

*Unapproved  
No redactions needed*



**COURT OF APPEAL**

**CIVIL**

**Neutral Citation No. [2022] IECA 142**

**Court of Appeal Record No. 2022 /40**

**Donnelly J**

**Faherty J**

**Collins J**

**BETWEEN**

**PEMBROKE EQUITY PARTNERS LIMITED**

*Plaintiff/Appellant*

**AND**

**EILEEN CORRIGAN and JAMES PATRICK GALLIGAN**

*Defendants / Respondents*

**JUDGEMENT of Mr Justice Maurice Collins delivered on 24 June 2022**

**Background**

1. The Plaintiff/Appellant, Pembroke Equity Partners Limited (“*the Company*”) appeals from an order of the High Court (Meenan J) made on 23 November 2021 which awarded the Defendants/Respondents (“*the Defendants*”) the costs of a motion for security for costs they had brought against the Company (“*the motion for security*”).

2. Before addressing the motion for security further, it is necessary to say something more about the underlying proceedings.
3. Those proceedings began life in May 2012 as a claim for summary judgment in a total sum of €409,304.12. That sum was said to be the balance due by the Defendants, inclusive of interest, arising from a loan of €300,000 advanced by the Company in May 2006. In due course, the Company applied to the Master for liberty to enter final judgment (in an increased amount, due to the accrual of further interest). However, that application was opposed by the Defendants and on 24 July 2014 the Master made an order by consent adjourning the proceedings for plenary hearing and directing the delivery of pleadings in the ordinary way.
4. The Company delivered its Statement of Claim in July 2015. It pleads the terms of the loan facility and says that the loan was provided for the purposes of funding the acquisition by the Defendants of a pharmacy on Dame Street called the *City Pharmacy*. As of the delivery of the Statement of Claim, the sum being claimed by the Company had increased to €556,068.99.
5. The Defendants delivered their Defence in June 2018. It effectively traverses, or puts the Company on proof of, all material matters pleaded in the Statement of Claim. In addition, it pleads a defence of set-off in proceedings referred to as “*the City Pharmacy Proceedings*”. It is necessary to say something about those proceedings as they are relevant to the motion for security. They involve claims for damages for breach of

contract, negligence, breach of duty and misrepresentation brought by (*inter alia*) the Second Defendant, Ms Corrigan arising from the acquisition of the City Pharmacy. The Defendants are the vendors of the pharmacy business (which was operated by a company called City Pharmacy Limited, which is one of the plaintiffs in those proceedings), the two partners in a firm of accountants who had acted as accountants for City Pharmacy Limited prior to its sale and the Company. The accountants are also shareholders in the Company. The essential claim made in those proceedings is that the purchasers were induced to pay a grossly-inflated price for the City Pharmacy by reason of inaccurate financial information and/or negligent financial advice provided to them by the accountants and the Company. The Defence delivered in these proceedings also sets out in detail the complaints of the Defendants as to the actions of the Company.

6. A Reply to this Defence was delivered in June 2019 taking issue with it.
7. It appears that the claims made in the other proceedings against the accountants has been compromised. The claim against the Company remains.

## **The Motion for Security**

8. On 6 November 2019 the solicitors acting for the Defendants wrote to the Company's solicitors indicating an intention to seek security for costs. The letter stated that a review of the Company's "*latest accounts*" indicated that it appeared to have no income, negligible assets and significant debt. On that basis, it was suggested, there was reason to believe that the Company would be unable to pay the Defendants' costs in the event that they were successful in the defence of the proceedings. The letter went on to seek confirmation that the Company would provide security and indicated that, in default of such confirmation, the solicitors anticipated instructions to issue a motion for security under Order 29 RSC and/or section 52 of the Companies Act 2014 ("*Section 52*").
  
9. The motion issued on 11 November 2019, before the Company had an opportunity to respond. The notice of motion sought an order pursuant to Section 52 and/or Order 29 requiring the Company to furnish security and a stay on the proceedings pending such security. No specific amount of security was sought. The motion was grounded on an affidavit sworn by the Second Defendant in which she averred that the Defendants had a good defence, making reference in that context to the fact that the Company had consented to the remittal of its summary claim to plenary hearing. As regards the financial position of the Company, she referred to its most recently filed accounts and also exhibited a review of those accounts undertaken by a firm of accountants, Blackthorn Capital, which suggested that the Company was "*grossly insolvent with excess current liabilities of €5.175m*". Ms Corrigan also addressed the issue of delay.

Finally, she exhibited a report from Behan & Associates, legal costs accountants, which estimated the Defendants' costs of defending the proceedings at €194,441 (inclusive of VAT).

10. A replying affidavit was sworn by Hilary Haydon, a director of the Company, in September 2020. He asserted that the Defendants had delayed for a period of nearly eight years in bringing an application for security and said that it would be unfair if the Defendants were permitted to erect a "*further obstacle in the form of an order for security*". He explained at some length why she considered that the Defendants did not have any *bona fide* defence to the Company's claim and after discussing the Company's accounts, stated her belief that "*on proper analysis*", there was no reason to believe that the Company would not be in a position to pay the Defendants' costs if its claim was unsuccessful. Mr Haydon exhibited a report from Cyril O' Neill & Co, legal costs accountants, estimating the Defendants' costs at €110,638 (inclusive of VAT).
  
11. A number of further affidavits were then exchanged, focused mainly on the financial position of the Company. Ms Corrigan put in evidence a detailed "*Security for Costs Report*" prepared by Kirby Healy Chartered Accountants which concluded that there was no prospect of the Company being in a position to meet an adverse costs award. In response, Mr Haydon exhibited a report from a Mr Mark Hutch, accountant, expressing the contrary view. Issues relating to subordination of debts and the extent to which the Company had the support of its creditors were debated. For the purposes of this appeal, it is not necessary to discuss the detail of these issues. It is enough to say that there was a heated dispute as to whether a fundamental prerequisite for the making of an order

for security for costs under Section 52 - “*that there is reason to believe that the company will be unable to pay the costs of the defendant*” – was satisfied or not.

12. In total, 5 substantive affidavits were sworn, with exhibits running to many hundreds of pages.

### **The Hearing in the High Court and the Order under Appeal**

13. In due course the motion for security was ready to be heard and on 18 March 2021, it was fixed for hearing for 2 days, commencing on 23 November 2021. However, on 16 November 2021 (more than 2 years after the issuing of the motion) the Company's solicitors wrote to their opposite numbers stating that, while their client remained of the view that there was no basis for the motion, it was willing to lodge €120,000 by way of security. The letter made it clear that the offer to lodge security was "*without admission of any obligation*" and solely to avoid delay (the letter had earlier suggested that the motion for security was a "*tactic for the purposes of delaying the hearing of the main action*"). The letter made it clear that the offer was an open offer which would be brought to the attention of the High Court at the commencement of the application.
14. In response to a letter from the Defendants' solicitors pointing out that the offer made no mention of costs, and asserting that the offer had validated the necessity for the motion and that all the Defendants' costs had to be discharged if the motion was to be withdrawn, the Company's solicitors stated that the costs of the motion should be costs in the cause.
15. That was the state of play when the matter came on before Meenan J in the High Court on 23 November 2021. By then the Defendants had obviously resolved to accept the offer of security made and counsel for the Defendants, Mr O' Callaghan SC (who also appeared for the Defendants in this appeal) asked the court to make a formal order to lodge the €120,000 by way of security within 7 days. That order was duly made by

consent. He then applied for the costs of the motion, on the basis that costs should follow the event. He submitted that his clients had had to bring the motion and the Company should have agreed to put up security much earlier and, not having done so, the Defendants should have their costs. Opposing the costs, counsel for the Company, Mr Hayden SC (who also appeared for the Company in this appeal) characterised the motion as a delaying tactic and emphasised the delay in the motion being brought. He also stressed the fact that the Defendants had accepted a substantially lower sum than that sought by them, which he suggested amounted to an acknowledgement that they would only have been entitled to security from the time it was first requested. He referenced his client's position as to its financial solvency and capacity to pay the costs and as to the merits (or lack of merits) of the Defendants' defence and explained that the only reason that the Company had agreed to provide security was to stop further delay and get the matter on for hearing. He concluded by applying for costs on the basis that the Company had "*succeeded on the event*", apparently on the basis that the Defendants had agreed to accept a substantially lower amount by way of security than they had sought. Though the transcript is unclear at this point (the hearing was conducted remotely), it appears that Mr Hayden suggested, in the alternative, that the costs of the motion should be made costs in the cause.

16. The Judge gave his ruling immediately. Referring to the letter of 16 November and the Company's stated position that the Defendants were not entitled to security, he considered that it "*really can't have it both ways.*" He had to have regard to the effect of the letter and he was satisfied that its effect "*was to effectively concede the matter of security for costs.*" It followed that the Defendants had been correct to bring the motion



because, if the motion had not been brought, the offer to lodge security would never have been made. On that basis, it appeared to the Judge that, for the purposes of section 169 of the Legal Services Regulation Act 2015, the Defendants had been “*entirely successful*” in their application for security. It followed that they were entitled to their costs. However, the Judge considered it appropriate to put a stay on the order for costs given that it might be that the Defendants would ultimately not be successful in their defence of the proceedings.

17. The formal order made by the High Court orders, by consent, that the Company lodge the sum of €120,000 to the credit of the action as per the attached lodgement schedule or, in the alternative, enter into security by bond in that amount with an approved guarantee society, within 7 days and orders that there be a stay on the proceedings until such security is provided. The order also provides for the payment of the Defendants’ costs of the motion, subject to the stay imposed by the Judge.

## **The Appeal**

18. The Company says that the High Court erred in making the costs order it did. It asks this Court to set aside that order and substitute for it an order reserving the costs pending to the trial of the action.

### **The Standard of Review**

19. Before addressing the arguments advanced by the Company in support of its appeal, it is necessary to recall that, in an appeal from a costs order made by the High Court in the exercise of the significant discretion conferred on that court by sections 168 and 169 of the Legal Services Regulation Act 2015 (“*the 2015 Act*”) and by Order 99 RSC, this Court is not at large. The appeal does not involve a *de novo* assessment of where the costs should fall here. Rather, this Court is essentially concerned with whether the order under appeal was or was not within the range of orders reasonable open to the Judge to make in the circumstances presented to him. If, applying the appropriate principles, the order was within the range of orders reasonably open to the Judge, then this Court should not interfere with it: *O v Minister for Justice* [2021] IECA 293, paras 30 & 51-52.
20. For the reasons that I shall explain, I am of the opinion that the order under appeal was well within the range of orders reasonably open to the Judge to make. Adopting the language used by Bingham MR in *Roache v News Group Newspapers Ltd* [1998]

EMLR 161 (at 166) – which has been cited very frequently in this jurisdiction – it is quite clear that the Defendants were “*really the winner(s)*” and the Company was “*really the loser*” of the motion for security. That inescapable fact is reflected in, and provides an adequate basis for, the order made by the High Court here.

### **The Grounds advanced by the Company**

#### *Preliminary*

21. In their written submissions, the Company states that there is effectively one issue in the appeal, “*namely whether the Judge exercised his discretion correctly*”. The Company then identifies and addresses a number of questions which it say arises in addressing that “*overarching issue.*”
22. I agree that there is a effectively one issue in this appeal. However, that issue is not whether the Judge exercised his discretion “*correctly*”, at least if that is intended to mean that the order made by the Judge was the order which this Court would have made had the application for costs been made to this Court in the first instance. As is evident from *O v Minister for Justice* and the authorities discussed in it, that is not the threshold for review. The issue is not whether the Judge’s order was “*correct*” but, rather, whether it was within the range of orders reasonably open to him.
23. Standing away from the detail of the arguments advanced by the Company, a number of points are clear. In the first place, the Judge undoubtedly had power to make the

order that he did, having regard to the provisions of Section 168, and in particular section 168(2)(c) of the 2015 Act.<sup>1</sup> That is so whether or not the hearing on 23 November 2021 is properly to be regarded as the *determination* of an interlocutory application for the purposes of Order 99, Rule 2(3) RSC. Secondly, in doing so he was obliged by Order 99, Rule 3(1) RSC to have regard to the matters set out in section 169(1) of the 2015 Act. Section 169(1) embodies the general principle that costs follow the event (expressed in terms of a party who is entirely successful being entitled to an award of costs unless the court orders otherwise). That, according to the Supreme Court in *Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535 is the “*overriding start point on any question of contested costs*” . While *Godsil* was a pre-2015 Act case, in my view that same principle animates its provisions and those of Order 99 (recast). Thirdly, the Judge here took the view that the Company had effectively conceded the matter of security and that the outcome of the motion vindicated the Defendants’ decision to bring the motion because otherwise they would not have obtained security for their costs. In my opinion, it was open to the Judge to take that view: indeed it is difficult to see how any other view might properly have been taken. In those circumstances, the Defendants were presumptively entitled to their costs and the real issue was whether there were countervailing factors which made it appropriate to make some different order – whether an order for costs on some discounted basis or an order reserving the costs or making them costs in the cause. A number of countervailing factors were pressed in the

---

<sup>1</sup> There was no dispute that the costs issue here fell to be determined by reference to the provisions of the 2015 Act and of Order 99 RSC (recast) (inserted by SI 584/2019). Part 11 of the 2015 Act came into operation in October 2019 but the recast Order 99 only came into operation on 3 December 2019, after the issue of the motion. But the appeal proceeded on the basis that Order 99 (recast) applied to the costs application in the High Court.

High Court and again on appeal to this Court. The Judge clearly considered that those factors did not justify any departure from the general rule. In my view, the Judge was entitled to take that view and it follows that the appeal must fail.

*The Relevance of Section 169(1) of the 2015 Act*

24. The first question identified by the Company is whether the provisions of section 169(1) of the 2015 Act applied to the costs determination here. Section 169(1) provides that “[a] party who is entirely successful in civil proceedings is entitled to an award of costs unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings...” including the matters set out at (a) to (g). The Company submits that this provision applies only to the substantive determination of civil proceedings and has no application to the costs of an interlocutory application such as was at issue here. Accordingly, it says, the Judge erred in having regard to section 169. The Company recognises that, even if it is correct in this contention, it does not dispose of the appeal because the Judge still had a discretion to make the order that he did. However, the Company says, the Judge unduly restricted his discretion by applying section 169(1).
  
25. At the level of general principle, that argument has considerable force. Although the issue does not appear to have definitively determined, the limited authority opened to the Court suggests that, in its own terms, section 169(1) applies only to the awarding of costs at the conclusion of proceedings: see the (*obiter*) observations of Haughton J (Donnelly and Faherty JJ agreeing) in *McFadden v Muckno Hotels Ltd* [2020] IECA

110, at para 30, as well as those of Murray J (sitting as a High Court judge) in *Daly v Ardstone Capital Limited* [2020] IEHC 345, at para 14.

26. However, as the Defendants observed in response, section 169(1) cannot be read in isolation. It must, firstly, be read with the provisions of section 168 of the 2015 Act. More importantly, for present purposes, it must be read with the provisions of Order 99 RSC, Rule 3(1) of which provides in relevant part that:

*“The High Court, in considering the awarding of the costs of any action or step in any proceedings ... shall have regard to the matters set out in section 169(1) of the 2015 Act, if applicable.”* (my emphasis)

27. According to Murray J in *Daly v Ardstone Capital Limited* the effect of this provision is that “*at least in a case where the party seeking costs has been entirely successful – it should lean towards ordering costs to follow the event.*” (para 15(d)). Murray J was specifically addressing the costs of interlocutory applications. I agree with his analysis of the interaction of section 169(1) and Order 99, Rule 3(1) in this context. I would add that there is nothing surprising about a broad presumption – and that is all it is – that a party who is “*entirely successful*” in an interlocutory application should get their costs. That was, after all, the essential position before the enactment of the 2015 Act: *Veolia Water UK plc v Fingal County Council (No 1)* [2006] IEHC 240, [2007] 2 IR 81, at pages 85-86, especially paras 2.5, 2.6 and 2.8. Nothing in the 2015 Act or in the recast Order 99 suggests any intention to alter that position. On the contrary, Order 99, Rule 2(3) RSC repeats the provisions of former Order 99, Rule 1(4A) - inserted into Order

99 in 2008 - which clearly reflects a policy that costs should generally be determined on the determination of interlocutory applications (subject to the important qualification, discussed further below, that it must be possible to do so “*justly*”). It appears to me that, if costs are generally to be determined at interlocutory stage, it can only be on the basis of a general rule that the successful party should get their costs.

28. Indeed, Mr Hayden accepted that, as regards interlocutory applications, the combined effect of Order 99, Rule 3(1) and Section 169(1) of the 2015 Act is that the successful party should presumptively get their costs or, as he put it, that costs should follow the event.<sup>2</sup>

29. It follows that, assuming that the Judge was correct to consider that the Defendants had been “*entirely successful*” in the motion for security – and that is the subject of separate dispute – he was entitled to take the view that the Defendants were presumptively entitled to their costs and that did not involve any improper limitation on his discretion..

---

<sup>2</sup> At one point in his submissions, Mr Hayden appeared to suggest that the effect of Order 99, Rule 3(1) was only to require a court to have regard to the factors set out at section 169(1)(a)-(g). That would have the perverse effect of requiring a court to have regard to factors which are intended to be considered in the context of considering whether to depart from the general rule in section 169(1), without having to have regard to the general rule itself. It would also mean that, save where a final order was being made in civil proceedings, there would be no presumption that the successful party should get their costs. Finally, any such argument faces an additional hurdle in that Order 99, Rule 3(1) applies not just to any “*step in any proceedings*” but also to “*the costs of any action.*” In any event, as I have said, Mr Hayden ultimately accepted that the rule that costs follow the event applies to interlocutory matters.

*Were the Defendants “Entirely Successful”?*

30. Next it is said that the Judge erred in taking the view that the Defendants had been “*entirely successful*”.
31. I am not certain whether the Company advances any challenge to the Judge’s view that the Defendants had been “*successful*” in their motion. As already noted, the Judge took the view that the Company had effectively conceded the matter of security and that the outcome of the motion vindicated the Defendants’ decision to bring the motion because otherwise they would not have obtained security for their costs. Clearly – and correctly - the Judge considered that the Defendants had obtained something of value by pursuing the motion. That being so, he was plainly entitled to take the view that the Defendants had been “*successful*”.
32. In this context, the Judge should not be criticised for not being persuaded that the Company’s offer was prompted only by a pragmatic desire to avoid further delay in the proceedings. In the circumstances where the Company’s offer was made more than 2 years after the issuing of the motion, the suggestion that it was motivated by a desire to avoid delay must be taken with a large pinch of salt.
33. What was said by the Company is that the Judge was wrong to take the view that the Defendants had been “*entirely successful*” because he failed to have adequate regard



to the fact that the Defendants accepted €120,000 by way of security, a sum substantially less (more than 33% less, as Mr Hayden observed in argument) than the sum of €194,441 that they had sought.

34. In my view, there is no substance to this point. There appears to be some uncertainty as to whether the issue of the *quantum* of security was to be addressed at the hearing in November 2021. Mr Hayden believes that it was (even though his written submissions for the hearing appear not to have addressed the issue). Mr O' Callaghan appears to be of a different view. In any event, the fundamental issue arising from the motion for security was whether the Defendants were entitled to security at all. That was the battleground and it was to that question that the evidence was almost exclusively directed. Ultimately, the Company conceded that issue by making the offer that it did, effectively on the doorstep of the court. If the Company had made that offer earlier and it had been rejected by the Defendants on the basis that they were intent on holding out for the higher amount, that would no doubt have been very relevant to the determination of costs. But that is not what occurred here. At no stage prior to the letter of 16 November 2021 did the Company indicate *any* willingness to provide security in *any* amount.<sup>3</sup> Similarly, if following the Company's offer the hearing had proceeded on the issue of *quantum* only, and the Company had succeeded on that issue, that would have obvious cost consequences. But that is not how matters proceeded. If no offer had been

---

<sup>3</sup> In argument, Mr Hayden suggested that there was nothing to prevent the Defendants from approaching the Company to indicate that they would be willing to accept security in the lower estimate given by Cyril O' Neill. In my view, there is no reality to that suggestion having regard to the Company's insistence – maintained over a 2 year period - that there was no basis for security for costs.

made and the motion had proceeded to a hearing and the Defendants succeeded in establishing an entitlement to security but the Company was successful in relation to *quantum*, then there might have been a basis for giving less than full costs to the Defendants, provided that the *quantum* could be said to have taken up a significant amount of court time thus materially increasing the cost (*Veolia*, para 2.8-2.10). Again, however, that is not what occurred here.

35. It may be that, as Murray J tentatively suggested in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183 that winning the event and being “*entirely successful*” in proceedings are not the same thing in all circumstances (para 20). In the circumstances here, however, the Judge was entitled to take the view that the Defendants had been “*entirely successful*” in the motion for security and that there was no basis for discounting or reducing their costs by reference to the fact that the amount belatedly offered by the Company and which they had accepted was less than their own estimate. In fact, no submission to the effect that the Defendants were only entitled to a portion of their costs was made either to the High Court or to this Court on appeal.

#### *The Judge’s Discretion*

36. Next the Company says that, regardless of whether section 169(1) was applicable or not, and even if the Judge was entitled to take the view that the Defendants had been “*entirely successful*” in their motion, his decision was still bad because he failed to exercise his discretion properly.

37. The starting point of the Company’s argument is that Order 99, Rule 2(3) RSC had no application in the circumstances here because (so it is said) the High Court did not “*determine*” any interlocutory application. It is not evident to me how this issue properly arises on this appeal at all. The Judge does not appear to have been referred to Order 99, Rule 3(2) RSC and it is not referenced in his ruling. That (significant) issue aside, it is also unclear what is the relevance of Rule 3(2) in the circumstances here. As the Company accepts, even if Rule 3(2) was not engaged, the Judge was nonetheless entitled to make an order in respect of the costs of the motion for security.
38. In making that order, the Judge was entitled to proceed on the basis that the motion had been conceded and the Defendants had obtained the relief sought by them. The order sought by them was made, albeit on consent. That order was made once and for all. In my view, the making of that order was clearly an event and one in respect of which the Defendants were the clear winners.
39. If that did not constitute an *event* (as I consider it clearly did), that was only because of the unilateral action of the Company in belatedly offering to put up security. That rendered a hearing of the motion unnecessary because the High Court was able to make the order sought by the Defendants on consent. By analogy with the line of authority addressing issues of costs in the context of proceedings which are rendered moot by the unilateral action of one of the parties - see by way of example *Cunningham v President of the Circuit Court* [2012] IESC 39, [2012] 3 IR 222 as well as *Godsil v Ireland* – that indicates that the Defendants should nonetheless have their costs. Those authorities are all concerned with public law proceedings but the principle is one of general

application. But the position is *a fortiori* here, where the contested motion led to the making of an order in favour of the Defendants.

40. The Company complains that, in making the order he did, the Judge failed to give the Company credit for making the offer which led to the resolution of the motion. It is said that public policy favours the consensual resolution of disputes and that the order for costs made against the Company here effectively penalises it for taking a pragmatic approach to the motion and such an approach may deter litigants from seeking compromise in the future.

41. That public policy favours the consensual resolution of disputes, large and small, cannot be gainsaid. That saves costs and maximises judicial resources. Here, however, in stark contrast to the position in *McFadden v Muckno Hotels Ltd* where undertakings were offered by the defendant employer within 3 days of the issue of an interlocutory injunction motion (and where this Court held that such undertakings would have been forthcoming at an earlier stage if requested, leading the Court to conclude that the motion had issued prematurely and was not necessary to vindicate the rights of the plaintiff), the Company opposed the motion tooth and nail for a period of 2 years, allowed a hearing date to be fixed and only 7 days before that hearing date did it move from its previously maintained position that there was no basis for seeking security against it. At that stage, the Defendants (and the Company) had incurred significant costs. Two hearing days in the High Court – which would otherwise have been available to other litigants – had been taken up. The Judge clearly saw no reason why, in such

circumstances, the Company should be given particular credit for its approach in terms of the costs that it should have to bear and not do I.

42. The observations made by Peart J in *Irish Bacon Slicers* are also apt here:

*“It is right that there should be costs consequences immediately visited upon a defendant who waits until the injunction hearing itself to proffer an undertaking, thereby removing the need for the plaintiff to proceed to a hearing of his application. The fact that there is no “event” in the sense of a court’s determination of whether or not an injunction should or should not be granted does not seem to me to be something of which such a defendant should be able to gain advantage by having the question of costs kicked off into the long grass, to be retrieved perhaps a year later, or more, when the substantive action is finally determined. That itself would be unjust to the plaintiff who in a real sense has prevailed on his application.”*

43. Here in a “*real sense*” the Defendants prevailed on their application for security and no error has been established in the costs order made by the High Court.

44. The other countervailing factor emphasised in argument both in the High Court and in this Court was the Defendants’ alleged delay in seeking security. Delay was of course deployed by the Company as a ground on which security for costs should be refused. The Defendants disputed that there had been any culpable delay, saying that the financial position of the Company had deteriorated subsequent to the commencement

of the proceedings and that that explained the fact that the motion had not issued earlier. If the motion had proceeded to a hearing, the High Court would have to form a view on the issue of delay. As matters stand, there is a dispute on the affidavits which this Court is not in a position to resolve.

45. In the circumstances, it is not necessary to enter on the question of whether Order 99, Rule 2(3) RSC was engaged here and whether there was a *determination* of the Defendants' application for security for the purposes of that sub-rule. *Prima facie*, it would appear that the order made by the Meenan J on 23 November 2021 *determined* the application in the fundamental sense of bringing the application to an end by granting the relief sought by the Defendants. However, I recognise that there are a number of decisions of the High Court (Laffoy J) which appear to suggest that Order 99, Rule 3(2) is engaged only where the Court has adjudicated on the issues in dispute: *O' Dea v Dublin City Council* [2011] IEHC 100; *Tekenable Limited v Morrissey* [2012] IEHC 391.

46. *O' Dea v Dublin City Council* and *Tekenable* involved applications for an interlocutory injunction (as did *McFadden v Muckno Hotels Ltd*) and the facts and circumstances were materially different to the facts and circumstances here. Quite apart from concluding that Order 99, Rule 1(4A) (the predecessor to the current Order 99, Rule 2(3)) did not apply, in *O' Dea* and *Tekenable* Laffoy J considered that it was not possible to form a view as to where the costs should lie. Here, the Judge saw no difficulty in making that assessment and, as will be evident from the above, I can find no error in his approach.

47. Finally, I should mention the decision of the High Court (Allen J) in *3V Benelux BV v Safeguard Card Services Limited* [2020] IEHC 277 which the Court brought to the attention of the parties. There Allen J considered the application of Order 99, Rule 1(4A) in deciding on costs following a contested security for costs application which had been determined in favour of the applicant. In brief summary, the plaintiff argued that it was not possible justly to adjudicate on the costs because the findings made by the court would be revisited at trial and the issues might be determined against the applicant. Allen J rejected that argument for the reasons set out in his detailed judgment. The issue in *3V Benelux BV* does not arise here. No argument was advanced to the High Court or to this Court on appeal that the High Court could not justly adjudicate on the issue of costs. However, the decision indicates that any such argument would have faced significant hurdles.

## **Conclusions**

48. For the reasons set out above, I would dismiss the appeal.

*Donnelly and Faherty JJ have authorised me to indicate their agreement with this judgment*