



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2020:000123

**O'Donnell C.J.
Dunne J.
O'Malley J.
Baker J.
Woulfe J.**

Between/

SHAY SWEENEY AND THE LIMERICK PRIVATE LIMITED

Plaintiffs/Appellants

-and-

THE VOLUNTARY HEALTH INSURANCE BOARD IRELAND

Defendants/Respondent

**Ruling on Costs of the Court delivered by Mr. Justice O'Donnell, Chief Justice,
on the 10th of November, 2021.**

1. The substantive proceedings between the plaintiffs herein (“Mr. Sweeney”) and the defendant (“the VHI”) concern an assertion on behalf of the plaintiffs who are the proprietors of, or participants in, a private hospital, that the VHI has abused its dominant position by refusing to cover procedures carried out in the plaintiffs’ hospital. However, the particular issue arising in this appeal concerned the fact that an expert witness had been retained on behalf of the plaintiffs, who had previously acted on behalf of the VHI in similar litigation brought by other private hospitals.

The VHI brought an application to have the expert witness excluded. The High Court refused the application, but on appeal the Court of Appeal granted the order and this Court on appeal upheld the decision of the Court of Appeal.

2. The parties have now agreed that the issue of costs can be dealt with by the Court on the papers and have delivered detailed submissions on the issue of costs. In carefully constructed submissions, the plaintiffs maintain that the VHI has not been “entirely successful” in these proceedings, because the Court did not endorse the test adopted in *Prince Jefri Bolkiah v. KPMG* [1999] 2 A.C. 222 (“*Bolkiah*”) but rather preferred the formulation adopted in a number of Australian cases, that the moving party should demonstrate a “real and sensible risk” of disclosure. The plaintiffs also maintained that the matter was both novel, and of public importance and this justified the Court in departing from the normal rule that costs would follow the event, it being accepted that the VHI was successful on the event in this case, i.e., that an order was made as sought by the VHI in respect of the continued participation of the proposed expert witness.
3. Mr. Sweeney maintains that the Court should set aside the order for costs made in the Court of Appeal, and substitute for it an order requiring the successful defendants to pay to the unsuccessful plaintiffs the costs of the proceedings in the High Court, the Court of Appeal and this Court.
4. The VHI for its part, takes issue with the submissions. It argues that, in the light of the judgment of the Court, it cannot be said that the VHI was anything other than entirely successful on this appeal. It was pointed out that the VHI made submissions suggesting that there was no significant distinction between the *Bolkiah* test and the Australian test, whereas the plaintiffs had unsuccessfully contended for an entirely

different test, which the Court did not accept. It was also argued that the novelty of the issue did not mean that the general rule of costs should not apply. In so much as the plaintiffs sought not just the costs of this appeal, but also the costs of the High Court and Court of Appeal hearing, the VHI pointed out that the order for costs in the Court of Appeal had been agreed between the parties and provided that the VHI should recover the costs of both the High Court and the Court of Appeal but execution on foot of any such order should be stayed pending the outcome of the case in the High Court.

5. While the submissions made on behalf of the plaintiffs are well presented, it should be said that, even disregarding the manner in which the order for costs was made in the Court of Appeal, there can be no justification for the unsuccessful plaintiffs recovering all the costs of the hearings in the High Court, the Court of Appeal and this Court. Such an order would singularly fail to recognise the fact that the VHI succeeded on the issue, and that the plaintiffs took up the position of resisting the VHI's application, and failed in their opposition. This is private commercial litigation, from which the plaintiffs hope to benefit. The Court considers, therefore, that there is no basis for requiring a successful party to pay the costs of the unsuccessful party. In this case, the Court is satisfied that the merits and justice of this application are best met by the form of order made in the Court of Appeal, which recognises the fact that the VHI was successful in its application but imposing a stay on any order for costs, pending the determination of the litigation proper. The Court considers that this order protects the legitimate interests of both parties in the light of the decision made by the Court, and will accordingly order that the VHI should recover its costs of the High Court, Court of Appeal and the appeal to this Court and

that execution on foot of such order should be stayed pending the determination of this case in the High Court.