Neutral Citation [2008] IEHC 290

**THE HIGH COURT**

**Record Number 2007 8432 P**
**2007 180 COM**

**BETWEEN**

**PATRICK HICKEY, DRISHLAWN LIMITED, HICKEY'S PHARMACY LTD., WHEATON PHARMACY LTD., GLEESON'S PHARMACY LTD., PHILIP DILLON LTD., ESTHERFIELD LTD., DGM PHARMACIES LTD., T/A HICKEYS PHARMACY**

**PLAINTIFFS**

**AND**

**THE HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**Judgment of Ms. Justice Finlay Geoghegan delivered on the 11th day of September, 2008**

1. The first named plaintiff, Mr. Hickey, is a pharmacist and the majority shareholder of the second named plaintiff. The second named plaintiff is a holding company which owns twenty-four shops which trade as "Hickeys Pharmacies". The third to eighth named plaintiffs are companies within the Hickeys Pharmacy Group which have entered into individual community pharmacy contractor agreements for the provision of community pharmacy services, under the Health Act, 1970 ("CPC agreement"). Those agreements are each in standard form and were agreed in 1996 following negotiations between the Minister for Health and Children ("the Minister") and the Irish Pharmaceutical Union ("IPU").

2. The defendant is the body established by the Health Act, 2004 to manage the health services and perform the functions assigned to it by that Act. The CPC agreements entered into by the third to eighth named plaintiffs prior to 2004, were with the relevant health board. Pursuant to s. 63 of the Act of 2004, those agreements now have effect as if the defendant is substituted for the health board and are enforceable by and against the defendant.

3. In this judgment, save where I expressly otherwise state, insofar as I refer to the plaintiffs, I am referring to the third to eighth named plaintiffs who are now parties to a CPC agreement with the defendant.

4. The plaintiffs claim that the defendant is in breach of its contracts with them in reducing the amount paid for the reimbursement of cost in the payment in respect of the cost of drugs dispensed under the GMS scheme and other community drugs schemes. Such reductions were decided upon by the defendant in September 2006 and September 2007. The defendant denies that it is in breach of contract and asserts that if the Court was to uphold certain of the contractual terms contended for by the plaintiffs that they are void, by reason of section 4 (1) of the Competition Act 2002.

5. The plaintiffs' claims, and the defendant's defence thereto, requires the Court first, to determine what were the relevant contractual provisions between the plaintiffs and the defendant in September 2006 and September 2007 in relation to the payments which have been reduced by the defendant. Whilst there are almost no facts relevant to those issues in dispute between the parties, it is necessary, for a full consideration of the contractual arrangements, to set out the relevant factual background in relation to the supply and distribution of medicines dispensed under the GMS and other community drugs schemes leading to the 1996 CPC agreements and the contested decisions taken by the defendant in 2006 and 2007.

6. The persons participating in the supply and distribution of drugs in Ireland and the arrangements made in relation thereto for supply, under the General Medical Services (GMS) scheme, include the following:

> The manufacturers and importers of proprietary and non-proprietary drugs and their representative organisations which, at different times, were the Pharmaceutical and Allied Industries Association, the Federation of Irish Chemical Industries ("FICI") and the Irish Pharmaceutical Healthcare Association ("IPHA").
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> The wholesalers and their representative body, the Pharmaceuticals Distributors Federation ("PDF").
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> The pharmacists, referred to in the agreements as "the contractor", and their representatives, the Irish Pharmaceutical Union ("IPU"), and its committee, the Pharmaceutical Contractors' Committee ("PCC").
>
> The Minister and his/her Department ("the Department").
>
> The health boards.
>
> The GMS (Payments) Board.
>
> The defendant, as successor to the health boards and GMS (Payments) Board.

7. The Health Act, 1970 provided for the reorganisation of the health services and the introduction of the General Medical Services ("GMS") scheme. It also provided for the establishment of health boards. Section 59 (1) obliged the health boards to make arrangements for the supply, without charge, of drugs, medicines, and medical and surgical appliances, to persons with full eligibility. It also permitted health boards to make provision for the supply of such drugs, medicines, etc., to other persons. From the outset, it was intended that drugs be dispensed by privately owned pharmacies free of charge to eligible persons and that such pharmacies be remunerated for such supply by the health boards.

8. In 1971, the Minister (through his Department) and the IPU, entered into a memorandum of agreement in relation to the proposed arrangements for the supply of drugs by pharmacies, for the purposes of the GMS scheme ("the 1971 memorandum"). The 1971 memorandum envisaged that a standard form of agreement, to be entered into between a pharmacist and the relevant health board, would be negotiated between the Department and the Joint Negotiation Committee representing community pharmacists.

9. Paragraph 13 of the 1971 memorandum stated: "It is proposed that in general the provisions of the agreement shall be based on the terms of this memorandum".

10. The 1971 memorandum, under a heading of "Basis of Remuneration" provided at paras. 20 and 22, the following:

> "20. The pharmacist will be remunerated on the basis of the recoupment to him of the ingredient cost of prescription items dispensed for eligible patients under the scheme, together with a fee for each item (subject to paragraph 25). The

> fee will contain specific elements to cover the cost of containers, capital investment and obsolescence . . .
>
> The price of a proprietary item to the pharmacist will be taken as the basic ex-wholesale price ruling during the month the prescription was dispensed. The ingredient cost of non-proprietary items will be arrived at on the basis of lists agreed between the Department of Health and the Joint Negotiating Committee . . ."

11. The 1971 memorandum then sets out at paras. 23 to 33 under a heading of "Details of Remuneration", certain detailed fees to be applied, and also made provision for advance payments.

12. A standard form contract was subsequently agreed in 1971. This was the agreement entered into between each pharmacist ("the contractor") and their relevant health board, between that date and the introduction of the new CPC agreement in 1996. The only provisions relevant to payments to be made to the pharmacist are those at paras. 10 and 11 which provide:

> "10. The board shall in consideration of the service provided by the contractor in accordance with these terms and conditions and on foot of claims made in the form and at the times directed by the Minister for Health make payments or arrange for payments to be made to the contractor in accordance with such rates as may be approved of or directed by the Minister from time to time after consultation with the Pharmaceutical Contractors' Committee.
>
> 11. The contractor shall not demand or accept any payment or consideration whatsoever, other than payments made under paragraph 10 in reward for the supply of medicines and appliances under section 59 (1) of the Health Act, 1970".

13. From 1971, all payments to the pharmacists under the GMS scheme were paid through a central payment service known as the General Medical Services (Payments) Board. Those functions have now been taken over by the defendant. The GMS (Payments) Board was responsible for the verification of the accuracy of claims made by pharmacists, the calculation of payments to be made to the pharmacists for the services provided, and the making of such payments. I am satisfied, on the evidence of Mr. Burke, a former Chief Officer of the GMS (Payments) Board, and the evidence given by Mr. Hickey and other pharmacists on behalf of the plaintiff, that, essentially, the same system (albeit modernised by the use of electronic equipment and communication), was operated by the GMS (Payments) Board in relation to the making of payments. In respect of each item dispensed by a pharmacist under the GMS scheme, a claim was made identifying the relevant code of the product and the quantity dispensed. The payment due to the pharmacist was then calculated and, for example, in respect of the GMS scheme, it was the addition of two separately identified elements of the payment, one being termed the ingredient cost and the other the fee.

14. Even prior to 1971, it appears that the Minister, through his Department, had entered into agreements with representatives of the manufacturers and importers of medicines. Copies of many of the successive agreements entered into were admitted in evidence by consent. The first such agreement produced is of July 1969, between the Pharmaceutical and Allied Industries Association and the Department of Health. A curious feature of this, and many of the successive agreements, is that it sets out what will be done by persons not represented by the parties to the agreement, in addition to those represented. The 1969 agreement provides that "manufacturers and principal importers shall supply wholesalers at normal wholesale prices", and also that, "wholesalers shall supply retail pharmacists at normal trade prices". The wholesalers were not represented by either party to the agreement.

15. It is not in dispute between the parties that the normal trade price or, as sometimes referred to, the "ex-wholesale price", at the time of the 1969 agreement, and at the time of the 1971 memorandum, was the ex-factory price plus 17.66%. In certain documents it is explained in a different way, namely, that the normal wholesale margin in Ireland was 15% of the trade price or the Irish trade price. Both result in the same margin for wholesalers.

16. The 1969 agreement with the Pharmaceutical and Allied Industries Association appears to have remained in place until 1983 when it was replaced by an agreement between the Federation of Irish Chemical Industries (FICI) and the Department of Health. The 1983 agreement commenced a pattern which was repeated in successive agreements between the Department and the manufacturers. The agreements sought to determine the Irish trade price, *i.e.* the price to the pharmacist, by reference to United Kingdom prices. In relation to General Medical Services, the 1983 agreement provided:

> "General Medical Services
>
> In regard to drugs and medicines for the General Medical Services it is agreed that; manufacturers and principal importers shall supply wholesalers at normal wholesale discounts; wholesalers shall supply retail pharmacists at the trade price; manufacturers and importers shall themselves be free, if they so wish, to supply to retail pharmacists at the trade price.
>
> The General Medical Services Payments Board on behalf of the health boards, will re-imburse retail pharmacists for the drugs properly dispensed by them under the scheme."

17. It is again common case between the parties that the "normal wholesale discounts" referred to is 15% of the trade price, and further, that the trade price was then the ex-factory price plus 17.66%.

18. Similar agreements were subsequently entered into between the Department and FICI in 1986, 1987 and 1990, with substantially similar provisions. The agreements sought to fix the Irish trade price by reference to the United Kingdom price and contained provisions similar to the above in relation to how the different persons in the chain of supply for the GMS Scheme were to behave, including the wholesalers who were not represented by the parties to the agreements. In 1990, the phrase "appropriate wholesale discount" rather than "normal wholesale discount" was used in the statement in relation to General Medical Services. It was not submitted that this change was relevant; the wholesale discount remained at 15% of the trade price.

19. The agreement between the Department and FICI in 1993 provided for reductions in the ex-factory prices to wholesalers and retained a similar statement in relation to General Medical Services, save that in relation to reimbursement by the General Medical Services (Payments) Board, which provided:

> "The General Medical Services (Payments) Board, on behalf of the health boards, will reimburse retail pharmacists *at cost* (emphasis added) for the medicines properly dispensed by them under the Scheme."

20. In evidence, this was stated to be an indication of the intention of the Department to confine reimbursement to the cost to the pharmacist of the drugs supplied to them by the wholesalers. The other change in the 1993 agreement was that it sought to fix the price of new medicines at the level of the price to the wholesaler, rather than, as in previous agreements, the price to the pharmacist.

21. A similar agreement was entered into in 1997 between the Department and the Irish Pharmaceutical Healthcare Association (IPHA), which was the successor to FICI, with the same provisions in relation to the General Medical Services scheme.

22. In 2006, the defendant and others entered into agreements with IPHA and APMA, of a quite different nature. The 2006 agreements did not include any statement in relation to the supply by manufacturers to wholesalers, or wholesalers to pharmacists in relation to the GMS scheme, nor made provision in relation to the reimbursement to pharmacists for drugs dispensed under such scheme. Those agreements provided for reduction in the ex-factory prices. They were explained in evidence as being the first step in the reduction of the cost to the State of the provision of drugs under the GMS scheme and in hospitalsin implementation of Cabinet committee decisions taken in April 2005.

23. It is common case between the parties that from 1971 to 2006 the price at which wholesalers invoiced retail pharmacists for drugs, and which was referred to as the Irish trade price, the trade price, or the ex-wholesale price or basic ex-wholesale price, was the ex-factory price plus 17.66%. It is also common case that the Irish wholesale margin during this period was considered to be 15% of the trade price.

24. However, notwithstanding that the price at which individual items were invoiced by wholesalers to retail pharmacists continued to be the ex-factory price plus a constant mark-up of 17.66%, there were very considerable changes which occurred in the wholesale distribution sector and the arrangements entered into between wholesalers and retailers. First, there appears to have been significant competition and consolidation through the 1980s and early 1990s of wholesalers in Ireland, resulting in only three significant wholesalers continuing to supply the retail pharmacists.

25. Secondly, and more significantly to the issues which the Court has to consider in this claim, wholesalers commenced granting significant discounts and rebates to pharmacists. I find that in 1971, there does not appear to have been any significant practice of wholesalers granting discounts to pharmacists. The practice appears to have commenced possibly in the late 1970s and had become relatively widespread during the 1980s. It was well established and quite significant by the early 1990s. The discounts given by wholesalers to pharmacists are a matter of individual negotiation between wholesalers and pharmacists and normally apply on settlement of accounts by the pharmacists.

26. From the evidence of Mr. Hickey, and the other pharmacists who gave evidence on behalf of the plaintiffs, which I accept, it appears that the general practice is for each pharmacy to have a primary wholesaler from whom it obtains most supplies, and to have a second line wholesaler from whom the pharmacy may need to obtain supplies from time to time. The amount of the discount allowed by a wholesaler relates to matters such as the quantities purchased; the credit terms and compliance with the credit terms; electronic ordering and arrangements for bulk ordering; and location and delivery arrangements. Mr. Hickey gave evidence that the discounts generally earned by the plaintiffs from its primary wholesaler, was in the order of 11% - 12%. However, he emphasized that this would vary from month to month and from pharmacy to pharmacy, and that, in particular, where an individual pharmacy did not meet the time for payment under its credit terms it would lose part of its discount. His evidence was that a lesser discount was available to the plaintiffs from their second line wholesale supplier provided the individual plaintiff achieved a specified threshold of purchases.

27. There was some dispute between the parties as to the timing and extent of the knowledge within the Department of the practice of wholesalers giving discounts to the pharmacies. The Minister is not a party to these proceedings. The defendant's witnesses did not dispute that there was knowledge of the practice of discounting within the Department, certainly by the late 1980s, but submits that there is no evidence that the Department was aware of the extent of the discounting at that time. From the oral evidence given on this issue, and the documents produced in evidence, I am satisfied on the evidence before me, as a matter of probability, relevant officials within the Department were aware by the late 1980s, that there existed a practice of wholesalers giving significant discounts to pharmacies which related *inter alia* to products dispensed under the GMS and other community drugs schemes. Correspondence between the GMS (Payments) Board and the Department in October 1988 has being admitted into evidence in which a Mr. Byrne of the former draws the attention of the Department to what he describes as "the established accounting practice" of offering settlement discounts, typically of the order of 2% to 3%, in return for prompt payment. He also draws attention to discounts substantially in excess of this, and in one instance at 15%, on invoices supplied to them. This was explained as being a special case to an ex-employee.

28. I also find, as a matter of probability, that the relevant officials in the Department did not have, what Mr. Hathway referred to in evidence as, "verifiable evidence" of the level of discount being granted by wholesalers to pharmacists. However, it appears by 1990 some officials were in a position to make an educated guess. A Departmental memorandum produced in evidence which appears to date from 1990, and related to proposals to reduce the margin for wholesalers from 15% to 12.5%, under a heading of "Discounting", stated:

> "It is strongly submitted that the wholesalers co-operation should be obtained to assist the termination of the practise of discounting in return for the Department not looking for a more significant reduction in their margins.
>
> It is well known that wholesalers give major discounts to pharmacists. However, these discounts are not taken into account by the G.M.S Payment Board when it is re-imbursing pharmacists. As a result pharmacists not only obtain a fee from the G.M.S. Scheme for dispensing, they also keep the discounts as profit. Even in the United Kingdom, where this discounting is monitored and 'clawed-back' by the national health service, the discounts [are] around 10% and there is no reason to believe that they are any less here. However, there is no comprehensive evidence on the extent and percentage of discounting here. If one assumes that discounting is at the level of 10% across the board then it could be argued that pharmacists are effectively de-frauding the G.M.S. Payments Board of around £11m per annum.
>
> As a first step it could be mooted that a 5% discount will be assumed and that pharmacists' re-imbursements will be reduced by the amount. If the wholesalers and the I.P.U. object to this we will agree that an independent agency, perhaps the Director of Consumer Affairs, will conduct an enquiry based on sampling to establish the true level and extent of discounting. The United Kingdom has successfully monitored discounting on this basis for a number of years and has reduced the prices re-imbursed to pharmacists by 10% as a result."

29. There was no evidence of any effective steps taken pursuant to this memorandum in the early 1990s, either to reduce the wholesaler's margin or to reduce the rate at which pharmacists were reimbursed the cost of drugs dispensed by them.

30. Subsequent to 1971, there were a number of additional schemes added to the GMS scheme under which pharmacies were to provide drugs free to patients and be paid by, or on behalf of, the health board or defendant for so doing. It is not necessary to refer to all of these. The practice appears to have been that on the introduction of each scheme a memorandum of agreement was entered

into between the Department and the IPU. One such agreement was a 1990 agreement in relation to the Drugs Cost Subsidy Scheme (DCSS), now the Drugs Refund Scheme. That scheme provided for the supply, free of charge to certain persons, of drugs in excess of a specified amount per month, then IR£28.00. The agreement, at para. 5, set out detailed provisions in relation to the making of claims by pharmacists and then, in relation to payment, stated:

> "Payment will be calculated as follows:
>
> > reimbursement of ingredient cost, i.e. the basic ex-wholesaler price current in the month the items were dispensed, and, in accordance with the code or product name, as appropriate, and the quantity claimed;
> >
> > normal 50% mark-up on ingredient cost; and
> >
> > an inclusive fee of 123.6p (as at 1 Jan 90) to be increased in line with Public Service Pay Awards (inclusive of container and broken bulk allowances)."

31. The plaintiffs lay much emphasis on the fact that this agreement was entered into at a time when, as they contend and I have found, the officials of the Department were aware of a widespread practice of discounts being allowed by wholesalers to pharmacists. Notwithstanding this, the Department agreed to the reimbursement of ingredient cost at the basic ex-wholesaler price current in the month the items were dispensed. I am satisfied and find that in 1990, the basic ex-wholesaler price referred to in this agreement was the Irish trade price or the ex-factory price plus 17.66% determined in accordance with the FICI agreements. The evidence of Mr. Burke makes clear that such price for each individual item was established from prices determined by the FICI agreements by a committee in which the Department participated and maintained in a list with products identified by code. Further, that such list was used by the GMS (Payments) Board for the purposes of all payments and available to pharmacists.

32. In 1996, following extensive negotiations, the Department and the IPU entered into a further memorandum of agreement in June 1996. That agreement included terms and conditions for a new Community Pharmacy Contractor agreement which was appended to the memorandum between the Department of Health and the IPU. The 1996 memorandum did not contain any new provisions in relation to the basis of the remuneration of pharmacists. The 1996 CPC agreement was to replace the 1971 agreement. Clauses 12(1) and 13(1) of the 1996 agreement substantially repeated clauses 10 and 11 of the 1971 agreement, and provide:

> "12. (1) The board shall in consideration of the service provided by the pharmacy contractor in accordance with these terms and conditions and on foot of claims made in the form and at the times directed by the Minister, make payments or arrange for payments to be made to the pharmacy contractor for prescriptions dispensed at his/her contracted community pharmacy in accordance with such rates as may be approved or directed by the Minister from time to time after consultation with the Pharmaceutical Contractors' Committee.
>
> 13. (1) The pharmacy contractor shall not demand or accept any payment or consideration whatsoever other than payments under clause 12(1) in reward for the supply of medicines which under the Health Act, 1970, are to be supplied without charge.

33. The changes made in the wording of clauses 12(1) and 13(1) of the 1996 CPC agreement, when compared with clauses 10 and 11 of the 1971 agreement, are not relevant to any issue in these proceedings.

34. The plaintiffs rely on clauses 19 (3) and (5) of the 1996 agreement which provide:

> "(3) This agreement is to be construed as contingent upon the terms agreed or to be agreed between the Minister and the Pharmaceutical Contractors' Committee regarding arrangements for the provision of pharmaceutical services under the provisions of the Health Act, 1970. The pharmacy contractor and the board agree that any changes in the terms of such arrangements, which may be agreed between the Minister and the Pharmaceutical Contractors' Committee, shall be incorporated into this agreement and the terms of this agreement shall be construed accordingly, following the issue of a notification of such agreed changes by the Minister.
>
> (5) The terms and conditions of this (sic) agreement between the Pharmaceutical Contractors' Committee and the Minister may be subject to review after a period of five years. In default of agreement on any such review, the matters of disagreement shall be subject to mediation and recommendation by a third party appointed by the Minister following consultation with the Pharmaceutical Contractors' Committee. Any alterations to the agreement between the Minister and the Pharmaceutical Contractors' Committee arising from the review provided for in this clause, shall be incorporated into this agreement and the terms of this agreement shall be construed accordingly, following the issue of a notification of such agreed changes by the Minister. The terms and conditions of this agreement may also be extended for specified periods with the agreement of the Minister and the Pharmaceutical Contractors' Committee."

35. The plaintiffs entered into CPC agreements with the relevant health board, or laterally, the defendant, on dates between 1996 and 2004. In summary, I am satisfied on the evidence that the factual position was that the payments made to the plaintiffs in respect of drugs and other items dispensed under the GMS scheme from the date of contract were, in respect of each item dispensed, a single payment which was made up of two elements:

> the ingredient cost which was, by that time, the ex-factory price (determined in accordance with the relevant agreement between the Department of Health and FICI or IPHA), plus 17.66%, and,
>
> a fee, which was increased from time to time.

36. Similarly, in respect of several of the other schemes, including the DCSS, each plaintiff received, in respect of each item dispensed, a single payment made up of, in most incidences, three elements: the ingredient cost, a fee, and a mark-up of 50% of the ingredient cost.

37. I also find that since the commencement of the CPC agreements, the pharmacists were invoiced by the wholesalers for each individual item at the same price as allowed as the ingredient cost in the payment arrangements operated by or on behalf of the health boards. The plaintiffs were, and are, also granted significant discounts on their monthly accounts from their primary wholesaler, and whilst such discounts vary from pharmacy to pharmacy and from month to month, are now in the order of 11% to 12%. The plaintiffs are also entitled to some discount, albeit lesser and subject to threshold purchases, from their second line wholesale suppliers.

38. The evidence is that in April 2005, the Cabinet committee on health considered a range of issues intended to reduce the rate of increase in the cost of community drugs schemes and of hospitals supplies. In November 2005, the Chief Executive Officer of the defendant established a pharmaceutical steering group to implement the Cabinet committee decision. The defendant first concluded the 2006 agreements with IPHA and APMI, the two bodies then representing manufacturers and importers of pharmaceutical products. Those agreements were estimated to provide savings in the order of €250 million.

39. The next step intended by the defendant was a review of the wholesale arrangements for the supply of medicines to hospitals and through the community drugs scheme. Mr. Sean Hurley, who chaired the joint negotiation team consisting of members of the Department and the defendant which pursued this review, gave clear and helpful evidence of the steps taken. The joint negotiation team commenced negotiations with the Pharmaceuticals Distributors Federation ("PDF") who represented the wholesalers. The intention was to attempt to reduce the "wholesale mark-up". Initial meetings were held in July and August 2006, but ultimately, discussions ceased by reason of the position taken by the PDF that discussions on price would be contrary to section 4 (1) of the Competition Act, 2002.

40. In the course of the July and August meetings, a document was produced by the PDF to the joint negotiation team for the purpose of outlining the impact of the 2006 IPHA agreement on wholesalers. This document quantified the discounting arrangements then entered into by wholesalers with retailers at approximately €100 million per year. Mr. Hurley's evidence, which I accept, was that this was the first occasion on which the members of the joint negotiating team, including the representatives of the Department, were aware of the full extent of both the practice of discounting and the disparity between what the pharmacists were reimbursed by the State in respect of the cost of drugs and what they paid to wholesalers (net of discounts).

41. Mr. Hurley's evidence, which I accept, is that following the refusal by the PDF to enter into negotiations and the reservations expressed in relation to potential breaches of competition law, the joint negotiation team decided to begin a process based on a mechanism recommended by the Competition Authority known as "unilateral fee setting by the payer". He explained the process as being one under which the payer (the defendant) determines the fee it is willing to pay based on its own market knowledge. In order to gather the market knowledge a public consultation process is conducted, inviting submissions from the public on what it considers to be an acceptable fee.

42. On 21st December, 2006, the defendant published, pursuant to this strategy, a call for public submissions into the provision of pharmaceutical wholesale and distribution services to both community pharmacy contractors and other healthcare locations in the Republic of Ireland. The process was conducted between December and February 2007, and the evidence is that a total of 162 submissions (including 143 from community pharmacy contractors and a submission from the IPU) were received.

43. In January 2007, the defendant also procured an independent economic analysis from INDECON consultants. That report was completed in March 2007. The evidence is that INDECON were asked to provide an analysis of the Irish and European wholesale markets with a view to enabling the defendant to make an informed decision identifying a realistic cost for the provision of pharmaceutical wholesale distribution services, to both community pharmacies and the Irish health service.

44. The evidence of Mr. Hurley is that, following this process, the joint negotiation team estimated that wholesalers then paid an average of over half of their then margin to retailers in the form of rebates and discounts. Following a recommendation from the joint negotiation team, the defendant, he states, arrived at a new realistic wholesale mark-up of 7% to 8%. It is the decisions taken by the defendant in the course of, and following this process, which give rise to the reduction in the payments to the pharmacies to reimburse the cost of drugs, which are contested in these proceedings, and alleged to be in breach of the individual plaintiffs' CPC agreements with the defendant.

45. Mr. Hurley accepted in evidence, and I find as a matter of fact, that there was no consultation with the IPU in relation to the decisions to change the rate at which pharmacists, including the plaintiffs, were to be reimbursed the ingredient cost of drugs dispensed by them under the GMS and other community drugs schemes.

46. The defendant communicated directly with each pharmacist during the work of the joint negotiation team, by a letter dated 18th January, 2007, from Professor Sabra, the Head of the Corporate Pharmaceutical Unit of the defendant. In that letter Professor Sabra explained the steps taken by the joint negotiation team, the decision not to engage in negotiations with the IPU or PCC in relation to fees by reason of competition law issues, the public consultation process then underway, and the reduction in the price of medicines pursuant to the 2006 IPHA and AMPI agreements which were to take effect from 1st March, 2007. He then stated:

> "As a result of a recent PDF submission to the DOHC, the negotiation team learned that various rebates, discounts and other trading benefits are granted by wholesalers to pharmacy contractors. The existence of these previously undisclosed trading practices raises some concerns. The HSE brings to your attention the terms of Clauses 12 (1) and 13 (1) of your Pharmacy Contractor's Agreement."

47. He then set out the terms of clauses 12 (1) and 13 (1) and reminded the pharmacists that all trading practices in relation to the provision of community pharmacy services under the Health Act of 1970, must fully comply with the terms of the contractors' agreement.

**Contested decisions**

48. In September 2006, the defendant decided to reduce the amount it would pay as reimbursement of the ingredient cost of new medicines from the ex-factory price plus 17.66%, to the ex-factory price plus 15%. There was no public announcement of the decision at the time, and it appears that it took some time for the plaintiffs to become aware of this decision and its impact.

49. In September 2007, the defendant determined to reduce the price at which it would reimburse pharmacies the ingredient cost of medicines under the GMS and community drugs schemes from the ex-factory price plus 17.66% to the ex-factory price plus 8%, with effect from 1st December, 2007,. It also determined to further reduce the amount payable from 1st December, 2008, to the ex-factory price plus 7%. This decision and the reasons therefor were communicated by a letter dated 17th September, 2007, to community pharmacists, including the plaintiffs, in the following terms:

> "Re: *Wholesalers' margin*
>
> Dear Pharmacist
>
> Under current arrangements, the HSE reimburses pharmacy contractors for medicines purchased from wholesalers and supplied under the GMS and Community Drugs Schemes at the ex-factory price of medicines plus an assumed wholesalers'

margin calculated on the ex-factory price. These prices are available from the HSE at any time.

Reimbursable prices are based on a margin for wholesalers of 15% of the ex-factory price for distributing items, which have become reimbursable under the GMS and Community Drug Schemes since 1 September 2006 and 17.66% in respect of items, which became reimbursable prior to that date.

It has come to the attention of the HSE that these margins frequently exceed the actual margins charged by wholesalers for medicines supplied under the GMS and Community Drugs Schemes.

As you know, the HSE advertised and commenced a public consultation process in December 2006 aimed at determining an appropriate wholesalers' margin for the provision of wholesale services at the current service levels. This consultation process was completed in February 2007. The HSE received a significant volume of submissions from manufacturers, wholesalers, community pharmacists and other stakeholders. The HSE also commissioned an independent economic analysis of the pharmaceutical wholesale sector. The HSE intends to publish this report on the HSE's website at www.hse.ie shortly.

Having considered the submissions and economic analysis, the HSE is satisfied that the appropriate wholesalers' margin is no more than 7-8% of the ex-factory price. As a result of the review, the HSE has determined that arrangements for the reimbursement of drugs supplied under the GMS and Community Drugs Schemes will be as follows:

In respect of all prescription items supplied by community pharmacists, on or after 1st December 2007, the HSE will pay a wholesale margin of 8% calculated on the ex-factory price of all medicines reimbursable under the GMS and Community Drug Schemes, i.e. all claims received in respect of December 2007 and onwards will have the revised prices applied to them.

In respect of all prescription items supplied, by community pharmacists, on or after 1st December 2008, the HSE will pay a wholesale margin of 7% calculated on the ex-factory price of all medicines reimbursable under the GMS and Community Drug Schemes, i.e. all claims received in respect of December 2008 and onwards will have the revised prices applied to them.

The wholesalers' margin will thereafter be reviewed from time to time.

The HSE appreciates the value of the Community Pharmacist in the delivery of a quality health service.

Yours faithfully"

50. There were certain further clarifications given in subsequent correspondence which are not relevant to the issues which I have to determine and the implementation date deferred to 1st March, 2008.

51. Each of the September 2006 and September 2007 decisions are pleaded as, and not denied to be, decisions taken by the defendant. Evidence was given that, prior to the announcement of the decision of September 2007, a meeting was held with the Minister for the purpose of informing her of the proposed decision and at which she indicated approval for the defendant's proposed decision.

52. There is no evidence of any consultation between the Minister or the defendant with the PCC in relation to the decisions to reduce the rate at which the ingredient cost of medicines under the GMS and other community schemes would be reimbursed to pharmacies, including the plaintiffs.

53. I am satisfied on the evidence that, since the implementation of the reduction of reimbursement price paid on behalf of the defendant, wholesalers have continued to invoice the plaintiffs for drugs supplied at the ex-factory price plus 17.66%. They have also continued to grant discounts. The plaintiffs do not allege that the reduced amounts paid as reimbursement of ingredient cost have been less than the net amount paid by them to purchase the drugs, taking into account the discounts allowed to them on settlement of their invoices/monthly accounts.

**Issues**

54. The plaintiffs claim that the decisions taken by the defendant in September 2006 and September 2007, to reduce the amount paid to the plaintiffs as the ingredient cost of medicines reimbursable under the GMS and community schemes, is in breach of the plaintiffs' CPC agreement with the defendant.

55. It is important to emphasize that the only issues with which the Court is concerned are what are the relevant contractual terms between the plaintiffs and the defendant and whether the decisions taken were in breach of those terms? The reason I emphasize this is that a significant portion of the evidence adduced before the Court related to the respective merits of the positions of the parties in relation to the reduction in the amount of the reimbursable cost decided upon by the defendant and its impact on the overall provision of services by community pharmacies in the GMS and other community drugs schemes and payments therefor. It forms no part of the Court's function to form any view on the respective merits of the position of the parties. The Court is confined to determining what are the relevant contractual provisions between the parties and whether the decisions taken were in breach of those contractual provisions. The defendant has also raised competition law issues which only arise if the Court was to find for the plaintiff on certain of its contractual submissions.

56. The identification of the relevant terms of the contract between the individual plaintiffs and the defendant, in relation to the provision of community pharmacy services, is complex by reason of the multiplicity of parties involved in concluding these arrangements, and the existence of memoranda agreed between the Minister and the IPU, alongside individual contracts in standard form entered into between the plaintiffs and the defendant and its predecessors, but not negotiated by them. These contractual arrangements have already been the subject of considerable analysis by Clarke J. in the case of *Irish Pharmaceutical Union and Ors. v. Minister for Health and Children and Ors*. [2007] IEHC 222, albeit in relation to a different contractual obligation, namely, the making of advance payments. The plaintiffs seek to rely on the analysis of Clarke J. in support of their submissions herein.

57. The issues which the Court has to determine appear to be the following:

What contractual obligation and/or right existed between the defendant and the plaintiffs in September 2006 in relation to payments to reimburse the ingredient cost of products dispensed under the GMS and community schemes to eligible

persons? I have identified September 2006 as there is no evidence to suggest any change in the contractual arrangements between September 2006 and 2007.

What, if any, contractual arrangements applied between the parties in relation to any alteration in the amount so payable?

If necessary, whether any of the contractual provisions found to exist are void by reason of section 4 of the Competition Act 2002?

58. The plaintiffs' primary submission is that they have a contractual entitlement to be paid by the defendant as reimbursement of the ingredient cost of medicines supplied, a price which they call "the basic ex-wholesale price". In the pleadings, and at the outset of the case, they defined the basic ex-wholesale price as being "the normal cost price charged by a wholesaler to a community pharmacist before discounts or rebates or any other special terms", and asserted that the amount equates, or equated, to the amount of the ex-factory price plus a mark-up of 17.66%. It would appear from the closing submissions made by counsel on their behalf that they may have refined that submission to one in which the basic ex-wholesale price to which they allege a contractual entitlement is the ex-factory price plus a mark-up of 17.66%. As will appear, nothing turns on this slight variation. The refinement was made in response to hypothetical queries put by the Court as to what the plaintiffs contended the contractual obligation to be in the event, for example (which did not occur), that a wholesaler increased the price at which it invoiced medicines to a pharmacist to a price which exceeded the ex-factory price plus 17.66%. The plaintiffs conceded that they are not contending an entitlement to be reimbursed a price invoiced by a wholesaler, which amounted to, for example, the ex-factory price plus 30%.

59. The plaintiffs submit that such contractual entitlement is an implied term of each plaintiff's CPC agreement with the defendant. They submit that such term is implied, either by custom and usage, or by reason of clause 19 (3) of the 1996 CPC agreement. The plaintiffs do not rely on clause 12 (1) of the 1996 CPC agreement, and submit that payments made to them by or on behalf of the defendant, as reimbursement of the ingredient cost, are not payments referred to in clause 12 (1) of the CPC agreement. The plaintiffs submit that those payments made on behalf of the defendant which represent fees for dispensing, or an amount which is a mark-up on the ingredient cost, are payments which come within clause 12 (1) of the 1996 CPC agreement.

60. The defendant's submission is that it accepts that the defendant is contractually obliged to reimburse a pharmacist for the cost of medicines supplied under the GMS and other community drug schemes. Whilst the defendant, initially in the defence as pleaded, maintained that payments intended to reimburse at cost formed part of the payments made pursuant to clause 12 (1) of the 1996 CPC agreement, it changed its position on that issue at the hearing of the action. The submissions made by counsel on its behalf at the hearing were that, on reflection, the defendant agreed with the submission made by counsel for the plaintiffs that the payments intended as reimbursement of ingredient cost did not form part of the payments referred to in clause 12(1) of the 1996 CPC agreement. The ultimate submission of the defendant, through its counsel in closing, was that the contractual obligation of the defendant was an implied term of the CPC agreement between the plaintiffs and the defendant, and was to reimburse the plaintiffs for the cost of medicines supplied at a price or rate which originally the Minister, but now the defendant, determined to be an average or proximate cost across the pharmacy market. The defendant submitted that such term was implied from the 1971 memorandum but not by reason of clause 19 (3) of the CPC agreement ("terms agreed or to be agreed"), which clause, it asserted, was concerned with non-pay issues.

61. In summary, both parties agree that the CPC agreement includes a contractual right for the plaintiff to be paid, by or on behalf of the defendant, an amount to reimburse the cost of medicines dispensed under the GMS and other drugs schemes, but dispute the exact nature of the contractual term and the basis for same in the CPC agreement.

**Conclusions on contractual terms**

62. The starting point of any consideration of the contractual terms that exist between the plaintiffs and the defendant must be the express terms of the written agreement between the parties, i.e. the 1996 CPC agreement.

63. There is no dispute between the parties as to the principles which the Court should apply in construing the terms of that agreement. They include those approved of by the Supreme Court in *Igote Ltd. v. Badsey Ltd.* [2001] 4 I.R. 511.

64. In *Igote Ltd. v. Badsey Ltd.*, the parties were in dispute as to the meaning of a particular clause in a share subscription agreement. Murphy J. (who delivered the single judgment with which there was unanimous agreement), at p. 516, quoted with approval a passage in the judgment of Keane J. (as he then was) in the case of *Kramer v. Arnold* [1997] 3 I.R. 43, at p. 55, as succinctly expressing the rule as to the construction of a contract and the context in which it is to be achieved:-

> "In any case, as in this case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances."

65. Murphy J. had, earlier in the judgment, quoted with approval from the well known speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989. In *Prenn v. Simmonds* Lord Wilberforce said at p. 1383:-

> "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations . . . We must . . . inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view."

66. In *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* he repeated his views at pp.995 and 997:-

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the 'surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes a knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating … what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were".

67. Murphy J. also referred to the dangers in exploring the background or surrounding circumstances to a contract under construction and the limitations which must be placed upon the factual matrix rule, as explained by May L.J. in P*lumb Brothers v. Dolmac*

*(Agriculture) Ltd.* (1984) 271 E.G. 373, at p.374:-

> "There has grown up a tendency to speak about construing documents in or against what is described as the 'factual matrix' in which the contract or documents first saw the light of day. In truth that is only, I think, a modern way of saying what has always been a rule for a long time that, in construing a document, one must look at all of the circumstances surrounding the making of the contract at the time it was made. There is the danger, if one stresses reference to the 'factual matrix' that one may be influenced by what is in truth a finding of the subjective intention of the parties at the relevant time, instead of carrying out what I understand to be the correct exercise, namely, determining objectively the intent of the parties from the words of the documents themselves in the light of the circumstances surrounding the transaction. It is not permissible, I think, to take into account the finding of fact about what the parties intended the document to achieve when one is faced with the problem some five, ten or many years later of construing it. In deciding what the document did in fact achieve, all that one can look at are the general circumstances surrounding the making of the document and in which it was made, and deduce the intention of the parties from the actual words of the document itself. The contract between the parties is what they said in the relevant document. It is not for this or any court to make a contract for the parties different from the words that the documents actually use merely because it may be that the parties intended something different."

68. As appears, the primary rule of construction is that the Court must determine objectively the intent of the parties from the words of the document itself, in the light of the surrounding circumstances (or factual matrix of the transaction).

69. The judgment of Clarke J. in *IPU v. The Minister for Health and Children* [2007] IEHC 222, does not necessarily support the contention of the plaintiffs to have an implied contractual right to be made payments which include reimbursement of ingredient cost at the basic ex-wholesale price being the ex-factory price plus 17.66%. That decision concerns a claim to a contractual entitlement to be made advance payments as part of the arrangements with pharmacists for the GMS scheme. As appears from paragraph 3.9 of the judgment of Clarke J. he held that neither the !996 CPC agreement nor the 1971 agreement made reference to advance payments and it was only in the absence of an express provision relating to advance payments that Clarke J. went on to consider the application of clauses 19(3) and 19(5) of the CPC agreement to the claim.

70. In this action, the plaintiffs' claim relates to one element of the payment to which they allege a contractual entitlement for the supply of drugs under the GMS and other community drug schemes. The 1996 CPC agreement contains an express provision relating to the entitlement of the plaintiff to receive payments from the defendant in respect of services provided under the agreement. Clause 12 (1) provides:

> "12. (1) The board shall in consideration of the service provided by the pharmacy contractor in accordance with these terms and conditions and on foot of claims made in the form and at the times directed by the Minister, make payments or arrange for payments to be made to the pharmacy contractor for prescriptions dispensed at his/her contracted community pharmacy in accordance with such rates as may be approved or directed by the Minister from time to time after consultation with the Pharmaceutical Contractors' Committee."

71. In accordance with the above principles, this clause must be construed objectively from the plain meaning of the words used and in the relevant matrix of fact of the 1996 CPC agreement. There are a number of such undisputed facts. The first is that the 1996 agreement replaced the 1971 agreement. In particular, clause 12 (1) replaced clause 10 of the 1971 agreement. Apart from minor terminological changes, each clause is identical.

72. It appears to me that, logically, the first question which the Court must consider is whether the payments which are the subject matter of the dispute in these proceedings are included in the payments referred to in clause 12(1) of the CPC agreement. It is only if they are not that the Court has to consider their alleged inclusion as an implied term and *inter alia* the decision of Clarke J. in *IPU v. The Minister* in relation to clause 19(3) of the CPC agreement. The final positions of the parties to the proceedings are that whilst the payments referred to in clause 12(1) and 10 of the 1971 agreement include those payments made on behalf of the defendant for drugs and other items supplied by the plaintiffs to eligible persons which are the fee in GMS scheme and the fee and 50% mark up on ingredient cost in the Drugs Refund scheme they do not include the payments made as reimbursement of ingredient cost for the same supply of drugs and other items.

73. It is unusual for the Court not to accept an agreed position of the parties as to the meaning of a provision in an agreement which is the subject matter of a dispute between them. The parties who are in dispute contend for differing implied terms and for different reasons none of which appear to me to be correct in law or on the facts. The agreements at issue between the parties are not agreements negotiated by the parties. I indicated in the course of the hearing, my tentative view that clause 10 of the 1971 agreement and clause 12(1) of the CPC agreement might apply to the payments in dispute, and gave counsel for both parties an opportunity of addressing the issue. I have carefully reconsidered the submissions made prior to reaching the conclusions set out herein.

74. Notwithstanding the submissions of the plaintiffs, and the final submissions of the defendant, I have concluded that construing clause 12 (1) of the 1996 CPC agreement in accordance with the principles set out above, and the relevant matrix of fact, that the payments in dispute in these proceedings, i.e. those payments intended as reimbursement of ingredient cost of medicines supplied, are included in the payments referred to in clause 12(1). Further, that to construe clause 12(1) in any other way would not be in accordance with the agreed legal principles in that it would be contrary to the plain meaning of the words used by the parties when construed in the relevant factual matrix.

75. As already indicated, clause 12 (1) must be construed as including the same type of payments as were included in clause 10 of the 1971 agreement. The 1971 agreement was drawn up as the standard contract to be entered into by pharmacists, following the 1971 memorandum concluded between the Minister and the IPU. The basis of remuneration for pharmacists providing services, to which the 1971 agreement applied, was set out at para. 20 where it stated:

> "The pharmacist will be remunerated on the basis of the recoupment to him of the ingredient cost of prescription items dispensed for eligible patients under the scheme together with a fee for each item . . ."

76. In substance, this provided that each pharmacist was to be paid for the services to be provided by the making of a payment which would have two distinct elements, one of which was intended as reimbursement of the ingredient cost of the medicines, and the other as a fee.

77. As already observed, the 1971 agreement was intended, in accordance with para. 13 of the 1971 memorandum, to be based on

the terms of the memorandum. Where, in 1971, the parties agreed in clause 10 that the health boards should make payments, or arrange for payments to be made to the pharmacist in consideration of the services provided, and having regard to both the plain meaning of the words "to make payments for services provided" and the factual matrix, which includes clause 20 of the 1971 memorandum, it appears to me an inescapable conclusion that the parties intended that the health board would make payments of the type referred to in para. 20 of the memorandum i.e. a payment which comprised a fee and an amount to reimburse the ingredient cost of the medicine supplied to the GMS patient.

78. The parties correctly, in my view, contend that clause 10 did and clause 12(1) does include the fee element of the payments. To construe clauses 10 of the 1971 agreement and 12 (1) of the CPC agreement as excluding payments intended to reimburse the ingredient cost, the Court would have to find from the plain meaning of the words used in the 1971 agreement, or in the 1996 CPC agreement, an intention by the parties that the reference to "payments" in those clauses was only intended to refer to some, but not all, of the payments to which it is common case the pharmacy contractors had an entitlement to be paid for drugs dispensed, pursuant to the GMS and other drugs schemes. It does not appear to me that any such intention can be deduced from the words used in clauses 10 or 12 (1), or any of the remaining provisions of the 1971 agreement or the 1996 CPC agreement. On the contrary, clause 11 of the 1971 agreement and clause 13 (1) of the 1996 CPC agreement (which are in similar terms), expressly state that the contractors are not entitled to accept any payment "whatsoever" other than payments made under clause 10 (or clause 12 (1)) in reward for the supply of medicine which, under the Health Act, 1970, are to be supplied without charge. These clauses emphasize that the payments referred to in clauses 10 and 12 (1) respectively were intended by the parties to be all the payments which the pharmacist was entitled to be paid *inter alia* by the defendant in respect of drugs and other items dispensed by them. Such payments include an amount to reimburse the cost of the drugs or other items supplied by the pharmacist to which there is an agreed contractual entitlement (with only a dispute between the parties as to the amount).

79. The parties also submitted that the reference in clause 10 to the payments being made "in accordance with such rates as may be approved of or directed by the Minister", implied that the payment referred to did not include the element of the payment directed to reimbursement of cost. This does not appear to me a sustainable submission, for the following reason.

80. It appears to me from the 1971 memorandum that the then intention of the Minister and the IPU, in accordance with para. 20, was that the payment to pharmacists would comprise two elements; one to recoup the pharmacist the ingredient cost of the medicine dispensed, and one as a fee. However, it also appears to me from para. 22 of the 1971 memorandum that the parties then agreed what amount would be considered as the ingredient cost to the pharmacist for the purposes of such payment. At para. 22, the memorandum states, "the price of a proprietary item to the pharmacist *will be taken* [emphasis added] as the basic ex-wholesale price . . ." . The words "will be taken" indicate that such price is to be used as the amount of the cost for the purpose of reimbursement. Another way of stating in substance the same thing, would be that the rate at which pharmacists will be reimbursed the ingredient cost will be "the basic wholesale price . . ." . What was agreed between the Minister and the IPU, as declared in the 1971 memorandum, appears to me to be that all pharmacists would be reimbursed the cost at a rate then agreed and set out in the memorandum, as distinct from the actual cost to the individual pharmacist.

81. When the 1971 agreement was drawn up and entered into by the then community pharmacists, the Minister had approved rates for both elements of the payments to be made to the community pharmacist (reimbursement of cost and fees) as set out in the 1971 memorandum. The payments to be made pursuant to clause 10 were certain and ascertainable.

82. Between the 1971 agreement and the 1996 CPC agreement, there were a number of community drugs schemes added to the services provided by pharmacists under the CPC agreement. As already stated , the detail of one such agreement was referred to in evidence, namely, the DCSS, in relation to which agreement was reached in 1990 between the Minister (through his Department) and the IPU. At para. 29. of this judgment, I have set out the agreement reached between the Department and IPU in relation to payments to be made under that scheme. As appears, the agreement referred to a single payment to be calculated by the addition of three elements: (a) reimbursement of ingredient cost (as defined); (b) normal 50% mark-up on ingredient cost, and (c) an inclusive fee then specified at 123.6p to be increased in line with public service pay awards.

83. In respect of this scheme, it appears envisaged from the outset that a single payment would be made which comprises three elements and a rate was agreed for each element of the payment. This approach is consistent with the construction which I have placed on clause 10 of the 1971 agreement. In addition, insofar as the additional community drugs schemes formed part of the factual matrix at the time of agreement on the 1996 CPC agreement, it would not appear that there is anything in the arrangements made in respect of payments for drugs dispensed under those schemes which suggests that any different meaning should be placed on clause 12(1) of the 1996 CPC agreement from that given to clause 10 of the 1971 agreement. On the evidence, I am satisfied that at the time each of the plaintiffs entered into the CPC agreement with the defendant or its predecessor, that the payments to which they became contractually entitled by reason of clause 12(1) included in respect of each of the relevant schemes a payment one element of which was the reimbursement of ingredient cost at a rate which had then been approved by the Minister. On the evidence, I find that at all material times such rate was the basic ex-wholesale price current in the month the items were dispensed, and that further, such basic ex-wholesale price was equal at all material times to the current ex-factory price plus 17.66%.

84. I am also satisfied there was no material change in that position between the date upon which each of the plaintiffs entered into the contracts, and September 2006. The rate which the Minister had approved for the reimbursement of ingredient cost in the GMS and other drugs schemes, had, for many years, been the ex-factory price plus 17.66%. I am expressing this as "for many years" as it appears to me that there may have been a period in which the basic ex-wholesale price was fixed in the FICI agreement, and the factory price deduced by a reduction on the margin of 15%, rather than the fixing of the factory prices and the establishment of the basic ex-wholesaler price by a mark-up of 17.66%. If such a system applied, then it was prior to 1993, and as the relevant percentages remained constant, it was only a question of the starting point and not of any material relevance to the issues which the Court has determined. Since the 1993 FICI agreement, at latest, the basic ex-wholesaler price appears to have been determined by the ex-factory price plus 17.66%.

85. Whilst Mr. Hurley gave evidence that it was his view, and that of the joint negotiation team, after the conclusion of the 2006 agreements with IPHA and APMI, which no longer provided for the price at which wholesalers should supply to pharmacists, that there did not exist a basic ex-wholesaler price, no submission was made on behalf of the defendant, in my view correctly, that these agreements in any way altered the rate which had been approved long prior to that date, by the Minister, for reimbursement of ingredient cost to pharmacists under the CPC agreement.

86. Accordingly, I am satisfied that in September 2006, each of the plaintiffs with a CPC agreement with the defendant (the third to eighth named plaintiffs), had a contractual right, pursuant to clause 12 (1) of its CPC agreement, to receive a payment in respect of items dispensed under the GMS and other community drugs schemes which included a payment for reimbursement of ingredient cost at a rate which was commonly referred to as the basic ex-wholesale price, and which was the ex-factory price prevailing in the month

in which the item was dispensed plus 17.66%.

87. I have also concluded from the terms of clause 12 (1) of the CPC agreement, that the rate of such payments was capable of being varied from time to time, but that, in accordance with its express terms, the rate could only be varied by a decision taken by the Minister, after consultation with the Pharmaceutical Contractors' Committee, to approve of or direct a new rate. This appears to follow from the express words used in clause 12 (1) " . . . in accordance with such rates as may be approved or directed by the Minister from time to time (emphasis added) after consultation with the Pharmaceutical Contractors' Committee". Such a construction of clause 12 (1) in relation to variation was not disputed on behalf of the plaintiffs.

88. No submission was made on behalf of the defendant that any provision of the Health Act, 2004 transferred to it the functions assigned to the Minister by clause 12(1) of the CPC agreement. Section 63 of the Act of 2004, substitutes the defendant for "a specified body" in any agreement to which it refers. A "specified body" is defined in s. 56 for that purpose, and the Minister is not a specified body.

89. As already indicated, there is no evidence that the Minister approved or directed any change in the rate at which ingredient cost would be reimbursed prior to the decision made by the defendant in September 2006. In relation to 2007, whilst there was evidence of information given to the Minister in relation to the proposed decision and her assent to it being implemented, there is no evidence of any consultation by the Minister with the Pharmaceutical Contractors' Committee in advance of the meeting at which she is contended to have approved the reduction proposed by the defendant.

90. Whilst not strictly relevant as it was not conducted by the Minister, I think I should add that I am not satisfied that the public consultation undertaken by the defendant could amount to consultation with the PCC for the purposes of clause 12 (1) of the CPC agreement in relation a change of a rate at which a payment is to be made to pharmacy contractors under the CPC agreement. That consultation, as appears from the public advertisement and briefing document, was a consultation in the context of a review by the defendant of "the provision of pharmaceutical wholesale and distribution services to both community pharmacy contractors and other healthcare locations . . ." While such a consultation may have relevance to the determination of a change in the rate at which pharmacy contractors might be reimbursed the ingredient cost of medicines and other items supplied to eligible persons, it is not the type of consultation which appears to me envisaged by the express terms of clause 12 (1). That must be a consultation which relates to a potential change in the rate, or rates, of payments or elements of payments to pharmacy contractors, under the CPC agreement. The evidence suggests that there are many and differing issues which might arise in such a consultation, having regard to developments in the pharmacy market since 1971, the differences between pharmacies, the differing commercial arrangements with wholesalers and the connection between the rate at which cost is reimbursed and the fee structure for the various schemes.

91. As I have found that the plaintiffs were, in September 2006, expressly entitled, pursuant to clause 12(1) of the CPC agreement, to a payment in respect of reimbursement costs at a rate which was then approved by the Minister as being the ex-factory price plus 17.66%, it is unnecessary for me to consider further the submissions made that a right to such a payment is implied in the CPC agreement, either by custom and usage or by reason of clause 19(3).

**Competition law issues**

92. The defendant contended that if the Court held that plaintiffs have a contractual entitlement to be paid for the ingredient cost at the ex-factory price plus 17.66% implied by reason of agreements reached between the Minister and the IPU, or incorporated by reason of clause 19 (3), such provisions are void pursuant to s. 4 (1) of the Competition Act, 2002, as being an agreement between undertakings (i.e. the pharmacists) under the umbrella of the IPU or PCC in relation to prices. Those issues do not now arise by reason of the conclusions reached on the nature of the contractual entitlement of the plaintiffs and the basis for same in clause 12 (1) of the 1996 CPC agreement.

93. The defendant did not plead or contend that clause 12 (1) of the 1996 CPC agreement was void as being contrary to s. 4 of the Act of 2002, even at a time when it contended that the payments which were in dispute in these proceedings were made pursuant to that clause. It is clear from the terms of clause 12 (1) that the contractual entitlement of the plaintiffs is to be made payments at a rate, or rates, unilaterally determined by the Minister by approval or direction, following consultation. The contractual entitlement of the plaintiffs and the contractual obligation of the defendant do not require the Minister to reach *agreement* with the IPU on the rate at which a payment is to be made by the defendant to the plaintiffs. Undoubtedly, as I have held the Minister, in 1971, approved as the rate of payment for reimbursement of costs, a rate which he had agreed with the IPU. However, he was not contractually bound to do so. It does not appear to me, on the decisions of the European Court of Justice and of the Supreme and High Courts, relied upon by the defendant, that there is any authority for the proposition that the provisions of clause 12 (1) should be regarded either as including an agreement between undertakings in relation to price, or a decision of an association of undertakings in relation to price, such that it is void, pursuant to section 4 of the Act of 2002. The contractual provision in clause 12(1) is for payment at a rate approved or directed by the Minister.

94. Whilst counsel for the defendant submitted in his closing submission that a requirement to consult with the IPU in relation to variation, such as included in clause 12(1), could give rise to a decision of an association of undertakings or concerted practices in relation to price contrary to s. 4 of the Act of 2002, it does not appear to me that there is, amongst the decisions referred to, any authority for the proposition that the Court should conclude that the consultation procedure prior to a unilateral decision of the Minister, envisaged by clause 12(1), gives rise as a matter of probability to any such activities which are contrary to section 4(1) of the Act of 2002. In those circumstances, it does not appear to me that a contractual obligation to consult with representatives of the undertakings, in advance of the Minister unilaterally determining the rates of payment, should be considered contrary to section 4(1) of the Act of 2002.

**Relief**

95. Having regard to the claims made by the plaintiffs and my findings herein, I have determined that the plaintiffs are entitled, at this stage in the proceedings, to the following declarations:

> Each of the third to eighth named plaintiffs was entitled in September 2006 and September 2007, pursuant to clause 12 (1) of its CPC agreement with the defendant, to a payment which included reimbursement of the ingredient cost of medicines and other items supplied under the GMS and other drugs schemes at the rate of the ex-factory price prevailing in the month in which the item was dispensed plus 17.66%.
>
> The defendant's decisions of September 2006 and September 2007, reducing the price at which it would reimburse the plaintiffs the ingredient cost of medicines and other items supplied by them under the GMS and other drugs schemes, were in breach of contract, being in breach of clause 12(1) of the CPC agreement with each of the third to eighth named plaintiffs.

**Damages**

96. The plaintiffs' claims include a claim for damages for breach of contract. However, it was agreed that all issues in relation both to the liability of the defendant for damages, and the quantification of any such damages, would be left over until after the determination by the Court as to whether the defendant was, or was not, in breach of contract to the plaintiffs in the decisions taken and implemented. I will hear counsel as to the manner in which the claims for damages for breach of contract should now be pursued, at a date to be fixed.