

THE HIGH COURT

[2024] IEHC 573
[Record No: 2021/652S]

BETWEEN:

AVENTIS SOLUTIONS LIMITED

PLAINTIFF

AND

CREDEBT EXCHANGE LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 9th day of October, 2024.

INTRODUCTION

1. This matter comes before me on an application for security for costs pursuant to Order 29 of the Rules of the Superior Court, 1986 (as amended).
2. The central dispute in these proceedings relates to the charging of a fee of £528,000.00 by the Defendant. This fee represents 3% of the money received by the Defendant from the UK Department of Health and Social Care on foot of the invoices traded between the parties. The Plaintiff also alleges that the Defendant incorrectly calculated the currency exchange balance in the sum of £65,610.49 and failed to apply a current exchange gain of £17,969.00 when it transferred £3,004,283.30 to the Plaintiff on or about 31st of July, 2020 in settlement of the parties' affairs. These claims are denied.
3. This application for security for costs was heard together with an application pursuant to s. 52 of the Companies Act 2014 and/or Order 29 in separate but related proceedings entitled *Credebt Exchange Limited v. Aventis Solutions Limited and Harry Parkinson* [2024] IEHC 572. In these separate but related proceedings, the Defendant sues the Plaintiff and a former employee of the Defendant in respect of an alleged unlawful disclosure of confidential documents by the said former employee which documents were then in turn deployed, it is claimed unlawfully, by the Plaintiff in the within proceedings.

4. Although there is an overlap in the applicable legal principles and the same legal team acted in both applications which were heard sequentially, the differences between the cases are such that it is necessary to make separate rulings on each application, each of which are delivered contemporaneously (See *Credebt Exchange Limited v. Aventis Solutions Limited and Harry Parkinson* [2024] IEHC 572.)

BACKGROUND

5. The Plaintiff is a limited liability company registered in England (company no. 07673288) with a registered address at Suite 7, The Colony Wilmslow, Altrincham Road, Wilmslow, England, SK9 4LY and is engaged in the business of medical goods supply and procurement.

6. In May, 2020, the Plaintiff entered into an agreement with the Department of Health and Social Care in the United Kingdom (the “Department”) to supply it with 42 million facemasks for use in combatting COVID-19 (the “Supply Agreement”). The monetary sum agreed to be paid under the Supply Agreement was GDP£18 million. Also in May 2020, the Plaintiff entered into an agreement with a Chinese Supplier (the “Supplier”) to purchase 42 million facemasks to be supplied to the Department (the “Purchase Agreement”) in discharge of obligations under the Supply Agreement. To comply with the Supply and Purchase Agreements, the Plaintiff required a short-term trade finance facility.

7. The Defendant is a private company limited by shares with a registered office in Dublin. It is a receivables exchange platform that provides sub-prime funding for businesses. The Defendant was approached by the Plaintiff for trade finance facilities permitting it to purchase medical goods (face masks) for onward supply to the Department of Health and Social Care in the UK. Following discussions, a trade finance facility was provided to the Plaintiff by the Defendant and a written agreement was executed.

8. Under the terms of the arrangement in place, payments on foot of the supply agreement were first paid to the Defendant who, following a reconciliation whereby fees due to the Defendant were deducted, in turn made payment to the Plaintiff.

9. By July, 2020 the parties were in dispute in relation to the deductions permitted under the arrangement and sums due to be paid out to the Plaintiff. Most notably, an issue arose as

to whether a fee was payable in respect of an invoice finance facility in the sum of 3% of monies received.

10. It is common case that a meeting was convened on or about the 29th of July, 2020 during which the Plaintiff entered into an agreement in writing (hereinafter referred to as the “Purported Settlement Agreement”) which it has subsequently contended is not enforceable against it and/or did not settle the dispute between the parties.

11. On or about the 31st of July 2020, after the execution of the Purported Settlement Agreement, the Defendant transferred £3,004,283.30 to the Plaintiff in accordance with its terms. The Plaintiff maintains that this figure was wrongfully reduced by the charge of an additional fee of £528,000.00 for an invoice service facility which was not properly due under the Finance arrangement. The Plaintiff further maintains that in calculating the sum due and agreed at the meeting on the 29th of July, 2020, the Defendant improperly made deductions in respect of an incorrectly calculated currency exchange balance loss in the sum of £65,610.49. The Plaintiff claims that properly a net currency exchange balance gain of approximately £17,969.00 ought to have been applied.

12. Based on these factors the Plaintiff maintains that the Defendant continues to owe it £611,579.49 and proceedings were instituted by summary summons in December, 2021 (some fifteen months after the July, 2020 meeting) but remitted to plenary hearing following an extensive exchange of affidavit evidence in which the Defendant disputed the Plaintiff’s claim and relied specifically on the terms of the agreement between the parties as reduced to writing and the Purported Settlement Agreement entered into in July, 2020. The Order (Holland J.) transferring the proceedings to plenary hearing was made on the 18th of July, 2022.

13. On the 3rd of October, 2022, the Defendant requested the Plaintiff to provide security for costs on the grounds that it was not aware that the Plaintiff, whose registered office is in the UK, had any assets within the jurisdiction or within the European Union which would be sufficient to satisfy an order for costs. On the 8th of November, 2022, the Plaintiff refused the request for security for costs. A Notice of Motion seeking an Order requiring the Plaintiff to provide security for costs issued in March, 2023.

NATURE OF THE CLAIM

14. In a Statement of Claim delivered in September, 2022, following the transfer of the summary proceedings for plenary hearing, the Plaintiff pleads that in or around late May 2020, the parties entered into an agreement wherein it was agreed that the Defendant would provide the Plaintiff with a short-term trade finance facility (the “Finance Agreement”). It is pleaded (para. 6 of the Statement of Claim) that it was an express and/or implied term of the Finance Agreement, *inter alia*, that:

- (i) The Defendant would provide the Plaintiff with a trade finance facility of £11,200,000.00;
- (ii) The Defendant would charge the Plaintiff the following fees:
 - a) A fee of 3% of the trade finance facility of £11,200,000.00, in the sum of £336,000.00;
 - b) An arrangement fee of €96,000.00;
 - c) A membership fee of €2,000.00 per month.
- (iii) The Defendant would transfer funds directly to the Supplier;
- (iv) As the Defendant is based in Ireland, the monies sent to the Supplier would be converted from Euro into Sterling;
- (v) Any fluctuations in the exchange rate between Euro and Sterling might lead to a positive or negative balance being applied to the account of the Plaintiff;
- (vi) The Defendant would receive the payments from the Department due to the Plaintiff under the Supply Agreement;
- (vii) After deducting its fees and applying any exchange balance to the account of the Plaintiff, the Defendant will transfer the balance of the payments received from the Department to the Plaintiff.

15. It is further pleaded (at para. 7 of the Statement of Claim) that on or about the 20th of July, 2020, the Defendant falsely claimed that an additional fee of £528,000GBP (the “Additional Fee”) for a finance facility, known as an ‘*invoice finance facility*’ and/or ‘*customer invoice facility*’, was due and owing by the Plaintiff to the Defendant pursuant to the Finance Agreement on top of the fees set out above.

16. The Additional Fee was 3% of the money received by the Defendant from the

Department. It is pleaded that it was never agreed that the Defendant would charge the Plaintiff an 'invoice finance facility' or 'customer invoice facility' fee or any other fee consisting of 3% of the money received from the Department pursuant to the Finance Agreement or otherwise. It is further pleaded that no 'invoice finance facility' or 'customer invoice facility' or other similar invoice finance service was requested by the Plaintiff from the Defendant and that none was provided. At paragraph 8 of the Statement of Claim it is pleaded:

“No service was provided by the Defendant to the Plaintiff in relation to which it purported to charge the Additional Fee.”

17. It is accepted by the Plaintiff and specifically pleaded (paragraph 11 of the Statement of Claim) that on or about the 29th of July, 2020, the Plaintiff, its servants and/or agents, met the Defendant, its servants and/or agents, to discuss, *inter alia*, the Additional Fee.

18. The Plaintiff pleads that the Purported Settlement Agreement is not enforceable or binding against it. It maintains that the Defendant threatened that unless the Plaintiff agreed to enter into a settlement agreement, which provided for a payment from the Defendant to the Plaintiff with, *inter alia*, the Additional Fee deducted and paid to the Defendant, the Defendant would not transfer any money to the Plaintiff and that accordingly the Plaintiff executed the Purported Settlement Agreement under economic duress (paragraph 12 of the Statement of Claim).

19. It is further pleaded (paragraph 13 of the Statement of Claim) that during the said meeting, the Defendant fraudulently and/or negligently represented to the Plaintiff that a currency exchange balance loss in the sum of £65,610.49 had to be applied and charged to the Plaintiff's account, further reducing the sum to be transferred by the Defendant to the Plaintiff. The Plaintiff maintains (also at para. 13) that the Defendant knowingly and/or wrongly charged and applied an incorrect currency exchange balance loss in the sum of £65,610.49 to the Plaintiff. The Plaintiff pleads that in fact, a currency exchange balance gain and not a loss ought to have been applied to the account of the Plaintiff (in the approximate sum of £17,969.00).

20. It is the Plaintiff's pleaded case that the Purported Settlement Agreement did not settle the within dispute due to, *inter alia*, not being supported by consideration, being

vitiated by duress and/or fraudulent and/or negligent statements misrepresenting the true currency exchange balance to be applied to the account of the Plaintiff and therefore has no legal effect and/or is void. It is pleaded that the Purported Settlement Agreement did not settle the dispute between the parties concerning the charging of the Additional Fee. The sum of £611,579.49 is claimed as due and owing.

21. In a full Defence delivered in November, 2022, the Defendant advances a preliminary objection in reliance on the Purported Settlement Agreement entered into in writing dated the 29th of July, 2020. It is contended that under the terms agreed all issues relating to the trade finance facility granted by the Defendant to the Plaintiff were settled in full and no further funds were due from the Defendant to the Plaintiff upon receipt by the Plaintiff of GBP £3,004,283.30. It is further pleaded that in accordance with the terms of the Purported Settlement Agreement, the Defendant paid the said sum in full and final settlement of the Plaintiff's claim. Accordingly, the Defendant maintains that the very subject of the within proceedings has been compromised by the Purported Settlement Agreement and the Plaintiff is estopped from maintaining the claim pleaded in the Statement of Claim.

22. In addition to this preliminary objection and defence argument, the Defendant denies the oral agreement contended for by the Plaintiff in its Statement of Claim and at paragraph 8 of its Defence relies on the agreement entered into in writing dated the 4th of June, 2020, between the Defendant and the Plaintiff (the "Master Agreement"), whereby the Defendant agreed to provide a trade finance facility to the Plaintiff in accordance with the terms of the Master Agreement. It is pleaded that clause 21.7 of the Master Agreement provided that it and any other documents entered into between the parties at the date thereof constitute the entire agreement between the parties, and overrides and supersedes all previous arrangements, representations, understandings and arrangements, written or oral, between the parties. It is pleaded that the contractual relationship between the parties to the within dispute is governed by the Master Agreement.

23. The Defendant relies at paragraph 8(c) of the Defence on the Revolving ETR Purchase Agreement ("RPA"), the terms and conditions of which provided that the Defendant was entitled to recover a sell rate of 3.00% on both the liability to purchase the products ("b-ETR") and on the receivables due from the United Kingdom Department of Health and Social Care ("d-ETR"). The RPA is claimed to have been accepted by the Plaintiff on the 29th of May, 2020 and to form part of the entire agreement between the parties.

24. It is denied in the Defence that the Defendant falsely claimed an additional fee of GBP £528,000 as alleged (at para. 9) and it is pleaded that the Defendant was entitled to charge the said sum in accordance with the terms of the trade finance facility granted to the Plaintiff which expressly and unambiguously provided that the Defendant was entitled to recover a sell rate of 3.00% on both the b-ETR and the d-ETR. It is further denied (at para. 10 of the Defence) that no service was provided to the Plaintiff by the Defendant and/or that it was not entitled to charge the fee of GBP £528,000 in accordance with the terms of the trade finance facility granted to the Plaintiff as alleged at paragraph 8 of the Statement of Claim.

25. It is specifically denied that the Defendant threatened the Plaintiff at the Settlement Meeting as alleged or that any unlawful economic pressure was brought to bear on the Plaintiff and/or that the Plaintiff executed the Settlement Agreement under economic duress. All wrongdoing in relation to sums charged in respect of exchange rate fluctuations in the sum of £65,610.49 is denied and it is pleaded that this sum was lawfully charged to the Plaintiff in accordance with clause 13 of the Master Agreement and the Terms and Conditions. It is pleaded that the reconciliation of the FX currency charges was explained to the Plaintiff at the Settlement Meeting. It is denied that the sum of GBP £611,579.49 claimed is due to the Plaintiff from the Defendant.

26. A Reply to Defence was delivered on the 24th of January, 2023 by the Plaintiff's former solicitors. In this, it is denied that the Master Agreement, RPA or Terms and Conditions bore the meaning or construction asserted by the Defendant, and it is specifically denied that the Defendant was entitled to charge a sum for an invoice service on the basis that no such service was provided.

27. In Replies to Particulars delivered in February, 2023 (Reply No. 5), a copy of the RPA relied upon in the Defence was provided. The Defendant contended that the terms of the commercial agreement with the Plaintiff were discussed and the RPA was presented before the Master Agreement was executed on behalf of the Plaintiff. It is pointed out on behalf of the Defendant that the RPA Offer's Terms and Conditions are hyperlinked twice on the RPA document. In its terms the RPA instructed the Plaintiff to "*carefully read and understand the RPA Offer Terms and Conditions*" and contained a link to the Defendant's "*Terms and Conditions a/Trading*" which it is contended contained, *inter alia*, detailed explanations of the services offered by the Defendant, defined terms and applicable policies. It was pointed

by way of Reply to Particulars that at paragraph 12 of the Affidavit sworn by one Mr. Farrell on behalf of the Plaintiff on the 14th of December, 2021 (in the summary judgment proceedings), he acknowledged that he had received the RPA. As further detailed in Replies to Particulars, at paragraph 16 of his said Affidavit, Mr. Farrell acknowledged that he had clicked on a link within the RPA labelled "*if this RPA Offer is generally acceptable to you*" to accept the terms of the RPA.

28. In further Replies to Particulars (para. 8) in response to a request for particulars relating to the reconciliation of exchange rates, it is specifically pleaded by the Defendant that the FX currency charges were explained to the Plaintiff at the Settlement Meeting on the 29th of July 2020, at which the Plaintiff settled in full and final settlement all issues relating to the trade finance facility granted by the Defendant. It is pleaded that at this meeting the Defendant provided the Plaintiff with a settlement document outlining the financial elements of the trade (Sell Rate, Margin call, FX, Arrangement Fee etc.), and explained each item in detail.

EVIDENCE GROUNDING APPLICATION

29. There was an exchange of some six affidavits in respect of this application - three sworn by one Mr. Reynolds on behalf of the Defendant to ground the application and three sworn by one Mr. Farrell on behalf of the Plaintiff to resist the application. There was no cross-examination on the affidavits.

30. In the affidavits sworn on behalf of the Defendant, the Defendant verified the factual underpinnings of its Defence and exhibited documents in support thereof including, *inter alia*:

- (i) the Master Agreement as executed on behalf of the Plaintiff on the 4th of June, 2020;
- (ii) the Convertbill Provisional RPA Offer letter dated the 29th of May, 2020; and
- (iii) the Settlement Letter executed by the Plaintiff's Directors on the 29th of July, 2020.

31. The Master Agreement adduced in evidence is a very detailed document. In material part it provides at clause 13 for expenses as follows:

"Expenses

The Member shall promptly pay and reimburse Credebt Exchange on demand for:

- (i) *all out-of-pocket costs and expenses of transferring funds in and out of the Member's designated bank account and other Account Bank fees and charges; and*
- (ii) *all reasonable outside counsel and professional fees and costs incurred in connection with or arising out of any specific amendment, waiver or consent under or in connection with this Agreement in relation to the Member; and*
- (iii) *all out-of-pocket third-party costs and expenses with directly related to the Member that are incurred by Credebt Exchange in its capacity as Negotiation Agent, Document Agent or Servicer, and which are identified by Credebt Exchange in its discretion as being reimbursable by the Member."*

32. In relying on the Master Agreement and for the purpose of defending against the Plaintiff's contended oral agreement, specific reference was made to clause 21.7 which provides:

"Entire Agreement

This Agreement, the Leasabill ETR, the Investabill ETR, the Claimabill ETR and the Membership Application and any other documents entered into between the Parties at the date of this Master Agreement (including the Schedules and the documents expressly referred to therein) constitutes the entire agreement between the Parties concerning the subject matter hereof and, overrides and supersedes all previous agreements, representations, understandings and arrangements, written or oral, between the Parties concerning the same."

33. The Convertbill Provisional RPA Offer letter dated the 29th of May, 2020, which it was claimed had been clicked as accepted by the Plaintiff, as exhibited in evidence, also expressly refers to d-ETR and b-ETR. These are both detailed separately under costs of funds as being 3%.

34. In the Settlement letter executed by the Plaintiff's Directors on the 29th of July, 2020, and exhibited in support of the Defence of these proceedings, the said directors confirmed that:

"upon receipt of GBP 3,004,283.30, three million and four thousand two hundred and eighty-three pounds and thirty pence that the b-ETR facility ID 202006080241 DHSC

granted to Aventis Solutions Limited on Originator ID 12006001715 is settled in full and final settlement and no further funds are due from Credebt Exchange Limited to Aventis Solutions Limited. Upon execution of this legally binding document payment of the above sum will be paid to Aventis Solutions Limited on 2020-07-30 with a value date of 2020-07-31 to the nominated bank account held on file for this facility.”

35. In grounding its concerns in relation to the Plaintiff’s ability to pay costs if the Defendant were to successfully defend the proceedings, filed annual accounts for the Plaintiff are exhibited for several years (2017, 2018, 2019, 2020, 2021). Mr. Reynolds, on behalf of the Defendant, points out that the financial statements for Aventis demonstrate an inconsistent financial position over several years. The financial statement for the year ending 30th of June, 2017, demonstrates that the Plaintiff had assets of GBP £889. The financial statement for the year ending 30th of June 2018 demonstrates that the Plaintiff had assets of GBP £623. The financial statement for the year ending the 30 of June, 2019, demonstrates that the Plaintiff had assets of GBP £322. The financial statement for the year ending the 30th of June, 2020 demonstrates that the Plaintiff had assets of GBP £154,967. The financial statement for the year ending 31st December, 2021, demonstrates that Aventis had assets of GBP £805,480. As appears therefrom, the improved financial position may be attributed to an unidentified investment in the sum of GBP£1,033,000. The 2021 financial statement was approved by the board of directors of the Plaintiff on the 25th of October, 2022.

36. On behalf of the Defendant, Mr. Reynolds notes that the accounts are unaudited abridged accounts. He acknowledges that while the financial position of the Plaintiff has improved following the investment made to its fixed assets, its liabilities nonetheless exceed its liquid assets. Further, the nature of the investment made is described in his first affidavit as “*entirely unknown*”.

37. He maintains that the trend in the financial statements substantiate the Defendant’s legitimate belief that the Plaintiff will not be able to satisfy any costs award. He points to the fact that the Plaintiff is a private limited company located in the United Kingdom and has no assets within the jurisdiction, or the European Union, and he deposes to the fact that he has been advised that the difficulties of enforcing any award of costs against the Plaintiff will be substantial following the United Kingdom's withdrawal from the European Union.

He further notes the expense likely to be occasioned in enforcing any award of costs in the UK jurisdiction following its withdrawal from the European Union will be significant when compared with the expense likely to be incurred in the enforcement of a similar award against a defendant domiciled in the State or with assets situated in the jurisdiction. He highlights on affidavit that the 2021 financial statement suggests that the primary component of the Plaintiff's assets is fixed and not readily realisable.

38. In a second affidavit sworn by Mr. Reynolds, made in reply to an Affidavit on behalf of the Plaintiff sworn by Mr. Farrell, he points out that a review of the financial statements for the three years prior to the 20th of June, 2019, demonstrates that the Plaintiff was barely solvent in the period prior to the COVID-19 pandemic. He suggests that its improved financial position can exclusively be attributable to the emergence of the COVID-19 pandemic in early 2020 and the temporary difficulties experienced by the Department of Health and Social Care in the UK in sourcing personal protective equipment like masks. He supports his concerns in this regard with reference to the fact that engagement with the Department of Health and Social Care in the United Kingdom was solely attributable to the COVID-19 pandemic as illustrated by the fact that the department corresponded to the parties through a dedicated COVID-19 email address named "*COVID-19 Finance Operations*" and he exhibits a chain of emails to evidence this. From this, he deduces that the temporary change in the Plaintiff's financial position is solely attributable to it being engaged by the Department of Health and Social Care in the United Kingdom in the context of the COVID-19 pandemic. As the measures associated with the COVID-19 pandemic and a shortage of PPE have ended, Mr. Reynolds contends that the Defendant is legitimately concerned that the primary source of revenue for the Plaintiff has stopped, and that it will return to its barely solvent position which persisted prior to the emergence of COVID-19.

39. In this further affidavit, Mr. Reynolds returns to the question of the unidentified fixed asset investment in the sum of GBP £1,033,000.00 reflected in the financial statements which had still not been identified in the replying affidavit filed on behalf of the Plaintiff, despite concerns in this regard having been raised in his first affidavit. Mr. Reynolds noted that in that same period (2021), the Plaintiff's liabilities significantly exceeded its current assets giving rise to liabilities of GBP £79,547.00. He noted that the Plaintiff did not have sufficient cash available to meet these liabilities. Accordingly, the Plaintiff was solely able to remain solvent in its 2021 financial statement because of the unspecified fixed asset investment. Mr. Reynolds

observes that the accounts demonstrate that the Plaintiff does not have sufficient cash available to meet any cost award. He further points out that it is entirely unclear what the actual value of its non-cash assets would be, or if they are capable of being readily realised to satisfy any adverse cost award. Furthermore, it is deposed that the Defendant has no awareness of any third-party security interests which might impact its ability to realise non-liquid assets. It is noted by Mr. Reynolds that the settlement figure paid in July, 2020 of in excess of £3,000,000.00 is not reflected in the accounts.

40. In grounding its application for security for costs, the Defendant also exhibits an Estimate of Costs from Cyril O'Neill, Legal Costs Accountant, which provides an estimate of costs from the date security for costs was requested in October, 2022 to the conclusion of a High Court hearing at €402,500 based on an estimated trial duration of eight days. This estimate includes a professional fee of €175,000.00 for solicitors, a brief fee of €45,000.00 for senior counsel and a brief fee for junior counsel of €30,000.00. Senior counsel's brief on the security for costs application was estimated at €10,000.00, with an estimated fee of €6,500.00 for junior counsel.

41. In the several affidavits sworn by Mr. Farrell on behalf of the Plaintiff, he denies that the written agreements reflect the entirety of the agreement between the parties and relies on oral discussions with one Mr. Grimes. He claims that he was told by the said Mr. Grimes that the fees for invoice financing did not really apply to the Plaintiff because it was being paid the same day. He disputes that any service was provided for which an additional 3% D-ETR could properly be charged regardless of what the contract documents relied upon by the Defendant say and he contends that the Purported Settlement Agreement is not binding on the Plaintiff. He refers to the fact that the Defendant has not exhibited bank statements to demonstrate the existence of the service it has charged for or to show where it stored the Plaintiff's funds. Despite engaging on affidavit with the terms of the Defence contended for in grounding the application for security for costs, Mr. Farrell at no point explains what the intangible fixed asset recorded in the Plaintiff's accounts is, despite this being clearly raised on behalf of the Defendant as the basis for its concern that the Plaintiff would be unable to discharge an order for costs against it at the conclusion of these proceedings. Without explaining what the unidentified asset in the Plaintiff's financial statements is, he nonetheless avers that there would be a prejudice to the Plaintiff in having to liquidate an asset to comply with a security for costs

order. While denying that the Plaintiff is impecunious, he also contends that the conduct of the Defendant has led to any impecuniosity of the Plaintiff.

42. In a third Affidavit, Mr. Farrell refers on behalf of the Plaintiff to a criminal complaint the Plaintiff has made in respect of its dealings with the Defendant. This criminal complaint was seemingly made against a background of a threat to make such a complaint if monies claimed were not paid over by the Defendant. It appears from the terms of this third Affidavit that a Garda investigation has commenced in respect of this complaint. Allegations are made by Mr. Farrell on foot of documents said to be under investigation to the effect that the Defendant charged fees for services not provided and in respect of foreign exchange transactions which did not occur. He also refers in this affidavit to a pending application for discovery seeking documents in relation to the disputed fees charged when it is contended no service was provided. These allegations of criminal wrongdoing are denied by Mr. Reynolds on behalf of the Defendant, and he points to what he considers amounts to a strategy on the part of the Plaintiff to damage the Defendant reputationally as a means of coercing payments from the Defendant. Mr. Reynolds contends that such a strategy the Defendant constitutes an abuse of process. To support his belief as to the Plaintiff's strategy, Mr. Reynolds points to a negative google review posted by the Plaintiff in or about May, 2024, in which reference is made to investigation by the serious crime unit of An Garda Síochána.

43. On behalf of the Plaintiff, a report from Lowes Legal Costs Accountants is exhibited by Mr. Farrell which estimates the legal costs in the sum of €197,150.00. Several factors appear to have informed the assessment carried out by Lowes including a shorter duration of trial, significantly lower professional fees and brief fees, lower refresher fees, lower drafting fees, lower fees for expert witnesses and dispensing with a stenographer altogether. It is further stated that:

"[t]he plaintiff has already indicated to the defendants that it will not be seeking discovery and further it has been advised by the plaintiff that the nature and extent of discovery, if any, can be expected not to be extensive or contentious."

44. Almost the only fee the Legal Costs Accountant are *ad idem* on in a comparative schedule prepared by Lowes is the cost of the Legal Costs Accountants Security for Costs Report in the sum of €3,000.00.

APPLICABLE TEST

45. The application herein is made under Order 29 of the Rules of the Superior Courts, 1986 (as amended). Order 29 allows for the making of an order requiring a plaintiff (whether an individual or incorporated) to grant security for costs to a defendant. It is the power relied upon where a plaintiff resides outside the jurisdiction and the territory of the EU. An order granting security for costs under Order 29 will not be made by reason only of the fact that the plaintiff resides outside the jurisdiction unless upon a satisfactory affidavit that such defendant has a defence upon the merits (Order 29, rule 3).

46. In determining an application under Order 29 against a foreign limited liability company as opposed to an individual, it is established that it is proper to take into account the factors which must be considered in an application under section 52 of the Companies Act, 2014 (see *Be Spoke Capital AG v. Altum Capital Management LLC* [2022] IEHC 524, para. 41). Section 52 of the 2014 Act provides for applications that an Irish limited liability company incorporated under domestic legislation provide security for costs. It vests a judicial discretion in the Court to make an order requiring security for costs 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. In directing security for costs, s. 52 provides that a court may stay all proceedings until the security is given.

47. There is a substantial body of jurisprudence dealing with the granting of an order for security for costs under Order 29 and/or s. 52 of the 2014 Act (or previous statutory provision) and the principles are now well established.

48. An earlier formulation of test on an application for security for costs was set down in *Usk and District Residents Association Ltd v Environmental Protection Agency* [2006] IESC 1 (referring to *Interfinance Group Limited v KPMG Peat Marwick* (High Court, Unreported, Morris J, the 29th of June, 1998) (in the context of section 390 of the Companies Act, 1963, the predecessor to section 52 of the 2014 Act):

“1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish: - (a) That he has a prima 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; 2. 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 rests upon the party resisting the order.”

49. The test has been reiterated in numerous more recent judgments including *Coolbrook Developments Ltd v Lington Development Ltd* [2018] IEHC 634 and *Quinn Insurance Limited v Price Waterhouse Coopers* [2021] 2 IR 70; [2021] IESC 15. I have also been referred to a decision delivered the same day as the decision in *Quinn* in the case of *Protégé International Group (Cyprus) Ltd v Irish Distillers Ltd* [2021] IESC 16; [2021] 2 I.R. 134 where the Supreme Court considered the principles identified in *Quinn v PWC* [2021] IESC 15 to be in accordance with the appellant’s right to an effective remedy under EU law.

50. As the case-law demonstrates, the modern test remains a graduated one. The defendant must establish that they have a *prima facie* defence to the plaintiff’s claim. If that is established, then they must establish that there is reason to believe based on credible testimony that the plaintiff will not be able to pay the costs. If the defendant establishes those facts, then the court should order security unless the plaintiff establishes special circumstances which mean the Court should not direct security. Clarke CJ. put it as follows in *Quinn Insurance*:

“[5] ... an initial onus rests on a defendant seeking security for costs to establish that it has a bona fide defence to the proceedings and also that the plaintiff concerned would not be in a position to meet the costs of the proceedings were it to lose and costs be awarded against it. Where both of those matters are established by the defendant to the satisfaction of the court, then security will ordinarily be ordered unless there is a sufficient countervailing factor (or a “special circumstance” as that term is used in the jurisprudence) which tilts the balance of justice against the making of an order.”

Prima Facie Defence

51. In terms of the requirement to establish a *prima facie* defence, what constitutes a *prima facie* defence has been considered in many cases since as long ago as *Walker v. Atkinson* [1895] 1 IR 246 and *Denman v. O’Callaghan* [1897] 31 ILTR 141. It was set out more recently by

Finlay Geoghegan J. in *Tribune Newspapers v Associated Newspapers Ireland* (ex tempore, High Court, 25th of March, 2011). There Finlay Geoghegan J. said:

“What appears from the judgments in a manner similar to the judgments in relation to summary judgment..., is that the Defendant seeking to establish a prima facie defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish these facts. Mere assertions will not suffice. This appears to me also to follow from the reference in the Superior Court Rules to a defence on the merits. If such evidence is adduced then the Defendant is entitled to have the Court determine whether or not it has established a prima facie defence upon an assumption that such evidence will be accepted at trial. Further the Defendant must establish an arguable legal basis for the inferences or conclusion which it submits the Court may arrive at based on such evidence. Insofar as the Plaintiff is submitting that the appropriate test includes an assessment by this Court on the application for security for costs as to whether the defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding, I reject that submission. Such an exercise would inevitably require the Court at the interlocutory stage for the application for security for costs to assess the strengths and weaknesses of the respective parties’ contentions and cases. The decision of the Supreme Court already referred to appears to me to clearly rule out such an approach. Accordingly, in my judgment, what is required for a Defendant seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submission applicable thereto which, if accepted by a Trial Judge, provide a defence to the Plaintiff’s claim.”

52. This passage was cited with approval by Charleton J at paragraph 9 of his judgment in *Olltech (Systems) Ltd v Olivetti UK Ltd* [2012] 3 IR 396; [2012] IEHC 512. Charleton J also added at paragraphs 4 and 5:

*“It is no part of the task of a court on an application for security for costs to take a view as to who ought to win at trial. In *Connaughton Road Construction Ltd. v. Laing O’Rourke Ireland Ltd.* [2009] IEHC 7, (Unreported, High Court, Clarke J., 16th January, 2009), this principle was emphasised, at p. 5, by Clarke J. thus:- “3.3 I am mindful of the fact that all of the authorities make clear that the court’s assessment must*

be conducted on a prima facie basis. As was pointed out in Irish Conservation and Cleaning Ltd. v. International Cleaners Ltd. (Unreported, Supreme Court, 19th July, 2001) to do otherwise would be to invite the court, on a preliminary motion, to decide the case. Everything which I say hereafter should, therefore, be subject to the qualification that I am referring, even if not expressly stated, to the various necessary matters being established on a prima facie basis."

53. All the authorities, including subsequent authorities such as *Greenclean Waste Management Ltd v. Leahy* [2015] 1 IR 106; [2015 IECA 97 and *Bionomica Ltd (in vol. liq.) v. Response Engineering Ltd* [2020] IEHC 340, caution against engaging in an adjudicative analysis of the defence. Nonetheless, given the potential consequences of an order securing costs on the ability to maintain proceedings, the Defence offered must nonetheless be carefully scrutinised. Accordingly, while consideration at this interlocutory stage is limited solely to whether a *prima facie* defence is made out, this does not equate to the exercise performed by a Court in refusing summary judgment where a lower standard applies. Furthermore, care must be taken to establish that there is a *bona fide* defence to the full claim and not just parts of the claim (Clarke C.J., *Quinn Insurance v Price Waterhouse Cooper* [2021] 2 IR 70; [2021] IESC 15, para. 115).

54. The principles to be applied in determining whether a *prima facie* defence is established were succinctly distilled very recently by Dignam J. in *Fortberry Ltd. v. AIB Plc* [2024] IEHC 83 following a careful review of the case-law. In terms which I gratefully adopt as a correct statement of the law, he states as follows (para.15):

“(a) an applicant for security for costs must establish that it has a prima facie defence to the claim;

(b) where that is a defence based on fact they must adduce evidence or demonstrate the existence of evidence and must establish an arguable legal basis for the inferences or conclusions which they say should be drawn from the evidence; and where the defence includes a legal defence they must show the existence of relevant legal submission;

(c) a mere assertion that the applicant has a particular defence on the merits is insufficient if that assertion is unsupported by any evidence;

(d) it is not sufficient for an applicant to simply refer to its Defence though that may be sufficient where the matter traversed is the very issue to be resolved in the case;

(e) the court must carefully scrutinise or interrogate the claimed defence;

(f) it is not, however, necessary for an applicant to prove his defence on the balance of probabilities at the application for security stage; and

(f) it is unnecessary for the Court to consider the respective merits of the parties' competing contentions as the Court's concern is whether the applicant has established that it has a prima facie defence to the respondent's claim."

Risk of Inability to Discharge a Costs Order

55. Where a *prima facie* defence is made out on the basis of the principles established, the Court must next consider whether the risk of an inability to discharge a costs order has been established to the requisite degree.

56. The applicable principles were addressed at some length in *Coolbrook Developments Ltd v Lington Development Ltd & Anor* [2018] IEHC 634 where Barniville J. considered the decision of the Supreme Court in *IBB Internet Services Ltd v. Motorola Ltd* [2013] IESC 53 and the Court of Appeal in *Flannery and Lexington Services Ltd v. Walters & Ors* [2015] IECA 147 before stating (para. 54):

"Therefore, while the court does not assess the evidence before it on the question of the alleged inability of the company to pay the defendant's costs on the balance of probabilities, the court is required to consider all of the material evidence and to reach an assessment of the range of likely eventualities in the case and thereby to determine whether it is truly the case that there is "reason to believe" that the company "will" be unable to pay the costs of the defendant should it successfully defend the proceedings. The evidence must satisfy the court that there is "significantly greater than a mere risk" of that eventuality arising (see IBB, per Clarke J. at para. 5.16, p.19)."

57. While the Court must consider all the relevant evidence before it, Barniville J. notes that the authorities confirm that the accounts of the company at issue are particularly relevant to the Court's assessment as to whether the company would be unable to pay the defendant's

costs of successfully defending the proceedings citing, in particular, *Hedgecroft Ltd t/a Beary Capital Partners v. HTREMFTA Ltd & Ors* [2017] IEHC 275 where importance had been attached to the fact that an audit had not been carried out in respect of the affairs of the company and *Fides Capital Ltd v. Alchemy Projects Ltd* [2017] IEHC 266 where it was found that there was nothing in the plaintiff company's most recently publicly filed financial statements to suggest that it would be able to meet the defendant's costs of defending the proceedings.

58. Added to this, Barniville J. further referred in his judgment in *Coolbrook Developments Ltd v Lington Development Ltd & Anor* [2018] IEHC 634 to the principle of law to be applied in assessing the evidence on the issue of the alleged inability of a company to pay the defendant's costs of successfully defending the proceedings which emerges from the case law, namely, where the evidence available to the Court discloses circumstances in relation to the financial position of the company which calls for an explanation and where the company does not put that explanation and evidence supporting it before the Court, the Court should not resolve the uncertainty or fill the gap in favour of the company which could have provided the relevant explanation (see *Parolen Ltd v. Doherty & Anor* [2010] IEHC 71 and *James Elliott Construction Ltd v. Irish Asphalt Ltd* [2010] IEHC 234).

59. Summarising the principles to be derived from the cases in *Coolbrook Developments Ltd v Lington Development Ltd & Anor* [2018] IEHC 634 Barniville J. referred (at para. 63-67) to six principles condensed as follows which I adopt as a statement of principle guiding my decision on this application, namely:

- (i) the onus rests on the applicant for security for costs to persuade the court that there is "*reason to believe*" that the company, the subject of the application, will be unable to pay the costs of the defendant, if successful in its defence;
- (ii) the standard by which this inability has to be established is not the balance of probabilities but something a lot stronger than a "*mere risk*" of this event happening must be established;
- (iii) the court must consider the issue on the basis of all of the material evidence and such evidence may emanate from both sides of the application and evidence must be credible;
- (iv) while the accounts or financial statements of the company are very relevant and may afford a basis for deciding the application one way or the other, they are not

necessarily determinative of the application and may raise other questions or issues requiring an explanation from the company;

- (v) how up to date the accounts or financial statements provided actually are is relevant; and,
- (vi) where there are gaps or uncertainties in the accounts or in the evidence available to the court which could be filed or answered by the company resisting the application and where the company does not fill those gaps or answer those uncertainties, the court will lean against filing the unexplained gaps or resolving the uncertainties in a manner favourable to the company.

60. It is noted that very recently, in *Henderson v D.A.A.* [2024] IEHC 29 in a judgment delivered by Bolger J. on the 22nd of January, 2024, it was held the defendant was, in principle, entitled to security for costs pursuant to Order 29 because it established that the plaintiff resides out of the jurisdiction and that it has a *bona fide* defence in circumstances where if an order for costs is ultimately made in favour of the Defendant, the enforcement of such an order would be more difficult/expensive as she is resident in the UK, a non-EU jurisdiction outside the Brussels Convention on the Enforcement of Judgments.

61. I proceed on this application on the basis that in considering whether there is reason to believe that the company the subject of the application will be unable to pay its debts I should consider the available credible evidence in relation to the Plaintiff's financial position in the manner summarised by Barniville J. in *Coolbrook Developments Ltd v Lington Development Ltd & Anor* [2018] IEHC 634. I am satisfied in this regard that it is proper for me to weigh unexplained gaps in evidence against the Plaintiff.

Special Circumstances

62. Whatever about its application on the facts of a given case, the general test as developed through the case-law is a straightforward test. A layer of complexity arises in these applications, however, from the fact that it is also established that special circumstances may warrant refusal to make an order securing the costs of a defendant in advance of trial, notwithstanding that the defendant has shown that it has a *prima facie* defence and that the plaintiff lacks the funds to discharge the costs order against it, should that come to pass.

63. Special circumstances include, as asserted in this case, impecuniosity due to the alleged wrongdoing of the Defendant. It has been established, however, that the effect of alleged wrongs is not *prima facie* evidence of wrongdoing on the part of a defendant and a causal connection between an alleged wrong and purported effect must be shown. Were it otherwise, most Plaintiffs would be able to defeat an application for security for costs if the value of the claim exceeds the likely costs of the proceedings.

64. The approach to be adopted in assessing whether the inability to pay costs is due to the relevant defendant's wrongdoing was summarised in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7 (Clarke J.) (recently affirmed by the Supreme Court in *Quinn Insurance Ltd v. Price Waterhouse Cooper (A firm)* [2021] IESC 15; [2021] 1 I.L.R.M. 253) at para. 3.4:

"In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-

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

(2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;

(3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and

(4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position."

65. To this end a plaintiff must not only show a *prima facie* case, but also a *prima facie* level of losses attributable to the defendant's wrongdoing to enable the court to assess whether, again on a *prima facie* basis, those losses are sufficient to justify attributing the plaintiff's inability to pay costs, in the event of losing, to the asserted wrongdoing. The observations of Clarke C.J. in *Protege International v Irish Distillers* [2021] IESC 16, emphasising the need for a plaintiff seeking to avail of special circumstances, to do so on the basis of giving the Court

adequate information to enable a proper interrogation of any relevant proposition to be conducted, should also be recalled.

66. Public interest considerations arising from the use of a security for costs application to stifle a claim were considered in *Quinn Insurance v PWC*, where Clarke CJ found that the evidential basis for a claim that proceedings would be stifled requires to be considered. If it is contended that a defendant is not impecunious in resisting an order for security for costs, but at the same time, proceedings would be stifled by the making of an order granting security for costs, such a claim should be grounded in evidence and warrants careful scrutiny. The separate public interest in a point of law being determined in open court was addressed in *Be Spoke Capital AG v. Altum Capital Management LLC* [2022] IEHC 524, where it was recalled that the threshold for a plaintiff to demonstrate a point of law of exceptional public importance triggering a common good interest in a determination in court is a high one, which requires the plaintiff to identify a point of law that is of such gravity that it transcends the interests of the parties and serves the common good. Ultimately, the exercise of the Court's discretion is informed by the Court's conclusions on whether the interests of justice are served by the making of the order having cumulatively weighed all of the factors in the case, including the interest in having a dispute determined by the Court.

Quantum of Security

67. On the authorities, most notably *Coolbrook Developments Limited v. Lington Developments Limited* [2018] IEHC 634, *Hedgecroft Limited v. Htremfta Limited* [2018] IECA 364 and *Farrell v. Bank of Ireland* [2013] ILRM 183; [2012] IESC 42, the Court has a full discretion as to the amount of security for costs which is to be provided. As established in *Coolbrook Developments Ltd v Lington Development Ltd & Anor* [2018] IEHC 634, the Court must seek to achieve a balance between the defendant's right to recover their costs of successfully defending proceedings, and the right of a plaintiff to have litigation fairly conducted. The case-law on this question was comprehensively reviewed by O'Moore J. in *Be Spoke Capital AG v. Altum Capital Management LLC* [2022] IEHC 524. As apparent from the decision in that case, while ultimately the quantum of the security to be directed is a matter for the discretion of the Court, the default position now is that the Court should direct security in the full amount of the probable costs.

APPLICATION OF THE TEST

68. Turning then to apply these principles to the facts and circumstances of this case having regard to the affidavit evidence adduced, I propose to consider each limit of the test in turn.

Prima Facie Defence

69. While it is unquestionably the case that the Plaintiff alleges serious wrongdoing against the Defendant in these proceedings, the Defendant has supported its defence of the Plaintiff's claims by documentation which can provide objective support for the defence of these proceedings. Furthermore, there is little doubt on the papers that the issues in relation to the invoice service fee and the charge for exchange rate fluctuations were issues that the parties were alive to when attending a settlement meeting in July, 2020. While it may well be that further information has come to light since then which has given rise to fresh or increased concerns on the part of the Plaintiff, it is beyond doubt that it entered into a settlement agreement in July, 2020.

70. The fact that it is possible that a Court may ultimately be persuaded that the settlement agreement is vitiated or unenforceable does not displace the Defendant's entitlement to assert a *prima facie* defence with reference to the said settlement agreement. In this regard, I rely on the dicta of Hyland J. in *Driminiskin Developments Limited & Ors. v. Kevin O'Gorman & Ors.* [2020] IEHC 153, where she found that a *prima facie* defence had been established in reliance on a settlement agreement. As in this case, the Plaintiff had pleaded that there was no consideration for the settlement, and as in this case the Plaintiff contended that the settlement agreement was entered into under duress and therefore the settlement must be put aside. Similar to this case also, it was not disputed that a meeting had taken place or an agreement executed. Hyland J. observed (at para. 74):

"The first plaintiff may be successful on the point that the settlement agreement is void for a lack of consideration or for the other reasons identified above, but that is a matter for the trial judge. What is clear is that there will be a substantive issue in relation to the settlement at the trial of the action and the legal effect of same. If the defendant succeeds in establishing there is a valid agreement in place, that will constitute a full defence to the claim of the first plaintiff. The existence of the settlement agreement therefore constitutes a prima facie defence. As for the point that the plea at paras 1 to 4 of the defence cannot succeed because it does not refer to consideration for the settlement, that is at best in my view a pleading point and not one which can be treated

as meaning that the defendant does not have a prima facie defence in relation to the settlement.”

71. It seems to me that the dicta in *Driminiskin Developments Limited & Ors. v. Kevin O’Gorman & Ors.* [2020] IEHC 153 carries persuasive force given the common feature of the two cases – namely the existence of a settlement agreement. While the Plaintiff clearly disputes the validity and enforceability of the settlement agreement and suggests that it does not cover all aspects of the dispute, this is a substantive issue for trial. I could not at this interlocutory stage conclude that the settlement agreement does not constitute credible, objective evidence on a *prima facie* basis that the Defendant has a full defence to the Plaintiff’s claim. It is my view that on any objective assessment of the Purported Settlement Agreement, it can form the basis of a *prima facie* defence to the entirety of the Plaintiff’s claim. Accordingly, I have little hesitation in concluding that a *prima facie* defence has been demonstrated.

72. I do not need to refer to the terms of the Master Agreement or the RPA to reach this conclusion. I am satisfied, however, that they provide further objective evidence that a real line of defence is open to the Defendant on the claim as pleaded.

Ability to Pay

73. No audited accounts have been provided by the Plaintiff to demonstrate that it is in a sound financial position in response to the concerns set out by the Defendant on affidavit in reliance on filed annual financial statements. Questions raised in relation to the intangible asset identified in the financial statements have not been addressed, and I consider that the Plaintiff has responded evasively on affidavit in this regard. There is no evidence that the Plaintiff has the cash reserves necessary to discharge an order for costs of any magnitude. Nor is there any evidence to suggest that the Plaintiff continues to trade profitably now that the emergency need for personal protective equipment which occurred on a time limited basis in 2020 by reason of the COVID-19 Pandemic has passed. In my view the vague reference on behalf of the Plaintiff to a need to liquidate an unidentified, unspecified asset to meet an eventual order for costs if unsuccessful in these proceedings serves to exacerbate rather than alleviate concerns relating to the Plaintiff’s ability to pay what will undoubtedly be a significant adverse costs order if the Defendant is successful in its defence of these proceedings.

74. By its failure to disclose the nature of the intangible asset, provide audited accounts or address concerns raised in relation to its current trading position post COVID-19, the Plaintiff has failed to provide evidence which might suggest that concerns identified on behalf of the Defendant are unwarranted. While the onus to demonstrate a basis for concern that there is a real risk that the Plaintiff will be unable to meet an adverse costs order is on the Defendant on this application, where the Plaintiff does not fill the gaps identified or answer the uncertainties arising from the information which the Defendant has put before the Court, I am entitled to lean against filling the unexplained gaps or resolving the uncertainties in a manner favourable to the Plaintiff. On the basis of the material before me, it seems to me that the Plaintiff's impecuniosity is not attributable to the claims advanced in these proceedings but rather the fact that the temporary improvement in its trading position related to a temporary need for face masks during the COVID-19 Pandemic and the unexplained disbursement of the payments received from the supply of face masks to the UK Department of Health and Social Care in 2020.

75. I am satisfied that there is reason to believe that, quite apart from issues of enforceability of a costs order which also arise by reason of the non-EU residence of the Plaintiff, there is a real risk that the Plaintiff would not be able to meet an adverse costs order made against it. I reach this conclusion in circumstances where the Plaintiff has no real cash reserves, has produced no independent evidence of business as a going concern, has provided no particulars in relation to the fixed asset identified in its Financial Statement (by virtue of which it is claimed the Plaintiff is solvent) and indeed has failed to provide any information in relation to the use of the significant sum paid by the Defendant in purported settlement of a dispute with the Plaintiff in July, 2020.

76. It follows in my view that the Defendant is entitled to an order granting security for costs unless special circumstances are demonstrated on behalf of the Plaintiff which would warrant the exercise of a discretion to refuse such an order in accordance with established principles.

Special Circumstances

77. While in written submissions filed in advance the Plaintiff based its claim that special circumstances arise on impecuniosity occasioned by the alleged wrongful acts of the

Defendant, in oral submissions before me an argument was also pressed that there are public policy circumstances which warrant the refusal to exercise a power to order security for costs arising from the fact that a criminal investigation is underway in respect of matters which are also the subject of these civil proceedings. The Plaintiff did not point to any authority in support of its position in this regard.

78. In relation to the claim that impecuniosity has been occasioned by the Defendant's wrongdoings, it seems to me that the necessary causal link to make this claim has not been demonstrated. True it is that the Plaintiff, if successful, will have been wrongfully deprived of a sum of money sufficient to discharge a costs order such that it might be claimed that but for the alleged wrongdoing the Plaintiff would have the benefit of this money in its financial statements, but on the facts and circumstances of this case, there is no reason to conclude that a company that traded so poorly before the COVID-19 Pandemic and shows no evidence of profitably trading since then would be in a position to discharge a sizeable costs order, but for the alleged wrongdoing complained of in these proceedings. It is noteworthy in this regard that a sizeable payment in excess of £3,000,000 was made in July, 2020, but is not obviously reflected in the Plaintiff's financial statements. If a sum of this magnitude was dispersed without explanation, there is little reason to believe that the same would not also have occurred were the figure paid over in July, 2020, increased in the order of £600,000 in line with the Plaintiff's claim in these proceedings. Accordingly, I am not persuaded that the Plaintiff has demonstrated special circumstances whereby its impecuniosity may be related causally to the alleged wrongdoing of the Defendant.

79. As for the claimed asserted public policy special circumstance, despite the absence of any authority directly on point, and the late and unconvincing manner in which this argument was introduced by counsel for the Plaintiff (albeit new to the case following a change in legal team), it seems to me that a factual basis for making a claim that there are special circumstances in this case relating to the existence of an ongoing criminal investigation has been laid on the evidence. There is equally a basis for concern, however, in relation to the way this complaint has been made and pursued as to the weight and significance to be attached to the existence of a criminal complaint in deciding on the application before me in these separate civil proceedings. The seeming attempt made on the part of the Plaintiff to extract payments from the Defendant under threat of complaint and damage to reputation signals to me that a high degree of caution is required in relation to my treatment of the fact that a criminal complaint

made by the Plaintiff remains under investigation if I am to properly guard against the risk of an abuse of process.

80. I cannot decide on this interlocutory application in civil proceedings and without the benefit of full information whether the allegations made are well founded or bogus and whether wrongdoing amenable to either criminal or civil redress arises.

81. While it should be expected that criminal complaints are not made lightly, the existence of a criminal complaint under investigation does not mean that the complaint is well-founded. An investigation is conducted by the appropriate authorities precisely because it is necessary to establish whether there is a basis for the complaint or not, and whether criminal wrongdoing is disclosed on the evidence uncovered in the investigation. Whether an order by way of security for costs is made or not has no bearing on the proper investigation of the criminal complaint made by the appropriate authorities and does not operate to place any barrier on the criminal process as a remedy, should sufficient evidence of criminal wrongdoing be identified.

82. Furthermore, while a restriction is placed on a civil remedy by ordering security for costs, the nature of the restriction is not to deprive the Plaintiff of a right of access to the courts but instead reflects a balancing between the rights of the Plaintiff and Defendants when due regard is had to the fact that an inability to recover costs from an unsuccessful impecunious Plaintiff raises countervailing access to justice considerations from the perspective of the Defendants. There is a significant risk of injustice in exposing Defendants to considerable costs of defending proceedings without any prospect of recovering those costs if the Defendants succeed.

83. In light of the nature of the evidence which is before me and concerns raised which call into question the Plaintiff's motivations in making criminal allegations which remain under investigation, it seems to me that there is no sufficient evidential basis before me to justify a departure from the normal rule in relation to security for costs where a *prima facie* defence is demonstrated, and there is a real basis for concern that the Plaintiff would be unable to discharge an adverse cost order. I reach this conclusion in circumstances where the effect of an order requiring security for costs in these proceedings is not to preclude criminal investigation of the complaint made or impact on any decision made in that investigation. Furthermore, in requiring security for costs from the Plaintiff, the purpose of my order is not

to preclude the proper conduct of these proceedings but rather to require that they are conducted in a manner which ensures that in the possible event that the Defendant is successful in its defence of these proceedings, it will not be subjected to the injustice of an unenforceable costs order.

84. It must also be recalled that while it has been submitted on behalf of the Plaintiff that the Defendant's application for security for costs is designed to stifle the claim, there is no evidence that it will have this effect. Rather, it is suggested that payment of costs would require an asset to be liquidated. If, as the Plaintiff maintains, it is not impecunious but is in a position to discharge a cost order should one be made, then the effect of my order is merely to require that appropriate security is provided so that the Defendant is not on hazard for its costs were it to be determined that the Plaintiff's claim lacks merit, as it seems possible it may, and were it to transpire that a consequential costs order in favour of the Defendant is unenforceable, a risk which has been substantiated by the Defendant as real in making this application.

Quantum

85. In terms of quantum, it seems to me that the default position that the Defendant should be entitled to security for the entirety of its costs does not mean that it can seek security for inflated costs. In this case, I am confronted with two diverging costs accountants' reports. They disagree in relation to almost every cost heading. While Legal Costs Accountants are very experienced, it must be acknowledged that measuring costs is not an exact science. I am also conscious of a common understanding, commented upon by O'Moore J. in *Be Spoke Capital AG v. Altum Capital Management LLC* [2022] IEHC 524, that it is a rare bill of costs which is adjudicated without deduction no matter how experienced or gifted the costs accountant.

86. Given the marked divergence between the two costs accountants, it seems to me reasonable to conclude that the Plaintiff's estimate is likely too low and the Defendant's estimate likely too high; but that each has adopted a position most favourable to their clients within the bandwidth of what their experience and expertise allows. The likelihood is that each would be prepared to negotiate a reasonable compromise figure, had they instructions to do so. While this general view might suggest that I should proceed in unscientific fashion to split the difference between the two costs accountants, I do not consider it appropriate to adopt such a

blunt approach in this case because I am satisfied that I should prefer the position of the Defendant's cost accountant over that of the Plaintiff's at least to some extent, with the result that picking a midway point between the diverging figures would not provide adequate security against the likely full costs of the proceedings.

87. I come to the conclusion that I should prefer the figures advanced on behalf of the Defendant because I cannot ignore that the Plaintiff's cost estimate is predicated on at least one assumption deriving from client instructions which it is now known to be false, namely the assumption that discovery was not required in these proceedings. Despite apparent instructions to their cost accountant to the contrary, the Plaintiff has, in fact, issued a motion for discovery, and I understand that it has a return date in November, 2024. In my view, a mistaken instruction in relation to the necessity for discovery undermines the reliability of the Plaintiff's cost accountant's assessment of costs, not only in relation to the discovery process itself, but also in relation to the complexity of the issues and the length of the trial, with the result that the Defendant's cost accountant's assessment of complexity and duration is more likely to be accurate.

88. Bearing this in mind but allowing that the full extent of the professional fee, counsel's brief and refresher fees may not be recoverable upon adjudication and that the Defendant's claim is likely over stated to some extent, I am satisfied that ordering security in the amount of €325,000 meets the justice of the case. This represents a reduction of slightly less than 20% on the costs identified by cost accountants on behalf of the Defendant. I am satisfied that even if it were to transpire that this figure is less than might ultimately be recoverable by the Defendant, it provides a high level of security for the Defendant in the event of a costs order in its favour upon its successful defence of these proceedings.

CONCLUSION

89. In the light of my findings as set out in this judgment, I will order security for Defendant's costs in the amount indicated at paragraph 88 above and place a stay on the further prosecution of these proceedings pending provision of said security. I will hear the parties in relation to the form of the final order and any consequential matters including the costs of this application. I propose that the matter be listed before me for mention upon the expiry of fourteen days from delivery of this judgment with a view to finalising my order.

