THE SUPREME COURT

[Appeal No: 72/2020]

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

BETWEEN/

QUINN INSURANCE LIMITED (UNDER ADMINISTRATION)

APPLICANT/APPELLANT

AND

PRICEWATERHOUSECOOPERS (A FIRM)

DEFENDANT/RESPONDENT

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 22nd March, 2021.

1. Introduction

1.1 These proceedings arise out of the collapse of the plaintiff/appellant ("QIL") leading to it being placed in administration. QIL contends that the defendant/respondent ("PwC") was in breach of contract and negligent in the manner in which it gave unqualified assurances in relation to financial statements and regulatory returns in respect of four financial years ending on 31 December 2005, 2006, 2007 and 2008.

1.2 The particular issue with which this Court is now concerned centres on an application brought by PwC seeking security for costs. The High Court (Haughton J.) refused the application (see- *Quinn Insurance Ltd. (Under Administration) v. PricewaterhouseCoopers* [2018] IEHC 16). PwC appealed to the Court of Appeal, which court allowed the appeal and ordered that QIL provide security (see the judgment of Baker J., speaking for the Court in *Quinn Insurance Ltd. v. PricewaterhouseCoopers* [2020] IECA 109). From that decision QIL sought leave to appeal to this Court.

2. The Grant of Leave to Appeal

2.1 By determination dated 28th July 2020 (See- *Quinn Insurance Ltd. (Under Administration) v. PricewaterhouseCoopers (A Firm)* [2020] IESCDET 92), this Court granted QIL leave to appeal the decision of the Court of Appeal on the following basis:-

> *"18. The questions raised include, but are not confined to, whether, in deciding as it did, the Court of Appeal, although making a discretionary order, erred in principle in ordering security for costs in this case. However, viewed, this application has considerable significance. In the view of the Court, the matters raised are of general public importance in generally identifying the appropriate test for security for costs, and also having regard to the public interest principle in s.52 of the 2014 Act. It is in the interests of justice that leave should be granted. The issues to be determined will be fixed following case management. The Court, therefore, grants leave to appeal."*

2.2 Shortly after leave to appeal was granted in this case, the Court also gave leave to appeal in another case involving security for costs arising in a corporate context (see – *Protégé International Group (Cyprus) Ltd. v. Irish Distillers Ltd*. [2020] IESCDET 106) ("*Protégé*").

3. Protégé

3.1 While the precise issues which required to be decided in the respective cases differed materially, both appeals arose from at least the same general legal background. As will be commented later in this judgment, the essential regime concerning the grant or refusal of security for costs in a corporate context is well settled. For example, the judgment of this Court in *Usk District Residents Association Ltd. v. Environmental Protection Agency* [2006] IESC 1 makes clear that an initial onus rests on a defendant seeking security for costs to establish that it has a *bona fide* defence to the proceedings and also that the plaintiff concerned would not be in a position to meet the costs of the proceedings were it to lose and costs be awarded against it. Where both of those matters are established by the defendant to the satisfaction of the Court, then security will ordinarily be ordered unless there is a sufficient countervailing factor (or a "special circumstance" as that term is used in the jurisprudence) which tilts the balance of justice against the making of an order. In both these proceedings and in *Protégé* it had come to be accepted that the respective defendants had met the onus of proof which lay on them to establish a *bona fide* defence and the inability of the respective plaintiffs to meet an order for costs should one be made against them. Thus, at least in general terms, both cases were concerned with whether special circumstances had been established by the respective plaintiffs. Both appeals, therefore, turned, at least in very general terms, on the proper identification and application of the special circumstance jurisprudence, not least that aspect of that jurisprudence which is concerned with a contention that, *prima facie*, the inability of the plaintiff concerned to meet any costs order which might be made is due to the wrongdoing alleged against the defendant. Both cases also involved what has come to be known as the public interest special circumstance. For those reasons it was arranged that both appeals would be heard by the same panel of this Court and in relatively close proximity one to the other, for it was clear that there might well be at least some issues of general principle which would be common to both proceedings.

3.2 Be that as it may, it is appropriate to turn first to the specific issues which arise in the context of this appeal. In order to understand those issues more fully it seems to me to be appropriate to start by an analysis of what transpired in both the High Court and the Court of Appeal.

4. The Judgments of the Lower Courts

4.1 As noted earlier, it was at all times accepted that QIL would be unable to meet the costs of PwC, should such costs be awarded against QIL at the end of the proceedings. It was also accepted that PwC had established that it had a *bona fide* defence to the proceedings. Thus the issue of the grant, or otherwise, of an order requiring security for costs turned on whether there were special circumstances which might justify a refusal to award security for costs notwithstanding that inability to pay and a *bona fide* defence had been established.

4.2 In essence, in the High Court, Haughton J. concluded that there were two bases on which special circumstances had been established to his satisfaction. The first arose from his finding that QIL had established, on a *prima facie* basis, that its inability to pay costs was due to the wrongdoing which it alleges against PwC. That is, of course, a well-established and frequently invoked ground on which special circumstances justifying the refusal of security for costs can be made out.

4.3 The second basis on which Haughton J. held that special circumstances existed relied on what he considered to be the public importance of these proceedings.

4.4 In respect of QIL's submission that its inability to pay costs stemmed from PwC's wrongdoing and that special circumstances should be held to have been established on this basis, Haughton J. first considered the test which I set out at para 3.4 of my judgment in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd*. [2009] IEHC 7. In that paragraph the following four elements were identified as matters which must be established in order to rely on this special circumstance:-

> *"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."*

4.5 Haughton J. drew attention to the fact that, in *Connaughton Road*, I had placed particular emphasis on the fact that the relevant plaintiff is only required to establish that its inability to pay costs was caused by the defendant's wrongdoing on a *prima facie* basis and that, consequently, the Court's assessment of whether the plaintiff has satisfied each of the four limbs of the above test must likewise be conducted on a *prima facie* basis.

4.6 Haughton J. held that QIL had successfully established the first limb of the test in *Connaughton Road*. The trial judge was first satisfied that the affidavit evidence of Mr McAteer (one of the two joint administrators of QIL) demonstrated, on a *prima facie* basis, that there was actionable wrongdoing on the part of PwC. In Mr McAteer's affidavit it was stated that the alleged wrongdoing of PwC concerned its failure to identify and

report on the understatement of QIL's technical provisions (in broad terms, the estimated liability of Quinn for insurance claims) and on certain inter-company guarantees when rendering its audit opinions in the financial statements for the year ended 31 December 2005 and the following years, 2006, 2007, and 2008. Mr McAteer averred that, had PwC reported the existence and importance of the technical provisions and the guarantees to the non-executive members of QIL's board and to the Financial Regulator, QIL could and would have taken action to prevent its insolvency.

4.7 Haughton J. recognised that it is inherent in the act of forecasting what would have happened to a company "*but for the alleged wrongdoing*" that it is necessary to hypothesise on the facts, or inferences from those facts, as they are known or reasonably assumed. In the context of these proceedings, he concluded that the evidence of Mr. McAteer was an exercise of reasonable hypothesis which, provided it was not grounded in unreasonable conclusions or inferences, is a necessary exercise from which the court may conclude that a *prima facie* case has been made out that inability to discharge costs that may be awarded to a successful defendant arises from the defendants own alleged wrongdoing. Haughton J. was satisfied that, for the purposes of the application before him, the exercise undertaken by QIL was one of reasonable hypothesis which was, in his view, supported by known facts. The trial judge was also satisfied, based on the same affidavit evidence and argument, that the maximum quantum of losses that could be recovered was in the order of €900 million euros, as pleaded by QIL.

4.8 Haughton J. then proceeded to consider the second and third limbs of the *Connaughton Road* test, which concern causation and remoteness and, in particular, PwC's contention that the loss claimed by QIL is too remote. Haughton J. emphasised the interlocutory nature of the application and held that, in the context of proceedings which are at an interlocutory stage, it is not appropriate for the court to favour one piece of evidence or factual inference over another or to make a determination between any competing arguments put forward by the parties in relation to causation and remoteness.

4.9 Rather, Haughton J. emphasised that, in the context of an interlocutory application, the onus is on the plaintiff to establish, *prima facie*, that the defendant's wrongdoing is the cause of the losses claimed. He held that a plaintiff is not required to satisfy the Court as to the probability of such loss at this stage, but only to demonstrate that it is arguable that its claims will succeed at full hearing. On the basis of the evidence and argument presented by QIL, Haughton J. accepted that QIL had established, on a *prima facie* basis, a causal connection between the alleged wrongdoing of PwC and the losses claimed by QIL, amounting as pleaded to a sum of €900 million. Furthermore, he was satisfied that the claimed losses were arguably not too remote. Haughton J. concluded that any further scrutiny and weighing of the counter-arguments between the parties was a matter for the trial judge at full hearing.

4.10 PwC argued that QIL had failed to satisfy the fourth limb of the test in *Connaughton Road*, as the final sum owed by QIL to the Insurance Compensation Fund ("the ICF") stands at €1.1 billion, which exceeds the plaintiff's estimated total losses of €900 million. That sum

of €1.1 billion represented the shortfall in the assets of QIL over its liabilities which shortfall was met by the ICF and remains due to it. Therefore, it was submitted by PwC that, even if QIL's claim were to be wholly successful, its liabilities would still exceed its assets by €200 million, meaning it would not be in a position to meet PwC's costs. On that basis it was argued that PwC could not be regarded as the sole cause for QIL's insolvency, as PwC could not be held responsible for the residual gap of €200 million.

4.11 In response to these submissions, QIL relied on the dicta of Mahon and Hogan JJ. in *CMC Medical Operations Ltd (in Liquidation) t/a Cork Medical Centre v. Voluntary Health Insurance Board* [2015] IECA 68 in support of their argument that the fourth limb of the test in *Connaughton Road* should not be read as being a purely mathematical or mechanical test, lest it restrict the constitutional right of access to justice. Haughton J. was persuaded by QIL's submissions in this regard and, in line with the approach taken by the Court of Appeal in *CMC Medical*, concluded that it would be incorrect to treat the fourth limb of the *Connaughton Road* test as a narrow mathematical exercise, as to do so might have the result of unduly stifling claims and curtailing the right of access to justice. Haughton J. considered that I clearly had not intended the test in *Connaughton Road* to be viewed through a purely mathematical lens and that, instead, the courts should have regard to the broader circumstances said to give rise to the inability to pay costs.

4.12 On this basis, Haughton J. was willing to accept that QIL had made out a *prima facie* case that the cause of its insolvency, and consequently its inability to pay costs, flowed from the alleged wrongdoing of PwC. Therefore, he was satisfied that QIL had established special circumstances which could lead the Court to refuse the application for security for costs.

4.13 The second basis on which Haughton J. refused to make an order for security for costs was that, in his view, the proceedings involve matters of exceptional public importance such that it was in the public interest that they be resolved by the courts. Haughton J. accepted that the threshold for a plaintiff to demonstrate that a matter of exceptional public importance arises is a high one and that the relevant plaintiff must identify an issue which transcends the interests of the parties and benefits the community as a whole. Haughton J. considered that the present proceedings met this threshold as, in his view, they raised issues of great public interest and exceptional general importance and represented more than "a run of the mill professional negligence suit".

4.14 Haughton J. reached this conclusion on the basis of the size and influence of QIL in the Irish insurance industry, the size of the claim and the role played by the Exchequer in QIL's winding down. He drew attention to the fact that the QIL's losses had been spread across the community, resulting in substantial expense to the Exchequer and the imposition of a 2% levy on members of the public purchasing insurance in the State. On this basis, Haughton J. concluded that there was a significant public interest in determining the reasons for QIL's collapse and whether PwC, as its auditor, should bear any responsibility.

4.15 Haughton J. was also satisfied that the case raised significant points of law relating to the relevant regulatory framework and the extent of the obligations of auditors of insurance companies under the Insurance Acts 1909 to 1980 and under the European Communities (Non-Life Insurance) Framework Regulations 1994 (S.I. 359/1994) and the European Communities (Non-Life Insurance Accounts) Regulations 1995 (S.I. 202 of 1995) ("the 1994/1995 Regulations"), together with the audit guidelines relating to those regulations. The trial judge concluded that the public interest in these matters extends to establishing how QIL could collapse notwithstanding the regulatory system, the role of the Financial Regulator and the need for public confidence in the proper regulation of the insurance industry in the future. On this basis, Haughton J. concluded that special circumstances had been established and, accordingly, was willing to exercise the Court's discretion to refuse an order for security for costs on that basis as well.

4.16 The Court of Appeal concluded that Haughton J. was correct to hold that it had been established, in accordance with relevant case law and in particular *Connaughton Road*, that inability to pay costs was *prima facie* due to the alleged wrongdoing. However, the Court of Appeal also considered that the ordering of security for costs would not stifle these proceedings. The basis for that conclusion was the potential availability of monies from the ICF. On that basis, the Court of Appeal considered that security should be ordered notwithstanding the fact that the relevant special circumstances had been established.

4.17 In addition, the Court of Appeal came to the view that public importance sufficient to amount to a special circumstance had not been established. Thus the appeal brought by PwC was allowed and security ordered.

4.18 In the Court of Appeal, Baker J. (speaking for the Court) stated that the test which I set out in *Connaughton Road* requires a plaintiff to make a credible causal connection, *prima facie*, between the alleged losses and the pleaded wrongdoing. This, she stated, means that the plaintiff must go beyond making a mere assertion linking their loss with the alleged wrongdoing and instead point to some objective and ascertainable evidence which demonstrates, on a *prima facie* basis, that the wrongdoing concerned caused the plaintiff's impecuniosity and that the damages sought are recoverable as a matter of law and are not too remote.

4.19 Baker J. had no difficulty in accepting that QIL had established that, on such a *prima facie* basis, its inability to pay costs should it lose stemmed from the alleged wrongdoing of PwC. In this regard, she concurred with the assessment of the trial judge that the affidavit evidence of Mr McAteer on behalf of QIL was the opinion of an expert and, therefore, could not be characterised as mere speculation or bald assertion as it was grounded on fact and not reliant on unreasonable inferences or conclusions. She drew attention to the fact that Mr McAteer's affidavit evidence provided concrete examples of the type of provision which QIL stated it could, and would, have made in order to prevent its insolvency. On this basis, Baker J. was also prepared to accept that QIL's evidence, *prima facie*, demonstrated that, had the auditors identified the likely impact of the

combined effects of the Guarantees, the understatement of the technical provisions and certain gifts to related companies at an early stage, QIL may have been able to avoid the insolvency that ensued.

4.20 On that analysis, Baker J. determined that QIL had discharged the burden of showing, on a *prima facie* basis, that the losses it says are attributable to the alleged negligence and breach of duty of PwC could have led it to avoid the financial catastrophe that befell it. Baker J. was also prepared to accept that QIL had demonstrated, *prima facie*, that the claimed losses were not too remote.

4.21 Baker J. did express concern in relation to the residual gap of at least €200 million between QIL's claimed losses, amounting to €900 million, and the €1.1 billion owed by QIL to the ICF. She remarked that, even if QIL were to be wholly successful, its liabilities would exceed its assets and therefore she doubted whether the causative connection, *prima facie*, could be sufficient to reverse the financial position to enable QIL to meet the costs. However, Baker J. did not consider that these concerns, in themselves, were sufficient to disentitle QIL to resist security. While ordinarily, a plaintiff would be required to demonstrate that it would be in a position to recover sufficient damages to reverse its current financial position and enable it to pay the costs, Baker J. held that this case was not one where an analysis of the current estimate of likely damages would be sufficient to meet the test. Rather, she concluded that it was necessary to adopt a different analysis, which did not focus wholly on the figures but instead brought to bear an argument of a different nature, namely that the losses could have been stemmed in sufficient time and to a sufficient extent to have created a different financial landscape for the company.

4.22 In respect of the fourth limb of the test in *Connaughton Road*, Baker J. concurred with Haughton J. that the test ought not to be applied as a purely mechanical or mathematical exercise. However, she added that, when having regard to the broader circumstances giving rise to a plaintiff's inability to pay costs, the court may still be required to examine the quantum of the claim and to consider whether, *prima facie*, the figures relied on credibly support an argument that makes a causal connection between the inability to pay costs and the losses claimed. Baker J. also concurred with the finding of the trial judge that, at an interlocutory stage, it is not appropriate for the court to engage in weighing competing arguments made by the parties. It was sufficient, in her view, for the court to be satisfied that a credible causal connection has been established.

4.23 On these bases, Baker J. was satisfied that QIL had established that its inability to pay costs *prima facie* stemmed from the PwC's wrongdoing and that, consequently, special circumstances had been established which would entitle the Court to refuse to make an order for security. However, she then remarked that, even where the court is entitled to refuse to make an order for security, it does not mean that security will inevitably be refused. Rather, she held that the exercise is a discretionary one that seeks to find the balance of justice between the parties.

4.24 In respect of the issues regarding the potential stifling effect of an order for security for costs, Baker J. stated that the courts should be reluctant to make an order where doing

so would stifle a genuine dispute between parties to litigation. She recognised, however, that there is a need to balance a corporate plaintiff's right to sue with the interests of a defendant who has no prospect of having its costs met in successfully defending a claim. As such, Baker J. was of the view that the discretion of the court to refuse to make an order for security for costs should only be exercised in special circumstances.

4.25 In the present case, Baker J. found that there was no evidence that the making of an order for security for costs would bring an end to the litigation, nor had the case been argued on the basis that making an order for costs would stifle the claim. Baker J. expressed the view that, in circumstances such as these, where a plaintiff would be in a financial position to continue to pursue the litigation notwithstanding the order for security for costs, the non-stifling effect of a potential order for security should be regarded as a very significant factor in balancing the rights of both parties to litigation. Where a plaintiff could and does provide security, so that it can still continue the action, the defendant's right to collect costs if it is successful is adequately protected, while the proceedings will nonetheless be determined on the merits. Baker J. held that this approach might inform the discretionary process in a suitable case, even in circumstances where a plaintiff has established special circumstances within the meaning of the jurisprudence.

4.26 Baker J. then stated that, in her view, these proceedings were such a case. She remarked that, given that the agreed estimate of the likely costs was €30 million, it would be unduly onerous to expect PwC to bear the risk of having to meet costs of that magnitude. In this regard, she observed that, while QIL enjoys the benefit of limited liability, PwC does not, meaning that the individual partners are personally liable for these substantial costs. Furthermore, in the light of the fact that the court has discretion as to the amount and mode of security, Baker J. held that the balance may fairly be struck so as to support the respective interests of both parties to this litigation.

4.27 For these reasons, Baker J. did not consider that the factors identified by the trial judge fully answered the justice and the balance of interests in this case in a proportionate manner and, therefore, she decided that security for costs ought to be provided.

4.28 In respect of the trial judge's finding that the case involved a matter of exceptional public importance, Baker J. concluded that QIL had failed to demonstrate that its case raised a matter of sufficient general public importance which could justify the Court in refusing to make an order for security for costs. As such, she found that trial judge erred in refusing to make an order for security on this basis.

4.29 Baker J. accepted that the trial judge was correct in his conclusion that the proceedings had the potential to provide clarification on the extent of the duties and obligations owed by auditors to their clients. However, Baker J. remarked that the same is true of the majority of cases which result in a written judgment of the Superior Courts, insofar as they seek to provide clarification on a certain area of law or to advance the understanding of the common law. Therefore, in Baker J.'s view, the fact that the matters raised in these proceedings might have far reaching effects on the development of an area of the

common law and might, therefore, be said to benefit from the analysis of the Superior Courts, was not, in itself, sufficient to establish that they were proceedings of exceptional public importance.

4.30 Furthermore, Baker J. distinguished certain authorities relied on by the trial judge to support his finding that these were proceedings of exceptional public importance (notably the determination of this Court in *The Law Society v. MIBI* [2016] IESCDET 57) on the basis that those decisions concerned the requirements of general public importance to be met by parties when applying for leave to appeal to the Court of Appeal and to the Supreme Court, rather than concerning the assessment required when deciding whether a plaintiff must give security for costs. Baker J. held that there could be no analogy drawn between the general public importance test as applied by the Supreme Court in considering an application for leave to appeal, which tends to focus on the general benefit of the proposed litigation to the public at large, and the private commercial interests at issue in the present case.

4.31 Finally, Baker J. accepted that QIL's collapse had had a significant societal impact, including a substantial cost to the Exchequer and the imposition of a 2% levy on members of the public buying insurance. She further accepted the trial judge's conclusion that there were interests at stake in this litigation which transcended QIL's private commercial interests, insofar as QIL's success in this litigation will result in the conferral of a substantial financial benefit to the state. However, Baker J. nonetheless found that the trial judge had overstated the importance of the involvement of the Exchequer in funding the winding down of the Quinn administration. Baker J. remarked that the burden on a plaintiff seeking to establish a matter of exceptional public interest is a heavy one to discharge and, in her view, the fact that the Exchequer or the taxpayer might receive the benefit of the litigation was not, in itself, a matter that made the litigation one of exceptional public interest. For these reasons, Baker J. held that the trial judge had erred in treating this litigation as public interest litigation of sufficient importance to justify a departure from the requirement that security for costs be provided and, accordingly, she allowed the appeal.

4.32 Having regard to those judgments and the determination of this Court granting leave to appeal, it is appropriate to turn to the issues which require to be decided on this appeal.

5. The Issues

5.1 It should be noted that PwC seeks to uphold the decision of the Court of Appeal both as to its correctness on the ground on which PwC succeeded, but also on the additional ground that it is contended that the Court of Appeal (and the High Court) were in error in concluding that inability to pay had *prima facie* been demonstrated to be due to the alleged wrongdoing. If PwC is found to be correct in that later proposition then, of course, the ultimate decision of the Court of Appeal on that aspect of the case might well be correct but for different reasons. Thus the first question for this Court to address is as to whether special circumstances, in the sense of inability to pay costs being *prima facie* attributable to the alleged wrongdoing, were properly made out in the first place.

5.2 The second issue concerns the circumstances in which it is appropriate for a court to order security for costs notwithstanding a finding that inability to pay is *prima facie* attributable to the alleged wrongdoing. Obviously that issue would not arise in the event that the Court is persuaded that PwC are correct on the first point for, if that type of special circumstance was held not to have been established, then the question of when security might nonetheless be ordered notwithstanding its establishment would not arise. The issue of the relevance, if any, of the question of whether the proceedings would be likely to be stifled if security were ordered also arises.

5.3 The third issue concerns whether the Court of Appeal was correct to overturn the High Court on the public interest special circumstance.

5.4 It is next necessary to briefly set out the position of the parties on those three issues.

6. The Positions of the Parties

6.1 In respect of the first issue arising on the appeal, being whether special circumstances, in the sense of QIL's inability to pay costs being, *prima facie*, attributable to PwC's wrongdoing, have been established, the parties were in agreement that the correct test to be applied is that which I set out in *Connaughton Road*. However, the parties dispute whether, on the pleadings and the evidence, QIL can be said to have satisfied this test.

6.2 QIL submitted that the High Court and the Court of Appeal were manifestly correct in concluding that it had successfully established, on a *prima facie* basis, that its inability to pay costs stemmed from PwC's alleged wrongdoing. QIL therefore disputes PwC's submission that the decision of the Court of Appeal to make an order for security for costs should be affirmed on the alternative ground that that Court erred in determining that QIL had established, *prima facie*, that its inability to pay costs flowed from PwC's alleged wrongdoing. PwC argued that, in concluding that QIL had satisfied the test in *Connaughton Road*, the Court of Appeal erred on two bases. The first is the contended lack of a sufficient causal connection, even on a *prima facie* basis, between the wrongdoing alleged and the losses claimed and the second is the Court of Appeal's determination that the fourth limb of the *Connaughton Road* test had been satisfied, despite the fact that the total losses claimed would not enable QIL to be in a position to discharge an adverse costs order if their claim was unsuccessful.

6.3 With respect to issues of loss and causation, it is QIL's submission that, but for PwC's failure to bring both the under-reserving and the issues concerning the guarantees to the attention of the Financial Regulator and QIL's directors in 2005, QIL would not have made gifts totalling €110 million to Quinn Group companies in 2006. QIL further submits that, had it been aware of the true nature of its financial position, it would have taken action to address its solvency issues, including releasing the guarantees concerned at no cost to QIL and adjusting its pricing model to reduce loss-making enterprises. PwC argued that these submissions are counter-factual and maintained that QIL has failed to adduce any evidence in support of the proposition that the guarantees would have been released at no cost. However, QIL submitted that its case is far from speculative, citing its board's prompt disclosure to the Financial Regulator on becoming aware of the guarantees and

subsequent regulatory intervention in the application to have QIL placed into administration as evidence supporting its submission that, had it known of its financial difficulties, it would have taken rapid and effective action. Furthermore, QIL contended that, had the under-provisioning been reported by PwC in a timely manner, it would immediately have led to substantially larger technical provisions which would, in turn, have restrained QIL by reducing its available capital. It is QIL's submission that these restraints, as well as an awareness of its own loss-making, would have resulted in QIL taking action to ensure reform.

6.4 QIL's position is that it has successfully established to a *prima facie* standard that, but for PwC's wrongdoing, it would have avoided insolvency and continued operating as a successful business, which, it argued, would have been able to meet any award of costs against it. QIL submitted that the Court of Appeal was correct in accepting its submissions in this regard, as well as the High Court's analysis of the evidence. It was further submitted by QIL that there was ample evidence to support the conclusions of both lower courts.

6.5 However, PwC submitted that the affidavit evidence of Mr McAteer, adduced on behalf of QIL and relied on by the Court of Appeal in reaching its conclusions that QIL had, *prima facie*, satisfied the test in *Connaughton Road*, is highly speculative. Furthermore, PwC argued that the Court of Appeal was incorrect to conclude that this evidence was not speculative as it represented "the opinion of an expert". PwC submitted that, as one of the joint administrators of QIL, Mr McAteer was not an "independent" expert, nor, it was said, had QIL been able to demonstrate that he was. PwC argued that the Court of Appeal placed too much reliance on this affidavit evidence, without having sufficient regard to "compelling countervailing evidence" adduced by PwC. In response to QIL's argument that there is no requirement that a plaintiff satisfy a court as to probability of loss at an interlocutory stage, PwC argued that the affidavit evidence adduced by QIL, and relied on by the Court of Appeal, is insufficient to generate a dispute which cannot be resolved at the interlocutory stage. Rather, it was submitted by PwC that this affidavit evidence serves only to highlight the dearth of substantive material placed before the Court of Appeal by QIL.

6.6 With respect to the arguments concerning the fourth limb of the *Connaughton Road* test, PwC submitted that the Court of Appeal's conclusion that QIL had satisfied the fourth limb of the test, notwithstanding the fact that the total losses claimed would not place QIL in a position to discharge an adverse costs order, amounts to an impermissibly flexible application of *Connaughton Road*. In determining that the test set out in *Connaughton Road* was not a purely mathematical exercise, but rather involved taking account of all the circumstances in the proceedings, PwC submitted that the Court of Appeal misunderstood the language and effect of the judgment and departed from the approach which I took in that case. PwC submitted that QIL cannot meet the fourth limb of the test in *Connaughton Road* for the reasons outlined above, being that, even if QIL were to recover the entirely of the losses pleaded, they would still be indebted to the ICF to the

sum of €200 million and therefore its financial position would not be reversed so as to enable it to meet costs.

6.7 QIL, for its part, argued that applications for security for costs ought not be treated as mini trials of quantum and therefore relied on the findings of the High Court and Court of Appeal to the effect that I did not intend the fourth limb of the *Connaughton Road* to be read as a strict mathematical exercise, but rather that it was appropriate to take account of the broader circumstances giving rise to the inability to pay costs. QIL also sought to distinguish the circumstances of this case from those in *Connaughton Road*, on the basis that it is said to be "a world away from the 'single transaction' nominally capitalised plaintiff" in that case. However, PwC argued that the general principles apply to all applications.

6.8 Turning to the second issue arising on this appeal, concerning the circumstances in which it is appropriate for a court to order security for costs even where special circumstances warranting a refusal of an order for security for costs have been established, QIL submitted that the Court of Appeal was incorrect to conclude that, notwithstanding the fact that it had established that its inability to pay stemmed from PwC's wrongdoing, security may still be ordered if doing so will not stifle the plaintiff's claim.

6.9 QIL argued that there is no authority to support the proposition that a prerequisite to refusing security for costs, where special circumstances have been established, is that a plaintiff must be able to demonstrate that ordering security would stifle the claim. In this regard, QIL sought to distinguish *Hedgecroft Ltd. v. Htremfta Ltd*. [2018] IECA 364, the judgment cited by Baker J. in the Court of Appeal as authority for the proposition that establishing special circumstances does not mean that security for costs will inevitably refused, from the present proceedings on the basis that *Hedgecroft* concerned an unusual factual circumstance which does not apply here. Given the so called "atypical set of facts" in *Hedgecroft*, QIL argued that, in that case, the Court's discretion cannot be said to have been exercised simply because the claim would not be stifled in any event, nor should it be considered an authority for such a proposition.

6.10 QIL submitted that the effect of the Court of Appeal judgment is that, in cases where ordering security may stifle the claim, the stifling or non-stifling effect of an order for costs may become a potentially determinative requirement that has to be satisfied by a plaintiff in order to resist an order. QIL argued that this is in spite of the fact that a plaintiff cannot rely, as a special circumstance, on the fact that ordering security will stifle the claim. It was submitted by QIL that the approach adopted by the Court of Appeal will require the courts to determine not only whether the test in *Connaughton Road* has been satisfied, but also whether, by reference to the financial position of the plaintiff, the ordering of security at some percentage of the potential costs of the defendant will have the effect of stifling the claim.

6.11 QIL identified three practical consequences which might arise from adopting this approach which, it submitted, will negatively impact on applications for security for costs. First, QIL argued that it will not be possible for the courts to determine whether, as a matter of

principle, security should be ordered before determining the quantum of security because it is not possible to express a view on whether an order for security would stifle a claim, and therefore on whether security should be ordered at all, unless the level of security to be provided is known. Second, it was contended by QIL that the question of whether the ordering of security will stifle a claim will necessarily involve an analysis of any potential avenues by which the plaintiff could obtain the financial resources to put up security, including a review of the financial position of both the company and its shareholders and/or a consideration of whether it would be possible for the company to borrow money from a financial institution or raise a bond. Having to address these possibilities will, it was submitted, increase the complexity, length and cost of security for costs applications. Third, QIL contended that the stifling criterion has the potential to become not just *a factor* in the exercise of the Court's discretion, but *the determinative factor*, undermining the established sequential test for security. It was submitted by QIL that, if a plaintiff identifies the level of security which it can provide without stifling the claim, security will be fixed at that level, notwithstanding the establishment of special circumstances.

6.12 Furthermore, QIL took issue with a number of the factors which were considered by the Court of Appeal in reaching its conclusion that, despite QIL having established that is inability to pay costs *prima facie* stemmed from PwC's wrongdoing, security for costs should nonetheless be ordered. In addition, QIL argued that certain of the findings set out in the judgment of the Court of Appeal contain factual assumptions which are said not to be borne out in the evidence. QIL submitted that, contrary to what is said in para. 86 of the Court of Appeal judgment, it never accepted the estimated total costs figure of €30 million and that the Court of Appeal therefore erred in describing this figure as "agreed". QIL also contended that there was no evidence as to what extent individual partners in PwC might be personally liable for costs and that, for this reason, the Court of Appeal should not have had regard to this factor.

6.13 QIL further disputed the Court of Appeal's finding that it would be "intrinsically unfair" if PwC had to bear the risk that it could not recover its costs from QIL. It was submitted by QIL that this is the risk which underpins the approach of ordering security where a defendant makes out a *prima facie* case that a plaintiff would be unable to meet an order for costs and also establishes that it has a *prima facie* defence. Where a special circumstance is established, as it was in this case, QIL argued that this provides the countervailing consideration which means that it is no longer regarded as being unfair that the defendant should bear that risk.

6.14 Finally, QIL argued that the Court of Appeal should not have proceeded on the assumption that the proceedings would not be stifled with the result that making an order of security for costs would not create a form of injustice to QIL. It was submitted by QIL that, in order to determine whether it was possible that security could be put up by a plaintiff or whether alternatively the proceedings would be stifled, the court must first ascertain the amount of the security which would need to be provided. QIL submitted that the amount of security to be provided was not addressed in the present case, nor was it the subject of evidence from QIL, because it was not a factor that had previously

been identified as relevant to the assessment of whether security for costs should be granted in the first place. On this basis, QIL argued that the Court of Appeal erred in concluding, without having first determined the amount of security, that the claim in the present litigation would not be stifled.

6.15 In response to QIL's submissions, PwC submitted that the judgment of the Court of Appeal does not in fact create a requirement that a party resisting an order for security must satisfy the court that the ordering of security would result in the stifling of the plaintiff's claim. Rather, PwC argued that, where it clear that an order for security will not stifle proceedings, the court may consider that this fact can allow the Court to exercise its discretion in favour of ordering security in a suitable case. PwC submitted that the Court of Appeal was correct in determining the present litigation to be such a suitable case and, therefore, correctly decided to exercise its discretion in favour of making an order for security. PwC, in addition, suggested that it is appropriate to consider whether an order for security for costs would stifle a plaintiff's claim in order to properly balance that plaintiff's right to have its claim litigated with a defendant's right to its costs if it succeeds.

6.16 PwC also contested QIL's submission that the Court of Appeal's decision to make an order for security, notwithstanding the establishment of special circumstances, is not supported by any authority. PwC cited a number of authorities which it submitted supported the approach taken by the Court of Appeal, including *Hedgecroft*, which, PwC argued, sets out a general principle, relating to the discretion of the courts to order security, based on whether such an order is "fair or proportionate in all the circumstances". PwC submitted that this principle is overriding and applicable in all cases, despite the atypical factual circumstances arising in *Hedgecroft*.

6.17 PwC also cited a number of English authorities which it argued support the decision of the Court of Appeal to order security. These include *Keary Developments Ltd. v. Tarmac Construction Ltd.* [1995] 3 All ER 534, in which the Court of Appeal of England and Wales held that a court should consider not only whether the plaintiff company concerned can provide security out of its own resources but also whether the company could raise the amount needed from its directors, shareholders or other backers. PwC submitted that precisely such a scenario arises in the present litigation and submitted that QIL has a wealthy backer, but one who will not be required to make provision for the payment of costs to PwC, should the proceedings fail, unless QIL is compelled to provide security.

6.18 In response to QIL's submission concerning the undesirable practical consequences which would allegedly arise from the approach adopted by the Court of Appeal in relation to the non-stifling effect of the order for costs, PwC submitted that these submissions are centred around a false premise. In contrast to QIL's submissions, PwC submitted that the effect of the Court of Appeal judgment is not to impose additional requirements on the courts beyond determining that the test in *Connaughton Road* has been satisfied. Rather, PwC argued that the judgment means that the courts, as part of the exercise of their

discretion, may consider the fact that a requirement for the provision of security will not stifle the claim.

6.19 In this regard, PwC argued that the Court of Appeal judgment will not require the courts to determine the quantum of security before determining whether security should in fact be ordered because, in the present litigation, the Court of Appeal reached such a determination before the High Court has determined the quantum of security and QIL does not dispute the likelihood that, if so ordered, it will provide security. Furthermore, PwC argued that the Court of Appeal judgment will not alter the courts' field of enquiry by requiring an analysis of the potential avenues, including third parties, by which the plaintiff could obtain the financial resources to put up security, because the courts are already fully entitled to see if security may be funded by third parties. PwC also contested QIL's submission that a stifling criterion would become *the determinative factor* in the exercise of the courts' discretion, arguing that the courts' primary consideration will always be to "advance the ends of justice" by balancing the interests of the plaintiff and the defendant "in a fair and proportionate manner".

6.20 In response to QIL's argument that there was a lack evidence presented to the Court of Appeal to demonstrate the liability of individual partners for the costs of the proceedings, PwC submitted that the entitlement to security cannot depend on the fortuitous circumstance of insurance, its limits of indemnity, the size of any excess, or policy conditions that might be relevant.

6.21 Furthermore, PwC argued that the logical consequence of QIL's argument that the Court of Appeal was incorrect in concluding that it would be "*intrinsically unfair*" for PwC to bear all of the risk on costs, is that once special circumstances are demonstrated, security cannot be ordered. This, PwC submitted, is inimical to the exercise of the courts' discretion, which is "to advance the ends of justice, not to hinder them".

6.22 PwC noted QIL's criticism of the Court of Appeal judgment for concluding that requiring security will not stifle QIL's claim and submitted that the basis for the Court's conclusion on this point is the fact that there was a lack of evidence, both in the affidavits adduced on behalf of QIL and in oral arguments made before the Court, that the making of an order that security be provided for the costs of PwC would, or could, stifle the claim of QIL. PwC avers that, at no stage in the present application, has QIL suggested that it would not be possible for the claim to be pursued if an order for security for costs was made.

6.23 Finally, in respect of the second issue, in response to QIL's submission that, where a plaintiff has established special circumstances, the jurisdiction of the High Court to order the mode and amount of security cannot be a factor on foot of which a court should order security, PwC submitted that this argument is without merit and that there is no inherent flaw in a court considering such a factor to be relevant.

6.24 With respect to the third issue, concerning the existence of a point of exceptional public interest which would constitute a special circumstance such as to justify the refusal of an

order for security for costs, QIL submitted that the Court of Appeal erred in the application of the relevant principles to these proceedings.

6.25 It was argued by QIL that, in order to establish the existence of this special circumstance, a plaintiff is not required to demonstrate that the proceedings are brought to vindicate the public interest. Rather, it is said, the justification is that the proceedings in question provide a public forum in which questions of acute public interest can be resolved. In support of this submission, QIL referred to a number of authorities in which an order for security for costs was refused in what QIL describes as "essentially private litigation".

6.26 These include *Comcast v. Minister for Communications* [2014] IEHC 18, which related to allegations of corruption in high office in association with the award of a mobile telephony licence, in which the High Court considered the matter to be one of high public controversy and *Dublin Waterworld Limited v. National Sports Campus Development* [2014] IEHC 518, where the plaintiff alleged wrongdoing by the defendant public authority in pursuing an unmeritorious VAT-related claim against the plaintiff, where the High Court found that there was a public interest in ensuring the accountability of a publicly-owned body in the public forum offered by the courts. In *Murphy Concrete (Manufacturing) Limited v. Newlyn Developments Limited* [2015] IECA 294, the plaintiff developers alleged that infill supplied by the defendant for use in the construction of a large number of houses was contaminated by pyrite, causing damage to the houses and exposing the plaintiffs to liability. There, the Court of Appeal upheld the ex tempore decision of Kearns P. in the High Court (Unreported, High Court, Kearns P., 7th June 2013) refusing security for costs in light of the "multiplicity of house owners affected and the range and scope of the claim".

6.27 QIL contended, as was previously argued before the lower courts, that these proceedings raise questions of acute public interest, namely in relation to the socialisation of the losses which resulted from QIL's collapse and the role of an insurer's auditor within the regulatory system, referring to the auditor's obligations in the Insurance Act 1989 and the 1994/1995 Regulations to which reference has been made. It was submitted that there is a public value in having these matters resolved by the courts in a public forum, so as to maintain public confidence in the insurance industry and identify any need for reform in the present system of insurance regulation.

6.28 In light of those interests as outlined, QIL submitted that the Court of Appeal erred in its conclusion that the interests pursued in this litigation are "wholly commercial" and suggested instead that they are broad and public in nature such as to justify the refusal of a security for costs.

6.29 Finally, QIL maintained that the test of general public importance, as employed by this Court when considering an application for leave to appeal to the Court, is of relevance to the test to be employed by the courts when considering an application for security for costs and disputes the conclusion of the Court of Appeal in that regard.

6.30 In response, PwC submitted that the matters of exceptional public importance put forward by QIL are not sufficient to reach the high threshold said to be required by the authorities, and it disputed the analogy which QIL sought to draw between the test of general public importance as applied by the Supreme Court in its determinations of leave applications and the test which is to be applied in applications such as this. Further, PwC argued that the authorities referred to by QIL in support of its submissions can be readily distinguished from the present proceedings in that they each involved unique facts which do not feature in this case.

6.31 Regarding the fact that the losses resulting from QIL's collapse are ultimately to be borne by the public, PwC made three submissions. First, it was said that issues of exceptional public importance do not arise merely because of the involvement of a public body, as any litigation involving any public body will have implications on funding from the Exchequer. Second, it was pointed out that these proceedings are not directly connected to the 2% levy which was imposed on insurance customers in the State. Finally, PwC argued that the quantum of QIL's losses is not sufficient to give rise to a matter of exceptional public importance, as the losses, it was submitted, were correctly described by the Court of Appeal as "wholly commercial".

6.32 In relation to the role of an auditor in the regulation of the insurance industry, PwC submitted that, as the regulator of QIL is not a party to proceedings, the Court of Appeal was correct in its finding that "the lessons, if any, to be learned by the regulatory system, the Financial Regulator, or other bodies responsible for regulation are not to be learnt in this litigation, but in proceedings where the various regulatory bodies are parties".

6.33 Further, PwC submitted that it did not, at any stage, have a role in the regulation of QIL and argued that the reports submitted to the Financial Regulator under s. 35(1) of the Insurance Act 1989 in February, May and June 2008 were not binding on the Regulator. In addition, PwC argued that the mere imposition of a statutory duty on a private entity should not give rise to an issue of exceptional public importance, nor should it effectively transform that entity into a public regulator.

6.34 Before going on to consider the specific issues which arise in the circumstances of this appeal, it seems to me to be useful to make some general observations on the state of the law concerning security for costs in a corporate context. I, therefore, turn to those observations.

7. The General Approach

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.

7.2 While not in issue in these proceedings, I would emphasise that it is important for a court, faced with an application for security for costs, to scrutinise carefully the basis on which the defendant applying for security seeks to establish a *bona fide* defence. One of the consequences of the making of an order for security may be that the proceedings will not go ahead. While such an eventuality is an inevitable possibility of the security for costs regime, it does mean that a potentially good claim might not be prosecuted in the event that security is ordered. It is not unreasonable to require a defendant in such circumstances to put forward its defence in sufficient detail to enable the Court (and, indeed, the plaintiff) to scrutinise the extent to which a *bona fide* defence has truly been established. 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.

7.3 That being said, the question on this appeal does not centre on the issues where the onus lies on the defendant but rather whether the plaintiff has established special circumstances. The special circumstances concerned involve two of the most common headings in that regard being first a contention that the plaintiff's impecuniosity is *prima facie* due to the wrongdoing alleged and second that the public interest requires the proceedings to go ahead without security being ordered.

7.4 Before addressing those two headings of special circumstance, I consider it appropriate to make some general observations on the rationale behind the statutory regime which permits an order for security for costs to be made in an appropriate case. There can be little doubt that the costs of participation in civil proceedings in common law jurisdictions significantly exceeds that which is likely to pertain in the civil law world. While there may be a range of reasons which may explain that distinction, it seems clear that a much greater burden lies on the parties, as opposed to the Court, in carrying out research both in relation to the facts and the law. In certain types of cases the burden of making discovery can also play an important part. At the end of the day there is certainly a transfer of costs from the State to the parties with the State having to expend significantly lower sums on maintaining its civil justice system in a common law jurisdiction as opposed to one of the civil law.

7.5 However, the fact that costs are high brings with it its own problems. There can, of course, be issues concerning the ability of parties to bring proceedings in circumstances where the nature of the claim which might be brought is such that a party could not be reasonably be expected to mount the litigation themselves. Such matters have been touched on in recent judgments of this Court including *Persona Digital Telephony Limited & anor v. Minister for Public Enterprise & ors*. [2017] IESC 27. However, access to justice not only applies to those who might wish to bring a claim before the courts. Defendants are entitled to access to justice as well. A defendant has no choice about being sued. However, just as the cost of bringing certain types of proceedings may prove a barrier to those who might have a good claim being able to vindicate their rights, so also can the cost of defending proceedings be a barrier to the rights of defence and the ability of

parties sued to vindicate their right to have the claim determined by a court of competent jurisdiction on the merits or at least not to be forced to compromise the case on a skewed basis because of their exposure to costs.

7.6 All parties, whether natural persons or corporate, do, of course, have to have regard to the cost of proceedings in reaching any assessment as to the merits of bringing a claim, of defending it, or as to the basis on which it may make sense to compromise.

7.7 However, the position of an impecunious corporate plaintiff brings with it additional difficulties. In such a case, a defendant not only has to take into account the ordinary factors which any litigant must evaluate but also has the additional difficulty that, even if the proceedings are successfully defended and an order for costs made in its favour, there will be no prospect of recovering those costs. It must, of course, be also acknowledged that similar problems can be encountered by defendants sued by impecunious natural persons. There are, however, it seems to me, significant differences between the position of an impecunious plaintiff who is a natural person and an impecunious corporate entity. First, and importantly, the impecunious plaintiff who loses the case and has costs awarded against him or her nonetheless will have an adverse costs order in place and will in practice potentially be liable for those costs should their financial fortunes change during any relevant limitation period. Second, it may be possible for the defendant to at least recover some of their costs (subject to the financial position of the plaintiff concerned) including by the utilisation of various procedural devices designed to arrange for periodic payments. There is, therefore, at least some prospect of an at least partial recovery of any costs awarded in favour of a successful defendant in such cases and also a risk to the unsuccessful plaintiff that their financial position may not be clear for quite some time after the proceedings have completed. These considerations will hardly ever apply in the case of an impecunious corporate plaintiff which is likely to be liquidated should it fail in its proceedings or, perhaps, left to wither on the vine if there is little perceived benefit in liquidation. In those circumstances, the prospect of any recovery of costs by the defendant will be very small indeed and there will be no continuing financial risk for stakeholders in the corporate entity concerned.

7.8 It seems to me that these risks are as weighty a consideration concerning access to justice as that which applies to the position of a plaintiff. Such a defendant can suffer a significant injustice if forced to expend considerable money in defending proceedings without any prospect of recovering those costs, even if the defence should prove successful. Such an eventuality operates as a barrier to access to justice for that defendant just as much as the costs of bringing proceedings or the requirement to put up security for costs may act as a barrier to justice for an impecunious plaintiff. If we knew what the result of the case was going to be, none of these problems would arise. However, the very difficulty which the jurisprudence in respect of security for costs seeks to address is that the application for security must, at least initially, logically be made at or near the beginning of the proceedings and thus at a time when it will not normally be practicable to form any detailed view as to the merits of each side's case. If certain aspects of the civil justice review recently published, arising from the work of a committee

chaired by the former President of the High Court, Mr. Justice Kelly, are implemented it may be that, at least in some types of cases, a clearer view of the merits may be capable of being formed at an earlier stage. However, at the end of the day, security for costs applications, such as other procedures including interim and interlocutory injunctions or stays, involve a court attempting to do justice at a time when it will not be possible to form any strong view as to the merits or otherwise of the claim brought and where putting in place procedures to allow a much stronger view on the merits to be taken at that time would be self-defeating for they would add to the complexity and thus the costs of such interlocutory application.

7.9 It seems to me that this analysis should inform the proper approach to the jurisprudence concerning special circumstances. Why is it that the default position is that security should be ordered if the defendant establishes both a *bona fide* defence and what I describe as the impecuniosity of the corporate plaintiff? In those circumstances the balance might be described in the following way. If the plaintiff puts up security and wins, then the security will be returned. The plaintiff will have been at the loss of whatever security has been put up for a period of time. That detriment cannot be ignored but it is nonetheless different in character to the loss which would be suffered by a defendant if security is not ordered. In the latter case, should the defendant succeed, the defendant will be at the permanent loss of whatever expense was incurred in defending the proceedings, as those expenses are likely to prove irrecoverable. It is easy to see how, ordinarily, the balance of justice in such circumstances might be said to favour the grant of security. However, that analysis assumes that the plaintiff can or will put up the security. There is, of course, the other important factor that the plaintiff may not be able (or may be unwilling) to put up security. It will be necessary to return to this aspect of the balance in due course.

7.10 I have used the term impecuniosity in relation to the type of plaintiff against whom an order for security for costs might potentially be made so as to distinguish such a corporate entity from one which may be insolvent. The relevant test is that it must be demonstrated by the defendant that the corporate plaintiff concerned would not be able to pay costs in the event that the proceedings are unsuccessful and the defendant is awarded its costs. A plaintiff does not necessarily have to be insolvent for it to be in such a position. To take but the simplest example, it is only necessary to consider a company established with only nominal share capital. If that company has no liabilities, then it will not be insolvent but it clearly would be wholly unable to pay any costs awarded against it. It will be impecunious but not insolvent.

7.11 On the other side, it is possible to envisage a company which is insolvent but would ultimately be able to pay costs should they be awarded. A company which is unable to pay its debts as they fall due may well find itself committing an act of insolvency but there may be reason to believe that it would be able, nonetheless, to pay costs should it lose and have an award made against it. It might, for example, have non-cash assets which would be likely to be capable of being realised in time to pay any costs award but

not in time to pay its debts as they fall due in circumstances where its borrowings are at their limit.

7.12 Furthermore, many companies in liquidation do have cash available, albeit in insufficient sums to meet all of the liabilities to creditors of one sort or another. In such a case a liquidator may have to consider whether it is appropriate to deploy some of that cash in mounting proceedings on the basis of an assessment that the better advantage to the creditors might be achieved by bringing the proceedings and thus potentially increasing the funds available for distribution. In a case where security for costs was ordered against such a company, the liquidator would also need to factor in the potential loss of whatever sum had to be put up as security in any such overall assessment. However, it is important to emphasise that natural persons and wealthy companies also frequently have to make such assessments before commencing proceedings. How much will it cost to run the case? What would the exposure be to the costs of the other side should the proceedings fail? What is likely to be gained if the proceedings are successful and, importantly, what are the chances of success? That type of assessment has to be made in almost any case and a liquidator of a company which has sufficient cash to mount proceedings and provide security for costs is really faced with no different an equation than the management of a wealthy company or a private individual who would be a mark for costs should they bring proceedings which failed. It is for reasons such as those which I have sought to analyse that I consider that the term "impecuniosity" better describes the situation of the type of corporate plaintiff who would not be able to pay costs should they be awarded against the company concerned. As pointed out, such an impecunious plaintiff is *prima facie* liable to have an order for security for costs made against it subject to the defendant being able to establish a *bona fide* defence.

7.13 There can, however, be countervailing factors which shift the balance that ordinarily arises. The reason why it is said that security should not be ordered, where a special circumstance arises if the defendant can demonstrate, on a *prima facie* basis, that its impecuniosity was arguably due to the wrongdoing of the defendant in respect of which the claim was brought, stems from the obvious injustice of a defendant being potentially in a position to prevent a good claim being brought where it is arguable that the plaintiff concerned had not the resources to demonstrate that it could pay costs if awarded because of the very wrongdoing which lies at the heart of the claim itself. Indeed, the reason why the jurisprudence also recognises a public interest special circumstance is that there may be cases where there is an overriding public interest in the proceedings going ahead. It will again be necessary to return to this point in due course.

7.14 However, returning to the special circumstance which may be established if inability to pay costs can be shown, *prima facie*, to be due to the alleged wrongdoing, two important questions of principle seem to me to arise. The first is as to the extent to which the Court can or should inquire into whether ordering security will, in fact, make it unlikely that the proceedings will go ahead. It is sometimes said that there is a difference between the Irish jurisprudence and that of the courts of England and Wales on this question. There can be little doubt that the question of whether the proceedings will in fact be stifled is a

matter taken into account in England and Wales. For example, in *Keary Developments Ltd. v. Tarmac Construction Ltd*. at paras. 539-540, Peter Gibson LJ. in the Court of Appeal of England and Wales observed that:-

> *"[539] Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled…*
>
> *[540] … the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons."*

This passage was later cited by the Court of Appeal of England and Wales in *Olympic Airlines SA (In Liquidation) v ACG Acquisition XX LLC* [2012] EWCA Civ 1659, in which the Court decided to make an order for security for costs against an impecunious plaintiff on the basis that such an order would not stifle the appeal. Likewise, in *Calltel Telecom Ltd & Anor v HM Revenue & Customs* [2008] EWHC 2107 (Ch), Briggs J., in the High Court of England and Wales, made an order for security for costs against Calltel, despite finding that its inability to pay was attributable to the disallowance by HM Revenue of a tax credit that had been claimed by Calltel. Briggs J. held that that the order would not stifle the claim, as one of Calltel's shareholders could afford to put the company in sufficient funds to provide the security, meaning, in his view, that no injustice would arise from ordering security.

7.15 It is argued that the Irish jurisprudence does not recognise the relevance of such a factor. That view is sometimes traced to the judgment of Keane J. in *Lismore Homes (in receivership) v Bank of Ireland Finance Ltd* [1992] 2 I.R. 57 at p. 63 where the following is stated:-

> *"Section 390 of the Act of 1963 expressly envisages that an impecunious plaintiff company may be required to give security for costs and it may well be that in many cases this will mean the end of the action, unless someone other than the company itself is prepared to put up the security. To refrain from granting an order for security, save in the exceptional circumstances already referred, simply because it might have the effect of stifling the plaintiff companies' action would be to render the section nugatory."*

7.16 It does not seem to me that the passage in question says anything more than that the fact that the proceedings may not go ahead if security is ordered cannot be regarded as being necessarily decisive for, as is pointed out by Keane J., if that were to be so there would be little practical benefit of the section. However, the passage does not necessarily go so far as to say that the Court may not, in an appropriate case and dependant on all the circumstances, have some regard to the question of whether the proceedings will actually go ahead if security is ordered.

7.17 There are arguments of both practicality and principle which cut both ways on this important issue. Against the Court taking into account the likelihood or otherwise of the proceedings being stifled if an order for security for costs is made, it can be said that it might potentially involve difficult issues arising on many security for costs applications, which could both prolong the process and add to the costs of the litigation itself. By definition, the corporate plaintiff does not have the money itself. If it could show that it did have the money, then there would be no basis for ordering security in the first place. It follows that, if security is ordered, and assuming that the security is in the form of a cash lodgement or the like (an issue to which I will return), then some third party will have to put up the money. But how is it to be judged whether there is such a third party who might put up the money and whose refusal to advance the money might be considered to be relevant to the balance of justice? It would be necessary to inquire into potential sources of funding such as borrowing, money being advanced by shareholders or creditors or, indeed, a form of third party funding which does not breach the law of maintenance and champerty, being where a third party in substance buys into a cause of action by becoming a shareholder in the company which has the benefit of the cause of action concerned.

7.18 It will always be easy for a plaintiff company to say that it does not have the money and cannot get it. That in turn would necessarily lead to some level of inquiry as to the efforts which might have been or could be made to secure sufficient funding to put up whatever security might be offered. A further refinement on those difficulties stems from the fact that there might be questions as to whether it would be possible to take a definitive view on such questions without knowing the amount of the security ultimately likely to be ordered. Each of the potential sources of funding to which I have referred, and doubtless others, may well be dependent on the funder concerned taking a view as to the likely chances of success of the proceedings and assessing how much funding they are prepared to put up based on that view, coupled with the likely damages or other beneficial relief which might be achieved should the proceedings prove successful. As already noted, such are the types of question that almost any party to proceedings will have to ask themselves, being is it worth the cost of going to court and risking an adverse costs order if losing, in order to achieve what might be gained by success? For example, a preferential creditor might take the view that it was worth putting up some funding to allow a claim to be brought where it was clear that it would be that preferential creditor who would principally benefit if the claim is successful. Just how much the preferential creditor might be willing to put up would depend both on a view as to the chances of success and how much money would be gained for the preferential creditor in the event of the proceedings succeeding. Similar considerations might arise in the case of shareholders or others in appropriate cases. But it does have to be taken into account that many of these matters would have to be gone into, perhaps in some detail, if the Court were to take into account the likelihood of the proceedings actually being stifled if an order is made.

7.19 On the other hand, there is the question of how the plaintiff company is likely to fund its own costs of the proceedings. In some cases, perhaps less complex, it may be possible

to find lawyers who are willing to take the case on a so-called "no foal no fee" basis, so that the lawyers concerned take the risk that they will not be paid unless the proceedings are successful and an order for costs obtained against a defendant capable of meeting that order. But, in other cases, some form of funding may have to be provided to the impecunious company to enable it to run its own case. Certainly in such cases there is an argument that it is unjust that a third party (be it shareholder, creditor, investor or any other with a legitimate interest) can put up their own money to fund proceedings on behalf of an impecunious corporate plaintiff with a view to benefiting if the proceedings are successful, while at the same time leaving the defendant with potentially no recourse in respect of their costs should the proceedings be successfully defended. This situation is further complicated by the recent jurisprudence of this Court in *Moorview Development Limited & ors v. First Active Plc & ors* [2018] IESC 33, which makes it clear that there is a jurisdiction to award costs against a third party funder in certain circumstances. It follows that a defendant who successfully sees off proceedings brought by an impecunious plaintiff company may have some recourse if it can be shown that the proceedings were funded by a third party funder against whom a *Moorview* costs order could be made.

7.20 In all of those circumstances, it does seem to me that there is at least some merit in considering the overall approach adopted in other cases (such as applications for interlocutory injunctions) where it is necessary to make a decision on limited information at an early stage of the proceedings and where it is clear that there is some risk that injustice on one side or the other will be an unavoidable consequence of the decision made. In those circumstances, it has been said in some of the injunction cases that a court should attempt to fashion an order which minimises the risk of injustice all round. It does seem to me that a similar broad approach is appropriate in the context of applications for security for costs. The simple black and white situation where security in cash for the full sum is either awarded or no security is put in place does not necessarily, and in all cases and in all circumstances, have to represent the only binary choice.

7.21 In an appropriate case it may, for example, be sensible for the Court, where the proceedings are likely to be very expensive and protracted, to direct security on a phased basis so that the matter can be reviewed from time to time in light of developments in the case. Likewise, there may be circumstances where ordering security in the form of an indemnity from those who can be shown to be likely to benefit should the proceedings be successful may be an appropriate form of security even where those persons might not necessarily be a mark for all of the costs which might be awarded. To take but a simple example, if it were the case that an individual could bring proceedings without having to give security for costs, where is the injustice to a defendant if a corporate vehicle of that same individual, which was impecunious, could bring similar proceedings with the benefit of an indemnity from the individual in respect of the costs which might be awarded against the impecunious corporate vehicle should the defence succeed. Such a defendant would be no worse off than were it sued by an individual in exactly the same circumstances. These are matters which a court should consider in attempting to minimise the overall risk of injustice. That being said, it should also be recognised that failing to provide full security does expose a defendant to the almost certain consequence

that a successful defence of the proceedings will nonetheless leave that defendant with irrecoverable costs and thus a significant detriment. I would consider, therefore, that the default position should continue to be that full security in monetary form should be provided but that the Court may depart from that position if it considers it necessary and appropriate so to do to minimise the risk of injustice across the board.

7.22 It seems to me that this approach is consistent with the change in wording between s. 390 of the Companies Act 1963 and s. 52 of the Companies Act 2014. S. 390 of the 1963 Act provided:-

> *"390.—Where a limited 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 defence, require* ***sufficient*** *security to be given for those costs and may stay all proceedings until the security is given."*

(Emphasis added)

The wording of the above section was amended slightly in s.52 the 2014 Act to remove the word "sufficient", so that the section now provides:-

> *"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."*

7.23 On the broader question of whether it is appropriate for the Court, at least in certain cases, to have regard to the likelihood that ordering whatever security may be considered appropriate may actually stifle the proceedings, I am influenced by the potentially significant consequences of both the making and the refusing of an order of security. The making of an order runs the risk that a good claim may actually be stifled. The refusal of the order runs the risk that the defendant's right of defence may be materially compromised. Both of these are significant considerations which lead me to the view that the Court should err on the side of greater inquiry and should thus place at least some weight on an assessment of the extent to which ordering an appropriate form of security may actually stifle the claim.

7.24 On the basis of that analysis, it seems to me that it is appropriate to characterise the overall approach as being one where the Court should attempt to adopt the course of action giving rise to the least risk of injustice while recognising, for the reasons already set out, that there will inevitably be some risk of injustice no matter what course of action the Court determines on. Where, in accordance with *Connaughton Road*, the Court is satisfied that an appropriate *prima facie* case has been made out to the effect that the

inability of the plaintiff to pay costs should it lose is due to the wrongdoing alleged, then that fact by itself will ordinarily tip the balance of justice against the making of an order for security for costs. The overriding injustice in such a case stems from the fact of a plaintiff being at risk of not being able to maintain a good claim in circumstances where there is an arguable basis for asserting that the impecuniosity of the plaintiff concerned is due to the wrongdoing in respect of which the very proceedings are brought. The risk of that injustice occurring outweighs any potential risk of injustice to the defendant concerned. I will turn shortly to an analysis of the standard to which a plaintiff wishing to avail of that special circumstance must adhere in order to obtain the benefit of that more or less automatic defence to an application for security for costs.

7.25 However, even if the full *Connaughton Road* special circumstance is not established, it does not seem to me that that is the end of the matter. Thereafter the Court can also consider whether the proceedings would in fact be stifled and, in so doing, will have to analyse any assertion put forward on behalf of the plaintiff concerned that it would not be in a position to put up security should it be ordered. I will also return to the proper analysis of that question in due course. It does, however, seem to me that there are, in effect, two stages to the process. The first is as to whether inability to pay costs should they be awarded has, on a *Connaughton Road* basis, been shown *prima facie* to be due to the wrongdoing alleged. If so, then security should not ordinarily be ordered. If not, then the Court should enter into an inquiry as to the likelihood of the proceedings actually being stifled if an order is made and take the result of that analysis into appropriate account in its overall assessment.

7.26 I now return to make some general observations about the *Connaughton Road* jurisprudence. It is true that *Connaughton Road* itself concerned a claim by a company which only had a single purpose and where it was, therefore, necessary to show that there was some reality (even on a *prima facie* basis) to the contention that the party concerned could have met a costs order were it not for the relevant wrongdoing. Just as I have emphasised that it is important for the Court to carefully scrutinise the question of whether the defendant truly has a *bona fide* defence (including, in appropriate cases, just how far that defence might go in meeting the plaintiff's claim), so also is it appropriate for the Court to carefully scrutinise the proposition put forward on behalf of a plaintiff to the effect that there is a good *prima facie* basis for suggesting that, but for the alleged wrongdoing, the plaintiff concerned would be in a position to meet an adverse costs order. It seems to me to be again appropriate to comment that it is for the plaintiff to put up whatever evidence it wishes in that regard. It is not for a defendant to "raise particulars" about the evidence but it is open to a defendant to seek to persuade the Court that the evidence is inadequate. Mere assertion is certainly impermissible. Whether some level of even limited expert evidence may be required is a matter which will depend on the circumstances of the individual case.

7.27 There are undoubtedly proceedings where it would be impossible for the Court to reach any sustainable conclusion on the extent of the position in which the plaintiff might have found itself were it not for the relevant wrongdoing without some expert testimony.

While it may be true to say that the exercise is not a purely mathematical one, I do think there is a danger in failing to recognise that mathematics do form a central role. The reason is obvious. Whether a plaintiff has the money to provide for an adverse costs order is a mathematical exercise. It is one which involves estimates and will rarely be capable of exact calculation, but its fundamentals are essentially based on sums of money. Likewise, the position in which the plaintiff might have been were it not for the wrongdoing is essentially a mathematical exercise. Again, it is one which may well involve estimates and may not be capable of exact calculation. It remains the case, however, that it is still broadly a numerical exercise.

7.28 In *CMC Medical*, Hogan J. questioned whether an overly rigid application of *Connaughton Road* might be a breach of the right of access to the Court. At para. 10 of his judgment in that case, he remarked:-

> *"[10] The effect of this (the Connaughton Road) test appears to be that an impecunious plaintiff company may face an order for security for costs even where the plaintiff could demonstrate that it would otherwise have a good cause of action. If, for example, the company has a deficit of €40,000 and the costs of the proceedings have been estimated at €60,000, does this mean that it should face an order for security for costs under s. 390 of the 1963 Act unless in that example it could show that it is likely to recover more than €100,000 damages? I cannot help thinking that as the application of s. 390 of the 1963 Act in this manner could effectively stifle otherwise valid claims, the Connaughton Road test itself may have to be re-visited in the light of the constitutional considerations I have just mentioned."*

7.29 While acknowledging that the point identified by Hogan J. is a valid consideration, it is also open to the view that it fails adequately to acknowledge the potential interference with the right of defence which may arise where a court does not make an order for security for costs. It follows that I remain of the view, which I expressed in *Connaughton Road*, that it is necessary for the Court to analyse the basis put forward by the plaintiff for suggesting that it has *prima facie* established that its inability to meet a costs order was arguably due to the alleged wrongdoing. That exercise may not be capable, in many cases, of an exact mathematical calculation, not least because the application will be determined at an early stage in the proceedings when the Court will not have available to it all of the detailed evidence concerning losses which might become available at a trial. The Court will have to make estimates based on the evidence. But it remains an exercise which is fundamentally rooted in reasonable estimates about numbers, even if those numbers are not capable of exact calculation. It is also an exercise where a plaintiff seeking to rely on that particular special circumstance must itself decide just how much evidence it wants to put up and, inevitably, run the risk that, if it fails to put up sufficient evidence, the Court may not be persuaded that it has met the threshold of establishing the special circumstance concerned.

7.30 The question might be asked as to why it is necessary for a plaintiff seeking to establish the relevant special circumstance to show that its claim is, by itself, sufficient to make the

difference between being able to pay costs should it lose and not being in such a position. There is, of course, the problem identified in *Connaughton Road* itself which draws attention to the fact that both sides of the equation, as it were, are based on contradictory assumptions. In order to show, on a *prima facie* basis, that the plaintiff would have been able to pay costs were it not for the alleged wrongdoing, it is necessary to assume that the wrongdoing occurred and that the plaintiff will succeed. However, of course, the plaintiff would be only be obliged to pay costs should the claim fail. However, it seems to me that the answer to that conundrum stems from the fact that the Court is considering where the least risk of injustice lies against a potential background of a case where it is at least arguable that the impecuniosity of the plaintiff, on which the defendant relies in bringing the application for security, is due to the wrongdoing at the heart of the proceedings. However, for that injustice to be potentially present it does seem clear that the consequences of the wrongdoing must be shown, on a *prima facie* basis, to be sufficient to make the difference. Every plaintiff who has a *prima facie* claim for money will be able to demonstrate that at least some of its impecuniosity is potentially due to the alleged wrongdoing of the defendant. If that were to be sufficient then it would set at nought the regime for security for costs and would give rise to the potential for significant injustice to defendants which I have already sought to analyse. The balance is only tipped where it can be shown that, rather that the alleged wrongdoing only forming part of the shortfall giving rise the impecuniosity, it is arguable that it forms all of it.

7.31 However, insofar as there remains some validity in the point made by Hogan J. in *CMC Medical*, it seems to me that this is met by the introduction of the second leg of the test to which reference has already been made being an analysis of whether the proceedings will be truly stifled if an order for security is made.

7.32 It may be one thing if the Court is satisfied that there is no real way in which security, even of a limited variety, could be put up despite reasonable efforts having been made, but it is altogether a different thing if parties who might hope to benefit from the successful maintenance of proceedings simply take the view that they do not wish to risk putting up security. It might rhetorically be appropriate to ask the question of why such a person should be put into any better position than a well-resourced plaintiff who has to make exactly the same call as to whether it is worth pursuing proceedings in the light of all of the risks and potential benefits involved. If those who might hope to benefit by proceedings do not consider it worthwhile to take the risks inherent in putting up security (and assuming that there is reason to believe that they would be able to put up whatever security the Court considers appropriate) then why should they be in any better position that a wealthy corporate plaintiff who makes exactly the same decision.

7.33 In that context, it is appropriate to say a little more about the stifling question. It does seem to me to be incumbent on a plaintiff who puts forward a defence to an application for security for costs based on a special circumstance involving stifling to give the Court some reasonable detail as to whether the proceedings will actually be stifled. To avoid applications for security for costs becoming themselves a barrier to access to justice (which might occur if they come to involve excessively detailed considerations

themselves), I would again emphasise that it is for the plaintiff in such a situation to put forward whatever information they wish. It is not for the defendant to raise particulars or require additional information, although it will always be open to a defendant to criticise the extent of the information put forward. If a plaintiff does not put forward sufficient information the Court can reach whatever conclusions are appropriate. The fact that the Court may consider that the proceedings would be likely to be stifled if security is ordered is not a decisive factor but it must be taken into account in determining where the least risk of injustice lies. In some cases it may indeed prove to be an important factor.

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.

7.35 It is next necessary to consider how those general principles affect the proper resolution of this appeal.

8. Application to this Case

8.1 As noted earlier, the first question is as to whether the High Court and the Court of Appeal were correct to determine that the "impecuniosity due to alleged wrongdoing" special circumstance had been made out in accordance with the principles identified in *Connaughton Road*. The key point, it seems to me, is the acceptance that the full sum of damages claimed would not be sufficient to restore QIL to a position where it would be able to pay costs should they be awarded. I accept that there may be circumstances where a simple equation of that type does not properly reflect the true situation in the case. Anyone with experience of corporate recovery procedures such as examinership will be aware that certain companies suffer an additional shortfall in their assets by the very act of going into liquidation. Assets quite properly valued on a going concern basis may actually be a lot less valuable if they have to be sold. For example, plant and equipment, which is being depreciated at an appropriate level to reflect the fact that it may have to be replaced at a certain point in the future, may not actually have a sale value which is as much as the book value. Also the experience is that certain kinds of debts may be harder to recover in the case of a company which has ceased trading. Other examples could be given. It follows that there may be cases where it is arguable that a company would not have gone into liquidation in the absence of the wrongdoing alleged even though it may be possible that the damages which could be recovered would not be sufficient to make up the larger shortfall which has now emerged because of the liquidation itself.

8.2 However, it seems to me that a significant onus rests on a plaintiff in such circumstances to establish the real prospect that it could have avoided liquidation were it not for the wrongdoing sought to be litigated. A key question is as to why the shortfall between the

maximum amount of the claim made and the deficit in the company cannot itself also be recovered in damages if that shortfall is in fact due to the wrongdoing alleged. *Prima facie*, it would appear that a company which can only establish losses attributable to the alleged wrongdoing which fall short of its deficit cannot show that it would have remained capable of continuing in business if the wrongdoing had not occurred for there is, again *prima facie*, an underlying deficit which would have led to it being insolvent anyway. In passing I should note that QIL is, of course, in administration but the reason for that particular legal status (as opposed to liquidation) stems from the fact that it is an insurance company where public policy may require that the company continue in existence to provide cover for policy holders and can rely on the insurance fund to that end. However, for the purposes of the type of analysis with which I now concerned, it does not seem to me that there is likely to be any material difference between the proper approach to a company in liquidation, on the one hand, and an insurance company in administration, on the other.

8.3 The question that must be asked on the facts of this case is how is it possible to reconcile the contention that QIL could have avoided administration but for the alleged wrongdoing of PwC if all of the consequences alleged of that wrongdoing amount to a significantly lesser sum than the shortfall which it now experiences. For that to be so then there must have been consequences of the wrongdoing which are not reflected in the damages claim, for if all of the consequences of the wrongdoing are reflected in the damages claim then it is impossible to see how QIL could have avoided being significantly insolvent even had it not suffered the alleged wrongdoing.

8.4 There is a further aspect to the analysis which, in my view, needs to be considered. I indicated earlier in this judgment that it is appropriate that a court faced with an application for security for costs should carefully interrogate the contention of the defendant applying for security that there is a *bona fide* defence to the full claim. Putting its cards on the table in that regard is the price which a defendant must pay for seeking the benefit of an order for security. However, the same also applies to a plaintiff who seeks to rely on the "impecuniosity due to alleged wrongdoing" special circumstance. The Court must take a realistic assessment of the claim as made and assess whether there is any real possibility of the claim being allowed in full. If not, then a court will be required to take that factor into account in assessing the real possibility that the alleged wrongdoing provides a complete explanation for the impecuniosity of the plaintiff concerned.

8.5 I now turn to the evidence put forward on this point by QIL. This involved a number of averments designed to suggest that QIL would have remained solvent (and also in a position to meet any costs order that might arise) were it not for the alleged wrongdoing of PwC and notwithstanding the fact that the maximum amount of QIL's claim appears to be of the order of €200 million less that the shortfall which has now been identified in respect of the company.

8.6 It is said that QIL ended up paying €201 million in respect of certain guarantees which had been given. One possible scenario put forward is an assertion that it would have been possible to have had those guarantees released at no cost to QIL had the true state of the company been disclosed. Obviously the central allegation made by QIL against PwC suggested that it was due to the negligence of PwC that the true picture remained hidden.

8.7 In the alternative it is said that, if it had not proved possible to secure the release of the guarantees in question, then the difficulties which, it is argued, PwC should have identified would have led to both the board of QIL and the Regulator being informed with the result that actions would have been taken either by the board or imposed by the Regulator. In that context it is said that certain gifts made by QIL to other companies would not have taken place.

8.8 In addition, it would appear to be asserted that, even if the guarantees had been released, certain lesser sums of gifts would not have been made had PwC brought the true position to the attention of the board.

8.9 In essence it appears to be asserted that either a combination of the release of the relevant guarantees and action which would have prevented the making of certain gifts, or alternatively the non-release of the guarantees and similar action which would have prevented the making of gifts in a larger sum, would have improved the financial position of QIL by an amount in excess of €300 million. On that basis it is asserted that the putting of that significant sum back in to the calculations would lead to the view that QIL would be in a position to pay costs should they be awarded in that the sums concerned exceed the shortfall by in excess of €100 million.

8.10 There are a number of issues which need to be analysed in the context of the case as thus put forward. First, it seems to follow that QIL are not asserting that they are entitled to claim, in these proceedings, damages in respect of the sums amounting to over €300 million on which reliance is placed. There may very well be good reason why damages in respect of those sums are not claimed but it seems to me to require some level of engagement with that question for those sums to be properly taken into account. There may be an answer to this rhetorical question but it still needs to be asked. Why, if those sums can be said to have been lost by QIL as a result of the wrongdoing alleged against PwC, can they not be claimed?

8.11 In addition, it seems to me that the evidence put forward in respect of such sums is quite limited and does not afford any court considering same a real opportunity to critically assess the assertion that those sums should properly be taken into account in analysing the hypothetical counterfactual state in which QIL would have been, on a *prima facie* basis, in the absence of the wrongdoing alleged.

8.12 It is in the context of matters such as that that PwC argued that QIL's assertions in respect of those sums are speculative.

8.13 In my view, those explanations given as to how QIL could have remained as a solvent trading entity if the alleged wrongdoing had not occurred are very much at the speculative end of the spectrum. I am not satisfied that any sufficient evidence was given to meet what I have described as a heavy onus which lies on such a plaintiff to explain how there are unusual circumstances to justify the contention that it would nonetheless have been able to pay costs were it not for the wrongdoing alleged, but where, at the same time, the maximum quantification of its claim does not readily demonstrate that fact. When coupled with the fact that it would seem unlikely that the claim would be awarded in full, I have come to the conclusion that QIL have failed to establish the "impecuniosity due to alleged wrongdoing" special circumstance.

8.14 Before going on to the other leg of the test, being stifling, I would also make a small number of additional observations. I do not accept the point made by PwC to the effect that the Court should not have any real regard to the evidence tendered on behalf of QIL because that evidence came from an administrator who was, it was said, not, therefore, an independent expert. A court should assess that evidence on its merits having regard to all the circumstances of the case. I have found that evidence insufficient to meet the significant onus which I have identified but do not do so on the basis of the standing of the deponent.

8.15 Next, I would not take into account the potential personal exposure of the partners in PwC. I have emphasised that, at each stage of this analysis, parties are required to put their cards on the table if they want the Court to take a particular factor into account. No evidence was given as to the true exposure of the partners having regard to whatever insurance may be in place. In those circumstances, it is not a factor to which I would have attributed any weight. I appreciate that there may be reasons why parties may not wish to disclose certain matters such as insurance cover but, as I have indicated, a party who wishes to obtain the benefit of a very significant order in the shape of a requirement that its opponent put up security for costs, has to put its cards on the table. If it is not prepared to do so, then it must accept the consequences.

8.16 Turning then to the stifling issue, it is necessary to set out why it is said that the proceedings will not be stifled even if security is required to be put up. It seems clear that, at least to date, the insurance fund (in the light of orders of the President of the High Court) has been prepared to provide funding to allow QIL to discharge its own costs in progressing these proceedings to this point. It obviously does not follow that QIL has a blank cheque and it further does not follow that the President of the High Court would necessarily be prepared to put up additional funds in the shape of security for costs should same be ordered. However, it is clear that the President of the High Court would be able to make such an order if it was considered appropriate. However, in doing so, the assessment would be, as I have already analysed, similar to the one that would be required to be made by a wealthy corporate entity or, indeed, natural person. The cost of running the case, the risk of costs against if losing, the potential benefits and the chances of success would all have to be weighed in the balance to decide whether it made sense to take the risk. A similar analysis would be required to be taken by the President of the

High Court in order to decide whether it made sense to continue with these proceedings by providing the funding to put up security. It would, in my view, require a significant countervailing factor to allow a plaintiff, such as QIL, who has at least *prima facie* access to sufficient funds to put up security for costs, to be put in a better position than an equivalent wealthy corporate plaintiff. Looked at from the other side why, in those circumstances, should the defendant be put to the certainty of having to meet, without potential recourse, the substantial costs of defending these proceedings when the plaintiff is being funded to run them. If there were a sufficient case made out that the only reason why QIL was impecunious, in the sense in which I have used that term, was arguably due to the wrongdoing alleged against PwC, then the answer to that might be that there is a good reason. However, in the circumstances of this case, I am not satisfied that there is such a good reason.

8.17 Given that I have concluded that QIL have not made out the "impecuniosity due to alleged wrongdoing" special circumstance, it is also necessary to turn briefly to the public interest special circumstance. However, as noted earlier in the section of this judgment in which I sought to address the general principles applicable to applications such as this, it seems to me that the question of stifling is of central relevance to the public interest special circumstance. There was a significant debate between the parties as to the precise threshold of public interest which it is necessary for a plaintiff to demonstrate in order to avail of that special circumstance. However, wherever that threshold may lie, the underlying rationale for a public interest special circumstance is that there may be a sufficiently weighty public interest in the proceedings in question being determined by a court, such that the public interest concerned outweighs the individual interests of the parties. However, it clearly follows that the public interest concerned will only be interfered with if the proceedings are not going to go ahead. If the proceedings do go ahead, then the public interest will be met. It seems to me to clearly follow, therefore, that it is necessary for a plaintiff who seeks to rely on the public interest special circumstance to demonstrate that the proceedings are likely to be stifled if security is ordered. If the plaintiff cannot so demonstrate then it follows that there will be no interference with the public interest for the case will be likely to go ahead and the public interest requirement will thereby be satisfied. The public interest special circumstance is not a reason for imposing potential injustice on a defendant simply because there is a significant public interest in the case going ahead. The imposition of that risk of injustice on the defendant is only justified where there is a real risk that the proceedings will be stifled and thus the high public interest in the case going ahead will be defeated.

8.18 For those reasons, it seems to me that the analysis which I have conducted in respect of stifling under the "impecuniosity due to alleged wrongdoing" special circumstance heading applies equally in respect of the public interest special circumstance contention. For the same reasons, I am not satisfied that it has been demonstrated that these proceedings will be stifled and thus the public interest defeated. In those circumstances it does not seem to me to be necessary to decide whether the threshold for the public interest special circumstance has been demonstrated to have been met in this case.

8.19 It follows that I am not satisfied that either of the two special circumstances advanced on behalf of QIL have been demonstrated to exist. I would propose, therefore, that the order of the Court of Appeal be upheld and security directed although I do so on somewhat different reasons to those which found favour in the Court of Appeal.

8.20 I would not, in the particular circumstances of this very complex litigation, rule out the possibility that security might properly be ordered on a staged basis by reference to important milestones within the case such as the completion and delivery of discovery.

9. Conclusions

9.1 For the reasons set out in this judgment I have, therefore, concluded that the Court of Appeal was correct to hold that QIL should be required to put up security for costs. In reaching that conclusion I have set out in some detail my views as to the proper approach to an application for security for costs in a case such as this. In particular I have reiterated the views which I expressed in *Connaughton Road* concerning the proper approach to be adopted in a case where it is said that security should not be ordered because there is a *prima facie* basis for suggesting that the impecuniosity of the relevant plaintiff is due to the wrongdoing alleged. However, I have suggested that there may be a second stage to the consideration which the Court should give in such cases even where the test identified in *Connaughton Road* is not met. The Court should consider whether it is likely that the proceedings will be stifled and take the result of that consideration into account in assessing which course of action runs the least risk of injustice.

9.2 For the reasons set out in this judgment, I am not satisfied that QIL has met the *Connaughton Road* test. In addition, I have indicated the reasons why I do not consider that it has been established that there is any likelihood that the proceedings will be stifled. I have, therefore, proposed that the "impecuniosity due to alleged wrongdoing" basis for establishing a special circumstance should be rejected.

9.3 In addition, I have set out the reasons why I do not consider that the public interest special circumstance has been established on the facts of this case. I do so on the basis that it has not been shown that the proceedings would be stifled should security be ordered and that, therefore, any possible public interest in the proceedings going ahead will not be impaired.

9.4 I also offer some general observations on the way in which security may be provided in appropriate cases including, in complex cases, a staggered approach and, in appropriate cases, the possibility that a guarantee from the natural persons who might ultimately hope to benefit from a successful conclusion of the proceedings may be considered appropriate irrespective of the extent to which those individuals might or might not be in a position to meet the full extent of the guarantee should it be called on.

9.5 I should add that I fully agree with the observations set out in the judgement of O'Donnell J.

9.6 In those circumstances I simply propose that the appeal be dismissed and the order of the Court of Appeal affirmed.