THE HIGH COURT

COMMERCIAL COURT

[2024] IEHC22

RECORD NUMBER 2023/4600 P

BETWEEN

BEAKONFORD LIMITED

PLAINTIFFS

AND

OONAGH STOKES

AND

BARBARA WILDING

DEFENDANTS

JUDGMENT OF Mr Justice Twomey delivered on the 22st day of January, 2025

SUMMARY

1. This is a case that concerns the use of hourly rates, or more accurately their non-use, in the estimation of fees due to lawyers in High Court litigation, in the context of a security for costs application.

2. In particular it relates to the relevance of hourly rates when a court has to resolve the conflict between, on the one hand, the requirement (in the Legal Services Regulation Act, 2015 ("**2015 Act**")) that High Court costs be *'reasonable'* and, on the other hand, the fact that the

costs, which are adjudicated by a State body (the Office of the Legal Costs Adjudicator), are, in practice, *anything but reasonable*, since they are at *'millionaire'*[1] levels. This conflict requires consideration of how one determines what is meant by *'reasonable'* litigation costs when it comes to the High Court.

3. The background to this issue is that judges have little or no control over the *amount* of costs which have to be paid by a losing litigant to his opponent's lawyers. This is because while judges decide *which party has to pay* costs, it is the Legal Costs Adjudicator ("**LCA**"), and previously the Taxing Master, who *calculates the actual amount to be paid* in costs in accordance with rules laid down by the Oireachtas, which are currently contained in the 2015 Act. Thus, a security for costs application is one of the few occasions in which the courts have any insight to how costs are calculated, even though costs are an integral part of the administration of justice, since they will often exceed the damages awarded.

4. As a result, the judiciary, with no control over the level of litigation costs, has repeatedly complained about the *'high costs of litigation'*[2] in the High Court.[3] Indeed, it is almost 60 years since the Supreme Court, in *McCarthy v Walsh* [1965] IR 246 at page 255, first referenced the very high cost of litigating in the High Court. Since then, the judiciary has repeatedly noted that *'many people are unable to afford the often high costs of professional representation'*;[4] that litigation costs in the High Court are *'by, any standards, high',*[5] that they are *'prohibitive'*,[6] that they are *'absurdly high'*[7] *etc*.

5. More significantly, when it comes to the *effect* of these high costs, judges have pointed out that because the *'costs of litigation generally soar'* this means that the *'interests of justice*

[1] Kelly P in *The Bar Review*, February 2018, Vol 23(1), at p 11 stated: *'Under the current system, as they say, the only people who can litigate in the High Court are paupers and millionaires'.*
[2] *Ojewale v Kearns and Another* [2021] IEHC 476 at para 8 *per* Butler J.
[3] As distinct from the District Court where the judiciary has highlighted the low level of fees in that Court, see for example, see the interview with O'Donnell CJ in the *Irish Times*, 30 September 2023.
[4] *Allied Irish Bank Plc v Aqua Fresh Fish Ltd* [2018] IESC 49 at para 26, *per* Finlay Geoghegan J.
[5] *Somers v Kennedy, Fitzgerald, Curtis and Fitzpatrick* [2022] IEHC 78 at para 6, *per* Butler J.
[6] *Bourbon v Ward* [2012] IEHC 30 *per* Kearns P.
[7] *O'Donoghue v South Kerry Development Partnership* [2016] IEHC 259 at para 43, *per* Barrett J.

are not served.'[8] In fact, judges have also noted that high litigation costs *'threaten to overwhelm'* the *'fair administration of justice'*.[9]

6. Since it is clear therefore that *'prohibitive'* litigation costs are compromising the *fair* administration of justice, the importance of reducing High Court litigation costs cannot be overstated.

7. Yet, despite this fact, and despite the many decades of judges complaining about the high costs of litigation, there has been no effective reduction in High Court litigation costs. Since any change to the rules governing the calculation of costs is a matter for the Oireachtas, this begs the question of whether the courts are simply restricted to highlighting the problem and calling, as the Supreme Court did several years ago, for the Oireachtas to give *'urgent consideration'* to the reform of *'the cost of going to court'*?[10] In other words, are the courts resigned to witnessing *the infliction* of injustice by these *'prohibitive'* costs on a daily basis (particularly on ordinary citizens in relatively minor disputes), even though the courts are supposed to *administer* justice?

8. The fact that such injustice is a *daily* occurrence is illustrated by the recent case of *Gilvarry v Naylor* [2024] IEHC 668, where the costs were €1.5 million in an everyday family dispute over a father's will. The fact that this was a run of the mill dispute that could affect the average family in the State is illustrated by the fact that the father's estate was only worth €450,000 (not much more than the average house price in the State).[11] Thus, although it might be hard for non-lawyers to believe, the costs were in fact over *three times* the value of the assets the subject of the dispute – this is as nonsensical as paying three times the value of a car for it to be repaired (but with car repairs, the payer *has a choice* not to repair the car, while a litigant

[8] *Tobin v Minister for Defence* [2019] IESC 57 at paras 7.9 and 7.18, *per* Clarke CJ.
[9] *Tobin v Minister for Defence* [2018] IECA 230 at para 15, *per* Hogan J.
[10] *SPV Osus Limited v HSBC Institutional Trusts Services (Ireland) Limited* [2019] 1 IR 1 at para 2.5, *per* Clarke CJ.
[11] The median price of a house in the State is €330,000 - *National Residential Property Index* (CSO Publication, 18 December 2024).

does not have a choice not to be sued) . Yet this is what occurred. As a result, the latest chapter in that case was not about the legal issues at stake, but rather about which lawyers would get paid first out of assets which were insufficient to cover all the legal costs.

9. It is difficult to describe *'millionaire'* costs, such as these, as *'reasonable'* in the context of a dispute over an estate worth €450,000. However, cases like *Gilvarry v Naylor*, where costs are out of all proportion to the value/importance of an everyday dispute, are so common that they are hardly newsworthy, such that it is difficult to avoid the conclusion that in another 60 years judges may *still* be pointing out the effect of *'prohibitive'* High Court costs on ordinary citizens.

10. Yet, since the role of the courts is to try to improve the system for litigants,[12] is there anything that the courts can do about the *'prohibitive'* costs that ordinary citizens are forced, by the laws of this State, to pay to have their disputes (particularly relatively minor disputes) resolved?

11. One possible answer may be the *correct* interpretation of the 2015 Act, particularly when one bears in mind that this Act was *intended to reduce litigation costs*.[13] In this Court's view, correctly interpreting that Act requires firstly, the use of hourly rates in calculating litigation costs and secondly, that those hourly rates be *'reasonable' per se*. In this Court's view this must mean that the costs are *'reasonable'* on objectively justifiable grounds, which does not mean that they are reasonable for a wealthy businessman (or indeed a person of no means), but rather for the average citizen. Thus, one does not determine if proposed High Court costs are reasonable by comparison with *'millionaire'* costs paid in other cases in the past (or indeed

[12] Interview with former President of the High Court, Irvine P, *The Irish Times* (6 August 2022).

[13] See the Explanatory Memorandum of the legislation, which is referenced below. However, despite these aims, the minority view in the Review of the Administration of Civil Justice (2020) ("**Kelly Report**") at p 426 *et seq*., noted the *'significant limitations insofar as [the 2015 Act's] potential to effect a reduction in litigation costs is concerned'.* Therefore, the minority report called for the introduction of '*fixed recoverable costs'* instead of the current system of adjudication by the LCA. Kelly P, in his letter of 30 October 2020 to the Minister for Justice and Equality enclosing the Report adopted the views of the minority report in this regard.

by comparison with what corporate or wealthy clients in the 'open market' might *agree to pay* their own lawyers). Considering whether hourly rates are reasonable on objectively justifiable grounds has, at least, the potential to lead to a reduction in the costs which a losing litigant is *forced by the State* to pay - something which has been called for by the judiciary, *without success*, for at least 60 years.

Conflict between requirement in 2015 Act that costs be *'reasonable'* and *'millionaire'* costs

12. This issue arose in this security for costs application because in order to determine the amount of security to be paid, this Court had to have to regard to the costs which the LCA is likely to adjudicate as *'reasonable'* under the 2015 Act. Accordingly, this case was concerned with the law and the practice concerning *how* costs are estimated/adjudicated upon, and the *likely level* of those costs. Based on the expert evidence in this case, it appears to this Court that the *current practice* regarding the estimation/adjudication of legal costs is based on an incorrect interpretation of two separate provisions of the 2015 Act.

13. This became clear because this Court was provided with three expert opinions on the likely costs in the case. One expert thought that the LCA would adjudicate the sum of €454,820.50 (incl. VAT) as *'reasonable'* costs for one defendant's lawyers for a 6-day trial (plus preparatory work). This sum was made up of payments to a solicitor, a junior counsel, and a senior counsel, with the solicitor's fee[14] alone estimated to be €209,100, which is €170,000 (excl. VAT). A second expert in legal costs provided a very similar estimate of €411,429 (incl. VAT) for the litigation costs, with the fee for one solicitor estimated at €196,185, which is €159,000 (excl. VAT) for a 6-day trial (plus preparatory work).

It takes Taoiseach 8 months to earn lawyer's fee for 6 day trial (plus preparatory work)

[14] As noted hereunder, this Court rejected the suggestion by Mr. Fitzpatrick that it would be reasonable for a second solicitor to *'attend the trial'*. It is to be noted that the estimate provides for a second solicitor for only a small period of time (i.e. just 6 days of the several months of solicitors' time that could be involved).

14. While the 2015 Act requires litigation costs such as these to be *'reasonable'*, it became clear to this Court that it can be difficult to appreciate how reasonable, or unreasonable, High Court litigation costs are, when they are put in the hundreds of thousands of euros, with no idea of how much of a lawyer's time underpins the figures. In this Court's view, litigation costs would be much easier to assess as regards whether they are 'reasonable' (as required by the 2015 Act) if they were put in terms which most people can relate to, i.e. euros per hour, so as to enable comparison with fees/rates for other services (and so determine if they are '*reasonable*' on '*objectively justifiable'* grounds). For example, to put the sum of €209,100 (€170,000, excl. VAT) into context, it would take the Taoiseach, on a salary of €241,480,[15] a *full eight months* to earn the sum which it is claimed is *'reasonable'* to pay one legal practitioner for his time in a 6-day trial (plus preparation).

15. It is for this reason that the most surprising thing about this particular costs' estimate (and indeed the estimates of the other two experts) is that there was no reference in the estimate to the time which the lawyers were estimated to expend, or their hourly rates, in order to justify that figure. In the context of the sum of €170,000 (excl. VAT), this meant that this Court was being asked to find that this sum was *'reasonable'* remuneration for one legal practitioner for his costs for a 6-day trail (plus preparatory work) *without the Court having any idea* of how much time the legal practitioner was estimated to expend providing the legal services. Thus, this Court was being asked to approve the costs without knowing whether the figure of €170,000 was based on, say:

- the legal practitioner working for 170 hours (i.e. the equivalent one-month[16] full time doing nothing else) at a rate of €1,000 per hour, which would be an *inordinate hourly rate* (and could not in this Court's view be a *'reasonable'* hourly rate), or

[15] The Taoiseach earns €241,480 per annum, which, based on a 40-hour week would equate to an effective hourly rate of somewhere between €100 and €200 per hour. It should however be noted that pension and other benefits are in addition to this salary, which benefits are not paid to a self-employed lawyer receiving an hourly rate.
[16] 170 hours ÷ 8 hours = 21.25 days = approx. 1 month, based on a five-day week.

- working at a rate of say, €200 per hour (the hourly rate used by the Taxing Master, the predecessor of the LCA, in *Bourbon v Ward* [2012] IEHC 30) and so for 850 hours (i.e. the equivalent of five months[17] full time doing nothing else), which appears to this Court to be an *inordinate amount of time* for a trial that is only going to last for 6 days, or
- indeed some other amount of time/hourly rate.

Losing litigant should not have to pay hourly rates that are multiples of the Taoiseach's

16. To put it another way, this Court is being asked to approve an estimate for litigation costs (which a losing litigant would be forced by the laws of the State to pay his opponent's lawyers), *without knowing* whether it is based on the lawyer being paid at rates which roughly approximate to that of the Taoiseach or at rates which would be *many multiples* of what the Taoiseach earns (€1,000 per hour), or somewhere in between.

17. The fact that this Court *does not know* if the effective hourly rate is €200 or €1,000 or some other figure is a crucial omission. This is because, in this Court's opinion, *if* the costs were based on a legal practitioner being paid €1,000 per hour, this could not be 'reasonable' in anyone's language. This is because it could never be *'reasonable'* (which costs must be under the 2015 Act) for a losing litigant to be forced, by the law of this State, to pay his opponent's lawyers at hourly rates of pay that are *multiples of the hourly rate* paid to the person occupying the most important role in the State. Yet, a court and a losing litigant *do not know* if this is the case. This is because, based on the expert evidence in this case, litigation costs are adjudicated/estimated without reference to hourly rates.

18. While it is not clear what the hourly rates are, one thing that is clear from the expert evidence in this security for costs application is that the costs are likely to be at *'millionaire'* levels. (This is in the context of a dispute that could happen to the average citizen, since it is a dispute between a homeowner and her neighbour about proposals to develop neighbouring

[17] 850 hours ÷ 8 hours = 106.25 days = 21.25 weeks = *circa* 5 months.

lands). The costs are likely to be at *'millionaire'* levels because two of the three experts in legal costs believe that the LCA will adjudicate, under the terms of the 2015 Act, costs of either €411,429 or €454,820.50 to *one* defendant's lawyers for a 6-day trial (plus preparatory work). There are two defendants in this case, so when one takes account of this fact and the plaintiff's own costs, one is talking about total costs of *circa* €1.2 million, based on the views of the majority of the experts in this case.

How does one resolve the conflict between *'reasonable'* costs and *'millionaire'* costs

19. If these experts are correct, this raises the question of how it could be determined to be *'reasonable'* by the LCA *under the terms* of the 2015 Act for *'millionaire'* costs to be paid for a 6-day trail (plus preparatory work), particularly when the whole purpose of that Act was to reduce litigation costs.

20. In attempting to resolve this conflict between the terms of the 2015 Act which requires this Court to come up with an estimate that is *'reasonable'* on the one hand, and the *'millionaire'* cost estimates provided to the Court on the other hand, this Court considered two provisions of the 2015 Act. The first provision which this Court considered is Paragraph 2(c) of Schedule 1.

(i) Paragraph 2(c) of Schedule 1 means hourly rates are mandatory

21. This Paragraph states that *'time'* which is reasonably expended on a matter *'shall'* be considered as a factor in determining whether legal costs are *'reasonable'* by the LCA. It is important to note that this *mandatory* use of time (i.e. hours) when adjudicating on costs will of necessity disclose the hourly rates of lawyers underpinning those costs.[18] As noted hereunder, when the 2015 Act requires, as it does, that the LCA consider whether the *'time'* which underpins costs is reasonable, this is akin to requiring the LCA to consider whether the

[18] For example, if the estimated time underpinning the costs of €170,000 is disclosed to be 340 hours (i.e. 2 months doing nothing else, based on an 8-hour day) then the lawyer would be paid an *effective hourly rate* of €500 per hour (340 hours x €500 = €170,000).

effective hourly rate to be paid to the lawyer is reasonable. Accordingly, this provision can be seen as making it *mandatory* for the LCA, when adjudicating on costs, to consider whether the effective hourly rates being paid to the individual lawyers are *'reasonable'*.

22. Of course, there should be nothing surprising about the 2015 Act making the use of hourly rates mandatory. After all, hourly rates are a commonly used, an accessible, a consistent, and (more importantly) a transparent way in which to put a value on the provision of many services, i.e. the amount of time in hours it takes to provide the service, multiplied by an hourly rate to reflect the expertise and experience of the provider of the service. For this reason, quite apart from the fact that is it is required by Paragraph 2(c) of Schedule 1 of the 2015 Act, there would appear to be no good reason for solicitors' and barristers' costs, in High Court litigation, not to be valued similarly to other services, i.e. using hourly rates.

23. Yet, based on the expert evidence in this case, it appears that *the current practice* is that hourly rates are *not used* by legal costs accountants in valuing lawyers' services, when providing expert evidence to a court. In addition, as noted below, it is *implicit* in the evidence of the three experts in this case that when the LCA is adjudicating on costs, he also does not use hourly rates, despite the express requirement in Paragraph 2(c). (However, it is crucial to note that there was no direct evidence from the Office of the Legal Costs Adjudicator regarding whether or not the LCA uses hourly rates in adjudicating on costs).

(ii) *'reasonable'* in Para. 1(b) in Sch. 1 means on objectively justifiable grounds

24. Having concluded that it is mandatory to use time/hourly rates in determining whether litigation costs in the High Court are reasonable, the second provision of the 2015 Act which was considered by this Court was Paragraph 1(b) of Schedule 1. This requires that the costs, which a losing litigant is obliged to pay his opponent's lawyers in the High Court, must be *'reasonable'*, which raises the question of what is meant by this term.

25. Based on the submissions of one expert in legal costs in this case, there would appear to be an expectation that a court might regard legal costs of €454,820.50 as *'reasonable'* (or that the LCA would adjudicate such sums as reasonable) simply because they are *'at a level'* that have been adjudicated in similar cases in the past. However, to the extent that this reflects a practice of legal costs accountants (or of the LCA), this would fly in the face of numerous judicial pronouncements that High Court costs are in fact *anything but reasonable*. This is because, as already noted, judges have regularly referred to the prohibitive/millionaire level of costs. Thus, judges have highlighted *a clear disconnect* between the terms of the 2015 Act on the one hand, requiring costs to be *'reasonable'* and, on the other hand, the reality of costs which are being adjudicated upon in practice by the LCA at *'millionaire'* levels and which are *'prohibitive' etc* and so anything but reasonable.[19]

The term 'reasonable' in the 2015 Act does not mean by comparison to 'millionaire' costs

26. For this reason, to the extent that there is a practice on the part of legal costs accountants (or the LCA) to argue for, or determine, that costs are *'reasonable'* by comparison with costs in other cases, this Court does not regard that as being an appropriate comparator and regards this approach as an incorrect interpretation of what is meant by *'reasonable'* in the 2015 Act.

27. Instead, in this Court's view, for High Court litigation costs to be *'reasonable'* under the 2015 Act, this must mean that those costs are reasonable *per se*, which must mean that there are *'objectively justifiable'*[20] grounds for concluding that it is reasonable for the State to force its citizens to pay the level of costs and hourly rates being sought.

Is €X per hour an objectively justifiable hourly rate to force a losing litigant to pay

28. Taking these two interpretations of Paragraph 1(b) and Paragraph 2(c) of Schedule 1 of the 2015 Act together, when the LCA is determining how much a losing litigant should be

[19] This disconnect is also consistent with the statement in Kelly Report (at p 426) noting the *'significant limitations insofar as [the 2015 Act's] potential to effect a reduction in litigation costs is concerned'*.
[20] *Daly v Minister for the Marine, Ireland and Attorney General* [2001] 3 IR 513 at p 523, *per* Fennelly J.

obliged by law to pay the winning litigant's lawyers, the LCA is firstly required to use hourly rates and secondly, he should determine whether the hourly rate of €X per hour, which underpins the proposed costs, is reasonable on objectively justifiable grounds.

29. For this reason, in the context of this case, the fact that *'millionaire'* costs of say €454,820 might have been paid in other 6-day High Court trials in the past *is not a good comparator* in determining whether that proposed figure is *'reasonable' per se* for the costs in this case. In contrast, something which is *'objectively justifiable'* (and so a good comparator) might be say, the effective hourly rate which the *State regards as reasonable* to pay to the person holding the *most important office* in the State (the Taoiseach). Thus, for example, in this Court's view, it would not be reasonable, on objectively justifiable grounds, for the *State to force* a losing litigant to pay his opponent's lawyers at an effective hourly rate of pay of €X per hour, if that rate is multiples of the effective hourly rate of pay, *which the same State* regards as reasonable to pay the holder of the *most important office* in the country.

30. It is possible that, if the foregoing approach is taken (as this Court believes is required by the terms of the 2015 Act), rather than what appears to be current practice (of (i) *not* using hourly rates and (ii) using *'millionaire'* costs as a comparator to determine if costs are reasonable), there is at least some prospect that litigation costs might end up being *reduced* to *'reasonable'* levels *per se*, as the 2015 Act had intended.

ANALYSIS

31. The reason these issues arose in this case is because the first defendant ("**Ms. Stokes**") and the second defendant ("**Ms. Wilding**") are seeking security for their costs from the plaintiff ("**Beakonford**"). The plaintiff is suing the defendants because it claims that they have sought to extort money from it. The plaintiff claims that the defendants are doing so by wrongfully challenging the grant of planning permission for a proposed development by Beakonford of

houses at a site at Inchanappa South, Ashford, Co. Wicklow ("**Site**"), which is beside Ms. Stokes' family home.

32. One of the key issues to be determined by this Court is the amount which Beakonford should pay as security (assuming this Court orders security to be paid) and accordingly, that matter will be considered first.

33. Any such security is based on the likely costs which the LCA would adjudicate that Beakonford has to pay the two defendants, in the event that it loses in the High Court. Accordingly, the focus of this judgment is on the likely level of costs that the LCA should/will adjudicate as *'reasonable'* and the expert evidence which was provided to this Court in this regard.

A person is free to agree to pay their own lawyer whatever hourly rate they want

34. As a preliminary point, it is important to note that a person can *agree* to pay her own lawyer €500 or €1,000 or any other amount per hour if she so wishes, and this private agreement is of no concern to a court. However, what we are concerned with in this case is a losing litigant's (or a presumed losing litigant's) costs, i.e. the amount of money the State *calculates and obliges* a losing litigant to pay his opponent's lawyers. The other reason the courts have a role in relation to those costs is because the 2015 Act requires losing litigant's costs, which are adjudicated upon by an LCA, to be *'reasonable'*.

LEGISLATIVE BACKDROP TO CALCULATING SECURITY FOR COSTS

35. The key legislation which governs the likely costs Beakonford will have to pay, if it loses, is the 2015 Act. Accordingly, this legislation is also the key legislation governing a security for costs application.

36. Section 155(1) of that Act provides that:

"Schedule 1 on the **principles relating to legal costs** shall apply to the adjudication of a bill of costs by a Legal Costs Adjudicator." (Emphasis added)

Paragraphs 1 and 2(c) of Schedule 1 of the 2015 Act expressly provides as follows:

"PRINCIPLES RELATING TO LEGAL COSTS

"1. A Legal Costs Adjudicator **shall apply** the following principles in adjudicating on a bill of costs pursuant to an application pursuant to *section 154*:

(a) that the costs have been reasonably incurred, and

(b) that the costs are **reasonable in amount**.

2. In determining whether costs are reasonable in amount a Legal Costs Adjudicator **shall** consider each of the following matters, where applicable: […]

(c) **the time** and labour that the legal practitioner **has reasonably expended on the matter**" (Emphasis added)

LCA *must* determine if costs are reasonable based on amount of time

37. Based on the wording of Schedule 1, it is clear that the 2015 Act requires that any costs which are adjudicated by the LCA must be:

(i) reasonable in amount, and

(ii) that in determining whether legal costs are reasonable in amount, time *must* be used as a factor (unless the time factor is not *'applicable'*).

That is the clear obligation upon the LCA when he is *adjudicating* on costs under the 2015 Act.

The approach of a court to costs estimates when determining security for costs

38. As regards the position of a court when it is *estimating* costs (for the purposes of calculating the amount to be paid as security for costs), it seems clear to this Court that, like the LCA, a court *also* must estimate costs that are *reasonable in amount* and, in determining that issue, time *must* be used by the court in reaching its estimate. This is because it would defy

logic for a court to estimate the amount to be put up as security for a debt (legal costs) by ignoring how that debt is going to be calculated (i.e. by the use of *'time'*) when it comes to its eventual calculation (by the LCA).

39. This then begs the question of *how* time is taken into account by the LCA (and a court) in order to comply with the 2015 Act.

(I) LCA must estimate number of hours reasonably expended

40. It seems to this Court clear from Paragraph 2(c) that the first step for the LCA is that he must ensure that he *'consider[s]'* the amount of *'time'* which is *'reasonably expended'* in the particular case. This must mean that there is first a quantification of that time. Since hours are a unit of time, this must mean that the LCA *must quantify the number of hours* which he calculates to have been reasonably expended in the case.

41. Once the number of hours has been estimated, then it seems clear to this Court that for the *'time'* (i.e. the number of *hours*) to be actually taken into consideration in the adjudication of costs, as required by the 2015 Act, then one must take the next logical step, namely of putting a monetary value on that time.

(II) Converting number of hours into a monetary value - use of hourly rates

42. The most logical way in which to convert time into a monetary amount is by applying an hourly rate to that time (or hourly rates, if different rates are applied for different lawyers to reflect their experience and expertise). Otherwise, after coming up with say, 10 hours (as the time estimated to have been, or will be in the future, *'reasonably expended'* on a case), how else could a legal costs accountant/LCA convert this number of hours into a monetary value *other than* by applying an hourly rate?

43. The other approach of haphazardly attaching a lump sum, be it say, €2,000 or €10,000 to say, 10 hours in one case and say, €3,000 or €9,000 to 10 hours in another case, would, in this Court's view, lack the necessary transparency and consistency which should apply to the

imposition of a *State calculated financial obligation* on a citizen (which a losing litigant's costs are).

Implicit in the reference to *'time'* is the requirement to use hourly rates

44. For this reason, it seems clear to this Court that *implicit* in the requirement in the 2015 Act, that *'time'* be used as a factor in the adjudication of costs, is that hourly rates are used so as to convert that time into a monetary value. Anything else would appear to this Court to mean that there is too much discretion involved, and not sufficient transparency (a key component of the rule of law), in converting time into a monetary figure.

45. Indeed, the problem with the absence of time/hourly rates, as a basis for legal costs, is vividly highlighted in this case. This is because Mr. Stephen Fitzpatrick of Peter Fitzpatrick Legal Costs Accountants ("**Mr Fitzpatrick**") supported his estimate for legal costs by making an *implicit* reference to the amount of time which is estimated to be expended on the case. Thus, to support his view that the LCA would determine that the sum of €454,820.50 is an appropriate figure for costs, Mr. Fitzpatrick refers to it being a *'weighty Brief'*. This seems to suggest that there would be a considerable amount of time needed to deal with this case. However, the problem with his failure to use actual time (in hours) or hourly rates is that there is, in this Court's view, no transparent, consistent, or logical step, used by Mr. Fitzpatrick in getting from:

(a) the number of hours involved in dealing with the *'weighty Brief'* (however many that may be) to

(b) the end figure of €454,820.50.

(III) Time and hourly rates must be used, unless their use is not *'applicable'*

46. The only caveat to the conclusion that the 2015 Act *requires* the LCA to take account of time (and so hourly rates) when adjudicating on costs is the expression *'where applicable'* in Paragraph 2 of Schedule 1 of the 2015 Act. To understand what this expression means, it is

to be noted that Paragraph 2 contains several matters, apart from time, which are to be considered by the LCA when deciding if costs are reasonable. For example, it includes at Paragraph 2(j), as a matter to be considered, whether expert witnesses were engaged by the legal practitioner whose costs are being adjudicated upon. It is relevant to note however, that in many cases the LCA will be determining whether a certain figure for costs is reasonable where there will have been *no* expert witnesses engaged. Thus, one can see why the term *'where applicable'* is used in the introductory words of Paragraph 2.

47. However, in relation to the factor of *'time'* in Paragraph 2(c), it is very hard to think of any situation where the LCA would be adjudicating on the costs of a lawyer where that lawyer had expended *no time* on the case (such that *'time'* was not *'applicable'* as a factor in the adjudication of costs). Thus, it seems clear to this Court that the default rule, under the 2015 Act, is that the *'time'* reasonably expended by a legal practitioner (which, of necessity, implies the use of hourly rates) is to be used as a factor in determining whether the costs are reasonable.

Other reasons why time/hourly rates should always be used to value losing litigant's costs

48. In addition, of course, it should be observed that there are several other reasons why time/hourly rates should always be used to put a value on the legal services (which have been provided to his opponent's lawyers and for which a litigant is forced to pay).

Time/hourly rates are a common and consistent way to value services

49. Firstly, time and hourly rates are a commonly used and consistent way in which to put a value on the provision of a service, whether professional or non-professional, i.e. the amount of time it takes to provide the service multiplied by an hourly rate to reflect the expertise and experience of the provider of the service. Indeed, as already noted, the importance of time in valuing legal services is implicitly recognised by one of the experts in this case, i.e. the reference to *'weighty Brief'* in Mr. Fitzpatrick's report, *albeit* that he does not quantify that

time to support a finding that his estimate is 'reasonable in amount' (in line with Paragraph 2(c) of the Schedule 1).

Time/hourly rates are an accessible way to value services

50. Secondly, the use of euros per hour (rather than providing costs as global figures in hundreds of thousands of euros) is accessible, which laws should be. This is because euros per hour is *easy to understand* by members of the public. In this regard, it is members of the public who are the ones who are usually subject to the figures adjudicated by the LCA or estimated by legal costs accountants, as they are the ones who are ordered to pay legal costs or security for legal costs.

Time/hourly rates also allows for easy comparison between costs in different cases

51. Thirdly, the use of time/hourly rates has the advantage of allowing easy comparison between costs in one case versus those in another case, i.e. what number of hours were involved in the respective cases and/or was there any basis for a different hourly rate to apply? In contrast, *meaningful comparisons* are much more difficult if a global figure for the costs in case X (of say €400,000) are compared with a global figure for the costs in case Y (of say €500,0000, *without any reference* to the number of hours estimated to have been reasonably expended or the hourly rates which applied.

Transparency means that payer of State imposed obligation knows basis for its calculation

52. Fourthly, the most important reason for providing the hourly rates underpinning costs/estimates is that it provides transparency (an important aspect of the rule of law). The rule of law is particularly relevant with dealing with a losing litigant's costs, as they are a *State calculated* financial obligation (since they are adjudicated upon by a State body, the Office of the Legal Costs Adjudicator, in accordance with rules for their calculation enacted by the Oireachtas). In addition, a losing litigant's costs are *State imposed* in the sense that they *do not result from agreement* between a person and his lawyer. Instead, they arise where a person *is*

ordered by a court, in accordance with the laws of the State, to pay the costs of his opponent's lawyers.

53. Looked at another way, since transparency is a key element of the rule of law, one could well ask how could it be just for the person who is subject to a *State imposed* and *State calculated* financial obligation to be denied transparency regarding the amount of 'time' (and so the hourly rate) underlying that financial obligation, particularly when the 2015 Act explicitly states that *'time' must* be used in calculating that financial obligation, in the first place?

54. It seems to this Court that the answer is that such an approach would *not* be just. Accordingly, it seems to this Court that the very least a litigant is entitled to know is the time/hourly rates underpinning his/her financial obligation (and this applies whether one is dealing with costs adjudicated upon by the LCA or security for costs ordered by a court).

55. To put it another way, since a losing litigant (or presumed losing litigant) is required, in effect, by Schedule 1 of the 2015 Act to pay for the *'time'* of the lawyers acting for the winning litigant, it seems clear that she should be entitled to, at least, know the amount of time she is paying for, and so whether she is paying say, €200 per hour or say, €1,000 per hour for that time.

Absence of transparency is exacerbated by the high level of legal costs in High Court

56. To the extent that this absence of transparency regarding hourly rates reflects the practice of legal costs accountants and possibly the LCA, it is exacerbated by the fact that in this case, one is not dealing with District Court costs, but rather, as already noted, High Court costs, which have been described as *'prohibitive'* etc.

57. Yet, based on the evidence in this case, despite all of these complaints about the level of costs in the High Court and the calls for reform, High Court costs remain at *'millionaire'* levels. This is because in this case, two of the three experts in legal costs estimated that the

total costs which the plaintiff would have to pay if he lost (and *including* the plaintiff's own costs) would be *circa* €1.2 million, all for a relatively straight-forward High Court trial which is to last for just 6 days.

Absence of transparency exacerbated by so many minor cases being heard in High Court

58. The absence of transparency regarding hourly rates is also exacerbated by the presence of so many *relatively* minor[21] cases in the High Court. In this regard, by far the biggest factor in the level of litigation costs for resolving a dispute is always whether the Oireachtas requires that type of dispute to be heard in the High Court rather than the Circuit Court or the District Court.[22] Yet, in recent decades, there has been a drastic reduction in the number of more affordable trial courts (District and Circuit Courts) relative to the number of *'prohibitively'* expensive High Courts.[23] This means that many minor disputes are required to be heard in the High Court, with costs at *'millionaire'* levels, as vividly illustrated by cases such as *Gilvarry v Naylor*, where costs are out of all proportion to the value of the dispute.

A. MANDATORY TO USE TIME/HOURLY RATES WHEN ASSESSING COSTS

[21] For example the dispute over the return of a €500 deposit to a tenant (*Abeyneh v Residential Tenancies Board* [2023] IEHC 81), where the costs, as it was a judicial review, are, it seems, on the High Court scale, rather than the District Court scale, even though the value of the dispute was less than the maximum level for the Small Claims Court (€2,000) let alone the District Court (€15,000).

[22] In *very general* terms, but to get an idea of the difference, in the level of litigation costs, which laws make, when they require/permit disputes to be heard in the High Court - resolving a dispute in the District Court might cost €500 to €1,500, yet resolving the same dispute might cost €15,000 to €50,000 in the Circuit Court and €150,000 to €500,000 (or more) in the High Court.

[23] See *Shannon v Shannon* [2024] IEHC 291, where it is noted that in 1961 there were 400% more District Courts than High Courts but now there are only 41% more District Courts than High Courts. Similarly, in 1961 there were 43% more Circuit Courts than High Courts, but now there are in fact *more* High Courts than Circuit Courts. Thus, there has been a dismantling of the pyramid structure for courts that exists internationally and used to exist in Ireland. Accordingly, many minor disputes are heard in the High Court at costs which dwarf the value of the dispute, e.g. in *Tennant v. Reidy* [2022] IECA 137 at para 23, Noonan J noted that a dispute over €20,000 that had been heard in the High Court *'should never have come before the High Court at all',* given the value of the dispute. Similarly, personal injury claims for as little as €60,001 are heard in the High Court, where costs are often in the hundreds of thousands of euros, which means that plaintiffs without means can use legal costs as a means to force settlement in a tactic that Clarke J in *Farrell v. The Governor and Company of the Bank of Ireland* [2013] 2 ILRM 183 at para. 4.12 described as akin to '*blackmail*'.

59. For all these reasons therefore, on a plain reading of the 2015 Act, it seems to this Court that the default rule is that a mandatory factor for the LCA, in deciding whether costs are *'reasonable',* is to determine whether the effective *hourly rate* of say €X per hour, that underlies those costs, is reasonable.

60. Since the LCA is obliged by the 2015 Act to use time/hourly rate(s) to adjudicate on legal costs, it follows that legal costs accountants, when opining on the amount of legal costs which will be adjudicated upon by the LCA in the future, should, in this Court's view, also use time/hourly rate(s).

61. As regards the approach of a court in a security for costs application, firstly it must be the case that a court should use an estimate for legal costs, for that purpose, that is *'reasonable',* since the overriding principle regarding legal costs in the 2015 Act is that they be *'reasonable'*. Secondly, the 2015 Act makes clear that in adjudicating on whether legal costs are reasonable, one must consider the amount of *'time'* that was reasonably expended on the case (and so hourly rates). In this Court's view, all of this means that in a security for costs application, a court, when determining whether an estimate for legal costs is reasonable (whether provided by legal costs accountants or otherwise), must consider the amount of time which is estimated to be reasonably expended on the case (which of necessity involves the use of hourly rates). It seems to this Court that this conclusion is also entirely logical, since how could a court possibly determine if the estimates, which the experts have provided, are reasonable, if it has no idea of how much time the lawyers are being paid for, and at what hourly rates?

62. For example, viewed through the prism of this case, how could this Court determine that a global figure of €170,000 for the costs for *one legal practitioner* for a 6-day trial (plus preparatory work) is a *'reasonable'* fee, if this Court does not know if it is based on the lawyer being paid an *effective* hourly rate of €200, €500, or €1,000 or some other rate per hour?

63. This conclusion that hourly rates must be used in decisions regarding costs also means that, even if High Court costs remain at *'prohibitive'* levels for the next 60 years (which must be a possibility, based on the experience of the past 60 years), at least a losing litigant (and indeed legislators) will have *transparency* in terms that are easy to understand, i.e. in euros per hour, regarding how much the *State by its laws obliges a losing litigant to pay* his/her opponent's lawyers in legal costs.

How does a court determine if estimates are reasonable?

64. Having determined therefore that a court, in a security for costs application, should use time/hourly rates to decide whether a particular estimate is reasonable, this raises the question of how a court determines if the hourly rates provided to a court are *'reasonable'* for the purposes of the 2015 Act.

65. Unfortunately, in this case, this Court was presented with three sets of global figures (i.e. €250,796, €411,249, and €454,820.50) from three separate legal experts, as estimates for the costs of a 6-day trial, without this Court having any idea of the estimated time, and so the estimated hourly rates of the lawyers, which underpinned those figures.

Practice of not providing time/hourly rates is inconsistent with the 2015 Act and caselaw

66. As a preliminary point, it should be pointed out that, to the extent that these three reports, in not using time/hourly rates, represent current practice of legal costs accountants regarding estimating costs (or the practice of the LCA when he is adjudicating on costs), this practice is inconsistent not only with the express terms of Paragraph(c) of Schedule 1 of the 2015 Act (that time *'shall'* be considered when adjudicating on costs), but it also ignores the previous decisions of the High Court on determining legal costs.

67. This is because in *Cafolla v Kilkenny* [2010] IEHC 24, Ryan J. noted that *'asking how long'* it takes to provide legal services is the *'most elementary'* way to calculate legal costs. This view that it is *'elementary'* that time *should* be used in deciding on legal costs was also

adopted by Kearns P. in *Bourbon v Ward* [2012] IEHC 30. It should be clear therefore, that quite apart from the terms of the 2015 Act, the LCA, legal costs accountants and the courts should use *'time'* when adjudicating/estimating/deciding legal costs.

The 2015 Act requires costs to be *'reasonable'* but in practice costs are unreasonable

68. While the first issue raised by this case was the absence of time/hourly rates, the second issue was how one determines if costs (or an estimate) are reasonable when there is such a disconnect between on the one hand, *the law*, which states in the 2015 Act that High Court costs must be reasonable, and, on the other hand, the fact that in *practice* costs in the High Court are anything but reasonable?

69. The reason this Court can say that, despite the terms of the 2015 Act, in practice High Court costs are unreasonable, is because judges have made this abundantly clear on a regular basis. Thus, when it comes to High Court costs, judges have, as already noted, referred to them as *'absurdly high'* etc, in contrast to District Court costs (where judges have highlighted their low level).[24]

Plaintiff is estimated to have to pay almost €1 million in costs if he loses

70. Further evidence of the *'millionaire'* level of High Court costs is provided by the evidence in this case, since one of the experts (Mr. Fitzpatrick) felt that the LCA will adjudicate €454,820.50 (incl. VAT) as an appropriate amount of legal costs for *one defendant* for a 6-day trial in the High Court (plus preparatory work). This sum is based on a solicitor's fee of €170,000 (excl. VAT), a senior counsel's fee of €99,100 (excl. VAT), and a junior counsel's fee of €71,750 (excl. VAT). All parties assumed that the plaintiff will have to pay the two defendant's costs if it loses and so one is talking about costs of almost €1 million (excluding the plaintiff's own costs).

Lawyers and costs accountant do not determine a 'reasonable; fee, the LCA does

[24] See for example the interview with O'Donnell CJ in the *Irish Times*, 30 September 2023.

71. It is important to point out that the legal practitioner in question is not claiming to be 'entitled' to be paid by the losing litigant the sum €170,000 for a 6-day trial (plus preparatory work). Nor is he claiming that it is *'reasonable'* that he be paid that amount. Similarly, the legal costs accountant (Mr. Fitzpatrick) is not claiming that a legal practitioner is 'entitled' to €170,000 for a 6-day trial (plus preparatory work) or that such a fee is reasonable fee *per se*. Rather, it is Mr. Fitzpatrick's professional opinion that the rules passed by the Oireachtas for the calculation of costs (in the 2015 Act) will permit and/or require a State body (the Office of the Legal Costs Adjudicator) to determine that €170,000 is a *'reasonable'* fee for one lawyer for his time for a 6-day trial (plus preparatory work). In particular, Mr. Fitzpatrick states that his estimate is:

> 'within a range of fee that other similar Commercial Court applications have resolved at and at a level that has been determined by the Legal Costs Adjudicators'.

72. If Mr. Fitzpatrick is correct that the LCA adjudicates costs at this level (and two of the three experts set costs at this *'millionaire'* level), it is no surprise that the Supreme Court has called for the *'urgent'* reform of rules which permit and/or require the LCA to adjudicate costs at almost €1 million (as there are two defendants) for a 6-day trail (plus preparatory work).

How does a court determine a reasonable estimate if costs in practice are not reasonable?

73. This reference to the 'millionaire' level of costs in the High Court leads to the more fundamental question of how does a court determine costs (or decide on estimates for costs) when there is such a disconnect between the 2015 Act saying that legal costs have to be *reasonable*, on the one hand, while on the other hand, judges regularly point out that they are in fact at *'millionaire'* levels and so are *anything but reasonable*?

A court does not follow unreasonable costs which have been adjudicated by the LCA

74. Bearing in mind that the role of the courts is to seek to improve the court system for litigants,[25] the answer is *not* that a court simply accepts the practice to date and as a result ignores the overriding terms of the 2015 Act, which require legal costs to be reasonable.

75. Accordingly, in this instance, this Court will *not,* as appears to be suggested by Mr. Fitzpatrick, deem his estimate of €454,820.50 to be *'reasonable'* simply because it is *'at a level'* which has been approved by the LCA in other High Court cases. This is because Mr. Fitzpatrick may be correct that this level of fee is *'at a level'* that the LCA has adjudicated upon in the past. However, this does not make it *'reasonable'*. Indeed, it would be illogical to conclude that an estimate of costs is reasonable simply because it is at the level of previous costs (when one bears in mind that those costs have been described as, in effect, unreasonable, i.e. at 'millionaire' levels).

76. To put the matter another way, the question of whether costs (or estimates) are reasonable is *not* determined by whether similar costs (and so similar effective hourly rates) were paid in the past.

B. COURT DETERMINES IF HOURLY RATE IS OBJECTIVELY JUSTIFIABLE

77. Instead, the answer, in this Court's view to resolving this tension, is for judges (and indeed the LCA) to:

(i) apply the *mandatory* factor set down in the 2015 Act (i.e. time/hourly rates) to determine whether costs are reasonable, and

(ii) then determine whether the hourly rate(s) of €X per hour, underpinning those costs, are reasonable *per se,* i.e. on objectively justifiable grounds (rather than by comparison to costs adjudicated in other cases).

[25] Interview with former President of the High Court, Irvine P, *The Irish Times* (6 August 2022).

Taking this approach, when a court has to determine if €X per hour is reasonable on objectively justifiable grounds, it could do so by reference to comparators that might be regarded as objectively justifiable hourly rates of pay in the context of a person (a losing litigant) *being forced by the laws of the State* to pay for services (in this instance, legal services) provided to another party (the winning litigant's lawyers). One logical comparator, in this Court's view, when considering whether it is reasonable for *the State to force* a citizen to pay his opponent's lawyers €X per hour, would be the effective hourly rate of pay which the *same State* regards as reasonable *for it to pay* the person holding the most important office in the State.

Determining a losing litigant's costs is not an example of the free market

78. In this regard, it is important to emphasise that in determining what a reasonable hourly rate of pay for a lawyer is, on objectively justifiable grounds, this Court is not concerned with the hourly rate of pay that a person *agrees to pay* his own lawyers on the open market. This is because a person *is free to pay his own lawyer* €500 per hour or indeed €1,000 per hour, whether that is regarded as reasonable on objectively justifiable grounds or not. That is the free market.

79. However, determining a losing litigant's costs is not an example of the free market in operation. This is because there is no free will on the part of the losing litigant (or presumed losing litigant in the case of security for costs), as it is the rate of pay that the State, by its laws, forces a losing litigant to pay his opponent's lawyers. In addition, of course, these costs are required by the 2015 Act to be *'reasonable'*.

80. To conclude therefore regarding this Court's interpretation of the relevant terms of the 2015 Act, when a Court is determining the appropriate level to be paid as security for costs:

- in light of Paragraph 2(c), the Court should consider the proposed hourly rates of the lawyers, and

- in light of Paragraph 1(b), the Court should determine whether those rates are reasonable on objectively justifiable grounds and not by comparison to previous 'millionaire' hourly rates of pay.

SHOULD BEAKONFORD HAVE TO PROVIDE SECURITY?

81. Although this Court chose to deal first with the most important issue in this case (i.e. *how* a court determines the *amount* of security for costs to be provided), chronologically the first issue which this Court had to consider is whether the plaintiff has to provide security in the first place. This Court will now deal with that issue.

82. In this regard, it is clear from the law from the case of *Quinn v Pricewaterhousecoopers* [2021] IESC 15, that to be successful in a security for costs application:

(i) the defendants must establish that they have a *prima facie* defence;

(ii) they must establish that that the plaintiff will not be able to pay the defendants' costs if it is unsuccessful; and

(iii) if this is the case, the default position is that security for costs will be ordered, unless there are special circumstances entitling the court to exercise its discretion not to order security for costs.

83. Counsel for Beakonford conceded (correctly in this Court's view) that the defendants had a *prime facie* defence and that there was insufficient evidence to support a claim that the defendants' actions had caused the alleged inability of the plaintiff to pay the legal costs if the defendants won the litigation.

84. Thus, the second key issue for this Court to determine at the hearing was whether the defendants had established that Beakonford will not be able to pay the defendants' costs if Beakonford loses the litigation.

85. Section 52 of the Companies Act 2014 clarifies the approach to be taken in security for cost cases, as it states:

> "Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, **if it appears by credible testimony that there is reason to believe** that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given." (Emphasis added)

86. It is clear from the judgement of Clarke J. in *IBB Internet Services Limited & Ors v Motorola Limited* [2013] IESC 53 at paragraph 5.16, that the *'reason to believe'* test in section 52 is something less than the balance of probabilities but a lot stronger than the defendants having to establish a mere risk (that the plaintiff will be unable to pay their costs). As noted by Clarke J., there must be *'truly [a] reason to believe'* and so in this case, there must truly be a reason to believe that Beakonford will not be able to pay the defendants' legal costs if they win the litigation.

87. Having considered the evidence of both parties, there are a number of reasons why this Court concludes that the defendants have established that there truly is a reason to believe that Beakonford will be unable to pay their legal costs if the defendants win the litigation.

The absence of company accounts

88. As noted by Barniville J. in *Coolbrook Developments Limited v Lington Development Limited & Anor* [2018] IEHC 634 at paragraph 57, the accounts of a company are particularly relevant to the assessment of the financial health of a company, and so relevant to the assessment of whether that company will in fact be able to pay legal costs.

89. However, in this case, one is dealing with Beakonford, a special purpose company which was only incorporated on 14 September 2021 in order to acquire the Site and which has not yet filed any accounts.

90. Since the financial strength of a company is usually determined by its publicly filed accounts, this placed Beakonford in the unusual position of arguing that it was a company of considerable financial strength without any audited accounts to support that claim.

91. To counter the defendants' claim that there was reason to believe that it would not be able to pay its legal costs, Beakonford relied on a letter dated 7 February 2024 from the company's accountants, KBG Accountants, which enclosed what the firm described as *"draft financial statements"* for the year ended 31 December 2023. This letter also enclosed a valuation report from Norths Property which valued the Site, which had been bought for €4 million on 21 July 2021, at a value of €32 million on the date of valuation, i.e. 9 March 2023.

92. However, when one considered the attachment to KBG's letter, what was enclosed was not financial statements but a one-page document entitled *'Balance sheet as at 31st December, 2023'*, which was on the headed notepaper of a company called Beakonshaw which appears to be a company in the same group as Beakonford. As such, this therefore is an unaudited and draft balance sheet prepared, it seems, by Beakonford itself. This one-page document states that the company's *'Current Assets'* are valued at €25,390,799. This valuation of current assets is based on a figure of €32 million inserted opposite *'Stock or WIP'* on that document, which is said to be the value of the Site and not the €4 million price paid for it. Under the heading *'Liabilities'*, the draft balance sheet has a figure of €10,608,280 as a long-term loan taken out by the company.

93. While this draft balance sheet therefore states that Beakonford has net assets of €25,390,799, it is important to note that this is not an audited balance sheet and so is of limited assistance to a court, or indeed any third party, seeking to assess the financial strength of that company.

94. Added to this is the fact that in the covering letter, the company's accountants state that:

> "We wish to report that **if** the company's land was included in the company's accounts at its market value, then the company's net asset value would be €25,390,799" (Emphasis added)

The importance of the word *'if'* becomes clear when one considers the expert report prepared by Ms. Stokes' accountant regarding this unaudited draft balance sheet prepared by Beakonford.

95. This expert report by DSB Accountants states that the Site, which was purchased for €4 million, cannot be revalued under Generally Accepted Accounting Principles in the draft balance sheet under *'Stock or WIP'*. Instead DSB Accountants state that the Site must be carried in the Balance Sheet at the lower of cost or net realisable value. For this reason, it stated that it should be valued in the balance sheet at €4.5 million, allowing for stamp duty and other acquisition costs on the €4 million purchase price, and not at €32 million. On this basis, DSB Accountants estimated that, in light of the loan of €10 million to the company in its balance sheet, the company was in fact in a negative net asset position.

96. It is important to note that this claim regarding the correct valuation to be used of the Site, which is based on independent expert accountancy advice on behalf of Ms. Stokes, remains unanswered by Beakonford. Thus, it is the only expert accountancy report that can be relied on by this Court regarding the valuations in the accounts, which would mean that Beakonford is in a negative net asset position.

97. As noted by Barniville J. in *Coolbrook* at paragraph 66 *et seq*, not only are the accounts of a company very relevant to a security for costs application, but it is also not the role of the court to fill in gaps or answer uncertainties raised by the presence or absence of material in those accounts. So in this case, it is not the role of the Court to seek to answer those concerns raised by DSB regarding those accounts or to otherwise assume that €32 million can, in fact, be inserted as the value of the Site in the accounts.

98. All of this means that the starting point for this Court is that there is an unanswered accounting expert report stating that Beakonford is in a negative net asset position. While as noted by Barniville J. in *Coolbrook* at paragraph 66, the accounts are not *'necessarily determinative of [a security for costs] application'*, this draft balance sheet, as analysed by an unanswered expert accountancy report, if it were the only evidence, would amount to credible testimony that there is reason to believe that Beakonford will be unable to pay the costs of the defendants.

99. Added to this, however, is the fact that one is dealing with a newly incorporated special purpose company set up for the purposes of property development. In addition, uncontroverted submissions were made on behalf of the defendants that Beakonford had charged its assets (primarily the Site) and that there is nothing to stop it granting further charges over its assets and taking on further liabilities.

The Valuation by Norths Property of the Site at €32 million

100. To counter this, Beakonford argued that this Court should look outside the company's accounts and look at the real value of the Site, rather than the value that one might have to put into the company's accounts for that Site.

101. In this regard, Beakonford pointed out that it had an expert report from an auctioneering firm (Norths Property) which values the Site at €32 million. If this Court relied on that expert report, it would mean that the company has sufficient assets after paying off the loan of €10 million to easily meet any order for legal costs against it. It also pointed out that there is no expert auctioneering report from the defendants contradicting this expert valuation.

102. However, even in the absence of a contradicting expert report, there are a number of reasons why this Court cannot ignore the foregoing accounting evidence from DSB Accountants and why it cannot rely on the valuation of €32 million.

103. Firstly, the method used by Norths Property to value the Site (i.e. using the projected sale prices of houses for four phases of the Site and working backwards to calculate the value of the Site, by taking away all the development and other costs) clearly results in the end value, being the Site with planning permission for the four phases. However, there are two problems with this valuation method. Firstly, the Site does not have planning permission for four phases; it only has planning permission for one phase. This calls into question the starting value ascribed to the Site by Norths Property, before taking away the development costs, to end up with the alleged market value of the Site.

104. Secondly, it calls into question the final 'market value' attributed to the Site by Norths Property, since this clearly must be a valuation of the Site before development but with planning permission for four phases, even though the Site only has value planning permission for one phase.

105. When this inconsistency was sought to be addressed by Mr. Paul McElearney of Norths Property, he averred that there was a typographical error in the draft report and that the reference to 'FPP' in that report is an abbreviation for final planning permission and he states that 'the purpose of the North Valuation was to value the lands without regard to FFP'.

106. However, it does not make any sense to this Court that this valuation is without regard to planning permission. This is because how can a method of valuation, which is based on the price of houses for four phases on the Site, and therefore of necessity with planning permission, work back to the value of the Site by taking away development costs, not end up being a value of the Site with planning permission for four phases?

107. This calls into the question the reliability of the valuation provided by Norths Property of €32 million for the Site, which also happens to be the same figure it comes up with using the second method of valuation (which is considered below).

108. However, the other reason this Court would have concerns about the reliability of this first method of valuation is because so much of the figures which Norths Property used to deduct from the sales price of the houses, to end up with the valuation of €32 million, are provided by Beakonford, and not independently verified. To take but one example, the final valuation figure of the €32 million depends on *'the construction cost provided by the borrower [Beakonford]'* of *'€79,074,080'*.

109. The second basis for the valuation used by Norths Property (i.e. comparing similar development sites to the Site, which were sold in the area, in order to come up with a value for the Site) suffers from the same issue as the first valuation method used by Norths Property. For example, the Vartry Wood development, which is compared with the Site for valuation purposes, means that one is comparing a site which is sold with full planning permission (Vartry Wood) versus the Site, which has only partial planning permission.

110. However, this is not the only issue with this second valuation method. This is because this valuation method was done on the basis that the Site *'benefits from all necessary rights of way/wayleaves etc'* (at page 20 of Norths Property Report).

111. However, it is clear that the Site may not in fact have all necessary rights of way. This is because Ms. Stokes provided the Court with an Engineer's Report from Mr. Tom Crotty of Minerva Consulting that there may be an issue with the planning permission for phase one of the planning permission, as it allegedly involves building on Ms. Stokes' right of way over the Site. This evidence has not been countered by Beakonford for the purposes of this application and so it is the only expert evidence this Court has regarding issues concerning the planning permission for phase one.

112. There are also other reasons, outside of the terms the North Property Report, to call into question this valuation of €32 million for the Site. This is because Beakonford itself gave evidence of what someone would be prepared to pay for the Site. It did so through the affidavit

of Mr. Greg Kavanagh, a director of Beakonford, which is dated 7 February 2024. In it, he averred that he had received two offers of €9.5 million and €10 million for the Site. It must be assumed that these offers are from a willing purchaser at arm's length for the Site as is, i.e. with planning permission for phase one. With this in mind, it should be noted that unlike the Norths' Report, which is an opinion of what some unknown purchaser might be willing to pay for the Site, this is actual evidence of what a purchaser has offered to pay for the Site. Yet, even based on the higher of these two figures (€10 million), the company would still be in a negative net asset position, since its draft balance sheet shows that it has a loan in excess of €10 million.

113. Quite apart from the reliability of the €32 million valuation, there are also other reasons why the defendants have reason to believe that Beakonford will not be able to pay the defendants' costs. For example, in its letter dated 13 December 2023 to Ms. Stokes' solicitor, Beakonford's solicitors stated that:

> "You cite from the Affidavit of Greg Kavanagh sworn on 25 October, 2023 to support the position that the development loan exhibited at Tab 2 of the Affidavit is in some manner under threat and therefore affects our client's financial capacity. Yet you neglect to acknowledge that it is your client and [Ms Wilding] who have caused this financial hardship through initiating *mala fides* planning appeals and causing the delays to the development in Ashford, Wicklow. But for the Defendants' actions, our client would not be incurring the ongoing costs of the delay to the development and **nor would the development loan be prejudiced** – of themselves, these special circumstances precluded the making of an order for security for costs." (Emphasis added)

While not a determinative factor *per se*, nonetheless, the use of the term 'prejudiced' suggests that there may have been, or may be, default by Beakonford on the terms of its loan.

114. When one considers the foregoing, one can say that Beakonford's own correspondence (and the sworn evidence of Mr. Kavanagh) does not support the view that it is the owner of an asset which is worth multiples of the company's borrowings and so is a company in a strong financial position. Rather this supports the defendants' claim that they have reason to believe that Beakonford will not be able to pay their costs.

115. For all of the foregoing reasons, this Court concludes that the defendants have provided credible testimony that there is reason to believe that Beakonford will be unable to pay their costs if the defendants win the litigation.

HOW MUCH ARE THE LEGAL COSTS IN THIS CASE LIKELY TO BE?

116. Having concluded that Beakonford will not be able to pay the defendants' costs if it loses the litigation, the final issue in dispute between the parties was the actual amount of costs in euros which has to be provided by Beakonford. This centres around the question of how much legal costs each defendant is likely to be granted by the LCA if they succeed in having Beakonford's claim dismissed. This involved a closer scrutiny of the three expert reports to determine how much costs are likely to be and/or which of the three expert reports, if any, were to be preferred.

117. Each of the expert's reports contained very different estimates of the costs, and they range from:

- €250,796 (incl. VAT) from Lowes Legal Costs Accountants ("**Lowes**"), on behalf of Beakonford, to
- €411, 249 (incl. VAT) from McCann Sadlier Legal Costs Accountants ("**McCann Sadlier**") on behalf of Ms. Stokes, to
- €454,820.50 (incl. VAT) from Mr. Fitzpatrick on behalf of Ms. Wilding.

Lowes' estimate and McCann Sadlier's estimate were provided on the basis of a trial lasting six days, and it seems to this Court that Mr. Fitzpatrick adopted a similar timeframe for his estimates.[26]

118. Lowes estimated costs of €250,796 (incl. VAT) includes a solicitor's instruction fee of €123,000 (incl. VAT), a senior counsel's fee of €64,636 (incl. VAT), and a junior counsel's fee of €41,205 (incl. VAT). This figure, it must be remembered, is just the costs of one defendant. All parties, when presenting their estimate for one defendant, appeared to assume that the costs for both defendants would be the same.

119. McCann Sadlier suggested a figure of €411,249 (incl. VAT) for Ms. Stokes, which included a solicitor's fee of €196,185 (incl. VAT), two senior counsels' fees of €68,880 (incl. VAT) and €68,265 (incl. VAT) respectively, and a junior counsel fee of €47,970 (incl. VAT).

120. As already noted, Mr. Fitzpatrick suggested a figure of €454,820.50 (incl. VAT) for Ms. Wilding, which is made up of a solicitor's fee of €209,100 (incl. VAT), a senior counsel's fee of €121,793 (incl. VAT), and a junior counsel's fee of €88,252.50 (incl. VAT).

121. If the Lowes' figure was accepted, the total costs for both defendants, is *circa* €500,000. This would mean that before Beakonford is permitted to continue this action, it would have to provide security of *circa* €500,000 (incl. VAT) for the defendants' legal costs.

122. On the other hand, if the McCann Sadlier figures *or* Mr. Fitzpatrick's figures were taken by the court as the likely costs which would be approved by the LCA, it would mean that Beakonford would have to pay a sum of close to €1 million to continue with this litigation. If

[26] The McCann Sadlier report states that it is based on a trial lasting '*up to six days'*. Similarly, the body of the Lowes' report clearly states that the estimate is made '*on the basis of a 6-day hearing'* (*albeit* that but there is reference in the appendix to 8 days, which may be a typographical error). Mr. Fitzpatrick states in his report that the duration of hearing *'appears to be suggested'* by Lowes at eight days (his reference to eight days is however subject to a footnote, which was not attached to the document which was provided to the court), but he then goes on to state that he adopts the lower of the projections, so he appears to be adopting the six-day period.

one includes Beakonford's own costs, the likely costs of all parties, based on their two reports, is *circa* €1.2 million.

Experts opining on *how* the LCA adjudicates on costs

123. One point to note about the three reports is that all three experts were opining on *how the LCA adjudicates* on costs. Thus, they were opining on the sum the LCA would adjudicate upon, but *without* basing this sum on the amount of time (they estimated that it would take the lawyers to provide their legal services). Thus, the clear implication from these experts is that they believe that the LCA *also* does not use time/hourly rates when he is adjudicating on costs. However, it is important to note that no evidence was provided by, or on behalf of, the Chief Legal Costs Adjudicator. Accordingly, despite this being the clear implication from the expert reports, there is no basis for this Court to conclude that Legal Costs Adjudicators do not use time/hourly rates when adjudicating on costs, which, if this was the case, would be inconsistent with the 2015 Act.

DETERMINING WHETHER HOURLY RATES IN THIS CASE ARE REASONABLE?

124. This Court has already noted that it is *required*, in light of the terms of Paragraph 1(b) and 2(c) of Schedule 1 of the 2015 Act, to determine whether the *hourly rates* underpinning the estimates are reasonable. Yet, none of the three reports provided an estimate of the time or hourly rates which underpinned their estimates. Accordingly, this Court sought to get some idea of the hourly rates that *might* be underlying the estimates in this case.

Is the €170,000 based on an effective rate of €200 per hour or €1,000 per hour?

125. Taking Mr. Fitzpartick's estimate of €170,000 therefore, *if* Mr. Fitzpatrick's estimate of the time to be *'reasonably expended'*, which underpinned this figure, was say, 170 hours (i.e.

the equivalent of working full time for 1 month), this would mean that the effective hourly rate, underpinning this estimate, is €1,000 per hour.[27]

126. Bearing in mind that the Taoiseach appears to be paid an effective hourly rate of in or around €200 per hour,[28] this Court would have little hesitation in concluding that an hourly rate of pay which is five times that rate (i.e. €1,000 per hour) is not reasonable *even if* a similar level of fees had been paid in other High Court cases. This is because, *if* this was the hourly rate underpinning this estimate, this Court could not see how it could be *'reasonable'* (on objectively justifiable grounds) for the State to *force a losing litigant to pay his opponent's lawyers several times* the rate that the same State regards as a reasonable rate of pay for the person *holding the most important office* in the State.

127. To take the other extreme, *if* Mr. Fitzpatrick's estimate is based on an hourly rate of say, €200 per hour, (the hourly rate used by the predecessor of the LCA, the Taxing Master, in *Bourbon v Ward* [2012] IEHC 30), this would mean that the time expended by the lawyer was 850 hours (i.e. the equivalent of working full time for *circa* five months[29]). However, it seems to this Court that five months is an *inordinate amount of time* to be spent preparing for a trial that is only going to last for six days and it seems unlikely (in the absence of evidence from any of the experts that this amount of time would be the required) that this could be the amount of time underpinning this estimate of €170,000. Indeed, if one trial like this could take five months full-time, it would imply that a solicitor might only have the time to deal with a few High Court trials, like this one, a year.

128. Similarly, if the fee of €99,100 excl. VAT (estimated by Mr. Fitzpatrick for the senior counsel) was based on an effective hourly rate of €200 per hour, this would mean that the senior

[27] 170 hours x €1,000 per hour = €170,000.
[28] The Taoiseach earns €241,480 per annum, which, based on a 40-hour week would equate to an effective hourly rate of somewhere between €100 and €200 per hour, excluding pension and other benefits.
[29] 850 hours ÷ 8 = 106.25 days = 21.25 weeks = *circa* 5 months.

counsel would expend 495 hours[30] (i.e. the equivalent of working full time for *circa* 3 months[31]), which seems like an inordinate amount of time, as it would suggest that a senior counsel might only have time to deal with a handful of such cases a year.

129. The foregoing exercise therefore highlighted for this Court, in relation to the estimate of €170,000 (€209,100 incl. VAT), that:

(i) it *could* be based on an *unreasonable amount* of time (five months) being expended by one lawyer on a trial that is only going to last for 6 days; or

(ii) it *could* be based on an *unreasonable hourly rate of pay* (€1,000 per hour) for the lawyer; or

(iii) it *could* be based some *unknown hourly rate* of say, €400, €600, or €900 per hour, which this Court was being asked to approve.

This exercise also highlighted for this Court how unsatisfactory it is for a court (or an LCA) to approve an estimate for legal costs (or indeed decide actual legal costs) *without knowing* how much time the lawyers are estimated to expend on the case and so whether the estimate (or adjudicated costs) is based on €200 per hour or €1,000 per hour or some other hourly rate.

Putting global figures for costs into hourly rates vividly illustrates *'millionaire'* rates

130. In addition, this exercise, which put global figures for High Court costs in terms which most people should understand, i.e. hourly rates (which it appears *could* be anything from €200 up to €1,000 per hour), also starkly illustrates why for over half a century, Irish judges have complained, without any success, about the high level of costs:

- 4 years ago Kelly P. noted that Ireland is one of the *'highest-cost jurisdictions internationally'*.[32]

[30] €99,100 ÷ €200 = 495.5 hours.
[31] 495 hours ÷ 8 hours = 62 days = 12.4 weeks = *circa* 3 months.
[32] Kelly Report, Chapter 9 at para 1.2.

- 5 years ago Clarke C.J. called for the Oireachtas to give *'urgent consideration'* to the *'cost of going to court'*.[33]
- 6 years ago Kelly P. complained about the *'millionaire'*[34] levels of High Court costs.
- 12 years ago, Kearns P. stated that *'the right of access for all citizens to our courts…is threatened when the cost of going to court – be it for plaintiffs or defendants – becomes or remains prohibitive'*.[35]
- 20 years ago in the Supreme Court, McGuinness J. referenced the *'very high costs that are inevitable in a prolonged High Court action'*.[36]
- 30 years ago High Court judge O'Hanlon J. pointed out the *'terrifying cost'* of High Court litigation.[37]
- 60 years ago in the Supreme Court, Murnaghan J. noted the *'high cost of litigation'*.[38]

131. When one considers the unsuccessful attempts over many decades by the judiciary to reduce High Court litigation costs, it is possible that a factor in the absence of any meaningful reform of legal costs in many decades from the Oireachtas, could well be because legal costs are presented as global figures (e.g. using terms such as solicitors' instruction fees or counsels' brief fees) in the tens or hundreds of thousands of euros, to which few consumers of those services (or indeed legislators) can relate.

132. As a result, there is no transparency in terms which most people understand, i.e. in euros per hour, regarding what is meant by *'prohibitive'* costs, so as to enable *meaningful* comparisons to be made with hourly rates paid in other circumstances, e.g. by the State to the holder of the most important role in the State.

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[33] *SPV Osus Limited v HSBC Institutional Trusts Services (Ireland) Limited* [2019] 1 IR 1 at para 2.5.
[34] *The Bar Review*, February 2018, Vol 23(1), at p 11.
[35] *Bourbon v Ward* [2012] IEHC 30.
[36] *C.F. v J.D.F.* [2005] 4 IR 154 at para 49.
[37] O'Hanlon J, on his retirement expressed concern at the '*the terrifying cost of litigation'*. He stated that for '*ordinary members of the public who become involved in High Court litigation, it could spell financial disaster for many of them'*, *The Irish Times* (8 April 1995).
[38] *McCarthy v Walsh* [1965] IR 246 at p 255.

Can anything be done to improve the system for litigants?

133. Since it is the role of the courts to try to improve the system for litigants,[39] this begs the question of whether there is anything the courts can do to improve the situation for litigants or is it possible that in another 60 years, judges will still be highlighting the *'prohibitive'* level of High Court costs and calling for reform?

134. Based on the evidence in this case, there are two possible reasons, in this Court's view, why High Court litigation costs remain at *'millionaire'* levels despite numerous attempts over many decades to highlight this issue and the calls for reform:

- Firstly, there appears to be the practice of *not* bringing transparency (of hourly rates) to the estimation and adjudication of High Court litigation costs, even though this practice, to the extent that it exists, runs contrary to Paragraph 2(c) of Schedule 1 which requires *'time'* (and so of necessity, hourly rates) to be used in determining that costs are reasonable.
- Secondly, there appears to be the practice of deeming costs to be *'reasonable'* simply because they are *'are at a level'* at which previous costs have been adjudicated, even though the judiciary has made clear that these costs are *'prohibitive',* at *'millionaire'* levels etc. This is despite the fact that, in this Court's view, Paragraph 1(b) of Schedule 1 requires litigation costs to be reasonable *per se*, and so not by comparison to other 'millionaire' costs, but instead 'reasonable' on objectively justifiable grounds. This is because in the Supreme Court case of *Daly v Minister for the Marine, Ireland and the Attorney General* [2001] 3 IR 513 at 523, Fennelly J. concluded, when considering what was meant by the term *'reasonable'*, that it meant *'in the sense of being objectively justifiable'*.

Since these practices, to the extent that they exist, are not supported by this Court's interpretation of the 2015 Act, it seems to this Court that the stopping of those practices has the

[39] Interview with former President of the High Court, Irvine P, *The Irish Times* (6 August 2022).

potential, at least, to lead to litigation costs in the High Court becoming more transparent and perhaps even 'reasonable' *per se*.

Are any of the estimates in this case *'reasonable'*?

135. In this case, this Court has been asked to determine which, if any, of the estimates are reasonable. This Court is required by the 2015 Act to make its decision using time/hourly rates, even though none of the experts provided this Court with the time underpinning their estimates and so, the hourly rates.

136. Despite these shortcomings, this Court will determine the amount of costs which should be provided as security by Beakonford. While this is far from ideal, it is doing so for a number of reasons.

137. Firstly, it is because the alternative was for this Court to request the three experts to prepare revised reports which would be consistent with the default rule in the 2015 Act (that 'time' be used as a basis determining if costs are reasonable) *and* then for this Court to hold a further day's hearing in the High Court to hear submissions from the three parties on these revised reports. This would risk adding more *'prohibitive'* costs on top of existing *'prohibitive'* costs in an application which is not even dealing with the final costs, but rather just the security which has to be put up for that those *estimated* costs (which will be adjudicated in the future).

138. Secondly, if the plaintiff were to win the substantive case, the costs involved in providing further details regarding the defendants' costs would prove to have been wasted costs, since the plaintiff is most unlikely in that scenario to have to pay any of the defendants' costs.

139. Thirdly, the parties themselves have asked this Court to come up with its estimate based on these three reports even though none of the reports are consistent with the 2015 Act as they have no reference to time/hourly rates.

140. Fourthly, even without time/hourly rates, this Court is able to prefer one report over the others, based on the terms of the three reports, for the reasons set out below.

141. In these circumstances, this Court has chosen not to force the parties to incur further costs. Instead, this Court concludes that it prefers Lowes' estimate of €250,796 *per* defendant (and thus a total of €501,592) as the estimated legal costs. However, as noted below, while this Court prefers the Lowes' estimate, because it has not been provided with the time/hourly rates underpinning that estimate, this Court cannot definitively determine that the Lowes' estimate is *'reasonable'* as required by the 2015 Act. However, if the plaintiff loses the action and if it is required to pay the defendants' adjudicated costs, then at that stage, the LCA can adjudicate such costs based on hourly rates that are 'reasonable' based on objectively justifiable grounds.

142. The reasons for preferring the Lowes' estimate are as follows:

(i) Should losing litigant have to pay for two Senior Counsels for his opponent?

143. McCann Sadlier, on behalf of Ms. Stokes, in its report provides for the payment of two senior counsels a total of €137,145 (incl. VAT), that is €68,880 (incl. VAT) for one senior counsel and €68,265 (incl. VAT) for the other. In effect therefore, McCann Sadlier is suggesting that it is its expert opinion that the LCA will allow for two senior counsels at the trial as 'reasonable' when he is adjudicating on the final costs to be paid by Beakonford (if it loses).

144. It is to be noted that neither of the other two experts, Lowes or Mr. Fitzpatrick, thought that the LCA would oblige Beakonford to pay for two senior counsels to attend the trial on behalf of Ms. Stokes.

145. It is clearly in the financial interests of the *second* senior counsel that there be a finding by this Court that it is appropriate for the plaintiff to pay for two senior counsels for the defendant if it loses. This is because otherwise that second senior counsel might not be engaged by Ms. Stokes, since he/she would not be entitled to any payment from Beakonford, if it loses.

Similarly, it might be argued that it is in the financial interest of *both* senior counsel for there to be two senior counsels engaged, since they can take on other work on the basis that if trial dates clash at least one senior counsel should be able to attend. However, it is difficult for this Court to see how *it is in the interests of the opposing litigant, who is paying the wining side's legal costs*, to have to pay the costs of two senior counsels.

<u>It is the responsibility of the courts to improve the system for litigants</u>

146. In this regard, former President of the High Court (Irvine P.) stated that:

> 'I have always seen it as my responsibility to try to make the system better for the litigant, who must always be kept front and central in the administration of justice.'[40]

As it is the role of this Court therefore to look out for the interests of litigants, and not the interests of the legal profession or other parties, this Court would treat with caution the estimate provided by McCann Sadlier. While of course any litigant (who is having her costs paid by the opposing litigant) *might prefer* to have two senior counsels attending a trial on her behalf, this Court cannot see any basis for Beakonford being *obliged to pay* for Ms. Stokes having two senior counsels at the trial.

147. It is important to point out that Ms. Stokes is perfectly entitled to engage two senior counsels if she chooses and indeed, her legal submissions indicate that she has decided to instruct two senior counsels to date, unlike Beakonford or Ms. Wilding. This is her prerogative, since how she spends *her own money* is her own business.

148. However, what we are dealing with here is *how she gets to spend the money of the (presumed) losing litigant*. Thus, Ms. Stokes *may* believe, or *may* have been advised, that two sets of eyes are better than one, that one senior counsel has skills that complement the other senior counsel, that having two senior counsels reduces the possibility of her being left without

[40] *The Irish Times*, 6 August 2022.

at least one senior counsel on the day of the trial because one is involved in another trial *etc*. However, whatever the reason, none of these issues should be of any concern to the plaintiff and certainly it should not be *obliged by law* to pay additional legal costs to her if it loses simply because she was advised, or chose, to instruct two senior counsels. This therefore is a reason for this Court not preferring McCann Sadlier's report.

(ii) <u>Should a losing litigant have to pay for two solicitors for his opponent at trial?</u>

149. A similar issue arose in Mr. Fitzpatrick's report, on behalf of Ms. Wilding. This is because Mr. Fitzpatrick believes that the plaintiff should be liable to pay the costs of Ms. Wilding having two solicitors at the trial (i.e. for a period of 6 days). By implication therefore, he suggests that it is his expert opinion that the LCA will regard it as reasonable for two solicitors to be at the trial for Ms. Widling, when adjudicating on costs.

150. Again, neither of the other two experts, in this case Lowes or McCann Sadlier, suggested that the LCA would calculate costs based on two solicitors attending the trial.

151. Ms. Wilding is perfectly entitled to pay for two solicitors to attend her trial on her behalf, should she so wish, just as Ms. Stokes is perfectly entitled to pay for two senior counsels to attend her trial. However, it is another matter entirely for the plaintiff to have to pay those legal costs if it happens to lose the case. This is because there are two very different matters at play here. One is the entitlement of a litigant, who may have sufficient resources, to agree to pay whatever amount of money she wants, even if this means having two, three, or four solicitors at the trial or having two, three, or four barristers at the trial.

152. The other matter at play is the extent of the *legal obligation which is imposed by the State* on a litigant, who happens to lose his litigation, to pay the winning litigant's legal costs (with the full machinery of the State to enforce that legal obligation). However, this very onerous legal obligation (which applies to every litigant) is not a legal obligation to pay whatever sum the winning litigant wants to expend on legal costs. In particular, this Court can

see no basis for the suggestion that a losing litigant should be obliged to pay for two solicitors to attend the trial of the action in this case.

153. Of course, *if someone else is paying the defendant's legal costs* (and security for costs is based on the assumption that a plaintiff will end up paying the legal costs of the defendant), why wouldn't a defendant want to have two senior counsels or two solicitors at the trial? However, as noted by Irvine P., the role of this Court is to consider the financial interests of litigants and so not the financial interests of solicitors or barristers, or indeed other professionals, who might benefit from such a situation. For this reason, this Court has little hesitation in rejecting the claim that a losing litigant should have to pay the costs of two solicitors and/or two senior counsels for their opponent, while of course noting the entitlement of that opponent to use *their own money* to pay for that number of lawyers if he/she so wishes. This is a reason for this Court not preferring Mr. Fitzpatrick's report.

(iii) <u>Amount of time, not value of the claim, is key in calculating High Court costs</u>

154. Mr. Fitzpatrick in his report supports his estimate of €454,820 for the legal costs in this case on the basis that that the *'issues* [are] *of a high commercial value'*. By implication therefore, he suggests that it is his expert opinion that the LCA will allow for more legal costs in the High Court where the matter is of high commercial value.

155. It is true that the *'amount of money'* or *'value of the property'* is listed as a factor in Paragraph 2(g) of Schedule 1 of the 2015 Act in determining legal costs. However, it is important to bear mind that these factors in Paragraph 2 of Schedule 1 apply to litigation costs generally, and not just High Court litigation costs. Yet, there is a very significant difference between say a County Registrar adjudicating on costs for a dispute in the Circuit Court (which must be done in accordance with Schedule 1 of the 2015 Act, *per* section 141 of the 2015 Act) and an LCA adjudicating on costs in the High Court. The degree to which the value of the case

is a factor will vary accordingly. This is because in the High Court, costs are already at *'prohibitive'* levels such that the Supreme Court has called, without success, for their reform.

156. In this Court's view, this is a crucial backdrop to the extent to which the value of a claim will be a factor in adjudicating on costs in the High Court, as distinct from say the Circuit Court. This is because when one is dealing with High Court costs, costs are already at *'millionaire'* levels. Thus, in a High Court case such as this one, where costs are already so high (with the *lowest* estimate being €500,000 in order for the plaintiff to be allowed to continue with this 6-day trial), this Court does not accept Mr. Fitzpatrick's suggestion that the *'commercial value'* of the case justifies an increase of these costs even further. Thus, while a lawyer in private practice is entitled to base his fees to *his own client* on the value of a claim and that client is *free to agree* those fees, when it comes to what a losing litigant is *forced by the State to pay* his opponent's lawyers in the High Court, this should be based primarily on time, in this Court's view. This therefore is another reason for this Court not preferring Mr. Fitzpatrick's report.

(iv) <u>Should a losing litigant be forced to pay higher costs in the Commercial Court?</u>

157. Mr. Fitzpatrick, on behalf of Ms. Wilding, also seeks to justify his proposed level of legal costs of close to €1 million (when both defendants' costs are included) for a 6-day trial by referencing the fact that the case is to be heard in the Commercial Court.

158. However, since judges have observed that *all* High Court cases (i.e. Commercial Court and non-Commercial Court cases) already incur *'millionaire'* or excessive levels of costs, this Court cannot see any justification for the €200,000 uplift from Lowes figure to Mr. Fitzpatrick's figure simply because the case is to be heard in the Commercial Division of the High Court rather than say in the Chancery Division of the High Court.

159. Of course, Mr. Fitzpatrick's Report has set out in clear terms the number of hours, and the hourly rates applicable, which it is estimated this case would take in the Commercial Court.

If he had, and there was a *rational, transparent, and logical basis* for concluding that more hours were likely to be expended in the case than if the case was not heard in the Commercial Court, then this Court could have considered whether this was a rational basis for an uplift on the figure proposed by Lowes. However, this is not present in his Report, but instead there is simply a reference to the fact that the hearing will take place in the Commercial Court and a global figure of €454,820 is estimated as the figure which, as a result, the LCA will adjudicate as reasonable.

Could the costs in fact be less in the Commercial Court?

160. Indeed, the contrary argument could well be made, namely that the costs might be less in the Commercial Division of the High Court, than say the Chancery Division of the High Court, because of the speed with which the case will be heard in that court. In this regard, one of the aims of the Commercial Court was to lead to quicker, more *efficient* hearings and so, to minimise costs. Kelly J., as he then was, stated that:

> '[pre-trial procedures in Commercial Court cases] will mean greater expenditure on legal costs at the preparatory stage of the case, but **major savings, in most cases**, at the much more expensive trial stage.'
>
> '[case management conferences in Commercial Court cases] will ensure that the proceedings are prepared for trial in a manner which is just, expeditious and **likely to minimise the costs** of the proceedings' (Emphasis added). [41]

Similarly, it might be argued that the number of hours involved in a case which goes from institution of proceeding to trial in say 9 months in the Commercial Court, might in fact be more time efficient and so incur less time-costs than if the same case took say 2 years to come

[41] *Irish Times*, 27 February 2004 at p 28.

to be finalised in another division of the High Court. In this regard, in the Supreme Court case of *Bank of Scotland v Fergus* [2019] IESC 91 at paragraph [45] McKechnie J. stated:

> *'The basic rationale underlying the [Commercial] [C]ourt […] is this: to ensure that proceedings may be determined in a manner which is just, speedy and* ***efficient****: to which can be added the objective of* ***minimising costs*** *(Re Norton Health Care [2005] IEHC 411, [2006] 3 I.R. 321)'* (Emphasis added)

For all these reasons, this Court does not agree with Mr. Fitzpatrick's suggestion that the costs should be higher because the proceedings were instituted in the Commercial Court. This therefore is another reason for this Court not preferring Mr. Fitzpatrick's report.

Should there be higher hourly rates for commercial law specialists v. other specialists?

161. There is one further issue which Mr. Fitzpatrick's reference to the Commercial Court raises. Although not explicitly stated, he seems to be suggesting that in his opinion the LCA provides for lawyers to be paid by losing litigants *at a higher hourly rate* in the Commercial Division of the High Court than in other divisions of the High Court. Since Mr. Fitzpatrick does not use an hourly rate, it is not clear if he is suggesting that this is in fact the approach taken by the LCA.

162. However, since judges have noted on several occasions that legal costs are already at *'prohibitive'* levels in the High Court generally, it seems to this Court that the key factor in determining legal costs in the High Court should be the amount of time involved by the solicitor and barristers and there could be no basis for these rates being increased, beyond existing *'millionaire'* rates, simply because those lawyers specialise in commercial law.

163. It is of course true that one of the factors to be taken into account in determining costs, under Paragraph 2(b) of Schedule 1 of the 2015 Act, is:

"the skill or specialised knowledge relevant to the matter which the legal practitioner has applied to the matter"

However, as previously noted, the factors set out in Paragraph 2 apply to litigation costs generally, and not just in the High Court and so, when one considers that in the High Court one is already dealing with costs at *'prohibitive'* levels, this Court cannot see how there could be justification for a further increase in the amounts paid to lawyers simply because, through happenstance or otherwise, they are commercial law specialists, rather than say specialists in another area, e.g. criminal law, where a specialist who will take as many years to be regarded as a specialist in his/her field as a commercial law specialist.

(v) Not a *'remarkably low'* sum for a *'weighty Brief'* as claimed by Mr. Fitzpatrick

164. Mr. Fitzpatrick claims in his report that the Lowes' figure is *'remarkably low'* for a *'weighty Brief'*. Firstly, it is important to note that the Lowes' figure of *circa* €500,000 or *circa* €250,000 per defendant in Lowes' report is not this Court's estimate of the legal costs. Rather it is an estimate of the legal costs from an expert in legal costs.

165. On the basis that this is one expert's view of the likely legal costs, it seems likely that there would be many solicitors who would be happy to have €100,000 (excl. VAT) and senior counsel who would be happy to have €52,500 (excl. VAT) set aside in a bank account, or in the form of a bond, to pay them for six days of work at a trial (plus preparatory work). Thus, this Court does not agree that this is a *'remarkably low'* figure. This is because we are not dealing with what a commercial lawyer will be able to get her own client *to agree* to pay him/her (and in this respect, Mr. Fitzpatrick may well be correct that, in the context of what a corporate client will *agree* to pay its lawyers, higher amounts might be agreed, but we are not dealing with the free market where higher rates *may* be available.) Instead, we are dealing with the amount of money a losing litigant is *forced by the State* to pay the winning litigant's lawyers. More significantly, Mr. Fitzpatrick has provided no details of *how much time* he estimates the lawyers

will expend on the case or their hourly rates, and so this Court has no transparent basis for concluding that the Lowes' estimate of €100,000 is a remarkably low fee for a solicitor to be paid.

The term 'reasonable' costs does not mean in comparison to 'millionaire' costs

166. In addition, it is possible that Mr. Fitzpatrick is correct that these figures may be low compared to *'prohibitive'* costs which are calculated by the LCA in other High Court cases. However, when the 2015 Act requires costs to be *'reasonable in amount'*, it does not, in in this Court's view, mean that they are reasonable in comparison to *other* High Court costs for the simple reason that, as already noted, judges have for decades described High Court costs as, in effect, anything but reasonable.

167. Mr. Fitzpatrick supports his view that Lowes figure is low and that his figure is to be preferred, by stating that his estimate is within *'a range of fee'* for similar Commercial Court cases and *'at a level that has been determined by the Legal Costs Adjudicators'* in the past. However, for the foregoing reason, this argument does not carry much weight in this Court's view. This is because the estimate of *'millionaire'* costs in this case (i.e. of almost a million euro in order for Beakonford to be allowed to continue the litigation) cannot be regarded as reasonable *per se*, as suggested by Mr. Fitzpatrick, simply because in another case that level of *'millionaire'* costs was paid.

Aim of the 2015 Act was to reduce litigation costs

168. Support for this approach to interpreting 'reasonable' in the 2015 Act is to be found in the fact that the enactment of the 2015 Act (with its clear emphasis on litigation costs being 'reasonable') was an *attempt* by the Oireachtas to *reduce the high costs of litigation*. This is clear from the terms of the Act itself and its explanatory memorandum. The Act describes itself as:

> "An Act […] to provide for **reform** of the law relating to the charging of costs by legal practitioners and the system of the assessment of costs relating to the provision of legal services' (Emphasis added)

Crucially however, the explanatory memorandum states that one of the aims of the 2015 Act is to meet the State's commitments (i.e. *'structural reform building on the recommendations of the Legal Costs Working Group'*). In this regard, the Report of the Legal Costs Working Group notes that its task was to make recommendations which would lead to *'a reduction in the costs associated with civil litigation.'*[42]

169. Accordingly, it seems to this Court that the term *'reasonable'* when used in the 2015 Act does not mean by comparison to costs which have been paid in other High Court cases, since those costs have been described as at 'millionaire' levels, *'prohibitive' etc*. Instead, in light of the aim of the 2015 Act to reduce legal costs, it must mean reasonable *per se*, i.e. on objectively justifiable grounds. Thus, this must mean a losing litigant's costs are based on an objectively justifiable reasonable hourly rate for the particular service. The context for determining what is reasonable is that the service being valued is legal services, where a person (the losing litigant) is being forced by the State to pay for that service, which was provided to a third party (his opponent's lawyers), whom he never engaged and for whom he never agreed rates of pay.

Lowest estimate of €100,000 for one lawyer is what the Taoiseach earns for 5 months

170. In this context, it is relevant to note that the State must be regarded as having determined that a reasonable rate of pay for 12 months work on the part of the holder of the *most important office* in State (the Taoiseach) is €241,480. Against this background, it is to be noted that the *lowest* estimate from the three experts (i.e. from Lowes) for a solicitor to be paid for a 6-day

[42] Legal Costs Working Group, *Report of the Legal Costs Working Group* (Pn A5/1816, Stationary Office 2005) at p 5.

trial (plus preparatory work) was the figure of €100,000 (excl. VAT). Thus, the lowest estimate for a solicitor's fee for a 6-day trial (plus preparatory work) is nonetheless equal to the sum which the Taoiseach earns for *circa* 5 months working full time. In addition, of course, as already noted, Mr. Fitzpatrick has provided no details of *how much time* he estimates the lawyers will expend on the case to enable this Court conclude that €100,000 is a remarkably low fee.

171. It is of course true that, because this Court was also not provided by Lowes with an estimate of the *'time…reasonably expended'* behind this figure, it is not in a position to determine what time, and so what hourly rate(s), underpins this estimate of €100,000. Accordingly, this Court is not in a position to decide whether this estimate represents an hourly rate of €200 per hour or indeed €500 per hour or more. Accordingly, this Court *cannot definitively determine*, as required by the 2015 Act, whether the estimated costs of €100,000 for one lawyer for a 6-day trial (plus preparatory work) are reasonable based on the time input of the lawyers – since no time input was provided.

172. Of course, if this Court were to accept Lowes' figure of €250,796 for one defendant, it is important to bear in mind that the total sum which the plaintiff will have to pay, in order to be allowed to continue with its action, is still €501,592 for both defendants which could not, in this Court's view, be regarded in very general terms as a *'remarkably low figure'* in order for a litigant to be permitted to bring a 6-day High Court action.

€1.2 million to resolve a straightforward dispute involving citizens of the State

173. On the other hand, if this Court accepted Mr. Fitzpatrick's figure of €454,820.50 (incl. VAT) for one defendant, it would mean that Beakonford would have to lodge a sum approaching €1 million in order to continue with its proceedings, a figure which also takes no account of Beakonford's own legal costs. If one includes Beakonford's own costs, the total

costs of all sides could be €1.2 million to get the High Court to resolve a relatively straight forward dispute involving citizens in this State.

174. It should be no surprise therefore that like other judges before, from Murnaghan J. in 1965 to Clarke C.J. in 2019, this Court does not believe that it should cost so much to litigate in the High Court. Yet, if Mr. Fitzpatrick, who is an expert in legal costs, is correct, and legal costs are *circa* €1.2 million for a straightforward High Court claim, it seems to this Court that, in the absence of reform by the Oireachtas of how legal costs are calculated by the LCA (despite regular calls for their reform), the courts have to put an onus on lawyers to do more to have their disputes dealt with more efficiently.

175. For this reason, while *not* a determinative factor in this Court preferring the Lowes' Report, it is nonetheless to be noted that in relation to all three estimates, one is *not* dealing with the actual costs incurred *to date*, but with estimates regarding the likely costs to be incurred *in the future*. A more efficient approach to the proceedings might well end up leading to considerable savings.

176. In this regard, the courts themselves have an interest in incentivising litigants and their lawyers to be as efficient as possible with court time and to do everything possible to either settle the case or, if it is to run, to ensure that it takes the absolute minimum amount of time by agreeing matters and concentrating on the key issues in the case.

177. It is of course the case that *all* litigants (save for those who are unlikely to ever pay legal costs, even if they lose) have an incentive to be as efficient as possible with court time under the 'loser pays principle'. This is because prior to judgment, neither the plaintiff nor the defendant knows for definite which one will win/lose and so which one will have to pay the other's costs.

178. Yet the position of a defendant *with security for costs* is somewhat different from a defendant *without* any security for costs, particularly if he/she expects to win. It is arguable

that a defendant, with security for costs, who *expects* to win, and has say €450,000 in legal costs in a bank account awaiting payment if he/she wins, has marginally less incentive to be efficient with court time than one with say €250,00 in that same bank account.

179. Accordingly, *if there were no other reasons* to prefer one expert estimate over another (which is not the case here), it seems to this Court that the High Court could legitimately choose a lower estimate in light of the increasing role of the courts in *encouraging the efficient use of court time*, as illustrated by the recent reduction in hearings in planning cases from seven days down to two to three days.[43]

(vi) Level of costs likely to be less where two defendants face similar claims

180. Although not determinative, there is another reason why this Court prefers Lowes' lower estimate for the legal costs in this case than those of McCann Sadlier or of Mr. Fitzpatrick. It is because the claims which are made against the two defendants are very similar. Thus, when it comes to the amount of costs to be set aside for both defendants, it seems likely that there will be a certain degree of overlap for those two defendants, regarding the legal and factual issues to be decided at the trial.

181. This often happens in trials and there is therefore a basis for certain efficiencies and time-saving to be achieved, which should impact on legal costs. In the interests of saving court time (e.g. by a judge not having to read similar/identical written submissions or hear similar/identical oral submissions), it seems to this Court that such efficiencies should be encouraged and indeed incentivised, if necessary, by not automatically doubling the security for costs where there are two defendants facing the same/similar claims.

[43] "'*Pre-2020, a seven-day hearing for planning cases wouldn't have been unheard of, if not more'* he says. *'The current practice direction says that the standard method is two to three days, as determined by the court'*" – per Humphreys J, *The Currency* (10 December 2024).

182. Indeed, the fact that there is this possibility for efficiencies and cost-savings in this case is illustrated by what happened at the security for costs hearing. This is because the pleadings indicate that Beakonford believes that Ms. Stokes is the driving force behind the claims that Ms. Stokes and Ms. Wilding are seeking to extort money from Beakonford. This was reflected at the security for costs hearing, since Ms. Stokes took the lead at that hearing. Thus, Ms. Stokes' oral submissions at the security for costs hearing lasted 1 hour and 25 minutes. In contrast, Ms. Wilding's submissions, consisted of her counsel (appropriately) adopting those submissions. As a result, counsel for Ms. Wilding (appropriately) took only 25% of the time that counsel for Ms. Stokes took to make his oral submissions (i.e. 20 minutes), during which he dealt with one or two discrete issues which had not been covered by Ms. Stoke' counsel.

183. Similarly, it is clear that Ms. Stokes has also taken the lead when it comes to evidence. This is because she, and not Ms. Wilding, obtained an expert engineer's report *and* an expert accountant's report. Again, Ms. Wilding relied (appropriately) on Ms. Stoke's expert engineer report and on Ms. Stokes' expert accounting report without having to go to the cost of obtaining separate reports.

184. Thus, it seems likely that the same efficient approach could be taken (and should be encouraged) in relation to many of the issues at the trial between the two defendants, and thereby reduce their individual costs.

185. Despite this, it is to be noted that there is no reference in either of the defendants' legal costs reports to the savings that might arise as a result of the overlap between the issues both defendants have to address at trial. On the contrary, as noted, McCann Sadlier claims that Ms. Stokes requires two senior counsels at the trial and Mr. Fitzpatrick claims that Ms. Wilding requires two solicitors at the trial. However, this Court is entitled to have regard to likely efficiencies and indeed, to the need to incentivise/encourage such efficiencies in the interests of other litigants and the taxpayer, who is funding the courts.

186. Accordingly, although not determinative, this is another reason why this Court would favour the lower figure for legal costs proposed by Beakonford. This is because when it is doubled to cover both defendants' legal costs (which all parties assumed would happen), this takes no account of the savings and efficiencies that should arise in this case, which could mean that one defendant's costs are less than the other (despite this doubling of the estimate).

CONCLUSION

187. This judgment considered (in the context of a security for costs application) whether a losing litigant in the High Court is entitled to know the hourly rates of the lawyers, whose costs he is ordered to pay. Thus, is he entitled to know whether he is required by the laws of this State to pay his opponent's lawyers €200 per hour, €500 per hour, or €1,000 per hour? To put it another way, is he entitled to know whether he is required to pay his opponent's lawyers a similar hourly rate to the Taoiseach or *several* times the rate at which the Taoiseach is paid? While a litigant is free *to agree to pay his own lawyer* €500 or €1,000 per hour, if he chooses, it is a separate issue entirely whether a losing litigant is obliged by the laws of the State to pay such rates, or more precisely whether he is entitled to *know* the hourly rates he is obliged to pay his opponent's lawyers.

188. This Court has concluded that it could not be just for a losing litigant to be forced by the laws of the State to pay his opponent's lawyers an hourly rate, that is *multiples* of the effective hourly rate paid to the person occupying the most important role in the State (the Taoiseach). Accordingly, a losing litigant is entitled to know whether or not this is the case and so he is entitled to know the applicable hourly rates. This is because Paragraph 2(c) of Schedule 1 of the 2015 Act makes it clear that it is *mandatory* that time, and so hourly rates, are used in *calculating* the amount a losing litigant has to pay his opponent's lawyers. It follows that transparency demands that a losing litigant, who is subject to this financial obligation of paying

his opponent's lawyers, is entitled to know the hourly rates which were used in the calculation of that obligation.

189. Similarly, in a security for costs application, such as this one, this Court, when estimating the amount of security to be provided by a (presumed) losing litigant, should be presented with the hourly rates upon which any costs estimates are based. In this way, this Court can determine if those hourly rates are *'reasonable'* on objectively justifiable grounds and not by comparison with *'prohibitive'* costs that were paid in other cases.

190. As regards the amount of security for legal costs in this case, for the reasons set out above, this Court prefers Lowes' estimate of €250,796 (incl. VAT) for *each* of the defendants, and thus it determines that a total of €501,592, in legal costs for both defendants, is the amount to be paid by the plaintiff as security to cover legal costs for six days of a hearing in the High Court (and preparatory work).

191. This Court has chosen Lowes' estimate over the other estimates, even though this Court has not been able to determine whether the figure of €250,796 *per* defendant for legal costs is in fact *'reasonable'*, in line with the terms of the 2015 Act. This is because this Court does not know the *'time'* which is estimated to be expended by the solicitor and two barristers, and which underpins the estimates of their costs. Accordingly, this Court cannot determine if the proposed hourly rates to be paid to those lawyers are reasonable *per se*. This Court has nonetheless concluded, for the reasons set out above, that it would be inappropriate to force all parties to *incur further costs* in providing estimates which are based on time reasonably expended/hourly rates. Accordingly, it has adopted the Lowes' estimate, even though this Court cannot definitively say that this estimate is 'reasonable'. Of course, if the plaintiff loses the substantive action and it comes to the adjudication of the defendants' costs by the LCA, at that stage the LCA can ensure that the costs are 'reasonable' by applying hourly rate(s) that are reasonable on objectively justifiable grounds.

192. This case will be provisionally put in for mention at 10.30 a.m. a week from its delivery to deal with any final orders and costs. However, on the assumption that it should not be necessary to expend costs on a further court sitting, and in order to facilitate the parties agreeing all outstanding matters, the parties have liberty to notify the Registrar if such a listing proves to be unnecessary. This is particularly so in light of the clear implication from *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at paragraph 94, that there is an onus on lawyers to take a broad-brush approach to costs and not to engage in the inefficient use of court resources and costly *'nit-picking'*.