

**THE HIGH COURT**

[2022] IEHC 175

[2018 7009 P]

**BETWEEN**

**I.E.G.P. MANAGEMENT COMPANY LIMITED BY GUARANTEE**

**PLAINTIFF**

**AND**

**JOSEPH COSGRAVE, PETER COSGRAVE, MICHAEL COSGRAVE, COSGRAVE DEVELOPMENTS UNLIMITED COMPANY, COSGRAVE PROPERTY DEVELOPMENTS LIMITED, O'CONNOR SUTTON CRONIN AND ASSOCIATES LIMITED, PAT DUNPHY, KEANE MURPHY DUFF LIMITED TRADING AS KMD ARCHITECTURE, GARY O'HARE AND OLM SURVEYING LIMITED TRADING AS OLM CONSULTANCY**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Nuala Butler delivered on the 24th day of March, 2022**

**Introduction**

1. The underlying dispute in this case concerns liability for alleged fire safety defects in the construction of a development comprising five apartment blocks and some commercial units known as the Ivy Exchange at Parnell Street in Dublin ("the development" or "the complex"). In total there are 198 apartments and 11 commercial units in the development. The buildings were built on foot of three grants of planning permission dated between February 2004 and January 2005 and construction was substantially complete by late 2006. The events which led to the discovery of the alleged defects have not been pleaded. It seems that as a result of some unspecified complaint, the plaintiff caused investigations to be carried out in 2018 which indicated the existence of such defects. Initial correspondence suggested that the cost of remedying the defects would be circa €7 million. However, as a result of continued and more detailed investigations, the estimate of the cost of the repairs by the time this application was heard by the court was in excess of €9 million.
2. Ten defendants have been sued. The first three defendants are businessmen and property developers and are the principals of the fourth and fifth defendants, corporate entities who were the developer and main contractor in the construction of the complex (collectively referred to as "the Cosgrave defendants"). The sixth defendant is a firm of consultant civil and structural engineers engaged by the Cosgrave defendants for the purposes of the construction project. The seventh defendant is a consultant mechanical and electrical engineer similarly engaged for the purposes of the project. The current whereabouts of the seventh defendant is unknown and the proceedings have not yet been served on him. The eighth defendant is a firm of architects of which the ninth defendant is a director (referred to collectively as "the architect defendants"). The eighth defendant was engaged by the Cosgrave defendants to provide architectural services in respect of the project, principally between 2002 and 2004. The ninth defendant provided a certificate of compliance with the Building Regulations in respect of unit no. 171 in July 2006. The tenth defendant is a firm of consultant fire engineers, apparently incorporating or including the firm of McBains Cooper, both of which were engaged for the purposes of the project. The tenth defendant made applications to Dublin City Council for fire safety certificates at various stages of the development and also provided PSDS/PSCS services (Project Supervisor Design Process and Project Supervisor Construction Stage) which

were a legal requirement under the Safety, Health and Welfare at Work (Construction) Regulations, 2013. As the applications before the court were brought by the sixth, eighth and ninth defendants, the terms of their engagement and the scope of their responsibilities are relevant to the issue of whether they have a prima facie defence to the plaintiff's case and will be addressed further below.

3. The plaintiff is a company limited by guarantee and is an owner's management company within the definition contained in s. 1 of the Multi-Unit Development Act, 2011. The common areas of the development were transferred by the first to third defendants inclusive to the plaintiff on 30th January, 2012. In the initial exchanges of correspondence between the parties the plaintiff's solicitors described the plaintiff as representing the individual apartment owners. In the first replying affidavit to the eighth and ninth defendants' motion, the plaintiff's solicitor states that the plaintiff "*is representing consumer apartment owners*". However, at the hearing of these motions the plaintiff's counsel was adamant that the plaintiff's proceedings had been brought on its own behalf as the defects identified were in the common areas of the development of which the plaintiff is the owner. It is of some significance that the plaintiff is not a trading company and does not carry on any business. Instead, it carries out the statutory role ascribed to it under the 2011 Act. Again, I will return to this issue in due course.
4. There are three applications currently before the court. Firstly, there are two motions for security for costs brought by the sixth, and the eighth and ninth defendants respectively. Secondly there is a motion brought by the plaintiff against the eighth and ninth defendants seeking an order under O.56A of the Rules of the Superior Courts and s.16 (1) of the Mediation Act, 2017 inviting those defendants to consider mediation as a means of attempting to resolve the dispute the subject matter of these proceedings. At the time of the hearing, the plaintiff was of the view that all of the defendants consented to mediation, although this was disputed by the eighth and ninth defendants on the basis, inter alia, that such consents were heavily conditional and the conditions were not satisfied. Although the mediation motion was issued first in time, logically the security for costs motions fall to be considered and determined first as if the moving parties in those motions are awarded security for costs, then they would be entitled to have that security in place before proceeding to mediation.

#### **Background to Dispute**

5. Before considering the legal issues in detail I propose to outline the background to the dispute between the parties which has some bearing on the issues I have to decide. It is evident from the brief outline above, that the complex was designed and constructed more than fifteen years ago. The plaintiff, which is now the owner of the common areas, did not exist at the time the project was underway. In the period immediately between its completion and the transfer of the common areas to the plaintiff in 2012, the complex was managed by a company under the control of the Cosgrave defendants. The Cosgrave defendants and persons associated with them own a reasonably significant proportion of the units in the development (i.e. just under 20%). Subsequent to the 2012 transfer, some or all of the Cosgrave defendants' interests in the development were transferred to

a new company also under Cosgrave control. Nothing turns on this at present although it seems that that company is not currently prepared to pay additional charges to meet the costs of this litigation.

6. As the plaintiff was not in existence at the time of the development it had no contractual relationship with any of the defendants. More significantly from the plaintiff's perspective, as it was not involved in the construction it does not have in its possession the contractual material nor any of the technical design documents generated for the purposes of the development. Some of these documents are a matter of public record and can be obtained by making an appropriate request from the relevant local authority. Indeed, it would seem that the plaintiff or its architect have already done this, at least to a certain extent. However, the plaintiff does not have and could not reasonably be expected to have other documents which would have been generated by relevant professionals involved in a major construction project.
7. The plaintiff has not made a formal request for discovery, but in correspondence with both of the defendants before the court, it sought to be provided with all of the documents pertaining to the development. Although the correspondence threatened the immediate issuance of a motion seeking pre-trial disclosure no such motion has been brought. The defendants have declined to provide the documents requested for reasons which include a reluctance to do so until the plaintiff's case against each defendant is more specifically pleaded and because the defendants are no longer in possession of the relevant project files. The latter is not particularly surprising given that the first request for access to documents was made in September 2018, over twelve years after the project was completed and, in the case of the architects, some sixteen years after their initial work was done (i.e. the preparation of architectural drawings on foot of which the applications for planning permission were made). At the same time, in light of the size, scale and value of the project, it is unlikely that the relevant records were destroyed as distinct from being archived or sent off site for storage. No particular explanation was offered as to what exactly happened the documents or where they might now be. However, as the motions before me did not concern access to documents, I have not enquired into this matter further.
8. This absence of access to the project documents (whether or not they are still in existence) was responsible for much circularity in the parties' respective positions. The defendants complain, not without justification, that the plaintiff's case is pleaded in a vague and generalised way with all of the damage and the same particulars of negligence, misrepresentation and breach of duty being pleaded against all ten defendants notwithstanding the very discreet role and responsibility of each within the overall project. The particular defendants before the court point out that the case against them is effectively one in professional negligence and such proceedings should not be issued by the plaintiff's lawyers unless and until the plaintiff is in possession of an opinion from a relevant professional supporting the contention that the actions of the defendant in question fell below the standards reasonably expected of them. No such opinions have been put before the court. The plaintiff does not appear to have sought nor to be in

possession of an opinion from a structural engineer. An architect's report from Bluett & O'Donoghue was commissioned by the plaintiff and provided to the defendants but this does not go so far as to suggest that the eighth and ninth defendants were negligent. In fairness to the reporting architect, his comments are heavily circumscribed by the limited information available to him which he expressly notes meant that various matters could not be assessed further by him.

9. The plaintiff in response contends that until it has access to the project files it cannot be more specific as regards the fault it alleges against each of the defendants. In fact, at the hearing the plaintiff's counsel took a very simplistic approach to this conundrum. He asserted that the plaintiff is in possession of a building in which there are significant fire safety defects for which neither the plaintiff nor the owners of the individual units are responsible. Until the plaintiff sees the detailed records it cannot identify which defendant was responsible for the various areas of the development in which the defects appear. He describes the defendants collectively as being members of the construction team and legally as being concurrent wrongdoers. Consequently, he argues that one or more of the defendants must be responsible to the plaintiff for the cost of carrying out the necessary remediation work. As the plaintiff is a stranger to the relationships between the defendants, it cannot say who is responsible. On the assumption that the plaintiff must succeed in the case, in counsel's view it is a matter for the defendants to fight it out amongst themselves as regards their respective share of liability.
10. This is perhaps an overly simplistic approach. The litigation is still at an early stage and it cannot be said with certainty that the plaintiff will succeed, nor against whom the plaintiff might succeed. Even if the court were to accept that a the plaintiff is likely to succeed against at least one of a group of alleged wrongdoers, if the entire group has been sued because the plaintiff cannot currently identify which that might be, the plaintiff still accrues a potential costs liability towards those defendants who are ultimately shown to have no liability to the plaintiff. In other words, decisions made by a plaintiff in the course of the litigation that gave rise to costs being incurred by persons against whom that plaintiff does not succeed, do not necessarily fall to be paid for by the person or persons against whom the plaintiff does succeed.
11. Prior to issuing these proceedings the plaintiff sent correspondence to all ten defendants on 10th June, 2019 in a form commonly described as an O'Byrne letter. This letter stated that the recipient, along with the other defendants, was involved in the development of the complex and, in circumstances where the plaintiff was unable to state whether the recipient or the other defendants were liable for the plaintiff's alleged loss, it called on the recipient to admit liability. Crucially, the letter went on to invoke s.78 of the Courts of Justice Act 1936 and advised the recipient that if at the hearing of the action the plaintiff succeeded against the recipient but not against some or all of the other defendants it would seek to recoup the costs of the successful defendant from the recipient.
12. Section 78 of the 1936 Act gives the court jurisdiction in cases where a plaintiff succeeds against one or more defendants but fails against others, to order that the unsuccessful

defendants pay to the plaintiff the costs the plaintiff is liable to pay to the successful defendants. The section does not establish an automatic rule but confers upon the court a jurisdiction which may be exercised "if having regard to all the circumstances it thinks proper to do so". The sending of an O'Byrne letter in advance of issuing proceedings against multiple defendants, thus affording them the opportunity to identify inter se which of them is liable for the damage claimed by the plaintiff, will be a relevant circumstance for the court to consider in deciding whether it is proper to make such an order. However, it does not follow that a plaintiff who sends such a letter is automatically protected from an adverse costs order. Amongst the factors the court will have regard to is the extent to which the plaintiff's action against the successful defendant was reasonable. In *O'Keefe v. Russell* [1994] 1 ILRM 137 the Supreme Court treated this issue in terms of there being "a genuine alternative claim and alternative potential liability" as between the defendants.

13. In this case the plaintiff has taken certain steps with a view to putting itself in a position to immunise itself against a possible adverse costs order in the event that it succeeds against some but not all of the defendants. However, should this be the outcome of the case and the sixth, eighth and ninth defendants are amongst those against whom the plaintiff does not succeed, an issue will arise as to whether it was reasonable for the plaintiff to institute proceedings against these defendants in the absence of a report from a relevant professional supporting the claim of professional negligence and breach of duty against these defendants. None of this is a live issue at present as it depends on a series of events which may or may not occur and potential applications which may or not be made. Nonetheless it is a consideration which should be borne in mind and in consequence of which I have some difficulty with the plaintiff's starting point to the effect that, as it will almost certainly succeed against some of the defendants, both the issues in the case and the question of the costs of the successful defendants will largely fall to be resolved as between the defendants themselves.

#### **Legal Proceedings**

14. A plenary summons was issued by the plaintiff on 31st July, 2018 seeking an order of specific performance requiring the defendants to carry out repairs to the complex to make good the defects identified or, alternatively, damages for breach of contract, negligence and negligent misrepresentation. Relief was also sought under s.24 of the Multi-Unit Developments Act, 2011 directing the defendants to complete the development in accordance with the terms of the contracts under which they were engaged, the conditions of the relevant planning permissions and the terms of the Building Control Act. Section 24 of the 2011 Act allows such relief to be sought against "the developer", a term which is defined as meaning the person who carries out or arranges for the development or construction of a multi-unit development. It is by no means clear that the defendants who are the moving parties in these applications fall within that definition. Further, as s.26 (1) of the 2011 Act expressly provides that the Circuit Court has exclusive jurisdiction in respect of such applications and that "*such applications shall not be made to the High Court*", it seems unlikely that this relief can be properly sought in these proceedings.

15. The papers do not indicate when the proceedings were served but a statement of claim was not filed until 2nd December, 2019. Although very lengthy, the statement of claim is quite repetitive. It initially sets out the appointment and/or engagement of each defendant or group of defendants but does so in virtually identical terms save that the particular role or title of each defendant is inserted and that the pleas are modified accordingly. The opinions or certificates of compliance provided by various of the defendants are expressly pleaded. It is then pleaded that notwithstanding these certificates confirming compliance, the works were carried out in a defective manner. The defects are then set out over eight pages under the heading "*particulars of failings*". Then, in a similar fashion to the initial pleas against each defendant or groups of defendants, the particulars of negligence, breach of duty and of misrepresentation are pleaded separately against each defendant or group of defendants but the pleas made are, to a very large extent, repeated verbatim and modified only to reflect the title of the particular defendant against whom the plea is being made. The statement of claim does not purport to link any of the defects pleaded to any specific defendant or to any particular default on the part of any specific defendant. In essence, as the defendants complain, all of the defects are alleged against all of the defendants who are in turn all alleged to have been negligent in almost exactly the same manner.
16. Unsurprisingly given the form in which the statement of claim is pleaded, the defendants responded by seeking particulars. The architect defendants served a notice for particulars on 4th March, 2020 and the sixth defendant on 21st April, 2020. These notices sought particulars of the terms of engagement pleaded against the respective defendants as well as of the negligence pleaded against each of them. The architect defendants went further and sought copies of the documents referred to by the plaintiff, including the terms of the contract under which the architects were employed, pursuant to O.31 r.15 of the Rules of Superior Courts (i.e. a notice requiring production of documents referred to in the other party's pleadings). In each case the plaintiff purported to reply but the replies declined to answer the specific queries on the basis that the answers were either a matter for evidence, were not matters for particulars or by referring back to the statement of claim. The plaintiff also invoked the principles set out in *Armstrong v. Moffat* [2013] IEHC 148 contending that the request for particulars went beyond what was required for the defendants to know the case they had to meet and to be able to plead in response to that case. The plaintiff pointed out that in addition to the pleadings it had provided the defendants with copies of its expert reports, which I understand to be the report of a consultant fire engineer, JAG, and of an architect, Bluett O'Donoghue, and had afforded the defendants the opportunity of inspecting the premises. The replies to particulars prompted notices for further and better particulars from each of the defendants. Again, the plaintiff purported to reply to these notices but did so in a manner which declined to provide substantive replies to most of the queries raised.
17. This exchange again reflects the circular mode in which these proceedings are moving. The defendants contend they do not know specifically the case each has to meet. They describe the plaintiff's expert reports as simply identifying the defects to which the proceedings relate without identifying which defendant is allegedly responsible for each

defect or why and without identifying the damage for which each defendant is allegedly responsible flowing from the particular defects for which they are responsible. The plaintiff contends that the case has been adequately pleaded and that it cannot be more specific until it has received documents from the defendants. As the sixth defendant invoked the provisions of O.31 r.15 in its request for further and better particulars to seek copies of the document referred to in the pleas made against it in the statement of claim, both of these defendants are now seeking copies of documents from the plaintiff which the plaintiff is in turn seeking from these defendants.

18. The sixth defendant filed its defence on 8th February 2021. The architect defendants have not yet filed their defence but have exhibited the defence they intend filing in the affidavit grounding the application for security for costs. Both defences are in broadly similar terms.
19. Apart from identifying matters which are denied, which are not admitted or to which the sixth defendant is a stranger, the sixth defendant makes three significant positive pleas in its defence. The first is to raise the Statute of Limitations against the plaintiff's claim. The second is that the plaintiff has not particularised its claim against the sixth defendant. At the hearing counsel argued that this went so far as the plaintiff not actually pleading any claim against the sixth defendant. The third is that the engagement of the sixth defendant as a consulting engineer for the purposes of the works was pursuant to the Institute of Engineers Ireland Conditions of Engagement Agreement SE 9101 and, specifically, that they were engaged to provide "*normal services*" under that agreement. Normal services under Clause 6 of the Agreement relate to the "*strength, stability, stiffness, robustness and durability of the basic structure of the buildings*". Significantly, the standard form agreement also provides for the possibility parties will agree that the consulting engineer will also provide "*additional services*" but no such agreement was reached in this case. Additional services include at Clause 7(1)(r) "*advising on fire resistance or related matters*". Consequently, the sixth defendant pleads that the allegations in the statement of claim are matters for which the sixth defendant had no responsibility. Finally, whilst admitting that an opinion on compliance was provided, no admission is made as regards the effect or meaning of that document. Counsel for the sixth defendant pointed out that the opinion in question (provided in respect of commercial units in Blocks 4 and 5) was in similar terms to the terms on which the sixth defendant was engaged. The opinion identifies the services provided as relating to the overall stability design of the works; records that the sixth defendant did not supervise construction of the works and notes that the opinion is subject to the design of parts of the works by specialist suppliers or sub-contractors "*meeting the requirements of the performance specifications*".
20. The architect defendants also plead both that the plaintiff's claim is statute barred under the Statute of Limitations and that the claim against them is not pleaded with sufficient particularity to enable the architect defendants to know the case which they must meet. Thereafter, apart from denials, matters not admitted and matters to which it is pleaded the architects are strangers, the architect defendants plead that they were engaged by the developer (being the fourth defendant) to provide architectural services in accordance

with stages 1 to 5 of the RIAI Scope of Services Agreement only. Whilst these stages include both scheme design and detailed design/building regulations, they expressly do not include project planning or operations on site and completion, all of which fall within stages 6 to 8. Consequently, it is pleaded that the architect defendants had no role in the construction phase of the development and specifically did not carry out periodic inspections. Insofar as the ninth defendant subsequently provided an architect's opinion on compliance, it is expressly pleaded that the plaintiff does not have an interest in unit 171 to which that opinion relates. Further, it is pleaded that the opinion was expressly qualified in that it was based on a visual inspection only, and it relied on confirmations provided by other experts, notably in this case by the tenth defendant who was the fire safety expert. Finally, in the event that the plaintiff establishes that it has suffered the alleged damage, the architect defendants make an express plea attributing liability for that damage to the negligence, breach of duty and misrepresentation of the other defendants and adopts the particulars pleaded by the plaintiff against those defendants.

### **Legal Principles Applicable to Security for Costs**

21. Before looking at the particular applications for security for costs before the court it might be useful to set out the basic principles governing such applications. There was in fact a considerable measure of agreement between the parties as to what those principles are; the real disagreement focused on how they should be applied in the particular circumstances of the case.
22. Both applications are made under s.52 of the Companies Act, 2014 which provides as follows:

*"Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."*

The fact that these applications have been made under this statutory provision rather than the parallel provisions of O.29 of the Rules of the Superior Court is of some significance as it has been recognised that the availability of security for costs as against a corporate defendant is a *quid pro quo* for the benefit to the members of limited liability in circumstances where a company may not be able to meet an order for costs made against it and thus the likelihood of its being granted is somewhat greater than in the case of a natural defendant. Clarke J. put it thus in *Farrell v. Bank of Ireland* [2013] 2 ILRM 183:

*"4.18 The jurisprudence in respect of corporate parties is relatively well settled. It is clear that the underlying rationale behind the provisions of s.390 of the Companies Act 1963 is to the effect that the ordering of security for costs against a corporate plaintiff (who would be unable to pay the defendants costs if the defendant were to succeed) is seen as deriving from the limited liability attaching to the company concerned. It has in some of the cases been described as the price*



*paid for limited liability. As pointed out by Barrington J. in Lismore Homes Ltd v Bank of Ireland Finance Ltd [1999] 1 I.R. 501 at 507 'insolvent limited liability companies are in a different category simply because the liability of their shareholders is limited'.*

*4.19 The logic behind that rationale is that parties, such as shareholders, or in an appropriate case creditors, behind a company will get the benefit of the company being successful in litigation but will be spared the adverse cost consequences of the company being unsuccessful for the premise on which security for costs is ordered under s.390 is that those costs will not, in practice, be paid if the company loses. Why should the parties who are going to benefit by a successful action not also be exposed to the costs of failure? That is the underlying rationale for corporate security for costs."*

23. The basic test for security for costs under s.52 (and formerly under s.390 of the Companies Act 1963) was set out by the Supreme Court in its decision in *Usk and District Residents Association Ltd v. Environmental Protection Agency* [2006] IESC 1 as follows:

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

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

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

*2. In the event that the above two facts are established then security ought to be required unless it can be shown that there are 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 vests upon the party resisting the order."*

In this case the defendants, being the moving parties in the application for security, both accepted that they bore the onus of proving the existence of a prima facie defence and that the plaintiff would not be able to pay their costs in the event that the proceedings were successfully defended by them. The plaintiff accepted that it bore the onus of establishing special circumstances. The main dispute between the parties was to whether it had been established that the plaintiff would not be able to pay the costs if the proceedings were successfully defended and whether the plaintiff could establish special circumstances.

**Prima Facie Defence:**

24. Although the affidavits initially filed on behalf of the plaintiff took issue with whether the defendants had established a prima facie defence, its position on this issue appeared to shift at the hearing and, implicitly accepting that a *prima facie* defence on the Statute of Limitations had been established, Counsel for the plaintiff argued that the importance of the limitation point went beyond the particular circumstances of the case and, thus, amounted to or contributed to the existence of special circumstances which would justify

the refusal of security. Consequently, I do not propose to look in any great detail at the case law concerning what is required in order to establish a *prima facie* defence. It was put as follows by Charlton J. in *Oltech (Systems) Ltd v. Olivetti UK Ltd* [2012] 3 IR 396 at p.402 in which he characterised what was required as being “a reasonably sustainable defence”:

*“It has to be demonstrated, rather, that if there is a legal defence that it is potentially sustainable on a practical view of the law or, if the defence is one of fact, that if what the defendant alleges in answer to the plaintiff is proven in court that it will defeat the plaintiff’s claim.”*

25. Charlton J. relied on an *ex tempore* ruling of Finlay Geoghegan J. in *Tribune Newspapers Plc (In Receivership) v. Associated Newspapers (Ireland) Ltd* (25th March, 2011) in which she teased out what is required to constitute a *prima facie* defence for the purposes of an application for security for costs. She noted that although the statutory provision did not expressly require that a *prima facie* defence be established, the purpose of the section (i.e. ensuring the availability of funds to meet the costs of a successful defendant) would not come into play unless the defence proposed by that defendant reached at least that threshold. In particular Finlay Geoghegan J. rejected the notion that the court should, on an application for security for costs, assess whether the defence is likely to succeed at the full hearing or even.

**Plaintiff’s Inability to Pay Costs:**

26. The second of the threshold requirements that the defendants must establish is the inability of the plaintiff to pay the defendants’ costs should they succeed in defending the claim. The statutory provision requires that there be “*reason to believe*” that such inability will arise and that this reason be based on credible evidence. Clarke J (as he then was) has pointed out that the words “*by credible testimony*” add little to the section as a court could not be satisfied of something on the basis of evidence which it did not find to be credible (see *IBB Internet Services Limited v. Motorola Limited* [2013] IESC 53 at para. 5.1). Consequently, the two issues to be considered are what is meant by the phrase that the company “*will be unable to pay the costs*” of the successful defendant and the evidential standard imposed by the phrase “*reason to believe*”. These two issues are necessarily intertwined because the court must assess the plaintiff’s potential future inability to pay by reference to the appropriate evidential standard in order to reach a conclusion as to whether security should be given within the terms of the section. Both of these concepts have been considered and addressed extensively in the established jurisprudence.
27. Clarke J. speaking for the Supreme Court in *IBB Internet Services v. Motorola Limited* (above) identified difficulties in the application of the section arising from the fact that whereas a court is usually tasked with making a decision on the basis of whether a historic or existing position has been established to the requisite standard on the evidence, under s.52 the court must assess the likelihood of a particular situation materialising in the future. This necessarily impacts both on the type of evidence that

may be appropriately considered and also on the manner in which it should be analysed by the court. He considered the issue as follows: -

*"5.8 It must, of course, be taken into account that the court, in considering inability to pay costs, is, in a sense, predicting a future uncertain event. The question which must be considered concerns the ability of the corporate plaintiff to pay costs at the time when the proceedings have failed. That involves not only a consideration of the relevant plaintiffs' current ability to meet an order for costs but also any likely change in that ability brought about by the passage of time and, of course, predicated on the failure of the proceedings.*

*5.9 The balance of probabilities test used to assess evidence in all civil proceedings is, of course, principally concerned with the standard by reference to which a decision-maker (judge or jury) must assess that evidence in order to make findings as to events which actually occurred. Historical facts relevant to the determination of the legal rights and obligations of the parties are frequently, of course, disputed to a greater or lesser extent. When there is conflicting or, indeed, arguably insufficient, evidence in respect of such material facts then the court assesses the matter on the balance of probabilities. If, by reference to that test, the court is satisfied that it is more probable that the facts are as asserted by one party then the court will, for the purposes of the case, take the facts as being so. The fact that the court might have entertained some doubt about the material facts is, thereafter, irrelevant for the court will assess the case, provided it is satisfied on the balance of probabilities, on the basis that the facts are so.*

*5.10 It does need to be noted that the same regime does not necessarily apply in respect of the assessment by the court either of the course of future uncertain events or, indeed, in determining what might have happened in hypothetical circumstances...*

*5.12 All of that goes to show that the balance of probabilities test is not, strictly speaking, in any event particularly apposite for the assessment of future uncertain or hypothetical events. The precise position that any company will find itself in at a time when it might, hypothetically, be called on to pay the costs of unsuccessful proceedings is necessarily uncertain. This is so for many reasons...*

*5.16 All of this goes to show that an assessment of the ability of a company to pay costs after a loss of proceedings occurring at some future date involves a whole range of estimates and hypotheses which, in my view, would render attempting to reach an assessment on the balance of probabilities inappropriate in any event. For that reason, it seems to me that use of the term "reason to believe" is appropriate. It is for that reason that I agree with the analysis in Jirehouse which suggests that "reason to believe" differs from a matter being established on the "balance of probabilities". Indeed I would go further and suggest that a test of "balance of probabilities" would be inherently inappropriate to an assessment of a hypothetical future event redolent with estimates. As was pointed out in Jirehouse the fact that*

*there must be reason to believe that the company "will" be unable to pay necessarily implies that what must be established is something a lot stronger than a mere risk. The phrase "reason to believe" should not be further defined, again for the reasons set out in Jirehouse, to avoid the risk of changing the test. While it does not require the court to assess the matter on the balance of probabilities, it does require the court to consider all material evidence and reach an assessment of the range of likely eventualities and thereby determine whether there truly is "reason to believe" that the company "will" be unable to pay costs should it lose. That requires that the evidence satisfy the court that there is something significantly greater than a mere risk of such an eventuality occurring."*

28. The decision referred to by Clarke J., that of Court of Appeal for England and Wales in *Jirehouse v. Beller* [2009] 1 WLR 751 considered a provision of the UK Rules of Court which was almost identical to the Irish statutory provision in particular as regards the use of the phrases "reason to believe" and "will be unable to pay". In rejecting the argument that "reason to believe" imported an obligation to prove inability to pay on the balance of probabilities Arden LJ concluded: -

*"There is a critical difference between a conclusion that there is "reason to believe" that the company will not be able to pay costs ordered against it and a conclusion that it has been proved that the company will not be able to pay costs ordered against it. In the former case, there is no need to reach a final conclusion as to what will probably happen. In the latter case, a conclusion has to be reached on the balance of probabilities".*

29. Kelly J. in *Greenclean Waste Management v. Leahy* [2015] 1 IR 106 had to consider whether an insurance policy taken out by the plaintiff (referred to as an "after the event" policy) to provide cover for the defendant's legal costs was sufficient to displace the finding that the plaintiff was otherwise insolvent and unable to pay the defendant's costs. Kelly J. considered the terms of the policy in some detail and accepted a number of criticisms made by the defendant which included the fact that the defendant had no knowledge or control over whether the plaintiff had fulfilled certain conditions of the policy. He concluded (at paras. 41 and 42 of the judgment) that it was clear from its terms that the proceeds of the policy in question did not and would not ever form part of the assets of the company and, consequently, the court was not entitled to have regard to the existence of the policy in the context of making an assessment of the plaintiff's ability to discharge costs. However, he went on to conclude that the existence of such a policy was a matter which could be taken into consideration in the exercise of the court's discretion and might be sufficient to justify a refusal of security notwithstanding that there was reason to believe the plaintiff would otherwise be unable to pay the defendant's costs. In the event, Kelly J. did not exercise his discretion in this regard and made an order directing that the plaintiff provide security for the defendant's costs. He concluded (at para. 56) that the policy was "so conditional...that it does not provide a sufficient security to the defendant to warrant refusal of an order for security for costs. The policy is

*voidable for many reasons which are outside the control, responsibility or, by times, knowledge of the defendant."*

30. This is echoed in the view taken by Barnville J. in *Coolbrook Developments Limited v. Lington Development Limited* [2018] IEHC 634 to the effect that the court has to consider the issue of inability to pay costs "on the basis of all of the material evidence and such evidence may emanate from both sides of the application" (see para. 65). In applying these principles Barnville J. did not accept an argument on behalf of the company as to the potential availability of rental income to satisfy the defendant's costs. He described the availability of the rents in question as "highly qualified, conditional and restricted" (see para. 76 of the judgment) and, on the facts of the case, unsupported by the evidence.
31. Barnville J. in *Coolbrook* (above) also addressed the extent to which the court should have regard to the plaintiff's failure to address an issue raised on the evidence before the court, notwithstanding that the onus of proof lies on the defendant. Referring to decided authority he stated as follows at para. 59 of his judgment: -

*"It is also necessary at this point to refer to an additional principle of law which must be applied in assessing the evidence on the issue of the alleged inability of a company to pay the defendant's costs of successfully defending the proceedings which emerges from the case law. The principle is this. Where the evidence available to the court discloses circumstances in relation to the financial position of the company which calls for an explanation and where the company does not put that explanation and evidence supporting it before the court, the court should not resolve the uncertainty or fill the gap in favour of the company which could have provided the relevant explanation. This principle emerges from the decisions of Clarke J. in the High Court in *Parolen Ltd v. Doherty & Anor* [2010] IEHC 71 and *James Elliott Construction Ltd v. Irish Asphalt Ltd* [2010] IEHC 234".*

32. Finally, a plaintiff who would be unable to pay a defendant's costs is frequently described as an impecunious plaintiff. The courts have often pointed out that the terms impecunious and insolvent are not synonymous as regards a corporate entity. A company may be solvent in the sense of having assets which exceed its liabilities and it may be able to meet its day-to-day expenses while at the same time being unable to meet the very high costs attendant on litigation. This distinction was recently summarised by Clarke CJ in *Quinn Insurance Limited (Under Administration) v. Price Waterhouse Coopers (A Firm)* [2021] IESC 15 as follows: -

*"7.10 I have used the term impecuniosity in relation to the type of plaintiff against whom an order for security for costs might potentially be made so as to distinguish such a corporate entity from one which may be insolvent. The relevant test is that it must be demonstrated by the defendant that the corporate plaintiff concerned would not be able to pay costs in the event that the proceedings are unsuccessful and the defendant is awarded its costs. A plaintiff does not necessarily have to be insolvent for it to be in such a position. To take but the simplest example, it is only*

*necessary to consider a company established with only nominal share capital. If that company has no liabilities, then it will not be insolvent but it clearly would be wholly unable to pay any costs awarded against it. It will be impecunious but not insolvent.*

*7.11 On the other side, it is possible to envisage a company which is insolvent but would ultimately be able to pay costs should they be awarded. A company which is unable to pay its debts as they fall due may well find itself committing an act of insolvency but there may be reason to believe that it would be able, nonetheless, to pay costs should it lose and have an award made against it. It might, for example, have non cash assets which would be likely to be capable of being realised in time to pay any costs award but not in time to pay its debts as they fall due in circumstances where its borrowings are at their limit.”*

**Special Circumstances to Justify Refusal:**

33. If the defendants satisfy both of limbs of the first paragraph of the test as set out by the Supreme Court in *Usk*, the onus then shifts to the plaintiff to establish that there are special circumstances such that notwithstanding its likely inability to meet the defendant’s costs, security should not be ordered. Again, although s.52 does not mention “*special circumstances*”, it flows from the fact that the court’s jurisdiction is discretionary that there will be circumstances in which the threshold requirements for the grant of security for costs are met but it is nonetheless appropriate that security be granted. One of the differences between the approach taken by courts to corporate litigants compared to personal litigants is that the default position in respect of corporate litigants is that once the threshold criteria have been met then security should generally be granted unless special circumstances are shown. Because natural litigants are not availing of limited liability and have a right of access to court which is protected by the constitution and by the ECHR, the courts’ approach to making an order for security for cost against natural litigants is that special circumstances must be shown to justify the making of such order (see the comments of Clarke J. in *Farrell v. Bank of Ireland* at para. 4.31 and 4.32 discussing the judgment of Walsh J. in *Midland Bank Ltd v. Crossley-Cooke* [1969] IR 56).
34. Three general points emerge from the case law. The first is that the category of special circumstances which will justify refusal of an order for security for costs notwithstanding that a defendant has met the threshold requirements is not closed. It is open to a plaintiff facing such an application to rely on any grounds that appear to it to constitute special circumstances. That said, there is an onus on the plaintiff to put forward “*sufficient clear evidence*” to enable the court to analyse the proposition being advanced and a failure to put forward such evidence can legitimately lead to the court not being satisfied that the plaintiff has discharged the onus upon it (per Clarke C.J. in *Protégé International Group (Cyprus) Ltd and Irish Distillers Ltd* [2021] IESC 16 at para. 6.7).
35. Secondly, despite the category of special circumstances being open, the case law focuses on two particular sets of circumstances which, if established, have been accepted by the courts as justifying the refusal of an order. These are firstly, cases where the plaintiff’s inability to meet the defendant’s costs results from the wrongdoing alleged against the

defendant in the proceedings and secondly, cases where there is a public interest in having the issues raised in the litigation heard and determined by a court notwithstanding the potential injustice that may be caused to a successful defendant if it cannot recover its costs. As both of these categories are relied on by the plaintiff in the present case I will look at the case law applicable to them in a little detail.

36. Finally, recent case law has made it clear that the exercise of the court's discretion in circumstances where the threshold criteria for the grant of security have been met entails a "least risk of injustice" analysis of a type similar to that required in the case of interlocutory injunctions and other interlocutory applications. There is some lack of clarity as to whether this analysis is required in all cases, even where the court has not accepted the grounds advanced by a corporate plaintiff as constituting special circumstances, or only where it has been accepted, at least on a *prima facie* basis, that special circumstances do arise. Logically it would seem that the former is the case, although where the contended for special circumstances have not been accepted the weight of the matters to be balanced will, in all probability, tend inexorably in favour of the grant of security.
37. Before looking at the specific categories it is useful to look at the evidential burden facing a plaintiff seeking to establish the existence of special circumstances which would justify the refusal of security. Peart J. in *Tír Na nÓg Projects (Ireland) Ltd v. P.J. O'Driscoll and Sons (A Firm)* [2019] IECA 154 considered the standard of proof which a plaintiff must meet to establish that there are special circumstances justifying the refusal of an order for security notwithstanding the plaintiff's likely inability to pay the defendant's costs. Again, this threshold is at a *prima facie* level. This means the level of proof required is lower than the ordinary civil standard of proof, i.e. on the balance of probabilities, but requires more than mere assertion. He stated at para. 31 of the judgment:

*"It seems to me that in order to satisfy the requirement that special circumstances be established on a prima facie basis, as opposed to a balance of probabilities, the plaintiff must do more than merely assert the proposition on affidavit, but must bring forth some evidence which is cogent and credible, which corroborates the contention being made. Any affidavit filed in response by the defendant may affect the trial judge's view as to that cogency and credibility, but the trial judge's task remains to decide if prima facie evidence has been adduced, and not to determine as a matter of probability whether or not the impecuniosity of the plaintiff has or has not been brought about by the wrongdoing alleged against the defendant. That seems to me to be what is intended by the requirement to establish the matter, and has been consistently stated to be the level of proof required by the decided cases from Jack O'Toole Limited v. MacEoin Kelly Associates in 1986 up to Connaughton Road in 2009, which has been consistently followed in later cases."*

As will be apparent later, an issue arises in this case as to the extent to which the court can or should accept the plaintiff's assertions on matters which are the subject of some

public concern but in respect of which specific evidence has not been adduced by the plaintiff.

38. The test for a plaintiff to establish that its inability to pay the defendant's costs is due to the alleged wrongdoing of the defendant is set out at paras. 3.4 and 3.5 of the judgment of Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7 as follows:

*"In order for a plaintiff to be correct in his assertion that his inability to pay stems from the wrongdoing asserted, it seems to me that four propositions must necessarily be true:-*

- (1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);*
- (2) that there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;*
- (3) that the consequence(s) referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff which loss is recoverable as a matter of law (for example by not being too remote); and*
- (4) that the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position.*

3.5 *Given that, on a motion such as this, a plaintiff is only required to establish the special circumstances, arising out of its inability to pay costs being due to the alleged wrongdoing of the defendants, on a prima facie basis, then it follows that each of the above steps must also be established on such a prima facie basis only....*

3.6 *It follows, in my view, that a plaintiff must at least establish a prima facie case that the quantum of damages which he might obtain in the event that he is successful, is of an order of magnitude sufficient to reverse the current financial position whereby the plaintiff company would be unable to pay the defendant's costs in the event that the defendant was successful. That this is so can be seen from the comment of Murray J. (speaking for the Supreme Court) in *Framus Ltd & Ors v. CRH Plc & Ors* [2004] 2 I.R. 21 at pp. 61 and 62, where it was noted that the plaintiff in that case had shown some evidence of wrongdoing on the part of the defendant but not, even on a prima facie basis, that its impecuniosity was due to that wrongdoing. It is not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a prima facie basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of point (4) referred to above."*



This test has been approved and applied in a number of subsequent cases. Further, as pointed out by Hogan J. (then a judge of the High Court) in *Pierse Desmond Ltd v Nicfhionnlaoidh T/A MacGinley Solicitors* [2011] IEHC 145 a plaintiff must adduce some evidence upon which the court can conclude not just that there was actionable wrongdoing on the part of the defendant but also that that wrong doing caused financial loss to the plaintiff which in turn has caused the plaintiff's inability to meet the defendant's costs. The court is not required to make a determination on the merits of these issues. The evidence which may be tendered at the hearing of the action may be both different to and more complete than the evidence which is available to the court on an interlocutory application. Nonetheless there is an obligation on the plaintiff to adduce some evidence for the purposes of meeting an application for security for costs on the basis that special circumstances exist which would enable the court to conclude that the various limbs of the *Connaughton Road* test either were or could be established.

39. In an appropriate case these considerations will require a detailed financial analysis of the extent to which a plaintiff company is insolvent or otherwise unable to meet the defendant's costs irrespective of the effects of the alleged wrongdoing on the part of the defendant and also of the extent to which the alleged wrongdoing of the part of the defendant has caused or contributed to the plaintiff's current financial situation. As it happens, although the plaintiff's affidavits initially raised this ground, because of the plaintiff company's particular circumstances, on opening his submission counsel for the plaintiff indicated that he was not going to be arguing for special circumstances on the basis that the plaintiff's inability to pay costs was due to the damage the subject of the proceedings. He accepted that by virtue of the type of company it is, the plaintiff would never be in possession of a large amount of funding that was not ear-marked for a specific purpose. However, when the hearing of the application resumed after an interval of some weeks the plaintiff's position appeared to have changed and an argument was made on the basis that the actions of the defendants had caused the plaintiff's financial position to deteriorate in a way which was material to its ability to meet the defendants' costs. This argument was made on the basis that the actions of all of the defendants to the proceedings caused all of the damage rather than being specifically directed to the actions of the moving parties. I will return to this issue in due course.
40. The second category of case in which special circumstances have been found to exist is where the issues in the litigation are themselves of such public importance such that they should be heard and determined notwithstanding the plaintiff's impecuniosity. There was some debate as to the level of importance that this would entail with the plaintiff arguing that it has at least reached the standard encompassed in the requirement that it be shown that there is "*a point of law of exceptional public importance*" as regards a pre-emptive costs order which involve the issues transcending the facts of the individual case and the interests of the parties (see Laffoy J in *Village Residents Association Ltd v An Bord Pleanála* [2000] 4 IR 321). The matter of public importance can be either a legal issue or, more generally, the resolution of a matter of some public concern. For example, in *Re Millstream Recycling Ltd v. Teirney* [2010] 4 IR 253 Charlton J. refused security for costs in respect of proceedings arising out of circumstances in which pork products had

become contaminated by dioxins. The events giving rise to the proceedings had been a matter of considerable public concern at the time and the controversy had ongoing implications for the reputation of Irish pork products and agricultural products generally. Charlton J. ultimately concluded that "*The determination of the facts behind the scandal transcended the individual claims and counterclaims of the parties.*"

41. The fact that a plaintiff may be unable to proceed with its case if the full amount of security is required to be provided has always been considered a material (but not necessarily determinative) factor in the exercise of the court's discretion (per Barniville J. in *Coolbrook Developments Ltd* (above) at para. 107). The issue in this case is materially different and concerns the extent to which the court can have regard to the public interest in the litigation proceeding where the company accepts that the grant of security for costs would not prevent it from doing so. Essentially the question is whether the importance of the issues can give rise to special circumstances which justify the refusal of security where the grant of security will not impact on the proceedings being heard nor on the issues of public importance being determined.
42. There is recent case law on what I might term "public interest special circumstances" which suggests that if the granting of security for costs would not stifle the litigation by preventing the plaintiff from proceeding, then the fact that the issue is of public importance should not operate to deprive the defendant of security to which it would be otherwise entitled. The matter had been uncertain as is evident from the judgment of Baker J. in the Court of Appeal in *Quinn Insurance Ltd (Under Administration) v. Price Waterhouse Group (A Firm)* [2020] IECA 109 who stated at para. 80 of her judgment:

*"No useful authority has been identified regarding the correct approach to the exercise of the discretionary power when the ordering of security would not stifle the claim. While the fact that the granting of security for costs is not, of itself, a sufficient reason to withhold the making of the order, the converse is not necessarily true. The fact that a corporate plaintiff will be in a position to continue to pursue the litigation notwithstanding the order for security for costs can be a very significant factor in balancing the rights of a corporate plaintiff to sue and the interests of the defendant with no prospect of having its costs met in successfully defending a claim, even where a plaintiff has established special circumstances within the meaning of the jurisprudence."*

[Presumably a clause has been inadvertently omitted from the third line of this extract and what is intended to be said is the fact that the granting of security will stifle a claim is not of itself sufficient reason to withhold the making of the order, the converse is not necessarily true.]

43. However, Clarke J. in the Supreme Court took a more robust view. As a matter of general principle, he regarded the likely stifling of the litigation if security was ordered, although not decisive, to be a matter which must be taken into account in determining where the least risk of injustice lies. However, where the grant of security would not prevent the proceedings going ahead, then he regarded the weight to be attached to the public

interest in the hearing of the proceedings to be minimal. He put it thus at para. 7.34 of his judgment:

*"I would add that it seems to me that the question of whether the proceedings are likely to be actually stifled may play a very significant role in an assessment of whether the 'public interest' special circumstance has been established. The whole point about that special circumstance is that there may be cases where there is a genuine public interest in certain issues being litigated in open court. That public interest would be impaired if the proceedings were not to go ahead because security for costs was ordered. However, if the proceedings are going to go ahead in any event (or if that remains highly likely) then the weight to be attached to the public interest in the proceedings going ahead in the context of a security for costs application will be minimal."*

44. These points are relevant because it was accepted by the plaintiff's counsel that the plaintiff had not made the case that the grant of security for costs in response to either of these motions would stifle the litigation. Instead, the plaintiff argued that the fact the proceedings would not be stifled was not determinative and the court still had to look at the public policy issues. This is in principle correct but must be subject to the observation in *Quinn* (above) that the weight to be attached to public interest factors will necessarily be significantly reduced where the granting of the order will not impact on the proceedings going ahead.

**Amount of Security:**

45. Although they are two distinct concepts, there is an obvious overlap between the plaintiff's ability to pay costs and the amount of security that a plaintiff should be directed to provide in the event that an order is made. Both require an estimate to be made of the costs the defendant will likely incur in the event that the proceedings are successfully defended. Like the question of the plaintiff's ability to pay *simpliciter*, this involves an assessment of a likely future position, albeit an assessment that can be guided by the expertise of legal costs accountants who are particularly well placed to value the work likely to be involved. Nonetheless difficulties can arise when the extent of the work likely to be involved is either disputed or unclear. There can also be *bona fide* differences of opinion between costs accountants as to what fee a particular piece of work should bear.
46. There are some well-established principles regarding the assessment of the amount of the defendant's costs from the perspective of the plaintiff's ability to pay. Firstly, the assessment must take account of all of the calls on the plaintiff's funds including the need to make provision for the plaintiff to meet its continued day-to-day expenses outside of the litigation. Secondly, the court should take into account not just the costs of the defendant bringing the application but also those of any other defendant making a similar application and, importantly, the plaintiff's own costs. The funds available to the plaintiff at the time its ability to pay the defendant's costs are being assessed are likely to be depleted by the need to pay its own lawyers and experts as the litigation proceeds. Thus, in this case, assuming that both defendants establish a *prima facie* defence, this means that the court must look at the plaintiff's ability to pay three sets of costs, its own and

that of both defendants. The costs of defendants who have not brought an application for security do not have to be factored into the calculation as those defendants have not yet established a *prima facie* defence to the plaintiff's case. In this case there is a further application for security for costs pending on behalf of the Cosgrave defendants but as no court has yet formed the view that the Cosgrave defendants have a *prima facie* defence to the plaintiff's claim, the amount of costs that they may incur and for which the plaintiff may ultimately be liable is not included in the calculation. Thirdly, in estimating their likely costs the defendants should not factor in costs which have already been incurred before an application for security for costs is brought. The plaintiff's counsel took issue with the extent to which some of the costs in respect of which security is claimed arose before the application for security was made, particularly solicitors' instruction fees. However, but there was no clear breakdown by any of the costs accountants as between fees arising before and after these motions were brought. Finally, VAT on legal fees can be excluded from consideration if that VAT is likely to be recoverable and thus will not represent an actual detriment to the successful defendant.

47. The case law as to the amount of security that should be awarded against a corporate plaintiff has undergone two radical shifts over the past 20 years or so. There was a long-standing practice where security was generally ordered in the amount of one third of the defendant's estimated costs. However, in *Lismore Homes Ltd v. Bank of Ireland (No. 3)* [2001] 3 IR 536 the Supreme Court (Murphy J.) focussed on the text of s.390 of the Companies Act, 1963 which conferred jurisdiction on the court to require that "*sufficient security*" be given for a defendant's costs. Murphy J. did not accept that the section conferred a general discretion on the court which either required or allowed the court to conduct a balancing exercise in order to determine a figure that was just in all of the circumstances where security was to be granted. Rather, the requirement that security be "*sufficient*" meant that once a decision had been made that security was to be provided, the amount must be adequate and its adequacy would be directly related to a reasonable estimate of the amount of the defendant's costs. For the most part this meant that full security should be granted unless there was a specific reason not to do so. The court's discretion lay in its initial decision to grant or refuse the request for security.
48. The text of s.52 of the 2014 Act differs significantly from s.390 of the 1963 Act in that the word "*sufficient*" is omitted. The effect of this was analysed by Barniville J. in *Coolbrook* (above) in which he held that the removal of the word "*sufficient*" was a deliberate decision on the part of the Oireachtas which resulted in the court having a very wide discretion as to the amount of security that should be ordered in any given case. He put the matter thus:

"106. My conclusion on this issue is that the removal of the word '*sufficient*' by s. 52 of the 2014 Act must have been deliberate. It must have, therefore, been the intention of the Oireachtas to change the law from that which existed under s. 390 of the 1963 Act. Therefore, I agree with Barrett J. in *Fides and Baker J. in Werdna* that the requirement to direct full security to be provided in the case of an order under s. 390 as interpreted by the Supreme Court in *Lismore Homes (No. 3)* and

*applied in subsequent cases no longer exists under s. 52 of the 2014 Act. The court now has a very wide discretion as to the amount of security which can be required in the circumstances arising in the application before it. In my view, the court has complete judicial discretion as to the amount of security to be ordered. In exercising that discretion in determining the amount of security to be provided, the court is required to carry out the balancing exercise described by the Supreme Court in Farrell and referred to and applied by the Court of Appeal in Flannery and by the High Court (Baker J.) in Werdna....*

*108. I conclude, therefore, that a court determining the amount of security required to be provided under s. 52 of the 2014 Act has a full discretion as to the amount of such security and is not bound by any rule or principle that unless special circumstances are established the amount of costs to be provided by way of security should be one third of the likely estimated costs of the defendant. There is nothing in my view in s. 52 which would constrain or restrict the court in such a way. It must be borne in mind that the court will only be considering the amount of security for costs to be awarded where it has already accepted that there is reason to believe that the company will be unable to pay the costs of the defendant if it successfully defends the proceedings. Therefore, the essential question for the court to determine in fixing the amount of the security to be provided is whether it would be just to leave the defendant at risk on costs by not directing the provision of full security or whether it would be just in those circumstances to direct that a lower amount be provided by way of security. It may well, therefore, be the case that unless there are other factors present which may persuade the court to exercise its discretion to reduce the amount to be provided, the court will in most cases direct the provision of full security. I agree with the views expressed by the authors of Delany and McGrath that such an approach may well be more consistent with the rationale behind s. 52 which is essentially to prevent the abuse of limited liability status.”*

**Phasing of Security:**

49. The last area where the general principles of the law on security for costs are relevant to this case concerns phasing the provision of security once it has been ordered. This was not a feature of the response made on affidavit by the plaintiff to the defendants' applications but was introduced by counsel for the plaintiff in his reply to the case made by the defendants at the hearing. Consequently, it was not dealt with by the defendants in their written submissions nor in the original books of case law provided to the court. Particular reliance has been placed on two judgments of Clarke J., one a judgment of the High Court in 2010 and the other, more than a decade later, one of his last judgments as Chief Justice in 2021.
50. In the earlier of the two cases, *Salthill Properties Ltd v. Royal Bank of Scotland Plc* [2010] IEHC 31 Clarke J. accepted an argument made on behalf of a company against whom he had determined that security should be granted, that the order providing for such security should be structured so as to initially require it to cover only the reasonable costs that

would arise up to a point in time where discovery would be made and analysed by the plaintiff. This was accepted as marking a “watershed” because it would then be necessary for the plaintiff to review its position in light of the material obtained by way of discovery and other pre-trial steps and to decide whether the proceedings should go ahead. It was accepted in that case that in the event the plaintiff decided to go ahead with the proceedings, further security would need to be provided at that time. The order ultimately made by Clarke J. provided for payment of security in two stages, with the proceedings to be struck out for want of prosecution automatically in the event of default in respect of either date.

51. Clarke C.J. revisited these themes in *Quinn Insurance Ltd (Under Administration) v. Price Waterhouse Group (A Firm)* (above). He addressed the rationale for ordering phased security as follows:

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

*7.21. In an appropriate case it may, for example, be sensible for the Court, where the proceedings are likely to be very expensive and protracted, to direct security on a phased basis so that the matter can be reviewed from time to time in light of developments in the case. Likewise, there may be circumstances where ordering security in the form of an indemnity from those who can be shown to be likely to benefit should the proceedings be successful may be an appropriate form of security even where those persons might not necessarily be a mark for all of the costs which might be awarded. ...These are matters which a court should consider in attempting to minimise the overall risk of injustice. That being said, it should also be recognised that failing to provide full security does expose a defendant to the almost certain consequence that a successful defence of the proceedings will nonetheless leave that defendant with irrecoverable costs and thus a significant detriment. I would consider, therefore, that the default position should continue to be that full security in monetary form should be provided but that the Court may depart from that position if it considers it necessary and appropriate so to do to minimise the risk of injustice across the board.”*

Thus, there is a clear jurisprudential basis for phasing any security which the plaintiff might be directed to provide. The outstanding issues concern the evidential basis required for such a decision to be made and whether, in directing phased security, the court should postpone some or all of the key decisions such as the amount of security that might be required at a later stage and even if a second tranche should be required.

**Discussion: Prima facia defence**

52. In its affidavits and written submission the plaintiff disputed that the defendants had established *prima facia* defences to its claim. In his oral argument counsel for the plaintiff appeared to resile from this stance. Instead of disputing the existence of a *prima facia* defence, he focused his arguments under this heading on two issues. The first was the central feature of the plaintiff's entire response, concentrating on the circumstances in which it finds itself where it does not know which of a number of concurrent wrongdoers are actually responsible for the defects of which it complains. The second was to take one strand of both defences, namely the Statute of Limitations point, and to argue that this issue was a point of such public significance that it requires to be determined by the court and, thus, constitutes special circumstances which should excuse the plaintiff from the obligation to provide security. Whilst I will deal with the merits of this argument below, I think it implicit in the fact that it was made that the plaintiff accepts that there is a *prima facia* defence to its claim under the Statute of Limitations (without of course accepting that the defendant's contention on the statute are correct).
53. As it happens I am satisfied not only that the defendants have raised a *prima facia* defence under the Statute of Limitations but also that each of them has raised a *prima facia* defence as to whether, in light of the terms of the contracts on foot of which they were engaged, they assumed any responsibility for the fire safety elements of the construction project. As I am satisfied that a *prima facie* defence has been made out under both of these headings, I do not propose to consider other elements of the defences as the outcome of such consideration would have no bearing on whether the defendants have satisfied the first of the two threshold requirements.
54. The sixth defendant has exhibited the contract under which it was engaged which makes a distinction between normal services and additional services, fire safety falling within the latter. The sixth defendant's deponent, a director of the company, has sworn that it was engaged to provide only normal services. A different engineering firm, the tenth defendant, was engaged in respect of fire safety. The certificate of completion provided by the sixth defendant mirrors this distinction. Therefore, independently of the Statute of Limitations issue, the sixth defendant has clearly raised a *prima facia* defence to this claim on the basis that the defects the subject of the proceedings did not fall within the scope of its contractual responsibilities.
55. The architect defendants make a similar case in respect of the scope of their responsibility for fire safety under the contract on foot of which they were engaged. The plaintiff makes a number of evidential arguments as regards this defence to contend that it does not meet the requisite standard under the *prima facia* test. I accept that the evidence of the architect defendants in this regard is not as strong as that of the sixth defendant. For

example, the RIAI contract under which the architect defendants were engaged is not exhibited and the grounding affidavits sworn on behalf of these defendants are sworn by solicitors rather than by a member of the eighth defendant with personal knowledge of the contractual arrangements. Nonetheless I am satisfied that a *prima facie* defence has been shown on this ground. The RIAI services agreement is one commonly, if not invariably, used by architects in Ireland and its terms are widely known and understood by those in the construction industry. Further, the terms of the compliance certificate provided by the ninth defendant (which is exhibited) expressly references the provision of services under the RIAI Scope of Services Work Stages 1 – 5 and that fire safety design was provided by McBain’s Cooper (subsequently part of the tenth defendant) who also acted as the project supervisor design and construction (PSDC). In any event, my conclusion on this aspect of the defence can be regarded as *obiter* in light of my conclusions on the Statute of Limitations defence.

56. I do not propose to analyse the Statute of Limitations defence in any detail since, if the case proceeds, the issues arising under the Statute will undoubtedly be considered in greater depth by the trial judge. As a starting point, the Statute of Limitations provides for a six-year limitation period for the institution of proceedings in contract and in tort and the works carried out by these defendants on the construction project took place some fourteen to sixteen years prior to the institution of the proceedings. Time begins to run for the purposes of the Statute at the point where the cause of action accrues so the key issue will be the determination of when the cause of action accrued. The defendants argue that this issue has been authoritatively determined in their favour by the Supreme Court in the recent decision *Brandley v. Dean* [2017] IESC 83. McKechnie J., speaking for the Supreme Court, held that in cases of latent damage the cause of action accrues at the point in time where the damage becomes manifest, meaning capable of being discovered and capable of being proved by the plaintiff. He attributed some lack of clarity in earlier cases to a failure to distinguish between defects *per se* and the physical damage caused by such defects in terms of the resulting claims being one for pure economic loss on the one hand as opposed to property damage on the other. This means that there are potentially two limitation periods in cases where defects in the construction of property are capable of causing property damage – one in respect of the defects themselves and the other in respect of any damage they cause. These limitation periods might overlap but might also run completely independently of each other. A claim for pure economic loss, being the cost of remedying defects (which may or may not go on to cause damage to the property) will exist, assuming the defects are capable of discovery, from the point at which the building was constructed. Thus the cause of action will accrue at the date of completion of construction. The other potential time limit, in respect of a claim for property damage resulting from defects in the constructed property, will run from a later date being the date on which any damage resulting from these defects becomes manifest.
57. Of course, the problem here is that the defects complained of relate to fire safety and, for obvious reasons, the plaintiff cannot wait for that damage to manifest itself before ensuring that the necessary remedial works are carried out. Although counsel for the plaintiff describes the works as “covered-up works”, it seems the defects now complained



of were apparent as soon as an inspection was conducted on behalf of the plaintiff. The reason why this inspection was carried out at that time has not been explained to the court. It may not even be correct to describe these defects as latent defects since it seems that they exist currently in the same form as they did at the time the building was constructed. Thus, the facts in this case give rise to somewhat different legal issues than those in *Brandley v Dean* where cracks appeared in buildings which had been constructed using inadequate materials such that there was a “*manifestation*” of the damage being caused by the defects complained of. These issues are undoubtedly complex and, whilst the plaintiff’s arguments might well ultimately succeed, I have no hesitation in finding that the defendants have raised a *prima facie* defence on these grounds.

#### **Inability to Meet the Defendant’s Costs**

58. Again, the approach taken by the plaintiff in its affidavits and written submissions was materially different in some respects to that taken by counsel for the plaintiff at the hearing. Some of this was because evidential issues raised by the plaintiff in its early replying affidavits were met in the defendant’s later affidavits, including the provision of affidavits and reports from expert witnesses. Matters were not helped by a further shift in the position adopted by counsel for the plaintiff between the first and the second day of his oral submissions, which were separated by a number of weeks. As a result of these various changes, the following analysis is conducted on the basis of a factual position which is inconsistent with some of the submissions and concessions made by counsel for the plaintiff at the outset.
59. Both defendants started their analysis of the plaintiff’s financial position by pointing to para. 41 of the statement of claim in which the plaintiff pleads that it is “...a *management company and does not have the resources to undertake the substantial and extensive remediation works*”. At that stage the plaintiff’s estimate of the cost of the remediation works which would be required was some €7 million, although that estimate has since increased to €9 million. Both defendants took the view that this plea was indicative of the plaintiff’s impecuniosity. I am not convinced that this is necessarily so. The cost of the remedial work required is very significant and the plaintiff could both be solvent and be in a position to meet the defendants’ legal costs without being in possession of the amount of funding that would be required to carry out these works.
60. The architect defendants did not initially go further in their grounding affidavit but the sixth defendant did. Its director, Mr. Barrett pointed to the then most recent financial statements available for the plaintiff, for year-end 31st May, 2018, which showed the plaintiff had net assets of €532,082 and liabilities of €61,084. The sixth defendant exhibited an estimate of its own potential costs dated 28th January, 2021 in an amount of €690,750 (exclusive of VAT). In addition to the obvious shortfall between these two figures, Mr. Barrett identified the need to take account of the fact that the plaintiff’s assets would require to be applied to pay the running costs of the development and also the plaintiff’s need to pay its own legal costs.
61. In its initial response to both applications the plaintiff’s solicitors identified that neither defendant had an affidavit or report from a chartered accountant analysing the plaintiff’s

financial position. The plaintiff also complained that the architect defendants had not quantified their likely costs nor provided evidence to support their claim, relying instead on a round figure estimate. The plaintiff has put forward the evidence of two legal costs accountants. One of these suggests that the architect's costs will be in the region of €237,500. The other suggests that the sixth defendant's costs will be in the region of €430,500. It is not clear why the plaintiff instructed two different costs accountants to consider the positions of the sixth defendant and the architect defendants respectively nor why it suggests that there would be a difference of nearly €200,000 between the appropriate level of costs for those two defendants given that the plaintiff has pleaded a virtually identical case against both. I will consider the actual estimates below.

62. In addition to disputing the level of costs likely to be involved, the plaintiff adduced the evidence of a chartered accountant and insolvency practitioner, Myles Kirby, who was asked to review the financial position of the plaintiff company. An intrinsic element of the case made by Mr. Kirby on behalf of the plaintiff is that it would be open to the plaintiff to raise the funds necessary to pay the defendant's costs by means of a special levy on its members, namely the owners of the units within the development.
63. There then followed a series of affidavits in which chartered accountants instructed on behalf of the defendants (Mr. Jim Luby on behalf of the architect defendants and Mr. Liam Grant on behalf of the sixth defendant) took issue with Mr. Kirby's evidence querying the basis for his instructions on certain issues and disputing some the conclusions reached by him. It was contended by the defendants' accountants that the plaintiff already had significant arrears in the collection of routine management charges which put in question its ability to raise and collect a special levy. Mr. Grant suggested that in concluding that the amount of such a levy would not be excessive when spread amongst all of the owners of the units in the development, Mr. Kirby had failed to take into account that the plaintiff would have to fund its own legal costs from the same source. Mr. Kirby disagreed with the issues raised regarding his analysis, particularly as regards the level of arrears within the development and the extent to which those arrears could be classified as long-term arrears.
64. I mention this at the outset because in examining the evidence before the court on these issues in accordance with the jurisprudence set out above (in particular *Connaughton Road, Jairhouse* and *Coolbrook*) I do not have to reach a conclusion, on the balance of probabilities or otherwise, that the plaintiff will or will not be able to meet the defendant's costs. Rather, the threshold required to establish "*reason to believe*" an inability to pay is somewhat lower than that required to establish the same proposition on the balance of probabilities. Consequently, in teasing out the evidence of the accountants I am not engaged in an exercise in which I have to decide which of their opinions is most likely to reflect the probable future position. Instead, if I am satisfied that the defendants have established a *prima facie* inability to pay on the part of the plaintiff, I then have to decide if the plaintiff's evidence, including that of Mr Kirby, is sufficient to allow me to conclude that notwithstanding the *prima facie* case, there is no reason to believe the plaintiff will be unable to pay their costs. In other words, the level of evidence required to establish a

reason to believe will necessarily be less than that required to refute a reason to believe and establish that there is in fact no such reason.

65. Each of the three accountants have analysed the plaintiff's financial position based on its accounts over a period between 2017 and 2020 as those accounts became available. The plaintiff's income comprises annual service charges paid by its members who are the unit owners within the development and their contributions to a sinking fund both of which are legal requirements under the Multi-Unit Development Act, 2011. Although there are some arrears owed in respect of these charges, over this period the plaintiff has met both its routine expenses and maintained a surplus, albeit a surplus that has declined over the same period. The defendants' accountants point to the fact that the plaintiff's net assets have reduced significantly. Despite accumulated arrears, service charge income has remained relatively static, expenses have increased and the cash reserves which were available to the plaintiff in 2017 have now been significantly depleted as they have been used to make up the deficit between the plaintiff's income and its expenditure. The plaintiff says that this is due to increased non-routine expenses largely reflecting increased insurance costs, works carried out and legal and professional expenses related to this litigation. I accept that this is the case.
66. Mr Kirby explains this in his report. In looking at the plaintiff's financial position over the period from year ending 31st May, 2017 to year ending 31st May, 2020 he points out that given the nature of the plaintiff's activity, its income and expenditure levels should be largely consistent year-on-year and that, as might be expected, the service charge income has remained relatively consistent. However, the level of expenses increased significantly in the year ending 31st May, 2019 and thereafter. This increase is attributed to the issues the subject of the proceedings and, in particular, a significant increase in building insurance costs because of the fire safety issues with which the plaintiff is now faced. In addition, the plaintiff had incurred legal and professional fees associated with the proceedings markedly in excess of the provision for legal and professional fees made in previous years. As a result of these matters, the sum in the accumulated members' funds referred to by Mr. Barrett in the sixth defendant's grounding affidavit had significantly reduced by 31st May, 2020.
67. The plaintiff is undoubtedly not an insolvent company. It has assets and it is able to meet its current liabilities as they fall due. The issue is whether the plaintiff is impecunious in the sense that it will be unable to meet a large liability for the defendant's costs in the event that the proceedings are successfully defended. Because counsel for the plaintiff accepted that the plaintiff would never have on hand money to pay in excess of €1 million in legal costs as that is not what the company was set up to do, it is unnecessary to analyse the financial position of the plaintiff company in great detail. He acknowledged that even without the damage that is the subject matter of these proceedings, the plaintiff would simply never have that level of funds. Instead, he argued that the court should look at how the company traditionally conducts its business and raises its funds. Thus, the relevant issue is the ability of the company to raise the funds necessary to pay the defendant's costs in the event that the proceedings are successfully defended. From

the outset the plaintiff has proposed that these funds could be raised by way of imposition of a special levy on members in the event that the proceedings were unsuccessful and orders for costs are made against the plaintiff. Putting the issue in terms of s.52, counsel contended that in order for the court to grant security for costs there must be reason to believe either that a special levy would not be imposed or that it would not be collected.

68. There was some disagreement between the parties as to the mechanism for the imposition of a special levy and some confusion as to whether the provisions of s.18(4) of the 2011 Act would apply to the raising of a special levy by the company for the purposes of paying legal costs awarded against it. Section 18 of the 2011 Act deals with annual service charges and subsection (4)(b) provides that where the service charge proposed to the general meeting of an owners' management company is disapproved by not less than 75 % of the persons present and voting, the proposed service charge shall not take effect. In those circumstances the existing charge continues to apply until a new service charge is adopted in respect of the period concerned. The significance of this is that if s.18(4)(b) applied it would make the imposition of such a levy on the members at the plaintiff's proposal virtually automatic unless 75% of the members object to it. Consequently, counsel for the plaintiff argued that a special levy could be raised with the approval of only 25% of members. In circumstances where the ownership of a significant portion of the units includes commercial entities and investors as well as the Cosgrave defendants, it was asserted that these members would have a financial interest in ensuring that a levy was raised and paid (although as matters have transpired it seems that this is not in fact the case as the Cosgrave company to which their interests have been assigned has refused to pay an additional charge in respect of this litigation). The defendants disputed this proposition.
69. I understand all of the accountants to have proceeded on the basis that a special levy would be required in order for the defendant's costs to be raised by the plaintiff from its members as a charge of this nature would not fall within the scope of the matters covered by the annual service charge. The matters which are covered by the estimate for the annual service charge are listed in s.18(3) of the 2011 Act. These include general maintenance and repairs (sub-para (b) and (c)) and there is separate provision in s.13 for a management company to effect immediate repairs required for safety reasons and to recover the cost of such repairs from any person, including the developer, who is responsible. Under s.18(3) the estimate may also include legal services and accounts preparation (sub-para.(h)). In my view the phrase "legal services" in the context of s.18(3) where it appears listed with the other types of service that a management company would routinely employ such as accounts, cleaning, waste management, gardening, concierge and security refers to the type of legal services which a management company engages on its own behalf and not to the discharge of legal costs orders made against it in favour of third parties. In those circumstances it does not seem to me that s.18(4)(b) would apply and consequently a special levy would have to be raised by the plaintiff proposing a resolution at an EGM of its members and that resolution would have to be passed in accordance with the normally applicable rules.

70. To support the contention that a special levy could be both imposed and collected, counsel for the plaintiff pointed to the fact that the plaintiff, as an owners' management company, is an integral part of the title to their property for the owners of each individual unit in the development. If the plaintiff did not pay the costs ordered against it, then it could be wound up by the defendants which would leave the unit owners with an unmarketable title to their properties. For this reason, counsel argued that the members of the company, being the owners of the units in the development, could not in reality refuse either to accept or to discharge a special levy.
71. This was seriously contested by the defendants on a number of different grounds. Even if the rules were structured to enable charges proposed by the plaintiff to take effect unless opposed by a significant proportion of members, the defendants queried the capacity of the plaintiff to impose a special levy to meet their costs after the litigation had concluded. At the point where the levy was being proposed the proceedings would have been unsuccessful – at least as far as these defendants are concerned – and the unit owners would have nothing positive to gain by paying the defendants' costs for which they are not otherwise legally liable. Further, they would presumably have had levies imposed on a continuous basis over the preceding years in order to meet the plaintiff's own costs (some of which would of course be recoverable if the plaintiff succeeds against any defendant) and, depending on the outcome of the litigation as a whole, the costs of the remedial works. In those circumstances it can be expected that the members' enthusiasm for the imposition of a special levy for the defendant's costs would be low.
72. At this point I should note that subsequent to the hearing of these motions, the plaintiff's solicitor sought the leave of the court to file an additional affidavit. This application was opposed and I agreed to accept the affidavit on a *de bene esse* basis. Part of the defendants' objection included the fact that the plaintiff had already sought to introduce additional affidavit evidence half way through the hearing (affidavits of a director of the plaintiff company and of a property management company acting as managing agent for the plaintiff). That application was the subject of a discrete ruling made during the course of the trial in which I allowed the affidavit of the managing agent exhibiting updated accounts and allowed portions of the director's affidavit. I excluded the admission of material which was not new but was rather material that was in existence at the time the original affidavits were sworn and was being introduced to enable the plaintiff to make new and previously unflagged arguments after the defendants had moved their applications. Applying a similar rationale to the affidavit of the plaintiff's solicitor, I think that I should have regard to it as it concerns matters which have occurred since the hearing and which the plaintiff could not have put into evidence when the original affidavits were sworn.
73. That said, I find the affidavit to be of relatively little assistance. The solicitor avers that at an AGM of the plaintiff in May 2021 a resolution was passed to enable the plaintiff to raise service charge fees to provide, inter alia, for security for costs. The resolution itself is not exhibited and it is unclear whether it represents the conferral of a general power to raise funds on the plaintiff or is linked to an actual figure which was to be levied pursuant to

that resolution. If it is linked to an actual figure, it is unclear whether this represents the entire of the amount which would be required to provide security for these defendants' costs or some lesser amount. The actual amount which would be required is, of course, a matter in dispute on this application. The plaintiff's solicitor states that this charge has been paid by some members and that the plaintiff "*anticipates collection of the balance from remaining members in early course*". There is no indication of the amount actually collected in respect of such security nor the proportion of members from which it has been collected nor conversely the amount outstanding and the proportion of members who have not paid. At its height the affidavit provides some support for the plaintiff's contention that it would be able to impose a special levy. Nonetheless, I am mindful that there is likely to be difference between the level of support for a levy to provide security for costs to enable litigation which will benefit members to progress and a levy to meet an order for costs after the litigation has concluded.

74. The affidavit states that the plaintiff sought to collect these charges from a company which apparently now holds the units previously owned by the Cosgrave defendants. This company has failed to pay – a large sum - as a result of which the plaintiff will be pursuing this company, presumably by taking legal action. The plaintiff's solicitor also exhibits correspondence from the solicitor acting for the Cosgrave defendants requesting that security be provided for the Cosgrave defendants' costs. There is obviously a significant dispute between the plaintiff and the Cosgrave defendants. As the Cosgrave defendants are not currently before the court I do not propose to make any comment on this aspect of the plaintiff's solicitor's affidavit save to note that, even with the imposition of some form of special levy, rightly or wrongly the plaintiff has not actually been able to collect the amounts involved from a significant portion of the members.
75. Further, in the defendants' view the plaintiff already has a significant level of arrears of service charges suggesting that unit owners would not have the capacity to meet large additional charges, even if they were to accept imposition of a special levy. Although the plaintiff's solicitor's most recent affidavit suggests that a levy in respect of security for costs has been collected from some members, no figures are provided so it is not known whether the level of arrears is the same as that generally relating to the plaintiff's service charges. There was considerable dispute between the accountants as to whether arrears of service charge are currently an issue for the plaintiff. Mr. Kirby for the plaintiff states that as of 31st May, 2018 the level of the plaintiff's arrears were circa 20% of its service charge income. He accepted that of the €585,220 billed to members in June 2020, €219,125 was still outstanding in December 2020. Mr. Kirby conducted an analysis of this figure. For various reasons he classified most of these arrears as "recoverable" either because the unit owners were clearing their arrears by standing order or by making regular payments; because a receiver had been appointed who would be legally obliged to clear the arrears before the relevant units could be sold or because the debt was owed by a commercial owner who was a significant nationwide retailer. He identified eleven debtors as having long term arrears and a sum of €67,355 as being attributable to this category. In his experience as a receiver of a property developments, he has found that service charges are almost always collected even if only at the point where a unit is sold.

76. In response to this analysis Mr. Luby for the architect defendants pointed out that even if arrears of service charge were ultimately collected, these were not funds presently available to the plaintiff. Further, the moneys raised by the plaintiff by way of service charge are committed to be used for the budgeted expenses of the company for which they are raised. Mr. Grant for the sixth defendant noted that the arrears of service charge had increased significantly between 2018 and 2020 (perhaps partly attributable to the Covid-19 pandemic) such that, in his view, the collectability of such debts had to be considered doubtful. In his view the plaintiff's inability to collect arrears of routine service charges casts doubt on its ability to collect a significantly larger levy.
77. There was also considerable debate between the accountants as the amount which would require to be raised by way of special levy and, consequently, the amount which each individual unit owner would be expected to bear. A significant feature of this debate is that the different views expressed were based in part on different instructions from the parties as to the amount of the costs that would be in issue. Unfortunately, the plaintiff's accountant, whose reports consider the lower estimates provided by the plaintiff's costs accountants, was not asked to consider the position if the higher figures proposed by the defendants' costs accountants were to prevail.
78. On the basis of the architect defendants' original estimate of costs of at least €500,000, Mr. Luby initially posited a figure of €2,392 per unit to be paid by way of special levy in addition to the routine annual service charge of €1,960. These calculations did not take account of the different size of various units nor differences between the commercial and residential units but simply divided the relevant totals between all of the units in the development. Mr. Kirby has confirmed that the apportionment of the estate charge levy between commercial and residential units is 37% to 63% respectively.
79. Mr. Kirby used the plaintiff's estimate of the eighth and ninth defendant's costs at €237,500 to say that the amount of the special levy would be approximately 67% of the annual service charge. In his view this would not be unduly onerous on the members. Mr. Kirby's calculation in respect of the sixth defendant was based on the plaintiff's estimate of €435,173 in respect of costs producing a charge of between €1,600 and €2,900 per unit (all figures excluding VAT). This represents a special levy of up to approximately 150% of the annual service charge.
80. Both defendants' accountants believe that Mr. Kirby's views as to the likely burden on individual unit holders are unrealistic. Firstly, they complain that Mr. Kirby has not factored in the need for members of the plaintiff company to pay additional charges to meet the plaintiff's own legal expenses, either while the litigation is ongoing or after it has concluded. Further, Mr. Kirby has provided a report in respect of the application for security for costs made by each defendant but does not deal with the cumulative effect of the plaintiff having to meet the legal costs of both defendants. Even at its most simplistic level an estimated levy of 150% of existing service charges taken together with another estimated levy of 67% of existing service charges produces a combined levy of 217% of the existing charges. As previously noted, I have difficulty with the plaintiff's position that

there will be a difference of nearly €200,000 between the estimated costs of these two defendants, although I accept that Mr. Kirby's calculations have been conducted on the basis of the different estimates provided by two different legal costs accountants acting on behalf of the plaintiff in respect of each of the defendants. However, assuming that the costs for each defendant will be similar then, using the plaintiff's higher estimate – which is still lower than the defendants' estimates - the levy will amount to approximately 300% of the annual service charge.

81. Where then does that leave the court in respect of the plaintiff's ability to pay the defendant's costs? As previously noted, the plaintiff is at present solvent and were it not for the existence of this litigation there would be no reason to question its ability to meet its liabilities on an ongoing basis. I accept the point made by Mr. Kirby to the effect that, as a not-for-profit management company of a property, the plaintiff's function is to collect levies and charges and to discharge costs associated with the development's common areas. As an owners' management company, the plaintiff can raise a sinking fund in order to cover future expenses and remedial work but would not normally be expected to raise and retain large sums of money in advance of incurring any liability to expend those sums. Consequently, I agree that no particular weight should be attached to the fact that the plaintiff did not have sufficient funds as of 31st May, 2018 to pay estimated future legal costs, whether its own or those of the defendants. I note that in absolute terms the plaintiff's financial position has dis-improved since 2018 due, on the one hand, to a somewhat higher level of arrears (possibly due to the Covid-19 pandemic) and, on the other, to increased costs arising from the subject matter of this litigation. Again, I do not think that particular weight should be attached to this particularly in circumstances where, absent this litigation, these variations would not materially alter the plaintiff's solvency. However, the issue is not solvency but capacity to meet the defendants' legal costs. The plaintiff's counsel has acknowledged that the plaintiff would never normally be in possession of either assets or funds at a level that would suffice for that purpose. Instead it is proposed that the plaintiff would raise a special levy for that purpose.
82. The issue for the court's consideration is whether, on the evidence, the defendants have established a reason to believe that the plaintiff will not be able to meet their legal costs or, conversely, whether the plaintiff has displaced that "reason to believe" by raising the possibility of a special levy being imposed by the plaintiff on its members. The starting point for the analysis of this issue is the acceptance by the plaintiff that it does not and would not normally have available to it the level of funding required to pay the defendants' costs. Therefore, on a *prima facie* basis there is reason to believe that the plaintiff will be unable to pay the defendant's legal costs. However, that is not the end of the matter because if there is a realistic prospect of the plaintiff being able to raise the funds necessary to pay the defendant's legal costs then, in my view, it would be unfair to treat it, as an owner's management company, as being unable to pay those costs without considering the basis put forward for the proposed funding. At the same time, it is important to bear in mind that the court's task is not simply to decide whether it is more likely than not that the plaintiff will be able to raise the level of funds required in the



manner proposed. The question is whether, notwithstanding the plaintiff's proposal, there is still reason to believe that it will be unable pay the defendant's costs. In other words, whilst it may be more likely than not that the plaintiff can raise the funds in the manner proposed, there might still be sufficient doubt or uncertainty for there to be reason to believe on a *prima facie* basis that it will not actually be able to do so. In my view, having considered all of the evidence, I am satisfied that there is reason to believe that the plaintiff will be unable to pay the defendant's costs. My reasons for reaching this conclusion are as follows.

83. Firstly, I do not think the assumption made by counsel for the plaintiff that a special levy would fall within s.18 (4) of the 2011 Act is correct. As I read the legislation that provision relates only to the annual service charge. Therefore, in normal course a special levy imposed in respect of an adverse order for costs would have to be approved by the plaintiff company at an extraordinary general meeting of its members. The papers before the court do not indicate whether there are any special voting arrangements applicable to the passing of resolutions, including resolutions for the imposition of special levies, at such meetings. In the absence of specific information on this point, the court cannot assume that the rigorous statutory requirement that a proposal to levy a charge be opposed by at least 75% of the members in order to be defeated would apply. Consequently, I do not think it is a given that, having lost the litigation against these defendants, members of the plaintiff company would automatically or even readily accede to the imposition of a levy on them in order to meet the costs due by the plaintiff company to the defendants. I also think that there is a difference between the likelihood that members would support a levy to provide for security for costs to enable litigation to continue (as they apparently have done in some form) and that members would support a levy to pay costs after the litigation has concluded unsuccessfully.
84. Secondly, whilst the argument made by the plaintiff's counsel as regards the impact that the winding-up of the plaintiff company would have on the title to individual unit owner's properties has some merit, it is contingent on a number of factors which may or may not materialise. It is not by any means a given that the defendants would move to wind up the plaintiff company in the event that their legal costs remained unpaid. The plaintiff company itself is not in possession of any substantial assets which would be available to a liquidator to disburse to the defendants in respect of their costs. Therefore, the only reason the defendants would move to wind up the plaintiff company is if doing so would impose sufficient pressure on the members of the plaintiff company to accept and pay a levy in order to avoid the difficulties a winding-up would create for their titles.
85. It is not clear that the winding-up of the plaintiff company would necessarily have the catastrophic effects predicted by the plaintiff's counsel. The sixth defendant provided the court with an authority, *Re. Heidelberg Co. Ltd* [2007] 4 IR 175, in which the interests of a management company and a company which was the vendor of units in an apartment block were vested in a new management company incorporated by the owners of the apartments subsequent to the original companies being struck from the register for failing to make annual returns. Whilst the facts of the two cases are quite different and I note

that *Re. Heidelstone Co. Ltd* predates the enactment of the 2011 Act, it nonetheless provides some authority for the proposition that where an owners' management company ceases to exist for whatever reason, it may be legally possible to transfer the interest previously held by that company to a new company in order to enable the owners of the apartments and other units within the development to complete their title. I acknowledge that it is unclear how such an application would be determined if it arose in the hypothetical circumstances of the winding-up of the plaintiff company. Nonetheless I do not think that the detriment to the title of the individual apartment owners is so immediate or so clear-cut that it necessarily follows that they would vote, by whatever majority is required, to impose a special levy upon themselves in order to meet the defendant's legal costs.

86. Thirdly, there are significant differences between the amount of the costs estimates which in turn will have an impact on any assessment of how likely it is the plaintiff will be able to both impose and recover a levy to meet those costs. The plaintiff's expert evidence is premised on the lower of those estimates being the correct figure which, for reasons set out below, I do not accept to be the case. Therefore, the relative ease with which the plaintiff assumes that the necessary sums can be raised has to be viewed with some caution.
87. Those differences are particularly stark in respect of the architect defendants. The architect defendants' costs accountant has provided an estimate of the total costs in an amount of €623,300 (excluding VAT) excluding intra-defendant discovery, preliminary applications and mediation. The plaintiff's costs accountants estimate in respect of these defendants is €237,500 which is a difference of nearly €400,000. There are five factors which explain most of this differential. The first is that the plaintiff's estimate allows for junior but not for senior counsel; secondly the plaintiff's estimate provides for a two day trial whereas the architect defendants' estimate provides for a five week (20 day) trial; thirdly the plaintiff's estimate allows for two expert witnesses whereas the architect defendants' makes provision for at least six; fourthly the architect defendants' estimate includes adjudication costs which the plaintiff's does not and finally, although both estimates include a solicitor's general instruction fee, there is a difference of nearly €120,000 in the amount allowed. The plaintiff's costs accountant subsequently reviewed his original estimate and accepted some additional costs would be incurred including the instruction of senior counsel and an increased number of expert witnesses. Inclusion of these matters resulted in an increase in the plaintiff's estimate to approximately €364,800. I note that Mr. Kirby was not asked to reconsider his views in light of this increase of nearly 50% of the costs estimate on foot of which he was originally instructed. There is still a significant gap (approximately €260,000) between the two figures which is largely attributable to the size of the solicitor's instruction fee; the inclusion of adjudication costs and a dispute whether the architect defendants' lawyers would be engaged in the proceedings for two days or for five weeks.
88. The difference between the plaintiff's estimate and the sixth defendant's estimate of the sixth defendant's likely costs is not so great. The sixth defendant's costs accountant has

estimated costs on the basis of junior and senior counsel being instructed for a four week (16 day) trial and has made provision for four expert witnesses. He also included the costs of a stenographer (on the assumption that these costs will be shared) and a figure of €30,000 for an e-discovery provider. The total, excluding VAT, is €690,750 which is not dissimilar to, although slightly larger than, the architect defendant's estimate. The plaintiff's cost accountant's estimate of the same costs is €430,500 – again a difference of about €260,000.

89. Because this estimate has been provided by a different costs accountant than that engaged by the plaintiff in respect of the architect defendants, the approach taken by the plaintiff to some items is materially different as between the two defendants. For example, the plaintiff's estimate allows the sixth defendant a solicitor's instruction fee some €75,000 greater than that allowed to the architect defendants' solicitor without there being any other apparent justification for this difference. The sixth defendant's counsel are allowed fees in respect of written legal submissions for both the application for security for costs and the substantive hearing whereas a claim for written submissions in respect of the architect defendants' counsel seems to be disregarded on the basis that it was unclear to which application the claim related. Nonetheless, there is a similarity in that the major difference between the figures quoted in the two estimates arises as a result of one estimate providing for a two-day trial and the other for a sixteen-day trial (or longer).
90. Obviously, any costs estimate is necessarily only an estimate and litigation is subject to many variables, including the length of a trial. The length of a trial will be determined by a number of factors including the extent to which certain issues may be agreed between the parties or remain live which in turn will affect the number of witnesses, including expert witnesses, required. However, the differing estimates as to the length of the trial in this case do not result from the parties taking materially different views of how long the case is likely to last but rather taking different views as to the extent to which each defendant will be required to be present in court throughout the entire of the proceedings.
91. In my opinion, the view taken by the plaintiff and on which the plaintiff's solicitor instructed both costs accountant to the effect that each defendant would only participate in the trial for two days is quite unrealistic. Whilst it might be possible in a case where a very discreet issue is pleaded against one of a number of defendants to contend that that defendant is not required to be present and consequently not entitled to recover costs for the whole of the trial, that cannot be said in this case. The plaintiff has pleaded identical damage - being the entire of the damage it has sustained - against all ten defendants and the grounds upon it is alleged that each defendant is liable for that damage are virtually identical. Consequently, the case against either the sixth or the architect defendants cannot be described as discreet. Presumably their counsel will, at a minimum, require to be present in court while the plaintiff opens its case and while the plaintiff calls evidence as to the defects in respect of which it is claiming damages. Each defendant will also require to be present when evidence is being given by any of the plaintiff's expert witnesses touching on their own area of involvement in the construction project.

Naturally, they will have to be present while calling their own witnesses. Although the plaintiff seems to disregard any potential costs liability on its part for time that the defendants might spend disputing issues as between themselves, it is by no means clear at this stage that the costs that might be incurred by a defendant dealing with the evidence of co-defendants would not be recoverable against the plaintiff if that defendant succeeds in full in defending the plaintiff's claim against it. Theoretically there may be elements of the case which involve evidence that is of no relevance to these defendants but until the case against each of these defendants is pleaded more specifically it is not possible to segregate out those elements and to state definitively that the defendant will not be required to be present in court or to recover costs while that evidence is being given. If evidence of that nature is interspersed between elements of the case which are of direct relevance to these defendants, then it is not practical to expect them to withdraw from the case, to remain on standby and to return when a different witness is called. Therefore, I do not accept one of the major premises underlying the plaintiff's costs estimates which is that the defendants will each only be engaged in the trial for two days. I think that the defendants' estimates of 4 and 5 weeks respectively are more realistic and, in ease of the plaintiff, I will adopt the shorter of the two being the sixth defendant's estimate of a 4 week or 16 day trial.

92. I have adopted the following approach in attempting to estimate the likely costs that will be incurred by each of these defendants in successfully defending these proceedings. Firstly, I acknowledge that fees incurred before the motion for security for costs was brought should not be included in this estimate. However, the evidence before court from the costs accountants does not clearly distinguish between those elements which pre-date and which post-date the bringing of the motions. Counsel for the plaintiff identified in argument the solicitor's instruction fee as being an item which was incurred before the motion was brought but there was no evidence from its costs accountants identifying what, if any, portion of the solicitors' fee should be omitted. Consequently, I have proceeded using the higher of the two estimates for the solicitors' fee provided by the plaintiff's costs accountants. As this is a broad-brush exercise in which not all elements of expenditure which are likely to be properly incurred (including, for example, the cost of any mediation) have necessarily been identified or included in the estimates provided, if anything arising before the application has been improperly considered it can be offset against these matters. Secondly, this estimate excludes VAT and thirdly I have not included the adjudication fee referred to in the architect defendants' estimate as I have not been provided with any legal basis for the inclusion of this item. Finally, no justification has been suggested for the materially different approach that is taken by the plaintiff towards each of these defendants save that the estimates are provided by two different costs accountants. Consequently, I have assumed that in the event the proceedings are successfully defended the costs recoverable by each of these defendants in respect of major items of expenditure are likely to be similar.
93. On that basis I think the plaintiff's ability to pay costs should be assessed by a reference to a figure of €530,500 in respect of each of these defendants. That figure comprises a solicitor's professional fee of €225,000 (the higher of the two figures estimated by the

plaintiff's cost accountant); a fee for senior counsel of €67,500 together with fifteen refreshers of €3,600 making a total of €54,000; a fee for junior counsel of €40,000 together with fifteen refreshers of €2,400 making a total of €36,000 (counsels' fees were not really disputed save for the number of refreshers); an further €10,000 in respect of additional work likely to be done by counsel including written submissions, preparation of witness statements and the drafting of any additional preliminary pleadings and motions etc.; €60,000 in respect of expert witnesses for each of the defendants; €30,000 in respect of discovery and e-discovery and the balance, a figure of just under €8,000 in respect of miscellaneous costs and outlay including stenography fees. These are not absolute figures by any means. For example, no particular estimate has been given by any of the parties in relation to the costs of a contested discovery motion nor the costs of making discovery save for the sixth defendant's provision of €30,000 in respect of an e-discovery provider. The figure I have included is not intended to be specifically referable to an e-discovery provider but to allow some headroom in the overall figure for an inevitable discovery process which, even if not contested, is still likely to involve both defendants in an extensive paper trail through archived files and emails.

94. Based on this analysis, in order to meet both motions the plaintiff would have to be able to raise and recover a special levy in an amount of €1,061,000. This would be in addition to the funding which would be required on an ongoing basis during the litigation to meet its own legal costs (some of which may be recoverable). I am not satisfied that the potential for the plaintiff to raise a special levy provides the necessary assurance that this levy will in fact be raised and, more importantly, collected, for there not to be "*reason to believe*" that the plaintiff will be unable to meet the defendant's costs. I appreciate that this statement encompasses a triple negative which arises because of the interplay between the onus of proof on the defendants to establish reason to believe the plaintiff's inability to pay on a *prima facie* basis and, once established, the consequent and somewhat higher higher burden on the plaintiff to dispel this reason by satisfying the court that there is no reason to believe it will not be in a position to pay costs. The proposal is inherently uncertain as it requires a number of steps to be successfully taken by the plaintiff and the management of its implementation is outside the control of the defendants. Consequently, to echo the views of Kelly J in *Greenclean* and Barnville J in *Coolbrook*, the proposal is too conditional to provide the defendants with the necessary level of assurance as regards payment of their costs for the court to be satisfied that there is no reason to believe the plaintiff will not be able to pay them.

#### **Special Circumstances**

95. As the defendants have both satisfied the two threshold requirements for security for costs, the onus shifts to the plaintiff to establish that there are special circumstances which justify the refusal of such an order notwithstanding that there is reason to believe the plaintiff will not be able to pay the defendant's costs if they succeed at trial. In this case the plaintiff has advanced a number of grounds which it is asserted amount to special circumstances. There is a degree of overlap between some of these grounds and also, unfortunately, a considerable lack of clarity as to what grounds are and are not being maintained by the plaintiff in this regard.

96. Woven into the plaintiff's arguments was the suggestion that as these defendants had not disclosed material to it in response to its solicitor's correspondence, security should be refused. The plaintiff described this as a duty to disclose and used the oft-cited phrase to argue that the defendants had not approached their applications with "cards on the table". I am reluctant to treat this as a special circumstance which justifies refusal of security or as some sort of equitable precondition which must be satisfied before an application for security can be made. This is not public law litigation and these defendants are purely private entities to which no enhanced duty of disclosure applies. There has been no application for discovery, not even a formal letter of request for discovery under O.31, r.6, by reference to which the court could assess whether the defendants have unreasonably withheld material in their possession. Further, the defendants have contended that the case against them has not been pleaded with sufficient particularity to enable them to assess what material might be relevant to the issues in the case. The plaintiff has made little or no effort to respond meaningfully to the requests for particulars which have been raised by them, even allowing for the difficulties with which it is faced. In some instances it might well be appropriate to refuse security to a defendant who has manifestly hindered the progress of the litigation but I am not satisfied that I could reach such a conclusion in this case.
97. In opening his reply counsel for the plaintiff indicated that he was not going to argue special circumstances resulting from an inability on the part of the plaintiff to pay costs due to the damage claimed in this case allegedly caused by the defendants. That argument had been made in the plaintiff's written legal submissions. Instead, the special circumstances contended for by the plaintiff on the first day of the reply was the importance, from both a legal and a public policy perspective, of the issues raised concerning the accrual of a cause of action in cases of "covered-up" defects to property which have not yet caused damage. Further, it was argued that as this legal issue is raised by an owner's management company there is an additional important issue as to the ability of such companies to bring proceedings of this nature without having to lodge security for costs. I have already accepted that the Statute of Limitation issue pleaded by both of the defendants amounts to a *prima facie* defence for the purposes of this application. I am also prepared to accept that the broader issues raised by the plaintiff as to how the Statute of Limitations should be applied in a case such as this where there are latent defects in a property which have not yet caused material damage are important and are not specifically covered by the judgment of the Supreme Court in *Brandley and Dean*. I accept, broadly speaking, that these are issues of some public importance going beyond the facts of this particular case.
98. The defendants complain that the plaintiff has not placed evidence before the court as to the number of buildings or persons affected by defects in newly constructed property affecting fire safety. This is correct but the plaintiff points to the fact that there have been government working groups and reports on this topic as establishing that this is an issue of public concern. In December 2017 a joint committee of the Oireachtas produced a report on building standards entitled "Safe as Houses" which looked, *inter alia*, at the situation of apartment buildings built before changes in building control in 2014. On foot

of the recommendations of that committee, a working group was established by the government to examine housing defects, including fire safety, in apartments and duplexes. There has already been an amount of high-profile litigation around this issue involving other apartment developments. Consequently, even though the plaintiff has not adduced tailored evidence as regards the number of buildings and unit owners in precisely the same circumstances as those in issue here, I am satisfied that there is a broader issue of public concern of which the plaintiff's case is typical such that the importance of the issues raised in the litigation transcends the interests of the parties.

99. I am hesitant to accept that the fact these issues are raised by an owners' management company adds an additional element to their public importance. Nor do I think that there is a discreet legal issue of public importance as to whether an owners' management company should be able to litigate proceedings of this nature without being exposed to a requirement to provide security for costs. I acknowledge that an owners' management company is a statutory requirement in all multi-unit developments under the 2011 Act. The imposition by the Oireachtas of the requirement that a developer establish an owners' management company and transfer the common areas of the development to that company of which the owners of the individual units are then members is designed to ensure the proper management and good governance of such developments. I do not think it was intended to provide the owners of properties within a multi-unit development of the benefit of limited liability without the burden of the protections usually afforded to third parties litigating with limited liability companies. Although it has a specific statutory basis and is a not-for-profit company, an owners' management company is not a charity nor is it equivalent to a non-governmental organisation in the public law sphere. Even those types of entity are not in principle immune from orders for security for costs, although I acknowledge that charitable status, for example, might weigh in the balance against the making of such an order.
100. Whilst the court is sympathetic to the owners of apartments within the complex, if the plaintiff is correct in the allegations it makes then the likelihood is that one or other of the defendants will ultimately be liable for the costs of carrying out the necessary remedial works and the plaintiff will recover the costs of the litigation as against that defendant. If, however, the plaintiff does not succeed in its case against the sixth defendant or the architect defendants and those defendants have, between them, incurred more than a million euro of legal costs, it is inherently unfair that a firm of structural engineers and a firm of architects should have to bear those costs themselves without there being a realistic prospect of recovering them from the plaintiff. Therefore, although the category of special circumstances is not closed, I am reluctant to interpret it as allowing a particular type of plaintiff an unrestricted entitlement to litigate in the form of a limited liability company without being subject to the possibility of security for costs being ordered to protect the legitimate interests of those defendants whom it may choose to sue.
101. Although I do not accept that there is a discreet issue of public importance arising out of the fact that the plaintiff is an owners' management company, I have accepted that the

issues raised in the proceedings, insofar as they have not been previously determined by the courts, are capable of being characterised as issues of public importance. Nonetheless, the defendants argue that this is not sufficient to constitute special circumstances unless ordering security for costs would stifle the litigation by preventing the plaintiff from proceeding and the issues from being determined. Support for this proposition is found in the recent judgment of Clarke C.J. in *Quinn Insurance (Under Administration) v. PWC (A Firm)*. The plaintiffs expressly did not say to the court that ordering security for costs would stifle the litigation. Instead, it was argued, on the basis of the judgment of Costello J. in the Court of Appeal in *Protégé International Group (Cyprus) Ltd v. Irish Distillers Ltd* [2020] IECA 80, that the question of whether the proceedings would be stifled was merely one of a number of factors to which the court should have regard in deciding whether special circumstances existed. Costello J. lists a number of points at para. 70 of her judgment which she felt were relevant to the exercise of the court's discretion on the facts of that case. One of those was that the appellants did not say that security for costs would stifle the litigation. I am not certain that Costello J.'s listing this as a factor which the appellants had not raised can be read as a statement that where litigation raises an issue of public importance that of itself is a factor tending to justify refusal of an order for security for costs when the litigation is going to proceed regardless of whether security is ordered. As it happens, Costello J. found that the appellants had not established that either a point of law or a factual issue of exceptional public importance arose on their appeal. Her judgment was upheld by the Supreme Court [2021] IESC 16 which held that the question of stifling did not properly arise in the proceedings.

102. It is interesting to note that much of the jurisprudence on stifling considers whether the fact that the proceedings will be stifled if security is granted is necessarily determinative of whether such an order should be made. The consensus in the jurisprudence is that if a plea by a corporate plaintiff of inability to provide security were automatically a justification for not granting security this would deprive the statutory provision of its intended utility and effect. Far less attention has been paid to circumstances where a plaintiff does not assert that a grant of security would prevent the proceedings from going ahead but nonetheless contends that the issues are so important that security should not be awarded. However, the issue seems to have been authoritatively determined by Clarke CJ in *Quinn Insurances v. PWC*. The public interest to be served by having an important legal or factual issue determined will not be hindered by a grant of security for costs if the corporate litigant accepts that it will pursue the case regardless, therefore the weight to be attached to that public interest will be minimal. As this is the factual position here, I do not think that I can or should refuse the defendants the orders they have sought on the basis that the underlying litigation raises important legal issues of potentially broad relevance when the granting of an order will not affect the determination of those issues.
103. In passing I should note that the plaintiff has brought a motion which is dealt with at the conclusion of this judgment seeking to direct that the architect defendants consider mediation in circumstances where the plaintiff contends all of the other defendants have agreed to go to mediation. I mention this because whilst there are many public policy



considerations which support the resolution of disputes through mediation, a mediated settlement of a dispute such as that in issue in these proceedings would not serve to resolve either the legal or the factual issues which are asserted to be of public importance. A future case may have to determine whether it can be said that the public importance of the legal issues raised in a case justify a refusal of security for costs where the corporate litigant is pro-active in seeking to have those issues resolved by mediation, the outcome of which might never be known to the public.

104. The hearing of this application did not conclude within the two days originally allocated to it and had to be resumed a month after the original hearing date. This meant that the plaintiff's submission was split with an interval of some weeks between the first and second parts. Although counsel for the plaintiff had been quite categorical on the first day in stating that the plaintiff was not asserting an inability to pay costs arising from the damage the subject of the litigation, when the hearing resumed the plaintiff sought to make an argument that its financial position had been detrimentally affected by increased insurance costs arising out of the defects the subject matter of the proceedings. The main item in issue here is an increase of over €100,000 per annum in the insurance costs for the development because of the increased fire risks. Although I accept that this is a cost largely attributable to the issues which are the subject matter of the proceedings, for two reasons I do not think that this gives rise to special circumstances which would justify the refusal of security.
105. Firstly, in the analysis above I accepted the argument made on behalf of the plaintiff by Mr. Kirby that, as an owner's management company, it would not be expected to raise or maintain a large cash fund for which it had no immediate use. Consequently, I did not regard the increased expenses recorded in the plaintiff's accounts nor the fact that it had eaten into its cash reserves in order to meet those expenses as material as being determinative of whether it had an ability to pay the defendants' legal costs. As the plaintiff's counsel clearly stated that the plaintiff would never have the type of funds necessary to meet an adverse costs order in reserve, I am likewise reluctant to treat an increase in expenditure which has impacted on its existing reserves as a factor which would justify refusal of an order for security. Secondly and perhaps more importantly, the jurisprudence is clear that the detrimental effect of the defendants' alleged wrongdoing must be such as to make a material difference to the plaintiff's ability to pay costs. The amount of costs in issue between these two applications is in excess of one million euro. It would take a decade before the increases attributable to greater insurance costs (assuming they persist) would reach a figure which would make the difference between the plaintiff being able to meet and not being able to meet the defendants' costs. Hopefully, these proceedings will have reached a conclusion long before that.
106. Finally, in dealing with special circumstances I note that the jurisprudence suggests that even where special circumstances have been established it does not necessarily follow that security will be refused. O'Donnell J in *Quinn* (above) cautions that the ground relied on in that case (inability to pay caused by the wrongdoings the subject of the proceedings) was an exception which should "*cannot be allowed to become so broad as to*

*swallow the presumptive rule of security when there is a demonstrated inability to pay and a prima facie defence*". The court retains a discretion to grant or refuse security and must exercise that discretion by seeking to find the balance of justice between the parties. The case law does not appear to suggest that where special circumstances have not been established the court nonetheless is at large in exercising a discretion and must seek to find the balance of justice as between the parties. This may be because at this point in the analysis the applicant for security will have established a *prima facie* defence to the proceedings and the corporate plaintiff's inability to pay giving rise to a presumptive entitlement to security. If the grounds relied on by the plaintiff as constituting special circumstances are found not to do so, either because they are legally incapable of doing so or because the plaintiff has not adduced the evidence to support them, it is difficult to see how a discretionary consideration of the same material could result in a conclusion that notwithstanding the defendants' *prima facie* defence and the plaintiff's inability to pay, the balance of justice nonetheless required that security be refused. Thus, accepting, as I do, that the power to award security for costs under s.52 is a discretionary one and logically that must mean that the court always has a residual discretion to refuse security, the refusal of security in cases where the defendant has established a *prima facie* entitlement and the plaintiff has not established any special circumstances to justify refusal must be truly exceptional. Having considered all of the grounds raised as regards the threshold tests and the existence of special circumstances and the evidence adduced in respect of these issues I am satisfied that there is nothing truly exceptional about this case which would warrant a refusal of security notwithstanding my conclusions on the earlier issues.

### **Amount of Security**

107. The case law considered above at para. 46 – 49 above makes it clear that the court has a wide discretion under s.52 as to the amount of security that should be required in any case where it is appropriate to order that it be provided. The court does not start from the premise that one-third of the amount of likely costs will do justice between the parties nor that the full amount of the likely costs will be necessary in order for the security to be adequate. The overriding criteria is that both parties should be treated fairly. The absence of security should not enable a plaintiff to abuse the process of the court by taking or prolonging frivolous litigation or, more relevant to the present circumstances, maintaining a claim against one of a number of defendants when in fact there are no valid grounds for doing so. Equally, the court should not enable a defendant to use the requirement for security as a means of bullying a less well funded plaintiff or of avoiding the court's scrutiny where there is a *bona fide* case for that defendant to answer.
108. It has been recognised (see *Farrell v. Bank of Ireland* and *Coolbrook* above) that the main rationale behind the award of costs is that the successful party, whether that be plaintiff or defendant, should not be penalised by having to bear the costs of litigation which they were required to take to assert their legal rights or, conversely to defend when a claim has been wrongly made against them. The provision of security ensures, as regards certain types of impecunious plaintiff, that funds will be available to pay the successful defendant's costs at the conclusion of the litigation. In s.52 of the Companies Act, 2014

the Oireachtas has recognised that impecunious corporate plaintiffs comprise a class of litigant against whom it may be appropriate to award security for costs, subject always to the particular circumstances of the case and of the parties. This is because those behind a corporate plaintiff will otherwise get the benefit of the company being successful in litigation without facing any adverse cost consequences should the company lose.

109. Fortunately, there is no significant inequality of arms in this case. The defendants who have brought these applications are not major commercial entities, nor have they engaged in speculative, if potentially rewarding, transactions. They are firms of professional persons who provide professional services to the construction industry through corporate entities established for that purpose. Those services are naturally provided for a fee and the defendants make a profit from the services which they provide. Leaving aside the question of whether the defendants hold insurance in respect of the matters the subject of these proceedings, they are not of themselves "*deep pockets*". It goes without saying that if either defendant was negligent in the manner alleged then it is only proper that they remedy the defects in the plaintiff's premises or provide the funds to enable the plaintiff to do so. However, if they have not been negligent, then the successful defence of these proceedings, which is important to safeguard their professional reputations, will be a protracted and costly exercise. It is inherently unjust that they be required to undertake that exercise if there is no prospect of recovering the costs of successfully doing so at the conclusion of the litigation. In making these comments I am conscious that the plaintiff has issued these proceedings alleging professional negligence against these defendants without, apparently, the plaintiff's lawyers being in possession of reports from relevant professionals in the defendants' fields of expertise supporting the claims against them.
110. The plaintiff on the other hand is an owner's management company which owns the common areas of the development and carries out specific functions on behalf of the members who are the owners and/or occupants of units within the development. The plaintiff is required by statute to carry out those functions and indeed the 2011 Act requires that a corporate entity be in place to carry them out. The plaintiff is not a trading company and does not carry on any business as such. The development is a substantial residential and commercial development in the centre of Dublin and, of itself, is a valuable asset although the portion of it owned by the plaintiff does not have a ready commercial value. Whilst initial correspondence from the plaintiff's solicitors and the initial replying affidavit suggested the plaintiff was representing the apartment owners in the building, at the hearing counsel was careful to emphasise that the plaintiff had brought these proceedings on its own behalf as the owner of the common areas in which it is alleged the defects arise. I accept that the bulk of the defects are in the common areas, although the reports provided from JGA Fire Engineering Consultants and Bluett O'Donoghue Architects would suggest that the plaintiff's complaints are not confined to those areas. However, I do not think this makes a material difference as, even if the defects are confined to the common areas, the members of the plaintiff company will undoubtedly benefit both in terms of the security and the value of their properties if the plaintiff succeeds in this litigation. Thus, because of the plaintiff's corporate status they

are in a position to benefit from the litigation without personally being at risk of adverse costs consequences if the plaintiff does not succeed.

111. It was notable that at the hearing of these applications all of the parties before the court were well resourced and were in a position to avail of the services of established firms of solicitors and of senior and junior counsel all of whom, in turn, are experienced litigators in this type of litigation. Further, the plaintiff has not made the case that the granting of security for costs will prevent it from pursuing the litigation nor from doing so in the manner in which it always planned and intended to do. In those circumstances there are no particular factors which would justify the court in ordering that security be provided at a level materially different to and less than the costs which are likely to be incurred by the defendants. Consequently, I propose making an order that the plaintiff provide security in an amount of €530,500 in respect of each of these defendants.

### **Phasing of Security**

112. This is not however the end of the matter. At the hearing of the application counsel for the plaintiff made an argument which had not been flagged in the plaintiff's affidavits nor raised in its written legal submissions. This was an argument based on the judgments of Clarke J in Salthill and more recently in Quinn (see above) to the effect that in complex litigation an order for security for costs may be phased so that the plaintiff will not be required to lodge the full amount immediately. Instead, counsel pointed to what he characterised as potential watersheds in the litigation and suggested that the plaintiff should only be required to lodge a proportion of the total security up to that point in time.
113. Two potential watersheds were dealt with in the plaintiff's argument and a third mentioned in passing as he closed his case. The two dealt with in some detail were the making of discovery and mediation. The third was the possibility that the Statute of Limitations issue would be determined as a discrete preliminary issue. As this latter issue was not teased out in any detail in argument and as it is frequently necessary for a court to hear some or all of the evidence in order to lay the groundwork for an argument on the Statute such that there may not be a material saving in costs by having it tried as a preliminary issue, I do not propose to consider that particular potential watershed further.
114. It was a recurring theme in the argument before the court that the defendants felt that the claim against them was not adequately particularised and the plaintiff felt that, as a stranger to the relationships between the defendants, it could not be more specific in its pleas until after discovery had been made and examined. There was an additional motion relating to mediation which was opposed by the architect defendants on the basis that they should not be required to consider going to mediation until the case against them has been adequately pleaded and they know the case that they are meeting. Thus, there is some common ground between the parties as it seems that both anticipate that the case will – or perhaps will have to – become significantly more specific as the litigation progresses.
115. I think that there is some merit in the contention that discovery may be a watershed in this litigation. It is notable that the defences raised by both of these defendants include

pleas that the subject matter of the proceedings did not come within the scope of their contractual relationships with the fourth defendant and I have found that both defendants have established a *prima facie* defence on this ground. Once the plaintiff has obtained whatever relevant documentation is available from all defendants by way of discovery, it should then be in a better position to ascertain which, if any, of the defendants are responsible for the matters of which it complains and thereafter to discontinue the proceedings against any of the defendants against whom it cannot make a reasonable case in liability.

116. Mediation is less obviously a watershed in that it comprises a mechanism through which the settlement of a case may be achieved without the necessity of a court hearing. Save for the fact that settlement may be achieved, mediation of itself is not inherently likely to change the plaintiff's understanding of its ability to make a case against any of the defendants. Thus, the process of mediation is unlikely to put the plaintiff in a position of having to make positive decisions regarding the continuation or the discontinuation of proceedings against any of the defendants. On the other hand, if the proceedings settle against some or all of the defendants then the additional costs of a court hearing – which represent a large proportion of the overall costs – will not be incurred. One of the attractive features of mediation is that it significantly reduces the cost of litigation and consequently, if there is a realistic prospect that this matter will go to and perhaps be settled by mediation, then there is a corollary argument that the plaintiff should not be required at the outset to provide full security for costs to cover a lengthy court trial.
117. The defendants objected to the plaintiff making this argument both because they had no prior notice that it was going to be made and, more importantly, because no evidence was put before the court to support the phasing of security. Counsel for the architect defendants suggested that where the defendants had established a *prima facie* defence and the plaintiff's inability to pay and the plaintiff had not established special circumstances, then the default position was that full security should be ordered. Any departure from this default position would require evidence to justify it. There is considerable merit in these arguments. It is unhelpful to the court if a completely new issue is introduced by way of oral argument on reply as neither the moving parties' oral submissions or the papers and the written legal submissions will have dealt with this issue. This might be regarded as a minor inconvenience compared to the more major difficulty posed by the fact that there is no evidence before the court as to the likely costs that will be incurred by the parties in getting to a point where discovery will have been made and perused or, alternatively, in getting to and through mediation. This is a case in which all of the parties have engaged legal costs accountants who have not only provided estimates of the likely costs but commented on the estimates provided by their colleagues. None of those estimates consider discovery as a watershed in the litigation and none of those estimates specifically provide for the costs of mediation, although some do acknowledge the possibility that mediation would take place. If, in the many affidavits sworn by the solicitors on behalf of the plaintiff, the possibility of phasing an order for security for costs had been raised, then it would have been a relatively simple matter for

all four sets of legal costs accountants to have been asked to provide estimates of the costs of the proceedings to the various watershed moments now identified by the plaintiff.

118. This leaves the court in the very unsatisfactory position of being faced with a proposal which is, of itself, meritorious but not being provided with the evidence which would be necessary in order to make a meaningful estimate of the amount of costs to be provided on a phased basis so that effect could be given to that in a court order. In the authorities relied on by the plaintiff, Clarke J. indicated (at para. 10.2 of *Salthill*) that "*it would be appropriate to structure any order for security for costs in such a way as required security now to be put up only in respect of the reasonable costs that might apply up to the time when discovery would have been analysed*". How is the court in this case to assess the reasonable costs that might be incurred up to discovery or up to mediation? MacMenamin J. in a concurring judgment in Quinn (above) envisages that incremental applications might be made enabling the court to make focused orders and that such applications would be based on informed evidence on affidavit focusing on particular issues. Short of adjourning the matter to allow all four sets of legal costs accountants to be instructed to provide these estimates and then holding a further hearing on the issue, which I am very reluctant to do in light of the four days' costs already incurred, the court is left in a bind.
119. With some considerable hesitation I have concluded that the overall circumstances of the case and the interests of justice as between the parties do make it appropriate that security for costs be ordered on a phased basis. However, I am not prepared either to hold a further hearing of this motion with a view to determining what the reasonable costs of reaching the various watersheds identified by the plaintiff might be nor am I prepared to order partial security thereby imposing an obligation on the defendants to make a further application to bring the matter before the court for additional security to be ordered. Instead, I propose directing that the plaintiff lodge 50% of the total amount of security in respect of each defendant (*i.e.* 50% of €530,500 for each defendant being €530,500 in total). That amount is intended to provide security for the defendants at least in respect of any contested application for discovery, the making the analysing of discovery and any mediation that may occur. If the plaintiff does not discontinue the proceedings against either of these defendants subsequent to discovery and/or if the proceedings do not settle at mediation, then the plaintiff will be required to lodge the balance bringing the amount lodged up to the full amount of the security before any other preliminary application is made or a notice of trial is served by the plaintiff.
120. I acknowledge that the amount of security that the plaintiff is being required to lodge may in fact exceed what Clarke J describes as the reasonable costs that might apply up to the time of discovery or, as the case may be, mediation. It should be apparent from my comments in the preceding paragraph why I have taken this course of action. The plaintiff has not provided the evidence which would enable me to form a more exact view as to what the reasonable costs of reaching those watersheds might be. I am not prepared to impose upon the defendants the burden of incurring additional costs in the context of this application or a requirement to bring further applications when these matters could have been fully dealt with on this application if the plaintiff had raised the issue in a timely

manner so as to allow all parties to deal with it and put the relevant evidence before the court. Further, in making an order in this fashion I am aware that if the plaintiff discontinues proceedings against either of these defendants subsequent to discovery or if the proceedings are settled at mediation without 50% of the anticipated costs being incurred, then any amount lodged by the plaintiff in excess of the costs awarded to the defendant will be returned to the plaintiff. This is relevant also because the lodging of 50% of the total amount of security should not be taken as an indication that the court is of the view that reaching these points in the litigation would necessarily incur 50% of the total costs.

**Mediation:**

121. The plaintiff has brought a motion against the architect defendants seeking an order under O.56A under the Rules of the Superior Court and s.16(1) of the Mediation Act 2017 inviting these defendants to consider mediation. The application is made on the basis that the other defendants have indicated a willingness to attend mediation if all of the defendants were prepared to be involved in the mediation. The plaintiff complains that the architect defendants' reaction to the motion that they consider mediation was to issue a motion for security for costs. Chronologically this is correct, but I note that notwithstanding its *prima facie* agreement to attend mediation, the sixth defendant also issued a motion for security for costs as have the Cosgrave defendants so I am not sure that the causal connection suggested by the plaintiff can be readily inferred.

122. Section 16(1) of the 2017 Act allows a court, either of its own motion or on the application of the party involved in the proceedings, to: -

*"(a) invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute the subject of the proceedings".*

The parties are not required to have been invited by the court to consider mediation and may, and preferably should, reach agreement as to mediation as between themselves in the absence of court intervention. Of itself s.16 might seem relatively toothless since an invitation to consider mediation does not commit parties so invited to actually attend mediation. Indeed, the subsequent sections which make provision for the adjournment of the proceedings, the suspending of the Statute of Limitations and the potential extension of time limits prescribed by rules of court are all premised on a positive decision being made by the parties to engage in mediation and implicitly accept that they are not compelled to do so just by virtue of the fact that the court has invited them to consider it.

123. The real bite of the section lies in the provisions of s.21 of the same Act under which, in awarding costs of proceedings in respect of which an invitation to consider mediation has been extended under s.16, the court may take regard to any unreasonable refusal or failure by a party to consider using mediation or to attend mediation. Thus, a party who refuses to consider mediation or, having considered the possibility refuses to attend the mediation, faces additional risks in relation to costs by virtue of that refusal. The costs consequences are not automatic even where they arise they may not be identical in all cases. The court may only have regard to an unreasonable failure or refusal to engage

with mediation. Nonetheless these provisions operate as a significant incentive to parties both to consider and to actively engage in mediation as an alternative to prosecuting proceedings through the courts system.

124. Order 56A provides the procedural mechanism through which applications under s.16(1) of the 2017 Act can be made and for the implementation of orders made pursuant to that section. No issue is taken by the architect defendants with any procedural aspect of the plaintiff's motion.
125. Instead, the dispute between these parties on the mediation motion has echoes of the central themes of the dispute between the same parties on the security for costs motion. The plaintiff complains that the architect defendants have not provided it with the documentation available to them and that as a result of this failure (and presumably that of the other defendants) the plaintiff is not in a position to identify exactly which of the defendants is responsible for the various defects. Considerable emphasis is laid on the reports by the plaintiff's experts identifying defects and on the fact that none of the defendants have expressly disputed the existence of the defects as distinct from their liability for those defects. The court was taken in some detail through the correspondence which predated this motion in which these complaints are made by the plaintiff's solicitor.
126. In reply the architect defendants make many of the same complaints made in the context of security for costs. They state that professional negligence proceedings have been issued against them without the plaintiff's lawyers being in possession of an expert report justifying the institution of such proceedings. Their solicitor has repeatedly requested in correspondence that the plaintiff identify exactly what the architect defendants are alleged to have done incorrectly and that no meaningful response has been received to this correspondence. They say that the case against them is inadequately pleaded and the plaintiff has refused to respond to their requests for particulars in any meaningful way. In essence, the architect defendants say that the plaintiff's response to their *bona fide* request to understand the case being made against them is to point to the entirety of the defects the subject matter of the proceedings and to say that somebody amongst the defendants must be liable for these defects. Consequently, the architect defendants say they do not understand exactly what they are supposed to have done wrong nor what, if any, portion of the overall damage claimed is allegedly attributable to their negligence.
127. In defending this motion, counsel for the architect defendant did not dispute the merits of mediation as an alternative dispute resolution mechanism nor rule out the possibility of the architect defendants participating in mediation at a later stage. Rather, it was contended that the motion was premature in circumstances where the case against them has not yet been pleaded with particularity and the pleadings have not yet closed. They say they were under no obligation to provide the plaintiff with documents on foot of the plaintiff's solicitor's request nor, in circumstances where they were not in immediate possession of the documents requested, to identify to the plaintiff where those documents might currently be. The plaintiffs have not made a formal request for discovery nor brought a motion for discovery and these defendants contend they are not obliged to



reply to correspondence as if it were such a formal request or as if they were facing such a motion.

128. The architect defendants also take issue with the contention that all of the other defendants have agreed to attend mediation. Although the initial correspondence from the solicitors acting on behalf of the first to fifth defendants suggested that the solicitors were happy to recommend mediation but were awaiting their client's instructions, counsel for the plaintiff advised the court that in more recent correspondence those defendants had in fact confirmed their clients' willingness to attend mediation. Nonetheless the architect defendants say that the consent of the sixth defendant is predicated on all defendants being willing to mediate and as the seventh defendant is currently untraceable and has not yet been served with the proceedings then, regardless of the position adopted by the architect defendants, it cannot be said that all of the defendants have agreed to mediate. The plaintiff has tended to gloss over the absence of the seventh defendant presumably on the basis that if the seventh defendant cannot be traced, the plaintiff will continue with the proceedings against the remaining nine defendants and all of those, bar the architect defendants have agreed to attend mediation.
129. The only case which was opened to the court in the course of argument was *Atlantic Shellfish Limited v. Cork County Council* [2015] 2 IR 575 which the parties agreed was not directly on point. This was a case in which the Court of Appeal upheld a refusal by the High Court to make an order inviting the State defendants to consider mediation on the basis that it would not be appropriate to make such an order where the issues in dispute between the parties were not amenable to mediation. The issues in the case concerned the extent to which the State defendants, which had granted a foreshore licence to the plaintiff, were liable to the plaintiff for the contamination of its oyster fishery as a result of the first defendant having discharged sewage in the vicinity of its oyster beds. The court regarded the claim as comprising a particularly novel point of law. It did not regard the issues pleaded against the State defendants as being capable of resolution through the mediation process or, alternatively, that mediation would be capable of significantly narrowing the issues between the parties. Indeed, in this context the State defendants had argued that the plaintiff's application was self-serving in that the plaintiff was aware that the State defendants could not reasonably be expected to mediate and consequently, the effect of the application would be to trigger an entitlement on the part of the plaintiffs to claim some form of costs protection should the claim against the State defendants fail by reason of those defendants' earlier refusal to engage in mediation.
130. The architect defendants did not suggest that the issues raised in these proceedings were inherently unsuited to mediation. Indeed, it would be extremely difficult to make such an argument in the context of proceedings concerning the liability of defendants all of whom had been involved in a construction project for defects in the resulting property. Instead, the architect defendants' argument was more nuanced. They contended that in order for the issues in the proceedings to be capable of being resolved on mediation - or even capable of being narrowed on mediation - the issues must have been identified in advance. In other words, the court could not decide that mediation was appropriate

without knowing exactly what case was being made by the plaintiff against the architect defendants and that could not be ascertained from the pleadings as they currently stand.

131. I am inclined to agree with the architect defendants that this motion for mediation is premature. It is an understandable and pragmatic desire on the part of the plaintiff to get all of the defendants together at an early stage in the hope that a settlement can be reached and that the plaintiff will be put into a position where it can carry out works to its property which are essential in order to ensure fire safety. However, from the architect defendants' perspective, granting the motion and issuing an invitation under s.16 would force them to consider attending a mediation at which they may well be expected to contribute towards a settlement of the plaintiff's claim without actually knowing in any detail the claim that has been made against them. Further, they would be put in this position on pain of a costs sanction in the event that they refuse to attend mediation and their refusal is subsequently regarded as unreasonable.
132. Much of the argument on this motion has concerned the extent to which documents requested have not been provided and the reason that those documents may not have been provided. Not only has the plaintiff sought documents from the architect defendants, but they have relied on O.31, r.15 to request the plaintiff to provide them with much of the same documentation insofar as it is referred to in the plaintiff's pleadings and affidavits. All of this is reflected in correspondence between the parties as opposed to any formal application for discovery or any motion brought pursuant to a formal request. Obviously, it would be in everybody's interests and in the interests of the smooth progression of the litigation for those parties in possession of relevant documents and material to make them available to the plaintiff, if not to all of the other defendants, so that each of the parties can form an accurate view as to their likely liability for the issues the subject matter of the proceedings. That said, there is no generic obligation on the defendants to provide the plaintiff with documents simply because the plaintiff has requested those documents. Additionally, in the case of the architect defendants whom I understand were engaged as long ago as 2002 in respect of the pre-planning design of this development, it is unreasonable of the plaintiff to expect that documents which are now twenty years old would be immediately or even readily available to those currently working in the eight defendant company. Through no fault of the plaintiff's, its complaint of a lack of cooperation in the furnishing to it of relevant material would carry more weight if the interval between the generation of the documents and the plaintiff's request were not so great. It remains open to the plaintiff to seek relevant documentation, if it is available, by way of discovery.
133. It may be worth observing that I regard the replies furnished by the plaintiff to the requests for particulars raised by both the architect defendants and the sixth defendant as being unnecessarily uninformative and defensive. Plainly it cannot be said that an adequately particularised case has been provided to the professional defendants currently before the court, in circumstances where the plaintiff has pleaded an identical case against all of the defendants and attributed liability for all of the damage to all of them notwithstanding their different roles in the development process. The plaintiff cannot

refuse to engage with the architect defendants' reasonable requests for particulars and at the same time seek to compel the architect defendants into a mediation process whereby they will likely be expected to make a financial offer in settlement of the plaintiff's case without knowing exactly what that case is.

134. Based on these considerations I do not consider that the stance taken by the architect defendant is, at this point in time, unreasonable and, by extension I do not think that it would be appropriate to make an order inviting the eighth and ninth defendant to consider mediation at this stage. I am conscious that my decision in this regard will have an effect on the ability of the plaintiff to organise mediation with the other defendants, many of whose consent to mediation was conditional on all defendants being involved. Assuming that those defendants would be prepared to proceed to mediation in the absence of the seventh defendant (whose whereabouts have not been traced) it may be that they would equally be prepared to consider going to mediation in the absence of the architect defendants. If not, the onus lies on the plaintiff to take steps to particularise its claim against the architect defendants so that the objections currently raised by them could no longer be sustained. If the plaintiff requires discovery in order to do that it should make the appropriate requests of the various defendants in order to progress that matter. I will refuse the plaintiff's motion.