

THE HIGH COURT

COMMERCIAL

[2022] IEHC 549

Record No. 2021/4762P

BETWEEN

JAMES STREET HOTEL LIMITED

PLAINTIFFS

AND

**MULLINS INVESTMENT LIMITED, PETER MULLINS, DELBOURNE LIMITED
(IN LIQUIDATION), EOGHAN KEARNEY, LIAM FOLEY, PATRICK COX, SIMON**

FOX AND CMPDM LIMITED

And by Order

CARROWMORE PROPERTY LIMITED, GALLAGHER SHATTER, A FIRM AND

CLARK HILL, A FIRM

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 6th day of October, 2022

INTRODUCTION

1. Should a plaintiff be entitled to inflict €3 million in legal costs on the defendants, which the defendants will never recover, even if the defendants win the litigation?
2. That is the question for this Court, since the plaintiff in this case has no assets. Yet it wishes to pursue this litigation without putting up security for the defendants' costs, which are

estimated at *circa* €3 million. Obviously, if the defendants lose the litigation, they will have to pay their own legal costs in this amount. However, crucially, even if the defendants win the litigation, they will still have to pay those same costs, without being reimbursed by the plaintiff, as the plaintiff has no assets. Can this be fair?

3. This situation for defendants, which has been described by the Supreme Court as ‘*something less than*’ justice, is an issue that has been addressed by that court in cases where defendants were sued by a plaintiff, whether an individual or a company, with little or no assets.

4. The Supreme Court has said that such a plaintiff is akin to a ‘*highwayman*’ since the plaintiff is subjecting the defendant to the ‘*blackmail*’ of having to ‘*buy off the case (even if it was wholly unmeritorious)*’ or else..... The ‘or else’ is that if the defendant fails to buy off the case, she will have to pay High Court costs (in tens of thousands, hundreds of thousands or even millions of euro), which costs she will never be able to recover from the plaintiff if she wins the litigation.

5. Take the case of a straight-forward or typical High Court case such as an individual plaintiff with no assets taking a speculative or unmeritorious High Court personal injuries’ claim against a defendant. To continue with the Supreme Court’s analogy, the ‘gun to the head’ of the defendant by such a plaintiff, is the threat of the defendant having to incur irrecoverable legal costs of €50,000-€100,000. By any standard, this is an enormous sum of money, since it would take a person on average earnings in Ireland (of €45,779 - CSO Release 31st May, 2022) over two years to earn this amount. This is the type, and extent, of the ‘*blackmail*’ to which the Supreme Court is referring in even the most straight forward High Court cases. This is a matter of considerable concern to anyone who wishes to ensure that *true justice*, as distinct from *something less than justice*, is administered by the Irish courts.

6. However, the level of injustice is even more extreme when one is dealing with a High Court case that is not straight-forward such as a commercial case like this one. This is because

the ‘gun to the head’ for a defendant in what the Supreme Court has described as ‘*blackmail*’ is not €50,000-€100,000 but *circa* €3 million - more than a person on the average wage would earn in her entire lifetime.

7. While it is important to emphasise that it is not being suggested that the claim in this case is unmeritorious, it is important to note that even if the chances of success of the plaintiff’s claim are 50:50, if the defendants win the litigation, they are still guaranteed to ‘lose’ €3 million in legal costs as they will not be able to recover this sum from a plaintiff with no assets.

8. The Supreme Court’s reference to ‘*blackmail*’ in a scenario where a plaintiff has no assets makes sense because a defendant faced with having to incur irrecoverable costs, whether of €50,000 or €3 million, can save herself this amount by ‘*buying off the case*’, even if, as the Supreme Court notes, the claim is a ‘*wholly unmeritorious*’ one. Indeed, this is why in many cases, the merits of the case are secondary. This is because once High Court proceedings are served, the legal costs are so high as to move the focus of the litigation away from its merits to how does one reduce the legal costs which the defendant will have to pay, win, lose or draw? Usually this is by settling, regardless of the merits of the defendant’s case.

9. That is how our current litigation system operates for a defendant being sued by a plaintiff with little or no assets, whether in a personal injuries’ claim or a commercial claim. As observed by the Supreme Court, this cannot be described as offering justice, whether the claim is ‘*wholly unmeritorious*’ or not.

Injustice is exacerbated by removal of pyramid structure in courts in Ireland

10. The injustice, to which the Supreme Court refers, for defendants sued by plaintiffs with no assets is exacerbated in Ireland by the fact that so much litigation can or must issue in the High Court. In this regard, there is very much a flat, rather than a pyramid, structure, between the District, Circuit and High Courts in Ireland. This is unlike, as noted below, the position in England and Wales and unlike the position in Ireland in the 1950’s (were there was a ratio of

7 High Court judges to 30 District Court judges versus today where there is a ratio of *circa* 2 High Court judges (45) to 3 District Court judges (63)).

11. This injustice is further exacerbated by the fact that those proceedings, required or permitted to be, instituted in the High Court generate enormous costs (see *'Ireland ranks among the highest-cost jurisdictions internationally for civil litigation'* per the *Review of the Administration of Civil Justice*, October 2020 at p. 267 chaired by Kelly P. (the "Kelly Review"))).

100 times the cost difference between being sued in High Court v. District Court

12. In this regard, there is literally a hundred times the difference between a plaintiff with little or no assets suing a defendant in the District Court and that plaintiff suing the same defendant in the High Court.

13. In the District Court if the defendant wins against a plaintiff with no assets, he will not recover *circa* €500/€1,000 in legal costs, while in the High Court, if the defendant wins, he will not recover *circa* €50,000/€100,000 in legal costs. One can see why if the same '*wholly unmeritorious*' claim could be brought in either court, a defendant might be willing to settle such a claim in the District Court for €400, but in the High Court he might be willing to settle the exact same claim for €40,000. It is therefore no coincidence, in this Court's view, that the Supreme Court's references to '*something less*' than justice, '*highwaymen*' and '*blackmail*' was made in the context of defendants being sued in the High Court, rather than the District Court.

14. It seems to this Court that '*something less than*' justice will continue for defendants for so long as plaintiffs with no assets have nothing to lose in litigating (not even a relatively minor sum) and for so long as so much litigation may, or must be, brought in the High Court, by far the most expensive of the District, Circuit and High Courts. Such plaintiffs can, by simply

instituting the proceedings in the High Court, put ‘chips on the table’ or a ‘gun to the head’ of a defendant amounting to €50,000-€100,000 rather than €500-€1,000.

15. This is the background, to this case, where a corporate plaintiff with no assets wants to sue eleven separate defendants, where the legal costs of the defendants in defending the claim are estimated to be €3 million.

BACKGROUND

16. The plaintiff, effectively a €1 company, or what is colloquially known as a ‘shelf company’, is suing various defendants for damages of over €4 million in connection with the purchase by it of a site (the “Site”) for a hotel in James Street in Dublin 8, for which it paid €7.2 million. It financed this purchase through borrowings and finance from its parent company.

17. The legal costs of the defendants are estimated at over €3 million, which they will not recover from the plaintiff, which has no assets, if the defendants win the action. Not surprisingly therefore the defendants want the plaintiff to put up security for their legal costs, so that the defendants will have their costs covered, if they win.

18. However, the plaintiff wants the litigation to proceed without it putting up security. This means that the plaintiff wants to litigate on the basis that it is ‘lose/lose’ for the defendants (i.e. if they lose the litigation, they will have to pay their own legal costs of €3 million, but also if they win the litigation, they will also ‘lose’, since the plaintiff has no money to pay their legal costs of €3 million).

19. On the other hand, the plaintiff wants it to be ‘win/no lose’ for it as regards the outcome of the litigation. This is because if it wins, it will be paid its legal costs by the defendants, who have assets or insurance, unlike the plaintiff. However, if the plaintiff loses it will not end up paying the defendants’ costs, since it has no money.

20. In effect, the plaintiff wants a ‘free bet’ in the sense of litigating as a plaintiff without assets, with nothing to lose and so with all upside for it, with no downside.

21. The plaintiff claims that it is entitled to have this ‘unlevel playing field’ in its favour because of special circumstances which exist, which entitle it to avoid the default rule requiring a corporate plaintiff, without assets, to put up security for a defendant’s legal costs.

22. In effect, the plaintiff claims that these circumstances entitle the plaintiff to inflict €3 million in costs on the sellers of the Site (and their solicitors, who are also among the defendants being sued) with no prospect of recovery by any of those defendants, if those defendants win.

The injustice to the plaintiff of having to provide security of €3m to pursue a claim of €4m?

23. The plaintiff, in support of its claim, points to the what it terms the injustice of it having to come up with security for legal costs of what, in anyone’s language, is a huge sum (€3 million), in order to pursue a claim for €4 million.

24. However, this is a complaint about the very high level of costs in the High Court. If, for example, this claim could be pursued for a fraction of these costs (as is the case of litigation in the District or Circuit Court), then it seems unlikely that providing security (in the hundreds or thousands of euro) would be an issue for the plaintiff (or its shareholders/backers), particularly since the plaintiff believes that it has a very strong case to recover €4 million.

25. However, it seems that the huge amount of money that the plaintiff must come up with as security, in order to pursue the litigation in the High Court, is the problem from the plaintiff’s perspective and leads to its complaint about the injustice of this situation.

26. Yet, this is not a complaint that can be laid at the door of the defendants, who no doubt are equally concerned about the enormous costs which they will incur in defending a case which they had no role in bringing.

27. Clearly, this is a complaint against the high cost of litigation and the solution to that problem is not, as suggested by the plaintiff, permitting the plaintiff to impose irrecoverable

costs of €3 million on the defendants. Rather, the solution is reducing those costs (see for example some of the recommendations of the *Kelly Review* to the legislature regarding reducing litigation costs at Chapter 9). Another solution is having matters heard in courts, other than the one with the highest costs (the High Court), which is something over which the courts have no control, but which is a matter for the legislature.

28. This is the background to this application for security for costs. The plaintiff's response to the security for costs application by the defendants is that it should not have to provide any security because special circumstances justify it in being entitled to litigate on a 'win/no lose' basis.

A level-playing field or defendants guaranteed to lose?

29. Therefore, the question in this case is whether there should be a level playing field in this litigation, where both sides are 'at risk' of having to pay the other side's massive legal costs if they lose, or should the plaintiff be allowed litigate with nothing to lose, against defendants who will 'lose' millions of euro in legal costs (even if they win).

The backers of the €1 company will benefit from a win but will not suffer if plaintiff loses

30. This issue is brought into even sharper focus in a case such as this where there is a well-financed shareholder of the plaintiff (The Dublin Loft Company Limited) in the background. The Dublin Loft Company Limited has surplus assets of *circa* €20 million. This Court was told that the plaintiff is ultimately owned by members of the Cosgrove family who are experienced in property development (i.e. Una Cosgrave and her children Kelly, Mark and Andrew, who also control the company).

31. It seems clear that these backers of the plaintiff are happy to finance the plaintiff to pay its own lawyers to sue the defendants, presumably on the basis that they will benefit, as the

ultimate owners of the plaintiff, from the award of damages of €4 million if the plaintiff were to win.

32. However, they are resisting providing funds to the plaintiff to enable it provide security for costs, if it loses the litigation. In effect, the plaintiff and its owners/controllers are happy to see the defendants out of pocket in the sum of €3 million if those defendants were to win the litigation. It is important to bear in mind that this is the stark reality of what a €1 company like the plaintiff, and its owners/controllers, are seeking by wanting to litigate without providing security for costs.

33. In this regard, it is relevant to note that the fact the plaintiff in these proceedings is a €1 company, and so is not able to pay any legal costs to the defendants if it loses, has not come about by chance. The corporate structure for the acquisition of the Site was set up in this way. In this regard, the plaintiff did not seek to controvert the averment of Mr. John Harding, a chartered accountant, on behalf of Gallagher Shatter, solicitors (the 10th defendant), that the plaintiff was deliberately incorporated and operated on the basis that only €1 would be invested in the capital of the company, by its well-financed parent, and that the plaintiff was wholly reliant on funding from its parent.

34. This brings into sharp focus that the deliberate use of €1 special purpose companies in these types of corporate structures has the effect of insulating their backers from the downside of any future litigation regarding the activities of that corporate structure, while benefiting from all the upside (if a court were not to order security for costs).

35. It is this Court's view that this reality of the use of special purpose companies, by well-financed parent companies or individuals, needs to be borne in mind, to ensure that the privilege of limited liability, which was originally introduced to encourage enterprise and risk-taking in the interests of creating employment and the growth of the economy, is not used as a tool to

impose massive *irrecoverable* litigation costs on defendants, irrespective of the outcome of the litigation. This latter effect is not in this Court's view the purpose of limited liability.

36. In this case, one is dealing with well-resourced or insured defendants, but it could just as easily have been an uninsured individual (who was selling the Site) having to defend the litigation and being faced with '*something less*' than justice, when faced with the unenviable choice of on the one hand settling for a large sum or on the other hand facing a huge irrecoverable cost if it won the litigation.

THE LAW APPLICABLE TO SECURITY FOR COSTS

37. There was no dispute between the parties regarding the principles applicable to security for costs. In brief, an application for security for costs against a company is made under section 52 of the Companies Act, 2014 which states:

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

38. This section grants a court the discretion to order security for costs. However, as noted below, the default rule is that, where a corporate plaintiff has little or no assets, a court will order security. It is clear that the ordering of security in such circumstances is regarded as the price that companies pay for the privilege of limited liability. As noted by Clark J. at paragraph 4.19 of the Supreme Court case of *Farrell v. The Governor and Company of the Bank of Ireland* [2013] 2 ILRM 183, shareholders in a company, with limited liability, get the benefit of the litigation if it is successful. However, he correctly observed that this then logically leads to the question:

“Why should the parties who are going to benefit by a successful action not also be exposed to the costs of failure. That is the underlying rationale for corporate security for costs.”

39. In light of this logic, the default rule is that companies with limited liability are required to provide security for costs. As noted by O’Donnell J. in the Supreme Court case of *Quinn Insurance Ltd (Under Administration) v. PricewaterhouseCoopers* [2021] IESC 15 at para. 12, there is an injustice to a defendant, who wins her case, in not being able to recover her costs from a corporate plaintiff with no assets:

“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.**”
(Emphasis added)

40. The ‘*distorting effect*’ for a defendant of being sued by a plaintiff with no assets is particularly extreme in the High Court where irrecoverable costs can be tens of thousands, hundreds of thousands or, as in this case, millions of euro.

41. It is easy to imagine just how threatening and ‘*distorting*’ and unjust this must feel for a defendant (whether an uninsured individual or a well-resourced company) faced with a claim, even if it is a stateable or arguable claim. This feeling of injustice and grievance arises in all litigation, whether it is a small business being sued by an individual, without assets, for alleged personal injuries or a large business being sued by a company, without assets, for alleged negligent misstatement (as in this case).

42. O’Donnell J., at para. 12 in *Quinn* also dealt with the aggravating situation where not only is the plaintiff a company without assets, but it is one with wealthy shareholders or backers:

“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.**” (Emphasis added)

43. This comment is echoed in the Supreme Court case of *Farrell* where, in the context of an individual plaintiff with little or no assets, Clarke J. stated at para. 4.12 that:

“If there were not provision **requiring generally for the payment of costs to the successful party** then there would be a real risk that the bringing or defending of

proceedings could be used as a **form of unfair tactic little short, at least in some cases, of blackmail**. A plaintiff could threaten proceedings which would undoubtedly put the defendant to significant cost in the **hope that the defendant would buy off the case (even it was wholly unmeritorious) so as to avoid having to incur the costs of defending**. If it were not possible, ordinarily, to recover costs on behalf of a defendant in respect of a failed claim then **such a tactic could easily be adopted by many unscrupulous parties**. Likewise, a defendant, with no real defence, could implicitly threaten a plaintiff with a defence by trench warfare which would greatly increase the costs of the plaintiff establishing his rights and entitlements and thus, in truth, devalue those rights and entitlements by placing an unreasonably high price on their establishment.” (Emphasis added)

Being sued by a plaintiff without assets is akin to highwaymen/blackmail

44. These comments from these two Supreme Court decisions spell out in plain English what is actually happening when a plaintiff with no money to pay a defendant’s enormous legal costs, institutes proceedings, particularly in the High Court, whether the claim is unmeritorious or arguable. To use the Supreme Court’s expression, that plaintiff is effectively blackmailing a defendant into a settlement for a sum, less than the sum that she will have to pay in legal costs to ‘win’ the case.

45. In this *‘blackmail’*, the key issue for the defendant is often not the substance of the claim (which she may believe to be without merit), but the irrecoverable legal costs which will be saved by the defendant settling, be that a sum in the tens of thousands, hundreds of thousands or millions of euro.

46. Therefore, the key lever in the settlement of such a case will often not be the merits of the case but the massive legal bill, which will have to be incurred to defend the claim, and which will never be recovered by the defendant, win, lose or draw.

47. If one was analysing this type of litigation as a ‘business model’ it would be clear that the key ingredient in the success of the ‘business’ (i.e. in the high price obtained for settlements) will often be, not the merits of the claim, but rather that our current system of litigation facilitates large settlements, by ensuring that proceedings can be instituted in the High Court, which is by far the most expensive court in which to litigate.

48. As noted by the Supreme Court, this cannot be the administration of justice. It follows that it is incumbent on the courts and the legislature, in light of these stark comments by the Supreme Court, to take whatever steps are necessary to ensure that true justice, rather than something short of justice, is achieved by reducing/eliminating the blackmail/highwayman element of litigation which arises every time an individual, small business or large corporation is sued by a plaintiff without assets, whether an individual or a corporate entity.

49. This could be done by ensuring (a) that plaintiffs have at least some financial disincentive (or some ‘skin in the game’) if they lose, rather than the current situation where they have everything to win and nothing to lose and (b) seeking to reduce legal costs (as recommended most recently by the *Kelly Report*) and (c) by ensuring that as many disputes as possible are heard in first instance courts (i.e. the District and Circuit Court) where legal costs are not as prohibitively high as in the High Court.

Proportion of District/Circuit to High Court in Ireland out of sync with England & Wales

50. In this regard, it is to be noted that the structure of the High Court and other first instance courts is not the pyramid structure that one might expect. Such a pyramid structure would ensure that there are much more judges in less-expensive District and Circuit Courts, so that only a small proportion of cases are heard in the most expensive court of first instance (the High Court).

51. Rather than a pyramid structure, there are in fact more High Court judges (45) than Circuit Court judges (39) and only 40% more District Judges (63) than High Court judges.

52. This is in stark contrast to England and Wales, where, in broad terms, the number of District judges and Circuit judges is many multiples of the number of High Court judges, with approximately 400 District judges versus approximately 600 Circuit judges versus only *circa* 100 High Court judges.

53. Since the Supreme Court has drawn attention to the fact that plaintiffs can ‘*blackmail*’ defendants using legal costs, it is arguable that this blackmail is facilitated, to a greater degree, in Ireland than it would be in England and Wales. This is because the very low number of District and Circuit judges in Ireland, relative to High Court judges, suggests that it is much more likely that a dispute in Ireland will end up in highest and most expensive court of first instance, than a comparable dispute in England and Wales.

Legislation which obliges litigants to issue proceedings in the High Court

54. This blackmail issue, identified by the Supreme Court, regarding litigation costs in the High Court is exacerbated by the practice of regularly providing in each new piece of legislation for recourse to the High Court (sometimes regarding relatively minor matters), rather than the District Court or Circuit Court. By providing that an appeal or judicial review lies to the High Court, rather than the District or Circuit Court, it increases a hundred times (compared to the District Court) or ten times (compared to the Circuit Court) the cost to citizens of vindicating their rights. (e.g. the right of a person to appeal a decision of the Information Commissioner to the High Court under s. 24 of the Freedom of Information Act, 2014). Such litigants are faced with the massive costs which the *Kelly Review* noted are associated with litigating in the High Court for sometimes relatively minor matters such as freedom of information (relative, that is, to matters which on a daily basis are heard in the District and Circuit Courts, such as removing children from the care of their parents (District Court) and manslaughter (Circuit Court.))

Massive change in ratio of High Courts to District Courts in recent decades

55. It is relevant to note that this absence of a pyramid structure in Ireland, which favours disputes being resolved in the court with the highest cost (the High Court), is a relatively new phenomenon. For example, in 1955, there were seven High Court judges and 30 District Court judge. This is a ratio of 7 High Court judges to 30 District Court judges compared to the current ratio of *circa* 2 High Court judges to 3 District Court judges. This is a massive change in the ratio of expensive litigation to inexpensive litigation (in favour of expensive litigation) over the last number of decades that appears to have occurred without extensive comment.

THE SECURITY FOR COSTS TEST

56. The test for whether to grant security for costs was set out by Clarke J. in the Supreme Court decision in *Usk and District Residents Associations Ltd v. The Environmental Protection Agency* [2006] IESC 1 at para. 6.2:

“In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:

- (a) that he has a prime facie defence to the plaintiff’s claim, and
- (b) that the plaintiff will not be able to pay the moving party’s costs if the moving party be successful;

In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus vests upon the party resisting the order.”

57. As referred to previously, this means that that the default rule is that security is ordered where a corporate plaintiff does not have sufficient assets to pay the defendant’s costs (assuming that the defendant has a *prima facie* defence).

58. However, it is clear from *Usk* that this default rule may be displaced if there are special circumstances which would justify a departure from this rule. It is also clear from the *Quinn* case at para. 8.13 of Clarke C.J.'s judgment that there is 'a heavy onus' on a corporate plaintiff without assets to explain how these circumstances are such as to justify a departure from the default rule and instead permit that plaintiff to effectively be allowed to litigate for free, while the defendant has to pay his own legal costs, win, lose or draw.

ANALYSIS

59. The first step of the test as to whether to order security for costs is to ask whether the defendant has (or in this case, all the defendants have) a *prima facie* defence. The second step in the test is conceded by the plaintiff, namely that it will not be able to pay the defendants' costs if they win the litigation.

60. Accordingly, if the defendants have a *prima facie* defence, security for costs will be ordered against the plaintiff, unless special circumstances can be shown to exist which justify the Court in exercising its discretion not to make such an order, which is the third step in the test to be considered.

61. The defendants in this case can be grouped into four categories, since four separate motions for security for costs were brought. These were brought on behalf of

- (i) the first defendant ("Mullins") and the second defendant ("Mr. Mullins"),
- (ii) the 3rd to 9th defendants (the "Vendors"),
- (iii) the 10th defendant ("Gallagher Shatter"), which solicitors' firm acted for the third defendant ("Delbourne") and
- (iv) the 11th defendant ("Clark Hill"), which solicitors' firm acted for Mullins.

Plaintiff not pursuing special circumstance that inability to pay caused by defendant

62. During the course of the plaintiff's submissions it also became clear that it was not pursuing the special circumstance that the defendants had caused the plaintiff's inability to pay the defendant's legal costs (if the defendants were to win).

63. This was because the plaintiff is, and always was, in effect a €1 company, as it never had any net assets, as it was incorporated shortly before the closing of the sale of the Site solely for the purpose of acquiring the Site and has never traded. Accordingly, on its balance sheet, the only items were the value of the property which it had purchased, which was cancelled out by the amount of borrowings (of equal value, to the value of the property) taken on by the company to acquire the property. Hence its balance sheet has in effect a net zero value.

64. It follows that the plaintiff would never have been in a position to pay the defendants' legal costs and so it could not be said that, were it not for the alleged wrongdoing of the defendants, the plaintiff would have been in a position to pay the defendant's legal costs. Accordingly, this particular 'special circumstance' does not exist to relieve the plaintiff of the default obligation to provide security for costs.

Plaintiff not claiming special circumstance that litigation will be stifled if security ordered

65. Similarly, it became clear during the course of the plaintiff's submissions that it was not claiming, as a special circumstance, that the litigation would be stifled if it was required to provide security for costs. In particular, uncontroverted submissions were made on behalf of the defendants that the defence, by the plaintiff to this security for costs' application, was being funded by the plaintiff's well-resourced parent. Furthermore, no evidence was provided on the part of the plaintiff that the litigation would be stifled if an order was made for it to provide security for costs.

Plaintiff is claiming special circumstance that it must win against one defendant

66. The special circumstances which the plaintiff is relying upon are those set out in the decision in *Valebrook Developments Ltd (in Receivership) v. Keelgrove Properties Ltd* [2011] IEHC 173, namely that the plaintiff is guaranteed to win against one of the defendants. On this basis, the plaintiff claims that this is a special circumstance in which full security for costs should not be ordered. The plaintiff claims that, as it is highly probable that it will be successful against at least one of the defendants, it would be unfair for security for costs to be ordered against *all* the defendants.

67. The plaintiff conceded that all the defendants, save for Mullins and Delbourne, had a *prima facie* defence to its claim. Accordingly, the first issue to be considered is whether Mullins and Delbourne have a *prima facie* defence, which requires some analysis of the merits of the case

68. The second issue to be considered, overlaps with that issue as it also requires some consideration of the merits. This is because if all the defendants have a *prima facie* defence then full security for costs will be ordered against the plaintiff in relation to all the defendants, unless this Court can conclude that there is a ‘*high degree of likelihood*’ (per Clarke J. in *Valebrook* at para. 3.10) that the plaintiff will be successful against at least one of the defendants. This is entirely logical because if a plaintiff is highly likely to win against one of the defendants, it would be unfair that this plaintiff, in order to litigate, would be required to provide all defendants with security for costs.

69. To answer both of these issues it is necessary to briefly refer to the merits of the plaintiff’s case.

The merits of the plaintiff’s case

70. The plaintiff agreed to purchase the Site in James Street under the terms of a contract dated 1st March, 2019 with Delbourne, the third defendant, which is owned/controlled by the fourth, fifth, sixth and seventh defendants. The eighth defendant, (“CPMDM”) had an option

to purchase that site which it assigned to Delbourne, to facilitate the sale. Mullins, the first defendant, was the owner of the Site and it agreed with Delbourne to facilitate the sale of the Site to the plaintiff by means of a sub-sale, rather than Delbourne having to acquire the site from Mullins for a sale on to the plaintiff (thereby leading to a saving for Delbourne on stamp duty). Mr. Mullins, the second defendant, is being sued because, inter alia, he swore, on behalf of Mullins, a statutory declaration that no easements affected the Site.

71. Next to the Site is a hostel which is called Tathony House, and which is owned by Tathony Holdings Limited. The property and its owners are, for ease of reference, referred to herein as “Tathony House”. When planning permission was sought for a hotel to be built on the Site, Tathony House objected on 27th October, 2017 by way of a third party appeal to the planning permission on the basis of its effect on its property rights and, in particular, its effect on the amount of natural light entering Tathony House, i.e. an alleged easement of light (through an ancient right to light, prescription at common law and at statute and by virtue of Part 8 of the Land and Conveyancing Law Reform Act 2009).

72. Despite these objections, the planning permission was granted by An Bord Pleanála on 9th May, 2018. However, Tathony House initiated a judicial review of An Bord Pleanála’s decision on the 9th July, 2018. This challenge was brought on the grounds that An Bord Pleanála had failed to take account of the alleged easement of light claimed by Tathony House. These proceedings were discontinued and struck out by order dated 2nd October, 2018.

73. The sale of the Site to the plaintiff closed on 9th April, 2019. However, shortly thereafter Tathony House initiated proceedings against the plaintiff seeking an injunction to prevent the plaintiff from building the hotel in view of Tathony House’s alleged easement of light. These proceedings were settled between the plaintiff and Tathony House. Subsequently, on the 14th May, 2021, the plaintiff entered a contract for the sale of the Site to a third party, which was completed on 21st June, 2021. This resulted in a loss to the plaintiff in relation to its dealings

with the Site, since it received the sum of €5.25 million, which is considerably less than the €7.2 million it had paid for it. The difference between these two prices forms part of the plaintiff's claim for damages against the defendants.

74. The plaintiff's key complaint in these proceedings is that draft replies to the Law Society's Requisition 14.6 was issued on behalf of Mullins in the following terms:

"Is there any litigation pending or threatened or has any court order been made in relation to the property or any part of it or the use thereof or has any adverse claim thereto been made by any person? If so, furnish details.

Reply: Vendor says no."

75. Similarly, the plaintiff complains that Delbourne also replied to this same requisition in identical terms, i.e.

"Is there any litigation pending or threatened or has any court order been made in relation to the property or any part of it or the use thereof or has any adverse claim thereto been made by any person? If so, furnish details.

Reply: Vendor says no."

76. In particular, the plaintiff claims that Mullins and Delbourne (and their solicitors) misrepresented to the plaintiff that there was '*no adverse claim*' made against the Site by any person, when there had in fact been a judicial review by Tathony House to the grant of planning permission for the building of the hotel.

77. The plaintiff claims that Tathony House's challenge to the grant of planning permission (which was that An Bord Pleanála failed to take account of its submission regarding its alleged easement of light) amounts to an 'adverse claim' regarding the Site, which both Mullins and Delbourne should have disclosed to the plaintiff and their failure to do so amounted to negligent misstatement.

78. The plaintiff claims that if it had been notified of this ‘adverse claim’ it would not have proceeded with the purchase of the Site. On this basis, the plaintiff claims that it has suffered a loss, made up of the difference between its purchase price of the Site in 2019 and its selling price in 2021, plus ancillary costs, amounting to a total of €4,026,040.43.

Do Mullins and Delbourne have a *prima facie* defence?

79. Mullins and Delbourne argue that a claim in judicial review proceedings that a State body did not take account of a submission, in reaching its decision, is a public law claim, rather than a private law claim, and is not an adverse claim against property and so does not fall within the terms of Requisition 14.6

80. In addition, one of the defences raised by Mullins and Delbourne is that there is an absence of causation between the alleged negligent misstatement and the loss suffered by the plaintiff. In particular, they claim that even if the answer to Requisition 14.6 had made reference to the public law claim, this would have made no difference to the plaintiff’s decision to proceed with the purchase. This is because the defendants claim that the plaintiff was (or should have been) aware of the potential for such a claim of an easement of light, yet it proceeded with the purchase of the Site.

81. The reason the defendants say that the plaintiff was, or should have been, aware of the alleged ‘adverse claim’ over the Site is because it is not disputed that the plaintiff examined the planning file in relation to the Site and that it received specialist professional advice prior to the purchase of the site, including from a light specialist.

82. In this regard, it is relevant to note that the submission on the planning file which was made on behalf of Tathony House (and so was available to the plaintiff) states the following, in relation to property rights and light issues, in a document dated 27th October, 2017 from Thornton O’Connor Town Planning (the advisers to Tathony House):

“[Tathony House] has **major justifiable concerns relating to the quantum of daylight that Tathony House will receive if the proposed development is granted** [...] the development represents overdevelopment of the site that if permitted will irrevocably seriously impact the amenities and property rights of [Tathony House’s] property.

[...]

The most significant concern for [Tathony House] is that the Proposed Development will have **a serious detrimental effect on the amount of daylight** that Tathony House will receive if Planning Permission is Granted.”

[...]

When analysing the Daylight Assessment submitted [with the planning application] , it was noted that in relation to Tathony House there are 2 no. location points assessed in terms of the daylight impact of the proposed development. Location Points G and H relate to Tathony House.

[...]

As demonstrated by Daylight Impact Results (Figures 3.1 & 3.2), it appears that assessment points G & H are at upper floor levels of the building, which would receive a greater infiltration of light than the ground floor level. We questioned the use of upper floor level rooms for this assessment , which to be robust should be based on a ‘worst case scenario’ and therefore ground floor level points (which contain apartment units) should have been taken.

[...]

[Tathony House] has now retained a Daylight Specialist, Mr. Chris Shackleton (report enclosed), who has advised that the Daylight Assessment submitted as part of the Planning Application is inconsistent in how it assesses daylight impact on various neighbours. The report did not test ground floor windows on [Tathony House's] property, only first floor windows which shows that 1 No. of the 2. No. first floor windows will lose 63% of its daylight... Mr. Shackleton considers that this loss of daylight should not have been defined as negligible... as the qualitative figures demonstrate a failure in accordance with BRE methodology.

He further notes that the BPG3 report submitted on behalf of the Applicant sought to define a revised Vertical Sky Component target of 9.1% as against the standard 27% by using Cow's Lane as a reference. He concludes that this is unacceptable as Cow's Lane is c. 2 km from the subject site and comprises a completely different context. Mr. Shackleton (referring to the table shown in Figure 3.2 above extracted from the BPG3 report) states:

‘the standard VSC (Vertical Sky Component) set as good practice in BRE guidance document is 27%. The proposed 9.1% represents only 1/3 of that value. If this is accepted, then it sets a new precedent and thus design target for other developments and for impact on neighbours.’

BPG3, using the 9.1% revised target, considered it acceptable that the proposed VSC would be 11.7% at Point G on Tathony House as a result of the proposed development, as Cromwell Land was compared to Cow's Lane where the ‘special’ target is 9.1% due to the surrounding 5-6 No. stories. Mr. Shackleton ‘finds no planning/urban guidance as to why Cow's Lane was selected other than it was a street that met a requirement to give a low VSC (daylight) values that met the applicant's development strategy.’

Window G on Tathony House Hostel (Figure 3.2 above) would experience a reduction of daylight by 63% (Existing VSC – 31.7%, Proposed VSC – 11.7%) which would cause a severe negative impact on [Tathony House], and fails to meet the BRE guidance standard VSC of 27%. Mr. Shackleton states that ‘this would be a very significant precedence for future development in Dublin City’, which will have a severe negative impact on [Tathony House] and other properties around the city if this precedence is set by granting permission for this aparthotel development.” (Emphasis added)

83. It is also relevant to note that in the letter dated 27th January, 2021 from the plaintiff’s solicitor to Crowley Millar (solicitors for the 3rd to 9th defendants), it is clearly stated that specialist light advisors were engaged by the plaintiff. This is because it is stated in response to a question (in Crowley Millar’s letter dated 20th January, 2021) whether the plaintiff received professional advice on the right to light issues prior to executing the contract for its purchase of the Site, that:

“Yes. The advisors noted that it was **not possible to give quick advice on right to light issues**, that an analysis could be prepared, but sought instructions as to the basis on which **a court might determine there had been an injury to a right to light**. In light of the representations furnished by Delbourne and Eoghan Kearney, our client understood there was no such basis.” (Emphasis added)

84. Mr. Mark Cosgrove, on behalf of the plaintiff, nonetheless claims that the plaintiff is entitled to recover damages from the defendants (for not disclosing that Tathony House took a judicial review on the grounds, *inter alia*, that its alleged easement of light was not properly considered by An Bord Pleanála). He does so on the basis that when the plaintiff received the replies to requisitions stating that there were not any ‘adverse claims’, the plaintiff’s concerns were ‘*allayed*’ (at para. 46 of his affidavit).

85. However, this was at a time when the plaintiff was in possession of details of Tathony House's appeal of the planning permission to An Bord Pleanála in which it provides very detailed and specific claims regarding the alleged diminution in light to various windows of the hostel as a result of the proposed building of the hotel.

86. It is also to be remembered that the claim being made by Tathony House was not a claim in private law against the owner of the Site that it had an easement of light. It was a very different right, in the sense that it was not claiming a property right, which is the focus of Requisition 14.6, against An Bord Pleanála. Rather it was a public law claim that a State body should have taken account, in granting the planning permission, the diminution of the light into Tathony House arising from the building of the proposed hotel, because of Tathony House's alleged easement of light.

87. In this context, despite the plaintiff having a copy of the planning file with all these details regarding Tathony House's claim of an alleged easement, and despite engaging light experts prior to the purchase of the Site, the plaintiff claims that the statement by Mullins and Delbourne that there was no 'adverse claim' against the Site (even though there had been a judicial review of An Bord Pleanála decision which was discontinued) allayed its concerns regarding any issues regarding an alleged easement of light, such that it proceeded with the purchase of the Site.

88. In particular, in its legal submissions the plaintiff claims that the plaintiff was engaged in a risk analysis when deciding to proceed with the purchase of the Site and the fact that the defendants failed to disclose the judicial review proceedings impacted upon its risk analysis, notwithstanding its engagement of its own experts.

89. At para. 1.04 of those submissions, it is stated:

"It is of course acknowledged that a baseline level of risk exists with respect to many urban property acquisitions that such easements may be asserted. However, the

statement to the effect that no such claims had been made, **afforded the plaintiff a false assurance as to the level of risk.** Crucially, the plaintiff has averred that disclosure of such a claim would have been decisive to its decision to go ahead with the project.” (Emphasis added)

90. At para. 4.09.4, it is stated:

“Delbourne further argues that **the plaintiff ought to have been aware that there was a risk of such an easement. That is not the issue.** That does not exculpate the giving of a false assurance regarding known risk. Mr Cosgrave has sworn that had the claim been disclosed, the plaintiff would not have proceeded. It was decisive.” (Emphasis added)

91. The key question for this Court, at this juncture, is not to decide whether the plaintiffs or Mullins and Delbourne will be successful at the trial of the action in relation to its defence, but whether the defence put up by Mullins and Delbourne amounts to a *prime facie* defence.

92. It does seem to this Court that Mullins and Delbourne do have a *prima facie* defence in the sense that it is not mere assertion. Instead, they rely upon claims which are backed up by evidence and in particular the fact that the plaintiff reviewed the planning file with the extensive references to Tathony House’s claim of a diminution of its light with considerable detail provided by Tathony House’s light experts. Furthermore, there is evidence that the plaintiff engaged its own light experts, which must have been for the purpose of advising on Tathony House’s claims regarding light in the planning process. Indeed, in its own submissions at para. 4.09.4, the plaintiff acknowledges, in effect, that for all these reasons it was well aware of the risk of there being such an easement of light.

93. It appears to this Court therefore to be at least arguable that in these circumstances the plaintiff was aware of the potential for a claim by Tathony House against the plaintiff, when it

came to building the hotel, regarding its alleged easement of light, even though the defendants failed to disclose the judicial review proceedings by Tathony House (which were discontinued).

94. For this reason, it must also be arguable that the plaintiff, in light of its engagement of its own experts, regarding the light issue, would have proceeded with the purchase, even if it had known about the claim by Tathony House in the judicial review proceedings. This is because it seems likely that those light experts would have advised of the risk of Tathony House having an easement of light and the impact of the building of a hotel on that alleged right.

95. This Court notes that the plaintiff claims that it was all about the level of risk and if it had known about the judicial review proceedings, it would not have proceeded with the purchase. However, this Court cannot conclude, at this interlocutory stage in the proceedings, before hearing any evidence, that the plaintiff would not have proceeded with the purchase of the Site if it had been advised of the discontinued judicial review.

96. In particular, this Court cannot conclude that Mullins and Delbourne do not have, even a *prima facie* defence, when they claim that the plaintiff's knowledge of the judicial review proceedings would have made no difference to its decision to buy the Site. This is because this Court cannot assume, at this interlocutory stage, that the evidence will support the plaintiff's claim that knowing about the judicial review would have led it to abort the sale, as one cannot say that discovery in this case might not reveal that the plaintiff did in fact consider the likelihood of Tathony House establishing that it had an easement of light and/or the risk of an injunction being sought by Tathony House.

97. It is at the very least arguable that the plaintiff's specialist advisers would have considered the risk of an injunction being sought by Tathony House, in light of the extensive objections made by Tathony House in the planning process regarding its easement of light.

98. Furthermore, Tathony House was never going to be seeking to establish property rights in a public law case, so whether public law proceedings issued or not would not have affected

to a considerable degree the key issue at stake, namely the legal analysis of whether the legal conditions were met for there to be an easement of light in private law proceedings, which issue may or may not have been considered by the plaintiff's advisers.

99. It is clear from para. 4.09.4 of the legal submissions, that the question of the risk of private law proceedings was always an issue for the plaintiff's advisers to consider, whether or not Tathony House brought public law proceedings (and discovery may indicate whether the risk of an injunction was considered by the plaintiff). This is because the forum to determine Tathony House's private property rights was never going to be public law proceedings against a State body, but rather private law proceedings against the owners of the Site.

100. On this basis, this Court concludes that Mullins and Delbourne have a *prima facie* defence, which defence is also available to all the other defendants, since it goes to an essential proof in the plaintiff's claim, namely that the loss was 'caused' by the alleged negligent misstatement by all defendants.

101. Since the plaintiff has conceded that all the defendants, save for Mullins and Delbourne, have a *prima facie* defence, it follows that, in light of this Court's conclusion that Mullins and Delbourne also have a *prima facie* defence, this means that all the defendants have a *prima facie* defence to the plaintiff's claim.

102. In light of the other concessions made by the plaintiff, the only way in which the plaintiff can avoid paying security for costs for each of the defendants is if it can establish the special circumstances that there is a high degree of likelihood that it will be successful in its claim against at least one of the defendants.

Is the plaintiff highly likely to succeed against at least one of the defendants?

103. The plaintiff is seeking not to have pay security for costs for all the defendants based on the special circumstances set out in *Valebrook* by Clarke J. at para. 3.5:

“There can be little doubt but that there are cases where, in the light of the position adopted by all parties, **a plaintiff is bound to succeed against one defendant** but fail against another. In the simplest of cases a plaintiff may sue two defendants in the alternative. Perhaps a case of an agent, who purports to act on behalf of a disclosed principal, but where the relevant principal denies the agent's authority, is a simple case in point. Assuming that the alleged agent accepts that he entered into the relevant obligation and purported to do so on behalf of the named principal, then it seems inevitable that the plaintiff will succeed against one or other but not both. If the agent had authority and the court so finds, then the plaintiff must succeed against the principal. If the agent had not authority, then the plaintiff must succeed against the agent for breach of warranty of authority. **I assume, for the purposes of the example, that there is no overall defence such as would avail both agent and principal.**

Again, to take a simplified version, it is possible to envisage a single case in which a corporate entity which was impecunious brought such proceedings. Both defendants might independently seek security for costs. Assuming the facts to be as I have stated them, it is difficult to see how the justice of the situation would be met by requiring the relevant corporate plaintiff to put up separate security for each of the defendants. The same security would be sufficient to meet the reasonable requirements of whichever defendant turns out to be successful. **There is no real basis on which it could be envisaged that the plaintiff would lose against both defendants** or otherwise be required to pay the costs of both defendants. Why then should the plaintiff be required to put up security beyond that which could reasonably be envisaged as being likely to materialise by way of liability?

I am satisfied, therefore, that, at the level of principle, it is appropriate for the court to consider, **as a special circumstance**, the possibility that a relevant plaintiff might suffer

an injustice by **being required to put up two sets of security when it is highly improbable that both could materialise.**” (Emphasis Added)

104. It seems clear to this Court that this special circumstance only applies to the plaintiff in this case if it is highly likely that it would win against at least one of the defendants.

105. In this regard, this Court has noted that there is at least one *prima facie* defence to the plaintiff’s claim, which is open to all the defendants. That defence is that it would have made no difference to the plaintiff’s purchase of the Site, if any of the defendants had notified the plaintiff of the claim made by Tathony House in the judicial review in relation to its alleged easement of light.

106. As already noted, this is a *prima facie* defence because of the plaintiff’s review of the planning file (containing details of Tathony House’s claim to an alleged easement of light) and because of the plaintiff’s engagement of light experts. For both these reasons it is arguable that the plaintiff was so well apprised of the risk of a claim by Tathony House of an alleged easement, that being told, as well, that Tathony House had brought a judicial review of the planning decision (which was discontinued) would have made no difference to the plaintiff’s decision to buy the Site.

107. Accordingly, the *prima facie* defence is that, despite this high degree of knowledge which the plaintiff had, it was happy to proceed with the purchase of the Site, and so would have done so, even if notified of the judicial review proceedings, which allegedly contained simply a different iteration of the claim of an alleged easement of light that had been made in the planning process, *albeit* as a public law claim, i.e. it was a claim that An Bord Pleanála failed to take account of that claim to an alleged easement of light.

108. It is important to note that if this defence is successful, it will be successful for *all* the defendants. While this Court cannot at this stage in the proceedings say with any certainty whether or not this defence will be successful at the trial, equally this Court cannot say that it

is highly likely that this defence will *not* be successful for one of the defendants. Yet being able to say that that it is highly likely that at least one of the defendants will not have a defence is a key condition for there to exist the special circumstances set out in *Valebrook*. Therefore, since the plaintiff cannot avail of the special circumstances (that it is highly likely to succeed against at least one defendant), it must provide security for the costs for all the defendants.

Phasing of the security for costs?

109. While the parties have deferred to a later date the issue of the quantum of the security to be provided, they have made submissions regarding the phasing of the security.

110. In this regard, it is clear from *Quinn* at para. 7.21 that it may be sensible for the court, in some cases, to direct security on a phased basis:

“In an appropriate case **it may, for example, be sensible for the Court**, where the proceedings are likely to be very expensive and protracted, to **direct security on a phased basis** so that the matter can be reviewed from time to time in light of developments in the case. Likewise, there may be circumstances where ordering security in the form of an indemnity from those who can be shown to be likely to benefit should the proceedings be successful may be an appropriate form of security even where those persons might not necessarily be a mark for all of the costs which might be awarded. To take but a simple example, if it were the case that an individual could bring proceedings without having to give security for costs, where is the injustice to a defendant if a corporate vehicle of that same individual, which was impecunious, could bring similar proceedings with the benefit of an indemnity from the individual in respect of the costs which might be awarded against the impecunious corporate vehicle should the defence succeed. Such a defendant would be no worse off than were it sued by an individual in exactly the same circumstances. These are matters which a court should

consider in attempting to minimise the overall risk of injustice. That being said, **it should also be recognised that failing to provide full security does expose a defendant to the almost certain consequence that a successful defence of the proceedings will nonetheless leave that defendant with irrecoverable costs and thus a significant detriment.** I would consider, therefore, that the **default position should continue to be that full security in monetary form should be provided** but that the Court may depart from that position if it considers it necessary and appropriate so to do to minimise the risk of injustice across the board.” (Emphasis added)

111. It is clear that to depart from the default rule of providing full security, there must be a basis for so doing. This is because if this Court were to relieve the plaintiff of the obligation to provide full security for the defendants’ costs, the only parties at risk are the defendants, to the extent, if any, that they incur legal costs which are not covered by the first phase of the security provided.

112. The plaintiff is not exposed to any financial risk in these circumstances. Accordingly, it seems clear that there must be a good evidential basis for departing from the default rule that there should be a ‘level playing field’ by putting the defendants alone at some degree of risk that the portion of security provided may not in fact cover their entire legal costs.

113. In this case, the plaintiff has sought a phasing of the security until the end of the discovery phase.

114. However, no compelling evidence has been provided to the Court that it was likely that discovery would lead to a ‘watershed’ or ‘gotcha’ moment for the benefit of plaintiff, such as to justify a phasing of the security for the benefit of the plaintiff, and to the potential detriment of the defendants, so as to justify a departure from the default rule.

115. Indeed the only evidence regarding discovery before the Court is the explanatory note issued by the plaintiff’s costs accountant, *Behan and Associates*, dated 12th May, 2022 in which

the point being made appears to be that the discovery in this litigation is not likely to be an issue, since it is stated that discovery *'should not be unduly onerous nor overly contentious, such that it will be unnecessary (sic) to trouble the Court with Motions for Discovery.'*

116. Accordingly, this Court does not see any basis for departing from the default rule that the plaintiff is required to provide full security for the defendants' costs (by providing for phased security up to the end of the discovery phase).

Phasing of the security for costs until the mediation stage?

117. Phasing of the security for costs up until the mediation stage is somewhat different from phasing of the security up to any other stage of the proceedings.

118. This is because in every case, regardless of the respective strengths of the parties' claims, mediation offers a realistic prospect of the case being settled. It is very different therefore from a claim by a plaintiff that discovery will be a key moment in the litigation, for which evidence would have to be provided to the Court, before the Court would order a phasing of the security up until the end of the discovery stage.

119. With mediation, no evidence needs to be provided to a court that it is a 'watershed' moment. This is because mediation, if entered by the parties, has the potential to be the key moment in almost every dispute (in the sense that it will possibly/probably lead to the resolution of the dispute). Of course, one party may provide evidence to the Court that in the particular circumstances of their case, mediation is highly unlikely to be successful, in which case mediation could not be a 'watershed' moment (and phasing of the security to the mediation stage is unlikely to be ordered).

120. There is another reason why mediation is different from other 'watershed' moments in litigation. This is because there is a public interest element to cases being settled by mediation, rather than being litigated. Accordingly, every encouragement should be given to parties to

settle their own disputes without unnecessarily using court time, which is paid for by the taxpayer.

121. In addition, of course, there is the public interest in freeing up court time to deal with other cases which are being delayed due to insufficient court resources (See *Novartis v. Eli Lilly* [2021] IEHC 814 at para. 7 where the shortage of High Court judges was starkly illustrated by the fact that of the six rapes/murders listed in the Central Criminal Court to open on 8th November, 2021, just one got on for hearing).

122. In all these circumstances, it seems to this Court that an important encouragement for parties to settle their own disputes, may include, where appropriate, the phasing of security for costs orders up to the mediation stage of a dispute.

123. In this case, the plaintiff argued that the Court might consider phasing security up until the end of the mediation stage, on the basis that mediation is in many cases a watershed moment and counsel for the plaintiff argued that it was virtually unheard of that cases like this one would not go to mediation, which submission was not controverted by the defendants.

124. On this basis, the plaintiff argued that that it was appropriate for the Court to consider phasing the security until that stage.

125. However, it is important to note that in this particular case, the plaintiff did not argue that there should be a phasing of the security until the end of the mediation stage alone. Rather it argued that there should be phasing of security up until the end of the discovery *and* mediation stage. However, this Court has now determined that there is no basis for phasing of security up until the end of the discovery stage.

126. In these circumstances, and since the parties have deferred until a later hearing the amount of security which will be provided by the plaintiff, it seems to this Court that, at that hearing this Court can consider any submissions which the parties may wish to make on how

a phasing of the security might work, if the Court were to order it, to the end of the mediation stage.

127. In particular, and in light of the voluntary nature of mediation, this Court will hear from the parties regarding what form a phased security for costs order might take.

CONCLUSION

128. This Court has concluded that the plaintiff is not entitled to inflict €3 million in legal costs on the defendants, which the defendants will never recover were they to win the litigation. The only way in which to avoid such a situation, when a plaintiff has no assets, is by requiring that plaintiff to provide security for the defendants' costs, which this Court will now order.

129. It is important to note that there is no injustice being visited upon the plaintiff by requiring it to provide security for the costs of the litigation it wishes to pursue against the defendants.

130. Indeed, this is simply a basic principle of fair-play that there should be a level playing field in litigation between plaintiffs and defendants, such that it is win/lose for both parties and not lose/lose for the defendants and win/no lose for the plaintiff.

131. Indeed, if the plaintiff's submissions are to be believed, then the plaintiff feels that it has a very clear case for damages of €4 million and is guaranteed to succeed against one of the defendants. If this is indeed its belief, it should be able to obtain €3 million funding from its parent company for the security for costs, in order to 'collect' the €4 million in damages from the court proceedings.

132. However, the reality is of course very different and litigation is a completely unpredictable business - see for example the case of *Minister for Justice & Equality v. Sciuka* [2021] IESC 80, where over the course of hearings in three different courts (the High Court, the Court of Appeal and the Supreme Court), the applicant eventually won, even though five out of nine judges found against him (one in the High Court, three in the Court of Appeal and

one in the Supreme Court), while four of the nine judges (in the Supreme Court) found for the applicant.

133. That is why no matter how strongly the plaintiff feels that it is guaranteed to win, it may not in fact be such an easy matter for it to persuade its parent to part with *circa* €3 million from its parent to enter the ‘game of chance’, that is litigation.

134. However, it remains to be observed that, at least the parent of the plaintiff *has a choice* whether to spend €3 million on this ‘game of chance’. This contrasts with the position of the defendants (where this Court not to make an order for security for costs) and highlights perfectly why the courts should be so reluctant to allow a plaintiff with no assets to avoid providing security for costs. This is because if no security were ordered in this case, it would mean that the defendants *would have no such choice* regarding spending so much money on legal costs - a choice which remains open to the plaintiff and its parent.

135. Instead, the defendants would be forced against their will to spend €3 million in costs which, win, lose or draw, they would be guaranteed never to recover. This needs only to be stated to highlight how unjust this situation would be and why the Supreme Court has used such strong language, such as ‘*something less than*’ justice, ‘*blackmail*’, ‘*highwayman*’ and defendants having to ‘*buy off the case (even if it was wholly unmeritorious)*’ to describe the position of a defendant being sued by a plaintiff with no assets.

136. This would be in stark contrast to the plaintiff in such a situation, who would recover its costs if it won.

137. Save in exceptional circumstances, it is difficult to see how it could ever be just to force defendants against their will to spend €3 million in costs which, win, lose or draw, they are guaranteed never to recover.

138. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms

of any draft agreed court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).