

THE HIGH COURT

COMMERCIAL

[2022] IEHC 262

[2021 No. 5835 P]

BETWEEN

BLUE POOL HOTEL LIMITED

PLAINTIFF

AND

**COLUM PETERS, TERESA PETERS, ROUFIS LIMITED AND THE
WILTON PUB LIMITED**

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 6th May 2022

1. This judgment addresses an application by the defendants that the court should revisit an *ex tempore* judgment delivered on 21st December 2021 on their application for an order under s. 52 of the Companies Act, 2014 (“*the 2014 Act*”) requiring the plaintiff to furnish security for their costs of these proceedings. On that occasion, for reasons which I explained at the time, I indicated that, subject to certain conditions described below, I was prepared to make an order requiring the plaintiff to provide security for the defendants’ costs. The defendants subsequently brought the present application. They are unhappy with the conditions imposed by me and they have submitted that the conditions should be vacated. In order to understand how this application arises, it is necessary, in the first instance, to briefly describe the nature of the proceedings before the court and to thereafter describe the nature of the debate which took place on 21st December 2021 and the order made by me on that occasion. In addition, it will be necessary to consider the relevant authorities on the power of a

court to revisit a judgment and also the case law dealing with applications for security for costs by a defendant who is also a counterclaimant.

Background

2. The fourth named defendant is the owner of a public house known as the Wilton Pub situate at Cardinal Way, off Sarsfield Road, Wilton, in the City of Cork. By a contract of sale made between the fourth named defendant of the one part and the plaintiff of the other part on 4th November 2019, the fourth named defendant agreed to sell and the plaintiff agreed to purchase the public house for €2,745,000. On the same day, the fourth named defendant agreed to sell certain business assets relating to the pub to the plaintiff for €565,000.

3. The closing date for both the contract of sale and the asset purchase agreement was initially 12th December 2019. That closing date was subsequently extended on a number of occasions up to and including 11th March 2020. Pursuant to the contract of sale, the plaintiff paid a deposit of €331,000. The deposit was held by the solicitor for the fourth named defendant pending completion of the contract.

4. According to the statement of claim, the first named defendant, acting on behalf of all of the defendants, approached Mr. Patrick Sexton, director of the plaintiff company, prior to the closing date and orally requested that, in lieu of the plaintiff acquiring the pub and the business assets and undertakings by means of the contract for sale and asset purchase agreement, the plaintiff would agree to acquire the pub and the assets through a share purchase arrangement under which it would acquire all of the shares in the fourth named defendant. It is alleged, in para. 14 of the statement of claim, that the plaintiff was already willing and able to complete the contracts as of 12th December 2019 but agreed to proceed by way of a share purchase transaction in the manner requested by the defendants. It is further alleged that, in order to allow

completion of all reasonable and necessary due diligence enquiries by the plaintiff's accountants into the assets, liabilities and business of the fourth named defendant, it was necessary to extend the closing date to 11th March 2020.

5. In para. 17 of the statement of claim, it is alleged that there was substantial delay in the completion of the share purchase transaction. On 24th June 2021, the fourth named defendant caused a completion notice to be served pursuant to general condition 36 of the original contract of sale making time of the essence for completion and affording the plaintiff 28 days to complete the purchase. The purchase was not completed by 21st July 2021 and the fourth named defendant thereafter called upon its solicitor to release the deposit to it pursuant to the provisions of clause 37(a) of the contract of sale. Subsequently, on 19th August 2021, the fourth named defendant's solicitor released the deposit to the fourth named defendant.

6. In the statement of claim, the plaintiff pleads that the completion notice is invalid and of no effect and that the fourth named defendant was not entitled to forfeit the deposit. The plaintiff contends that, at the time the completion notice was served, the contract for sale was at an end and had been replaced by an agreement to purchase the shares in the fourth named defendant. In the statement of claim, the plaintiff seeks a declaration that it is entitled to acquire the pub through the purchase of the shares in the fourth named defendant. It also seeks a declaration that the defendants are estopped from denying the plaintiff's entitlement to acquire the property. In the alternative, the plaintiff seeks a declaration that the fourth named defendant is not entitled to forfeit the deposit.

7. In the defence and counterclaim, the defendants accept that, subsequent to the execution of the contract of sale and asset purchase agreement, there were discussions between the fourth named defendant and the plaintiff in relation to the acquisition of

the business by means of a possible share transaction rather than by means of the existing contract. However, the defendants contend that no concluded or binding agreement was ever reached in relation to a share purchase. In those circumstances, the fourth named defendant contends that it was entitled to serve a completion notice under the existing contracts and to forfeit the deposit of €331,000. As part of the relief claimed in the counterclaim, the fourth named defendant seeks a declaration that it was “*lawfully entitled to forfeit the deposit paid by the Plaintiff pursuant to the said Contract of Sale...*”. For reasons which are explained in more detail below, this plea is of particular relevance to the conditions imposed by me in my judgment on the application for security for costs in December 2021.

8. On 15th November 2021, the defendant brought an application pursuant to s. 52 of the 2014 Act requiring the plaintiff to furnish security for its costs on the grounds that the plaintiff company has no more than €100 in assets and that it will, therefore, not be in a position to meet an award of costs in the defendants’ favour in the event that they are successful in their defence of the proceedings. In their grounding affidavit and in the submissions made on their behalf at the hearing of the application for security for costs on 21st December 2021, the defendants also called into question the validity of the plaintiff’s claim but there is no application to dismiss the proceedings on the grounds that they are bound to fail and, for that reason, I do not believe that this element of the defendants’ submissions are germane to the issue of security for costs.

9. Furthermore, at the hearing on 21st December 2021, there was no dispute between the parties that, on an application for security for costs, the following issues require to be addressed:-

- (a) In the first place, the court has to consider whether there is evidence before it that the plaintiff will not be in a position to meet an award of costs. Insofar as this element of the test is concerned, the plaintiff, very properly, concedes that there is such evidence here;
- (b) The court must next consider whether the defendants have established on affidavit that they have a defence to the claim. Again, the plaintiff has very properly conceded that this condition has been met;
- (c) Where it is established (or conceded) that the plaintiff will not be in a position to meet an award of costs in favour of the defendant and that the defendant has established on affidavit that it has a defence to the claim, the third element of the test to be applied requires the court to consider whether there are special circumstances that exist that would induce the court, in the exercise of its discretion, to refuse to order security. This is where the debate in this case occurred in December 2021. It was accepted by the parties that, insofar as this element is concerned, the onus lies on the plaintiff to establish special circumstances.

10. The species of special circumstances relied upon was based on the fact that, in order to defend the claim now advanced by the defendant by way of counterclaim, the plaintiff will need to advance the matters raised by them in their statement of claim. In broad terms, if the plaintiff is to defeat the counterclaim that the contract is at an end and that the deposit has been validly forfeited, the plaintiff will need to establish that the contract for sale and asset purchase agreement of 4th November 2020 were replaced by a share purchase agreement and that the completion of that share purchase agreement was delayed by the necessary due diligence exercise such that the fourth

named defendant was not entitled to serve a completion notice under the pre-existing contracts or to forfeit the deposit.

11. In the circumstances described in para. 10 above, it is unsurprising that, in the course of his oral submissions on 21st December 2021, it was accepted by counsel for the defendants that the factual matrix relevant to both the plaintiff's claim and the defendants' counterclaim is the same. This is important in the context of an application for security for costs. There is authority to the effect that, where a plaintiff's defence to a counterclaim essentially replicates the case which a plaintiff would make in its statement of claim, security for costs will not be ordered. The decision of Charleton J. in *Oltech (Systems) Ltd v. Olivetti UK Ltd* [2012] 3 I.R. 396 confirms this. In that case, Charleton J., at pp. 412-413 explained the underlying rationale for this approach as follows:-

“A defendant may also be a counterclaimant on a subject matter that identifies as the plaintiff's defence the same issues that the plaintiff company seeks to plead against a defendant as establishing an entitlement to damages. To take a plain example; a baker may sue a manufacturer of flour and claim that the poor quality of the flour has caused a loss of trade or the ruination of a retail business. In those circumstances, the baker is highly unlikely to pay the miller. If the baker sues first, the miller may counterclaim for the price of the unpaid flour. If the baker is an impecunious individual, or operates through a limited liability company of stretched means, the defendant miller may seek an order for security for costs and counterclaim for the price of the flour. Were the action by the baker to be stayed on the basis that a reasonable defence by the miller was in prospect and that the baker was impecunious, an undesirable situation would result. The counterclaiming case of the defendant would be

defended by the plaintiff on the basis of the quality of flour but because the case of the plaintiff had been stayed, even were that defence to counterclaim to be sustained, the plaintiff would not be entitled to damages. In recent similar cases before the High Court, an undertaking has been sought and given by a defendant that its counterclaim on the same subject matter as the plaintiff's claim would not be pursued. This principle is persuasively established in case law from the neighbouring kingdom."

12. In light of that principle, the defendants, on affidavit, indicated that they would not pursue their counterclaim and argued that, in those circumstances, security should be ordered. By so indicating, it was submitted that the mischief identified by Charleton J. in *Oltech* would not arise. However, in the course of the hearing on 21st December 2021, I raised a question with counsel for the defendants as to whether, this meant, that the deposit would require to be returned to the plaintiff in circumstances where, as noted above, it is an integral part of the counterclaim that the fourth named defendant was entitled to forfeit the deposit in the manner described above. I posed that question in circumstances where it struck me that, if the deposit was to be retained by the defendants, they would, in fact, be getting the benefit of an element of their counterclaim. In response to that question from me, counsel for the defendants did not accept that proposition and sought to make the case that justice required that security for costs should nonetheless be ordered. It should be noted that I raised this question with counsel before he completed his opening submission. Counsel did not address it further in his reply.

13. At the conclusion of the argument on 21st December 2021, I adjourned the hearing until a little later in the day when I delivered an *ex tempore* judgment. In that judgment, I indicated that, in circumstances where the defendants were purporting to

retain the deposit, it could not be said that, in truth, they had abandoned their counterclaim. I indicated that, in my view, the effect of what was proposed by the defendants was to give them the benefit of an element of their counterclaim while, at the same time, preventing the plaintiff from defending that element of its counterclaim in the event that security for costs is ordered against it. That did not seem to me to bring the matter within the ambit of the decision of Hamblen J. in *Dumrul v. Standard Chartered Bank* [2010] EWHC 2625 (Comm). It should be noted that the decision in *Dumrul* was one of the English authorities cited by Charleton J. in *Oltech* (to which he refers in the final sentence of the extract from his judgment quoted in para. 11 above).

14. The rationale underlying the approach of the court to refuse security for costs where there is an overlap between a counterclaim advanced by a defendant and the claim advanced by the plaintiff is further explained by Bingham L.J. (as he then was) in *BJ Crabtree v GPT Communication Systems* [1990] 59 BLR 43 at pp. 6-7:-

“It is, however, necessary as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear and, indeed, was not I think in controversy -- that in the course of defending the counterclaim all the same matters as would be canvassed if the plaintiffs were to pursue their claim, but on that basis they would defend the claim and advance their own in a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back. I

have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation.”

15. This principle was applied by Hamblen J. (as he then was) in *Dumrul*. In that case, the defendant bank was counterclaiming for an amount alleged to be due by the plaintiff (a customer of the bank) in response to a claim advanced by the plaintiff against the bank in relation to an alleged failure to properly value foreign exchange options held by him with the defendant. Hamblen J. analysed the case made on both sides and, at para. 10 of his judgment, came to the conclusion that the essential issues between the parties arose both on the claim of the plaintiff and the counterclaim of the defendant. Hamblen J. also noted, at para. 15 of his judgment, that it was conceded on behalf of Mr. Dumrul that if the bank were to withdraw its counterclaim, or undertake to do so, the problem of *“one-sided litigation presented by the Bank’s counterclaim would similarly be removed, and there would be no objection to an order for security on this basis”*. However, the bank had not been prepared to adopt that position. In para. 18 of his judgment, Hamblen J. identified the unfairness to Mr. Dumrul if the bank’s claim could be pursued after his claim was dismissed for failing to provide security for costs. In particular, he identified the following prejudice to Mr. Dumrul:-

- (a) The outcome would be that Mr. Dumrul would have to conduct a defence addressing all the issues underlying his claim, and that he would, if successful, be unable to secure judgment on his claim.
- (b) Mr. Dumrul would, therefore, know that his claim would, if pursued to judgment, have been successful, and would have incurred all the costs required to bring that claim to judgment in the prosecution of his defence of the bank’s counterclaim; but he would be debarred from ever securing judgment on it.

16. Against that background, Hamblen J. indicated that he would only be prepared to make an order for security for costs against Mr. Dumrul if the bank was prepared to undertake to consent to the dismissal of the counterclaim in the event that Mr. Dumrul's claim was dismissed for failure to put up security for costs.

17. Having regard to these authorities, I took the view in my judgment of 21st December 2021 that, although the defendants had indicated that they were prepared to abandon their counterclaim if security for costs was ordered against the plaintiff, the effect of what they proposed (in retaining the deposit) was to give them the benefit of an element of their counterclaim while at the same time preventing the plaintiff from defending that element of their counterclaim. I took the view that this would give rise to the kind of one-sided litigation which Hamblen J. decried in the *Dumrul* case.

18. In light of the approach taken in *Dumrul* and the other cases cited above, it would logically follow that the defendants' application for security should be refused. However, it struck me that, if the defendants were prepared to give up their claim to the deposit, this would remove the obstacle to the grant of the order sought. On that basis, I therefore indicated in my December judgment that, if the defendants were prepared to abandon their claim to the forfeiture of the deposit, that would bring them within the ambit of the *Dumrul* decision. Accordingly, I gave the defendants an opportunity to consider doing that and I indicated that, if the defendants were prepared to abandon their counterclaim (including the claim that the deposit had been validly forfeited), the defendants would be entitled to security for their costs. For that purpose, I proposed to adjourn the matter to 13th January 2022 to see if the defendants would be prepared to go that far. I further indicated that, if, on 13th January 2022, the defendants were prepared to go that far, I would make the following orders:-

- (a) An order requiring the plaintiff to provide security for costs in an amount that I would fix on that date. If the plaintiff failed to do so within a time to be fixed, I indicated that, in light of the urgency of the matter from the defendant's perspective, it would be appropriate that the plaintiff's claim should stand dismissed as from the date of its failure to provide security for costs;
- (b) However, in such event, the decision would be conditional on the defendant not only abandoning its counterclaim but also returning the deposit to the plaintiff within a period to be fixed by the court subject to an appropriate deduction to be made by way of setoff in the event that the defendant is awarded any costs against the plaintiff in these proceedings. In making the latter observation, I stressed that I was not signalling that the defendants have any entitlement to costs, I was simply providing for that eventuality if and when it arose;
- (c) On the other hand, if the plaintiff provides security for costs in such sum as might be fixed on 13th January 2022, the proceedings would continue and the issue as to who should get the deposit would be an issue to be determined in the proceedings in the usual way;
- (d) Finally, I indicated that, if the defendants do not agree to abandon the counterclaim and return the deposit on the terms outlined above, the application for security for costs would be dismissed.

19. The matter was subsequently listed before me on 13th January 2022. On that occasion, counsel for the defendants indicated that my ruling in relation to the deposit had come as "*something of a surprise*" to him and he emphasised that it had not been flagged in the written submissions delivered in advance of the December hearing on

behalf of the plaintiff. In response, I made it clear that I did not accept that counsel had been taken by surprise. I further indicated that I believed my ruling was based on the case law which had been cited on behalf of the defendants and that it had appeared to me that the defendants were seeking to obtain the best of both worlds by, on the one hand, obtaining security for costs and, at the same time, retaining the deposit. Nonetheless, I agreed to allow counsel to make such argument at a further hearing which I fixed for 9th February 2022. I directed the exchange of written submissions in advance of the adjourned hearing.

20. Subsequently, written submissions were delivered on behalf of the defendants on 21st January 2022. However, those submissions did not address the jurisdiction of the court to revisit a judgment previously given. Such submissions were subsequently furnished on 27th January 2022. Written submissions were also delivered on behalf of the plaintiff on 7th February 2022.

21. A further hearing subsequently took place on 9th February 2022 when oral submissions were made by counsel for both sides. In the course of that hearing, the Digital Audio Recording (“*DAR*”) of the relevant exchange between counsel for the defendants and the court on 21st December 2021 was played. It was clear from the *DAR* that counsel for the defendants was given the opportunity at the hearing on 21st December 2021 to address the question posed by me in relation to the deposit. Counsel, very properly, accepted that the court had raised the issue in the course of the December hearing but he maintained that he did not have any prior notice of the question. He also made the case that, in circumstances where the hearing on 21st December 2022 was a remote hearing, his instructing solicitor was not physically present. Had he been physically present, he might have given him instructions to drop that element of the counterclaim in relation to the deposit. Counsel also confirmed

that the defendant would now withdraw that element of the counterclaim. Counsel submitted that, in fact, the defendants had no need to seek such relief in circumstances where they had (so counsel argued) lawfully taken steps to forfeit the deposit in accordance with the terms of the contract between the parties. Counsel for the defendants also argued very forcefully that the imposition of the condition in relation to the deposit constituted a predetermination by the court of the lawfulness or otherwise of the forfeiture and that it did not meet the justice of the case. Counsel also submitted that, if the plaintiff does not provide security, the plaintiff will be entitled automatically to the return of the deposit and that, in such circumstances, the plaintiff may simply walk away with the deposit and abandon its claim for specific performance of the agreement. In such circumstances, counsel urged that the plaintiff will essentially have succeeded in its case against the defendants for the return of the deposit without ever having to prove that the forfeiture was unlawful and without having to provide security for costs. On the other side of the coin, the fourth named defendant will, in those circumstances, have lost the deposit (which it contends had been lawfully forfeited pursuant to the contract) and will have abandoned any possibility of suing for the deposit by virtue of its undertaking not to pursue the counterclaim.

22. It was also submitted on behalf of the defendants that the requirement to provide what counsel described as a “*fortified undertaking*” would represent an undesirable precedent. In particular, he submitted that a “*shelf company*” purchaser that suffered the forfeiture of a deposit could sue the vendor for specific performance and for the return of the deposit in the expectation that, if it did not provide security for the defendants’ costs, it would benefit from its default by automatically obtaining the return of the deposit. It was suggested that such a precedent would be “*far*

reaching” and its potential application would not be limited to contracts for the sale of realty. Counsel also highlighted that the plaintiff, in its February submissions, had not sought to address the justice of the case at all but had confined its submissions to the principles by which a court could revisit an earlier judgment. In that regard, the plaintiff relied upon the judgment of Clarke J. (as he then was) in *Re McInerney Homes Ltd* [2011] IEHC 25 in which he adopted the principles set out in the judgment of the Court of Appeal of England & Wales in *Paulin v. Paulin* [2010] 1 W.L.R. 1057. Counsel for the plaintiff also relied on the judgment of O’Donnell J. (as he then was) in *Re McInerney Homes Ltd* [2011] IESC 31 (on appeal from Clarke J.) where, at para. 74 of his judgment, O’Donnell J. said:-

“It is only in exceptional circumstances where justice requires that course that the Court should reopen proceedings after the delivery of judgment and before the formal order is made.”

23. In contrast, counsel for the defendant sought to rely on a decision of the U.K. Supreme Court in *Re L & B (Children)* [2013] UKSC 8 in which the court rejected the relatively high bar set by the earlier authorities in favour of an approach which looks to *“do justice in the particular circumstances of the case”*. Prior to that decision, the courts of England & Wales had taken the view that strong reasons were required before a court should reconsider a judgment previously delivered by it. At para. 27 of her judgment in that case, Baroness Hale said:-

“27. ...one can see the Court of Appeal struggling to reconcile the apparent statement of principle in [the earlier case law] ..., coupled with the very proper desire to discourage the parties from applying for the judge to reconsider, with the desire to do justice in the particular circumstances of the case... I would agree with Clarke LJ in Stewart v Engel [2000] 1

WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in In re Blenheim Leisure (Restaurants) Ltd, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances.”

The principles applicable to an application to revisit a judgment

24. As noted in para. 25.53 of *Delany & McGrath on Civil Procedure*, 4th Ed., 2018, it is well accepted that, following the delivery of judgment by a judge, the judge has jurisdiction to revise or alter the decision at any time up to the point when the order to be made on foot of that judgment has been perfected. In the present case, no order has yet been perfected on foot of the judgment delivered by me on 21st December 2021.

25. Nonetheless, the jurisdiction to revisit a judgment is sparingly exercised. As the case law demonstrates, there is a relatively high bar that must be surmounted by an applicant before a court will intervene. In short, where a court is asked to reverse its conclusion or substantially change the judgment, strong reasons will have to be identified by an applicant seeking the correction of an alleged error. In contrast, there is greater scope for a judge, after judgment has been delivered but before perfection of the order, to amplify the reasons for a decision.

26. The principles to be applied are identified in the judgment of Clarke J. in *McInerney Homes*. Having referred to the judgment of Wilson L.J. in the Court of

Appeal of England & Wales in *Paulin v. Paulin* [2010] 1 W.L.R. 1057 at para. 30, Clarke J. took the view that the approach taken in that case represents the law in Ireland. The relevant principles which emerge from the decision are as follows:-

- (a) A reversal by a judge of a decision is to be distinguished from an amplification of the reasons given for that decision. Where the reasons are allegedly inadequate, a party should invite the court to consider whether to amplify them before complaining about their inadequacy on appeal. Wilson L.J. stressed that a judge has “*an untrammelled jurisdiction to amplify*” the reasons for a decision at any time prior to the perfection of the order to be made on foot of a judgment.
- (b) The same cannot be said to apply where a party seeks to persuade a court to correct an error in its decision at least where the “*correction*” would involve a reversal of the decision. Whatever may have been the position before *Re Barrell Enterprises* [1973] 1 W.L.R. 19, the decision of the Court of Appeal of England and Wales in that case narrowed the circumstances in which it is considered proper for a court to be asked to reverse its decision prior to perfection of the order. In that case, it was held that, save in “*most exceptional circumstances*”, the successful party ought to be entitled to assume that the judgment given is a valid and effective one.
- (c) Notwithstanding the requirement of exceptional circumstances, Wilson L.J. approved an observation made by Rix L.J. (sitting as a first instance judge) in *Compagnie Noga D’Importation v. Abacha* [2001] 3 All ER 513 at paras. 42-43 that “*exceptional circumstances*” is not a statutory definition and should not be “*turned into a straitjacket at the*

expense of the interests of justice” and that a formula of “strong reasons” was an acceptable alternative to that of “exceptional circumstances”.

27. As noted in para. 22 above, the decision of Clarke J. in *McInerney Homes* was appealed to the Supreme Court where, in the course of his judgment on the appeal, O’Donnell J. indicated that the jurisdiction to reopen and issue previously decided should be an exceptional situation. Similar observations were made by Finlay Geoghegan J. in *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63 at para. 33 and by Hogan J. in *SZ (Pakistan) v. Minister for Justice and Law Reform* [2013] IEHC 95. The reasons why courts do not readily revisit decisions was explained by O’Donnell J. in *Nash v. Director of Public Prosecutions* [2017] IESC 51 where he said, at para. 7:-

“7. *This responsibility flows from the significance of an application to court in respect of a judgment delivered. It is sometimes thought that such applications are not welcomed or encouraged because of the potential embarrassment of an error being publicly identified. As Baroness Hale observed in Re L and B [2013] UKSC 8, while judicial tergiversation is not to be encouraged, it takes courage and intellectual honesty to admit one’s mistake. But those are features required at all stages. The obligation to do justice fairly, and without fear or favour... should extend to a willingness to acknowledge error if justice should require it. History has shown in any event, that courts have entertained applications and exceptionally made orders setting aside judgments already given. Courts are, however, reluctant to entertain such applications for different and good reasons. First, the revisiting of old*

ground inevitably adds to the costs incurred by and the stress imposed upon all the parties involved. It also requires the allocation of scarce time and resources which are therefore necessarily denied to litigants who have not yet had their case heard or considered on appeal. For example, this application has occupied considerable time both in and outside court. More importantly again, such an application in principle runs directly counter to an important value which the law, and it should be added justice accords to finality...” (emphasis added)

28. I appreciate that *Nash* was concerned with a judgment of a final court of appeal. However, very similar considerations arise in the context of a court of first instance. This is clear from the judgment of Rix L.J. (siting as a first instance judge) in *Compagnie Noga D'Importation v. Abacha*. As noted in para. 26 (c) above, Rix L.J. observed that “*strong reasons*” is an acceptable alternative to “*exceptional circumstances*”. This view was also accepted by Clarke J. in *McInerney Homes*. Rix L.J. nonetheless added that it will necessarily “*...be in an exceptional case that strong reasons are shown for reconsideration*”. At paras. 44 to 47 of his judgment in that case, he explained why this is so:-

“44. “*In the present case Noga asks the court to reconsider its judgment because of the submission that it has got the answer wrong. In every case where an appeal is allowed, the court below has, by definition, got it wrong. The solution is to appeal. What is special, what is exceptional about this case? What are the strong reasons? It is not the case of an ex tempore oral judgment. The judgment here, whatever its defects, has been reserved and is the product of substantial reflection...*”

45. *...It is a case where it is said that the judge has got it wrong, on points which have been argued. The very issue for reconsideration is in dispute...*

46. *...*

47. *... it is in the nature of the legal process that, once judgment has been rendered, analysis thereafter becomes clarified and refined... But that is the function of the appeal process. In my judgment, to grant this application... would subvert the appeal process itself. In doing so, it would not answer the interests of justice, but would be the antithesis of justice according to law. There are of course cases where an error of fact or law may be too clear for argument... In such a case, it is better that the error is corrected without imposing on the parties the need for an appeal. But no parallel to Noga's application has been cited to me. It is in my judgment wrong for a judge to be treated to an exposition such as would be presented to a court of appeal. If in such circumstances, a judge would be tempted to open up reconsideration of his judgment, an appeal would not be avoided, it will be made inevitable. Every case would become subject to an unending process of reconsideration, followed by appeal, both on the issue of reconsideration and on the merits."*

29. As outlined above, counsel for the defendants has sought to argue that the approach taken by the U.K. Supreme Court in *L & B (Children)* set a lower bar for an

application of this kind. However, I do not believe that this can be said to represent the law in Ireland. While O'Donnell J. in *Nash* made a passing reference to the judgment of Baroness Hale in *L & B (Children)*, there is nothing in his judgment to suggest that he approved the test laid down in that case. On the contrary, the tenor of his judgment suggests that the jurisdiction to reopen an issue already decided will only be exercised exceptionally and for good reasons. Accordingly, this is the approach that I must take in considering the present application.

Discussion and analysis

30. As noted above, counsel for the defendants has sought to argue that the defendants did not have an opportunity to address the court in relation to the question of the deposit. For the reasons discussed in para. 21 above, I do not believe that this is correct. I acknowledge, however, that it was an issue that was raised by me rather than by the plaintiff. In this context, counsel for the defendant has drawn attention to the judgment of Donnelly J. in the Court of Appeal in *Begley v. Damesfield Ltd* [2020] IECA 171 where the Court of Appeal set aside a decision of Baker J. in the High Court insofar as she made a finding as to the existence of a collateral contract between the parties. The court did so in circumstances where the existence of such a collateral contract was never part of the plaintiff's case and where it had not been pleaded or argued. In para. 98 of her judgment, Donnelly J. noted that no notice had been given to the parties of the intention to take that course by the High Court judge. Furthermore, she noted at para. 100 that:-

“One of the purposes of advocacy is to persuade a decision maker of the correctness of the advocate's position. The appellant was denied that opportunity in the present case.”

31. I do not believe that *Begley v. Damesfield Ltd* provides an appropriate comparator. In that case, it is clear that the High Court judge gave no advance notice of her intention to make a finding of the kind made. In contrast, I specifically raised the issue of the retention of the deposit with counsel for the defendants in the course of the argument. Given that I posed the question at the end of his opening submission, counsel also had the opportunity to further reflect on the question and to receive instructions from his solicitor prior to his closing submissions. It also has to be kept in mind that this was an application in Commercial Court proceedings where I, in accordance with the usual practice, had fully read all of the papers in advance. It is not unusual in such circumstances for a judge hearing such an application to raise points independently of the parties and counsel is expected to be in a position to address any questions posed by the court. Moreover, the question posed by me arose against the backdrop of the *Oltech* and *Dumrul* line of authority on which counsel for the defendants had specifically relied in support of the application for security. For all of these reasons, I cannot accept that *Begley v. Damesfield Ltd.* provides a basis to revisit my December judgment.

32. In addition, counsel for the defendant has argued that the fact that the judgment given on 21st December 2021 addressed an interlocutory motion provides a further ground for revisiting the decision. Counsel for the defendant highlighted, in this context, the observation made by Clarke J. in *McInerney Homes* in para. 3.2 of his judgment to the effect that a distinction can be made between revisiting a final ruling, on the one hand, and a decision made in proceedings which are still “*alive*”. It is true that Clarke J, made such a distinction in his judgment, However, as I understand the approach taken by Clarke J. in his judgment, he put cases in which no final order has yet been made into the latter category and he held that the principles which I have

attempted to summarise in para. 26 above were applicable to that category. Because no final order has yet been made on foot of my December judgment, this case falls into that category. The order proposed by me on 21st December has not yet been perfected. Accordingly, this is a case where it would be possible to revisit the judgment if sufficiently strong reasons could be advanced to support the application. In these circumstances, I do not believe that this submission on behalf of the defendants takes the matter much further. It seems to me that the present application must be assessed by reference to whether there are strong reasons to revisit the judgment.

33. To paraphrase Clarke J. in *McInerney Homes*, it will be a recipe for chaos if courts were too readily to permit parties to revisit interlocutory orders previously made. That said, I accept that there may be cases where a change in circumstances may make it appropriate to revisit an interlocutory order. This is particularly so where the interlocutory order was made on the assumption that a particular set of circumstances would remain in place pending the trial and it subsequently transpires that the underlying circumstances change in an unexpected way. But, that is not what has occurred here. In this case, a new argument is sought to be made which was not previously made as to why it is inappropriate for the court to impose a condition on the grant of security for costs (namely the return of a deposit). I cannot accept that this meets the “*strong reasons*” standard.

34. Lest I am wrong in that conclusion, I will, for completeness, also consider whether I fell into error in making it a condition of the grant of security for costs in this case that the deposit should be returned (less any costs that might be awarded to the defendants). As outlined above, counsel for the defendant has characterised this as a “*fortified undertaking*”. I do not believe that this is an appropriate way in which to

characterise the condition which I imposed. The reason for imposing this condition was to ensure that the order made would comply with the principles underlying the case law discussed in paras. 11 to 16 above. In this context, it is clear from the case law that, ordinarily, security for costs will be refused where a plaintiff's defence to a counterclaim is based on the same or substantially similar facts to those on which the plaintiff must rely in order to sustain the claim made in the statement of claim. In the present case, it was acknowledged that such an overlap exists. The plaintiff will be relying on precisely the same evidence both to sustain its claim and to defend the counterclaim. The authorities demonstrate that, in such circumstances, security for costs will ordinarily be refused. The courts will, however, be prepared to order security for costs where a defendant is prepared to undertake not to prosecute the counterclaim. This course is taken in order to ensure that a defendant is not put at an unfair advantage as a consequence of an order for security for costs. The withdrawal of the counterclaim is regarded as necessary in order to remove the problem of what Hamblen J. described in the *Dumrul* case as "*one-sided litigation*". What he had in mind was that, as a consequence of an order for security for costs, an impecunious plaintiff will be unable to pursue its claim but will nonetheless be forced to conduct a defence of the counterclaim even where that defence is based on the same evidence that would have subtended its claim. In such circumstances, the plaintiff will be required to address all the issues underlying its own claim but without any hope of securing judgment on foot of that claim even where the counterclaim is ultimately successfully defended.

35. I remain of the view that it is necessary to make it a condition of the grant of security for costs that the fourth defendant should repay the deposit to the plaintiff. In the absence of such a condition, I cannot see how the principles explained in the

Oltech and *Dumrul* line of authority can be complied with. Without that condition, the defendant will get the benefit of an element of its counterclaim notwithstanding that the case law establishes that, if security is to be ordered, a defendant must agree not to pursue its counterclaim. If the defendants do not give up the deposit, it cannot be said that they are giving up their counterclaim. On the contrary, they get the benefit of an element of their counterclaim while, at the same time, the plaintiff is prevented from pursuing its claim in respect of the deposit.

36. Counsel for the defendants forcefully argued that the defendants will be exposed to injustice if security for costs is denied to them because of their desire to hold on to the deposit. He suggested that, if the deposit is returned, the plaintiff may decide to abandon the claim and walk away with the deposit leaving the defendants with no mechanism available to them to pursue their claim to the deposit which he contended had been validly forfeited. On an application for security for costs, I cannot make any determination as to whether the deposit was validly forfeited. That is a matter for the trial. That said, I appreciate that counsel may well be right in suggesting that, as a consequence of the order proposed by me, the plaintiff may decide to pocket the deposit and abandon the claim. Nevertheless, it seems to me that this merely identifies why, in this case, there may be good reason why the defendants would not be prepared to give up the whole of their counterclaim as a condition of obtaining an order for security for costs. As the *Oltech* case illustrates, defendants are not always willing to do so. In that case, the defendant had a counterclaim for €2.3 million in respect of the amount due by the plaintiffs for printers and associated office equipment. It is scarcely surprising that the defendant there was not prepared to give up such a valuable claim in order to obtain security for its costs of defending the plaintiff's claim.

37. Counsel for the defendants also submitted that the order proposed by me will encourage unmeritorious claims for specific performance of contracts by impecunious corporate plaintiffs in the knowledge that they will be able to defeat an application for security for costs where the defendant vendor counterclaims for a declaration that it is entitled to retain a deposit. I am not sure that this is an entirely realistic scenario given that most sensible vendors will not wish to enter into a contract with an impecunious purchaser. Moreover, similar considerations could be said to arise in any case where a defendant, as a condition for the grant of an order for security for costs, is required to undertake not to pursue its counterclaim. By any standard, that is an onerous requirement which significantly entrenches on a defendant's commercial interests. Essentially, it forces a defendant to elect between pursuing a counterclaim or obtaining an order for security for costs.

38. I appreciate that the defendants argued in the course of the February hearing that they did not need to advance a counterclaim in this case; that they could have chosen to simply defend the plaintiff's claim. However, the fact is that they chose to pursue a counterclaim. That was an integral element of the factual background against which the application fell to be considered and determined. Furthermore, the defendants argued at the hearing of the application that the *Oltech* and *Dumrul* line of authority governed their application. The suggestion that they did not need to plead a counterclaim was not mooted until the February hearing. In my view, I cannot have regard to that submission since it runs directly counter to the way in which the application was originally argued in December 2021. The time to make that argument was at the December hearing either in response to the question posed by me or in the course of the closing submissions on behalf of the defendants.

39. At the February 2022 hearing, counsel for the defendants also suggested that, if the December hearing had been conducted as a physical hearing, his instructing solicitor would have been in a position to give immediate instructions to counsel to withdraw so much of the counterclaim as sought relief in respect of the deposit. I have to say that I can see no reason why similar instructions could not have been given in the course of a remote hearing. At remote hearings, counsel often have to pause in order to take instructions from their solicitor sent by text or telephone. The court will also be prepared to briefly break a hearing to allow the presenting counsel to confer with co-counsel or solicitor before concluding submissions.

40. Furthermore, the submission summarised in para. 39 above illustrates the reason why strong grounds are required before the court will be prepared to revisit a judgment. After the conclusion of a hearing – or after the delivery of a judgment – it is often possible, in retrospect, for an advocate to think of additional arguments that could have been made or of different positions that could have been taken. Anyone who has ever acted as an advocate will be familiar with such thoughts. However, if a court were to permit parties to seek to revisit judgments in such circumstances, it would lead inevitably to the wholesale rearguing of issues. This would completely undermine the certainty and finality of decisions made in court proceedings. In the words of Rix L.J. in *Noga*, every case would become “*subject to an unending process of reconsideration.*”

Conclusion

41. For all of the reasons outlined above, I am not satisfied that this is a case which merits revisiting the decision made by me in December 2021. Accordingly, I will not interfere with the order proposed by me. The defendants will have to make up their mind as to whether they wish to obtain security for costs on the terms set out in

my judgment. If not, the application for security for costs will stand refused. I will list the matter remotely before me at 10.30 a.m. on Thursday 19th May 2022 for the purpose of making a final order and dealing with costs.

High Court Practice Direction HC 101

42. Finally, in accordance with the above practice direction, I direct the parties to file their written submissions (subject to any redactions that may be permitted or required under the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.