THE COURT OF APPEAL

Unapproved
No Redactions Needed

Record Number: 2023/304
High Court Record Number: 2015/4210P
Neutral Citation: [2025] IECA 15

Binchy J.

Pilkington J.

O'Moore J.

BETWEEN/

SHAY SWEENEY AND THE LIMERICK PRIVATE LIMITED

PLAINTIFFS/APPELLANTS

-AND-

THE VOLUNTARY HEALTH INSURANCE BOARD

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 31st day of January, 2025.

1. The plaintiffs ("the Sweeney interests") wished to set up a private hospital in Limerick. With this in mind, they engaged in negotiations with the defendant, the VHI, in order to have the intended facility approved for insurance purposes by that body. Ultimately, the VHI did not approve for cover the medical facility that the Sweeney interests wished to open. These proceedings were commenced on the 26th May, 2015. In them, the Sweeney interests seek both declaratory reliefs and damages arising from that failure.

2. In a judgment of the 11th October, 2023 the High Court (Barrett J.) ordered the plaintiff company (Limerick Private) to furnish security for costs in favour of the VHI, limited to those costs that the respondent estimated it would incur from the date of the judgment of the High Court. Limerick Private appealed that decision, and this is my judgment on that appeal.

3. Limerick Private raised two essential issues on the appeal. They are that: -

(1) the trial judge was wrong in not finding that Limerick Private's impecuniosity was not caused by VHI;

(2) the trial judge was wrong in his approach towards the delay on the part of VHI in seeking security for costs.

4. This second point had three limbs. The first was that the High Court incorrectly identified the period of delay. The second was that the High Court failed to apply correctly the law on the question of prejudice caused by the delay of the VHI, and incorrectly characterised the matters which were said to give rise to prejudice. Thirdly, it is said that the High Court ignored the fact that the VHI provided no explanation for its delay in seeking security for costs against Limerick Private.

5. In order to understand and decide upon the propositions urged on behalf of Limerick Private, it is important to set out the factual background to the case. There were three affidavits sworn in respect of the motion. The first of these was a grounding affidavit of Aaron Keogh, the Managing Director of VHI. The second was a replying affidavit sworn by the first named plaintiff, Mr. Sweeney, on behalf of Limerick Private. The exchange of affidavits closed finally with the second affidavit of Aaron Keogh sworn in response to the affidavit of Mr. Sweeney.

6. Before describing the procedural history of the action, which is important in the context of the allegation of delay, some of the affidavit evidence in connection with the

commercial reality of the project should be noted. In his only affidavit, Mr. Sweeney emphasised the importance of VHI cover. At para. 26 he states: -

> "26. Secondly, the Plaintiffs' case, as supported by our expert economist Mr. Taylor is that 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."

7. The report of Mr. Taylor, the author of works on healthcare and competition law and a partner in Aldwych Partners of London, was exhibited to Mr. Sweeney's affidavit. The report indicated the crucial need for VHI cover in order for the Sweeney interests' project to proceed, and set out the dominant position of VHI in the market. The contents of that report were emphasised by counsel for Limerick Private in his oral submissions on the appeal. These factors were stated to be *"key to the case"*.

8. A separate issue, however, was the funding of the proposed venture. Mr. Sweeney went on in his affidavit to swear the following: -

> "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 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.*"'

9. In his second affidavit, Mr. Keogh gave evidence that this important letter from AIB had not been exhibited by Mr. Sweeney and that—subsequent to the service on VHI's solicitors of the Sweeney affidavit—McCann Fitzgerald, on behalf of VHI, wrote to the solicitors for the Sweeney interests seeking production of that letter pursuant to O. 31, r. 15

of the Rules of the Superior Courts. The letter was exhibited by Mr. Keogh in his second affidavit. The letter states that the first precondition (of 12) for the AIB loan to be advanced was: -

> "(1) EUR 21,000,000 (twenty one million euro) own funds to be introduced up front to the project."

10. Mr. Keogh's second affidavit went on to state, at para. 30(a), that *"... no evidence has been provided to demonstrate as to how Condition No.1 would have been complied with..."*. Mr. Keogh also raised the question as to how other preconditions would be met by Limerick Private or by Mr. Sweeney. He also noted that in December 2012 it appeared from 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."*

11. As already noted, there was no replying affidavit from Mr. Sweeney (or otherwise on behalf of Limerick Private) delivered in response to Mr. Keogh's second affidavit. I do not think that there was anything underhand on the part of Mr. Sweeney in not exhibiting the letter of the 13th July, 2007 and, as I have noted, this letter was provided when it was sought by McCann Fitzgerald. However, on the evidence as it stands, Mr. Keogh's account is accurate. The only funding for the project identified by the Sweeney interest was the AIB funding. This contained specific and quite onerous conditions which, on the evidence before the High Court and this court, there is no reason to believe that the Sweeney interests were in a position to meet.

12. I will now describe the history of the proceedings. Initially, the Minister for Health of Ireland and the Attorney General were sued in addition to VHI. However, these other defendants were removed from the proceedings. Both sets of written submissions to this

court contain chronologies. Combining these, the following is a comprehensive account of how the proceedings progressed. In understanding the chronology, it is essential to know that the original competition expert retained by the Sweeney interests was someone to whom VHI objected. The ground of objection was that the expert in question had been retained by the VHI in respect of similar matters, albeit in other proceedings.

Event	**Date**
Plenary Summons and draft statement of claim.	26th May 2015
Letter from McCann Fitzgerald concerning various matters including a statement that security for costs would be sought.	28th May 2015
Letter from Angela McCarthy, solicitor for the Sweeney interests, concerning security for costs.	5th June 2015
Letter from McCann Fitzgerald requiring Limerick Private to provide security for costs.	18th September 2015
Letter from Angela McCarthy concerning, among other things, security for costs.	16th October 2015
Letter from McCann Fitzgerald calling for confirmation that Limerick Private would provide security for costs.	16th October 2015
Letter from McCann Fitzgerald in relation to various matters again seeking security for costs.	23rd October 2015

Date by which Limerick Private's agreement to provide security for costs was sought by McCann Fitzgerald, failing which VHI would issue a motion seeking same.	3rd November 2015
Letter from Angela McCarthy regarding the amendment of the title to the proceedings and referring to the security for costs issue.	1st February 2016
VHI's notice for particulars.	29th February 2016
Replies to particulars furnished by the Sweeney interests.	21st April 2016
VHI's rejoinders to replies for particulars.	26th April 2017
Sweeney interests' replies to particulars.	29th May 2017
The Sweeney interests discontinued their claim against the State respondents.	2nd October 2017
Action admitted to the competition list.	10th October 2017
Order directing replies to rejoinders by the Sweeney interests.	12th December 2017
Replies to rejoinders.	16th February 2018
Repeated rejoinders by VHI.	9th March 2018
Replies to repeated rejoinders.	6th April 2018
VHI's further request for particulars.	9th April 2018
Replies to further particulars by the Sweeney interests.	16th April 2018

Defence delivered.	18th June 2018
VHI's notice of motion to exclude expert evidence issued.	26th November 2018
Judgment of the High Court in favour of VHI on expert evidence issue.	28th May 2019
Judgment of the Court of Appeal on expert evidence issue.	9th June 2020
Judgment of the Supreme Court on expert evidence issue.	9th September 2021
Ruling in the Supreme Court on costs and order of the Supreme Court.	10th November 2021
Notice of intention to proceed.	6th January 2023
Letter from Angela McCarthy.	4th April 2023
Letter from McCann Fitzgerald referencing security for costs.	28th April 2023
Letter from McCann Fitzgerald calling on Limerick Private to provide security for costs.	22nd May 2023
Letter from McCann Fitzgerald indicating that a motion would be issued seeking security for costs.	13th June 2023
Letter from Angela McCarthy indicating that any motion would be opposed.	14th June 2023
Draft report of Mr. Taylor, expert for the Sweeney interests, provided to VHI.	19th June 2023

Motion seeking security for costs issued.	28th June 2023
Judgment of the High Court on security for costs.	11th October 2023

13. Importantly, no explanation for the delay on the part of the VHI in bringing the current application has been provided in either of Mr. Keogh's affidavits. One can easily speculate as to why this was the case. It may have been thought that the application with regard to the disqualification of the original expert on behalf of the Sweeney interests (who in the past had provided similar assistance to VHI) would deal such a body blow to these proceedings that there was no need to bring a separate application for security. Whether or not that was a legitimate approach to take remains undecided, as the failure to give any evidence to that effect leaves the VHI's undoubted delay completely unexplained. In the relevant period of delay, it is also notable that VHI did not give any evidence as to why, having threatened within two days of service of the writ to seek security for costs, it did not do so at the time. Again, one could speculate that a letter stating that security for costs would be sought is part of the strategy employed by defendants in a situation such as this, and is deployed to put pressure on the claimant either to consider withdrawing the case or to settle for something close to nuisance value. However the absence of any evidence from VHI as to why it did not follow through on its letters of the 28th May, 2015, 18th September 2015, 16th October 2015, or 23rd October, 2015 for some years is again significant. As we will see in connection with the issue of any prejudice caused by the VHI's delay, it is not open to a court at any level to introduce its own views in lieu of evidence which a party should itself have provided.

14. On the issue of the extent of the delay, the trial judge found, in a section at p. 15 of his judgment entitled *"**Court Note**"*, that: -

> "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 18th 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…"

15. The conclusion by the trial judge that the VHI's delays in bringing this motion is to be calculated from when its defence was delivered was the subject of stern criticism by counsel for Limerick Private on the appeal. Even the approach set out by the trial judge which I have just quoted, namely that matters should be looked at closely, was—in the submission of counsel—not applied by the trial judge himself. It was suggested that the trial judge had not considered carefully the correspondence, and had *"airbrushed"* the application by VHI for the recusal of the first expert witness engaged by the Sweeney interest. Counsel focused particularly on the judgment in *CMC Medical Operations v VHI* [2015] IECA 68, in which VHI had sought security for costs before it delivered its defence. There was also a strong submission made on the basis of a judgment by Barrett J. in *Euro Safety and Training*

Services Limited v FÁS [2016] IEHC 161, and in particular the following reference at para. 38 of that judgment: -

> "It has been contended by FÁS that the present application could not have been brought until it had filed its defence, a contention that the court, with respect, considers to be entirely wrong. There is no reason why this application could not or should not have been brought after the delivery of the statement of claim, and every reason why it both could and should."

16. Counsel for Limerick Private makes the simple case that, by issuing correspondence stating that a motion for security for costs would be brought and in particular by requiring an agreement on the part of Limerick Private to provide security by the 3rd November, 2015, the months of October and November 2015 were the latest (and most generous) starting points from the VHI's perspective as to when its delay was to be calculated.

17. In response on this issue, counsel for VHI accepted that the delivery of the defence was not *"a point in time written in stone"* but argued that in this case this was an appropriate time from which to calculate VHI's delay given the need to raise particulars over an extensive period of time.

18. In deciding this issue, the contents of the correspondence from the VHI's solicitors and the absence of any explanation as to why these motions were not brought are both critical factors. It is worth setting out the precise terms used in the letter of the 23rd October, 2015, which is not the first time that security for costs was raised as an issue on behalf of the VHI. The letter concluded: -

> "If we do not receive your client's agreement to provide security for our client's costs on a voluntary basis by 3 November 2015, we are instructed to issue a motion seeking

> security for costs pursuant to s52 of the Companies Acts (*sic*) 2014, together with related reliefs."

19. Every application for security for costs is to be decided on its own facts. In this case, the only meaning that this correspondence can bear is that VHI was of the view, prior to giving the instructions recited in this letter, that it would be able to establish that it has a full defence to the claim and otherwise satisfy the court that security for costs should be ordered. It was therefore incumbent on VHI, in this motion, to explain why any such reading of the letter would be wrong or to justify why the motion was not brought in accordance with instructions given to its solicitors in October 2015 at the latest. It is also important to note that Mr. Sweeney in his affidavit refers to this correspondence, highlights the paragraph which has just been recited, and goes on to state: -

> "3 November 2015 came and went, and no such application issued, until now, nearly seven years later."

Tellingly, Mr. Keogh does not deal with this averment in his second affidavit.

20. I agree with the submissions made on behalf of Limerick Private on this issue. The analysis by the trial judge did not pay sufficient heed to the early correspondence on behalf of VHI. That correspondence means what it says, which is to imply that VHI was in a position to seek this relief in October or November 2015. It is from that point in time that VHI's delay in bringing the motion is to be calculated.

21. The second delay related issue is the question of prejudice. The trial judge found that no real prejudice had been shown by the Sweeney interests. At p. 34 of his judgment he says: -

> "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)."

The trial judge went on to note that at no point did Mr. Sweeney give evidence 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…"*. He concluded that: -

> "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."

22. Much of what the trial judge says in this regard is undoubtedly correct. However, it is submitted on behalf of Limerick Private that the prejudice suffered by it is as described by Baker J. in *Werdna* and by Clarke J. in *Moorview*. Counsel submits that the Sweeney interests have been prejudiced as they did not have the opportunity to make the decision as to whether to go on with the case and therefore incur costs *"in the light of full information, including the fact that security for costs would have to be put up"*; Clarke J. in *Moorview*.

23. In his oral submission on this issue, counsel for VHI emphasises the absence of any affidavit evidence of prejudice on the part of the Sweeney interests and, with regard to *Moorview*, argued (at p. 39 of the DAR transcript): -

> "… but in that case [Clarke J.] was not talking about the fact that there had been a demand for security. He was not talking about a case where the plaintiff was on risk in relation to security and was told that it would be brought."

24. For the sake of completeness, I should also note that counsel for Limerick Private relied upon two other arguments with regard to prejudice. The first was that the Sweeney interests had suffered three orders for costs against them *"and that's a prejudice in and of itself"*; page 48 of the DAR transcript. He also relied upon a comment by Hyland J. in *Marlan Homes v Egan* [2022] IEHC 35, to the effect that the court in that case could infer prejudice as: -

> "Legal proceedings are by their nature demanding and difficult for all parties."

This comment appears at para. 51 of the judgment; at para. 50, Hyland J. had referred to the *"core requirement"* being that the court was *"satisfied that a plaintiff has been disadvantaged."* I would respectfully agree with that summary. As to whether or not such disadvantage can be inferred, this is something to which I will shortly return.

25. In deciding this question of prejudice, the evidence available to the court is critical. The burden is on Limerick Private to show that it has in some way been disadvantaged by VHI's delay. However, of great importance is that Mr. Sweeney in his affidavit describes no such disadvantage. Undoubtedly, steps have been taken by the Sweeney interests during the period of delay, and these steps could have involved the incurring of costs. These include the delivery of further particulars of the claim (on a number of occasions, over an extended

period of time), the unsuccessful defence of the application with regard to the original expert, and so on. However, not even the vaguest idea is given as to the extent of these costs. It is clear from earlier authorities that, in most cases at least, it is unnecessary to provide chapter and verse as to legal expense. It is certainly not required in this case. Nonetheless, one would have thought that in setting out the prejudice suffered by the Sweeney interests in general and Limerick Private in particular there would at least have been some evidence provided as to the scale of the costs involved. Even more important is the basis upon which these legal services were provided. It is not unknown for both solicitors and counsel to act on a no foal no fee basis in respect of even the most complicated litigation. In a case such as this where, as I have already noted, Mr. Sweeney hints at personal financial difficulties, and where the financial position of Limerick Private has been poor from the start, it would not be at all unusual for a legal team (and possibly expert advisors) to act on such a basis. However, nothing is said about the terms on which either lawyers or experts have been engaged by the company or by Mr. Sweeney.

26. Equally, Mr. Sweeney does not say that the making of an order for security for costs is a stifling of the case. He hints that it may be, but does not say it in clear terms. This was acknowledged by his counsel as *"an evidential deficit"* during the course of the appeal.

27. Finally, Mr. Sweeney does not give any evidence that, had the motion been brought promptly by VHI, he would not have in any event proceeded with the action.

28. The absence of any evidence of prejudice is quite stark. In circumstances where no evidence of prejudice is advanced, the court should only infer prejudice where this can properly be done. I respectfully do not agree that prejudice can be found here by making a finding of fact, by way of inference, that litigation is stressful. Firstly, there is nothing in the evidence in this case that allows such an inference (properly so described) to be drawn.

Secondly, it is simply not the case that every litigant is pressurised by the conduct of litigation. For some parties, the prosecution of proceedings is far from stressful; on the contrary, some litigants thrive in the contest. As a general rule, however, where a party has not given evidence that there have been adverse consequences arising from the other side's delay, it is only in very rare cases (if any) that such prejudice can be found.

29. There remains the important issue of the judgment of Clarke J. in *Moorview*. At the end of the appeal hearing, it seemed to the Court, and was accepted by counsel, that this judgment may be at odds with the judgment of Baker J. in *Werdna*. The full quote from the judgment of Clarke J. in *Moorview* is as follows: -

> "3.7 Some prejudice has been asserted on behalf of Moorview. In procedural terms, it would appear that the most significant step taken by Moorview during the period after when an application for security for costs might ordinarily have been expected to have been brought, was the making of discovery. It is clear from *Hidden Ireland* that the incurring of expenditure by a plaintiff during a period of delay in bringing an application for security for costs is a relevant factor. When an order for security of costs is made against a plaintiff, that plaintiff has to make a decision as to whether it wishes to continue with the proceedings. It may well do so. However, it has to balance various factors in considering whether continuing with the proceedings is a beneficial course of action for it to adopt. Doubtless regard will be had to the prospects of success, the extent of the damages or other relief which might be obtained, and the amount of costs which will have to be incurred, both in pursuing the proceedings and in putting up security for the defendant's costs. Similar considerations apply to all litigants in any form of litigation. However, an order for security for costs is an added factor to be taken into account by a plaintiff in a case

where security is ordered. In my view, the rationale behind the delay special circumstance jurisprudence is that a party is entitled (where security is to be ordered) to be able to include that factor in its judgment as to whether to progress the proceedings from as early a time as is reasonably practicable. The test is not as to whether the relevant plaintiff might not nonetheless have gone ahead with the proceedings even had security been ordered earlier and, thus, would have incurred any costs arising in the intervening period in any event. Rather it is that the plaintiff incurring costs in the intervening period ought to have been entitled to make its decision, as to whether to incur those costs, in the light of full information, including the fact that security for costs would have to be put up."

30. In *Werdna*, Baker J. observed: -

"70. The circumstances of the delay in the present case are nothing like those which were determinative in the application before Barrett J. in *Euro Safety v. An Foras Áiseanna*, where there was little or no engagement between the parties in the three-year period. Pleadings have progressed in the present case and it is to the benefit of the plaintiff that its case is ready or close to being ready to proceed. Unless the plaintiff can say, which it has not said, that it would not have commenced or continued these proceedings had it known that an application for security for costs would be brought by any of the defendants, I am not satisfied that the delay has been such as would disentitle the first and second defendants to the reliefs sought, save with regard to the amount in respect of which security is to be provided."

31. It should be observed that Baker J. went on (at para 73): -

"73. The expenditure incurred by the plaintiff in bringing the case on for hearing including the expenditure on discovery and other pre-trial litigation costs must be

balanced against the fact that security is to be given only for post request costs, and delay is a relevant discretionary factor if it can be shown that the delay caused detrimental loss or expenditure which would not have otherwise been incurred. One discretionary factor is not sufficient to wholly disentitle the defendants to the order and I consider that justice can be done by making an order for an amount less than that claimed."

The trial judge in the current proceedings, it should be noted, calculated the security to be ordered by reference to the estimated costs that the VHI may incur from the delivery of his judgment; para. 16.

32. In considering the comment by Clarke J. in *Moorview*, Baker J. also noted (at para. 71 of her judgment): -

"71. Clarke J., in *Moorview Developments Ltd v. Cunningham* [2010] IEHC 30, considered that the test was not whether a plaintiff would discontinue an action in the light of a request for security for costs but whether the plaintiff would have made a decision to continue with full information that an application would be made for security … That means that the amount of the claim, and whether the amount directed to be secured is disproportionate to the amount of the claim, are relevant factors."

33. The difference between the view taken by Baker J. and the comments of Clarke J. appears to be that the former expects a plaintiff to provide evidence that it would not have incurred costs had it known that a security for costs motion would be brought, while the latter finds sufficient prejudice in the lack of the opportunity to make a "fully informed decision" about commencing or continuing a claim. On the basis that this correctly describes the difference in approach, I would prefer the view of Baker J. Undoubtedly, the steps taken by the Sweeney interests—either in delivery of particulars or in resisting the application with

regard to their first expert—have been taken in advancing their proceedings. While the outcome with regard to the recusal of the first expert was disappointing from the point of view of the Sweeney interests, and while this issue certainly resulted in costs orders against them, it was their decision to dispute VHI's original application and continue to do so at every level of the Superior Courts. In deciding whether or not prejudice has resulted to the Sweeney interests as a result of VHI's delay, it seems logical for the court to enquire as to whether any costs or liabilities incurred by the Sweeney interests over the relevant period would in all likelihood have been incurred in any event. That is why the sort of evidence described by Baker J. at para. 70 of *Werdna* seems to me to be essential. It is not forthcoming here.

34. However, even if this court was to confine itself to the approach set out by Clarke J. in *Moorview*, on the facts of this case the Sweeney interests did make a decision to proceed notwithstanding the possibility that security for costs might be sought and ordered. The correspondence from VHI in 2015 was categoric. Security for costs would be sought. At that time, the Sweeney interests did not have any delay to deploy to see off such an application. The only other basis upon which the application for security for costs is currently resisted—that the VHI's wrongdoing was the cause of the impecuniosity of Limerick Private—was, as I will shortly describe, always hopeless. When security for costs was originally demanded, therefore, any consideration of the issue would have led the Sweeney interests to realise that it was very likely to be ordered. Notwithstanding this, the proceedings continued. While a letter seeking the provision of security for costs is not the same as the *"fact that security for costs would have to be put up"* (to use the language of Clarke J. in *Moorview*), as things stood in late 2015 were the VHI to follow through on its threat to seek security, the making of an order in its favour was always on the cards.

35. From October/November 2015 onwards, therefore, the Sweeney interests proceeded to press on with the litigation in the knowledge that the request for security for costs had not gone away. There is some evidence, rejected by the trial judge, to the effect that VHI may have abandoned its request for security for costs. However, that evidence is cautious and unconvincing. At para. 17 of his affidavit, Mr. Sweeney states: -

> "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, the VHI progressed matters vigorously from its own perspective, taking a number of procedural steps."

This diffident evidence is further diluted by the more detailed contents of para. 20 of the same affidavit: -

> "The fact that the VHI progressed their 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 the VHI, being apparently focussed (*sic*) 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."

36. As counsel for VHI submitted at the hearing of the appeal, this language appears almost designed to avoid saying that the Sweeney interests would not have taken the steps of advancing the action had it known that security for costs would be ordered. More importantly, Mr. Sweeney does not clearly and unequivocally say that he had formed the opinion at a particular point in time that the threat of security for costs had gone away as

VHI had abandoned its stated intention to seek such security. As this evidence is not given, the High Court was entitled to find that VHI never abandoned its entitlement to seek security for costs and that the Sweeney interests never relied on such a purported abandonment. In coming to that conclusion, in the *"Court Note"* which I have already mentioned, the trial judge had expressly considered a further section of Mr. Sweeney's affidavit (para. 6) where it is averred that *"... it is quite obvious from the correspondence that any intention to bring an application [for security for costs] was effectively abandoned."* That averment, as with the other averments, seeks to substitute a reading of the correspondence for clear and direct evidence from Mr. Sweeney to the effect that the VHI's request for security had been abandoned and that he had formed the opinion that this was the case.

37. I therefore agree with the trial judge that no prejudice has been shown by Limerick Private arising from VHI's delay such as would disentitle VHI to an order for security for costs.

38. The third challenge on behalf of Limerick Private to the trial judge's approach to the delay issue relates to the lack of an explanation on the part of VHI. However, the lack of an explanation does not in itself, on the authorities, support a refusal of an order for security. As is referred to in several of the more weighty authorities on which the Sweeney interest rely (including *Moorview*, *Werdna*, and *Marlan Homes*), once delay is established the critical issue is the prejudice (if any) resulting to the plaintiff. The absence of any explanation by VHI has, as I have already found, resulted in my conclusion that the delay in this case is exceptionally long. That does not, in itself, mean that the order should be refused on that basis.

39. With regard to the length of the delay, I have found that this runs to just shy of eight years. That is an exceptional period of time. There is a tendency in some of the analyses of

the delay cases to refer to the length of the delay as though that was the only factor, or even the dominant one. Often, the delay is easy to establish but the prejudice caused by that delay can be problematic to assess. However, as in any walk of life, delay must be seen in context. If the only issue was the delay on the part of VHI, that would have to be seen and assessed by reference to the vigour with which the Sweeney interests had prosecuted their claim. In that regard, it would (for example) be notable that VHI's original notice for particulars was raised on the 29th February, 2016, but it was still necessary for an order to be made on the 12th December, 2017 directing that proper replies be provided to some of the particulars, and that this was not done until the 16th February, 2018 (almost exactly two years after the original notice for particulars was raised on behalf of VHI). While the delay on the part of VHI is extreme, it must be viewed in the context of the general progress of the case. However, it is the absence of established or probable prejudice on the part of Limerick Private that has led to my conclusion that the trial judge was correct not to refuse security by reference to this special circumstance.

40. The second special circumstance asserted by Limerick Private on the appeal was that its admitted inability to meet the costs of VHI resulted from the actions of the defendant. There are two ways of approaching this. Firstly, there is the argument that the wrongful action of VHI in refusing to provide cover in respect of the private facility in Limerick prevented the establishment of a successful commercial venture. However, as found by the trial judge the Sweeney interest have not put forward any evidence that the preconditions in the only offer of finance for the project (the AIB letter of 13th July 2007) could have been met. The evidence therefore fell far short, as the trial judge observed, of the requirements set out in *Protégé International v Irish Distillers Limited* [2021] 2 IR 134 by Clarke CJ (at paras. 58 to 59). While counsel for Limerick Private urged the court to look at impecuniosity *"with a wider lens…"* this does not surmount the fact that the requirements set out in

Connaughton Road v. Laing O'Rourke Construction [2009] IEHC 7 are simply not met in this case. There was nothing like the detailed, cogent and credible evidence (as required by the judgment of Clarke J. in that case) available here.

41. Secondly, there is no doubt that the position of the plaintiff company as it stood in advance of the wrong complained of is not the cause of VHI. The audited accounts of Limerick Private show that, as of the 31st December 2006, the 31st December, 2007 and onwards, the company was *"effectively insolvent"*, as submitted by counsel for VHI. The position of Limerick Private, therefore, is that its inability to meet the costs of VHI has not been caused by any wrongdoing on the part of the defendant, at least on the evidence available to this court.

42. I would therefore dismiss the appeal and affirm the order of the High Court.

43. My provisional view is that the VHI is entitled to the costs of the appeal. If a different order as to costs is sought, notice should be provided to the Court of Appeal office by 5pm on the 14th of February 2025. If such notice is given, directions will be provided as to the exchange of submissions. Binchy and Pilkington JJ agree with this judgment, and the orders which I propose.