THE HIGH COURT

[2022] IEHC 739

Record No. 2021/3551 P

BETWEEN

FANPLEX LIMITED

APPLICANT

- AND –

BANDAN PROPERTIES LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Brian O'Moore delivered the 7th day of November 2022

1. This is my judgment on the motion brought by the Defendant ("Bandan") seeking security for costs against the Plaintiff ("Fanplex"). It is arranged in the following sections;

A. Does Bandan have a Bona Fide Defence to the claim?

B. Has Fanplex established Special Circumstances to justify refusal of the motion?

C. Outstanding Issues.

2. It follows from the structure of the judgment that there are certain matters which are not in dispute. For example, it is not denied that Fanplex is impecunious and unable to pay costs awarded in Bandan's favour if these are in the amount put forward by Bandan or any similar amount. There is also a consensus about the principles to be applied in deciding the motion. As the application is one made under section 52 of the Companies Act 2014, this is not surprising. The onus of establishing the existence of a bona fide defence is on

Bandan. If this is done, and if impecuniosity on the part of Fanplex is established, the onus shifts to it to show that there are special circumstances which "justify the Court not ordering security " (paragraph 2.9 of the Fanplex written submissions). It is agreed that mere assertion that there is a defence is not sufficient. It is also agreed that, in seeking to establish "special circumstances" the requirements set out by Clarke J in Connaughton Road Construction Limited v Laing O'Rourke Ireland Limited [2009] IEHC must be met by Fanplex. Finally, it is not disputed that the potential stifling of these proceedings, together with the associated right of access to the Courts, must be taken into account in determining where the least risk of injustice lies.

A. DOES BANDAN HAVE A BONA FIDE DEFENCE TO THIS CLAIM?

3. The parties entered into a Joint Venture Development Agreement on the 28th of May 2018. Much stress is laid by Fanplex on the recitals to that agreement, which read;

“BACKGROUND

(A) The parties have come together with the intention of acquiring the Site, obtaining Planning Permission and developing out the Site by building a minimum of 80 housing units, in order to share in the profit.

(B) Bandan will make an offer to acquire the Site for an amount up to but not (without the agreement of both parties) to exceed 2,700,000 euro.

(C) Bandan will secure a loan of up to 3,000,000 euro to fund the acquisition of the Site and the planning application.

(D) The parties may decide to sell the Site following the receipt of Planning Permission or proceed to develop the Site.

(E) In the event that the parties agree to develop the Site, Bandan has agreed to appoint the Developer to procure the carrying out of the Development upon the terms set out in this Agreement."

4. Given the emphasis placed on this wording by Fanplex, it must be remembered that these are merely recitals which, on their face, set out the background to the contract. They are subject to the detailed operative terms of the agreement, which follow them.

5. As is clear from the recitals themselves, however, it was for Bandan to secure the significant loan required to buy the site which the parties intended to develop, and to fund the necessary planning application. Perhaps reflective of this obligation on Bandan, that company was entitled -under Clause 18 .1 (c) to terminate the agreement with immediate effect by giving notice that it could not secure financing for the development "on terms acceptable to Bandan." In October 2020, Bandan purported to exercise this right and so notified Fanplex. At the same time, Bandan stated that it would pay to Fanplex a 35% share of profit (after recovering all costs) from the sale of the site in Bettystown which the parties had intended to develop. Counsel for Fanplex described this offer as both an acceptance that Fanplex remains entitled to 35% of the net profits (notwithstanding the service of the notice of termination) and as "extraordinary and dishonest...In fact, this stated position appears to be more a tactical attempt by Bandan to stave off troublesome litigation rather than a concession as to the meaning of the contract. It was also carefully calculated, as is examined later in this judgment when the assertion of special circumstances is considered.

6. In the event that a valid notice is served under Clause 18.1, Clause 19 (b) provides;

“Bandan shall not be liable to make any further payments to the Developer under the terms of this Agreement except Bandan shall within 10 Working Days pay to the Developer the costs of all construction works completed and carried out and provided pursuant to this Agreement as certified by the Architect.”

As it happens, no construction works were carried out on the site

7. Bandan's position, therefore, is that it served a valid notice under Clause 18.1, that the agreement thereby comes to an end, and that Clause 19 extinguishes any liability to make further payments to Fanplex. This represents a coherent defence to Fanplex's claim. Counsel for Fanplex disputes that this amounts to a bona fide defence for three reasons.

8. Firstly, it is submitted that the bona fide defence claimed by Bandan amounts to mere assertion. That is not so. In his final affidavit, Paul Doody (one of Bandan's deponents) sets out in detail his evidence as to the efforts to obtain financing, the engagement with a number of different potential financiers, the terms available (when they were available) and the reasons why any available terms were not acceptable to Bandan. While Mr. Meade (Fanplex's deponent) disputes much of Mr. Doody's evidence, it is not appropriate at this stage to determine on the differences between the witnesses. It is enough that Bandan has given detailed and plausible evidence that describes a defence to Fanplex’s claim.

9. Secondly, it is submitted on behalf of Fanplex that, in terminating the agreement pursuant to Clause 18, Bandan must act reasonably. In that regard, reliance is placed on Clause 3.2 which reads;

"All decisions as to borrowing and creation of security will be made by Bandan (acting reasonably) in accordance with the terms of this Agreement."

Even if this means that Bandan must act reasonably in deciding whether or not an offer of finance is acceptable to it, which is by no means a sure proposition given the terms of the agreement, the evidence of Mr. Doody meets this standard (albeit on a prima facie level). Even if it did not, I would have concluded that the dispute about whether or not the acceptability of the finance to Bandan (which is the relevant question) must be assessed objectively itself gives rise to a question which Bandan can certainly credibly argue. On this specific issue, therefore, Bandan has a prima facie defence.

10. Thirdly, counsel for Fanplex argues that a bona fide defence is not established because no documents are exhibited by the Bandan deponents setting out the attempts to obtain finance or the nature of the facilities offered. In my judgment in Be Spoke Capital v Altum Capital Management LLC [2022] IEHC 524, I set out some reasons why demands for documentation at this stage of proceedings are unlikely to be justified. This is not least because such an approach risks turning an interlocutory motion into a mini trial of the action, which on all the authorities is precisely what it is not to be. A sufficiently full description of the facts can establish that a bona fide defence exists, even if documents are not deployed to support it at this stage.

11. I therefore find that Bandan has established a bona fide defence to the extent that it is required to do so. I will now address the "special circumstances" asserted by Fanplex.

B. HAS FANPLEX ESTABLISHED SPECIAL CIRCUMSTANCES TO JUSTIFY REFUSAL OF THIS MOTION?

12. Fanplex relies upon a number of arguments to the effect that Bandan's wrongdoing is the reason why it is not in a position to meet any award of costs (at least at anything like the level suggested by Bandan). It also says that the open offer contained in the letter of the 10th of August 2020 gives rise to a special circumstance which justifies the refusal of the motion. Before considering these submissions, and in particular the argument that but for Bandan's wrongdoing Fanplex could meet Bandan's probable costs, it is necessary to assess what these costs are likely to be.

13. The only evidence on the quantum of costs was put up by Bandan. It is provided in a report from the firm of Peter Fitzpatrick, exhibited to an affidavit of Judith Halley sworn over a month before the motion was heard. Despite delivering two further affidavits (including one the day before the hearing) Fanplex did not provide any evidence challenging the Bandan figures; this is notwithstanding the fact that (in the first of these two subsequent affidavits) Mr. Meade swore (at paragraph 21);

"The claim to be entitled to 724,615 euro in costs is extraordinary given the nature of the claim and the amount at issue between the parties."

This assertion was either just Mr. Meade's opinion (in which case it is of no evidential value) or was based on some advice (which should be the case). If the latter, it is surprising that nothing was put before the Court indicating what the true level of costs was, in the view of Fanplex. There was certainly time to do so. In their written submissions, delivered 8 days before the hearing but after Mr. Meade's affidavit, counsel for Fanplex proceed on the basis that the sum which may be ordered is the sum claimed by Bandan (even though, at paragraph 2.21 counsel submit – without any evidence – that this amount "is entirely

unreasonable and purely speculative"). For example, at paragraph 2.8 counsel talk of Fanplex being required to "stake such an extraordinary sum as that claimed..." At paragraph 2.19, counsel submit that "...the loss concerned is sufficient to make the difference between the Plaintiff being able and unable to discharge the Defendant's costs..." For this submission to be meaningfully scrutinised, measuring the likely costs had to be done before deciding the motion.

15. I have set out at some length the background to the evidence on the quantum of costs as, after the hearing and after I had indicated my decision on the motion, a rather diffident application was made that Fanplex be allowed time for the preparation and filing of an affidavit on the amount of costs. I will return to this at the end of the judgment. However, on the uncontradicted evidence before me I have assessed the likely costs of Bandan from the bringing of the motion for security at 670,269.34 euro. In reaching this figure, I have taken into account the fact that a bill of costs is unlikely to be measured in the full amount initially sought, and that view is supported by some of the fees described. For example, I do not think that a refresher for senior counsel will be measured at 6,000 euro per day on a party and party basis. As against that, given the welter of unnecessary detail provided (by both sides) in the affidavits on this motion, the 6 day estimate for the trial appears to be (if anything) rather conservative. In all these circumstances, a 7.5% discount is to be applied to the Peter Fitzpatrick fees. No submission was made to me that any of the items listed in the Peter Fitzpatrick report should be completely excluded.

16. I will now deal with the detailed submissions of Fanplex on special circumstances. The first number of these are based on the premise that, were it not for the wrongdoing of Bandan, Fanplex would be able to meet an award of costs of 670,269.34

17. Firstly, Fanplex argues that Clause 5 of the agreement provides an Exit Option which, if exercised, would have left it with the ability to develop the site itself. There are two problems with this submission, on the evidence before me. These are;

(a) The Exit Option only became exercisable after the grant of Planning Permission. According to Clause 4.8 of the agreement, it is only after Planning Permission "which is satisfactory to both parties" is achieved that the parties "shall...offer to the other party the option to acquire the other party's interest in the Site at open market rates as per clause 5..." On the evidence, no such Planning Permission was ever obtained. The submission therefore contemplates a situation where the agreement continued on, and at some later stage a satisfactory Planning Permission within the meaning of Clause 4.8 is in fact granted. That may be at some unknown time in the future.

(b) More fundamentally, if the Exit Option had arisen, if it had been validly triggered by Bandan's actions, and if Fanplex had chosen to acquire the site, there remain two commercial conundrums as far as this submission goes. The first is whether Fanplex had, or would have had, the finance to acquire the site. As counsel for Bandan argued in the reply, "there isn't any evidence of committed proof of funds..." which would suggest that the site could have been acquired. Indeed, the level of funds required to exercise the option was unclear. Clause 5.2 allows a party to acquire the other's interest in the Site at market price "less the Development costs". These costs encompass the costs of acquiring the Site including interest which, for reasons I set out later in this judgment, appears to be greater than the value of the Site itself. Fanplex has not put forward any credible analysis of the Agreement which allows it to acquire the Site without this debt being addressed. As a result, Fanplex has not shown on the evidence that it is in a position to acquire Bandan's interest. The second is the level of profit that Fanplex might have made from its acquisition

of the site. Despite extensive evidence in the motion, there was no contemporary valuation and nothing about the cost of funds which would allow the court to assess what (if any) return would have accrued to Fanplex in the counterfactual underpinning this submission. The judgment of Clarke J in Connaughton Road Construction Road v Laing O'Rourke Ireland [2009] IEHC 7 makes plain the need for a plaintiff in the position of Fanplex to establish not only actionable wrongdoing of a defendant, but also a causal connection between such wrongdoing and a financial consequence for the plaintiff as well as "some specific level of loss in the hands of the plaintiff..." (paragraph 3.4). In Connaughton Road Clarke J noted the absence of cogent evidence showing – on a prima facie basis –that a sufficient return would have been made by the plaintiff but for the wrongdoing of the defendant. There is a similar lack of coherent evidence here. It might have been expected that some expert report might have been produced showing that the loss to Fanplex exceeded the sum which might be awarded to Bandan should the latter succeed in the action. Instead, counsel for Fanplex has tried to pull together an argument based on evidential fragments. Indeed, at one stage counsel made an oral submission reliant on the fact that this action was admitted to the Commercial List; if, it was argued, Bandan had suggested that the case had a value of over a million euro it followed that Fanplex's losses exceed that amount. This argument elides the difference between what is claimed and what the plaintiff can establish on evidence in this motion are (prima facie) its losses. The likely level of return to Fanplex on the acquisition of Bandan's interest is also uncertain as a result of the doubt, in the submissions made to me, as to exactly what is involved in invoking Clause 5.2.

18. I therefore find that Fanplex has not established that the loss of the Exit Option provisions has led to its inability to pay Bandan's costs.

19. The second argument is that Fanplex had a right to a profit share in the site if it is sold as developed or sold after Planning Permission is granted. This is set up as follows;

(a) The Recitals to the agreement states that; “The parties may decide to sell the Site following the receipt of Planning Permission or proceed to develop the Site.” Schedule 3 of the agreement states that; “Subject to clause 3 below, Net Profits after all financing charges will be split 65% to Bandan and 35% to the Developer.” The Developer was intended to be Fanplex.

(b) It is therefore submitted that Fanplex has “an acquired right” to a share in the profits, which “cannot be extinguished by the terms of this contract unless it says so somewhere...”

20. Even on this description of the argument, it is plain that it is an insufficient one for the purpose of seeing off this motion. Fanplex’s entitlement, even if it survives the provisions of Clauses 18 and 19, is to a share in Net Profits. These are the proceeds of sale after deduction of a whole range of costs including the cost of acquisition of the site, construction costs, professional costs, taxes and levies, and the costs of securing Planning Permission. Again, there is insufficient evidence to establish that 35% of Net Profits would exceed the amount of any costs that might be awarded to Bandan. Indeed, the evidence is that the value of the site is in the region of 3.75 million euro (the amount offered by an entity called Shannon Homes – Fanplex had proposed a *lesser* value when trying to buy the site itself). The sums advanced by Bandan to buy the site (and associated costs) were 3.16 million euro and Bandan has been paying interest at “approximately 30,000 euro per month” (paragraph 51 of the grounding affidavit of Judith Hally). On these figures, and given that the site was acquired in May 2018, the amount paid by Bandan in connection with the purchase of the site and associated costs exceeded 4 million euro at the time the

motion was brought. On these figures, there would be no Net Profits were the land to have been sold before development

21. The returns (were the site to be developed) are also highly speculative; counsel for Fanplex grounded his submissions on two single sheet projections both dated July 2020. One of these gives a "worst case scenario" of the selling prices for the units to be constructed on the site. The second gives a projected profit of 2,920,155 euro. However, as pointed out in Mr. Doody's evidence, this figure does not take into account the interest cost of about a million euro; this significantly affects the return to Fanplex. Even more importantly, this form of analysis does not meet the requirements of Connaughton Road. Extrapolating a return from two brief emails, outdated at the time the motion was heard, is not an approach on which the court can rely in determining whether special circumstances are made out.

22. It is also noteworthy that, given my findings on Bandan's likely costs, the projected profit figures would have to be exactly right for this alleged special circumstance to be established. The costs are 670,269.34 euro. The net profit on development would need to be 1,915,05.25 euro in order for Fanplex's 35% share to put it in funds to pay the costs; Fanplex has no other asset. The net profit (taking into account the omitted 1,000,000 euro interest liability) on the single sheet calculation would be 1,920,155 euro. If this projected profit slipped by a whisker over 5,000 euro, Fanplex's share would not be sufficient to meet Bandan's likely costs. This gossamer thin margin illustrates pointedly why properly worked projections based on "cogent evidence" are required in this case for Fanplex to discharge the burden upon it. Nothing close to this has been provided. This is particularly unfortunate given that, in Replies to Particulars, Fanplex informed Bandan that "expert evidence will be adduced regarding the precise expected profit after all expenses from the

development/completion of the project in accordance with the amended planning permission obtained in May 2021." If this evidence, as one would expect, was available even in summary form at the time of these Replies (which predate Fanplex's last two affidavits) it would have been helpful for Fanplex if it had been deployed.

23. Fanplex has therefore not established that its inability to pay costs arises from this alternate alleged wrongdoing on the part of Bandan.

24. One other wrongdoing is alleged to have led to Fanplex's inability to meet the costs of Bandan. It is this. In Replies to Particulars, Fanplex pleads that it has been at the loss of an "Agreed Management Fee" of 12,500 euro per month. This culminated in a loss of 300,000 euro by August 2020, to which is to be added a similar fee of 20,000 per month to be paid from then on by a "new investor on the replacement of Bandanna..."; paragraph 7 of the Replies. The evidence to this effect is remarkably thin. There is, as Mr. Doody points out, nothing in the agreement about management fees; this is unsurprising, as in his first affidavit Mr. Meade says that Mr. Doody asked him to keep the management fee "outside of the contract..." At paragraph 9 (d) of his first affidavit, Mr. Meade says;

"...this was not forthcoming despite repeated requests, only 4 payments were made to Fanplex, during the entire project covering a period of over 2 years. 2 payments were only released when I had to sign a personal loan for the monies despite Mr. Doody reassuring me that they could be regarded as payment of a Management Fee."

Ms. Haley, in reply, denies that there was any obligation to pay a management fee to Fanplex, avers that three loan amounts of 12,500 euro each were advanced to Mr. Meade personally, exhibits the loan documents, and points out that under the agreement any Development Costs will be disbursed by Bandan and that Fanplex was never actually appointed Developer. In response, Mr. Meade swears (at paragraph 14.iii of his second

affidavit) that there is a loss of Management Fees and other losses as claimed in the Pleadings... (including those set out in the Replies to Particulars). Mr. Doody responds by denying that there was any arrangement about management fees of the type alleged. Mr. Meade's final affidavit states that Mr. Doody's evidence "is rejected and has been addressed in my previous affidavit."

25. This alleged special circumstance did not feature prominently in the written or oral submissions on the motion. The sum claimed is not enough to show that Fanplex is unable to meet Bandan's costs because of this factor alone. At its absolute height, the management fees claim was worth (when the motion was heard) 560,000 euro. This is sufficient to find that this alleged special circumstance does not mean that the motion should be refused. However, there is also no evidence about the arrangement for the payment of a management fee of 20,000 per month by an alternative investor; simply vouching the accuracy of Replies to Particulars in generic terms is not enough. In addition, and without purporting to evaluate disputes in the affidavits, if it had to be decided I would have struggled to describe the Fanplex evidence on this matter as either cogent or coherent given its opacity and the oddness of the payment of "management fees" to the Plaintiff company being signed for by Mr. Meade as loans to him personally. Mr. Meade does not even describe what account these monies were paid into; his description of the transactions would have been assisted were he to have given evidence that the payments were made into Fanplex's bank account, which logically must have been the case.

26. While other financial arguments were raised (for example, the submission that Fanplex had - for unspecified reasons - a right to a 50% share in the Site) these were not pursued and were, in any event, unsubstantiated at this stage in the proceedings, at least. Three other submissions on special circumstances remain to be assessed.

27. It was submitted that it would be unfair, in a row about an asset in which both sides had an interest, if the happenstance that Fanplex is the plaintiff meant that it could not prosecute its claim. This was argued given that Bandan itself is a special purpose vehicle without net assets. This submission is misplaced. Bandan has purchased, with money it has procured, the site at Bettystown. Fanplex is making a claim that it is entitled to an interest in the site and/or damages from Bandan. However, the parties agreed to this structure of debt and resulting ownership. In those circumstances, it is no injustice that (if the other requirements are met) Fanplex should provide security in respect of Bandan's costs.

28. It was also submitted that, if security for costs is directed at the level sought by Bandan, this "would clearly bar the Plaintiff from pursuing its claim and would have the effect of stifling its claim"; written submissions at paragraph 2.23. This is true of many motions seeking security, and is not a decisive factor; Clarke CJ in Quinn Insurance v PWC [2017] IESC 73. I have considered the likelihood that these proceedings may not go further but, in all the circumstances of this case (which are described in some detail earlier in this judgment) I feel that the greater injustice would be caused by risking a situation where Bandan expends a very large sum on legal fees and expenses, wins the case, and is then left with a meaningless costs order in its favour. It should also be noted that, despite the strong language used by Fanplex's counsel in their submissions, nowhere does Mr. Meade say that the proceedings will be stifled in the event that security is ordered; it may not as a general rule be necessary for him to exclude the possibility that the security will be funded by the shareholders of Fanplex, though the prosecution of the claim to date has presumably been financed by someone. However, the categoric statements by Fanplex's lawyers that the action will be stifled should be grounded in some evidence to that effect.

29. An associated submission on the stifling of litigation was made (in Fanplex's written submissions) by reference to the judgment of Hogan J in Pagnell Limited v OCE Ireland Limited [2015] IECA 40. In that case, the Court of Appeal considered that the making of a "substantial open lodgement...can only be regarded as a tacit admission that the plaintiff's claim is significant and meritorious." This, the Court found, amounted to a special circumstance justifying the refusal of an order for security. The lodgement in that case (50,000 euro against a claim of 400,000 euro) was distinguished from an instance where what might be described as a tactical lodgement was made, as opposed to one which by its amount suggests that the claim is a well founded one. At paragraph 36, Hogan J describes such a tactical lodgement;

"A common example is where a defendant elects to make a small lodgement even in the face of an unmeritorious claim on the purely practical basis that it makes more economic sense to dispose of the claim in this manner at an early stage rather than endure lengthy litigation and thereafter attempt to recover any award of costs from an impecunious litigant."

30. The lodgement in Pagnell was relevant, the plaintiff submitted, as it was inconsistent with a bona fide defence. In much of the relevant part of the judgment this is the context in which the lodgement is being considered. On any view of the offer made in the current proceedings, I do not believe that its existence suggests that there is no bona fide defence or that the arguments to that effect are in any way diluted.

31. As observed at paragraph 29, the judgment in Pagnell concludes by describing the open lodgement not as a factor inconsistent with a bona fide defence but rather as a special circumstance; this circumstance is described as arising from recognition that the claim is

significant and meritorious and that. It therefore should not be stifled. The rationale is described by Hogan J at paragraph 41;

"The Oireachtas plainly did not intend that [the relevant section] would be utilised to suppress claims which the defendant by its very own conduct – namely, the making of an open lodgement for a substantial figure – must be taken to have acknowledged are meritorious and substantial in their own right."

32. Whatever about the general rule set out in Pagnell, its application to the facts of this case does not help Fanplex. The letter of the 10th of August 2020, sent on the same day as the termination notice, represented an effort to avoid litigation launched by an impecunious plaintiff before costs began to rack up. This is clear from the fact that what was on offer was, in principle, what Bandan characterised as the original deal but was also, in practice, unlikely to be of any monetary value. If the site was sold at the reserve of 3.65 million euro, the proceeds would have gone to repay Bandan's debt built up in acquiring the site (including interest on the acquisition costs). This reserve should be seen in the context of Fanplex's own valuation of the site (two months beforehand) at 3.1 million. Were the site sold at that value, there would have been nothing for Fanplex.

33. The letter of August 2020 bears a resemblance to the example given by Hogan J of a lodgement of little value designed to head off a claim which could be costly to defend. The letter may have been considerably more artful, but certainly does not connote acknowledgment of a claim of either substance or merit.

34. Having considered each of the alleged special circumstances, I have decided that neither individually nor collectively do they amount to reason to refuse the application.

C. OUTSTANDING ISSUES.

25. In summary, I have decided to direct Fanplex to provide security in respect of Bandan's costs in this litigation. In order to avoid Bandan being left with an order for costs which is inefficacious, either in whole or in part, the security to be provided is to be for the full amount of 670,269.34 euro. Had there been submissions made, or evidence provided, to the effect that Fanplex could provide security in a lesser sum I would have considered fixing the security in such a sum (provided it gave reasonable protection to Bandan) in order to accommodate Fanplex's right of access to the courts. However, no such representation was made notwithstanding as invitation to that effect by counsel for Bandan in opening the motion.

35. At the end of the hearing of the motion, counsel for Fanplex stated that, if the Court was against him on the question of security, he would want to make submissions "on the correct order that would be fashioned..." When giving my decision on the motion, I listed it for mention to see what further submissions were proposed. On that occasion, counsel for Fanplex applied for leave to deliver an affidavit on the quantum of costs. When asked why this had not been done before the motion was heard, counsel replied that there had been a change of solicitors and added that he was in the Court's hands. At no time did counsel say to what extent the proposed evidence differed from the affidavits on the likely question of costs which had already been put before the court.

36. While the solicitors for Fanplex had indeed changed, this occurred over six weeks before the motion was heard; this is made clear in Mr. Meade's second affidavit (at paragraph 38), where he explains (by reference to the change in solicitors) the failure to comply with directions about the delivery of pleadings. However, the new solicitors were on record for the delivery of the Statement of Claim, the Replies to Particulars, the delivery

of a Notice for Particulars, and the delivery of written submissions on the motion. Critically, the same solicitors were on record at the time the Peter Fitzpatrick report was exhibited with Ms. Hally's second affidavit and were acting for Fanplex when Mr. Meade's second and third affidavits were prepared, sworn and delivered. The reason given for the failure to address the likely costs appears to be without merit. In addition, as explained earlier in the judgment, to consider properly certain of Fanplex's submissions it was necessary to form a view about the likely costs to be secured. Finally, the motion had concluded and the decision given before any application was made to bring in this evidence. While declining potentially relevant evidence is something that any court or tribunal is loath to do, given the factors that are set out here the application to put in a further affidavit was refused.

37. There remain issues about the time for providing security and the precise form of the Order. In particular, Bandan sought an Order that security be made in 28 days and an Order striking out or dismissing the action should the security not be paid within that time. I will hear the parties on the form of the Order, the costs of the motion and any other relevant matter on the 8th of November 2022.