[2019] IEHC 903

THE HIGH COURT
COMMERCIAL

[2018/ 5084 P]

BETWEEN
WARATEK HOLDINGS LIMITED, WARATEK INC. AND WRASP SECURITY LIMITED
PLAINTIFFS

AND
WARATEK LIMITED, JOHN HOLT AND JOHN MATTHEW HOLT
DEFENDANTS

AND
BY WAY OF COUNTER CLAIM
WARATEK LIMITED
COUNTERCLAIM PLAINTIFF

AND
BRIAN MACCABA, JCA INVESTMENT HOLDINGS LIMITED, WRASP SECURITY LIMITED, WARATEK INC., WARATEK HOLDINGS LIMITED AND BREEZEFIELD LIMITED
COUNTERCLAIM DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on the 20th day of December 2019,

1. Waratek Limited ("Limited") is an Irish company originally promoted by the Second and Third Named Defendants, John Holt and John Matthew Holt. It developed and patented an antivirus security software application known as "RASP", an abbreviation for *"runtime application self-protection*" which was conceived of and devised by John Holt and John Matthew Holt. Limited's current shareholders are the Holts and a diverse group of investors based internationally.

2. These proceedings concern principally the validity or otherwise of a merger transaction executed on 4 May, 2017, between Limited and the plaintiffs and the validity or otherwise of actions taken by the defendants later in 2017 deeming the merger transaction to be null and void. Other issues arise to which I shall return later.

3. This judgment relates to an application by the defendants for orders requiring the plaintiffs to give security for costs.

4. Before I describe the background to these proceedings and the issues relevant to this application, it is appropriate to observe that almost none of the facts are agreed even for the purpose of this interlocutory application. There is agreement as to the fact of the execution of certain transaction documents and the passing of certain resolutions. However, there remains in dispute even for the purpose of this application, most of the facts and circumstances surrounding the transaction documents executed and other corporate acts and the consequences of those acts in terms of their financial, commercial and legal effects. In reciting a chronology of events, I am not to be taken as making any findings of fact, save in relation to certain obvious events and documents, or expressing views as to their effects, all of which will be for determination by the trial judge.

Background

5. Prior to the events giving rise to these proceedings, Limited was the owner of the patented anti-virus technology. It had two subsidiary companies. Waratek Inc. ("Inc"), incorporated in Delaware, was a marketing and brand development company. Waratek

(UK) Limited ("Waratek (UK)"), incorporated in the UK, is a less significant company in the narrative, although it was the direct employer of the group's Chief Executive Officer, Mr Brian Maccaba, who is the First Named Defendant to the Counterclaim.

6. Mr Maccaba was employed as CEO from in or about 2011, until the termination of his appointment on 5 December, 2017.

7. Mr Maccaba was a director of Limited for a short period between March and July 2013. The defendants say that Mr. Maccaba was a *de facto* director for a longer period and that he occupied the position of director at the time of the events referred to in this judgment. They say that he attended board meetings and that as far as company decisions were concerned he acted on an equal footing with the directors and other officers of Limited.

8. In 2015, Limited was under financial pressure, a prospective investment having failed to materialise. Mr. Maccaba introduced the company to a contact and family friend of his in the United States, Mr. James Casper who owned a company called JCA Investment Holdings Limited, ("JCA"), the Second Named Defendant to the Counterclaim. It was said that Mr. Casper was interested in purchasing the rights to sell the Waratek technology in the U.S. Heads of terms were prepared by Mr. Maccaba and on 26 November 2015, a Reseller Agreement was entered into with a subsidiary of JCA, Partridgevale Limited, which later changed its name to Wrasp Security Limited ("Wrasp") and is the Third Named Plaintiff and a defendant to the counterclaim.

9. The Reseller Agreement was essentially a distribution agreement, which conferred U.S. distribution rights on Wrasp and provided for a 50:50 split of revenues as between Limited and Wrasp. The investment aspect was structured by an obligation on Wrasp to make minimum quarterly royalty payments to Inc of $385,000.

10. After the execution of the Reseller Agreement further discussions took place leading to an amendment of the Reseller Agreement agreed on 24 December 2015, pursuant to which Limited sold its shareholding and interest in Inc to JCA for $10,000.

11. Thereafter, Limited remained in the ownership of its original shareholders and continued to develop and own the patented technology.

12. Inc remained responsible for the marketing of the technology and development of the brand. Wrasp was the distributor for the U.S. market. Inc and Wrasp were subsidiaries of JCA.

13. There is a dispute as to the extent of the rights conferred on Wrasp under the Reseller Agreement. The plaintiffs say that the licence conferred on Wrasp permanent exclusive rights to the U.S. market and that in the event that those rights were to be rescinded in accordance with the terms of the licence, Wrasp would continue to hold permanent non-exclusive sales and marketing rights of the technology on a worldwide basis.

The merger

14. During 2016, Mr. Maccaba put forward another proposal, namely to merge Limited with the U.S. companies. Under this proposal, a new holding company would be established, Waratek Holdings Limited, ("Holdings"), the First Named Plaintiff, which would acquire the entire shareholding of Limited, Inc, and Wrasp, in exchange for the issue of 60% of the shares in Holdings to the shareholders in Limited and 40% to JCA as the shareholder in Wrasp and Inc. The 60:40 proportion could be later adjusted to 50:50 if certain milestones were achieved.

15. A central issue in these proceedings is a claim by the defendants that in the negotiations relating to the transactions referred to above, it was at all times the understanding and belief of the board of Limited, induced by representations made to it by Mr. Maccaba, that JCA and its subsidiaries were owned and controlled by Mr. James Casper, and therefore, an unaffiliated third party.

16. The defendants acknowledge that they were aware prior to these transactions, that Mr. Maccaba, or parties connected to him, had made certain loans to Inc. They say however that it was not until November 2016 that they became aware that he had invested as much as $220,000 in Inc and that Hilary Guiney, Mr Maccaba's wife, was a director of Inc. Nor, they say, were they aware that Ms Guiney was the source of the $10,000 which JCA paid for Inc in December 2015. They claim that even at this point, there was concealed from them that Mr Maccaba and persons connected with him in effect owned and controlled JCA. In short, the defendants claim that representations made to them that JCA was an unaffiliated third party owned and controlled by Mr. James Casper were false and that JCA Investment was a vehicle owned and controlled by Mr. Maccaba and persons connected with him including Ms Guiney, and that Mr. Casper was no more than a "front" to enable Mr Maccaba to acquire a 50% interest in the Waratek Group.

17. On 4 May 2017, the merger transaction documents were executed, being a Share Exchange Agreement, Offer Letter, Option Agreement, and a Warranty Agreement, all giving effect to the "share for share" merger. On the U.S. side, the counterparty became Breezefield Limited, the parent company of JCA, the Sixth Named Defendant to the counterclaim. Breezefield later transferred its shareholding in Holdings to two new companies, Waterbuck Way Limited and Dreamwalk Limited.

18. The defendants say that the merger was effected by the operation of Article 79 of the Articles of Association of Limited. That Article provides for a "Co-Sale", whereby an investor majority seeking to sell shares can compel the holders of other shares to sell and transfer their shares to its proposed purchaser, a mechanism commonly known as a "drag along" provision. They say that this provision could only be invoked validly where the proposed purchaser is an "unaffiliated third party". They say that having regard to facts they claim emerged later, Holdings was not an "unaffiliated third party" and the transaction was not a "*bona fide sale*", and therefore Article 79 could not have been validly invoked.

19. The plaintiffs assert that once the board of directors of Limited had approved a sale of shares to Holdings, it became a "Permitted Transferee" for the purpose of Articles 44 to

53 and accordingly, that the validity of the transaction was not dependent on the transferee being an unaffiliated party.

20. Illustrative of the level of disagreement even as to basic facts is the existence of the dispute firstly as to the issues identified above, namely whether the validity of the merger transaction depended on Article 79 of the Articles of Association, or could be validated by reference to other provisions in the Articles, and secondly as to what occurred thereafter in terms of consummation and implementation of the transaction. For example, it is said that although there was agreement that the shares in Limited would be acquired by Holdings, the register of shareholders of Limited was never altered. Also in dispute is what happened thereafter to the business and trade, including the employees of the respective companies. It appears to have been envisaged that the merger would bring the trading operations of the three companies together under the umbrella of Holdings, and yet the plaintiffs claim that Limited, later seeking to "avoid" the merger, appropriated to itself the business and undertaking of Inc and Wrasp.

21. The defendants say that after the execution of the merger transaction the board of Limited became aware that Ms Guiney was a director of JCA and Wrasp and had been a director of Inc, and that Mr. Maccaba had acted as CEO of Inc.

22. The defendants commissioned EY to examine the merger transaction and investigate matters concerning disclosures and communications of Mr. Maccaba in relation to the transaction and whether he, or any person connected to him, had any undisclosed, direct or indirect interest of any nature in Breezefield Limited, Waterbuck Way Limited, or Dreamwalk Limited.

23. On 21 August 2017, Mr. Maccaba was suspended from his position as CEO.

24. In November 2017, EY reported findings that Mr. Maccaba's interest or that of parties associated with him, in Inc, Wrasp, JCA and Breezefield was more substantial than he had previously disclosed and recited information to the effect that Mr Casper was not the true owner or controller of JCA.

25. On 5 December 2017, the employment of Mr Maccaba was terminated.

Avoidance of the merger

26. In December 2017, the board of Limited determined that because of Mr Maccaba's interest in JCA and its subsidiaries, the offer from Holdings which underpinned the merger transaction as structured was not a *bona fide* offer received from an unaffiliated third party within the meaning of the Articles of Association. Therefore, the execution of the merger using the Co-Sale provisions of the Articles was invalid and the entire merger transaction should be treated as null and void.

27. A meeting of shareholders of Limited was convened and held on 20 December 2017, at which resolutions were passed declaring that the offer by Holdings "*is not and never was a bona fide offer from a third party for the purposes of Article 79", and "That the directors of the company are hereby instructed: -*

(i) To treat the purported transfer as null and void and having no effect;

(ii) To take all measures which the directors consider necessary or desirable to dispute or contest any claim against the company that the purported transfer was validly effected;

(iii) Not to take any action which would in any way perfect, validate or facilitate the purported transfer or the purported transaction".

28. On 26 December 2017, Limited served on Wrasp a Notice of Termination of the Reseller Agreement. The stated grounds were the repudiatory breach by Wrasp of its operational and payment obligations under the agreement.

29. On 27 December 2017, Limited and certain "*contracting shareholders*" entered into a Share Subscription and Shareholder's Agreement with a new investor, Wildermuth, pursuant to which Wildermuth invested a sum of $3 million.

30. It is said by the plaintiffs that in negotiating the Wildermuth investment, Limited wrongfully and falsely warranted to the investor that the merger had not been given effect to and would not be given effect to.

31. I shall refer to the actions of Limited in December 2017 as the "avoidance" of the merger.

These proceedings

32. The plaintiffs seek a declaration that the merger is valid and binding and that Holdings is the owner of 100% of the issued share capital of Limited. They claim in the alternative an account of all and any gain by Limited on foot of an allegedly unlawful process whereby it acquired the goodwill, assets, business and undertaking of JCA, Inc and Wrasp.

33. The plaintiffs allege that John Holt and John Matthew Holt conspired together to falsely allege that they, and Limited, were unaware that Mr Maccaba, or persons connected with him, had an interest in the business of JCA. They allege that the defendants made their false claim with the deliberate objective of fabricating a basis on which to set aside the merger.

34. The plaintiffs also allege that on foot of these false claims, the defendants have asserted that the merger did not occur, that Holdings does not own any of the shares in Limited and that Limited has retained and converted to its use the goodwill, assets and undertaking of Holdings without payment or compensation.

35. The defendants admit the execution of the merger transaction documents and admit that Limited has asserted that the merger was invalid and of no legal effect. They deny that the transaction was implemented, and deny that they were under any obligation to do so.

36. The defendants plead that the purported merger was:

(i) Null and void for non-compliance with the Articles of Association of Limited,

(ii) Void and unenforceable because it was procured by fraudulent misrepresentation and conspiracy by Mr Maccaba and the plaintiffs and by reason of breach of fiduciary duties by Mr Maccaba.

The counterclaim

37. The defendants seek a declaration that the merger was null and void and/or unenforceable. They seek damages against the counterclaim defendants for breach of fiduciary duty (as regards Mr Maccaba), fraudulent misrepresentation, and conspiracy.

38. Other reliefs are claimed by the defendants relating to the Reseller Agreement and claims are made for an account and inquiries.

39. The affidavits exchanged in this interlocutory application address the evidence extensively. They reveal allegations and counter-allegations as to who knew and did what and when. At the heart of this case is the stated belief of the defendants that at all times, commencing with the first introduction of Mr Casper to the group, Mr Maccaba was embarked on an elaborate scheme or "ruse" to acquire for himself and/or persons connected to him a substantial shareholding in the company which employed him, and that this scheme was advanced by not revealing the true extent of his interest in the counterparty to the merger. This central allegation is denied fully, and Mr Maccaba and the plaintiffs say that at all material times he had disclosed his interest and abstained from relevant decisions, such that the defendants knew of his interests when entering into the transactions and cannot now rely on these allegations, to avoid the merger.

40. Apart from these factual matters, the parties in their submissions refer to the legal issues which will require determination at the trial. These range from a consideration of the validity of the merger transaction as executed having regard to the constitution of Limited and to the Companies Acts, through to the application of the principles relating to fiduciary and other duties of directors, fraudulent misrepresentation, conspiracy, and conversion.

41. Pleadings and particulars have been exchanged to the point of a Reply to the Defence and Defence to Counterclaim.

Security for Costs

42. The principles governing an application of this nature are well established in numerous decided cases of the Superior Courts. I shall briefly refer to the decisions of the courts which are most relevant to the issues which I have to consider in this case.

43. In *Usk and District Residents Association Limited v. The Environmental Protection Agency* [2006] IESC 1, the Supreme Court (at para. 6.2) approved the summary of the law given by Morris P. in *Inter Finance Group Limited v. KPMG Pete Marwick* (Unreported, High Court, 29th June, 1998) where he set out the test in the following terms: -

> *"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 specific 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 part, or where 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".

44. The principles were considered at length by Clarke J. (as he then was) in Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited [2009] IEHC 7, (at para. 3.1), where he quoted from the passages referred to above and continued: -

"3.1 As I have already noted, there is ample authority for the proposition that the court retains a discretion not to order security for costs where the plaintiff concerned 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. It has, of course, been pointed out that there is a certain superficial illogicality about the court considering such an eventuality. The defendant would only become entitled to its costs if it wins. By definition if it wins then the plaintiff's inability to pay costs cannot have been due to any wrongdoing on the part of the defendant, because the court will have found either that there was no such wrongdoing or no losses (or indeed both).

3.2 On the other hand, the court is faced with being unable, at the stage at which the application must necessarily be brought for it to have any practical effect, to reach a view as to which party is going to win. It must, therefore, take the rather superficially illogical step of assuming, for the purposes of the defendant recovering costs, that the defendant will win, but also assuming, for the purposes of determining whether any inability to pay those costs is attributable to the wrongdoing asserted, that the plaintiff will win.

3.3 I am mindful of the fact that all of the authorities make clear that the court's assessment must be conducted on a prima facie basis. As was pointed out in Irish Conservation and Cleaning Ltd v. International Cleaners Ltd (Unreported, Supreme Court, Keane C.J., 19th July, 2001) to do otherwise would be to invite the court, on a preliminary motion, to decide the case. Everything which I say hereafter should,

therefore, be subject to the qualification that I am referring, even if not expressly stated, to the various necessary matters being established on a prima facie basis."

45. The passage above is particularly apposite to this case, where the information provided by both parties on this security for costs application addresses very extensively the fundamental merits of the case. While this is understandable the Court must exercise caution not to make any findings as to the merits which go beyond the question of a *prima facie* defence or the likelihood of either party succeeding at trial.

46. Clarke J. identified four propositions to be established, again on a *prima facie* basis, to support an assertion that the plaintiff's inability to pay stems from the wrongdoing alleged, namely:-

"(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".

47. It is also well established from the authorities that in addressing the question of whether the defendant seeking security of the costs has a *prima facie* defence to the claim, it is insufficient for such defendant to simply assert that he has a defence. He is required to refer to evidence which he says establishes the existence of a *prima facie* defence.

48. In *Quinn Insurance Limited (Under Administration) v. PricewaterhouseCoopers (A Firm)* [2018] IEHC 16, ("*Quinn Insurance*"), Haughton J. (at para. 10) quoted with approval the passage in the judgment of Finlay Geohegan J. in *Tribune Newspapers Limited (in receivership) v. Associated Newspapers Ireland trading as Irish Mail* (25 March 2011) where she stated: -

"If such evidence is adduced then the Defendant is entitled to have the Court determine whether or not it has established a prima facie *defence upon an assumption that such evidence will be accepted at trial. Further, the Defendant must establish an arguable legal basis for the inferences or conclusions which it submits the Court may arrive at based upon such evidence. Insofar as the Plaintiff is submitting that the appropriate test includes an assessment by this Court on the application for security for costs as to whether the defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding, I reject that submission".*

49. In *Quinn Insurance*, Haughton J. continued as follows: -

> *"The court must also be cognisant of the nature of a security for costs application. It is not meant to be a review, much less a detailed analysis or assessment, of the evidence that may be adduced by a defendant at trial, such as would effectively require defendants in this case to adduce what are likely to be very extensive working audit papers. It is also generally sought pre-discovery. Thus the plaintiffs have not yet been required to discover their records, including their internal working documents relating, for instance, to actuarial calculations, claims forecasts, and the preparation of financial statements and regulatory returns. It could be anticipated that if the audit working papers were referenced and exhibited (even in part) the volume of the grounding affidavits, replying affidavits and exhibits, which is already substantial, would have grown exponentially. This would run the risk of changing the scale of security for costs applications, making them unwieldy, and causing such applications to take up excessive court time. Such applications should be dealt with expeditiously and cost-effectively. At risk of repetition, the court's task is to consider the evidence as presented, and the inferences or arguments that flow from that, in ascertaining whether there is a prima facie defence, and as Ryan J. stated in Newlyn and Marchbury, 'the burden is not a heavy one' (para.73)".*

***Prima Facie* Defence**

50. The starting point in this case is that documents which at least purported to effect the merger of Limited with Inc and Wrasp were duly executed on 4 May, 2017. The defence rests almost entirely on the factual premise that Holdings as the purchaser of shares in Limited was not an unaffiliated third party and therefore the transaction was not a *bona fide* sale to which the Co-Sale provisions of the Articles of Association applied. That is an oversimplification of the issues, but at trial the resolution of the factual dispute regarding the status of Holdings, the status, ownership and control of JCA and the role of Mr Maccaba will largely inform the determination of both the plaintiffs' claims and the counterclaims.

51. At first pass, it is arguable that a court could decide on the validity of the merger by a close examination of the transaction documents and the Articles of Association of Limited and a limited number of facts surrounding the execution of the merger transaction documents. However, it is not the function of the court to adjudicate, even at this stage, on any limited but substantive issues.

52. As regards evidence proffered by the defendants, Mr John Matthew Holt has sworn two lengthy affidavits in which he describes in detail the development of the relationship between Limited and the U.S. companies from the time of the introduction of Mr Casper by Mr Maccaba through to the merger. Exhibits to his affidavits include the following:

    (i) Emails emanating from Mr Maccaba from 2016 concerning his investment in Inc and which the defendants say evidences a failure on his part to disclose the true extent of his role in Inc and JCA.

(ii) Emails between Mr Maccaba and Mr Casper which the defendants say reveal that he was the party driving and giving instructions to Mr Casper and to the lawyer representing JCA, at a time when, before he was removed from this function, he was supposed to be representing Limited in the negotiations.

(iii) The Report of EY which the defendants say identifies that Mr Maccaba's involvement with Inc was "*more hands on*" than known by the board of Limited and which reveals the extent of the previously undisclosed exposure of Mr Maccaba to Inc and Wrasp, and that Mr Maccaba's wife and other persons associated with him, including lawyers in Israel and Ireland, collaborated in the scheme alleged by the defendants.

(iv) Companies Registration Office printouts showing the role of Mr Maccaba and persons connected to him in JCA, in Wrasp, in Breezefield, in Waterbuck Way Limited and in Dreamwalk Limited.

53. The replying affidavits are sworn by Mr Edwin Alkin, who describes himself as a director of Holdings. On any overview of the narrative, Mr Alkin's role appears to be limited, and it is said by the defendants that he was not a director of the plaintiff companies or of JCA at the time of the events and transactions in dispute in the case. It is, of course, possible that at a trial more information could emerge as to his involvement in the matter.

54. Mr Alkin's affidavits comprise largely of the plaintiffs' submissions in response to the assertions made by the defendants and he proffers explanations for certain factual issues. Of particular significance is that he expressly acknowledges (in paragraph 12(d)) the existence of a dispute as to whether material matters concerning Mr Maccaba were known to Limited and the existence of a dispute as to whether these matters entitled Limited to "rescind" the merger.

55. A remarkable feature of the case, which is relevant to the exercise of my discretion, is that no affidavit has been sworn by Mr Maccaba in response to the very serious allegations made against him personally. Equally remarkable is the fact that Mr Maccaba, not being a plaintiff, when the counterclaim was served on him, was reluctant to authorise solicitors to accept service of the Notice of Counterclaim, and only very late in the process instructed Arthur Cox to enter an Appearance.

56. Undoubtedly the plaintiffs will at the trial adduce evidence and proffer explanations of the many allegations made against them and against the counterclaim defendants. But Mr Alkins' affidavit is so limited in addressing the extensive evidence referred to in the defendants' affidavits and his acknowledgment of a real dispute on the most central questions regarding the role of Mr Maccaba, are such that I am not prepared to find that the defendants have no *prima facie* defence to the claim regarding the validity of the merger.

57. As regards the claims for conversion by Limited of the assets, business and undertaking of Inc and Wrasp, the defendants' affidavit evidence at this stage is somewhat vague. The

defence appears to rest on the proposition that the assets, business and undertaking now operated by Limited were never the property of Inc and Wrasp. However, this element of the case is largely dependent on the plaintiffs firstly proving that the merger was valid and that the avoidance actions of December 2017 were wrongful. Accordingly, I cannot find that there is no *prima facie* defence to the claim on this issue.

Plaintiffs' inability to pay the costs of successful defendants

58. Possibly the only proposition on which the parties agree in this application is that the financial status of the plaintiffs is such that if they are unsuccessful in this action they will be unable to meet any award of costs made in favour of the defendants.

Special circumstances

59. The "special circumstance" invoked by the plaintiffs to persuade the court to refuse an order for security for costs is that most commonly relied on in such applications, namely that the plaintiffs' impecuniosity has been caused by the alleged wrongdoing the subject matter of the proceedings.

60. The plaintiffs say that if the merger had not been "avoided" or "rescinded", Holdings would now be the owner of the entire shareholding in each of Limited, Inc and Wrasp.

61. They refer to an affidavit sworn by Mr John Holt in the defendants' application to enter the proceedings in the Commercial List in which he is quoted as saying that in the context of the "Wildermuth" investment, the group was valued at $28 million. They say that under the terms of the merger Holdings has a contractual entitlement to own and control the group, and that the original shareholders of JCA are therefore entitled to 60% of that value.

62. The defendants say the following: -

    (i) That Holdings is and was always no more than a "shelf" company incorporated to facilitate the merger transaction.

    (ii) That the correct analysis of this matter should be to examine the status of the plaintiff companies before the merger transaction, and not at the date of the avoidance complained of.

    (iii) That before the merger, Holdings held no assets whatsoever.

    (iv) That even if the merger was implemented, the interest of Holdings and ultimately that of its shareholders would be limited to the shares in the subsidiaries and therefore, the plaintiffs would not have had cash or other liquid assets to meet an award of costs.

63. As regards the reference to the "group" having a value of $28 million, the defendants say that even if this figure were correct, it represents a stated "enterprise value". They say that, as is typical of companies in the technology sector, such an enterprise value does not directly reflect assets or revenues of the company and therefore does not mean that

were it not for the avoidance of the merger, the plaintiffs would have been in a position to discharge substantial legal costs.

64. As regards Inc and Wrasp, it is said that they also have limited assets, even before the events giving rise to these proceedings. Inc was essentially a marketing and branding company. Wrasp's only material asset was its contracted position as a distributor under the Reseller Agreement, which the defendants say was validly terminated on 26 December 2017 by reason of non-performance on the part of Wrasp, not least its payment obligations.

65. The first question these submissions raise is whether for the purpose of determining if the plaintiffs' inability to meet an order of costs is attributable to actions of the defendants the analysis of the plaintiffs' financial trading should be made, as the defendants contend, as of the date prior to the merger in May 2017 or as the plaintiffs contend, a date after the merger and before the avoidance events in December 2017. This question became central to the submissions on this application. The first step in resolving it is to consider the fundamentals of the proceedings themselves.

66. The proceedings as now constituted, having regard to the Defence and Counterclaim, will engage the court at trial in scrutiny not only of the basic validity and enforceability of the merger transaction itself but also of the conduct of all of the parties, including the counterclaim defendants. It will extend also to factual and legal issues concerning the claims for fraudulent misrepresentation and conspiracy, and claims by the plaintiffs alleging conversion of their assets and undertaking. This having been noted, the events which most immediately gave rise to the proceedings are the avoidance actions of December 2017 culminating in the central event of the avoidance resolution of 20 December 2017, and those are the actions of the defendants complained of in the proceedings. Therefore, I have concluded that in determining whether the impecuniosity of the plaintiffs stems from that avoidance action the correct starting point must be the evidence as to the financial position of the plaintiffs immediately prior to those events. This means giving the plaintiffs the benefit of an assumption that the merger was duly implemented in accordance with the May 2017 agreement. If the plaintiffs were then in a position to meet substantial costs they will have established a special circumstance which would justify refusing an order for security for costs.

67. Before addressing this question further it is appropriate, for completeness, to observe that the financial standing of the plaintiffs before the merger was no better in terms of cash resources than at the later dates. At that stage Holdings was a shelf company, incorporated for the purpose of facilitating the merger, and clearly had no assets. As regards Inc and Wrasp, the plaintiffs own expert, Mr Carson, notes that prior to the merger they were loss-making and required external funding to discharge their costs (Deloitte Letter, 27th March, 2019).

68. Because so much of the argument in this application related to the correct time at which to examine the financial status of the plaintiffs, there was limited discussion of the actual financial status of the plaintiffs. It is clear under the terms of the merger transaction,

Holdings had an entitlement to the entire shareholding in the group. The plaintiffs do not submit that they then held or had ready access to cash or liquid resources at a level which would enable them to meet an order for costs. Their submission is based entirely on the proposition that if the merger were not avoided Holdings would have a shareholding at a value equating to $28 million, taking the figure referred to by Mr Holt in an earlier affidavit.

69. As noted earlier, it is common for companies in the technology sector to be valued by reference to future projections and multiples of revenues and such valuations largely depend on certain targets and projections as to the future. As a general rule they do not directly reflect such a company's current ability to fund its activities and costs without continuing investment, let alone discharge potential adverse costs of complex legal proceedings. In this case, there is no evidence before the court that prior to the avoidance actions any of the plaintiffs had the ability to meet costs and they have not so claimed. In Mr Alkin's affidavit sworn on 11 January, 2019, he states positively that:-

> *"…the entire Waratek project is based upon the proposition that the business has an enterprise value based upon the strength of its technology and the prospect of either making sales or selling the business. The "financial position" of all of the Waratek entities is now and always has been negative, i.e. all of the Waratek entities including Waratek Limited have costs – substantial costs – and little income to meet their costs."* (emphasis added)

It seems to me that if this averment made on behalf of the plaintiffs were correct it cannot then be established that the inability to meet an order for costs stems from the avoidance acts of the defendants.

70. In *Lough Neagh Exploration Ltd v. Morrice ("Lough Neagh*") [1989] ILRM 205, Laffoy J considered the position of a plaintiff which was an exploration company which claimed that but for the commission of certain acts by the defendants, it would have been involved in an exploration venture which would have proved to be a success. Its assets included information and expertise in relation to oil and gas exploration and a licence to prospect. The court found the plaintiff's submissions to be "*far too speculative, farfetched and remote to be tenable*", and found that the plaintiff was devoid of any assets from which to satisfy an order for costs. The plaintiffs in this case are in a stronger position than the plaintiff in *Lough Neagh* in that the merger transaction documents as executed conferred on Holdings a contractual right to ownership of the shares in the group. The only value referenced is that in December 2017 a valuation of $28 million was placed on the shareholding of certain companies in the group in the context of a particular investment. But, as in *Lough Neagh*, the ability to fund costs is nowhere evidenced. On the contrary, the only evidence is that the shareholding had a "hope" value, and none of the plaintiffs had available to them, even after the merger, the required cash resources. That being the case, the plaintiffs cannot establish even on a *prima facie* basis that the avoidance actions which they claim deprived them of this shareholding is the cause of their impecuniosity.

71. In the circumstances the plaintiffs have failed to demonstrate that their inability to meet any order for costs is attributable to the actions of the defendants. Therefore, I shall exercise my discretion to order that they provide security for costs.

72. I shall hear the parties further as to the quantum of the security to be provided.