THE SUPREME COURT

[Appeal No. 72/20]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
O'Malley J.

BETWEEN:

QUINN INSURANCE LIMITED

APPELLANT

V.

PRICE WATERHOUSE COOPER

RESPONDENT

Concurring Judgment delivered by Mr. Justice John MacMenamin dated the 22nd day of March, 2021

1. I agree with the judgment the Chief Justice delivered, applying the law as it presently stands. However, I would like to add some observations. The events described in the judgment delivered by today highlight some of the strengths and weaknesses of a security for costs regime. Among other considerations, two principles arise. First, there is a constitutional right for litigants to have access to the courts. Second, there is an entitlement that defendants should have some form of protection against unmeritorious plaintiffs, who, in the event that a claim is unsuccessful, may not be a mark for costs. Thus, when asked to fix security for costs, a court is necessarily engaging in a balancing exercise. However, in that balance, it seems to me, there may, in the future, be more room for an application of the principle of proportionality.

2. The judgment in *Connaughton Road* establishes valuable guidelines as to the approach which courts should adopt generally in making orders for security. Those guidelines are (i) that actionable wrongdoing be established; (ii) that there be shown to be a causal connection between the defendant's wrongdoing, and the potential consequences for the plaintiff; (iii) that it be shown that the consequences of that wrongdoing gave rise to specific and identifiable loss; and (iv) that the loss was sufficient to make the difference between a plaintiff being in a position to meet the costs of a defendant, in the event that

the defence should succeed, and the plaintiff not being in such a position to meet a costs award.

3. However, as in many instances in law, there are sometimes consequences in the adoption of an overly rigid approach to guidelines. I think this may be so in applications for security for costs in substantial cases. In such instances, courts are sometimes called on, explicitly or tacitly, to make some estimate as to the merits of the case on an application for security. But such applications frequently come at a time when there is not always as full information as there might be. Yet, despite this frequent deficiency in evidence, courts are nonetheless asked to engage in some form of heuristic assessment of the merits of the case.

4. I entirely agree with the Chief Justice that the process of *arriving* at a figure for security for costs must, to a large extent, be a mathematical exercise. But such exercises are always predicated on the fullness and validity of what might be called the "data input", in this case evidence. Even the best, and most rigorous conclusion, can be called into question when there is insufficient data as an input. Yet, as matters stand, courts are frequently requested, at quite an early stage, to make what may be a "once and for all" determination as to a sum for security for costs.

5. Again, speaking of substantial commercial cases, the costs of discovery can themselves be very substantial. It is so in this case. Yet, in the absence of discovery as yet, a court is nonetheless called on to make some estimate as to the merits of a case. I therefore pose the question whether, as a matter of justice under the Constitution, a court should, in such cases, be called on to make what may be a final determination on security, with all the consequences, when, by any standard of reference, the level of information then available may be quite limited, when discovery has not been made.

6. This is not to say, of course, that a defendant should be precluded from a proportionate degree of protection until a more informed decision can be made. But, in future substantial cases, it seems to me, there would be much to be said for approaching such applications on a step-by-step, or staged basis. Thus, in cases where discovery is not made, a court might nonetheless make an interim order for security, based only, at that point, on the potential range of costs for discovery.

7. On completion of the discovery process, it might then be open to a defendant to make a further application for security, having in mind the costs of a potential hearing.

8. I acknowledge immediately that this should not be permitted to become some sort of "satellite" litigation. Procedures would have to be adopted to ensure that such hearings, by way of notice of motion, were focused. But I do not think that is beyond legal ingenuity. On completion of discovery, courts could, for such motions, make focused orders, based on affidavit evidence, focusing on particular issues, and allowing the parties to refer to particular documents, or categories of discovery. Parties might, therefore, be in a position to produce more informed evidence, based on financial, or other advice, as to the merits of the case, based on a wider range of evidential material. This would,

therefore, allow a court to make a more informed decision, when a question involving substantial costs arose.

9. As matters stand, and on the law, a court is unavoidably faced with what may be quite a stark choice. This involves approaching the issue where, on the appellant's case, the costs may be €30 million. By any standard, this is a huge sum of money. The difficulty posed by such a stark choice is that, when engaged in an exercise of determining whether there should be security, a court must do so in the absence of a range of documentary evidence, which will actually be in the possession of each of the respective parties, but not available to the other party, or to the court. The result is that a court is often called on to proceed on the basis of a "worst case scenario"; that is, an assumption that a substantial sum of costs *will* be incurred in defending a claim, when experience shows this may not always turn out to be the reality.

10. I would, therefore, reserve to a future case a further consideration of the principles which might be applicable in security for costs applications in substantial cases of this type.

11. During the course of submissions, the Court was referred to what was suggested to be a constitutional unfairness of a situation where, in this case, the appellants appear to have potential access to funding from a third party source for the prosecution of the claim, yet that same third party source might not be amenable to any adverse order for costs. I would reserve any further observation on such a situation to an appropriate time and occasion.