

THE HIGH COURT

[2023] IEHC 685

Record No. 2020/ 3336 P

BETWEEN

STUDENT MARKETING NETWORK LIMITED

PLAINTIFF

-AND-

KBC BANK IRELAND PLC

DEFENDANT

JUDGMENT (ex tempore) of Mr. Justice Conleth Bradley delivered on Thursday, 16th November 2023

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1. INTRODUCTION

(a) Preliminary

1. A feature of the start of college and university life for students can often include the establishment of arrangements with financial institutions to facilitate the educational and social rite of passage which becomes part of the lived experience of third level learning.
2. This forms the context to this application where the plaintiff company, Student Marketing Network Ltd, (“SMNL”) was engaged in the provision of marketing services which invited members of the student population at various campuses in the State to open bank accounts with the defendant bank, KBC Ireland Bank PLC (“KBC”).
3. The dispute, in brief, centres on SMNL’s allegation that in or around April 2018, KBC wrongfully terminated a three year extension of its supply agreement with it and engaged a separate third party to provide student marketing services thereafter.
4. However, KBC is now applying to the court for orders (i) dismissing or striking out SMNL’s claims against it pursuant to O.19, r.28 of the Rules of the Superior Courts 1986 (as amended) (“RSC 1986”) on the basis that no reasonable cause of action is disclosed in the Statement of Claim and/or that the company’s action is frivolous or vexatious and/ or pursuant to the inherent jurisdiction of the court on the grounds that the proceedings have no reasonable prospect of success, are bound to fail and/or are an abuse of process of the court (hereafter also referred to as the “strike out/dismiss

application”) (ii) directing SMNL to furnish security for costs pursuant to section 52 of the Companies Act 2014 and/or O.29 of the RSC 1986 and/or the inherent jurisdiction of the court (and, if so directed, certain consequential orders) (hereafter also referred to as “the security for costs application”).¹

(b) Pleadings

5. SMNL issued a plenary summons dated 8th May 2020. An appearance was entered by KBC on 15th July 2020. SMNL delivered a Statement of Claim on 2nd October 2020.
6. KBC raised particulars on 2nd February 2021 and SMNL issued replies to the notice for particulars on 17th June 2021.
7. Mr. Myles Kirby of Kirby Healy Chartered Accountants was instructed by the solicitors for SMNL to prepare a report on the financial position of SMNL for the purposes of the security for costs motion and this report which is dated 30th March 2022 is exhibited to Mr. Kirby’s affidavit sworn on 31st March 2022.
8. Mr. Jim Luby of McStay Luby Chartered Accountants was requested by the solicitors for KBC to prepare an independent expert report which is dated 20th January 2023 and is exhibited to Mr. Luby’s affidavit sworn on 23rd January 2023.
9. In sequence I heard, first, from Nathan Reilly BL for KBC and then from Adrian O’Higgins BL for SMNL. As is set out later in this judgment, the positions adopted by both parties, and the submissions of counsel, assisted in narrowing the issues before the court.

¹ The parties agreed that the plaintiff’s motion for judgment in default of defence dated the 29th July 2021 could be adjourned pending the resolution of the motions before the court.

(c) A Central Question

10. SMNL pleads in its Statement of Claim that it had been providing agreed services for KBC since in or around 2014 and the background to the current issue was the seeking of a reduction in the agreed rates in or around May 2016.

11. Specifically, in relation to current application before the court, SMNL pleads in its Statement of Claim that pursuant to an oral agreement reached on 19th May 2016, it had agreed to reduce its rates on condition that it be provided with a fixed term contract of three years and that KBC would continue to engage the Plaintiff on an exclusive basis during the currency of the new agreement and that KBC agreed to this. It further pleads that it is pursuant to this agreement on 19th May 2016 that on or about 24th June 2016, KBC presented the Plaintiff with a document entitled “KBC Ireland Contract Order Form” also described as “the Supply Agreement” (and is also referred to herein as the “Contract Order Form”).

12. The central controversy between the parties is as follows.

13. On the one hand, SMNL pleads that its contractual arrangements with KBC were governed by the express and implied terms of the Contract Order Form dated the 24th June 2016 (which was to run for 36 months from the signature date of 24th June 2016) together with oral agreements in relation to *inter alia* the reduction of rates, an extension of the contract and exclusivity. Further, it alleges that in or around February 2018 KBC informed it that due to Central Bank Regulations it was necessary to conduct a tender process, that same was a mere formality and that if SMNL participated in the tender, it would be awarded the contract on the same basis as the Contract Order Form. While it

subsequently participated in the tender, SMNL alleges that from April 2018 KBC wrongfully ended the contract and retained a separate third party to provide student marketing services to it.

14. On the other hand, KBC maintains, in response, that its contractual relationship was in fact governed by the Contract Order Form *together with* the KBC Bank Ireland Plc Purchasing Order General Terms and Conditions (hereafter referred to as the “General T&C document”), which KBC maintains was appended to the Contract Order Form, and a reading of the documents together is entirely dispositive of SMNL’s claims which is why it is seeking to dismiss SMNL’s action, or in the alternative, an order for security for costs is sought.

15. This fundamental conflict as to what in fact constitutes the governing contractual arrangements between the parties forms an important part of my consideration of both motions before the court (the strikeout/ dismiss application and the security for costs application).

16. By way of example, while KBC have yet to file a defence, Paul Burns on behalf of KBC (in a supplemental affidavit sworn on 31st January 2023) states that the e-mail exchange exhibited in the affidavits to these applications demonstrates that on 29th June 2017 (rather than reaching a concluded agreement as is stated by SMNL), KBC required a review of SMNL’s accounts for a period of three years prior to being in a position to issue any new contract and no new contract in fact issued.

17. Mr. Burns states that SMNL provided two years' accounts rather than the three years which were requested and required and that there was, in any event, insufficient information furnished.

(d) Motion for Judgment in Default of Defence

18. SMNL's application for judgment in default of defence (which stands adjourned) was brought by way of notice of motion dated 29th July 2021 and grounded on an affidavit of Nap Keeling sworn on 27th July 2021. [*In this regard, after delivering judgment on 16th November 2023, I acceded to the request from Mr. Reilly BL (for KBC) to mention the matter in 3-4 weeks' time].

(e) Security for Costs & Strike Out/ Dismiss Application

19. The application on behalf of KBC to strike out/ dismiss SMNL's claims against it and to seek security for costs as against SMNL was brought by way of notice of motion dated the 23rd August 2021 grounded on an affidavit of Paul Burns (Head of Procurement with KBC) dated 20th August 2021. Therein, Mr. Burns sets out the procedural background which included the assertion that SMNL ignored the correspondence on behalf of KBC in relation to security for costs and instead served a motion for judgment in default of defence. Mr. Burns' affidavit then addressed the provisions of what KBC state are the core contractual documents which formed the agreement of 24th June 2016, namely the Contract Order Form and the General T&C document in asserting that SMNL's claim was frivolous and vexatious. Mr. Burns then addresses the basis for KBC's application for security for costs and, by way of example, refers to SMNL's accounts for the year ending 31st August 2019 (as filed in the Companies Registration Office) which he says demonstrates that the SMNL will not be

in a position to meet an order for costs if KBC is successful in defending the action. He exhibits the report compiled in 2021 from Behan & Associates Legal Costs Accountants which estimates at that time that the legal costs on a party and party basis of a four day action as €245,139.17.

20. This was replied to on behalf of SMNL by its Chief Executive Officer Mr. Colman Byrne by way of an affidavit sworn on the 29th March 2022. Mr. Byrne accepts, for the purpose of this motion only, that KBC have a *prima facie* defence to the proceedings, given what he describes as the low threshold applicable. Further, he says that he does not contest that SMNL cannot meet the fee estimates from either Behan & Associates or from Cyril O'Neill Legal Costs Accountants dated 25th March 2022 which estimates a cost €170,236.22 for a three day action (the latter report is exhibited by Mr. Byrne). However, Mr. Byrne asserts, in the context of the security for costs motion, that there are special circumstances which should influence the exercise of the court's discretion, namely that it is KBC's alleged wrongdoing which has led to this difficulty and he makes reference to the affidavit and report of Myles Kirby in that respect. He states that there are a number of conflicting versions of material factual events which can only be resolved by oral evidence and sets out his response to Mr. Burns' first affidavit and refutes Mr. Burns' characterisation of the relationship between the parties dating from 2014 to in or around February 2018.

21. As referred to earlier, Mr. Myles Kirby prepared a report dated 30th March 2022 which is exhibited to Mr. Kirby's affidavit sworn on 31st March 2022 and Mr. Jim Luby prepared a report dated 20th January 2023 which is exhibited to Mr. Luby's affidavit sworn on 23rd January 2023. These are referred to later in this judgment when

addressing the respective arguments of the parties in the context of the security for costs application.

22. Mr. Byrne's Affidavit sworn on 29th March 2022 was further replied to by Aidan Power (Director of Marketing and Corporate Affairs of KBC) by way of an affidavit sworn on 31st January 2023. Therein, Mr. Power sets out his understanding of his contacts with Mr. Byrne in or around February 2018 including in relation to previous unsuccessful negotiations. While he accepts that he had "some interactions" with Mr. Byrne in Café Di Napoli on 21st February 2018, he denies saying to Mr. Byrne that the requirement for a tender process was a mere formality and states that he "*outlined clearly that it was a competitive process and that the outcomes would have to be determined in accordance with that process, but the Plaintiff should put his best foot forward...*". Mr. Power adds that the competitive nature of the process was further reiterated to the Plaintiff throughout the stages of the process and refers to a further meeting with Mr. Byrne on 21st May 2018 where he was accompanied by two KBC colleagues and that a memorandum of this meeting is exhibited (at "PB9") to Mr. Burns' supplemental affidavit, sworn on 31st January 2023. Mr. Power concludes by making the point that the relationship between the parties was governed by the written agreement which was entered into by them on 24th June 2016.

23. Mr. Paul Burns swore an affidavit on 31st January 2023 supplemental to his first affidavit sworn on 23rd August 2021, and in further response to Mr. Colman Byrne's affidavit. In summary, Mr. Burns refers to the aforementioned concessions made by Mr. Byrne in the context of the security for costs motion and sets out his understanding of SMNL's conduct since the issuing of the motion. Mr. Burns responds, *seriatim* as it were, to Mr. Colman Byrne's reply to the strike out/dismiss application and points out

that Mr. Byrne does not deny that he signed the Contract Order Form on behalf of KBC on the 24th June 2016 and that “...[h]e does not deny that the Contract Order Form was returned to the Plaintiff in hard copy, with the General Condition attached to it. He does not deny that he received the e-mail sent to Mr. Byrne on 25 May 2016 (exhibited at PB3) of my First Affidavit, notwithstanding what was said on his behalf by his solicitor in the letter dated 17 November 2020.”

24. As referred to earlier in this judgment, Mr. Burns states that the e-mail exchange exhibited between the parties illustrates that on 29th June 2017 (rather than reaching a concluded agreement as is stated by SMNL), KBC, in fact, required a review of SMNL’s accounts for a period of three years prior to being in a position to issue any new contract and no new contract issued. Mr. Burns states that SMNL provided only two years’ accounts and not the three years which were requested and that insufficient information was furnished.

25. He states that the “2016 Agreement” continued to govern the relationship between the parties and that Mr. Byrne provided no evidence to contradict this. Mr. Burns refers to, and exhibits, an email dated 24th May 2018 from Colman Byrne to Aidan Power following KBC’s announcement of a tender process which he says is illustrative of Mr. Byrne’s contradictory position of when it is alleged the three-year agreement commenced (either 2016 or 2017). (This email is addressed later in this judgment).

26. Mr. Burns refers to the position in relation to the tender process stating his understanding that it will be addressed by Mr. Power.

2. STRIKE OUT/DISMISS APPLICATION

(a) O.19, r.28 RSC 1986

27. O.19, r.28 RSC 1986 provides as follows:

“The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.”

28. An application under O. 19, r.28 RSC 1986 is based on a contention that the case as pleaded does not disclose a cause of action. Insofar as the strike out/ dismiss application on behalf of KBC is based on O.19, r.28 RSC 1986, the court’s consideration is predicated solely on the pleadings² and on the assumption that any statements of fact in the Statement of Claim are true and can be proved by SMNL.

(b) *The Inherent Jurisdiction of the Court*

29. The court’s inherent jurisdiction to stay proceedings is not limited to the pleadings and therefore can include the affidavit evidence adduced. The inquiry under the court’s inherent jurisdiction is aimed at preventing an abuse of process. Therefore, if a plaintiff’s claim is bound to fail or if the proceedings are frivolous and vexatious, the court has the inherent jurisdiction to dismiss or stay the proceedings. However, the exercise of this jurisdiction is not a means for a court to resolve issues summarily.

² *Barry v. Buckley* [1981] I.R. 306 per Costello J. (as he then was) at page 308.

30. Accordingly, as both counsel for KBC and SMNL agree, the established jurisprudence emphasises that the court’s inherent jurisdiction in this regard is to be “*sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff’s case is very weak or where it is sought to have an early determination on some point of fact or law.*”³
31. In exercising its inherent jurisdiction, a court can assess whether a factual allegation amounts to no more than a mere assertion which is without evidence or a credible basis.
32. Similarly, a court can examine “documentary facts” where the relevant documents govern the legal relations between the parties or form the only possible evidential basis for the plaintiff’s claim.⁴
33. It is upon this basis (i.e., reliance on documents) that KBC principally rely referring in particular to the provisions of the Contract Order Form and the General T&C document in submitting that SMNL’s case is untenable and bound to fail.
34. The inherent jurisdiction of the court referred to in *Barry v Buckley*⁵ extends to cases where it can be shown that there is no arguable basis in law and in fact for the claim made. It has been observed that the applicable threshold to be applied, when a party is seeking to dismiss a claim against it pursuant to the inherent jurisdiction of the court, is similar to that which applies when a party is seeking an interlocutory injunction and synonymised as requiring that, for example, a plaintiff establish a “fair question” a

³ *Keohane v. Hynes* [2014] IESC 66 per Clarke J. (as he then was) at paragraph 6.6.

⁴ *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301; *Keohane v. Hynes* [2014] IESC 66 per Clarke J. (as he then was) at paragraphs 6.8 and 6.9.

⁵ [1981] I.R. 306 per Costello J. (as he then was) at page 308.

“serious issue to be tried” or a “*bona fide*” issue⁶. In one seminal authority it was suggested that the threshold which applies to an application to dismiss a claim was similar to that for the grant of a prohibitory injunction, namely requiring that the claim is not frivolous or vexatious i.e., that there is a serious issue to be tried.⁷

(c) Documentation

35. In *Keohane v. Hynes* [2014] IESC 66 at paragraph 6.9 and *Moylist Construction Limited v. Doheny* [2016] IESC 9, [2016] 2 I.R. 283 Clarke J. (as he then was) emphasised the *significant limitations* on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail.

36. Thus, subject to the caveat of an unusual (and necessarily unpredictable) case arising, the limited form of factual analysis in which a court can engage – in the exercise of its inherent jurisdiction in assessing whether a plaintiff’s claim is bound to fail – involves those cases where the legal rights and obligations are governed by *documentation*.

37. Therefore, in the context of “documentary cases”, a court may (i) inquire as to whether there is any evidence outside of the documentary record which could realistically

⁶ *Ryanair Designated Activity Company v. Skyscanner Ltd. & Ors* [2022] IECA 64 per Murray J. at paragraph 31. The court comprised Donnelly, Haughton and Murray JJ.

⁷ *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 per Lord Diplock at p. 407. In *McGrath v. O’Driscoll* [2005] IEHC 179, [2005] 4 I.R. 100, [2007] ILRM 203 at p. 210 Clarke J. also drew an analogy in the consideration of questions of law or construction (including, where appropriate, the construction of documents) in the context of an application to dismiss with the similar exercise carried by a court in assessing an *application for summary judgment*. In both cases a court can resolve such questions but should only do so where the issues which arise are *relatively straightforward* and where there is *no real risk of an injustice* being done by determining those questions within the limited context of a motion for summary judgment.

impact on such rights or obligations (ii) examine evidence where the plaintiff's factual allegations are based only on documentary evidence; (iii) examine an allegation to determine whether it is a *mere assertion* and, if so, to consider whether there is any credible basis for considering that evidence might be available at trial to substantiate it.⁸

38. A contract's provisions, for example, may be so clear from the documents that the inexorable consequence is that a plaintiff's claim may be bound to fail. This is the core of the case presented on behalf of KBC by Mr. Reilly BL.

39. That said, there may be cases which should proceed to trial where, notwithstanding the contractual text, facts are asserted and either supported by evidence or the possibility of evidence which may result in an alternative or different interpretation of a contract.⁹ This is part of the case presented on behalf of SMNL by Mr. O'Higgins BL.

40. Further, given the binary consequences of an application to dismiss/strike out, the default position is that an action should proceed to trial. Paraphrasing the observations

⁸ In *Moylist Construction Limited v. Doheny* [2016] IESC 9, [2016] 2 I.R. 283 Clarke J. (as he then was) carried a further analysis of a court's inherent jurisdiction to dismiss or stay an action because it is bound to fail including an analysis of the decisions in *Barry v. Buckley* [1981] I.R. 306, *McGrath v. O'Driscoll* [2005] IEHC 179, [2007] ILRM 203 (as approved by the Supreme Court in *Danske Bank v. Durkan New Homes* [2010] IESC 22), *Salthill Properties Ltd. v. Royal Bank of Scotland plc* [2009] IEHC 207, *Lopes v. Minister for Justice* [2014] IESC 21, [2014] 2 I.R. 301 and *Keohane v. Hynes* [2014] IESC 66. See also a summary of the applicable principles in *Allied Irish Banks Mortgage Bank v. Lannon* [2018] IECA 224 per Irvine J. (as she then was) at paragraph 37.

⁹ *Jodifern Ltd. v. Fitzgerald* [1999] IESC 88, [2000] 3 I.R. 321 per Barron J. (Hamilton CJ., Keane, Murray, Barron and Murphy JJ.)

of Clarke J. (as he then was) in a number of judgments,¹⁰ the high bar required in an application to dismiss/ strike out reflects the curial concern that acceding to such an application (and thereby depriving a full trial and access to the courts) is a departure from the norm and should only be invoked when it is clear that there is no real risk of injustice in such an application.

41. In a similar vein, a motion to dismiss should not be used as a substitute for obtaining a summary disposal of the case in circumstances where the issues, which will need to be addressed in deciding whether the proceedings are bound to fail, are themselves complex.¹¹ The cases which are not suitable for an application to dismiss under the inherent jurisdiction are those which involve factual disputes (except for those limited exceptions referred to above) or where the legal issues or questions of construction arising are complex and require an analysis which is more appropriately addressed at a full trial (which may include an opportunity to amend the pleadings) and in circumstances where the facts can be comprehensively examined.

(d) *The Case on Behalf of KBC*

42. Mr. Reilly BL, for KBC, maintains that the documentary and contractual evidence before the court in this case is so clear that it is obvious that SMNL's case is untenable, is bound to fail and has no reasonable chance of success and therefore the court should invoke its inherent jurisdiction to dismiss SMNL's proceedings and claims as against KBC.

¹⁰ See, for example, the judgments of Clarke J. (as he then was) in *McGrath v. O'Driscoll* [2007] ILRM 203 (approved by the Supreme Court in *Danske Bank v. Durkan New Homes* [2010] IESC 22), *Keohane v. Hynes* [2014] IESC 66 and *Moylist Construction Limited v. Doheny* [2016] 2 I.R. 283.

¹¹ *Jodifern Ltd. v. Fitzgerald* [1999] IESC 88, [2000] 3 I.R. 321 per Murray J. (Hamilton CJ., Keane, Murray, Barron and Murphy JJ.)

(i) The documents

43. The first of two documents relied on by KBC is the Contract Order Form which states that this Supply Agreement is dated 24th June 2016. It is also date stamped and confirmation of receipt is endorsed as follows “KBC Mail Centre - 27 JUN 2016 - RECEIVED” and is between KBC Bank Ireland plc (“KBCI”) and Student Marketing Network (the “Supplier”).
44. The Contract Order Form sets out in a tabularised format the agreement between the parties.
45. The term of the contract is 36 months from the signature date which is 24th June 2016. The scope of services is described as “*Student Marketing Campaign Services as agreed year on year between both parties based on that year’s campaign strategy and plan.*”
46. The date and deliverables are described as a “*Student Marketing Campaign Services as agreed year on year between both parties based on that year’s campaign strategy and plan.*”
47. The key commercial items and pricing are described *inter alia* as “*this is a consumption based contract with no commitment from KBC Ireland to spend.*”
48. The Contract Order Form is signed on behalf of KBCI by Linsey Smith and is signed on behalf of the Supplier by Colman Byrne and it is dated ‘24-06-16.’

49. The second document relied upon by KBC is the General T&C document.
50. A key issue in the case concerns the nature of the contract that was entered into on 24th June 2016. In its Statement of Claim SMNL plead that it is the Contract Order Form (the Supply Agreement) and the various oral representations and emails pleaded therein. KBC does not agree and maintains that the Contract Order Form and the General T&C document must be read together.
51. In addition, KBC emphasises the following paragraphs of the General T&C document as governing the contractual relationship between the parties.
52. Clause 1.2 provides: *“Unless otherwise expressly agreed in writing by KBCI, entering into this Contract Order shall not imply any commitment by KBCI to contract exclusively for the Goods and Services with the Supplier.”*
53. Clause 1.4 provides:
- “The Contract Order will constitute an offer to purchase the goods and/or services on the terms and conditions set out herein. Acceptance by the Supplier of any Contract Order, whether in writing or by conduct, shall constitute acceptance of these Terms and Conditions. For the avoidance of doubt each Contract Order will constitute a separate contract between the parties. These Terms and Conditions will apply unless (and only to the extent that) the contrary is mutually agreed in writing and signed by an authorised representative of KBCI, notwithstanding anything to the contrary stated by the Supplier or any other terms and conditions proposed by the Supplier (whether set out in any*

proposal, delivery note, invoice, or other document from the Supplier, or otherwise) which shall be void and be of no effect.”

54. Clause 10 deals with “Dispute resolution” which I will refer to later in this judgment.

55. Clause 13.4 deals with “Amendments” and provides that “[n]either party shall be entitled to rely on any change in any provision of these Terms and Conditions, or the Contract Order, unless the same has been affected in writing and executed by a duly authorised representative of each of the parties.”

56. KBC places emphasis on Clause 13.6 which deals with the “Entire Agreement” and provides that “[t]he Contract Order and these Terms and Conditions represents [sic] the entire agreement and understanding between the parties hereto in relation to the supply of the Goods and Services and supersedes all previous statements, representations, agreements, and understandings between KBCI and the Supplier relating to the Goods and Services.”

57. Mr. Reilly BL (for KBC), therefore, says that the reliance by SMNL on pre-contractual e-mails and representations, including oral representations, to infer a different arrangement, is fully addressed by the terms of Clause 13.6, the “Entire Agreement”, which is dispositive of the issue and refers, by analogy, to paragraphs 58 to 60 of the judgment of the Court of Appeal (Collins J.) in *Betty Martin Financial Services Ltd. v EBS DAC* [2019] IECA 327.

58. Separately, the Supplemental Affidavit of Paul Burns sworn on 31st January 2023 exhibits the following document at “PB8” which on its face appears to be an e-mail

from Colman Byrne [mailto:colman@oxygen.ie] with a date and time of 24th May 2018, 17:22 to Aidan Power with the subject “Student Campaign – Urgent.”

59. The following is *inter alia* stated on the second page of the email:

“... Apart from being aggrieved for being treated so badly, we are firmly of the opinion that we are in possession of a 3 year contract. A fixed term contract that has another year to run. We paid for that 3 years with reduced charges to KBC. The agreement is a consumption agreement and KBC are still consuming. I am coming under a huge amount of pressure to activate the dispute clause in the agreement. Section 10.1. I have however always dealt with you in the past and would like to have one more attempt at agreeing a compromise. Surely we can come up with something where we continue our relationship and we could be in pole position to rejoin the campaign as the lead agency next year. As Fiona made it quite clear the agreement was non-exclusive, surely we could divide the campaign thereby creating competition and drive even better results for the bank?

I believe there must be a way to resolve this to the advantage of KBC and am willing to meet you at any time to discuss.

I would appreciate your thoughts on this. Regards. Colman...”

60. Three points arise from this apparent email.

61. First, it is stated that “...*The agreement is a consumption agreement and KBC are still consuming.*” The reference to a consumption agreement appears to be a reference to item 6 in the Contract Order Form document dealing with “Key Commercial Items and Pricing” where following a table which sets out rates in relation to staff, management,

subsistence, accommodation and mileage, the Contract Order Form states: “*This is a consumption based contract with no commitment from KBC Ireland to spend...*”. Mr. Reilly BL for KBC places reliance on these provisions in particular in grounding a submission that the allegations pleaded in the Statement of Claim have no basis.

62. Second, there is a reference in this email document “*...to activate the dispute clause in the agreement. Section 10.1 ...*” As referred to earlier in this judgment, it is noted that the General T&C document at paragraph 10 is entitled “Dispute Resolution” and paragraphs 10.1 and 10.2 set out the nature of the Dispute Resolution process in that document.

63. Third, the email refers to a person making “*...it quite clear the agreement was non-exclusive...*”.

64. This email forms part of the exhibits in Mr. Burns’ supplemental affidavit dated 31st January 2023 which addresses Colman Byrne’s earlier replying affidavit on behalf of SMNL dated 29th March 2022. The general tenor of Mr. Burns’ affidavit is seeking to point to, what he asserts, are contradictions in Mr. Byrne’s position relative to the strike out/ dismiss application and the security for costs application. Mr. Reilly BL for KBC places reliance on the contents of the email (and Mr. Burns’ supplemental affidavit) in suggesting that the position on behalf of SMNL in response to both motions is untenable.

65. Having regard to the legal principles (set out above) which govern the strike out/ dismiss application, the ultimate determination of these matters, including proving the email and the contents thereof, and whether or not it confirms a contradictory position, is more appropriate for further pleading and oral examination at the trial of this action.

Further, there is no agreement between the parties in this case that the contractual relationship is governed solely by documentation and there is further disagreement in relation to the applicability of the General T&C document in the context of the alleged contractual relationship.

66. To recap, a central point of conflict of fact and of interpretation between the parties arises as follows. SMNL maintains that the contract agreement comprised only the Contract Order Form (together with various oral representations and emails pleaded in the Statement of Claim). KBC, on the other hand, maintains that the contract comprises the Contract Order Form and the General T&C document.

67. At paragraph 25 of his first Affidavit sworn on 23rd August 2021, Paul Burns, Head of Procurement with KBC, exhibits a copy of e-mail chainage which appears, on its face, to be between Adam Griffin (of KBC) and Colman Byrne (of SMNL).

68. However, as with the position regarding the apparent email dated 24th May 2018, it is not possible at this juncture, in this application, to make a finding as to whether the emails, and more particularly the attachments in the last email, were in fact received and this remains a matter of controversy as between the parties. Again, this is more appropriately addressed by further pleadings and by oral examination at the trial of the action.

69. The following description is subject, therefore, to the aforesaid *caveat*.

70. The first email in sequence is described as being from Adam Griffin and it states that it is to “colman@oxygen.ie”. The date and time are recorded as 25th April 2016 at 13.49. The subject is “KBC Ireland Contract Extension.” The email addresses *inter alia* the

extension offer and sets out a table with rates and an approximate 1.9% reduction in relation to staff, management, subsistence, accommodation and mileage and refers to five points under a heading “Assumptions”.

71. The second email is described as being from Colman Byrne [<mailto:mcolmanbyrne@icloud.com>] to Adam Griffin. The date and time are recorded as 24th May 2016 at 17.55. It is sent from an iPhone. The subject reads “Re: KBC Ireland Contract Extension.” The e-mail content confirms that Mr. Byrne is “...*happy to proceed with the arrangement as specified in return for a 3 year agreement. I look forward to receiving contracts...*”.

72. The third email in this chainage is purportedly from Adam Griffin adam.griffin@kbc.ie to ‘Colman Byrne’. The date and time are recorded as Wednesday 25th May 2016 at 09.35. The subject reads “RE: KBC Ireland Contract Extension.” This e-mail records that it has attachments which are described as “KBC Ireland Contract Order Form – Student Marketing Network docx; Contract Order Terms and Conditions 2016.docx.”

(ii) The response on behalf of SMNL

73. It is submitted on behalf of the SMNL that because the document was sent via an i-message account that it is possible that Mr. Byrne did not receive the General T&C document because of the manner in which was sought to be sent and that this is the type of issue which would benefit from oral examination at trial rather than being determined by the current motion before the court. In response it is submitted on behalf of KBC that these matters are not addressed on behalf of SMNL by way of affidavit in response to the motion.

74. Further, on behalf of SMNL, Mr. O'Higgins BL makes three points in relation to the General T&C document. First, there is no signature or initials or acknowledgement on the document; second, there is no response to the third e-mail above; third, there is no reference to the General T&C document in the Contract Order Form.
75. It is noted that in its replies to particulars dated 17th June 2021 – raised in connection with the plea in the Statement of Claim at paragraph 12 thereof that on “*On 19 May 2016, the Plaintiff agreed to reduce its rates on condition that it be provided with a fixed term contract of three years and that KBC would continue to engage the Plaintiff on an exclusive basis during the currency of the new agreement. KBC, its servants or agent, agreed to these terms*” – SMNL in response to a request to furnish a copy of the alleged agreement, states (at paragraph 3(a)) that a “*...copy of an email sent by Mr. Griffin on 25 April 2016 referring to the negotiations and proposed terms and a further e-mail sent on 19 May 2016 recording this agreement is attached hereto at Appendix A.*” It is in response to the request for particulars of the reduction in rates provided by the Plaintiff (at paragraph 3(e)) that reference is made in the replies to particulars dated 17th June 2021 to “*Mr. Griffin's e-mail of 25 April 2016.*” On this point, Appendix A in the replies to particulars contains *inter alia* two of the three e-mails referred to above, the 25th April 2016 and the 19th May 2016 (but does not include the 25th May 2016 e-mail).
76. From the perspective of SMNL, these matters appear to address, in the context of paragraph 12 of the Statement of Claim, the request to provide particulars of the alleged negotiations which took place between the parties allegedly giving rise to the conclusion of a fixed term contract of three years on an exclusive basis (3(a)). Emphasis is placed on the reply to that request which states that “*...3(a) This agreement was*

negotiated and concluded during various phone conversations between Colman Byrne, on behalf of the Plaintiff and Adam Griffin, on behalf of the Defendant, between April and May 2016 and a meeting attended by Mr. Byrne and Mr. Griffin on 15 April 2016 at the Defendants offices at City Quay, Dublin 2...”.

77. It may be observed that, on the important matter of this apparent email chainage, the plaintiff relies on two of the e-mails to make the point about oral agreements (as pleaded in its Statement of Claim) whereas the defendant relies on three of the e-mails in aid of its arguments that the plaintiff’s claim is bound to fail having regard to what it says are the clear and unambiguous contractual documents.

3. DECISION ON APPLICATION TO DISMISS/STRIKE OUT

78. A question which the court has to address, applying the well-established principles of law, is whether it can resolve, in this application to strike out/dismiss, the controversy between the parties in relation to whether SMNL received only the Contract Order Form dated 24th June 2016 (and date stamped with KBC Mail Centre as received on 27th June 2016).

79. Mr. Reilly BL, in written and oral submissions, emphasises that this is a clear example of “a documents case” and places reliance on the written terms of both the Contract Order Form and the General T&C document. It is submitted that a reading of the Contract Order Form *together with* the General T&C document raises what are straightforward issues of contractual interpretation.

80. However, there does exist a factual dispute between SMNL and KBC which has two inter-related aspects: first, whether or not the General T&C document *was received* and, second, whether the Contract Order Form together with oral representations or the Contract Order Form together with the General T&C document comprises the entire agreement.
81. In considering this matter and the principles which apply – including that a court will rarely dismiss proceedings as bound to fail where there is a dispute as to facts which is not capable of being resolved by reference to admitted documents¹² the following points are apposite.
82. First, there is no agreement between the parties in this case that the contractual relationship is governed solely by documentation.
83. Second, factual disputes exist between the parties as to the relevance or applicability of the General T&C document in the context of the contractual relationship.
84. Third, the parties do not agree that the contractual documentation, referred to by Mr. Reilly BL for KBC, represents the entire contractual agreement between KBC and SMNL. SMNL, for example, specifically alleges that the interpretation of the contract must be informed by oral representations and that controversies, for example in relation to email chainage, are more appropriately addressed by oral examination at the trial of the action.

¹² *Ruby Property Co. v. Kilty* [1999] IEHC 50.

85. Fourth, in those precise circumstances, it cannot be said that there is agreement that the documentation referred to is capable of interpretation on its own terms and without resort to extrinsic evidence.

86. Fifth, the factual dispute cannot be resolved on a summary strike out/ dismiss application without the risk of injustice to SMNL and must therefore await further pleadings and/ or oral evidence in a plenary hearing.

87. I, therefore, refuse the strike out/ dismiss application brought by KBC.

4. SECURITY FOR COSTS APPLICATION

(a) The Applicable Threshold

88. By way of a preliminary finding in relation to this application, having regard to the chronology set out in the first affidavit of Paul Burns dated the 23rd August 2021, the defendant has not delayed in bringing this application. In fact, the point is made that the plaintiff ignored the correspondence on behalf of the defendant raising the issue of security for costs and brought a motion for judgment in default of defence which the parties agree now stands adjourned.

89. The following application is made pursuant to section 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, requires security to be given for those costs and may stay all proceedings until the security is given.”

90. In considering a motion for security for costs a court is exercising a *discretionary jurisdiction* at the *outset* of the proceedings which is the case in this application.

91. The fact that such an application is made in the early stages of an action (before any concluded view can be taken on the merits of the proceedings) speaks also to the legal threshold to be applied on what is an interlocutory application.

92. The applicable principles are well-settled.

93. In the ordinary course, therefore, if it is established that there is reason to believe a company will be unable to pay costs if it is unsuccessful in the action, and if a defendant establishes a *bona fide* defence to the plaintiff’s claim, then security for costs ought to be required unless it can show that there are specific (or special) circumstances where the court should exercise its discretion not to make the order sought and the onus in that regard moves to the party resisting the order.

94. Typically, the specific or special circumstances – which are non-exhaustive –include those cases where it is alleged that a plaintiff’s inability to pay costs is as direct result of the defendant’s alleged wrong, where there has been a delay in seeking security for costs or where there is a public interest in the litigation continuing.

95. In this case, for the purposes of this motion or application only, Mr. O’Higgins BL (for SMNL) accepts that due to the low threshold required to establish that KBC has a *prima*

facie defence to the proceedings, SMNL does not contest that KBC does have a *prima facie* defence (a defence has not yet been delivered).

96. Additionally, Mr. O’Higgins BL does not contest that SMNL would be unable to meet either of the costs estimates put forward.

97. As agreed by both counsel, the adoption of this position (subject to the aforementioned conditions) on behalf of SMNL, allows the court to focus on the issue of whether SMNL can rely on the special circumstances’ exception in seeking to persuade the court against granting the order for security for costs sought by KBC.

98. The principles which the court applies at this precise juncture, given the aforesaid concessions in the terms set out on behalf SMNL, were adumbrated by Clarke J. (as he then was) in *Connaughton Road Construction Ltd. v Laing O’Rourke Ireland Ltd.* [2009] IEHC 7.¹³

99. Accordingly, in order for SMNL to establish that its inability to pay costs – in the event that its action fails and it is ordered to pay costs – was caused by the alleged wrongdoing of KBC, it is necessary for SMNL to meet the following four requirements on a *prima facie* basis:

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

¹³ (Unreported, High Court, Clarke J., 16th January, 2009). See, in particular, paragraph 3.4 of the judgment of Clarke J. (as he then was).

- (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiffs;
- (3) 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,
- (4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position.

100. It must be borne in mind that SMNL is required to establish the aforesaid specific or special circumstances, which are the cause of its inability to pay costs due to the alleged wrongdoing of KBC, on a *prima facie* basis only.

(b) *KBC's Interpretation of the Criteria in Connaughton Road Construction Ltd.*

101. Mr. Reilly BL (for KBC) while accepting that the court has a discretion to refuse security for costs where a plaintiff can establish on a *prima facie* basis that a defendant's alleged wrongdoing has caused the loss, submits that evidence put before the court on behalf of SMNL does not discharge that burden.

102. In relation to paragraphs (1) and (2) of the criteria in *Connaughton Road Construction Ltd*, it is submitted on behalf of KBC that the SMNL's response in this regard amounts to no more than mere bald assertions¹⁴ and that the SMNL have failed

¹⁴ Per Finlay CJ. in *Jack O'Toole Ltd. v. MacEoin Kelly Associates* [1986] I.R. 277 at p. 284. Reference is also made by Mr. Reilly BL to *Inter Finance Group Ltd. v. KPMG Peat Marwick* [1998] IEHC 217 (per Morris J. as he then was) and *Pebble Beach Owners Management Company Ltd. v. Neville* [2016] IEHC 446, per Baker J. at paragraph 33.

to tender *prima facie* evidence in support of the pleas in the Statement of Claim that there is allegedly actionable wrongdoing on the part of KBC and relies on its earlier submissions in the dismiss/ strike out application.

103. It is further said that the reasons posited by SMNL (referred to in the next section of this judgment) lack cogency and credibility and that the impecuniosity conceded on behalf of SMNL was not caused by any alleged wrongdoing on behalf of KBC.

104. In relation to paragraph (3) of the criteria in *Connaughton Road Construction Ltd.* it is submitted on behalf of KBC that even if SMNL has established on a *prima facie* basis that the consequence(s) referred to in paragraph (2) have given rise to a specific level of loss in the hands of SMNL which loss is recoverable as a matter of law, it is contended that there is no *prima facie* evidence before the court as to how any such consequence has given rise a specific level of loss and it is further asserted that what is before the court in no more than mere assertion. Reference is made to Mr. Luby's report dated 20th January 2023 which *inter alia* addresses Mr. Kirby's report. In this report Mr. Luby states that Mr. Kirby's reference to cash at bank at 31st August 2018 in the amount of €210,021 was not "free" cash and that the sum due to creditors at the same date amounted to €140,230 and that net assets, which takes account of obligations to creditors, is in his view, a more relevant measure of SMNL's financial position, which Mr. Luby states amounted to €83,024. In reference to Mr. Kirby's calculation of the additional contribution which could have been achieved in 2019 and 2020 of €230,000 (€115,000 for each year), Mr. Luby states that this does not give due regard to the level of overheads and that Mr. Kirby makes the assumption that all of the contribution goes to bottom line net profit and gives the example in 2018 that the net

profit figure was €35,545 and presents a table in this regard summarising the profit and loss accounts presented.

105. Insofar as Mr. Kirby's report is concerned, it is stated that the net profit earned by SMNL averaged €28,840 in 2017 and 2018 with benefit of KBC turnover and that accepting Mr. Kirby's analysis would, it is stated, imply that the SMNL could have generated a net profit before tax in 2020 of €160,000 which amounts to a 27% net profit margin, which KBC say is unrealistic and lacking in cogency and credibility.

106. Mr. Luby's report states that this would have resulted in cumulative net assets of €140,704 (net assets at 31st August 2018 of €83,024 plus two years' net profit at €28,840) as at 31st August 2020 (pointing out that no adjustment has been made for Corporation tax which would potentially reduce the cumulative reserves). Mr. Luby's report states that after provision for normal working capital requirements for two months trading costs of approximately €80,000 based upon 2018 costs, the residual level of net assets of €60,000 would be insufficient to pay the costs of SMNL and KBC, even based on SMNL's lower costs estimate.

107. It is further contended by counsel on behalf KBC that Mr. Kirby's report appears to be predicated on *assumptions* based on instructions from Mr. Byrne largely on hearsay and none of which, it is stated, has been properly explained or put before the court by way of affidavit.

108. It is submitted on behalf of KBC that on a reasonable reading of the net assets of SMNL, with or without the business from KBC, SMNL had insufficient assets to

meet the costs of KBC, in the event that KBC succeeded in the action and were granted their costs against SMNL.¹⁵

109. Further doubt is expressed in relation to SMNL's stated inability to reduce its labour costs and Mr. Burns' supplemental affidavit points out that having regard to the nature of the services required for student marketing campaigns, focused as they are in the September – November period when students go back to college, staff are typically recruited on a short-term temporary basis and despite this, Mr. Byrne, on behalf of SMNL, has failed to explain why SMNL were unable to reduce its costs (particularly labour) notwithstanding that it has no turnover from KBC for the 2018 campaign.

110. Taking the reports of the financial experts in sequence, the point is made that there was no response to the report of Mr. Luby (McStay Luby Chartered Accountants) dated 20th January 2023.

(c) SMNL's Interpretation of the Criteria in Connaughton Road Construction Ltd.

111. It is submitted on behalf of SMNL that it meets the threshold of the four requirements set out in *Connaughton Road Construction Ltd.*

¹⁵ Reliance is placed on behalf of KBC on the decision of Allen J. in *3V Benelux BV v. Safecharge Card Services Ltd.* [2019] IEHC 675 and the decision of Heslin J. in *Delta Index Limited v. Ayondo Markets Ltd.* [2021] IEHC 52.

112. It contends that in order to satisfy the matters at paragraphs (1) and (2) of *Connaughton Road Construction Ltd*, SMNL must establish a *prima facie* case on liability and causation and its pleads that the alleged wrong and contractual breach occurred from in or around April 2018 onwards when KBC treated the Supply Agreement at an end. It is submitted on behalf of SMNL that the causal connection occurred when due to the alleged breach of contract the financial expert report identified a significant loss of earning and points, for example, to the table in Mr. Kirby's report dated 30th March 2022 of SMNL's unaudited financial statements where he states that the figure for turnover dropped from €521,525 in 2018 to €277,718 in 2019.
113. In relation to the matters at paragraph (3) and the recoverable loss as a consequence of the matters referred to in paragraph (2) in *Connaughton Road Construction Ltd*, it is submitted on behalf of SMNL that the table in Mr. Kirby's report dated 30th March 2022 of SMNL's unaudited financial statements confirms a specific level of loss before tax in 2019 in the amount of €104,583.
114. Insofar as the matters referred to at paragraph (4) of *Connaughton Road Construction Ltd* are concerned, it is submitted on behalf of SMNL that there is a significant dispute between the plaintiff and defendant and the court only needs to be satisfied on a *prima facie* basis that the losses allegedly attributable to the KBC's alleged wrongdoing are sufficiently large to justify a finding that those losses can explain the plaintiff's inability to pay costs. Reference is made to Mr. Kirby's report dated 30th March 2022 where Mr. Kirby states that he had "*determined that had the Plaintiff continued generating turnover from the Defendant for a further two years, it could have generated additional contribution of c.€115k per annum, or c.€230k for the*

remaining two-year period. If the Plaintiff had the benefit of the KBC business, it would therefore be in a position to meet an adverse costs award.”

115. Reference is also made to that part of his report where Mr. Kirby *inter alia* states that:

“...The Plaintiff’s cash at bank of €85,266 on 31st August 2020 is less than the estimated costs to defend the proceedings. The Plaintiff will not be able to meet the Defendant’s full costs if the Defendant is successful.

I analysed the contribution from the terms agreed in 2016 between the Plaintiff and Defendant. On the basis that the Plaintiff would have generated similar levels of turnover to that achieved for the year ended 31st August 2018 for a further two years, I estimate that the Plaintiff would have generated additional contribution of c.€230k.

That additional contribution would have translated into additional cash which should have substantially increased the €210,021 that was already on hand on 31st August 2018. Based on my review, I believe the Plaintiff would be able to meet an award of costs if it had not lost the KBC business...”

116. In considering the above matters, Mr. O’Higgins BL (for SMNL) reiterates the point that the court is only concerned with a *prima facie* standard and he refers to the definition of *prima facie* given by Peart J. in the Court of Appeal in *Tír Na N-Óg Projects (Ireland) Ltd. v. P.J. O’Driscoll & Sons (A Firm) & Ors* [2019] IECA 154¹⁶ where at paragraph 30 Peart J. observed that:

¹⁶ The was comprised of Peart, McGovern and Costello JJ.

“...It is worth recalling what is meant by the phrase ‘prima facie’. It is a lower standard of proof than proving a matter on the balance of probabilities. According to Murdoch’s *Dictionary of Irish Law* (4th ed. LexisNexis) the Latin phrase translates as ‘of first appearance’ and means:

‘On the face of it; a first impression. A prima facie case is one in which there is sufficient evidence in support of a party’s charge or allegation to call for an answer from his opponent. If a prima facie case has not been made out, the opponent may, without calling any evidence himself, submit that there is no case to answer, whereupon the case may be dismissed’.”

117. Reference is also made to the following passage in the headnote of the judgment of the Supreme Court in *Quinn Insurance Ltd. (under administration) v. Price Waterhouse Coopers (a firm)* [2021] IESC 15, [2021] 1 ILRM 253 (where the Supreme Court considered the decision of the Court of Appeal in *CMC Medical Operations Ltd. (in liquidation) t/a Cork Medical Centre v. VHI Board* [2015] IECA 68):

“...(4) In assessing an application for security for costs, a court should err on the side of greater inquiry and should thus place at least some weight on an assessment of the extent to which ordering an appropriate form of security may actually stifle the claim. That was an element in the assessment of whether or not there were special circumstances in the public interest that security for costs should not be ordered. A court should consider whether it was likely that the proceedings would be stifled and take the result of that consideration into account in assessing which course of action ran the least risk of injustice...”

118. Mr. O’Higgins BL submits that the least risk of injustice should be considered and the claim on behalf of SMNL was not *a mere assertion* but was rather a claim where an expert had brought *prima facie* evidence to bear. It is said that SMNL had expected to earn similar sums in 2018 that it had earned in 2016 (€243,922) and 2017 (€246,917.24) but this had not occurred because of the actions of KBC. It is submitted that *but for* the actions of KBC, SMNL would have generated profit and would have been able to pay its legal costs and asks the court to dismiss KBC’s motion and refuse its application for security for costs.

5. DECISION ON SECURITY FOR COSTS APPLICATION

119. It is accepted and well-settled that the court’s jurisdiction in this application for security for costs is a *discretionary* one.

120. Mr. Reilly BL for KBC makes the point that the rationale for the *special circumstance* exception is that this discretion must be exercised in the *interests of justice* and it would be unjust to reward a defendant for their own alleged wrongdoing by awarding security for costs and that this potential is identified on a *prima facie* basis as a matter of factual or ‘*but for*’ causation.

121. As SMNL is only required to establish that its inability to pay costs was caused by KBC’s alleged wrongdoing on a *prima facie* basis, my assessment of whether it (and the onus is on SMNL) has satisfied each of the four criteria in *Connaughton Road Construction Ltd.* is also on a *prima facie* basis. In terms of what *prima facie* means in this context (and at this stage) SMNL are not required to satisfy the court as to the probability of such loss at this stage, but only to demonstrate that it is arguable that its claims will succeed at the trial of the action.

122. In considering these matters, which includes assessing the evidence on a *prima facie* basis which was adduced on behalf of SMNL and the report of Mr. Kirby (the report of Mr. Kirby dated 30th March 2022 reviews *inter alia* review SMNL’s unaudited financial statements), I must also bear in mind that this is an *interlocutory application* and generally it is not appropriate that I favour one piece of evidence or factual inference over another or to make a final determination between any competing arguments put forward, for example, by Mr. Luby or Mr. Kirby or in relation to causation and remoteness. Rather, having regard to the applicable *prima facie* threshold, Clarke J. (as he then was) described the criteria at paragraphs (1) and (2)¹⁷ in *Connaughton Road Construction Ltd.* as doing no more than stating: “*that the plaintiff must establish a prima facie case on liability and causation, for if such a case cannot be established, then there could be no basis for finding, even on a prima facie basis, that any lack of resources of the plaintiff are due to wrongdoing on the part of the defendant.*”¹⁸

123. In this case – in terms of the aforesaid criteria in paragraphs (1) and (2) in *Connaughton Road Construction Ltd.* – SMNL plead and assert that the alleged wrongdoing and alleged breach of contract occurred, with immediate termination, from in or around April 2018 with the practical consequence being that it had an expectation that the contract would be binding to on or about June 2020 and that it would have achieved similar payments in the period up to 2020 as it had in 2016 (€243,922) and

¹⁷ [2009] IEHC 7 and listed as items (1), (2), (3) and (4) of paragraph 3.4 in the judgment of Clarke J. (as he then was).

¹⁸ [2009] IEHC 7 at paragraph 3.4.

2017 (€246, 917.24). I find on this basis therefore that SMNL has established, on a *prima facie* basis, that there was actionable wrongdoing on the part of KBC.

124. The criteria in paragraph (3) in *Connaughton Road Construction Ltd.* provides that the consequences referred to in paragraph (2) should have given rise to a specific level of loss which is recoverable as a matter of law and is not remote. The criteria in paragraphs (2) and (3) concern the issues of causation and remoteness. The criteria in paragraph (4) of the judgment of the High Court in *Connaughton Road Construction Ltd.* provides that the loss concerned is sufficient to make the difference between SMNL being in a position to meet the costs of KBC in the event that it should succeed, and SMNL not being in such a position i.e. SMNL must show a *prima facie* level of losses attributable to KBC's alleged wrongdoing so as to enable the court to assess whether on a *prima facie* basis whether those losses are sufficient to justify attributing SMNL's inability to pay costs (in the event that it fails and is ordered to pay costs) to KBC's alleged wrongdoing.

125. Further having regard to the decision of the Court of Appeal in *CMC Medical Operations Ltd. (in Liquidation) t/a Cork Medical Centre v. Voluntary Health Insurance Board* [2015] IECA 68, the criteria in paragraph (4) in *Connaughton Road* should not be read as being as a narrow mathematical or mechanical test having regard to the constitutional right of access to justice and to the courts with the result of unduly stifling claims.

126. Therefore, on a *prima facie* basis, the evidence of Mr. Kirby is that SMNL would have generated similar levels of turnover to that achieved for the year ended 31st August 2018 for a further two years which he estimates at approximately €230,000 i.e. had SMNL continued generating turnover from KBC for a further two years, it could

have generated additional contribution of approximately €115,000 per annum for those two years, and therefore, in Mr. Kirby's view if the SMNL had the benefit of the KBC business, it would be in a position to meet an adverse costs award. It is stated that this additional contribution would have translated into additional cash which should have substantially increased the €210,021 that was already on hand on 31st August 2018 and in such circumstances SMNL would be able to meet an award of costs if it had not have lost the KBC business.

127. In the circumstances I find that SMNL have established, on a *prima facie* basis, a causal connection between the alleged wrongdoing of KBC and the losses set out in the report of Mr. Kirby as set out above and that these could not be deemed as too remote and that on a *prima facie* basis the level of losses attributable to KBC's alleged wrongdoing are sufficient to justify attributing SMNL's inability to pay costs (in the event that it fails and is ordered to pay costs) to KBC's alleged wrongdoing. In summary, SMNL have made out a *prima facie* case that the cause of its impecuniosity, and consequently its inability to pay costs, arises from the alleged wrongdoing of KBC in allegedly breaching the contract in 2018. This finding on a *prima facie* basis is not, of course, an evaluation of the prospects of success which must await further pleadings and the trial of the action.

128. Accordingly, I find that SMNL satisfy on a *prima facie* basis the criteria in paragraphs (1), (2), (3) and (4) of the judgment of the High Court in *Connaughton Road Construction Ltd.* and I refuse the application for security for costs.

6. PROPOSED ORDERS

123In relation to the motion, which was first moved before me, I refuse the application on behalf of KBC seeking the striking out/dismissing of the statement of claim delivered by SMNL and I reserve the question of the costs of that application.

124In relation to the second motion, I refuse the application on behalf of KBC seeking an order for security for costs from SMNL and I reserve the question of the costs of that application.