



THE COURT OF APPEAL

Court of Appeal Record No. 2020/210

High Court Record No. 2019/6157P

Woulfe J.

Neutral Citation Number [2022] IECA 49

Noonan J.

Ní Raifeartaigh J.

Between

ELVERTEX LIMITED (IN VOLUNTARY LIQUIDATION)

Plaintiff/Appellant

-and-

GERALDINE LYONS

Defendant/Respondent

JUDGMENT of Mr. Justice Woulfe delivered on the 7th day of March, 2022

Introduction

1. This appeal was brought by the plaintiff against the judgment and order of the High Court (Allen J.) made on the 11th September, 2020. By this order the learned trial judge ordered

that the plaintiff furnish security for the defendant's costs in this action, in such an amount as may be fixed by the Master of the High Court, and that in default thereof further proceedings in this action be stayed. It was also ordered that the plaintiff pay the defendant the costs of the motion.

Background

2. The underlying claim in these proceedings is that the plaintiff company is the owner of the goodwill attached to the business which trades under the name of The Galleon Restaurant in Salthill in Galway, and that the defendant is passing off her business carried on in the building in question as that of the plaintiff and/or has expropriated the plaintiff's property in the goodwill attached to its business. The evidence before the High Court was that the restaurant business at 210 Upper Salthill was established in or about 1965 by the Lydon family, and it was initially carried on in the name of The Galleon Grill. The building and the business were purchased in 1987 by John O'Sullivan and Nives O'Sullivan, who took an assignment from Thomas Lydon & Sons Limited of the residue unexpired of a term of 999 years of a 1934 lease, and in that assignment the property was described as The Galleon Grill. Mr. O'Sullivan carried on the business for some years in his own name, and later through a company that he incorporated called Elverta Limited.

3. In or about 2011/2012, Mr. O'Sullivan's son, Roger O'Sullivan, took over the business. By a lease made on the 24th April, 2012, between John O'Sullivan and Nives O'Sullivan and the plaintiff, the premises known as The Galleon were demised to the plaintiff for a term of four years and nine months at a rent of €65,000 per annum, plus a turnover rent. The demise included the intoxicating liquor license attached to the business. The plaintiff covenanted not to alter the external appearance of the building, and at the end or sooner determination of the

tenancy to yield up the premises in good condition, and also covenanted to re-transfer the license attached to the premises.

4. The term of that 2012 lease was extended to ten years by a deed of variation made on the 6th September, 2017. Roger O’Sullivan operated the business through the vehicle of the plaintiff company, which was incorporated in 2011. He, and through him the plaintiff, got into financial difficulties which appear to have been unrelated to the core business of the company, but in any event by January, 2019, the plaintiff was in arrears of rent. In those circumstances, Mr. and Mrs O’Sullivan, as landlords, were entitled to forfeit the lease, and the evidence is that the landlords, by their solicitors, demanded possession of the property and that Mr. Roger O’Sullivan, on behalf of the plaintiff, handed over the keys. In addition, on the eve of the resolution to wind up, the company executed an *ad interim* transfer of the intoxicating liquor license which, by the terms of the lease, it was required to do in the event of termination.

5. The defendant had a long association with the restaurant in Salthill, having started working there in 1996. The evidence is that she first went into occupation of the premises in early February 2019 as caretaker, and then on foot of a lease for two years at an annual rent of €126,000. The demise under that lease includes the special restaurant license attached to the premises. The lease also includes a covenant not to alter the premises without consent, and a covenant to restore the premises at the end of the demise.

6. The plaintiff company went into voluntary liquidation on the 19th February, 2019. The liquidator, Mr. Anthony Fitzpatrick, was appointed at a creditors’ meeting on that date. The liquidator has formed the view that the name, reputation and business of The Galleon Restaurant forms a part of the goodwill of the plaintiff company. The plaintiff claims that the defendant is benefiting from the goodwill and assets of the company in existence at the date of the liquidation for her own financial gain, without paying into the liquidation fund for same. It

claims that the defendant is guilty of passing off her restaurant business as that of the plaintiff company.

The High Court Proceedings

7. These proceedings were commenced by plenary summons dated the 1st August, 2019. The plaintiff claims various reliefs, including a permanent injunction restraining the defendant from passing off her restaurant business name or business as that of the plaintiff by use of the marks and business name “The Galleon Restaurant”, and damages for passing off. The plaintiff then issued a notice of motion dated the 6th August, 2019, seeking interlocutory relief, grounded upon an affidavit sworn on the 2nd August, 2019, by the liquidator, Mr. Fitzpatrick. It appears that this application for interlocutory relief did not ultimately proceed to a hearing.

8. On the 9th October, 2019, the defendant issued a motion seeking security for costs pursuant to s.52 of the Companies Act 2014, and an order staying the proceedings until security is given. The motion was grounded upon an affidavit of the defendant sworn on the 8th October, 2019.

9. In her affidavit the defendant set out the history of the restaurant in Salthill known as “The Galleon Restaurant”, and how she had taken over its operation in February, 2019. She described how John O’Sullivan ran a restaurant known as “The Galleon Restaurant” at the premises from 1987 until he retired in or about 2012, under a 999-year lease assigned to him and his wife Nives in February, 1987. He ran the restaurant through a company called Elverta Limited, which the defendant believed was set up on the 5th January, 1987, and was dissolved on the 8th February, 2013, at which time that company was solvent. The defendant believed that Elverta Limited held a lease from the O’Sullivans in respect of the premises. The business name “The Galleon Restaurant” was registered by the O’Sullivans in 1987, and by Elverta Limited in October, 2000.

10. The defendant stated that she was employed by Elverta Limited from 1996 until John O’Sullivan retired in 2012, and then the plaintiff company took a lease of the premises from the O’Sullivans in April, 2012. Their son, Roger O’Sullivan, was a director and shareholder of the plaintiff, and he ran the restaurant through the company until January, 2019. The plaintiff registered the business name “The Galleon Restaurant” on the 18th November, 2013. While the defendant became aware that Roger O’Sullivan had taken over running the restaurant from his father in or about April, 2012, she first became aware that the plaintiff company had taken over the operation a week after that occurred, upon making an enquiry about the change in the name of the employer on her payslip. There were no other noticeable changes at the restaurant when the plaintiff commenced trading, or as a result of it having done so.

11. The defendant explained that in the period leading up to January, 2019 she, as acting general manager, had been aware of the difficult financial circumstances of the plaintiff for some time. On or about the 16th January, 2019, the landlord served the plaintiff with a formal demand for possession of the demised premises on the grounds that the lease had been forfeited for non-payment of rent. Subsequent to receipt of the said notice, Roger O’Sullivan, on behalf of the plaintiff, surrendered possession of the demised property, including the entire contents thereof, by handing over the keys of the premises to the solicitors for the landlord. The plaintiff ceased trading on the 28th January, 2019, after the restaurant closed for business on the 27th, on which date the defendant and the other employees of the plaintiff were so informed and given P45’s and application forms to apply for social welfare.

12. The defendant exhibited a caretaker’s agreement which she entered into with the landlords on the 4th February, 2019. She states that she re-opened the restaurant as a sole trader on the 8th February, 2019, having made arrangements with suppliers, hired staff, some of whom had worked for the plaintiff, and registered with the Revenue Commissioners. She paid over €1,300 to a utility provider, in respect of the plaintiff’s arrears for telephone and internet

services, in order that she could use the telephone number which had been used by The Galleon Restaurant for many years. This telephone number had also been used when the previous company known as Elverta Limited ran the restaurant, prior to the incorporation of the plaintiff. She also paid a bill of approximately €600 owed by the plaintiff to an electrician, and she honoured many vouchers previously issued by the plaintiff.

13. The defendant also exhibited an asset sale agreement, which she entered into with the plaintiff on the 8th February, 2019. This agreement provided that the plaintiff would sell to the defendant certain property owned by the plaintiff for the purpose of the restaurant business, being the goodwill, the fixed assets and the stock. While a purchase price for the latter two items was set out in the agreement, no price for the goodwill in relation to the business was set out. The defendant states that she subsequently became aware that the list of assets which she had agreed to purchase were not assets of the plaintiff, but were assets of the landlords, and had been returned to the landlords when possession of the premises was surrendered. As a result she informed Roger O’Sullivan, on behalf of the plaintiff, prior to the creditors’ meeting on the 19th February, 2019, that she would not proceed with the purchase of the assets which belonged to the landlords and not the plaintiff. Instead she paid the landlords the sum of €7,500 on the 10th April, 2019, in respect of the stock which was on the premises when possession was surrendered, being stock of which she subsequently acquired possession.

14. The defendant then exhibited a lease of the premises which she entered into with John and Nives O’Sullivan on the 10th April, 2019, which lease contains, *inter alia*, the terms and covenants set out at para. 5 above. She states that she is a sole trader and currently employs 33 staff (22 part-time and 11 full-time) in the restaurant known as “The Galleon” or “The Galleon Restaurant” which is trading profitably. She registered “The Galleon Restaurant” as a business name in the Companies Registration Office on the 6th February, 2019.

15. The defendant avers that she has been advised by John O’Sullivan that when the landlords purchased the premises in 1987, they also purchased goodwill from the vendors who had run a restaurant known as “The Galleon Grill” at the premises since 1965, having agreed to pay a specific sum therefor. She says that she believes, having been so informed by John O’Sullivan, that the goodwill relating to the restaurant was not sold by him and his wife to any person or company, specifically it was not sold or otherwise conferred on the plaintiff, nor was the goodwill abandoned as stated by Mr. Fitzpatrick in his affidavit sworn for the purposes of the injunction application. John O’Sullivan had informed her directly that such goodwill as exists is attached to the premises, which are described as “The Galleon” and are owned by the landlord. The plaintiff does not own and never owned the goodwill, name and business of “The Galleon Restaurant”.

16. The defendant denies that she has used any property, or property rights of the plaintiff in order to run the restaurant, and denies that the name “The Galleon Restaurant” or the goodwill relating thereto belongs or belonged to the plaintiff. She states that she is not trading in reliance on the goodwill owned by the plaintiff nor on its reputation. Although she was using the telephone number which was used by the plaintiff company, this telephone number had been used by The Galleon Restaurant since she started working in the restaurant in 1996, long before the incorporation of the plaintiff company. She was not using the website which had been used by the plaintiff company. At the time she commenced trading, the restaurant had been closed because the plaintiff had been unable to pay its debts of approximately €1.3m, the lease having been forfeited by the landlords, and the plaintiff was incapable of continuing to trade. While The Galleon Restaurant has a good reputation, this reputation was created long before the incorporation of the plaintiff, and has been damaged rather than improved by the plaintiff, which failed to meet its debts and resulted in the restaurant closing after 54 years.

17. The defendant states that she accordingly believes that she has a good defence to the within proceedings, and that the maintenance and institution thereof prejudices rather than benefits the creditors of the plaintiff. Having regard to the limited assets of the plaintiff company, she does not believe that it would be in a position to discharge any order for costs which might be made in her favour if the plaintiff is unsuccessful in the within proceedings, and she therefore seeks an order for security for costs.

18. A series of further affidavits were then interchanged between the parties. The defendant's solicitor, Davitt Geraghty, swore an affidavit on the 9th October, 2019. He stated that he believed the defendant had a good defence in these proceedings, and in other related proceedings brought by the liquidator. He exhibited a report from a legal costs accountant which estimated the defendant's probable costs in defending these proceedings as a figure of €84,757.50. It was his opinion that the plaintiff would not be in a position to pay the defendant's costs in the event that she successfully defends these proceedings.

19. The plaintiff then served a statement of claim dated the 4th December, 2019. It is pleaded that the plaintiff registered the business name "The Galleon Restaurant" in 2013, under the Registration of Business Names Act 1963, and traded under the said name from its leased premises in Salthill without any objection from the retired John O'Sullivan, the former owner/operator of the restaurant and now the landlord of the premises, thereby facilitating and permitting the goodwill to pass to the plaintiff. Through the trading name "The Galleon Restaurant" the plaintiff built up considerable goodwill and reputation by operation of a "full service" restaurant business. The plaintiff pleads that the defendant continues to trade from the plaintiff's former premises using "The Galleon Restaurant" business name, as well as the plaintiff's website and telephone number, and that the restaurant continues to trade without any alteration to the premises, the layout or indeed the menu. It is pleaded that the defendant is thus benefiting from the goodwill and assets of the company in existence at the date of the

liquidation for her own financial gain, without paying into the liquidation fund for same. Particulars of alleged passing off are set out, with a claim that the defendant has represented herself as operating the same business by use of the name, website, premises and reputation of the plaintiff's business such as to lead to confusion in the minds of the public between the plaintiff's business and the defendant's business. As regards proof of loss and damage, it is pleaded that the plaintiff has suffered loss of goodwill to the value of €130,000.

20. The liquidator then swore an affidavit on the 20th December, 2019, by way of a reply to the defendant's affidavit. As regards the plaintiff's claim that the defendant is passing off, he states that it suffices to say that the defendant is doing so by using its business name "The Galleon Restaurant", employing the company's former staff, trading from the company premises, using the company assets, get up, stock, logos, and the company telephone number and Facebook, and relying on the company goodwill, which was generated by the company, without payment for same to the liquidator or without his consent.

21. Mr. Fitzpatrick goes on to say that the defendant is preventing him carrying out his work as liquidator, by using the goodwill and intellectual property of the company. He suggests that but for the actions of the defendant there would be no need for the application for security for costs to be brought. He states that the defendant is responsible for the plaintiff having to bring the proceedings herein, otherwise the creditors of the plaintiff will not be able to realise the value of the company goodwill, business name, reputation and get up and intellectual property rights.

22. As regards the history of the goodwill, Mr. Fitzpatrick suggests that John O'Sullivan traded through Elverta Limited and not in his own name from 1996 to 2011, and that he surrendered the restaurant and goodwill, reputation and business to his son, Roger O'Sullivan, *via* Elvertex Limited in 2011. He states that when Roger O'Sullivan took over the restaurant *via* Elvertex Limited from Elverta Limited (dissolved), his father's company, both John

O'Sullivan and Elverta, *via* its dissolution, abandoned all their claims. He states that there were changes to the restaurant after Roger O'Sullivan took over, at least in terms of new stock and equipment.

23. As regards the events of early 2019, Mr. Fitzpatrick states that John O'Sullivan did not forfeit the lease according to Roger O'Sullivan. He states that there was a surrender of the lease by Roger O'Sullivan to his father for no consideration on the 15th February, 2019, and that the propriety of the surrender is a matter to be determined in separate company law proceedings issued by the liquidator. While the plaintiff ceased trading on or about the 28th January, 2019, it remained in occupation of the premises. He says that Roger O'Sullivan advised him that a sign was placed on the premises stating that the restaurant was being renovated, and that the defendant renovated same over the next few days to enable her to continue the company's business, leading to her re-opening on the 8th February, 2019. There was no sign that the restaurant was under new management, or that the ownership and management of the business known to the public as "The Galleon Restaurant" had changed hands in any way.

24. Mr. Fitzpatrick replies to averments made by the defendant regarding steps taken by her at the time of re-opening the restaurant. He states that she wrongfully and without his authority as liquidator paid €1,300 to a telephone and internet service provider to clear the company's arrears, so that she could benefit from wrongfully taking over the company's telephone and internet service. He suggests that this, in turn, led the public to view the defendant's new business and that of the plaintiff, *i.e.* The Galleon Restaurant, as one and the same. As regards the defendant paying a bill of €600 owed by the plaintiff to a creditor electrician, he states that the defendant preferred this creditor without his authority as liquidator to enable her to trade. As regards the defendant honouring the plaintiff's gift vouchers, he says this was also without his authority as liquidator and was a clear attempt by the defendant to convince the public that the plaintiff's business and her own business were one and the same.

25. As regards the defendant registering “The Galleon Restaurant” as a business name in February, 2019, Mr. Fitzpatrick says that this was a wrongful step to enable her to trade using the company name, goodwill and reputation *etc.* He states that this wrongful registration by the defendant was done in circumstances where the plaintiff had registered the same name back in 2013 and had built up considerable goodwill trading as “The Galleon Restaurant” since 2013. He suggests that neither John O’Sullivan nor Nives O’Sullivan nor Elverta Limited have a claim to the restaurant name or the rights arising from same, having long since abandoned all such rights. He suggests that in 2011 when John O’Sullivan passed the business over to his son, Roger O’Sullivan, the goodwill also passed without consideration and was incorporated in Roger O’Sullivan’s new company, Elvertex Limited, in which company neither John nor Nives O’Sullivan had any interest.

26. Mr. Fitzpatrick later exhibits a copy of the 2012 lease between John O’Sullivan and Nives O’Sullivan as landlords and the plaintiff as tenants. Clause 3.8.3 of the lease contained the covenant whereby the plaintiff covenanted not to make any alterations, additions or improvements to the demised premises which materially affect the external appearance of the demised premises without the prior consent of the landlord (such consent not to be unreasonably withheld or delayed). Clause 5.1.1. provided that the landlord had a right to re-enter if the rent or service charge or any sum due under the lease was unpaid for 21 days after becoming due (whether formally or legally demanded or not).

27. Mr. Fitzpatrick concludes his replying affidavit by arguing that there are several reasons why security for costs should be refused, including public policy issues regarding the defendant trading via a phoenix business. He states that he is advised, that though there are certain times when security for costs can be ordered, the Court has the necessary discretion and the exceptions are not entirely limited. He states that he does not believe that the defendant had a defence to the proceedings herein.

28. The liquidator then swore a further affidavit on the 7th January, 2020, this time in reply to the affidavit of Davitt Geraghty, which was largely a repeat of his previous affidavit. As regards any new matters, he refers to the increased rent of €126,000 per annum now being received by the landlords from the defendant. He states that he is advised that this increased rent is approximately 60% in excess of the rent formerly being received by the landlords from the plaintiff, and that this substantial increase is a recognition by John O’Sullivan of the strong financial value of the business goodwill acquired by the defendant, without any payment to the liquidation fund for this asset to the detriment of the creditors.

29. Mr. Fitzpatrick exhibits a copy of a deed of surrender dated the 15th February, 2019, whereby the plaintiff surrendered and yielded up to the landlords all its estate and interest in the demised premises, and the landlords released the plaintiff from all the tenant’s covenants in the lease. He also exhibits a copy of the directors’ estimated statement of affairs dated the 19th February, 2019, showing an estimated total deficit of €1.468M.

30. As regards Mr. Geraghty’s averment that the existence of goodwill in the plaintiff company will be disputed by the defendant, Mr. Fitzpatrick states that the goodwill attaches to the restaurant business and not to the premises, and that the goodwill, including the business name, is an asset of the company which he can sell and intends to do so. He says that in the restaurant sector the business goodwill is identified and bound up with the brand name of the restaurant business, and that this is borne out by the worldwide and national expansion of restaurants/café businesses such as McDonalds, Supermacs, Subway, Starbucks, Costa Coffee, House *etc* where franchisees are willing to pay large sums to acquire a license to operate under the business name. Over many years, customers and the public generally have identified and continue to identify “The Galleon Restaurant” as a brand name representing good quality food and service, and he says that this goodwill and reputation is a business asset of the company.

31. The defendant then swore a further affidavit on the 14th February, 2020, in response to the replying affidavit of Mr. Fitzpatrick. She states that she intends to put in a full defence to the within proceedings, as is clear from the affidavits which have already been sworn by her and on her behalf in these proceedings. However, she is anxious not to incur further costs prior to the determination of the application for security for costs. She states that she did not place a sign on the restaurant, or cause a sign to be placed there, stating that renovations were being carried out. She did not carry out renovations, but she repainted the interior of the restaurant with a number of her friends between the 5th and 7th February, 2019. She did place signs on the door on the 8th February, 2019, when she commenced trading, which referred to “Geraldine Lyons trading as The Galleon Restaurant”. These signs, which are not similar to signs used by the plaintiff company, are still in situ.

32. As regards the payments made to the plaintiff’s telephone and internet service provider and to the electrician, the defendant states that it was made very clear to both that she did not make the payment on behalf of the plaintiff, nor was she connected with the plaintiff or acting on its behalf. As regards honouring the gift vouchers, she states that it was made clear to each customer who sought to redeem a voucher that there had been a change in ownership of the restaurant, and that she would honour the voucher, in full or in part, despite having no obligation to do so. The defendant believes that the sale of vouchers shortly before a company is forced to cease trading, for the reason that it cannot meet its debts, would have a negative impact on goodwill.

33. As regards the asset sale agreement signed by the plaintiff on the 8th February, 2019, the defendant states that no suggestion was made at that time that she was using goodwill, or intellectual property rights held by the plaintiff, or that she was passing off her business as that of the plaintiff, or that any further payment was due or would be sought in order that she would be in a position to trade as “The Galleon Restaurant”, using the assets referred to in the asset

sale agreement. The liquidator had not sought to enforce the asset sale agreement, despite being aware of its existence prior to the 25th February, 2019. She believed that Mr. Fitzpatrick was aware of an intention on the part of the plaintiff to enter into an asset sale agreement, or at least the proposal that the plaintiff would enter into such an agreement, even prior to it ceasing trading.

34. The next affidavit was one sworn by Emer Johnson on the 20th February, 2020. She explained that she is an accounts manager and was formerly employed by the plaintiff in the accounts department from July 2017 to late January 2019, but she was now self-employed. She described how in the course of her employment with the plaintiff she was present at a meeting in late January 2019 with Mr. Fitzpatrick and others, regarding the imminent cessation of trade by the plaintiff company. She says that at that meeting asset sale agreements for the plaintiff and other related companies were discussed, and Mr. Fitzpatrick did say that we would be needing an asset sale agreement for the plaintiff company to tidy everything up. It was her understanding from explanations given to her at the time after this meeting that all fixed assets, stock and goodwill were to be covered in the asset sale agreement for the plaintiff company.

35. The last two affidavits relevant to this application were then sworn by Mr. Fitzpatrick on the 13th March, 2020. The first of these was sworn in reply to the defendant's most recent affidavit, and consists largely of rebuttals of averments made in that affidavit. He states that visually the restaurant premises now looks the same as when the plaintiff company operated its business there, and he exhibits photos taken of the premises. He complains again about the defendant paying off a couple of relatively small creditor balances, and says he regards this as serious and an obstruction to the liquidation. As regards the defendant hiring 11 former employees of the plaintiff, he suggests that these employees, who he believes are familiar faces to the patrons of the restaurant, were handpicked by the defendant to create the clear impression

to the public that the defendant's business is that of the plaintiff. He repeatedly refers to the defendant as operating a "phoenix" business.

36. As regards the deed of surrender dated the 15th February, 2019, Mr. Fitzpatrick states that Roger O'Sullivan executed this purported deed unbeknownst to him at the time, four days before the liquidation process commenced, and when the plaintiff was insolvent, and he says that he is challenging the validity of the alleged deed of surrender in other company law proceedings.

37. The second affidavit sworn by Mr. Fitzpatrick on the 13th March, 2020, was in reply to the affidavit of Emer Johnson. As regards the meeting in late January 2019, where Ms. Johnson states an asset sale agreement in relation to the plaintiff company was discussed, Mr. Fitzpatrick states that he was present at the conclusion of a meeting at the plaintiff company's premises only for the purpose of being introduced to Roger O'Sullivan, and finding out about the different companies which were to be placed into liquidation. He was not a party to the asset sale agreement referred to by Ms. Johnson. He recalled making a broad comment along the lines that if the company were to enter an asset sale agreement, he expected it would be all encompassing and would tie up with the balance sheet.

The High Court Judgment

38. The defendant's motion was heard by Allen J. on the 11th September, 2020, and he delivered his *ex tempore* judgment on the same date. Having noted that the plaintiff went into voluntary liquidation on the 19th February, 2019, and is hopelessly and grossly insolvent, he held that there was no issue as to the inability of the plaintiff to pay the costs if this action were to fail, noting that the defendant's estimate of her costs at a little less than €85,000 was uncontested.

39. Allen J. then looked at the limb of the test for security for costs whereby there is an onus on the defendant to establish a *prima facie* defence, not only by assertion but by pointing to the existence of credible evidence which if accepted at trial would amount to a defence. He reviewed the uncontested evidence as to the history of the restaurant business in question, noting that the building and business were purchased in 1987 by John O’Sullivan and Nives O’Sullivan. He described how Mr. and Mrs. O’Sullivan, or perhaps it was Mr. O’Sullivan only, carried on the business for some time through a company and then in 2011 Mr. O’Sullivan’s son, Roger, took over the business. Allen J. held that “the means by which that was done is in my view critical”, and he explained as follows:-

“By a lease on the 24th of April, 2012, between John O’Sullivan and Nives O’Sullivan and Elvertex Limited, that’s the plaintiff, the premises known as The Galleon were demised to the plaintiff for a term of four years and nine months at a rent of €65,000 per annum plus a turnover rent. It’s clear from the terms of the lease that the demise included the intoxicating liquor license by then attached to the business. The plaintiff covenanted not to alter the external appearance of the building and at the end or sooner determination of the tenancy to yield up the premises in good condition and significantly I think also covenanted to re-transfer the license attached to the premises. And so the legal effect of the lease was that at the end or sooner determination of the tenancy the premises would revert to Mr. and Mrs. O’Sullivan. I see nothing in the lease that might have allowed the plaintiff or anyone else to establish themselves in business elsewhere under the name Galleon Restaurant.”

40. Allen J. noted how the term of that 2012 lease was extended to 10 years by a deed of variation, and held that the effect was that at the end of the 10 years the premises would revert as a licensed restaurant to Mr. and Mrs. O’Sullivan with the unaltered Galleon Grill sign on the front of it. He described how the plaintiff was in arrears of rent by 2019, and stated that in those

circumstances the landlords were entitled to forfeit the lease. He stated that the uncontested evidence was that the landlords, by their solicitors, demanded possession of the property and that Mr. Roger O’Sullivan, on behalf of the plaintiff, handed over the keys and, on the eve of the resolution to wind up, the plaintiff executed an *ad interim* transfer of the intoxicating liquor license which, by the terms of the lease, it was required to do in the event of termination.

41. Allen J. referred to the evidence of the defendant that she first went into occupation of the premises as a caretaker and then on foot of a lease for two years at a rent of €126,000, which demise under that lease includes the special restaurant license attached to the premises. He noted that there is in the 2019 lease a covenant not to alter the premises without consent and a covenant to restore the premises at the end of the demise. While there was no express covenant to reassign the intoxicating liquor license, if that was not implicit there was nothing in that lease that would entitle the defendant, at the end of the term of the letting, to establish herself in business elsewhere under the name The Galleon Restaurant. In addition to that, the defendant had deposed on affidavit that Mr. O’Sullivan will say that he never transferred the goodwill in the business.

42. Counsel for the plaintiff had disputed that the defendant had established a *prima facie* defence, and some of these arguments were next considered by the trial judge. The first argument was that the business carried on by the defendant was a phoenix business or a phoenix company, but Allen J. could see in the evidence no connection established between Mr. and Mrs. O’Sullivan and the defendant or between the defendant and Roger O’Sullivan. The “phoenix” argument was not supported by the lease, at nearly twice the rent which the plaintiff company was paying, or by the fact that the defendant had worked for John O’Sullivan or for his company for the years between 1996 and 2011 when the plaintiff took over the operation of the business. Counsel also argued that the defendant had preferred two of the plaintiff’s

creditors by paying off their debts, but Allen J. could see no warrant for the suggestion that this amounted to the preferring of any of the company's creditors.

43. Overall, "without the slightest hesitation", Allen J. found that the defendant had made out a *prima facie* defence to the action. The onus then shifted to the plaintiff to make out the existence of special circumstances which would justify the Court, in exercising its discretion, not to make an order for security for costs. The plaintiff argued that the goodwill of the plaintiff has been wrongfully appropriated by the defendant, and it is asserted that the goodwill built up in connection with the business was variously bestowed by Mr. John O'Sullivan on Mr. Roger O'Sullivan or abandoned by Mr. John O'Sullivan or surrendered by Mr. John O'Sullivan or his company. Allen J. accepted the defendant's argument that what was put up on behalf of the plaintiff amounted to no more than mere assertion. There was no evidence that any value was attributed to goodwill in the company's accounts, and goodwill was not part of the assets shown in the statement of affairs of the company. While it was listed in the asset sale agreement of the 27th January, 2019, a nil value was ascribed to it. It seemed to Allen J. that the proposition that the goodwill attached to the premises was abandoned by the O'Sullivans was inconsistent with the assertion by Mr. Fitzpatrick himself, in one of his affidavits, that the rent now paid by the defendant reflects the goodwill which is attached to the business.

44. Allen J. did not think either that the plaintiff's argument was made out by the mere fact that the plaintiff registered the name "The Galleon Restaurant" as a business name, as registration by itself does not establish ownership of the goodwill attached to the business. Most of all it seemed to him that the case which the plaintiff made was utterly at variance with the terms of its lease of the property. He therefore found that there was no *prima facie* case that the defendant was wrongfully passing off her business as that of the plaintiff, or that she had wrongfully appropriated the goodwill. In any event it seemed to him that there was no *prima facie* evidence of the value of the goodwill. The figure of €130,000 put forward by Mr.

Fitzpatrick was mere assertion, and it related to the value of the entirety of the goodwill established between 1965, when the business was established, and 2019 when the plaintiff ceased trading. Counsel for the plaintiff had suggested that the value of the goodwill might have been enhanced during the period in which the plaintiff was trading, but if the goodwill was devisable at all, which he doubted, the trial judge felt that there was no evidence from which any figure could be put on any enhancement of the goodwill during that period. There was also no evidence that the company, or any assignee of the company or of anything that the company might have, would be entitled to set up a business under the name Galleon Restaurant elsewhere, other than in the Salthill premises.

45. Allen J. accepted the submission by counsel for the defendant that unless an order was made for security for costs, the defendant would find herself in a lose-lose situation. It seemed to him that there was a real danger that without such an order the defendant would be put in a position of paying money to her lawyers or paying it to the plaintiff, and he accepted that this inequality of arms would impinge upon the defendant's right of access to the Courts to vindicate her position. He regarded it as well-established that the fact that an order for security for costs might stifle an action was no bar to making such an order, and in this case in any event there was no evidence that such an order would stifle the action, and it seemed to him that if the creditors had confidence in the action they could fund it, and in particular could fund security for costs as required. Overall the trial judge was satisfied that the defendant was entitled to the order for security for costs as sought.

Notice of Appeal

46. The plaintiff filed a notice of appeal to this Court on the 8th October, 2020, and set out eight grounds of appeal. One ground was that the High Court judge erred in law by finding that the defendant had established a *prima facie* defence. Another ground was that the trial judge

had erred in law and misapplied the test in respect of security for costs by finding that the plaintiff had not established a *prima facie* case that the defendant is wrongfully passing off her business as that of the plaintiff, or that the defendant has wrongfully appropriated the goodwill, which goes to the merits of the substantive case and not the security for costs application. Among the other grounds it was argued that the trial judge erred in law by failing to exercise his discretion to refuse the application, in circumstances where the plaintiff alleges the defendant is wrongfully relying on the plaintiff's goodwill and reputation to operate her business. I will turn to the submissions on appeal shortly, but it is necessary, firstly, to refer to the legal principles by reference to which a case such as this falls to be determined.

The Legal Principles

47. The starting point as regards security for costs in context of limited companies is s. 52 of the Companies Act 2014, which provides as follows:-

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

48. In his judgment for the Supreme Court in *Quinn Insurance Limited (Under Administration) v. PricewaterhouseCoopers (A Firm)* [2021] IESC 15 (“*Quinn Insurance*”), Clarke C.J. set out the following helpful summary of the applicable legal principles (at para. 3.1):-

“...the essential regime concerning the grant or refusal of security for costs in a corporate context is well settled. For example, the judgment of this Court in *Usk District Residents Association Ltd. v. Environmental Protection Agency* [2006] IESC 1 makes

clear that an initial onus rests on a defendant seeking security for costs to establish that it has a *bona fide* defence to the proceedings and also that the plaintiff concerned would not be in a position to meet the costs of the proceedings were it to lose and costs be awarded against it. Where both of those matters are established by the defendant to the satisfaction of the Court, then security will ordinarily be ordered unless there is a sufficient countervailing factor (or a “special circumstance” as that term is used in the jurisprudence) which tilts the balance of justice against the making of an order.”

49. In his concurring judgment in the same case, O’Donnell J. (as he then was) discussed the issue of “special circumstances” as follows (at para. 4):-

“Such special or specific circumstances can include cases where it is said that the plaintiff’s inability to be in a position to discharge future costs flows from the wrong allegedly committed by the moving party, or that there has been delay in seeking the order sought, or where, for example, it is said that there is a public interest in the litigation proceeding. The list of such circumstances is not closed. See, in this regard, *Usk and District Residents Association Ltd v. The Environment Protection Agency* [2006] IESC 1...and *Inter Finance Ltd v. KPMG Peat Marwick* (Unreported, High Court, Morris P., June 29th, 1998). The contention that the plaintiff’s impecuniosity, as it is often described, is due to the alleged wrong of the defendant which is the subject-matter of the proceedings was subject to principles set out by Clarke J. (as he then was), in *Connaughton Road Construction Ltd v. Laing O’Rourke* [2009] IEHC 7 (“*Connaughton Road*”). In that case, at para. 3.4 of the judgment, Clarke J. said that to establish that inability to pay stemmed from the alleged wrongdoing, it was necessary to establish four propositions:

- (i) That there is an actionable wrongdoing on the part of the defendant (for example, a breach of contract or tort);

(ii) That there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiffs;

(iii) That the consequence(s) referred to in (ii) have given rise to a specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example, by not being too remote); and,

(iv) That the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position.”

50. In *Quinn Insurance* Clarke C.J. stated as follows in relation to the “impecuniosity” special circumstance (at para. 7.30):-

“...the court is considering where the least risk of injustice lies against a potential background of a case where it is at least arguable that the impecuniosity of the plaintiff, on which the defendant relies in bringing the application for security, is due to the wrongdoing at the heart of the proceedings. However, for that injustice to be potentially present it does seem clear that the consequences of the wrongdoing must be shown, on a *prima facie* basis, to be sufficient to make the difference. Every plaintiff who has a *prima facie* claim for money will be able to demonstrate that at least some of its impecuniosity is potentially due to the alleged wrongdoing of the defendant. If that were to be sufficient then it would set at nought the regime for security for costs and would give rise to the potential for significant injustice to defendants which I have already sought to analyse. The balance is only tipped where it can be shown that, rather than the alleged wrongdoing only forming part of the shortfall giving rise to the impecuniosity, it is arguable that it forms all of it.”

51. These principles have recently been discussed and applied by this Court in *Demeray Limited (In receivership) v. O’Grady* [2022] IECA 12.

Submissions in the Appeal

Submissions of the Appellant

52. The plaintiff submits that as the defendant has failed to deliver a Defence, the threshold of having a *prima facie* defence has not been met. It is submitted that the trial judge failed to give the merits of the defendant's defence adequate consideration, and fell into error by concluding that the defendant met the threshold of a *prima facie* defence. In that regard, the plaintiff cites the judgment of Finlay Geoghegan J. in *Tribune Newspapers v. Associated Newspapers Limited* (Unreported, 25th March, 2011) ("*Tribune Newspapers*"), where she stated that mere assertions would not suffice and then continued as follows:-

“In my judgment, what is required for a defendant seeking to establish a *prima facie* defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by a trial judge, provide a defence to the plaintiff's claim.”

53. The plaintiff refers to certain admissions made by the defendant, including that she admitted to operating the same restaurant as had been run by the plaintiff using the same name “The Galleon Restaurant”, and admitted to having registered the business name which had been previously registered by the plaintiff in 2013. The plaintiff highlights the defendant's assertion that the restaurant has a good reputation. It is submitted that the trial judge misapplied the *prima facie* defence test in the *Tribune Newspapers* case. The plaintiff cites the defendant's denial that the name “The Galleon Restaurant” and the goodwill relating to the name and the business belong to the plaintiff, and it is submitted that a mere denial does not constitute a *prima facie* defence within the meaning of the test set out in *Tribune Newspapers*.

54. The plaintiff submitted in its written submissions that if this Court accepts that the defendant has a *prima facie* defence, then her causing or contributing to the plaintiff's impecuniosity constitutes special circumstances to justify the exercise of discretion against

making an order for security for costs. The test for causing impecuniosity as set out in the *Connaughton Road* case was cited, and it was stated that the plaintiff believes that it meets that test. During exchanges with members of the Court, however, counsel for the plaintiff appeared to reject the suggestion that the plaintiff was claiming as a special circumstance that the defendant's wrongful conduct has led to the plaintiff's impecuniosity. He accepted that the defendant was not responsible for the €1.4m deficit, and said that the plaintiff's special circumstance was that the case fell within the principles referred to in the English case of *Gill All Weather Bodies Limited v. All Weather Motor Bodies Limited* (77 Law Jour 123), as cited in *Peppard & Company Ltd v. Bogoff* [1962] I.R. 180 ("*Peppard*"). In the English case, Maughan J. stated as follows:-

“There may be many cases where a company is insolvent, and yet the Court would not order security to be lodged. I will take as an example the case of a defendant company which is alleged to have stolen the plaintiff company's business. It is quite clear the Court would not ask the plaintiff company to give security.”

It was submitted that the present case was similar to the example mentioned in that case, in that the defendant has appropriated the goodwill of the plaintiff company, and but for her actions the plaintiff would be in a position to pay costs.

55. As regards discretion, it was also submitted that the exceptions to requiring security for costs are not yet closed by the Courts. During oral submissions, counsel for the liquidator highlighted averments made by Mr. Fitzpatrick as to the defendant's alleged behaviour in taking steps to avoid the consequences of the plaintiff's liquidation, and as to his belief that the defendant's behaviour is an exception to the need for the provision of security for costs, as same could prohibit the company's creditors from the realisation of the company's assets.

56. The plaintiff also referred to the judgment of the Supreme Court, per Clarke C.J., in *Quinn Insurance*. At para. 7.25 of his judgment Clarke C.J. stated as follows:-

“However, even if the full *Connaughton Road* special circumstance is not established, it does not seem to me that this is the end of the matter. Thereafter, the Court can also consider whether the proceedings will in fact be stifled and, in so doing, will have to analyse any assertion put forward on behalf of the plaintiff concerned that it would not be in a position to put up security should it be ordered.”

In the present case it is submitted that this Court should exercise its discretion and allow the appeal against the order for security for costs, as otherwise the creditors may suffer significant adverse consequences as the case may be stifled and the public interest element of a liquidation may be defeated.

The Respondent's Submissions

57. The defendant submitted that Allen J. had not erred in finding that she had established a *prima facie* defence to the proceedings. It was not necessary for her to deliver a formal Defence, and in any event what was required was evidence on affidavit rather than mere assertion in pleadings. In the present case the defendant had furnished credible evidence on affidavit, which was largely direct evidence, in response to the allegations made against her by the plaintiff.

58. The defendant highlighted aspects of the affidavit evidence which, it was submitted, established a *prima facie* defence. This included her averments that she was informed by John O'Sullivan that neither he, nor his wife, transferred the goodwill they had in “The Galleon Restaurant” to the plaintiff or to any other person. It was clear from the exhibited leases, held by both the plaintiff and the defendant, that the landlords did not permit either tenant to alter the external appearance of the restaurant, the external appearance which includes the signage and name of The Galleon Restaurant. She submitted that she also furnished credible evidence on affidavit that she is not passing her business off as that of the plaintiff, including that it is

publicly known she is running the restaurant herself, that there are signs on the door of the restaurant which refer to her, and that she had made it clear to her suppliers that she, and not the plaintiff, is running the restaurant.

59. If this Court accepts that the onus has shifted to the plaintiff to establish special circumstances, the defendant emphasises that the plaintiff's claim arises purely from events which occurred after the plaintiff had ceased trading. The directors' estimated statement of affairs shows an estimated deficit of €1,468,041, of which €309,552.00 is owed to preferential creditors. Therefore, even if it were established on a *prima facie* basis that the plaintiff has a good claim against the defendant (which it is submitted, cannot be established), the damages which might be awarded to the plaintiff would be significantly less than the plaintiff's deficit as of the 19th February, 2019. Clearly the inability of the plaintiff to meet such a costs order is not due to any alleged wrongdoing on the part of the respondent (which is denied).

60. As regards the issue of stifling, the defendant submits that Allen J. correctly found that there is no evidence to demonstrate that the proceedings would be stifled if the order granting security for costs were made. She cites the comments of Clarke C.J. in *Quinn Insurance* that it was incumbent on a plaintiff, who puts forward a defence to an application for security for costs based on a special circumstance involving stifling, to give the Court some reasonable detail as to whether the proceedings will actually be stifled.

Decision

61. The authorities make it clear that an initial onus rests on a defendant seeking security for costs, pursuant to s. 52 of the Companies Act 2014, to establish two matters. Firstly, that the plaintiff company would not be in position to meet the costs of the proceedings if it were to lose and have costs awarded against it, and secondly, that it has a *prima facie* defence to the plaintiff's claim.

62. As regards the first matter, Allen J. was clearly correct in holding that there was no issue as to the inability of the plaintiff company to pay the defendant's costs if the action were to fail. As noted by him, the plaintiff went into voluntary liquidation on the 19th February, 2019, and it is hopelessly and grossly insolvent. He also noted that the defendant had put before the Court an uncontested estimate of her legal costs, from a legal costs accountant, at a little less than €85,000.00.

63. As regards the second matter, I am satisfied that Allen J. was again correct in finding that the defendant had established a *prima facie* defence, according to the test set out by Finlay Geoghegan J. in *Tribune Newspapers*, *i.e.* she had objectively demonstrated the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by a trial judge, provide a defence to the plaintiff's claim.

64. The evidence before the trial judge was that there was goodwill built up in connection with the restaurant business, known initially as "The Galleon Grill" and then subsequently as "The Galleon Restaurant", from the time the restaurant began operating from the premises in Salthill in or about 1965. After John O'Sullivan retired in or about 2012, the benefit of this goodwill was enjoyed by the plaintiff company, through which Roger O'Sullivan operated the restaurant, at least until the plaintiff ceased trading in late January, 2019. Allen J. noted that the liquidator asserted that this goodwill was variously bestowed by John O'Sullivan on Roger O'Sullivan, or abandoned by John O'Sullivan, or surrendered to Roger O'Sullivan or his company, the plaintiff herein. Allen J., however, accepted the defendant's argument that what was put forward on behalf of the plaintiff amounted to no more than mere assertion.

65. I am satisfied that Allen J. was correct in reaching this conclusion as to a *prima facie* defence for the following reasons. Firstly, it is important to note that Mr. Fitzpatrick is a stranger to events prior to the 19th February, 2019, save for his attendance at one meeting in late January, 2019. The defendant has averred that she believes, having been so informed by

John O’Sullivan, that the goodwill relating to The Galleon Restaurant was not sold by him and his wife to any person or company, and specifically it was not sold or otherwise conferred on the plaintiff company, nor was the goodwill abandoned as suggested by Mr. Fitzpatrick. She states that Mr. O’Sullivan has informed her directly that such goodwill as exists is attached to the premises, which are described as “The Galleon”, and are owned by the landlords of the premises. Although this evidence is hearsay in nature, such evidence may be admitted in an interlocutory application such as this pursuant to O. 40, r. 4 of the Rules of the Superior Courts, subject to certain conditions. In the present case, no objection was taken to its admission. One might also note that the vast majority of Mr. Fitzpatrick’s averments on the issue of goodwill are of course also hearsay, given that he is a stranger to events prior to the 19th February, 2019. They also fall to be admitted (if at all) pursuant to O. 40, r. 4 as they are not admissible pursuant to s. 686 of the Companies Act 2014, which provision makes certain information admissible, but only “as between” the parties listed in that provision, which list would not include the defendant herein.

66. Secondly, the liquidator’s claim that the goodwill was permanently transferred to the plaintiff does not appear to be supported by the objective evidence. I agree with the trial judge that the means by which Roger O’Sullivan took over the business, through the vehicle of the plaintiff company, appears to be of significant importance. Under the 2012 lease with the O’Sullivans, the plaintiff covenanted not to make any alterations to the demised premises which materially affect the external appearance of the demised premises without the prior consent of the landlord, which effectively meant that the signage for the restaurant could not be changed. The plaintiff also covenanted to yield up the demised premises at the expiration of the term of the lease, and on termination to re-transfer any license attached to the demised premises. As Allen J. observed, the legal effect of the lease was that at the end or sooner determination of the tenancy the premises would revert to Mr. and Mrs. O’Sullivan, and there

appears to be nothing in the lease that might have allowed the plaintiff or anyone else to establish themselves in business elsewhere under the name The Galleon Restaurant.

67. In my opinion Allen J. correctly highlighted other objective evidence which assisted the defendant in establishing a *prima facie* defence. There was no evidence that any value was attributed to goodwill in the plaintiff company accounts, and goodwill was not part of the assets shown in the statement of affairs of the company. While goodwill was listed in the asset sale agreement dated the 27th January, 2019, a nil value was ascribed to it. The proposition that the goodwill attached to the premises was abandoned by the O’Sullivan is inconsistent with an averment made by Mr. Fitzpatrick himself, that the rent now paid by the defendant to the O’Sullivan reflects the goodwill which is attached to the business carried on in the premises.

68. The authorities also make it clear that if the defendant satisfies the initial onus to establish the above two matters, then the onus will shift to the party resisting the order for security to show “special circumstances” which tilt the balance of justice against the making of an order. A frequently invoked ground on which special circumstances is argued is that the plaintiff’s inability to pay costs flows from the wrongdoing allegedly committed by the defendant. As set out at para. 49 above, this contention that the plaintiff’s impecuniosity is due to the alleged wrongdoing of the defendant is subject to the four propositions identified by Clarke J. in *Connaughton Road*.

69. While the plaintiff stated in its written submissions that it believed that it met the *Connaughton Road* test, during the hearing the plaintiff’s counsel appeared to accept that this was not the case and he accepted that the defendant was not responsible for the estimated deficit of €1.468m. This appears to me to have been a very sensible concession, in circumstances where the defendant’s alleged passing off did not commence until **after** the plaintiff had ceased trading, this making it impossible in my opinion to show that the alleged wrongdoing caused

even part of the shortfall giving rise to the impecuniosity, let alone all of it as now required by the decision of the Supreme Court in *Quinn Insurance*.

70. The plaintiff's counsel clarified at the hearing that the special circumstance relied upon was instead the circumstance identified in the *Peppard* case, *i.e* the case of a defendant which is alleged to have stolen the plaintiff company's business, which as applied to the present case involved the defendant having appropriated the goodwill of the plaintiff company. The difficulty with this submission, in my opinion, is that the *Peppard* case highlighting the nature of the alleged wrongdoing has since been overtaken by the additional requirements in the *Connaughton Road* test, as fortified by *Quinn Insurance*. I am satisfied that the plaintiff does not meet these requirements, for the reasons set out in the previous paragraph.

71. As regards the issue of stifling, there was a substantial discussion about this issue in the Supreme Court decision in *Quinn Insurance*. Clarke C.J. held (at para. 7.33) that it was "incumbent on a plaintiff who puts forward a defence to an application for security for costs based on a special circumstance involving stifling to give the Court some reasonable detail as to whether the proceedings will actually be stifled". In the present case, Mr. Fitzpatrick does not appear to have made any averment on affidavit that the proceedings would be stifled; there is simply an assertion at para. 39 of the plaintiff's written submissions that this Court should exercise its discretion and allow the appeal "as otherwise the creditors may suffer significant adverse consequences as the case may be stifled". The trial judge held that there was no evidence that an order for security would stifle the action, and it seemed to him that if the creditors have confidence in the action they can fund it, and in particular can fund a security for costs order as required. I am satisfied that he was correct in so finding.

Conclusion

72. In my view the trial judge was correct in finding that the defendant had established the plaintiff company's inability to pay costs if it were to be unsuccessful in this action, and had established a *prima facie* defence, and in finding that the plaintiff had failed to establish special circumstances to justify a refusal to order security for costs. Accordingly, I would dismiss the appeal and affirm the decision of the learned trial judge.

73. With regard to costs, as the plaintiff has been entirely unsuccessful in this appeal, my provisional view is that the defendant is entitled to her costs of the appeal. The same result would follow if the Court were to apply the traditional approach whereby "costs follow the event", and I see no circumstances present that would justify making any alternative order as to costs. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within fourteen days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the above proposed terms, the requesting party may be liable for the additional costs of such a further hearing. In default of receipt of such application, an order in the above proposed terms will be made.

74. As this judgment is being delivered electronically, I note that each of Noonan J. and Ní Raifeartaigh J. have indicated their agreement with it and with the orders I propose.