THE HIGH COURT

[2022] IEHC 524

[2021 5165P]

BETWEEN

BE SPOKE CAPITAL AG

PLAINTIFFS

AND

ALTUM CAPITAL MANAGEMENT LLC

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 28th day of July, 2022

1. Even by the standards of the Commercial Court, which is often the home of particularly intense disputes, these proceedings appear to be unusually hard fought. In this motion, by which the Defendant (Altum) seeks an order that the Plaintiff (Be-Spoke) provide it with security for costs, only one relevant issue has been agreed. Be-Spoke accepts that it is impecunious, in that it could not pay Altum's costs in the event that the proceedings are successfully defended and in the event that Altum is awarded its costs of the action. Everything else is in dispute. This includes the interesting question as to what principles the Court is to apply when security for costs is sought under Order 29 of the Rules of the Superior Courts against a foreign limited liability company.

2. The parties fundamentally disagree about this basic issue. Altum submits that, in these circumstances, the Court should decide the application by reference to the criteria which

govern an application under section 52 of the Companies Act 2014; this section deals with applications that an Irish limited liability company incorporated under domestic legislation provide security for costs. Be-Spoke submits that it should be treated in the same way as would an individual plaintiff resident outside the jurisdiction, and that mere impecuniosity is therefore not enough to justify the order sought.

3. I will structure the judgment in this way;

1. Order 29.
2. Bona Fide Defence.
3. Special Circumstances - has Altum caused Be-Spoke's impecuniosity?
4. Special Circumstances - a point of law of exceptional public importance?
5. The Amount of any Security.
6. Staggered Security.

Order 29.

4. Order 29 reads;

"1. When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security.

2. A defendant shall not be entitled to an order for security for costs solely on the ground that the plaintiff resides in Northern Ireland.

3. No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits.

4. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction.

5. If a person brings an action for the recovery of land after a prior action for the recovery of the same has been brought by such person or by any person through or under whom he claims, against the same defendant, or against any person through or under whom he defends, the Court may at any time order that the plaintiff shall give to the defendant security for the defendant's costs, whether the prior action has been disposed of by discontinuance or by non-suit or by judgment for the defendant.

6. Where the Court shall have made an order that a party do furnish security for costs, the amount of such security and the time or times at which, and the manner and form in which, and the person or persons to whom, the same shall be given shall, subject to rule 7, be determined by the Master in every case.

7. Where a bond is to be given as security for costs, it shall, unless the Master shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court. Provided that in any matrimonial cause or matter where security for costs is to be given by bond the bond shall be given to the Master.

8. No defendant shall be entitled to an order for security for costs in proceedings for the enforcement of a judgment under Chapter III of Regulation No. 1215/2012, Chapter III of Regulation No. 2201/2003, Title III of the Lugano Convention, or Title III of the 1968 Convention solely on the ground that the plaintiff is a foreign national or that he or she is not domiciled or resident in the State in which enforcement is sought.

9. For the purposes of rule 8, "domicile" is to be determined, as the case may be, in accordance with the provisions of:
Article 2 of Regulation 2201/2003,
Articles 62 and 63 of Regulation No. 1215/2012,
Articles 59 and 60 of the Lugano Convention, or
section 15 and the Ninth Schedule of the 1998 Act."

By contrast, section 52 of the 2014 Act reads;

"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."

5. The scope of Order 29 has been described in the following way by O'Neill J in Ditt v Krohne [2012] 3 I.R. 120 at paragraphs 15 and 16;

> *"15. If residence outside the jurisdiction and impecuniosity are not of themselves the factors which entitle a defendant or respondent to an order for security for costs but are merely matters to be taken into account by the court in exercising its discretion, what then is the decisive or determinative factor which establishes a threshold or test which will lead the court to exercise its discretion in favour of the granting or refusing of the order.*
>
> *16. In my opinion, this can only be the impossibility of enforcement of a costs order against the plaintiff in question; or substantially increased difficulty or expense in enforcing such costs order as compared to the enforcement of such an order against a plaintiff resident in Ireland or who had sufficient assets in Ireland."*

6. These factors, and the manner in which they are considered, are not identical to the considerations applicable to an application under section 52. These have been summarised by Clarke C.J. at paragraph 7.1 of Quinn in this way;

> *"7.1. As already pointed out, 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."*

7. On the basis of Ditt, applications under Order 29 and section 52 both require the moving defendant to establish that it has a bona fide defence. However, the two then diverge.

Once impecuniosity is established, an application under section 52 will succeed unless special circumstances are shown by the plaintiff. According to Ditt, this is not the case with an application under Order 29, which obliges the moving defendant to establish residence outside the jurisdiction along with impossibility (or substantially increased difficulty) in enforcing an award of costs. Impecuniosity in itself is not enough and, indeed, may not even be relevant. If a wealthy plaintiff is resident and holds all his assets in a jurisdiction where the enforcement of an Irish award of costs is practically impossible (whether because of local law, local practice, or local corruption) then his means are no answer to an application under Order 29.

8. The very real differences between a motion brought under section 52 and one brought under Order 29 (if Ditt is applied) are underscored by the row between the parties in this case. If the criteria were the same, this dispute would be absolutely pointless. However, it has become the central issue on the motion. It is implicitly accepted by Altum that, if the approach described by O'Neill J in Ditt is applied, the application fails.

9. Ditt, like many applications under Order 29, dealt with proceedings where the plaintiff was an individual. Different criteria have been applied to Order 29 motions where the plaintiff was a limited liability company, albeit a foreign limited liability company to which section 52 does not apply. Given the emphasis on the cases involving such companies, and their undoubted relevance to the issue I have to decide, it is useful to go through these in some detail. I will do so in chronological order.

10. The first decision is that of Clarke J in Harlequin [2012] IEHC 13. In that case, an application for security for costs was brought against the plaintiffs (both foreign companies).

As the Companies Act 1963 (then in force) did not apply to such companies, the motion was to be decided under Order 29. Clarke J noted;

> *"That the parties agreed that, in all the circumstances of the case, the question of whether Harlequin should be required to provide security for costs under Order 29 fell to be considered by reference to the same principles as would, in fact, apply in an application under s. 390 of the 1963 Act..."*

11. Section 390 of the 1963 Act was the precursor of section 52 of the 2014 Act.

12. On that basis, Clarke J ordered on the 22nd of November 2011 that security be provided. His judgment of the 19th of January 2012 deals with issues surrounding the amount of the security. Of the three issues, the relevant one was;

> *"2.2A Whether, given that the order for security for costs made was under Order 29 rather than under s. 390 of the 1963 Act, it is appropriate to follow the common practice in orders made under Order 29 to direct security at one third of the total amount of costs estimated as being likely to arise"*

13. It will be seen immediately that, while the parties had agreed that the principles to be applied in deciding whether security should be ordered were the principles applicable to a section 390 motion, they disagreed as to whether what I might call Order 29 principles or section 390 principles were to be applied in determining the quantum of security.

14. Given its importance in the debate before me, and in my own analysis of this issue, I may be forgiven for setting out at some length the relevant portions of the judgment of Clarke J.

15. From paragraph 4.5 on, and having set out the relevant authorities, Clarke J framed the dispute;

> *"4.5 From those authorities it seems clear that a general practice exists in this jurisdiction which confines, ordinarily, security for costs, in cases where same is directed under Order 29, to approximately one third of the costs likely to be incurred. However, there clearly is a discretion to depart from that practice. It is argued on behalf of Harlequin that Fallon is authority for the proposition that the discretion to depart from the so called one third rule is one which requires significant countervailing factors……*
>
> *4.8 It is, however, also necessary to note that the jurisprudence in this jurisdiction suggests that, where the court orders security against a company under the provisions of s. 390 of the 1963 Act, the amount of security should be estimated on the basis of the full costs likely to be incurred (see Lismore Homes Ltd v Bank of Ireland Finance Limited [2001] IESC 79)."*

16. Clarke J's analysis begins at paragraph 4.9 and 4.10

> *"4.9 Against that background it is, perhaps, important to return to the basis for the distinction between the proper approach under Order 29, on the one hand, and under s. 390 of the 1963 Act, on the other hand, as identified by Kingsmill Moore J. in Thalle v. Soares. As pointed out in the relevant passage cited, the foundation of the two jurisdictions is different because the jurisdiction exercised under the Rules is one*

that applies, at least ordinarily, to foreign based plaintiffs whereas the jurisdiction under the 1963 Act derives from the nature of limited liability. It has frequently been pointed out that the obligation to put up security for costs in the circumstances to which s. 390 of the 1963 Act applies, is a quid pro quo for the benefit of limited liability. There are at least circumstances where the beneficiaries of a company should not be able to escape from the practical consequences of having brought unsuccessful litigation by hiding behind limited liability.

4.10 On the other hand the jurisdiction under Order 29 is not based on the fact that a relevant plaintiff may be unable to pay costs in the event of losing but rather the jurisdictional difficulty of recovering those costs if the plaintiff is based in another jurisdiction and has no assets in this jurisdiction. Indeed, that position has, in substance, been significantly altered by the membership of Ireland of the European Union and the availability of improved methods of judgment enforcement within the European Union arising from measures such as the Brussels Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). It is also important to recall, as McCarthy J. noted in Fallon, that the constitutional right of access to the courts needs to be given all due weight. It is for that reason that a personal plaintiff resident in the jurisdiction cannot have security ordered against him (See Proetta v Neil [1996] 1 I.R. 100, at 104; Pitt v Bolger [1996] 1 I.R. 108, at 120 and Salthill Properties Ltd & Anor v Royal Bank of Scotland & Ors [2010] IEHC 31). That jurisprudence also makes it clear that that principle applies to all EU nationals. It should be noted that the unique circumstances under the consideration in Fallon involved security not for an original claim but rather for an appeal, and in the wholly exceptional circumstances where the court was satisfied that the plaintiff was, in

effect, a nominated man of straw put up to represent the interests of others. The jurisdiction under Order 29 is based on the practical difficulty of enforcing an award of costs outside the jurisdiction (or nowadays outside the European Union) rather than anything else."

17. Clarke J then goes on to observe, at paragraph 4.11, that the parties had agreed to the application of section 390 principles to the motion for security and that (if these principles were fully applied) security in the full amount would be ordered. Twice in this portion of the judgment, Clarke J emphasises the oddity of a foreign company (which enjoys limited liability) being treated more favourably than an equivalent Irish company. Indeed, the paragraph concludes;

"If a similar set of findings were made against an Irish company, then there is no doubt but that an order under s. 390 would be made and that security in the full amount of the costs estimated as being likely to arise would be directed. Why should Harlequin, simply because it is registered in a different jurisdiction, expect to do better?"

18. Having considered, at paragraph 4.12, the contrasting treatment of a personal Irish plaintiff with a personal foreign plaintiff Clarke J goes on (in the following paragraph) to reject any difference in treatment between an Irish limited company and a foreign limited company. The terms used by the judge are trenchant.

"However, that logic has little application in the case of a foreign corporate plaintiff. If such a corporate plaintiff is required to give full security (rather than one third),

then that corporate plaintiff is in no worse position than an Irish company in exactly the same circumstances. There would be no different barrier to access to the courts applicable as and between Irish and foreign corporate entities. As pointed out by Kingsmill Moore J. in Thalle v. Soares, the logic behind the different approach under s. 390 of the 1963 Act is that security under that section is part of the consequences of limited liability."

19. Clarke J's conclusion on this point is at paragraph 4.15

"4.13 However, that logic has little application in the case of a foreign corporate plaintiff. If such a corporate plaintiff is required to give full security (rather than one third), then that corporate plaintiff is in no worse position than an Irish company in exactly the same circumstances. There would be no different barrier to access to the courts applicable as and between Irish and foreign corporate entities. As pointed out by Kingsmill Moore J. in Thalle v. Soares, the logic behind the different approach under s. 390 of the 1963 Act is that security under that section is part of the consequences of limited liability."

20. It would do an injustice to this judgment to suggest that Clarke J robotically applied section 390 principles simply because the parties agreed that he would do so. It is of course the case that this decision was delivered in the context of the earlier agreement of the parties that section 390 criteria determined the question as to whether security should be ordered. It is also correct to say that, in Mavior v Zerko Ltd [2013] 3 I.R. 268, Clarke J in the Supreme Court noted that in Harlequin the section 390 provisions were applied by analogy "in circumstances where" the parties had reached an agreement to that effect and further noted

that the point "should not, therefore, be taken as having been definitively determined." Nonetheless, Harlequin represents a thoughtful and persuasive consideration of the factors which the Court should logically take into account in deciding whether to grant security for costs against a foreign limited company pursuant to Order 29.

21. The judgment in Harlequin was considered by Laffoy J in Ticket Generator Limited v DAA and others [2012] IEHC 216. In Harlequin, employing the rules that would apply to security for costs awarded against an Irish company, Clarke J directed that the 'one third' rule would not be followed but that the Plaintiff should provide full security for costs. Again, this was to avoid a difference in treatment between a foreign company and an Irish company. Laffoy J found (at paragraph 3 of her judgment) that "the underlying rationale of the Harlequin decision is compelling." I would respectfully agree. Notwithstanding her view of the logic of the Harlequin judgment, Laffoy J felt that she was bound to apply the one third rule in Ticket Generator because of the decision of the Supreme Court in Framus Ltd. v C.R.H. Plc [2004] 2 I.R. 21. However, Framus (as applied by Laffoy J.) governed only the quantum of the security to be ordered. It did not govern the application, by analogy, of the provisions of the companies legislation to the question of the circumstances in which a foreign company will be directed to provide security in the first place. It is clear from Mavior, to which I have already referred, that this question remains undecided.

22. In Flannery v Walters [2014] IEHC 575, McGovern J considered the judgments in Harlequin, Framus and Ticket Generator. At paragraph 9 of the judgment, McGovern J observed;

"9. Like Laffoy J., I believe the legal issues surrounding the distinction to be drawn between a foreign corporate plaintiff and an Irish corporate plaintiff under O. 29 and s. 390, respectively, is anything but clear. For my part, I do not read the Framus judgment as limiting the discretion which I have to decide on the amount of the security to be ordered, although it does appear to suggest that the "one-third rule" is the default position to be adopted in the absence of special circumstances. In Farrell v. Bank of Ireland, the Supreme Court seems to have pulled back somewhat from that position and I feel I am entitled to rely on it. It is difficult to ignore the obvious problem that arises if foreign companies could maintain proceedings in Ireland on easier terms than Irish companies. Clarke J. referred to this problem in the Harlequin case (para. 4.11). Such an anomaly could not serve the interests of justice. It is one of the hallmarks of justice that there should be consistency and equality of treatment between similar parties presenting before the courts in similar circumstances. On rare occasions, the Court may find itself faced with a situation where it has to make an order that might not meet this standard, simply because of a statutory provision which requires to be fulfilled. In such cases, all the Court can do is to point out the anomaly and hope that the Legislature will act to cure the problem."

23. Counsel for Be-Spoke submitted that this "chimes with the situation here. "Of course, whether or not that is indeed the case is the issue which I must decide. However, McGovern J did not feel the need to decline to tackle the anomaly and resign himself to hoping for action from the Legislature. Instead, in the next paragraph he held;

"10. There seems to be no good reason in this case why the counterclaim plaintiff should be treated any differently than an Irish company would be in similar

circumstances, having regard to the fact that I directed security be furnished on the basis of inability to pay the costs of the defendants to the counterclaim if successful in their defence. In those circumstances, I will fix security in the full amount of such figures as I calculate on the basis of the competing sums offered by the legal cost accountants for each party."

24. The logical approach, that similar parties be treated similarly in order to achieve a just outcome, is identified by McGovern J and given effect by him.

25. On appeal, and having set out paragraphs 9 and 10 of the judgment of McGovern J, Finlay Geoghegan observed;

"54. In my judgment the trial judge was correct in his conclusion that the Supreme Court judgments collectively do not limit his discretion to depart from the so called "one third rule" whereas on the facts herein, he has determined that a limited company registered outside the jurisdiction but within the EU should give security on the basis of inability to pay the costs of the defendants. Whilst the basis for such an application is O. 29 of the Rules of the Superior Courts as the company is resident outside the jurisdiction of the courts of this State, it is now well recognised that in practice an order may not be made under O. 29, simply by reason of such residency if the plaintiff is resident within the EU. Such an approach would be discriminatory and contrary to EU law."

26. Finlay Geoghegan concluded (at paragraph 57);

"57. In my judgment on the facts before him, the trial judge was not in error in exercising his discretion in favour of making an order for the full amount of what he determined to be a reasonable estimate of the costs associated with the counterclaim on the basis set out in paras. 11 and 12 of his judgment."

27. As counsel for Altum correctly submits, the analysis which began in Harlequin is now reflected in the judgments of Laffoy J., McGovern J, and Finlay Geoghegan J. I am also referred to the decisions of Laffoy J in Lough Neagh Exploration v Morrice [1998] 1 ILRM 205, Finlay Geoghegan J in Tribune Newspapers, and Ryan J in Comcast. The conclusion of Ryan J in Comcast (on the issue relevant to the current application) was;

"The tests to be applied under Section 390 and Order 29 are the same."

28. Counsel for Be Spoke submits that the conclusion (on this point) by Ryan J in Comcast is one unsupported by the decisions to which he refers in his judgment. I am not convinced that this is so. In particular, while it is the case that Laffoy J in Lough Neagh records that the parties had agreed the applicable principles it is important to examine precisely how the judge approached this consensus.

29. At page 207 of the report, Laffoy J observes;

"The Plaintiff being a limited company incorporated in accordance with the laws of Northern Ireland, security for costs is sought not pursuant to the provisions of Section 390 of the Companies Act, but under Order 29 of the Rules of the Superior Courts, 1986. However, it is common case that, in broad terms, the same principles govern

the determination whether a plaintiff should be ordered to furnish security for a defendant's costs under Section 390 and under Order 29."

30. Having noted the 'broad terms' of the parties' agreement, Laffoy then proceeds to set out the "well settled" principles which she ultimately applies in deciding the motion. After doing this, the judge continues;

"These applications are, as it were, hybrids, in that the Plaintiff is incorporated outside the jurisdiction but is a limited company. The decision of Keane J. in Pitt -v- Bolger [1996] 2 I.L.R.M. 68 to the effect that the undoubted discretion provided for in Order 29 should never be exercised by an Irish court so as to order security to be given by an individual plaintiff who is a national of and resident in another Member State of the European Union, which is a party to the Brussels Convention, save, possibly where there is cogent evidence of substantial difficulty in enforcing a judgment in that other Member State, is not of relevance, given that the Plaintiff is a limited company and not an individual."

31. It is notable that, in the view of Laffoy J., the application of Order 29 can be varied to accommodate the fact that the plaintiff is a company as opposed to an individual.

32. Laffoy J has taken the broad agreement in principle of the parties and fashioned a set of rules relevant to the application before her. The thrust of the judgment is, as Ryan J finds in Comcast, that the tests to be applied under Order 29 and section 390 are the same, at least where the relevant circumstances are the same. In other words, as McGovern J found in

Flannery, parties in a similar situation having similar characteristics should be treated similarly.

33. The judgment in Comcast post-dated the decision of the Supreme Court in Mavior. Ryan J does not refer to Clarke J's judgment. I should now set out what, in my view, Mavior decided and (at least equally importantly) what it did not decide.

34. Mavior was an attempt to have security for costs ordered against an unlimited company resident in Ireland. The plaintiff was therefore neither foreign resident (so as to fall under Order 29) nor was it a company incorporated in the State (so as to fall under s. 390 of the Companies Act 1963). The argument made by the defendant was that in these circumstances there was an inherent jurisdiction to order security which existed in tandem with the provisions of statute and the rules of court. The asserted inherent jurisdiction would address the lack of any express power to order security for costs against an unlimited company resident in the State. The legal issues in Mavior are therefore far removed from the central issue in the current motion. This is clear not only from the very potted summary which I have just provided, but also from the judgment of Clarke J. Paragraph 23 of that judgment reads;

> *"I should also deal, at this stage, with the question of Mavior's status as an unlimited company in the context of O.29. The trial judge concluded that there was no reason in principle to distinguish, so far as security for costs is concerned, between an unlimited company, resident in the jurisdiction, and an Irish resident natural person. I agree. The separate statutory regime in respect of limited liability companies has*

been the subject of much analysis but is not relevant in this case. Any other entity, be it a natural person or any form of corporation which is not caught by s.390, is subject to the potential for security for costs being ordered under the rules. There is, therefore, no reason why the same broad principles should not apply to an unlimited company as would apply to a natural person. I would leave over to a case in which the issue specifically arises the question of the proper approach in the case of a limited company registered outside Ireland. It is arguable that s.390 of the Companies Act, only applies to Irish registered companies. If that be correct then the only basis for directing security against a non-Irish registered limited company would be under the rules. Different questions might arise depending on whether the company was an EU-resident company or one resident outside of the EU. In the latter case it is important to note that, while the question of ordering security against non-EU limited companies in Harlequin Property (SVG) Limited & anor v. O'Halloran & anor [2012] IEHC 13 was dealt with on the basis of applying the provisions of s.390 by analogy, that course of action was adopted in circumstances where the parties agreed that same was the appropriate basis for considering security for costs in that case. That point should not, therefore, be taken as having been definitively determined."

35. Counsel for BeSpoke relies heavily on a lengthy subsequent passage in the judgment, in which Clarke J warns against the courts creating or extending rules which really require legislation. It is put this way by Clarke J (at paragraph 28);

"There is a case to be made that an unlimited company whose shareholding can be traced back to entities whose liability is limited should, for the purposes of security for costs, be treated in the same way as a limited liability company and that the law

should be changed in this regard. Likewise, there is a case for the proposition that an unlimited company whose shareholders are natural persons should be treated, for the purposes of security for costs, in the same way as those shareholders. However, such a change would be a radical departure in the existing framework which, in my view, could only be brought about by legislative change."

36. This passage appears in the context of the problem created by the status of the plaintiff; an unlimited company based in Ireland. However, at the commencement of this part of the judgment Clarke J recognises the ability of the courts to expand the circumstances in which security for costs can be awarded under Order 29. This is to be done, if at all, by "a reinterpretation of the case law." (Paragraph 27). He continues;

"If any contemplated expansion goes beyond that which could reasonably be said to be a legitimate extension of the existing case law, then it seems to me that same could only be achieved either through rule change or, depending on how significant the change might be, statutory amendment."

37. It is worth noting that Clarke J (in Harlequin), Laffoy J (in Lough Neagh Exploration) and McGovern J (in Flannery) proceeded on the basis that an application for security for costs against a foreign limited company should be assessed by reference to s. 390 criteria. BeSpoke submits that these decisions are of no assistance because they reflected the agreed position of the parties, and certainly that aspect of these judgments prevent them from being anything close to binding authorities. However, it is unlikely that any of these judges would have (for the sake of convenience or otherwise) decided motions on the basis of an agreed legal position about which they had any meaningful reservation. Apart altogether from that

observation, what is argued for by Altum on this point does not constitute an illegitimate extension of the existing case law. It is, at most a modest clarification of the existing case law or (at most) a reinterpretation of the earlier decisions.

38. Mavior does not assist BeSpoke in its submissions on this issue. Equally, the other authorities relied upon by BeSpoke do not carry the matter further. ABM Construction v Habbingley [2012] IEHC 61 and the lower court decision in Mavior [2012] IEHC 471 deal with applications for security against Irish resident unlimited companies. Equally, the reliance on the judgment of O'Neill J in Ditt v Krohne [2012] does not address the fundamental argument advanced by Altum; where the plaintiff is a foreign limited liability company, should the court in exercising its discretion as to whether to order security for costs not consider the same factors that would apply to an Irish limited company? The fact that the impecuniosity of individuals has not been a reason to order security does not engage meaningfully with the Defendant's submission. Limited liability companies are treated differently from individuals under domestic law. No rational basis has been advanced to me as to why foreign limited companies should be equated with individual claimants, as opposed to Irish corporate plaintiffs.

39. BeSpoke also made submissions to the effect that ordering security for costs against it would be in violation of the Constitution, or in defiance of the provisions of the companies legislation. On the second point, counsel for BeSpoke accepted at the end of his submissions that companies such as the Plaintiff are not *"subject to governance by the [Companies Act] 2014 at all whether by reference to security for costs or otherwise..."* If that is so, it is difficult to see how it is inappropriate to apply to this motion the requirements set out in

paragraph 52 of the 2014 Act. The Oireachtas has not sought in any way to restrict the court in this regard.

40. The constitutional point is based on the contention that the alleged judicial extension of the existing rule would involve an overreach which violates the separation of powers. I do not accept this submission. As already described, the decision to treat this plaintiff in the same way as an Irish limited company would be treated involves a development of the case law which is within the bounds of what Clarke J in Mavior describes as acceptable.

41. I have concluded that, in deciding an application under Order 29 for security for costs involving a foreign limited company as plaintiff, it is proper to take into account the factors which must be considered in an application under section 52 of the 2014 Act made against an Irish limited company. I agree with the analysis set out by Clarke J in Harlequin, and with the sentiments of McGovern in Flannery concerning the equal treatment of entities who find themselves in a comparable situation. While not an essential part of my decision, I agree with counsel for Altum that the decision of the Court of Appeal for England and Wales in Chequepoint v McClelland [1997] 2 All ER 384 is of assistance. The analysis of Lord Bingham CJ, as well as that of Aldous and Philips LJJ, bear striking similarity to that of Clarke J in Harlequin. As counsel for Altum submitted;

> *".the gist of [Chequepoint]... is that under a generalised rule of court a French company was ordered to pay full security notwithstanding that it was not covered by the English Companies Acts on intellectually almost the same basis as Mr. Justice Clarke rationalised that ordering full security against the Harlequin companies was appropriate in that case."*

42. This is a fair summary of the decision in Chequepoint. It is of course correct to say, as counsel for BeSpoke submits, that the judgments of the Court of Appeal do not bind this court. It is also correct to say that the rules in England and Wales are different, though not so different as to make the comparison unhelpful. Both sets of rules ultimately mandate the court (either expressly or by implication) to make an order which does justice between the parties Finally, counsel for BeSpoke submits that the issue in Chequepoint was one of discrimination, and that discrimination is not raised here by the plaintiff. However, this ignores the reality that (however it arose) the court in Chequepoint endorsed the concept of equal treatment of domestic limited companies and foreign limited companies, notwithstanding the fact that British legislation did not impose the relevant regime on foreign limited companies. This is in essence the same problem that falls to be resolved in the current application.

BONA FIDE DEFENCE

43. The claim made by BeSpoke is set out fully in a Statement of Claim dated the 28th of September 2021. The pleading describes, in some detail, contractual arrangements between the parties put in place for the "principal purpose of [establishing] the contractual basis for the funding of BCI, and BC Spain, and the establishment of a platform for the non-bank lending/securitisation to be carried out by BC Spain (and in other jurisdictions as agreed), all under the Be-Spoke Capital branding." (paragraph 13).

44. At a very high level, it is claimed that a Bad Performance Notice was unlawfully issued by Altum on the 6th of August 2021 in respect of one Lars Schmidt-Ott (described,

somewhat inelegantly, as 'LSO' in the Statement of Claim). LSO is described as the ultimate beneficial owner of 70% of the shares in BeSpoke; there are 2 other shareholders.

45. The effect of the Notice, if valid, is set out at paragraph 45 of the Statement of Claim, as follows;

> *"Accordingly, upon the occurrence of a valid LSO Bad Performance Breach, 50% of the shares in BC Switzerland held on his behalf would effectively be confiscated immediately (with the balance being confiscated 18 months later if an Exit had not occurred by then), and all of BC Switzerland's Warrants would be cancelled.) "*

46. BC Switzerland is the Plaintiff company. The Warrants were instruments capable of being translated into shares in BCI, an Irish company. As is clear from the language of paragraph 45, it is said that LSO and the Plaintiff lost all commercial value in the enterprise as a result of the Notice.

47. The business between the parties is set out in a Shareholders Agreement, which contains an entire agreement clause. Clause 9.5 of the Agreement permitted Altum to serve the Bad Performance Notice if it determined that LSO *"is not meeting or has not met desirable standards of performance...as determined by [Altum] in its reasonable discretion... "*

48. Be-Spoke pleads that a large variety of contractual terms are to be implied into the exercise of this power by Altum. There are 23 implied terms asserted in the Statement of Claim including a term that a Bad Performance Notice would not be issued during a holiday period.

49. In advancing the application for security, Altum has put forward extensive evidence as to how and why the decision was made to serve the impugned Notice. In response, counsel for Be-Spoke submitted that a defendant seeking security must "go beyond mere assertion and must show a satisfactory evidential basis" in order to establish a prima facie defence. Counsel then focused on the assertion that the Notice was served for an ulterior motive and asks me to conclude that the absence of "some positive piece of evidence" or some "concrete documentary record of the decision-making process" no prima facie defence is made out. I disagree. The evidence from Altum carefully and fully sets out the events culminating in the service of the Notice. The fact that documentary evidence in the shape of emails is not forthcoming on this procedural motion does not mean that the position of Altum can be properly described as "mere assertion". On the evidence, Altum has certainly made out a prima facie defence to the claim. Given this detailed evidence, the absence of "concrete documentary evidence" does not mean that a prima facie defence is not established. As an aside, the precise nature of the documentary evidence required was not obvious to me. It is unlikely, though not impossible, that the Altum narrative would be supported by contemporaneous internal emails describing the service of the Notice as one done bona fide and for proper purpose. The absence of such emails does not necessarily suggest bad faith. Complaining about the absence of such documentation does not assist Be-Spoke. Equally, even the one example given by counsel in his oral submissions (emails saying that action should be taken because of the unsatisfactory performance of LSO) is not documentation the absence of which would allow the court to deny (for that reason alone) that a prima facie defence had been established. If it were necessary for an account, given on affidavit with a level of detail, to be supported by documentary evidence then the motion would turn into a miniature trial of the action, focusing excessively on the merits of the defence. It would

require Altum either to disclose a self-selected, and possibly unrepresentative sample of documents, or alternatives to exhibit all relevant documents. Either goes safely beyond what the caselaw currently requires.

50. There is a separate reason why Altum has made out a bona fide defence. In order to establish that the Notice is invalid, much of its pleaded case requires Be-Spoke to satisfy the court at the trial of the action that the pleaded terms are in fact to be implied into the Shareholders Agreement. This is particularly relevant to the "third prong" of his claim emphasised by counsel, namely the plea that the Notice was not to be issued for an ulterior purpose. Whether or not such a term is implied, in the specific circumstances of this agreement, is very much an open question. Like all of the alleged implied terms, Altum does not accept that this term is to be placed in the Shareholders Agreement. Inasmuch as the claim is reliant on implied terms, therefore, I am satisfied that Altum has shown that it has a prima facie defence.

SPECIAL CIRCUMSTANCES - HAS ALTUM CAUSED BE-SPOKE'S IMPECUNIOSITY?

51. The test set out by Clarke J in Connaughton Road Construction Ltd v Laing O'Rourke Ireland Ltd [2009] IEHC 7 is well known and represents the approach to be followed in deciding this issue. The onus is on the plaintiff to establish that its inability to pay the defendant's costs flows from the wrongdoing of the moving party. This must be shown on a prima facie basis. Where, prior to any possible wrongdoing, the plaintiff had no significant net assets it must be established that it would have acquired sufficient assets to meet the Defendant's costs were it not for the wrongdoing alleged. In meeting this standard, it would

be expected that the plaintiff would produce *"some evidence to suggest that all, or a sufficient portion of, the difference in [the plaintiff's financial] position can be attributed to the wrongful actions of the defendant.... the way in which a plaintiff may seek to establish these matters is not prescribed in any way, and it is open to a plaintiff in such circumstances to attempt to establish the special circumstances in whatever way it can."* (Paragraph 4.11 of the judgment of Clarke J.)

52. Counsel for Be-Spoke claims that the *"practical consequence of the issuing of the notice led to the cancellation of the warrants."* In establishing the value of the cancelled warrants, counsel points to these indicators;

1. Be-Spoke cancelled a debt due by BCI in the amount of some 2,470,000 euro (approximately) and "instead the warrants were issued to" Be-Spoke.

2. Nagoh, an Altum managed fund, valued the equity of BCI at between 34.69 million euro and 47.147 million euro as of September 2021. Mr. Schmidt-Ott, in an affidavit opposing the motion, swears that this gives the warrants a value of "up to 4.7 million euro."

3. Mr. Schmidt-Ott also avers that "but for Altum's wrongful and illegal breach of the breach notice, [Be-Spoke] would have available to it an asset in the form of the warrants which had a value significantly in excess of the elevated cost estimate put forward by [Altum]." In truth, this adds nothing to the point summarised at (2), and to which I will return.

4. Mr. Schmidt-Ott avers that the book value of the warrants in Be-Spoke's annual financial statements (of CHF 2.6 million) does not represent their true value, and that Altum does not dispute this. Again, this evidence appears to be predicated on the Nagoh valuation.

5. On the Nagoh figures, the lower value of the warrants (representing 10 % of BCI) is 3.47 million euro. There is also a subordinated liability owed by Be-Spoke to its shareholders of 2.7 million euro. Mr. Schmidt-Ott states that this valuation involves;

> *"The ability and willingness of myself and Mr. Wiesli to confirm or extend the subordination of loans due to ourselves and our affiliates."*

6. The evidence of Mr. Schmidt-Ott that;

"...it is clear that [Be-Spoke] could, with no particular difficulty, have raised additional funds..." which would have met the amount of costs claimed by the defendants.

53. On the basis of this evidence, counsel submits that the Connaughton Road test is met. I do not agree. With the exception of point (1), the entirety of the evidence put before the court is based on the Nagoh valuation of BCI, or on the subjective opinion of Mr. Schmidt-Ott. The fact that Be-Spoke cancelled a debt of a particular amount does not mean that the value of the warrants at any given time exceeded the cancelled loan. As a method of valuing the warrants, this is a remarkably roundabout approach. In any event, given the scale of the planned venture it is likely that the sums invested by any party would reflect the eventual

value of the enterprise and not the value of a particular asset (the warrants) at quite an early stage in the development of the business.

54. With regard to the Nagoh valuation, and the worth of the warrants as extrapolated from that, it became plain during the hearing that Mr. Schmidt-Ott had simply taken one of the values given by Nagoh to BCI (albeit the lowest one) and carried out a straight-line calculation in order to establish the value of the warrants. This has two flaws. Firstly, it does not take into account any potential discount given that 10% of BCI is very much a minority holding. Counsel's response was to say that there was no evidence "with regard to discounting a ten per cent shareholding". However, the onus of establishing the level of loss caused by the wrongdoing is on Be-Spoke. The concept of a majority holding being valued at a discount is a familiar one, it should have been addressed by Be-Spoke in resisting the motion.

55. Of course, the minority discount only applies to shares. As counsel for Altum submitted in opening the application, the warrants themselves are subject to a limitation on their disposal. No evidence is given as to how that restriction might impact on the value of the warrants.

56. It is worth recalling the observations of Clarke C.J. in Protege International v Irish Distillers [2021] IESC 16, emphasising the need for a plaintiff *"...if it wishes to avail of special circumstances, [to] do so on the basis of giving the Court adequate information to enable a proper interrogation of any relevant proposition to be conducted."* For the reasons, I have identified, that has not happened here.

57. In addition, the evidence about the continued subordination of the debt owed by Be-Spoke and Mr. Schmidt-Ott's confidence that (in certain circumstances) additional funds could have been raised, fail to meet the requirements set out by Clarke C.J. at paragraph 6.10 of Protege where he held;

> *"Each case must be judged on its own circumstances and on the evidence presented. But the evidence must go beyond mere assertion and speculation."*

58. In my view, this is precisely how Mr. Schmidt-Ott has addressed this part of the motion. Clarke C.J. continued;

> *"As already noted, there may be cases where expert evidence is necessary because there may be cases where, without expert evidence, it will not be possible to put the contention that impecuniosity was due to the alleged wrongdoing beyond the level of assertion and speculation. There may, however, be other ways in which the burden can be met in many cases. However, it must be met in some realistic way."*

59. This is a case where an expert valuation of the warrants was open to Be-Spoke, but instead it chose to rely on what its own counsel described as a *"cut and paste"* from the Nagoh accounts and what its own major shareholder then says is the value of the asset lost to it by Altum's alleged wrongdoing. This is not a satisfactory way of establishing that the asserted special circumstance exists.

SPECIAL CIRCUMSTANCES - A POINT OF LAW OF EXCEPTIONAL PUBLIC IMPORTANCE?

60. In its counsel's oral submissions, Be-Spoke identifies this point of law, which it says is of exceptional public importance;

> *"...the issue, Judge, is the role of a judicial review type principle in and around the exercise of a contractual discretion."*

Counsel referred me to the judgments of the UK Supreme Court in Braganza v BP Shipping [2015] UKSC 17. That case concerned a refusal to pay out on a death in service policy in respect of an employee who, it was alleged had taken his own life. It is, both legally and factually, a very different sort of case to the current action. Whether or not Altum was obliged to comply with judicial review type processes (inasmuch as this is pleaded) is a matter which can be decided in accordance with the well-established law on the implication of contractual terms. Any such obligation to comply with Wednesbury/O'Keeffe principles (as counsel described then to me) can only arise, in this case if such an obligation is found to be an implied term; it does not seem to be an express one. The circumstances in which a term will be implied into a contract are well established. Whether or not the specific terms of the Shareholders Agreement, the matrix of fact surrounding it, and all the relevant circumstances give rise (on the facts of this case) to such implied terms do not constitute a point of law transcending the interests of the parties, to use the language of Costello J in the Court of Appeal in Protege (as summarised by Clarke C.J. in the Supreme Court);

> *"... the threshold for a plaintiff to demonstrate a point of law of exceptional public importance is a high one, which requires the plaintiff to identify a point of law that is*

of such gravity that it transcends the interests of the parties and serves the common good."

61. This has not been established in this case; the relevant point of law will be decided within the narrow confines of the facts of this case and will apply only to the parties in this case.

62. There is another reason to reject the argument that this sort of special circumstance should lead to the refusal of the application for security. As Clarke C.J. held in Quinn Insurance v PWC [Supreme Court, 22nd March 2021] at paragraph 7.34;

"7.34.I would add that it seems to me that the question of whether the proceedings are likely to be actually stifled may play a very significant role in an assessment of whether the "public interest" special circumstance has been established. The whole point about that special circumstance is that there may be cases where there is a genuine public interest in certain issues being litigated in open court. That public interest would be impaired if the proceedings were not to go ahead because security for costs was ordered. However, if the proceedings are going to go ahead in any event (or if that remains highly likely) then the weight to be attached to the public interest in the proceedings going ahead in the context of a security for costs application will be minimal."

63. I am conscious of the submission on behalf of Be-Spoke that, in accordance with the decision in Trident International v Manchester Ship Canal [1990] BCLC, there is no obligation on a plaintiff company to show that if security is ordered the claim will be stifled.

He also submitted that there is no evidence before the court as to whether this claim will be stifled or not. This was in response to a submission by counsel for Altum that there was a source of funding available to Be-Spoke which would allow it to continue with the case even if it had to provide security. It may also have been in response to a question which I put to the Plaintiff's counsel. Going through the correspondence, in which Be-Spoke's solicitors (Byrne Wallace) proposed that there would be a standstill agreement, I observed that Byrne Wallace had stated that BeSpoke would "provide an undertaking as to damages in the event a standstill arrangement was entered into." Counsel was unable to say where the money to back up such an undertaking would come from, given BeSpoke's impecuniosity. Counsel also felt it improper to speculate on how any such undertaking would be funded, given that this was not addressed in any of the affidavits. In any event, having opened Trident International, counsel then made the following submission (unsupported by any evidence);

> *"I want to be completely upfront with the Court. I am not submitting, and I don't have instructions to submit, that the claim will be stifled. I have instructions to say that the claim may be stifled if costs in the amount of 800,000 euro is ordered, so to that extent I rely on the dictum [in Trident International} that it is implied in [BeSpoke's] resistance of the application that it may very well be unable to fund the 800,000 figure. I can't put the matter any higher than that."*

64. I am not remotely critical of counsel in making this submission, in accordance with his instructions. It is clear that BeSpoke has some funds available to it in order to press on with this case, despite its acknowledged impecunious state. It was able (through its solicitors) to offer an undertaking as to damages (which these solicitors had presumably satisfied themselves would be met). It is able to maintain these proceedings to this point. In the very

carefully formulated instructions provided to its counsel, BeSpoke tells the court that the claim "may be" stifled if the full security sought by Altum is ordered. Given the way in which the oral submissions developed, and given the decision that counsel should communicate the position to the court, it is striking that counsel was not instructed to inform me that the action would simply not proceed should a certain amount of security be fixed. It follows, pretty obviously, that the claim "may" proceed even if the full security sought is ordered and (by extension) is even more likely to proceed if a smaller sum in security is to be provided. In Trident International, Nourse LJ states that while it may often be sensible, and perhaps desirable, that a plaintiff adduce evidence to show that if an order for security is made then it will or may be unable to pursue the proceedings, "it cannot be essential". However, what is quite undesirable is that a plaintiff selectively and partially reveals something about its ability to pursue a claim without giving the full story. That is especially the case where the information provided to the court (by submission, and not in evidence) appears designed to bargain with the court about the amount of security to be provided should Altum's motion succeed.

65. I therefore conclude that the security which I propose to order will not stifle this action. While ordinarily it may not be essential for a plaintiff to establish the chilling effect of an order for security for costs, in this case the indications are that the case will proceed. Even if the alleged special circumstance existed, it does not represent a reason to refuse security as this is not likely to bring the action to an end.

THE AMOUNT OF ANY SECURITY

66. This heading covers two issues. What are the likely costs, on a party and party basis, to be incurred by Altum in defending these proceedings? What percentage of this sum is to be

secured? On the second issue, it is submitted on behalf of Be-Spoke that the 'one third rule' as applied by Laffoy J in Ticket Generator is the appropriate approach. Be-Spoke further submits that I should not follow the decisions in Harlequin and Flannery, as these proceed on the basis that similar considerations apply to foreign limited companies as to Irish limited companies, and that they also place inappropriate weight on the desirability of treating Irish and foreign limited companies equally. In truth, these arguments are two sides of the same coin, and I have already not accepted them on the fundamental question of how the court should approach a motion seeking security against a foreign limited company. Counsel for Altum submits that the justice of the case requires that full security be provided. I agree with this submission. Be-Spoke is a company with no meaningful assets. If full security is not provided, any award of costs in its favour will be inadequate and potentially meaningless. If such an award of costs is made, this means that Altum will (in all likelihood) have successfully defended Be-Spoke's claims. In those circumstances, it would be quite unfair for a court order to be rendered less than fully effective, and Altum to be left out of pocket, because full security was not provided at this stage.

67. On the first issue, I am assisted by the evidence of two expert costs accountants. The first of these, Martin Raftery, says that the likely costs amount to 833,451.67 euro. The second, Shane Galligan, says that the costs will be 477,850 euro. VAT is not chargeable on the fees. It need hardly be said that the higher figure is from the professional advising Altum, and the lower figure from the expert advising Be-Spoke.

68. There was no real debate about why I should choose either figure, and almost no debate or submission as to why I should prefer the view of either man on any constituent part of the overall figure. The one point made to me (by counsel for Altum) which I found useful

was the observation that Mr. Galligan had taken the position that the security for costs motion would not carry a senior. That view is not correct, given the plethora of issues in the motion, at least one of which is of some importance, and the fact that both sides engaged seniors for the application. This may only be a straw in the wind, but it must be coupled with other indicators. For instance, Mr. Galligan suggests a five- or six-day trial while Mr. Raftery suggests an eight-day hearing. As I observed at the start of the judgment, this case is a remarkably hard fought one. On that basis, a six-day hearing seems very optimistic. I have come to the view (taking everything into account) that Mr. Galligan somewhat understates the intricacies and demands of the case and the legal services required in its defence. Having said that, some of the figures suggested by Mr. Raftery seem slightly on the high side. For example, on a party and party basis a brief fee of 80,000 euro may be a bit ambitious, though again I think that Mr. Galligan's proposed figure is far too low.

69. In the round, therefore, I prefer Mr. Raftery's figures. As explained, I do have some reservations. I am also conscious of the fact that, at least inasmuch as I am aware, it is a rare bill of costs which is adjudicated without deduction no matter how experienced or gifted the costs accountant. Taking these factors into account, I will therefore reduce by 10% the figure put forward by Mr. Raftery and fix the security accordingly.

STAGGERED SECURITY

70. This is not the sort of complex litigation in which a staggered costs order is appropriate. That description applies to litigation such as the claim by the liquidators of Quinn Insurance against that company's auditors or, indeed, the claim by the Special

Liquidators of IBRC against the auditors of Anglo-Irish Bank. Complex litigation would also include the Quinn family's proceedings against IBRC (and IBRC's proceedings against the Quinn family), the claim by Hansfield Developments against the Lagan Group (involving pyrite damage to hundreds of homes in North Dublin) and the action brought by Fyffes against DCC. The current claim has its complexities, as do most Commercial Court actions, but it is not in the league of cases where a staggered costs order should be made.

CONCLUSION

71. I will therefore order security for costs in the amount indicated in this judgment. I will hear the parties about the precise form of the order.