Neutral Citation [2013] IEHC 279

Record No. 2012/574JR

The High Court

Between:

Positive Action Limited

Applicant

-and-

Health Service Executive

Respondent

Judgment of Mr. Justice Birmingham delivered the 1st day of May 2013

1. The applicant is a company limited by guarantee. It is, perhaps, best described as an advocacy and support organisation, which seeks to advance the interests of those women and their family members who were infected with Hepatitis C arising from the provision of contaminated blood products.

2. Since 1995, the applicant has been in receipt of significant levels of State funding paid through the mechanism of an annual grant. Initially payments were made through the Department of Health but since 2005 funds have been provided through the respondent, the Health Service Executive (HSE).

3. In July 2008, the respondent notified the applicant that it intended to introduce new arrangements which would be standardised for all non-statutory and voluntary organisations funded by it. The suggestion of the introduction of standardised conditions for receipt of State funds was unwelcome as seen from the perspective of the applicant. Accordingly, the applicant and its legal advisers engaged in intensive discussions designed to secure agreement on what has been described as a "bespoke" model for funding. The bespoke or tailored model is to be contrasted with the standard Service Level Agreement (SLA), and standard Grant Aid Agreements (GAAs), referred to during the course of the proceeding as a generic document.

4. In those discussions, the applicant presented its objection to the suggestion that it should have to adhere to a SLA/GAA. In broad terms, the objection was that the standardised agreement did not take account of the applicant's unique status as an advocacy organisation, advancing the interests of a client group that had been wronged by State action and inaction. Specifically, the point was made that the generic document would in effect categorise the applicant as a service provider and, as a result, designate it as an agent of the respondent, that the generic documents would undermine and diminish the independence and autonomy of the applicant and that the generic agreement would provide for a degree of control exercisable by the respondent and the Minister for Health which would be substantial and overarching. Such a level of potential control was inappropriate having regard to the distinctive, if not unique character, of the applicant. Attention was drawn in particular to a provision which required a recipient of grant aid to comply with requests from the respondent for the provision of information which was seen as objectionable.

5. The outcome of the discussions that took place between November 2008 and August 2009 was that agreement was reached on a bespoke agreement which differed in significant respects from the generic documents which had been tabled. A bespoke agreement, acceptable to the applicant, was concluded on the 21st August, 2009. 2010 and 2011 saw grants paid pursuant to agreements which were, to all intents and purposes, identical to the agreement concluded in 2009.

6. There was a very significant development in November 2011 when the respondent informed the applicant that it would be a requirement for funding in 2012 that a standard or generic agreement be signed. A Service Agreement, in the form required to be signed, was furnished to the applicant on 17th February, 2012. The applicant objected to the proposed generic agreement. The grounds of objection essentially mirroring those that had been advanced by the applicant back in 2008 when the idea of signing a standard form agreement was first mooted.

7. What might be described as a stand-off has developed, which has seen the respondent taking the position that no funding can be provided in 2012 and, indeed, by implication at least, in future years unless a generic agreement as furnished is signed. For its part, the applicant says that it cannot sign the generic document and instead it asserts that it has an entitlement to be grant aided on the same basis as heretofore.

8. As the impasse remains in place, the applicant has launched the present proceedings. In broad terms, the case made by the applicant involves the invocation of the doctrine of legitimate expectation, with the applicant contending that it had a legitimate expectation that it would continue to receive funding by way of grant aid on the same basis as before, or put slightly differently, and more accurately, that it had a legitimate expectation that it would not be required as a condition of funding to sign a generic SLA/GAA which contained provisions, which seen from the perspective, of the applicant were objectionable.

9. Before considering the arguments that have been made in relation to the doctrine of legitimate expectation, it is appropriate to refer to the statutory provisions referable to the funding of voluntary non-governmental organisations.

10. Section 39(1) of the Health Act 2004, is the section most directly relevant. That section provides as follows:-

> "The Executive may, subject to any directions given by the Minister under section 10 and on such terms and conditions as it sees fit to impose, give assistance to any person or body that provides or proposes to provide a service similar or ancillary to a service that the Executive may provide.
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> . . .

Assistance may be provided to a person under this section whether or not the person is a service provider."

11. Section 38 of the same Act also has relevance to the issues that have arisen during the course of the proceedings. That section so far as material provides:-

> "38(1) The Executive may, subject to its available resources and any directions issued by the Minister under section 10, enter, on such terms and conditions as it considers appropriate, into an arrangement with a person for the provision of a health or personal social service by that person on behalf of the Executive.
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> (3) A service provider shall –
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> (a) keep, in such form as may be approved by the Executive in accordance with any general direction issued by the Minister, all proper and usual accounts and records of income received and expenditure incurred by it,
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> (b) submit such accounts annually for audit, and
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> (c) supply a copy of the audited accounts and the auditor's certificate and report on the accounts to the Executive within such period as may be specified by the Executive.
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> . . .
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> (5) The Executive may exempt from the requirements of subsection (3) –
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> (a) a service provider who in any one financial year receives from the Executive in respect of health and personal social services provided on behalf of the Executive a total sum that does not exceed the amount that may be determined by the Minister, or
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> (b) such other categories of service providers as may be specified by the Minister.
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> . . .
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> (7) The Executive may request from a service provider any information that it considers material to the provision of a health or personal social service by the service provider.
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> (8) A service provider shall comply with a request made under subsection (7) to the service provider."

12. It will be seen that s. 38 and s. 39 diverge in significant respects. Section 38 permits the HSE to enter into arrangements with a body to provide health or personal social services on its behalf. Section 38 contains detailed provisions about the obligations that are imposed upon such service providers. In contrast, s. 39 permits the HSE to give assistance to a body providing a service similar or ancillary to a service that the HSE may provide. The section it will be seen is significantly less prescriptive.

13. The interaction between s. 38 and s. 39 was central to the discussions that took place in 2008 and 2009 and also central to what developed in 2011. Two draft documents were circulated in 2008/2009 – a Service Level Agreement which was an elaborate document containing thirty four detailed clauses over some thirty eight pages and a much less elaborate grant aid agreement running to some nine pages. The respondent's position was that the short form grant aid agreement was not appropriate for bodies receiving more than €250,000 per annum. Positive Action always fell into this category. The level of funding has fluctuated somewhat from year to year and has experienced a reduction in recent times in line with the general reduction in public expenditure. However, by way of a general indication of the level of funding, it may be noted that the grant for 2009 was €620,000 and this has been subject to reductions since then in accordance with the general reduction in public expenditure.

14. The bespoke agreements that were in place in 2009, 2010 and 2011 were broadly analogous to the generic grant aid agreement document, i.e. the short form document. When, in late 2011, the question of the terms on which funding would be provided arose again, the document submitted for signature was essentially the elaborate generic SLA save that its cover sheet with its reference to s. 38 was substituted for by a cover sheet that now referred to s. 39. Likewise, the opening "background section" was altered to refer to s. 39 rather than s. 38.

15. The classic statement of the elements that are required to be present if the doctrine of legitimate expectation is to have effect is to be found in the judgment of Fennelly J. in *Glencar Exploration Plc v. Mayo County Council (No. 2)*]2002] 1 I.R. 84. There, he commented as follows:

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

16. The applicant has subjected the course of dealings that have taken place between the applicant and the respondent over the years to analysis and concludes that the result of that analysis is that it is in a position to establish that each of the matters identified by Fennelly J. as pre-conditions have been met. So, it is contended that it is clear that a relevant clear and unambiguous representation was made by the HSE. It is said that after Positive Action maintained its resistance to being requested to sign a generic SLA that the HSE, through a senior official, Ms. Michelle Tait, National Hepatitis C Co-ordinator of the HSE, commented that Positive Action was "in a different cohort" and would be allowed to agree a different type of document which need not even be called an SLA. It is said that the continued resort to bespoke agreements in 2010 and 2011 amounted to further implied representations by

continued practice that Positive Action was not and would not be required to adhere to the respondent's general policy on the use of standard or generic SLAs. It is said that the representations created an expectation on the part of Positive Action, reasonably entertained, that the HSE would abide by the representations. The applicant contents that any suggestion that it was unreasonable or illegitimate for Positive Action to have expected that the respondent would relinquish its discretion to decide on the terms and conditions upon which funding would be provided is misplaced. It is said that the only legitimate expectation which is contended for on behalf of the applicant is that it would not be required to enter into a generic SLA but rather would be able to agree a bespoke agreement. It is not disputed by the applicant that the respondent retained the power to alter the terms of the bespoke agreement. However, while the details of the agreement were subject to modification, what was required, it is said, was that the arrangements in relation to funding would be tailored to meet the applicant's needs and concerns.

17. The applicant further contends that it would be unjust, unfair, and an abuse of process for the HSE to resile from the representation made during 2009. The applicant says that the respondent failed to recognise the legitimate expectations that the applicant had, and failing to recognise the existence of these representations, in consequence, failed to properly take them into account. Insofar as the HSE purports to justify its change of approach to Positive Action by reference to the recommendation of a HSE internal audit, there is no indication that the attention of the internal audit team was drawn to the fact that any indication had ever been given to Positive Action that it would not be required to enter into the generic SLA. It is said that there is no objective justification for the HSE's change of position. In particular, there is no basis for concluding that permitting the applicant to receive funding without signing a generic SLA would give rise to serious administrative difficulties or render the system of financially supporting voluntary bodies administratively unworkable. A huge majority of the organisations funded by the HSE have no difficulty with the generic agreement. Recognising the particular difficulties that the applicant has would not mean that the HSE would find itself having to deal with vast numbers of bodies all with different agreements. The great bulk of funded organisations would sign up to the appropriate standard agreement without hesitation.

18. Further, the applicant says that on foot of the representation which it says was made and relied upon, that it would not be required to sign and observe the exacting terms of the generic SLA, that it acted to its detriment in that it suppressed a post of office manager which had previously existed in the belief that the administrative obligations that arise for a non governmental organisation in receipt of HSE funding could be undertaken satisfactorily by the volunteer directors and members of the organisation. Given the extent of the administrative burden imposed in complying with the generic SLA procedures this was not a step that would have been contemplated if the applicant had any awareness that it was going to be required to adhere to the generic SLA procedure. The applicant says that on the authorities, referring to cases such as *R. [BIBI] v. London Borough of Newham* [2002] 1 WLR 1023 and *Paponette & Ors. v. Attorney General of Trinidad and Tobago* [2012] 1 AC 1, in that regard, it was not obliged to establish that it had acted to its detriment, but that, if that was a requirement, it was certainly in a position to do so having regard to its decision to discontinue the position of office manager.

19. Having regard to these factors, the applicant says that the actions of the HSE in requiring Positive Action, a body funded pursuant to s. 39 of the 2004 Act, to sign a generic SLA which was designed for s. 38 service providers, was irrational, unreasonable and *ultra vires*.

The respondent's position

20. The respondent says that the proceedings that have been brought raise in stark terms the question of whether an expectation can prevail over the express wording of a statutory provision. The HSE has an express statutory power to impose such terms and conditions as it sees fit on the provision of financial and other assistance. Accordingly, it is said that there can be no legitimate expectation in these circumstances; that, because financial assistance was provided on particular terms in the past that this means that any future financial assistance must be provided on the same terms and conditions, this does not mean that any future financial assistance must be provided on the same terms and conditions. The respondent focuses on the terms of s. 39 as set out above. It is pointed out that s. 39 is an empowering provision. Power is conferred on the HSE to give assistance. In particular circumstances it may give assistance. The power to provide financial assistance is subject to any directions given by the Minister. No such direction has been given in the present case. However, the very fact that there is provision for the giving of directions is inconsistent with any notion of entrenched and unalterable procedures. More directly relevant is the fact that a discretion is given to the HSE to give financial assistance on such terms and conditions as it sees fit to impose. It is said that by virtue of this section the legislature has conferred on the HSE a broad discretion both as to whether to give financial assistance and, if financial assistance is to be given, as to the terms and conditions which apply. There is nothing in the section which precludes the imposition of any particular class of terms or conditions and, in particular, it is said there is nothing to prevent the imposition of terms and conditions which are similar in effect to provisions of s. 38 of the Act.

21. The respondent contends that the case advanced on behalf of the applicant is one that does violence to the constitutional principle of the separation of powers.

22. It is also said that the proceedings ignore a number of fundamental judicial review principles and that what is sought is to have the Court substitute its opinion for that of the decision maker and, in effect, constitute itself as a court of appeal.

23. So far as the core legitimate expectation argument is concerned, the HSE says that what the applicant is in effect saying, is that because financial assistance was provided on particular terms in the past during the 2009 to 2011 period, that the HSE is precluded from attaching different terms and conditions in the future. It says that the argument so viewed ignores the fundamental limitation on the doctrine of legitimate expectation that it cannot override an express statutory discretion. The respondent says that these proceedings violate the fundamental principle that the freedom to exercise properly a power conferred by statute must be respected.

24. In my view, the starting point for consideration of the issues that have been debated has to be the terms of s. 39(1) of the Health Act 2004. It seems to me that the section creates a very broad discretion as to whether a particular body will be assisted financially and if so, as to the terms and conditions on which the assistance will be provided. Funding has been provided since 1995 and each year, certainly since 2005 when the HSE became involved, has seen the HSE and Positive Action signing an agreement. The provision of funding is a matter for the HSE's discretion. If the HSE could radically reduce the level of funding or discontinue ongoing funding altogether, and it does not seem to be seriously disputed that it could do just that, then it seems to be very difficult to argue that they are precluded from taking the less radical step of imposing terms and conditions. This is a case where the greater includes the less. In fact, it seems to me that the terms on which a voluntary organisation will be funded and, indeed, the question of whether a particular organisation should receive funds, is quintessentially a matter for the Executive. In this instance decisions in relation to funding of non-statutory bodies have been vested in the HSE and that having occurred, it seems to me that the courts should be slow to intervene. In this instance the power to make decisions in relation to funding has been entrusted to a body which is expected to have a particular knowledge and expertise in relation to the issues that arise. In contrast, the Court is ill-equipped to pass judgment on what are appropriate conditions if funding is to occur. A court is most unlikely to have any experience of interacting on a day to day basis with a non governmental organisation. It seems to me that this is an area where there is a requirement for judicial

restraint. In that regard, it seems to me that the arguments advanced by the applicant seek to spancel the HSE. These arguments fail to acknowledge that when the power or discretion is conferred by statute, that fact must be respected. In that regard, the decision of the Supreme Court in *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160 is instructive. In that case what was in issue was a challenge to a decision by the Revenue Commissioners to refuse a refund of certain excise duties on the basis of an alleged breach of a legitimate expectation. The applicant pointed out that he had been granted the refund on previous occasions and not having been given any notice of a change of practice, had a legitimate expectation that this would continue to be the position. In the course of his judgment O'Flaherty J. commented as follows:

> "It will be clear immediately that acceptance of this submission would involve a radical enlargement of the scope of legitimate expectation. It would involve the Court saying to the administration that it was not entitled to set more stringent standards, so that it might discharge its statutory obligations, without giving notice to anyone who might have benefited in the past from a more relaxed set of rules."
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> Stated thus, I believe it would involve the courts in an unwarranted interference with the actions of administrators. Our constitutional system is based on the separation of powers and just as the judicial organ of State requires the respect of the legislative and executive branches of government, so must the courts exercise proper judicial restraint."

25. In *Tara Prospecting Limited v. Minister for Energy* [1993] ILRM 771, Costello J., as he then was, was required to consider a challenge to a decision by the Minister which excluded the applicants for prospecting licences in the Croagh Patrick area and which also indicated that State mining leases would not be granted in the future, this in a situation where one of the applicants had been granted prospecting licences on previous occasions. Section 8 of the Minerals Development Act 1940, which was the statute in question, provided that every prospecting licence should be granted "upon such terms and conditions as the Minister thinks proper and specifies in such licence". Costello J. referred to the relevant statutory provisions and noted that the Minister had a very wide discretion as to whether or not he will give a prospecting licence and an equally wide discretion as to whether or not he would grant a State mining lease. In summarising the applicable legal principles, Costello J. commented:

> "(3) In cases involving the exercise of a discretionary statutory power the only legitimate expectation relating to the conferring of a benefit that can be *inferred* from words or conduct is a conditional one, namely that a benefit will be conferred provided that at the time the Minister considers that it is a proper exercise of the statutory power in the light of current policy to grant it. Such a conditional expectation cannot give rise to an enforceable right to the benefit should it later be refused by the Minister in the public interest. (Italics in original)
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> In cases involving the exercise of a discretionary statutory power in which an explicit *assurance* has been given which gives rise to an expectation that a benefit will be conferred no enforceable equitable or legal right to the benefit can arise. No promissory estoppel can arise because the Minister cannot estop either himself or his successors from exercising a discretionary power in the manner prescribed by Parliament at the time it is being exercised." (Italics in original)

26. The reference to terms and conditions as the Minister thinks proper in the Mineral Developments Act is echoed by the reference to the terms and conditions that the HSE sees fit to impose in the present case.

27. The need for restraint on the part of the Court and the need to respect a discretion vested in an administrative body emerges very clearly from the decision in *Abrahamson v. The Law Society* [1996] 1 I.R. 403. In the course of his judgment, McCracken J. commented as follows:

> "Where a Minister or public body was given by statute or statutory instrument a discretion or power to make regulations for the good of the public or a specific section of the public, the court would not interfere with the exercise of such discretion or power, as to do so would be tantamount to the court usurping that discretion or power to itself, and would be an undue interference by the court in the affairs of the persons or bodies to whom or which such discretion or power had been given by the legislature."

28. Later in his judgment, McCracken J. stated:

> "However, the powers given to the Society under Art. 30 are clearly discretionary powers, and involve not only a finding by the Education Committee of the Society that there are exceptional circumstances, but more importantly, impose a discretion on the Education Committee 'subject to such conditions as it deems appropriate' to modify any requirement or provision of the regulations. That is a discretion given to the Committee under the provisions of the Solicitors Acts, and it is one with which the court ought not to interfere."

29. In my view, the arguments advanced by the applicant are in direct conflict with the principle that freedom to exercise properly a statutory power is to be respected. It was a principle referred to by Fennelly J. in the *Glencar* case which I have quoted above. It is, to my mind, a very fundamental principle and the fact that the arguments advanced by and on behalf of the applicant are in conflict with it, is determinative of the case.

30. Even if what occurred in 2008 and 2009 could be interpreted as the HSE agreeing to funding in the long term on the basis of a bespoke agreement, and I do not believe that the HSE was tying its hands into the indefinite future, there remains the fact that a public authority is entitled to change its mind. It is of significance that the change proposed in this case was always intended to operate prospectively. In November 2011, the applicant was informed that funding in 2012 would be subject to altered terms and conditions. There is no question here of any retroactive change. There may be cases where the change of mind or change of policy is such that it is necessary to provide a reasonable period of notice or to put in place some form of transitional arrangements. Here, though, the position is that the question of funding was addressed on an annual basis. Every year saw a decision on the level of funding and every year saw an agreement being signed. I can see no basis for contending that it was impermissible for the HSE, in 2011, to indicate that it would provide funding in 2012 only on the basis that stipulated terms and conditions were met.

31. While the claim on behalf of the applicant has been couched primarily in terms of legitimate expectation, the written submissions filed on behalf of the applicant, in particular, have also sought to challenge the decisions of the HSE on grounds of irrationality/unreasonableness. Such an argument is unsustainable. That the HSE would wish to put in place a Standard Service Level Agreement is scarcely at all surprising, and in itself could not be seen as unreasonable or irrational. In excess of 2,400 non-statutory/voluntary organisations are in receipt of funding from the HSE. In 2011, the funding provided amounted to approximately €3.4 billion – it is to be expected that the HSE would wish to exercise strict control and supervision over such a large area of expenditure. It is also not at all surprising that in addressing the funding of voluntary organisations that the HSE would seek to identify a threshold over which a comprehensive set of conditions would apply and below which less formal arrangements could be

contemplated. The threshold decided upon was annual funding of €250,000 and it is the case that Positive Action at all stages has been very substantially in excess of that figure. It is also clear that the move to a standardised agreement did not, as it were, emerge out of the blue. That was an objective going back to 2008, if not earlier. There was a further development when, in mid-2010, an internal audit in respect of the provision of financial assistance to Hepatitis C support groups was commenced. Positive Action is one of four support groups that are in receipt of funding from the HSE arising from the contaminated blood products disaster. That internal audit drew attention to the fact that in respect of 2009 and 2010, standard form SLAs had been signed by two of the four support groups and non-standard or bespoke forms signed by two others, one of which was Positive Action. The internal audit report recorded that the non-completion of standard SLAs for the period concerned was in contravention of the terms of the HSE National Financial Regulations. The internal audit report contained a recommendation as follows:

32. "In future, the HSE standard SLA must be in place for each funded organisation for each year. The sign-off on this documentation should be implemented in time for the commencement of each financial year.

> ***Ranking priority***; high (N) [Emphasis in original report]."

33. The significance of the "ranking priority high (N)" is explained in the report. "High" identifies a control area which poses a key risk to the organisation and/or its service users and clients e.g. strategic, operational, financial or reputational, which may have serious implications for achievement of the organisation's objectives and which should be addressed immediately to reduce the risk to an acceptable level. The significance of the letter 'N' was explained as follows:

> "Some risks identified will have implications for the HSE nationally and therefore require consideration on a broader scale basis. Any risks identified that may have national implications will be denoted with an (N) *e.g*. high (N) medium (N) and low (N)."

34. Positive Action has downplayed the significance of the internal audit report and, as I have mentioned earlier, pointed out that it has not been established that the difficulties that Positive Action had with the standard SLA had been brought to the attention of the auditor, but notwithstanding this, it seems to me hard to contend that an organisation responding to the terms of a report from its internal auditor could be categorised as acting unreasonably or irrationally. That, of course, is not to say that other responses might not have been possible, but it is to say that the existence of a report containing such a recommendation makes it very difficult indeed for the applicant to cross the unreasonable/irrational threshold. The contents of the report served to reduce whatever degree of flexibility was available to the HSE, and to push it in a particular direction.

35. For these reasons, the arguments in relation to unreasonableness and irrationality also fail. In conclusion, my view is that the applicant is not entitled to the reliefs that it seeks and that no illegality attaches to the decisions of the HSE to impose conditions in relation to future funding. In that regard I note that there is an amount of disagreement between the parties as to what was said by Ms. Tait in 2009. The contention that Ms. Tait referred to Positive Action being in a separate cohort is disputed by her. However, even assuming in favour of the applicants that their recollection of what was said is correct, it does not seem to me to be the case that Ms. Tait could be regarded as having committed to funding on a particular basis in perpetuity or to have excluded the HSE from considering in future years what terms and conditions ought to apply to funding. Accordingly, the applicant's claim fails.