**THE HIGH COURT**

[2021] IEHC 125

**[2018 No. 11047 P]**

**BETWEEN**

**TOM MCEVADDY PROPERTY LIMITED TRADING AS NEXUS HOMES (IN LIQUIDATION)**

**PLAINTIFF**

**AND**

**NATIONAL ASSET LOAN MANAGEMENT DAC**

**DEFENDANT**

**(No. 2)**

**JUDGMENT of Mr. Justice Twomey delivered on the 25th day of February, 2021**

**INTRODUCTION**

1. The legal costs for the defendant are estimated to cost €231,000 to resolve a dispute with the plaintiff in the High Court over the ownership of a sum of €228,000. Therefore, if the defendant were to win the case but not recover its legal costs (as the plaintiff is impecunious) it would actually have cost it money (€3,000) in order to have the High Court determine that it owns the €228,000.

2. However, the position is worse when one considers that the €231,000 in legal costs are just those of the defendant. Assuming that the plaintiff is likely to incur a similar level of legal costs, the total legal costs for establishing the ownership of €228,000 in the High Court is likely to be €460,000.

3. Furthermore, as a significant number of High Court cases are appealed to the Court of Appeal, if the High Court judgment in this dispute were to be appealed, it is possible that the total costs for establishing who owns €228,000 could be over €500,000 (when the costs of the appeal are included), which is well over twice the value of the amount in dispute.

4. The reason that this disconnect, between the value of the dispute and the cost of resolving that dispute, has come to light is because in *Tom McEvaddy Property Ltd v. NAMA* [2020] IEHC 593 (the "Principal Judgment") this Court held that the, plaintiff (the "Company") should provide security for costs to the defendant ("NAMA") before proceeding with its litigation about the ownership of this sum. As part of this Court's task to determine how much security the Company should provide, this Court received submissions from the defendant regarding the likely costs of the litigation.

5. In this case, the defendant is 'lucky' that the plaintiff is an impecunious company (and not an impecunious individual), since the courts generally require impecunious companies to put up the estimated legal costs of the defendant as security before being permitted to continue with the ligation. In this way, if the defendant wins it will not be met with a plaintiff that cannot pay the defendant's legal costs, since it will be able to rely on the security.

6. However, if the plaintiff was an impecunious individual resident in Ireland (or the EU) then, as noted below, the current position appears to be that defendants do not generally look for security for costs against an individual plaintiff. In such a situation, if the

defendant won (at first instance and on appeal) it could end up spending €260,000 (€230,000 plus say €30,000 on the appeal) in irrecoverable legal costs in taxpayers' funds in order to establish that it owns the sum of €228,000 and so it would have cost it €32,000 (even taking account of the €228,000) in its pursuit of 'justice'.

7. Since legal costs are '*an intrinsic part of the administration of justice'* (per Baker J. in *Quinn Insurance Ltd v. PricewaterhouseCoopers* [2020] IECA 109 at para. 53), it could be argued that justice is denied if a defendant wins his case but cannot recover his costs from an individual plaintiff, particularly where the legal costs exceed the value of the dispute, as in this case, so that to achieve justice such a defendant would be 'down' €32,000 even after taking account of the sum in dispute.

8. Since it is arguably a denial of justice for it to cost €231,000 to establish that one owns €228,000, and bearing in mind that it is the task of this Court to administer justice, reference is made in this judgment to the effect of the high costs of litigation in Ireland on a court's task to administer justice and also to the recent analysis of this issue in the *Review of the Administration of Civil Justice (the "Civil Justice Review")* published in October 2020. In the absence of a reduction in legal costs, and in order to seek to ameliorate, even to some degree, this injustice for a defendant, reference is made herein to the option for such a defendant of seeking security for costs orders against individual plaintiffs in certain circumstances.

9. Although the focus in this judgment is on the position of a defendant (since this case involves an impecunious plaintiff), it is important to remember that high legal costs which are irrecoverable can also affect plaintiffs, since if it was a plaintiff who was suing an impecunious defendant over an asset/cash worth €228,000, that plaintiff would not recover his €260,000 in costs if he wins at first instance and on appeal and so he could end up in the unenviable position of also being 'down' €32,000 in achieving the 'justice' of an order that he owns the property worth €228,000.

10. However, as this case involves an impecunious corporate plaintiff, consideration will first be given to the issues that arise for a defendant being sued by such a plaintiff.

**SECURITY FOR COSTS AGAINST AN IMPECUNIOUS CORPORATE PLAINTIFF**

11. Having decided in the Principal Judgment that the Company had to provide NAMA with security for its costs, this Court requested the parties to engage with each other so as to agree all outstanding matters arising from that decision, so that no further court time would be unnecessarily used in dealing with this matter. The matter was also adjourned on a number of occasions to facilitate engagement between the parties regarding the amount of security to be provided. At the hearing of this matter, counsel for NAMA submitted that there had not been '*very much engagement'* on the part of the Company with NAMA to seek to reach agreement on the quantum of the security.

12. In the absence of agreement, it was necessary for this Court to have a hearing regarding the amount of the security to be provided by the Company before it was allowed to proceed with the litigation. NAMA provided the Court with a report from legal costs

accountants, *McCann Sadlier*, in which it is estimated that it will cost €231,140.50 (including VAT) to defend these proceedings. As noted in the Principal Judgment, the proceedings are relatively straight-forward as they involve a claim by the Company that NAMA holds the sum of €228,375.84 on trust for the Company, which is denied by NAMA. The report from the costs accountants estimates that it will take up to four days for the matter to be heard in the High Court.

**€460,000 in High Court legal costs to resolve a dispute over €228,000**

13. On the assumption that the plaintiff's legal costs will be in the same range as the defendant's, it is therefore estimated that it will cost *circa* €460,000 for this dispute over the ownership of €228,000 to be resolved by the High Court.

14. The fact that one party would spend €230,000 (and that the two parties might spend circa €460,000 on aggregate) resolving in the High Court a dispute over €228,000 would not appear to make economic sense. In this regard, litigation and in particular High Court litigation would appear to be, economically speaking, an anomaly, since in other walks of life this outcome would be unlikely to happen. For example, it seems most unlikely that a person would spend €10,000 repairing a car worth €9,000. Nor would two people spend €20,000 repairing a car worth €9,000 (and then toss a coin to see who has to pay the repair bill). So how is it that two parties propose spending €460,000 resolving a dispute over €228,000, with the loser likely to foot the bill?

15. The answer is that a party that is sued has no choice about whether he will be sued or not and he has no choice regarding the legal costs, as he is subject to the 'going rate' (as evidenced in this case by the report of *McCann Sadlier*), particularly as regards the level of costs he has to pay the winning party. If he fails to pay those going rates to the winning party (as decided by the legal costs adjudicator, in the absence of agreement), he is subject to enforcement action for those legal costs, with the assistance of court orders if necessary. In particular, a person who is sued does not have a choice of other cheaper forms of litigation, since there is only one forum for litigation, the High Court, assuming of course his case falls within the jurisdiction of the High Court (a dispute over a sum in excess of €75,000).

16. In this regard, this Court has no reason to believe that the rates proposed by *McCann Sadlier* are not the current 'going rate' for High Court litigation. The estimate contains a sum of €80,465 as the professional fee for the solicitor, plus €75,020 for senior counsel and €55,962 for junior counsel. Included in *McCann Sadlier's* estimate is a brief fee for senior counsel for the action of €36,300 (€30,000 plus VAT). Support for the view that this might in fact be the going rate is provided by the *Civil Justice Review*, which was chaired by the then President of the High Court, Mr. Justice Peter Kelly. The Review Group specifically set out at p. 270 of the Report the following commentary from the Medical Protection Society:

> "A senior barrister's fee for a short trial in Ireland can easily be set at €30,000, which is twice the figure we would pay to a Queen's Counsel in England. The high fees are further distorted by the attempts by some plaintiffs' lawyers to argue that

junior counsel should receive 50% of the fee of senior counsel, regardless of work undertaken"

and

"In our experience, plaintiffs' costs [in Ireland] are amongst the highest in any country in which we have members […] Few law firms charge with reference to hourly rates for work undertaken. This means there is little transparency on bills offered as part of the settlement of a claim; plaintiffs' lawyers seek payment of a lump sum "professional fee" to reflect the work undertaken […] It is not unusual for the bill to be reduced by 20-30% following negotiation" (Emphasis added)

17. The fact that the defendant has no choice but to defend this litigation in the High Court assumes of course that the plaintiff refuses to agree to resolve the dispute by a cheaper form of dispute resolution such as mediation (or by consent of both parties in the Circuit Court). However, in some instances, it may suit an impecunious plaintiff that legal costs are high, since as noted by the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 42 at para. 4.12, such a plaintiff can use his impecuniosity (and so his inability to pay hundreds of thousands of euro to the defendant in legal costs if the defendant wins) as an '*unfair tactic'* which is '*little short of blackmail'* to force the defendant to 'buy off' the plaintiff's claim (even where it is '*wholly unmeritorious'*) and thereby save the defendant hundreds of thousands in legal costs he would otherwise have to pay to 'win' the case.

18. Although this judgment is concerned with the issues that arise because of the high level of legal costs when a defendant is sued by an impecunious/insolvent plaintiff, since that is what has happened in this case, it should be noted that the high level of legal costs in the High Court could suit, not only an impecunious plaintiff, but also a wealthy plaintiff suing a person or company of modest means. This is because the risk, even if small, of such a defendant having to pay those high costs could allow an unscrupulous wealthy plaintiff, in a similar way to an unscrupulous impecunious plaintiff, to use his wealth as an '*unfair tactic'* which may also be '*little short of blackmail'* to force the defendant to settle (even where the plaintiff's claim is '*wholly unmeritorious'*). Of course, unlike with an impecunious plaintiff, if the defendant is prepared to take that risk and he wins the litigation, at least he will also win as regards legal costs as the plaintiff has the means to pay those costs.

**Little disincentive for impecunious plaintiff not to appeal High Court decision**

19. This case also highlights another issue for defendants who are seeking justice where they are being sued by an impecunious plaintiff. This is the issue of an appeal because, save in rare cases, every litigant in the High Court has a right of appeal and a very high proportion of High Court decisions are appealed to the Court of Appeal. If an impecunious plaintiff has lost in the High Court, just as he had 'nothing to lose' (as regards legal costs) in the High Court, so too he has 'nothing to lose' in pursuing the appeal, since if an impecunious plaintiff loses his appeal, he will not be paying the defendant's legal costs for that appeal.

20. So, to take an example using the figures in this case, if a defendant were to win against an impecunious plaintiff in the High Court (with the same level of legal costs as here, i.e. €230,000) and that plaintiff was to appeal, it would cost the defendant a further sum in legal costs to appeal, say €30,000 for one side (i.e. say €60,000 in legal costs for the plaintiff and defendant for the dispute to be resolved on appeal). One could well be talking therefore about a figure of over €500,000 for the entire legal costs, of the first instance and the appeal hearings, in determining the ownership of the sum of €228,000.

21. Of course, at the appeal stage, assuming he had won in the High Court, the defendant would be faced with the dilemma of whether he should spend €30,000 to 'win' his appeal in a case he regards as unmeritorious, or instead (having already spent €230,000 in irrecoverable legal costs on 'winning' in the High Court) he should seek to '*buy-off'* the appeal for say €15,000, rather than seeking to win it at a cost of €30,000 – i.e. the same result but at a lesser cost, *albeit* where the defendant feels that the claim has no merit.

22. This Court would emphasise that while the legal costs being used in this example are from this case and are being used to highlight the very real financial issues that arise for defendants when being sued by impecunious plaintiffs, such as the Company, it is not being suggested that the Company would seek to use its impecuniosity as a tactic to seek a buy-out of its claim at first instance or on appeal.

**High level of costs highlight need for reforms suggested in Civil Justice Review**

23. The facts of this case also highlight perfectly why the recent *Civil Justice Review* called for the reform of the system of legal costs to enable access to justice become more affordable. In its Report, the Review Group noted that '*Ireland ranks among the highest-cost jurisdictions internationally for civil litigation'* (at p. 267). While it is clear that reform is necessary, it should be noted that the Review Group was unable to reach consensus on the approach that should be taken to achieve this reform. The majority view as to the best approach is the creation of non-binding guidelines for the assistance of parties and their lawyers, by reference to individual 'items' outlined in a table (see p. 321 et seq. of the Report). It is recommended in the Report that these should take into account '*prevailing economic conditions'* and should '*ensure no more than a reasonable level of remuneration on a party and party basis'.*

24. In contrast, the minority of the Review Group do not deem the above suggested guidelines to be sufficient to reduce the costs of litigation. The minority also do not view the regime for the regulation of legal costs under the Legal Services Regulation Act, 2015 as being capable of reducing litigation costs. The view of the minority is that more stringent measures are required, in the form of legislative intervention. They propose that a mandatory scale of fixed recoverable costs/maximum costs (the *'Table of Costs'*) would be set by an independent '*Litigation Costs Committee'*, to be established under statute.

25. While this Court is not expressing a view regarding whether the majority view or the minority view, or a mix of the two, should be favoured, it is nonetheless worth noting, in the context of this case, that the Table of Costs would provide for '*the fixing of charges expressed as a percentage of or otherwise by reference to the value of the claim' where*

*proceedings relate to 'a dispute relating to an entitlement to or ownership of property or relating to a matter, and the value of that property or matter is central to the dispute'*. Reliance was placed by the minority (at p. 428) on the views of the senior judiciary in England and Wales at p. 11 of its paper *Transforming Our Justice System* (September 2016) regarding fixed recoverable costs:

> "More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action."(Emphasis added)

The minority also placed reliance on the views of six High Court judges in Ireland, since at p. 428, it is stated:

> "support for scales of fixed recoverable costs as a means of addressing high legal costs levels in Ireland was evidenced in some of the submissions received by the Review Group, including the submission from six judges assigned to the Personal Injuries List in the High Court."

26. In his covering letter to the Minister for Justice enclosing the *Civil Justice Review*, Mr. Justice Peter Kelly stated that he supported the view of the minority:

> "Despite my best efforts, consensus was not achieved on recommendations to reduce litigation costs. Hence there are two sets of proposals. The majority proposals in essence recommend the use of non-binding guidelines as to costs levels. The minority recommends prescribing maximum costs levels with suitable safeguards to deal with exceptional circumstances.
>
> […]
>
> Having chaired the sub-group on litigation costs and carefully considered the issues, I am of opinion that the recommendations of the minority are more likely to achieve much needed costs reductions than those of the majority. More radical measures than the introduction of guidelines will be needed to achieve the desired results in my view." (Emphasis added)

27. Of course, whether any of the recommendations, the majority, a minority or a mix of both are introduced, remains to be seen. However, until reforms are made, the system will continue to throw up anomalies such as the present one. Indeed, this anomaly is a regular occurrence in the High Court, where impecunious plaintiffs (with 'no skin in the game' when it comes to legal costs and so with nothing to lose) may in some instances, as noted by the Supreme Court in *Farrell v. Bank of Ireland*, be involved in claims where the cost to the defendant of 'winning' the litigation is an incentive to settle wholly

unmeritorious claims. Accordingly, so long as legal costs in the High Court remain not only high, but also disproportionate to the value of the dispute, it will be necessary, in this Court's view, to consider other avenues to achieve justice between the parties, including as noted below the possibility of ordering security for costs against an individual plaintiff resident in Ireland in certain circumstances.

28. In this regard, it is relevant to note that in *Farrell v. Bank of Ireland*, the Supreme Court referred at para. 4.15 to the '*injustice'* which arises for the party who is sued by an impecunious plaintiff and so will not recover her costs, even if she wins the case. Since the courts are tasked with the administration of justice without fear or favour, this means that whether the defendant is a person of average means, a State body funded by the taxpayer, a bank or a business owner/employer/car owner (whether covered by insurance or not), this '*injustice'* of 'winning' but 'losing' on legal costs is something to be borne in mind every time such a defendant is sued by an impecunious plaintiff.

29. In the context of the reforms proposed in the *Civil Justice Review*, it remains to be observed that the high level of legal costs has been a problem, not just for decades, but for at least 250 years, as evidenced by the comments of Voltaire (1694-1778) that:

> "I was never ruined but twice: once when I lost a lawsuit, and once when I won one."

Indeed, the facts of the current case illustrate perfectly that the comment by Voltaire is as true today as it was in the 18th century, since if the defendant in this case was an individual, she would have to pay the plaintiff's as well as her own legal costs, a total of *circa* €500,000 (i.e. including the costs of an appeal) if she lost this dispute over €228,000 and thus she could be said, in the words of Voltaire, to have been '*ruined'* where she lost a lawsuit.

30. However, the irony of Voltaire's statement continues to this day because even if she won a case where she was being sued by an impecunious individual, rather than a company, she could end up having to pay her own legal costs of *circa* €260,000 (including the costs of an appeal). Since the average income in the State at present is *circa* €40,000 gross/€32,000 net, it could take a person on the average wage (after paying her mortgage and living expenses), a huge part of her working life to pay the legal costs of the case she has 'won'. It follows that, if an individual on the average wage in the State is sued in the High Court by an impecunious plaintiff in a case such as this one, she will have the *certainty* of financial ruin, even if she wins the litigation. For this reason, one can still say that a person could be '*ruined'* today as they were 250 years ago, if they 'won' a lawsuit (taken in the High Court against them by an impecunious plaintiff).

31. Since the high level of legal costs has been a problem for many years, it is relevant to note that, in his covering letter to the Minister for Justice, Mr. Justice Peter Kelly pointedly stated that:

> "Lytton Strachey in his short biography of Florence Nightingale records her worry that the report of the Royal Commission into the health of the army "would like so many other Royal Commissions before and since, turn out to have achieved nothing but the concoction of a very fat blue book on a very high shelf".
>
> Not much has changed since then, as we are all too familiar with reports of various bodies, meticulously prepared and containing valuable recommendations for reform or innovation, which have met the fate identified by Strachey.
>
> In an effort to avoid such a result, the Review Group determined at its first meeting to produce recommendations which would be practical, affordable and capable of implementation with as little fuss as possible. [..]
>
> In excess of 90 recommendations are made in the report. Some are more important than others. Some are more far reaching than others. Some will make a bigger impact on how litigation is conducted than others. It is of course a matter for the Government to decide which, if any, of the recommendations it will accept. The recommendations likely to have greatest impact in achieving the matters identified in the Review Group's terms of reference, in my view, are those dealing with discovery, judicial review and litigation costs." (Emphasis added)

Therefore, only time will tell whether the measures recommended by the *Civil Justice Review* or indeed other reforms are implemented by the Oireachtas so that justice is not denied to the average citizen in the State because of the key role legal costs, and in particular high legal costs, play in the administration of justice, or whether in 250 years Voltaire's words will continue to be true.

**Access to justice for those who are not paupers or millionaires?**

32. The problem with this high level of costs is not only that a defendant could be '*ruined'* if he is sued by an impecunious plaintiff, but also that it is arguable that justice is denied to a citizen (whether a plaintiff or defendant) on the average income in the State (or anything close to it), but who cannot afford to 'gamble their home' on the outcome of a case. This is a concern regularly expressed by the Irish courts, see, for example, the remarks made by Clarke C.J. in *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited* [2019] 1 I.R. 1 at pp. 7 and 8:

> "I remain very concerned that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court. That is a problem to which solutions require to be found. It does seem to me that this is an issue to which the legislature should give urgent consideration." (Emphasis added)

33. In this regard, the present case, not only provides evidence of the fact that legal costs often bear no relation to the value of the dispute, but it also provides evidence of the truth of the adage used by the then President of the High Court, Kelly P., that '*the only people who can litigate in the High Court are paupers or millionaires'* (The Bar Review,

February, 2018, Vol. 23(1) at p. 11). In many ways, this case is the perfect illustration of that adage, since the defendant is the putative 'millionaire' in the sense that it is a well-resourced State body, while the plaintiff is the putative 'pauper' in the sense that it is an insolvent company.

34. Not only can it be said that the only people who can litigate are paupers and millionaires, but it can also be said that both the high level and the disproportionate level of legal costs is such as to facilitate an unscrupulous plaintiff with an unmeritorious claim (whether impecunious or a millionaire), to use their respective financial positions as a form of '*blackmail'* (to use the Supreme Court's expression in *Farrell v. Bank of Ireland*) to encourage a defendant of average means to settle. When faced with a wealthy plaintiff, the high level of costs means that even with a very strong case the defendant may not wish to 'gamble his house' when the plaintiff can afford to spend years incurring legal costs and so he may feel forced to settle even if he will get his costs if he wins. When faced with an impecunious plaintiff, he may feel forced to settle applying basic economics, since he faces the prospect of not getting his costs, even if wins, and so it may cost him more than the value of the dispute to 'win' the case, which would be a completely pyrrhic victory.

**Supreme Court's suggestion that a plaintiff's impecuniosity could be used as blackmail**

35. This case is also an example of the type of case referenced by the Supreme Court in *Farrell v. Bank of Ireland* at para. 4.12 (per Clarke J., as he then was) where an impecunious plaintiff, such as the insolvent Company in this case, could (if it was unscrupulous) use its impecuniosity as an '*unfair tactic little short, at least in some cases, of blackmail*' to '*buy-off the case'* even if it was '*wholly unmeritorious'*. However, it is important to emphasise that there is no suggestion that the Company in this case is unscrupulous.

36. The risk of blackmail to which Clarke J. refers arises because a defendant with assets, in this case NAMA, is faced with what its counsel has described as an '*unmeritorious'* case (since this Court has determined in the Principal Judgment that the Company does not even have a *prima facie* case against NAMA). However, in the absence of security for costs, it would cost NAMA €230,000 to defeat what it believes is an unmeritorious case and establish that it owns the €228,000 in dispute.

37. Even the most basic economics would suggest that, in the absence of security for its costs, a defendant in NAMA's position would be better off settling with the Company and so paying the Company say €150,000 (to include fees for the Company's lawyers), rather than fighting and 'winning' the 'unmeritorious claim' at a cost of €230,000.

38. However, where one is dealing with a State body tasked with looking after taxpayers' funds, the 'economic sense' of paying-off what it perceives to be an unmeritorious claim, in order to save on irrecoverable legal costs, may not be as straight forward a matter as it might be for a private individual or company. This is because a State funded body may be publicly criticised for 'wasting' €150,000 of taxpayers' money by paying it to a person with what NAMA regards as an 'unmeritorious claim', even though this may appear to

make economic sense if the plaintiff is not in a position to pay NAMA's legal costs. On the other hand, a state-funded body might be publicly criticised, from a purely economic perspective, for spending so much taxpayers' money on legal costs which it knew were going to be irrecoverable. It is almost a catch-22 situation even where there is no suggestion of bad faith on the part of the plaintiff (and it is important to emphasise that none is suggested on the part of the Company in this case). Ironically, the option which may attract less criticism (not settling) is the one which is likely to cost the taxpayer more money.

39. Clearly the same personal incentives (which apply when a person or private company is spending its own money) do not apply when taxpayers' money which belongs to everyone is being spent. Indeed, there is a risk that such money, which belongs to everyone is sometimes treated as belonging to no one (although it is not being suggested that such an approach is taken by NAMA), and so the same safeguards might not necessarily apply as apply when it is an individual's personal money is at stake.

40. In this regard, the cost to the taxpayer of high legal costs was noted by the *Civil Justice Review* at p. 317:

> "The high cost of litigation in this jurisdiction represents a barrier to access to justice, translates into increased costs in the economy, hampers national competitiveness and imposes a burden on the taxpayer where the litigation involves, or is ultimately financed by the State." (Emphasis added)

As noted below, it may be appropriate in certain circumstances for a body which is funded by the State to seek, and proportionate for a court to grant, security for costs from, not just corporate plaintiffs, but also individual plaintiffs, in order to seek to protect taxpayers' funds.

**The disproportionate level of legal costs in Ireland**

41. This case also highlights the disproportionate level of costs versus the value of the dispute. Indeed, this is not the first time that this Court has remarked on the fact that legal costs in the High Court can be disproportionate to the value of the dispute, see for example the case of *Nutrimedical B.V. v. Nualtra Ltd* [2017] IEHC 253 in which it was estimated that the legal costs for one side to a dispute which was valued at €260,000 would amount to five times the amount in dispute, being €1.3 million. As that was a commercial matter, it is perhaps relevant to note that the *Civil Justice Review* records at p. 268 of its Report that Ireland is the fourth most expensive jurisdiction in the EU for the litigation of commercial contract disputes.

42. The far-reaching consequences (for a person on the average income in the State) of high legal costs (*albeit* in the context of England and Wales) were set out in detail by Lord Woolf in *'Access to Justice'* (Final Report, 1996) where he stated at para. 3 of *Chapter 7 (Costs),* under the heading '*The importance of costs'*, that:

> "The adverse consequences which flow from the problems in relation to costs contaminate the whole civil justice system. Fear of costs deters some litigants from litigating when they would otherwise be entitled to do so and compels other litigants to settle their claims when they have no wish to do so. It enables the more powerful litigant to take unfair advantage of the weaker litigant. […] it is incorrect to assume that high costs are not a problem merely because they are met out of a relatively deep pocket or are passed on in insignificant amounts to individual consumers. They still constitute an unnecessary cost to the economy as a whole and are not acceptable however they are distributed." (Emphasis added)

43. The above statement regarding the significant effects of high litigation costs is echoed in the *Civil Justice Review*, published over 20 years on from the Woolf Report, where, at p. 317, the Review Group observes that:

> "The high cost of litigation is a matter of far greater concern to litigants in Ireland than in most other European countries with which we have been compared on this criterion." (Emphasis added)

44. One set of reforms considered by the Review Group were those recommended by Lord Justice Jackson in 2009 in his *Review of Civil Litigation Costs* in England and Wales at p. 17, wherein he recommended that the Civil Procedure Rules ought to be amended to clarify that costs are proportionate:

> "if, and only if, the costs incurred bear a reasonable relationship to the sums in issue in the proceedings." (Emphasis added )

One can almost sense Lord Jackson's exasperation that it can cost more than an asset is worth to have its ownership resolved by the courts. Indeed, as evidenced by this case, we are not talking about assets of nominal value but rather one which is worth €228,000, which is seven times the net income (*circa* €32,000) of a person on the average wage in the State.

45. The disproportionate level of High Court costs means that a person can, against their will, be subjected to High Court litigation by an impecunious plaintiff who has nothing to lose, while the defendant (say on the average income in the State) may have to spend a significant part of his working life paying off the legal costs of the case he has 'won'. It is little wonder that such a defendant who comes in search of justice would be advised to settle, even if he believes the case is unmeritorious.

46. For this reason, it is perhaps not surprising that in this case the plaintiff is not an individual on the average income in the State (since he would be risking financial ruin if he was), but rather an insolvent company who will never be paying legal costs - win, lose or draw. In this regard, it is also relevant to note that while the plaintiff is a company, and the disputed sum relates to planning fees paid in respect of the development of a property in Sandyford, County Dublin, that property is not owned by the company, but by the married couple who are the sole shareholders in the Company. For this reason, this

development property is not available to meet any legal costs order, if the Company were to lose this litigation.

**The amount paid in legal costs by the State**

47. On the other side of the litigation is a State funded body with unlimited resources to meet legal costs and for whom the payment of hundreds of thousands in legal fees is not a matter of the same concern as it would be for an individual. For this reason, assuming the Company comes up with the security, that State-funded body is likely to spending €231,000 in taxpayers' funds in fighting this case in the High Court over the sum of €228,000.

48. If nothing else therefore, this case highlights the reasons why the *Civil Justice Review* recommends the reform of the civil justice system, particularly in relation to the massive amounts of money which are spent by the State on legal costs. In the Introduction to *Chapter 9 (Litigation Costs*) of the Report it states:

> "The remit of the Review Group requires it to examine the current administration of civil justice in the State and make recommendations with a view, inter alia, to "…[r]educing the cost of litigation including costs to the State…".
>
> […]
>
> The particular element of the Review Group's remit mentioned above clearly envisages a proposal for a system for assessment of legal costs which not only meets expectations of fairness and efficiency, but one which in its design ensures that litigation costs levels will be reduced – as distinct from merely containing, or moderating an increase in, legal costs levels." (Emphasis added)

As noted hereunder (in the context of security for costs against individual plaintiffs), the fact that there is no one with a *personal* interest in protecting taxpayers' funds does, in this Court's view, put an onus on the courts, when dealing with litigation against a state-funded body (where it will not be able to recover its legal costs if it wins), to bear in mind the public interest in protecting taxpayers' funds, when it is seeking to ensure that a defendant's right (as well as that of a plaintiff) to have litigation fairly conducted.

**SECURITY FOR COSTS IF IMPECUNIOUS PLAINTIFF IS AN INDIVIDUAL?**

49. Because the plaintiff in this case is an impecunious company, rather than an impecunious individual, the defendant applied for security for its costs and for the reasons outlined in the Principal Judgment, this Court granted NAMA security for costs.

50. However, it remains to be observed that if the plaintiff in this case were an impecunious individual resident in Ireland or the EU, rather than an impecunious company, defendants have not heretofore generally applied for security for costs (although as noted hereunder Order 29 of the Rules of the Superior Courts allows for such applications). As a result, such a defendant would have to litigate on the basis of an 'unlevel' playing field, i.e. if the plaintiff wins, he gets his legal costs but if the defendant wins, it would not get its legal costs and so would 'lose' by having to pay its owns costs of *circa* €230,000.

51. In such a situation, NAMA (without the benefit of security for costs) would be faced with the prospect of spending taxpayers' money in two ways to achieve the same result, one is to '*buy off the case'* (to quote the Supreme Court in *Farrell*), which NAMA views as '*unmeritorious'*, for say €150,000 (to include the Company's legal fees) or the other is to spend €230,000 on *irrecoverable* legal costs to 'win' its case – the same result (if it wins) but almost double the cost.

**Unlevel playing field for those sued by an impecunious individual plaintiff**

52. This is unfortunately a regular problem for those sued by impecunious individual plaintiffs in the High Court. Not only is it a regular problem, but it is also a very significant problem, because of the high level of High Court costs (as illustrated by the estimated costs in this case). Whether he settles or wins litigation which he regards as unmeritorious (and assuming it is unmeritorious), the defendant 'loses' hundreds of thousands of euro. In contrast, the impecunious plaintiff if he wins the case also wins in relation to legal costs. Accordingly, this is not a level playing field in that litigation.

53. While this Court must be conscious of the constitutional right of all persons (including impecunious plaintiffs) to have access to the courts, it is important to observe that there is a competing constitutional right, namely a defendant's property rights (i.e. which are affected when he 'loses' money in legal costs when he 'wins' litigation against an impecunious individual plaintiff, particularly when he loses even more money in legal costs than the value of the asset in dispute).

54. Indeed, when one is dealing with High Court litigation, one is dealing with very significant property rights, since one could be balancing the right of an impecunious plaintiff, A, to sue B, a person on the average income in the State of *circa* €32,000 net, on the basis that even if B 'wins', he will arguably have his property rights breached by having to work for perhaps a decade or more to pay off the legal costs of the case he has 'won'.

55. Furthermore, this problem if anything may be growing since Clarke J. (as he then was) in *Persona Digital Telephony Limited and Anor. v. The Minister for Public Enterprise and Others* [2017] IESC 27 at para. 2.8 (h) observed that:

> "[I]t is at least arguable that there is a very real problem in practise about access to justice. An assessment of the precise extent of the problem would require detailed evidence and, therefore, nothing which I say should be taken as indicating a concluded view. Nonetheless it is worth recording that the experience of the courts suggests that there may well be problem, that it may well be significant and that there are at least arguable grounds for suggesting that it is growing." (Emphasis added)

Thus, as legal costs have now reached the point where it could take a person on the average income a significant part of his working life to pay-off the legal costs of his 'winning' a High Court case, it is arguable that the constitutional property rights of a defendant cannot ignored when considering the competing constitutional right of access to the courts on the part of an impecunious individual plaintiff, such that an individual

plaintiff might be required, in certain circumstances, to provide security for (even some of) the costs of the defendant before proceeding with the litigation, such that he has at least some 'skin in the game' and that if the defendant wins the litigation, at least some part of his legal costs will be paid by the plaintiff.

**Right of plaintiff *and* defendant to have 'litigation fairly conducted'**

56. Support for the view that a court, in its task in administering justice, should have regard not just to the right of a plaintiff to have access to the courts, but also the property rights of the person being sued, is to be found in *Farrell v. Bank of Ireland*. At para. 4.6 of his judgment, Clarke J. stated:

> "Where, however, a party has had access to the court, but where, as part of the administration of justice, decisions are taken by the court which affect that party's ability to pursue the litigation, then it seems to me that such questions are more properly viewed in the context of the right to fair process being the right to have litigation fairly conducted (whereby the court is required to balance the rights of all parties to litigation in a fair, balanced and proportionate way) rather than on the basis of a right of access to the court *per se*." (Emphasis added)

57. Similar views were expressed by Cooke J. in *Goode Concrete v. CRH plc* [2012] IEHC 116 at para. 36:

> "In the view of the Court, the entitlement of citizens to access to the Courts applies to defendants or respondents as well as to plaintiffs. A defendant ought not to be forced to forego defending an action against which there is a stateable defence on the merits out of fear of being bankrupted by having to incur substantial costs which will be irrecoverable from an insolvent plaintiff. A plaintiff's right of access to the Courts is not absolute and the Court has jurisdiction to prevent the right being abused by, for example, dismissing a case for inordinate delay or as frivolous, vexatious or bound to fail in order to prevent injustice to a defendant (see *Barry v Buckley* [1981] IR 306)." (Emphasis added)

58. More recently, in *Tobin v. Minister for Defence* [2019] IESC 57, similar views to those of Cooke J. in *Goode Concrete* were expressed by the Supreme Court (although, not in the context of an application for security for costs, but instead regarding the scope of an order for discovery). At para. 7.18 of his judgment, Clarke C.J., made certain comments regarding access to justice and noted that:

> "[I]it is important to emphasise that access to justice does not only apply to plaintiffs who might be inhibited in their ability to bring cases but applies equally to defendants who may be inhibited in their ability to properly defend proceedings because of what might be seen to be the excessive burden of the costs of litigation." (Emphasis added)

**Balancing a plaintiff's right of access to court with a defendant's property rights**

59. Against this background, it is arguable that when one considers the constitutional right of access to the courts in this context, i.e. as a right which needs to be '*balanced'* with the

property rights of a defendant, there may be cases where it is preferable that in some instances individual plaintiffs, who are impecunious, have some 'skin in the game', by way of security for costs (even if less than 33% of the estimated legal costs of the defendant) to reduce the risk of a defendant winning the litigation but losing completely as regards legal costs, as well of course as reducing the type of situation envisaged by the Supreme Court in *Farrell* arising, i.e. where a defendant could be subject to '*blackmail'* to buying-off their '*wholly unmeritorious'* claim.

60. While this Court must on the one hand seek to ensure that impecunious plaintiffs with *prima facie* claims are not prevented from accessing the courts because they do not have the financial resources, on the other hand this Court must be conscious of the property rights of defendants, who have a defence on the merits to the claim (as required by the Superior Court Rules regarding security for costs, i.e. Order 29, rule 3). Accordingly, there may be cases where it is appropriate and proportionate to seek to protect, to some degree at least, the property rights of a defendant, who is sued and thereby forced to spend hundreds of thousands in euro in irrecoverable legal costs by a plaintiff with 'no skin in the game'.

61. In summary, when one considers the unlevel playing field which a defendant faces when being sued by an impecunious individual (who has 'no skin in the game' whatsoever when it comes to legal costs and so has 'nothing to lose' in litigating) combined with the '*injustice'* of a defendant winning his litigation but 'losing' financially in terms of legal costs (often in the hundreds of thousands of euro), it is arguable that the plaintiff's and defendant's '*right to have litigation fairly conducted'* (per Clarke J. in *Farrell* at para 4.6) should mean that defendants have their property rights protected to some degree, even where the plaintiff is an impecunious individual, by the provision of, at least some, security for costs in certain cases.

62. Such an approach would also have the advantage of discouraging those cases which the Supreme Court in *Farrell* regarded as amounting to blackmail, since it is less likely that a plaintiff will pursue a case, if he knows it to be unmeritorious, in the hope of settlement if he stands to lose some of his own money. In this way, such a plaintiff is prevented from '*litigating on a consequence-free basis'* to adopt the expression used by O'Malley J. in *W.L. Construction Limited v. Chawke* [2020] 1 I.L.R.M. 50 at para. 67 (*albeit* that expression was used in the context of the Supreme Court allowing an individual, who was a 99% shareholder in the plaintiff company, to be joined as a party to litigation in order to make him liable for the costs order made against the plaintiff company.)

63. In assessing any such application, it would obviously be incumbent on the court in light of the particular circumstances of the case to determine if security for costs against an individual plaintiff is appropriate and what level would be proportionate so that the constitutional rights of *both* the plaintiff and defendant are respected.

**The right of a defendant to seek security for costs against an individual plaintiff in Ireland**

64. While the High Court (Clarke J.) noted in *Salthill Properties Ltd v. Royal Bank Scotland plc* [2011] 2 I.R. 441 at 454, that it would be preferable if the entitlement to obtain security for costs against individual plaintiffs resident in Ireland was spelt out more explicitly by means of a change to Order 29 of the Rules of the Superior Courts (the order dealing with security for costs), the subsequent Supreme Court decision (Denham C.J., Clarke J. and MacMenamin J.) in *Mavior v. Zerko Ltd* [2013] 3 I.R. 268 at 275 (per Clarke J.) specifically stated that:

> "there is nothing in the text of O. 29 which seeks to limit*, per se*, the jurisdiction to order security for costs in respect of natural persons to persons resident outside the jurisdiction."

65. While, Clarke J. noted at p. 277 of *Mavior* that to date the jurisprudence has been that the High Court will not order security for costs against an individual resident in Ireland, in the absence of some countervailing factor, he noted at p. 278 that:

> "If there is room for expansion in the circumstances in which security for costs can be awarded under O. 29 then it should be done by a re-interpretation of the case law."

66. On the authority of this Supreme Court judgment therefore, there is nothing to stop a defendant seeking security for costs from an individual plaintiff who is resident in Ireland (or the EU). For such an order to be granted, there has to be a countervailing factor to justify it - to quote Clarke J. in *Farrell v Bank of Ireland* at para 3.2, which concerned security for costs for an appeal, there has to be a '*countervailing factor – that is a factor sufficient to make it proportionate to order security*'.

67. In that case, the Supreme Court ordered that an individual plaintiff resident in Ireland give security for costs for the appeal which she wished to pursue. As regards the amount of that security, at para. 3.6 of his judgment in *Farrell*, Clarke J. noted that:

> "However, the submissions made on behalf of Bank of Ireland acknowledge that there is something of a practice, at least in the case of personal litigants as opposed to corporate parties, of the court fixing security at one third of the amount estimated as being the likely cost to be incurred in the appeal. However, Bank of Ireland argues that the actions of Ms. Farrell of which it complains (and as already outlined) are such as ought lead the court, on the facts of this case, to depart from that general practice and require full security." (Emphasis added).

68. In that case, because of the vexatious and oppressive manner in which the individual plaintiff had conducted the litigation, the Court fixed the security at one half of the estimated costs, rather than applying what it referred to as the foregoing '*one third rule'*. In this regard, Clarke J. noted that fixing the level of security for individual plaintiffs at one third, rather than all, of the likely costs was regarded as a response to the fact that an order for security can have the effect of preventing litigation.

69. While *Farrell* concerned security for costs of an appeal, rather than security for costs of a first instance hearing, a crucial factor for the Supreme Court in making that order was the fact that the '*inability or difficulty in recovering costs can give rise to an injustice'* for the defendant (at para. 4.15) and the court's desire to avoid/lessen that injustice. However, that injustice also arises at first instance (for a defendant sued by an impecunious plaintiff) as it does on appeal, *albeit* that the injustice of not ordering security is greater in principle at the appeal stage (since the impecunious plaintiff will have already had his case heard, and he will have lost, in the High Court). Yet, on the other hand, the injustice of not ordering security is usually greater in quantum at the High Court stage, with legal costs often being in the hundreds of thousands of euro, while on appeal they are often a fraction of that amount. Since costs play such an important role in the administration of justice, and pending any significant reduction in legal costs, this degree or quantum of injustice cannot in this Court's view, be ignored, particularly if the defendant is a person who could be financially ruined by having to pay the costs of 'winning' the litigation, particularly where those costs are greater than the amount in dispute (which effectively 'denies' the defendant 'justice' were he to win the litigation and not have any of his costs covered by the plaintiff).

70. In this regard, it is clear that the risk of this degree or quantum of injustice is most acute in the High Court, since the costs there, as evidenced in this case, can in the most straight forward cases amount to hundreds of thousands of euro, which is many multiples of the costs in the District Court or Circuit Court and also is in most cases also multiples of the costs in the Court of Appeal and/or the Supreme Court.

**Amount of security ordered against an individual plaintiff**

71. It seems clear therefore that a defendant is not prohibited from seeking, whether in relation to a first instance hearing or an appeal, to vindicate his property rights by applying for some of his estimated costs, as security against an individual impecunious plaintiff where there is a countervailing factor which would be sufficient to make such an order proportionate.

72. In determining what is proportionate, it seems clear that a factor in determining whether such an order would be proportionate is the amount of security, i.e. whether it is 50% (as in *Farrell* where the circumstances were extreme), 33% (which appears to be the default when dealing with individual plaintiffs) or indeed say 5% or 10% (if the circumstances were such to justify it). In the case of such an application, the Court would then of course have to balance the competing constitutional rights of the plaintiff and defendant in determining what order, if any, will enable the plaintiff and defendant to have their '*litigation fairly conducted'* (per Clarke J. in *Farrell* at para. 4.6).

73. In relation to the amount of security provided by a *corporate* plaintiff, as noted hereunder, it is generally 100% of the estimated legal costs which is ordered. However, it is clear from *Farrell* that where there are countervailing factors justifying an order for security for costs against an *individual* plaintiff, it is generally 33% of the estimated legal costs which is ordered, so that it does not have the effect of preventing the litigation (see for example *Thalle v. Soares* [1952] I.R. 182, in which the Supreme Court ordered one

third of the estimated costs as the security to be provided by an individual plaintiff for a first instance hearing in the High Court).

74. The fact that the countervailing factors in *Farrell*, which justified the order of security against the individual plaintiff, were somewhat extreme, is evidenced by the fact that the Supreme Court ordered that security of 50% of the estimated costs be provided, rather than the usual 33%. These extreme 'countervailing factors' were the fact that the individual plaintiff had conducted the litigation in a vexatious and oppressive manner. It would appear to follow that where the countervailing factors are not of such a nature, the amount of the security ordered is likely to be 33% of the estimated legal costs.

**Countervailing factors to justify an order for security against an individual plaintiff?**

75. While there may be some cases where the existence of countervailing factors might give rise to an order for security for costs against an individual plaintiff who is resident in Ireland, it is also clear that there will be many cases where it is inappropriate to order that an individual plaintiff provide security for costs. For example, it might require an extreme set of countervailing factors for it to be proportionate to require an individual plaintiff, who claims medical or professional negligence, to provide security for costs, for the very reason that to institute such proceedings the plaintiff will generally have to have procured an independent expert opinion supporting a claim of negligence against that professional.

76. However, the circumstances of this case, *albeit* if the plaintiff was an individual, might be such a situation where there are countervailing factors to justify ordering security for costs. For example, say the defendant is an individual who earns a salary which is in the region of the average income in the State of *circa* €32,000 net and he is sued by an individual impecunious plaintiff over the ownership of the sum in dispute, €228,000, where the defendant's legal costs are estimated at €231,000. In such a situation, it could be argued that it could not amount to justice for such a defendant (with a defence on the merits), that the plaintiff can have 'nothing to lose' (as regards legal costs) when he sues the defendant, yet the defendant, even if he wins the case, may have to work for years if not decades to pay off the High Court costs of the case he has 'won'? In other words, why should a defendant have everything to lose, as regards legal costs, but the plaintiff has nothing to lose (which will be the case if he is not required to put up even some amount of costs as security)?

77. The injustice in such a scenario is arguably increased when, as in this case, the legal costs are disproportionate to the value of the asset in dispute, so that to achieve 'justice', assuming he wins the case (without any security for costs from the individual plaintiff), will actually cost the defendant more than the asset is worth. It seems that if the Court was not to award security for costs to the defendant in this situation, it would be denying justice to the defendant. In this regard, this Court is not alone in concluding that justice can be denied in Ireland because of the effect of high legal costs, see for example Kelly P.'s covering letter to the Minister for Justice enclosing the *Civil Justice Review* wherein he stated:

> "Ireland is a high cost jurisdiction in which to conduct litigation. That fact may amount to a denial of justice for individuals and businesses who are deterred from having recourse to the courts for fear of financial ruin. It also has a negative effect on attracting international commercial litigation to what is the only English-speaking exclusively common law jurisdiction in the European Union post Brexit" (Emphasis added)

78. Since the overriding role of the court is to *achieve justice* between the parties, it seems to this Court that in order to avoid the risk of a denial of justice to the defendant, and in order to ensure that both the plaintiff's right of access to the courts and the defendant's property rights are protected, and assuming of course that the defendant has a defence on the merits to the plaintiff's claim (as required by Order 29, rule 3), it is at least arguable that it would be proportionate to require the plaintiff to provide at least some of those costs as security. In this way, the amount of the security should not be such as '*can have the effect of preventing a party from pursuing'* the litigation (per Clarke J., albeit in the context of an impecunious individual plaintiff pursuing an appeal in *Farrell v. Bank of Ireland),* but equally some, *albeit* limited, protection is given to the defendant's property rights by ensuring that if he wins, he does not have to pay all his own legal costs.

79. In any case in which such an application is made for security for costs against an individual plaintiff, the onus would be on the court to ensure that the granting of an order for security and then the amount of security, whether 1% or 33%, is proportionate and that it achieves a balance between the plaintiff's right of access to the courts, once the nature of the claim and all the circumstances have been considered, and the property rights of the defendant.

80. While the foregoing is an example of a case where there might be countervailing factors justifying an order for security for costs against an individual plaintiff, it is clear from the wording of Order 29 that there is no limit on the circumstances in which such an application can be made. So for example, even if the defendant is a corporate body it does not mean that a court would conclude that it is proportionate that the litigation proceed where the defendant has everything to lose but the plaintiff has nothing to lose, e.g. a corporate body might well be the trading vehicle of a sole trader and it could lead to significant negative financial consequences for that person.

81. Similarly, just because one is dealing with a large body corporate such as a bank or insurance company or other large organisation does not mean that it is not also entitled to '*have litigation fairly conducted'*. Ultimately the shareholders, policy holders or members of that organisation may have to indirectly cover those costs and so the fact that the defendant is a large organisation does not mean that it is not entitled to a level playing field, at least in some circumstances, when it is sued by an impecunious individual plaintiff. Indeed, this is clear from the decision in *Farrell*, where the defendant was a major bank and yet it was entitled to security for costs from an individual plaintiff.

82. In the context of insurance companies sued by impecunious individuals, it is relevant to note the effect on insurance policies of legal costs was referenced by the *Civil Justice Review* at p. 267:

> "[T]he European Commission noted that legal costs in personal injury cases, "which have also grown significantly in recent years", were contributing to driving up the cost of premiums for motor vehicle and liability insurance policies"

83. As regards other organisations, these too are entitled to have litigation conducted fairly, and if need be on a field which might even be less uneven (by providing for even limited security for costs), if not fully level. In this regard, this Court noted in *Houston v. Barniville & Ors*. [2019] IEHC 601 the fundamental unfairness to a large organisation, in that case the Bar Council, of being liable to pay *circa* €500,000 in legal costs even though it won a case against an impecunious individual plaintiff in the High Court, particularly as those costs are likely to have be carried by barristers in practice, including those starting out in their career earning less than the average income in the State.

84. Finally, as regards state-funded bodies, as noted earlier, it is this Court's view that, where a state funded body is being sued, the courts should be alive to the interests of taxpayers, since there is no one with a *personal* interest in protecting taxpayers' funds, particularly since a state-funded body might be subject to less criticism for spending more taxpayers' funds on irrecoverable legal costs than it would be for spending less taxpayers' funds on settling (what it believes to be) unmeritorious claims. Accordingly, where legal costs are being expended on behalf of the taxpayer in defending litigation, and where there is no prospect of those costs being recovered if the state-funded body wins, the right of both parties to have litigation conducted fairly, may mean that, notwithstanding the right of access of plaintiffs to the courts, in certain circumstances, an individual plaintiff resident in Ireland may be be required to provide at least some security for costs.

**THE AMOUNT OF SECURITY TO BE AWARDED IN THIS CASE**

85. Notwithstanding that it is going to cost the parties to this case twice the value of the amount in dispute to resolve their disagreement, it is this Court's task to now fix the amount of the security in respect of the litigation being pursued by the insolvent corporate plaintiff. This is the amount which should be paid by the Company, usually paid into court, as security for NAMA's legal costs, if NAMA ends up winning the litigation. This Court will now consider the principles which are applicable to its decision and then apply those principles to come up with the secured amount to be provided by the Company.

**Court does not have to accept expert evidence, even if it is only evidence available**

86. It is to be noted that in this case the Court was not provided with any evidence regarding the likely legal costs involved in the litigation, other than the report of *McCann Sadlier*, which was provided on behalf of NAMA. The Company did not instruct a legal costs accountant to prepare a report on the likely legal costs for the Company as the plaintiff in these proceedings.

87. However, as the Company is in insolvent liquidation, it is possible that it was decided on behalf the Company that such an expense was not justified. If this was the case, it is

understandable since every penny spent on legal fees could lead to less money being available for the creditors of the Company.

88. In any event, it is this Court's view that the absence of expert evidence from a legal costs accountant on behalf of the Company, does not mean that this Court *must* accept the expert evidence of *McCann Sadlier*, simply because it is the only expert evidence open to the Court.

89. This is because the Supreme Court and the Court of Appeal have indicated that caution should be exercised by the courts in dealing with expert evidence. This is because it would defy human nature in this Court's view, if a legal costs accountant, who is paid by one side to litigation, in erring on the side of caution in relation to his estimate, is not subconsciously more inclined to err in favour of the interests of his paying client, rather than *against* the interests of that client. It is important to note that this is not a comment on the integrity or professionalism of the legal costs accountant in this case, but rather a comment on human nature.

90. To take an example, say there are two legal costs accountants in an application by a defendant seeking security for costs from a plaintiff, one instructed by the plaintiff and one instructed by the defendant. The legal costs accountants for the plaintiff might initially estimate that a trial will last 1-2 days, while the legal costs accountant for the defendant might initially estimate the trial will last 2-3 days. In finalising their reports, it seems to this Court that the legal costs accountant for the plaintiff, if he is to err on any side, is likely to *subconsciously* err on an estimate which favours the interests of the party paying him, i.e. 1 day, while the legal costs accountant for the defendant is likely to *subconsciously* err on an estimate which favours the interests of the party paying him i.e. 3 days. It is because of this element of human nature that, even though they are both acting professionally and ethically, it is quite common for a court to be faced with two conflicting and very divergent reports from legal costs accountants and indeed other experts.

91. Similar views were expressed by Irvine J., as she then was, in *Byrne v. Ardenheath Company Ltd & Anor*. [2017] IECA 293 at para. 31 regarding the opinions of expert witnesses, where she noted that:

> "their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them." (Emphasis added)

and by O'Donnell J. in the Supreme Court case of *Hanrahan v. Minister for Agriculture, Fisheries and Food* [2017] IESC 66 at para. 4, where he noted that:

> "I do not wish to criticize the individuals who gave evidence in this case, since this was a difficult case and in any event the 'high ball – low ball' approach which occurred here is only an example of a more widespread phenomenon. However, it is surely not coincidental that it was the independent expert on behalf of the plaintiff whose opinion was that the damages were extremely substantial, and the

expert on behalf of the defendant who considered that in effect there was no loss at all." (Emphasis added)

92. For this reason, it does not follow that this Court must slavishly follow an expert opinion, simply because this Court is not an expert in the issue at hand (legal costs), which it is not, or because this Court has only expert evidence from one expert. This Court when faced with only one expert opinion is entitled to take account of the views expressed by the Court of Appeal and the Supreme Court regarding expert opinion evidence which is obtained by one party to litigation.

**The security amount should include VAT if not recoverable by defendant**

93. The amount of the estimate provided by *McCann Sadlier* includes VAT. Where the payer of the legal costs is registered for VAT, and is likely to be able to recover VAT, it seems clear that the plaintiff should not be required to have to give security for the VAT amount, on top of the legal fees (see the judgment of Clarke J., as he then was, in H*arlequin Property (SVG) Ltd v. O'Halloran* [2012] IEHC 13 at para. 3.3). This principle seems self-evident, since to take an example if a defendant pays his lawyers say €123,000 (inc. VAT at 23%) in legal fees, such a defendant will only be paying a net amount of €100,000 since he will be recovering the VAT element of the fee from the Revenue Commissioners. Hence the security amount required of the plaintiff should be €100,000 and not €123,000.

94. However, in this instance, this Court has received uncontroverted sworn evidence that NAMA, although registered for VAT, is not in a position to recover VAT on its legal fees. For this reason, it seems clear that the secured amount should include VAT. Otherwise, if NAMA were to win the litigation and had to pay its legal team say €123,000 (inc. VAT), it would be out of pocket to the tune of €23,000, since the Company would only have provided security of €100,000 and NAMA would not be able to recover the €23,000 in VAT it had paid for the legal services.

95. If this were to happen, then NAMA would suffer the '*injustice'* (to use the expression used by Clarke J. in *Farrell v. Bank of Ireland* at para. 4.15), of a defendant winning litigation but the plaintiff not paying his *full* legal costs. Since the security of costs regime is designed to prevent this injustice arising, it is important that the security amount include, in this instance, VAT.

**Security for legal costs should cover costs incurred before application was made**

96. It was submitted on behalf of NAMA that *if* there was only to be security for those costs incurred *after* the application for security for costs was brought, this would lead to a reduction of only €9,000 on the overall secured amount, as very little in the estimate of legal costs relates to legal advice obtained before the application for security was made.

97. In making this submission, reference was made by counsel to the judgment of Baker J. in the High Court case of *Werdna Ltd v. MD Insurance Services Ltd* [2018] IEHC 194 as authority for the proposition that security is not generally provided for costs incurred before the application for security for costs is made.

98. However, *Werdna* does not appear to be authority for this proposition. This is because the *Werdna* decision refers to the Court of Appeal decision in *Paulson Investments Ltd v. Jons Civil Engineering Ltd* [2016] IECA 169, which is not in fact a case in which security for costs was fixed by the Court, since the security for cost order was refused. In that case, it was held that the fact that a lodgement had been made by the plaintiff to its solicitors in the sum of €500,000 for the purpose of discharging future costs orders against it, was a '*special circumstance'*, which provided justification to the court in refusing the application for security for costs in the first place.

99. It is important to note that it was in this context, and not in the context of an order by the Court fixing security for costs, that Finlay Geoghegan J. noted at para. 36:

> "I recognise that the amount is as a matter of probability less than the full amount of the probable amount of security if the High Court order were upheld and the amount was to be determined upon the basis of the estimated twenty day trial but only costs incurred after the respective dates of application for security."

It is clear therefore that as no order for security for costs was made in that case, these comments are at most *obiter* regarding whether security should be given for costs incurred before the application was made. Accordingly, this statement does not amount in this Court's view to a general principle that when fixing security for costs a court should exclude the costs incurred prior to the date of the application.

100. On the contrary, it is this Court's view that the general principle should be that when a Court determines that the circumstances are such as to justify an order for security for costs against an insolvent plaintiff as in this case (including that the defendant has a defence on the merits of the case and that the defendant was not responsible for the plaintiff's impecuniosity), the amount of the security should be sufficient to cover *all* legal costs incurred by the defendant.

101. This is because it seems to this Court that the rationale for security for costs is to ensure that, if a defendant is unfortunate enough to be sued by an insolvent plaintiff and he 'wins' the litigation, he should *not* suffer the injustice of 'losing' by having to pay his legal costs, which this Court interprets as having to pay *some or all* of his legal costs. This is achieved by requiring the insolvent plaintiff to provide security for *all* those costs.

102. For this reason, and in light of this Court's obligation to seek to achieve justice between the parties to litigation, it is this Court's view that, as a general rule, the secured amount should cover *all* the costs, both before and after the application for security of costs was brought, save in exceptional circumstances.

103. This is because when an impecunious plaintiff decides to institute proceedings against a defendant who has some, even limited, means, the plaintiff is immediately starting with an advantage as the playing field is not 'level'. The plaintiff will also inevitably be aware of this 'unlevel' playing field, i.e. it is 'no lose' for the plaintiff (as he will not be paying legal costs even if he loses), but it is 'no win' for the defendant (as she will be paying her own

legal costs even if she wins). Indeed in some instances this 'tactical' advantage (to adapt Clarke J.'s expression in *Farrell*) may be a factor in his litigating in the first place. For this reason, this Court does not believe that it is just to the defendant that the impecunious plaintiff escapes having to provide security for *some* of the costs of the litigation, just because they were incurred before the application for security for costs was brought.

104. Secondly, this would be particularly unjust on the defendant, since it is inevitable that some legal costs will be incurred by the defendant before she brings the application for security for costs, even if she brings that application at the earliest possible opportunity. For example, there will of necessity be the legal costs involved in relation to the letters threatening litigation and when the plenary summons issue, all of which arise before the defendant could reasonably be expected to have brought his application. Those legal costs involve the defendant's lawyers advising on how best to respond to the threatened litigation, assessing the merits of the case as outlined in the plenary summons, investigating and advising on the financial position of the plaintiff and whether to bring a security for costs application *etc*.

105. In this Court's view, the foregoing factors tip the balance in favour of providing for security for *all* costs as a general rule, both before and after the security for costs application.

106. In this Court's view, it is only in exceptional circumstances, for example where there has been an inexcusable delay in the bringing of that application, that it may be appropriate to limit the security to the legal costs incurred after the making of the application. In such a case, the argument could perhaps be made that the plaintiff was lured into spending a lot of money on legal costs (assuming that, as an impecunious plaintiff, he had sourced funds to do so), on the assumption that it would be on an 'unlevel playing field' in his favour. This is because as observed by Clarke J. in *Farrell* at para. 4.21:

> "It is well settled that it is, in the absence of some significant excusing factor, essential that an application for security for costs before a court of first instance be brought at an early stage. It is rightly considered that inducing a party to expend its own time and resources in bringing litigation close to trial only to spring an application for security for costs at a late stage would in itself be an unfairness which may well disentitle a party, otherwise entitled, to an order for security."

107. On this basis, the impecunious plaintiff may claim that he would not have continued to spend his time and resources, if he was required to litigate on a 'level' playing field (i.e. if he was required to pay security for costs to cover the eventuality of his losing the litigation). Accordingly, it is possible that he may be able to persuade the Court that an inexcusable delay by the defendant in seeking security for his legal costs is such as to justify any such order not applying to some or all of the legal costs which were incurred by the defendant *before* the application for the order was brought by the defendant.

108. In summary therefore, for the foregoing reasons, while there may be special circumstances justifying an order for security for costs only in respect of costs incurred

after the date of the application, e.g. an inexcusable delay by the defendant, there is not, in this Court's view, a general principle that an order for security for costs should only be made in respect of costs incurred after the application is made. On the contrary, it is this Court's view that the general rule should be that an order for security for costs should cover all costs incurred by the defendant both before and after the making of the application.

**Default rule is to grant security for the full amount of costs**

109. It is clear from the judgment of Costello J. in the Court of Appeal decision in *Protégé International Group (Cyprus) Ltd v. Irish Distillers Ltd* [2020] IECA 80 at para. 71 that the default rule regarding the fixing of the amount of the security is that the full amount of the estimated costs be fixed as the security, but that in the interests of justice there may in some cases be reasons to order a discount:

> "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."

**When should the Court apply a discount?**

110. The purpose of this Court in imposing security for costs and in fixing the amount of the security, is to seek to achieve justice between the parties, because as noted by the Supreme Court in *Farrell v. Bank of Ireland* (per Clarke J. at para. 4.15), it amounts to an '*injustice'* for a defendant who wins the litigation not to recover all his costs because of the financial position of the plaintiff.

111. It is this Court's view, you do not avoid injustice to a defendant, who wins against an impecunious plaintiff, by allowing him only part of his costs. Or to put the matter another way, there would have to be very good reasons to allow litigation to proceed on a playing field that is not level (i.e. where if the defendant 'wins' he loses as regards costs, even if not fully, but partially, which in the context of High Court legal costs, can still be a significant amount of money).

112. It follows therefore that in most cases the security should be for the full amount of the costs. In this regard, this Court would agree with the comments of Barniville J. in *Coolbrook Developments Ltd v. Lington Development Ltd* [2018] IEHC 634 at para. 108, where he noted that the key issue, in determining the amount of security, is '*whether it would be just to leave the defendant at risk on costs by not directing the provision of full security'* and this Court would agree with his conclusion that that '*the court will in most cases direct the provision of full security'.*

***Legal costs are a crucial part of ensuring justice is achieved between litigants***

113. Another reason for a court being reluctant to discount the security (and thereby deny a winning litigant full costs) is because legal costs play a key role in the very administration of justice in every case. As noted by Baker J. in *Quinn Insurance* at para. 53:

> "Costs are such an intrinsic part of the administration of justice, and of how justice is distributed between plaintiff and defendant, that the ability to recover costs must be seen itself as a right."

This right to which Baker J. refers must, in this Court's view, be the right to recover 'full costs', whatever they may be, and not merely a portion of the costs incurred. Clearly, the greater the costs, the greater the part that those costs play in the administration of justice, as perfectly illustrated by the facts of this case, since not only are the costs a key part of this case, but they are the *most significant* part of this case, as they dwarf the sum in dispute.

***Who pays the costs?***

114. Indeed, it is to be observed that in this case (and indeed in many other cases in the High Court as one is usually dealing with legal costs in the hundreds of thousands of euro), the question of '*who pays the costs*?' is often more important than who owns the money/property in dispute. This is because with a jurisdiction of €75,000 in the High Court (€60,000 for personal injuries) and with a straight forward case such as this costing *circa* €460,000, it will not be unusual for the costs of the hearing to exceed the sums in dispute). Indeed, it is one of the ironies of High Court litigation that while is very cheap to instigate High Court litigation, it can cost hundreds of thousands of euro to end it. Accordingly, what often starts out about a dispute about property or money, very quickly becomes more about who is going to pay the legal costs. Unfortunately, this may only become obvious to some litigants after the whole process has started and after money has been expended on both sides of the litigation and they realise that they cannot afford to back out of the litigation (by paying their own costs and/or the other side's costs) and so end up litigating, in effect, over who is going to pay the costs.

***No discount if the plaintiff's case is weak***

115. Since the purpose of fixing a security amount is to seek to avoid the injustice of a winning defendant not getting his full legal costs, it seems clear that the *weaker* the plaintiff's case appears (*albeit* at a preliminary stage in the proceedings) the *greater* the risk of this injustice, and so the greater the need to ensure that the security will cover *all* the defendant's legal costs. This is because the purpose of security for costs is to ensure that if the defendant wins the case, he does not in reality 'lose' by having to pay out legal costs out of his own pocket because the secured amount is insufficient to cover all the legal costs.

***No discount if the case is 50:50***

116. If an insolvent plaintiff has a 50:50 chance of winning his litigation, to this Court there would appear to be no basis for allowing that plaintiff to escape litigating on a level playing field, i.e. why should the defendant not recover full costs if he wins the litigation, just because the plaintiff happens to be an insolvent company. When one bears in mind that most litigation has a 50:50 chance of success (in this case it is arguably less than 50:50 since the Company has failed to establish even a *prima facie* case, *albeit* on a preliminary basis), it is this Court's view that in most cases therefore full security for costs should be awarded.

**A *discount if the insolvent plaintiff has a very strong case?***

117. However, if the insolvent plaintiff had a very strong case against a defendant, say with a 75% or greater chance of success, then the question for the Court to assess is whether it should discount the security for costs on account of that fact. This is because by not requiring the insolvent plaintiff to provide *full* security, the court may avoid the risk of stifling what appears to be a strong claim. In this regard, Keane C.J. noted that this could be a factor in the fixing of the level of security in the Supreme Court case of *Hot Radio Co. Ltd v. IRTC* [2000] IESC 55 at p. 8, where he stated:

> "it was just in this case to order the full measure of security because there is no suggestion that the action would be stifled by the award of security for costs in the sum actually awarded […]"

118. However, if a Court decides to discount the security to be provided by the insolvent corporate plaintiff, it must be remembered that the Court is thereby allowing the litigation to proceed on an 'unlevel level playing', If one bears in mind this in mind, it means that just because the plaintiff might have say a 75% chance of success does not mean that he should only pay 25% of the costs as security. This is because account must be taken of the injustice which will apply to the defendant if, against the odds, he ends up winning a case where the security for costs has been discounted, i.e. he will end up winning the case, but losing on legal costs. No such injustice will apply to the plaintiff who, if he wins, will always get his full legal costs. Accordingly, while an insolvent plaintiff with a very strong case, on a *prima facie* basis, may get some discount so as to prevent the litigation from being stifled, it should not, in this Court's view, be a significant discount since then if the defendant wins, he also loses to a significant degree on legal costs, which would lead to an injustice for him (particularly as legal costs are an intrinsic part of the administration of justice).

**Potential injustice for the impecunious plaintiff?**

119. Looking at the issue from the perspective of the impecunious corporate plaintiff,

it is not, in this Court's view, an 'injustice' that a corporate plaintiff which is impecunious/insolvent cannot pursue a very strong claim without putting up a significant proportion of the legal costs as security, because with the 'benefit' of limited liability comes the 'burden' that defendants who the company sues should have the advantage of the security.

120. In this regard, it is important to remember that nobody is forced to carry on business through a limited liability company. It is a choice which is made invariably for the benefit and privilege of limited liability, in order to ensure that the individuals who will benefit from the company's activities will not be personally liable for the debts (including legal costs) incurred by the company. Coming with this benefit is the burden that if the company is impecunious/insolvent and wishes to pursue a claim, it will have to put up legal costs as security.

121. It is not to say that there is no risk of injustice to the plaintiff. However, the primary risk of injustice for the plaintiff is addressed at an earlier stage in the security for costs

process. This is the injustice that would arise if an insolvent corporate plaintiff was prevented from litigating a claim because it could not afford security for costs, even though its inability to pay was caused by the defendant's wrongdoing. As noted in the Principal Judgment, to avoid this injustice arising for an impecunious corporate plaintiff, it is allowed take a case against such a defendant *without* security for costs (even though the defendant is faced with the '*injustice'* that if he wins the case, he still 'loses' as regards legal costs).

122. Before concluding, this Court would emphasise that the amount in dispute in this case relative to the legal costs means that it is a good example of both the high cost and the disproportionate cost of justice in the High Court, an issue to which significant attention has been drawn by the recent Civil Justice Review. This Court would emphasise that while it found in the Principal Judgment that the Company did not have a *prima facie* case for the return of the €228,000 from NAMA, that decision was reached on the basis of a preliminary hearing only. It is of course possible that at the trial of this action the Company will be able to establish that it owns the money in dispute. It is also important to emphasise that there is no suggestion that the Company would seek to use the impecuniosity of the Company as an unfair tactic, nor is there any suggestion that the Company does not genuinely believe that it has a good case for the return of the money.

**CONCLUSION**

123. This case highlights both the high level and the disproportionate level of legal costs in the High Court today and why the *Civil Justice Review* has called for the reform of legal costs.

124. In addition, although the plaintiff is an impecunious corporate plaintiff and security for costs were granted against that plaintiff, the facts of this case highlight the manner in which justice could be denied, if a citizen on the average income in the State were sued in relation to this same dispute by an impecunious individual plaintiff resident in Ireland, *unless* that defendant was granted security for costs against that individual.

125. As regards the amount of the security of costs to be provided by the corporate plaintiff in this case, having considered all of these principles, this Court concludes that in circumstances where the Company has not established even a *prima facie* case against NAMA, the security for costs should be for the *full* amount of those costs, so as to avoid the risk of an '*injustice'* for NAMA (of having to forgo *any* of its legal costs, if it wins the case brought against it by the Company).

126. Furthermore, since NAMA will not be recovering VAT on those costs, the security amount should include VAT.

127. However, as regards what the full amount of those costs are, this Court has only had expert evidence from NAMA's experts regarding the quantum of those full costs. As this Court must exercise caution in considering expert evidence provided by just one party to the litigation and bearing in mind as Cooke J. stated in *Goode Concrete v. CRH plc* [2012] IEHC 198 at para. 12, that fixing the amount of security for costs is not '*an exact science'*, this Court proposes to take as this court's estimate of the full costs in this case a figure

which is 80% of the amount suggested (€231,140.50), being a figure of €185,000 (inc. VAT) and so the security should be in this amount.