THE SUPREME COURT

[Appeal No: 76/2020]

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

BETWEEN/

PROTÉGÉ INTERNATIONAL GROUP (CYPRUS) LIMITED AND AVALON INTERNATIONAL MANAGEMENT INC.

PLAINTIFFS/APPELLANTS

AND

IRISH DISTILLERS LIMITED

DEFENDANT/RESPONDENT

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

1. Introduction

1.1 This is the second judgment delivered today in respect of separate appeals brought against orders requiring a corporate plaintiff to provide security for costs. While the specific issues of detail which arise in the respective proceedings are different, there are underlying issues in both cases which concern the proper operation of the regime whereby impecunious corporate plaintiffs may be required to provide such security. For those reasons the appeals were considered by the same panel of the Court and in close proximity one to the other.

1.2 As will appear later in this judgment, the proper general approach to determining questions concerning the provision of corporate security for costs is addressed in some detail in the judgment delivered in the other proceedings being *Quinn Insurance Ltd. (Under Administration) v. PricewaterhouseCoopers (A Firm)* [2021] IESC 15 ("*Quinn*"). Those general observations are of equal potential relevance to this appeal. However, the application of those principles to the particular facts and issues which arise on this appeal is very much specific to the circumstances of this case.

1.3 In these underlying proceedings the plaintiffs/appellants ("Protégé", save where it is necessary to make a distinction between the first named plaintiff/appellant and the second named plaintiff/appellant – "Avalon"), allege abuse of a dominant position against the defendant/respondent ("Irish Distillers"). Irish Distillers brought an application before the High Court seeking security for costs on the usual basis that it was alleged that Irish Distillers had a *bona fide* defence to the proceedings and that Protégé would be unable to pay the costs of the proceedings should they be unsuccessful and costs be awarded in favour of Irish Distillers. Protégé have accepted that Irish Distillers have discharged the onus of proof on it to demonstrate that both of those factors were present. At all times, therefore, the issue between the parties concerned the question of whether Protégé had demonstrated that special circumstances, in accordance with the established

jurisprudence, existed such as ought lead the Court to decline to order security. Both the High Court (see, *Protégé International Group (Cyprus) Ltd. & anor v. Irish Distillers Ltd*. [2019] IEHC 322) and the Court of Appeal (see, *Protégé International Group (Cyprus) Ltd & Anor v. Irish Distillers Ltd*. [2020] IECA 80) held in favour of Irish Distillers and directed security. It is against the order of the Court of Appeal that Protégé sought and obtained leave to appeal to this Court.

2. The Grant of Leave to Appeal

2.1 By determination dated the 17th September 2020 (see, *Protégé International Group (Cyprus) Ltd. & Anor v. Irish Distillers Ltd*. [2020] IESCDET 106), this Court set out the basis on which leave to appeal was granted, which can be summarised as follows:-

> *"8. … There is … in the Court's view an issue of general public importance as to whether the existing jurisprudence of both the High Court and the Court of Appeal on the question of security for costs may need to be considered, and possibly adjusted, in the light of the rights based arguments sought to be put forward by Protégé."*

2.2 It should be noted that a dispute arose between the parties as to the permitted scope of this appeal. Irish Distillers argued that leave should not be granted on the basis that much of the argument advanced by Protégé in their application for leave to appeal had not been canvassed before the High Court or the Court of Appeal. For its part, Protégé did not accept that the issues it sought to raise before this Court differed significantly to those raised in the courts below. The determination of this Court concluded that there might be a legitimate issue between the parties as to the scope of the arguments which Protégé should be permitted to make on appeal to this Court, in light of the way in which this application was run in the High Court and the Court of Appeal. While granting Protégé leave to appeal, this Court also directed that Irish Distillers should be free to argue, either at a preliminary hearing or at the substantive hearing of the appeal, that some or all of the grounds now sought to be advanced by Protégé should not be considered by the Court on the basis of Irish Distillers' contention that these grounds were not advanced in the courts below.

2.3 The determination of this Court also noted the potential overlap of certain issues between the security for costs applications in respectively these proceedings and in *Quinn*. The Court therefore put in place arrangements in its determination to ensure that the respective parties would be familiar with the issues being raised in both cases, on the basis that it was likely that the Court would be required to form at least some overarching views on the precise application of the jurisprudence in this area which might potentially impact on both appeals.

2.4 It is next necessary to briefly set out an account of the underlying issues and the facts insofar as they are relevant to the application for security for costs.

3. Issues and Facts

3.1 The security for costs application to which this appeal relates arises in the context of the abuse of dominance complaints made by Protégé to the effect that Irish Distillers has, without justification it is said, refused to provide a long term supply agreement to Protégé

for mature and new fill Irish Whiskey, thereby, it is argued, placing Protégé at a competitive disadvantage.

3.2 Protégé is a company limited by shares, established in 2011, with its registered office in Cyprus. Protégé designs, markets and sells drink brands, particularly alcoholic spirits. Avalon is a company limited by shares and incorporated in Panama. Protégé does not manufacture its own spirits, but obtains supplies of the relevant spirits from producers, which it then bottles, brands and distributes. One of the spirit brands that Protégé has brought to market is a whiskey brand called "The Wild Geese", which is an award-winning premium Irish Whiskey.

3.3 Irish Distillers is a well-known company with its registered office in Ireland. It is the largest producer and supplier of Irish Whiskey on the island of Ireland. Irish Distillers' parent company is Pernod Ricard S.A, which is a French company with a significant worldwide presence in the Irish Whiskey market. Irish Distillers' principal business is the production of whiskey, which it sells through its own brands, notably Jameson, and third party brands. It also supplies bulk spirits to a wholesale customer base.

3.4 In order to be designated an Irish Whiskey, a whiskey must first satisfy certain strict legal requirements. The whiskey must be distilled either in the State or in Northern Ireland, and it must then be matured in wooden casks in a warehouse on the island of Ireland for a period of no less than three years. If an undertaking wishes to bottle and sell Irish Whiskey, it must either distil it itself in that manner, or obtain it from those undertakings which distil and mature Irish whiskey on the island of Ireland.

3.5 In a supply agreement for Irish Whiskey, the supplier will typically undertake to provide both mature whiskey and new fill whiskey to a third party brand. Protégé submitted that it has been requesting Irish Distillers to provide it with such a renewable long term supply agreement for "The Wild Geese" whiskey over many years and that Irish Distillers has consistently refused to meet this request, without, it is said, any justification.

3.6 It is Protégé's case that Irish Distillers' conduct amounts to an abuse of what Protégé asserts is a dominant position held by Irish Distillers in whiskey markets in Ireland and in the EU, which it argues is contrary to s.5 of the Competition Act 2002, and/or Art. 102 of the Treaty on the Functioning of the European Union ("TFEU"). In these underlying proceedings, Protégé seek various reliefs including damages and injunctive relief. For its part, Irish Distillers denies Protégé's claims and argues that it has legitimate and objective justification for its refusal to provide Protégé with a supply agreement, including capacity constraints and the continuation of supplies to other traders.

3.7 As noted earlier, the broad general approach to applications for corporate security for costs is well settled and was not in dispute between the parties. That approach was, for example, set out in the judgment of this Court in *Usk District Residents Association Ltd. v. Environmental Protection Agency* [2006] IESC 1, in which it was made clear that an initial onus rests on the defendant seeking corporate security for costs to establish both that it had a *bona fide* defence to the proceedings and that the plaintiff concerned would be

unable to pay costs should they be awarded against it. I will refer to the second of those criteria as relating to the "impecuniosity" of the plaintiff company as opposed to using the term "insolvency". The reason for the use of this terminology is explained in the judgment in *Quinn*.

3.8 In any event, as already noted, Protégé accepts that Irish Distillers had discharged the onus which lay on it to establish a *bona fide* defence and the impecuniosity of Protégé.

3.9 On the basis of the analysis of this Court in, for example, *Usk*, it followed that it was necessary for Protégé, in order to avoid an order for security for costs, to seek to establish that there were special circumstances justifying a departure from what might otherwise be the default position which would pertain where a *bona fide* defence and impecuniosity are established.

3.10 In that context, Protégé first sought to rely on the well-established special circumstance which suggests that security should not be ordered where, on a *prima facie* basis, it can be credibly suggested that the impecuniosity of the relevant corporate plaintiff is due to the wrongdoing alleged. There was again no dispute between the parties that such a special circumstance exists in principle and that at least significant guidance as to how a court should consider whether such a special circumstance has been established can be found in the decision of the High Court in *Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd*. [2009] IEHC 7. There were, however, disputes between the parties as to precisely how the process of evaluating the existence or otherwise of such special circumstances should be conducted and the precise way in which the Court should evaluate whether such special circumstances had been demonstrated to be present.

3.11 In essence, Protégé put forward a case which suggested that, but for the alleged abuse of dominant position by Irish Distillers, it would have established a significant market in the Irish whiskey business such that, it was said, it would have had assets sufficient to meet the likely costs of the proceedings should it fail. As noted in *Connaughton Road*, there is something of a paradox in the way in which a court is required to approach such matters. On the one hand, for the purposes of considering the position in which the plaintiff would find itself without the alleged wrongdoing, the Court must assume that the wrongdoing occurred and attempt to determine what would have been the financial position of the relevant plaintiff on that hypothesis. On the other hand, for the purposes of assessing whether that financial position would have placed the corporate plaintiff in a position to pay costs should it lose, the Court is necessarily assuming that the plaintiff will lose and have costs ordered against it. Be that as it may, for the reasons set out in *Quinn*, such is the exercise in which the Court is required to engage.

3.12 On that basis, it is appropriate to look at the facts relevant to the respective contentions of the parties in respect of that special circumstance.

3.13 As already noted, Protégé contended that it (or connected companies) have been requesting Irish Distillers for supply of Irish Whiskey over many years since 2002 and that Irish Distillers has consistently refused to meet that request, for reasons which, Protégé

argued, have changed over the years. Irish Distillers accepted that it refused to provide such companies with a supply agreement in 2001 and that it had then said that it would only agree to a long term supply agreement if an undertaking was given not to sell "The Wild Geese" in territories in which Irish Distillers sold Jameson. As a result, Protégé argued that, from 2002, it or connected companies were forced to pay more for whiskey than its competitors, who were supplied by Irish Distillers without restrictions as to where they could sell their whiskey in competition with Jameson.

3.14 Protégé submitted that Irish Distillers' refusal to provide a long-term supply agreement has inhibited the growth and development of relevant brands, notably "The Wild Geese", and has prevented the attraction of investment in the same manner as its competitors who have the benefit of a such an agreement. In particular, Protégé argued that it or connected companies have suffered a loss of opportunity between 2002 and 2009, a period during which sales of Irish Whiskey grew worldwide. Since 2013, it is argued that the business of "The Wild Geese" has been in decline and that this eventually resulted in the closure of Protégé's UK office with twelve staff members being made redundant, at, it is said, a significant cost to Protégé. It is Protégé's case that this decline in business is directly attributable to Irish Distillers' refusal to supply it with Irish Whiskey.

3.15 In addition, the shortage of Protégé's supply of Irish Whiskey is said to have forced it both to increase its prices and to limit supply to its existing customers. As a result, Protégé contends that many of its customers were no longer prepared to invest in "The Wild Geese" brand. It was further submitted by Protégé that it lost the majority of its international distributor network due to its lack of a secure supply of Irish Whiskey.

3.16 Pernod Ricard have also taken multiple trademark actions against Protégé across 34 jurisdictions in what Protégé argues is an attempt to restrict "The Wild Geese" from competing in the Irish Whiskey market. It would appear that Pernod Ricard have been unsuccessful in all bar one of these actions. However, it is Protégé's submission that it was forced to incur significant legal costs during 15 years of trademark litigation, as its legal costs in those proceedings were not recoverable. As a result, Protégé contends that its resources, both intellectual and capital, which would have been available for marketing and promotion of the "The Wild Geese" brand, were absorbed in dealing with these cases.

3.17 In addition to the "impecuniosity due to alleged wrongdoing" special circumstance, Protégé also sought to place reliance on an alternative special circumstance, being that it is said that the public interest in these proceedings going ahead would justify the Court in declining to make an order for security for costs.

3.18 Before going on to outline the reasoning of both the High Court and the Court of Appeal, it is of some importance to emphasise that Protégé also sought to place reliance on what was said to be an EU law dimension to this appeal. In simple terms, Protégé argues that it is, in these proceedings, seeking to vindicate rights which it enjoys under EU law. On that basis it contends, not controversially, that it must be entitled to an effective remedy. The potential issue of EU law which arises is as to whether the Irish regime in respect of security for costs in corporate cases potentially diminishes access to the Court in such a

way as could be said to deprive a plaintiff, who wishes to allege a breach of EU rights, of an effective remedy. A second potential question might arise in the event that the Court was so persuaded. In such circumstances it might be necessary to determine what variation in the proper approach to an application for security for costs might be required to ensure that the right to an effective remedy was not impermissibly impaired.

3.19 It is next appropriate to turn to a brief outline of the findings both of relevant fact and of law made by, respectively, the High Court and the Court of Appeal.

4. Judgment of the High Court

4.1 In the High Court, the trial judge gave a brief written judgment in which he made an order for security for costs against Protégé.

4.2 The trial judge accepted that Irish Distillers had made out a *prima facie* case of impecuniosity against Protégé, as evidence and accounts generally showed that Protégé lacked the necessary funding to meet the likely costs in the event that Irish Distillers' case was successful. The trial judge also noted that Protégé had conceded that Irish Distillers had established a *prima facie* defence. In addition, the judgment notes that there was no financial information provided to the Court in respect of Avalon. In light of the fact that Irish Distillers had established a *prima facie* defence and that Avalon is established outside the EU, the trial judge found that a presumption arose that Irish Distillers was entitled to the requested order against Avalon. On that basis the trial judge held that the onus then shifted to Protégé and Avalon to establish that the requested order should not be made. Those companies sought to do so on the following three grounds:-

1. Any inability on their part to pay costs if losing was said to be attributable to the wrongful acts alleged against Irish Distillers;

2. The case was said to raise one or more points of law or issues of exceptional public importance; and

3. The European context to the case should weigh against granting the requested order as to make same, it was claimed, would deny the plaintiff effective redress.

4.3 The trial judge rejected all three grounds. In respect of the first ground, concerning the special circumstance detailed in *Connaughton Road*, where a court may decline to make an order for security for costs if the plaintiff can establish on a *prima facie* basis that its inability to pay stems from wrongdoing on the part of the defendant, the trial judge held that Protégé and Avalon had failed to adduce any evidence that satisfied the test for causation of impecuniosity as set out in *Connaughton Road*.

4.4 The trial judge also rejected the second ground advanced by Protégé and Avalon, holding that the fact that Ireland had a booming whiskey trade was not in itself sufficient to convert what he defined as "a private competition dispute" into one raising a point of exceptional public importance.

4.5 Finally, in respect of the third ground, relating to the plaintiffs' right to an effective remedy under European Union law, the trial judge cited the judgment of the High Court (McKechnie J.) in *Digital Rights Ireland v. Minister for Communications* [2010] IEHC 221 and held that the involvement of EU directives, or other issues heavily informed by EU law, while a relevant factor, could not in itself constitute a special circumstance justifying a refusal by the court to make an order for security such that it would be determinative without more. He held that, in the present proceedings, this required element of "more" was absent.

4.6 In light of those findings, the High Court made an order for security for costs against Protégé and also against Avalon. The amount of the security was designed to cover a reasonable estimate of the costs which Irish Distillers would be likely to incur in defending the proceedings. However, having regard to the scale of the potential costs likely to be incurred by Irish Distillers, the trial judge ordered security for costs in the amount of €1 million.

5. Judgment of the Court of Appeal

5.1 In the Court of Appeal, Protégé sought to appeal the High Court judgment on four grounds, contending that the trial judge had erred:-

1. In concluding that the plaintiff had adduced "no evidence" that satisfied the "*Connaughton Road*" test for impecuniosity;

2. in concluding that the proceedings raised no point of law or issues of exceptional public importance;

3. in fixing the amount of security to be provided without hearing submissions on the matter; and

4. in fixing security at €1 million

5.2 In respect of the first ground of appeal, again relating to the test in *Connaughton Road*, Protégé argued that it had adduced considerable evidence establishing that its inability to provide security for costs was attributable to the wrongdoing alleged against Irish Distillers. Costello J., delivering the judgment for the Court of Appeal, did not accept that this was the case, noting that the affidavits of Mr André Levy on behalf of Protégé and Avalon made no attempt to quantify the losses allegedly resulting from wrongdoing on the part of Irish Distillers. Furthermore, she observed that both Avalon and Protégé had failed to provide the Court with the kind of financial and business documents that one might expect a plaintiff to exhibit in an application of this nature.

5.3 First, Costello J. noted that there was no evidence whatsoever provided to the Court in relation to Avalon, save a certificate of incorporation from Panama written in Spanish, which could not be authenticated. There was no other evidence of the company's existence, nor of the nature of its relationship with Protégé. For these reasons, Costello J. concurred with the trial judge's finding that Avalon had failed to establish the special circumstance arising from the test in *Connaughton Road*.

5.4 In addition, Costello J. found that the financial information provided to the Court in respect of Protégé was scant and incomplete. Protégé did not supply the Court with any accounts or financial information for the years ending December 31st 2016 and December 31st 2017. The information supplied in respect of the year ending December 31st 2018 consisted only of an unaudited set of financial statements. The affidavits sworn by Mr Levy did not contain any information relating to Protégé's business, including documents such as business plans, evidence of funding for the expansion of the business or any distribution agreements. Costello J. also found that there was no evidence regarding the other brands developed by Protégé, nor any attempt to explain the relationship between the "The Wild Geese" brand and the rest of Protégé's business.

5.5 Costello J. noted what she considered yet further examples of Protégé and Avalon's failure to adduce evidence in support of their contention that their impecuniosity flowed from Irish Distillers' alleged wrongdoing, including the fact that Protégé had failed to file an affidavit from a financial advisor or other expert which might have assisted in establishing a specific level of loss attributable to the alleged refusal of Irish Distillers to provide Protégé with whiskey. Furthermore, there was no evidence supplied to the Court relating to the distribution of the possible profit to be derived from the exploitation of the "The Wild Geese" brand, making it impossible to assess the level of damages recoverable at law by either or both of Protégé and Avalon from Irish Distillers. On these bases, Costello J. concluded that the balance of the evidence that was relied on by Protégé and Avalon amounted to bare assertion, which did not satisfy the threshold of *prima facie* evidence set out in *Tribune Newspapers (in receivership) v. Associated Newspapers (Ireland) Limited* (Unreported, High Court, Finlay Geoghegan J., 25th March 2011).

5.6 The Court of Appeal found that it had not been provided with any evidence of the level of unquantified damages which Protégé and Avalon claimed could transform their financial fortunes to a position where they could pay the costs if awarded, as was required by *Connaughton Road*. In the view of Costello J., both appellants failed to establish on a *prima facie* basis that the wrongdoing alleged against Irish Distillers has led to their inability to meet any award of costs that might be made in favour of Irish Distillers. On this basis, she concurred with the conclusion of the trial judge that there was no evidence that satisfied the test of causation.

5.7 Furthermore, Costello J. held that, in order to satisfy the test in *Connaughton Road*, so as to establish a special circumstance justifying a refusal by the Court to award security for costs notwithstanding that inability to pay and a *bona fide* defence had been established, the appellants must establish, on a *prima facie* basis, that the alleged actionable wrongdoing of Irish Distillers gave rise to some specific level of loss, which is recoverable as a matter of law. Costello J. held that Protégé and Avalon had failed to satisfy this aspect of the test in *Connaughton Road* as the alleged damages were not, in her view, shown to be recoverable at law. Proceedings alleging breaches of competition law are regarded as claims in tort which attract a six-year limitation period. Given that the present proceedings commenced on 5 July 2019, Costello J. held that Protégé and Avalon

were not entitled to rely on any alleged failures to supply whiskey prior to July 2013 as establishing a special circumstance within the meaning of *Connaughton Road*.

5.8 In addition, Costello J. concluded that certain wrongs which Protégé sought to rely on were not encompassed by the proceedings. She held that the present proceedings were not concerned with trademark litigation in which Protégé and Avalon had been engaged with Pernod Ricard as the opposing party. Therefore, it was her view that the Court could not have regard to the costs incurred in separate litigation when considering the issue of special circumstances as this was not a wrong in respect of which Protégé could recover damages from Irish Distillers in these proceedings.

5.9 In respect of the second ground of appeal advanced by Protégé, being that the trial judge had erred in concluding that the case raised no point of exceptional public importance, Costello J. held that that the threshold for a plaintiff to demonstrate a point of exceptional public importance is a high one, which requires the plaintiff to identify a point of law that is of such gravity that it transcends the interests of the parties and serves the common good. Costello J. found that the present proceedings did not raise any such issue which could be said to touch on the common good in a way that transcended the interests of the parties. On this basis, Costello J. held that the trial judge was correct in concluding that these proceedings constituted private litigation between private operators, the principal purpose of which was to secure a long term agreement and damages for Protégé.

5.10 The fact that these proceedings involved issues of competition law was not, in Costello J.'s view, sufficient to elevate them to the status of raising points of exceptional public importance, particularly given that Protégé and Avalon had not identified any specific uncertainty in competition law in need of clarification. Similarly, the fact that one of the parties in the present proceedings is a major contributor to Irish exports was not regarded by Costello J. as satisfying the threshold necessary to establish a point of exceptional public importance. Finally, in respect of the second ground of appeal, Costello J. held that the fact that significant amounts of money were at stake in the present litigation did not mean that it raised matters of exceptional public importance. On this basis, she was satisfied that the trial judge was correct in his conclusion that the Protégé and Avalon had failed to meet the high threshold required to establish this special circumstance.

5.11 Turning to the third and fourth grounds of appeal, Protégé and Avalon argued that the trial judge had erred in fixing the quantum of security solely on the basis of the evidence adduced by the parties' respective cost accountants without having heard submissions in relation to the same. Those companies submitted that this was a breach of their entitlement to fair procedures and natural and constitutional justice. The appellants further argued that the trial judge had erred in relation to the level at which he fixed the amount of security, which was €1 million.

5.12 The parties disagreed on the nature of the submissions that had been made in the High Court in relation to the amount of security to be ordered. Protégé argued that submissions were expressly made by both parties in the High Court to the effect that it

was not yet appropriate to determine the amount of security to be ordered. On this basis, Protégé argued that it had not been afforded the opportunity to make submissions in the High Court on what it considered to be an appropriate amount of security. However, Irish Distillers submitted that, as both parties had made general submissions relating to the amount of costs likely to be incurred in defending the proceedings, this issue was clearly open before the High Court. Irish Distillers further submitted that counsel for Protégé had not expressly stated in the High Court that costs should not be fixed at that stage.

5.13 The sole basis on which Costello J. was willing to consider granting an appeal on this point was if Protégé could demonstrate that the trial judge had not afforded them an opportunity to be heard on this issue. In the absence of a transcript of the hearing before the High Court, Costello J. determined that it was not possible for the Court of Appeal to establish the precise nature of the submissions made before the High Court relating to the amount of security to be ordered. Costello J., therefore, felt that she was unable to decide whether there was a want of constitutional fairness or not. This, she considered, was an unsatisfactory basis on which to determine an issue so fundamental to the administration of justice. She therefore proceeded to consider herself the correct level at which to fix the amount of security to be ordered, but explicitly stated that she did so without finding that the trial judge had erred in the manner alleged by Protégé.

5.14 Costello J. considered that the purpose of making an order for security for costs is to prevent the perceived injustice of the defendant having to meet the expenses of what may emerge to be an unmeritorious claim. In her view, this perceived injustice would not be addressed if the quantum of security was anything less than a significant percentage of a fair estimate of the full costs on a party and party basis. However, she observed that in some circumstances justice may not be served by making an order for the full costs and that a trial judge may, therefore, exercise a discretion to mark a discount from the estimated full costs, based on the interests of justice and balancing the rights of both parties. She held that the extent of this discount is a matter for the discretion of the trial judge.

5.15 In light of the fact that the Court of Appeal does not have the benefit of hearing witnesses being cross-examined so as to resolve discrepancies of fact, Costello J. determined the amount of security to be fixed in this case on the basis of what she considered to be the justice of the case. Having reviewed the evidence provided by both parties in relation to estimated costs, Costello J. concluded that Irish Distillers' estimate was closer to a fair estimate of the full costs likely to be incurred. She held that the trial judge may well have been correct in finding that to award the full amount estimated by Irish Distillers would constitute awarding security for costs on an indemnity basis and that he was therefore correct to mark a discount from this estimate. When considering the correct discount to be deducted from the full estimated costs, Costello J. did not believe that costs should be significantly reduced from the hypothetical full fair value in this case. She also considered it to be pertinent that Protégé had not suggested at any point that an award of costs on a full costs basis would stifle their claim. Costello J. therefore

concluded that, in her view, the justice of the case would be met if Protégé and Avalon provided security for costs in the sum of €1 million. On that basis the proceedings were stayed pending the provision of such security.

5.16 In substance, the submissions of the parties on the appeal to this Court were the same as those which were advanced both before the High Court and before the Court of Appeal. Thus, this Court is called on to consider the proper general approach to the special circumstance in which it may be said that the impecuniosity of the plaintiff in question is *prima facie* due to the wrongdoing alleged against the defendant. At least in general terms, that issue also arose in the *Quinn* proceedings. I have set out in my judgment in those proceedings what I consider to be the proper overall approach and it is, therefore, unnecessary to address those general questions again in this judgment. I will simply adopt what is said in *Quinn* in that regard. It will, however, be necessary to turn to the application of those general principles to the facts of this case.

5.17 In addition, it will be necessary to consider the public interest special circumstance and the question of whether the general principles identified for the award or refusal of an order for security for costs in the Irish impecunious corporate context can be said to in any way infringe the effective remedy requirements of the TFEU or of European law.

6. Application of General Principles to this Case

6.1 On that basis, I propose first to analyse the question of whether it is appropriate to direct security to be provided by Protégé against the backdrop of the analysis of the general principles in Irish law as set out in some detail in *Quinn*. Thereafter, I propose to consider whether there is anything in the law of the European Union that would, in the circumstances of this case, render it necessary to take a different view.

6.2 The first issue is, therefore, as to whether the High Court and the Court of Appeal were correct to say that "impecuniosity due to wrongdoing alleged" had not been established. Before going into the details of the conclusions reached by those Courts in that regard, it does seem to me to be appropriate to make a number of general observations.

6.3 I would repeat the comments made in *Quinn* to the effect that there is an obligation on both sides to applications such as this to put their cards on the table. A defendant wishing to obtain the benefit of an order for security is obliged to give a court all relevant information to enable the Court to carefully interrogate the question of whether the defendant truly has a full *bona fide* defence on an arguable grounds basis. Likewise, a plaintiff who has impecuniosity and an arguable *bona fide* defence established against it must, if it wishes to avail of special circumstances, do so on the basis of giving the Court adequate information to enable a proper interrogation of any relevant proposition to be conducted. As pointed out in *Quinn*, a failure to do so may result in the Court concluding that it has insufficient information to make a proper and sustainable finding in favour of a plaintiff on any relevant issue.

6.4 In those circumstances a number of matters do need to be emphasised. Protégé itself was only established in 2011. There would appear to have been some connected

companies involved in what might be described as the general business, at an earlier stage. However, the precise connection between such companies and Protégé and Avalon has been left very vague on the evidence. Likewise, the precise position of Avalon is more than vague. In those circumstances, and even leaving aside the question of the Statute of Limitation referred to by the Court of Appeal, it is by no means clear as to how it can be argued that damages could be recovered in these proceedings for any alleged abuse of a dominant position which occurred prior to 2011. If any corporate entity suffered a loss by reason of the abuse of a dominant position by Irish Distillers prior to that time, then it is wholly unclear as to how any such losses could be said to impact on the financial position of either Protégé or Avalon today. Unless such losses could be shown to have a financial impact on either of the plaintiffs today, then it is impossible to see how it can be said that any inability to pay arising today can be attributed to such wrongdoing. There might be an explanation as to how it can be said that the financial situation of either or both of the plaintiffs today has been affected by such wrongdoing but no such explanation has been properly put in evidence before the Court.

6.5 Particular reliance was placed by Protégé on the contention that companies who were involved in establishing themselves in the Irish whiskey market in the latter part of the first decade of this century did become significant corporate entities with high value. The first question concerning the relevance of that contention is the one already addressed. Protégé itself was not involved at the time in question. Second, it must, of course, be recognised that companies who, whether by luck or design, gain the advantage of being first movers in a new or expanding market, can frequently do very well. However, the fact that early entrants into a potentially lucrative new or expanding market may do well does not mean that everyone else will do just as well. Subsequent entrants will increase competition and may not do anything like as well as those who have managed to become established at just the right time. It is, therefore, in my view, speculative in the extreme to suggest that Protégé, post 2011, would have enjoyed the same opportunities as those who became established in the market in earlier years. Much clearer evidence would have been needed to make such a case. On that basis, it also seems to me that the suggestion that Protégé could have done as well as those earlier entrants is again little more than speculation. If there is an evidential basis to support Protégé's case which goes beyond the speculation that it might have done as well as those earlier entrants (or that what happened in respect of other companies during that earlier period affects Protégé's current position) then no evidence in that regard has been put before the Court.

6.6 That leads to a further point. Some of the more straightforward cases in which an impecuniosity due to alleged wrongdoing special circumstance is advanced by a plaintiff involve a company which was in reasonable financial health prior to alleged wrongdoing. On that basis it may be possible to demonstrate that, at such a relevant time, the company concerned could have paid any costs that might be awarded. In such a case, the analysis concentrates on whether a *prima facie* case has been made out for the proposition that the wrongdoing may explain the difference between that previous healthy financial position and the current impecuniosity of the company.

6.7 A different analysis arises in cases where the argument of the plaintiff is that it would have made money had the defendant not been guilty of wrongdoing and where it is asserted that the money which it would have made would have been sufficient to pay the relevant costs. In such a case, the plaintiff may not be able to show that it would have been in a position to pay the costs concerned before the alleged wrongdoing occurred but may seek to persuade the Court that the wrongdoing prevented it from bettering its financial position in a material way relevant to the analysis required in considering whether special circumstances have been made out. I do not rule out the possibility that such an argument may find favour in the circumstances of any individual case. However, it does seem to me that a court is required to carefully analyse such a contention, for the consideration starts with the proposition that the relevant plaintiff was not, prior to the alleged wrongdoing, in a position to pay costs should it lose and where it must now establish a credible basis for lost profits such as would have changed that situation. Here, again, the onus rests on the plaintiff to put forward sufficient clear evidence to enable the Court to conduct that analysis in a thorough fashion. Yet again, it must be observed that a failure by such a party to put forward clear evidence of that type can legitimately lead to the Court not being satisfied that it has discharged the onus on it.

6.8 In passing I would comment that the precise type of evidence which it will be necessary to put forward will be very much dependent on the nature of the case. There is no rule that there must be expert evidence. But there may well be cases where, in the absence of expert evidence, a court will be unable to conduct the proper exercise. In such a case, a plaintiff who does not tender expert evidence may find that the Court does not take the view that it has discharged the onus on it.

6.9 At paras. 37-42 of her judgment in the Court of Appeal, Costello J. set out a long list of matters which, in her view, were absent in the evidence put before the High Court on behalf of Protégé and Avalon. They are worth repeating here;

"37. It is striking that in Mr. Levy's three affidavits he makes no attempt to quantify the losses allegedly caused to each of the appellants by the alleged wrongdoing of IDL. A careful review of these very lengthy (excessively so) affidavits reveals considerable detail on the claim against IDL, but no evidence relevant to the issue for determination on the application before the court.

38. There is no evidence whatsoever about Avalon. The sole evidence before the Court in relation to this appellant was the exhibited Certificate of Incorporation from Panama in Spanish. There was no evidence of its authenticity. This is remarkable and very telling, given that Mr. Maguire averred that his lawyers were unable to discover evidence of even the existence of the company. There was no evidence of any relationship or agreement between Protégé and Avalon, despite the plea that Protégé is the exclusive sales agent of Avalon in the EU. Neither was there even a reference, let alone evidence, to the pleaded assignment of the interest of Avalon Group Inc. BVI to Avalon in 2016. Mr. Levy did not address this in his affidavits. There were no accounts exhibited in relation to Avalon and Mr. Levy described

Avalon as a "relatively small" company. Not only was there none of the evidence one would expect in a motion for security for costs from Avalon, there was no explanation for the absence of such information. In relation to Avalon, I have no hesitation in agreeing with the trial judge that it has failed to establish this alleged special circumstance on the basis of prima facie evidence.

39. *The situation in relation to Protégé is hardly better. First, Protégé provided "very limited financial information" as described by Mr. Patrick Dillon, chartered accountant and partner with Grant Thornton, who prepared the report and affidavit on the ability of Protégé and Avalon to meet the estimated costs of IDL. Protégé provided audited financial statements for the years ended 31 December 2013, 2014 and 2015 to IDL, which were then furnished to Mr. Dillon. In January 2019, Protégé's solicitors provided an unaudited set of financial statements for the year ending 31 December 2018. The document expressly states that the financial statements were based upon information provided which has not been subject to audit or review engagement, and the author did not accept any responsibility for the reliability, accuracy or completeness of the compiled information contained in the financial statements. There was no information provided for the years ending 31 December 2016 or 31 December 2017. …*

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

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

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

6.10 I have quoted from the judgment of Costello J. at some length because I consider that those paragraphs set out accurately, and in considerable detail, many of the matters which should have been addressed by Protégé and Avalon if they wished to persuade the Court that it truly was the case that it had been demonstrated, on a *prima facie* basis, that their undoubted inability to pay costs was due to the alleged wrongdoing of Irish Distillers. I would emphasise that there is no particular way in which evidence, sufficient

to meet the burden on a party seeking to resist an application for security on such a basis, must be presented. Each case must be judged on its own circumstances and on the evidence presented. But the evidence must go beyond mere assertion and speculation. As already noted, there may be cases where expert evidence is necessary because there may be cases where, without expert evidence, it will not be possible to put the contention that impecuniosity was due to the alleged wrongdoing beyond the level of assertion and speculation. There may, however, be other ways in which the burden can be met in many cases. However, it must be met in some realistic way. In my view, Protégé and Avalon fell far short of presenting the kind of evidence which would be considered sufficient to meet the burden on them and I would uphold the finding of the Court of Appeal in that regard.

6.11 As noted in *Quinn*, it is also necessary to take into account, even where "impecuniosity due to alleged wrongdoing" is not made out, the possibility that the proceedings may be stifled if security is ordered. However, there was absolutely no true evidence presented on behalf of either Protégé or Avalon to suggest that the proceedings would be stifled or to enable the Court to assess the circumstances in which security might not reasonably be capable of being put up. In those circumstances, I am not satisfied that there was any evidential basis on which the Court could have concluded that these proceedings would be stifled should security be ordered.

6.12 On that basis, it does not seem to me that the question of stifling properly arises so that the second stage of the analysis identified in *Quinn* does not truly arise on this appeal due to the absence of any relevant evidence.

6.13 So far as the public interest special circumstance is concerned, I would reiterate the point made in *Quinn* to the effect that evidence that it is likely that the proceedings will in fact be stifled if security is ordered forms an essential part of the assessment were such a special circumstance is asserted. As noted in *Quinn*, the purpose of the public interest special circumstance is designed to cover situations where it is in the public interest that the proceedings go ahead. Unless there is a credible basis for suggesting that the proceedings will not go ahead if security is ordered then that public interest falls away. There being no evidence to suggest that these proceedings will not necessarily go ahead if security is ordered, it follows that the public interest special circumstance has also not been made out.

6.14 It follows, in turn, that the application of well-established Irish principles leads to the conclusion that security should be ordered in this case and that the decision of the Court of Appeal in that regard should be upheld. There remains, however, the question of whether the law of the European Union might require a different result.

7. European Union Law

7.1 There was, in fact, little between the parties as to the general principles of European Union law applicable to an assessment such as this Court must now make. It is, of course, well established that parties wishing to assert, in national courts, rights conferred on them under European Union law, are entitled to an effective remedy. It is also well

established that, subject to the obligations of equivalence and effectiveness, member states enjoy procedural autonomy. It is also true, as Advocate General Bobek reiterated at para. 42 of his opinion in *UH v. An tAire Talmhaíochta Bia agus Mara, Éire agus an tArd-Aighne* (Case C-64/20) ECLI:EU:C:2021:14 that, "the relation between the principle of effectiveness, as one of the dual requirements arising under the procedural autonomy of the member states, and the principle of effective judicial protection, as a fundamental right later enshrined in Art. 47 of the Charter, is perhaps not (yet) entirely clear". In so doing, the Advocate General repeated a point previously made by him in *Secretary of State for the Home Department v. Banger* (Case C-89/17) ECLI:EU:C:2018:225. However, Advocate General Bobek went on to suggest that it can hardly be disputed that, at the very least, the two principles overlapped to a large extent with regard to their substance. Neither party made any submission to this Court which suggested that the previous case law of the CJEU on the principle of effectiveness in the context of the procedural autonomy of member states was not also relevant to considering whether the principle of effective judicial protection, as set out in Art. 47 of the Charter, has been met.

7.2 It is clear that the right to an effective remedy will be breached if national procedural law renders it "practically impossible or excessively difficult" to exercise the rights conferred by European Union law. These principles have been reiterated on numerous occasions by the CJEU. The issue between the parties concerns whether the Irish law on security for costs in respect of impecunious corporate plaintiffs is a procedure which breaches that obligation of effectiveness. It is again well settled, and not disputed, that national procedural law must be disapplied if it does breach that principle.

7.3 The relevant procedural law of Ireland has been fully set out in the judgment in *Quinn* and also addressed in this judgment. For the reasons set out in this judgment, I am satisfied that Irish procedural law requires an order for security to be made in this case. The issue of European Union law, therefore, comes down to one as to whether that Irish procedural requirement must be disapplied on the basis that it breaches the principle of effective remedy or effective judicial protection and, in practice, would make it excessively difficult for a party seeking to assert public procurement rights under European law to obtain any remedy to which that party might be entitled. I did not understand either party to disagree that such was the question which the Court must address. However, the parties did disagree as to the answer to that question. A number of the decisions of the CJEU were referred to by the parties and it is appropriate to briefly comment on those judgments.

7.4 In *Orizzonte Salute – Studio Infermieristico Associato v. Aziendo Pubblica di Servizi all persona San Valentino* (Case C-61/14) ECLI:EU:C:2015:655, the CJEU was concerned with Italian court fees, an issue not of particular relevance to this case, although it is worth noting that the CJEU determined that the levying of court fees can be justified on the basis that it amounts to a source of financing for the judicial activity of member states, but also that it discourages the submission of claims which are manifestly unfounded. The Court did reiterate the basic principle of the requirement of effectiveness and also the requirement that national procedural rules must not compromise in particular

the effectiveness of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

7.5 Protégé also referred the Court to *Commission v. United Kingdom* (Case C-530/11) ECLI:EU:C:2014:67. This case involved the obligation imposed by Directive 2003/35/EC, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending same with regard to public participation and access to justice, which gives effect to Art. 9(4) of the Aarhus Convention, which in turn requires that litigation on certain environmental matters "should not be prohibitively expensive". While some of the observations of the Court in that case are of marginal relevance to the issues with which this Court is concerned, it must be recalled that a court, in determining whether a national legal system fails to provide a means of challenging relevant environmental decisions on a basis which is not prohibitively expensive, is required to assess a whole range of potential exposure to cost and not just the possibility that an unsuccessful plaintiff may be ordered, should it lose, to pay the full costs of a respondent or notice party.

7.6 In *Star Storage AS v. Institutul National de Cercetara-Dezvoltare in Informatica* (Case C-439/14) ECLI:EU:C:2016:688, the CJEU was concerned with a Romanian law which required the payment of a so-called "good conduct guarantee" for the admissibility of proceedings. The Court noted, in concurring with the opinion of the Advocate General, that the good conduct guarantee in question constitutes a limitation on the right to an effective remedy. The Court went on to note, however, that the guarantee could be justified but only if it is provided for by law, if it respects the essence of the right to an effective remedy and subject to the principle of proportionality and also if it is necessary and genuinely meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. Amongst other factors, the Court took into account the fact that the good conduct guarantee at issue might discourage frivolous challenges. The Court did note that it was necessary to assess whether the measure in question retained a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved. On the facts, the Court was satisfied that this reasonable relationship of proportionality had been achieved.

7.7 *Deutsche Energiehandels – und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* (Case C-279/09) ECLI:EU:C:2010:811 was one of two cases to which we were referred in which the question of the provision of security for costs was specifically at issue. Under the German law in question, the plaintiff was required to make an advance payment of €274,368. The plaintiff concerned had been refused legal aid and the referring court wished to know whether that refusal might be inconsistent with the principle of effectiveness. The Court again reiterated that the assessment in question required a determination first of whether the relevant measure constituted a limitation on the right of access to the Court which undermines the very essence of that right. Second, it was necessary to determine whether the measure pursued a legitimate aim and third,

whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

7.8 The Court did, however, give significant guidance on the matters which required to be considered. It was held that a national court must take into consideration the subject matter of the litigation; whether the application had a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law or procedure and the applicant's capacity to represent itself effectively. Obviously some of those matters were concerned with the question of the requirement that legal aid might have to be available in order to meet the principle of effective remedy.

7.9 However, importantly, the Court indicated that, in order to assess proportionality, a national court may take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. That criterion closely echoes the stifling consideration identified both in the judgment in *Quinn* and in this judgment.

7.10 In *Hayes v. Kronenberger GmbH* (Case C-323/95) ECLI:EU:C:1997:169, the CJEU was concerned with a German law which required foreign nationals acting as plaintiffs in proceedings before the German courts to provide security for costs in certain circumstances. The Court appeared to accept that, in principle, member states could lay down detailed procedural rules concerning security for costs. The German rule, however, failed to meet the requirements of European law because it discriminated between German nationals and nationals of other member states. That judgment appears to accept that there is nothing wrong, in principle, with a regime for providing for security for costs although, of course, in the light of some of the subsequent jurisprudence, it is clear that such a rule must be assessed on the basis of the criteria identified not least that of proportionality.

7.11 It is next appropriate to refer to *van Schijndel* and *van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* (Joined Cases C-430/93 and C-431/93) [1995] E.C.R I-04705, where a number of important principles are identified in the context of the assessment of the compatibility of national procedural rules with the principle of effectiveness. In that case the CJEU said the following:-

> *"[E]ach case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."*

7.12 It seems to me that this case is of particular importance in placing emphasis on the need to put the rights of the defence into the overall assessment.

7.13 Having regard to that case law, it is clear that the first question which must be asked is as to whether the national procedural law in question potentially interferes with the right of access to a court to enforce European rights and, importantly, whether the national procedural law concerned undermines the core or essence of that right. Obviously the requirement to put up security does interfere with the right of access to the Court.

7.14 It must therefore, in accordance with the relevant jurisprudence, first be determined that the measure does not undermine the core or essence of the right to an effective remedy. If it were to be determined that the procedural measure in question did so undermine the essence of the right, then it would follow that it must be disapplied without any further consideration. If it does not so undermine the essence of the right then the further analysis mandated by the jurisprudence must be engaged in.

7.15 I will shortly return to the factors identified in the judgment in *Quinn* and in this judgment which, in my view, materially reduce the potential adverse impact of Irish security for costs law in the context of impecunious corporate plaintiffs. Those factors are, of course, material to an assessment of the proportionality of the measure. However, they also, in my view, demonstrate that the law does not undermine the essence of the right. The circumstances in which a party can avoid an order for security reduce the extent to which access to an effective remedy may be interfered with. In particular, the requirement, analysed in *Quinn*, that the Court must in addition consider whether the proceedings would be stifled if an order for security be made, also significantly reduces the impact of the measure. In those circumstances, I am not satisfied that it can be said that the essence of the right to an effective remedy is undermined. Security can and is frequently put up by the party concerned. Where a court is satisfied that, despite genuine efforts, it is not possible to put up security, then that too is a factor which the Court must take into account. Given my conclusion that the essence of the right is not affected, it is necessary to go on to consider the other matters which the jurisprudence mandates.

7.16 The next question which therefore arises is as to whether the measure is designed to meet a legitimate aim recognised in European Union law. Clearly such a measure may have the capability of discouraging frivolous or unmeritorious cases. An impecunious corporate plaintiff might otherwise have a free ride in bringing proceedings without any consequence in costs of the proceedings being unsuccessful and thus placing a heavy burden on the defendant thereby interfering with the right of defence. It follows, importantly, for the reasons analysed in some detail in *Quinn*, that the Irish law on security for costs forms an important part of the protection of the rights of defence. Were it not for the existence of such a rule, an impecunious corporate plaintiff could bring proceedings in circumstances where the defendant would have no prospect of recovering costs should it succeed and where such a defendant could, therefore, be significantly impaired in practical terms in the way in which it might mount its defence. In those circumstances it seems to me that it is clear that the requirement, in appropriate

circumstances, that security for costs be provided does pursue a legitimate aim in European Union law as recognised in the jurisprudence of the CJEU.

7.17 However, that is not, in itself, sufficient. It is also necessary to assess whether the measure in question is proportionate to that aim. In that context a number of matters need to be taken into account. First, the exposure to costs will only arise in the event that the proceedings are unsuccessful and costs are awarded against the relevant plaintiff. Should that not occur then the money will be returned. It is true, as the CJEU noted in *Star Storage*, that even putting up money which will be later returned does place a burden on the relevant party. However, in assessing proportionality, regard must be had to the extent of the burden. The burden of putting up security for costs will, in the event that the party is successful, be only that the party concerned will be out the money until the proceedings end. Even where the party loses, that party will only be out such money as is properly assessed as representing the reasonable costs of the defendant in defending the proceedings. There is no element of penalty involved. In addition, the requirement to put up security does not place an impecunious corporate plaintiff in any different position to a corporate plaintiff that has sufficient funds. The latter takes the risk, by commencing proceedings, that it will suffer the financial cost of having to reimburse the defendant for the reasonable expense of defending the proceedings should the case fail. The requirement to put up security for costs simply places the impecunious corporate plaintiff in the same position.

7.18 As part of the assessment of proportionality, it is also necessary to have regard to some of the observations made, particularly in *Quinn*, but also in the judgment in this case, concerning when security should be ordered. The fact that a plaintiff who can establish that there is an arguable basis for suggesting that their impecuniosity was due to the wrongdoing of the defendant alleged in the proceedings provides, in my view, a significant diminution in the detriment to a plaintiff against whom an application for security is brought. By definition, security will only be ordered against a plaintiff who cannot establish that impecuniosity was *prima facie* due to the alleged wrongdoing. That means that security will only be ordered against a corporate plaintiff who was impecunious in any event. Furthermore, the fact that the Court is required to at least have regard to the possibility that the proceedings might be stifled operates as a further potential protection. That requirement stems from the need to deal appropriately with a case where the backers of the impecunious corporate plaintiff concerned are prepared to put up money to fund the litigation itself, but do not wish to be exposed to having to compensate the defendant for its funding of the defence in the event that the defence should succeed. That is, in my view, a significant factor. Such cases can be distinguished from those where it can be shown that the impecunious corporate plaintiff has no reasonable means of being able to put up security. While, as noted in *Quinn*, that factor is not decisive, it is nonetheless important.

7.19 At the end of the day, the backers of an impecunious corporate plaintiff are required, as a result of the security for costs law, to potentially be put in a position to make the same kind of decision that both amply resourced corporate plaintiffs and private individuals

have to make when contemplating proceedings. Is the risk of losing and having to pay the costs of the successful defendant worth taking in the light of the issues raised in the proceedings, the likely remedies which may be obtained and the perceived chances of success and failure. Viewed against that background, it seems to me that Irish security for costs law meets the proportionality test identified in the jurisprudence of the CJEU.

7.20 I would only add that the fact that the judgment in *Quinn* and this judgment makes clear that the Court can be flexible as to the manner in which security is ordered adds to the argument in favour of the measure being proportionate. The Court is not required to order full security, although that may well be the starting point. The Court can order staggered security. The Court can order security in a sum less that the estimated full cost of defending the proceedings if the balance of justice requires such a course of action. In an appropriate case, the Court may consider ordering security in the form of a personal guarantee from the individuals backing the impecunious corporate plaintiff so as to put them in the same position as they would be, were they bringing the proceedings in their own name. All of these factors diminish the burden of the law on security for costs and support the view that it is proportionate to the end of not depriving a defendant of the significant right to be able to conduct its defence without the fear that all of the costs which it expends on a potentially successful defence will prove irrecoverable.

7.21 In the light of that analysis, I am not satisfied that there is anything in Irish security for costs law which infringes the principle of effectiveness as it has been developed in the jurisprudence of the CJEU or the right to an effective remedy identified in Art. 47 of the Charter. European Union law does not, therefore, in my view, mandate a different result to this appeal.

8. Conclusions

8.1 As noted in this judgment, the main principles applicable to the consideration of applications for security for costs in a corporate context have been very fully set out in the judgment in *Quinn* which is also delivered today. This judgment is, therefore, concerned with the application of those principles to the facts of this case. The judgment also considers the compatibility of Irish security for costs law with the requirements of European law which mandate that there be an effective remedy or effective judicial protection available in the courts of member states when European Union rights and entitlements are asserted.

8.2 For the reasons set out in this judgment, I am satisfied that both the High Court and the Court of Appeal were correct to hold that Protégé and Avalon had not established, on a *prima facie* basis, that their current impecuniosity was due to the wrongdoing alleged against Irish Distillers in these proceedings. In light of the analysis contained in *Quinn*, it follows that it was also necessary to consider whether it was likely that the proceedings might be stifled in the event that security was ordered. For the reasons also set out in this judgment, I have concluded that Protégé and Avalon have failed to demonstrate that there was a likelihood of the proceedings being stifled. It follows that the "impecuniosity due to alleged wrongdoing" special circumstance was not established.

8.3 Likewise, I have set out the reasons why I am not satisfied that the public interest special circumstance has been made out. This is so, in particular, because any public interest in proceedings going ahead will not be interfered with unless it is demonstrated that it is likely that the proceedings would be stifled.

8.4 Finally, this judgment analyses relevant case law from the CJEU. On the basis of that case law, the assessment which requires to be made is first to determine whether the essence of the right to an effective remedy is respected. If so, it is next necessary to consider whether any interference with the right to an effective remedy may be justified on the basis of pursuing an objective of the European Union as recognised in the jurisprudence. Finally, it is necessary to consider whether there is an appropriate proportionality between any impairment of the right concerned and the extent to which the legitimate objective identified may be achieved. For the reasons set out in this judgment I am not satisfied that any impairment of the right to an effective remedy which may result from the making of an order for security for costs, in accordance with the principles identified in *Quinn*, fails to respect the essence of the right. In addition, I am satisfied that Irish security for costs law pursues a legitimate objective and in particular is designed to enhance the rights of defence and discourage unmeritorious claims. Finally, I set out the reasons why I am satisfied that there is an appropriate proportionality between any impairment of the right to an effective remedy and securing the legitimate objectives identified. In those circumstances I am of the view that Irish security for costs law meets the requirements of the jurisprudence of the CJEU and does not require, therefore, either to be adjusted or disapplied in cases involving an assertion of breach of European Union law rights.

8.5 For those reasons I would dismiss the appeal and uphold the order of the Court of Appeal.