

**THE HIGH COURT**

[2023] IEHC 553

[2015 No. 4210 P]

**BETWEEN**

**SHAY SWEENEY and THE LIMERICK PRIVATE LIMITED**

**PLAINTIFFS**

**– and –**

**THE VOLUNTARY HEALTH INSURANCE BOARD**

**DEFENDANT**

**JUDGMENT of Mr Justice Max Barrett delivered on 11<sup>th</sup> October 2023.**

SUMMARY

*In this judgment I explain why I will make an order for security for costs against The Limerick Private Limited and certain related orders.*

1. By notice of motion dated 28<sup>th</sup> June 2023, VHI seeks the following orders:

- (1) an order pursuant to s.52 of the Companies Act 2014 directing that The Limerick Private Ltd furnish security in respect of the costs of VHI in relation to its defence of the claim made against it by Limerick Private Ltd in these proceedings;
- (2) in the alternative, an order pursuant to s.52 of the Companies Act 2014 directing that Limerick Private Ltd furnish security in respect of the costs of such steps in the within proceedings as seem appropriate to the court;
- (3) an order pursuant to s.52 of the Companies Act 2014 fixing or determining the amount, timing, manner and/or form of such security and the persons to whom it shall be given;
- (4) if necessary, an order pursuant to s.52 of the Companies Act 2014 and/or pursuant to the inherent jurisdiction of the court, staying these proceedings and/or steps in the proceedings until (i) judgment is given on the application for the reliefs aforesaid and/or (ii) in the event that an order is made directing the provision of security for costs, until such security is provided;
- (5) an order granting VHI liberty to apply to dismiss these proceedings in the event that such security as may be ordered is not furnished in accordance with the court's order;
- (6) such further order as seems fit;
- (7) the costs of the application.

2. Mr Sweeney, I understand, is an individual plaintiff within the jurisdiction. So there is no right on the part of VHI to seek security for costs against him. That said, the plaintiffs (correctly) have not sought to resist the present application on the basis that Mr Sweeney is a co-plaintiff.

3. Section 52 of the Act of 2014 is repeatedly mentioned in the notice of motion. It provides as follows:

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

*if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given.”*

4. I will return to the law later below. First, however, I turn to a consideration of the helpful affidavit evidence that is before me in this application. That evidence comprehensively identifies the facts and issues in play before me.

5. In his grounding affidavit, Mr Keogh, the managing director of VHI, avers, among other matters, as follows:

***“Summary of VHI’s position***

4. *I am advised that what are usually the most costly stages of legal proceedings – namely discovery, trial preparation including engagement with fact and expert witnesses, and the trial itself – are now intended to be pursued by the plaintiffs in the near future, following a period of inactivity on their part. I say that the costs to VHI of defending the present proceedings from this point onwards to trial will be very significant (as confirmed by the report of [the]...legal costs accountants dated 27<sup>th</sup> June 2023...). The within application seeks security in respect of those costs from [Limerick Private Ltd]....*
5. *Further, as things stand, the position in these proceedings is that VHI has an order in its favour for the costs (in three courts) of the interlocutory motion regarding expert evidence. VHI also has a further order for costs in its favour in respect of its application to compel replies to particulars from the plaintiffs. These orders have been stayed pending the determination of the substantive proceedings. However, VHI has no security in respect of these costs. The recent statements made on behalf of the plaintiffs on 14<sup>th</sup> June 2023 increase VHI’s apprehension as to whether it will ever recover such costs, much less (in the event that VHI is successful) the costs of the wider proceedings.*
6. *For reasons set out more fully below, I also say and believe and am advised that VHI has a strong defence to the claims made by the plaintiffs. Further, I say that if VHI is successful in defending the proceedings –*

*which it firmly believes it will be – then [Limerick Private Ltd]...will be unable to pay any of VHI's costs of defending them (which has now been confirmed by counsel for [Limerick Private Ltd]. I also say and believe and am advised that in such circumstances, the onus is on the plaintiffs to establish the existence of special circumstances which would justify the court exercising its discretion by refusing to order [Limerick Private Ltd]...to provide security for VHI's costs and that there are no such special circumstances in this case.*

### ***Background to proceedings***

7. *The plaintiffs instituted these proceedings in May 2015 seeking, inter alia, various declaratory reliefs that [VHI]...abused its dominant position in refusing to provide cover [to Limerick Private Ltd]...together with a declaration that the requirement of substitution constitutes a breach of both the Competition Act 2002 and Art. 102 TFEU. The plaintiffs also seek damages for interference with their constitutional right to earn a livelihood. These claims are denied in full by VHI.*
8. *After a protracted period in which VHI sought proper particulars of the plaintiff's case lasting over two years – which required a motion from VHI to compel replies, and which replies the plaintiffs ultimately were ordered to provide – VHI delivered its defence on 18<sup>th</sup> June 2018.*
9. *By way of notice of motion dated 26<sup>th</sup> November 2018, VHI applied to exclude the expert economist, Prof. Moore McDowell, who had been retained by the plaintiffs on the basis, inter alia, that the engagement gave rise to a conflict of interest on the part of the expert, who had previously acted for VHI in substantially similar proceedings. [The High Court]...ruled in favour of the plaintiffs on 28<sup>th</sup> May 2019. VHI appealed to the Court of Appeal which on 9<sup>th</sup> June 2020 ruled that Professor McDowell was to be excluded. The plaintiffs appealed to the Supreme Court which confirmed the ruling in favour of VHI on 9<sup>th</sup> September 2021.*
10. *After the Supreme Court judgment in September 2021 nothing further was heard from the plaintiffs' solicitors until a notice of intention to*

*proceed was received on 6<sup>th</sup> January 2023. Thereafter, nothing further occurred until 4<sup>th</sup> April 2023 when a letter was received from the plaintiffs' solicitor in effect reactivating the proceedings and, most surprisingly, seeking that the trial of the proceedings be heard by the end of December 2023. This letter seeking extremely expedited directions to trial was sent in circumstances where the proceedings relate to matters which date back to 2011 and beforehand, where there had been a lengthy period of inactivity on the plaintiffs' part, and where the several substantive outstanding steps required to progress the matter to trial made it unfeasible (in VHI's view) for a trial to take place within the period sought.*

11. *The plaintiffs have now applied to this...court for full directions up to a trial by the end of 2023, and voluntary discovery requests have now also been made by both parties. The plaintiffs also furnished a draft expert report to [Limerick Private Ltd]...on 19<sup>th</sup> June 2023.*

#### ***VHI's Defence to the Plaintiff's Claims***

12. *I believe and am advised that VHI has not only a prima facie defence – but a strong defence – to the plaintiffs' claims, as illustrated by the comprehensive defence delivered by VHI on 18<sup>th</sup> June 2018. The defence denies all of the plaintiffs' allegations of wrongdoing against it, and all of the key elements of the plaintiffs' claims concerning the relevant product and geographic markets. VHI's alleged dominant position, and any abusive or wrongful conduct on the part of VHI. Although I do not understand [Limerick Private Ltd]...to dispute the existence of a prima facie defence on the part of VHI, I make the following comments by way of illustration.*
13. *First, [Limerick Private Ltd's]...claim is, effectively, a claim that it is entitled to have VHI make a decision which will enable [Limerick Private Ltd] to set up and/or pursue a business venture, regardless of the likelihood of success of that venture or of its likely impact on VHI, its members, or consumers of medical services generally. As pleaded at*

*para.45 of the defence, neither the company nor Mr Sweeney has any such right.*

14. *Second, a core element – if not the core element – of the plaintiffs’ case is the claim in respect of the alleged policy of ‘substitution’ pleaded at para.15 of the statement of claim. Indeed, it will be seen from the discovery request received from the plaintiffs’ solicitors that the sole category of discovery which they request is focused upon ‘substitution’, and I beg to refer to a copy of same when produced. The alleged policy of ‘substitution’ is therefore clearly crucial to the plaintiffs’ claim. However, even on the plaintiffs’ own case, it appears that this allegation is directed more at the Minister for Health (formerly the third-named defendant in the proceedings) than at VHI. Paragraph 13 of the statement of claim pleads:*

*‘The insurmountable stumbling block put on the table for the plaintiffs and the mid-west region was that of ‘substitution’....This criteria for Limerick and the mid-west region is acknowledged to be a policy of both the first and third-named defendants and effectively requires the closure of another acute bed within the system before a new one is allowed to open.’ (my emphasis).*

15. *Paragraph 17 of the statement of claim continues:*

*‘Further communication with the third-named defendant in June 2014 resulted in being referred to the private health insurance unit within that department where the principal administrator...finally returned several phone messages and calls made, and advised that she was the author of all communications and that the ‘substitution’ policy is in fact a departmental policy.’ (my emphasis)*

16. *Paragraph 15 of the defence pleads that VHI had no substitution policy at all.*

17. *More generally, the fact that the plaintiffs made (although then ultimately discontinued) a case against Ireland, the Minister for Health, and the Attorney General, evidences the lack of substance underlying the substitution claim.*
18. *Third, far from the refusal of approval to the plaintiffs having been wrongful, clear and sound grounds existed for VHI's then refusal. For example, the following pleas from VHI's defence set out some of these grounds:*
- a) *Paragraph 13 of the defence pleads that the plaintiffs failed to fulfil either of the criteria listed at para.12, namely of “[d]emonstrating that they [met] an important medical need which is not met by existing facilities and [did] so at a competitive cost...” and of “[p]rovid[ing] medical services at prices which are sufficiently competitive...”. I am advised that these are also matters in respect of which [Limerick Private Ltd]...will need to satisfy the court if it is to establish that VHI's conduct was the cause of its alleged losses.*
  - b) *Paragraph 16 of the defence pleads that VHI explained to the plaintiffs that “having reviewed the application that it was satisfied that it did not require the services offered and that they would not provide [VHI] with any price competition as against existing suppliers.”*
  - c) *Paragraph 17 of the defence pleads to yet further reasons why VHI was entitled to refuse the plaintiffs' application.*
  - d) *Moreover, regarding the wider context, para.24 of the defence pleads that the economic context within which VHI operates is defined by the regulatory context in which it operates which entails various requirements – a point which has been ignored by the plaintiffs in their statement of claim.*
19. *I am informed by McCann FitzGerald, solicitors for VHI, that at the hearing of 14<sup>th</sup> June 2023 (in respect of the plaintiffs' application to have a hearing date fixed) counsel on behalf of the plaintiffs – in support of a*

*submission that interlocutory applications in respect of security for costs and discovery should be heard before the end of the legal term (i.e. before 31<sup>st</sup> July 2023) – indicated to [the High Court]...that the company would oppose VHI's application for security for costs. In particular, counsel indicated that [Limerick Private Ltd's]...defence to VHI's security for costs application would essentially focus upon the proposition that [Limerick Private Ltd's]...inability to pay costs was caused by the alleged wrongdoing of VHI. It therefore appears that [Limerick Private Ltd]...does not dispute the existence of a prima facie defence on the part of VHI to the plaintiffs' claims.*

20. *For the avoidance of doubt, VHI relies on all pleas set out in its defence....*

**...[Limerick Private Ltd's] Impecuniosity**

21. *I say and believe that [Limerick Private Ltd]...will not be able to pay VHI's costs of these proceedings in the event that VHI is successful – which, I am advised, is part of the applicable test on a motion for security for costs.*
22. *I am advised that this was confirmed by counsel for [Limerick Private Ltd]...at the hearing of 14<sup>th</sup> June 2023. I note also that [Limerick Private Ltd's]...solicitor...averred that the financial circumstances of both plaintiffs are 'straitened' in his affidavit sworn on 27<sup>th</sup> April 2023 in support of the plaintiffs' directions application.*
23. *In light of the above, including the position as communicated to the court, I am advised that the onus now lies on [Limerick Private Ltd]...to establish the existence of special circumstances which would justify the refusal of an order for security for costs.*
24. *In this regard, I also note that the affidavit of 27<sup>th</sup> April 2023 was the first occasion on which any material had been stated regarding the financial circumstances of the first-named plaintiff (with the averment that his financial circumstances are 'straitened'). I am advised that the caselaw on security for costs establishes that the presence of a natural person plaintiff in proceedings may be a relevant consideration regarding*

*whether security should be ordered against a corporate co-plaintiff if the natural plaintiff is a mark for costs. I say and believe that what clearly emerges from the affidavit of 27<sup>th</sup> April 2023 is that Mr Sweeney is not a mark for costs.*

***Untenability of any assertion that [Limerick Private Ltd's]...impecuniosity is attributable to VHI***

25. *As noted, I am advised that the onus lies with [Limerick Private Ltd]...to demonstrate that special circumstances apply such that security for costs should not be ordered, and to so demonstrate through appropriate evidence. The Company's evidence in that regard is awaited. Strictly without prejudice to that, and to the necessity for the Company to adduce evidence that satisfies all requirements of the applicable test, VHI's position is that first, there was clearly no wrongdoing on its part, and, second, that even if one were to assume that there had been wrongdoing on its part, [Limerick Private Ltd]...is unable to discharge the onus which rests upon it to demonstrate its inability to meet a costs order was caused by VHI.*
26. *In light of the special circumstances which the Company has signalled before the court that it will rely on (i.e. that VHI's alleged wrongdoing, is the cause of its inability to meet an order for costs), I set out below certain observations in this regard. However, I wish to stress that these are non-exhaustive observations. In the event that [Limerick Private Ltd] intends to assert the existence of any additional special circumstances in its replying affidavit, VHI, in conjunction with its legal representatives, will review same and respond to them as necessary.*
27. *First, I say and am advised that there is a distinct lack of clarity in the plaintiffs' pleadings, and a lack of general visibility, as to exactly what 'loss' the plaintiffs are alleged to have suffered. For example, it will be seen that, although the statement of claim seeks damages for breach of competition law, no clear explanation of the alleged loss actually alleged to have been suffered is set out therein. In circumstances where the very alleged loss is uncertain, [Limerick Private Ltd's]...project of linking its*

*poor financial position to VHI's conduct faces considerable difficulties. Among other things, I believe and am advised that it is also relevant in this context to compare the quantum of alleged loss with the quantum of the likely costs of the within proceedings.*

28. *Second, regardless of what the nature of the plaintiff's losses are said to be, the limited publicly available information on its financial circumstances set out in [Limerick Private Ltd's]...annual financial statements filed with the CRO from the years 2006 to 2021 does not seem to support a claim that VHI was the cause of its impecuniosity...*
29. *In particular, the abridged financial statements for each of the years ending 31<sup>st</sup> December 2010, 31<sup>st</sup> December 2011, [and] 31<sup>st</sup> December 2012 state as follows:*

*'The company's balance sheet as at 31 December [2010/2011/2012] shows the company in a net liability situation. The company has relied on the financial support from the directors to fund expenditure. The development project has been put on hold until financing is in place to complete the project.'*

...

30. *As the above excerpt illustrates, the same note appears in the abridged statements filed in the period before VHI's refusal of [Limerick Private Ltd's]...application (for the years ending 31<sup>st</sup> December 2010 and 2011) and also the statements filed immediately after the refusal of the application (for the year ending 31<sup>st</sup> December 2012). Accordingly, based on its own financial statements, it was [Limerick Private Ltd's]...inability to obtain third party financing – and not any conduct on the part of VHI – which was inhibiting the progression of the project.*
31. *It is also apparent that the company has never traded since its incorporation. It appears to have been set up solely for the purposes of the business venture the subject of these proceedings (akin to a special purpose vehicle). Further the financial statements show [that Limerick*

Private Ltd]...had negative balances on its balance sheet for each of the years from 2006 (when it was incorporated) up to 2012 (when VHI declined its application for cover)...Accordingly...I say that [Limerick Private Ltd]...was not trading and was already balance sheet insolvent at the time of VHI's alleged wrongdoing, and remained so thereafter, without VHI's conduct having any apparent impact on [Limerick Private Ltd's]...financial position.

32. Finally, having regard to the point made in paras. 12-20 in support of VHI's position that it has a prima facie defence to the plaintiffs' claims – namely that the plaintiffs' cause of action is essentially a claim that VHI should be compelled to make a decision which allows the plaintiffs to pursue a particular business venture regardless of the consequences to any party other than the plaintiffs; that its central claim of an alleged policy of 'substitution' appears to be more properly directed at other parties; and the very clear pleadings in VHI's defence as to the failure of the plaintiffs' application to satisfy the relevant criteria – I say and am advised that it is difficult to see how VHI can credibly be contended to have caused loss to the plaintiffs, much less to be blameworthy in respect of [Limerick Private Ltd's]...inability to pay costs.

#### ***Uncertainty regarding financing by the plaintiffs of their own costs***

33. Finally, I am advised that in circumstances where it has been stated that [Limerick Private Ltd]...cannot pay its own costs, considerations of fairness make it appropriate that it should address on affidavit the uncertainty and lack of visibility regarding how its own legal costs in prosecuting the within proceeding are being financed.

#### ***Estimate of VHI's likely costs***

34. In bringing the within application, VHI has sought an estimate of its likely costs of defending the proceedings from 22<sup>nd</sup> May 2023 (the date on which it formally called on [Limerick Private Ltd]...to provide security for its costs in correspondence) onwards. VHI engaged...[legal costs

accountants] *to estimate such costs....[They estimate that VHI's] total costs of defending these proceedings from 23<sup>rd</sup> May 2023 up to the conclusion of a unitary trial will be €1,790,500.00 (exclusive of VAT).*<sup>1</sup>

### ***Correspondence relating to Security for Costs***

35. *In this section I briefly summarise the correspondence between the parties in relation to the issue of security for costs. First, by letter dated 18<sup>th</sup> September 2015, shortly after the proceedings were filed, McCann FitzGerald wrote to the plaintiffs' then solicitors noting that, based on a review of its annual returns, it appeared that [Limerick Private Ltd]...had never traded, had no assets, and would not be able to meet an order for costs against it. The letter also called on [Limerick Private Ltd]...to provide security for VHI's costs....*
36. *By reply dated 16<sup>th</sup> October 2015, [Limerick Private Ltd's]...then solicitors neither expressly agreed nor refused to provide security. Rather the letter stated, inter alia, the following in reply: "In so far as security for costs goes, you can be the potentially proud owner, if as you seem so certain that you will prevail, of a site with full planning permission for a hospital, partly constructed". [I understand from the hearing that this may have been stated tongue-in-cheek].*
37. *By letter dated 23<sup>rd</sup> October 2015, McCann FitzGerald replied and, inter alia, sought various clarifications of [Limerick Private Ltd's] position....The clarifications sought on behalf of VHI were not provided, and there was no further substantive correspondence relating to security for costs in this period....No security for costs application was ultimately brought at that time.*
38. *Following the reactivation of the proceedings by the plaintiffs in their letter dated 4<sup>th</sup> April 2023, McCann FitzGerald responded by letter dated 28<sup>th</sup> April 2023. Among other things, McCann FitzGerald put it to the*

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<sup>1</sup> This cumulative figure has not been, to use a colloquialism, 'plucked from the air'. It has been reached by professional legal costs accountants as a result of their adding together the following estimated costs: (1) Solicitors' Fees (€1,020,000), (2) Copying and Miscellaneous (€8,000), (3) Senior Counsel (€249,500), (4) Junior Counsel (€177,500), (5) Witnesses (Accountant and Economist) (€285,000), and (6) Miscellaneous Outlay (€50,500).

*plaintiffs' solicitors that [Limerick Private Ltd]...has never traded since incorporation, is balance sheet insolvent, and would be unable to meet any award of costs that may be made against it. The 28<sup>th</sup> April letter also noted that McCann FitzGerald needed to take instructions in relation to the issue of security in light of the passage of time since these proceedings were last active....*

39. *There was no response to the 28<sup>th</sup> April 2023 letter.*
40. *By letter dated 22<sup>nd</sup> May 2023, and in circumstances where no reply at all had been received to the correspondence dated 28<sup>th</sup> April, McCann FitzGerald wrote to the plaintiffs' solicitors calling on [Limerick Private Ltd]...to provide security for VHI's costs.*
41. *There was no response to the 23<sup>rd</sup> May 2023 letter.*
42. *By letter dated 13<sup>th</sup> June 2023, and in circumstances where there has still been no response one way or the other to the letters dated 28<sup>th</sup> April and 22<sup>nd</sup> May 2023, McCann FitzGerald wrote to the plaintiffs' solicitors stating that an application for security for costs would be brought and proposing directions for the hearing of that application.*
43. *I am informed that at a hearing on 14<sup>th</sup> June 2023, counsel for [Limerick Private Ltd]...indicated to this...court that it would be opposing VHI's application for security for costs....*
44. *After the said hearing, there was a further exchange of correspondence between the parties' solicitors in relation to proposed directions. By letter dated 14<sup>th</sup> June 2023, the plaintiffs' solicitors wrote to McCann FitzGerald indicating an intention to rely on the Court of Appeal decision in CMC Medical Operations...refusing to grant VHI security for its costs in those proceedings.*
45. *Should any reliance be placed on the above judgment of the Court of Appeal...VHI will respond by way of submission in due course. However, although this may more properly be a matter for submission [– it most certainly is –] the Court of Appeal found in that case that there were special circumstances which justified the refusal of an order for security for costs. I believe and am advised that it is a matter for [Limerick Private Ltd]...to establish to the satisfaction of the court in this case that there are special circumstances applicable to it in this case which would justify*

*the refusal of an order for security. Furthermore I am advised that more recent case law has a different emphasis regarding how certain relevant issues in security for costs applications are to be approached.*

...

### ***Summary and conclusion***

48. *In summary, VHI now faces the prospect of contesting what are likely to be extremely costly High Court proceedings brought by an impecunious limited liability plaintiff in which VHI will not be able to recover any of its costs in the event it is successful. In those circumstances, I believe and am advised that VHI is entitled to security for its costs of defending the proceedings. I further believe and am advised that [Limerick Private Ltd]...will be unable to establish the existence of any special circumstances which would justify the court in refusing to grant an order for security.”*

6. In his replying affidavit, Mr Sweeney avers, amongst other matters, as follows:

“4. *In the first instance, any suggestion to the effect that...VHI [is] under some misapprehension about the finances of [Limerick Private Ltd]...until recently is not credible. The correspondence exhibited on behalf of...VHI has been curtailed and I exhibit further correspondence below in order to give this...court the full picture of the engagement between the parties on this issue.*

5. *I believe and am advised that special circumstances exist which warrant this...court in the exercise of its discretion, to refuse the relief sought.*

### ***Delay***

6. *In the first instance, the delay in...VHI bringing the within application is truly staggering....VHI having first raised the issue of security for costs back in 2015, some eight years ago, now seeks to resurrect the issue, when*

*it is quite obvious from the correspondence that any intention to bring an application was effectively abandoned.*

[**Court Note:** With respect, I do not see that VHI ever abandoned its entitlement to seek security for costs, I do not see that the plaintiffs ever relied on such a purported abandonment, and respectfully (and I will return to this again later below), I do not see on the evidence before me that the passage of time has caused anything by way of significant prejudice to the plaintiffs. I do also, with respect, have to take issue with the mention of “eight years”. That seems to me to be not quite right in terms of a calculation of the applicable delay. In *Moorview Developments Ltd v. Cunningham* [2010] IEHC 30, Clarke J., as he then was, states at §3.3 that it seemed reasonable to him that a defendant would wait until pleadings are or should be closed before seeking security for costs. In a similar vein, Barr J. observes in *Savanne Ltd v. IBRC and Fingleton* [2021] IEHC 535, §73, that delay in that case fell to be calculated from the moment when the defence was filed. The particular usefulness of using the filing of the defence as an embarkation point for the calculation of delay (all else being equal) is that it gives practitioners and judges a useful pointer as to where that embarkation point is likely to be in any one case. Here, the defence was delivered on 18<sup>th</sup> June 2019, yielding a delay of four years and eleven months before the present motion was brought (which is strikingly close to the four year and seven month period that was found in *Savanne* not to prevent security for costs being ordered). So it seems to me that the headline figure of eight years is not the period of delay that actually arises for consideration when one looks at matters a little more closely.]

*It also comes after...VHI vigorously pursued an application, which was heard in three courts, to exclude the plaintiffs’ expert. The timing of the application in respect of which I am advised that this...court can draw its own conclusions, must be viewed against the backdrop of the plaintiffs seeking to progress this matter to hearing after having secured another expert in light of the decision of the Supreme Court.*

[**Court Note:** In fact, I understand from the hearing that the plaintiffs have suffered a degree of ill-luck in this regard in that the replacement expert has had the good luck recently to be nominated to quasi-judicial office in another jurisdiction and will need, as a consequence, to withdraw from acting as an expert witness in these proceedings.]

7. *In the circumstances, I believe and am advised that the sheer length of delay is in and of itself a special circumstance which would warrant this...court refusing the within application,*
8. *I beg to refer to paras. 35-48 of...VHI's [grounding] affidavit, wherein Mr Keogh purports to summarise the correspondence between the parties in relation to security for costs. I note that Mr Keogh has referred to and exhibited a letter dated 18<sup>th</sup> September 2015 and, given that he has not referred to any correspondence prior to this date, I will assume he is relying on this letter as the initial correspondence on behalf of...VHI in relation to seeking security. However, this was not the first time the issue of security for costs was raised on behalf of...VHI.*
9. *It should be recalled that the within proceedings issued on 26<sup>th</sup> May 2015 and a statement of claim was delivered on the same date. Immediately after the issuing of proceedings, the VHI's solicitors wrote to my solicitor on 28<sup>th</sup> May 2015 addressing various issues. It is clear from the correspondence that they had been served with draft proceedings at this time. However, the issue of security for costs was specifically mentioned. The letter states as follows:*

*'We note also from our search of the latest accounts as filed at [the] Companies Registration Office that your client Limerick Private Hospital Limited appears to be insolvent. If proceedings are brought, we intend to seek security for our client's costs unless your client demonstrates that it would be able to meet any order for costs ultimately made in our client's favour.'*

10. *Clearly, the within application was, even at that early stage, contemplated by...VHI....*
11. *Also absent from...VHI's affidavit is a letter from my solicitor to...VHI's solicitor dated 5<sup>th</sup> June 2015, wherein she noted...VHI's threat to seek security for costs and stating that should an application be brought the plaintiffs would be relying on the decision of the Court of Appeal in CMC....*
12. *I beg to refer to para.36 of...VHI's affidavit, where Mr Keogh refers to, and quotes selectively from my solicitor's letter dated 16<sup>th</sup> October 2015. He purports to exhibit this letter....However, what is exhibited...is a letter of 16<sup>th</sup> October 2015 from...VHI's solicitors to my solicitor, which states that, failing confirmation of security, they are instructed to issue a motion seeking security for costs.*
13. *[In] the letter dated 16<sup>th</sup> October 2015 from my solicitor to VHI's solicitors...my solicitor pointed out that [Limerick Private Ltd]... 'has not been able to trade because your clients and/or the other named defendants have refused to provide cover and in circumstances where, as set out in the statement of claim, each and every effort made by the plaintiffs and each or either of them was obstructed, or otherwise impeded by constant changing of the 'goal posts' as to the relevant requirements for cover to be addressed. She added that '[i]n effect [Limerick Private Ltd]...has not traded because of you and/or the other defendants or each or either of you have not allowed it to do so. That is the basis of the claim.'*
14. *I beg to refer to para.37 of...VHI's affidavit, which refers to correspondence from...VHI's solicitors dated 23<sup>rd</sup> October 2015 and refers to clarifications sought on behalf of...VHI not having been provided. Notably, there is no response from...VHI's solicitors to the statements made by my solicitor in her letter dated 16<sup>th</sup> October 2015 to the effect that [Limerick Private Ltd]...has not been able to trade because...VHI has refused to provide cover. In fact, the letter from...VHI's solicitors is far more definitive and forceful on the issue of security for costs than what is suggested by Mr Keogh. It made a very clear statement in the final paragraph, stating:*

*'If we do not receive your client's agreement to provide security for our client's costs on a voluntary basis by 3<sup>rd</sup> November 2015, we are instructed to issue a motion seeking security for costs pursuant to s.52 of the Companies Act 2014, together with related reliefs.'*

15. *No such agreement was ever furnished. 3<sup>rd</sup> November 2015 came and went, and no such application issued, until now, nearly seven years later. The last sentence of para.37 is particularly telling in that it states that '[n]o security for costs application was ultimately brought at that time.' Absolutely no justification has been advanced on behalf of...VHI for failing [to] bring its application at that time, notwithstanding that it knew, or ought to have known of the unchanged status and financial circumstances of[Limerick Private Ltd]....*
16. *I beg to refer to para.37 of...VHI's affidavit, wherein Mr Keogh makes reference to a 'passing comment' in my solicitor's letter dated 1<sup>st</sup> February 2016. However, this letter has not been exhibited by Mr Keogh. The exchange of correspondence between my solicitor and...VHI's solicitors was against a backdrop of an issue raised by...VHI as to the correct title of[Limerick Private Ltd] and my solicitor addressed the issue of security for costs once again, indicating the intention to rely on the determination of the Supreme Court in December 2015, which I understand relates to the CMC proceedings referred to above, and the Supreme Court's refusal to allow the VHI leave to appeal against the Court of Appeal's decision not to grant it security for costs.*
17. *The plaintiffs continued to process their case with all the attendant cost implications. From its end and seemingly having taken the decision, for whatever reason not to bring the threatened application for security for costs...VHI progressed matters vigorously from its own perspective, taking a number of procedural steps....VHI raised a notice for particulars on 29<sup>th</sup> February 2016, which was replied to by the plaintiffs on 21<sup>st</sup> April 2016....VHI raised rejoinders to replies to particulars on 26<sup>th</sup> April 2018 which were replied to...on 29<sup>th</sup> May 2017. On 10<sup>th</sup> October 2017, the within proceedings were entered into the Competition List. On 12<sup>th</sup> December*

2017, and pursuant to an application brought on behalf of...VHI, this...court ordered that the plaintiff reply further to certain rejoinders, and these were replied to on 16<sup>th</sup> February 2018. A defence was delivered on behalf of...VHI on 18<sup>th</sup> June 2018.

18. *During this time, correspondence passed between my solicitor and...VHI's solicitor, in which the issue of security for costs was not once raised on behalf of...VHI...*
19. *It is common case at this stage that...VHI objected to the retention of the plaintiffs' expert and brought an application on 26<sup>th</sup> November 2018 which was refused by [the High Court]...but appealed successfully to the Court of Appeal...and the Supreme Court (order of 10<sup>th</sup> November 2021), perfected on 16<sup>th</sup> May 2022.*
20. *The fact that...VHI progressed [its]...application, which was indeed ultimately successful, to have the plaintiffs' expert excluded must mean that it had in its contemplation the hearing of the within proceedings. I am advised that it can be inferred that...VHI, being apparently focused on being disadvantaged at the hearing by the plaintiffs' expert's retention, must be seen to have abandoned its intention to seek security for costs, which should be sought at an early stage in the proceedings.*

[**Court Note:** Again, with respect, I do not see that VHI ever abandoned its entitlement to seek security for costs, I do not see that the plaintiffs ever relied on such a purported abandonment, and respectfully (and I will return to this again later below), I do not see on the evidence before me that the passage of time has caused anything by way of significant prejudice to the plaintiffs.]

...[**Limerick Private Ltd's**] *impecuniosity is indeed attributable to VHI*

21. *I beg to refer to paras. 25-32 of...VHI's affidavit, which attempts to cast doubt on the fact that [Limerick Private Ltd's]...financial circumstances are attributable to...VHI.*
22. *I beg to refer to para.27 of...VHI's affidavit, wherein Mr Keogh states that he is advised that there is a distinct lack of clarity in the plaintiffs'*

*pleadings, and a lack of general visibility, as to what 'loss' the plaintiffs are alleged to have suffered. I find this averment remarkable. As at the date of issue of the proceedings, declaratory relief together with damages was sought. By way of letter from my solicitor dated 21<sup>st</sup> April 2016, the VHI's solicitors were alerted to the fact that planning permission would expire that urgency should be applied to the case. The case has progressed, and notwithstanding the fact that detailed schedules of the losses being incurred...were provided together with expansive folders of invoices vouching the claim, no request for any further particulars or details were ever sought by the defendants. Therefore, I find it incredulous that it can now be claimed on behalf of...VHI that it is in some way at a loss regarding the loss alleged to have [been] suffered.*

23. *I beg to refer to paras.28-32 of...VHI's affidavit and the allegation to the effect that [Limerick Private Ltd's]...annual financial statements do 'not seem to support a claim that VHI was the cause of its impecuniosity.' Mr Keogh appears to hone in on a statement in the abridged financial statements to the effect that the development project was stated to be put on hold until financing was in place to complete the project. As will be seen below, this financing was expressly dependent on VHI approval. Further, pending VHI approval, I maintained a position of caution on company accounts and funded ongoing costs from my own personal resources.*
24. *A key element of development of the hospital was the approval of VHI, and this fact is respectfully well known to...VHI. Confirmation of VHI cover, and consequently its involvement in any hospital project, was vital to all or any involvement by either financial stakeholders or consultants.*
25. *In the first instance, [VHI]...has been provided with extensive documentation with the plaintiffs' replies to particulars....*
26. *Secondly, the plaintiffs' case, as supported by our expert economist...is that obtaining confirmation of VHI cover was essential to [the] financial success of the hospital. Therefore, the wrongful denial of same is directly causative of the plaintiffs' inability to provide security for costs. A copy of [this expert's]...report...has already been provided to...VHI's solicitors on 19<sup>th</sup> June 2023....Paragraphs 103 to 109 of [this economist's]...report refer*

*in particular to new private hospitals' dependence on agreeing terms with VHI. He cites a number of examples including the Whitfield Hospital, Cork Medical Centre, and St Vincent's Private Hospital.*

27. *To briefly address what was involved in the Limerick Private Hospital project, it was intended to and designed to comprise five storeys above ground with three levels underground, with a total of 95 beds, six operating theatres (and originally the urgent care unit with Swiftcare). I began the planning process in 2002. Initial plans were submitted in August 2004 and full planning was approved in September 2005. In September 2006, plans for a hospital extension were presented. Planning was approved in February 2007 and granted in March 2007....*
28. *The Information Memorandum (...already furnished to the defendants both with the submissions for cover and the replies to particulars) containing, as each revised submission did, the summary business case, revenues, floor plans, case mixes covering all ranges from inpatient to day cases, salaries and costs.*
29. *Section 4 of the Information Memorandum, under the heading 'Private Hospital Funding', notes that '[p]rivate hospitals in Ireland are reimbursed primarily through health insurance and to a lesser extent direct patient payments.' Section 4.2, under the subheading 'Private Health Insurance' specifically refers to...VHI, which in and of itself is a testament of the position of VHI in the market.*
30. *A full format of the business case took a very conservative calculation of 43% occupancy of the proposed hospital in year one allowing for pre-opening costs and projected through to year 10 based on prevailing factors as were then perceived. No matter how good the business case was, it was not going to be sufficient on its own without VHI approval....*
31. *Furthermore, securing finance for the project was made conditional on obtaining VHI approval. AIB was prepared to provide a loan in the sum of €54,600,000 (into the total proposed cost of €75,000,000) , subject to a number of preconditions. In a letter to me dated 13<sup>th</sup> July 2007, AIB stated under the schedule of preconditions required that it is 'to be satisfied with progress relating to the hospital achieving VHI approval prior to drawdown.'*

32. *After the severe disappointment of refusal of cover from VHI in 2012, and because I failed to understand the rationale for refusal but still remained confident in the project I established an alternative route to getting VHI support. I had been in touch with UK Specialist Hospitals (UKSH) on or about 2012 in relation to funding. Representatives from UKSH visited Limerick in April 2012 and a decision was made on their behalf to move forward with the project. However, and by way of letter to me dated 11<sup>th</sup> May 2012...UKSH expressly stated as follows: 'Our commitment of funding to the hospital will be contingent upon obtaining confirmation of VHI cover.'*

33. *On 23<sup>rd</sup> March 2013 the High Quality and Efficiency Model of Elective Care was presented to...VHI in conjunction with the UKSH. Page 17 of this document...contains the following statement:*

*'VHI paid out €1.23 billion in healthcare costs for its consumers in 2011. It is still by far the principal claims-paying health insurer (possibly 75% of claims, perhaps even higher in relation to procedures like in-patient orthopaedics). However, all four insurers have an interest in lower-cost, higher efficiency provision of secondary care. Banks will not now provide finance to a new hospital provider without an agreement in principle for cover with...VHI in advance. Equity finance is also highly influenced by this position and is unlikely to take the risk of failure to achieve VHI cover shortly before or after opening. Even if other insurers were to indicate cover, their throughput of cases would not be sufficient for commercial viability. VHI's position is key to enabling itself, and other insurers also, to avail of lower-cost-higher quality assured provision.'*

34. *I wish to refer in particular to page 16 of that document and in the outlined box the indicative savings being proposed. So impressed was...VHI with this model that I understand they invited UKSH to entertain a presence in*

*Dublin with this model which would have the support of VHI, but not for the mid-west.*

***First Plaintiff's Financial Position***

35. *I wish to refer briefly to my own financial position. I beg to refer to para.24 of...VHI's affidavit in this regard, wherein Mr Keogh refers to an affidavit sworn by my solicitor on 27<sup>th</sup> April 2023 in the context of the plaintiffs' application for directions. To the extent that it is claimed now on behalf of...VHI that my own impecuniosity comes in any way as a surprise, I dispute this.*
36. *All of the correspondence from...VHI concerning the issue of security for costs, including the initial correspondence beginning as far back as 2015, has only ever referred to the position of [Limerick Private Limited]...Therefore, it can only be inferred that...VHI had formed the view, even back then that I would not be a 'mark for costs'.*
37. *My own financial position is in any event, a matter of public record. There are a number of judgment mortgages registered on my properties as follows: a. 24<sup>th</sup> December 2012, ACC Bank; 11<sup>th</sup> July 2013, Don O'Malley & Partners Ltd; 23<sup>rd</sup> June 2020, Everyday Finance DAC.*
38. *As outlined above, I funded ongoing costs relating to the project from my own resources and, therefore, my own financial position is in large measure attributable to the actions of...VHI."*

7. In a further affidavit, Mr Keogh avers, amongst other matters, as follows:

***"Summary of VHI's position***

5. *I believe and am advised that in order to obtain an order for security for its costs against [Limerick Private Ltd]...VHI must establish: (i) that it has a prima facie defence to the claims in the proceedings and (ii) that [Limerick Private Ltd]...would not be able to meet an order for costs against it in the event that VHI was successful in defending the proceedings. In my first affidavit...in support of the within application...I*

*set out some of the reasons why VHI has a prima facie defence to the claims in the within proceedings, as well as the basis for the position that [Limerick Private Ltd]...would be unable to meet an order for costs against it. These matters have not been contested in Mr Sweeney's affidavit.*

6. *In such circumstances, I am advised that the burden is on [Limerick Private Ltd] to establish the existence of special circumstances which would justify the refusal of an order for security. Although this may be more properly a matter for submission [– it is –], I believe and am advised that [Limerick Private Ltd]...has failed to discharge that burden, and indeed that aspects of Mr Sweeney's affidavit positively undermine [Limerick Private Ltd's] case in relation to the existence of special circumstances.*
7. *I also note that [Limerick Private Ltd]...has not taken issue with the estimate of VHI's costs of defending the proceedings up to trial....*

#### ***Response to certain averments concerning alleged delay***

8. *Paragraphs 6 to 20 inclusive of Mr Sweeney's affidavit are entitled 'Delay'. VHI will respond by way of submission to many of the points set out, to the extent [that] they are properly relevant to the application. Nonetheless, there are a limited number of points which I wish briefly to make.*
9. *The essence of the points made under this heading appears to be encapsulated by Mr Sweeney's assertion at para.7 that the alleged delay in bringing the application for security for costs 'is in and of itself a special circumstance' warranting refusal of the application. While VHI will respond by way of submission in due course, I am advised that this view of the law is not correct.*
10. *Notably, Mr Sweeney's affidavit says relatively little with respect to how the alleged delay is suggested to have occasioned prejudice to the plaintiffs. The closest Mr Sweeney appears to come is a highly vague averment at para.17 to the effect that: 'The plaintiffs continued to process their case with all the attendant cost implications.' However, the only substantive steps referred to as evidence of the plaintiffs 'process[ing] their case with the attendant cost implications' in the following paragraphs*

*are (i) the exchange of particulars on the statement of claims and replies thereto (which particulars I am advised were necessitated by the plaintiffs' failure to adequately particularise their claim and resulted in an order from this...court compelling the plaintiffs to provide replies to particulars raised by VHI); (ii) the delivery of VHI's defence (which is primarily a cost to VHI, rather than the plaintiffs); and (iii) VHI's application to exclude the plaintiffs' previously retained expert. While it is true that the application in respect of Prof McDowell ultimately proceeded to the Supreme Court...that was nonetheless a discrete and relatively 'net' interlocutory application essentially seeking a single relief.*

11. *No effort is made by Mr Sweeney, for example, to quantify the costs to date which have been (i) incurred and (ii) actually expended by the plaintiffs. Much less is any attempt made to compare these with the future costs in the later stages of the proceedings.*
12. *It is not accepted that the passage of time has resulted in much if anything by way of significant prejudice to the plaintiffs. I respectfully believe that such prejudice (if indeed there is any at all) would be far outweighed by that which VHI would suffer if it were not awarded security for costs.*
13. *I also note that Mr Sweeney does not engage with the pace at which the plaintiffs themselves have progressed the within proceedings or with the lapses of time which have been attributable to them.*
14. *As noted in my first affidavit, owing to the protracted period spent seeking replies to particulars from the plaintiffs from 2016 onwards. VHI did not deliver its defence until June 2018. Although there has been a relatively significant passage of time since then, in reality the proceedings did not actually progress any further in substance between the time of the delivery of VHI's defence in 2018 and the correspondence in April-June 2023 exhibited to my first affidavit (in which VHI raised the issue of security for costs again) and the plaintiffs related application for direction issued on 9<sup>th</sup> May 2023. Indeed, the plaintiffs only issued a request for discovery (which is, I am advised, the usual next step following the close of pleadings) on 14<sup>th</sup> June 2023. I therefore believe and am advised that while there has been a quite significant passage of time between the institution of the proceedings and VHI's application for security for costs there has*

*not been any delay on the part of VHI in the manner which Mr Sweeney's affidavit seeks to portray.*

***Response to certain statements made regarding loss***

15. *In my first affidavit, I made the point, inter alia, that in circumstances where the very alleged loss claimed is uncertain, [Limerick Private Ltd's]...attempt to link its poor financial position – which as noted in that affidavit was already the case prior to any conduct on the part of VHI – to VHI's actions face considerable difficulties. In Mr Sweeney's affidavit, he relies largely on simple assertion in this regard. At para.22 of Mr Sweeney's affidavit, for example, he refers to but does not exhibit "...detailed schedules of the losses being incurred..." ...I say that it is not entirely clear what 'schedules of losses' are referred to by Mr Sweeney in circumstances where they were not exhibited to his affidavits. However, I would make the following general comment on the lack of clarity in respect of the plaintiffs' claim for losses. In replies to particulars delivered on 21<sup>st</sup> April 2016, the plaintiffs stated as follows in response to a request seeking particulars of the plaintiffs' alleged loss, damage, inconvenience and expenses:*

*'19....The damage suffered by the plaintiffs herein is or can only be determined by reference to whether the hospital is built or never to be built. In either scenario, it ought to be calculated by reference to the loss of being able to develop the hospital and its adjacent facilities, or by reference to the costs incurred by the plaintiffs consequent upon the applications made and the position or positions taken by the defendants and each or either of them, which resulted in the following liabilities being incurred, which if the hospital is not built are losses sustained in addition to the commercial loss of the hospital and its adjacent facilities, upon which the adjacent facilities are or were dependent. Additionally, if the hospital is not to be built, then the site will have to be reconfigured and this will include*

*restoring and/or removing the underground work carried out and for which an estimate is provided in the figures set out below. A full Excel spreadsheet setting out these particulars numbering five pages in all is attached, ending with the very extensive costs as might or may be incurred if the site is to be returned to its original condition with the construction which has taken place to date removed.'*

16. *The document which was attached to those replies to particulars dated 21<sup>st</sup> April 2016 sets out a series of short, vague descriptions with a corresponding sum attributed to all of them.....*
18. *I note also that the breakdown of the plaintiffs' alleged losses has never been verified on affidavit, and I note that Mr Sweeney's latest affidavit does not verify them. I am advised that this is relevant, not least considering that the onus rests upon [Limerick Private Ltd]...to demonstrate by evidence – which evidence and information is within the possession of the plaintiffs – that 'special circumstances' arise to resist a security for costs application.*

***Response to certain other averments regarding the plaintiffs' undisputed impecuniosity allegedly being attributable to VHI wrongdoing.***

19. *The plaintiffs' arguments under this heading asserting that [Limerick Private Ltd's] impecuniosity is attributable to VHI, appear to be summarised by the following assertions at para.26 of Mr Sweeney's affidavit:*

*'...obtaining confirmation of VHI cover was essential to financial success of the hospital. Therefore, the wrongful denial of same is directly causative of the plaintiffs' inability to provide security for costs.'*

20. *While it may more appropriately be a matter for submission [– it is –] I believe that in this regard Mr McSweeney's affidavit assumes much, but*

*evidences very little. I am advised that the onus with respect to 'special circumstances' on a security for costs application lies with the plaintiffs. However, VHI does not accept (i) that the plaintiffs have made out (even to the level required in a security for costs application) that VHI's decision not to enter into a contractual relationship with a counterparty, with whom it did not compete was 'wrongful'; and (ii) even assuming (i) was satisfied, that VHI's conduct was the actual cause of [Limerick Private Ltd] not being in a position to meet an order for costs.*

21. *As regards the latter point, put simply, the plaintiffs have not made out (even to the level required on a security for costs application) the proposition that had approval been received from VHI, the hospital would have been in a position to trade; let alone that it would have been a commercial success to such a level as would have yielded profits, either equal to or greater than the sum sought by way of security for costs here or at all.*
22. *The above point will be a matter for submission in due course. However, VHI's position in the above respect is further supported by the views of Mr Patrick Dillon of Grant Thornton....In particular, Mr Dillon's report concludes, based on the materials provided by [Limerick Private Ltd]...in connection with its application for approval to VHI as provided to him, that [Limerick Private Ltd]...has not put forward any evidence of committed funding for the project; [Limerick Private Ltd]...has not provided any evidence of its ability to meet the preconditions to any funding set out in the letter from AIB dated 13<sup>th</sup> July 2007 (which I refer to in the following paragraphs); and that securing financing for the proposed private hospital facility at the time the application was submitted to VHI in 2011 would have been extremely challenging in light of the general lending and economic conditions at that time (including in particular in relation to healthcare development projects).*
23. *At para.31, Mr Sweeney also states: 'AIB was prepared to provide a loan in the sum of €54,600,000 (into the total proposed costs of €75,000,000) subject to a number of preconditions.' I will return to this letter below, but the first thing which is notable in this regard is that even if all AIB 'preconditions' had been satisfied and the loan drawn down, on Mr*

*Sweeney's own version of events there would still have been a further shortfall of €20,400,000 in respect of the 'proposed costs' of the venture alone, and without even considering, whether and when it would have been profitable or not. How and when that shortfall of €20,400,00 would have been provided is simply not addressed in Mr Sweeney's affidavit at all.*

***AIB Letter of 13<sup>th</sup> July 2007***

24. *At para.31, Mr Sweeney proceeds to refer to 'a letter to me dated 13<sup>th</sup> July 2007' from AIB. Mr Sweeney did not exhibit that letter. In light of the omission to exhibit this correspondence, McCann FitzGerald LLP wrote to the plaintiffs' solicitors on 7<sup>th</sup> July 2023 demanding production of this letter....*
25. *A copy of the letter was subsequently furnished on 8<sup>th</sup> July 2023....*
26. *The letter is one of the few items approaching tangible evidence which Mr Sweeney has elected to make reference by way of opposition to the present application for security for costs, in circumstances where the majority of the exhibits to his affidavit are either inter partes correspondence, documents emanating from [Limerick Private Ltd]...(the 'Information Memorandum' and the 'Business Case') or its proposed venture partner, UK Specialist Hospitals Ltd (the letter of 12<sup>th</sup> May 2012 and the March 2013 'High Quality and Efficiency Model of Elective Care' document). It is therefore appropriate to examine the letter here. Aspects of the letter will be a matter for submission in due course; however, without in any way detracting from that position, I would make a number of discrete observations upon it.*
27. *First, contrary to what is implied at para.31 which states 'AIB was prepared to provide a loan...' the letter does not in fact evidence loan approval at all. As is apparent from the final lines thereof:*

*'The above is the basis...[on] which AIB Business Banking Cork are prepared to recommend this proposal to the relevant Sanctioning Authority of AIB Group and is subject to change.*

*Please note that this does not constitute any offer of loan facilities.'*

28. *Indeed, I note that Mr Dillon of Grant Thornton also takes the view...that the relevant letter 'should be considered highly conditional and in no way representing committed funding.'*
29. *Second, the letter is dated 13<sup>th</sup> July 2007. However, the plaintiffs' formal application to VHI for approval of the hospital was not made until 2011. No evidence has been adduced by Mr Sweeney that even the limited position set out in the 2007 letter, i.e. that a particular unit within AIB was 'prepared to recommend' a loan proposal to a higher entity within that bank – actually subsisted until 2011. The lending environment had significantly changed in the intervening years; a point which I will return to below.*
30. *Third, there are a variety of other conditions in the letter quite apart from that of approval by VHI. If necessary, these will be a matter for submission in due course. However, I would briefly note a number of matters.*
  - a) *As I have already alluded to above, no evidence has been provided to demonstrate as to how Condition No.1 would have been complied with, namely €21,000,000...own funds to be introduced up front to the project'*
  - b) *Indeed, a short number of years later in December 2012, it appears – from para.37(a) of Mr Sweeney's affidavit – that ACC Bank registered a judgment mortgage over one of his properties, which seems to indicate unspecified borrowings as well as financial difficulty, at least on his part.*
  - c) *Condition No.9 required 'Cost overrun Guarantee to be provided by the Promoters and Bank to be satisfied with the ability of Promoters to meet any overruns to the project.' In common with the vast majority of the conditions, no evidence has been provided which tends to indicate (even to the level germane to a security for*

*costs application) that this condition could have been fulfilled.*

- d) *No evidence has been forthcoming as to what the feasibility would have been of securing a 'Fixed price contract...for the construction of the Hospital at €54,600,000 (Condition No 2) in either late 2007 or subsequently. Conditions Nos 3 and 4 are also relevant in that regard, with Condition No 4 requiring that AIB had to be satisfied with the abilities of any putative building contractor to 'complete the project on budget and within timescale'. Information has not been provided with respect to what the 'timescale' would have been, a matter which is, in turn, of possible relevance to the situation regarding AIB and other banks in the years which followed.*

31. *Regarding the last sentence above, and more generally, it is well known that in 2008, the year following that in which the letter was written, and various years thereafter, were marked by unprecedented volatility in the banking sector, including for AIB. This period was colloquially known as the 'Credit Crunch' and witnessed, among other things, a significant reduction in liquidity available to various banks. Mr Sweeney's affidavit ignores all of this. Needless to say, the difficulties facing the banking sector, and the downturn in economic activity generally had nothing to do with VHI. This is also acknowledged in the unabridged financial statements for [Limerick Private Limited]...for the year ended 31<sup>st</sup> December 2010, where it states as follows: 'The principal risk facing the company is the general downturn in the construction sector and lack of financing available generally in the economy.' These were provided by Mr Sweeney by letter dated 14<sup>th</sup> February 2012 in an effort to demonstrate that all Companies Registration Office matters had been regularised in respect of [Limerick Private Ltd]...following it having been listed for strike off [from] the Companies Registrar on 6<sup>th</sup> November 2011....I would also note Mr Dillon's views in respect of the funding environment at this*

*time...which indicates that debt markets were very challenging, particularly for private healthcare providers, at the time that the plaintiffs submitted their application for cover in respect of the proposed hospital in 2011.*

32. *Finally, I note that at paras.10-14 of Mr Sweeney’s affidavit, he exhibits certain correspondence from 2015 shortly after the institution of the proceedings and appears to criticise VHI for failing to exhibit such correspondence. I say and am advised that it is not clear how any of this correspondence is said actually to benefit [Limerick Private Ltd]...in the context of the within application in circumstances where the correspondence constitutes yet further examples – in addition to those contained in the correspondence exhibited to my first affidavit – of VHI indicating that [Limerick Private Ltd] did not appear to be in a position to meet an order for costs against it, [Limerick Private Ltd’s]...failure to provide any substantive response.”*

8. All of the above-quoted affidavit evidence is helpful. The following key points arising from that evidence might usefully be amplified upon before proceeding further:

#### A. General

- The plaintiffs have failed to establish the existence of special circumstances which would justify the refusal of an order for security. In fact, aspects of Mr Sweeney’s affidavit evidence undermine Limerick Private’s case in relation to the existence of special circumstances.
- The plaintiffs have not taken issue with the estimate of the costs of defending the proceedings up to trial that has been provided by legal costs accountants engaged by VHI.

#### B. Delay

- Delay can be a special circumstance that can warrant refusal of an application for security for costs (see Delany & McGrath, §13.111). That said, there is no “*delay and be damned rule*” (*P. Shiels Plant Hire Ltd v.*

*Meath Co. Co.* [2016] IEHC 71, §13). Nor is it the case that delay necessarily entitles a party to an order for security for costs (*ibid.*, §14). Delay of “*an undue and substantial kind*” is what will warrant security being refused (*Dublin International Arena Ltd v. Waterworld Ltd* [2007] IESC 481, [2008] ILRM 496 ). It seems to me at least that the mere establishment of some element of delay, rather than an element of delay coupled with significant prejudice, is unlikely generally, in and of itself, to yield a decision to refuse an order for security for costs. I do not see on the evidence before me that there is any significant prejudice occasioned thus far to the plaintiffs in the delay to date in these proceedings; to the extent that there has been any (if any) degree of prejudice occasioned by the delay, any (if any) such prejudice seems to me to be far outweighed by that which VHI would suffer if it were not awarded security for costs. This in proceedings that, it is undisputed, would be likely to cost VHI €1¾m+ to run in circumstances where, even if it were to succeed in every respect, its prospects of recovering even a portion of those monies by way of costs order is very low, if indeed there are any such prospects at all.

- Mr Sweeney’s affidavit says relatively little with respect to how the alleged delay is suggested to have occasioned prejudice to the plaintiffs. That is a deficiency that cannot be cured by counsel in argument. Indeed, one seems not very far in this regard from the advancement of a case on the basis of “*bare and unsubstantiated averments*” which was held to be impermissible in *Quinn Insurance Ltd v. Pricewaterhouse Coopers* [2021] 2 I.R. 70, §164.
- “[D]elay by one party is not a factor to be viewed in splendid isolation” (*P. Shiels Plant Hire Ltd v. Meath Co. Co.* [2016] IEHC 71, §15). In this regard, I note that Mr Sweeney at no point engages with the pace at which the plaintiffs have progressed the within proceedings or with lapses of time attributable to them; and the plaintiffs have been responsible for significant delay of their own when it comes to providing proper particulars. The first request for particulars was in February 2016 and (remarkably) the final particulars, after a successful motion brought by VHI, were only furnished on 16<sup>th</sup> April 2018.

- Owing to the protracted period spent seeking replies to particulars from the plaintiffs from 2016 onwards VHI did not deliver its defence until June 2018. Although there has been a significant passage of time since then, in reality the proceedings did not progress any further in substance between the time of the delivery of VHI's defence in 2018 and the correspondence in April-June 2023 and the plaintiffs' related application for direction issued on 9<sup>th</sup> May 2023. In fact, the plaintiffs only issued a request for discovery (the usual next step following the close of pleadings) on 14<sup>th</sup> June 2023. So while there has been a significant passage of time between the institution of the proceedings and VHI's application for security for costs there has not been delay on the part of VHI in the manner which Mr Sweeney's affidavit seeks to portray.

### C. Prejudice

- The closest Mr Sweeney comes to averring prejudice is that the plaintiffs have continued to process their case with all the attendant cost implications. However, the only substantive steps referred to as evidence of the plaintiffs so doing are (i) the exchange of particulars on the statement of claims and replies thereto, (ii) the delivery of VHI's defence (which is primarily a cost to VHI), and (iii) VHI's application to exclude the plaintiffs' previously retained expert, a 'net' interlocutory application that essentially sought a single relief (even if it brought the parties to the Supreme Court before coming back again to this court).
- No effort is made by Mr Sweeney, for example, to quantify the costs to date which have been incurred and actually expended by the plaintiffs; and no attempt is made by Mr Sweeney to compare those existing costs with the future costs in the later stages of the proceedings. In this regard, I find myself in the same position as Baker J. in *Werdna Ltd v. MA Insurances Services Ltd* [2018] IEHC 194, §62, where costs claimed to have been incurred have not been broken down sufficiently for me to understand what exactly is at stake. (I am sympathetic to the fact that the impecunious in any one case may not be able to afford the best of accounting or other experts to identify the type of amounts at stake; but even if I allow latitude

in this regard –I should and do – it does seem to me that Mr Sweeney could and should, with respect, have taken more care in this regard).

- Mr Sweeney, I note, at no point avers that if the plaintiffs had only been aware at an earlier stage that an application for security would later be brought, the plaintiffs would have abandoned their case or, e.g., would not have defended the motion to exclude Prof. McDowell. Here (rather like in *Village Residents Association Ltd v. An Bord Pleanála* [2000] 4 I.R. 321) there is no evidence before me that the plaintiffs altered their position to their detriment by reason of the application for security not having been made earlier.

#### D. Impecuniosity

- Limerick Private’s attempt to link its poor financial position to VHI’s actions is notably unconvincing, not least though not only (and certainly not insignificantly) because the breakdown of the plaintiffs’ alleged losses has never been verified on affidavit.
- The essence of the plaintiffs’ arguments to the effect that the plaintiffs’ undisputed impecuniosity is attributable to VHI wrongdoing appears to centre on the proposition that obtaining confirmation of VHI cover was essential to the financial success of the hospital and hence the allegedly wrongful denial of that cover was directly causative of the plaintiffs’ inability to provide security for costs. I do not see that the plaintiffs have established (even to the level required in a security for costs application): (i) that VHI’s decision not to enter into a contractual relationship with a counterparty, with whom it did not compete was ‘wrongful’; (ii) that VHI’s conduct was the actual cause of Limerick Private Ltd not being in a position to meet an order for costs; (iii) that had approval been received from VHI, the hospital would have been in a position to trade; let alone that it would have been a commercial success to such a level as would have yielded profits, either equal to or greater than the sum sought by way of security for costs.
- I note also that (i) the plaintiffs have not put forward any evidence of (a) committed funding for the project, (b) Limerick Private’s ability to

meet the preconditions to any funding set out in the letter from AIB dated 13th July 2007, (ii) even if all AIB's 'preconditions' had been satisfied and the loan drawn down, on Mr Sweeney's own version of events there would still have been a further shortfall of €20,400,000 in respect of the 'proposed costs' of the venture alone; how and when that shortfall would have been provided is not addressed by Mr Sweeney, (iii) the supposed AIB loan offer is highly conditional and in no way represents committed funding, (iv) the AIB letter is dated 13th July 2007; however, the plaintiffs' formal application to VHI for approval of the hospital was not made until 2011, (v) no evidence has been adduced by Mr Sweeney that the 'terms' of the 2007 letter pertained through the collapse of the so-called 'Celtic Tiger' and on into 2011, (vi) there are several conditions in the letter of 2007 separate from VHI approval but there is no evidence before me that these were satisfied.

- I note that in *Protégé International v. Irish Distillers Ltd* [2021] 2 IR 134, Clarke C.J. (at §§58-59) expressly approved the Court of Appeal's statement in that case that the type of evidence which a party seeking to advance an argument as to impecuniosity should adduce, *e.g.*, business plans, projections, evidence of funding, distribution agreements, affidavits from financial advisors and other experts. I am sympathetic to the fact that the impecunious in any one case may not provide all of these documents (indeed they may not exist in any one case) and that it is important not to lose sight of the fact that the impecunious are impecunious, with all the drawbacks that brings; here, however, I have been presented with no such documents.

9. I respectfully adopt the following general observations in the written submissions of counsel for the plaintiffs:

*"7. Giving the lead judgment of the court in PwC [i.e. Quinn Insurance Ltd (in administration) v. PwC* [2021] 2 IR 70], Clarke C.J. summarised the Court's approach on such applications (at §3.1)...[stating]

[1] [A]n initial onus rests on a defendant seeking security for costs to establish [i] that it has a bona fide defence to the proceedings and also [ii] 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. [2] Where both of these matters [i.e. [1][i] and [1][ii]] 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.’

8. As Clarke C.J. stressed in *PwC*, the key element for the court in an application for security for costs is to minimise the risk of injustice, while recognising that there will inevitably be some risk of injustice no matter what course of action the court [settles upon]....”

10. In the proceedings before me the plaintiffs do not contest that the defendant has made out the existence of a *bona fide* defence. Nor do the plaintiffs dispute their own impecuniosity (though it is asserted that this has been caused by the defendant’s wrongdoing). The plaintiffs oppose an order for security for costs on two bases, each of which they contend gives rise to a special circumstance: (a) that the plaintiffs’ impecuniosity has been caused by the defendants’ wrongdoing and/or (b) that the defendant has delayed such as to be disentitled to the order sought.

11. When it comes to point (a) in the previous paragraph it will be clear from what I have already stated that I do not, with respect, accept that the plaintiffs’ impecuniosity has been caused by the defendants’ wrongdoing. The reasons why are set out previously above under the sub-heading ‘D. Impecuniosity’ and I would reiterate those points here.

12. When it comes to point (b) in the paragraph before last I would reiterate the points set out previously above under sub-headings ‘B. Delay’ and ‘C. Prejudice’. Respectfully, I do not see that the passage of time has caused anything by way of significant prejudice to the plaintiffs. Any, if any – and I do not see on the evidence before me that there is any – significant prejudice occasioned thus far to the plaintiffs in all that has occurred to date in these proceedings is far outweighed by the degree of prejudice that VHI could suffer if it were not awarded security for

costs (in proceedings that, it is undisputed, would be likely to cost VHI €1¼m to run in circumstances where, even if it were to succeed in every respect, its prospects of recovering even a portion of those monies by way of costs order is very low, if indeed there are any such prospects at all).

**13.** It follows from the foregoing that I do not consider that the plaintiffs have established any special circumstance which would tilt the balance of justice against the making of an order for security for costs. In *PwC* (at §7.25), Clarke C.J. indicates that even if a full *Connaughton Road* special circumstance is not established, that is not the end of matters, that a court can also consider whether the ordering of security for costs would stifle the proceedings (and would have to analyse any assertion put forward by a plaintiff that it would not be in a position to put up security should it be ordered). Here there has been no averment that awarding security would stifle the proceedings; accordingly it is not a factor to be taken into account (*Savanne*, §79).<sup>2</sup>

**14.** I respectfully do not see that because in *CMC Medical Operations v. VHI* [2015] IECA 68, the Court of Appeal found that there were special circumstances which justified the refusal of an order for security for costs, I should reach a similar conclusion here because the plaintiffs consider a similarity to exist between the facts of that case and this one. It is for the plaintiffs to establish to my satisfaction in *this* case that there are one or more special circumstances applicable to Limerick Private which would justify the refusal of an order for security. For the reasons identified previously above, with all respect, no such special circumstances appear to me to have been established on the evidence before me. In any event, as was highlighted at the hearing of this application, there are a number of significant differences between that case and this: there (unlike here), the hospital actually opened; there (unlike here) the alleged abuse of dominant position had been set out in some detail; there (unlike, with all respect, here) the

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<sup>2</sup> I should perhaps note that when it comes to the four cumulative criteria mentioned in *Connaughton Road Construction v. Laing O'Rourke Ltd* [2009] IEHC 7, §3.4, (a) the precise contours of the abuse of dominant position contended for by the plaintiffs remain opaque; so *Connaughton* criterion (i), “that there was actionable wrongdoing on the part of the defendant” and the related criterion (ii), “that there was a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff”, are not met; and (b) the claimed losses arising from the alleged wrong (which are not verified on affidavit) remain uncertain and vague; so *Connaughton* criterion (iii), “that the consequences referred to in (ii) have given rise to some specific level of loss in the hands of the plaintiff, which loss was recoverable by law” and the related criterion (iv), “that the loss concerned was sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position”), are not satisfied.

promoters had a proven track record in the private hospital market; there (unlike here), there seems to have been assured access to bank financing.

**15.** The “*default position*”, as identified by Clarke C.J. in *Quinn Insurance Ltd v. Price Waterhouse Coopers* [2021] 2 I.R. 70, §97 is that “[F]ull security in monetary form should be provided but...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”. I understood counsel for the plaintiffs to intimate at the commencement of his oral submissions in this matter that such is the impecuniosity of the plaintiffs that Limerick Private would not be in a position to meet any costs order that might be made against it. If I am correct in that understanding then, to paraphrase Barniville J., as he then was, in *Coolbrook Developments Ltd v. Lington Development Ltd & Anor* [2018] IEHC 634 (at §116) that would be to give the plaintiffs the benefit of all the upside in the proceedings but none of the downside risk.

**16.** For the various reasons stated, I propose to order security for costs against The Limerick Private Limited in the amount of €1,790,500.00. That is not quite full security as the just-mentioned figure is the estimated cost to VHI of defending the proceedings from this point onwards. However, it seems to me that ordering just that tranche of secured costs is the fairest way of minimising the risk of injustice to all if and when these proceedings continue. I would also propose to make the orders sought in paras.4(2) and 5 of the notice of motion (as identified at the start of this judgment).

**17.** It became the practice during the Covid lockdowns to give a provisional view at the end of a judgment as to how costs should lie. Subject to contrary argument between the parties, my provisional view is that VHI brought this application, succeeded on this application, and thus an order for the costs of the application should issue in its favour. That is a provisional view. If the parties consider that matters should rest otherwise as to costs, I will hear them further in this regard.