APPROVED

[2020] IEHC 340

THE HIGH COURT

2017 No. 11546 P.

BETWEEN

BIONOMICA LIMITED (IN VOLUNTARY LIQUIDATION)
GRETTA DALY

PLAINTIFFS

AND

RESPONSE ENGINEERING LIMITED
COMMISSIONING SERVICES LIMITED

DEFENDANTS

MAURICE DALY

THIRD PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 15 July 2020

INTRODUCTION

1. The underlying dispute in these proceedings has its genesis in what is a commonplace type of commercial transaction, namely the assignment of the benefit of a loan from one company to another. In brief outline, it is the plaintiffs' case that the first named plaintiff acquired the benefit of a loan which the first named defendant had advanced to the second named defendant. The benefit of the loan is said to have been subsequently assigned to the second named plaintiff, who is the sole shareholder of the first named plaintiff. Both defendants deny that they have any liability to either of the plaintiffs.

2. The resolution of this dispute should have been relatively straightforward. Yet, the proceedings have instead become enmeshed in a series of pre-trial applications. These applications could have been avoided had the moving parties engaged sensibly with

requests for further particulars raised by the other side, and if the plaintiffs had filed replying affidavits promptly setting out the precise nature of their claim.

3. All the time, the legal costs incurred are increasing. The position now adopted by the second named defendant is that the legal costs which would be incurred by it were the matter to proceed to full hearing are in the order of €400,000 (exclusive of VAT). This is so notwithstanding that the value of the disputed loan is only €300,000.

4. There are three motions before the court. The objective of the first two motions had been to ensure that security, e.g. in the form of a bond, would be put in place to guarantee that the second named defendant will be able to recover its costs against the corporate plaintiff if successful in the defence of the proceedings. Two related motions were issued in this regard. First, a motion seeking to have the second named plaintiff removed from the proceedings; and, secondly, a motion seeking an order for security for costs pursuant to section 52 of the Companies Act 2014.

5. It is now accepted that the second named plaintiff is a proper party to the proceedings, and the only issue outstanding in respect of the first motion is costs. The second motion has been pursued. One of the principal issues to be determined on that motion is whether the presence of a natural person as a co-plaintiff in the proceedings represents a special circumstance such as to justify the refusal of an order for security for costs.

6. The third motion has been brought by the plaintiffs, and seeks to compel further and better replies to particulars.

PROCEDURAL HISTORY

7. The plaintiffs' claim can be summarised as follows. (It should be emphasised that what follows is merely an overview of the claim as advanced by the plaintiffs: this court has,

obviously, made no findings of fact in relation to any of these issues at this interlocutory stage of the proceedings).

8. A loan of €300,000 had been advanced by Response Engineering Ltd to Commissioning Services Ltd in the latter part of 2007. Thereafter, in or about June 2012, Response Engineering Ltd agreed to sell and transfer the loan to Bionomica Ltd. It is pleaded that the transaction was for "consideration received and acknowledged".

9. It had been intended to give effect to the transfer of the loan by way of an instrument described as a "deed of transfer and novation". This instrument appears to have been executed on 13 June 2012. For reasons which are not fully explained, however, the original borrower is incorrectly described in the instrument as "CSL Commissioning Services Ltd" rather than "Commissioning Services Ltd". Much of the dispute between the parties centres on what the legal consequences of this seemingly botched transaction were.

10. The plaintiffs' position is that the instrument was not effective to transfer the legal title of the loan to Bionomica Ltd, but it is said that that company nevertheless obtained *beneficial* ownership of the loan in consequence of the consideration received and acknowledged by Response Engineering Ltd.

11. (The position adopted by Response Engineering Ltd in its defence to the proceedings is that insofar as any failure to accurately reduce that agreement to writing has had the effect of preventing Bionomica Ltd from managing and pursuing the recovery of the loan, which is not admitted, that failure was caused by Mr Maurice Daly, who was then a director of Commissioning Services Ltd. Mr Daly has been joined as a third party to the proceedings).

12. The plaintiffs say that the beneficial ownership of the loan was subsequently transferred from Bionomica Ltd to Mrs Gretta Daly as part of the solvent winding up of that

company. (Mrs Daly is the wife of the third party, Mr Maurice Daly). A deed of assignment dated 22 February 2018 has been exhibited by Mrs Daly. It is explained that Mrs Daly had been the sole shareholder of the company, and that the purpose of the solvent winding up was that all of Bionomica Ltd's surplus assets, including the loan and all related claims, were to be distributed to Mrs Daly as the sole shareholder.

13. Much of the detail of the plaintiffs' claim, as summarised above, is not to be found in the statement of claim delivered in the proceedings on 27 February 2018. Rather, it has been set out, for the first time, in an affidavit dated 28 May 2020 filed by Mrs Daly shortly before the hearing of these pre-trial applications. Counsel on behalf of Commissioning Services Ltd is highly critical of the approach adopted by the plaintiffs in this regard. It is said that the statement of claim did not explain in any meaningful way how Mrs Daly is said to have come to obtain an interest in the (alleged) loan. The description, in the statement of claim, of the loan and its related rights having been "distributed" to Mrs Daly, was said to be deliberately ambiguous. Moreover, complaint is made that the plaintiffs' solicitors had declined to clarify the position in response to a request for particulars made on 30 March 2018, and had refused to comply with a request to produce a copy of the company resolution referred to in the statement of claim. (This latter request was made pursuant to Order 31, rule 15 of the Rules of the Superior Courts).

14. Counsel submits that, on the basis of the plaintiffs' case as then pleaded, it was reasonable for Commissioning Services Ltd to issue a motion in September 2019 seeking to have Mrs Daly struck out from the proceedings on the basis that she had been improperly joined, and had neither an interest in the proceedings nor a reasonable cause of action against the defendants.

15. It was only on receipt of Mrs Daly's affidavit in June 2020 that an explanation for her involvement in the proceedings was provided for the first time. The affidavit sets out the

detail of the events leading to the assignment of the loan to Mrs Daly. In her affidavit, Mrs Daly asserts that, far from being an "artificial or improper" presence in the proceedings, she is "in economic substance" the plaintiff in the proceedings. Mrs Daly further asserts that she is suing in her capacity as successor in title to Bionomica Ltd's beneficial interest in the loan.

16. Counsel for Commissioning Services Ltd submits that this represents a *volte face* on the part of the plaintiffs. The logic of the case now being made is that Bionomica Ltd can no longer have any interest in the loan.

17. In response, counsel for the plaintiffs submits that, in truth, there is only one debt and there is only one claim being made against the defendants. The plaintiffs, and the third party, all have the same legal representation. The defendants will not be incurring a second set of costs or be exposed to a double claim.

18. It is further submitted that the only reason that the corporate plaintiff has been named in the proceedings is to avoid a technical argument on behalf of the defendants to the effect that the wrong party has sued for the recovery of the loan. (Counsel colourfully described such a line of defence as akin to a "game of ring-a-ring-a-rosie").

19. It is submitted that—ever before the Supreme Court of Judicature Act (Ireland) 1877—the *beneficial* owner of a debt could always sue for the debt by joining the nominal owner of the debt to the proceedings. The whole point of such an exercise was to ensure that everyone was before the court. This precluded the making of a subsequent claim by the trustee or nominee of the debt, and the debtor would not face a second claim for the debt. As a result of the Supreme Court of Judicature Act (Ireland) 1877, it became possible to assign the legal interest in a debt. The transfer of the legal interest in the loan in the present case suffers from a deficiency, however, because of the (alleged) failure of the tripartite novation in June 2012.

20. Counsel does accept, however, that there are what he characterised as "infelicities" in the drafting of the statement of claim, and that an amendment may be necessary.

21. Insofar as the financial statements of Commissioning Services Ltd are concerned, counsel draws attention to the fact that the abridged financial statements to the year ending 31 January 2008 identify (at page 11) a loan from Response Engineering Ltd in the sum of €300,000.

APPLICATION FOR SECURITY FOR COSTS

22. Section 52 of the Companies Act 2014 provides as follows.

> "52. Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."

23. The legal principles governing an application for security for costs are well established, and require the court to undertake a stepwise approach, whereby various criteria are considered in sequence. The criteria, as approved of by the Supreme Court in *Usk District Residents Association Ltd v. The Environmental Protection Agency* [2006] 1 I.L.R.M. 363 are as follows.

> "The overall approach to security for costs was helpfully summarised by Morris P. in *Interfinance Group Limited v. KPMG Pete Marwick* (High Court, Unreported, Morris J. 29th June, 1998) as follows:-
>
> '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 vests upon the party resisting the order.
>
> The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendants costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.
>
> The list of special circumstances referred to is not, of course, exhaustive.'"

24. Each of these criteria is addressed, in turn, under separate headings below.

(1). ***Prima facie defence***

25. The first matter to be addressed is whether the party seeking security for costs has a *prima facie* defence to the proceedings. The onus of proof lies with the moving party in this regard.

26. The rationale for requiring a defendant to demonstrate a *prima facie* defence, as a prerequisite to the making of an order for security for costs in their favour, is to avoid a potential abuse of process. It would be unjust if a defendant, who has no answer to a claim against it, could prevent a wronged company from prosecuting proceedings by demanding that security for costs be provided in advance. The injustice would be all the greater were the company's inability to discharge the defendant's costs to have been caused by wrongs committed by the defendant.

27. Having said that, it must also be borne in mind that an application for security for costs comes before the court on the basis of an interlocutory application only, and is grounded on affidavit evidence. The judge hearing such an interlocutory application is not in nearly as good a position as the trial judge will be to adjudicate upon the underlying merits of the case. The judge hearing an application for security for costs must be careful,

therefore, to resist any temptation to embark upon an actual adjudication. The assessment should instead be confined to determining whether or not there is a *prima facie* defence.

28. The very recent judgment of the Court of Appeal in *Charles Kelly Ltd v. Ulster Bank Ireland Ltd* [2020] IECA 8 explains that the High Court must analyse the pleaded defence (and replies to particulars if any) and the precise legal basis upon which the defendant has asserted that it has a defence to the claim against it.

29. This analysis is made more complicated in the present case by reason of the fact that the plaintiffs' case has shifted since the statement of claim was delivered. I will return to consider the implications of this presently.

30. The defence delivered in the proceedings puts forward a number of grounds for resisting the claim against Commissioning Services Ltd. First, it is pleaded that the inter-company transfer of €300,000 did not constitute a loan, but rather was intended to repay a director's loan in the context of a then proposed merger of Commissioning Services Ltd and Response Engineering Ltd. Secondly, it is pleaded that, even if the €300,000 did constitute a loan, it had subsequently been agreed between the two companies that the said loan would be written off in its entirety. (This plea is made without prejudice to the first plea). Thirdly, it is pleaded that the conduct of Mrs Daly and her husband, who has been joined to the proceedings as a third party, in signing off on the financial statements constitutes acquiescence. Finally, there are what might be described as a number of formal defences pleaded to the effect that any assignment of the alleged loan did not comply with the requirements of section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877.

31. Counsel for Commissioning Services Ltd submitted that—arising out of the recently filed affidavit of Mrs Daly—a further line of defence is now available. Specifically, the position now adopted by Mrs Daly is that she is the *successor in title* to Bionomica Ltd's

beneficial interest in the loan. This implies that title has passed from the company. Counsel submits that on the plaintiffs' own case, therefore, Bionomica Ltd can have no claim against Commissioning Services Ltd. It is said that this represents a complete defence to the corporate plaintiff's claim.

Findings of the court

32. I am satisfied that Commissioning Services Ltd has demonstrated a *prima facie* defence to the claim made against it by the corporate plaintiff, Bionomica Ltd. In carrying out this analysis, it is appropriate to have regard not only to the formal pleadings but also to the affidavit filed by Mrs Daly. Whereas it is regrettable that this elaboration of the plaintiffs' claim has only been provided at the eleventh hour, regard should be had to same in determining whether there is a *prima facie* defence. It represents sworn evidence, and thus has a greater weight than a mere pleading. The second named defendant is not prejudiced in circumstances where the affidavit has actually disclosed an additional potential ground of defence. I will return to consider the plaintiffs' delay in providing the detail of their case when determining the costs of the pre-trial applications.

33. It is apparent from the pleadings and the affidavits filed that there is a *bona fide* dispute between the parties as to the precise circumstances in which a transfer of €300,000 came to be made by Response Engineering Ltd to Commissioning Services Ltd., and whether this transfer had been made in the context of a proposed merger. It is also apparent that—whatever the position may be in respect of the initial transfer—there are acknowledged difficulties with the *subsequent* assignment of the (alleged) loan to Bionomica Ltd in June 2012. These difficulties stem from the misdescription of Commissioning Services Ltd as "CSL Commissioning Services Ltd". What the precise legal consequences of this misdescription are, is, ultimately, a matter for the trial judge to determine. For present purposes, however, it is sufficient to note that these difficulties may mean that

Commissioning Services Ltd has a defence to the proceedings. It is at least arguable that the transaction was not competent to transfer an interest in the loan to Bionomica Ltd. For similar reasons, the alleged failure to comply with the requirements of section 28(6) of the Supreme Court of Judicature Act (Ireland) 1877, if made out at trial, might well represent a defence to the proceedings.

34. Finally, the position now adopted by the plaintiffs, i.e. to the effect that Mrs Daly is the *successor in title* to Bionomica Ltd, opens up a further possible line of defence. If whatever interest Bionomica Ltd had held in the loan has, indeed, passed to Mrs Daly, then that company would appear to have no cause of action against Commissioning Services Ltd. It should be emphasised that for the purposes of the application for security for costs, Commissioning Services Ltd, as moving party, only has to establish a *prima facie* defence to the corporate plaintiff's claim. It is not necessary, for this purpose, to demonstrate a *prima facie* defence to Mrs Daly's claim.

35. For the avoidance of any doubt, it should be explained that none of this is to say that Commissioning Services Ltd will inevitably succeed in its defence of the proceedings; rather, it simply means that the threshold of a *prima facie* defence, as understood in the case law discussed earlier, has been met.

(2). Whether company unable to pay costs of successful defendant

36. The next matter to be considered is whether it appears, by credible testimony, that there is reason to believe that the corporate plaintiff will be unable to pay the costs of the defendant if successful in its defence. The approach to be taken in this regard has been summarised as follows by the Supreme Court in *IBB Internet Services Ltd v. Motorola Ltd* [2013] IESC 53 at paragraph 5.16.

> "[…] While it does not require the court to assess the matter on the balance of probabilities, it does require the court to consider all material evidence and reach an assessment of the range of likely

> eventualities and thereby determine whether there truly is 'reason to believe' that the company 'will' be unable to pay costs should it lose. That requires that the evidence satisfy the court that there is something significantly greater than a mere risk of such an eventuality occurring."

37. The affidavit evidence filed on behalf of Bionomica Ltd by its liquidator indicates that, although in the course of being wound up, the company is solvent and currently has €118,549.47 in cash at the bank. The remaining creditors of the company are identified as Mrs Gretta Daly and her son, Mr Damien Daly, both of whom have confirmed to the liquidator that they are not seeking repayment of the money due to them pending the conclusion of these proceedings.

38. In order to assess whether there is "reason to believe" that the company will be unable to pay the costs of the defendant, Commissioning Services Ltd, it is necessary to consider the *quantum* of costs for which the company might be liable. Each side has put before the court an estimate of costs prepared by their respective legal costs accountants. The estimates differ wildly. The estimate submitted on behalf of the party seeking security for costs suggests that the overall costs which it would incur were the proceedings to go to full hearing is in the order of €525,000. This figure includes value added tax ("VAT"). The figure exclusive of VAT is €432,668.

39. By contrast, the estimate submitted on behalf of the corporate plaintiff is €128,200. This figure excludes VAT on the basis that same is not ordinarily recoverable from the other side pursuant to a costs order. See Order 99, rule 2(4) of the Rules of the Superior Courts. See also the judgment of the High Court (Baker J.) in *Werdna Ltd v. MA Insurance Services Ltd* [2018] IEHC 194, citing with approval *Harlequin Property (SVG) Ltd v. O'Halloran* [2012] IEHC 13; [2013] 1 I.L.R.M. 124 (Clarke J.).

40. The costs estimate prepared on behalf of Commissioning Services Ltd is dated 27 August 2019, and thus predates the coming into force of the new costs regime under the Legal

Services Regulation Act 2015. The relevant provisions of that Act were not commenced until October 2019. It is not immediately obvious that the implications of the new costs regime had been considered in preparing the costs estimate.

41. Following the hearing of the motions on 16 June 2020, the parties were directed to file written legal submissions addressing the quantum of legal costs which they say the second named defendant would be likely to recover under the new costs regime under the Legal Services Regulation Act 2015 in the event that it were to be successful in its defence of the proceedings. Both sides filed helpful written legal submissions on 8 July 2020. In brief, each side stood over its original costs estimate, save that Commissioning Services Ltd made some minor deductions to its costs estimate to reflect the fact that senior counsel was not, ultimately, briefed on the pre-trial applications. These deductions produced a final estimate of approximately €400,000 (excluding VAT). It is expressly submitted on behalf of Commissioning Services Ltd that the costs outlined in its legal costs accountant's report of 27 August 2019 (less the deductions referred to above) would be recoverable under Parts 10 and 11 of the Legal Services Regulation Act 2015. (See §24 of the written legal submissions).

42. The disparity between the two sides' costs estimates is referable, in large part, to the differing assumptions made as to: (i) the length of time which the full hearing is likely to take; (ii) the brief fees payable to counsel; and (iii) the solicitors' general instructions fee. The higher estimate put forward by the party seeking security has been calculated on the basis of a six-day hearing, and a brief fee for senior counsel of €45,000. By contrast, the estimate put forward by the corporate plaintiff has been calculated on the basis of a two-day hearing, and a brief fee for senior counsel of €18,000. The solicitors' general instructions fees are estimated at €225,000 and €62,500 respectively.

43. The two sides' costs estimates also differ significantly in respect of the costs associated with the three pre-trial motions the subject of this judgment. The revised costs estimate on behalf of Commissioning Services Ltd proposes a *separate* brief fee for junior counsel of €6,667 on each of the three motions, giving an aggregate fee for junior counsel of €20,001 in respect of a hearing which finished comfortably within a day. By contrast, the other side have proposed a single brief fee of €4,000.

44. The key differences between the rival costs estimates are summarised in tabular form as follows.

Item	Second named Defendant's estimate	Plaintiffs' estimate
Solicitors' instruction fee	€225,000	€62,500
Brief fee for senior counsel	€45,000	€18,000
Brief fee for junior counsel	€30,000	€12,000
Aggregate refreshers	€41,667	€11,700

45. It is a cause of concern that the estimates of costs differ so wildly. There is an obligation on legal costs accountants, when preparing costs estimates for a court, to act *independently* of the interests of their clients. There is a detailed legislative regime in place which identifies the criteria to be applied in measuring costs on a "party and party" basis. Against this background, it is difficult to understand how two experienced legal costs accountants could have reached such vastly different estimates for the same case, i.e. €128,200 versus €400,000.

46. If the lower figure is correct, then the threshold issue, i.e. whether there is reason to believe that the corporate plaintiff will be unable to pay the costs of the second named defendant if successful in its defence, might well have been decided in favour of the corporate plaintiff. As noted above, the company is solvent, and currently has €118,549.47 in cash at the bank. The remaining creditors of the company have confirmed to the liquidator that they are not seeking repayment of the money due to them pending

the conclusion of these proceedings. The cash assets of the company would thus come very close to covering the costs of the second named defendant.

47. Had it been necessary—in order to determine the application for security for costs—for me to reach a concluded view on the likely level of costs, I would have had to give serious consideration to allowing cross-examination of the two legal costs accountants and/or to directing the preparation of a costs estimate by a legal costs accountant *independent* of the parties. I would also have had to review the statutory notices issued to the parties by their solicitors disclosing the legal costs that will be incurred in relation to the proceedings. (Section 150 of the Legal Services Regulation Act 2015, previously section 68 of the Solicitors (Amendment) Act 1994). Having to take these various steps would have been unfortunate, as it would have resulted in yet further costs being incurred in these proceedings.

48. It should also be emphasised that the making of an order for security for costs is *discretionary*. Were a court to reach the conclusion that a party seeking security for costs had put forward an exaggerated costs estimate, then this is a factor which would weigh heavily against granting the relief. The making of an order which requires a corporate plaintiff to put in place arrangements to ensure that monies are available to cover the costs of the other side (if successful) has the potential to restrict the right of access to the courts. Such arrangements have a financial cost to the company, whether in terms of the interest charged by a surety or in the loss of access to monies held in reserve. In an extreme case, a company may be unable to provide security, and will thus not be able to pursue the proceedings. Given the grave implications for a corporate plaintiff, it behoves the party seeking security to put forward a fair and accurate estimate of the level of costs it is likely to receive on a "party and party" assessment.

49. As it happens, it is unnecessary for me to reach a concluded view on the likely level of costs in the present case. This is because it is possible to determine the application for security for costs on an alternative basis. For the reasons explained under the next heading, I have concluded that, even if the threshold issue of inability to pay had been resolved against the corporate plaintiff, the application for security for costs would nevertheless be refused by reference to the special circumstances of the case.

50. It is not, therefore, strictly speaking necessary to resolve the threshold issue of the likely level of costs, given that the outcome of the application for security for costs would be the same. It is nonetheless a cause of concern that, on one side's estimate, their legal costs would exceed the value of the underlying claim, i.e. the principal sum of €300,000, by a margin of €100,000. It should be recalled that the second named defendant's (revised) costs estimate of €400,000 (exclusive of VAT) is referable to the costs of a *single* party only. The proceedings involve two plaintiffs, two defendants and a third party. If each of these parties were to incur fees of the scale contended for by the moving party, it would have the consequence that the aggregate legal costs of the proceedings would dwarf the principal sum claimed.

51. With the benefit of case management by the court, it should be possible to keep the costs in proportion to the value of the claim. I will return to discuss case management towards the end of this judgment.

(3). Special circumstances

52. The next issue to be considered is whether the presence of a natural person as a co-plaintiff in the proceedings represents a special circumstance which ought to cause the court to exercise its discretion against granting an order for security for costs.

53. The general rule is that a person resident within the jurisdiction (or within the European Union) will not normally be required to provide security for costs irrespective of their

financial circumstances or their ability to meet an order for costs against them. I will refer to such plaintiffs as "individual" plaintiffs or as a "natural person".

54. The position of corporate plaintiffs is different. The legislature has put in place a statutory mechanism under section 52 of the Companies Act 2014 (previously, section 390 of the Companies Act 1963) which allows a court to order a company to put security in place to cover all or part of the costs which a successful defendant might recover. The rationale for this difference in treatment between individuals and companies is that the shareholders and creditors of an insolvent company should not be able to approbate and reprobate, i.e. to obtain the potential benefit of proceedings taken in the company's name without the attendant risk in terms of costs.

55. The position has been explained as follows by the Supreme Court in *Farrell v. The Governor and Company of Bank of Ireland* [2012] IESC 42; [2013] 2 I.L.R.M. 183.

> "The logic behind that rationale is that parties, such as shareholders, or in an appropriate case creditors, behind a company will get the benefit of the company being successful in litigation but will be spared the adverse cost consequences of the company being unsuccessful for the premis on which security for costs is ordered under Section 390 is that those costs will not, in practice, be paid if the company loses. Why should the parties who are going to benefit by a successful action not also be exposed to the costs of failure. That is the underlying rationale for corporate security for costs. There are, of course, a range of other factors that need to be taken into account such as the establishment of an arguable defence and the existence of special circumstances in accordance with the jurisprudence. It is not necessary to consider those factors in this case."

56. This difference in treatment has the effect that a defendant faced with proceedings taken jointly by a natural person and a company will generally only be entitled to seek security for costs against the latter.

57. It follows, therefore, that the presence of a natural person as co-plaintiff will, in most instances, have the practical consequence that the making of an order for security for costs as against the corporate plaintiff will not result in the entire proceedings being

stayed. The individual co-plaintiff will be entitled to pursue the proceedings in their own name even if the corporate plaintiff does not provide security. Depending on the financial means of the co-plaintiff, either one of the following two scenarios might play out (assuming the corporate plaintiff discontinues its proceedings). If the individual plaintiff is impecunious, then the defendant may find itself unable to recover costs even if successful in its defence of the proceedings. If, conversely, the individual plaintiff is a good "mark" for costs, then the defendant will be able to recover its costs against them.

58. In each of the above contingencies, the practical benefit to a defendant of obtaining an order for security for costs against the corporate co-plaintiff is very limited.

59. A decision to grant security for costs involves balancing the rights of the defence against the right of access to the courts. The presence of a natural person as co-plaintiff might, in principle, be sufficient to tip the balance in favour of refusing an order. In particular, if the court were satisfied that the defendant would be able to recover costs from the individual plaintiff, it might allow both co-plaintiffs to pursue the proceedings jointly, without any necessity for the corporate plaintiff to provide security for costs. This is because any costs order is likely to be made against both plaintiffs jointly and severally (assuming, of course, that the claims of the two co-plaintiffs are closely enough related). A successful defendant would, therefore, be entitled to recover all of the costs from the individual plaintiff, and it would then be a matter between the co-plaintiffs *inter se* as to whether the individual is entitled to a contribution from the company. The making of an order for security for costs in such a case would not be of any practical benefit to the defendant, but might, in some instances, result in the corporate plaintiff not being able to pursue the proceedings.

60. This issue has been addressed in a number of judgments of the High Court. In each instance, the High Court has held that the presence of a natural person as co-plaintiff is

merely a factor to be considered; it is not a *jurisdictional bar* to the making of an order under what is now section 52 of the Companies Act 2014 (previously, section 390 of the Companies Act 1963).

61. Before turning to these authorities, it may be useful first to refer briefly to a judgment of the High Court of England and Wales which has been approved of by the High Court in some of those cases. The judgment is that in *Pearson v. Naydler* [1977] 1 W.L.R. 899. The issue before the court was whether the long-established practice, to the effect that no order for security for costs would be made against a plaintiff ordinarily resident outside the jurisdiction where there is a genuine co-plaintiff who resides within the jurisdiction, should be extended to a corporate plaintiff.

62. Megarry V.-C. rejected an argument that the presence of the individual plaintiff negatives the statutory powers of the court to order the provision of security for costs. The position of corporate plaintiffs was distinguished from that of natural persons as follows.

> "In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. The basic rule is the opposite: section 447 [of the Companies Act 1948] applies to all limited companies, and subjects them all to the liability to give security for costs. The whole concept of the section is contrary to the rule developed by the cases that poverty is not to be made a bar to bringing an action. There is nothing in the statutory language (the substance of which goes back at least as far as the Companies Act 1862, section 69) to indicate that there are any exceptions to what is laid down as a broad and general rule for all limited companies. Nor is it surprising that there should be such a rule. A man may bring into being as many limited companies as he wishes, with the privilege of limited liability; and section 447 provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty. Yet if [counsel] is right, there is an implied exception or qualification to section 447 which makes it operate as if there were inserted in some suitable place some words such as 'unless the company sues with one or more natural persons as co-plaintiffs or co-pursuers.' I can see no grounds for making any such implication. The authorities on the ambit of the exception in the case of foreigners seems to me to provide no true analogy for the restriction of the basic statutory rule for companies."

63. The Vice-Chancellor concluded that the presence of a natural person as co-plaintiff did not exclude the statutory jurisdiction, but rather was a *factor* to be considered in the exercise of the court's discretion.

64. These principles were applied by the High Court (Murphy J.) in *Bula Ltd v. Tara Mines Ltd (No. 3)* [1987] I.R. 494. The court held that, whilst the presence of individual co-plaintiffs is a factor to be considered in all cases, it was not, in that case at any rate, one of major significance. It was accepted that the position might be different if it was shown that the individual plaintiffs were a good mark for costs.

65. A similar approach was adopted by the High Court (Clarke J.) in *Salthill Properties Ltd v. Royal Bank of Scotland plc* [2010] IEHC 31; [2011] 2 I.R. 441. The court, having cited *Bula Ltd* (above), held that the party placing reliance on the existence of the individual co-plaintiff is required to show that the individual plaintiff would be a good mark. On the facts, the corporate plaintiff had produced no evidence from which the court could infer that the individual plaintiff would be a mark for any costs awarded against him.

66. These principles were applied more recently in *Kimpton Vale Ltd v. Ferox Ltd* [2013] IEHC 577. Much emphasis is placed on this judgment by counsel for the second-named defendant. There, the High Court (Keane J.) had not been satisfied on the evidence that the individual co-plaintiffs would be a good mark for costs. The court noted that the individual co-plaintiffs had executed personal guarantees amounting to in excess of eight million euros each. The court did not consider a bare assertion on oath, to the effect that recourse could not be had to those personal guarantees unless other property assets had first been realised and a shortfall remained, sufficient in the absence of any meaningful evidence concerning the relevant agreement(s) and the nature and value of those assets. Similarly, a bare assertion on oath, to the effect that certain unencumbered property jointly owned by the co-plaintiffs was worth very significantly more than the defendant's

possible exposure to costs, was held to be insufficient in circumstances where the assertion had been made without reference to any valuation, much less any independent expert valuation, of the property.

67. I turn now to apply the principles identified in the foregoing case law to the facts of the present case.

68. Mrs Daly has averred, in her affidavit of 28 May 2020, that she enjoys a net worth in excess of €1,700,000 (excluding the loan the subject-matter of these proceedings), and that she is "more than a good 'mark' for any costs" that might be awarded to Commissioning Services Ltd in these proceedings. In the course of his submissions, counsel on behalf of the plaintiffs confirmed that Mrs Daly accepts that, in the event of the defence of the proceedings being successful, she would be *personally* liable to discharge any costs order made in favour of Commissioning Services Ltd. This concession was well made: in the event that a costs order is made in favour of either of the defendants, it would almost certainly be made against the plaintiffs jointly and severally. The claims of the two co-plaintiffs are inextricably linked and relate to a single alleged debt of €300,000. A successful defendant would, therefore, be entitled to recover all of the costs from Mrs Daly, and it would then be a matter between Mrs Daly and Bionomica Ltd *inter se* as to whether she is entitled to a contribution from the company.

69. Having regard to all of the foregoing, the existence of Mrs Daly as a co-plaintiff represents a special circumstance militating against the making of an order for security for costs. The evidence establishes that Mrs Daly is a good mark for any costs order. Mrs Daly has given sworn evidence as to her net worth, and has provided a credible explanation as to the source of those funds.

70. The facts of the present case are entirely distinguishable from those arising in *Kimpton Vale Ltd*. As discussed above, the evidence of the co-plaintiffs' financial position in that

case consisted of what the court considered to be "bare assertions", given against a background of the co-plaintiffs' potential exposure under a guarantee for a sum in excess of eight million euros.

71. In summary, the second named defendant's application for security for costs is refused.

FURTHER AND BETTER PARTICULARS

72. The other pre-trial application which remains outstanding is the plaintiffs' application to compel Commissioning Services Ltd to provide further and better particulars of certain matters stated in its defence.

73. The legal principles governing the obligation on a party to provide particulars have been authoritatively stated by the Supreme Court in *Quinn Insurance Ltd (Under Administration) v. Pricewaterhousecoopers (A Firm)* [2019] IESC 13. O'Donnell J., delivering the judgment of the court, summarised the guidance as follows (at paragraph 20).

> "The guidance to be gleaned from the case law on O. 19, r. 7 (1) RSC can, I think, be summarised as follows:-
>
> i. The basic rule remains the classic formulation in *Mahon v. The Celbridge Spinning Co. Ltd*. [1967] I.R. 1, at p. 3. A party is entitled to know the nature of the case being made against them. However, the role of particulars is not to require a party to furnish detailed particulars or specific aspects of the case. It is sufficient that the issues between the parties should be adequately defined and the parties should know in broad outline what is going to be said at the trial of the action.
>
> ii. This reflects the classic distinction, dating at least from O. XIX, r. 4 of the Rules of Court scheduled to the Supreme Court of Judicature Act 1875 enacted in England and Wales, and also to be found in O. XIX, r. 4 of the 1905 Rules of the Superior Courts made pursuant to s. 61 of the Supreme Court of Judicature (Ireland) Act 1877, that pleadings should contain facts and not evidence. This is now set out in O. 19, r. 3 RSC, which provides:-

> ‘Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved […]’

iii. The purpose of particulars may be viewed in the light of the fact that they are directed towards a trial, which in most cases will ultimately be decided by reference to oral evidence. Particulars in pleadings should facilitate the trial and not be a substitute for it: *McGee v. O’Reilly* [1996] 2 I.R. 229, at p. 234.

iv. The defendant is entitled to be told of the facts as the plaintiff alleges them to be, and it is not a ground for refusing particulars that the defendant may know the true facts: *Moorview Developments Ltd. v. First Active plc* [2005] IEHC 329, (Unreported, High Court, Clarke J., 20 October 2005), para. 7.2.

v. In complex cases, more detailed particulars may properly be required: *Playboy Enterprises International Inc. v. Entertainment Media Networks Ltd*. [2015] IEHC 102, (Unreported, High Court, Baker J., 19 February 2015), para. 14.

vi. The party is entitled to know the range of evidence (rather than any particular item of evidence) with which he or she will have to deal with at the trial: *Cooney v. Browne* [1985] I.R. 185, p. 191.

vii. The procedures requiring an exchange of witness statements may reduce the risk of a party being taken by surprise at a trial, but does not mean that less is required by way of particulars. One important function of particulars is to limit the range of discovery, which can be burdensome and expensive for the parties: *Thema International Fund plc v. Institutional Trust Services (Ireland) Ltd*. [2010] IEHC 19, (Unreported, High Court, Clarke J., 26 January 2010), para. 4.1.”

74. At a later point of his judgment (paragraph 23), O’Donnell J. explained the distinction between a matter for particulars and a matter for evidence, as follows.

> “The distinction at issue in this appeal (and indeed in most cases of difficulty) is not between facts that must be proved, and the evidence which may prove them (sometimes referred to as a distinction between *what* would be proved and *how* it will be proved): it is a distinction as to the level of detail which is required at the stage of pleadings. At a certain point, the other party will have been sufficiently informed of the case it has to meet, and further detail can be left to evidence at the trial. At that stage, any further detail is not a matter for particulars or pleadings in advance of trial, but for evidence at the trial. In that sense, it is properly said in response to any request for particulars that the information sought is not a matter for particulars, but rather for evidence. However, that distinction is not drawn by asking if the particulars seek an

> explanation of *why* or *how* something is alleged to have occurred. If a plaintiff simply pleaded that a defendant was negligent or careless or failed to take sufficient care, a defendant would be entitled to require particulars of how or why that is so, and if the plaintiff refused to provide such details, a court would order the necessary particulars be delivered."

75. I turn now to apply these principles to the circumstances of the present case. The plaintiffs had served a request for further and better particulars on 28 May 2019. This was only replied to on 11 June 2020.

76. The first area of dispute is in respect of the particulars of the transfer of the sum of €300,000 by Response Engineering Ltd to Commissioning Services Ltd. The plaintiffs' case is that this transfer represented a *loan* from the first company to the second company. In its defence, Commissioning Services Ltd offers a different explanation for the transfer: specifically, it is suggested that the transfer is referable to a proposed merger between the two companies, and had been intended to repay a director's loan. It is expressly acknowledged in the defence, however, that the proposed merger did not take place in the manner envisaged.

77. Paragraph 8 of the defence reads as follows.

> "8. The sum of €300,000 was transmitted by the First Named Defendant to the Second Named Defendant between August and December 2007. The said funds did not constitute a loan and the Second Named Defendant denies any liability to the Plaintiffs or either of them, or to the First Named Defendant."

78. The request for particulars and the response to same are set out below.

> "3. Arising out of paragraph 8 of the Defence, please give full and detailed particulars of the arrangements and basis upon which the '*sum of €300,000 was transmitted by the First Named Defendant to the Second Named Defendant between August and December 2007*' (our emphasis)."
>
> "3: The sum of €300,000 was transmitted to the Second Named Defendant by way of electronic funds transfer. Anything further is a matter for evidence."

79. This response is inadequate. The plaintiffs are entitled to particulars of the basis upon which the sum of €300,000 was transferred between the two companies. Without in any

way trespassing upon the merits of the case, it is fair to say that the explanation offered by the defendant for the transfer is not straightforward. The abridged financial statements to the year ending 31 January 2008 identify (at page 11) a liability of €300,000 which is described as "Response Engineering Loan". This appears under the heading "Creditors: Amounts falling due after more than one year".

80. It is now pleaded that the transfer did not, in fact, constitute a loan, but instead took place in the context of a proposed merger. It is next pleaded that the merger did not ultimately take place in the manner envisaged. The plaintiffs are entitled to know what the defendant says are the consequences of the transaction not proceeding. Is it, for example, going to be said that the sum of €300,000 is subject to some sort of constructive trust. In the absence of particulars in this regard, the plaintiffs cannot know the nature of the case they are likely to meet at trial. The absence of particulars also has the potential to increase legal costs unnecessarily. As appears from the Supreme Court judgment in *Quinn Insurance Ltd*, one important function of particulars is to limit the range of discovery, which can otherwise be burdensome and expensive for the parties.

81. The next area of dispute concerns the plea that even if the sum of €300,000 had represented a loan, same had been written off in its entirety. This plea is set out at paragraph 14 of the defence, as follows.

> "14. Without prejudice to the foregoing, if the transmission of €300,000 from the First Named Defendant to the Second Named Defendant did constitute a loan, which is denied, the Second Named Defendant pleads that it was subsequently agreed between the Defendants that the said loan would be written off in its entirety."

82. The request for particulars and the response to same are set out below.

> "5. Arising out of paragraph 14 of the Defence, please give full and detailed particulars of the agreement referred to as to the writing off of the loan, and without prejudice to that please:
>
> (a) specify when that agreement was made;

(b) specify whether that agreement was made orally or in writing;

(c) insofar as it is alleged that the terms of that agreement were made or evidenced in writing, please identify all relevant documents and furnish copies of the same; and

(d) if and insofar as the agreement is alleged to have been made orally, please identify where, by whom and in whose presence the agreement was made and set out the material terms of the same."

"5: This is a matter for evidence. The Second Named Defendant's pleading in this regard is sufficiently particularised. The fact of the writing-off of the loan is evidenced by the statement contained in the Second Named Defendant's financial statements for the year ending 31st December 2012, referred to at paragraph 16 of the Second Named Defendant's Defence."

83. Counsel for the defendant conceded that further and better particulars should be provided in this regard. With respect, this concession was sensibly made. Again without trespassing on the merits, it is fair to say that whereas commercial loans are indeed written off from time to time, it is relatively unusual. No meaningful explanation has been provided as to how a loan which had previously been reflected in the financial statements came to be written off in its entirety. Moreover, on the plaintiffs' chronology at least, the alleged write-off of the debt occurred at a time when the benefit of the loan had *already* been sold on to Bionomica Ltd, and Response Engineering Ltd would no longer have had any interest in the loan which would have been capable of being written off by it.

84. The next number of issues in dispute concern the manner in which the sum of €300,000 had been reflected in the financial statements of Commissioning Services Ltd throughout the relevant period. It is pleaded in the defence that the sum had been reflected as a liability for the financial years ending 31 January 2008, 31 December 2008, 31 December 2009, 31 December 2010 and 31 December 2011. It is then pleaded that the financial statements for the year ending 31 December 2012 contained the following text.

> "The directors believe that certain liabilities that had been provided for will not crystallise in the future and have therefore been released to the profit and loss account."

85. The request for particulars and the response to same are set out below.

> "6. Arising out of paragraph 15 of the Defence, please:
>
> (a) particularise the basis for the liability referred to; […]"
>
> "6(a): This is a matter for evidence. The Second Named Defendant's pleading in this regard is sufficiently particularised."
>
> "7. Arising out of paragraph 16 of the Defence:
>
> (a) please furnish a copy of [the 2012] financial statements* referred to;
>
> (b) particularise the material facts for the plea that the alleged statement cited related to '*<u>any</u> sum owing by the Second Named Defendant to the first Named Defendant*' (our emphasis)."
>
> *Counsel for the plaintiffs, in submission, confined this request to the 2012 financial statements in circumstances where the reference to the liabilities not crystallising is said to be contained in that year's financial statements.
>
> "7(a): Please see enclosed at appendix 3.
>
> 7(b): This is a matter for evidence."

86. The plaintiffs are entitled to further and better particulars in respect of these items. At the risk of belabouring the point, the chronology of events pleaded in the defence is relatively unusual, i.e. the sum of €300,000 appears to have been reflected initially as a liability, only for it to have been subsequently "released" in the financial statements for the year ending 31 December 2012. This may well be found by the trial judge to be an accurate reflection of the transactions between the parties. For present purposes, however, it is sufficient to say that the plaintiffs are entitled to some explanation, by way of further and better particulars, of the circumstances leading to this change in the treatment of the sum of €300,000 in the financial statements.

87. The plaintiffs are also entitled, in accordance with Order 31, rule 15 of the Rules of the Superior Courts, to have a copy of whichever *version* of the financial statements wherein the text referring to the "release" of the liability is contained. There seems to be some confusion as to whether this text is to be found in the *abridged* version of the financial statement for the year ending 31 December 2012, which version has, seemingly, already been produced to the plaintiffs. At all events, this matter is now to be attended to, and the correct version produced.

88. The final area of dispute concerns the particulars of the alleged acquiescence of Mrs Daly and her husband in the write-off of the loan. This is pleaded as follows at paragraph 17 of the defence.

> "17. These financial statements were signed by Mr Holland, the Second Named Defendant's managing director, and the Third Party, then a director of the Second Named Defendant, on 14 June 2013 and were filed with the Companies Registration Office on 20 June 2013. The financial statements reflected the mutual intention of the First Named Defendant and the Second Named Defendant to write off any liability as between them, and were concluded with the agreement and knowledge of the Third Party, who at that time was both director and company secretary of the Second Named Defendant, and who had been a director and company secretary of the First Named Plaintiff and the Second Named Defendant up to, respectively, 25 July 2012 and 13 June 2012. Furthermore, the Second Named Plaintiff (the wife of the Third Party) was a director and shareholder of the First Named Plaintiff as of the date (14 June 2013) on which the Third Party signed the financial statements of the Second Named Defendant. Accordingly, the First Named Plaintiff and the First Named Defendant were on notice of, and consented to, the write-off of the loan."

89. The request for particulars and the response to same are set out below.

> "8. Arising out of paragraph 17 of the Defence, please:
>
> (a) particularise the Second Defendant's case as to the alleged role and relevance to the alleged writing off of the loan of each of:
>
> (i) the First Plaintiff; and
>
> (ii) the First Defendant;
>
> (b) clarify whether the expression '*mutual intention*' is intended to refer to a contractually binding arrangement, and if so please

(i) give full and detailed particulars of the offer, acceptance and consideration for that alleged contract, and please:

(ii) say whether that alleged contract was made orally or in writing;

(iii) if and insofar as made or evidenced in writing, please identify all relevant documents and furnish copies of the same;

(iv) if and insofar as the alleged contract was made orally, please say when, where, by whom and in whose presence that contract was made and set out the material terms of the same."

"8(a): This is a matter for evidence. The Second Named Defendant's pleading in this regard is sufficiently particularised.

8(b): This is a matter for evidence. The Second Named Defendant's pleading in this regard is sufficiently particularised."

90. For reasons similar to those set out in respect of the two previous issues, these are matters in respect of which the plaintiffs are entitled to further and better particulars. The suggestion that the (alleged) loan had been written off requires some explanation by way of particulars. The plea that this reflected the "mutual intention" of the two defendants must be explained, and the particulars raised—but not answered—are reasonable.

91. In summary, an order will be made directing that the second named defendant is to provide further and better particulars in response to numbered items 3; 5; 6(a); 7 and 8 of the notice for particulars served by the plaintiffs on 28 May 2019.

CASE MANAGEMENT

92. As noted earlier, on the basis of the second named defendant's costs estimate, it has been suggested that the legal costs of a *single* party to these proceedings will be well in excess of the principal sum claimed. Were legal costs of a similar magnitude to be incurred by

the other parties to the proceedings, including the third party, then the costs of the litigation would dwarf the value of the claim.

93. The costs of litigation should, generally, bear some proportion to the value of the underlying claim. This is especially so in the case of commercial litigation. There is a public interest in ensuring that legal disputes can be resolved without the parties having to expose themselves to an excessive level of legal costs. Were it otherwise, then parties with *bona fide* claims might be deterred from instituting proceedings for fear of financial ruin.

94. This is reflected, to an extent, in the principles relating to the assessment of legal costs under Schedule 1 of the Legal Services Regulation Act 2015. The overarching principles informing the adjudication of costs are (a) that the costs have been reasonably incurred, and (b) that the costs are reasonable in amount. One of the matters which a Legal Costs Adjudicator must consider, in determining whether the costs are reasonable, is the amount of the money, or the value of the property or the interest in the property concerned. See Schedule 1, paragraph 2(g).

95. Of course, it will not always be feasible to achieve symmetry between the amount of legal costs and the value of the underlying claim. In some instances, such as in the case of constitutional litigation, it will not be possible to ascribe a mere monetary value to a claim. In other instances, the legal issues may be very complex and time-consuming, with the result that there is an imbalance between the legal costs and the value of the underlying claim.

96. The high level of costs estimated on behalf of the second defendant in these proceedings is predicated on an assumption that the trial of the action will take six days. However, it should be possible to reduce the hearing time required—with an attendant reduction of legal costs for all sides—by case management.

97. I propose, therefore, to list this case for a directions hearing on 29 July at 10.15 am, with a view to having the proceedings listed for full hearing in September. The directions hearing will take the form of a remote hearing. The plaintiffs' solicitors are to notify the other parties to the proceedings of this date.

98. It seems, in light of the claim as formulated in Mrs Daly's affidavit, that the plaintiffs may need to amend their statement of claim to ensure that it identifies the real issues in controversy between the parties. If the plaintiffs do intend to amend their pleadings, a draft of the amended statement of claim is to be furnished to the court and to the other parties by 22 July 2020. If there is any opposition to the proposed amendments, these will be heard as part of the directions hearing on 29 July 2020.

CONCLUSION AND PROPOSED ORDER

99. The second named defendant's application for security for costs is dismissed for the reasons set out above. The presence of a natural person, who is a good "mark" for any costs order, represents a special circumstance which obviates the necessity for requiring the corporate plaintiff to put in place security to cover the costs of the defendant if successful.

100. The plaintiffs' application to compel the second named defendant to provide further and better particulars in response to the notice for particulars served by them is allowed. An order will be made directing that the second named defendant is to provide further and better particulars in response to numbered items 3; 5; 6(a); 7 and 8 of the notice for particulars served by the plaintiffs on 28 May 2019.

101. Order 99, rule 2(3) of the Rules of the Superior Courts provides, *inter alia*, that upon determining any interlocutory application, the High Court shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of

the interlocutory application. Part 11 of the Legal Services Regulation Act 2015 provides, *inter alia*, that a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings order that a party to the proceedings pay the costs of, or incidental to, the proceedings. The general rule is that costs follow the event.

102. Subject to consideration of any written submissions which the parties may file within fourteen days of this judgment, my tentative view on the costs of the pre-trial applications is as follows.

103. For the purpose of identifying the "event", it is appropriate to consider the motion to strike out the co-plaintiff from the proceedings and the motion for security for costs together. The two motions are inextricably linked. Both motions were issued on the same date (5 September 2019), and it is evident that the primary motivation for seeking to strike out the co-plaintiff was a concern that security for costs would not be ordered against a corporate plaintiff when another *bona fide* plaintiff is joined to the proceedings. The objective of the first motion was to address this concern by having Mrs Daly struck out of the proceedings. See Affidavit of Kevin Harnett sworn on 3 September 2019, at paragraph 23, as follows.

> "23. The ordinary and normal rule is that security for costs will not be ordered against a plaintiff when another bona fide plaintiff is joined to the proceedings. However, where a Court is of opinion that such a co-plaintiff is a) not a real and substantial plaintiff in the action, b) is not entitled to the relief claimed therein, and/or c) has been joined merely to oust the jurisdiction to order security for costs against the first plaintiff, it is entitled to strike out the participation of that co-plaintiff from the proceedings. It is clear that Mrs Daly fits this criteria, in that she is not entitled to any relief from these proceedings on their face, lacks bona fides, and has been joined for the purpose of avoiding an order for security for costs."

104. Put otherwise, the strike out application was being made in aid of the security for costs application.

105. The "event" has been decided in favour of the plaintiffs in that the application for security for costs has been dismissed. This is not, however, the end of the analysis for costs purposes. It is also necessary to consider whether the form of costs order needs to be modified to reflect the fact that the precise basis for Mrs Daly's participation in the proceedings had only been clarified at the eleventh hour. It will be recalled that the detail is set out in an affidavit sworn on 28 May 2020, and filed shortly before the hearing of the pre-trial applications on 16 June 2020. Counsel for the second named defendant has argued that the explanation now offered for Mrs Daly's participation in the proceedings represents a *volte face*, and that his clients should be awarded the costs of the strike out motion on the basis that it was reasonable for them to have issued same in September 2019 given the lack of any explanation at that time for Mrs Daly's participation. Counsel points out that the plaintiffs had failed to respond properly to a request seeking particulars of the precise basis on which Mrs Daly is allegedly the beneficial owner of the property, rights and claims to which reference is made. The plaintiffs' response had been to say "This is a matter for evidence".

106. With respect, these submissions would have had much more force had the second named defendant—upon receipt of Mrs Daly's affidavit in June 2020—decided to *withdraw* both motions. In such a scenario, there might well have been an argument for saying that the second named defendant should be entitled to some costs. Instead, the second named defendant only withdrew the first motion, and pressed on with the security for costs motion notwithstanding the content of Mrs Daly's affidavit, and, in particular, the detail provided of her financial position. This necessitated a day's hearing before the High Court, and the second named defendant was ultimately unsuccessful in its application.

107. The *proposed* order, therefore, is that the second named defendant is to pay two-thirds of the plaintiffs' costs of the two motions. This discount of one-third is intended to reflect

the court's disapproval of the plaintiffs' conduct in (i) failing to provide a proper response to the particulars raised, and (ii) failing to file a replying affidavit in a timely manner. The costs of the strike out application would be confined to drafting costs, i.e. the costs award proposed would not include a separate brief fee on that motion. Only one brief fee would be allowed on the two motions.

108. The position in respect of the costs of the third motion, i.e. the application for further and better particulars is more straightforward. The "event" went in favour of the plaintiffs, and they would appear to be entitled to their costs.

109. These *proposed* costs orders will be subject to the usual proviso that costs are to be assessed by the Office of the Chief Legal Costs Adjudicator in default of agreement, and that there is to be a stay on the execution of the costs orders pending the final determination of the High Court proceedings.

110. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

111. In the event that either party wishes to make submissions as to why the court should not make costs orders along the lines proposed above, short written submissions should be filed in the Central Office within fourteen days of today's date, and a copy of same emailed to the Registrar assigned to this case.

Appearances

Garvan Corkery for the plaintiffs instructed by Harry McCullagh Solicitors
Hugh McDowell for the second named defendant instructed by Maples and Calder LLP