THE HIGH COURT

[2021] IEHC 52

Record No. 2018/9987P

BETWEEN

DELTA INDEX LIMITED

PLAINTIFF

- AND –

AYONDO MARKETS LIMITED

DEFENDANT

Judgment of Mr. Justice Heslin delivered the 26th day of January 2021

Introduction

1. This is an application for security for costs which is brought by the defendant in a motion which was issued on 04 April 2019. At the outset it is appropriate to point out that the hearing on 25 November 2020 proceeded on the basis that the defendant seeks an order pursuant to s. 52 of the Companies Act, 2014 and no relief was sought under O. 29 of the Rules of the Superior Courts. In advance of the hearing, Ms. Geoghegan BL for the defendant/applicant and Mr. Moran BL for the plaintiff/respondent prepared outline written submissions which were most helpful and which they supplemented by way of clear and comprehensive oral submissions at the hearing. I have very carefully considered all written and oral submissions, key elements of which I will refer to later in this judgment. As regards the relevant background, the plaintiff, which is a limited liability company incorporated in Ireland, is engaged in the business of online "spread trading". Spread trading involves taking a position on price movements of a financial product within a range of values. The defendant, which is a private limited company incorporated in England and Wales, carries on the business of providing access to spread trading technology platforms and associated services. It is not in dispute that the plaintiff and defendant entered into two successive "White Label" contracts which provided for the ability of customers of the plaintiff to access the defendant's spread betting technology and services under the plaintiff's name and brand. It is not in dispute that the contracts, concluded on 23 November 2011 and on 01 January 2015, respectively, involved payment by the defendant to the plaintiff of a percentage of the transactional revenue earned by the defendant on foot of customers' trades. It is also common case that the defendant was required under the contracts to provide a monthly report to the plaintiff and agreed not to contact the relevant customers except as necessary for the purposes of operating the White Label site.

2. The plaintiff issued a plenary summons on 16 November 2011 seeking, *inter alia,* damages for breach of contract, damages for misrepresentation, judgment in the sum of €7,915, an order that the defendant cease trading with the plaintiff's customers and a range of further orders. A statement of claim was delivered, which is dated 18 December 2018, in which the plaintiff pleads that the defendant breached its duties to the plaintiff both during and following what was a mutually agreed termination of their contractual relationship. The plaintiff pleads that, during the term of the relevant contracts, the defendant negligently or intentionally misrepresented the figures in its monthly reports to the plaintiff. It is claimed by the plaintiff that the defendant under-reported losses made by the plaintiff's customers as a consequence of which the plaintiff was paid less than was

contractually due to it by the defendant. The plaintiff also alleges that the defendant, in breach of contract, permitted customers to continue trading with the defendant. The plaintiff also pleads that the defendant failed to discharge an invoice in the sum of €7,915. It is also claimed that, on termination, the defendant had no right to continue to trade with customers of the plaintiff and was obliged to destroy or return all confidential information including customer data, never to communicate with any customer and to return customers' funds. The plaintiff's principal claims are for breach of contract, damages for misrepresentation, judgment in the sum of €7,915 and orders to the effect that the defendant ceases trading with the plaintiff's customers and/or takes steps to return those customers and to account to the plaintiff for profits.

3. It is not in dispute that the plaintiff's unaudited abridged financial statements for the year ended 31 December 2018 show that the plaintiff's liabilities exceed the plaintiff's assets by €513,811.00. The plaintiff concedes that if its claim against the defendant is unsuccessful, it would struggle to meet the defendant's costs of defending the action. The plaintiff also concedes that it has no real source of income at present. Furthermore, the plaintiff accepts that, for the purposes of the present application, the defendant has a *prima facie* defence. The plaintiff accepts that, absent special circumstances, an order for security for costs ought to be made by this court. The plaintiff asserts that there are special circumstances which should cause this court to exercise its discretion not to make an order for security for costs. Specifically, the plaintiff claims that the defendant's alleged wrongdoing has caused its inability to pay costs. This is disputed by the defendant. Before looking more closely at the pleaded claim and the evidence proffered by both sides in respect of the security for costs application, it is appropriate to refer to the statutory provision under which this application is brought and to certain relevant legal principles.

Section 52 of the Companies Act, 2014

4. Section 52 of the Companies Act, 2014, which replaced s. 390 of the Companies Act, 1963, 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."*

Legal Principles

5. In *Harlequin Property (SVG) & Ors. v O'Halloran & Or* [2012] IEHC 13 Clarke J. (as he then was) described the equivalent statutory provision as being a *quid pro quo* for limited liability (see para. 4.9). More recently in *Hedgecroft Limited t/a Beary Capital Partners v Htremfta Limited & Ors* [2018] IECA 364, Ms. Justice Costello, on behalf of the Court of Appeal, dismissed an appeal against an order for security for costs which had been granted in the High Court by Mr. Justice Binchy. Analysing the relevant jurisprudence regarding s. 52 of the Companies Act, 2014, Costello J. stated the following at para. 34: -

"34. The courts have recognised that the implications of the jurisdiction to make an order under s. 52 (and its predecessor, s. 390) are that if the members of the company, who have obtained the benefit of limited liability, do not fund the litigation or if the company is not otherwise in a position to raise the funds to meet the security required in a manner which does not offend other legal principles, that the proceedings in which the limited liability company is a plaintiff may proceed no further. In previous cases it was accepted that potentially valid claims may nonetheless be prevented from proceeding to hearing by reason of the granting of an order for security for the costs of the defendant and the subsequent failure of the plaintiff to provide the security required."

6. At para. 42 of her decision, Ms. Justice Costello made clear that the principles applicable to an application for security for costs were those summarised by Morris J. in *Interfinance Group Ltd. v KPMG Peat Marwick* and she quoted from the said decision principles which explain the role special circumstances may play: -

"(1) In order to succeed in obtaining security for costs an initial onus rested upon the moving party to establish:

a) that he had a prima facie *defence to the plaintiff's claim, and*

b) that the plaintiff would 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 could be shown that there were specific circumstances in the case with ought to cause the court to exercise its discretion not the make the order sought.

In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's 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."

Special circumstances

7. It is clear from the authorities that if an applicant establishes (1) that they have a *prima facie* defence to the plaintiff's claim and (2) that the plaintiff would not be able to pay their costs in the event of the defendant being successful, then, normally, the court will make an order directing the plaintiff to provide security for costs. This is subject to the plaintiff being afforded the opportunity to argue that, notwithstanding the fact that the defendant has satisfied the statutory criteria, the court should, nonetheless, decline to exercise its discretion in favour of the defendant/applicant. This requires the plaintiff/respondent to establish special circumstances which would form a basis for the court to exercise its discretion against making the order sought. The foregoing is

precisely the position which pertains in the present case and whether, or not, special circumstances exist is the key issue before the court in the present application. The authorities also make it clear that the onus is on the plaintiff/respondent to demonstrate special circumstances. If the plaintiff/respondent does so, the jurisdiction to grant, or not, an order for security for costs still remains a matter for the discretion of the court, with such discretion to be exercised fairly.

The relevant test

8. Both parties acknowledge that the test to be applied where a plaintiff claims that its inability to pay costs is due to the wrongdoing of the defendant, was set out by Clarke J. (as he then was) in *Connaughton Road Construction Limited v Laing O'Rourke Ireland Ltd.* [2009] IEHC 7. At para. 3.4 of his decision, the now Chief Justice stated as follows:

> *"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."*

9. The foregoing test has been applied in a number of subsequent cases and was restated with approval by Ms. Justice Costello in the Court of Appeal's decision in *Hedgecroft Limited.*

A *prima facie* basis

10. In *Connaughton Road*, Clarke J. made it clear that the standard by which each of the criteria must be met is that of a *prima facie* basis. This is clear from his comments at para. 3.3 where the learned judge stated: "*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*.", with Clarke J. elaborating at para. 3.5 in the following terms:

> *"Given that, on a motion such as this, a plaintiff is only required to establish the special circumstances, arising out of its inability to pay costs being due to the alleged wrongdoing of the defendants, on a* prima facie *basis, then it follows that each of the above steps must also be established on such a* prima facie *basis only.*

Items (1) and (2) do no more than state that the plaintiff must establish a prima facie *case on liability and causation, for if such a case cannot be established, then there could be no basis for finding, even on a* prima facie *basis, that any lack of resources of the plaintiff are due to wrongdoing on the part of the defendant. Item (3) is of some relevance to the first of the matters which was debated in the course of the hearing before me. In response to some of the points made by counsel for Laing O'Rourke, it was responded on behalf of Connaughton Road that those matters 'only went to quantum'. The implicit suggestion was that the court was not concerned, on an application such as this, with quantum. That may be true to an extent, but it seems to me that it is not correct to state that a court should have no regard to questions of quantum in an application such as this. To take a simple example a plaintiff company which has an excess of liabilities over assets of (say) €200,000 will manifestly be unable to pay the defendant's costs should the defendant succeed. If the high watermark of that plaintiff's claim is only for €100,000 then it equally follows that the plaintiff's inability to pay costs has not been caused by the defendant's wrongdoing in that, even if the plaintiff were to succeed, there would still be an excess of liabilities over assets of €100,000.*

3.6 *It follows, in my view, that a plaintiff must at least establish a* prima facie *case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful. That this is so can be seen from the comment of Murray J. (speaking for the Supreme Court) in Framus Ltd & Ors v. CRH Plc & Ors [2004] 2 I.R. 21 at pp. 61 and 62, where it was noted that the plaintiff in that case had shown some evidence of wrongdoing on the part of the defendant but not, even on a* prima facie *basis, that its impecuniosity was due to that wrongdoing. It is not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a* prima facie *basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of point (4) referred to above. Even if, therefore, a plaintiff can show a* prima facie *case, it is also necessary to show a* prima facie *level of losses attributable to the defendant's wrongdoing so as 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. On that basis I am satisfied that the court can have some regard to quantum in an application such as this.*

…

3.8 *Counsel for Laing O'Rourke suggested, correctly in my view, that there were no special considerations to be given to such companies one way or the other. However, he did assert that, in attempting to show special circumstances, it was*

incumbent on such a company to show, at least to a prima facie *level, that were it not for the wrongdoing asserted it not only would not have lost money, but would have made sufficient profits so as to be in funds sufficient to pay the likely costs of a successful defendant.*

3.9 It seems to me that if a plaintiff is not in a position to establish such a fact (on a prima facie *basis), then a plaintiff will not have been able to show that its inability to pay costs is due to the wrongdoing which is at the heart of the proceedings. …*

3.10 As part, therefore, of the overall question of assessing whether it has been shown, on a prima facie *basis, that a plaintiff's inability to pay potential costs is due to the wrongdoing asserted, the court must look at all of the circumstances asserted on behalf of the parties. In particular in a case where, prior to any possible wrongdoing, the plaintiff company had no significant net assets, it seems to me that it follows that such a company will need to establish that, in the absence of the wrongdoing alleged, it would have acquired net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant were successful."*

Not sufficient for the plaintiff to make mere "bald assertions"

11. In her judgment in *Pebble Beach Owners Management Company Ltd. v Neville* [2016] IEHC 446, Ms. Justice Baker cited the *Connaughton* Road test and said the following in relation to the burden faced by a plaintiff who seeks to establish that special circumstances exist due to impecuniosity allegedly flowing from the defendant's wrongdoing:

"33. The onus is on the plaintiff to establish that special circumstances exist, and once again, as with the burden on the defendants and moving party under the threshold test, it is not sufficient for the plaintiff to make mere bald assertions, and it must establish by evidence and argument that its impecuniosity was caused by the wrong the subject matter of the claim. This is clear from the judgment of Finlay C.J. in Jack O'Toole Limited v. MacEoin Kelly Associates & Anor. [1986] 1 I.R. 277, where he said that it was not sufficient for a plaintiff 'to make a mere bald statement of the fact'."

Evidence which is cogent and credible

12. The test outlined in *Connaughton Road* was applied by the Court of Appeal in *Tír na N-Óg Projects (Ireland Ltd) v. PJ O'Driscoll & Sons (A Firm) & Ors* [2019] IECA 154. In that case, Mr. Justice Peart made it clear that, in order to determine whether a *prima facie* basis for refusing security for costs had been established, there must be "cogent and credible" evidence advanced by the plaintiff that corroborates the contention that the plaintiff's inability to pay was caused by the defendant's wrongdoing. The learned judge made clear that this involved a plaintiff doing more than merely asserting a proposition on affidavit and, while it was not appropriate for the court to evaluate the prospects of ultimate success, it was appropriate to interrogate the evidence put forward by a plaintiff to enable the court to decide if *prima facie* evidence has been adduced. It is also clear from Mr. Justice Peart's decision that the court is entitled to take into account any

evidence proffered by the defendant in the context of considering the cogency and credibility of what the plaintiff claims to constitute *prima facie* evidence satisfying the *Connaughton Road* test. It is useful to quote the following from para. 30 onwards of Mr. Justice Peart's decision:

> *"30. It is worth recalling what is meant by the phrase* 'prima facie*'. It is a lower standard of proof than proving a matter on the balance of probabilities. According to Murdoch's Dictionary of Irish Law (4th ed. LexisNexis) the Latin phrase translates as 'of first appearance' and means:*
>
> > *'On the face of it; a first impression. A* prima facie *case is one in which there is sufficient evidence in support of a party's charge or allegation to call for an answer from his opponent. If a* prima facie *case has not been made out, the opponent may, without calling any evidence himself, submit that there is no case to answer, whereupon the case may be dismissed'.*
>
> *31. It seems to me that in order to satisfy the requirement that special circumstances be established on a* prima facie *basis, as opposed to a balance of probabilities, the plaintiff must do more than merely assert the proposition on affidavit, but must bring forth some evidence which is cogent and credible, which corroborates the contention being made. Any affidavit filed in response by the defendant may affect the trial judge's view as to that cogency and credibility, but the trial judge's task remains to decide if* prima facie *evidence has been adduced, and not to determine as a matter of probability whether or not the impecuniosity of the plaintiff has or has not been brought about by the wrongdoing alleged against the defendant. That seems to me to be what is intended by the requirement to establish the matter, and has been consistently stated to be the level of proof required by the decided cases from Jack O'Toole Limited v. MacEoin Kelly Associates in 1986 up to Connaughton Road in 2009, which has been consistently followed in later cases."*

13. On the evidence before the court, Mr. Justice Peart was satisfied that the *Connaughton Road* test had been satisfied. The plaintiff/respondent had set out in a second affidavit, the position regarding its impecuniosity and provided what Peart J. regarded as cogent detail as to the history of the company and its financial history, including financial contributions made by individual investors. The learned judge considered that relevant materials had been exhibited which at least on a *prima facie* basis, rationally supported what the company contended. He also found that correspondence from taxation and financial consultants, in addition to a brochure, tended to corroborate, to a *prima facie* level of proof, what the plaintiff/respondent asserted. Peart J. also noted that no affidavit was filed by the defendant/appellant in response to the second affidavit furnished by the plaintiff/respondent.

***Prima Facie* credible evidence**

14. In *Welcome Ireland Hospitality Ltd. v Cedarcourt Developments Ltd*. [2019] IECA 308, the fundamental issue before the Court of Appeal was whether the respondent had established special circumstances. In the course of her judgment, Ms. Justice Baker

made clear that the *Connaughton Road* test was the appropriate one and noted that the test was followed in a number of cases by the Court of Appeal, including in the *Tír na n-Óg* decision, stating *inter alia* that "None of the cases have thrown any doubt on the correctness of the analysis of Clarke J. in Connaughton Road…". Among other things, it is clear from this decision that it is appropriate for the court to analyse the evidence put before it. In that case the respondent's deponent, a Mr. Hughes, relied on a document prepared by a firm of accountants showing estimated loss of profits of which Baker J. stated, at para. 18 that "*It is useful to analyse this in some detail*". As to the nature of evidence of a causative link between *Welcome* and the wrong, the subject matter of the claim, Baker J. emphasised that the test is not met where a plaintiff made, what Finlay C.J. described in the *Jack O'Toole Ltd*. case as "*a mere bald statement of fact*" and made it clear that the evidence of the causal connection must be "*credible*". Referring to the *Lismore Homes Ltd*. decision, Baker J. noted that "*the Supreme Court analysed the evidence and considered that the plaintiff had adduced credible expert evidence which had not been doubted by the defendant."* (para. 26). At para. 27, Baker J. put matters as follows:

> *"It is also clear from the judgment of Clarke J. in Connaughton Road Construction Ltd. v Laing O'Rourke Ireland Ltd, at para. 4.14 et seq., that the evidence required must be such that enables a court to form a view as to whether the causative connection between the financial difficulties and the alleged wrongdoing can be established. What has been the required (sic) in the reported cases is at least 'some approximate accounts' to enable the court to draw out the exercise of analysing the current financial position of the plaintiff and to draw inference from the comparison between that and likely projection absent the alleged wrongdoing.'"*

Baker J. went on at para. 28 to state that –

> *"In the light of the authorities, and because what is required is* prima facie *credible evidence and more than mere assertions on the part of the resisting party, I consider the evidence in the present case is not sufficient."*

In the case before the Court of Appeal, Baker J. held the evidence did not meet the threshold and took the view that it was in the nature of an assertion by the relevant accountant and that the factual basis of the projected figures remained unclear. Among other things, Baker J. found that the accountant's letter relied on did not positively state a view from an accounting perspective but, rather, the letter's author stated regarding the projections that he would not consider them unreasonable. Of this, Baker J. stated:

> *"That expression is not evidence of the view of Mr. O'Connell who signed the letter of actual projections and, more importantly, of the basis on which they were calculated."*

The learned judge made it clear that the type of evidence required to satisfy the *Connaughton Road* test may vary and will depend on the circumstances of the particular case but emphasised that, regardless of the type of evidence relied upon "… *the evidence*

must be credible and more than mere assertion and would have to credibly point to projected costs and likely profit by reference to some objectively ascertainable evidence."

The claim in the present proceedings

15. Having looked at several relevant authorities, it is appropriate to look more closely at the claim in the present proceedings, as pleaded in the statement of claim delivered 18 December, 2018. It is pleaded that, from 28 November 2011 to 20 April 2018, the defendant provided the plaintiff with a "White Label" service whereby the defendant allowed the clients of the plaintiff online access to the defendant's spread betting technology and services under the plaintiff's name and brand, the arrangement being recorded in two "White Label" agreements entered into on 28 November 2011 and 01 January 2015 respectively. Paragraphs 4 and 5 set out what the first of those contracts is said to have provided. The terms referred to are –

    (i) the plaintiff granted the defendant the exclusive right to trade with its existing customers for the duration of the first contract;

    (ii) the defendant would pay the plaintiff the greater of 30% of the transactional revenue on the trades made or 40% of the client loss as defined in the contract;

    (iii) the customer database of the plaintiff would remain the property of the plaintiff and the defendant would process the data and deal with the plaintiff's customers strictly limited to the purpose of the operation of the White Label site;

    (iv) the defendant agreed never to communicate with the plaintiff's customers other than as necessary for the operation of the White Label site; and

    (v) the defendant agreed that, within 10 working days at the end of each month, it would deliver a monthly report providing information in sufficient detail to enable the plaintiff to verify the calculation of the sums due to the plaintiff in relation to spread trades entered into during the previous month and further providing information in sufficient detail that may reasonably be requested by the plaintiff.

    It is pleaded that during the operation of the contract the defendant made monthly reports representing the transactional revenue and client loss sums which the plaintiff relied on as accurate. Paragraphs 6 and 7 of the statement of claim plead the terms of the second contract and the plaintiff's reliance on the monthly reports supplied by the defendant.

16. It is also pleaded that, by mutual agreement between the plaintiff and the defendant, the second contract was terminated as and from 20 April 2018. It is appropriate to mention at this juncture that in the present case, there is no dispute in relation to termination and no claim is made by either side that termination was other than by mutual agreement.

The first part of the plaintiff's claim

17. In para. 9 of the statement of claim it is pleaded that the defendant had no right to trade with customers of the plaintiff as and from 20 April 2018 and it is pleaded that the

defendant was obliged to return to the plaintiff all customer data, never communicate with any of the plaintiff's customers and not to use any personal data held by reason of the first and/or second contract. At para. 10 it is pleaded that, as part of the discussions between the parties regarding the administrative details of the termination arrangements, the plaintiff expressly permitted the defendant to keep open existing unsettled trades. It is pleaded that, save for existing unsettled trades already placed by the plaintiff's customers on the termination date, the defendant was obliged to completely cease trading with customers of the plaintiff, to return their funds and to destroy or return all customer data held. At para. 11 of the statement of claim it is pleaded that, in breach of contract, the defendant has continued to trade with customers of the plaintiff contrary to the terms of the second contract. It is also pleaded that, through offering an ongoing trading facility with the plaintiff's customers and through active solicitation of the plaintiff's customers, the defendant breached the second contract and caused the plaintiff to suffer loss.

The second element of the plaintiff's claim

18. The second aspect of the plaintiff's claim relates to the monthly reports. At para. 12, the plaintiff pleads that the defendant delivered monthly reports to the plaintiff which lacked sufficient detail to allow appropriate interrogation by the plaintiff. It is also pleaded that, despite the paucity of information contained in reports, the plaintiff accepted the accuracy of the bottom line figures provided by the defendant. It is appropriate to quote, *verbatim*, paras. 13 and 14 of the statement of claim as follows:

> *"13. Since the termination of the Second Contract and in particular the client date (sic) base sent then, the plaintiff has analysed the basic information that the defendant did provide in the monthly reports against the information provided on termination. It has become apparent to the plaintiff that the defendant has negligently and/or intentionally underreported the losses made by the plaintiff's customers with the effect that the plaintiff has been denied its true entitlement to contractually due payments from the defendant.*
>
> *14. Prior to the first contract, the customers of the plaintiff were, on average, incurring a monthly loss of in excess of the industry average of €250 loss per client per month. Remarkably, the same client base when it traded using the defendant's trading platform, made an average profit of €270 per month over the six year period of trading. The figures provided by the defendant, if accurate, which accuracy the plaintiff does not accept, would indicate that the clients of the plaintiff comprise an extreme statistical outlier. The probability of the statistical anomaly demonstrated by the contents of the monthly reports occurring is beyond remote."*

19. In para. 15 the plaintiff refers to what is described as the extreme statistical improbability of the accuracy of the defendant's monthly reports and pleads that the plaintiff has discovered gross inconsistency in the reports actually provided and which is pleaded to be illustrated in a table which includes *inter alia* figures for "*Client monies on account with Delta as at 11/12/20111 transferred to Ayondo"; "Estimated client funds with Ayondo as*

at 31/12/2017"; and "Unexplained Variance" said to be "Difference in monies owed to clients".

The third element of the plaintiff's claim

20. It is pleaded in para. 17 that, in accordance with the terms of the second contract, the plaintiff issued an invoice to the defendant for the period of November 2017 in respect of the sum of €7,915 due and owing in respect of a transactional rebate due to the plaintiff. It is pleaded that, despite demand, this has not been paid. It is pleaded at para. 18 that in addition to the foregoing sum, the defendant never issued a revenue report for December 2017.

The plaintiff's pleaded "*Particulars of Loss*"

21. Paragraph 16 of the statement of claim is entitled "Particulars of Loss" and it is appropriate to quote ,,m`1 of the defendant, the plaintiff has been caused to suffer loss in the manner more particularly set out hereunder:

> *The plaintiff had 300 trading customers on the White Label site as at the termination date. Following the termination and as a result of the breach of contract of the defendant, only approximately 50 of the plaintiff's customers have migrated to the new trading website of the plaintiff. The plaintiff currently estimates its likely losses at in excess of €225,000 from a high level review of the data it has at its disposal at present. The plaintiff expressly reserves the right to furnish further particulars of the sums claimed upon receipt of further information, documentation, and/or expert reports.*
>
> *The plaintiff will also seek discovery of the trading details of its customers from the defendant during and after the currency of the first and second contract in order to assist in determining the precise extent of the losses it has suffered by reason of the breach of contract of the defendant.*
>
> *The plaintiff is not currently in a position to quantify the loss it has suffered due to the underreporting of client losses by the defendant. Following discovery of the full trading history of the plaintiff's clients and analysis thereof, the plaintiff will provide full particulars of losses suffered due to the misrepresentation and breach of contract of the defendant."*

The affidavit of Edward Drake sworn 02 April 2019

22. The affidavit grounding the defendant's motion was sworn by Mr. Edward Drake, the defendant's chief operating officer. In paragraphs 3 to 5, Mr. Drake summarises the plaintiff's claim against the defendant and in para. 6 he avers that the defendant has a defence to the plaintiff's claim. He also refers to correspondence requesting security for costs and calling on the plaintiff to remit the proceedings to the Circuit Court as well as referring to a notice for particulars raised in respect of the statement of claim to which no response had, by that stage, been received from the plaintiff.

23. At para. 7, he avers that, based on the publicly available information regarding the plaintiff's financial position, the plaintiff does not have sufficient assets to discharge an

order for costs against it. Reference is made to the unaudited abridged financial statements for the plaintiff for the year ended 31 December 2017 and Mr. Drake notes that, as at 31 December, 2017, the plaintiff's liabilities exceeded its assets by €492,641 and its ability to continue as a going concern depended on the continued support of its creditors. The relevant financial statements, being then the most recent, were exhibited. At para. 8 it is averred that Mr. Drake has been advised that the defendant's costs of defending the proceedings are likely to be substantial and are likely to exceed €150,000. Reference is made to a cost accountant's report being obtained and it is averred that an examination of the plaintiff's accounts demonstrate that its assets have decreased steadily year on year since 2012 and its liabilities far exceed its assets.

24. At para. 9, Reference is made to correspondence between the parties. Paragraphs 10 to 15 appear under the heading "*Prima Facie Defence*". With regard to the pleas at paras. 10 and 11 of the statement of claim that the defendant was contractually obliged to completely cease trading with the customers of the plaintiff et cetera, it is averred that the defendant corresponded with the defendant in relation to termination of the second White Label contract and the migration of customers to its nominated replacement, described as a regulated entity called London Capital Group ("LCG"). This is averred in para. 11.1. There follows a series of averments between paras. 11.3 and 11.10 which detail communication between the defendant and the plaintiff and between the defendant and LCG. Individuals are named and correspondence exhibited. Among other things, it is averred that certain emails sent by the defendant to the plaintiff's customers, regarding the transfer of customers from the defendant to the new service provider nominated by the plaintiff, LCG, was approved in advance by the plaintiff. Between paras. 11.2 and 11.8, Mr. Drake refers by name to a Mr. Conor O'Neill, representing the plaintiff, to Mr. Philip Holland of the defendant, to Mr. Lewis Cohen of LCG and to Mr. Michael O'Shea of the plaintiff in relation to communication averred to have occurred in March and April 2018 regarding the transfer of customers from the defendant to LCG. Email communication is exhibited and the following is averred at para. 11.10:

> "*11.10 In summary, in relation to the plaintiff's claim that Ayondo breached the terms of the White Label contracts, I say that the allegations are unfounded. I say that in accordance with the terms of the second White Label contract, Ayondo sought to agree a mechanism for transferring the customers from Ayondo to the new service provider nominated by the plaintiff, LCG. I say that upon inquiry, Ayondo was told not to arrange for a blanket transfer or to require customers to close their positions with Ayondo. It was agreed that Ayondo would inform the customers of the ability to transfer from Ayondo to LCG and provide them with the information required to transfer their accounts. Ayondo confirmed in writing that it would not close positions or force the customers to transfer to LCG and I say and believe that it is not open to Ayondo to simply close customer accounts where a customer has not requested to close or transfer the account. Ayondo is bound by the provisions of the Financial Conduct Authority's Client Asset Source Book. This requires that all money that is designated as "client money" must be held in a segregated account that is separate from the funds of Ayondo's business. A UK financial services firm*

can only hold and control client money if a relevant permission is held. Ayondo holds that permission in respect of those customers who have not requested to transfer to LCG. Ayondo is only entitled to receive client funds from a client and remit such money back to them except in certain circumstances where Ayondo may also receive or transmit money from or to a suitable regulated entity, once the relevant provisions have been complied with and permissions provided by the client. As the plaintiff is not a regulated entity there was no way Ayondo could transfer funds of clients to bank accounts held in the plaintiff's name. Ayondo could transfer funds to LCG as a regulated entity however a blanket transfer was rejected by LCG and the plaintiff."

25. At this juncture it is appropriate to note that it is common case between the parties that the defendant has a *bone fide* defence. That said, it is fair to say that in the 02 April 2019 affidavit sworn by Mr. Drake, the defendant puts forward specific reasons which are said by the defendant to undermine the plaintiff's claim and documentation is also exhibited, in the form of contemporaneous emails dating from March and April 2018 which is said to corroborate the defendant's position. It is plainly not for this court to determine any issue of liability. Nor does the court need to analyse the various averments made by Mr. Drake from the perspective of determining whether a *prima facie* defence exists. That issue is not in dispute. It is accepted that the defendant has a *prima facie* defence. The relevant burden for the purposes of the application, is a burden which the plaintiff faces, namely a burden to demonstrate that special circumstances exist, the test being that outlined in *Connaughton Road*. It is, however, appropriate in my view to consider the cogency and credibility of the evidence proffered by the plaintiff/respondent in light of the affidavits sworn on behalf of the defendant in the context of determining whether *prima facie* evidence has been adduced by the plaintiff sufficient to meet each of the four elements of the *Connaughton Road* test.

26. In paragraph 11.11 it is averred that it was not open to the defendant to destroy all documentation relating to customers and that, in accordance with Financial Authority Conduct Guidelines and Joint Money Laundering Steering Group Guidelines, it was required to keep data for at least five years post-termination of a client relationship. At para. 11.12 it is averred that no breach of contract took place on foot of the termination of the second White Label agreement or the migration process which, it is averred, was managed by agreement in accordance with the preferences and instructions of the plaintiff and LCG. With regard to the allegations of misrepresentation, Mr. Drake makes *inter alia* the following averments (at para. 12):

"… I say that Ayondo provided the plaintiff with a highly detailed monthly report showing not only the transactional revenue sum due to the plaintiff and the current cumulative profit and loss to clients, but also all calculations and raw data that supported the figures. Although it was not required to do so by the terms of the White Label Contracts, Ayondo made the VBA code (visual basic for applications) that underpins the process by which the calculations are done available to the plaintiff. There is more than enough information included in the monthly reports to

allow interrogation of the numbers by the plaintiff and the allegation of misrepresentation is entirely unfounded.

13. *In addition, I say that Edward Drake of Ayondo together with Michael O'Shea and Conor O'Neill of the plaintiff conducted a detailed 'walk through' of the first monthly report in 2011 whereby the first report was explained and feedback sought. I say that as a result of feedback from the plaintiff that it would like the profit and loss figures to be expressed so that they included unrealised profit and loss within the calculations, the reporting was then amended to cater for this and all reports subsequent to this were presented on that basis. I say that the same reporting methodology was used since 2011 and at no point during the operation of the White Label agreements did the plaintiff seek to challenge the calculations or information provided, seek further information, or ask for additional or different information in relation to the figures or information set out in the monthly reports.*

14. *At all times since the first report was provided to the plaintiff, it has been clear how payments due were calculated and all payments were correctly calculated and paid in full. The calculations carried out by the plaintiff in the statement of claim are fundamentally flawed and as a result their 'reconciliation' is incorrect. Firstly, it is important to recap the method for calculating 'Client Loss'. Client Loss is calculated excluding transactional revenue (specifically, spread and margin financing) and is net of hedge P & L/costs. It is also expressed from the perspective of Delta/Ayondo with a positive figure representing a gain to Delta/Ayondo and a negative figure representing a loss to Delta/Ayondo. In summary, the figure reported for client loss is therefore the amount lost by the client in excess of the transactional income paid (including the impact of hedging trades). Ayondo believes that Delta may be using logic, thus resulting in the erroneous reconciliation within the statement of claim. This is set out in Delta index scenario analysis upon which marked with the letters and number 'ED 9' I have signed my name prior to the swearing hereof.*

14.1 *In relation to the allegations at paragraph 14 of the statement of claim, that customers are profitable to the tune of €270 per month, I say that the customers are generally small loss-making. In addition, it should be noted that the plaintiff has used data from the period of the financial crash in 2008, whereas the relevant period in these proceedings is from 2011-2017. As a result losses were smaller and resultant profits lower than during that period.*

14.2 *In relation to the allegations at para. 16 of the statement of claim that there were 300 active clients as at the date of termination of the second White Label Contract; I say that this is incorrect. I say that in the time from inception to termination of the collaboration between the plaintiff and Ayondo pursuant to the White Label contracts, customer activity went from approximately 80 per month in 2011 to approximately 19 per month in the final reporting month. Without prejudice to the fact that I say that the calculations were correctly done and no further revenue is owed to the plaintiff, I say that even if further revenue was due to the plaintiff, it*

would not be in the amount claimed, since the plaintiff has carried out his calculations on the assumption that far more customers were active during the period of the White Label contracts than was the case."

27. At paragraph 15 Mr. Drake avers that the defendant has a full defence. In response, an affidavit was sworn on 24 July 2019 by Mr. Dermot O'Donoghue, a director of the plaintiff company and it is appropriate to examine the contents of same.

Affidavit of Dermot O'Donoghue sworn 24 July 2019

28. In paragraph 3 Mr. O'Donoghue acknowledges that "*on the basis of the current financial position of the plaintiff, it is likely that the plaintiff would struggle to meet the defendant's costs of these proceedings, if unsuccessful"*. He avers *inter alia* that "*the plaintiff has no real source of income at present".* He also accepts that the defendant has a *prima facie* defence to the proceedings but describes this as "*fundamentally flawed*" in a number of respects which he goes on to detail. The first issue in para. 3(i) of Mr. O'Donoghue's affidavit is that he says the defendant is conflating permission which was given by the plaintiff to the defendant to allow its customers keep their then-open unsettled positions with the defendant at the time of migration until the positions were closed, with an entitlement on the part of the defendant to retain all the plaintiff's customers and accept new trades from them and he avers that "*the reality is that the defendant continued after the migration date, in clear breach of the second contract and without any authority from the plaintiff, to provide trading services to the plaintiff's customers thereby effectively destroying the plaintiff's business."* The second reason why it is claimed that the defence is fundamentally flawed is that *"there was at the migration date and there is currently no regulatory impediment whatsoever to the defendant ceasing to provide trading services to the plaintiff's customers after the migration date*" and Mr. O'Donoghue avers that the regulations cited by the defendant do not oblige the defendant to take trades from the plaintiff's customers and he describes the regulations being relied upon as a "*smokescreen*". The third reason put forward as to why the defence is fundamentally flawed is that *"the defendant has not provided the data necessary to allow the plaintiff to assess the scale and extent of underreporting of monthly revenue by the defendant*" and it is averred that the data provided in the monthly reports does not allow the reporting to be interrogated to determine whether there has been underreporting.

29. In my view the averments made in para. 3(i), (ii) and (iii) can fairly be called assertions and no more than assertions. They are entirely consistent with the pleas made in the statement of claim but, in my view, no corroborative evidence is provided. In my view the averments do no more than assert that the pleas in the statement of claim are correct.

30. Mr. O'Donoghue goes on to aver that "*no attempt has been made to explain the unexplained variance UV at paragraph 15 of the statement of claim."* In my view, this is not so. In para. 14 of Mr. Drake's affidavit, he makes a number of claims as to why the defendant says that the reconciliation carried out by the plaintiff is incorrect and he refers to and exhibits a spreadsheet entitled "*Delta Index Scenario Analysis*" which comprises Exhibit "ED9" to his affidavit and which purports to show, in respect of each of the years

to the end of November 2012, 2013, 2014, 2015, 2016 and 2017 that the "*Adjustment due to Delta?", both "net of spread (as reported)"* and "*Gross (not as reported*)" is stated to be "none".

31. In his affidavit Mr. O'Donoghue makes clear that the primary ground upon which the plaintiff opposes the application is that the plaintiff's lack of resources stems from the wrongs committed by the defendant and it is averred that *"if the defendant had not systematically underreported monthly revenue and had not taken the plaintiff's customer's from it in breach of the second contract, the plaintiff would be in a position to meet an adverse costs order against it.".* It is appropriate to say that, although the foregoing averment is entirely consistent with the pleaded claim, Mr. O'Donoghue does not proffer any evidence of any sort to underpin the claims made. Mr. O'Donoghue goes on to explain that the plaintiff's claim has two strands to it, the first being in relation to the defendant taking the plaintiff's customers and continuing to trade with them and the second relating to underreporting of monthly revenue. Having made these averments in para. 4 of his affidavit, the paragraph concludes as follows*:"In this regard I beg to refer to the plaintiff's statement of claim dated 18 December 2018 when produced*." In the foregoing manner, the application for an order for security for costs is explicitly resisted on the basis of the contents of the statement of claim, namely, an assertion that the contents of the statement of claim are correct.

32. In paragraph 5 Mr. O'Donoghue avers that "*I readily accept that it is not possible through the use of one single figure for the plaintiff's claim to neatly demonstrate that the financial position of the plaintiff would be radically different to that appearing in the plaintiff's accounts, but for the defendant's wrongs. This is the case because the very nature of the underreporting of monthly revenue is such that the plaintiff requires discovery from the defendant to analyse the precise extent of the underreporting and the consequent losses to the plaintiff."* Having averred that the plaintiff cannot precisely predict the likely profits lost to it into the future, without discovery, Mr. O'Donoghue concludes para. 5 with the following averments: *"The plaintiff can say with certainty that there was underreporting by the defendant based upon objective statistical evidence, but without discovery, it is challenging to quantify same with exact precision. The plaintiff can say with certainty that the defendant has continued to trade with its customers and is making profits from the plaintiff's customers, but again it is challenging in the absence of discovery to quantifying same with precision*."

33. In my view, although Mr. O'Donoghue's averments are consistent with the plaintiff's pleaded case, he has not proffered any explanation as to what the plaintiff says was the underreporting. He has not, for example, referred to any information which the plaintiff sought but was denied during the currency of either of the contracts and although Mr. O'Donoghue makes clear that it is challenging to quantify, with exact precision, what was supposedly underreported, no evidence of any sort is proffered as a basis for the claim that there was underreporting. Nor is evidence proffered to support the assertion that the defendant has unlawfully continued to trade with the plaintiff's customers. In short, I am satisfied that what Mr. O'Donoghue avers goes no further than assertions to the effect

that the contents of the statement of claim are correct, without a basis for any assertions being put forward.

34. By contrast, it will be recalled that in para. 14.2 of Mr. Drake's 02 April 2019 affidavit, he addressed, in particular, the pleas made by the plaintiff in para. 16 of the statement of claim that there were 300 active clients at the date of termination of the second white label contract. Mr. Drake made very specific averments to the effect that customer activity went from approximately 80 per month in 2011 to approximately 19 per month in the final reporting month. Nowhere in Mr. O'Donoghue's affidavit does he engage with these averments. Nor does he explain why, if it be the case, the plaintiff cannot even comment on what the defendant avers in relation to actual client numbers.

The *effect* of alleged wrongs -v- evidence of wrongdoing

35. In paragraph 6 Mr. O'Donoghue avers that "*In order to demonstrate the likely effect of the wrongs of the defendant upon the plaintiff's ability to meet a costs order, the plaintiff commissioned Roberts Nathan Accountants to prepare a report analysing the effect of the wrongs of the defendant on the plaintiff's balance sheet."* This report is exhibited by Mr. O'Donoghue. At the outset, it is appropriate to comment on what this report is said to be. It is clearly stated to be a report which demonstrates the likely "*effect on the plaintiff of wrongs which are pleaded against the defendant."* In my view, an analysis of the *effect* of wrongs which are alleged is different to *prima facie* evidence *of* wrongdoing on the part of a defendant. An analysis of effect is also different to evidence of a causal connection between what is said to be a wrong and what is said to be a consequence. I will presently look at the Roberts Nathan Report but, before doing so, it is appropriate to look closely at what else is averred in the remaining paragraphs of Mr. O'Donoghue's 24 July 2019 affidavit. Paragraph 7 can fairly be said to do no more than repeat the contents of para. 14 of the statement of claim. In para. 8, the following is averred:

> *"8. If the pre-first contract average monthly revenues were to be applied to the plaintiff's clients over the 6 years of trading with the defendant, the plaintiff would have earned an additional amount of €1,608,926. Even applying a more conservative Revenue Yield percentage of 21%, the difference is €573,958. So, while the plaintiff cannot state exactly what the monthly revenues were, it can estimate, using the average loss data available to the same group of customers, what the monthly revenues were likely to have been during the 6 years of the first and second contracts' operation and extrapolate from that what was the extent of the loss caused by the plaintiff by the defendant's underreporting of the monthly revenues of the plaintiff's customers. When this is done, it becomes clear that the plaintiff would have earned somewhere between the conservative estimate based on 21% revenue yield of €573,956 and the average 35% from historic trading of €1,608,926. These are all funds which the plaintiff should have enjoyed and which would enable the plaintiff to have full capacity to meet any adverse costs order, but for the wrongs of the defendant."*

36. In my view, paragraphs 7 and 8 do no more than take the pleas made in the statement of claim as being established and comprise a calculation based on the pleas made in the

statement of claim being correct. In my view, no evidence is tendered of any sort which corroborates any contention being made by the plaintiff. It will be recalled that in paras. 12 and 13 of Mr. Drake's 02 April 2019 affidavit, it is averred by the defendant that the plaintiff was provided with highly detailed monthly reports showing not only the transactional revenue sum due to the plaintiff and the current cumulative profit and loss to clients but also all calculations and raw data which supported the figures. It was also averred that, although not required to do so by the terms of the contracts, the defendant made available to the plaintiff what is described as the VBA code which is said to underpin the process by which calculations are done. It was averred on behalf of the defendant that this was more than enough information to allow interrogation of the numbers by the plaintiff. It is fair to say that nowhere in his replying affidavit does Mr. O'Donoghue engage with these assertions. Nor does he engage with the assertion made by Mr. Drake in para. 13 of the latter's 02 April 2019 Affidavit that Mr. Drake, of the defendant, together with Mr. Michael O'Shea and Conor O'Neill of the plaintiff conducted what is described as a detailed "walk through" of the first monthly report in 2011 whereby the report was explained and feedback was sought. Mr. Drake went on to aver that as a result of feedback the reporting was amended to cater for the request made by the plaintiff and he also avers that the same reporting methodology was used from 2011 onwards and at no point during the operation of the contracts did the plaintiff seek any further information. It is fair to say that Mr. O'Donoghue does not address these averments and he does not provide any evidence to support the assertions of breach of contract or misrepresentation.

37. In paragraph 9 Mr. O'Donoghue avers as follows: "*In respect of the defendant continuing to accept trades from the plaintiff's customers beyond the migration date, the plaintiff has pleaded in the statement of claim that it has 300 trading customers on the white label site on the termination date. Under this heading the plaintiff estimates its loss as €201,190 to March 2019. This loss figure continues to grow as the plaintiff effectively has no customers due to the actions of the defendant*." In my view, the foregoing does no more than make in assertion which is consistent with the contents of the statement of claim and which, indeed, relies on the plea in the statement of claim. The calculation by the plaintiff of an estimate of its loss is a calculation which is made with reference to a plea in the statement of claim. There is, however, no evidence proffered in support of the assertion itself. There is no engagement, for example with the explicit averment by Mr. Drake on behalf of the defendant that customer numbers were very significantly *less* than the 300 pleaded by the plaintiff.

38. At paragraph 10 it is averred that, in addition to underreporting of monthly revenue, and the defendant essentially poaching the plaintiff's customers and continuing to trade with them, the plaintiff has lost value in having the customers into the future. Again, the foregoing can fairly be said to be an averment which is consistent with the pleas made in the statement of claim but which goes no further than asserting that the pleaded claim is correct.

39. The affidavit concludes with the averment at para. 11 that: "*As is apparent from the forgoing, if it were not for the wrongs the subject matter of these proceedings, the plaintiff would be in a positon to comfortably meet any adverse costs order. The defendant has caused the insolvency of the plaintiff by its acts and omissions in not properly remunerating the plaintiff and in taking the plaintiff's customers*." Once more, the foregoing constitutes an assertion on affidavit, but no evidence is put forward on behalf of the plaintiff which could be said to be cogent and credible which corroborates the assertions made. Given the significance of the reliance placed upon it by the plaintiff, it is appropriate to look closely at the contents of the report prepared by Roberts Nathan.

Roberts Nathan Report – "Net Asset Analysis July 2019"

40. Internal page 2 of the Roberts Nathan Report (hereinafter "RNR") states very clearly what Roberts Nathan did, namely: "*We have undertaken an analysis of the financial position of Delta Index Limited ('DIL or the Company') to illustrate the impact the loss of certain revenues has had on the company as at 31 December 2018 and 31 March 2019*." It is clear from the foregoing statement that the report analyses the "*impact*", or effect, of lost revenue. It does not, however, evidence wrongdoing on the part of the defendant. It does not evidence a causal connection between wrongdoing on the part of the defendant and a consequence for the plaintiff in terms of losses. Rather, it takes the fact of lost revenues as a "given", without providing any evidence or expert opinion to support the contentions made as to the defendant's liability to the plaintiff or the contention that wrongdoing on the part of the defendant caused loss to the plaintiff. Internal page 2 of the report also sets out *inter alia,* the following:

> **"Basis of our work**
>
> *The analysis contained in this report has been based on the financial information and explanations provided to us by the company.*
>
> *We have not carried out an audit on the information provided.*
>
> *We believe the contents of the report to be correct."*

41. The foregoing makes it clear that the report is based on information provided by the plaintiff which information Roberts Nathan have not audited. The fact that Roberts Nathan state their belief that the contents of the report are correct, cannot, in my view, alter the factual basis upon which the RNR was prepared. In other words, the report no doubt correctly reflects the information provided but, given that the only source of the information was the plaintiff, it is not open to the court to regard the contents of the report as other than based exclusively on the information provided by the plaintiff to Roberts Nathan. The section of the report entitled "Background" begins as follows:

> *"The directors of DIL have requested us to prepare an analysis of the impact income from revenue share agreements which it did not receive over the period December 2011 to March 2019 (Lost Revenue) would have had on the net assets of the company as at 31 December 2018 and 31 March 2019.*
>
> *The Lost Revenue relates to:*

(1) Introducer fees it should have earned under the terms of an Affiliate Agreement with London Capital Group Limited ('LCG') for the period April 2018 to March 2019.

(2) Under declared revenue from DIL's clients under the terms of its revenue share/white label agreements with Ayondo Markets Limited ('Ayondo') over the period December 2011 to December 2017."

42. It will be recalled that, in his grounding affidavit, Mr. Drake on behalf of the defendant made a series of averments in relation to *inter alia,* communication with LCG and communication with the plaintiff regarding the migration of customers to LCG and Mr. Drake exhibited certain communication including in respect of what are said to be emails sent by the defendant, with the approval of the plaintiff, to the plaintiff's customers, regarding LCG. It is fair to say that in his 24 July 2019 affidavit, Mr. O'Donoghue on behalf of the plaintiff did not address the specific averments made by Mr. Drake concerning the communication with LCG other than in very general terms. Nor did Mr. O'Donoghue refer to, exhibit or proffer any evidence concerning the terms of what the RNR calls the plaintiff's "*Affiliate agreement with London Capital Group Limited".* The "Background" section also states *inter alia* that estimated lost revenue for 2011 to 2019 is as follows:

"2018 – 19 – €201,190

2011 – 2017 – €573,956

In total the estimated Lost Revenue amounts to €775,147. This has had a significant impact on the net assets of DIL and its ability to continue to trade and discharge its liabilities."

43. Although an estimate of "Lost Revenue" is provided, no evidence is proffered in relation to wrongdoing on the part of the defendant or as to the causal link between alleged wrongdoing and the plaintiff's loss. Under the heading "Current financial Position" a spreadsheet is set out showing what is stated to be the final position as of 31 December 2017, as well as the draft position as of 31 December 2018 and 31 March 2019. The very last line of the spreadsheet gives the following figures in respect of each of the three periods, namely "(492,641)"; "(515,569)" and "(520,729)". The text to the right of the spreadsheet contains *inter alia* the following:

"As set out the company was in a net liability position as at 31 December 2017 of €515,569, this increased to €520,729 as at 31 March 2019.

The company did not generate income in 2018 (save for c. €800) and is not currently generating income. It is however, incurring and discharging certain costs to maintain the company.

It has reached standstill agreements with its main creditors and is not incurring additional or new creditor liabilities."

Not trading; not generating income; "standstill agreements" with creditors

44. In view of the foregoing, this court is entitled to conclude that the plaintiff company is not trading. Furthermore, although it is plain that the company is not generating any income, the company is discharging what are described as "certain costs". It is also of significance to note that the company has reached what are described as "standstill agreements" with its main creditors. Other than the foregoing reference, no explanation is given as to what arrangements have been reached with the plaintiff's main creditors although, given the undisputed fact that the plaintiff is insolvent, it cannot be disputed that whatever agreements are in place between the plaintiff and its creditors are of very great significance. Given that the company is not trading and not generating income but is discharging costs and is plainly insolvent, it seems uncontroversial to say that the "standstill agreements" with the plaintiff's creditors and the terms thereof are materially relevant to the ongoing survival of the company.

Lost Revenue analysis – London Capital Group

45. The section in the RNR entitled "Lost Revenue" begins with a subheading entitled "Lost Revenue Analysis – London Capital Group". This refers to the plaintiff entering into what is described as an Affiliate Agreement with LCG in February 2018, effective from 01 May 2018 "*whereby it would receive introducer fees based on the level of profits generated by each client over a three-month period as follows*". This is followed by a spreadsheet with two columns, the first specifying revenue generated by customers and the second specifying the relevant introducer fee. It has to be pointed out that Mr. O'Donoghue says nothing about the Affiliate Agreement in his affidavit. Under the spreadsheet, it is stated that "*At the date of termination of the Ayondo contract DIL had c. 300 actively trading customers on its white label site. It had c. 1,648 clients with funds on deposit and 75 clients with open positions with Ayondo. As at 31 March 2019 we understand that one customer transferred to LCG generating income of $1,000. DIL has estimated that the Lost revenues on the LCG contract over the period May 2018 to March 2019 amounts to €201,190."*

46. With regard to the foregoing, the reference to the plaintiff having some 300 actively trading customers does no more than reflect the plea to that effect made by the plaintiff in para. 16 of the statement of claim. With regard to the calculation of loss of €201,190, it is explicitly stated by Roberts Nathan that this is what the plaintiff has estimated the loss to be. It is also made clear that the calculation carried out by Roberts Nathan is based on "*assumptions*" including an assumed average revenue per customer per month and an assumption that the majority of what is described as being c. 300 actively trading clients would transfer to LCG. The basis for those assumptions is not, however, set out and it is also fair to say that the assumptions merely replicate what the plaintiff pleads in the statement of claim, rather than going any further. Taken at its height, the report sets out a calculation on the basis that what the plaintiff pleads to be correct, is in fact correct, but no evidence is proffered in support of the assertions themselves or of what is described in the RNR as the "*key assumptions*".

Lost Revenue analysis – Ayondo contracts

47. This section in the RNR begins by stating "*We understand that DIL was unable to place reliance on the limited financial information it received from Ayondo over the term of the contracts.*" The foregoing statement concerns the alleged wrongdoing on the part of the defendant as understood by Roberts Nathan, but no evidence of wrongdoing on the defendant's part is proffered. The information provided by the defendant is described as "*limited*" but no basis for this characterisation is set out. It is said that the plaintiff was "*unable*" to rely on the information provided by the defendant but nowhere it is explained how this arose or why this was, with reference, *prima facie* evidence. This section of the RNR states *inter alia* "*Whilst difficult to determine with accuracy the actual loss suffered by DIL we have carried out an analysis based on average revenues over the six-year period 2012 to 2017 as set out below*". What follows is a spreadsheet in which calculations are set out for each of the years 2012 to 2017 using what is stated to be the plaintiff's average revenue yield during the period 2006 to 2011 and which is stated to be 35% and comparing that to revenue yields of between 6% and 18% from 2012 to 2017. Below the spreadsheet appears the following statement: *"The analysis illustrates a €1.6m variance between actual revenue received and what was expected based on historic norms. Notwithstanding the analysis is carried out at a high level it does however point to unexplained discrepancies in the financial information."* This section of the RNR reflects para. 8 of Mr. O'Donoghue's 24 July 2019 affidavit and it is fair to say that it is an analysis based on assumptions made by the plaintiff as to the correctness of the pleas made in the statement of claim. It is also clear that the benchmark used in the July 2019 report by Roberts Nathan is what the plaintiff says is its average revenue yield during the period 2006 to 2011 expressed as a percentage, being 35%. That "historic percentage" between 2006 and 2011 is compared to historic figures between 2012 and 2017 and produces what is described as a variance between actual revenue received and what was expected based on historic norms. It is appropriate, however, to point out that nowhere, in opposition to the present motion, does the plaintiff exhibit any projections which were generated in, say, November 2011 when the plaintiff and the defendant entered into the first contract, as to what revenue yield the plaintiff expected during the three years of the operation of that contract. Nor does the plaintiff refer to any projections carried out in, say, January 2015 when the plaintiff and the defendant entered into the second contract, which projections looked at what the plaintiff expected the revenue yield to be during the currency of the second contract. In other words, the plaintiff has not exhibited any benchmark which, prior to or during the operation of the contracts, the plaintiff expected to achieve in terms of profitability, in the form of projections prepared by the plaintiff at the time or agreed by the parties to the contracts prior to or during the currency of the contracts. Rather, the exercise appears to have been done entirely with the benefit of hindsight. Thus, although the RNR refers to revenue which "*was expected based on historic norms",* there is no evidence before the court that this was an expectation which the plaintiff had, or which the parties shared, at the relevant time, namely as of 2011 or in the years that followed up to and including the termination, by agreement, of the second contract with effect from 20 April 2018. In saying the foregoing, I am not for a moment suggesting that the plaintiff's claim is not entirely stateable. Plainly it is and it may well be a successful claim. However, the task for this court is to ascertain whether

prima facie evidence has been put forward to meet the four-part *Connaughton Road* test. In my view, the report by Roberts Nathan does not comprise such evidence and even taking the contents of the RNR at its height, the fact that the plaintiff's average revenue yield in the period 2006 to 2011 was 35%, whereas revenue yield in 2015 is stated to be 18% and in 2017 is stated to be 6% does not, of itself, seem to me to be *prima facie* evidence of wrongdoing on the defendant's part. The position might well be different if, for example, there was evidence before the court that the plaintiff and defendant had, at some point, agreed that a specific revenue yield was expected or if the parties to the successive contracts had indicated that revenue yield below a particular percentage or range would be unacceptable. There is no such evidence dating from the relevant time exhibited. There is simply an analysis of what is said to be loss without any evidence proffered of wrongdoing on the part of the defendant or evidence that wrongdoing caused the loss which is calculated on a range of assumptions and which loss is exclusively based on information provided by the plaintiff to Roberts Nathan.

Financial impact on DIL

48. The next section in the RNR is entitled "Financial impact on DIL" and begins with the statement "*We have illustrated here the impact the lost revenue has had on the net assets of the company"*. There follows what is described as a balance sheet which shows, *inter alia,* what are said to be draft figures for 31 December 2018 and for 31 March 2019. The excess of liabilities is stated to be "(515,569)" to 31 December 2018 and "(520,729)" to 31 March 2019. However, these figures are adjusted as follows. Firstly, what is described as "LCG revenue" is stated to be €170,238 to 31 December 2018 and a further €30,952 to 31 March 2019. Adding those figures produces the sum of €201,190.00. It will be recalled that this is the figure referred to in para. 9 of Mr. O'Donoghue's 24 July 2019 affidavit wherein Mr. O'Donoghue averred that the plaintiff had pleaded in the statement of claim that it had 300 trading customers on the white label site on the termination date. It was made clear that the €201,190 to March 2019 represented what the plaintiff alleged to be the loss to it as the result of the defendant continuing to accept trades from the plaintiff's customers beyond the migration date.

49. It has to be said, however, that the calculation of the figure of €201,190 and its breakdown between 2018 and 2019 in the sums of €170,238 and €30,952, respectively, does no more than assume that the plea made by the plaintiff based on the loss of 300 trading customers is correct. In my view, there is no evidence proffered to justify the figures. Indeed, this section of the RNR is explicit about the fact that it illustrates "*impact*" of lost revenue on the plaintiff's assets. In my view to illustrate impact of lost revenue is different to setting out evidence of wrongdoing which resulted in lost revenue. It is fair to say that this section, like the entirety of the RNR, sets out illustrations based on assumptions but this is entirely different to setting out evidence on which those assumptions are made. It also has to be said that, once again, the calculation of impact, insofar as the LGC issue is concerned, relies entirely on the proposition that the plaintiff lost some 300 trading customers and neither Roberts Nathan nor Mr. O'Donoghue engage with the averments made by Mr. Drake for the defendant, in para. 14.2 of his 02 April

2019 affidavit, to the effect that customer activity went from some 80 per month in 2011 to approximately 19 per month in the final reporting month.

50. It is clear from the spreadsheet in the RNR that when a credit is given of €170,238 for what is described as "LCG revenue" and when a credit for "Ayondo revenue variance" of €573,956 is given, the "revised net asset position" as of 31 December 2018 is stated to be €228,626. On the basis of those credits, which are described as adjustments, carried forward into 2019 and also giving a further credit of €30,952 in respect of LGC revenue, the revised net asset position as at 31 March 2019 is stated to be €254,418. Later in this judgment, I will refer to the fact that the defendant's costs on a party-party basis have been estimated by a professional firm of legal costs accountants in the sum of €190,000 excluding VAT. That figure is obviously somewhat less than €254,418. It has to be said, however, that both the LGC revenue and the Ayondo revenue variance sums represent no more than a calculation by Roberts Nathan which assumes that all pleas made by the plaintiff are correct, without the plaintiff or Roberts Nathan adducing any *prima facie* evidence to support the pleas made. It is beyond doubt that if either or both of the LCG revenue or Ayondo revenue variance figures are taken out of the analysis, the plaintiff is plainly unable to discharge the defendant's costs.

For illustrative purposes

51. It also has to be said that, even in its own terms, the "Ayondo revenue variance" which is described by Roberts Nathan as a shortfall "*for illustrative purposes*" of €573,956 based on a discounting of the plaintiff's revenue yield (between 2006 and 2011) by 40% to an average revenue yield of 21%. The basis for that is entirely unclear other than the statement by Roberts Nathan that this represents a "*prudent approach*". Plainly, if the plaintiff's revenue yield was discounted by a larger percentage, what was described as the shortfall for illustrative purposes would be less and this could readily reduce the revised net asset position such that the plaintiff could not hope to meet the defendant's costs. In my view, when a loss which is said to be €573,956, is a loss calculated (a) on the basis of assumptions, specifically the assumption that the pleas in the statement of claim are correct and is (b) explicitly stated to be "for illustrative purposes", it neither constitutes *prima facie* evidence to satisfy the *Connaughton Road* test, nor can it be said to be a reliable indicator or guide to the quantum of the plaintiff's alleged losses.

52. The final page of the RNR comprises the "Summary and Conclusions", the fifth of five being that "*had the company the benefit of this revenue over the period of the Ayondo contracts and the LCG agreement to March 2019 it would have net assets of c. €254,418".* In short, the plaintiff's position is that its current insolvency plus the defendant's costs would be more than met by the estimate of loss flowing from the defendant's wrongdoings. For the reasons set out above I cannot, however, consider the Roberts Nathan report to do more than assume the plaintiff is entirely correct in the pleas which the plaintiff makes in the statement of claim and to calculate scenarios based exclusively on information provided by the plaintiff to that firm and based on the correctness of the assumptions, with no prima facia evidence being tendered in support of the assumptions themselves and without any material engagement with specific

averments which are made to the effect that the assumptions underpinning the calculations of loss are not, according to the defendant, correct.

53. Furthermore, the approach taken by Roberts Nathan to the discounting, by a percentage, of what is said to be the plaintiff's average revenue yield during the period from 2006 to 2011 is plainly of fundamental relevance to what is described as the "shortfall", namely the figure said to be the plaintiff's loss, which figure is specified to be €573,956. As well as saying that the foregoing shortfall is "*for illustrative purposes*", nowhere do Roberts Nathan explain why the "*prudent approach*" they have taken to discounting the plaintiff's revenue yield is to employ a 40% discount, as opposed to, say, a 45%, 50%, 55%, 60% or, for that matter, 30% or 20% discount. Quite apart from the fact that the calculations of estimated loss in the RNR rely on the pleas in the statement of claim being entirely correct, the opacity as regards why a 40% discount, as opposed to any other percentage, was "*prudent*" means that the basis for the calculation of the alleged revenue variance is not at all clear from the RNR, nor is it addressed in any way in the affidavits sworn on behalf of the plaintiff.

Affidavit of Edward Drake sworn 14 November 2019

54. In an affidavit sworn on behalf of the defendant by Mr. Drake on 14 November 2019, issue was taken with the averments made by Mr. O'Donoghue. At para. 4, Mr. Drake notes that, where the plaintiff accepts that the defendant has a *prima facie* defence, it is unnecessary to address the defence any further, but it is made clear that the defendant does not accept the criticisms made of same in para. 3 of Mr. O'Donoghue's affidavit. It is averred at para. 6 that "*Mr. O'Donoghue has not provided any or any adequate evidence*" to support the contention that the plaintiff's lack of resources to meet an adverse costs order is caused by the wrongs of the defendant. In my view, this puts the plaintiff squarely on notice that, from the defendant's perspective, insufficient evidence has been adduced in opposition to the security for costs application. Mr. Drake goes on, in para. 7 to assert that the RNR does provide any evidence in support of the plaintiff's position and he avers *inter alia* that the calculations are based on assumptions rather than the interrogation of the assertion that the plaintiff's financial position was caused by the defendant's actions. At para. 8 Mr. Drake refers to a report prepared by Mr. Cathal Cusack FCCA of Cusack Garvey chartered certified accountants, dated 23 October 2019, which is exhibited.

55. In para. 9 Mr. Drake refers in particular to paras. 3.10.B to 3.10.G and 4.10.G of the said report and he avers *inter alia* that:

> *"… as is clear from the contents of the Report and the documents referred to therein, the plaintiff was insolvent from at least December 2011, having incurred losses of over €7 million since commencing trade, and has remained insolvent to date. The plaintiff's financial position is such that its creditors could seek the liquidation of the company should they so wish and its directors have stated that the plaintiff is treated as a going concern because of the support of its creditors.*

10. I say that the plaintiff's tenuous financial position pre-dates its business relationship with the defendant and it is clear from the Report that the plaintiff's financial difficulties did not stem from any action of the defendant."

Report of Cathal Cusack dated 23 October 2019

56. The following are *verbatim* extracts from the 23 October 2019 report by Mr. Cathal Cusack of Messrs. Cusack Garvey, chartered certified accountants:

"3.10.B Paragraph 5 of Dermot O'Donoghue's affidavit states 'the plaintiffs can say with certainty that there was under reporting by the Defendant based on objective statistical analysis'.

3.10.C However, the objective statistical analysis appears to be the comparison of the six-year average gross revenue and resulting yield of DIL covering the period 2006 to 2011 with the results arising in the period under a contract with AML.

3.10.D The computation is based on the presumption that the customer base will match the 2006/2011 average in membership, activity and returns.

3.10.E The report does not consider other factors which may have had an impact on the overall revenue and resulting yield from DIL clients but presumes that the average of the conditions that held in the period 2006 to 2011 will continue to hold for a further six years. It is hard to think of another business that such a presumption could hold yet this is the bedrock of the plaintiff's computation of loss.

3.10.F The computation suggests a loss of €1,608,926 but this is reduced for the purposes of the claim to €573,956. There is nothing to support this reduction as valid or necessary other than it is result of 'taking a prudent approach'.

3.10.G AML was the platform through which DIL customers traded and the that the resulting revenue reported by AML is underreported is simply not supported by any evidence that has been put forward by the plaintiff."

57. On page 4 of the same report, under the heading of "Review of the financial positon of DIL", the following is stated:

"4.10.A It is the plaintiff's position that he alleged wrongdoing by AML is the reason that the plaintiff could not meet an adverse costs order against it.

4.10.B I carried out a review of the financial results from the publicly available information held by the Registrar of Companies. The results of this review are summarised in appendix 2.

4.10.C DIL was insolvent from at least 31st December 2011, the earliest period of its engagement with AML. At that point it had incurred losses of over €7 million since commencing trade, and its balance sheet was in deficit by over €300,000.

4.10.D The company's auditors expressed an 'emphasis of matter' paragraph in the audit report for the years 2012, 2013 and 2014. It refers to the fact the company was reporting its results on a going concern basis despite the insolvent nature of the balance sheet. It's not clear why this paragraph was not included in the 2015 audit report. The financial statements for the years 2016 and 2017 were not audited but the directors stated that they viewed the company as a going concern, despite its insolvent balance sheet, because of the continued support of its creditors.

4.10.E The publicly available financial statements for the years 2012 to 2017 are abridged and do not contain profit and loss statements. However, the overall result can be derived from the movement on capital. This analysis indicates that after 2012, the company enjoyed a period of profit while it was associated with AML. DIL's balance sheet improved in this period moving from a deficit of €789,391 in December 2012 to a deficit of €492,641 in December 2017.

4.10.F The Financial Impact statement prepared by Roberts Nathan appears to indicate that matters deteriorated in 2018 and the deficit at 31st December 2018 is estimated to be €515,569.

4.10.G The financial review can be summarised as follows:

- *DIL was insolvent in December 2011 and has remained insolvent since that date.*

- *DIL was insolvent from the inception of its association with AML but the financial statements show that the DIL's association with AML, rather than cause DIL's financial difficulties, actually improved DIL's financial condition."*

58. Having regard to the foregoing, I am entitled to find that the plaintiff was, as a matter of fact, insolvent from at least 31 December 2011. No issue was taken with this in any affidavit sworn on behalf of the plaintiff. In other words, nowhere was it asserted or was any evidence proffered by the plaintiff to the effect that the plaintiff was not insolvent at that point or, indeed, prior to entering into the first of its contracts with the defendant. I am also entitled to hold, for the purposes of this application, that the plaintiff's balance sheet improved during the currency of the plaintiff's two contracts with the defendant. Indeed, as will be seen from averments made on behalf of the plaintiff which are discussed later in this judgment, no issue was taken with this fact, although different reasons are given for the improvement in the plaintiff's financial position during the period when the two contracts were operative. It is also appropriate to refer to the conclusions set out on p. 5 of the report which are as follows:

"5.10.A The Roberts Nathan net asset analysis, by its own admission, lacks evidential support for the computation. However, it proceeds to prepare a claim and having arrived at a figure reduces it by a substantial factor on account of a prudent approach.

5.10. DIL is apparently without income, is insolvent and has been in an insolvent position since at least December 2012. It is at the mercy of creditors who could, if they wished, seek the liquidation of the company.

5.10. In my opinion the computation of the loss isn't supported by evidence and, from a financial perspective, the plaintiff is unable to sustain any action except one contingent on the prospect of an entirely positive outcome.

5.10.D The financial statements support the view that the plaintiff's inability to meet a costs order is not the result of any alleged wrong by AML, but the result of the substantial losses it incurred prior to its association with AML."

59. Appendix 1 describes the documents available, being Mr. O'Donoghue's 25 July 2019 affidavit, the RNR and "*Financial statements publicly available via the registrar of companies for the years 2006 to 2017*". Appendix 2 comprises a spreadsheet which is stated to be the "*Summary of results reported on the public register*" with figures given for the years 2006 to 2017, inclusive, and a graph of the relevant profits/losses shown in respect of those years. Among other things, closing balance sheet totals are given for each year. These are substantial positive sums for 2006, 2007, 2008, 2009 and 2010, with a dramatic fall in value between 2010 and 2011, specifically a positive balance sheet total of €2,603,871 in respect of 2010 as against a negative i.e. (309,878) in respect of 2011. Appendix 3 sets out Mr. Cusack's qualifications, being a fellow of the Association of Chartered Certified Accountants. Appendix 3 also notes that Roberts Nathan prepared the accountant's report for the plaintiff's financial statements in respect of 2016 and 2017.

Second affidavit of Dermot O'Donoghue

60. In an affidavit sworn on 06 March 2020 Mr. O'Donoghue, for the plaintiff, again acknowledges that on the basis of the plaintiff's current financial position "…*it is likely that it would struggle to meet the defendant's costs* …" Mr. O'Donoghue goes on to refer to a second report commissioned from Roberts Nathan accountants, which is dated 06 March 2020, and which he exhibits. In para. 7 Mr. O'Donoghue makes the following averments:

"7. As can be seen from the report of Roberts Nathan accountants exhibited hereto, the fact is the plaintiff was profitable during the period there was a contract between the parties hereto. The plaintiff was profitable because of steps taken by the plaintiff in changing its business model and reaching agreement with its creditors. The fact remains that, as can be seen from Roberts Nathan accountants report, had the monies due from the defendant to the plaintiff (estimated at €775,147) been paid as they should have been, the net financial position of the plaintiff would be €230,000."

61. In light of the foregoing averment it is not in dispute that the plaintiff was profitable during the period when there was a contract in place between the plaintiff and the defendant. Reference to the sum "*estimated at €775,147*" is no more than reference to a sum calculated on the basis that the pleas made by the plaintiff in the statement of claim are correct and the assumptions relied upon for the calculation of that sum are correct.

There is not, however, a tendering of any evidence by Mr. O'Donoghue to support the assertion of wrongdoing on the part of the defendant or to support the assertion that such wrongdoing caused loss to the plaintiff. Nor is there any evidence proffered which would provide a basis for the calculation of the alleged loss, other than assertions which reflect the pleas in the statement of claim. I will presently look at the second Roberts Nathan report but, before doing so, it is appropriate to look at the balances of the averments made by Mr. O'Donoghue in his 06 March 2020 affidavit.

62. In para. 8 Mr. O'Donoghue makes clear that the plaintiff relies on the findings of the Roberts Nathan Report to rebut the defendant's arguments. Mr O'Donoghue does not, however, proffer any evidence to corroborate the assertions made which underpin the calculations carried out by Roberts Nathan. At para. 9 Mr. O'Donoghue avers that: *"The directors of the plaintiff genuinely believed at the time of entering the agreement with the defendant, that the business model of the company would be totally transformed with roughly half the revenues but at a materially reduced cost base. The plaintiff's auditors, PWC, deemed the agreement with the defendant a change in business model defining the previous business model as discontinued operations and the new business model be continued operations*." In my view, the foregoing can fairly be characterised as no more than assertions. That is not for a moment to doubt the *bona fides* of the deponent, but it is appropriate to point out that the plaintiff has not, for example, referred to or exhibited revenue targets which the plaintiff and the defendant agreed upon when the plaintiff entered into the first or indeed the second contract with the defendant. Nor is it claimed that any specific revenue targets were breached. Rather, the thrust of the claim made by the plaintiff is that, even though the plaintiff was profitable during the period when it was contracting with the defendant, it attributes that profitability to other steps which the plaintiff took and, looking backwards after the agreed termination of the contractual relationship, the plaintiff is convinced that it should have been getting more income during the currency of the contract, from which it concludes that the defendant must have misrepresented the monthly figures during the period of the contract. Although emphasising, again, that it is no function of this court to make any findings in respect of the underlying claim, it is necessary for this court to examine the extent to which *prima facie* evidence has been put forward by the plaintiff to support the four elements of the *Connaughton Road* test. In my view, nothing in the plaintiff's 06 March 2020 affidavit can fairly be said to constitute such *prima facie* evidence. Rather, it seems to me to amount to assertions which, although entirely consistent with the statement of claim, go no further.

63. In para. 10 of his second affidavit, Mr. O'Donoghue avers that the plaintiff's wage bill went from €1,258,000 in 2011, to €32,000 in 2012, to €15,000 in 2013 and has been zero ever since. He avers that total operating expenses went from €2,495,000 in 2011, to €420,000 in 2012, to €27,000 in 2014. It is averred that, if not for the existing contracts in force, the plaintiff has been cash flow positive on a continuing operations basis since December 2011. In para. 11, Mr. O'Donoghue makes the following averment:-

"11. I say plaintiff (sic) entered into it initial agreement with the defendant on the 09 December 2011 and transferred all its clients to the defendant on the weekend of 9-11 December 2011. The reason the plaintiff entered into the agreement with the Defendant was to safeguard the company as losses were mounting and a corporate event was required to get the company onto a stable position with profits to pay off all creditors and ultimately dividends to shareholders based a (sic) stable revenue projections. At the time of the customer migration, the plaintiff wrote to its creditors and obtained accommodation from them to allow for this to happen. That accommodation continues."

Despite the reference to the "*accommodation*" with the plaintiff's creditors, no further details are provided in relation to the nature of same, the terms of same, the duration of same and/or the extent to which creditors could decide to cease providing the accommodation. This, it seems to me, is a significant issue in the present proceedings. On the basis of the evidence before this court, it appears to be the case that, even if one were to take at its height, all calculations done by Roberts Nathan - and leaving aside for present purposes the elements of the *Connaughton Road* test, the assumptions underpinning those calculations and the absence of *prima facie* evidence - the most that is said on behalf of the plaintiff is that if the plaintiff had the benefit of what is described as lost revenue, its net assets would be €228,626 at 31 December 2018 and €254,418 at 31 March 2019 (see the "financial impact and DIL" section of the RNR). That is not, however, the full picture. This is because, even before entering the first of its contracts with the defendant, losses were mounting in them plaintiff company and its financial circumstances were such that it had to write to its creditors and obtain what has been called an "accommodation" with them, which accommodation is said to continue. There is no evidence whatsoever put before court to the effect that the plaintiff can rely on this accommodation until the determination of the present proceedings. No detail whatsoever is given in respect of these accommodations, also described as standstill agreements with creditors. Thus, there seem to me to be three parties whose position is of relevance. There is the plaintiff who has pleaded a claim against the defendant. There is the defendant who opposes that claim and there are the plaintiff's creditors who reach an accommodation with the plaintiff prior to any contract being entered into as between the plaintiff and the defendant which contracts, according to the plaintiff, the defendant has breached. Ongoing accommodation from the plaintiff's creditors would seem to be essential, regardless of the outcome of a security for costs application, yet no details are provided in respect of such accommodation as continues.

Plaintiff insolvent prior to entering a contract with the defendant

64. Mr. O'Donoghue's second affidavit concludes with the averment that, but for the defendant's wrongs, the plaintiff would be in a position to comfortably meet any adverse costs order and it is averred that "*The Defendant has caused the insolvency of the Plaintiff by its acts and omissions in not properly remunerating the Plaintiff and in taking the Plaintiff's customers.*" That averment may well be directed to the current financial position of the plaintiff but, insofar as the position which pertained at the end of 2011 is concerned, it is an averment which does not appear to be supported by the facts. On the

contrary, the evidence before the court points to the plaintiff being insolvent as at the end of 2011 and, indeed, insolvent *prior to* entering into the first of the contracts with the defendant. The mounting losses to which the plaintiff refers arose *prior to* the first of the contracts between the plaintiff and the defendant and it will be recalled that an examination by Cathal Cusack accountant of the publicly available financial information in respect of the plaintiff showed a substantial drop, from €2,603,871 in 2010, to (309,878) in 2011 in respect of the plaintiff's closing balance sheet total. The foregoing is not disputed.

Second Roberts Nathan report dated 06 March 2020.

65. The 06 March 2020 report by Roberts Nathan ('RNR2') which Mr. O'Donoghue exhibits, makes clear that the analysis contained therein "…*has been based on the financial information and explanations provided to us by the Company. We have not carried out an audit on the information provided. We believe the contents of the report to be correct."* It is fair to say that there is a significant amount of repetition between RNR and RNR2 and the same figures are proffered as estimated lost revenue over the period 2011 to 2019, namely, €201,190 for the period 2018-2019 and €573,956 in respect of 2011-2017, giving a total estimated lost revenue of €775,147, being the self-same sums described in the first report. A significant portion of the RNR2 is devoted to commenting on points made in the Cathal Cusack report. It is fair to say, however, that nowhere in the RNR2 is any *prima facie* evidence proffered in support of any contentions made by the plaintiff, nor is any evidence proffered which would provide a basis for any of the assumptions made insofar as the calculation of alleged losses is concerned. Rather, assertions are made which reflect the contents of the pleaded claim made by the plaintiff. For example, the RNR2 states *inter alia,* that *"the analysis in the Roberts Nathan report is based on historical statistical analysis of DIL's performance as there was insufficient information made available to it to carry out an analysis of the actual trading performance of its clients over the period 2012 to 2018."* The foregoing is an assertion to the effect that insufficient information was provided by the defendant to the plaintiff, but no attempt is made to corroborate the assertion, by way of *prima facie* evidence, that insufficient information was made available to the plaintiff. It is not in doubt, in the present proceedings that the plaintiff did receive monthly reports from the defendant. There is, however, no attempt, for the purposes of the present application to explain, with reference to such reports as the plaintiff did get, or otherwise, why the reports furnished by the defendant to the plaintiff were inadequate or evidence misrepresentation.

66. Among other things, the RNR2 states that the plaintiff entered into "*standstill arrangements*" with its creditors, without any detail of same being furnished and the report states that the plaintiff's "*revised business model*" was profitable. No issue is taken by Roberts Nathan in the RNR2 with the statement made in para. 4.10.G of the Cathal Cusack report, wherein Mr. Cusack states that the plaintiff was insolvent in December 2011 and has remained insolvent since that date. Among other things, the RNR2 states that "*at no point in the Roberts Nathan's net asset analysis report does it state or assert that we did not have evidential support for the computation*". Although the foregoing is stated, Roberts Nathan do not explain what "*evidential support*" they had for

the computation or what they mean by referring to same. With regard to the statement made by Cathal Cusack in 5.10.B of his report, the following is said in the RNR2: *"It is difficult to understand how CC could assert that DIL is at the mercy of its creditors. This would appear to be the opinion of the author rather than based on evidence. As stated earlier, agreements were reached with creditors with regard to repayment of their liability. These agreements are still in force currently."* Despite referring to the lack of "*evidence*" for the opinion formed by Mr. Cusack, nowhere do Roberts Nathan provide any evidence whatsoever in relation to the agreements as between the plaintiff and its creditors. The terms are entirely unknown other than the fact that the plaintiff has obligations to creditors regarding repayment of liabilities. The terms of such agreements are not made clear. No evidence is proffered by Roberts Nathan to refute the conclusion which Cathal Cusack came to.

67. With regard to the opinion expressed by Cathal Cusack at 5.10.D, the RNR2 states as follows: "*The CC assertion that DIL's inability to meet a costs order is a result of the losses incurred prior to its association with Ayondo appears to be based again on the opinion of the author as there is no evidence or fact presented in his report."* It has to be said, however, that the exercise which Mr. Cusack conducted was, as clearly stated in his report, an analysis of the publicly available financial statements of the plaintiff and nowhere is any issue taken with the contents of the publicly available financial statements. Mr. Cusack also makes the point in his report that he cannot interrogate the estimated losses furnished in the RNR in the absence of evidence regarding the assumptions which underpin them. The comments in the RNR2 which criticise Mr. Cusack's assertion for lack of "*evidence*" does not go that step further by providing any evidence to refute the opinion which Mr. Cusack came to.

68. It might be recalled, at this juncture, that the plaintiff bears the burden to demonstrate that special circumstances exist and this involves meeting the various elements of the *Connaughton Road* test. Criticising the defendant's expert accountant for allegedly not providing evidence to support his conclusion that the plaintiff's inability to meet a costs order is a result of losses incurred by the plaintiff *prior to* any contract with the defendant is entirely different to presenting evidence that Mr. Cusack was wrong in the conclusion he reached.

69. The RNR2 goes on to give a narrative description in relation to what is described as the revised business model of the plaintiff between 2011 and 2018. This section begins as follows:

> *"Revised Business Model.*
>
> *DIL entered into the agreement(s) referred to earlier in this document to enable it to continue to trade as a going concern and to allow it to repay amounts due to its creditors and generate a return for its shareholders.*
>
> *Due to the significant decline in Irish retail clients spread betting in 2010 and 2011 (an impact experienced by all Irish spread betting firms) DIL's management*

engaged corporate finance consultants to carry out a strategic review of the business and identify the options available to it.

One of the options identified was to utilise the company's main and key asset – its client base to generate ongoing and recurring revenues.

DIL entered into revenue share/white label agreement with Ayondo in December 2011, the key financial terms were as follows, the greater of:

- *30% of spread revenues or*
- *40% of client losses.*

Management stated that the agreements were attractive for DIL not only based on the financial metrics but also the proposed investment planned by Ayondo in its trading platforms…"

70. In my view, nothing in this section can fairly be said to constitute *prima facie* evidence of wrongdoing on the defendant's part or *prima facie* evidence that, were it not for such wrongdoing, the plaintiff would have made sufficient profits to be in a position to pay the defendant's estimated costs. The next section of the RNR2 comprises an analysis of the profit and loss and balance sheet for the period 2011 to 2018 which illustrates the impact on the net assets of the company of what is described as the revised business model,. A spread sheet is set out detailing *inter alia,* income, costs, profit, assets and liabilities, with a total in respect of net liabilities specified in relation to each of the years, 2011 to 2018. Again, nothing in this section can fairly be said to constitute *prima facie* evidence corroborating any of the contentions made by the plaintiff in the statement of claim, or amounting to *prima facie* evidence that, absent alleged wrongdoing, the plaintiff would have earned enough to be in funds sufficient to discharge the defendant's costs. The same can be said in relation to the summary and conclusions detailed on internal p.9 of the RNR2.

Replying affidavit of Yorick Naeff sworn 18 June 2020.

71. On 18 June 2020 an affidavit was sworn on behalf of the defendant by Mr. Yorick Naeff, who is described as the defendant's chief executive officer. In para.3 he draws the court's attention to the fact that the name of the defendant company was changed on 18 July 2019 from "*Ayondo Markets Limited*" to "*Bux Financial Services Limited*". The parties to the proceedings are consenting to an order to reflect this name change and it is appropriate that such an order be made.

72. In para. 6 it is averred that, "…*the second expert report of Roberts Nathan relies entirely on untested assumptions in relation to the computation of alleged losses caused by the defendant and 'introducer fees' which are allegedly owing. Mr. Nathan has relied on a number of crucial assumptions, which were not tested by him and the basis of which are not explained by him or Mr. O'Donoghue*." At this juncture it is appropriate to point out that neither the first, nor the second Roberts Nathan report identifies any author. Rather, the reports and the covering letters regarding same appear to be authored by the

company which describes itself as Business Advisers & Tax. I do not believe that anything turns on this. Mr. Naeff goes on to refer to a second report prepared by Mr. Cathal Cusack who reviewed the second Roberts Nathan report and this is exhibited at para. 7. At para. 8., Mr. Naeff avers that a further set of financial statements were filed in the company's registration office and he exhibits a copy of the plaintiff's unaudited abridged financial statements for the year ended 31 December 2018, as approved by the Board of Directors for issue on 23rd October, 2019. It is averred that the defendant's concerns regarding the plaintiff's financial position have not changed upon review of same. At para. 9 it is averred that the most recent financial statements make it clear that the plaintiff relies on its creditors for financial support and Mr. Naeff quotes, *verbatim*, figure 3 on p.9 of the aforesaid financial statements, as follows:

> *"3 Going Concern.*
>
> *The company incurred a loss of €21,170 for the year ended 31 December 2018 and, at that date, the company's liabilities exceeded its assets by €513,811. The ability of the company to continue as a going concern is dependent on the continued support from its creditors and the ability of the company to trade profitably." (Emphasis added).*

73. Mr. Naeff goes on to make the following averment in respect of the foregoing:

> *"I say that the financial statements go on to say that the directors have prepared the financial statements on a going concern basis" but 'the validity of this assumption depends upon the company being able to trade profitably in the future and continued support from its creditors" (Emphasis added).*

74. In para. 10 Mr. Naeff avers that, not only is the plaintiff carrying a substantial deficit, it continues to increase that deficit as it is loss-making year on year. He avers that the ability of the directors to prepare financial statements on a going concern basis is expressly reliant on two factors which Mr. Naeff describes as uncertain. He avers that there is no evidence from the plaintiff's previous performance that would suggest it will suddenly become profitable, which the directors say is necessary for the plaintiff to continue as a going concern. He avers that the plaintiff's balance sheet shows that the plaintiff has no trade debtors and no movement in trade creditors as at the end of December 2018, indicating that the plaintiff company is not trading and Mr. Naeff avers that this further detracts from the likelihood of the plaintiff becoming profitable. He also avers that there is no evidence as to the nature of any arrangements with the plaintiff's creditors. It is fair to say that the foregoing averments made by Mr. Naeff are not controverted.

Insolvent prior to engagement with the defendant

75. Mr. Naeff goes on, at para. 11, to make the following averments:

> *"11. As the evidence before the court demonstrates the plaintiff was insolvent prior to its engagement with the defendant and continues to be insolvent. The fact that its*

losses were reduced during the period of engagement with the defendant is not evidence of any wrongdoing on the part of the defendant, nor is it relevant that the plaintiff took steps to reduce its deficit by entering into the white label contracts. The plaintiff's assertions that it had projected greater profits before entering into the white label contracts is not relevant. Those projects were based on historical results based on client behaviour which was observed whilst the plaintiff's business was still trading. The period during which the white label contracts were in operation was a very different market environment and the plaintiff and its expert have not addressed this fact: They have merely continued to rely on projections prepared during the credit crisis to project expectations in the more stable (and less profitable) period thereafter."

76. The foregoing averments are not controverted by the plaintiff. Mr. Naeff goes on, at para. 13 to aver as follows:

> *"13. Roberts Nathan's report dated 6 March 2020 refers to a statement entitled 'DIL business model 2011 to 2018 (which was not referred to in Roberts Nathan's first report). This 'Business Model' importantly confirms that the plaintiff suffered a deficit on its balance sheet of €307,879 and a further deficit of costs of €378,775 in December 2011. In the normal course of accounting, these losses would be (and were) realised at a later date. These losses are related to the plaintiff's discontinued business model which reinforces the fact that the plaintiff's current financial position is entirely a result of its historical operations of trading prior to its engagement with the defendant."*

77. The foregoing averments are not controverted by the plaintiff. In para. 14 Mr. Naeff rejects the assertions made in the Roberts Nathan report in relation to what is described as "*lost revenue*" from the plaintiff's relationship with LCG and it is averred that "*The migration of customers from Ayondo Markets Limited to London Capital Group was done in accordance of the expressed wishes of both the plaintiff and London Capital Group*."

Second report by Cathal Cusack, dated 22 April 2020.

78. The first page of this report begins by stating *inter alia,* that "*the Roberts Nathan commentary dated 6th March, 2020 has not altered the opinion expressed in my report dated 23rd October, 2019.* Mr. Cusack goes on to comment on the contents of the second report by Roberts Nathan under several headings. The first is that "*the RN Report lacks evidential support*". In that section, Mr. Cusack details the reasons for his opinion that the Roberts Nathan report lacks evidential support. Among other things, Mr. Cusack states that "*the impact of the loss is an arithmetical matter once the loss is established*" and "*RN has not provided any support for the computation of the loss*" as well as "*RN's report did not include evidence to support the relevance of the analysis nor evidence to support RN's reduction of the outcome for prudence".* It is also stated in a second heading that "*DIL is apparently without income, is insolvent and has been in an insolvent position since at least December 2012. It is at the mercy of creditors who could, if they wished, seek the liquidation of the company*." Mr. Cusack notes that Roberts Nathan have not disputed the foregoing and he refers to the notes to the financial statements for

2016 and 2017 to the effect that "*the ability of the company to continue as a going concern is dependent on the continued support from its creditors and the ability of the company to trade profitably".* He goes on to note *inter alia,* that the plaintiff lacks any current income and is unlikely to be able to trade profitably stating *inter alia, "this is likely to mean it can no longer be considered a going concern and, being insolvent, is subject to the actions of his creditors"*. He also notes that the "*standstill agreements*" referred to in the Roberts Nathan report have not been furnished and, for that reason, he cannot comment on them but states that the information publicly available quotes the directors of the plaintiff in the most recent financial statements as recording the plaintiff to be "*dependent on the continued support from its creditors*".

79. The third heading used by Mr. Cusack in his second report is "*in my opinion the computation of the loss isn't supported by evidence and, from a financial perspective, the plaintiff is unable to sustain any action except one contingent on the prospect of an entirely positive outcome*." Mr. Cusack notes that in the plaintiff's 2018 financial statements, the following is said with regard to the legal action: "*The directors do not believe that the outcome will have an adverse impact on the Company*". That section concludes with Mr. Cusack expressing the following views: *"I presume there is no provision for an order for costs should the action fail. The company is insolvent and has no current source of income. I am not aware of any proposal to inject capital into DIL. The commitment to further costs can only be met from a successful outcome of the legal action. DIL could not meet an order for costs*." The final section of Mr. Cusack's second report appears under the heading: "*The financial statements support the view that the plaintiff's inability to meet a costs order is not the result of any alleged wrong by AML, but the result of the substantial losses it incurred prior to its association with AML*". As well as stating that the plaintiff's financial statement and the Roberts Nathan report dated July 2019 confirmed that the plaintiff was insolvent prior to its engagement with AML and noting that the financial statements for the years 2016 to 2018 have not been subject to audit, Mr. Cusack comments on what the second report by Roberts Nathan describes as the "*DIL business model 2011 to 2018"*. Mr. Cusack states *inter alia,* the following with regard to same:

> *"The DIL Business Model shows that, during the years 2012 to 2016, DIL suffered costs of €378,775 related to its discontinued operations (I presume this to mean the operations in existence prior to its agreement with AML).*
>
> *Based on the information provided in the RN's 6th March, 2020 report, DIL at December 2011 had a deficit on its balance sheet of €309,879 and a further €378,775 of costs, related to its discontinued business model, would be recognised in later years. Therefore, the deficit arising from the business carried on prior to engagement with ANL is a total of €688,654.*
>
> *This reinforces my view that DIL's current insolvent position is entirely the result of its operations prior to its engagement with AML. DIL's arrangement with AML was*

even more beneficial to DIL than previously appeared as it provided revenue to support €378,775 of costs related to DIL earlier business."

Affidavit of Gillian Cantrell and report by Behan & Associates.

80. On 15 September 2020, Ms. Gillian Cantrell, solicitor for the defendant exhibited an estimate of party and party costs prepared by Messrs Behan & Associates legal costs accountants together with a schedule of estimated costs. A copy of the letter sent by Messrs A.&L. Goodbody Solicitors for the defendant to Messrs MacCarthy Johnson, solicitors for the plaintiff, enclosing the estimate carried out by Behan & Associates was also exhibited. It is not in dispute that Behan & Associates have estimated the defendant's costs on a party and party basis as totalling €192,050.00 excluding VAT. It is appropriate to point out that the plaintiff has not retained a cost accountant and has not proffered any evidence which takes issue with the analysis carried out by Behan & Associates.

Affidavit of Cathal Cusack sworn 17th September, 2020.

81. In an affidavit sworn on 17th September, 2020, Mr. Cusack refers to his qualifications and experience and to his duty to assist the court with matters within his field of expertise which overrides any obligation to the party which engaged him. Mr. Cusack exhibits his two reports and confirms, at para. 9, that the reports reflect his expert opinion. As I observed earlier in this judgment, no individual who is said to have authored the Roberts Nathan reports has sworn any affidavit confirming same or exhibiting same. I am, however, satisfied that nothing turns on this for the purposes of deciding the application before this court.

Discussion and decision.

82. In skilled submissions, counsel for the plaintiff contends that, for present purposes, the court must take the plaintiff's case against the defendant "*at its highest*" and counsel relies for that submission on the decision of Denham C.J. in *Murphys v. Callaghan & Ors*. [2013] IESC 30 wherein, at para. 24 on p.18 it was stated:

> *"In considering an application for a non-suit by a defendant, the trial judge must consider whether there was any evidence from which negligence may be inferred against the defendant or whether there was evidence, whatever its relevant cogency or strength, upon which a court could conclude that a defendant was liable. In essence this means that the trial judge must take the plaintiff's case against the defendant seeking the non-suit at its highest."*

The plaintiff also draws this Court's attention to what was said by the Supreme Court in the same decision at para. 33 on p.24: "*Of course a judge when applying the correct test, even though he or she is bound to take a plaintiff's case at the highest mark, would be entitled to dismiss if a plaintiff had not established a prima facie case, or if a plaintiff's case manifestly lacked credibility and no sufficient weight could be attached to it."*
Counsel for the plaintiff submits that this approach was applied by Mr. Justice Noonan in *W.L. Construction Limited v. Charles Chalk & Anor*. [2016] IEHC 539, at para. 91 on p.40 wherein it was stated:

> *"This case stands or falls on the evidence of Mr. Loughnane and Mr. O'Kane. Leaving to one side the separate issue of abuse of process for a moment, I accept, as I must, that I am obliged to take their evidence at its height in order to access whether the plaintiff has established a* prima facie *case against the defendants. However, taking the evidence at its highest is not to be equated with accepting that evidence without question. The court is entitled to access the credibility of the plaintiff's evidence and the weight to be attached to it even at this stage of the trial."*

It is appropriate to point out that the *W.L. Construction Ltd* case and the *Murphy* decision concerned applications for non-suit and dismissal of the plaintiff's claim at the conclusion of the plaintiff's case, the latter decision being a judgment of the High Court and the former being an appeal to the Supreme Court against an order made in the High Court by Mr. Justice Peart dismissing the plaintiff/appellant's claim. Regardless of the undoubted skill with which the submission is made, I regard myself as bound to apply the test identified in *Connaughton Road* and, in so doing, to decide whether the *prima facie* standard of evidence has been met in the context of the plaintiff's obligation to meet each element of the Connaughton Road test. The authorities provide clear guidance as to what that involves and I have referred to several of them earlier in this decision. It is clear that a mere or bald assertion is insufficient. It is equally clear that a plaintiff must do more than merely assert a proposition on affidavit. The authorities make clear that the plaintiff must adduce some evidence. Moreover, this evidence must be cogent and credible and must corroborate the contention advanced by the plaintiff. Plainly, to establish something on a *prima facie* basis carries a far lesser burden than to establish something on the balance of probabilities. It is a burden nonetheless. It is this burden the plaintiff must discharge in the context of the application before this Court. That means looking at such evidence as the plaintiff has proffered. I am not convinced that the concept of taking the plaintiff's evidence "*at its height*" is of assistance, in circumstances where the obligation of the court is to see whether such evidence as is proffered constitutes *prima facie* evidence. That means looking at it for what it is and deciding whether it is cogent and credible and corroborates what the plaintiff asserts on a *prima facie* basis. If, however, no more than assertions are made, which are not underpinned by some evidence, the plaintiff will not have discharged the burden on it.

83. In submissions, counsel for the plaintiff/respondent suggested that the defendant was inviting the court to mischaracterise the plaintiff's evidence or to treat it in an overly perfunctory way and it was submitted that, if the court rejects the evidence put forward by the plaintiff, the court will have adopted an extremely strict and inappropriate approach to the rules of evidence. Despite the skill with which submissions were made on behalf of the plaintiff, I do not accept that the foregoing is so. This court has looked carefully at the entirety of the evidence proffered by the plaintiff in the context of the claim which is made. Having done so, I am satisfied that the *Connaughton Road* test has not been met. It cannot be disputed that the plaintiff is a company which has an excess of liabilities over assets. At 31 December 2018 that figure was (€515,569) and at 31 March 2009 it was (€520,729). The report of July 2019 by Roberts Nathan sets out a

"*revised net asset position*" in respect of the company which produces a positive figure of €228,626 as of 31st December 2018 and a positive figure of €254,418 as of 31 March 2019. It is fair to say that this is the high water mark of the plaintiff's claim but immediately below the spreadsheet which calculates the revised net asset position, which is under the heading "*financial impact on DIL*", Roberts Nathan state the following: *"taking a prudent approach we have discounted the DIL revenue yield by 40% to an average revenue yield of 21% resulting in shortfall (for illustrative purposes) of €573,956)".* Far from being a calculation of likely damages, and fully aware that this Court could not expect a plaintiff to necessarily be in a position to specify its loss with particularity, what has been provided falls well short of what is necessary in terms of *prima facie* evidence in the context of the *Connaughton Road* test. Without an explanation of why a 40% discount was an appropriate one and the only appropriate one, the sum of €573,956 is explicitly set out "*for illustrative purposes*". The foregoing is done without any *prima facie* evidence of how any alleged wrongdoing has a causative link to alleged loss.

84. In addition to the foregoing, the revised net asset position of the plaintiff as calculated by Roberts Nathan plainly relies to a material extent on the sum of €170,238 which is said to be "*LCG revenue*". It will be recalled that this is revenue which the plaintiff asserts that it would have earned, on a contract between the plaintiff and London Capital Group, from what are described as some 300 actively trading customers whom, the plaintiff asserts, would and should have transferred to London Capital Group and would and should have earned an assumed average revenue per customer of a particular level resulting in assumed fees. In my view, it is fair to describe the calculation of the LCG revenue as no more than speculation and certainly well short of *prima facie* evidence either as to the reliability of the quantum or as to a causative link between any alleged wrongdoing on the part of the defendant and any loss suffered by the plaintiff. There is more than one assumption underpinning the calculation of the LCG revenue. There is an assumption that the figure of 300 actively trading clients is correct. It will be recalled that the defendant has made specific averments that this figure is not correct and it is fair to say that neither the plaintiff nor Roberts Nathan have engaged with the defendant's averments in that regard. Rather, the plaintiff simply maintains, but goes no further than repeating, the assertion that there were circa 300 actively trading clients and it is on this assertion that the calculation is based. A second assumption is that the majority of the asserted 300 actively trading clients would transfer to LCG immediately on termination of the contract with Ayondo. A third assumption is regarding average revenue per customer per month. The asserted ability on the part of the plaintiff to meet an order in respect of the defendant's costs is materially dependent on all of the foregoing assertions and assumptions but in my view, the *prima facie* evidence required under the *Connaughton Road* test is not there.

85. In my view, the plaintiff has not shown, at least to a *prima facie* level, that if it were not for the defendant's wrongdoing it would not only not have lost money but would have made profits so as to be in a position to discharge the defendant's costs. Nor, in my view, has the plaintiff shown, at least on a *prima facie* basis that the losses allegedly

attributable to wrongdoing on the part of the defendant are sufficiently large to justify a finding that those losses are sufficient to explain the plaintiff's inability to pay costs. Carefully considering the evidence before the court, I am not satisfied that the estimates of loss, in particular, what is explicitly described as being " *for illustrative purposes*", can fairly be considered to be a calculation of likely losses or likely damages, as opposed to a mathematical exercise carried out in the Roberts Nathan report and being a calculation which is entirely based on the assumption that the plaintiff's claim is correct, as opposed to any evidence, to a *prima facie* level, that any alleged wrongdoing had a causative effect on the plaintiff or that the effect of alleged wrongdoing gave rise to recoverable loss. Nor am I satisfied that there is *prima facie* evidence that the loss concerned is sufficient to bridge the gap between the plaintiff being in a position to meet the defendant's costs in the event that the defendant were to succeed, and the plaintiff not being in that position. To establish a *prima facie* case is different to and must go further than asserting wrongdoing and then calculating examples of loss on the assumption that wrong was done, but, in my view, the latter is what the plaintiff has done in the present case.

86. Having very carefully considered the entirety of the evidence before the court, I am satisfied that the plaintiff has failed to provide *prima facie* evidence of any causal connection between any alleged actionable wrong on the part of the defendant and any practical consequence for the plaintiff. Even if I am entirely wrong in the foregoing, I am also satisfied that the plaintiff has failed to proffer *prima facie* evidence as to how any such consequence has given rise to some specific level of loss. The plaintiff places very considerable reliance on the two reports prepared by Roberts Nathan. It is clear that the basis for the estimated losses calculated by Roberts Nathan constitutes assumptions, as opposed to *prima facie* evidence underpinning assumptions. Both reports are explicit about the fact that the reports illustrate the "*impact*" of the loss of certain revenues on the plaintiff company and that the Roberts Nathan analysis is "*based on the financial information and explanations provided*" by the plaintiff', making it equally clear that Roberts Nathan *'have not carried out an audit on the information provided'*. As such, both reports by Roberts Nathan address what is said to be the *effect* without any evidence being put forward that the defendant breached its contracts with the plaintiff and without any evidence as to a *causal link* between any wrongdoing and the plaintiff's alleged losses. The computation of losses contained in the Roberts Nathan reports can fairly be said to amount to nothing more than a mathematical exercise which is based on the assumption that the plaintiff's case is correct. No evidence is offered to underpin those assumptions. It can also fairly be said that the basis for the calculation of the losses is not clear. A prime example is the fact that Roberts Nathan say that because of a "*prudent approach*" the plaintiff's average revenue yield during the period 2006-2011 has been discounted by 40%. Nowhere is it explained how this 40% figure is arrived at or why a greater or lesser percentage discount would not be equally or more prudent.

87. I am very conscious that it would be wholly inappropriate to set the bar too high for a plaintiff and the authorities make it clear that a plaintiff is not required to establish the precise quantum of damages which it might recover against the defendant. This was

made clear in para. 35 of Ms. Justice Baker's judgment in *Pebble Beach Owners Management Company Ltd* wherein the learned judge referred to the decision of Murray J. (as he then was) in *Framus Ltd & Ors. v. CRH plc & Ors.* [2004] IESC 25. Ms. Justice Baker went on to state: "*However the plaintiff does have to show that the likely damages would be sufficiently close to the anticipated level of costs and would be, broadly speaking, sufficient to meet the costs."* To my mind, the exercise carried out in the Roberts Nathan reports can fairly be said to be entirely speculative and wholly based on an assumption that the plaintiff's pleaded case is correct. Neither the Roberts Nathan reports, nor the plaintiff's deponent offer *prima facie* evidence to support the assumptions relied upon, nor do they engage with specific averments made by the defendant which are relevant to the losses claimed.

88. In addition to the foregoing, I am satisfied that the plaintiff has not proffered *prima facie* evidence that the loss concerned is sufficient to make the difference between the plaintiff being in a position, or not, to meet the defendant's costs. It is not disputed that the plaintiff is insolvent and has been since 31 December, 2011. It is not disputed that the plaintiff's insolvency pre-dates its dealings with the defendant. It is clear from the evidence before the court that the plaintiff was insolvent prior to entering into any contract with the defendant and there is no *prima facie* evidence that, but for the defendant's alleged wrongdoing, the plaintiff would be in a position to discharge the defendant's estimated costs.

89. In his second report, Mr. Cusack identifies a deficit of €688,654.00 arising from the business carried on by the plaintiff under its discontinued business model, prior to engagement with the defendant and this figure has not been disputed. Prior to entering any contract with the defendant, losses were mounting in the plaintiff and it had to enter into what has been described as a "*standstill agreement*" with the plaintiff's creditors. No evidence is proffered by or on behalf of the plaintiff to refute the conclusion reached by Mr. Cusack to the effect that the plaintiff "*is at the mercy of creditors*" and support for Mr. Cusack's view is contained in the most recent publicly available financial statements in respect of the plaintiff, in particular, at figure 3 on p.8 of the plaintiff's financial statements for the year ended 31st December 2018, wherein it is stated that "*the ability of the company to continue as a going concern is dependent on the continued support from its creditors and the ability of the company to trade profitably.*" No evidence is adduced to support the proposition that the plaintiff is or can continue to trade profitably. It is acknowledged by the plaintiff that it has no income but does have outgoings. No evidence is adduced that there is any prospect of this changing. The "*standstill agreement"* with creditors which appears to be materially relevant to the plaintiff's continued survival is neither exhibited nor are details given in relation to the terms governing any creditor support.

Decisions summarised

90. The plaintiff's statement of claim undoubtedly pleads that there were inaccuracies in monthly reports and that the defendant misrepresented the position and breached both contracts loss but, in opposing the defendant's application for security for costs, there is

no *prima facie* evidence tendered in support of the pleas in the statement of claim that there was actionable wrongdoing on the part of the defendant. Thus, the first element of the *Connaughton Road* test has not been satisfied by the plaintiff. Even if I am entirely wrong in this view, it also seems to me that there is no *prima facie* evidence proffered as to the causal connection between alleged wrongdoing on the part of the defendant and a consequence, specifically an adverse consequence, for the plaintiff. Therefore, the second element of the test has not been satisfied. Lest I be wrong in the foregoing, I am also of the view that the plaintiff has failed to proffer *prima facie* evidence as to how any such adverse consequence has given rise to some specific level of loss which is recoverable. Thus, the third element of the test has not been satisfied. Even if I am wrong in that view, I am also satisfied that the plaintiff has not proffered *prima facie* evidence 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.

91. It is appropriate to ask whether pleading a case and asserting, on affidavit, that the pleaded case is correct and proffering a calculation based on the correctness of those assertions constitutes *prima facie* evidence in the sense required by the *Connaughton Road* test? To my mind it does not. There must be something more. It may not be very much more, but it must be something and that something must be cogent and credible and corroborative of the various elements in the *Connaughton Road* test. In my view, this *prima facie* evidence is lacking in the application before this court and I take this view very conscious of the skilled submissions by counsel for the plaintiff to the effect that this Court should not take an overly strict approach to the consideration of what might constitute *prima facie* evidence.

92. For the reasons set out in this decision I am satisfied that the plaintiff has not met the *Connaughton Road* test. That being so, the plaintiff has not discharged the burden of establishing on a *prima facie* basis, that special circumstances exist and the defendant is, therefore, entitled to an order for security for costs.

93. Relying on Mr. Justice Barniville's decision in *Coolbrook Developments Ltd v. Lington Developments Ltd & Anor.* [2018] IEHC 634, counsel for the plaintiff submits that the court has a discretion to make an order that less than 100% of the defendant's costs be lodged by way of security. In the manner so comprehensively analysed in *Coolbrook*, I am entirely satisfied that, as Barniville J. put it: "…*a court determining the amount of security required to be provided under s. 52 of the 2014 Act has a full discretion as to the amount of such security and is not bound by any rule or principle that unless special circumstances are established the amount of costs to be provided by way of security should be one third of the likely estimated costs of the defendant*." As Barniville J. pointed out, there is nothing in s.52 which would "*constrain or restrict the court*" in such manner. Although it is clear that the court enjoys a wide discretion in determining the amount of security for costs to be provided. Barniville J. makes clear at para. 109 of his decision in *Coolbrook* that "…*a court must seek to achieve a balance between the right of a defendant to recover the costs of successfully defending the proceedings and the right*

of a plaintiff (in this case a corporate plaintiff) to have litigation fairly conducted." In the present case, there is no question of, for example, delay on the part of the defendants in seeking security for costs. Nowhere is it asserted by the plaintiff that, if an order for security for costs is made, the plaintiff will be unable to litigate its claim. Nor has the plaintiff put forward any reason to support the proposition that this Court would be justified in departing from the principle that the quantum to be ordered should be less than the full costs which the defendant may face.

94. During submissions, counsel for the plaintiff drew the court's attention to one line in the estimate produced by *Behan & Associates* wherein a particular sum was estimated in respect of Senior Counsel for a "*Draft Defence*" and it was submitted that the defence delivered was not signed by Senior Counsel. Two comments seem to me appropriate to make at this juncture. Firstly, the plaintiff does not dispute the total which has been estimated by Behan & Associates of €192,050.00, excluding VAT, and no evidence whatsoever is proffered on affidavit by the plaintiff, or by any cost accountant retained by the plaintiff, which contradicts the assessment by Behan & Associates. Secondly, an estimate by an expert is precisely that, namely, an estimate at a point in time of the likely costs which a defendant can be expected to face. There may well be, it seems to me, some increases or decreases in respect of specific line items. The entitlement of the court to rely on what is an uncontroverted estimate by way of a total sum does not depend on a granular analysis on a line by line basis especially in the absence of any evidence on affidavit which takes issue with the total sum estimated. In short, on the evidence before the court, there can be no issue taken with the sum of €192,050.00 as being a reliable sum and it would be inappropriate for this court not to have regard to the total as estimated.

95. In the present case, I am satisfied that the correct balance between the right of the defendant to recover the costs in the event of successfully defending the proceedings and the right of the plaintiff to ha00000ve this litigation fairly conducted is struck by ordering that the plaintiff be directed to provide to the defendant the sum of €192,050.00, which sum is exclusive of VAT by way of security for costs.

96. As well as making an order pursuant to s.52 of the Companies Act 2014 requiring the plaintiff to provide security and fixing the amount of such security at €192,050.00, excluding VAT, it is also appropriate to make an order staying the plaintiff's proceedings until such time as the plaintiff provides such security. I will invite submissions in respect of any other order to be made which flows from the findings of the court and the form of same, having regard to the following statement which issued, on 24 March 2020, in respect of the delivery of judgments electronically: "*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." Having regard to the foregoing, the parties should correspond with each other with regard to the appropriate costs order to be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office no later than 21 days from today's date.