Neutral Citation Number: [2010] IEHC 346

**THE HIGH COURT**

**2010 7042 P**

**BETWEEN**

**TIMOTHY LYNCH, JACQUELINE CLUNE, JOSEPH KILROY, FRANK LUCEY, DAVID O'CONNOR, THOMAS CORCORY, MARY GANNON, JOHN SHEEHAN, CHRISTINA TAUT, BRIAN O'LEARY, KATIE O'CONNOR, ANNE TWOMEY, HOWARD GROSS, PIOTR BIELLICKI, DONALD DALY, RONAN CUDDIHY, CATHERINE SKELLY, JOHN SULLIVAN, PAVLINA FAGAN, PATRICK MAGUIRE, JOHN HEANEY, CATHERINE BARRY, CORINNE DWYER, DEIRDRE TWOMEY, THOMAS SHERIDAN, JULIE O'MARA, FRANK ROWE, THOMAS GUIHAN, PADDY MCKIBBEN, RORY LINEHAN, FIONA TWOHIG, AIDAN HIGGINS, JOHN HENNESSY, MYLES LEVINE, SHANE BYRNE, THOMAS TWOMEY, GERARD REYNOLDS, DENISE NOLAN, CLAIR KILGARRIFF, BRYAN HEFFERNAN, TOM O'CONNOR, LIAM TUOHY, NIAMH MORRIS, MICHAEL CROWLEY, TOM MCCARTHY, NUALA CAGNEY, DEREK O'RIORDAN, KEN O'CONNELL, ROBERT GILBOURNE, PETER MCKENNA, ELAINE GRAHAME, FERGAL BEGLEY, BRID CANTWELL, TONY WELSH, MICHAEL O'SULLIVAN AND CHRISTOPHER SCOTT**

**PLAINTIFFS**

**AND**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**JUDGMENT of Ms. Justice Irvine delivered on the 12th day of August, 2010**

1. This is an application for an interlocutory injunction. Initially, that application was made on behalf of all of the 56 plaintiffs to these proceedings but is now maintained only on behalf of the following named plaintiffs, namely: Dr. Jacqueline Clune, Dr. Joseph Kilroy, Dr. Frank Lucey, Dr. Christina Taut, Dr. Brian O'Leary, Dr. Anne Twomey, Dr. Howard Gross, Dr. Piotr Bielicki, Dr. Catherine Skelly, Dr. Pavlina Fagan, Dr. Catherine Barry, Dr. Corrine Dwyer, Dr. Thomas Sheridan, Dr. Thomas Guihan, Dr. Frank Rowe, Dr. Fiona Twohig, Dr. Myles Levine, Dr. Shane Byrne, Dr. Niamh Morris, Dr. Michael Crowley, Dr. Tom McCarthy, Dr. Robert Gilbourne, Dr. Elaine Grahame, Dr. Brid Cantwell and Dr. Bryan Heffernan.

2. The relief sought on the present application is:-

> "1. An interlocutory injunction restraining the defendant, its servants or agents or any of them, acting howsoever from giving effect or purporting to give effect to Circular No. 008/10 on April 26th 2010 issued by the Primary Care Reimbursement Service of the Health Service Executive;
>
> 2. Such further or other order as to the Honourable Court may consider appropriate."

3. The plaintiffs are all dentists providing dental treatment services under the Dental Treatment Services Scheme ("DTSS") operated by the defendant, the HSE.

4. In the substantive proceedings the plaintiffs are challenging the decision taken by the defendant by means of Circular No. 008/10 of 26th April, 2010, to give effect to a cap of €63 million imposed on the DTSS expenditure in the context of the budget of the Department of Health and Children for the year 2010. It is agreed that the effect of the introduction of the Circular is that it fundamentally changes the contract initially entered into between the Health Boards and contracting dental practitioners in 1994 and which contract was subsequently varied in 1999.

5. In broad terms, prior to the introduction of the Circular, contracting dental practitioners were entitled to provide what was described as "above the line" dental treatment to eligible persons without the prior approval of the Health Board; whereas in the case of "below the line" treatments, which were of a more complex variety, these did require prior approval by the Health Board. It is common case that by reason of the introduction of the Circular those eligible for treatment under the DTSS will now only be provided with emergency dental care.

6. The plaintiffs contend the terms introduced in the Circular amount to a breach of their respective contracts with the defendant. The defendant on the other hand maintains that it can lawfully unilaterally vary the terms of the DTSS. For the purposes of this interlocutory application it is conceded on behalf of the defendant that the plaintiffs have established that there is a fair question to be determined at the trial of the action. Thus the issues on the present application are confined to firstly deciding whether or not damages will be an adequate remedy for these plaintiffs if the relief they seek is refused and they succeed in their action and secondly, if in doubt on that issue, whether the balance of convenience favours the granting of the injunction sought. It is maintained on behalf of the 26 plaintiffs who continue to pursue their right to an injunction that they are all in a position worse than that of two other dentists who instituted proceedings seeking relief in similar terms which came before the High Court (Laffoy J.) for hearing on 11th June last. Further, Counsel on their behalf maintained that each of them was facing a real risk of having to close their practice between now and date of the determination of the legal issues at stake in these proceedings.

7. On 16th June, 2010, Laffoy J. granted an injunction to two dentists providing services under the DTSS restraining the defendant from giving effect to or purporting to give effect to the Circular (*Reid and Turner v. HSE,* Record No. 2010 4478P).

8. In her judgment at paras. 3.2 Laffoy J. recounted that the Irish Dentists Association ("the IDA") on behalf of its members had, in the previous six months, repeatedly expressed its willingness to engage in negotiations with the HSE in relation to the DTSS but this offer had not been taken up. The offer to negotiate was repeated in a letter sent by the plaintiffs' solicitors to the HSE dated 13th May, 2010. Subsequently an offer was made on behalf of the HSE to participate in mediation and this offer was rejected by the plaintiffs' solicitors as being inappropriate. There was further correspondence between the parties, and the HSE's solicitors invited the plaintiff's solicitors to a direct meeting and the plaintiff's solicitors requested that the HSE would put "any formal proposals in writing that could be the basis for discussions". By letter dated 4th June, 2010, the solicitors on behalf of the HSE replied that this suggestion was "unhelpful" and suggested a meeting between the representatives of the HSE and the IDA on a "without prejudice"

basis in an attempt to achieve a resolution. There was a further letter of 9th June, 2010, from the plaintiffs' solicitors indicating that their clients were open to "without prejudice discussion" but that pending a satisfactory resolution of the matters the plaintiffs would continue their application for interlocutory relief.

**Judgment of Laffoy J. delivered 16th June, 2010**

9. At para. 4.6 of her judgment Laffoy J., in applying the well known Campus Oil principles, said the plaintiffs had to establish:-

> (a) that there is a fair issue to be tried between the parties;
>
> (b) that damages would not be an adequate remedy for them, if the injunctive relief is refused and they are ultimately successful at the trial of the action; and
>
> (c) that the balance of convenience favours the grant of the injunction.

10. Both plaintiffs in that case swore grounding affidavits in support of their applications for interlocutory relief.

11. The first named plaintiff averred that his income from the DTSS in 2009 represented approximately 68% of his total practice income. The first named plaintiff also averred that he had seen a significant fall in patient numbers since the date of the Circular because patients were "actively declining treatment on the basis that it will not be covered by the DTSS". He further averred that the number of appointments had fallen by two thirds and as a result he had to lay off a part-time dental hygienist. Practice income had been reduced by approximately 50% and he estimated it would be likely to fall by up to 80% by the end of June due to reduced patient numbers. As a result the practice had to move to part-time hours and the plaintiff estimated his practice would face closure within 4-6 weeks.

12. The second plaintiff appeared to be in a less precarious position. In his ground affidavit the second plaintiff averred that his income from the DTSS in 2009 represented 30% of his total practice income. It was stated that the effect of the implementation of the Circular "would call into question the viability of the practice and would inevitably result in 'letting people go'". The second plaintiff employed a dental surgery assistant and a dental associate.

13. The evidence of the plaintiffs was contested on behalf of the HSE in an affidavit sworn by Mr. Bourke. However, Laffoy J. found that when he swore that affidavit the effects of the Circular had only been in place for approximately 5 weeks and took judicial notice of the fact there was a time lag in submissions by dental practitioners of claims under the DTSS. In other words the full effects of the Circular were not apparent at the date Mr. Bourke swore his affidavit. As a result Laffoy J. held Mr. Bourke's evidence was of no probative value.

14. Laffoy J. was satisfied on the evidence before her, i.e. the affidavits of the plaintiffs as to the effect of the Circulars on their practices, that the "viability of the dental practice of each of them is at risk and each may be forced to close down the practice in the interim". As a result she concluded "the plaintiff will probably suffer irreparable damage pending the trial of the action" and therefore "damages would not be an adequate remedy".

15. At the hearing of the present application, counsel on behalf of the plaintiffs submitted I should be bound by the decision of Laffoy J. in *Reid and Turner v. HSE* in accordance with the principles in *Irish Trust Bank Ltd. v. Central Bank* [1976/77] I.L.R.M. 50. In that case Parke J. said:-

> "I fully accept that there are occasions in which the principle of stare decisis may be departed from but I consider that these are extremely rare. A court may depart from a decision of a court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the judge disregarded or misunderstood an important element in the case or the arguments submitted to him or the authority cited or in some other way departed from the proper standard to be adopted in judicial determination. …. Whatever may be the case in courts of final appellate jurisdiction a court of first instance should be very slow to act on such a proposition unless the arguments in favour of it were coercive. If a decision of a court of first instance is to be challenged I consider that the appellate court is the proper tribunal to declare the law unless the decision in question manifestly displays some one or more of the infirmities to which I have referred. The principle of stare decisis is one of great importance to our law and few things can be more harmful to the proper administration of justice which requires that as far as possible lay men may be able to receive correct professional advice than the continual existence of inconsistent decisions of courts of equal jurisdiction."

16. I entirely agree with that statement, however, I do not think it necessarily applies in a case where an applicant is seeking interlocutory injunctive relief. Two arguments were advanced at the hearing of this application. First, that Laffoy J. decided the issue of entitlement to interlocutory relief in *Reid and Turner v. HSE* on facts similar to this case and therefore the court should follow that decision in this case. I cannot agree with that argument. An interlocutory injunction is a discretionary remedy and a plaintiff's entitlement to such relief must be determined on the facts of his or her own particular case. In this case there are 26 individual plaintiffs in differing circumstances and the court must take a view of the evidence adduced in this application and apply the *Campus Oil* principles to the facts of this application. The evidence before Laffoy J. was principally the affidavit evidence of each of the two plaintiffs as countered by that of Mr Bourke which she found to be of little value. In this case there is a significant amount of expert evidence proffered in relation to each plaintiff. Two accountancy reports have been delivered on behalf of the plaintiffs and also on behalf of the defendant. On the other hand, unlike in *Reid and Turner v. HSE,* there are no individual affidavits sworn by the plaintiffs setting out or verifying their individual circumstances. The task for this court is to apply the *Campus Oil* principles to the facts of this case based on the evidence adduced. I cannot accept the proposition that this court should simply follow the decision of Laffoy J. in a related proceeding.

17. The second argument is that Laffoy J. determined, as a matter of law, that the going out of business, or the closure of the dentists' practices amounted to irreparable harm that would not be adequately compensated by damages and this court is therefore bound by that determination of law. However, even if I am satisfied that the closure of a dentist's practice could cause irreparable harm that might not be adequately compensated by an award of damages, I must still determine if the individual plaintiffs in this case have adduced sufficient evidence to convince the court that there is a real risk that their practices will close in the short interim period between now and the delivery of judgment in *Reid and Turner v. HSE*,. In this regard it is of vital significance to this decision that it has been agreed that the judgment in *Reid and Turner v. HSE* will determine the legal issues in these proceedings. Accordingly, if those plaintiffs are successful, all of the plaintiffs in these proceedings will have their pre 26th April, 2010 contractual terms reinstated with immediate effect. Finally, on this issue there were several authorities opened to me at the hearing of this application as to whether insolvency or going out of business can constitute irreparable harm, that are not referred to in the judgment of Laffoy

J. and which it is appropriate for the court to take into account.

**Irreparable harm**

18. In *Curust Financial Services Ltd. v. Loewe-Lack Werk* [1994] 1 I.R. 450 the first defendant in 1986 had given the plaintiff the sole and excusive licence to manufacture, sell and distribute its paint product within Ireland and the United Kingdom. In 1990 the first defendant declared the agreement was at an end and at the end of 1991 ceased to supply the plaintiff. An agreement was entered into between the first and second defendant, whereby the second defendant would market the first defendant's paint in Ireland. The plaintiff issued proceedings in the High Court seeking a declaration that the first defendant was bound by the 1986 agreement and also seeking an injunction restraining the first defendant granting the second defendant the right to manufacture, sell or distribute its product in Ireland or the United Kingdom. An injunction was also sought against the second defendant. The plaintiff was successful in the High Court in obtaining an interlocutory injunction. On the issue of the adequacy of damages Barron J. said at pp. 456-457:-

> "The next issue is whether or not damages would be an adequate remedy. Damages are clearly an adequate remedy if they are liquidated in circumstances where there is no particular interest in the plaintiff to maintain the right save to obtain such damages. Save in the situation envisaged by Lord Cairns' Act where the damage is small, damages which are not readily susceptible to accurate measurement are not usually an appropriate remedy. A rich man has never been entitled to buy out the rights of a poor man just because he wishes to do so. For example the owner of premises which would be devalued by a readily ascertainable amount cannot be forced to accept that sum in lieu of an injunction to restrain a defendant from infringing that right. In my view that in essence is what the defendants are saying here: if there is a breach of the 1986 agreement, then the first defendant can pay the plaintiffs the value of the business which they will lose as a result. I do not accept such a proposition.
>
> I was referred in argument to *Westman Holdings Ltd. v. McCormack* [1992] 1 I.R. 151. In that case the question of the adequacy of damages as an alternative to an interlocutory injunction arose for consideration. The court took the view that in the particular case it was unlikely that the defendants would be in a position to pay such damages to the plaintiffs and found that the balance of convenience was in favour of granting an injunction. However, does seem to me that there is nothing in that case which suggests that the test for the adequacy of damages in the interlocutory period should be any different from the test as to the adequacy of damages before a final judgment is given. Where trade is involved, as in this case, it is always difficult to determine whether trade has been lost by reason of the failure to obtain the injunction or whether it has been lost through other causes, and equally, it is difficult if the injunction is ultimately given to establish whether or not all the trade which was lost has come back and if it has not, why it has not. In such cases it is also fairly notorious that people once they change over from a product which they have been using do not always return to that product when they are free to do so. Having regard to these views and to what I regard to be the general principles as to the adequacy of damages it seems to me that damages would not be an adequate remedy in the present case."

19. However, on appeal the Supreme Court reversed the decision of the High Court and held the plaintiff was not entitled to an interlocutory injunction. At p. 468 of his judgment Finlay C.J. said the issue of adequacy of damages was "the most difficult issue" arising on the appeal. The Chief Justice identified three issues raised by the plaintiff in this case in relation to the adequacy of damages.

> 1. There was no suggestion that if the plaintiff was awarded damages at the trial for breach of contract that the defendant would not be in a position to pay those damages.
>
> 2. The loss likely to be sustained by the plaintiff if the injunction was not granted would be "purely and simply a commercial loss arising from the diminution in trade" and therefore capable of quantification and assessment, but that it may be difficult, if not impossible, to quantify the future loss of profits which would continue to be sustained until the plaintiff recovered its share of the market.
>
> 3. If the plaintiff continued to suffer the losses it had already sustained up to the trial of the action, having regard to the proportion of its turnover and gross profits which the sales of the first defendant's product constituted, the plaintiff might not survive as a solvent trading unit.

20. In my view, exactly the same issues arise on the facts of this application. First, there can be no doubt that if the plaintiffs are successful in establishing a breach of contract at the trial of the action, that the HSE, as a state body, will be able to pay any damages awarded. Secondly, the losses actually suffered up to the date of the hearing by reason of the alleged breach of contract will be capable of quantification; however, there may be some difficulty, but not impossibility, in calculating future loss arising from the alleged breach of contract. Third, the plaintiffs in this case make the case they are likely to have to close their practices as a result of the alleged breach of contract and the reduction in income under the DTSS.

21. In relation to the second issue Finlay C.J. said at pp. 468-469:-

> "The loss to be incurred by Curust if it succeeds in the action and no interlocutory injunction is granted to them, is clearly and exclusively a commercial loss, in what had been, apparently, a stable and well-established market. In those circumstances, *prima facie*, it is a loss which should be capable of being assessed in damages both under the heading of loss actually suffered up to the date when such damages would fall to be assessed and also under the heading of probable future loss. Difficulty, as distinct from complete impossibility, in the assessment of such damages should not, in my view, be a ground for characterising the awarding of damages as an inadequate remedy."

22. In relation to the third issue, Finlay C.J. said at pp. 469- 472:-

> "There remains the question as to whether, on the evidence which was before the learned trial judge, it was open to him to conclude that damages would not constitute an adequate remedy by reason of a real risk that the postponement of their payment necessarily involved until after the determination of the action, would lead to the collapse, from a financial point of view, of Curust. Although this issue was submitted in the High Court and is the subject matter of certain averments in the affidavits, it was not decided by the learned trial judge because, for other reasons, he concluded that damages would not be an adequate remedy and proceeded on to consider the balance of convenience.
>
> Since this issue on affidavit and the inferences to be drawn from it was not decided in the High Court, by reason of the learned trial judge's view that damages were for other reasons not an adequate remedy, and since I find myself in disagreement with that view, it is necessary that I should reach a conclusion on the affidavit evidence as to whether it has, as a matter of probability, been established at this stage for the purpose of the interlocutory injunction that

> damages would not be an adequate remedy, by reason of the real risk of the financial collapse of the Curust companies. In my view, having regard to all the factors which I have outlined, there has not been established such a case as a matter of probability. No information is forthcoming about the general position of the companies with regard to their indebtedness or net assets situation. No attempt has been made to assess the probable result of competition between Curust and Sales Ltd. in relation to this market for rust primer, except an averment on affidavit that Sales Ltd. is underselling Curust with regard to the cost of the rust primer being offered for sale."

23. Thus the Chief Justice was satisfied the plainitff had not established a real risk of insolvency if the injunction was not granted and he did not need to determine whether, as a matter of principle, insolvency or going out of business could constitute a form of irreparable harm such that damages would not be an adequate remedy.

24. O'Flaherty J. also considered adequacy of damages and at p. 473 he indicated that because the plainitff was not being deprived of access to the market, but rather required to share the market with the second named defendant, there was no question that damages would not be an adequate remedy, but that "were it not for that factor I would hold that the matter was so finely balanced as to require a further inquiry as to where the balance of convenience lay. I would not, except for that circumstance, regard damages as an adequate remedy."

25. In my view a similar consideration applies here. The plaintiffs in this application operate both private and public practices and receive income from their private practices as well as under the DTSS. Each dentist has differing degrees of dependency on the DTSS. However, even under the changes introduced by the Circular, each dentist continues to be eligible to participate in the DTSS and will receive some, albeit a significantly reduced, income under the scheme. As well, each dentist continues to derive income from his or her private practice, although it is contended that the number of private patients has also been reduced. The fact is that all the plaintiffs will continue to receive some income from their practice as heretofore. The question is whether the reductions in income resulting from the changes introduced under the Circular will cause the plaintiffs to close their practices with the result that they will thereby suffer irreparable harm. The burden is on the plaintiffs to show that this is so.

26. In *Ó Murchú T/A Talknology v. Eircell Ltd.* [2001] I.E.S.C. 15 the plaintiff was refused an interlocutory injunction in the High Court the effect of which would have been to compel the defendant to continue supplying mobile phones to the plaintiff and to treat the plaintiff as its authorised agent. Kearns J. (as he then was) in an *ex tempore* judgment in the High Court held damages would be an adequate remedy to compensate the plaintiff for any loss suffered by him. The plaintiff carried on a business of selling mobile phones and expanded his business and opened additional shops under commercial leases. In the summer of 2000 there was a dispute between the parties. The plaintiff wanted to place a large order for the Christmas sales and the defendant refused to supply the order. The plaintiff brought proceedings seeking interlocutory relief "because he claimed that his trade would be ruined particularly having regard to the loss of the Christmas business". Geoghegan J. held that there was an arguable case and a fair question to be tried. However, he held damages would be an adequate remedy and at paragraph 12 of his judgment he said:-

> "I move now to the question of whether damages would be an adequate. remedy. The learned High Court judge clearly thought it was and I would have to agree with him. In every case in which there is a breach of an agency or distribution agreement the task of assessing damages will be difficult, but that does not mean that it cannot be done. The respondent is a viable company and is financially in a position to meet any award in damages that may be made against it. The appellant's loss is essentially financial. An interesting feature of the case is that much of the argument put forward on behalf of the appellant in the High Court was that the Christmas trade was absolutely vital and that without it, he would go out of business. The plaintiff is still in business, But even if he does go out of business, as a result of losing the agency, his losses can be assessed in money terms. There is a further reason why I think that damages are an adequate remedy. If there is an implied or oral agency agreement, that agreement would be terminable upon reasonable notice and I doubt very much that the appellant would be able successfully to argue that the length of that notice could be more than six months, Depending on the evidence of the trade it might be less. Any damages to be assessed therefore would be confined within a limited period. I am not, of course, expressing any view as to how damages are to be assessed in the event of a finding of infringement of the Competition Act as that is not before this court. But in so far as the appellant is complaining of breach of contract the damages would be limited in the manner which I have suggested, that should not make them too difficult to assess."

27. In my view, the decision of the Supreme Court was coloured by the fact that at the time of the appeal to the Supreme Court (judgment was given on 21st February, 2001) the plaintiff was still in business and had obviously survived the anticipated loss of business over the Christmas period. Nevertheless, the judgment indicates that insolvency or going out of business per se will not result in irreparable harm that cannot be adequately compensated by damages. However, there may be special features of a particular case which could convince the court that the closure of a business would constitute irreparable harm and damages would not be an adequate remedy.

28. In *Sheridan v. The Louis Fitzgerald Group Ltd.* [2006] I.E.H.C. 125 the plaintiff operated a catering business and together with a third party became the proprietor of a company which entered into an agreement with the defendant to provide catering services. It was alleged an agreement was reached between the parties under which the company would take a lease of a restaurant premises. This was denied by the plaintiff. The plaintiff sought an interlocutory injunction requiring the defendant to perform the alleged agreement to enter into the lease.

29. Clarke J. held there was a fair issue to be tried. On the issue of the adequacy of damages in this case Clarke J. noted at para. 4.2 that the plaintiff's argument was that if he did not obtain interlocutory relief he would be deprived of the ability to run the restaurant for the intervening period and might suffer further losses. Clarke J. referred to the decision of the Supreme Court in *Curust Financial Services Ltd*. and the decision of Kelly J. in *Smith Kline Beacham plc v. Genthorn BV* (28th February, 2003) where it was noted that "the onus was on the plaintiff, as a matter of probability, to demonstrate the risk that damages would prove to be an inadequate remedy".

30. Clarke J. noted that in this case the restaurant business was already up and running and an alternative contractor was in place to provide catering services for the defendant. He also noted that the case was "no more complex than many issues which arise in the course of the calculation of damages in commercial litigation".

31. Clarke J. said at para. 4.5:

> "4.5 It is clear from *Curust* that Finlay C.J. had regard not only to the loss which could be established up to the date when damages would be assessed but also to probable future loss. There is no reason in principle, therefore, why Mr. Sheridan would not be entitled to damages to compensate him for any loss which he could establish as being likely to

arise subsequent to the date of assessment of damages. If he can persuade the court that, as a matter of probability, the business as of that date was less than it would have been had he been operating it, he would, undoubtedly, be entitled to damages to compensate him for losses that would accrue during whatever period the court considered would be needed to enable the business to catch up to the position in which it would have been, had Mr. Sheridan had the opportunity to run it from the beginning. While there would undoubtedly be difficulties in such calculation it seems to me that such difficulty falls far short of the impossibility identified by Finlay C.J. in *Curust*.

4.6 In those circumstances I was satisfied that damages would be an adequate remedy. There is no suggestion that Fitzgerald would not be in a position to meet any such damages. On that basis it did not seem to me to be appropriate to grant the interlocutory injunction sought."

32. Similarly in *Clane Hospital v. VHI* [1998] I.E.H.C. 78 the plaintiffs were proprietors of five private hospitals. The defendant was the VHI and the plaintiffs were unhappy with the reductions introduced by the defendant to prices and charges in its new scheme and contended the new prices and charges were so low as to be less than the cost of the provision of the services and would lead inevitably to continuing and increasing losses and eventual insolvency for the plaintiffs and closure of the hospitals concerned. The plaintiffs sough an interlocutory injunction restraining the defendant from replacing the scheme of prices and charges which previously operated. Quirke J. was satisfied the plaintiffs had raised a fair question to be tried and proceeded to consider the adequacy of damages. It was argued that there was evidence the plaintiffs faced imminent bankruptcy which would inevitably result in the closure of some or all of the hospitals concerned and that it would be impossible to quantify the damage suffered by the plaintiffs. On behalf of the defendant it was contended that no evidence was adduced which could reasonably give rise to the inference that any of the plaintiffs were in danger of bankruptcy before the hearing of the action in at most six months time. It was also contended that any loss suffered could be calculated "having regard to the ready availability of documentation disclosing levels of remuneration, charges and prices applicable" prior to the new scheme being introduced.

33. At p. 13 of his judgment Quirke J. said there were two questions:

"1. Have the Plaintiffs established by way of evidence a real risk that the hospitals owned and run by the Plaintiffs or any of them face closure by reason of a real and perceived act or omission on the part of the Defendant and in particular by reason of the introduction by the Defendant of its new scheme and levels of remuneration, prices and charges between the date of its implementation and the date of the trial of the substantive issue herein?

2. If the Plaintiffs are ultimately successful in establishing their right to a permanent injunction in the terms sought herein, would it be possible for the court to measure the appropriate damages recoverable at common law for the loss which the Plaintiffs will have sustained as a result of the Defendant's introduction of their new scheme from the date of its implementation to the date of trial (approximately six months or thereabouts after the date of the hearing of the application for the relief sought herein)."

34. At p. 17 of his judgment Quirke J. said:-

"Whilst all of the foregoing three witnesses on behalf of the Plaintiffs deposed to the fact that the proposed new scheme introduced by V.H.I. was likely to put the future of the Plaintiffs' hospitals in jeopardy and would undoubtedly require the Plaintiffs to trade at a loss and whilst Mr. Fingleton deposed to the fact that it was *possible* that'... those hospitals that operated with excess capacity in 1995 and 1997 could be driven into bankruptcy under this new pricing structure'. It may be of significance that none of the deponents felt able to express the conviction that, by reason of the introduction of V.H.I. 's new scheme, any of the hospitals are faced with immediate closure or will be required to close within any particular period of time."

35. And at p. 19 Quirke J. continued:-

"The only evidence adduced on behalf of the Plaintiffs which would suggest that the hospitals owned by the Plaintiffs face closure by reason of the introduction of the V.H.I. 's scheme with effect from 2nd April, 1998 is the averment contained at paragraph 65 of Mr. Heavey's Affidavit sworn on the 14th April, 1998 wherein he states:-

> 'In the light of the very serious consequences for the future of each of the Plaintiffs, I say and believe that damages would not be an adequate remedy. The Plaintiffs may well be put out of business by the time this action comes on for trial.'

Reading that paragraph in conjunction with the succeeding two paragraphs, I have the clear impression that the averment concerned is intended to deal in a general way with the requirements for interlocutory relief and that is not unusual when Affidavits are sworn grounding applications for relief of the type sought herein. Such averments are perfectly proper and I have no doubt that the averment concerned was conscientiously made by Mr. Heavey in this case. However, I do believe that it is supported by any evidence which has been adduced at the hearing of this application."

36. Quirke J. concluded that:-

"It appears to me that if the hospitals owned by the Plaintiffs or any of them were facing such imminent closure as is suggested, then the Boards of Directors of the Plaintiffs affected would by now have met (possibly in crisis) or, at very least, financial institutions would have been approached with the view to providing support sufficient to enable the survival of the institutions concerned or some other measures signifying crisis would have been taken.

Counsel on behalf of the Plaintiffs has referred to correspondence between the Plaintiffs and V.H.I. which predicted dire consequences (including closure) for the Plaintiffs if the new scheme were to be introduced and contends that this correspondence, when read together with the evidence on Affidavit to which I have already referred, gives rise to an *inference* that the hospitals owned by the Plaintiffs are likely to face closure by reason of the application of the new scheme between April of 1998 and the date of trial of the substantive issue.

I am afraid that I cannot draw such an inference. I am satisfied that if any of the hospitals concerned were facing closure by reason of the application of this scheme for the period concerned, then some evidence would have been adduced in support of that contention."

37. Quirke J. then referred to the decision of the Supreme Court in *Curust Financial Services Ltd. v. Loewe-Lack Werk* and said he

was satisfied "on the evidence that the nature and character of the Plaintiffs' hospitals are such that if they, or any of them, are forced to *close* by reason of the introduction by V.H.I. of the new scheme then the damage to the hospitals will be such as to be incapable of remedy by way of an award of damages".

38. It is also noteworthy that Quirke J. referred to the judgment of Finlay C.J. in *Curust* and said this was authority for the proposition that "where it is argued that damages will not be an adequate remedy by reason of the real risk of the financial collapse of a commercial concern then there is an onus upon such a commercial concern to establish such a risk 'as a matter of probability'."

39. Quirke J. also considered whether it would be possible for the court at the trial of the action to measure appropriate damages. He was of the view that damages "can be readily calculated" and "should not cause any greater difficulty than would arise in the assessment of damages in cases which come before the courts every day".

40. Quirke J. also noted that there was no doubt the VHI had the capacity to pay any damages which may be awarded against it. The application for an injunction was accordingly refused.

41. In all the cases opened to me the courts were not satisfied on the evidence adduced that the threat of insolvency or going out of business had been established by the plaintiffs. In Sheridan Clarke J. indicated that even if that had been established any likely future loss was capable of being compensated and calculated in damages. On the other hand in *Clane Hospital* Quirke J. was of the view that if the plaintiffs had established by evidence that their hospitals would be forced to close, given the "nature and character" of the plaintiffs business, this would amount to irreparable harm such that damages would not be an adequate remedy.

42. Having considered all of the foregoing authorities, I am satisfied there is no principle of law which establishes that insolvency or going out of business per se should be deemed to amount to proof that irreparable harm will necessarily be occasioned and that damages will not provide the plaintiff with an adequate remedy should an interlocutory injunction be refused. Whether irreparable harm is likely to be sustained is a decision that will depend on the facts of each individual case. Such a decision may rest upon the precise nature of the business of the plaintiff, the market in which they are trading and their prospects should they win their case but are refused an injunction. For plaintiffs such as those in the present case who claim they may have to close their practices, whether they are likely to sustain irreparable loss and damage may depend upon whether the potential cessation of practice anticipated is likely to be temporary or permanent, if temporary, whether it will be for weeks months or years and perhaps other factors such as the percentage of their income generated by their private practice as opposed to their DTSS practice.

43. I can envisage a situation where a dental practitioner as a result of the type of breach of contract alleged in this case could experience significant loss and damage which might amount to irreparable harm; such as where, as a consequence of going out of business even temporarily, they anticipate loosing part or all of their private dental practice, unrelated to the alleged breach of contract under which the DTSS is administered. Thus, for the sake of argument, if the plaintiffs could establish as a matter of probability a real risk that their practices will close for a significant period of time between now and the delivery of judgment in *Reid and Turner v. HSE,* this could warrant an injunction of the nature sought given that in such circumstances it might be impossible for the court to assess the financial repercussions of closure and to adequately compensate the plaintiffs by an award of damages. However, the onus is on each plaintiff to establish on the evidence the likelihood of them having to terminate their practice in such circumstances that damages will not be an adequate remedy

**Are Damages an Adequate Remedy?**

44. On the facts before me I am satisfied that the only circumstances in which damages might not provide an adequate remedy would be if I was convinced, as a matter of probability, that these plaintiffs, between now and the date of the judgment in *Reid and Turner v. HSE* were likely to close their doors to both their DTSS and private patients for **some significant period of time**. Any lesser scenario can to my mind be adequately compensated by an award of damages.

45. It is common case that the judgment in *Reid and Turner v. HSE* will dispose of the legal issue between the parties to the present litigation. The trial of that action has been fixed for 7th December next and I do not think it unreasonable for me to assume that a judgment is likely to be delivered by mid January 2011. Should the plaintiffs be successful in those proceedings, then the plaintiffs in this action should immediately find themselves back with the same income generating capacity as they enjoyed prior to the implementation of the Circular on 26th April last assuming that in the meantime they are in a position to continue on with their private practices. Indeed one could even speculate that their incomes might at that point temporarily increase due to the fact that many DTSS patients who cannot currently be treated for routine or complex dental work whilst the Circular remains in being may then seek to have that work carried out.

46. The financial loss and damage sustained by any of the plaintiffs who remain trading until January next is well capable of calculation. Presumably their private practice income will remain as it was prior to 26th April and the only question will be how much they may have lost in terms of income from their DTSS patients. Whilst it might be difficult to be 100% accurate as to the precise losses arising, they certainly cannot be considered to be incapable of calculation, which is the test on an application for an interlocutory injunction according to the Supreme Court judgment in *Curust Financial Services Ltd. v. Loewe-Lack Werk* [1994] 1 I.R. 450 . Any loss of income in respect of "below the line work" or "above the line work" can be fairly accurately estimated by reference to the monthly income received by the relevant plaintiff for similar categories of work carried out over the same period in preceding years.

47. I reject the submission made by counsel for the Applicants that, when considering whether or not damages are an adequate remedy, I should take into account matters such as potential redundancies of staff within the dental practices should the injunction sought be refused. Harsh as it may appear, it is only the plaintiffs who are entitled to damages for any breach of contract on the part of the HSE. Regrettable as it may be that a number of these plaintiffs may have to let staff go as a result of the introduction of the Circular, the effect of the alleged breach of contract on third parties is not a matter which can be taken into account when considering whether damages are an adequate remedy. If this was so, the court would find itself constrained to grant injunctions in any case where it could be alleged that, absent an injunction, one or more redundancies might occur notwithstanding the fact that the potential loss of the plaintiff concerned was well capable of being compensated in monetary terms. That cannot be a correct proposition. However, if the court concluded that there was a doubt as to whether or not damages constituted an adequate remedy, then potential redundancies might fall to be considered by the court when dealing with the issue of the balance of convenience.

48. If I was satisfied from the evidence that there was a real risk that the remaining 26 plaintiffs might have to terminate their practices in early course, such that they would not be available to their private patients **for a substantial period of time** between now and January 2011, I would grant them the relief they seek. I would do this because it would then be inevitable that a significant number of their private patients would migrate to other dental practices, and even a prompt resumption by the plaintiffs of their practices in mid-January 2011 might not result in the return of those patients. In such circumstances there would be no certain way

of knowing what new or existing patients were lost by reason of the closure. The calculation of damages could in such circumstances be so speculative that they would have to be considered an inadequate remedy for the purpose of an application for interlocutory relief.

49. On the evidence, I am not satisfied that the 26 plaintiffs who have continued with their claim for an interlocutory injunction have discharged the burden of proof necessary to satisfy me that their practices are likely to terminate for any significant period between now and January next. In coming to this conclusion, I have considered well in excess of 500 pages of pleadings, exhibits, correspondence and expert testimony. It is not possible for me in the time frame which is reasonable for the delivery of a judgment on an interlocutory application to analyse and rehearse the facts pertaining to the cases of each of the 26 plaintiffs. However, I will try to demonstrate by reference to the case made on behalf of a number of these plaintiffs, and also by reference to the affidavits and exhibits relied upon, the factors which have led me to conclude that the burden of proof has not been discharged.

50. In reaching my conclusions, I have paid particular regard to the expert reports prepared by Mr. David McCaffrey, Chartered Accountant, on behalf of the plaintiffs and that of Mr. Kieran Wallace, Chartered Accountant, on behalf of the defendant. Mr. McCaffrey has prepared a spreadsheet setting out a significant amount of helpful financial information in relation to each of the plaintiffs. In particular, he advised the Court as to the total income of each of the plaintiffs from their DTSS practice and from their private practice in 2009 thus confirming what percentage of each plaintiff's total income was earned from their DTSS practice. Further, Mr. McCaffrey anticipated the likely earnings of each of the plaintiffs from their DTSS practice and their private practice for the current year taking into account the introduction of the Circular. The spreadsheet also shows the projected loss of profit for each plaintiff in this financial year and shows that loss as a percentage of overall gross profit. From his analysis, he has concluded that in the year 2010 the plaintiffs will sustain on average an overall reduction of 17% in their total income. For those with a greater part of their practice dependant on their DTSS contract, that percentage could be very much higher. In such circumstances he concluded "this fall in net income constitutes irreparable damage to the plaintiffs and will give rise to possible closures and redundancies." Mr Wallace on the other hand believes the average overall projected fall in income will be closer to 13% for 2010 as a result of the implementation of the Circular.

51. Having considered the reports furnished by Mr. Wallace, I have come to the conclusion that it is likely that the figures prepared by Mr. McCaffrey potentially overstate, in respect of each plaintiff, the likely consequences of the introduction of the Circular. Firstly, he has made an assumption that in the year 2010 each plaintiff will sustain a 15% reduction in their private practice income. Whilst common sense would suggest that there may perhaps be some reduction in the income of dentists from their private practice due to the current economic climate, it may be less than 15% and I note that Mr. McCaffrey has not supported this reduction by reference to information supplied to him by the plaintiffs. Further, he states it is reasonable to prepare the projected profits for 2009 and 2010 by using certain assumptions as to the level of fixed and variable costs which each of the plaintiffs is likely to incur, an approach criticised by Mr Wallace. Also, when projecting such costs for 2010 Mr McCaffrey has not, as complained of by Mr Wallace, considered whether in the present economic climate those costs might be expected to fall. However, most importantly the figures allowed for fixed and variable costs are not real. The fixed and variable costs incurred by each of the plaintiffs for 2009 must have been readily available from the same source that furnished him with details of the plaintiffs' private income for the same period. It goes without saying that if the fixed and variable costs were as a matter of fact less than those estimated by Mr. McCaffrey, then the projected profit for these plaintiffs for the years 2009 and the 2010 could be well be significantly in excess of that predicted.

52. Even assuming that the Circular will have the effect which Mr. McCaffrey predicts in terms of an overall reduction in income, an assumption I reject, it does not necessarily follow that any such reduction, or indeed the fact that any or many of the plaintiffs may face a number of months of unprofitable trading, will necessarily cause them to terminate their previously profitable practices, particularly when they may be certain at the time of making any decision regarding the viability of their practice that they will be in a position to return to their previous level of earnings, should the decision in *Reid and Turner v. HSE* be in their favour, by January 2011. On the evidence before me I am not satisfied that the plaintiffs are at a real risk of having to terminate their DTSS and private practices for any significant period prior to January 2011. In an effort to illustrate why I have come to this conclusion I will now briefly refer to some aspects of the financial information furnished pertaining to a number of the plaintiffs.

**Dr. Clune**

53. For the purposes of the present analysis I am using the figures set out in Mr. McCaffrey's spreadsheet even though, as already stated, I am satisfied from Mr Wallace's report that it is highly probable that he has underestimated the profitability of the plaintiff's practices for both 2009 and 2010.

54. In the year 2009, Dr. Clune had a turnover of €537,554 made up as to €240,287 from her DTSS practice and a sum of €297,267 from her private practice. After the deduction of total estimated fixed and variable costs of €296,760 she is given a projected gross profit for 2009 of €240,795. For 2010, Mr. McCaffrey speculates that in light of the Circular Dr. Clune's DTSS practice will now only produce an income of €178,095, and her private practice an income of €252,677 (allowing for an estimated 15% reduction), giving her a projected gross profit of €153,234 having allowed for estimated fixed and variable costs in a total sum of €277,539.

55. What is manifestly clear from these figures is that Dr. Clune made a very significant profit in 2009. Her practice will remain profitable for the year 2010 notwithstanding the fact that the Circular will have impacted significantly on her DTSS income. What is equally clear is that she continues to have a very significant private practice available to her between now and January 2011. Even allowing for the 15% reduction in that practice, *per* Mr. McCaffrey's report, she may still expect a turnover in excess of €20,000 a month from her private practice over this period and she will also continue to have a certain amount of income from her DTSS practice.

56. Even if it be the case that Dr. Clune anticipates that for a number of months her overheads will exceed her income, I remain unconvinced that, with a private practice of the nature outlined in Mr. McCaffrey's report, she cannot continue to practice in some shape or form so as to service her private patients over the brief finite period between now and January 2011 when, if the plaintiffs are successful in *Reid and Turner v. HSE*, she may expect an immediate return to the highly profitable practice she enjoyed prior to May of this year. Also, in addition to returning to her pre 26th April, 2010 profitability I do not think it unreasonable to assume, although I do not decide the issue on this basis, that she might well experience an uplift in her DTSS income over and above that enjoyed by her immediately prior to the introduction of the circular by reason of the fact that those DTSS patients who needed non-emergency dental work done whilst the circular was in being, may then seek to have it carried out with fairly immediate effect.

**Dr. Heffernan**

57. In the year 2009, Dr. Heffernan had a turnover of €427,886 made up of €154,039 from DTSS income and a sum of €273,847 from his private practice. Based on these figures he has been allocated a projected profit for the year 2009 in the sum of €200,867 allowing for variable and fixed costs. For the year 2010, Dr. Heffernan is expected to have a gross profit of €134,491 from his practice. It is anticipated that his DTSS income will be €114,170 and his non-DTSS income, a total sum of 232,770.04. His projected

gross profit figure takes into account the sum of €212,449 for estimated fixed and variable costs.

58. This is yet another case where one of the plaintiffs appears to have enjoyed a very successful practice prior to the implementation of the Circular. Notwithstanding the implementation of the Circular, he must expect to enjoy considerable ongoing income from his private practice between now and January 2011. Whilst that income may not leave him in a state of profitability over those months, I simply cannot accept that he will be forced to close his private practice because of a lack of profitability over such a short period of time having regard to the prior success of his practice and its undoubted return to very significant profitability assuming a successful outcome for the *Reid and Turner* proceedings.

59. The cases of Dr Clune and Dr Heffernan are only two of a number of cases to which similar considerations clearly apply and I do not think it helpful to repeat the exercise in respect of any of the other plaintiffs to make the same point.

60. Apart from relying upon the financial information furnished to the court as a basis for refusing the interlocutory relief sought, I have also partly based my decision upon a number of the averments contained in the affidavit of John O'Connor, the plaintiffs' solicitor. These averments also indicate a lack of clarity in the evidence in relation to the economic position of the plaintiffs pending the outcome of the *Reid and Turner* proceedings. Whilst counsel argued that each of the remaining 26 plaintiffs was at a real risk of or likely to have to close their practice before January, 2011 this assertion is not borne out in respect of all of these plaintiffs by Mr. O'Connor's affidavit. By way of example, at para. 12 of his affidavit he states that Mr. Kilroy's practice is unlikely to be viable for more than six months. The judgment in *Reid and Turner v. HSE* will have been given within that timeframe. A somewhat similar averment was made in respect of Dr. Guihan where it was stated that his practice would survive for four to six months. In respect of Dr. Crowley and Dr. Twomey it was stated vis-à-vis their practice at Carrigaline, that the practice would remain open but would not be profitable because of the significant loans on that practice. It being unlikely that their practices will close between now and January 2011, for each of these plaintiffs damages will be an adequate remedy.

61. In relation to a number of the remaining 26 plaintiffs, some of whom are specifically mentioned by name at para. 12 of Mr. O'Connor's affidavit, I have also had regard to his averment at the final bullet point at that paragraph where he stated as follows:-

> "At present, many of the other plaintiffs consider that their practices are not viable in the long term but cannot pinpoint anticipated dates of closure (Dr. Sheridan, Dr. Twohig (who is considering emigrating), Dr. Levine, who had indicated he may survive until February, Dr. Riordan, Dr. Gilbourne (who has indicated he will probably retire early at the end of the year), all fall within this category)."

62. It is undoubtedly the case that any plaintiff covered by the preceding paragraph will experience significant financial loss and damage by reason of the implementation of the Circular but once again that loss can be adequately compensated by an award of damages.

63. Another difficulty thrown up by the multiplicity of claims is some degree of confusion regarding a number of the plaintiffs who, from Mr. O'Connor's affidavit of the 3rd August, 2010, do not appear to be principals in their own practice but rather are associates in the practices of others. In this regard the respective positions of Drs. Taut, Bielicki and Morris have caused me considerable concern for a number of reasons many of which are unrelated to the issue of whether or not damages will afford them an adequate remedy in the absence of an injunction being granted.

64. First, the affidavit grounding this application which was sworn by Dr. Lynch on 21st July, 2010, set out the individual circumstances of each of the plaintiffs for the purpose of demonstrating their entitlement to an interlocutory injunction. The facts deposed to in that affidavit suggested that they were all principals in their own practices. It was stated at para. 44, *inter alia*, on behalf of Dr. Taut that "to date she has had to impose a 5% staff pay cut and shorter working hours. She anticipates that redundancies will occur in relation to her dental nurse and hygienists". Regarding Dr. Bielicki it was stated at para. 49, *inter alia*, that "to date as a result of the implementation of the Circular, shorter working hours have been imposed and it is likely that when the full impact of the Circular is felt over the forthcoming weeks, he will be required to make staff redundant". Finally, in relation to Dr. Morris it was stated at para. 78 that "she anticipates that as a result of the full impact of the implementation of the Circular in the forthcoming weeks she will be required to reduce the working hours of her dental nurses and will be required to reduce the working hours of her dental hygienist from five days per week to two days per week. In addition she anticipates that her associate dentists will lose half of their current hours".

65. Of substantial concern to me is the fact that, at para. 12 in the supplemental affidavit sworn by Mr. O'Connor, he states the following in relation to Drs. Taut, Bielicki and Morris, without making reference to the content of the affidavit of Dr. Lynch just referred to.

> "Dr. Taut is an associate. Associate dental practitioners are at greater threat as the principal dentist is likely to let go of associates to reduce costs."
>
> "Dr. Bielicki is an associate and anticipates that, as a result, he will be let go over the next three to four months and will emigrate."
>
> "Dr. Morris is an associate in two practices. She anticipates being let go from one of those practices within four to five weeks. Earnings are down 40% in the other practice and she envisages she will also be let go from that practice and emigrate as result."

66. Accordingly, it appears to be the case that, contrary to what was stated by Dr. Lynch in his affidavit, Drs. Taut, Bielicki and Morris are not principals in their own practices but are associates in the practices of other dental practitioners. Assuming that Mr. O'Connor's affidavit is accurate as to their status, it seems to be an inescapable conclusion that at least some of the plaintiffs in these proceedings were not asked to approve the content of Dr. Lynch's affidavit in relation to their own position. This affidavit was the factual basis upon which it was proposed to ask the Court to grant the injunction on 27th July last. Mr. O'Connor's affidavit was not sworn until the 3rd August and only then as a result of the affidavits filed on behalf of the defendants which hotly contested the financial case made out on the plaintiffs' behalf.

67. Of equal concern is that the information set out in Dr. Lynch's affidavit in relation to Drs. Taut, Bielicki and Morris forms the basis for Mr. McCaffrey's spreadsheet. There, each is treated as having a practice attracting substantial fixed and variable costs; and it is principally on the conclusions to be drawn from this spreadsheet that I am urged to conclude that each of the plaintiffs will sustain irreparable loss should I not grant the injunction now sought.

68. Unfortunately, I only noticed the change in the case being advanced on behalf of these three plaintiffs in Mr. O'Connor's affidavit after the hearing before me had concluded. I have therefore not been in a position to inquire into the terms of the contract which each of these three plaintiffs have with their principals. However, I think it highly unlikely that as associates they contribute to the overheads of their respective practices, or if they do, they do not do so to the extent that is ascribed to them in Mr. McCaffrey's report. Accordingly, I hope that I am not doing an injustice in assuming that, in circumstances where it is said that these three dentists are now "at risk of being let go", I may conclude that at all relevant times they were dental associates who were paid a salary or enjoyed a fee income but who did not discharge overheads of a nature outlined in Mr. McCaffrey's spreadsheet.

69. On the assumption that I am correct in this regard I will refer only to the case of Dr. Taut to demonstrate my concerns. In was stated for the year 2009 that Dr. Taut had total earnings of €42,313 made up as to €27,504 from DTSS patients and €14,809 from private patients. However, allowing for Mr. McCaffrey's substantial estimated fixed and variable costs of €42,616. a sum greater than her total income, it was anticipated that she would sustain a loss of €303.00. As a result of the implementation of the Circular, the court was then asked to accept that for the year 2010 Dr. Taut's practice would show a loss of €7,962. on the following basis. It was estimated that she would have a fee income of €32,973 made up as to €20,385 from DTSS patients and €12,588 from private practice. It was projected that she would incur estimated fixed and variable costs of €40,935 again a figure significantly in excess of her total income, thus leaving her with a substantial financial loss at the end of the year.

70. It is much more difficult to understand the projections of Mr. McCaffrey in relation to Drs. Bielicki and Morris in terms of the income figures he has attributed to them if they are associates. However, once again this is a problem that has arisen as a result of the fact that these three plaintiffs do not appear to have been asked to verify on affidavit the truth and accuracy of the facts and figures put before the court on their behalf

71. If it is the case, as I fear it is, that neither Dr. Taut, Dr. Bielicki nor Dr. Morris were working or remunerated in the manner suggested in Mr. McCaffrey's spreadsheet, then this is a matter of concern in that the information that forms the basis for their assertion that they will sustain irreparable loss is unreal. Of equal concern is the fact that, if I am correct in my assumption, it once again appears highly likely that at least some of the plaintiffs in these proceedings may not have seen the figures produced on their behalf in support of the assertion that, in the absence of an injunction between now and January 2011, they are likely to have to terminate their practices. If Mr. McCaffrey's spreadsheet had been produced to Drs. Taut, Bielicki and Morris, it must be assumed that they would have recognised that the financial outcome for each of them projected for 2009 and 2010 was erroneous.

72. Assuming that Mr. O'Connor's affidavit is correct as to their status I am now asked to grant these three dentists an injunction on a basis which is different from all but one of the other remaining plaintiffs. I am assuming, in dealing with this issue, that as associates in their respective practices each of them has a contract with the HSE, as if they have not I cannot see the basis for their inclusion in these proceedings. Having considered the evidence I am satisfied that for two reasons I should not grant the relief sought.

73. First, I am not satisfied that there is sufficient cogent evidence before me to allow me to conclude that Drs. Taut, Bielicki and Morris are likely, as asserted by Mr. O'Connor, to be let go prior to January, 2011. I have no affidavit from them personally stating that this is so, although I do not doubt for a moment that these were the instructions which they gave to Mr. O'Connor. Further, it is not stated on behalf of these dentists that they have been advised by their respective employers that they are likely to be made redundant within the relevant timeframe or indeed at all. Neither has anything in writing been furnished by their respective employers corroborating what is otherwise a bald assertion made on their behalf. That evidence is simply insufficient as a basis for granting the type of interlocutory relief claimed.

74. Secondly, even if I had evidence of the nature just referred to, I would not in any event have acceded to the application of these plaintiffs for an interlocutory injunction in circumstances where I am satisfied that damages will be an adequate remedy should they be made redundant between now and January 2011. Whilst redundancy would inevitably cause great distress and potential hardship for any practitioner who, but for the Circular, might have expected to enjoy financial stability in these financially troubled times, this does not render damages an inadequate remedy having regard to the legal principles outlined earlier in this judgment.

75. If these plaintiffs are let go and become re-employed in any shape or form between now and next January, their loss of income is easily discernible. If they do not obtain re-employment between now and then and are successful in these proceedings one would hope that they will be re-employed by their present employers, and if this happens then their loss is once again equally capable of being compensated in damages as is the case in any other scenario that I can think of.

76. All of these matters to which I have just referred create significant doubt in my mind as to the actual financial position of each of the 26 Plaintiffs. With the exception of Dr Clune, none of the other 25 plaintiffs have verified that the financial position put foreword on their behalf by Mr McCaffrey is accurate and it is perhaps of some relevance that Dr Clune only did so following Mr. McCaffrey's first report which paid particular attention to her position. I have no doubt whatsoever that there has been no effort on the part of any of the plaintiffs advisors to mislead the court, but perhaps it is the case that in searching for a method of advancing a claim on behalf of so many plaintiffs the evidence has become speculative to the point that it cannot support the application made. The only real figures relied upon by Mr. McCaffrey were those in respect of the actual income of each of the plaintiffs for the year 2009. All other figures, which have a very significant bearing on the profitability of these practices for 2010, are speculative; in particular, the figure allowed for fixed and variable costs in each case. Having regard to the lapse of time since the introduction of the Circular, there is no reason why the actual figures for each plaintiff's fixed and variable costs for 2009 were not obtained nor any instructions as to whether they had suffered any reduction in private practice income for the first six months of this year. Further, even if I was satisfied that the financial outcome for the plaintiffs was that indicated in Mr. McCaffrey's reports, including his negative predictions as to what is likely to occur between now and year-end, I would not grant an injunction to these plaintiffs without an affidavit from them confirming that their financial situation for 2009 and 2010 was as outlined by Mr. McCaffrey and that, notwithstanding their profitability in 2009 and likely return to profitability in 2010, assuming that the decision in Reid and Turner .v. HSE is in their favour, they will be closing down their practices in early course (as appeared likely in the case of the first plaintiff in the decision of Laffoy J. of 16th June, 2010).

77. Finally, having considered all of the evidence, I am somewhat surprised, in light of the claims made that these plaintiffs face the imminent closure of their practices that none of them moved earlier to seek injunctive relief given that the Circular was introduced on the 26th April last. What seems to have occurred is that following the judgment of Laffoy J. in *Reid and Turner* on 16th June, 2010, the IDA on 9th July, 2010, circulated an email to all of its members (see affidavit of Patrick Bourke on behalf of the HSE, at para.15). I will quote from this email.

> "Because the HSE is refusing to regard this as a sample case, as the IDA has suggested, we would urge all members in the DTSS who believe that their practice is in such jeopardy as would not be remedied by damages that might be awarded by the Courts, to contact the Association as a matter of urgency. We will arrange to provide expert legal

guidance to members who believe that the future of their practice may be at risk and who may wish to be enjoined with further injunction applications which would have the effect of entitling them to provide the full range of treatments available and to be paid in accordance with the terms of the DTSS.

However, we must ask that you contact IDA House as a matter of urgency if you are to be in a position to seek similar relief as Drs. Reid and Turner before the Courts rise for the Summer."

78. In a subsequent memorandum of 13th July, 2010, a further canvass of the membership was made in the following terms:-

"As I outlined in our email to you last Friday 9th July, the IDA would urge all members in the DTSS who believe that their practice is in jeopardy as a result of the cuts proposed by the HSE to contact the Association as a matter or urgency. We will arrange to provide expert legal guidance to members who believe that the future of their practice may be at risk and who may wish to be enjoined in further injunction applications."

79. In passing it is interesting to note that both documents, insofar as they canvassed members regarding their belief as to whether or not the introduction of the Circular was likely to affect the viability of their practices, left the timeframe within which that might be expected to occur open-ended. Of equal significance is the plaintiff's response to the inquiries made by the IDA as to the likely consequences of the introduction of the Circular which are contained in a table scheduled to the letter sent by Mr O'Connor to Mr Brendan Drumm CEO of the HSE on the 16th July. Only 11 of the 26 plaintiffs pursuing this application indicated that the introduction of the Circular might place their practices in jeopardy with only two indicating that this might occur in the short-term.

80. It seems to me that the present plaintiffs have emerged somewhat late in the day armed with evidence which is less than that which the relief sought would mandate, particularly in the light of the defendant's challenge thereto, in the hope of being able to obtain a like result to that achieved by their two colleagues in *Reid and Turner v. HSE*. However, in circumstances where there is no doubt in my mind that all of the plaintiffs who are principals in their own practices are likely to be adversely affected by the Circular, some in a very significant way at least in the short term, it is difficult to be critical about their decision to advance this application. Apart from watching a decline in their own income, many have already had to put existing members of their staff on reduced hours and in some cases have had to let members of staff go. Further, the manner of the introduction of the Circular, which was widely criticised by the four principal dental surgeons within the HSE, has not slipped my attention and from which criticism I can well understand the upset and anxiety that its introduction has caused. In particular, I note that in a letter addressed to the regional Director of Operations dated the 30th April, 2010, the four principal dentists referred, amongst other matters, to the fact that the Circular when distributed to contractors included no commencement date; that no notice period was given to patients or contractors; that no advice was contained in the Circular with regard to treatments in progress; nor was any advice given as to the approved practice to be followed. They concluded that:- "The release of the circular in the circumstances described above has caused confusion amongst HSE staff, contractors and the public"

**Conclusion**

81. To conclude, having regard to the evidential matters to which I have already referred, and the finite timeframe between now and January next when the decision in *Reid and Turner v. HSE* is likely to be available, I am not satisfied that the 26 plaintiffs who maintain a right to the interlocutory relief claimed have convinced me that their circumstances are such that they are likely to sustain loss and damage over that period which is incapable of being adequately remedied by an award of damages should I fail to grant the injunction sought and they are successful at the trial of the action.

82. Given that I have decided that damages are an adequate remedy for these plaintiffs should they win their case I do not need to proceed to deal with the issue of the balance of convenience.

83. I will refuse the application.