

**THE HIGH COURT**

[2021] IEHC 706

[Record No. 2020/5003P]

**BETWEEN**

**AIRSCAPE LIMITED  
AND BY ORDER OF THE COURT DATED 17TH MAY 2021  
CLARKSVILLE LIMITED**

**PLAINTIFF**

**AND**

**INSTANT UPRIGHT LIMITED**

**DEFENDANT**

**JUDGMENT OF Mr. Justice Twomey delivered on the 12th day of November, 2021**

**SUMMARY**

1. This is a case in which the defendant seeks security for costs against the plaintiff and, at the same time, the plaintiff seeks security for costs against the defendant in respect of the defendant's counterclaim.
2. This Court concludes, *inter alia*, that
  - In estimating the amount of security for costs to be provided by a plaintiff in respect of the substantive proceedings between the parties, this estimate should not include unadjudicated costs subject to a Court Order arising from an interim *mareva* injunction in favour of the defendant. This is because the security for costs regime is not designed to deal with costs which have been ordered to be paid by a plaintiff to a defendant at a previous stage in the proceedings, but rather prospective costs to be incurred, so as to ensure that litigation is fairly conducted between a plaintiff and a defendant.
  - In determining whether a plaintiff is likely to be able to pay the defendant's legal costs in a security for costs application, the financial projections should take account of the financial consequences for a plaintiff of losing the litigation, and so include not only the amount the plaintiff will have to pay, out of its resources, to the defendant for its legal costs, but also the amount, if any, the plaintiff will have to pay its own legal team.

**BACKGROUND**

3. The Motion for Costs applications in these proceedings arise from a Statement of Claim made by the plaintiff, Airscape Limited and by Order of the Court dated 17th May 2021 by Barniville J., Clarksville Limited (the "Landlord"), against the defendant, Instant Upright Limited (the "Tenant"), regarding an alleged breach of a lease agreement. The Tenant filed a counterclaim against the Landlord.
4. Both parties are looking for security of costs from the other – the Landlord in respect of the counterclaim filed by the Tenant, and the Tenant in respect of the initial claim made by the Landlord.

5. The parties entered into a Lease ("the Lease") on 21st December, 2001 for a period of 25 years regarding the premises known as Unit S1 Friel Avenue, Park West Industrial Park, Dublin 12 ("the Premises").
6. On 4th March, 2018 a snowstorm caused damage to the roof of the Premises, causing part of it to be unfit for purpose. The Tenant handed over possession to the Landlord of part of the Premises on 26th October, 2018 to allow repair works to be carried out. The Tenant remained in occupation until 31st January, 2019 when it vacated the Premises.
7. During this time, the Tenant also took up alternative accommodation in an alternative premises in Citywest in June 2018.
8. Between June 2018 and April 2019, the Landlord carried out repair works to the Premises. These works were completed around the 26th April, 2019 and were certified by the supervising architect on 1st May, 2019.
9. At that stage, the Tenant did not accept that the Premises had been adequately or appropriately reinstated. On this basis, the Tenant sought to terminate the Lease by notice of 25th March, 2020. The Landlord denied that the Tenant had the right to terminate the Lease.
10. The Landlord claims, *inter alia*, unpaid rent to the date of purported termination of the Lease, and the differential in rent between what the Tenant would have paid to the expiry of the term of the Lease and the rent being paid by a new tenant, which the Landlord acquired for the Premises.
11. In response, the Tenant filed a counterclaim, containing three claims:
  - A claim relating to the alleged failure of the Landlord to reinstate the Premises.
  - A claim for damages alleged to have arisen from the grant of an *ex parte* *mareva* injunction in July 2020, which was obtained by the Landlord against the Tenant.
  - A claim that the Tenant suffered loss and damage arising from alleged failures of the Landlord in the design and construction of the Premises in 2000 and 2001, which was before the Tenant signed the Lease.

**Landlord's motion for security for costs:**

12. The Landlord has brought an application for security for costs in defending one particular part of the counterclaim of the Tenant, i.e. that part in relation to what is referred to by the Landlord as the Pre-Lease Claim – a claim that the tenant is making regarding loss and damage arising from the Landlord's alleged failures in the design and construction of the Premises in 2000 and 2001. The Landlord is seeking for costs in the sum of €200,000.
13. As the Tenant is a registered company in a foreign jurisdiction, the Turks and Caicos (but with a branch in Ireland), the Landlord's application is brought under Order 29 of the Rules of the Superior Courts, rather than under s. 52 Companies Act 2014, although the parties

agreed that the principles applicable to s. 52 security for costs cases should be applied to this foreign registered company.

14. The Tenant opposes this application for security for costs.

**Tenant's motion for security for costs:**

15. The Tenant has issued a motion for security for costs as against the Landlord in respect of its claim against the Tenant for, *inter alia*, not re-taking possession of the Premises after the repairs and wrongfully terminating the Lease. The Landlord has agreed to lodge €350,000 as security for costs, however the Tenant submits that this sum will not be adequate in meeting the costs of the proceedings. It contends that the costs of the proceedings will be €1,011,403 and thus seeks security for costs to this amount.

16. The Landlord claims that €350,000 is an adequate sum as security for costs.

**SECURITY FOR LANDLORD IN DEFENDING THE TENANT'S COUNTERCLAIM?**

17. The first issue to be dealt with is the application by the Landlord for security for the legal costs it will incur in defending one part of the Tenant's counterclaim, namely that there were alleged defects in the Premises when the Tenant signed the Lease some 17 years prior to the damage to the Premises arising from the storm in 2018, and the Tenant vacating the Premises in 2018 and 2019.

18. The Tenant's counterclaim alleges that there was, what the Landlord terms, a latent defect in the building when the Lease was executed. The Landlord claims that it has a full defence to this latent defect claim, namely that the Tenant's nominated experts agreed to the practical completion of the Premises and agreed the Tenant's works to be done, and on that basis, the Tenant undertook a full repairing lease of the Premises. The Landlord claims that the counterclaim will take between four and six days and will involve a number of expert witnesses in relation to what occurred in 2001 and accordingly it seeks security for its legal costs in this regard.

19. It is common case that the applicable law in relation to security for costs is set out in *Usk and District Residents Association Ltd v. The Environmental Protection Agencies* [2006] IESC 1, namely that security for costs will be granted if:

- the applicant for security for costs (in this instance, the Landlord) establishes that he has a *prima facie* defence to the claim (in this instance, the counterclaim), and
- the applicant establishes that the claimant (in this instance, the Tenant) will not be able to pay the Landlord's costs if the Landlord is successful, and
- the claimant fails to establish that there are special circumstances which ought to cause the Court to exercise its discretion not to grant security for costs.

20. It is conceded by the Tenant that the Landlord has a *prima facie* defence to the Tenant's counterclaim. Thus, the first question to be considered is whether the Tenant will not be able to pay the Landlord's costs if the Landlord is successful.

**Will Tenant be able to pay Landlord's costs if Tenant loses the counterclaim?**

21. In considering the financial position of the Tenant, to answer this question, the only accounts of the Tenant which were made available to this Court were the accounts for the period ending 31st December, 2018, which showed at that stage that the Tenant had net assets of €4.8 million.
22. However, this security for costs application is unusual in the sense that normally the company resisting having to put up security for costs seeks to claim that it will easily be able to pay the other side's costs in the event that the company loses the litigation, and so there is no need for it to provide security.
23. However, in this case, the company resisting the security for costs, the Tenant, is at the very same time seeking security for costs against the Landlord in the sum of €1,011,403. Significantly, in support of its own motion seeking security for costs from the Landlord, the Tenant has provided sworn evidence to indicate its precarious financial position, in order to justify the Tenant seeking security from the Landlord. This is because on 15th June, 2021 Mr. Declan Murphy, the Tenant's Financial Controller ("Mr. Murphy") swore as follows:

"I say and believe **that [the Tenant] will not be in a position to lodge security in the amount of €350,000, or indeed €200,000** and that if this is ordered that this will preclude [the Tenant] from defending the claim or pursuing its counterclaim [...]"

The [Tenant] therefore request that the [Landlord] lodge security for costs in the amount of €350,000 or such amount as may be fixed by this Honourable Court (and/or the Master of the High Court) in respect of the said security." (Emphasis added)
24. This is therefore up to date sworn evidence on behalf of the Tenant, by its Financial Controller, and therefore of considerable evidential value, that it *would not be able to pay* the Landlord's legal costs if it was required to do so today. Since the 2018 Accounts are several years out of date, it is this up to date evidence which is of much greater significance to this Court's determination of whether the Tenant will be able to pay the Landlord's legal costs if the Tenant loses.
25. However, despite this averment in his affidavit of 15th June, 2021 (to support the Tenant's motion for security for costs against the Landlord), in his affidavit dated 30th July, 2021 (to defeat the Landlord's motion seeking security for costs against the Tenant), Mr. Murphy effectively takes the contrary position to that taken in its own motion by downplaying its precarious financial position.
26. In that affidavit, Mr. Murphy states that its current poor financial position is in fact due to several factors over the previous few years, including the disruption caused in 2018 by the storm which damaged the roof of the Premises, a ransomware attack, an industrial dispute, the decision by the company to move its production capacity to Latvia, litigation

with a third party over breach of contract, its termination of a lease with a third party, issues caused by the COVID-19 pandemic and finishing, most recently, with the blockage in the Suez canal in March 2021.

27. Thus, despite averring on the 15th June, 2021 that it does not have enough money to pay the Landlord if the Landlord won the litigation (to support the Tenant's application for security for costs *from the Landlord*), a few weeks later on 30th July, 2021, Mr. Murphy avers that the Landlord should have no concerns about its ability to pay its costs (to support the rejection of the Landlord's application for security for costs *from the Tenant*).
28. In addition to this apparent contradiction, the Tenant also claims that it has been advised by its lawyers that this litigation might not reach a stage where legal costs are required to be paid until 2023/2024 and that while it is not currently in a position to pay legal costs, it projects that it will be able to do so by 2023/2024.
29. It relies in this regard on the judgement of Clarke J., as he then was, in *IBB Internet Services Limited and Others v. Motorola Ltd* [2013] IESC 53, in which he states, *inter alia*, that the test, for determining whether a company will be unable to pay the costs of the winning litigant, is not on the balance of probabilities but whether there is '*reason to believe*' that the company will be unable to pay the costs. It is common case that this is the appropriate test for determining whether the Tenant will be unable to pay the Landlord's costs. However, the Tenant relies in particular on paragraph 5.12 of Clarke J.'s judgment which states:

"All of that goes to show that the balance of probabilities test is not, strictly speaking, in any event particularly apposite for the assessment of future uncertain or hypothetical events. *The precise position that any company will find itself in at a time when it might, hypothetically, be called on to pay the costs of unsuccessful proceedings* is necessarily uncertain. This is so for many reasons. First, it would be necessary, in any event, to make some assessment as to whether, over the likely period which might be expected to elapse before the proceedings come to a conclusion, there may be a material change in the company's financial position. A company which is losing significant money in circumstances where there is no particular reason to believe that that situation may change in the short term may well require to be assessed on the basis that its financial position would, in any event, be worse by the time the proceedings concluded."

(Emphasis added)
30. Similarly, it is to be noted that in *Ochre Ridge v. Cork Bonded* [2000] IEHC 96, at para. 29 of his judgment O'Neill J, held that

"[.]the appropriate time in respect of which the Court must determine inability to pay, is the point in time where the Defendant seeking security has been successful in his defence."
31. On this basis the Tenant argues that it is its financial position, when the litigation finally comes to an end, that is determinative of whether the Tenant will be able to pay the

Landlord’s legal costs (if the Landlord were to win). This Court agrees that this is the correct time for assessing inability to pay.

32. However, in making this assessment, the starting point is that today it is crystal clear that the Tenant will not be able to pay the Landlord’s legal costs (if it were to win), since this is what its Financial Controller has averred.
33. For this Court to conclude, after looking into the unknown future (and the recent years of COVID-19 illustrate just how unpredictable the future is) that this position will have changed, requires cogent evidence.
34. For example, if the Tenant had a court order in its favour for €1 million (excluding any legal costs payable to its lawyers) from a State entity, which had not yet been received, this is clearly cogent evidence which a Court could take account of in determining whether there is reason to believe that its current financial position, of being unable to pay the Landlord’s costs, will change to a position of being able to pay those costs.
35. However, the only evidence which this Court has to rely upon is five lines on a single page which is headed “Forecast” that was appended to Mr. Murphy’s affidavit.

**Instant Upright Ltd Forecast 2022 - 25**

	Forecast 2021	Budget 2022	Budget 2023	Budget 2024	Budget 2025
ATS Revenue	10,178.0	13,231.4	14,554.5	16,010.0	17,611.0
Specials Revenue	2000.0	2,600.0	2860.0	3,146.0	3,146.6
Total Revenue	12,178.0	15,831.4	17,414.5	19,156.0	21,071.6
Net Profit	181.2	459.1	598.0	752.2	923.5
% of Total Revenue	-1%	3%	3%	4%	4%

36. This document amounts to financial projections prepared, not by an independent accountant, but by the Tenant itself which were presented to the Tenant’s bankers as:

“the best estimate by the Company’s management and finance as to how we expect the business to fare in the next four years.”

37. This is all that it is, an internal estimate provided to its bankers. Furthermore, it is unclear what basis Mr. Murphy has for forecasting a 3% growth in one year and 4% in another

year, save that there is a general reference to growth expected to be higher post-COVID and that costs benefits are expected from the manufacturing move to Latvia.

38. On this basis, it is estimated that the Tenant will have a profit of €923,000 by 2025.
39. This Court does not believe that this one-page internal document with limited, if any, supporting evidence could be said to be sufficient to give this Court '*reason to believe*' that there will be a change in the future from the current position. In contrast, it is important to note that there clearly is reason to believe that the Tenant is *currently* unable to pay the Landlord's legal costs (in light of the sworn evidence of Mr. Murphy).

**No account is taken of the financial effect of losing litigation in assessing ability to pay**

40. Furthermore, it is curious, to say the least, that these financial projections are based on the premise that the Tenant will win the litigation (and presumably not have to pay costs), when the whole purpose of these financial projections is to deal with the company's financial position, after it has lost the litigation (and in particular to show that it has an ability to pay the Landlord's costs if it loses). No account appears to have been taken of the fact that if it loses the litigation, not only will it have to pay the Landlord's costs, but it will also, presumably, have to pay its own costs (including expert witnesses) for a trial that its own legal costs accountant estimates will take eighteen days. This is because Mr. Murphy avers that these

"projections are based on the premise that the [Tenant] will *successfully defend* the within proceedings, and without inputting any figure as damages recovered in the Counterclaim". (Emphasis added)

41. In assessing the ability of a party to pay the other party's legal costs for the purposes of a security for costs order, it seems to this Court, that for this assessment to be realistic, it must take account of all the liabilities of that party in the event of it losing the litigation, and so include the costs to be payable to its own lawyers, if any, and the winning party's lawyers.
42. In all these circumstances, this Court cannot see how it can move from the current conclusion that the Tenant is currently unable to pay the legal costs of the Landlord, to conclude that it has reason to believe that it will be able to do so in a number of years.

**Special circumstances to justify Tenant not providing security for costs?**

43. The next issue is whether the Tenant can establish that there are special circumstances which justify this Court in exercising its discretion not to make an order for security for costs.
44. The key circumstance relied upon by the Tenant is that it claims that the Landlord wrongfully obtained an *ex parte* interim *mareva* injunction against it, which the Landlord then withdrew on the second day of the hearing of its application for the interim *mareva* injunction. As part of the agreement between the parties at the time of the withdrawal of

that injunction application, the Landlord agreed to discharge the legal costs of the Tenant and a Court Order was issued to that effect.

45. The Tenant argues that this Court should mark its displeasure at what the Tenant says was an *'ill-founded tactical manoeuvre'* by the Landlord in respect of the *mareva* injunction application, by refusing the Landlord's application for security for costs from the Tenant in relation to its counterclaim.
46. This Court does not regard this as amounting to special circumstances justifying the refusal of the security for costs order. This is because the primary way in which a litigant obtains 'vindication' if she is wrongly sued is in receiving her legal costs for the unsuccessful proceedings. In this case, the Tenant has achieved that 'vindication' by obtaining a costs order in its favour in respect of the *mareva* injunction application. Such a litigant does not receive further vindication by means of the court denying that unsuccessful litigant a remedy, in relation to a different matter in proceedings involving that unsuccessful litigant, against the same opponent.
47. In any case, while the Tenant wants this Court to record its displeasure against the Landlord, it is important to note that while the Tenant *believes* that the *mareva* injunction was wrongfully pursued, that is all that this Court has, i.e. a *belief* that one party was wrongfully sued, *albeit* with an order on consent that costs be awarded against the Landlord. Crucially however, there has not been any admission by the Landlord to that effect or indeed a court finding to that effect.
48. Accordingly, this Court does not believe that it would be appropriate to seek to punish the Landlord or, to use the Tenant's expression *'mark its displeasure'*, by depriving the Landlord of security for its legal costs, should it defeat the Tenant's counterclaim.

**Landlord's error in its Statement of Claim?**

49. The Tenant also suggests that because the Landlord had to amend its Statement of Claim, as it was not in fact the owner of the Premises, as originally claimed, since another company in the Harcourt Group owned the Premises, that this is a special circumstance justifying the refusal of security for costs to the Landlord.
50. This Court cannot see any proportionality in this suggestion that the Landlord be deprived of hundreds of thousands of Euro in legal costs (if it were to win the litigation) simply because of an error about the true ownership of the asset in dispute (which error, while regrettable, is not unheard of, in complex litigation involving corporate structures). Accordingly, this Court cannot see how this oversight in the first version of the Statement of Claim can amount to a special circumstance justifying the refusal of security for costs. The Tenant has recourse in relation to any negative effect this error has on it, since to the extent that the manner in which the Landlord has handled the litigation has caused unjustified and additional costs to the Tenant, this can be reflected in any costs order made at the end of the litigation.

**Tenant's counterclaim cannot be separated from defence of the Landlord's claim?**



51. Finally, as previously noted, the counterclaim by the Tenant breaks down into three parts. The first part is based on the alleged failure by the Landlord to reinstate the Premises after the storm damage. The second part of the counterclaim is a claim for damages by the Tenant arising from alleged losses suffered by reason of the allegedly unjustified *mareva* injunction application. The third part of the counterclaim relates to a claim for losses arising from alleged defects in the design and/or construction of the Premises in 2000/2001 and a continuing breach of more than 17 years by the Landlord of alleged covenants to the Tenant.
52. It is accepted by the Landlord that the first part of the counterclaim, that the Landlord failed to reinstate the property after the storm is in fact a mirror of the Landlord's claim that the Tenant failed to reoccupy the Premises after its repair. On this basis, it is accepted by the Landlord that this part of the Tenant's counterclaim and the Landlord's claim deal with the same factual basis and the same witness testimony and documentary evidence.
53. It is clear therefore that it would not be appropriate for a plaintiff in the position of the Landlord to seek security for costs against a defendant, in the position of the Tenant, when the defendant's counterclaim is in effect a defence based on the exact same factual evidence and witnesses as the plaintiff's claim.
54. Similarly, it is accepted by the Landlord that it would not be appropriate for it to seek security for costs in relation to the second part of the counterclaim, i.e. that the *ex parte mareva* injunction was unjustified or wrongly secured. This is because this is very much a discrete legal argument as to whether, based on the evidence the Landlord had in its possession and that it produced to court at the *ex parte* stage, it was reasonable for it to apply for a *mareva* injunction. In circumstances where the Landlord agreed to withdraw that *mareva* injunction application and to pay the Tenant's legal costs, it clearly would not be appropriate for this Court to put up any obstacle to the Tenant making this counterclaim (whether in the form of a requirement of security for costs or otherwise).
55. However as regards the third part of the counterclaim to the Landlord's claim that the Tenant wrongfully refused to reoccupy the Premises, this is very different from the first two parts of the counterclaim. This is because it is a claim that some 17 years prior to the storm, in or around the execution of the Lease, the Landlord leased the Premises to the Tenant, even though it had latent defects.
56. However, unlike the first part of the counterclaim, this is likely to involve evidence from expert architects and engineers on behalf of the Tenant claiming that the original design or construction of the building was defective 17 years ago. It may also involve evidence as to why the Tenant's architect and/or engineer did not identify such defects and perhaps how the Tenant maintained and occupied the building over 17 year period in a manner which did not identify the defects or contribute to them.
57. For this reason, this part of the counterclaim (which the Tenant calls '*the roof collapse damages claim in the counterclaim*') could be said to be a stand-alone claim by the

Tenant against the Landlord, separate from the claim that the Tenant should have re-occupied the Premises after the remedial works, and separate from the claim that the *mareva* injunction was wrongfully obtained. Indeed, Mr. Murphy accepts as much, since he avers (at para. 21 of his affidavit dated 30th July, 2021) that:

“The [Tenant] denies that any legal argument concerning the inter-relationship of repair and insurance obligations in the Lease provides a defence to the roof collapse damages claim in the Counterclaim, *this is something which could be litigated as a standalone issue* with more limited cost and far lesser expense than the figures posited by the [Landlord]. I am advised by the solicitor for the [Tenant] that the cost of that hearing would be far less than the extant costs undischarged costs orders against the [Landlord].” (Emphasis added)

58. In addition, it is to be noted that the Tenant’s claim that the Premises had defects some 17 years prior to the storm in 2018 is likely to involve expert evidence from engineers and architects, while in contrast the Landlord’s claim that the Tenant should have re-occupied the Premises after the remedial works is likely to involve a legal analysis of the respective rights and obligations of the Landlord and Tenant under the Lease.
59. This Court agrees with Mr. Murphy that this part of the counterclaim could be heard separately and this Court does not believe that the alleged connection between this part of the counterclaim and the Landlord’s claim is such as to amount to a circumstance which would justify this Court refusing to grant the security for costs against the Tenant.
60. That deals with the first motion and this Court will order security for costs against the Tenant in respect of this part of the counterclaim. As regards the amount of that security, this issue will be considered after first dealing with the Tenant’s motion for security for costs against the Landlord.

#### **TENANT’S MOTION FOR SECURITY FOR COSTS AGAINST LANDLORD**

61. There is no dispute between the Landlord and the Tenant that the Landlord should provide security for costs to the Tenant in respect of the Landlord’s claim that the Tenant wrongfully failed to reoccupy the property after the remedial works. The only outstanding issue between the parties is the amount of that security.
62. The background to this issue is that the Landlord initially offered €200,000 as the amount of the security, but this was rejected by the Tenant. Then the Landlord offered €250,000, but this was also rejected by the Tenant, who sought €350,000 as security for costs. It is also relevant to note that in its grounding affidavit for this motion dated 15th June, 2021, the Tenant sought €350,000 in security for costs from the Landlord.
63. By letter dated 21st May, 2021 the Landlord agreed to provide €350,000 as security for costs, subject to the Tenant providing a similar sum. However, by letter dated 9th June, 2021, the Landlord had reduced the amount of security for costs it was seeking from the Tenant to €200,000.

64. This was the position until September 2021 when it became clear that, despite the Tenant initially seeking, and obtaining, €350,000 as security for costs, it now wanted €1,011,403 as security for costs.
65. In support of its application for €1,011,403 in security for costs the Tenant wishes to introduce into evidence an estimate of its legal costs from *McCann Sadlier*. However this is being provided outside the time-limit set by Barniville J. on the 17th May, 2021 for this evidence. The Landlord objected to the admission into evidence of the affidavit and expert report from *McCann Sadlier* for this reason.
66. While this Court takes seriously the breach of the Commercial Court's directions in this regard, it has decided to permit the admission of this evidence in the overall interests of justice and the fair determination of this application regarding the correct amount of security for costs.
67. It was not necessary for this Court to grant the Landlord time to reply to the Tenant's expert report from *McCann Sadlier*, as the Landlord had taken the precaution of having its own replying expert report from *Behan and Associates*, which was duly filed during the course of the hearing.

**The amount of security for costs?**

68. The issue of whether the €350,000 is an appropriate sum as security for costs is therefore to be determined by a consideration of the report of *McCann Sadlier* dated 29th September, 2021 and the replying letter of *Behan and Associates* dated 12th October, 2021.
69. First however it is important to note that the figure of €350,000, which has been agreed to be provided by the Landlord, arose because it was *requested* by the Tenant after it had rejected the Landlord's figure of €200,000 and then €250,000.
70. It is also important to note that the Tenant provided this Court with sworn evidence that this figure of €350,000 was the appropriate sum as security for costs. This is not an insignificant point, since there has been no change to the proceedings or the underlying dispute, since this evidence was provided. It appears that all that has changed is that the Tenant (who at all times was advised by a firm of solicitors), having obtained the commitment from the Landlord to provide this figure as security for costs, has had misgivings about the amount and has sought a report from a legal costs accountant to support a larger sum.
71. In these circumstances, it seems to this Court that the starting position should be that €350,000 is the appropriate security for costs, unless there are compelling reasons to depart from this figure. To do otherwise, would, in this Court's view, send out the message that there is no incentive for a plaintiff to agree a figure for security for costs, thereby saving on court time and the plaintiff's own legal costs in having a hearing on the appropriate sum, if that agreement can simply be unwound because the defendant has changed its mind.

72. Against this background this Court will now consider the reports of *McCann Sadlier* and *Behans and Associates*. *McCann Sadlier* seek a sum of €1,011,403 (excluding VAT) as security for costs for the Landlord's claim.

**Should legal costs, subject to a previous court order, be included in security for costs?**

73. First however, it is relevant to note that this estimate contains a figure of €218,862.74 in connection with the Court Order dated 24th July, 2020 granted to the Tenant against the Landlord in respect of the Tenant's legal costs for the withdrawn *mareva* injunction proceedings.

74. However, it is important to note that this Order was made over 15 months ago, yet for some reason, the Tenant has not pursued its entitlement to those costs during that time. It was open to the Tenant to seek an adjudication of the precise amount of costs to be paid by the Landlord in this regard. However, it has chosen not to do so. That entitlement to the legal costs in respect of the *mareva* injunction application is the entitlement of the Tenant to those costs, at the finally adjudicated sum, whether that is €218,862.74 or as suggested by *Behan and Associates* a fraction of this sum. This is because *Behan and Associates* say that suggested sum is far in excess of what is allowed on adjudication, and it gives the example of the solicitor's instruction fee of €90,000 for a *mareva* injunction application.

75. It also important to note that if the Tenant had promptly sought to have those costs adjudicated after the Court Order of July 2020, the Tenant might well have the final adjudicated costs in its bank account at this stage.

76. It is this Court's view that it is not appropriate for the Tenant to seek security for costs, as part of the substantive action, (for costs which *Behan and Associates* say are much greater than it will be entitled to an adjudication), but more significantly for money that it might already have in its possession, if it had acted promptly, and so for which there would be no need for security.

77. This is because the purpose of the security for costs regime is to ensure that litigation is fairly conducted and in particular that if a defendant wins the litigation that a plaintiff cannot use its shield of limited liability so as to avoid there being funds available to it to pay the defendant's legal costs. If security is ordered and not paid, the corporate plaintiff is not permitted to proceed with the litigation, since the proceedings are usually stayed pending the payment of the security. That is the purpose of the security for costs regime. Its purpose is not to provide security for legal costs orders which have already been obtained for discrete parts of the litigation that have been determined. For this reason, no account should be taken of the sum of €218,862.74 in assessing how much security for costs should be paid by Landlord.

78. Accordingly, this figure of €218,862.74 should be deducted from *McCann Sadlier's* proposed security of costs figure of €1,011,401, which would lead to a figure of approximately €790,000.

### **Deduction to take account of the costs of counterclaim?**

79. Secondly, it is relevant to note that the purpose of security for costs is to seek security from a plaintiff for the costs that the defendant will be put to in defending the plaintiff's claim. It is not intended to provide security for the costs which would be incurred by the defendant in pursuing any counterclaim against the plaintiff.
80. In this regard, *Behan and Associates* estimate that 40% of the €790,000 (the adjusted estimate of the costs of in defending the claim *and* pursuing the counterclaim) would relate to the Tenant's counterclaim regarding the latent defect in the Premises. If one was to apply such a discount, it would reduce the security for costs estimate to €475,000 in its opinion. The Tenant made submissions to the effect that its legal costs accountant suggested a 20% deduction in relation to the counterclaim might be applied to the *McCann Sadlier* estimate. In making those submissions, the Tenant accepted that it was hard to be scientific in this regard.

### **Double counting in the estimate?**

81. Thirdly, *Behan and Associates* made uncontroverted submissions that there is an element of double provision in the estimate provided by *McCann Sadlier*. They pointed out that in one part of *McCann Sadlier's* report it is stated that senior counsel's fees for this task would be €500, whereas in another part of the report there is again a fee for this task, and it is stated to be four times this amount, namely €2000.

### **Estimated costs are excessive?**

82. *Behan and Associates* also point out that these costs seem excessive. For example, there is an estimate of €15,000 for a mediator's fees, which would suggest that a mediator would charge €30,000, since it points out that mediators' fees are usually halved between the parties. It certainly seems to this Court that such a fee is well in excess of what one would normally see in relation to a typical mediation which is usually one day's work (with some reading work on the part of the mediator prior to the mediation).

### **CONCLUSION**

83. This Court will now deal with the sum to be fixed as security for costs to be provided by the Landlord to the Tenant in relation to the substantive proceedings and to be provided by the Tenant to the Landlord in respect of the Tenant's counterclaim.

### **Conclusion regarding security for costs to be provided by the Landlord to the Tenant**

84. For the foregoing reasons, this court prefers the approach adopted by *Behan and Associates* to that of *McCann Sadlier* and it notes that by *Behan and Associates* concludes that the figure of €350,000 is '*within the range of what is reasonable*' as security for costs in this case.
85. In these circumstances, and particularly when one bears in mind that the figure of €350,000 was initially suggested by the Tenant as the appropriate level for security for costs, it seems to this Court that in all circumstances the appropriate figure for security of costs to be provided by the Landlord to the Tenant is €350,000.

### **Conclusion regarding security for costs to be provided by the Tenant to the Landlord**

86. At this stage it is appropriate to also consider the amount of security which should be provided by the Tenant to the Landlord in respect of the Landlord's defence of the counterclaim. There is uncontroverted expert evidence before this court that the cost to the Landlord of defending the counterclaim will be €200,000 (per *Behan and Associates'* letter of 21st July, 2021 to *Kane Tuohy*, solicitors).
87. In these circumstances and in light of this Court's decision that the Landlord must provide security for costs in the amount of €350,000 to the Tenant, this Court concludes that it would be reasonable to fix the security to be provided by the Tenant to the Landlord, in the amount of €200,000.

**Right of parties in first instance hearing to have litigation fairly conducted**

88. This is particularly so, when one bears in mind the comments of Finlay Geoghegan J. in *Flannery v. Walters* [2015] IECA 147 at para. 56 that:

"In an application for security for costs where the judge or court has discretion as to the amount of the security to be determined, the balance sought to be achieved should primarily be the balance between the right of a defendant to recover costs if he successfully defends a claim and the right of a plaintiff to have access to the courts or as suggested by Clark J in *Farrell* in relation to an appeal, the right to have litigation fairly conducted".

89. While in this case one is not dealing with an appeal, it appears to this Court that the right to have litigation fairly conducted is not restricted to appellate litigation but also applies to first-instance litigation, as in this case. Accordingly, in this case where one is dealing with two corporate entities, the right to have litigation fairly conducted applies in a very similar manner to both the plaintiff and the defendant. Thus, this Court concludes that the Landlord and the Tenant would have their right vindicated, to have this litigation fairly conducted, by the Landlord providing security for costs of €350,000 in respect of the main claim and the Tenant providing security for costs of €200,000 in respect of its counterclaim.
90. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).