THE COURT OF APPEAL

Neutral Citation Number [2020] 80
Record Number: 2019/323

Costello J.
Haughton J.
Ní Raifeartaigh J.

BETWEEN/

PROTÉGÉ INTERNATIONAL GROUP (CYPRUS) LIMITED

- AND -

AVALON INTERNATIONAL MANAGEMENT INC.

PLAINTIFFS/
APPELLANTS

- AND -

IRISH DISTILLERS LIMITED

DEFENDANT/
RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 2nd day of April 2020

Introduction

1. This is an appeal by the plaintiffs (hereinafter "the appellants") against the judgment and order of Barrett J. in the High Court ordering the appellants to provide security for costs, fixing the security in the discounted amount of €1 million and, in default of providing the security, staying the proceedings. He set out his reasons for the order in his judgment of 17 May 2019 ([2019] IEHC 322). The substantive proceedings involve a claim by the appellants that the defendant ("the respondent" herein) is abusing a dominant position in the Irish whiskey market.

Background

2. In 1999, Protégé International UK was established in England as a private limited company. Protégé International Group (Cyprus) Limited ("Protégé") was incorporated in Cyprus in 2011. It is pleaded that Protégé International UK assigned to Protégé all of the rights relevant to these proceedings.

3. It is pleaded that Avalon International Management Inc. ("Avalon") is a company limited by shares, incorporated in Panama. It is pleaded that in 2016, Avalon Group Inc. BVI assigned to Avalon all of the rights relevant to these proceedings. It is pleaded that Protégé is the exclusive sales agent in the European Union for Avalon.

4. Protégé designs and markets international spirits drinks brands and one beer. Several of these have won international awards. One such is "The Wild Geese" Irish whiskey, which is a premium Irish whiskey. Protégé does not distil whiskey. It obtains supplies of the relevant spirits from producers which it then bottles, brands and distributes.

5. Irish Distillers Limited ("IDL") is the largest producer and supplier of Irish whiskey on the island of Ireland. It is a subsidiary of Pernod Ricard S.A., which is a French company with a major worldwide presence in the spirit market and, in particular, the Irish whiskey section of that market. It produces whiskey which it sells through its own brands, of which Jameson is the leader, and other brands, and it sells whiskey to other producers.

6. If a whiskey is to be designated as Irish whiskey it must satisfy strict legal requirements. It must be distilled on the island of Ireland from a mash of cereals and then matured in wooden casks in a warehouse in the State, or Northern Ireland, for a period of no less than three years. If an undertaking wishes to bottle and sell Irish whiskey, they must either distil it themselves, or obtain it from those undertakings which distil and mature Irish whiskey on the island of Ireland.

7. The appellants plead that IDL enjoys the dominant position in the relevant market of the supply of Irish whiskey. They say IDL has abused its dominant position contrary to s.5 of the Competition Act 2002, and/or Art. 102 TFEU, by refusing to supply Irish whiskey to the appellants without objective justification, and by wrongfully discriminating against the appellants by applying dissimilar conditions to equivalent transactions with other trading parties. In these proceedings, they seek various reliefs including damages and injunctive relief.

The High Court proceedings

8. The appellants issued the plenary summons in these proceedings on 5 July 2018. The statement of claim was delivered on 20 July 2018 and the proceedings were admitted into the Competition List of the High Court on 16 October 2018, with directions given in relation to a motion for security for costs. A notice for particulars was raised and replied to, and the motion for security for costs issued on 8 February 2019. The motion sought the following relief:-

> *"(1) An Order pursuant to Order 29, rule 1 of the Rules of the Superior Courts 1986 (as amended) and/or s.52 of the Companies Act 2014 directing the Plaintiffs to provide security for the costs of the Defendant;*
>
> *(2) An Order fixing the amount of security for costs;*
>
> *(3) An Order stipulating the time within which the security fixed by this Honourable Court is to be provided by the Plaintiffs;*
>
> *(4) An Order staying these proceedings pending the furnishing of security for costs of the Defendant by the Plaintiffs;*
>
> *(5) Any further or other Order;*

(6) The cost of this application;".

9. Six affidavits were sworn by the parties in support of, or in opposition to, the relief sought. Mr. Colm Maguire, of IDL, swore the grounding affidavit on 6 February 2019 and a replying affidavit on 25 March 2019. Mr. Patrick Dillon, a chartered accountant and partner with Grant Thornton, swore an affidavit to exhibit an expert report relating to the ability of the appellants to meet the estimated costs of IDL in defending the proceedings. Mr. Andre Levy, the owner, chairman and Chief Executive Officer of Protégé, swore three affidavits on behalf of Protégé and Avalon on 8 March 2019, 4 April 2019 and 3 May 2019, opposing the application. The motion was heard by the Judge in charge of the Competition List on 8 May 2019, and he delivered judgment on 17 May 2019.

Decision of the High Court

10. The trial judge accepted that the appellants had a *prima facie* case against IDL and noted that it was conceded by the appellants, for the purposes of the motion, that IDL had a prima facie defence to their claims. He held that Protégé would not be able to fully meet the likely costs of IDL if it succeeded in its defence. There was no evidence at all as to the financial position of Avalon. He held that, as a company established outside the EU, there was a presumption that IDL was entitled to the requested order against Avalon. In light of these findings and concessions, he held that the onus shifted to the appellants to establish that the requested order should not be made. The appellants sought to do so on three grounds:

    (i) any inability on their part to provide security is attributable to the wrongful acts of IDL;

    (ii) the case raises one or more points of law or issues of exceptional public importance; and

    (iii) there is a European context to the case that should weigh against granting the requested order as, to make same, it is claimed, would deny the plaintiff effective redress.

11. The trial judge rejected all three grounds. In relation to the first, he said that the appellants had adduced no evidence that satisfied the test for causation of impecuniosity identified by Clarke J. in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7. In relation to the second point, he held that the proceedings were private competition law proceedings claiming damages. There was no law or issue of exceptional public importance which satisfied the tests set out in the jurisprudence in this regard. He, likewise, rejected as a ground to refuse the relief sought the fact that the appellants claimed that there was a breach of Art. 102 TFEU by reference to the dicta of McKechnie J. in *Digital Rights Ireland Limited v. Minister for Communications and Ors.* [2010] IEHC 221. In light of these findings, he held:-

    "3. Given the foregoing, the court will make the requested order. However, the court is mindful in this regard of: Kingsmill Moore J.'s observation in Thalle v. Soares

[1957] IR 182, 194, that security should be viewed as not being an 'indemnity against all costs…or as an encouragement to luxurious litigation'; and Murray J.'s observation in Framus Ltd v. CRH plc & ors [2004] 2 IR 20, 60, that the courts should seek to ensure 'that the security is not a mere token and…not an obstacle to a full and fair disposal of the issues'. Given the scale of the (disputed) potential costs, to order full security on the figures of Irish Distillers could yield an indemnity (or even over-indemnity) scenario and/or present the obstacle contemplated by Murray J. That said, the court notes the frail financial position of Protégé and that the financial position of Avalon is unknown to the court. The court will therefore order security for costs in the (discounted) amount of one million euro."

The appeal

12. The appeal was brought on four issues. The appellants say the trial judge erred:

    (i) in concluding that the plaintiff had adduced "no evidence" that satisfied the "Connaughton" test for impecuniosity;

    (ii) in concluding that the proceedings raised no point of law or issues of exceptional public importance;

    (iii) in fixing the amount of security to be provided without hearing submissions on the matter; and

    (iv) in fixing security at €1 million.

Legal principles

13. The application is brought pursuant to O.29 of the Rules of the Superior Courts as the two appellants are companies incorporated outside the State, one within the EU, the other in Panama. It was accepted by the parties that the legal principles applicable to an application brought under s.52 of the Companies Act 2014 apply equally to this application. Section 52 confers a discretion on a judge whether or not to order the provision of security for costs. When considering the precursor to s.52, s.390 of the Companies Act 1963, Morris P. summarised the approach of the courts to an application for security for costs in *Interfinance Group Limited v. KPMG* (Unreported, High Court, Morris P., 29th June 1988) as follows:-

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

        (a) that he has a prima facie defence to the plaintiff's claim, and

        (b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful;

    (2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are special circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus rests upon the party resisting the order.

The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or whether there has been delay by the moving party in seeking the order sought.

The list of special circumstances referred to is not, of course, exhaustive."

14. This statement was endorsed by the Supreme Court (Clarke J.) in *Usk District Residents Associations Limited v. The Environmental Protection Agency & Anor.* [2006] 1 ILRM 363 as a correct statement of the law.

15. Three points emerge from this passage. First, the defendant must establish two matters on a *prima facie* basis, (1) that he has a defence to the plaintiff's claim and (2) that the plaintiff will be unable to pay the costs if he succeeds in his defence. Secondly, security ought to be ordered in that event. Thirdly, a plaintiff may establish "special circumstances" on a *prima facie* basis which will cause the court to refrain from granting the order sought and exercise its discretion to refuse to order the provision of security.

16. The defendant who proves the two facts to a prima facie standard has an entitlement to the order (see Geoghegan J. in *West Donegal Land League Limited v. Údarás na Gaeltachta* [2007] 1 ILRM 1, p.22 and *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7). At para. 2.3 Clarke J held:-

"It follows that security ought to be required unless Connaughton Road can show that there are special circumstances which ought to cause the court to exercise its discretion not to make the orders sought."

In *Webprint Concepts Limited v. Thomas Crosbie Printers Limited & Ors.* [2013] IEHC 359 Finlay Geoghegan J. held at para. 43:-

"…In accordance with the principles already set out, the Court must conclude that security is to be provided pursuant to s. 390 of the Companies Act, unless Webprint can show special circumstances which would cause the Court to exercise its discretion not to make the order sought."

17. The list of special circumstances is not closed. The two such relied upon in this appeal have been recognised as constituting special circumstances for the purposes of applications for security for costs. The issue is whether the appellants have established either, or both, to the required standard. It is accepted that the onus is on the appellants to establish special circumstances and that they must do so on a *prima facie* basis. For the purposes of this appeal, the two special circumstances relied upon are (a) that the inability of the appellants to provide security is attributable to the actions of the respondent and, (b) that the proceedings involve a point of law or issue of exceptional public importance.

18. In *Tribune Newspapers (in receivership) v. Associated Newspapers (Ireland) Limited* (Unreported, High Court, Finlay Geoghegan J., 25th March 2011) Finlay Geoghegan J.

stated that a defendant seeking to establish a *prima facie* defence, which was based on fact, had to objectively demonstrate the existence of the evidence on which it would rely in order to establish those facts and that mere assertions would not suffice. Where such evidence was adduced, the court should determine whether the defendant had established a *prima facie* defence based on an assumption that the evidence would be accepted at trial. In addition, the defendant would have to establish an arguable legal basis for the inferences or conclusions which it submits the court may arrive at, based upon the evidence adduced. She stated:-

> *"In my judgment, what is required for a defendant seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submissions applicable thereto which, if accepted by the trial judge, provide a defence to the plaintiff's claim…*
>
> *What appears from the judgments, in a manner similar to the judgments relating to summary judgment, is that a defendant seeking to establish a prima facie defence which is based upon fact must objectively demonstrate the existence of evidence upon which he will rely to establish those facts. Mere assertions will not suffice."*

19. The test outlined by Finlay Geoghegan J. was approved in the Court of Appeal in *Rayan Restaurant Limited v. Kean* [2015] IECA 264 at para. 27, and *Murphy Concrete (Manufacturing) Limited v. Newlyn Developments Limited* [2015] IECA 294 at para. 71. In my judgment, this test applies equally to the requirement that a plaintiff must establish on a *prima facie* basis the special circumstances asserted by it when seeking to resist an order for security for costs.

20. The court has a discretion, and it is not mandatory to grant security for costs, and the court should exercise its discretion in the interests of justice. By developing the concept of what constitutes special circumstances – which is not a closed list – the courts exercise their discretion in the interests of justice. As I said in *Hedgecroft Ltd v HTREMFTA Ltd.* [2018] IECA 364, *"[i]t is for the court to determine if the order [for security]would be fair or proportionate in all the circumstances."* But this jurisdiction is exercisable in accordance with case law and is not a freestanding discretionary jurisdiction, untrammelled by authority.

21. The first special circumstance relied upon by the appellants in the appeal is the assertion that their inability to pay costs is attributable to the wrongdoings of IDL. For the purposes of this assessment, the wrongdoing relied upon must be the subject of the claim, contrary to the assertions of counsel for the appellants. The parties resisting the application for security for costs cannot rely upon an alleged wrongdoing which is not the subject matter of their claim in the proceedings. This is clear from *Connaughton Road* where Clarke J. referred to the circumstances "*where it is asserted that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the moving party*" (para. 2.3). And, again, at para. 3.1 he referred to the court retaining a discretion not to order security for costs where the plaintiff can establish on a prima facie basis "*that his inability to pay the costs of the*

defendant concerned (in the event that the defendant might succeed) is due to the wrongdoing which he asserts in the proceedings." See also the decision of Charleton J. in *Oltech (Systems) Limited v. Olivetti UK Limited* [2012] 3 I.R. 396, at p.407.

22. The appellants advanced no authority to support the proposition that they may rely upon wrongdoing alleged against IDL but which is outside the scope of the proceedings and, in my judgment, such an argument is inconsistent with case law and with principle. If an allegation does not fall for resolution in the proceedings then the court cannot rule upon the alleged wrongdoing at the trial, and if it cannot determine the rights and wrongs of the issue, it seems to me that it may not have regard to any such allegation in an application for an order security for costs

23. The leading case in relation to this asserted special circumstance is *Connaughton Road*:-

"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.

…

3.6 It follows, in my view, that a plaintiff must at least establish a prima facie case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful. That this is so can be seen from the comment of Murray J. (speaking for the Supreme Court) in Framus Ltd & Ors v. CRH Plc & Ors [2004] 2 I.R. 21 at pp. 61 and 62, where it was noted that the plaintiff in that case had shown some evidence of wrongdoing on the part of the defendant but not, even on a prima facie basis, that its impecuniosity was due to that wrongdoing. It is not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a prima facie basis, that the losses

allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of point (4) referred to above. Even if, therefore, a plaintiff can show a prima facie case, it is also necessary to show a prima facie level of losses attributable to the defendant's wrongdoing so as to enable the court to assess whether, again on a prima facie basis, those losses are sufficient to justify attributing the plaintiff's inability to pay costs, in the event of losing, to the asserted wrongdoing. On that basis I am satisfied that the court can have some regard to quantum in an application such as this.

…

3.8 Counsel for Laing O'Rourke suggested, correctly in my view, that there were no special considerations to be given to [single purpose companies with virtually no paid up capital] one way or the other. However, he did assert that, in attempting to show special circumstances, it was incumbent on such a company to show, at least to a prima facie level, that were it not for the wrongdoing asserted it not only would not have lost money, but would have made sufficient profits so as to be in funds sufficient to pay the likely costs of a successful defendant."

24. The following points are relevant to this appeal. The appellants must establish on a *prima facie* basis that the alleged actionable wrongdoing of IDL gave rise to some specific level of loss to each of the appellants, which loss is recoverable as a matter of law. Clarke J. gave the example of a loss not being too remote. Another example is that the loss must not be statute barred. At this point, it is relevant to note that the Statute of Limitations was amended by the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017, which provides that the limitation period for actions for damages for infringements of competition law is six years.

25. Secondly, where the company had no significant assets prior to the events which gave rise to the proceedings concerned, it is incumbent upon such a company to show, at least to a *prima facie* level, that, were it not for the wrongdoing asserted, not only would it not have lost money, but it would have generated sufficient profits, such that it would have had sufficient funds to pay the likely costs of a successful defendant.

26. In *Webprint*, Finlay Geoghegan J. held:-

"48. As appears from the principles set out above, Webprint, on the facts herein, must establish a prima facie case that the quantum of damages which it may obtain in the event that it is successful in its claims for alleged wrongdoing against the second to eighth named defendant, inclusive, will be of an order of magnitude sufficient to reverse its current financial position in which it admits it would be unable to pay the defendants' costs in the order of €3 million if they were successful.

…

59. *It has not put before the Court any even prima facie evidence of the probable quantum of the loss allegedly suffered by Webprint by reason of [identified] lost opportunities. Insofar as Webprint adduced evidence of a revenue stream from printing the transferred titles and its impact on Webprint's current financial position, it confined itself to the revenue stream under the Printing Agreement with the reduction of €2 million per annum. There is, in my judgment, no prima facie evidence on this application which would permit the Court to conclude that if notice had been given to Webprint of the proposed sale of titles, that it would have achieved, either with Landmark or any third party, an agreement to print the titles into the future with only a reduction of €2 million on the revenue to which it is entitled under the Printing Agreement…*

60. *…at this stage of the application, the onus is on Webprint to establish a prima facie basis for obtaining the quantum of damages for which, it contends it would be entitled, if successful. Insofar as its contention on this aspect of the case is that by reason of the absence of notice and/or best endeavours by TCP to procure that it print the titles after their sale, or even to be entitled to print the daily Newspapers, the onus is on it to establish, at least on a prima facie basis, that it might have entered into a print agreement that would give it revenues, which, either on a capitalised basis or having regard to a probable current income stream, would reverse its present financial position…*

61. *…the onus is on Webprint to establish a prima facie case that the quantum of damages it might obtain, if successful, are of an order of magnitude to reverse its present financial position and admitted inability to pay the defendant's costs. This places on Webprint in the first instance an onus to establish a prima facie case as to the quantum of damages it might obtain, if successful. As pointed out by Clarke J. in Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd. [2009] IEHC 7, this does not require a detailed quantification of probable damages but it does require, in my judgment, prima facie evidence upon which Webprint can make an arguable case for damages of an approximate amount or order of magnitude. This appears to require it to establish, at least on a prima facie basis, that if given the opportunity, it might have entered into print agreements with estimated revenues, which would reverse its present financial position. The only evidence offered by Webprint to the Court relates to revenues under the Printing Agreement which, for the reasons already stated, do not appear to constitute, even on a prima facie basis, an estimate of losses which Webprint may have suffered by reason of its inability to have been given an opportunity of entering into print agreements with either Landmark or third parties."*

27. In that case, there was an effort by the plaintiff to put flesh on the bones of the alleged losses, which was analysed carefully by the trial judge. She makes it abundantly clear that bare assertions of losses will not suffice and that the onus rests on the plaintiff to adduce the evidence necessary to enable a court to conclude that its case as to special circumstances has been made out on a *prima facie* basis. It is not necessary to establish a

detailed quantification of the damages, but there needs to be evidence to substantiate an arguable case for damages of a particular order of magnitude which would suffice to meet the fourth proposition in *Connaughton Road*.

28. The second special circumstance relied upon in the appeal is the contention that the proceedings involve a point of law or issue of exceptional public importance. In *Oltech*, Charleton J. stated that a heavy burden lies on a party seeking to invoke this special circumstance. In *Village Residents Association Limited v. An Bord Pleanála (No. 2)* [2000] 4 I.R. 321 at p. 333, Laffoy J. said that the issue was:-

> *"…whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases also…"*

29. In *Webprint*, at para. 69, Finlay Geoghegan J. held as follows:-

> *"Central to all the formulations is that both the point of law and the requirement or desirability that it be determined must transcend the interests of the parties before the Court. The Court may also take into account whether the law relating to the alleged point of public importance is in a state of uncertainty such that it is in the common good that the law be clarified so as to enable the courts to administer justice, not only in the present case but also future cases."*

30. The jurisprudence has also been applied to cases raising facts, rather than points of law, which were deemed to satisfy the test. In *Millstream Recycling v. Tierney & Newtown Lodge Ltd.* [2010] IEHC 55, the court was concerned with issues of fact of exceptional public importance, namely "a contamination of food scandal that rocked an important sector of the Irish economy, the agri-food industry", the resolution of which, the trial judge held, transcended the individual claims of the parties. See also *Newlyn Developments Ltd v. Murphy Concrete (Manufacturing) Ltd* [2015] IECA 294.

31. Finally, I should observe that, in principle, it is open to a wealthy and well-resourced defendant – as well as to any other litigant – to seek an order for security for costs and it is neither improper, nor intimidatory, for a defendant so to do. Simply because such a defendant could absorb the costs if it succeeded in its defence against an impecunious plaintiff company, does not mean that it too may not avail of the jurisdiction of the courts under O.29 RSC, or s.52 of the Companies Act 2014. It is neither bullying nor heavy-handed tactics for it to do so, as was asserted by the appellants. Certainly, it is not a reason, in principle, to refuse such an order.

The appellants' case on special circumstances

32. The appellants submit that they have established on a *prima facie* basis that the alleged abusive conduct of IDL has had an adverse effect on their profitability, with the result that they concede that they would not be in a position to meet an award of costs in favour of IDL should it succeed in the defence of the proceedings. They identified the following

matters which they say are established by Mr. Levy's three affidavits, and which they argue satisfy the *Connaughton Road* test:

(1) Protégé has been requesting IDL for supply "over many years" since 2002;

(2) IDL has consistently refused to meet Protégé's request for supply, with the reasons for that refusal changing over the years;

(3) IDL accepts that it refused to meet Protégé's request in 2001;

(4) IDL informed Protégé that it would only supply whiskey if Protégé undertook not to sell The Wild Geese in territories in which IDL sold Jameson. This is not being denied;

(5) Pernod Ricard has taken some fifty actions in some thirty-four jurisdictions against Protégé in an attempt to prevent or restrict Protégé's Irish whiskey brand competing in the market in Irish whiskey, and in particular, with IDL's brand, Jameson;

(6) IDL failed in all of these trademark actions bar one in the United States, where Protégé's brand is now sold under "The Wild Geese Soldiers and Heroes" trademark;

(7) From 2002, Protégé was forced to pay more for whiskey than its competitors who were supplied by IDL without limitation as to where they could sell their whiskey in competition with Jameson;

(8) Protégé was forced to incur significant legal costs and to spend fifteen years in ultimately successfully defending the trademark proceedings. Legal costs are not awarded in trademark proceedings and Protégé have therefore had to meet these costs itself. Moreover, it seems that these proceedings may have been motivated by a desire on the part of IDL to have "The Wild Geese" trademark assigned to it;

(9) As a result of IDL's refusal to supply Protégé by providing it with a long-term supply agreement, Protégé has not been able to grow, develop and attract investment in the same manner as other companies, competitors of Protégé, which have had the benefit of such an agreement. Protégé's inability to develop The Wild Geese product has been a direct result of the unlawful conduct complained of in these proceedings;

(10) The appellants incurred legal, travel, accommodation and management costs, lost sales, suffered loss of opportunity and lost the value of their investment;

(11) The appellants have spent some fifteen years having to deal with Pernod Ricard litigation, as a result of which the appellants' resources, both intellectual and capital, that should and would have been available for marketing and promotion of The Wild Geese brand, were absorbed in dealing with these cases. Their resources

and capital have been prejudicially affected by paying very significant litigation expenses in trademark actions where costs are not awarded;

(12) Moreover, had the appellants had a long-term supply agreement, they would have been able to grow and attract investment, in the way that their competitors – and perhaps most obviously Walsh Whiskey, whose brand was valued at over €50 million following a supply agreement dated from 2006 – have grown and developed;

(13) In particular, the plaintiffs suffered a loss of opportunity between 2002 and 2009, as during that period Irish whiskey, as a category, was beginning to grow worldwide (and IDL was supplying to its competitors);

(14) Between 2002 and 2013, over €5 million was invested in "The Wild Geese" brand, in development, marketing, staffing and "in creating a truly internationally recognised brand", with the majority of expenditure being spent between 2009 and 2013. However, since 2013, "the [appellants] have had to manage a declining business due to the refusal of [IDL] to supply it with Irish whiskey;

(15) Without supply from IDL, in 2015, Protégé's UK office, where the majority of Protégé's employees were based, was closed, and twelve staff members were made redundant at a significant cost to Protégé. Protégé lost sales and potential for monetising its investments;

(16) The shortage of Irish whiskey also meant that Protégé was forced to both increase its prices and to limit supply to its existing customers, who, knowing that Protégé could not secure supply of Irish whiskey, were no longer prepared to invest in "The Wild Geese" brand;

(17) Protégé also lost the majority of its international distributor network;

(18) In short, Protégé have not been able to grow, develop and attract investment in the same manner as other companies, competitors of Protégé, which have had the benefit of such an agreement with IDL.

33. They say that the specific level of loss experienced by the appellants, as a result of IDL's alleged wrongdoing, is established from the following three facts:

(1) If the appellants had a long-term supply agreement with IDL, they would have been able to grow and attract investment, in the way that their – and IDL's - competitors, which have such agreements with IDL, have grown and developed;

(2) For example, Walsh Whiskey's brand was valued at over €50 million in 2013. following a supply agreement with IDL dating from 2006. It is significant in this regard that Walsh Whiskey comments on its website that its supply agreement with IDL "was the greatest turning point since the company was first established"; and

(3) The experience of a Niche Spirit, which attracted investment of €10 million (at a date unspecified) and is building a new distillery, is equally illustrative of the point.

34. In relation to the second special circumstance relied upon by the appellants, they submit that the proceedings meet the threshold of exceptional public importance on three grounds:

(1) The proceedings concern the rules of competition law, the enforcement of which is critical for the wellbeing of consumers generally; it clearly transcends the interests of those immediately involved in the proceedings. In those circumstances, the proceedings are similar to those at issue in *Millstream*, *Newlyn* and *Diarem Ltd v. Cliffs of Moher Ltd* [2017] IEHC 191.

(2) It is in the interest of the common good that the law on refusal to supply arising in this case be clarified, so as to enable the law to be administered, not only in the instant case but in future cases also. They rely upon *Oltech* in support of this point.

(3) The Irish whiskey market is an important and strategic Irish market, and the whiskey industry in Ireland employs a significant number of people, both directly and indirectly, and is a major contributor to Irish exports. Irish whiskey is unique to Ireland and can only be made and matured on the island of Ireland. It is, therefore, of national importance that this valuable Irish resource is fairly managed.

They also rely on the very extensive profits made by IDL and Pernod Ricard from its activities in Ireland, the majority of which come from IDL's dominant exploitation of the Irish whiskey market and, therefore, the matters arising in the proceedings raise matters of public importance. They refer to the strategic importance of the case as being similar to that of the pork industry in *Millstream*.

35. Finally, it is important to note that the appellants do not make the case that if security for costs is ordered that they will not be able to continue with the proceedings due to an inability to comply with the order, if made. This is so where IDL estimates its costs on a party and party basis for these proceedings at €1,220,000, while the appellants estimate that they would amount to €704,750.

Discussion

The first special circumstance: Inability to pay is due to the wrongdoing of the defendant

36. The trial judge held that the appellants had adduced no evidence that satisfied the test for causation of impecuniosity identified by Clarke J. in *Connaughton Road*. The appellants contend that he erred in this finding and that they had adduced considerable evidence which established the fact that any inability on their part to provide security for costs is attributable to the wrongful acts alleged against IDL. I do not accept this.

37. It is striking that in Mr. Levy's three affidavits he makes no attempt to quantify the losses allegedly caused to each of the appellants by the alleged wrongdoing of IDL. A careful review of these very lengthy (excessively so) affidavits reveals considerable detail

on the claim against IDL, but no *evidence* relevant to the issue for determination on the application before the court.

38. There is *no* evidence whatsoever about Avalon. The sole evidence before the Court in relation to this appellant was the exhibited Certificate of Incorporation from Panama in Spanish. There was no evidence of its authenticity. This is remarkable and very telling, given that Mr. Maguire averred that his lawyers were unable to discover evidence of even the existence of the company. There was no evidence of any relationship or agreement between Protégé and Avalon, despite the plea that Protégé is the exclusive sales agent of Avalon in the EU. Neither was there even a reference, let alone evidence, to the pleaded assignment of the interest of Avalon Group Inc. BVI to Avalon in 2016. Mr. Levy did not address this in his affidavits. There were no accounts exhibited in relation to Avalon and Mr. Levy described Avalon as a "relatively small" company. Not only was there none of the evidence one would expect in a motion for security for costs from Avalon, there was no explanation for the absence of such information. In relation to Avalon, I have no hesitation in agreeing with the trial judge that it has failed to establish this alleged special circumstance on the basis of *prima facie* evidence.

39. The situation in relation to Protégé is hardly better. First, Protégé provided "very limited financial information" as described by Mr. Patrick Dillon, chartered accountant and partner with Grant Thornton, who prepared the report and affidavit on the ability of Protégé and Avalon to meet the estimated costs of IDL. Protégé provided audited financial statements for the years ended 31 December 2013, 2014 and 2015 to IDL, which were then furnished to Mr. Dillon. In January 2019, Protégé's solicitors provided an unaudited set of financial statements for the year ending 31 December 2018. The document expressly states that the financial statements were based upon information provided which has not been subject to audit or review engagement, and the author did not accept any responsibility for the reliability, accuracy or completeness of the compiled information contained in the financial statements. There was no information provided for the years ending 31 December 2016 or 31 December 2017. Mr. Dillon notes that Protégé was marginally profitable in the four years leading up to the year ending 31 December 2015 (in the amount of €12,000) and apparently made accumulated losses of in or around €26,000 in the years 2016 to 2018. He is of the opinion that overall Protégé's net asset position deteriorated from €16,000 at December 2012, to a net liability position of €38,000 at December 2018.

40. Second, in the three affidavits sworn by Mr. Levy he adduced no financial evidence whatsoever with regard to the business of Protégé. He exhibited no business plans, no projections, no evidence of funding to support any proposed expansion of the business, no distribution agreements, nor any other documentation one might expect a plaintiff to exhibit where the plaintiff seeks to make the case that the failure to supply a crucial ingredient has resulted in a specific level of loss or damage, even if the exact quantification at this juncture must remain an estimate.

41. Third, Protégé did not file any affidavit from its financial advisors, or any other expert, who might have assisted in establishing a specific level of loss attributable to the alleged failure to supply whiskey by IDL to Protégé.

42. Fourth, there is no evidence of, and no clarity on, the distribution of the possible profit to be derived from the exploitation of The Wild Geese brand, as between Protégé and Avalon. It is, therefore, not possible to assess the claimed level of damages recoverable at law by each appellant from IDL. The difficulty is compounded by the failure to adduce evidence of the pleaded assignment of the interest of Protégé UK to Protégé in 2013, and the assignment between the two Avalon companies in 2016.

43. Fifth, on its own case, Protégé is not engaged solely in developing The Wild Geese brand. It has other brands which have won international awards and presumably generate income for the company. Protégé made no attempt to explain the relationship between the alleged losses sustained by its inability properly to develop and exploit The Wild Geese brand and the rest of its business, or the division of the profits derived from The Wild Geese brand between Protégé and Avalon.

44. Sixth, even on its own case, at a general level, much of what is relied upon by Protégé as satisfying the test posited by Clarke J. in *Connaughton Road* simply does not assist Protégé at all as the alleged damages are not recoverable at law. Proceedings alleging breaches of competition law, whether domestic or European, are regarded as claims in tort which attract a six-year limitation period. The third proposition in *Connaughton Road* is that the damages must be recoverable at law. These proceedings commenced on 5 July 2013. It seems to me that, for the purposes of this argument, the appellants may not rely upon any alleged failures to supply whiskey prior to July 2013 as establishing a special circumstance within the meaning of the case law. Such alleged damages will not be recoverable in law and thus, will not satisfy the third proposition. This applies to points 1, 2, 3, 4, 7, 8, 12, 13 and 14, at para. 32 above.

45. Large elements of the case advanced predates the involvement (and indeed incorporation) of Protégé. While it may well be that Protégé has assumed the rights of Protégé UK against IDL, and may establish this at trial, this has not been established on a prima facie basis in this application and thus, for the purposes of this judgment, this court cannot have regard to wrongs allegedly committed against Protégé UK prior to 2012 when, on its own case, Protégé came on the scene. This applies to points 1, 2, 3, 4, 7, 8, 12, 13, 14 and 15, which are not recoverable at law from IDL on the basis of the evidence adduced on this motion.

46. In addition, the appellants seek to rely upon wrongs not encompassed by the proceedings. The allegation is that IDL has, over the years, acted in breach of competition law by wrongfully refusing to supply Protégé (and formerly Avalon Group/Protégé UK) with Irish whiskey, and further discriminated against the appellants in refusing to supply Irish whiskey. It is not concerned with trademark litigation across the globe over a period of fifteen years in which Pernod Ricard was the opposing party, rather than IDL. The issue of the costs of that litigation does not fall to be decided in these proceedings. Therefore,

the court may not have regard to the costs incurred in other litigation relating to trademarks in considering the issue of special circumstances. It is not a wrong in respect of which the appellants can recover damages from IDL in these proceedings.

47. Seventh, the balance of the "evidence" relied upon by the appellants is no more than bare assertion, and does not satisfy the threshold of *prima facie* evidence set out in *Tribune Newspapers*. This applies to point 7 (the allegation that Protégé pays more for its supply of whiskey than other producers), to points 9, 12, 14, 16 and 17 (that Protégé was unable to develop and grow its business by reason of the failure to supply Irish whiskey), to the contention that Protégé's UK office was forced to close at considerable expense to Protégé (the party in these proceedings), to the claim of loss of distributors and, to the claim concerning price increases and customer limitation. The comparison with competitors, Walsh Whiskey and Niche, does not satisfy the requirement of identifying "some specific level of loss." They have not shown on a *prima facie* basis that they are in the same position as their competitors; they are different companies from those companies, operating under different conditions and the only apparent point of similarity is that they are all operating in the whiskey market.

48. Eighth, there was no evidence of the level of unquantified damages which the appellants claim is such as to transform the appellants' financial fortunes to a position where they could furnish the necessary security as was required by *Connaughton Road*. In my judgment, the appellants are in the same position as the plaintiffs in *Connaughton Road* and *Webprint*. They have failed to establish on a prima facie basis that the wrongdoing alleged against IDL has led to their inability to meet any award of costs that might be made in favour of IDL.

49. For these reasons, I agree with the conclusion of the trial judge that there was no evidence that satisfied the test of causation; though it would have been of assistance to the parties, and in the event of an appeal, to this court, if some explanation for his terse conclusion had been provided.

The second special circumstance: Point of law or issue of exceptional public importance

50. As has been previously held, the burden on the appellants to establish that the proceedings involve a point of law or issue of exceptional public importance is a heavy one. The point must be of such gravity and importance as to transcend the interests of the parties before the court. If the court is of the opinion that the law at issue is in a state of uncertainty, such that it is in the common good that the law be clarified, so as to enable the court to administer justice not only in the present case but also in further cases, this will suffice. The jurisprudence has been applied in exceptional cases.

51. This case does not involve any issue of major public scandal such as in *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2014] IEHC 18 (corruption of a government minister) or *Millstream* (pollution of pork and endangering the reputation of Ireland's agri-food business). Neither does it concern a major factual controversy as in *Newlyn Developments* (pyrite damaging hundreds of homes and other

buildings). It does not involve issues of personal privacy, such as would impact upon so many of us, as in *Digital Rights*, or issues of environmental law which may impact upon the community (*Diarem*).

52. The fact that these are competition law proceedings does not of itself elevate the proceedings to the status of raising points of law or issues of exceptional public importance. As the trial judge has said, they constitute private litigation between private operators whose principal purpose is to secure a long-term supply agreement and damages for the appellants. There is nothing about the claim of refusal to supply in this case touching on "the common good" which transcends the interests of the parties.

The fact that one of the parties is a major contributor to Irish exports is not sufficient to engage the jurisprudence on this point. Likewise, the extent of the profits which may be made by IDL, or Pernod Ricard (a non-party), from sales of Irish whiskey does not satisfy the threshold either.

53. The appellants had not identified any uncertainty in relation to competition law which is specifically required to be clarified in these proceedings. The fact that Irish whiskey is, by definition, unique to Ireland, and a significant employer, is not sufficient to meet the heavy burden identified by Charleton J. in *Oltech*, or to satisfy the threshold established in *Webprint*.

54. Finally, as has been frequently stated in other cases, the fact that significant amounts of money are at stake does not mean that the proceedings raise matters of exceptional public importance.

55. For these reasons, I am satisfied that the trial judge was correct to hold that the appellants had failed to meet the high threshold required for this special circumstance.

56. It follows that the appellants have not established any special circumstance which would lead the court to refuse to order security for costs in favour of IDL, and I would refuse the appeal in respect of these two issues.

Fixing the security for costs

57. In the event that they were unsuccessful on the first part of their appeal, the appellants further contend that the trial judge erred in proceeding to fix the quantum of the security on the basis of the evidence which has been adduced by the parties by their respective cost accountants. The appellants argued that, by fixing the amount of the security without hearing submissions regarding same, the High Court breached the appellants' entitlement to fair procedures and natural and constitutional justice. They also contend that the High Court erred in relation to the level at which it fixed the amount of security.

Discussion

58. The second relief sought in the notice of motion was an order fixing the amount of security for costs. In Mr. Maguire's grounding affidavit, he exhibited the opinion of a legal cost accountant who had experience in taxing costs of competition proceedings such as the current litigation. Mr. Noel Guiden, of Behan & Associates, produced a fourteen-page

estimate of the costs of IDL on a party and party basis for the purposes of the motion, dealing with the likely pleadings, the work involved in discovery, motions which might be envisaged, the engagement of expert witnesses and other witnesses, and preparatory work for trial. He estimates that the case will run for at least twelve days and would involve two senior counsel and one junior counsel. His total estimate comes to €1.22 million, exclusive of VAT as IDL is VAT exempt.

59. Mr. Brendan Cooke, of Cyril O'Neill & Co. Legal Cost Accountants, prepared a review of the estimate of the party and party costs of IDL. At page 2 of his report he says no issue was taken in relation to the description of the nature of the claims "except the statement that the plaintiffs' claim for damages is likely to be in the order of several million Euros. An accountant/financial expert has not yet been instructed by the plaintiffs and while the plaintiffs may claim significant losses it is at this moment speculative on the defendant's part to maintain that the losses will be in the order of several million Euro." Mr. Cooke disagrees with the need to instruct senior and junior counsel on the motion for security for costs and argues that the trial should be conducted on the basis of one, rather than two, senior counsel and one junior counsel. He itemises the individual heads of charge in similar detail to the estimate provided by Behan & Associates, and his total estimate of the cost is €704,750.

60. In his replying affidavit, Mr. Maguire responds to Mr. Cooke's estimate of fees in paras. 26-29 of his affidavit. In turn, Mr. Levy responds to Mr. Maguire in paras. 23-27 of his second affidavit, and he exhibits a second letter from Mr. Cooke who further engages in the dispute between the two cost accountants.

61. It is thus clear that the issue of fixing the security was expressly and clearly before the court, and the parties had engaged extensively in relation to the quantum of the costs of IDL on a party and party basis. It is also most important to note that the appellants never made the case that the proceedings would be stifled if the security for costs were ordered. In Mr. Levy's third affidavit he referred to the fact that in proceedings in Australia brought by Pernod Ricard security for costs were provided by Avalon. It follows that the evidence did not suggest that an order for security for costs would prevent the appellants from continuing the proceedings.

62. The appellants say that counsel for IDL expressly stated at the hearing that IDL was not asking the High Court to fix the amount of security for costs at that stage, and counsel for the appellants expressly stated that it would be inappropriate for the court to fix the amount of security for costs at that stage, and that, accordingly, the High Court did not afford the appellants' any opportunity to make submissions on the amount of security to be fixed. This meant that Protégé was afforded no opportunity to present its case or, at least, no reasonable opportunity to do so in relation to the amount of security.

63. It is clear from para. 3 of the judgment, quoted above, that the trial judge exercised his discretion in fixing the security at €1 million. As he explained, the security should not be viewed as an indemnity *i.e.* that he should not order the full cost estimate. He also noted that the security is not a mere token and he expressly noted "the frail financial position of

Protégé", and that the financial position of Avalon was unknown to the Court. He had previously observed that Avalon was a company incorporated in Panama. So, having regard to the undoubted discretion of the court to fix the level of security, he did so in a manner wherein he sought to balance the interests of the corporate plaintiffs and those of the defendant who successfully defends the proceedings.

64. I have set out the facts which were before the High Court in relation to the two estimates as to the costs likely to be incurred by IDL in defending the proceedings, and I have quoted the reasons for his decision in full. I also note that an alternative relief sought in the notice of appeal is "*an Order setting aside the Order of the High Court insofar as relates to the amount of security to be provided and requiring the Plaintiffs to furnish a lesser amount by way of security.*" In its written submissions, IDL argues that if this court considers that there was a procedural error, it may correct it by determining for itself the appropriate level of security.

65. IDL points out that the appellants made general submissions to the High Court on the level of security that ought to be awarded. It does not accept that counsel for the appellants had "expressly stated that it would be inappropriate for the Court to fix the amount of security for costs at that stage." IDL says that even if such a submission was made, it was followed by an alternative submission that any such security fixed ought not to be at a "full level of costs", but that any award of costs ought to be "proportionate" on the basis of the plaintiffs' estimate of the costs of the proceedings, as set out in the estimate provided by Mr. Brendan Cooke.

66. It is apparent that the trial judge sought to strike a balance between the level of costs estimated by IDL, of €1,220,000, and those estimated on behalf of the appellants, of €704,750. The trial judge expressly indicated that he was not ordering "*full security*" but was discounting the amount. He noted that to order full security on the figures of IDL could yield an indemnity (or even over-indemnity) scenario and/or present an obstacle to a full and fair disposal of the issues as contemplated by Murray J. in *Framus Limited v. CRH plc & Ors.* [2004] 2 I.R. 20. On that basis, he ordered security for costs in a discounted amount of €1 million, having noted "*the frail financial position of Protégé and that the financial position of Avalon is unknown to the court.*" In my judgment, he exercised his discretion in an appropriate manner, having regard to the relevant principles, and I see no reason for this court to interfere with that exercise of his discretion. As has been repeatedly stated, this court will show great deference to the High Court in the exercise of its discretion and will not simply substitute its discretion for that of the trial judge, while still ultimately retaining a discretion to allow an appeal.

67. The sole basis upon which I would consider allowing the appeal on this point would be if the appellants had shown that the trial judge failed to afford them an opportunity to be heard on this issue.

68. It was not clearly established what occurred before the High Court. Some submissions were made on the issue of the quantum of any security which might be ordered. The appellants say the submissions were to the effect that this issue should not yet be

determined. IDL disagrees and says that they went further. It is clear that the issue was before the court. The parties addressed the issues in evidence and, to a brief extent, in oral submissions. In the absence of a transcript of the hearing before the High Court, it is not possible to establish the exact position. I, therefore, cannot conclude whether there was a want of constitutional fairness or not. That is not a satisfactory basis to determine an issue so fundamental to the administration of justice.

69. However, insofar as the trial judge may have erred by not affording the parties an adequate opportunity to present their respective cases on this issue – and I am not so holding – they have each asked this court to exercise its discretion to fix the amount of security in the event that this court upholds the decision to order the provision of security for costs. I shall do so without specifically holding that the trial judge erred as alleged, as the extent of all the submissions before the High Court on this point have not been established one way or the other.

70. It appears to me that the following points are relevant to the exercise of this court's discretion:

(1) It was agreed between the parties that the application under O.29 of the Rules of the Superior Courts is to be applied in relation to foreign companies on the same principles applicable to applications under s.52 of the Act of 2014.

(2) As was observed by Barniville J. in *Coolbrook Developments Ltd v Lington Development Ltd* [2018] IEHC 634, the discretion granted to the court under s.52 is not trammelled by any presumptive rule of thumb. It is open to the court to order full costs if the judge is satisfied that this meets the justice of the case. Likewise, it is open to the court to discount the level of costs in respect of which he or she orders security.

(3) In principle, a defendant who seeks security for costs against a plaintiff company which is incorporated outside the State ought not to be disadvantaged vis-à-vis security for costs, compared to a defendant sued by a company incorporated within the State.

(4) The appellants do not say that security for costs will stifle the litigation.

(5) In Australia in 2009, when security for costs was ordered in proceedings involving the appellants, Avalon paid the (unspecified) security and the proceedings continued.

(6) There is clear evidence that Protégé will be unable to pay anything other than the barest token contribution towards the costs of IDL (in the event that IDL succeeds in its defence), and there is no evidence at all from Avalon as to its financial strength.

(7) Any award of costs against Avalon would have to be enforced in Panama, a matter which necessarily would involve further time and costs.

(8) The order for security for costs should be proportionate.

(9) The court should strike a balance between the interests of the corporate plaintiff and the defendant for whom security for costs is to be provided.

(10) A defendant is not entitled to an indemnity against all costs.

(11) The security should be neither a mere token nor an obstacle to "a full and fair disposal of the issues."

71. The purpose of ordering security for costs is to redress a perceived injustice in requiring a defendant to meet, in this case, the very significant expenses of defending what may turn out to be an unmeritorious claim, and who might then have to bear the burden of those costs because the corporate plaintiff is not a mark for costs. That perceived injustice will not be addressed, to my mind, if the quantum of the security is not a significant percentage of a fair estimate of the full costs on a party and party basis. There may be cases where, in the interests of justice and in balancing the rights of both parties, notwithstanding the fact that it is just to order that there be security for costs, it is not just to order the full or approximately full estimate of the full costs and the court ought to mark a discount from the estimated full costs of the defendant. The extent of any such discount is quintessentially a matter of discretion for the trial judge applying the factors I have set out above, and each case much be decided on its own facts. I believe the appropriate starting point would be for the trial judge to try to reach a fair estimate of the defendant's full costs on a party and party basis and then proceed to apply whatever discount meets the justice of the situation.

72. In this case, looking at the estimates provided by both sides, it seems to me that Mr. Cooke, on behalf of the appellants, has pared back the costs more than is just. For example, he says that the motion for security for costs should be conducted by IDL without a senior counsel, but the appellants instructed leading counsel on the motion in the High Court and on appeal. I do not believe it is fair to estimate the costs of IDL on the basis of one rather than two senior counsel in the circumstances of this case. If it goes to trial it is estimated to last three weeks, and this will involve considerable complex, detailed expert and factual evidence. I, likewise, note that there are discrepancies even on such apparently uncontentious issues as the outlays of the solicitors. This court does not have the benefit of cross-examination of witnesses and is not in a position to resolve discrepancies of fact on affidavit. The best it can do is assess, in the overall circumstances, where the justice of the case lies.

73. I am satisfied that the estimate advanced by IDL is more likely to be closer to a fair estimate of the full costs likely to be incurred on a party and party basis, than that advanced on behalf of the appellants. However, I acknowledge that this court is not in a position to resolve the dispute between the two legal costs accountants on these points. It may well be that the trial judge was correct to say that to order security for costs in the total sum estimated on behalf of IDL would, in effect, be to award security for costs on an indemnity basis (or indeed an over-indemnity basis). It is, therefore, appropriate to

discount this sum. The question is, to what extent? A deduction of €220,000 is a significant deduction. I do not believe that the costs should be significantly reduced from the hypothetical "fair" full value in this case. For all practical purposes, there is a complete inability to meet any potential costs on the one hand, and on the other hand, there is no suggestion that an award of costs on a full costs basis would stifle the claim. In striking the balance between the interests of the corporate plaintiff and the defendant, there is no need to discount the amount of security in order to avoid stifling a claim.

74. To my mind, the justice of the case is met if the appellants provide security for costs in the sum of €1 million, and that the proceedings are stayed pending the provision of such security.

75. Finally, I must comment on the brevity of the judgment of the High Court which ran to less than two pages. While applauding concision, it must not be at the expense of delivering a properly reasoned judgment which addresses the key elements in the case. The trial judge addressed the key elements but, in effect, stated his conclusions on the evidence without giving his reasons for his conclusions. The essential duty of any judge is to give reasons for his or her decision so that the parties can understand why one side has prevailed over the other. If authority for this basic proposition were required the Supreme Court decisions in *Leopardstown Club Ltd. v Templeville Developments Ltd* [2017] 3 I.R. 707, and the recent decision in *Morrissey v HSE* [2020] IESC 6 (paras. 7.1-7.10;10.1-10.3) make this clear. This obligation is particularly significant where the appeal from the judgment is a review of the hearing at first instance, rather than a rehearing which includes a rehearing of evidence. This court and the Supreme Court depend upon judges of the High Court engaging with the key elements of the case of each of the parties, both factual and legal, and to give reasons for their conclusions in relation to each element, whatever it may be. In this case, I regret to say that did not occur.

Conclusions

76. IDL is entitled to an order for security for costs on the basis that it was accepted that, for the purposes of the motion, it had established on a *prima facie* basis a defence to the claim of the appellants and secondly, that the appellants were not in a position to meet any order for costs which might be made in favour of IDL if it successfully defends the claim.

77. The appellants contended that two special circumstances arose which ought to lead the court to decline to award security for costs.

78. The appellants have not shown on a *prima facie* basis that their alleged inability to pay the costs of IDL is attributable to the wrongdoing of IDL, the subject matter of the proceedings. Secondly, they have not established that the proceedings involve a point of law or issue of exceptional public importance such as would justify refusing the order sought.

79. There was a conflict regarding the hearing in the High Court which did not allow this court to conclude that the trial judge had not afforded the appellants the opportunity to make

submissions in relation to the quantum of any security to be awarded. In its notice of appeal, the appellants requested that this court determine the quantum of security, in the event that they were unsuccessful in their appeal against the order for security for costs. On that basis, this court proceeded to assess the level of security *de novo*, having regard to the materials, evidence and submissions advanced by the parties on the appeal and has fixed the security for costs to be provided by the appellants at €1 million. Pending the provision of the security, the proceedings shall remain stayed.

As this judgment is being delivered electronically, Haughton and Ní Raifeartaigh JJ. have indicated their agreement with it.