



# THE SUPREME COURT

S:AP:IE:2020:000072

**Clarke C.J.  
O'Donnell J.  
MacMenamin J.  
Dunne J.  
O'Malley J.**

**BETWEEN/**

**QUINN INSURANCE LIMITED**

**(UNDER ADMINISTRATION)**

**Applicant/Appellant**

**- AND -**

**PRICE WATERHOUSE COOPER**

**(A FIRM)**

**Defendant/Respondent**

**Judgment of Mr. Justice O'Donnell delivered the 22<sup>nd</sup> day of March, 2021.**

1. I agree with the judgment of the Chief Justice and wish merely to add some observations on the question since it is unlikely that this issue, which is of some practical importance, will return to this Court for some time.
2. Applications for security for costs are reasonably common. At one stage, it was not unusual to find applications for security for costs involving individual litigants on the basis that they resided outside the jurisdiction (see, for example, *Heaney v. Malocca*

[1958] I.R. 111, and *Collins v. Doyle* [1982] I.L.R.M. 495), but the number of applications in this regard has declined substantially because of the regime for reciprocal enforcement of judgments between members of the European Union, and countries adhering to the Brussels and Lugano Conventions. It is still possible to encounter applications for security for costs in respect of appeals. However, the most common area is in the context of limited companies pursuant to s. 52 of the Companies Act 2014, which provides that:-

“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.”

3. It is well established that this section and its statutory predecessors, which can be traced to at least 1868, conferred upon the courts a discretion. Considerable case law has developed as to the circumstances in which such discretion should be exercisable. It is in the nature of an application such as this that courts will develop rules of thumb for the exercise of the discretion. This makes particular sense in this context since an application for security for costs must necessarily be made at the outset of the proceedings, and when it is difficult for a court to reach any concluded view as to the merits of the proceedings as it is faced not with witnesses who can be questioned, but rather with pleadings and affidavits, normally framed with an eye on the legal test involved. It is also desirable that interlocutory applications such as this should not become mini trials of the actions. Accordingly, it has come to be well accepted that, 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, moreover, a defendant establishes a *prima facie* defence to the plaintiff's claim, then security for costs ought to be required unless it can show that there are specific

circumstances which ought to cause the court to exercise its discretion not to make the order sought. In this regard, the onus will shift to the party resisting the order.

4. Such special or specific circumstances can include cases where it is said that the plaintiff's inability to be in a position to discharge future costs flows from the wrong allegedly committed by the moving party, or that there has been delay in seeking the order sought, or where, for example, it is said that there is a public interest in the litigation proceeding. The list of such circumstances is not closed. See, in this regard, *Usk and District Residents Association Ltd v. The Environment Protection Agency* [2006] IESC 1, [2006] 1 IRLM 363 ("*Usk*"), and *Inter Finance Ltd v. KPMG Peat Marwick* (Unreported, High Court, Morris P., June 29<sup>th</sup>, 1998). The contention that the plaintiff's impecuniosity, as it is often described, is due to the alleged wrong of the defendant which is the subject-matter of the proceedings was subject to principles set out by Clarke J. (as he then was), in *Connaughton Road Construction Ltd v. Laing O'Rourke* [2009] IEHC 7 (Unreported, High Court, Clarke J., January 16<sup>th</sup>, 2009) ("*Connaughton Road*"). In that case, at para. 3.4 of the judgment, Clarke J. said that to establish that inability to pay stemmed from the alleged wrongdoing, it was necessary to establish four propositions:

- (i) That there is an actionable wrongdoing on the part of the defendant (for example, a breach of contract or tort);
- (ii) That there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiffs;
- (iii) That the consequence(s) referred to in (ii) have given rise to a specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example, by not being too remote); and,
- (iv) That the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position.

5. It is said in these proceedings that the fourth limb of the *Connaughton Road* test has not been established in this case. While the plaintiff mounts a claim which, in any terms, is very substantial, it is said that the claim at its height still falls short of the extraordinary deficiency in the plaintiff client company now under administration. The plaintiff counters this by arguing that had the defendant not been guilty of the (alleged) wrongdoing, the plaintiff company would have taken steps in time which would have avoided or reduced the loss. The plaintiff also relies on certain *dicta* of Hogan J. (with whom Mahon J. agreed) in *CMC Medical Operations Ltd (In Liquidation) t/a Cork Medical Centre v. Voluntary Health Insurance Board* [2015] IECA 68 (Unreported, Court of Appeal, Hogan J., March 27<sup>th</sup>, 2015) (“*CMC Medical Operations*”), set out at para. 7.28 of the judgment of the Chief Justice, in which Hogan J. expressed the view that the *Connaughton Road* test may require to be revisited, as it was arguable that the application of what was then s. 390 of the Companies Act 1963 in the manner suggested “could effectively stifle otherwise valid claims”.
6. This latter factor of “stifling” is also important in this case in a different respect. The Court of Appeal judgment in this case turns on the fact that, although the Court of Appeal was willing to accept that the *Connaughton Road* test had indeed been satisfied, it nevertheless considered that security should not be ordered because, in this case, it had not been established, or even asserted, that a requirement to provide security would “stifle” the plaintiff’s claim. This issue was because of the particular circumstances of this case, in which the plaintiff is a company under administration and in which it is supported in the case by the Insurance Fund which, it was to be assumed, was funding the plaintiff’s own very substantial costs in mounting what would, on any view, be very substantial and expensive litigation.
7. Counsel for the plaintiff sought to counter the obvious practical force of this contention in a number of ways. It was argued that while “stifling” was a relevant contention in the

law of England and Wales, dealing with otherwise similar statutory provisions, it was not a relevant consideration in this jurisdiction. This was urged in reliance on the *dicta* of Keane J. (as he then was) in *Lismore Homes (In Receivership) v. Bank of Ireland Finance Ltd* [1992] 2 I.R. 57 (“*Lismore Homes*”), 63, where Keane J. said:-

“Section 390 of the Act of 1963 expressly envisages that an impecunious Plaintiff Company may be required to give security for costs and it may well be that in many cases this will mean the end of the action, unless someone other than the Company itself is prepared to put up the security. To refrain from granting an Order for security, save in the exceptional circumstances already referred to, simply because it might have the effect of stifling the Plaintiff Companies’ action would be to render the section nugatory.”

8. Second, and in the alternative, it is argued that if “stifling” is relevant, it is only relevant in a negative sense: the possibility that an action will be stifled may be a reason not to order security, but the converse, it was argued, is not true. The fact, if it be so, that an action will not be “stifled” is not a reason to order security. The court was limited to, and must follow, the steps outlined in *Usk*. If, for example, specific circumstances have been established such that it can be said that the plaintiff’s impecuniosity is allegedly due to the wrongdoing of the defendant which is the subject-matter of the proceedings, and which can be shown to satisfy the *Connaughton Road* criteria, then security should not be ordered even though there is no doubt about the capacity of the plaintiff to provide such security.
9. Third, it was said that consideration of whether funding to provide security might be available from outside the company itself was an impermissible inquiry, and ignored the fact that the company was a separate legal entity. The court should not, it was said, engage in a process of speculation as to the capacity of individual shareholders, for example, to fund litigation to which they were not formally a party.

10. The progress of the law often involves the reduction of complex theories, or apparently wide discretion, to clear rules which can be readily applied. This is, in general, a beneficial process. As was once said, there are many areas where it is more important that the law be clear rather than clever. If parties have a shared understanding of the manner in which the law will be applied, they can order their affairs accordingly and avoid the stress, delay, cost and uncertainty involved in legal proceedings where the outcome cannot be predicted with confidence. But the rules of thumb to which a broad discretion can be reduced must be applied with an understanding of the overall objective sought to be achieved, and for which the discretion is granted. In this case, it is said that Irish law requires merely that a defendant establish a likely inability to pay costs and a *prima facie* defence, in which case an order for security for costs ought normally to be made. If, however, a plaintiff can establish special circumstances, then, by the same token, an order ought not to be made. It is said that the Court of Appeal had found that there were such special circumstances, which must necessarily lead to a refusal of security for costs, and a consideration of “stifling” and, in particular, that this claim would not be stifled if security were ordered, was irrelevant.
11. If this indeed were the law, there would, in my view, be a large discrepancy between the legal test and any broader understanding of the considerations underlying the grant or withholding of security for costs. Looked at from that perspective, it might be thought that the apparent agreement – that the making of an order for security for costs in respect of a company which had a demonstrated inability to meet an order for costs would not inhibit the prosecution of the proceedings by the plaintiff – was the single most significant aspect of this case. In *Thalle v. Soares* [1957] I.R. 182, the Supreme Court, dealing with the question of the quantum of the security, said that the Court must be careful not to fix a sum which would shut out the plaintiff from the exercise of such rights as he may have. In *Cohane v. Cohane* [1968] I.R. 176, 182, Budd J. observed that if this was a:-

“proper matter to take into consideration in fixing security, it seems not illogical for the court in an application for security to weigh as one of the circumstances to be considered the fact that the granting of the order will have the effect of shutting out a plaintiff from the exercise of his rights. The weight to be given to such a factor should depend, of course, on the particular facts of the case.”

In *Comhlucht Páipéar Ríomhaireachta Teo v. Údarás na Gaeltachta* [1990] 1 I.R. 320 (“*Comhlucht Páipéar Ríomhaireachta*”), McCarthy J. observed that there was no evidence that the making of the order would hinder the proceedings, and in *Lough Neagh Explorations Ltd. v. Morrice and Ors* [1997] IEHC 224 (Unreported, High Court, Laffoy J., August 27<sup>th</sup>, 1997) (“*Lough Neagh Explorations*”), Laffoy J. similarly observed that there was no such evidence in that case and the principal behind the company was a person of substance.

12. As the Chief Justice in his judgment aptly puts it, the issue on an application for security for costs is a question to be determined by reference to the balance of injustice. That is because there is a possible injustice whatever order the court makes. The injustice to the defendant is obvious. The fact that s. 52 and its statutory predecessors are included in the Companies Acts is a recognition that the benefit of incorporation with limited liability is capable of causing injustice. If a company can bring proceedings in circumstances where it will not be obliged to pay any award of costs if it loses, then there is an obvious injustice to the successful defendant. Costs will only be awarded if the action is not well founded. It adds insult to injury, therefore, if the defendant who *ex hypothesi* should not have been sued is not able to recover the costs of establishing that the plaintiff’s claim was without foundation. Anyone with experience of litigation will understand the distorting effect of the fact that a plaintiff is not a mark for an award of costs. A defendant considering the risk of litigation must factor into its calculations the fact that it may have to expend considerable sums in defending a claim which will not be recoverable. This can

significantly alter the calculation that a defendant must make, and increase the incentive to compromise a claim even if it is considered to be one without merit. A defendant forced into such a compromise is entitled to feel aggrieved. Sometimes, this may be an unavoidable consequence. Parties may have different resources. An individual without assets may be able to secure legal assistance on perhaps a “no foal, no fee” basis, and on that basis be able to commence proceedings. Indeed, in many cases, the willingness of lawyers to act in such cases is important in securing access to justice. As, however, the Chief Justice points out, even then the proceedings are not without risk for a plaintiff. However, it reaches a different level again if the plaintiff is a limited liability company, without significant assets, but perhaps having wealthy shareholders or corporate backers who will benefit if the claim is successful, and who may be able to provide a fully resourced legal team to prosecute the claim. In such a case, a defendant is entitled to feel that the pressure to compromise because of the risk of expenditure of costs which will be irrecoverable is something less than the administration of justice according to law and instead has uncomfortable echoes of the practice and procedure of the highwayman.

13. What is the corresponding risk of injustice to a plaintiff? When a plaintiff has access to resources, and can provide security for costs, then there may be inconvenience and some cost in being deprived of the use of those funds for the duration of the case, but the potential injustice to such a plaintiff is not of the same level as that which a defendant runs when faced by a corporate plaintiff that will be unable to pay costs. The real potential injustice to the plaintiff, therefore, and which is of concern to the Court, is the possibility that an order for security for costs will not be met, and a plaintiff will not be in a position to proceed with litigation which may be justified. The risk of stifling of a claim is therefore an ever-present aspect of the balance which a court must make.
14. This is also apparent in other respects. The rationale of the recently developed special circumstance that security will be refused when it is considered that the proceedings can



be said to be in the public interest is only explicable on the basis that if the order is made, the claim might not, or would not, proceed. Similarly, the consideration first identified in *Peppard v. Bogoff* [1962] I.R. 180 (“*Peppard v. Bogoff*”), that security should not be ordered where it is contended that the alleged wrongdoing the subject-matter of the proceedings is what has caused the plaintiff’s inability to meet an award of damages, is underlain by a concern that it would be particularly invidious if a defendant could wrongfully damage a plaintiff, and then rely on the damage done as causing an inability to pay costs which would justify an order for security which might prevent the claim being brought to establish that very wrongdoing and recover compensation for it.

15. The sole basis upon which it is argued that the “stifling” of claim is not a relevant consideration is the *dictum* of Keane J. in *Lismore Homes* set out at para. 7 above. It is, in my view, a misreading of the observation of a judge whose expertise in this area deserves particular respect. Keane J. stated that if the contention that security *might* stifle a claim was sufficient to defeat an application, it would rob the section of any content. This is no more than simple logic. Since, by definition, an application can only be brought where it has been established that the plaintiff will be unable to pay costs should they be awarded, and therefore has insufficient assets at that point, it is possible to say in any case that the making of an order *may* or *might* stifle a claim. If this in itself was an answer to the application, then security could never be awarded.
16. Furthermore, it should be recognised that “stifling” is a value-laden term. It suggests not merely that the action will not proceed, but also that it is a good cause of action wrongly suppressed. But if an impecunious plaintiff is obliged to make the same calculation and assessment as a solvent plaintiff, and to decide that a potential claim is not worth the risks involved, then there is nothing wrong with an order for security for costs leading to a decision not to proceed. The mere fact, therefore, that a claim *may* not proceed because in order to do so a plaintiff must provide security for costs is not inevitably an injustice.

None of this means, however, that the stifling of the plaintiff's claim is not a consideration on an application for security for costs: it simply means that a plaintiff cannot defeat an application for security merely by contending *simply* that it *might* mean that the claim does not proceed.

### **Impecuniosity and Insolvency**

17. I agree with the Chief Justice that there is a distinction between impecuniosity (the rather archaic term normally used to describe a likely inability to pay costs in the future) and insolvency. Insolvency is a present inability to pay debts as they fall due. Particularly where insolvency has resulted in a formal process of winding-up, whether by voluntary decision of the company or order of the court, the question of security for costs of proceedings brought by the company in liquidation should rarely pose a problem in this regard. It was established in *Comhlucht Páipéar Ríomhaireachta* that the costs of a successful defendant to proceedings brought by a company in liquidation or by a liquidator ranked in priority in a winding-up to the liquidator's costs, and therefore security for costs would not be necessary unless, and unusually, the company had no assets capable of meeting even those costs paid in priority. McCarthy J. observed that it would be an injustice if the liquidator were able to pursue a claim but be immunised from the risk of a costs order.
18. Impecuniosity which does not involve present insolvency presents a different problem. In such a case, a company may have limited or no significant assets or capital, but no present liabilities. It follows, however, that it will not be in a position to pay costs should they be awarded, and therefore if a defendant can establish a *prima facie* case, security ought to be ordered unless there are countervailing factors. The same framework of analysis, however, applies. It is relevant to ask in whose interest the proceedings are being pursued by a company which, on its face, is not in a position to fund the litigation. If it is

clear that there are shareholders or backers who will likely benefit from the claim if successful, and who may be supporting the claim, then there is no reason why they should not also be expected to provide security. Even if it cannot be established that shareholders would provide security – and there is sometimes an unavoidable element of bluff and counter-bluff in such applications – a court should consider carefully whether such reluctance stems from nothing more than a realistic assessment of the chances of the claim succeeding, and the likelihood of an award of costs being made. But if the Court comes to the conclusion that security cannot be provided and that if an order is made that proceedings of some ostensible and substantial merit would not proceed, with the consequence that a wrongdoer who has caused damage should escape the consequences, then that is a feature which the Court may take into account in refusing security and, in this regard, I do not think that there is any significant difference between the position in the law of England and Wales and that in this jurisdiction.

19. I agree that a motion for security for costs should not ignore the fact that it is the limited company which is the plaintiff. The separation between the company and its shareholders must be recognised. However, it is not impermissible in my view – indeed it is only common sense – to have regard to the fact that if a company is impecunious, the proceedings must normally be being pursued for some reason and that someone is supporting them and likely to benefit from them if successful. I agree with much of what is set out in the decision of the UK Supreme Court in *Goldtrail Travel (in liquidation) v. Onur Air Taşımacılık AŞ* [2017] UKSC 57, [2018] 1 All E.R. 721. That case dealt with an order requiring payment into court of a judgment sum as a condition of permission to appeal. While observing that this was qualitatively different from an order for security for costs of such an appeal, Lord Wilson considered that similar principles applied. The conclusion of the majority of the UKSC is summarised in the headnote:-

“When, in response to a claim of a corporate appellant that a condition would stifle its appeal, the respondent suggested that the appellant can raise money from its controlling shareholder, the court needs to be cautious. The shareholder’s distinct legal personality had to remain in the forefront of its analysis. The question should never be whether the shareholder could raise the money; the question should always be whether the company could raise the money. In that context, the criterion was: ‘Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or from some other closely related person, as would enable it to satisfy the requested condition?’ In cases in which the respondent to the appeal suggested that the necessary funds would be made available to the company by, say, its owner, the court could expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company’s financial position; and by reference to all aspects of its relationship with its owner, including the extent to which he was directing (and had directed) its affairs and was supporting (and had supported) it in financial terms”.

I would add that the court may also have regard to the circumstances in which the claim is brought and the fact, if it be so, that the company’s claim is being supported by another party is a relevant consideration. I would, however, be reluctant to accept Lord Wilson’s observation that if it is established that the sum is not likely to be forthcoming, the Court should not make an order if that would mean the case will not proceed. Such an approach may be applicable in the context of a grant of leave to appeal subject to conditions (something that rarely, if ever, arises in this jurisdiction) on the basis that it is inconsistent with the fact that a court has determined there are sufficient grounds to merit an appeal,

but in the context of an application for security for costs there has been no determination that the plaintiff's case has reached any threshold of arguability on the merits. In that context, or indeed where security is sought for an appeal brought as a matter of right, an inability to obtain funds from a closely related person or entity which has otherwise provided financial support may reflect nothing more than a cold-headed assessment of the likely prospects of the case such as might induce a solvent plaintiff to decide not to proceed. A court should be robust in its assessment and slow to refrain from making an order for security which is otherwise warranted and where it is clear that there are resources which are or ought to be available to the plaintiff company.

20. In this regard, it is noteworthy that in *Lough Neagh Explorations* (a case which ended in an order being made dismissing the claim for failure to provide security – [1999] IESC 40, [1999] 4 I.R. 515), Laffoy J. had regard to the apparent resources available to the company through its principal, in ordering security in the first place. It is instructive that similar considerations have been found to be applicable in EU law. In Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* EU:C:2010:811, a claimant company was unable to make an advance payment of costs (amounting to €274,368) into court and contended that this was inconsistent with the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights. The CJEU concluded it was for the national court to assess if there was an impermissible interference with the principle, having regard to all the facts. In particular, it observed at para. 62:-

“With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the

ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings”.

**21.** I agree fully with the Chief Justice that the question of whether it has been shown that the inability to pay costs is due to an alleged wrongdoing of which the plaintiff complains in the proceedings is something which a court should scrutinise with considerable care. Otherwise, it would become too easy to avoid an order for security for costs merely by skilful pleading and ingenious, if implausible, calculations of damages. This ground of resistance to an order for security is an exception which cannot be allowed to become so broad as to swallow the presumptive rule of security when there is a demonstrated inability to pay and a *prima facie* defence. This defence will apply most clearly in the situation, such as in *Peppard v. Bogoff*, where it was alleged that the defendants had conspired to deprive the plaintiffs of their business and there was thus a very clear and direct connection between the wrong alleged and the inability to pay. In this case, I agree fully with the Chief Justice that it is not sufficient to argue that, in addition to the loss claimed, had the defendant not been at fault, the plaintiff might have taken steps to avoid the losses giving rise to the deficiency. A court is entitled to have regard to its experience, and it is normal practice in pleadings to put the plaintiff's case in its most ambitious way, and it is rare that even successful plaintiffs will recover everything that is claimed. It must also be kept in mind the fact that the application comes at an early point in the litigation, and that even if a causal connection can be established between the conduct of the defendant and the financial position of the plaintiff (perhaps as the result of the withdrawal of an exclusive agency agreement) that conduct may not be established to be wrongful. In such a case, it adds considerable insult, and loss, to the injury, and cost, of having to defend the proceedings, if the defendant is deprived of the protection for an order for security for costs on an approach that assumed (wrongly, in the event) that the defendant was at fault.

22. I respectfully agree that, if approached in this way, the *Connaughton Road* test does not require any reconsideration, as suggested in *CMC Medical Operations*. The example was given in that case of a company with a deficiency of €40,000 and costs estimated at €60,000. It is suggested that there is some injustice in a company facing an order for security for costs being required to establish that it was likely to recover more than €100,000 in damages. It is suggested that such an approach “could effectively stifle otherwise valid claims”. The argument runs, I believe, that if the plaintiff could establish a stateable claim to say €60,000, that such should not be inhibited by an order for security for costs, particularly since, if the plaintiff succeeds in that or even a lesser amount, it will recover costs.
23. First, this approach assumes something that cannot be known at the time of the security application: that is, whether the plaintiff has an “otherwise valid claim”. All that is known is that the defendant has a *prima facie* defence. The application must proceed on the basis that the plaintiff’s claim may be valid, but may not be. That, after all, is the very thing that the proceedings are to determine.
24. Second, the approach does not take account of the fact that this ground is an exception. It only arises where a defendant has established enough to be entitled to an order for security for costs. If the plaintiff can assert that its inability to pay costs is a consequence of the wrongdoing it alleges in the proceedings, it may not be required to provide security for costs, even if it could do so and even though it may turn out that, in the event, the defendant was not at fault. The fact that this is an exception, and is, moreover, dependent upon an assertion which may prove incorrect, means that the Court should not apply it loosely, since otherwise it would undermine the justification for an order for security for costs. If a plaintiff cannot establish, even on the basis of assertion rather than proof, that its parlous financial situation can be attributed to the wrongdoing of the defendant, then

it is in the same position as any other impecunious company which has a claim against a defendant and in respect of which an order for security for costs may be made.

- 25.** Third, it does not follow that a security order would not necessarily stifle such a claim. On this hypothesis, if a plaintiff has an “otherwise valid” claim for €60,000, then the corporate entity, and its shareholders and creditors, would have a real interest in seeing that such a claim was pursued. If those parties have an interest in pursuing the claim and incurring the costs of doing so, then, in principle, there should be no reason why an order for security would stifle such a claim. If such parties are only willing to pursue such a claim on the basis that they would risk the costs of pursuing the claim but not a possible liability to the defendant’s costs if the claim is unsuccessful, then that reflects not an unfairness in the security for costs regime, but rather on the assessment of the validity of the plaintiff’s claim. Finally, if, however, there is good evidence that the company both has a valid claim and that it simply cannot be pursued because of the immediate hurdle created by an order to provide present security for costs, then that is a consideration in its own right, but should not lead to an unjustified expansion of the *Peppard v. Bogoff* ground.
- 26.** The approach which permits a plaintiff to escape an order for security for costs, otherwise appropriate, by asserting that the inability is caused directly by the wrongdoing of the defendants which is the subject-matter of the proceedings, is generous to plaintiffs, and potentially harsh to defendants, since it is based on an assertion which may prove to be false, and should therefore be applied with caution and rigour. The *Connaughton Road* approach, in my view, adds a welcome element of rigour to the analysis, and should not be undermined. The risk of “stifling” should be dealt with squarely under that heading, rather than indirectly as part of the question of whether the defendant’s wrongdoing can be said to have caused the deficiency.



27. Finally, I also agree fully with the Chief Justice that, while it is desirable that applications for security for costs should not become mini trials, it is important that neither the defendant seeking such security, nor the plaintiff seeking to avoid it, should be allowed make their case on the basis of bare and unsubstantiated averments. It is, for example, understandable that, for practical reasons, defendants will be reluctant to commit themselves to an account of the circumstances giving rise to the proceedings at an early stage of the case and which may prove to be a tool for cross-examination by the plaintiff at the trial. However, the establishing to the satisfaction of the Court that there is a *prima facie* defence to the claim must rest upon evidence, and a court should not accept bare assertions crafted by the parties' lawyers in the light of the case law. If a defendant does not wish to commit itself to the grounds in its defence, it need not seek security for costs. Conversely, a plaintiff which seeks to escape an order for security for costs must give a detailed account of why, for example, it is said the deficiency in its assets can be attributed to the defendant's wrongdoing, and provide a plausible explanation for the apparent anomaly that it can incur the costs of pursuing the litigation, but not risk an adverse costs order.

28. In this case, I agree with the Chief Justice that the plaintiff has failed to establish its inability to be in a position to pay costs due, even on a *prima facie* basis, to the wrongdoing it alleges against the defendant. I also agree with the Chief Justice that the Court of Appeal was entirely correct to consider that the fact that the claim would not be stifled was a relevant – and indeed central – consideration in this application. Accordingly, I agree that the appeal should be dismissed.