

THE HIGH COURT
COMPETITION

[2012 No. 1101 P.]

BETWEEN**C.M.C. MEDICAL OPERATIONS LIMITED (IN LIQUIDATION) TRADING AS CORK MEDICAL CENTRE****PLAINTIFF****AND****THE VOLUNTARY HEALTH INSURANCE BOARD****DEFENDANT****JUDGMENT of Mr. Justice Cooke delivered the 12th day of June, 2012**

1. By notice of motion dated the 14th March, 2012, the defendant in this action applied to the Court for the following orders:-

- (1) An order pursuant to s. 390 of the Companies Act 1963, directing the plaintiff to provide sufficient security for the defendant's costs of the proceedings if it is successful in its defence;
- (2) An order staying the proceedings until such security is given;
- (3) An order that the liquidator of the plaintiff do disclose the financial state of affairs of the plaintiff;
- (4) An order that the plaintiff and its liquidator do disclose all participants in the development of the Cork Medical Centre and the precise nature of this participation;
- (5) An order that all parties funding the plaintiff and its liquidator in relation to the proceedings be identified by the liquidator of the plaintiff and be made liable to the defendant for all orders for costs in these proceedings made in favour of the defendant.

2. Upon the commencement of the hearing of the application, the Court indicated to the parties that it proposed to deal first with the application for security for costs, having regard to the fact that since the bringing of the motion, the plaintiff had disclosed to the defendant the identities of the two ultimate beneficial owners of the shares in the plaintiff company and had informed the defendant that the action was being brought by the liquidator on foot of an indemnity from those two shareholders in respect of the costs that might be incurred by the plaintiff in the proceedings. In the view of the Court the question as to whether any of the other reliefs sought in the notice of motion were necessary or appropriate would be better answered in the light of the outcome of the application for security.

3. The background to the litigation can be summarised as follows. In mid 2007, the defendant (VHI) was first approached by Dr. Joseph Sheehan and his son James Sheehan in connection with a project which they were then promoting to build and open a new private hospital at Bishopstown in Cork. Dr. Sheehan is a renowned orthopaedic surgeon now based in the United States who had considerable experience in promoting and operating a private hospital, the Blackrock Clinic, in Dublin and a new private hospital the Galway Clinic, in Galway. A first meeting between representatives of the two sides took place on the 12th September, 2007, at which the project was outlined on behalf of the promoters of the venture in general terms.

4. Between September 2007 and August 2009, the project was apparently advanced without reference to the defendant. The promoters maintain that they were aware that the VHI had a well established practice not to consider formal applications for approval of the hospital as one which would be covered by its insurance scheme until a point close to the opening of the new hospital when projected revenues, costs, prices and other aspects of the services to be provided could be currently given and more reliably assessed.

5. On the 4th June, 2009, a meeting took place between Mr James Sheehan and John Looney representing CMC and Mr Jimmy Tolan, Chief Executive of VHI and Dr Bernadette Carr, its medical director, at which the CMC plans for the new hospital, now to be located at Mahon Point in Cork, were outlined and updated. In an email the following day, Dr. Carr cautioned:-

"...As we indicated to you yesterday however at this point in time occupancy figures for the large private hospital in Cork are not high and we will need to discuss with you in due course where you see the capacity for growth in patient numbers or indeed if you believe there is unmet demand in the Cork/Southern Region. None the less VHI always welcomes competition to the provider market as we believe it can contribute to both quality improvement and cost efficiencies. From an economic point of view, VHI is currently going through a difficult time which we intend to manage through in the best interests of our members and in cooperation with appropriate provider partners."

In response to a request apparently made at the meeting, the VHI's standard form of questionnaire "for VHI recognition of a new and/or additional facilities" was forwarded to CMC.

6. On the 11th August 2009, Mr. Tolan wrote to Mr. James Sheehan in the following terms:-

"We will obviously take account of any further information that you want to put to us about the proposed development and the services that it is proposed to offer there, but I feel I should tell you that our preliminary view is that it is unlikely that VHI Healthcare for its part will need to avail of these for its members. We have to view the matter in the context of what is an ongoing significant decline in our membership base, the low occupancy by our members in a number of private

hospitals that we cover at present, including hospitals in Cork, and the additional costs that we as insurers tend to incur when we provide cover for non-essential accommodation."

7. James Sheehan replied on the 17th August, 2009: "To be honest, we were expecting such a response which was a similar response to our Galway Clinic Development. Please note, that the Cork Medical Centre has progressed quite significantly with many of the Cork Medical Community signing up to the project and the fit out well progressed. We will thus respond to your letter in due course and look forward to seeing you again to discuss the project further."

8. The next contact on behalf of the plaintiff with VHI was a letter of the 3rd May, 2010, (mistakenly dated 2009) in which James Sheehan described the capacity and facilities of the new hospital saying it would be "capable of providing a full range of elective procedures, coupled with therapies/rehab and out-patients, advanced diagnostics including providing the latest forms of MRI, CT and Cath labs from Siemens Medical." He added: "I am pleased to say, despite some earlier credit crunch gremlins, that the hospital is on schedule to be opened early September, 2010. I would like to invite you and your people to visit the new hospital at your convenience. In the meantime we look forward to meeting with you to agree hospital reimbursement rates in accordance with VHI Participating Hospital Benefit Schedule."

9. On the 13th May, 2010, Mr. Tolan replied, recalling the advice he had given and the caution he had expressed in August 2009, adding that there had been significant changes within private health insurance affecting VHI since August 2009. VHI had suffered underwriting losses of €80 million in 2009, and lost 120,000 customers in that year and a further 40,000 in the first few months of 2010. He said: "We do not require access to further hospital accommodation, nor indeed could we afford the additional costs which our experience teaches us we would incur as a result of providing cover for accommodation which is not essential".

10. On the 28th June, 2010, Mr. Looney sent the completed questionnaire form to Dr O'Halloran. Dr. O'Halloran responded on the 9th July, pointing out that "...there are a number of gaps in the information provided. As outlined in our correspondence dated 10th of May 2010 and reiterated at our meeting on the 28th of May 2010, Vhi Healthcare is not in a position to fund or insure any additional new private hospital capacity, including the Cork Medical Centre. I regret that our reply cannot be more favourable".

11. Following a request from Mr. Looney as to the information gaps identified, Dr. O'Halloran pointed to: "the names of the directors, the proposed prices, lists of consultants and other staff, financial projections and whether agreements are in place such that 20% of the capacity will be provided to public patients".

12. On the 27th July, 2010, Dr. O'Halloran wrote to Mr. Looney expressing surprise at an article that had appeared in the Irish Examiner newspaper which referred to Cork Medical Clinic having had "positive talks with Vhi Healthcare since September 2007" and that the clinic had expected to confirm details in the coming week. She reiterated that "Vhi Healthcare is not in a position to fund or insure any additional new private hospital capacity, including the Cork Medical Clinic".

13. On the 27th July, 2010, Mr. James Sheehan wrote to Mr. Tolan a letter in which he first summarised the contacts and exchanges that had taken place since September 2007, and claiming "...you, your colleagues and your predecessor had been fully informed about the project and the development of the facilities as early as September 2007. At a meeting with the VHI on 12 September 2007, Sheehan Medical outlined its intention to build a new private hospital in Cork and was encouraged by the VHI that a competitor to the Bon Secours in Cork would be a positive development and would be covered by the VHI. " Mr Sheehan claimed there had then been a shift in the position of the VHI which they had taken to be a "negotiating tactic" and said:

"Given the proximity to the planned opening of CMC in September 2010, the VHI's stance on this issue is a very grave concern to Sheehan Medical and raises serious issues for the financial viability of CMC. If VHI adheres to the position outlined in your letters of 9 and 13 July it will also constitute a very adverse development for your members in Cork and the wider Munster catchment area who will, as a result, be denied access to the most modern state of the art facility in the region. A refusal by VHI to cover the facility is not objectively justifiable and should VHI continue to maintain this position, the refusal will raise serious issues for the VHI itself".

14. Mr Sheehan then went on to argue that the additional capacity was required in the Cork area and requested an urgent meeting to explain why VHI should reconsider its position.

15. On the 8th August, 2010, Mr. Looney resubmitted the application form cum questionnaire in a version where some additional information was given to several of the questions asked. He attached a list of consultants who had applied for admitting rights to the hospital including consultants who had expressed an interest, but were not yet committed.

16. On the 26th August, 2010, Mr. Tolan replied to Mr. James Sheehan in a three page letter. He first gave in summary his view of the exchanges that had taken place both at meetings and in correspondence since June 2009, emphasising the occasions upon which the VHI had sought to make it clear that it did not consider that extra capacity was required in Cork and saying that "you would need to show that there was a real need for a new hospital if Vhi Healthcare was to be in a position to provide cover for it". He also referred to VHI's very difficult financial situation which created dangers in providing cover for additional accommodation where there was no clear need. He also made the point that holiday absences during August made it impracticable to fully assess immediately the recognition application/questionnaire which had been submitted. He pointed out that "your responses to the questionnaire do not describe any proposed innovative cost control measures" and emphatically denying that VHI performed any "gate-keeper" role as Mr. Sheehan had suggested in his letter of the 27th July, 2010. He also criticised the questionnaire responses saying that "On the financial side, no projected revenues are shown, no information is given as to the terms of the leasing arrangements for the hospital premises nor equipment and while your letter says you are satisfied that your costs and charges will be lower than those of other hospitals and that CMC will be a driver of lower hospital charges for the region, no details are provided of unit costs or rates to be charged in respect of services to be provided, nor do you seem to have any definite cost cutting proposals". He then concluded: "We will arrange to fully review what you have written following the return of the relevant people from vacation. If it then seems useful to have a further meeting, we can then certainly arrange one. I ask though that you should in the meantime provide us on paper with any extended answers to the questionnaire that you wish to offer and in particular that you provide the financial information requested".

17. On the 6th September, 2010, James Sheehan replied to Mr. Tolan addressing at length the four topics of (i) VHI encouragement; (ii) provision of information to VHI; (iii) the need for new hospital/ capacity constraints; and (iv) cost benefits. He attached a financial summary: "Cork Medical Centre five year projections" together with a schedule of 'package procedures' giving the 'proposed VHI Healthcare reimbursement rates' for each.

18. Following a meeting on the 17th September, 2010, Mr. Sheehan again wrote on the 20th September, 2010 appreciating the

serious concerns of VHI at the lack of a risk equalisation scheme saying "... nevertheless, we feel that this should not prevent you from taking steps to curtail overall claims costs. For this reason we firmly believe that the concept of tendering for services is the way forward, yielding a win-win outcome for VHI Healthcare and CMC. Tendering will deliver claims costs reduction and resolve your concerns about future capacity in the private hospital sector". He expressed surprise that at the meeting VHI had been concerned as to how the Bon Secour Hospital would survive the entrance of CMC: "This position seems to us to be anti competitive and protective of the existing dominant provider".

19. On the 6th October, 2010, Mr. Tolan replied to the letters of the 6th and 20th September. He said *inter alia*, that "The only basis therefore upon which we could contemplate providing cover for CMC is if we were satisfied that this was going to bring prices down significantly. We are not satisfied that providing cover to CMC could do this". He then explained the basis for that view. He also dealt with the complaint about "process" made by Mr. Sheehan in the letters saying that he did not think there was any ground for such complaint. He said:

"As I wrote in my previous letter, that meeting was the first occasion Bernadette Carr or I knew of the proposed development at Mahon Point. To avoid any doubt as to what I mean- we knew of the proposal outlined in 2007 but assumed it not to be proceeding, particularly having regard to the deteriorating economic climate which had developed in the meantime, which your letter remarks on in the context of your building plans and which has continued to deteriorate generally and for Vhi Healthcare. Whatever may have been your expectations before our meeting in June 2009 however, you could not have been in any doubt after that we considered it very unlikely that Vhi Healthcare would be prepared to provide cover for CMC and of the principal reasons for this. You may have decided to disregard what we told you in June and then again in August 2009, but you were not justified in doing so".

20. The hospital opened in Cork on the 15th October, 2010. Further exchanges of correspondence and some meetings took place in the following months up to January 2011, including an intervention on the part of a John Cleary of John Cleary Developments who was the developer and landlord of the property in which the hospital was located. He had apparently agreed a rent free period for a number of years under the lease to the plaintiff and was apparently planning to be an investor in the project.

21. On the 1st February, 2011, Mr. Looney wrote to Dr. Carr enclosing new proposals based on a "volume cap" and "package price" for each procedure as listed in the schedule and this was said to "deliver reduced costs to VHI... thereby assisting VHI in availing of the acknowledged competitive advantages CMC brings to the market".

22. Finally, on the 21st February, 2011, James Sheehan wrote to Mr. Tolan asking first for confirmation that an attached email from John Cleary which referred to VHI's intention to enter negotiations with a view to covering Cork Medical Centre to be concluded within a five/six week time frame was correct. He then said:

"As you can imagine we are under extraordinary pressure (with all our investors, banks etc.) not having cover for over 6 months now as we are losing 500+k per month since we opened with Staff, leasing, utilities and as you know our banks and investors will not commit anymore funds until we have your letter. If below [ie the Cleary email] is correct I would like to meet with you on Thursday (with John Cleary) to go through the letter as we are virtually paralysed from getting any NTPF (National Treatment Purchase Fund) work and other insurers business thus creating a nonstop loss with no revenue to hedge against that loss. . . . So, again, if you could confirm that the email below is correct it would be a huge help in keeping our partners at bay until this letter is produced. As of now, we are virtually bankrupted as this was completely unexpected, not only with not getting cover from you earlier but the knock-on effects of the other insurers business and NTPF (which has been non existent)."

23. The plaintiff company subsequently ceased operating and was wound up by its creditors, Mr. Kieran Wallace of KPMG, accountants, being appointed liquidator on the 11th May, 2011.

24. It is in that circumstance, accordingly, that the present action was commenced on the 3rd February, 2012. The essential cause of action is a claim that the defendant as a dominant undertaking in the relevant market has infringed both s. 5 of the Competition Act 2002 (as amended) and Article 102 TFEU by abusively refusing to approve the plaintiffs hospital as one in which patients holding insurance cover as members or subscribers of VHI might seek treatment or to which they might be referred for treatment by consultants. The plaintiff claims damages for the losses it claims it has sustained as a result of those infringements and which, it is alleged, rendered it insolvent.

25. In addressing the defendants' application for security for costs, it is possible to go immediately to one particular issue upon which, in the view of the Court, the present application depends. There has been no dispute between the parties as to the criteria to be applied to the application and as to the appropriate principles to be drawn from the relevant case law. In order to obtain an order for security for costs it lies with the defendant in the first instance to establish a) that it has a *prima facie* defence to the plaintiffs claim and b) that the plaintiff will be unable to pay the defendant's costs of the litigation if that defence succeeds. (See for example the judgments of the Supreme Court in *Usk & District Residents Association Ltd v The Environmental Protection Agency* approving the test applied by Morris P. in *Interfinance Group Ltd v. KPMG Pete Marwick* (Unreported Morris P. 29 June 1998). Here, it is accepted that the plaintiff is insolvent and will be unable to pay any costs that may be awarded against it. Furthermore, the plaintiff has been prepared to accept for the purpose of the present motion that the defendant is in a position to make out a *prima facie* defence to these claims. As the Court pointed out at the commencement of the hearing, in those circumstances the onus passes to the plaintiff to demonstrate by reference to appropriate evidence the existence of "special circumstances" which would justify the Court in declining to order security in which the defendant would otherwise be entitled to almost as of right.

26. Nor is there any dispute between the parties as to the issues the plaintiff must address in seeking to establish the existence of such "special circumstances". In the present case the circumstance relied on is the alleged fact that the inability of the plaintiff company to meet an award of costs is the result of the unlawful conduct of the defendant which has resulted in the plaintiffs inability to continue trading and in its resulting liquidation. In these circumstances the elements the plaintiff must establish are as follows: a) There was actionable wrongdoing on the part of the defendant; b) there is a causal connection between that wrong and its practical consequence for the plaintiff; c) that consequence has resulted in some loss to the plaintiff which is recoverable in law; and d) that loss is enough to account for the difference between the plaintiffs ability to meet an order for costs in favour of the defendant and not being so able. (See the judgment of Clarke J. in *Connaughton Road Construction Ltd v Laing O'Rourke Ltd* (Unreported, Clarke J. 16th January, 2009)).

27. Given that these issues must be addressed by the Court at this interlocutory stage on a *prima facie* basis, it is prudent when it is avoidable, for the Court to refrain from expressing views on the issues. In the particular circumstances of this action the Court considers that it is justifiable for the purpose of ruling on the motion to accept without comment that the plaintiff may be in a position

at a trial to demonstrate that the VHI is in a dominant position in a relevant market and that the refusal to approve the new hospital thereby depriving the plaintiff of access to a substantial pool of potential customers for its services, constitutes an unlawful abuse of that position. Whether this falls to be characterised as a question of access to an "essential facility" or as one of a dominant undertaking acting as a gate-keeper to a tied cohort of potential consumers is a question for examination at the trial.

28. In addressing these issues the Court is placed at something of a disadvantage. The evidence before the Court on the part of the plaintiff derives entirely from an affidavit of the liquidator Mr. Wallace, who does not claim to have had any involvement with the plaintiff company prior to his appointment in May 2011. Although the proceeding is brought by him on the basis of an indemnity from the directors of the plaintiff company, no affidavit evidence has been forthcoming from either of those directors nor from Mr. Looney, although these three were the individuals most directly involved in correspondence and meetings with the defendant upon which much of the argument between the parties on the motion has been concentrated. For example, in later correspondence the promoters clearly sought to attach significance to what transpired at the meeting on 12th September, 2007 (see paragraph 12 above). At paragraph 43 of his affidavit the liquidator refers to the description of that meeting given by Dr Carr at paragraph 23 of her first affidavit and says: "This version of the facts is not agreed." By whom one might ask: the liquidator, the company or the Sheehans? No direct testimony from those present on the side of the hospital project has been given as to which part of Dr Carr's description was "not agreed".

29. Furthermore, although the key issue which the Court must now address concerns the proposition that the plaintiff company was obliged to cease trading as a result of the wrongful withholding of approval by the defendant, the relevant financial information as to its commencing to trade and then ceasing has been extremely limited. In particular, the liquidator has not chosen to exhibit any statement of affairs, although, presumably, a statement of affairs was presented to the creditors at the meeting which appointed him. Nor is anything said as to what the funding arrangements for the project had been or even who its bankers were. The promoters have chosen not to explain to the Court the basis upon which the advancement of the project was funded. What arrangements had been put in place for working capital; over what period and upon what terms and conditions? An e-mail of 18th February, 2011 from a Mr McCormack of Euro Finance Group to Mr Tolan of VHI suggests that much of the planned funding had been solicited on the basis that it would be contingent on prior approval of VHI for the hospital being forthcoming. He wrote: "I have put in place all the funding for CMC and JCD and I have a number of investors, leasing companies and banks on standby to invest in CMC subject to VHI approval. They are now asking Euro Finance Group why has VHI delayed when all the other private medical insurance companies have approved CMC since the opening last year..."

30. Notwithstanding this evidential deficiency it is reasonable to assume that the plaintiff company has sustained a loss given that it is unable to pay its debts and has been wound up by its creditors. The key issue, however, is why it has sustained that loss. In the judgment of the Court, it is by no means apparent that the plaintiff has established on a *prima facie* basis that any such loss has a causal link to the wrongful conduct alleged against the defendant, namely the refusal to approve the hospital.

31. The plaintiff's essential case on this issue of causal connection is put on a fairly straightforward basis. The hospital opened in October 2010, and was forced to close in May 2011, due to the lack of insured patients referred to it. This is claimed to be attributable to the lack of consultants willing to commit their practices to the hospital until they knew that it had been approved by the VHI. Had approval been forthcoming the hospital promoters had projected that the hospital would have achieved an income of €21.575 million in its first year. This projection was explained to be based on the hospital attracting 60% of its patients from those covered by the VHI, that being the VHI's share of the relevant market. At paragraph 127 of his affidavit the liquidator says: "The plaintiffs financial calculations assumed that patients insured by the Defendant would account for around 60% of its revenues. This percentage reflected the defendant's share at the time, of the market for private health insurance...". In other words, the hospital had been opened by the promoters in the expectation not only that prompt approval would be forthcoming but that the hospital would almost immediately attract that volume of business from VHI subscribers.

32. Having regard to the fact that, as the correspondence quoted above illustrates, VHI had signalled its doubts as to the possibility of approving the hospital long before it opened in October 2010, the above projections raise, at the very least, the implication that the hospital's closure might be attributable to the combination of an over-optimistic expectation that prompt approval would be forthcoming on the one hand and a level of capitalisation or secure funding of working capital which was inadequate to maintain the project in its early stages, on the other.

33. The first contact about the project made in 2007, was clearly a purely introductory approach in respect of a project in its very early stages and on a different site and while it is said the promoters "were encouraged", apart from the assertion in the letter of 27th July, 2010 (see paragraph 12 above,) no earlier claim had been made that any promises had been given or any assurance had been sought such as might have constituted the basis for a legitimate expectation in respect of approval. It was not until two years after the initial meeting that the promoters advanced to the more formal stage of requesting to be provided with a recognition form for completion (see paragraph 5 above). The provision of that form, however, was accompanied by an explicit warning that VHI had doubts as to the need for such a hospital in Cork so far as its subscribers were concerned.

34. It is not in doubt either that the period of development of the hospital project unfortunately coincided with the sudden and serious reversal in the economic circumstances of the country with the resulting financial difficulties for all the State authorities and agencies including those in the health sector. Again, nothing has been said in evidence as to the effect, if any, on the project of the widespread cessation of lending by the banks to development projects during 2008 - 2009. As already remarked, questions are clearly provoked as to the banking and funding arrangements the promoters had in place in 2007 and thereafter for working capital in the hospital's early stages. Were they conditional on approval being forthcoming from health insurers and on consultants committing to the necessary transfers?

35. It is also clear from the letter of the 17th August, 2009, (see paragraph 7 above) that the plaintiffs promoters did not in fact have any basis for assuming automatic or immediate approval of the new hospital. They had apparently experienced similar doubts and delays in obtaining approval from the VHI for the clinic developed in Galway.

36. What is of considerable significance to the Court, however, in assessing the limited evidence made available to it on this particular issue, is the letter of the 21st February, 2011, quoted in paragraph 22 above. While the Court accepts that the implication of this letter may be altered by evidence given on either side at a full trial, its *prima facie* implication at this stage is that it raises a number of inferences. It indicates that the project was already under "extraordinary pressure" within four months of opening and was losing a very substantial amount of money every month in operating costs. Secondly, the fact that "our banks and investors will not commit any more funds until we have your letter" indicates that such commitments as had been obtained from banks and investors had been given on the basis that VHI approval would be forthcoming. Furthermore, the mention of the unavailability of NTPF work and business from other insurers suggests that those sources of revenue were also contingent upon VHI approval. As was explained in argument, the viability of the project was dependent upon attracting a sufficient number of consultants to transfer their practices to the

hospital with the result that they would then refer patients for treatment. Consultants were, however, reluctant to commit themselves to making such transfers of their practices until they knew that they would be able to refer patients whose fees were dependent upon reimbursement by the VHI. While this may be an aspect of the circumstances of the market which goes to the assessment of the alleged dominant position of the VHI, in the context of the present issue it is also a matter which is relevant to the causal connection between the claimed loss and the basis upon which the hospital was initially promoted and opened. In other words, has it been established on a *prima facie* basis at this stage that the hospital was obliged to close simply because the VHI unlawfully refused to grant approval, or was it obliged to close because of a misjudgement on the part of the promoters as to (a) the entitlement to approval as such; (b) how soon approval might be forthcoming if all of the necessary information was furnished; (c) the volume of business from VHI subscribers that could be attracted during the first year; (d) the number of consultants that might be persuaded to transfer their practices to the hospital and how quickly they would do so; and (e) the level of invested capital or securely committed funding that would be required to enable the hospital to operate after opening for a period that could be foreseen as reasonably necessary in order to obtain approval from the VHI.

37. It is immediately obvious that at the trial of this action, much will turn upon the evidence as to what was done, said, represented or agreed between the promoters and prospective investors and other insurers and the NTPF in relation to the business model upon which it proposed to operate. At this point, however, having regard to the very explicit warnings that were given by the VHI in correspondence to the effect that it had doubt as to the need for additional capacity in Cork, the Court cannot conclude that it was the unlawful refusal alone of the VHI to grant such approval that caused the insolvency and that a *prima facie* case to that effect has been established on the basis of the evidence summarised above. To put the matter in simple terms: the promoters knew from their Galway experience that there might be difficulty or at least delay in securing the necessary VHI approval for the hospital. The above evidence suggests that they promoted the venture to consultants (upon whom they depended for referred patients,) and banks or investors (upon whom they depended for working capital,) upon the basis that VHI approval would be forthcoming quickly enough to enable the hospital to achieve a particular level of revenue from VHI subscribers within the first year to render the venture viable.

38. For these reasons the Court is not satisfied that a *prima facie* case has been made out as to the existence of a causal connection between the refusal of the VHI to approve the hospital and the claimed loss resulting from its cessation of operations.

39. It follows, accordingly, that an order for security for costs will be made. The Court will hear the parties as to the basis upon which an order for security for costs ought to be made in the circumstances and particularly as to whether it falls to be made before or after directions are given as to the issues that might usefully be tried between the parties with a view to limiting the extent and cost of this litigation.