THE HIGH COURT

[2024] IEHC 83

[Record No.] 2021 3963 P

FORTBERRY LIMITED & JAMES FLYNN

Plaintiff

-V-

ALLIED IRISH BANKS PLC, SHANE McCARTHY & EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY

Defendant

Judgment of Mr. Justice Dignam delivered on the 15th day of February 2024.

Introduction

1. The first-named defendant ("*AIB*") seeks an Order pursuant to section 52 of the Companies Act 2014 directing the first-named plaintiff ("*Fortberry*") to provide security for AIB's costs, an Order measuring the level of security, and an Order staying these proceedings until that security is provided.

Legal Principles

2. The principles governing security for costs are well-established.

3. Section 52 of the Companies Act 2014 provides:

> *"Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of*

the defendant if successful in his or her defence, require security for those costs and must stay all proceedings until the security is given."

4. The test on such an application was set down in *Usk and District Residents Association Ltd v Environmental Protection Agency [2006] IESC 1 (*referring to *Interfinance Group Limited v KPMG Peat Marwick (High Court, Unreported, Morris J, 29th June 1998)* (in the context of section 390 of the Companies Act, 1963, the predecessor to section 52 of the 2014 Act):

> "*1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish: -*
>
> *(a) That he has a prima facie defence to the plaintiff's claim, and*
> *(b) That the plaintiff will not be able to pay the moving party's costs if the moving party be successful;*
>
> *2. In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus rests upon the party resisting the order."*

5. The test has been reiterated in a number of more recent judgments including *Coolbrook Developments Ltd v Lington Development Ltd [2018] IEHC 634* and *Quinn Insurance Limited v Price Waterhouse Coopers [2021] 2 IR 70*.

6. The test is a graduated one. The defendant must establish that they have a prima facie defence to the plaintiff's claim. If that is established then they must establish that there is reason to believe on the basis of credible testimony that the plaintiff will not be able to pay the costs. If the defendant establishes those facts, then the court should order security unless the plaintiff establishes special circumstances which mean the Court should not direct security. Clarke CJ put it as follows in *Quinn Insurance*:

> "[*5] ... an initial onus rests on a defendant seeking security for costs to establish that it has a bona fide defence to the proceedings and also that the plaintiff concerned would not be in a position to meet the costs of the proceedings were it to lose and costs be awarded against it. Where both of those matters are established by the defendant to the satisfaction of the court, then security will ordinarily be ordered unless there is a sufficient countervailing*

factor (or a "special circumstance" as that term is used in the jurisprudence) which tilts the balance of justice against the making of an order."

7. The second-named plaintiff, in the replying affidavit he swore on behalf of Fortberry, did not agree that Fortberry would be unable to discharge an award of costs. However, Counsel for Fortberry stated at the hearing that the application was not being resisted on the basis that Fortberry would not be unable to pay the costs if unsuccessful. He also said it was not being resisted on the grounds of any special circumstances. It is therefore not necessary for me to consider the principles applying to those limbs of the test save for the following. Part of Fortberry's case is that the second-named plaintiff ("*Mr. Flynn*") has offered an indemnity in respect of any liability which Fortberry might ultimately be held to have for AIB's costs and therefore, even if I conclude that AIB has a prima facie defence, I should decline to make an order for security for costs. The availability of an indemnity has been considered in a number of cases. While the availability of such an indemnity is not strictly speaking treated as a special circumstance and was not advanced as such on behalf of Fortberry, it is part of the exercise of the Court's discretion and I therefore deal with it below.

Prima Facie Defence

8. The test for what constitutes a prima facie defence has been considered in many cases since as long ago as *Walker v Atkinson [1895] 1 IR 246* and *Denman v O'Callaghan [1897] 31 ILTR 141*.

9. It was set out more recently by Finlay Geoghegan J in *Tribune Newspapers v Associated Newspapers Ireland* (ex tempore, High Court, 25th March 2011). A copy of this judgment appears to be unavailable but it has been quoted in a number of judgments and was incorporated by Finlay Geoghegan J into her judgment in *Webprint Concepts Ltd v Thomas Crosbie Printers Ltd [2013] IEHC 359*. Finlay Geoghegan J said:

"What appears from the judgments in a manner similar to the judgments in relation to summary judgment…, is that the Defendant seeking to establish a prima facie defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish these facts. Mere assertions will not suffice. This appears to me also to follow from the reference in the Superior Court Rules to a defence on the merits.

If such evidence is adduced then the Defendant is entitled to have the Court determine whether or not it has established a prima facie defence upon an

assumption that such evidence will be accepted at trial. Further the Defendant must establish an arguable legal basis for the inferences or conclusion which it submits the Court may arrive at based on such evidence. Insofar as the Plaintiff is submitting that the appropriate test includes an assessment by this Court on the application for security for costs as to whether the defence contended for is likely to succeed at the full hearing or even has a good prospect of succeeding, I reject that submission.

Such an exercise would inevitably require the Court at the interlocutory stage for the application for security for costs to assess the strengths and weaknesses of the respective parties' contentions and cases. The decision of the Supreme Court already referred to appears to me to clearly rule out such an approach. Accordingly, in my judgment, what is required for a Defendant seeking to establish a prima facie defence is to objectively demonstrate the existence of admissible evidence and relevant arguable legal submission applicable thereto which, if accepted by a Trial Judge, provide a defence to the Plaintiff's claim."

10. This passage was cited with approval by Charleton J at paragraph 9 of his judgment in *Olltech (Systems) Ltd v Olivetti UK Ltd [2012] 3 IR 396*. Charleton J also said at paragraphs 4 and 5:

"Approach

[4] It is no part of the task of a court on an application for security for costs to take a view as to who ought to win at trial. In Connaughton Road Construction Ltd. v. Laing O'Rourke Ireland Ltd. [2009] IEHC 7, (Unreported, High Court, Clarke J., 16th January, 2009), this principle was emphasised, at p. 5, by Clarke J. thus:-

> *"3.3 I am mindful of the fact that all of the authorities make clear that the court's assessment must be conducted on a prima facie basis. As was pointed out in Irish Conservation and Cleaning Ltd. v. International Cleaners Ltd. (Unreported, Supreme Court, 19th July, 2001) to do otherwise would be to invite the court, on a preliminary motion, to decide the case. Everything which I say hereafter should, therefore, be subject to the qualification that I am referring, even if not expressly stated, to the various necessary matters being established on a prima facie basis."*

[5] The task for the court, rather than to attempt to decide the case, is to apply the tests mandated by the case law. This approach emphasises that no assessment of ultimate liability ought to be made, much less any decision beyond stating whether there is a reasonable prospect of a defence succeeding at trial. Consequently, these motions should be brief applications. The special circumstances which mandate a court, in its discretion, to refuse to make an order securing the costs of a defendant in advance of trial are, however, the essential complicating factors in such applications that extend their duration. These special circumstances may apply notwithstanding that the defendant has shown that it has a defence which may reasonably be anticipated to succeed and that the plaintiff lacks the funds to discharge the costs order against it, should that come to pass."

11. In *Pagnell Limited v OCE Ireland Limited [2015] IECA 40* Hogan J referred to the passage from *Tribune Newspapers v Associated Newspapers* quoted above and went on to say:

"16. … It follows, therefore, that it is not sufficient for a defendant merely to assert a defence. Recalling again the underlying objective of the section – namely, that defendants should not have to face claims made by limited liability companies who would have insufficient assets to meet an order for costs – a defendant must show that there are reasonable prospects that this is likely to occur unless security is ordered. In this respect and in this particular statutory context, it should be stressed that it is for the defendant to establish a prima facie defence. Contrary to what Hedigan J. may have suggested in his judgment, the fact that the plaintiff has taken no steps to apply to have the defence struck out as unsustainable is not in itself a relevant factor. After all, the prima facie defence requirement imposes a higher requirement on a defendant than that required, for example, to establish a defence to an application for summary judgment where it is merely necessary to show that the defence is simply arguable: see, e.g., Danske Bank v. Durcan New Homes [2010] IESC 22."

12. In *Quinn Insurance v Price Waterhouse Cooper [2021] 2 IR 70* (at paragraph 78) Clarke CJ said:

"While not in issue in these proceedings, I would emphasise that it is important for a court, faced with an application for security for costs, to scrutinise carefully

the basis on which the defendant applying for security seeks to establish a bona fide defence. One of the consequences of the making of an order for security may be that the proceedings will not go ahead. While such an eventuality is an inevitable possibility of the security for costs regime, it does mean that a potentially good claim might not be prosecuted in the event that security is ordered. It is not unreasonable to require a defendant in such circumstances to put forward its defence in sufficient detail to enable the court (and, indeed, the plaintiff) to scrutinise the extent to which a bona fide defence has truly been established. It is not, of course, the case that the court can or should form a view as to the likelihood of any asserted defence succeeding but nonetheless it does seem to me that it is incumbent on a defendant moving an application for security for costs to go well beyond mere assertion."

13. He also said at paragraph 115:

"There is a further aspect to the analysis which, in my view, needs to be considered. I indicated earlier in this judgment that it is appropriate that a court faced with an application for security for costs should carefully interrogate the contention of the defendant applying for security that there is a bona fide defence to the full claim. Putting its cards on the table in that regard is the price which a defendant must pay for seeking the benefit of an order for security.

14. O'Donnell J echoed this in the same case, saying that "*[i]f a defendant does not wish to commit itself to the grounds in its defence, it need not seek security for costs*". He also agreed with Clarke CJ that it was important that a defendant seeking security for costs should not be allowed to make its case on the basis of bare and unsubstantiated averments.

15. It seems to me that the principles can be summarised as follows: (a) an applicant for security for costs must establish that it has a prima facie defence to the claim; (b) where that is a defence based on fact they must adduce evidence or demonstrate the existence of evidence and must establish an arguable legal basis for the inferences or conclusions which they say should be drawn from the evidence; and where the defence includes a legal defence they must show the existence of relevant legal submission; (c) a mere assertion that the applicant has a particular defence on the merits is insufficient if that assertion is unsupported by any evidence; (d) it is not sufficient for an applicant to simply refer to its Defence though that may be sufficient where the matter traversed is

the very issue to be resolved in the case; (e) the court must carefully scrutinise or interrogate the claimed defence; (f) it is not, however, necessary for an applicant to prove his defence on the balance of probabilities at the application for security stage; and (f) it is unnecessary for the Court to consider the respective merits of the parties' competing contentions as the Court's concern is whether the applicant has established that it has a prima facie defence to the respondent's claim.

Application of the Test

16. As noted above, in essence of Fortberry's position is that AIB does not have a prima facie defence and that, even if the Court is satisfied that it has a prima facie defence, I should refuse the relief on the basis that Mr. Flynn has offered an indemnity.

Prima facie defence

17. The general background is that Fortberry obtained a number of loan facilities from AIB between 2004 and 2007 and Mr. Flynn acted as guarantor for some of those facilities. In particular, it appears that by a facility letter of the 1st March 2007, AIB offered the facilities to Fortberry (the affidavits in places mistakenly refer to the plaintiffs as the defendants and vice versa). Various charges over three properties, Apartment 5 Aston House, Aston Quay, Dublin 2, 10 Anglesea Street, Dublin 2 and Unit 2 Bracken Road, Sandyford, Dublin 18 (referred to as "*5 Aston House*", "*Anglesea Street*" and "*Bracken Road*" respectively) were to be provided as security. A further facility was provided by letter of the 10th April 2008 to be secured by all sums charges over the same properties and a guarantee by Mr. Flynn for €2,500,000. That guarantee was given on the 13th May 2008.

18. In separate proceedings (*Allied Irish Banks Plc v Fortberry Limited, James Flynn & Ors Record No. 2013/2019P*), AIB sued on foot of these facilities and guarantee and on the 20th April 2016 Fortberry consented to judgment in the sum of €5,182,308.06 and Mr. Flynn consented to judgment in the sum of €2,500,000 before Gilligan J. A stay was placed on the judgment subject to certain conditions including that Fortberry would grant mortgages to AIB in respect of the three properties and that AIB was not precluded from registering judgment mortgages.

19. It is pleaded in the Statement of Claim in the instant proceedings that on the 12th May 2016, Fortberry executed mortgages over the properties at 5 Aston House, Bracken Road and 10 Anglesea Street. While the consent order referred to Fortberry granting mortgages over all three properties (presumably on the basis of what the court was told by the parties) and this is pleaded in the Statement of Claim, it appears to be common case that Mr. Flynn was the owner of 10 Anglesea Street and that he executed the mortgage in respect of this property. In September 2016 AIB registered judgment mortgages against the properties.

20. On the 21st October 2016, AIB appointed the second-named defendant *("Mr. McCarthy"*) as receiver over the three properties.

21. By Global Deed of Transfer of the 2nd August 2018, AIB assigned its interest in the matters specified in clause 1 and the schedules to the Deed to the third-named defendant ("*Everyday*"). I return to the detail of this.

22. In a separate set of proceedings ("*In the matter of a Bankruptcy Petition by Allied Irish Bank plc abd James Flynn Record no. 3872P")* AIB brought bankruptcy proceedings against Mr. Flynn on foot of his guarantee of Fortberry's debt. Everyday was substituted for AIB in those proceedings though this substitution was appealed and judgment was awaited at the time of the hearing. In further proceedings, Mr. Flynn brought personal insolvency proceedings where he obtained a protective certificate though the proposed arrangement was rejected by the Circuit Court and by the High Court.

23. The instant proceedings were then issued on the 2nd June 2021 and the Statement of Claim was delivered on the 15th June 2021. The Statement of Claim is lengthy and detailed, running to 21 pages and 47 paragraphs. However, Mr. McGinty, who swore the grounding affidavit, summarised the case against AIB as comprising nine issues. Fortberry did not disagree with this summary and this is broadly the way the matter was approached at the hearing. I will therefore adopt it. The nine issues are:

(i) A challenge to the appointment by AIB on 21st October 2016 of Mr. McCarthy as receiver over properties;

(ii) A challenge to the bankruptcy proceedings against Mr. Flynn;

(iii) A challenge to the assignment of the debt/facilities/mortgage/judgment by AIB to Everyday by Global Deed of Transfer;

(iv) An order directing the disclosure of the price paid by the Everyday for the said assignment;

(v) That the plaintiffs have no liability to AIB whether pursuant to the facilities/mortgages/judgment/judgment mortgages or at all;

(vi) An indemnity from AIB for the difference between the sum of €2.6 million and the sum paid by Everyday for the assignment in the Global Deed of Transfer;

(vii) An order directing AIB to transfer the facilities/mortgages/judgments set out in the Global Deed of Transfer to Everyday;

(viii) An order restraining AIB (or its servants or agents) from marketing the properties for sale and from selling them;

(ix) Claims for damages based on these matters.

24. In fact, it is only necessary to consider some of these in detail. The challenge to the bankruptcy proceedings against Mr. Flynn (point (ii) above) is not relevant to the particular question of whether AIB has a prima facie defence to Fortberry's claim in the instant proceedings as those bankruptcy proceedings are against Mr. Flynn. It may be relevant to the exercise of the Court's discretion, if satisfied that there is a prima facie defence to the other claims, and particularly to the question of whether the Court should refuse security for costs on the basis that Mr. Flynn has offered an indemnity in respect of Fortberry's liability for costs. In relation to point (v), AIB does not claim that Fortberry has any liability to it and therefore this point is simply not in issue. Similarly, AIB does not claim to have any right to sell the properties and therefore point (viii) is not in issue for the current discussion. The claim for damages is based on the other matters and therefore it does not need to be considered separately.

25. Thus, the Court has to decide whether AIB has a prima facie defence in respect of Fortberry's claim that:

(a) the appointment by AIB of Mr. McCarthy as receiver was invalid;

(b) the assignment of the debt/facilities/mortgages/judgment/judgment mortgages from AIB to Everyday by Global Deed of Transfer was in breach of contract or breach of duty

(c) AIB should disclose the price paid by Everyday for the facilities, mortgages, judgment and/or judgment mortgages;

(d) AIB should indemnify Fortberry in respect of the difference between €2.6 million and the price paid by Everyday;

(e) an order directing AIB to transfer the judgment, mortgages, judgment mortgages to Everyday or to take such steps as are necessary to perfect any such transfer.

26. I have no hesitation whatsoever in concluding that AIB has a prima facie defence in respect of (c) and (d). These points are based on the premise that AIB was under an obligation to permit Fortberry to redeem the debts for the same amount for which a third-party was willing to buy them. This is clear from the following paragraphs of the Statement of Claim:

(a) at paragraph 12(iii) and (iv) of the Statement of Claim it is pleaded:

"(iii) That the Plaintiffs had a contractual and/or equitable right to redeem or discharge the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages and/or the Properties at any price or value offered by any third party purchaser and/or assignee, and/or at least at a better price and/or value thereto, and/or should be given a reasonable opportunity, including relevant information, to do so;

(iv) That the First Named Defendant would not seek to transfer and/or assign the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages to a third party for a lesser sum than which the Plaintiffs were prepared to pay and/or offer;"

(b) at paragraph 26(i) and (ii) and paragraph 38(iii) and (iv) it is pleaded that the assignment to Everyday was in breach of contract and duty in that the plaintiffs were not given any opportunity to discharge or redeem the facilities,

mortgages, judgment or judgment mortgages at the price paid by Everyday and the assignment was at a lower price than the plaintiffs were prepared to pay; and

(c) The reliefs sought included:

"3. A Declaration that the assignment of the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages in or around 2 August 2018 was in breach of contract and/or the duties owed to the Plaintiffs in that it failed to provide the Plaintiffs with any opportunity, or, reasonable opportunity, to discharge and/or redeem the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages at any price or value offered by any proposed third party purchaser, including the Third Named Defendant;

4. An Order directing the First Named Defendant to furnish the price paid, if any, by the Third Named Defendant for the purchase of the Facilities and/or the Mortgages and/or the Judgment Mortgages."

…

"6. An Indemnity and/or Contribution in respect of the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages in respect of the difference between the sum of €2.6 million and the price paid, if any, by the Third Named Defendant for the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages or alternatively, for such other amount as this Honourable Court may consider fit or appropriate."

27. Fortberry did not point to any contractual provision under which AIB was obliged to permit Fortberry to redeem the debts for the same amount as a third party was willing to pay for them and the proposition that the general law imposes such an obligation is a novel one. This, of course, does not mean that Fortberry can not succeed at trial but the novelty of the proposition in itself readily leads to the conclusion that AIB has a prima facie defence to the claim.

28. This reasoning also applies to point (b), i.e that the assignment to Everyday was in breach of contract, at least in the terms in which it is pleaded in the Statement of Claim because the sole claim pleaded against AIB in respect of the assignment is that

Fortberry was not given an opportunity to redeem for the same or a better price as was paid by Everyday as set out in the paragraphs from the Statement of Claim quoted above. It is the case that in its claim against Everyday, Fortberry pleads two other bases for suggesting that the assignment was not lawful. In paragraph 30(i) and (ii), under the heading "*Particulars of Misprepresentation and/or Inducement to Enter Into Contractual Relations on the Part of the Third Named Defendant and/or its Servants or Agents*", the plaintiffs plead that Everyday:

> *"(i) Misrepresented that it was the lawful owner of the Facilities and/or the Mortgages, and/or the Judgment and/or the Judgment Mortgages, despite the fact that, inter alia, it had (a) failed, refused and/or neglected to amend the title Judgment, which remains in the name of the First Named Defendant to date, and/or (b) failed, refused and/or neglected to transfer the Mortgages and/or the Judgment Mortgages on the relevant folios and/or registry into its name and/or control;*
> *(ii) Misrepresented that the purported assignment and transfer of the Loans and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages took place on 2 August 2018, when, for instance, the registration of the mortgage took place by the First Named Defendant over Unit 2. Block 2, Bracken Road, Sandyford, Dublin 18 on Folio 85748L Co. Dublin only took place on 2 October 2018; therefore it is unclear how a lawful assignment, certainly of the First Named Defendant's interest in this property, could occur (two months earlier) on 2 August 2018."*

However, these are pleaded specifically against Everyday. The only case that is pleaded against AIB in respect of the assignment is the failure to give Fortberry the opportunity to redeem. It must follow from what I said in the proceedings paragraphs that AIB has a prima facie defence to his claim as pleaded.

29. However, during the course of the exchange of affidavits for this application, and in the course of submissions, Fortberry also sought to challenge this assignment on different grounds. Fortberry pointed to alleged defects in the documentation relating to the assignment to make the case that the assignment was not valid or effective and therefore AIB did not have a prima facie defence to the challenge to the assignment. The alleged defects include:

(i) AIB pleads in its Defence that AIB had transferred the facilities and/or mortgages, and/or judgment and/or judgment mortgages. There are three properties involved but Schedule 1 of the Global Deed of Transfer only

refers to two relevant mortgages: one between Fortberry and AIB of 12th May 2016 and one between Mr. Flynn and AIB of the same date (which must be 10 Anglesea Street). Therefore, it is unclear what was actually transferred by the Global Deed of Transfer.

(ii) the registration of AIB's ownership of the mortgage over Bracken Road only occurred after the date of the assignment to Everyday (the same point as is pleaded against Everyday at paragraph 30(ii) of the Statement of Claim);

(iii) the transfer of AIB's ownership of the charge over Bracken Road to Everyday has not been registered on the Folio so therefore not everything has been transferred to Everyday;

(iv) if there has been no assignment of Bracken Road then Mr. Mc Carthy can not act in relation to it;

(v) three judgment mortgages are referred to in the schedule - one of them refers to Mr. Flynn and 10 Anglesea Street and the others are referred to as being between "N/A" and (Allied Irish Bank plc"), i.e. they do not refer to Fortberry;

(vi) a judgment mortgage on Folio 85478L was only registered after the date of the assignment. This is the Bracken Road property;

(vii) the underlying judgment was not transferred pursuant to the Global Deed of Transfer and the underlying proceedings in which judgment was obtained have not been amended into Everyday's name (the same point is pleaded against Everyday at paragraph 30(i) of the Statement of Claim);

(viii) clause 7.15 of the loan terms and conditions only permits the assignment of the facilities to, inter alia, "a *financial institution*" and Everyday is not a financial institution; and

(ix) the necessary "*goodbye*" letter was not sent by AIB or received by Fortberry.

30. The question of whether or not a defendant has established a prima facie defence must be determined by reference to the pleadings in the case. As noted above, none of

these points form part of Fortberry's (or Mr. Flynn's) pleaded case against AIB. As discussed above, the sole claim against AIB in respect of the assignment is that Fortberry was not given an opportunity to redeem the debt for the same or a better price than Everyday paid for the assignment. Fortberry may have only become aware of some of these points during the exchange of affidavits for this application. However, Fortberry has not brought an application to amend the Statement of Claim or even indicated an intention to do so and has not delivered a Reply to Defence. In my view, therefore, these issues are simply not in the case against AIB and it could not properly be said that AIB does not have a prima facie defence to a challenge to the assignment on these grounds because it would amount to saying that it does not have a prima facie defence to a claim that has not been made against it.

31. There is a further difficulty with this approach in the particular circumstances of this case. On the one hand, Fortberry claims that AIB does not have a prima facie defence because, due to these matters, it has not established on a prima facie basis that it has assigned its interest in the facilities, mortgages, judgment or judgment mortgages to Everyday, but on the other hand it seeks an Order compelling AIB to complete all steps necessary to complete the transfer of its interest. There is a fundamental inconsistency in this approach.

32. A motion for security for costs should not become a forum for a forensic assessment either of the defence to the claim that is actually advanced in the Statement of Claim or of the rights or wrongs of things that are said in the exchange of affidavits but which do not arise from the pleaded case. It is not a forum for raising matters which are not part of the pleaded case and then pointing to "*holes*" in the defendant's response to these issues. There has to be a consideration of both but only insofar as is necessary to determine whether the defendant/applicant has established a prima facie defence. That is why Charleton J said in *Olltech (Systems) Ltd v Olivetti Ltd* that "*… these motions should be brief applications*. *The special circumstances which mandate a court, in its discretion, to refuse to make an order securing the costs of a defendant in advance of trial are, however, the essential complicating factors in such applications that extend their duration.*"

33. Fortberry also challenges the appointment of Mr. McCarthy as receiver (point (a)). Fortberry seeks a declaration that the appointment of Mr. McCarthy is null, void and of no effect.

34. A number of different bases were advanced in the Statement of Claim and during the exchange of affidavits including that:

(i) a receiver should not have been appointed because Fortberry had already agreed a sale of two of the properties;

(ii) an incomplete deed of appointment in respect of 10 Anglesea Street was exhibited and initially no deeds of appointment in respect of 5 Aston House or Bracken Road were put in evidence;

(iii) when the deeds of appointment in respect of 5 Aston House and Bracken Road were eventually put in evidence they were defective because the execution sheet on both contain handwritten notation stating "*Property known as apartment 5, Aston House, Aston Quay, Dublin 2*".

(iv) there is no evidence of a mortgage deed in respect of 5 Aston House or Bracken Road and no mortgage conditions are in evidence in respect of 5 Aston House of Bracken Road. There is therefore no evidence of a power to appoint a receiver;

(v) even if AIB was entitled to appoint a receiver under statute, there is no evidence of the statutory provisions having been complied with, eg. no evidence of a 3 month statutory demand;

(vi) even if AIB established that they had an equitable mortgage (as was submitted by AIB as a fall-back position), a Court Order appointing a receiver would have to be obtained and there is no evidence of same or no claim being made by AIB that such an order was obtained.

(vii) even if the appointment of Mr. McCarthy was valid and effective, it did not survive the assignment of the facilities and mortgages to Everyday.

35. Point (i) and point (vii) of these are expressly pleaded in the Statement of Claim. However, point (vii) (which is pleaded at paragraph 32 and 39 of the Statement of Claim) does not relate to the appointment of Mr. McCarthy and I therefore deal with it separately. Point (i) is pleaded at paragraph 14 of the Statement of Claim where it is pleaded that "…*on or about 21st October 201, in breach of contract and/or duty, the First Named Defendant purported to appoint the Second Named Defendant as receiver over the Properties. There was no basis for the purported appointment whereby the first*

named plaintiff had already agreed to a sale of two of the Properties" and in paragraph 38(1) where it is pleaded that AIB "*unlawfully appointed the Second Named Defendant as Receiver over the Properties, despite the fact that the first named plaintiff had already and previously agreed to a sale of two of the properties*". None of the others are expressly pleaded in the Statement of Claim. However, it seems to me that paragraph 15 of the Statement of Claim is sufficiently broad to encompass these matters for the purposes of this application (other than perhaps point (iii)). Paragraph 15 states:

> "*Further, and/or in addition to the foregoing, it is denied that the purported appointment of the Second Named Defendant complied with all of the legal formalities required under the Mortgages or by law, and the First and Second Named Plaintiffs require proof thereof*."

36. The matters at points (ii) to (vi) go to the question of whether the formalities required by the mortgages or by law were complied with and are therefore encompassed by paragraph 15. Indeed, it was not submitted by AIB that Fortberry could not raise them as part of their case.

37. In relation to the first point - that the receiver should not have been appointed because two of the properties were sale agreed- Counsel for Fortberry fairly accepted that he could not point to any specific legal bar on the appointment of a receiver in those circumstances. He was relying on the duty of the mortgagee to not act unfairly, unreasonably or capriciously (this is not an exhaustive list) and explained that Fortberry's case is that as there was an agreement to sell the properties it was unnecessary to appoint a receiver and therefore the appointment was in breach of these duties. In its defence, AIB denies that the appointment of Mr. Mc Carthy as receiver "*was in breach of contract and/or duty as set out in paragraph 14 of the Statement of Claim or at all*." Such a claim requires *inter alia* legal submissions on the scope and nature of a mortgagee's duties against a particular factual backdrop and it seems to me to follow that AIB has a prima facie defence to such a claim.

38. The second point is that an incomplete deed of appointment in respect of 10 Anglesea Street was exhibited and no deeds of appointment were exhibited in respect of Aston House or Bracken Road. The deed in relation to 10 Anglesea Street was incomplete in that it did not contain an execution sheet. At paragraph 5 of his replying affidavit on behalf of Fortberry, Mr. Flynn said that "…*I believe that the First Named Defendant has not properly put before this Honourable Court objective evidence do (sic) demonstrate that it has a prima facie defence*" and went on to say at paragraph 8:

"8. Therefore, it is, in fact not possible for this Honourable Court to be satisfied that the appointment of the Second Named Defendant over the Properties, particularly 5 Aston House and the Bracken Road property, were validly done and complied with all formalities, including that they were executed "under seal or under the hand of a duly authorised officer" of the First Named Defendant."

39. Mr. McGinty replied by a further affidavit on behalf of AIB. He did not address the point about the incomplete deed of appointment relating to 10 Anglesea Street and did not exhibit a complete copy. However, this was not pursued at all at the hearing but in any event it relates to Mr. Flynn's claim against AIB rather than Fortberry's claim in circumstances where it appears to be common case that Mr. Flynn owns that property and is the mortgagor. Mr. McGinty did address the point about the absence of the deeds of appointment in respect of 5 Aston House and Bracken Road and remedied this by exhibiting those deeds. This seems to me to address the complaint based on the failure to exhibit the deeds.

40. However, it is these deeds which give rise to the third point, i.e that the execution pages attached to both of the deeds contained handwritten notations reading "*Property known as apartment 5, Aston House, Aston Quay, Dublin 2*". Of course, there is nothing concerning about this being on the deed actually relating to 5 Aston House but it was also on the execution page in respect of Bracken Road. This led Fortberry to argue that the inference should be drawn that the same execution page had been attached to both deeds and, therefore, the appointment of Mr. McCarthy in respect of Bracken Road had not been executed. This, of course, is a very serious allegation and should be properly pleaded. It goes beyond an allegation that the formalities were not complied with. However, I am, in any event, satisfied, at least on a prima facie basis, that the two pages are in fact different. The position of the signature of the second Authorised Signatory is different on both sheets and there is a marked difference between the signature of the second witness on both sheets. It is also the case that this complaint could only go to the question of whether AIB has a prima facia defence in respect of Bracken Road.

41. It was also submitted on behalf of Fortberry that there was no evidence that the Common Seal of AIB was affixed to the deeds or that the Authorised Signatory did in fact have authority to sign the deeds. In my view this strays into attempting to try the case. The deeds expressly state that the signatories were present when the seal was affixed

and the signatories are each described as *"Authorised Signatory".* I am satisfied that this amounts to prima facie evidence of those matters, even allowing for the need for the Court to scrutinise carefully the basis of the claimed prima facie defence particularly where this point was not directly or specifically raised in Mr. Flynn's affidavits and therefore AIB was not given a specific opportunity to deal with the point.

42. The fourth point raised by Fortberry is that AIB does not have a prima facie defence to the claim that the appointment did not comply with the formalities because there are no mortgage deeds exhibited in respect of 5 Aston House or Bracken Road and there are no mortgage terms and conditions exhibited in respect of mortgages relating to those properties. These are in fact two separate issues. The first relates to whether there are mortgages at all and the second relates to whether, if there are mortgages, AIB had the power to appoint a receiver over the properties and whether that power was exercised in accordance with the applicable terms and conditions.

43. In relation to the first issue, the plaintiffs themselves plead that they executed mortgages over the properties. At paragraphs 7-9 of the Statement of Claim, the plaintiffs plead that they consented to judgment and that Gilligan J placed a stay on execution of that judgment subject to, inter alia, Fortberry granting mortgages to AIB over the three properties and go on to plead at paragraph 10:

> *"10. Subsequent to the foregoing, and in accordance with the conditions of the stay placed on the Judgment in or around 12 May 2016, the* ***First Named Plaintiff duly executed mortgages in favour of the First Named Defendant over the Properties ("the Mortgages").*** *"* [emphasis added]

44. Furthermore, there is also evidence in the other documentation of mortgages having been executed. In correspondence exhibited by Mr. Flynn, solicitors acting on behalf of Fortberry and Mr. Flynn in the other proceedings stated *"[W]e refer to the above and now enclose herewith the original mortgages in duplicate in respect of…"* and then identify each of the three properties at 5 Aston House, Bracken Road and 10 Anglesea Street. In the Company Printout from the Companies Registration Office exhibited to Mr. McGinty's grounding affidavit, charges dated the 12th May 2016 are registered over Bracken Road (Folio 85478L) and 5 Aston House "*as security for the payment and discharge of the Secured Liabilities in favour of Allied Irish Banks plc*".

45. In circumstances where Fortberry itself pleads that it executed mortgages over 5 Aston House and Bracken Road, where solicitors acting on its behalf stated that they

were forwarding the mortgages, and where charges are registered over 5 Aston House and Bracken Road in the Companies Registration office, the fact that the mortgage deeds are not exhibited can not be fatal to AIB's claim to have a prima facie defence to this aspect of the claim.

46. The second issue under this point is that the relevant mortgage conditions are not exhibited. The obvious significance of this is that (i) any contractual power to appoint a receiver must derive from the mortgage terms and conditions and without evidence of same the Court can not conclude that the mortgagee, AIB, had a contractual power to do so or even that there is a prima facie case that they had such power, and (ii) without evidence of the terms and conditions the Court can not be satisfied that the appointment was in compliance with the terms and conditions or that there is a prima facie case of such compliance. The second of these arises directly from the pleaded case which puts AIN on proof of compliance with the formalities. It seems to me that in the absence of evidence of the applicable terms and conditions, I simply can not conclude that AIB has established a prima facie defence to the claim that the formalities in respect of the appointment of the receiver were not complied with. In the authorities referred to above, Finlay Geoghegan J said in *Tribune Newspapers* that the defendant must "*objectively demonstrate the existence of evidence upon which he will rely to establish*" the facts upon which the defence is based; Clarke CJ stated in *Quinn Insurance* that a defendant must put forward its defence "*in sufficient detail to enable the Court… to scrutinise the extent to which a bona fide defence has truly been established*" and "*Putting its cards on the table... is the price which a defendant must pay for seeking the benefit of an order for security".* The minimum that is required to show that there is a prima facie case that the appointment was in compliance with the terms and conditions is to adduce evidence of those terms and conditions or, if they are not available, to explain why that is so. AIB does neither. The conditions applicable to the mortgage in respect of 10 Anglesea Street are exhibited to Mr. McGinty's grounding affidavit together with the Land Registry Form 51. It states that "[*T]his Mortgage incorporates the Loan Mortgage Conditions as if they were set out in this Mortgage in full and the Mortgagor acknowledges that the Mortgagor has been given a copy of the General Mortgage Conditions and has read them and agrees to be bound by them. The term 'Secured Liabilities' has the meaning given in the 'General Conditions'.*" These provide for the appointment of a receiver and there is a prima facie case that Mr. McCarthy was appointed in compliance with the terms and conditions in respect of 10 Anglesea Street (but that is a mortgage between between Mr. Flynn and Fortberry). It does appear very likely that the same terms and conditions applied to the other two mortgages as they were created on the same day, but this is not expressly stated on behalf of AIB and, in the absence of that, such a conclusion

would require the Court to engage in speculation. It is important to recall that the plaintiffs had not raised any specific complaint about the failure to exhibit the applicable terms and conditions until the hearing itself and I had regard to this. However, as discussed above, the plaintiffs had put AIB on proof that the exercise of the power of appointment by AIB was in compliance with the formalities. These formalities must include the terms and conditions**.** In order to establish a prima facie defence to this, AIB had to point to some evidence of the applicable terms and conditions and that the appointment was in compliance with them. They have not done that and in those circumstances there is no evidential basis upon which I could conclude that there is a prima facie case that the appointment was in accordance with them.

47. However, that in itself is not determinative because AIB adopts two fall-back positions:

(i) because there is a mortgage in respect of each of the properties, AIB had the statutory power to appoint a receiver under section 108 of the Land and Conveyancing Law Reform Act 2009 or

(ii) it had an equitable mortgage under the loans.

48. I consider each of these in turn.

49. Section 108 of the 2009 Act provides that a mortgagee may appoint a receiver in certain circumstances where the mortgage is by deed and the statutory terms are not expressly varied (section 96(3)) of the 2009 Act). Those circumstances are where:

(i) following service of notice on the mortgagor requiring payment of the mortgage debt, default has been made in payment of the debt or part of it for three months after service of the notice, or

(ii) where some interest under the mortgage or, in the case of a mortgage payable by instalments, some instalment representing interest or part interest and part capital is in arrears and unpaid for two months after becoming due or;

(iii) there has been a breach by the mortgagor or some person concurring in the mortgage, of some other provision contained in the mortgage or any statutory provision, including this Act, other than a covenant for payment of the mortgage debt or interest.

50. There is undoubtedly a prima facie case that the circumstances in (ii) apply, i.e. that there has been default of payment by Fortberry in terms of paragraph (ii). The

evidence is that the mortgages were executed on foot of the Order of Gilligan J of the 26th April 2016. Gilligan J had determined (by consent) that Fortberry was indebted to AIB on foot of the loan facilities in the sum of €5,182,308.66. Thus, the mortgages were to secure that indebtedness. No case at all has been made by Fortberry that any payment (whether of capital or interest) has been made in respect of that indebtedness since the date of judgment or expiry of the stay. This is notwithstanding Mr. McGinty saying in his affidavit on behalf of AIB that "*I understand that this debt has not been repaid to Everyday*" and "*I say and believe that these debts remain outstanding to Everyday*". Thus, there is a prima facie case that some interest or payment representing interest or part interest and part capital is in arrears for two months after becoming due and therefore one of the conditions under section 108 for the appointment of a receiver have been satisfied.

51. However, section 96(3) of the 2009 Act expressly provides that the provisions relating to the powers and rights conferred by Chapter 3 of the 2009 Act (which includes section 108) "*take effect subject to the terms of the mortgage (other than in the case of a housing mortgage*". The effect of this is that the statutory terms apply only if and insofar as the mortgage does not provide otherwise. In the absence of the terms and conditions, the Court can not determine whether or not the mortgage terms and conditions are different to the statutory terms.

52. It seems to me that this precludes the Court from concluding that there is a prima facie case that AIB was entitled to appoint a receiver on the basis that the statutory conditions had been met because the mortgage could have provided for different conditions.

53. It is the case that in very many cases the mortgage terms and conditions remove or lessen the limitations on the appointment of receivers provided for by section 108 and thus I considered whether I could conclude that even if the applicable mortgage terms and conditions were different to the statutory provisions they would be likely to have made it easier to appoint a receiver and therefore that there was a prima facie case that the conditions had been complied with. I also considered whether I could proceed on the basis that the same terms and conditions applied to 5 Aston House and Bracken Road as to 10 Anglesea Street. However, to proceed on either of these two bases would require the Court to engage in speculation and I do not believe that is open to me, particularly having regard to the very clear statements in the authorities as to the obligations on a defendant who seeks security for costs and as to how the court must approach such an application.

54. AIB's second fall back position in respect of the appointment of the receiver is that even in the absence of evidence of a legal mortgage and the applicable terms and conditions they have an equitable mortgage on foot of the loan agreement and the consent judgment. For the purpose of this application it can readily be accepted that there is a prima facie case that AIB (or now Everyday) holds an equitable mortgage. However, this does not establish a prima facie case in respect of the claim that the appointment of the receiver was invalid. Firstly, as discussed above, the existence or otherwise of a prima facie defence must be assessed by reference to the pleadings. It has not been pleaded that AIB (or its successor) has an equitable mortgage or that it relied on such a mortgage in appointing the receiver. Secondly, such an appointment would have to be on foot of a court application and there is no evidence of any such application having been made.

55. However, the fact that AIB has not established a prima facie case to these bases of the challenge to Mr. McCarthy's appointment is not determinative in circumstances where I am satisfied that there is a prima facie case that there was a valid assignment of the facilities, mortgages, judgment and judgment mortgages to Everyday. It must follow from this that there is a prima facie case that any liability arising from the alleged wrongful appointment of Mr. McCarthy as receiver has been assigned to Everyday. Indeed, this seems to flow from the plaintiffs' pleadings. At paragraph 29 of the Statement of Claim, it is pleaded (presumably as an alternative to the claim that the assignment was invalid) that "*…the Third Named Defendant, and/or its servants or agents, took any assignment or transfer of the Facilities and/or the Mortgages and/or the Judgment Mortgages subject to the contractual, equitable, fiduciary and/or statutory duties owed by the First Named Defendant to the Plaintiffs, as outlined aforesaid. As such, the Third Named Defendant "stood in the shoes" of the First Named Defendant as secured leader. Moreover, the Third Named Defendant took any lawful assignment subject to any "equities" which had accrued to the Plaintiffs in respect of the Facilities and/or the Mortgages and/or the Judgment and/or the Judgment Mortgages.*" If Everyday stands in the shoes of AIB then there must be a prima facie case that Everyday has assumed liability for any wrongful action on the part of AIB in respect of the appointment of Mr. McCarthy and that AIB therefore has a prima facie defence even if the appointment of Mr. McCarthy was wrongful.

56. The final point raised by Fortberry in relation to Mr. McCarthy's status is that his appointment did not survive the assignment to Everyday and that AIB has adduced no evidence such as a deed of novation. I am entirely satisfied that there is a prima facie case that this is not a matter for AIB. There is a prima facie case that it can not go to the validity or otherwise of Mr. Mc Carthy's appointment. The question of the survival of Mr.

McCarthy's appointment and therefore whether he can continue to act post-assignment is a matter for Mr. McCarthy and/or Everyday rather than AIB. Indeed, this case is pleaded against Mr. McCarthy rather than AIB (paragraph 32 and 39(viii) of the Statement of Claim). If the appointment has not survived the assignment then this is a claim against Mr. McCarthy or Everyday and not AIB. It would therefore be a matter for Mr. McCarthy and Everyday to establish that Mr. McCarthy, if properly appointed in the first place, continues to be validly appointed and acting as receiver.

57. Finally, it was submitted on behalf of Fortberry that in circumstances where AIB claims that it has assigned everything to Everyday but the transfer has not been registered on the relevant folios, then Fortberry must succeed in relation to Relief 7, i.e., an Order directing AIB to transfer the judgment, mortgages, and/or judgment mortgages to Everyday and to complete such steps as may be necessary to perfect any such transfer. However, to decide on this basis that AIB does not have a prima facie defence would be entirely illogical. Before the Court could make the Order sought at relief 7 it would have to decide the substantive issues in AIB's favour. In the context of this motion, the logic of this argument would be that AIB should not get security for costs because it had established a prima facie defence to the substance of case and as a consequence Fortberry would be entitled to one of the reliefs. It seems to me that this is illogical and is not consistent with the purpose and rationale of the security for costs provision. Counsel for Fortberry, accepted this logic and conceded that a party could not be denied security for costs on the basis that it did not have a prima facie defence to a small part of the case but did have such a defence to the larger part of the case.

58. AIB also relies on Fortberry's delay in instituting and prosecuting these proceedings. The chronology is set out above. Proceedings were only instituted almost five years after the appointment of Mr. McCarthy. I accept that delay could be a defence. However, it is not a defence which is pleaded. As discussed above, the existence or otherwise of a prima facie defence must be assessed by reference to the pleadings. I therefore can not determine that the plaintiffs' delay gives rise to a prima facie defence for the purpose of this application. I will express no view as to whether or not there has been material or culpable delay as this might have to be determined at another stage in these proceedings.

Indemnity

59. As noted above, Counsel for Fortberry stated that the application was not being contested on the basis that Fortberry would not be unable to pay the costs or on the basis of special circumstances.

60. However, Mr. Flynn offered an indemnity in respect of any liability for AIB's costs which Fortberry might ultimately be found to have and it was argued that if the Court were satisfied that AIB had established a prima facie defence this indemnity should be accepted rather than security for costs being directed. As I am satisfied that AIB does have a prima facie defence, I must consider this offer of indemnity.

61. I am not satisfied that it is appropriate to direct or accept this indemnity in the circumstances of this case.

62. The mere fact that the person giving an indemnity may ultimately not be able to discharge such an indemnity is not determinative. This is clear from the judgment of Clarke J in *Quinn Insurance* where he said:

> *"…there may be circumstances where ordering security in the form of an indemnity from those who can be shown to be likely to benefit should the proceedings be successful may be an appropriate form of security even where those persons might not necessarily be a mark for all of the costs which might be awarded. To take but a simple example, if it were the case that an individual could bring proceedings without having to give security for costs, where is the injustice to a defendant if a corporate vehicle of that same individual, which was impecunious, could bring similar proceedings with the benefit of an indemnity from the individual in respect of the costs which might be awarded against the impecunious corporate vehicle should the defence succeed. Such a defendant would be no worse off than were it sued by an individual in exactly the same circumstances. These are matters which a court should consider in attempting to minimise the overall risk of injustice.*

63. However, the fact that the individual may not be able to discharge the indemnity is clearly a significant factor in the Court's balancing exercise. That is also clear from Clarke J's judgment because he also went on to say:

> *"That being said, it should also be recognised that failing to provide full security does expose a defendant to the almost certain consequence that a successful defence of the proceedings will nonetheless leave that defendant with*

irrecoverable costs and thus a significant detriment. I would consider, therefore, that the default position should continue to be that full security in monetary form should be provided but that the court may depart from that position if it considers it necessary and appropriate so to do to minimise the risk of injustice across the board."

64. It must also follow that the Court must consider the extent of the likelihood that the individual will not be able to satisfy the indemnity.

65. There are very particular circumstances in this case. Mr. Flynn is indebted to either AIB or Everyday in the amount of €2,500,000 on foot of Gilligan J's Order. He also sought a Personal Insolvency Arrangement in 2019 and currently benefits from a Protective Certificate. Furthermore. Mr. Flynn did not adduce any evidence to the effect that there was even a possibility that he would be able to satisfy his indemnity other than to assert a willingness to give one. It seems to me, therefore, that this goes beyond a situation where Mr. Fynn "*might not necessarily be a mark for all of the costs"* and it seems that there is a very high likelihood that he would not be in a position to discharge the costs or even a significant part of them.

66. In those circumstances, there is a very strong basis for concluding that to accept or direct an indemnity from Mr. Flynn in place of an order for security for costs would be tantamount to refusing to grant security and would frustrate the very purpose of an Order.

67. I am therefore not satisfied that it is appropriate to accept or direct an indemnity in place of directing security for costs.

Quantum

68. While ultimately the quantum of the security to be directed is a matter for the discretion of the Court, the default position is that the Court should direct security in the full amount of the probable costs.

69. AIB relies on a report of Mr. Cyril O'Neill, Legal Costs Accountant, of the 9th February 2022 in respect of the probable amount of the costs. The evidence adduced on behalf of Fortberry is that of Mr. Flynn. He is a former taxing master.

70. I prefer the evidence of Mr. O'Neill for the following reasons. Firstly, while Mr. Flynn can be accepted as having expertise in the area, he can not be treated as an expert for the purpose of giving evidence and his evidence can not be treated as expert evidence. O'Moore J said in *McKillen v Tynan [2020] IEHC 189* (paragraph 59), inter alia:

> "*59. Paragraphs 25 and 26 of O'Leary are particularly helpful in setting out the recognised and desirable requirements placed on expert witnesses as to the nature and form of the evidence which they provide to the Court. The principles set out by Cresswell J in the case of "The Ikarian Reefer" [1993] 2 Lloyds Reports 68 are quoted with the approval by Mr. Justice MacMenamin, and I believe represent the law in this jurisdiction. These principles are:-*
>
> > *"(1) The evidence of such witnesses should be, and be seen to be, independent and uninfluenced in form or content by the exigencies of litigation;*
> >
> > *(2) Such witnesses should provide independent assistance to the court by way of objective, unbiased, opinion in relation to matters within their expertise and should never act as advocates;*
> >
> > *(3) Such witnesses should state the facts or assumptions upon which their opinion is based, and consider material facts which could detract from their concluded opinion…*"

71. O'Moore J also referred to the statement by O'Donnell J in *Emerald Meats Limited v The Minister for Agriculture & ors [2012] IESC 48* that:

> "*In theory, expert witnesses owe a duty to the Court to provide their own independent assessment. It is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the Court's determination.*"

72. Mr. Flynn lacks the independence required to give expert evidence. He is a party to the proceedings and is a director of Fortberry, who would be directly affected if ordered to give security for costs. Secondly, Mr. O'Neill's expert opinion is reasoned and considered. Mr. Flynn's opinion and the basis for it is limited to what he says in paragraph 43 and 44 of his replying affidavit. He says:

"43. Insofar as the amount of security is concerned, I say and believe that the costs sought are entirely excessive and that in my opinion, as a former taxing master, reasonable costs for a case of this nature would be in the region of 100,000 for a 3-4 day trial, which would tally up with what was ordered by the Court of Appeal in the aforementioned Netterville proceedings.

44. Therefore, I believe that if security is to be awarded in monetary terms, it should be considerably less than what is sought by the First Named Defendant."

73. In my view, therefore, the only evidence as to the likely quantum of costs to which any weight can be given is that of Mr. O'Neill.

74. At the very end of his submissions, Counsel for Fortberry indicated that he was instructed that if the Court was disposed to granting security for costs, Fortberry could obtain a costs accountant's report to deal with the question of costs. It was unclear whether an adjournment was being sought even at that late stage for that purpose. This was clarified by Counsel for Fortberry after Counsel for AIB had completed his reply. It was indicated that Fortberry was either seeking an adjournment or, alternatively, if the Court, having reserved its judgment, decided that security should be ordered, that Fortberry be given time to obtain a report before the Court determined the question of quantum.

75. I was not satisfied that the hearing should be adjourned or that I should, having decided to direct security for costs, adjourn the question of quantum until Fortberry obtains an expert report for the following reasons.

76. To allow hearings of motions such as this to be split in two without very good reason would be entirely inconsistent with the efficient administration of justice and the efficient use of court resources which in turn would have an adverse impact on the availability of court resources for other litigants. I do not believe that a good reason has been established.

77. Firstly, there is very little detail indeed given in Mr. Flynn's affidavits as to why a costs accountant's report was not available for the hearing. Mr. Flynn deals with this in paragraph 6 and 7 of his second affidavit (which itself was delivered to explain why the original replying affidavit was not sworn on time). The context was that the motion was originally returnable on the 25th April 2022; Fortberry was given three weeks to deliver a replying affidavit; when the matter came back before the Court on the 23rd May 2022,

Fortberry was given a further period of three weeks to deliver the affidavit; it was not delivered within this time period either and ultimately it was delivered on the morning the matter was next in Court, ie., the 11th July 2022. Mr. Flynn says that "*the delay occurred primarily due to difficulties in obtaining a costs accountancy report"* and that:

> *"7. Ultimately, however, I say what occurred was that the costs accountant which we usually instruct then got Covid, which meant that a decision was taken that this deponent – as former Taxing Master – would simply give my opinion on the costs put forward by the First Named Defendant*."

78. There is no detail whatsoever given as to when a costs accountancy opinion was first sought, when the costs accountant got Covid, whether he was unable to work while he had Covid, how long he was unable to work, when he returned to work, when Fortberry knew that he would not be able to furnish a report, and why a report from a different costs accountant was not sought.

79. Secondly, no real explanation has been given as to why Fortberry did not seek to submit a costs accountant report at some later stage. Counsel for Fortberry explained that when the replying affidavit was filed late, the Court directed an explanatory affidavit (Mr. Flynn's second affidavit) explaining the delay and left over the question of whether Fortberry's replying affidavit should be admitted to the judge hearing the motion. This was subsequently overtaken by AIB agreeing that it could be admitted. Counsel for Fortberry submitted that because they did not know if even their replying affidavit would be let in, they did not think they should try and have a further affidavit admitted. This is unsustainable in circumstances where no steps at all were taken in relation to possibly admitting a further affidavit; for example, an application could have been made to O'Moore J, to this Court at the beginning of the hearing, a letter could have been sent to the other side's solicitor asking for consent, or at the every least a desire to obtain a costs accountant's report could have been expressed in the affidavits filed on behalf of Fortberry. None of these steps were taken. Indeed, the opposite appears to be the case from Mr. Flynn's second affidavit where he says clearly that "*a decision was taken that this Deponent – a former Taxing Master – would simply give my opinion on the costs put forward by the First Named Defendant*."

80. In those circumstances, there is no good reason upon which the Court could grant an adjournment or accede to the suggestion of a further hearing on the question of the quantum of costs.

81. Counsel for Fortberry, on instructions, also made submissions as to the appropriate level of costs for individual items set out in Mr. O'Neill's expert report, such as the estimates given for solicitor professional fees, brief fees for Senior and Junior Counsel, and refreshers. However, in the absence of any expert evidence on these matters it seems to me that Mr. O'Neill's opinion is essentially unchallenged.

82. That is not to say that the Court should or does accept Mr. O'Neill's opinion unquestioningly. The Court has sufficient expertise to be able to reach its own views on certain matters such as the likely length of the trial. It is also the case that certain matters set out in Mr. O'Neill's report were overtaken by events.

83. Mr. O'Neill records that he was advised that the hearing would be likely to last seven days. The plaintiffs are of the view that it will take considerably less time than AIB's estimate. It is always difficult to estimate how long a trial will take, particularly before all the interlocutory stages such as discovery are completed. However, having considered the pleadings in this case and the number of issues raised, including, for example, the case being made that Everyday is being controlled by an external party, I am of the view that an estimate of seven days is far from unreasonable or inaccurate and certainly seems to me to be more accurate than 3-4 days. I will therefore approach the assessment of quantum on that basis.

84. It is also necessary to deduct the figure given by Mr. O'Neill for Senior Counsel in respect of this motion (as Senior Counsel was not briefed).

85. It was submitted on behalf of Fortberry that account must also be taken of the fact that there are two plaintiffs and that there are some elements of the claims which are individual to the different plaintiffs and that if an order is made for security in the full amount then Fortberry would be giving security for AIB's costs in respect of Mr. Flynn's claim. I accept that this is correct. Mr. O'Neill does not give a view on this issue. Counsel for both parties made submissions on this and were widely apart, with counsel for Fortberry suggesting that it meant that the estimate of costs must be reduced by 50% and counsel for AIB submitting that it was a relatively insignificant factor and should only lead to a reduction of approximately 10%. It seems to me that the reality is likely to be somewhere between those figures. This is not a forensic exercise. It cannot be in circumstances where there is no expert's report dealing with the question but, in circumstances where the burden of proof is on the applicant, it seems to me that any

benefit must be given to the respondent (Fortberry). I would therefore reduce the overall quantum by 35% from the figure given by Mr. O'Neill.

86. Thus, I assess the appropriate level of security at the amount stated by Mr. O'Neill in his report minus the figure in respect of Senior Counsel for this motion and then the remaining overall figure reduced by 35%.

87. I will ask the parties to complete the calculations based on the above and to submit the figure for the purpose of drawing up the Order. I will resolve any dispute in relation to these calculations. I will then make an Order directing security for costs in that amount and will stay the proceedings pending the provision of that security.