

THE HIGH COURT

[2022] IEHC 357
RECORD NO.: 2020/7619P

BETWEEN:

ATIN INVESTMENTS LIMITED

PLAINTIFF

AND

REMCOLL CAPITAL LIMITED

FIRST DEFENDANT

AND

GARLIN INVESTMENTS ICAV

SECOND DEFENDANT

JUDGMENT of Mr Justice Cian Ferriter delivered this 2nd day of June 2022

Introduction

1. This is the application of the second named defendant ("Garlin") for security for costs against the plaintiff. The application raises one issue of potentially wider application, in relation to the proper approach to the assessment of a plaintiff's ability to pay the defendant's costs in the event the plaintiff is unsuccessful in its proceedings.
2. Garlin is an Irish Collective Asset-management Vehicle. It has one sub-fund named Garlin Investments Fund 1. Garlin has a wholly owned subsidiary called Garlin Investments Fund 1 Ltd Partnership which is used by the fund to hold certain property investments. Garlin appointed Crossroads Capital Management Ltd as its alternative investment fund manager. The fund manager in turn appointed the first named defendant, Remcoll Capital Ltd ("Remcoll"), as an investment adviser to provide it with non-discretionary investment advice and assistance in relation to the fund's portfolio. Remcoll was also appointed to act as a project manager and lead consultant for certain specific projects relating to the development of care facilities within Ireland. Remcoll is owned 50:50 between two holding

companies. The holding companies are vehicles of two families, one of which is the Collins family. At the time of the events in issue in these proceedings, Christopher Collins was a director of both Remcoll and Garlin and the CEO of Garlin. His father, Paul Collins, was the CEO of Remcoll and a director of that company.

3. The plaintiff provides property consultancy services through its principal, Christopher O'Connor, who is the plaintiff's sole shareholder and director. Christopher O'Connor was formerly employed by Remcoll.
4. In furtherance of the discharge of its duties to the fund manager for Garlin's fund, Remcoll engaged the plaintiff pursuant to a service level agreement dated 28 August 2019 (the "contract") to assist Remcoll with the coordination and management of the development of a number of care centre properties.
5. The termination of the contract by Remcoll at the end of April 2020 is at the heart of the dispute between the parties in these proceedings.

The contract

6. The contract is expressed to be between:

"Chris O'Connor, trading as Atin Investments Ltd is a property investment, development and consultancy company [sic]... (hereinafter called "Atin" which expression shall where the context so admits or requires, include its successors and administrators) of the one part.

Remcoll Capital Ltd... (hereinafter called "RCL") which expression shall where the context so admits or requires, include its successors, licences [sic], assigns and associated companies of the other part."

7. The term "associated company" is not defined in the agreement. The plaintiff contends that the use of the term "associated companies" in the description of the parties to the agreement renders Garlin a party to the agreement, and subject to its obligations, as

Garlin is an associated company of Remcoll given the close association in terms of ownership and control that exists between Garlin and Remcoll.

8. The contract provides that *"Atin will be commissioned by RCL to provide consultancy services to RCL on a fee basis. This service level agreement has been signed by both Atin and RCL, to note that the entire agreement between the parties hereto shall comprise the following terms"*.

9. The terms are then set out. The terms of the contract provide for the plaintiff invoicing Remcoll on a phased basis per project. Included in the provisions of the agreement dealing with invoicing and fees is a paragraph stating:

"This profit split [between RCL and the plaintiff] applies to the profit generated between site finding stage and selling the sites to Garlin or any other party with the benefit of final grant of planning permission."

10. Garlin contends that this clause, and other clauses in the contract, makes it very clear that Garlin is being distinguished from Remcoll, with only the latter being a party to the contract.

11. The contract provides under a heading *"Old Town Site, Weston Park, Baltinglass Residential"* as follows:

"In lieu of 25% profit share of RCL a settlement figure of €150,000 plus VAT is agreed. This will be invoiced through the Baltinglass Residential site over a period of 24 months at rate €6,250 plus VAT from date of respond drawdown which is estimated to be December 2019."

12. As we shall see, the plaintiff maintains that this clause demonstrates that there was an unequivocal agreement in the contract to pay the sum of €150,000 plus VAT and that there is no defence to non-payment of this sum following the termination of the contract.

13. In the "general terms" section of the contract, it states that "*Atin shall to [sic] report to Paul Collins the CEO, RCL and associated companies or such other relevant manager or contact person appointed/nominated from time to time by RCL, utilising RCL's internal reporting structures and administrative systems*".
14. In a schedule to the contract, there is a spreadsheet which sets out, inter alia, projected fees. This references projected profit splits as to one-third to the plaintiff and two-thirds to Remcoll.

Garlin's 27 April 2020 letter to Remcoll

15. The matters at issue in the proceedings have their origin in a letter dated 27 April 2020, on Garlin's headed paper, signed by Christopher Collins as executive director, and addressed "*To whom it may or may not concern at Remcoll*". This letter states that:-

"The purpose of this letter is to inform you in my capacity as executive director of Garlin Investments, and its associated sub entities, that I wish for Chris O'Connor to be formally removed from all projects to which he is now providing services on behalf of Remcoll Capital. This decision may appear to be hastily made, but you can rest assured in the fact that I reflected on this decision for quite some time, and that this missive is simply the final representation of any emails and letters unsent regarding workplace bullying and improper conduct."

16. The letter goes on to deprecate alleged behaviour of Mr. O'Connor. It makes reference to "*the fact I am his supposed client*". It then states:-

"My request, therefore, is to either remove Chris from all projects bearing the Garlin name, or for Garlin's contract with Remcoll Capital to be terminated with effect from 1 May 2020."

17. There is then a reference to recent matters relating to the circulation of a development budget with Mr. Collins stating that these matters "*should be required to warrant his dismissal for contract infractions*".

18. At the time Mr. Collins sent this letter to Remcoll, he was also a director of Remcoll.

19. Mr. O'Connor says that he received a phone call on the same date as this letter (i.e. 27 April 2020) from Paul Collins, who is the CEO of Remcoll and father of Christopher Collins, to inform him that the contract was being terminated. Paul Collins then wrote to the plaintiff by letter of 30 April 2020 stating "*we no longer require your day-to-day involvement in the Donegal, Baltinglass and Killeshandra primary care projects... We would appreciate a summary of the status of each project to assist with an efficient transition at your convenience.*" The plaintiff treated this as a unilateral termination of the contract.

20. The plaintiff contends that the forgoing chain of events demonstrates clearly that Garlin intended to induce the breach of the plaintiff's contract with Remcoll and that in fact this is precisely what was achieved as a result of the 27 April 2020 letter.

The Plaintiff's claims

21. These proceedings were commenced by the plaintiff by plenary summons issued on 11 November 2020. The primary focus of the plaintiff's claims is that of breach of contract as against both Remcoll and Garlin, arising from the unilateral termination of the contract at the end of April 2020 and the failure to pay over sums due under the contract, and a claim against Garlin for the tort of inducement of breach of contract arising from the 27 April 2020 letter.

22. The plaintiff delivered a statement of claim on 23 December 2020 claiming as against both defendants: judgment in the sum of €383,094 plus VAT; damages for breach of contract; a declaration that the plaintiff (sic.) acted in breach of contract; orders for specific performance of the contract or damages *in lieu* of or in addition to specific performance; and damages for misrepresentation and/or negligent misrepresentation.

The Security for Costs Application

23. Garlin's solicitors wrote to the plaintiff's solicitors on 12 January 2021 indicating that that a security for costs application would issue if evidence of the plaintiff's ability to meet Garlin's costs was not forthcoming within 14 days.
24. On 26 February 2021, the plaintiff's solicitors replied asserting that its most recently filed accounts were not reflective of its financial position and that, if the plaintiff was in a poor financial position, same was due to the alleged wrongdoing of the defendants.
25. This motion issued on 29 March 2021 and an exchange of affidavits followed. There was a considerable degree of evidence in the affidavits relating to the background and substance of the dispute and the parties' respective positions as regards the matters in issue in the proceedings. It is of course not my role on this application to adjudicate on any of those matters. I will accordingly confine my references to the evidence to that evidence relevant to the issues on this application.
26. On 4 March 2022 (following the completion of the exchange of affidavits on the motion), Remcoll delivered a full defence including a traverse denial that it owed the sums claimed by the plaintiff in these proceedings or any sum.
27. Remcoll did not file any affidavit or otherwise participate in the motion.

Applicable Legal Principles

28. It is agreed that the application is governed by the provisions of Section 52 of the Companies Act 2014 ("s.52"). S.52 provides as follows:

"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."

29. The principles applicable to applications for security for costs under s.52 (and its predecessor, s.390 Companies Act 1963) are well established and are not in dispute.

30. In his judgment in *Quinn Insurance Ltd (Under Administration) v PricewaterhouseCoopers (A Firm)* [2021] IESC 15 (“*Quinn*”), Clarke C.J. stated as follows (at paragraph 7.1) in relation to the general approach to be followed on applications for security for costs:

“the broad overall approach to corporate security for costs is well-established and was not in significant dispute between the parties. The defendant must first establish a bona fide defence and also demonstrate that the plaintiff would be unable to pay the costs of the proceedings should the claim fail and costs be awarded against the plaintiff concerned. Thereafter, security should be ordered unless special circumstances can be established.”

31. Each of these three matters (i.e. *bona fide* defence, plaintiff’s ability to pay the applicant’s costs and whether special circumstances exist) are in issue on this application. I will deal with them in turn.

***Bona fide* defence**

32. In *Usk and District Residents Associations Ltd v The Environmental Protection Agency* [2006] 1 ILRM 363, [2006] IESC 1, Clarke J. (as he then was) stated as follows at paragraph 7.6 in relation to the materials which the Court should consider in determining whether a defendant has established a *bona fide* defence:

“It is well settled that it is insufficient for a defendant, or a party in a position analogous to a defendant, to simply assert that he has a defence. It is necessary that he establish, by evidence, a prima facie defence. In plenary proceedings it is inevitable that the moving party will require to file an affidavit setting out sufficient facts to enable the court to conclude that he has a prima facie defence. The mere denial in pleadings (if the case has reached that stage) of the plaintiff’s claim will not, obviously, be sufficient. A mere assertion in a grounding affidavit that the defendant has a good defence will not establish a prima facie case to that effect.”

33. The Court is not required to form a view as to the likelihood of a particular defence succeeding at trial. In this regard, Clarke C.J. stated as follows at paragraph 7.2 in *Quinn*:

"It is not, of course, the case that the Court can or should form a view as to the likelihood of any asserted defence succeeding but nonetheless it does seem to me that it is incumbent on a defendant moving an application for security for costs to go well beyond mere assertion."

(a) *Breach of contract*

34. The plaintiff has sought to argue that, as a matter of construction of the contract, Garlin should be regarded as a party to the contract in circumstances where (as set out earlier in this judgment) its recitals provide that the expression "*Remcoll Capital Limited*" (or "RCL") "*...shall where the context so admits or requires, include its successors, licences, assigns & associated companies*".

35. Assuming for present purposes that there is an arguable claim revealed by the plaintiff against Garlin, I am satisfied that a *bona fide* defence has been made out on the part of Garlin to the breach of contract claim. Garlin is not, on the face of it, a party to the contract. Its obligations are said to flow from the clause in the contract dealing with the parties (set out above) which provided that "*where the context so admits or requires*" references to Remcoll should include *inter alia* Garlin as an associated company. I am satisfied that Garlin has raised a *bona fide* defence as to whether the proper interpretation of the contract including the context of the payment clauses of the contract are such as to render it liable for any breach of contract rather than Remcoll.

(b) *Claim for unlawful interference in contractual relations*

36. The plaintiff also alleges that Garlin has been guilty of the tort of inducing a breach of contract and/or unlawful interference in contractual relations.

37. In *Webprint Concepts Limited v. Thomas Crosbie Printers Limited & Ors* [2013] IEHC 359 ("*Webprint*"), the question of whether the defendants had made out a prima facie defence to the plaintiff's claim for procurement of breach of contract, in the context of an application for security for costs, was analysed by Finlay Geoghegan J. At paragraph 38, Finlay Geoghegan J. cited the following description of the tort in Dugdale and Jones, *Clerk & Lindsell on Torts*, 20th edition (London, 2012), at p. 1608, para. 24-14:

"[k]nowingly to procure or, as it is often put, to induce a third party to break its contract to the damage of the other contracting party without reasonable justification or excuse is a tort."

38. Finlay Geoghegan J. went on to refer at paragraph 39 to the speech of Lord Hoffmann in the House of Lords in *OBG Ltd. v. Allan* [2007] UKHL 21, [2008] 1 A.C. 1 ("OBG"), at paragraphs 39 to 43 and quoted, *inter alia*, the following passage from same:

"39. To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."

39. At paragraph 40 of her judgment in *Webprint*, Finlay Geoghegan J. found that the real issue between the parties was whether the plaintiff could establish at trial that the defendants had the requisite intention to procure a breach of contract. She held that there was evidence before her in that case which, if accepted, formed an arguable basis for a defence and that accordingly a *prima facie* defence had been made out.
40. In his affidavit of 10 August 2021, sworn in relation to this security for costs application, Christopher Collins avers that Garlin will seek to defend this aspect of the plaintiff's claim, *inter alia*, on the basis that there was no inducement of Remcoll by Garlin in circumstances where the letter of 27 April 2020 constituted information or advice rather than persuasion; that there was no intention on the part of Garlin to bring about a breach of the contract; that there was in fact no breach of the contract on the part of Remcoll, which was entitled to cease using the plaintiff's services in light of Mr. O'Connor's conduct, and on the basis that the plaintiff has not identified any recoverable damage caused by the alleged interference in contractual relations.
41. Mr. Collins also averred that he did not at any point even suggest that Remcoll should refuse to pay the plaintiff any money which was properly due to it for work done up to the point of his letter of 27 April 2020; he sought to emphasise that his letter was indicating he was not prepared to work with Mr. O'Connor going forward but that nowhere in the letter did it suggest withholding payment of sums validly due by the plaintiff by Remcoll.

42. I am satisfied on the basis of the contents of Christopher Collins' affidavits as summarised above that a *bona fide* defence has been made out on a *prima facie* basis to this claim also.
43. It is accordingly necessary to next turn to the question of the plaintiff's ability to pay costs in the event that it is unsuccessful in its claims against Garlin following trial.

The plaintiff's ability to pay Garlin's costs if unsuccessful

44. Garlin accepts that it bears the onus of demonstrating the plaintiff's inability to pay its costs in the event the plaintiff's claims against Garlin are successfully defended.
45. Garlin placed unchallenged evidence before the court on the application, by way of a legal costs accountant's report, that its likely costs of defending the proceedings would be €161,445.
46. In *Bula Ltd v Tara Mines* (No. 3) [1987] IR 494 Murphy J. Stated as follows at page 498:

"All that the section requires is that it should appear by credible testimony "that there is reason to believe that the company would be unable to pay the costs of the defendant if successful in his defence."

47. In *IBB Internet Services Ltd v Motorola Ltd* [2013] IESC 53 Clarke J. (as he then was) further considered the test to be applied to this limb of a security for costs application as follows:

"[5.16] While [the test] does not require the court to assess the matter on the balance of probabilities, it does require the court to consider all material evidence and reach an assessment of the range of likely eventualities and thereby determine whether there truly is 'reason to believe' that the company 'will' be unable to pay costs should it lose. That requires that the evidence satisfy the court that there is something significantly greater than a mere risk of such an eventuality occurring."

48. In order to determine whether Garlin can satisfy this limb of the test, it is necessary to briefly summarise the evidence as to the plaintiff's likely asset position at the time at which a costs order against it in favour of Garlin might be made.
49. When this application was issued, Garlin was relying on the financial position as revealed by the plaintiff's then most recently filed accounts, which were for the year ending 31 December 2019, which indicated that the plaintiff had no fixed or tangible assets and that its total liabilities exceeded its total assets by €10,275. The financial statements filed by the plaintiff with the CRO for previous years recorded a similar position and suggested that the plaintiff's current liabilities had exceeded its total assets in each year since the year 31 December 2015.
50. In his first affidavit sworn in this application on behalf of the plaintiff (sworn on 28 June 2021), Mr. O'Connor stated that the sum claimed in the proceedings of €383,094 plus VAT included the following sums:
- €150,000, which was the figure agreed between the plaintiff and Paul Collins in August 2019 relating to the plaintiff's services provided in relation to the Old Town Site, Weston Park and Baltinglass Residential projects. He avers that while the figure was agreed, the timing for the payment of this figure was linked to the commencement of the works on the Baltinglass Residential site and therefore payment of this sum was due to start in April 2020 (i.e. prior to the termination of the contract).
 - €161,428 in respect of Baltinglass PCC (€31,428), Donegal PCC (€86,667) and Killeshandra PCC (€43,223).
 - €71,666 for a further (unspecified) project.
51. Mr. O'Connor's first affidavit exhibited a copy of a draft profit and loss account and balance sheet for the plaintiff for the year ended 31 December 2020 which reflected current assets in the amount of €397,334. This included a figure for "*prepayments and accrued income*" of €352,819. These draft accounts were analysed in Mr. Collins' replying affidavit of 10 August 2021. Mr. Collins expressed concerns about the fact that the draft 2020 accounts did not record any current assets other than anticipated income and/or prepayments and accrued income and provided scant information in relation to same. Mr. Collins also stated that the current assets referred to in the draft 2020 accounts appeared to consist largely of sums which the plaintiff seeks to recover in these proceedings from the defendants.

52. A final set of financial statements for the year ended 31 December 2020 was exhibited to Mr. O'Connor's second affidavit sworn in this application (sworn on 19 October 2021). The finalised financial statements for 2020 included the same figure as the draft accounts of €352,819 under "*pre-payments*". These statements showed a net asset position of €163,678 and current assets in the form of debtors and prepayments valued at €397,334. The accounts record creditors of €233,656 falling due within one year, which Mr. O'Connor says includes a provision of €200,000 for legal costs (although it is not clear from the relevant averment whether that provision also includes the plaintiff's own legal costs).
53. It was not disputed by the plaintiff at the hearing of the application that the sum claimed as assets in the draft and final accounts for 2020 essentially comprised of the €150,000 said to be already due and the other payments claimed arising out of the alleged unlawful termination of the contract (although as can be seen there was not a direct correspondence between the sum claimed in the pleadings of €383,094 and the figure of €352,819 specified as "prepayments" in the draft and final accounts for 2020).
54. It followed that, if those sums were excluded from a consideration of the likely assets available to the plaintiff in the event it did not succeed at trial, the plaintiff would not have sufficient assets to meet Garlin's likely costs of over €160,000.
55. The principal issue in dispute on application of this aspect of the test is whether sums which are the subject of claims in the proceedings can be factored into the plaintiff's likely assets in order to determine whether there is reason to believe that the plaintiff will be unable to pay Garlin's costs if Garlin is successful in its defence.
56. Garlin sought to rely, by analogy, on the analysis contained in a passage of the judgment of Barniville J. in *O'Gara v Ulster Bank and Seaconview* [2019] IEHC 213 ("*O'Gara*"), a judgment dealing with an application by the plaintiffs for an interlocutory injunction restraining the defendant bank from selling a number of commercial properties pending the determination of those proceedings. In the context of his assessment of whether damages would be an adequate remedy for the defendants in the event that an interlocutory injunction was granted and the defendants ultimately succeeded at trial, Barniville J. considered whether it was valid for the plaintiffs to rely on their claim for interest overcharging maintained in the proceedings, in order to demonstrate their ability to meet any sum for which they might be liable on foot of their undertaking as to damages. Barniville J. stated as follows:

"73. *The plaintiffs' attempt to rely, in order to bolster or substantiate their undertaking as to damages, on the claim which it is making in the proceedings for damages and restitutionary relief in respect of interest allegedly overcharged by UBI is a novel one. Neither side could point to any authority for the proposition that a plaintiff, in seeking to demonstrate the force or strength of its undertaking as to damages, can rely on what it hopes will be the outcome of its substantive claim against the defendant. It is not surprising that there is no authority on the point. In my view, it runs quite contrary to the entire basis and purpose of an undertaking as to damages. A plaintiff gives an undertaking as to damages to protect the defendant in circumstances where the plaintiff obtains an interlocutory injunction but ultimately fails at the trial. Conceptually, therefore, it is hard to imagine a situation where having failed at the trial, the plaintiff, nonetheless, recovers a sum which it could use to discharge its liability on foot of the undertaking as to damages. It may be the case that the plaintiffs in the present case would argue, on the facts of this case, that having obtained an interlocutory injunction restraining the sale of the properties, they could lose their case at trial that the loans were improperly sold or that the receivers were improperly appointed and had no entitlement to sell the properties but could succeed on that part of their claim which concerned interest overcharging. However, I would regard an undertaking as to damages predicated upon the ultimate success by the plaintiff on one aspect of a case involving many aspects as being wholly speculative and uncertain and inconsistent with the primary objective of an undertaking as to damages. If I were required to conclusively determine this issue (and I am not), I would not be prepared to accept an undertaking as to damages on the basis offered by the plaintiffs".*

57. While the *O'Gara* case related to whether sums claimed by a plaintiff in proceedings could be taken into account in assessing the adequacy of an undertaking as to damages by the plaintiff in the context of an interlocutory injunction application, Garlin submitted that the reasoning in the passage was equally applicable in a security for costs context to an assessment of the plaintiff's likely ability to pay a defendant's costs in the event the relevant defendant successfully defended the plaintiff's claims. In short, it was submitted that it would run contrary to the whole hypothesis underpinning this limb of the security for costs test for the plaintiff to be able to pray in aid the availability of sums to satisfy costs when those sums were in issue in the proceedings. The plaintiff countered by arguing that, in contrast to the position in *O'Gara*, its claim was not "wholly speculative and uncertain" at all; that the sums in question (and in particular the sum of €150,000) were in truth not in dispute and that while Remcoll had put in a traverse denial in its defence of the sums claimed, there was no evidence even to a *prima facie* level that there was actually a defence to the payment of the sums in question.
58. In my view, at the level of principle it is not open to a plaintiff to seek to rely on sums the subject of disputed claims in the proceedings as part of its assets for the purposes of satisfying the ability to pay test, once a *prima facie* basis in evidence supporting the

relevant defendant's defence to the claim to those sums has been established. The whole rationale behind security for costs is that a defendant who is successful in his defence of an action should be protected from a position where, notwithstanding his success, he cannot recover costs from the plaintiff. It is therefore conceptually flawed to seek to contend that disputed assets can be included for the purposes of this stage of the test when those assets, by definition, will not be available to meet the claim because, on the hypothesis applying, the plaintiff's claims to those very assets will have failed at trial. It must be remembered that this stage of the test is being applied after the court has satisfied itself that the defendant has established a *bona fide* defence to the claims and I have so found in respect of Garlin's defence to the sums claimed here.

59. It may be, of course, that notwithstanding a traverse denial by a relevant defendant in a defence or affidavit, the plaintiff can show by way of evidence on the security for costs application that there is in fact no arguable defence to a particular claim in the proceedings. However, if this is the case, the defendant will have failed the first limb of the security for costs test in respect of that claim in any event and it would follow that it would be open to the plaintiff to rely on the proceeds of that claim as part of the assets that will be available to it at the end of the trial i.e. the point at which the assessment of the plaintiff's ability to pay the successful defendant's costs would arise. (It should be noted that this scenario assumes that the plaintiff will have been successful in one unarguable aspect of its claims against a defendant but will have lost the balance of the claims such as to otherwise entitle the defendant to costs against the plaintiff; if there is no *bona fide* defence to any of the claims in issue, the question of award of security for costs would not arise at all).
60. On the facts here, the plaintiff places considerable reliance on the fact that (as set out above) the contract records an agreed payment of €150,000 to be made to the plaintiff and that no evidence has been advanced even on a *prima facie* basis to dispute that this sum is due notwithstanding the termination of the contract. It is said that, as Remcoll sought to terminate the contract because it believed that it had a power to do so but not on the basis that there had been any non-performance or poor performance of the services delivered under the contract at the date of termination, there is in truth no defence to at least the €150,000 element of the claim, notwithstanding the traverse denial of that element of the claim in Remcoll's defence.
61. However, it seems to me that this contention does not avail the plaintiff on this application for a number of reasons.

62. Firstly, I have concluded that Garlin has a *bona fide* defence to all of the claims in contract against it essentially on the basis that Garlin may be determined not to have any obligations under the contract at all. Accordingly, I cannot proceed on the basis that it must be assumed that the plaintiff will recover €150,000 against Garlin just because the plaintiff may well have a good case to recover that sum against the other defendant, Remcoll.
63. Secondly, I think it is problematic to proceed on the basis that the claim against a party who is not the subject of the application, and who was not before the court on the application and who could not reasonably be expected to have tendered evidence in relation to the application, should be accepted as being likely to succeed (even on a “reason to believe” basis) where that party has denied the claim in its pleading.
64. Thirdly, while the argument was made to the effect that the plaintiff would recover all of the contractual sums claimed of over €380,000 on the basis that there was no defence to the claim, the focus of the argument on this issue at the hearing was on the €150,000 sum which was specifically referenced in the contract. Given the evidence as to Garlin’s likely costs in the event that it successfully defends the plaintiff’s claims against it and given the likely costs of the plaintiff in prosecuting its claims against Garlin, even if I were to accept that the plaintiff would likely recover €150,000 from Remcoll, I am not satisfied that receipt of this amount would be sufficient to put the plaintiff in a net asset position which would enable it to meet Garlin’s costs of over €160,000.
65. I should note that counsel for the plaintiff sought to contend at the hearing of the application (although this contention was not in his written submissions or foreshadowed in the affidavits) that the court could proceed on the basis that, if the plaintiff succeeded against Remcoll but not against Garlin, Garlin could recover its costs against Remcoll and would not therefore need to call on the plaintiff to meet its costs. Quite apart from the fact that there has not been an appropriate exchange of any evidence on the issue of the plaintiff’s case against Remcoll, the basis upon which Garlin would be entitled to recover its costs against Remcoll in that eventuality (i.e. the plaintiff succeeding against Remcoll but failing against Garlin) is not at all clear and I do not believe I can proceed on the basis that if the plaintiff loses against Garlin it will nonetheless not be liable for Garlin’s costs.
66. Accordingly, I conclude that on the proper application of the principles relating to this aspect of the security for costs application, Garlin has discharged the onus on it of

demonstrating by credible testimony that the plaintiff is unlikely to be in a position to meet its costs in the event the plaintiff is unsuccessful against Garlin at trial.

67. Accordingly, I will turn to the question of special circumstances.

Special Circumstances

68. Once this stage of the analysis is reached, it is common case that the onus is on the plaintiff (and not Garlin) to demonstrate the requisite special circumstances. The special circumstances sought to be relied on by the plaintiff is that its impecuniosity is caused by the wrongdoing of Garlin.

69. The relevant test is that set out by Clarke J. (as he then was) in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd.* [2009] IEHC 7 ("*Connaughton Road*") (and considered further by him in the Supreme Court in *Quinn*):

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

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

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

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

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

70. As Clarke J. made clear in *Connaughton Road* (at paragraph 3.3), the above propositions must be satisfied on a *prima facie* basis.
71. In short, the plaintiff’s case is that but for Garlin’s inducement of breach of contract, on 27 April 2020, and the immediately following termination of the contract (to which the plaintiff claims Garlin is a party), it would be in a position to meet Garlin’s costs; its claim of over €380,000 if available to it would more than satisfy Garlin’s likely costs of over €160,000.
72. The plaintiff says an inexorable consequence of Garlin’s inducement of breach of contract was that the contract was breached and that sums owing under the contract were not paid over. It says that it follows that the entirety of the damages for breach of contract can be visited at Garlin’s door i.e. there is a causal connection between that actionable wrongdoing and the very real and practical consequences for the plaintiff of the very specific loss of the sums already earned under the contract, in addition to a claim to future damages also which loss is recoverable as a matter of law.
73. Counsel for Garlin maintained that this was too blunt an approach. He contended that, in relation to the inducement of breach of contract claim, propositions (2) to (4) of the *Connaughton Road* test were not satisfied. He sought to contend that the letter of 27 April 2020 did not in any shape or form suggest to Remcoll that it should not discharge sums legitimately due and owing under the contract to the plaintiff and therefore that there was no causal connection between the alleged inducement of breach of contract and the loss now claimed by the plaintiff.
74. While there are undoubtedly potentially complex issues to be teased out at trial if the question of damages is reached, it seems to me that there is an arguable proposition that sufficient causality has been made out by the plaintiff within the *Connaughton Road* test between the alleged inducement of breach of contract and the losses now claimed, in that the direct and practical consequence of the inducement of the breach of contract was to lead to a position where the plaintiff was deprived of both past and future potential entitlements under the contract; in my view, at least on a *prima facie* basis, on a “but for” analysis there is a causal link between the actions said to constitute inducement of breach

of contract and the plaintiff not receiving significant sums which it says were otherwise due under the contract.

75. Turning to the separate claim made by the plaintiff against Garlin for damages for breach of contract, while counsel for Garlin accepted that if there was an arguable case in breach of contract against Garlin, propositions (2) to (4) of the *Connaughton Road* test would be satisfied, he submitted that no arguable case in breach of contract against Garlin had been made out on the material before the court. I do not accept this contention. While the case in breach of contract against Garlin may be thin, I do not believe I can safely conclude at this point, in light of the ambiguities in the wording of the contract and the likely need for evidence at trial as to the context in which the contract was entered, that the plaintiff's breach of contract claim against Garlin does not surpass the low threshold of being arguable.
76. It follows that I am wrong in my conclusion as to the four propositions in *Connaughton Road* being made out by the plaintiff in relation to the inducement of breach of contract claim such as establish a special circumstance against the grant of security for costs, in my view, where the plaintiff has made out a *prima facie* case in breach of contract as against Garlin, the claim for damages for breach of contract in the sum of over €380,000 satisfies the causality and sufficient nexus limbs of *Connaughton Road* in any event such that the plaintiff has discharged the onus of demonstrating a special circumstance justifying the refusal of the security for costs application.

Conclusion

77. Accordingly, in my view, the plaintiff has discharged the onus on it of demonstrating a special circumstance against the grant of security for costs in favour of Garlin. In the circumstances, I will refuse the application for security for costs.
78. My provisional view of the question of the costs of this application, subject to hearing any submissions to the contrary, is that the costs of the application should be costs in the cause. It seems to me that Garlin had a legitimate basis to issue this motion given the position demonstrated by the plaintiff's 2019 accounts. The plaintiff was unsuccessful with a number of its arguments on the application. The decision to refuse security was a marginal one. I will list the matter before me on Monday 20 June next at 2pm in the event that either party wishes to contend for a different costs order.

