THE HIGH COURT

COMMERCIAL

[2024] IEHC 23

RECORD NUMBER 2022/6454P

BETWEEN

CONNECTIVE ENERGY HOLDINGS LIMITED

PLAINTIFF

AND

ENERGIA GROUP ROI HOLDINGS DAC

DEFENDANT

JUDGMENT OF Mr Justice Twomey delivered on the 18th day of January, 2024

INTRODUCTION

1. While High Court legal costs have been described by the former President of the High Court (Kelly P.) as only affordable to *'millionaires'*[1], it is rare that, in open court, one gets to see what exactly is meant by '*millionaire'* costs, in euro and cent terms. However, this is such a case, since the amounts/rates of pay for the lawyers were ventilated in open court.

2. This is because in this case, this Court was provided with evidence, from two experts on legal costs, on the likely costs of the trial of a dispute between the plaintiff ("**Connective**)

[1] See the comments of Kelly P. in *The Bar Review*, February, 2018, Vol 23(1), at p. 11: "*Under the current system, as they say, the only people who can litigate in the High Court are paupers and millionaires*".

and the defendant ("**Energia**"), regarding a relatively straightforward alleged breach of contract.

3. The lowest estimate stated that the Legal Costs Adjudicator would calculate costs for the defendant's solicitor, senior counsel and junior counsel of €206,025, €146,677 and €114,597 respectively (a total of almost half a million euro). This estimate was based on the fees for a trial lasting *less than two weeks* (i.e. 7 ½ days), plus preparatory work. To put these fees into context, the most important office holder in the State, the Taoiseach, earns €230,372 for *52 weeks work* or *circa* €5,000 per week. One can see therefore why Kelly P. described High Court costs as affordable only to millionaires.

4. However, that was the lowest estimate. The highest estimate was that the costs would be €937,186 (inc. VAT), based on the trial lasting *16 days*. That expert estimated that out of these costs, the solicitor would receive €473,550, the senior counsel, €214,020, and the junior counsel, €148,830. It is worth bearing in mind that these are just one side's legal costs. Thus, if the plaintiff were to lose, it would have to pay its own lawyer's fees, but also the defendant's legal costs, estimated to be €937,186. It seems likely therefore that, based on this expert's view, a losing litigant in the High Court in a relatively straight forward contract dispute would be liable for *total costs of between 1 and 2 million euro*. Thus, whether one takes the lowest estimate or the highest estimate, both experts' evidence starkly highlight what Kelly P. meant when he referred to *'millionaire'* costs in the High Court.

5. However, *in addition* to the professional fees to be paid to the three lawyers involved, this case also provided evidence of what the plaintiff described as the *'extraordinary'* cost of discovery. This is because the defendant's solicitor estimates that for this relatively straightforward case the discovery costs of his firm would amount to €701,100. Thus, this case also provides evidence of why the *Kelly Review* (as detailed below) described discovery as a major contributor to legal costs and why, some four years ago, it called for its abolition.

6. While this case is one involving corporate litigants, it should be borne in mind that the Legal Costs Adjudicator, when determining costs, does not apply different rates for costs, depending on whether the litigant is an individual, a small business or a large company. Accordingly, this expert evidence on legal costs in High Court cases is relevant to all High Court cases, including those where ordinary citizens end up being sued, or having to sue, in the High Court.

7. In this regard, another 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."[2]

It seems to this Court that one area where the system could certainly be made better for litigants is in relation to the legal costs which *losing* litigants are obliged by the State to pay. This is particularly so, when their cases are heard in the High Court, whether because they are *required by law* to be heard in that court (rather than the District Court or the Circuit Court), or because one of the parties is entitled to pursue the litigation in the High Court.

8. However, judges have no control over the level of legal costs, even though they preside over the administration of justice. This is because legal costs are calculated, not by judges in open court, but by the Legal Costs Adjudicator in accordance with the rates/rules passed by the Oireachtas. Indeed, this case was one of the rare instances where there is transparency (in the sense of these matters being aired in open court) regarding the precise level of legal costs in the High Court. This is because it was a security for costs application, in which Energia wants Connective to come up with €937,186, as security for Energia's costs, before being permitted to proceed with the litigation.

9. As it was a security for costs application, this case highlights the level of costs which a *losing litigant in the High Court is forced to pay his opponent's lawyers*. However, it is crucial

[2] *Irish Times*, 6 August, 2022.

to point out that if a client agrees to pay her own lawyer *'millionaire'* rates of pay, this is a private matter and there is no public interest involved. This is because lawyers are as entitled as any other professional to seek to be paid what they believe to be market rates. The client is then perfectly free to *choose* to agree to pay, or not to pay, those rates,

10. However, what we are concerned with in this case, is a completely separate matter. This is because it is the amount which the State, by its laws, forces a losing litigant in the High Court to pay her opponent's lawyers. In this respect, a losing litigant's legal costs differ from practically all other legal fees. This is because the payer of the legal costs *does not choose* the lawyer she is paying, *nor does she agree the rate of payment for that lawyer*. Instead, this is the sum which is *determined by the Legal Costs Adjudicator in accordance with rates/rules set down by Oireachtas* and then the State *obliges* her to pay that amount to *someone else's lawyer.* In addition, in order to ensure that she complies with this obligation, the machinery of the State is available to seek to enforce the payment (e.g. by obtaining court judgments, registering judgment mortgages etc). For this reason, this is a matter of considerable public interest, particularly where one is dealing with High Court costs which, unlike Circuit Court and District Court costs, have been described as *'millionaire'* costs.

11. In the experts' reports on legal costs provided to this Court, there is no breakdown of hourly rates or of how much time would be involved in preparing for the hearing. Nonetheless, whether one takes the lowest estimate, or the highest estimate, for the individual lawyers' fees, it certainly appears to be the case that a *losing litigant* in the High Court is forced to pay his opponent's lawyers at hourly rates of pay that are *many multiples of the rates of pay of the Taoiseach*. It is important to emphasise, once again, that if a client wants to pay *her own lawyers* these rates of pay, there is no reason why she should not do so. However, it does beg the fundamental question of whether it could be said to amount to justice that an ordinary

citizen should be obliged by the State to pay her opponent's lawyers rates of pay, which appear to be multiples of what the Taoiseach earns?

12. This is a matter of potential significance for every person in the State because at any time, *any individual* could be sued in the High Court (*e.g.* for defamation, personal injuries, property/planning issues, family law etc), or may have to sue in the High Court (since so many minor matters are heard in the High Court).[3] Bearing in mind the unpredictability of litigation,[4] this means that any individual could end up, at any time, being a losing litigant in a High Court case and then be *forced* to pay these '*millionaire'* rates - all in their pursuit of 'justice'.

13. This is not the first time that a judge has expressed misgivings regarding unaffordable legal costs. It is six years since Kelly P. stated that *'the only people who can litigate in the High Court are paupers and millionaires*,[5] while four years ago, Chief Justice Clarke called for the Oireachtas to give '*urgent consideration'* to the reform of laws which govern the '*cost of going to court'*.[6] It is also almost four years since the *Kelly Review* called for the reform of legal costs. However, as can be seen from the expert evidence in this case, these *'millionaire'* rates continue to be the 'going rates' applied by the Legal Costs Adjudicator in calculating the amount a losing litigant must pay her opponent's lawyers in High Court litigation.

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[3] A recent example of a minor case having to be heard in the High Court arises from the practice of referring challenges to decisions of administrative bodies to the High Court, rather than say the District Court or the Circuit Court, i.e. the appeal of a decision by the Residential Tenancies Board over a dispute regarding a monthly rent of €5,763.27 (a sum well below the monetary ceiling of €15,000 in the District Court) which was heard in the High Court - see *Vodo v Residential Tenacies Board* [2023] IEHC 605. Other examples of minor cases heard in the High Court are contained in *Sere Holdings v HSE* [2023] IEHC 63 at para 76 et seq, i.e. a dispute over a clamping fee of €80, a dispute over €20,000, and a dispute over a mix-up regarding a failure to issue a person his driver's licence, where his son with the same name was disqualified from driving.

[4] The most recent example of the uncertainty of litigation is provided by the case of *Revenue Commissioners v. Karshan* [2023] IESC 24, where in the High Court, O'Connor J. decided in favour of the Revenue, and his decision was reversed in the Court of Appeal (with one of the three judges dissenting), and then the Supreme Court unanimously reversed the Court of Appeal.

[5] *The Bar Review*, February, 2018, Vol 23(1), at p. 11.

[6] See *SPV Osus Limited v HSBC Institutional Trusts Services (Ireland) Limited* [2019] 1 I.R. 1 at p 7 per Clarke C.J.: "*However, I remain very concerned that there are cases where persons or entities have suffered from wrongdoing but where those persons or entities are unable effectively to vindicate their rights because of the cost of going to court. That is a problem to which solutions require to be found. It does seem to me that this is an issue to which the legislature should give urgent consideration*".

14. Who benefits from the continuation of these '*millionaire'* rates of pay in the High Court? It would certainly not appear to be litigants (except perhaps litigants who use strategic lawsuits against public participation ('slapp') – this is because a 'slapp' is likely to be much more effective, in stifling criticism/publicity/litigation, if it comes with a threat of High Court legal costs in the hundreds of thousands/millions or euro, than say with a threat of District Court legal costs of hundreds of euro). Yet as noted by Irvine P., the courts should try and improve the system for litigants. However, since judges do not make, or amend, the laws governing the calculation of legal costs in the High Court, all this Court can do, in seeking to improve the system for litigants, is to highlight this issue, as was previously done by Kelly P. and Clarke C.J.

15. Finally, in this regard, it is important to emphasise that neither the lawyers nor the legal costs accountants, who provided the expert evidence, in this case, have any role in determining the level of fees which a losing litigant is obliged by law to pay his opponent's lawyers. These rates are set down in laws passed by the Oireachtas and applied by the Legal Costs Adjudicator. Thus, while lawyers get to agree their fees with *their own clients*, they have no control over the fees which they receive from the losing litigant. In particular, it should be noted that the solicitors and barristers in this case have not charged or proposed to charge the foregoing professional fees. Rather these fees are based on the experts' views of the *current going rates* for lawyers' fees in High Court cases, i.e. they are the estimates of what two legal costs accountants, who are experts in legal costs, believe the Office of the Legal Costs Adjudicator is *obliged by law* to calculate should be paid to those lawyers (i.e. under, *inter alia*, Part 10, Chapter 4 of the Legal Services Regulation Act, 2015).

ANALYSIS

16. As already noted, the reason the legal costs in this case were subject to public transparency (in the sense of ventilation in open court) is because it was a 'security for costs' application by Energia against Connective. Energia wants Connective, which has little or no assets, to pay into court an estimate of Energia's legal costs, before proceeding with the litigation against Energia. In this way, if Energia wins the litigation, there will be money available to pay its legal costs.

17. Energia's security for costs application arises in the context of a dispute regarding a Share Purchase Agreement dated 31 May 2018 ("**SPA**") between Connective, Virdian Power and Energy Holdings DAC (the previous name of Energia) and Karol McElhinney ("**Mr. McElhinney**"). Under the terms of the SPA, Connective sold the entire issued share capital of CEHL (Dublin) Bioenergy Limited, which operated a renewable energy business, to Energia.

18. The only unusual factor in this straightforward breach of contract dispute is that there is no need for an assessment of the amount of damages payable, *if* there is found to be a breach of contract. This is because the 'damages', in this instance, amount, in effect, to the deferred consideration of €3 million under the SPA. This means that there will be no need for evidence or submissions, in order for the Court to calculate the damages resulting from the alleged breach of contract. Thus, there should be a considerable amount of court time saved in assessing damages, compared to other breach of contract cases.

19. In response to Energia's application for security for its costs, Connective does not dispute that 100% of the estimated costs of the trial in the High Court should be provided by it as security. However, as already noted, there is a significant disparity between the parties regarding the estimated costs of the trial.

20. In the Appendix to this judgment is the Schedule of costs prepared by Energia's legal costs accountants and Connective's costs accountants. While the costs experts provided their estimates net of VAT, it is important to note that if a private individual were to be involved in

a High Court case (e.g. defamation, personal injuries, planning etc), they would end up not recovering the VAT and so the net cost to that individual would be the costs, inclusive of VAT. In light of the points being made in this judgment, which may be of general application to litigants not registered for VAT, this Court has provided the VAT inclusive figures.

21. The parties are however agreed on one matter, namely that the disparity in legal costs between the two costs accountants is attributable to the disparity in their respective estimates of the length of the trial.

22. There is also disagreement between the parties regarding the form of security. This is because Connective wishes to provide the security for legal costs in the form of a charge over a residential property at St John's Rectory, Aghaveagh, Ballybofey, County Donegal ("**Property**"), while Energia seeks the security for its legal costs in the traditional form, i.e. cash or a bond. These two issues will be considered in turn.

23. However, before doing so, the amount and the breakdown in legal costs and the reasons for the disparity in those costs gives rise to several issues, which may be of more general application.

(i) Discovery costs of €701,100 for a straightforward High Court dispute?

24. The first issue of general application that arose in this case, and which has already been referenced, was the suggestion that Energia's legal costs for discovery in this relatively straightforward breach of contract dispute could amount to €570,000. As all figures provided by Energia were excluding VAT, this would amount to €701,100, when VAT is included. Connective describes the discovery costs as '*extraordinary*' in its oral submissions.

25. In light of the size of this sum, it is worth observing that it would take an individual on the average wage in Ireland of *circa* €48,000,[7] before tax, approximately 20 years to accumulate enough money to pay these costs of discovery.

26. This is relevant because the courts are supposed to provide access to justice for *all* citizens and not just corporate litigants or wealthy individuals. While this is a case involving corporate litigants, it does involve a straightforward dispute and so is similar to other straightforward High Court cases, but which might involve an individual in the High Court, such as personal injuries, defamation, planning etc.

27. Indeed, in light of cost of discovery in this case, it seems to this Court that this may well be the type of case that the *Report of the Review of the Administration of Civil Justice* (October, 2020), chaired by Kelly P., ("**Kelly Review**") had in mind, when it called for the Oireachtas to '*abolish the current entitlement to discovery'* (at p 190), as discovery acts as a '*barrier or impediment to justice rather than assisting in the administration of justice'* and is a *'major contributor'* to '*cost in the conduct of civil litigation'* and '*is failing all parties involved in litigation*' (at p 186).

(ii) <u>1/10th of the annual output of one High Court for a straightforward dispute?</u>

28. The second point of general application that arose in this case was the claim by Energia that a relatively straightforward breach of contract case should be allocated 4½ weeks of court time i.e. *1/10th of the annual output of one High Court judge*. It made this submission, in part, because of the '*value of the claim'* i.e. since this is a contractual dispute over €3 million. However, court time is not a commercial commodity, but it is a public resource that is available to all persons in the State, regardless of their financial means. Thus, as noted further below, it

[7] According to the CSO website, the average weekly earnings in Quarter 1 of 2023 was €923.48 per week, which is €48.020.96 per annum.

is this Court's view that the amount of court time allocated to a dispute should not be increased because of the 'value of the claim'.

(iii) Two days of High Court costs to read a judgment and apply for costs

29. The third point of general application that arose is the claim that a winning litigant, in a case such as this one, should be entitled to *two full days of High Court costs* i.e. tens of thousands of euro to pay its lawyers to *read* the judgment (which might be 50-100 pages in length) in order to advise the winning litigant of the result and also to pay its lawyers to finalise the costs arising from that judgment (which is usually a very straight forward matter, since the loser of the litigation, in most cases, pays the costs). For the reasons set out below, this was rejected by this Court.

(iv) Unpredictability of legal costs in straightforward High Court dispute

30. The fourth point of general application is that this Court was provided with an estimate of the legal costs in this case, by costs accountants on behalf of Connective, Cyril O'Neill ("**O'Neills**") and on behalf of Energia, Behan & Associates ("**Behans**"). O'Neills estimated that the costs, which the Legal Costs Adjudicator will calculate to be payable by Connective if it loses these proceedings, would be roughly half that estimated by Behans i.e. €473,550 v. €937,186. Bearing in mind that both firms specialise in legal costs, this illustrates in very stark fashion the unpredictability of the current laws for calculating legal costs.

(v) What exactly is meant by 'millionaire' costs in the High Court

31. The fifth point of general application is the one that was made earlier in this judgment, namely that this case provides a rare but concrete example of what is meant by the term *'millionaire'* costs in the High Court, when it was used by the former President of the High Court, particularly since it concerned one solicitors' firm, one senior counsel and one junior counsel, which is the norm for all High Court cases.

32. It is important to put even the lower of the two estimates of the lawyers' fees (of €206,025, €146,677 and €114,597 for the solicitor(s), senior counsel and junior counsel) into some kind of context - not even of the average wage in Ireland of *circa* €48,000 (less than €1,000 per week), but instead of the one of the highest paid offices in the State, that of the Taoiseach. With this in mind, these are the fees for a trial of less than 2 weeks (and preparatory work), while for 52 weeks' work the Taoiseach earns €230,372 or *circa* €5,000 per week. While this Court cannot be certain of the amount of preparatory work involved, it would certainly appear on the basis of the expert evidence presented to the Court by the legal costs accountants, that lawyers' fees in the High Court are calculated by the Legal Costs Adjudicator (applying rule/rates set by the Oireachtas) at rates which are far in excess of the rate of pay of the Taoiseach. (It also seems that the State, by its laws, *obliges losing litigants to pay* their opponent's lawyers, when they lose *civil High Court cases*, at very different rates of pay from those which *the State itself pays* it own lawyers acting in *criminal High Court cases* (i.e. in the Central Criminal Court)).

33. It is important to emphasise that no criticism is made of the costs accountants who provided the expert opinions, since they are simply providing the court with their estimates based on the rates of pay for lawyers in High Court cases, as set down by the Oireachtas and which have to be applied by the Legal Costs Adjudicator.

(vi) The *'tail'* of legal costs '*wagging the dog'* of justice

34. The next issue of general application, and the real problem caused by this level of legal costs, is that the *'tail'* (of legal costs) ends up '*wagging the dog'* (of justice). Indeed slapps (strategic lawsuits against public participation) are dependant for their effectiveness on this fact that High Court legal costs are only affordable to millionaires. In this way, the users of slapps are able to use the tail (of legal costs) to wag the dog (of justice) in order to stifle actions/comment with the threat of litigation.

35. More generally, the reason the tail of legal costs could be said to wag the dog of justice, is because many cases end up being settled, not because this represents the 'justice' of the case, but because the high level of costs in the High Court end up being weaponised and used, in the words of the Supreme Court, as '*blackmail*'.[8] Thus, many litigants in the High Court end up not obtaining justice, even though this is the purpose of our courts. As noted by the Supreme Court, it is because of the high level of legal costs, that litigants end up with '*something less than… justice'*.[9]

36. For example, it will often not be the 'just' outcome of a case (which might be damages of €60,001 in a personal injuries case or €75,001 in a defamation case - the floor for damages in the High Court), which determines that a case should be settled. Rather, it will often be the *'tail'* of costs (in the hundreds of thousands/millions of euros in the High Court) that forces parties to settle. This is because when the tail is hundreds of thousands of euros and the dog is 'only' €60,001 or €75,001 (or indeed a dispute with a nominal value which is heard in the High Court), it is perfectly clear how the tail ends up wagging the dog. Indeed, logic would appear to dictate that the 'tail' of legal costs *should* wag the 'dog' of justice in all cases where there is a complete lack of proportion between the amount of legal costs and the value of the dispute. This absence of proportionality is at its starkest regarding legal costs in the High Court, as it is not usually present in other legal costs such as conveyancing or probate costs (where costs might be a small percentage of the value of the asset) or in District Court or Circuit Court litigation.

37. This absence of proportionality in the High Court between the legal costs, on the one hand, and the value/importance/damages involved, on the other hand, can have a chilling effect

[8] See *Farrell v. The Governor and Company of the Bank of Ireland* [2013] 2 ILRM 183 at para. 4.12 per Clarke J.

[9] *Quinn v Pricewaterhousecoopers* [2021] IESC 15 at para. [12], where O'Donnell J. stated that '*a defendant is entitled to feel that the pressure to compromise because of the risk of expenditure of costs which will be irrecoverable is something less than the administration of justice according to law and instead has uncomfortable echoes of the practice and procedure of the highwayman*.'

on everything from free speech to outdoor pursuits, where there is a risk of litigation. This means that citizens might not fear 'justice' regarding their actions, in the form of an award of damages in a defamation or personal injuries case, but rather they will in reality fear the legal bill of hundreds of thousands of euros/millions of euros. These 'millionaire' costs, which are imposed on a losing litigant, are calculated at rates set by the State and then enforced by laws passed by the State.

38. This is starkly evidenced in this case, a relatively straightforward High Court case, in which a legal costs accountant estimates one side's legal costs will be €937,186. If this view was confirmed by the Legal Costs Adjudicator, this would mean that a losing party in a straightforward contract dispute could end up paying his own legal costs and the other side's legal costs, and so could be liable for total legal costs of *between one and two million euro*. How can this level of costs be justifiable as the cost of seeking justice regarding a straightforward breach of contract case?

(vii) <u>Security for costs generally only available where corporate plaintiffs</u>

39. Finally, in this regard, it is to be observed that it is completely understandable that Energia, like any defendant, would want to ensure, where it is sued by a plaintiff with no assets, that money is paid into court by that plaintiff, to cover the defendant's legal costs, if the defendant wins. After all, what defendant would not want to ensure that if she is sued by a plaintiff without assets that the plaintiff would be required to pay money into court to discharge the defendant's legal costs, if the defendant wins? In passing, it is to be noted that, under current law, this entitlement to security for costs is generally only available to defendants where the plaintiff is a *corporate entity* (without sufficient assets) and not where the plaintiff is an *individual* (without sufficient assets). This means that if an *individual plaintiff*, without assets, sues an individual defendant, and is permitted to do so in the High Court rather than say the District or Circuit Court, if the defendant wins, that defendant will end up having to pay the

'*millionaire'* legal costs herself even though she has won and so, in theory, obtained justice. This is because there will be no cash paid into court by the *individual* plaintiff for the benefit of that defendant, which there would be if she was sued by a corporate plaintiff, without assets.

40. It is now proposed to deal with the two substantive issues, which have to be determined by this Court, namely the amount of security to be provided by Connective and the form of that security.

A. <u>The amount of legal costs to be provided by Connective?</u>

41. In order for this Court to determine the appropriate level of costs to be provided as security, it is necessary for this Court to have an understanding of the likely length of the trial. For this reason, this Court needs to have an understanding of the issues which will have to be considered at that trial.

42. In this regard, in very broad terms, Connective claims that the payment of the deferred consideration under the SPA is contingent on the achievement of the 'Take Over Date', which was the date when the bio energy facility was to be ready to begin production. However, this was never achieved because of the termination of an agreement ("**EPC Agreement**") which Energia had with Jones Celtic Bioenergy Limited (**"EPC Contractor"**).

43. For its part, Energia claims that because the pre-conditions for the payment of the deferred consideration were not met, it is relieved of its obligation to pay the €3 million. However, Connective claims that Energia cannot simply relieve itself of this obligation to pay the €3 million by terminating the EPC Agreement. Instead, Connective claims that, under the terms of the SPA, Energia was under an obligation, before terminating the EPC Agreement, to ensure that there was an alternative party with whom a fresh EPC agreement could have been executed. This, Connective claims, would have led to the precondition, for the €3 million

payment, being satisfied. In its submissions, Connective summarised its claim by saying that Energia was not entitled to have a '*consequence-free termination'* of the EPC Agreement.

44. Connective also claims that even if it is wrong (in claiming that there was an obligation contained *in the SPA* upon Energia to enter a fresh EPC Agreement), then the SPA should be rectified to reflect that position, as it reflects the common understanding of the parties. In the alternative, Connective claims that Energia misrepresented that the deferred consideration would be payable.

45. These are the type of claims which one would typically see in other breach of contract claims in the High Court (provided that the deferred consideration was in excess of €75,000 - the monetary floor for breach of contract cases in the High Court). In this sense, this is a straightforward breach of contract claim, *albeit* over a deferred consideration of €3 million.

46. The following are the points relevant to deciding the amount of legal costs which should be paid by Connective.

A 113% difference in the estimates of the length of the trial

47. Connective estimates that the case will take 7½ days (i.e. just under two weeks of court time). Energia estimates that the case will take 16 days of hearing plus two days hearing/costs for the judgment and costs application (i.e. 4½ weeks of court time). Thus, Energia estimates that it will take 113% more court time to resolve the dispute than Connective. This is a very significant difference between two experienced legal teams regarding how much time a court should allocate to resolve a dispute.

Dispute requires 1/10th of the annual output of one High Court judge?

48. However, the most striking thing about these estimates is that Energia is claiming that it should be given over a month of court-hearing time to resolve, what this Court regards as, a straightforward contractual dispute. It is important to put this in perspective. It would mean that in the course of one year, approximately 1/10th of one High Court judge's annual *hearing*

time would be allocated to resolve just one contractual dispute between two private parties. (It should be noted that this figure takes no account of the amount of judicial time involved in judgment writing, which is usually a multiple of the hearing time). For one dispute to allegedly require so much of the High Court's time requires careful very careful interrogation. In interrogating Energia's claim, that it should be entitled to 4½ weeks of court time, the following principles and issues should be borne in mind. This is particularly so when one considers that

There is a strong public interest in how court time is used

49. Firstly, it is important for this Court to bear in mind that Energia is seeking to use taxpayers' funded resources for its benefit. As noted by MacMenamin J. in *Tracey v Burton* [2016] IESC 16 at para [45]

> *"Court time is not solely the concern of litigants, or their legal representatives. There is a strong public interest aspect to these issues."*

Accordingly, what is key in reaching any decision on the likely length of the trial, is not that Energia might want to have the best chance of success in its dispute (by having enough court time to cover every conceivable argument in its favour). Instead, what is key is what a court regards as an appropriate amount of time in light of the issues involved and bearing in mind that every extra hour/day is at considerable cost to the taxpayer. Furthermore, the more court time that is monopolised by one litigant (whether a litigious lay litigant, a wealthy individual litigant or a large commercial enterprise), the less court time that is available to other litigants, who are *equally entitled* to have their cases heard.

Focused written legal submissions and witness statements

50. It is also to be borne in mind that this is a hearing in the Commercial Court and considerable efficiency *should* be achieved in hearings in the Commercial Court. This is because legal submissions are exchanged well in advance of the hearing and provided to the Court, thereby reducing time at the hearing.

51. Similarly witness statements are exchanged well in advance of the hearing and provided to the Court, which can reduce considerably the time needed for witnesses (by eliminating examination of a witness by her own counsel) and sometimes even the need for particular witnesses. Thus, if anything, hearings involving commercial disputes in the Commercial Court *should* be more time-efficient and therefore cost efficient than hearings in other matters, since one of stated the aims of the Commercial Court, per Order 63A of the Rules of the Superior Courts, is to minimise costs).

Assessment of damages will play no part in the trial

52. A further factor to be borne in mind regarding this trial is that a significant portion of many trials is taken up with an assessment of damages. However, in this case, the damages are fixed by the terms of the SPA at €3 million and so this amounts to a significant time-saving on the norm. This suggests therefore that this trial should be significantly shorter than a similar breach of contract dispute which involves an assessment of damages.

Recent move by High Court to reduce hearing time from 2-3 weeks to 3 days

53. It is also relevant to note that there has been a move by one division of the High Court, the Planning & Environmental Division, to shorten the length of time which cases are allocated, even though those cases involving complex areas of law. Thus, while before 2020, it was not unusual for hearings in planning cases to run for 2-3 weeks, the Planning & Environment Division of the High Court has stated that it now generally confines cases to 3 days.[10]

The value of the dispute is irrelevant to the amount of court time allotted

54. One of the reasons put forward, in oral submissions by Energia, to justify such a long trial was the '*value of the claim'*. However, it seems to this Court that the value of a claim is, in most cases, not a justification for a longer trial. Thus, a person with a breach of contract

[10] Courts Service Media Release 11 December, 2023 and Practice Direction HC 124 at para 103 – "*The time allocated to a full substantive hearing will normally be a maximum of 3 days".*

claim worth €3 million is not *per se* entitled to more court time than a person with a claim of €100,000 or €10,000. The reason that the value of the claim does not justify more court time being allotted is because courts are not engaged in a 'business' where monetary values have any impact on how the workload of the courts is allocated. It follows that, just because litigants are willing to pay lawyers to spend a long time in court to argue their case is irrelevant to a court's decision as to the appropriate amount of time to allot to that case. To put the matter another way, large commercial entities are not entitled to more of a public resource (which court time is), than other litigants, who are not as well-resourced or litigating over large sums.

55. This is the situation, irrespective of the division of the High Court in which the case is being heard. It is true that the Commercial Court deals with urgent large value commercial disputes (i.e. worth in excess of €1 million) in what is known as a 'fast-track' manner. However, dealing with urgent matters quickly is not the same as saying that commercial litigants are entitled to *more* of the public resource, i.e. High Court time, than other litigants, simply because their dispute happens to be over a large sum of money.

56. The key factor in determining *how long* a trial should be is the complexity of the dispute and how long the court determines is appropriate for its resolution. This is because court resources are not unlimited. As noted by Charleton J. in *Talbot v Hermitage Golf Club* [2014] IESC 57 at para. [47] Charleton J:

> *"The resources of the courts are there for litigants.* ***Those resources are not, however, unlimited****. No litigant is entitled to more than what is* ***reasonably necessarily required for the just disposal of a case within the context of the other demands on court time****. Whether it is an unrepresented litigant or not, the resources which the courts decide to assign to a case must depend on: the importance of the legal issues involved; the gravity of the wrong allegedly suffered by the moving or counterclaiming party; the monetary sum involved; and the public interest in the outcome of the case.* ***Courts are entitled,***

and indeed are required, to foster their resources. This is both a matter of public and private interest. Court resources used in litigation are funded by public money*. In addition, the parties pay for legal representation.* ***Litigants should not be faced with cases that are longer or more expensive than they need to be for a fair resolution****. In many instances, costs if awarded against a* ***losing party may not be recovered****. In that regard, putting reasonable limits on submissions in terms of time and allowing a measured number of hours or days for each side to litigate the case is both right and appropriate."* (Emphasis Added)

57. While Charleton J does refer to the '*monetary value'* of the dispute as being a factor, it is important to note that he did so, not in the context of a large value dispute, but rather in the context of a very minor dispute (i.e. allegations of defamation in a golf club over a golfer's handicap) with a nominal/uncertain monetary value and which took up an inordinate amount of time (20 days in the High Court).

58. It seems clear to this Court that he was stating that, when dealing with a low value/nominal value claim, the monetary value of a dispute can be a factor in *reducing* the amount of court time allotted to that dispute. This is implicit in his reference to irrecoverable legal costs, i.e. the logic being that a winning litigant in a dispute over a small sum of money should not have to be faced with paying multiples of the value of the dispute in legal fees to resolve that claim (particularly when these might not be recoverable from the losing litigant). It seems clear that he was not suggesting that the monetary value of a dispute is a factor in *increasing* court time, i.e. that a non-complex claim over a large sum of money is entitled to more court time than a complex claim over a smaller sum of money, simply by virtue of the fact that it was a high value claim.

59. More generally, it seems to this Court that the monetary value of a dispute should rarely be a determining factor in increasing the length of the trial, as suggested by Energia. Firstly,

court time is a public resource, it is not a commercial commodity. If the monetary value of a dispute were *a factor,* in how long a trial should take, then it could be argued that a trial say over free speech, the right to life, the right to die *etc* (for which there is no monetary value) might be entitled to less court time than a trial over a €10 million dispute, which cannot be the case. Secondly, a contractual dispute over say €10 million could well be less complex than one over €100,000 and therefore require less court time than the lower value dispute, even though the litigants in the higher value dispute might believe that it is worth the expense of spending as much time in court, as possible, to argue their case.

60. It follows that the key factor in this case is not that it is worth €3 million and so deserves to be allocated 4½ weeks of court time, but rather it is whether this case is so complex, as claimed by Energia, as to require 4½ weeks of court time.

Is this a complex case requiring 4½ weeks of court time?

61. To answer this question, one must consider the issues which will have to be resolved at the trial. In this regard, there is agreement between the parties as regards the five issues which the trial court will have to deal with namely:

(i) whether the SPA should be interpreted as Energia claims or as Connective claims,

(ii) whether there has been a breach of the SPA,

(iii) whether Connective's claim for rectification of the SPA should succeed,

(iv) whether there was misrepresentation to Connective on the part of Energia in relation to the €3 million payment,

(v) whether the termination of the EPC Agreement was contrived on the part of Energia, in order to avoid paying the €3 million.

62. Behans, on behalf of Energia, estimate that there should be security for costs in the sum of €761,940 (excluding VAT) to cover the costs for a hearing of four weeks (16 days) with two

further days to deal with judgement and the costs application, thus 4½ weeks of court time in total.

63. O'Neills, on behalf of Connective, estimate that the hearing should take 7½ days (just under two weeks) with legal costs of between €360,919 and €395,919 (excluding VAT).

64. As a preliminary point, it is worth noting that, based on this Court's experience of many trials, this trial *could indeed take* 4½ weeks, *if* the amount of time taken, and legal costs incurred, were not an issue for any of the parties or for the Court. However, it is an issue for this Court, since the Supreme Court case of *Tracey v Burton* obliges this Court to have regard to the public interest in the efficient use of court time. When adopting this approach, it seems to this Court that there is no justification for allocating 4½ weeks to this case, as it should be heard within *at least* two weeks for several reasons.

65. Firstly, dealing with the five issues which have to be addressed at the trial in turn, all parties accept that the interpretation issue (regarding the SPA) is very straightforward, *albeit* that Connective thinks it is straightforward in its favour and Energia thinks that it is straightforward in its favour. In this regard, this Court agrees with both parties that this interpretation matter is straight forward and should be dealt with very promptly at the hearing. In particular it notes that there are only three or four clauses in the SPA, running to a line or two each, which are relevant to the contested interpretation. Furthermore, these matters will be addressed in written legal submissions and therefore should take up very little court time.

66. The second issue for the trial, as to whether there has been a breach of the SPA, should also not take much court time, since the answer to this question should be clear, once the interpretation issue of the contract (as rectified are not) is finalised by the court.

67. As regards the third issue for the trial, it is accepted by both parties that the rectification issue is fact intensive. However, many trials have some fact intensive issues and just because an issue in a trial is likely to be fact intensive does not *per se* entitle a litigant to 4½ weeks of

court time. It seems to this Court that something out of the ordinary would be required, for a court to allocate 1/10th of its annual output to just one dispute. It is not sufficient for one of the litigants to claim that a straightforward breach of contract dispute is fact intensive.

68. In support of a lengthy trial, Energia points out that this is a case which involves discovery. However, while it is true that the rectification issue will involve discovery, it is the case that discovery is a feature of most litigation, and this does not *per se* lead to the allocation of 4 ½ weeks of court time.

69. In this regard, Energia also points out that Connective, when it was seeking to have this matter entered into the Commercial Court, stated that there was an '*enormous volume of documents'* in the case. However, again it is important to note that, in sometimes the simplest of cases, parties generate enormous amounts of documents (in part, no doubt due to so much communication being done by email, with so many parties copied on those emails and with some many duplicates of draft agreements, drawings, circulated).

70. Since so many cases nowadays involve a large number of documents, it seems to this Court that something out of the ordinary would be required, other than simply a claim that a dispute involves discovery and that there is a large volume of documents to be discovered, for a court to allocate 1/10th of its annual output to that dispute.

71. It also is to be observed that in this case, while there will be discovery, it should primarily relate to the negotiations of the parties in the period prior to the execution of the SPA. Thus, it should be a focused discovery, since it relates to the issue of whether there was a common understanding (or misrepresentation) that there could be consequence-free termination by Energia of its agreement with the EPC Contractor, so as to relieve Energia of its obligation to pay the €3 million deferred consideration to Connective. In addition, the agreed discovery (which is set out in the Appendix to this judgment) is for a relatively short period, since it covers the period between 8 June 2017 and 31 May 2018, which is less than a year.

72. As regards the fourth issue for the trial, in many ways the claim of misrepresentation is similar to the claim that the contract should be rectified. It is true that it is fact-intensive, but because it deals with an issue similar, if not identical, to whether Energia should be entitled to a consequence free termination of the EPC Agreement, it covers similar ground and so should not add significantly to the time taken at the trial.

73. The fifth issue for the trial is whether the termination of the EPC Agreement was contrived by Energia. While this is clearly an issue in the case, as it is part of Connective's Statement of Claim, it does seem to this Court that this is very much a side issue. This is because the key legal issue is whether the SPA should be rectified, with the related issue of whether Energia has been guilty of misrepresentation. Accordingly, the question of whether the termination was contrived by Energia becomes largely irrelevant if Connective succeed in establishing that the SPA should be rectified and/or that Energia is guilty of misrepresentation. Equally, it seems to this Court that the question of whether the termination was contrived becomes irrelevant if Connective fails to establish either of these issues.

Conclusion regarding length of trial

74. When all of the foregoing principles and issues are taken into account, it seems to this Court that the dispute in this case should easily be capable of being heard within 7 ½ days of court time *if not less*. In particular, it does not appear to this court to be a particularly complex case and one which should require 1/10th of the annual output of one High Court judge. The fact that the dispute is over €3 million is irrelevant to this conclusion.

75. While this case *could* of course take 4½ week, if Connective were required to lodge in court costs to cover that amount of court time, it seems to this Court that this would amount to *"an encouragement to luxurious litigation"*, which Fitzgibbon J. held security for costs should not be (in *Perry v. Stratham Ltd* [1928] IR 500 at page 583.)

76. Indeed, it seems to this Court to be implicit in Fitzgibbon J.'s comment that security for costs, instead of being an '*encouragement to luxurious litigation'*, should act as an encouragement to efficient litigation. Thus, litigants should be encouraged, not to seek to cover every conceivable point in their favour, but rather to concentrate on their best arguments. In many cases the more concentrated the court hearing time, the more focused and effective the arguments will be, which will therefore be in everyone's interests. This is particularly so, when it seems to this Court that there is often, and was in this case, a certain amount of guess work involved in the amount of time which should be allocated. This is because Energia, while suggesting a 4½ week trial, nonetheless accepted that it was "*always difficult to estimate how long a trial is going to take, particularly at this early stage*".

77. For all these reasons, this Court believes that it is appropriate, when calculating the security for costs, to err on the side of a shorter hearing in this case, which should encourage both parties to adopt a more efficient use of public resources.

Two days of High Court costs for '*taking judgment*' and a costs application?

78. Another issue of general application, which was not concerned with the length of the trial *per se*, but more generally with the legal costs Energia's lawyers were seeking to have secured, was the suggestion which Behans made (on behalf of Energia), namely that Energia should be entitled to two days of High Court costs to deal with post-judgment issues. Behans at p 6 of its first Report of 24th May, 2023 states:

> *"We are instructed that the Trial will take four weeks i.e. 16 days* ***with 2 further days – Judgment and Costs Application****" (Emphasis added)*

Behans go on to state, at p. 6 its second Report of 2nd October, 2023 that it believes the *'Legal Costs Adjudicator would certainty make an allowance for such work*'. While it is conceivable that the Legal Costs Adjudicator might make an allowance for reading a judgment and

agreeing/arguing a costs application, this Court does not believe that the Legal Costs Adjudicator could allocate two days of High Court costs for this work for a number of reasons.

The amount of costs to be incurred in 'taking judgment'

79. Firstly, judgements are now delivered electronically in many cases and so it is not necessary for teams of lawyers to attend the court to 'take judgment'. This is one of the efficiencies that has arisen as a result of Covid-19. From the perspective of security for costs (i.e. how much should be paid into court by a plaintiff in case *she loses at trial*), in most cases all that needs to be covered, by those costs, at the judgment stage, is the defendant's lawyer simply reading the judgment *in order to determine that the defendant has won*. This is because the defendant is only entitled to have security for the costs incurred in 'winning' the case. The defendant is not entitled to security for the costs which it might incur in relation to *any potential appeal.*

80. Thus, the plaintiff is not required to pay into court cash which will be used to pay a defendant's legal costs for *carefully analysing the judgment* to see if there are grounds for appeal, the law relating to same, for preparing those grounds for appeal or for anticipating grounds for appeal from the plaintiff. Rather the plaintiff is only required to pay the defendant's legal costs for reading the judgment in order to determine whether the defendant won or lost. Thus, the suggestion that there should be a day or two days of High Court costs for reading the judgment is rejected by this Court.

The amount of costs to be incurred in making a costs application

81. Secondly, as regards the likely costs of Energia for any costs application, assuming it wins, this also should not take very long. This is because in the vast majority of cases, the costs position is very clear (since costs usually follow the event i.e. the loser pays). Indeed, because the position is usually clear, the practice of this Court is to discourage any court hearings after judgement has been delivered electronically. Instead, parties are strongly encouraged to avoid

further use of court time by agreeing the terms of any costs order to be provided to the registrar. In this Court's experience, this is invariably what happens – since in the vast majority of cases the costs implications of a judgment are clear. Indeed, the position is usually so straightforward as to who has won and who has lost (and that the loser should bear the costs), that it is common practice for many judges, when giving judgment, to also deliver a provisional decision regarding costs. Thus, the suggestion that two days of High Court costs should be allocated for this purpose is rejected, since in many cases there will be no need for a hearing.

82. Even if agreement is not quickly reached between the parties in relation to costs, it is clear from the recent judgement of the Court of Appeal in *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at para. [94], that the High Court is obliged to take a '*broad-brush approach'* to costs and not get involved in '*nit-picking'*. This direction from the Court of Appeal means that there is an onus on lawyers to also take a broad-brush approach and not to engage in time consuming and costly '*nit-picking'*. Therefore, even if there has to be a contested hearing, adopting the broad-brush approach which is now required, should mean that it will last no longer than 15 minutes, *in most contested cases.* In general, it is the practice of this Court to allot 15 minutes for such hearings. Accordingly, the suggestion that there should be a day or two days of High Court costs for finalising the costs is rejected by this Court.

Lack of detail regarding the length of the trial from Energia's costs accountant

83. O'Neills' Report, on behalf of Connective, of 11th September, 2023 at p. 5, regarding the length of the trial states that:

> *"We are instructed that in counsel's view the trial is likely to last 7 days, 1 day to open; 2 days leading evidence; 3 days for the defendant to reply and defendant witnesses and 1 day both sides to close with a further half day for judgment and costs application and final order making a total of 7 ½."*

84. Unlike O'Neills' approach, there was no attempt by Behans, on behalf of Energia, to provide a breakdown of the likely time the hearing would take, nor did they seek to challenge the detail of O'Neills' claims regarding for example the claim that Energia would need three days to reply and adduce its evidence. Accordingly, there was no opportunity for this Court to interrogate O'Neills' views, with the benefit of Behans' views. Instead, this Court was provided with a bald statement from Behans that four weeks would be attributable to the trial, with a half week attributable to the judgement and costs application and on this basis this Court was asked to approve a legal costs' estimate of €937,186 (inc. VAT). For this reason, this approach to costs did not recommend itself to this Court.

Discovery costs of €701,100 or *circa* €184,500 both suggested by Energia

85. Although not determinative, the final reason why this Court rejected Energia's estimate of the legal costs, is the uncertainty regarding Energia's discovery costs. Firstly, there is the *'extraordinary'* sum of €570,000 for discovery (which appears to exclude VAT and so amounts to €701,100 inclusive VAT). This sum was proposed by the lawyers acting for Energia. In view of the size of the figure claimed by Energia's lawyers for their discovery costs, it is perhaps not surprising that this figure for discovery was not relied upon by Energia's own legal costs accountants, Behans, which came up with a completely different figure. However, it is not clear how Behans came up with a figure of €200,000 (ex. VAT) for what it describes, at p 10 of its first Report of 24th May, 2023, as:

> *"All work including Discovery, compliance with Proofs, written submissions and Trial preparations, etc",*

While there was no breakdown within these categories of costs, this suggests a figure of *circa* €150,000 (ex. VAT and so €184,500 inc. VAT) for discovery alone.

86. When a Court has sworn evidence on behalf of the same party, Energia, that its discovery costs will amount to *circa* €184,500 and also sworn evidence that it will in fact cost €701,100, it is difficult not to treat both figures with a degree of scepticism.

87. While counsel for Energia made submissions in order to try to explain this massive discrepancy between these two figures, this Court must rely on evidence, not submissions, in reaching its decision on this application. In this regard, to support Energia's claim that Connective should pay into court the sum of €937,186 as security for Energia's legal costs, there is sworn evidence from Energia of the cost of discovery of Energia's lawyers in this case. In the Appendix to this judgment are the terms of the discovery which has been agreed between the parties and also a one-page, unsigned document from the e-discovery team in the law firm acting for Energia, which was exhibited in an affidavit sworn by Energia's solicitor, stating that Energia's discovery costs will be €570,000 (€701,100 including VAT)

88. Connective claims that this is an '*extraordinary'* sum for discovery costs. However, because the courts, unlike the Legal Costs Adjudicator, are not normally involved in assessing discovery costs, it is not clear whether the sum of €701,100 is a typical charge for discovery in a straightforward High Court case like this one or whether, as Connective claims, it is '*extraordinary*'.

<u>€701,100 as the going rate for discovery in a straightforward High Court dispute?</u>

89. It could well be that €701,100 is the going rate for discovery in a straight-forward case, and if this is so then this case will, at least, highlight the extent of the costs of straightforward discovery in the High Court. It would also provide evidence for why the *Kelly Review* at p 190 called for the Oireachtas to '*abolish the current entitlement to discovery'*. In the context of a claim by Energia that its legal costs for the trial will be €937,186, this case may also be the type of case the *Kelly Review* had in mind, when it concluded at p 186, that discovery (because of the volume of electronically stored data) often acts as a:

'*barrier or* ***impediment to justice*** *rather than assisting in the administration of justice'*. (Emphasis added)

90. While this Court does not know whether these type of discovery costs are representative of other straightforward High Court cases, what is clear to this Court, is that there is nothing out of the ordinary about the discovery in this case. In this court's view it is the type of discovery which one might expect in many breach of contract disputes, where claims of implied terms, and misrepresentation during the negotiations, are made, and where email and other documentation from the principals and their advisers has to be reviewed.

91. As is clear from the one-page document in the Appendix, discovery in this case appears to be e-discovery, in the sense of key words in documents being searched by machine, rather than by hand. One might have thought that the use of e-discovery would lead to the costs involved being less, than if individual lawyers had to hand review every document. However, the figure of €701,100 would suggest that this is not the case.

92. Indeed, if €701,100 could be the discovery costs charged by a law firm for a straight-forward discovery such as this one, this case also highlights (along with the professional fees for the lawyer) in the starkest of terms why the High Court has been described as a place for '*millionaires*'.

93. This case also highlights in very stark terms how it is, in the opinion of the Kelly Review, that discovery is a *'major contributor'* to '*cost in the conduct of civil litigation'* and how '*the current discovery regime is failing all parties involved in litigation'.*

94. It is to be noted that in the years since the *Kelly Review* was published, there has not been the abolition of discovery, which was called for, or its reform, which means that it remains

possible that legal costs of €701,100 will continue to be incurred for discovery in a straight-forward High Court case.

Who benefits from these types of legal costs and discovery costs?

95. This begs the question of who benefits from this system of justice? It would not seem to be litigants, since as noted by the *Kelly Review* at p. 188:

> *'countries with a civil law system appear to have faced no difficulties in the administration of justice in the absence of discovery'*

96. While litigants do not therefore appear to be the ones benefiting from these '*millionaire*' discovery procedures, it is clear that they are the ones who are suffering, since it is the litigants, not the lawyers, who bear these legal costs.

97. If nothing else, this case does have the advantage of achieving transparency regarding this important issue of the actual costs of High Court litigation, which is not dealt with in open court on a daily basis, but is dealt with by the Office of the Legal Costs Adjudicator. In this way it may highlight how the system might be made better for the litigant, whose interests '*must always be kept front and central in the administration of justice'* (*per* Irvine P.)

Conclusion regarding the amount of costs likely to be incurred

98. For all the foregoing reasons, this Court prefers the estimate of court-time (of 7½ days), which was provided by the legal costs accountants on behalf of Connective, rather than the one provided on behalf of Energia.

99. Since the parties agreed that the very significant difference in their respective estimated legal costs was directly related to the very significant difference in their respective estimates of the trial length, this Court will therefore adopt the costs estimate provided on behalf of Connective. It provided a range of figures, i.e. between €443,930 (inc. VAT) and €486,980 (inc. VAT), rather than one figure.

100. As regards which of these two figures to pick, it is relevant to note that Connective's estimate is based on a half day of High Court costs for reading a judgment and making a costs application. For the reasons set out above, a half day of High Court costs is not justifiable in this Court's view. Accordingly, this Court adopts as a starting point, the lower of the two estimates provided by Connective, i.e. €443,930.

101. O'Neills' estimate does however fail to include costs (estimated by Behans at €10,000) for the period from the letter dated 20th March 2023 (when the request for security for costs was made on behalf of Energia to Connective), up to 5th July 2023, when the motion for security for costs was filed. At the hearing, it was not disputed by Connective that the costs incurred by Energia during this period *should be included* in the security for costs, *albeit* that they were not included in O'Neills' estimate. Accordingly, this Court will fix a figure of €456,230 (inc VAT) for the security for costs in this case, being €443,930 plus €12,300 (i.e. €10,000 plus VAT). The figure excluding VAT is €370,919.

B. <u>The form of security- cash/bond or charge over a house?</u>

102. The second issue in this case is the form of security to be provided by Connective. It claims that whatever the final figure decided by this Court, which has now been fixed at €456,230 (i.e. €370,919 ex. VAT), this should not be provided in the usual way i.e. in the form of cash or a bond. Instead, Connective claims that it should be provided as a first charge over a residential property in Donegal, which Savills has valued at €350,000.

103. The Property is owned by the parent company of Connective, Glenmore Farming Group Limited –which is wholly owned by Mr. McElhinney and he is its sole director. Mr Peter Guzhar, Connective's solicitor, has averred that:

> *"[W]hile [Energia] might in ordinary course have an entitlement to security in a more liquid form than a charge over a property, that is not possible in the present*

circumstances. [The solicitors for Energia] suggests that finance be raised on the property but this would require to be serviced for the duration of the proceedings, which may well be appealed. I do not believe that this additional burden which is sought to be placed on Connective and Mr McElhinney is either necessary or fair."

104. Connective also makes clear that, if it were to be successful in persuading this Court to fix the security at its proposed estimates of between €360,919 and €395,919 (both ex VAT), Mr. McElhinney would make up the shortfall of up to €45,000 between that figure for the legal costs and the value of the Property in Donegal (€350,000). Mr. Guzhar also avers that:

"if an Order for security for Energia's costs is made in the quantum set out in its report of €761,940 then Connective's claim will effectively be stifled and the proceedings brought to a halt."

105. Since, Connective has been successful in persuading this Court to fix legal costs at €370,919 (ex. VAT), it seems to follow from the foregoing that the argument, that it might be stifled from pursuing the litigation, falls away. This is because, on Connective's own evidence, it is clear that the risk of the proceedings being stifled only arises if the costs were fixed at due €937,186 (inc. VAT).

106. The only issue remaining therefore is whether the security for costs, should be provided in the traditional manner, i.e. in the form of cash or a bond, or as a first charge over a residential property. The following are the factors to be taken into account in reaching this decision.

107. Firstly, it is common case that the default form of security is cash or a bond, since as noted by Clarke CJ in *Quinn Insurance Limited (Under Administration) v Pricewaterhousecoopers* [2015] IESC 15 para. [7.21]:

"[T]*he default position should continue to be that full security in monetary form should be provided but that the Court may depart from that position if it considers it necessary and appropriate so to do to minimise the risk of injustice across the board*."

It is relevant to note that Connective could provide no example to this Court of an instance where a court ever ordered security for costs in a form other than cash or a bond. In particular, no instance was provided of a charge over real property ever having been ordered as a form of security for costs.

108. Secondly, if there was to be a charge over the Property, it seems the injustice to which Clarke C.J. refers in *Quinn*, and which would be inflicted on a party, would be inflicted on Energia, and not on Connective. This is because, instead of cash which is fixed in value and is in a liquid form, or a bond, which is also fixed in value and as good as liquid, Energia would be getting a security which is both *illiquid* and *variable in value*.

109. Just how illiquid the Property in Donegal is, was underlined by Connective's written legal submissions which suggest that it would not be unreasonable for it to take a year for the Property to be sold.

110. As regards the variability of the valuation of security being provided, it is relevant to note that the valuation of €350,000 of the Property is simply an estimate, since Savills' valuation states:

> *"Whilst the residential property markets continue to perform well, our valuation has been prepared against the backdrop of a* ***very challenging economic outlook. There are concerns*** *as to how the economy will perform going forward given the current inflationary pressure, the cost of living crisis and rising interest rates that are impacting on the cost of debt"*

It also states:

> *"The Market Value of the* ***assumed*** *freehold interest/long leasehold interest, on an* ***'as is' basis*** *on the 29 August, 2023 is €350,000".* (Emphasis added)

111. The fact that the value of the security is so variable also means that there would be an onus on Energia, during the course of the litigation, to monitor the value of the Property on an

ongoing basis. This obligation does not arise in the case of cash or bond, because the value of either of those types of security is fixed.

112. Thirdly, the Property is residential and therefore if there had to be an enforcement of the security one would be dealing with a 'forced' sale of a residential property in a rural area. This is something which is not without risks, for Energia, as the holder of the security, both in relation to the sale proceeding as planned and as regards the market value being obtained.

113. Fourthly, any enforcement of the security of the Property would involve the appointment of auctioneers and solicitors, at significant costs, which costs do not arise when cash or a bond is the security.

114. Fifthly, the charge over the Property, which is being offered by Connective, does not *per se* grant a right of sale to Energia. Accordingly, Energia would need to have an agreement regarding the sale, regarding who had carriage of sale, the format of the sale process, the minimum sale price *etc*. None of these complications arise in the case of cash or a bond.

115. Sixthly, as one is dealing with a residential property there is a risk that it could be subject to a tenancy and therefore there could issues regarding vacant possession if the security has to be realised.

116. Seventhly, if the Property is used as a family home, there may be additional issues regarding realising the security, if and when the time comes.

117. Eighthly, since the proposed security constitutes real property, there will also be maintenance and insurance issues and the costs regarding same as well. Energia will also have to ensure that the Property is being maintained and insured, which is obviously not an issue in relation to cash or a bond.

118. Finally, as the Property is owned by a company, there is also a risk that the charge might be set aside for a period of two years after its creation, pursuant to s. 604 of the Companies Act, 2014, as an unfair preference.

119. Despite all of these disadvantages of the Property as security, compared to cash/bond, to support its application to have real property provided as security for costs, Connective relied on the statement of Clarke CJ in *Quinn,* at para. [7.20] that:

> "*The simple black and white situation where security in cash for the full sum is either awarded or no security is put in place does not necessarily, and in all cases and in all circumstances, have to represent the only binary choice*".

However, it is important not to read that statement in isolation. This is because Clarke CJ was also careful to state at para. [7.21] that:

> "*That being said, it should also be recognised that failing to provide full security does expose a defendant to the almost certain consequence that a successful defence of the proceedings will nonetheless* ***leave that defendant with irrecoverable costs and thus a significant detriment****.* " (Emphasis added)

120. Furthermore O'Donnell J. stated at para. [13] of his concurring judgment in *Quinn* that:

> *"When a plaintiff has access to resources, and can provide security for costs, then there may be inconvenience and some cost in being deprived of the use of those funds for the duration of the case, but* ***the potential injustice to such a plaintiff is not of the same level as that which a defendant runs when faced by a corporate plaintiff that will be unable to pay costs****"* (Emphasis added)

When all of the foregoing is considered, it is clear to this Court that, there is no *'injustice'* to Connective (or, in reality to Mr. McElhinney, since he owns the Property and owns the parent of Connective) of requiring Connective/him to:

- come up with €370,919 (ex VAT) out of his/their own cash resources, and not just €45,000, as he suggests (in this regard, it is to be noted that there was no evidence provided to the Court that he did not have access to more than €45,000), or

- to use the security of the Property to borrow such funds or obtain a bond – in this regard, it is to be noted that solicitors for Connective in their letter of 18th of April, 2023 claimed that the Property had a value of '*in the range of €400,000 to €500,000'* –which if it turned out to be the case, would mean that Mr. McElhinney should be able to comfortably use it as security for the cash/bond needed, or
- to sell the unencumbered Property -if the Property is indeed easily marketable security for Energia, as claimed by Connective, then Connective should have no problem selling the Property.

121. In summary, rather than there being any injustice to Connective/Mr. McElhinney in requiring it/him to provide security in cash/bond, there is only the inconvenience to it/him of coming up with the funds in cash/bond i.e. the borrowing costs (if he borrows the funds) or the loss of interest on cash (if he uses his own cash) or the loss of opportunities (to which that cash might have otherwise been put).

122. However, it has always been recognised that there will be a detriment to a plaintiff in such a situation, whether that be the payment of interest on a loan, the loss of interest on cash or the lost opportunity costs. Yet this has never been a reason for a court not to order security for costs. This is for the very good reason that the detriment to the defendant is greater, since what greater detriment is there in litigation, than a party successfully defending a case, which is found to be without merit, to only discover that she has got 'justice' in theory, but not in reality? This is because it has cost her hundreds of thousands/millions of euros in legal costs to get that 'justice' in the High Court, but this expenditure is irrecoverable from an impecunious plaintiff. The alleged 'injustice', but in reality the inconvenience, to a plaintiff, who simply has had to put up cash to proceed with a case, which cash is returned if she wins her case, pales into insignificance when compared with the real injustice of a winning defendant not recovering her legal costs. As noted by Clarke CJ at para. [7.9] of *Quinn*:

"*If the plaintiff puts up security and wins, then the security will be returned. The plaintiff will have been at the loss of whatever security has been put up for a period of time. That detriment cannot be ignored but it is nonetheless different in character to the loss which would be suffered by a defendant if security is not ordered. In the latter case,* ***should the defendant succeed, the defendant will be at the permanent loss of whatever expense was incurred in defending the proceedings, as those expenses are likely to prove irrecoverable***. *It is easy to see how, ordinarily, the balance of justice in such circumstances might be said to favour the grant of security*." (Emphasis added)

123. Accordingly, in this case, the inconvenience to Connective of it having to 'put its money (i.e. actual cash) where its mouth is', is not a reason to permit Connective to grant a fixed charge over the property, instead of providing cash or a bond.

CONCLUSION

124. This Court rejects Energia's claim that this straightforward High Court case should take up 4½ weeks of court time. It is this Court's view that it should take a *maximum* of 7½ days.

125. It also rejects Energia's claim that a Legal Costs Adjudicator would allocate two days of High Court costs to Energia's lawyers for their costs *after* the judgment has been delivered, i.e. for reading the judgment and finalising the costs consequences resulting from the judgment.

126. For these and the other reasons set out above, this Court prefers the lower of the two estimates of legal costs, i.e. the one provided on behalf of Connective (€443,930/€486,980), rather than the one provided on behalf of Energia (€937,197).

127. While opting for the lower of Connective's two estimates (€443,930), this lower figure was increased by €12,300 to take account of the fact that Connective's estimate failed to include costs for the period, from the date when the request for security for costs was made by Energia to Connective, up to when the motion for security for costs was filed.

128. However, whether this Court had opted for €486,980 or €443,930, one is still dealing with costs of close to half a million euros for a trial of less than two weeks (plus preparatory work). Indeed, Energia's expert in legal costs, believes the Legal Costs Adjudicator will determine that the legal costs in this case, for the defendant alone, will be €937,186.

129. This evidence suggests to this Court that the rates of pay for lawyers in the High Court cases are multiples of the rate of pay of the Taoiseach, yet, according to the experts, these are the rates of pay which the Legal Costs Adjudicator is obliged by law to apply (under, *inter alia*, Part 10, Chapter 4 of the Legal Services Regulation Act, 2015). As a result, they are the rates of pay in the High Court, which a losing litigant is obliged by law to pay to the winning litigant's lawyers. In these circumstances, this Court has no discretion to order a lesser sum as security for costs, as the role of a judge is to apply the laws as passed by the Oireachtas. Accordingly, all this Court can do, as other judges have done in past, is to highlight the fact that the law on costs in the High Court, as it currently stands, leads to this level of '*millionaire'* costs.

130. Accordingly, this Court will order that Connective provide Energia with security for costs in the sum of €370,919 excluding VAT (which with VAT, would come to €456,230). The final sum will exclude VAT, because it appears that Energia is only be seeking the VAT exclusive figure as security. This is because, Behans, in its first Report of 24th May, 2023 at p 12 stated:

> "*We are instructed that [Engeria] is registered for VAT, thus will be in a position to recover VAT from other than [Connective]. Accordingly all VAT is excluded from our assessment."*

131. As regards the form of that security, this Court rejects Connective's claim that it should be able to provide this security by providing a charge over a specific property (a house in Donegal), rather than in cash or a bond. This is because of, *inter alia*, the illiquidity and

variability of the value of property as an asset, which would mean that such a form of security would not provide the same level of security to Energia, as cash or a bond.

132. Finally, this Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any draft court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention a week from the delivery of this judgment at 10.45 am (with liberty to the parties to notify the Registrar, in the expectation that such a listing will be unnecessary).

APPENDIX

Agreed categories of discovery

Category 1

1.1 The EPC Agreement entered into with Jones Celtic Bioenergy Limited ("Jones").

1.2 All documents created between 8 June 2017 and 31 May 2018 establishing or evidencing the allegation that the EPC Agreement entered into by the Defendant and Jones was the EPC Agreement referred to in the SPA.

1.4 All documents effecting or containing the termination by the Defendant of Jones's employment under the EPC Agreement.

2 Category 2

2.1 All documents evidencing or establishing the alleged conditionality of the payment to the Defendant of the consideration in the SPA.

2.2 All documents evidencing or establishing negotiations with the Plaintiff of clauses 2.3, 3.1.2, 4.7, 4.8 and 6 of the SPA and of the consideration for the transfer of the shares as provided for in the SPA.

3 Category 3

3.1 All documents evidencing or establishing the calculation of the Take *Over* Target Date ("TOTO") (as defined in the SPA) until 22 February 2023.

4 Category 4

4.1 The agreement for the sale of the Company of 22 February 2023.

Discovery Costs

ALG and ALG Solutions estimated discovery costs for associated with a linear review of 100,000 documents relating to the Energia Huntstown Discovery matter.

As the final data volume in scope is not yet known with certainty only the minimum data volume, similarly the total documents requiring review is not yet known, as such, the estimate is based upon the information available as of this date, some standard industry assumptions[1] on any additional data volumes & the subsequent filtering of said data within our review platform Relativity.

- **First level review assumptions:**
  - Scope: 100k documents, daily review throughput per reviewer 300 documents
  - FPR Effort: 333 days = €240,000 to €250,000
  - Redactions: 500 documents, daily throughput 200 per reviewer: c.2.5 days effort: c.€2,000
  - 5% QC of c.4,250 documents; effort 14 days at 300 daily throughout p/r: c.**€11,000**
- **Legal team review and QC assumptions:**
  - Scope: 15% of review data promoted for second pass; daily review throughput per reviewer 200 documents
  - SPR Effort: 75 days = c.€192,000 to €197,000
  - Case team management & conflict checks effort: 10 days; c.**€25,000 to €26,000**
- **Solutions support assumptions:**
  - 90 hours across the team: c.**€20,000 to €23,000**
- **Technology assumptions:**
  - 450GB processed (1,575,000 documents if estimating 3.5k documents per GB)
  - Cost of acquiring data, processing it, building keyword index, analytics index, continuous active learning index, logging evidence and maintaining an evidence tracker: €45,000
  - Hosting 450GB in repository workspace for 6 months: c.**€28,250**
  - 10 user licenses for 6 months: €12,000

Total estimated discovery costs: **€550,250 to €570,000**

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[1] That this discovery will:

- require the processing of a minimum approximately 450GB of data;
- require the hosting of a minimum of 450GB of data for a minimum of 6 month;
- require a minimum of ten users to have access to the data for the 6-month period;
- require the review of a minimum of 100,000 documents at first level review and that first level reviewers will review on-average 300 documents per day (requiring approximately 333 days' work);
- require approximately 5% of all documents tagged not relevant at first level will be the subject of quality control review in accordance with industry best practice and that on average a quality control reviewer will review 300 documents per day (requiring approximately 14 day's work);
- require approximately 15% of all documents reviewed to be reviewed at second level by a lawyer to determine relevance, answer queries from first level team, and assert privilege over documents, and that on average a second pass reviewer will review approximately 200 documents per hour;
- require approximately 165 hours of project management and technology consulting support from start to finish.

Costs Report of Behan & Associates

[1]	**Solicitor's Professional fees**		
	March, 2023, to date	€10,000.00	
	Going forward to conclusion	€375,000.00	
	VAT @ 23%	--.--	€385,000.00
[2]	**Copying & miscellaneous**	€3,500.00	
	VAT @ 23%	--.--	€3,500.00
[3]	**Senior Counsel;**		
	Drafting work	€3,500.00	
	Brief fee (Security for Costs)	€7,500.00	
	Written submissions (Security for Costs)	€3,000.00	
	Discovery requests and advice	€1,500.00	
	Written Submissions (Substantive)	€4,500.00	
	Consultations (2)	€1,000.00	
	Interrogatories	€1,500.00	
	Advice on proofs	€1,500.00	
	Brief fee	€80,000.00	
	Refresher fees (€4,500.00 x 15)	€67,500.00	
	Taking Judgment/Costs Application(s)	€2,500.00	
		€174,000.00	
	VAT @ 23%	--.--	€174,000.00
[4]	**Junior Counsel;**		
	Drafting work	€4,500.00	
	Brief fee (Security for Costs)	€5,000.00	
	Written submissions (Security for Costs)	€2,000.00	
	Discovery request and advice	€3,000.00	
	Consultations (2)	€1,000.00	
	Interrogatories	€1,500.00	
	Written submissions	€3,000.00	
	Brief fee	€55,000.00	
	Refresher fees (€3,000.00 x 15)	€45,000.00	
	Directions/Judgment & Costs Application(s)	€1,000.00	
		€121,000.00	

	VAT @ 23%	--.--	€121,000.00
[5]	**Witnesses;**		
	Legal Costs Accountants (Security for costs)	€2,000.00	€2,000.00
[6]	**Miscellaneous outlay;**		
	Court fees/room hire	€8,000.00	
	Stenography fees	€12,000.00	€20,000.00
	Sub-total		*€705,500.00*
[7]	**Costs Adjudication (Court fees)**		€56,440.00
	Total (excluding VAT):		**€761,940.00**

Dated this 24th day of May, 2023

Behan & Associates,
Legal Costs Accountants

Costs Report of Cyril O'Neill

Based on the above we would estimate the defendant's probable party and party costs of defending the plaintiff's claim from the 20th March 2023 to the conclusion of the trial, judgment and costs application in the amount of €336,253.00 which is made up as follows:-

1.	Solicitors professional fees		167,500.00
2.	Copying and miscellaneous		2,000.00
3.	Senior Counsel		
	Drafting work (pleadings)	1,500.00	
	Brief fee (security for costs)	7,500.00	
	Written submissions (security for costs)	3,000.00	
	Discovery requests and advices	-.-	
	Written submissions (substantive)	4,000.00	
	Consultations (2)	1,000.00	
	Interrogatories	-.-	
	Advice on proofs	750.00	
	Brief fee	60,000.00/75,000.00	
	Refresher fees (€4,000.00 X 6)	24,000.00	
	Taking judgment/costs applications	2,500.00	104,250.00/119,250.00
4.	Junior Counsel		
	Drafting work (motions)	2,500.00	
	Brief fee (security for costs)	5,000.00	
	Written submissions (security for costs)	3,000.00	
	Discovery requests and advices	3,000.00	
	Consultations (2)	1,000.00	
	Interrogatories	-.-	
	Written submissions (substantive)	2,667.00	
	Brief fee	40,000.00/60,000.00	
	Refresher fees (€2,667.00 X 6)	16,002.00	
	Judgment/costs applications (one counsel only)	-.-	73,169.00/93,169.00

5.	Witnesses	
	Legal Costs Accountant (security for costs)	2,000.00
6.	Outlay	
	Court fees/room hire	1,500.00
7.	Stenography fees	10,500.00
8.	Costs adjudication (court fees)	-.-
Total:		€ 360,919.00/395,919.00

Dated this 11th day of September 2023

Cyril O'Neill

CYRIL O'NEILL
LEGAL COSTS ACCOUNTANTS
MARSHALSEA COURT
20-23 MERCHANTS QUAY
DUBLIN 8