent’s application is successful. The decision of the Court in *Quinn Insurance* (delivered after the close of evidence and delivery of submissions in this case) has,

undoubtedly, brought this issue into greater focus for the purposes of all applications for security.

Conclusions

60. For these reasons I have decided that the plaintiff's application for security for the costs of this appeal should be refused. In summary:

- (i) It being accepted that if the defendant does not prevail in its appeal it will not be in a position to discharge the plaintiff's costs thereof, the court may only direct such security if satisfied that there are special circumstances within the meaning of Order 86 Rule 9 Rules of the Superior Courts.
- (ii) Insofar as the plaintiff relies upon the fact that these are defamation proceedings, the merits of the case, the conduct of the defendant, the fact that the defendant is a body corporate, or the positions adopted by the defendant as to the consequences of its being a company limited by guarantee, these are not '*special circumstances*' within the meaning of the relevant rule.
- (iii) The defendant has contended that if security is ordered against it, this will preclude it from proceeding with its appeal. Even if one assumes that the onus in an application of this kind is on an appellant to establish that security will stifle its appeal, the evidence it has adduced here is sufficient to discharge that onus.

- (iv) The defendant has not established that these proceedings involve an issue of law of public importance such as to preclude the plaintiff from obtaining security were he otherwise entitled to such security.

61. It is my initial view that in the circumstances of this application it is appropriate to reserve the costs of this motion to the appeal. I believe that having regard to the defendant's admitted impecuniosity and its insistence up to the point of the delivery of written legal submissions in this case that its liability was limited to the amount of its guarantee, the plaintiff was justified in persisting with this application and it thus seems appropriate that the allocation of costs of this application should be addressed at the conclusion of the substantive appeal. If either party wishes to contend for a different order, they should notify the Court of Appeal Office within five days of the date of this judgment whereupon a date will be fixed for an oral hearing on the matter of costs.