Neutral Citation Number: [2010] IEHC 283

THE HIGH COURT

2000 8756 P

Between:

CHERYL DOHERTY (A MINOR)

SUING BY HER MOTHER AND NEXT FRIEND, SARAH DOHERTY

Plaintiff

-and-

NORTH WESTERN HEALTH BOARD

Defendant

-and-

BRIAN DAVIDSON

Third Party

-and-

THE MEDICAL DEFENCE UNION LIMITED

AND MDU SERVICES LIMITED

Additional Third Parties

THE HIGH COURT

2002 16269 P

Between:

NICOLE HASSETT (A MINOR)

SUING BY HER MOTHER AND NEXT FRIEND, ORLA HASSETT

Plaintiff

-and-

SOUTH EASTERN HEALTH BOARD

Defendant

-and-

RAYMOND HOWARD

Third Party

-and-

THE MEDICAL DEFENCE UNION LIMITED

AND MDU SERVICES LIMITED

Additional Third Parties

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 20th day of May 2010

1. The within judgment arises out of an application brought, by way of Notice of Motion dated the 12th October 2009, by the parties above-described as the Additional Third Parties, who are the Medical Defence Union Ltd. and MDU Services Ltd. (collectively cited as the "MDU"). The MDU has challenged the jurisdiction of this Court to hear and determine the claims of the Third Parties as set out in the Statement of Claim, delivered on 18th June 2009. This challenge is based on Council Regulation (EC) No. 44/2001 'on the Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters' ("the 2001 Regulation"), and in particular on Articles 22(2) and 25 thereof. At the outset issue was taken with the inclusion of MDU Services Ltd. as a party, but I am satisfied that nothing turns on any distinction between it and MDU Ltd. for the purpose of this motion.

2. The MDU, which is a mutual defence organisation for medical practitioners, was incorporated as a non-profit-making, limited liability

company in the United Kingdom under the laws of England and Wales. It has its registered office at 230 Blackfriars Road, London, England. In accordance with its rules and regulations, it is authorised to offer legal assistance and provide financial indemnity to its members if sued for legal wrongdoing. The Third Parties in the above actions are doctors, practising in this jurisdiction, who have been paid up members of this organisation for a period of 40 years; since around 1970 in fact. The Defendants, above-named, who have now been decreed by the Plaintiffs, claim to be indemnified by the respective Third Parties ("the doctors") in respect thereof. In turn the doctors claim a similar indemnity from the MDU.

3. The background to the present application can shortly be stated. The Plaintiffs in the above actions have both claimed for severe personal injuries, loss and damage, suffered and sustained by them by reason of negligence and breach of duty on the part of the Defendants. In essence these are birth injury cases, with the Health Boards representing the relevant hospitals, and with the Third Parties being the treating doctors. In both cases lawyers instructed by the MDU appeared on behalf of the doctors. Later however, the MDU withdrew indemnity cover from them. In the substantive actions, Nicole Hassett obtained judgment against the Defendant on the 18th February 2005, and Cheryl Doherty did likewise on the 28th January 2005, with indemnity ultimately being withdrawn by the MDU on the 28th April 2005 and the 8th December 2004 respectively.

4. On the 22nd June 2005 the High Court made an Order giving the doctors liberty to issue and serve a Third Party Notice joining the MDU as an Additional Third Party. The MDU challenged the jurisdiction of the Irish Courts, by way of Motion, to hear and determine these Third Party proceedings. On the 5th April 2006 the High Court dismissed the challenge. Subsequently, the MDU appealed this decision to the Supreme Court, which referred a question to the European Court of Justice (now the Court of Justice; the "CoJ") under Article 234 of the EC Treaty (now Article 267 of the Treaty on the Functioning of the European Union ("TFEU")).

5. The question referred was highly detailed and circumstance specific. It asked:

> *"Where medical practitioners form a mutual defence organisation taking the form of a company, incorporated under the laws of one Member State, for the purpose of providing assistance and indemnity to its members practising in that and another Member State in respect of their professional practice, and the provision of such assistance or indemnity is dependant on the making of a decision by the Board of Management of that company, in accordance with its Articles of Association, in its absolute discretion, are proceedings in which a decision refusing assistance or indemnity to a medical practitioner practising in the other Member State pursuant to that provision is challenged by that medical practitioner as involving a breach by the company of contractual or other legal rights of the medical practitioner concerned to be considered to be proceedings which have as their object the validity of a decision of an organ of that company for the purposes of Article 22 paragraph 2 of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters so that the courts of the Member State in which that company has its seat have exclusive jurisdiction?"*

6. The CoJ delivered its opinion on the 2nd October 2009 (*Hassett & Doherty*, Case C-372/07 [2008] ECR I-7403). Having quoted *verbatim* the reference question, the CoJ then summarised the essence of the request:

> *"By that question, the national court is essentially asking the Court whether point 2 of Article 22 of Regulation No 44/2001 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, concern the validity of the decisions of the organs of a company within the meaning of that provision."* (*ibid.* para. 16)

It ruled in the operative part of the judgment that:

> *"In the light of the foregoing, the answer to the question referred must be that point 2 of Article 22 of Regulation No 44/2001 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, do not concern the validity of the decisions of the organs of a company within the meaning of that provision."* (*ibid.* para. 31)

7. Having received the decision, the parties returned to the Supreme Court, where the MDU sought to suggest that, given the nature of the Third Party claims, the effect of the decision, as properly construed, was that jurisdiction vested in the Courts of England and Wales, and not in the courts of this Member State. Counsel for the MDU informed me that the Supreme Court felt it inappropriate, in the context of his submission, to engage in a characterisation of these claims, as the same had yet to be particularised in the doctors' pleadings. As a matter of record, the Supreme Court dismissed the MDU's appeal against the refusal of the High Court to set aside service on it of the Third Party notices. An issue thus arises as to whether the MDU is prohibited, by estoppel, abuse of process or otherwise, from in essence re-opening the jurisdictional issue. To resolve this, it is not necessary to consider the scope of Article 25 of the 2001 Regulation, and in particular the extent of the Court's ongoing duty of self-assessment thereunder. That exercise, which in itself is quite an important one, does not arise on the facts of this application. This is so because the Supreme Court expressly indicated that it would be open to the MDU to make submissions to the High Court, regarding the scope and import of the CoJ decision, should it so wish. Despite some issue being taken on what precisely the Supreme Court said, I am satisfied that the MDU believed, reasonably so, that it was entitled to raise matters again relating to jurisdiction arising out of the CoJ judgment, and this is what it has done in the Motion before me. Cases, therefore, such as *Henderson v Henderson* [1843-1860] All E.R. Rep. 378 and *White v Spendlove* [1943] I.R. 224 are not relevant. It should be noted that I did offer Counsel on behalf of the doctors the opportunity of seeking clarification from the Supreme Court in this regard, but he declined; and it should be said probably reasonably so. It is therefore in respect of this application which I presently give judgment, noting that issues arising are identical in both sets of proceedings; meaning that this judgment applies *mutatis mutandis*, with equal force to both.

The Impugned Decision of the MDU:

8. As stated above, the Health Boards, in respect of the award against them in the main proceedings, seek indemnities from the doctors who in turn seek the same relief against the MDU. This calls into play the powers of the Board of Management of the MDU ("the Board") as set out in Article 48 of the company's Articles of Association. The relevant parts state:

> *"(1) The Board of Management or any member of the Board of Management or employee or agent or committee of the MDU authorised by the Board of Management for the purpose may subject to the limits of any such authority and sub-paragraph (3) of this Article, and subject also to the like conditions as are specified in the provisos of the preceding Article, grant from the funds of the MDU to any member … an indemnity wholly or in part with regard to any action*

proceeding claims or demands by or against them in respect of any matter concerning or affecting whether directly or indirectly the professional character or interests or conduct in a professional capacity of any such member … or which raises directly or indirectly a question of professional principle and such indemnity may extend to all incidental or consequential losses, damages, costs, charges and expenses but excluding fines and penalties and to grant funds to meet or compromise (whether or not by way of indemnity) or take part in meeting or compromising any such action proceeding claims or demands.

(2) …

(3) Any such indemnity may be granted or terminated by resolution of the Board of Management or any authorised committee or decision of any authorised agent and the grant of indemnity in every case shall be made only upon such terms and conditions as the Board of Management committee or agent shall think proper and it shall rest only in the absolute discretion of the Board of Management committee or agent in every case to limit or restrict the grant of such indemnity or altogether to decline to grant the same or to terminate any indemnity so granted without assigning any reason." (Emphasis added)

Similar provision is made for affording legal assistance to members and former members of the MDU under Article 47 of its Articles of Association. Such assistance also rests "*only in the absolute discretion of the Board of Management*". Likewise the Board may exercise such discretion "*without assigning any reason*" therefor.

9. In brief, the MDU initially provided legal assistance to the doctors, but ultimately the Board refused to indemnify them for the damages arising out of the principal actions. It is this refusal which the doctors now challenge, and which is the subject of debate in relation to jurisdiction. I should note that I have in no way entered into consideration of the substantive arguments of the parties on the indemnity issue, except for the purposes of, and insofar as is necessary for, determining whether this Court has jurisdiction to hear and determine that issue.

The CoJ decision and Change of Circumstances:

10. This was the issue on which the then President of the High Court, Finnegan P., gave judgment on the 5th February 2006, and was the subject of the Reference on the 30th July 2007. The CoJ delivered its opinion on the 2nd October 2008.

11. The MDU points out that at the time of the CoJ ruling, the doctors had not served a Third Party Statement of Claim or particularised their allegations. It thus contends that, in light of these documents, it is now clear that, contrary to the statement in para. 28 of the judgment that the doctors "*do not in any way*" challenge the power of the Board to refuse indemnity, the doctors' in reality are challenging the power of the Board to refuse indemnity, in circumstances where such power is found in its Articles of Association and is wholly discretionary thereunder. Therefore the claim is one which involves a challenge to the "*validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs, as laid down in its Articles of Association",* and thus, on the CoJ's own interpretation, Article 22(2) is applicable in this case.

12. In response, the doctors position, simply put, is that the decision of the CoJ is determinative of the issue: Article 22(2) does not apply to this case; this Court therefore is the court which has jurisdiction to decide their claims, which are based on alleged misrepresentations, the existence of a collateral contract, estoppel and or the improper exercise of the Board's discretion. Given that none of these come within Article 22(2), the latter does not apply. They also contend that it is self-evident from the CoJ's judgment that it considered in full the arguments of the parties; explicitly rejecting those of the MDU and adopting those of the doctors. Furthermore, a number of references by the CoJ to proceedings "*such as those at issue before the referring court*", can only be taken to mean that this is not a case where Article 22(2) should apply. Finally they strongly deny that there is any difference, in substance, between their claim as set out in the Third Party Notice and the Third Party Statement of Claim.

13. Put succinctly, the MDU has three core issues in the within application:

i) What is the CoJ's interpretation or conception of the scope of the applicability of Article 22(2) of the 2001 Regulation in a case such as that being made by the doctors?

ii) What was the CoJ's understanding of the doctors' case and of the jurisdictional objection thereto based on Article 22(2) as advanced by the MDU?

iii) Has there been a material change in the case as now pleaded, so that the present case is such that the CoJ's decision can, despite its ruling on the non-application of Article 22, be applied in favour of MDU?

14. At the date of the reference the doctors' claim had been pleaded only by way of a Third Party Notice; no Third Party Statement of Claim or further particulars had by that date been delivered. Accordingly, that Notice together with the accompanying documents formed the basis of the opinion of the CoJ as given. The supporting documentation furnished to the Court included the judgment of Finnegan P. on the 5th April 2006, and the written submissions of both parties. From this material it is possible to compare the case of the doctors as then formulated with how it is presently framed. This exercise will help to establish what difference, if any, exists in the allegations then and now made, and will assist in deciding the extent of the scope and reach of the Court's judgment, although not determinative in that regard.

15. The relevant part of the third party notices states:-

"AND FURTHER TAKE NOTICE that the grounds of the said claim to an indemnity and/or contribution are:

(i) That having acted on behalf of Dr. Howard a member of the MDU for 32 years without any indication that an indemnity would not be available, you are estopped or otherwise precluded from withholding or failing to provide an indemnity in respect of the Defendant's claim against Dr. Howard;

(ii) that in the circumstances Dr. Howard has a legitimate expectation that an indemnity would be provided;

(iii) that your decision to withdraw cover is, in any event, unlawful and contrary to Dr. Howard's entitlement under the terms of his contract with you;

(iv) that your decision is not valid or lawful in circumstances where you failed to give any adequate individual consideration to the particular circumstances of Dr. Howard but rather you applied a blanket policy decision to withdraw indemnity to certain of your Irish members;

(v) that you have not used or applied any discretion you might have in deciding on the grant or withdrawal of an indemnity to Dr. Howard but you have, on the contrary, adopted a rigid rule that you will as a matter of course decline to assist members and former members who are Irish obstetricians in doing so you have not acted in good faith;

(vi) that your unequivocal and unconditional decision not to grant an indemnity to any Irish obstetrician members or former members constitutes a breach of Dr. Howard's contract with you;

(vii) that you (as solvent bodies) in refusing to meet your liabilities to Irish members and former members including Dr. Howard you have discriminated against Dr. Howard (and his obstetric colleagues) on grounds of nationality and your refusal to meet your Irish liabilities to Dr. Howard, and his obstetric colleagues is therefore contrary to EC law and to constitutional and natural justice;

(viii) that your decision to withdraw indemnity from Dr. Howard was actuated not by any proper exercise of any discretion you might have in relation to Dr. Howard but rather by your purported concerns about the level of payments being made in respect of claims in Ireland generally and the impact which the general level of payments in Ireland might have upon your finances. This was not a proper exercise by you of any discretion you might have had but rather constitutes unwarranted and unjustified discrimination against Irish members and former members;

(ix) that you canvassed for business in the Irish jurisdiction and represented that you would provide services to (*inter alia*) obstetricians in the Irish jurisdiction and, in doing so, represented that an indemnity would be provided in the event of a successful medical negligence claim against persons such as Dr. Howard, in consideration of which Dr. Howard paid annual membership fees (which you accepted). In the circumstances, Dr. Howard is entitled to rely on the said representation and you are estopped from providing an indemnity to Dr. Howard in respect of the above described claim;

(x) that your decision to deny indemnity to Dr. Howard is unfair and unreasonable."

16. In summary, it was being alleged that the impugned decision was unlawful and unsustainable in law. However loosely articulated, this conclusion was asserted on the basis of legitimate expectation, representation and estoppel (conduct) and by reason of the relationship between the parties which had existed for over thirty years (contractual). In addition, the considerations behind such a decision and the motivation therefor, and the manner of its exercise, were also challenged as being contrary to law. In no part of the Third Party Notice, is it obvious or patent that an attack on the validity of the MDU's constitution or, on the legality or validity, as opposed to the propriety, of any decision of its organ, was being made.

17. Reviewing the CoJ judgment, a number of points can be observed from the outset. The CoJ noted that Article 22 involves an exception to the general rules governing the attribution of jurisdiction, it therefore must not be given an interpretation broader than is required by its objective, since its "*effect is to deprive the parties of the choice of forum which would otherwise be theirs"* (para. 19 – *Sanders* [1977] ECR 2383, paras. 17 and 18; *Dansommer* [2000] ECR I-393, para. 21; and *ÈEZ* [2006] ECR I-4557, para. 26 cited). By introducing such an exception in the case of companies, "*the essential objective pursued is one of centralising jurisdiction in order to avoid conflicting judgments being given as regards the existence of a company or as regards the validity of the decisions of its organs"* (para. 20). Further, the Courts in which the company has its seat are best placed to deal with such disputes, *"[e]xclusive jurisdiction is thus attributed to those courts in the interests of the sound administration of justice"* (para. 21).

18. Referring to the MDU's submissions (which in fact Counsel says was not part of its case), the CoJ stated, at para. 22 of the judgment, that:

> *"[I]t cannot be inferred from the principles referred to in the preceding paragraphs that, in order for point 2 of Article 22 of Regulation No 44/2001 to apply, it is sufficient that a legal action involve some link with a decision adopted by an organ of a company (see, by analogy, in relation to Article 16(1) of the Brussels Convention, Case C-294/92 Webb [1994] ECR I-1717, paragraph 14, and Dansommer, paragraph 22)."*

Rather the Court noted, adopting the submissions of the doctors, that if all disputes involving a decision by an organ of a company, had to be treated as coming within the scope of Article 22(2), it would in reality mean that all legal actions brought against a company would almost always fall within the jurisdiction of the courts of the Member State in which the company has its seat. Such would be so even if the question applicable in case, could not give rise to conflicting judgments as regards the validity of the decisions of the organs of a company, and even in cases where the dispute does not require any examination of "*the publication formalities applicable to a company*":

> *"Such an interpretation would thus extend the scope of point 2 of Article 22 of Regulation 44/2001 beyond what is required by its objectives…"* (para. 25)

I would respectfully add that any other conclusion would deprive Article 5 of the 2001 Regulations of any purposeful utility.

19. The findings of the CoJ in the regard as mentioned, would not appear to be disputed by either of the parties. However, the MDU note the CoJ's characterisation of the doctors' dispute in the within case. In particular, paras. 26 – 31 state:

> *"26. It follows that – as was rightly pointed out by the doctors and by the Commission of the European Commission – that provision must be interpreted as covering only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs, as laid down in its Articles of Association.*
>
> *27. The order for reference does not indicate, however, that the doctors raised such challenges before the High Court.*
>
> *28. In fact, in the case before the referring court, the doctors <u>do not in any way</u> challenge the fact that the MDU's Board of Management was empowered under that company's Articles of Association to adopt the decision rejecting their claim for indemnity.*

29. What the doctors do challenge is the manner in which that power was exercised. They maintain that the MDU rejected their claim for indemnity automatically, without examining it in detail, thereby infringing their rights under the MDU's Articles of Association as members of that organisation.

30. Consequently, the disputes before the referring court between those doctors and the MDU do not fall within the scope of point 2 of Article 22 of Regulation No 44/2001.

31. In light of the foregoing, the answer to the question referred must be that point 2 of Article 22 of Regulation 44/2001 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, do not concern the validity of the decisions of the organs of a company within the meaning of that provision." (Emphasis added)

The Court's reference to proceedings *"such as those at issue before the referring court",* the MDU contends, must nonetheless be interpreted in light of the preceding paragraphs, and also the Court's enunciation of what it saw as being the doctors' case.

20. The question as posed by the reference was, by common accord, carefully crafted and circumstance specific; it was designed to incorporate all vital elements of the doctors' claim and the MDU's response. The first section of the question sets the context in which the MDU exists. It refers to: what is the MDU and by whose laws it is governed; the type of service available to its members, including those practising in this Member State; the making available of such services being dependent on a decision by the Board of Management to be reached in its absolute discretion, in accordance with the Articles of Association. The second part of the question sets in context the doctors' proceedings by referring to: the decision of the MDU to refuse indemnity; to such decision having been made "*pursuant to that provision*" – meaning Article 48 of the Articles of Association in which the phrase "*in its absolute discretion*" is mentioned – and the challenge to that decision being based on contract or other legal rights of the medical practitioner. The third part of the question then seeks the Court's opinion on what has previously been stated. In my view, this question contained each of the essential components of the doctors' action as then constituted. That being so, it now falls for consideration as to what the CoJ in fact decided.

21. Having set out the question referred, the CoJ, as is not uncommon, paraphrased what the National Court was essentially asking. There is nothing in its formulation which could give rise to a view that the CoJ was deliberately or inadvertently omitting from its consideration any essential or vital element of the assistance which the Supreme Court was seeking. The high point of the MDU's submission in this respect is based on paras. 26 – 31 of the judgment (see para. 19 *supra*.), in particular where the Court says that there was no challenge to the Board's power to adopt a decision rejecting the doctors' claim and that what the doctors were challenging was the exercise of that power in respect of the refusal, without consideration being given to the individual circumstances of the members concerned (paras. 28-29 of the CoJ decision).

22. In my opinion, when considered in its totality, the opinion of the CoJ does not support the submission of the MDU. As part of the dispute history, the Court noted the doctors' assertion that the indemnity refusal infringed their rights under the Articles of Association and the MDU jurisdictional response that such a claim was an attack on the validity of decisions by the Board, and thus fell within Article 22(2) of the Regulation. The Court, having reiterated its understanding of the jurisprudence behind that Article, went on to deal with the question in the context of the proceedings then in existence before the National Court. The passage above-cited from para. 28 of the decision, should be understood as correctly meaning that there was no challenge to the lawful existence or validity of Article 48 of the Articles of Association, under which the Board is empowered to make a decision, in its absolute discretion, to give or refuse indemnity. Whilst some ambiguity may exist regarding the summary of the doctors claim as set forth in para. 29 of the judgment, the most that can be said is that such a summary, if taken in isolation, is incomplete, as quite evidently the claim, in the context of the parties relationship and the historical actions of the MDU, asserts contractual and other rights. In addition, the phrase at the beginning of its concluding paragraph, "*in light of the foregoing*" (para. 31 *ibid*.), cannot in my opinion be restricted to the paragraphs immediately preceding. Such a phrase is intended to cover the entirety of the judgment, and in my view does so. I therefore believe that the opinion of the Court answers the question posed. Whilst some of its observations, taken in isolation, may give rise to uncertainty, when read as a whole, expressing an overall opinion, its judgment is defined and apparent. It therefore determines the issue on the claim as then presented. Accordingly the courts of this Member State have jurisdiction to hear and determine the Third Party claim. In addition, I do not believe that there is any necessity to resubmit the reference for further clarification by the CoJ. In fact, such a move should only be countenanced in the most unusual circumstances. These, in my opinion, do not exist and therefore I would determine the application as against the MDU

23. Further, I have considered the question of whether there has been any change of circumstances, such that the decision of the CoJ, despite my understanding of it, might nevertheless apply in such a way as to support the MDU's arguments. The Third Party Statement of Claim was delivered on the 18th June 2009, and arising therefrom particulars were sought and replied to. From a detailed examination of these documents, it seems to me that whilst the doctors' claim is more expansively detailed, laid out, as it is, in the context of the parties' historical relationship, I cannot find any plea which in substance renders the allegations now made, materially different from those which are deducible from the Third Party Notice. In addition, the written submissions on the reference support such a view. Consequently, in my opinion it must be accepted that the essence or core of the Third Party claim was communicated to, and appreciated by, the CoJ before it delivered its opinion on the referred question. There is therefore no change in circumstances with regards to nature of the doctors' pleas. Even were I to consider that the CoJ's view was informed on a restricted basis by virtue of further particulars having been delivered, the decision, as I interpret it, would nevertheless not support the arguments of the MDU. There has not therefore been such a change doctors' pleadings that the CoJ decision could now be interpreted so as to apply Article 22(2) in this case.

Jurisdiction:

24. As stated, I am satisfied that the CoJ decision was based on a proper understanding of the doctors' case as it was then particularised. Further, I am of the opinion that there is no material difference between the claims as pleaded before the CoJ, and those contained in the Statement of Claim and in the particulars delivered thereon. Furthermore, the CoJ's decision, in answering the question asked, is clear and capable of direct application to this case. For these reasons, I would be content to simply apply that decision to the motion before me, which would dispose of the matter. Nonetheless, in the event that I am in error and it is the fact that there has been a material change in the case as pleaded, I am satisfied, in light of the ongoing duty of the court under Article 25 of the 2001 Regulations (see para. 26 *infra*.), to apply the relevant case law, including the judgment of the CoJ as I understand it, to the case as currently pleaded, regardless of how it might have been so framed before, so as to come to a conclusion on whether, as the case now stands, I must refuse jurisdiction by virtue of the application of Article 22. I should say that, notwithstanding this approach, for the MDU to relitigate, without such a material change in circumstances, would be abusive.

25. From the decision of the CoJ it appears clear to me that if the doctors' claims principally involve a decision as to the legality or validity of Article 48 of the Articles of Association, it must follow that Article 22(2) is applicable. If however the doctors do not seek such a decision then Article 22(2) is not applicable.

26. The jurisdictional issue must lead ultimately to a conclusion that the indemnity dispute should be heard either in this jurisdiction or in the Courts of England and Wales (being the jurisdiction in which the company was incorporated). Jurisdiction in this case is governed by the 2001 Regulation, in particular Articles 2(1), 5, 6, 22(2) and 25. Article 2(1) provides the default position:

> *"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."*

Article 5 provides a general exception to this rule, and states *inter alia*:

> *"A person domiciled in a Member State may, in another Member State, be sued:*
>
> > *1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*
> >
> > *2. …*
> >
> > *3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur; …"*

Under Article 6:

> *"A person domiciled in a Member State may also be sued:*
>
> > *1. …*
> >
> > *2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;*
> >
> > *3. …*
> >
> > *4. …"*

Article 22(2) provides for certain compulsory and exclusive jurisdictions, regardless of domicile:

> *"in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law; …"*

Article 25 would appear to place an ongoing obligation on the Court to consider whether proceedings fall under Article 22, so that:

> *"Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction."*

It is thus clear, in this exercise, that if this Court, in light of the opinion from the CoJ or otherwise, comes to the conclusion that the proceedings in the present case are "*principally concerned with*", in particular, "*the validity of the constitution*" of the company or "*the validity of the decisions*" of its organs, this Court must, by virtue of Article 25 and having regard to Article 22(2), declare that it has no jurisdiction. Otherwise if the matter could be said to primarily relate to issues of contract or tort, or to a guarantee (although the latter would not appear to have been expressly relied upon), or is otherwise outside the scope of Article 22(2), it should be heard in this jurisdiction; being the Member State where those contractual services are provided, or else where the harm could be said to have occurred (Article 5).

27. The Commercial Court in England recently considered the CoJ's judgment in *Hassett & Doherty* [2008] ECR I-7403 in *JPMorgan Chase Bank NA and Ano'r v. Berliner Verkehrsbetriebe (BVG) Anstalt des Öffentlichen Rechts* [2010] 2 WLR 690 ("*JPMorgan*"). In the opinion of Teare J.:

> *"The ECJ stated (at 119 (paras 16-19)) that the exclusive jurisdiction provisions in art 22(2) must be interpreted strictly, that is not be given an interpretation broader than is required by the objective of art 22(2). The essential objective of art 22(2) was one of centralising jurisdiction in order to avoid conflicting judgments regarding the existence of a company or as regards the validity of the decisions of its organs: see paras 20-21. Following Webb v Webb it was said that it was insufficient for art 22(2) to apply that a legal action involved some link with a decision adopted by an organ of a company: see paras 22-23. If that were sufficient the scope of art 22(2) would extend beyond what was required by its objective: see paras 24-25. Article 22(2) must therefore be interpreted*
>
> > *'as covering only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs, as laid down in its articles of association': see para 26."* (*ibid*. at 704-705)

Such comments, I would note, would appear to be consistent with my own reading of the main points contained in the judgment of the CoJ in the within Hassett & Doherty case (see para. 22 *supra*.).

28. Teare J. carried out an extensive, and highly useful, review of the English and European case law in relation to Article 22. He considered the extent to which Article 22 might necessitate him to decline jurisdiction where it applied only to some of the issues in the proceedings. He referred to the Jenard Report on the Brussels Convention, which states in relation to the equivalent of Article 22 of the 2001 Regulation (namely Article 16 thereof), at p. 34 that:

> *"The matters referred to in this Article will normally be the subject of exclusive jurisdiction only if they constitute the principal subject-matter of the proceedings of which the court is to be seised."*

Commenting, Teare J. continues:

> *"The 'criterion' of the article is the 'subject-matter of the action'. With reference to art 22(2) the Jenard Report stated that the courts of the state in which the company has its seat have exclusive jurisdiction in 'proceedings which are in substance concerned with' a matter within art 22(2). This interpretation is mirrored (and perhaps prompted) by the express terms of art 25: 'Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22…'… The Jenard Report p 39 explained that '[t]he words 'principally concerned' have the effect that the court is not obliged to declare of its own motion that it has no jurisdiction if an issue which comes within the exclusive jurisdiction of another court is raised only as a preliminary or incidental matter'.* ([2010] 2 WLR 690 at 698)

He thus felt that:

> *"[W]ith regard to both art 22(2) and art 25, it would seem that a court seised of proceedings which involve several issues including one which is within art 22(2) must ask itself the following types of question. Does the issue within art 22(2) constitute the principle subject matter of the proceedings? Is that issue the subject matter of the action? Are the proceedings principally concerned with that issue? Is that issue raised only as a preliminary or incidental matter?"* (*ibid.* at 699)

29. Teare J. referred to the *Newtherapeutics* case [1991] 2 All E.R. 151, where Knox J. said at 165:

> *"It was common ground between the parties that the question whether art [22(2)] governs an action has to be solved by identifying the principal subject of the proceedings and seeing whether that falls within art [22(2)]… The problem therefore is to identify from the material before the court what it is that the proceedings are in substance or principally concerned with …"*

Commenting on that decision Teare J. felt, however:

> *"The following points may be noted. (i) Knox J did not consider that it was sufficient that the claim within art 22(2) might be dispositive of the case to conclude that the proceedings before him were in substance or principally concerned with an issue within art 22. … (ii) Knox J did not say that it was sufficient if the claim within art 22(2) was a principal issue in the case. On the contrary he was concerned to assess the principal issue. …*
>
> *Knox J. having considered the Jenard Report, considered that he had to identify the principal subject matter of the proceedings before him or, to put it another way, identify what it was that the proceedings were in substance or principally concerned with. He did not consider whether the claim within art 22(2) was a principal subject of the proceedings."* ([2010] 2 WLR 690 at 700)

30. Another case referred to by Teare J. was *Grupo Torras SA v. Al-Sabah* [1995] 1 Lloyd's Rep 374. He considered that in that case:

> *"Mance J said that the real issue did not appear likely to be whether the defendant had authority but whether they exercised that authority bona fide and properly in the interests of the company. … He concluded (at 408) that the proceedings were—*
>
> > *'not principally concerned with … the validity of … organs of [the company] … within the meaning of art [22(2)] …'"*

([2010] 2 WLR 690 at 700-701)

He noted that the conclusions of Mance J. would appear to have been accepted by the Court of Appeal in *Grupo Torras SA v. Al-Sabah* [1996] 1 Lloyd's Rep. 7.

31. It has been suggested by the MDU that this case will involve consideration of English company law, and that this should be taken into account when deciding if this Court should decline jurisdiction under Article 22(2). Mance J. in *Grupo Torras SA* noted that Article 22(2) called for "*an exercise in overall classification*". He said:

> *"The exercise envisaged by art. [22] only really works if the Court bears in mind the underlying rationale of the article and (viewing the litigation overall) attempts to assess whether it is likely to be so closely connected with matters of local company law and internal corporate decision-making in respect of one particular company that it should not be tried anywhere but the Courts of the State of that company's seat. In the resolution of that issue, all aspects of the litigation can and must be taken into account. At the end of the day, the Court must form an overall judgment. It is not enough that there will be evidence, even considerable evidence, about [other European] company law and practice; it is only if the whole proceedings viewed overall can be said to be principally concerned with such matters that art.[22](2) applies."* ([1995] 1 Lloyd's Rep 374 at 403-404)

32. Teare J. ultimately considered that the "overall" approach was the correct one for determining whether Article 22(2) applied, taking into account the underlying rationale/policy behind that Article, namely to avoid conflicting judgments as to the validity of decisions of organs of a company or other association. He rejected the approach suggested by Laddie J. in the *Coin Controls* case [1997] 3 All E.R. 45, which was "*that it is sufficient if an issue which is within art 22 is a major feature of the proceedings*", nor did he consider "*that it is sufficient if an issue within art 22(2) is or may be dispositive of the proceedings*", although he accepted that these might be relevant "*when forming the overall judgment required of the court in answering the question whether the proceedings in this court are principally concerned with the [art. 22] issue.*"

33. I would respectfully agree with the analysis carried out by Teare J. in *JPMorgan*. When the Court comes to consider whether its jurisdiction is ousted because of an issue falling under Article 22(2), it is clear that:

> i) Merely because some issue(s) arise(s), which may touch upon the validity of the decisions of the organs of a company, that will not automatically exclude the Court's jurisdiction;

ii) The fact that the Court may have to call evidence in relation to the law of other Member States, even substantive evidence, will not necessarily exclude the Court's jurisdiction;

iii) The nature of the proceedings as a whole must be considered, including both the statement of claim and defence.

Further, it is not enough that a major feature of the proceedings involves an Article 22(2) point, nor is it sufficient that a matter within Article 22(2) may be dispositive of the case. The ultimate question must be whether the proceedings are principally concerned with a matter falling under Article 22(2). It is also clear from, *inter alia*, both *JPMorgan* and the CoJ decision in the instant case, that when considering the scope of Article 22, it should, as an exception to the basic rule of domicile and to jurisdiction based on agreement, be construed strictly, *i.e*. it must not be given an interpretation broader than is required by its objective, namely to prevent potential conflict between judgments in different jurisdictions with regards to the status of a company or decisions of its organs.

34. This court now looks again at the nature of the proceedings as presently constituted, The Statement of Claim of the doctors against the MDU was delivered on 18th June 2009. Particulars were exchanged throughout July 2009 and in September 2009. A conditional defence on behalf of the MDU was delivered on 12th October 2009. It has been necessary for me to examine these in detail to ascertain whether any Article 22(2) issue currently arises, although it is unnecessary to recite them at length herein.

35. The doctors have advanced a number of grounds upon which they claim that they are entitled to an indemnity. In summary, and broadly categorised, these are:

i) Misrepresentation / The existence of a collateral contract;

ii) Estoppel / Legitimate expectation;

iii) The improper exercise of discretion.

I will now turn to consider the factual bases upon which each of these pleas are advanced by the doctors.

36. The doctors claim that as members of the MDU for almost forty years, there was a contract with that organisation for the provision of, *inter alia*, legal defence and indemnity services in this jurisdiction. At all times they complied with the terms of such contract, so as to qualify for indemnity in respect of any damages which may be awarded against them, or for which they were responsible, in legal proceedings. The MDU expressly and impliedly represented that such an indemnity would be provided in the event of either doctor being successfully sued. In particular the doctors contend, *inter alia*, that at all material times their understanding from representations made by the MDU was that where any allegation or accusation arose as to medical negligence on their part, they would have the support of indemnity cover from that body. Assurances from the MDU convinced them that this was so. They therefore claim in this regard that the MDU have misrepresented the position, and/or, by virtue of their membership of and the representations made to them by the MDU, a collateral contract has arisen between the parties which requires that they be indemnified in the presenting circumstances.

37. The doctors also maintain that the MDU is estopped from resiling from express assurances made to them that it would provide the assistance as sought. In fact making good on such assurances, legal defence services were provided by the MDU; solicitors being retained on its behalf, who organised every step necessary to assist in defending the main proceedings. At no point, in particular with regards to Dr. Howard's case, prior to Counsel's statement to this Court on 18th March 2005 and the letters of the 31st March 2005 and the 28th April 2005, did the MDU make any indication that it would not be providing cover in these cases. On the contrary, the actions of the MDU at all times gave the impression that the doctors would be indemnified in respect of the claims. Thus, in these circumstances, where the MDU participated and supported the doctors, and only at a very late stage decided to withdraw indemnity cover, they are estopped from so doing. Furthermore or in the alternative, the actions of the MDU gave rise to a legitimate expectation that indemnity would be provided.

38. Finally, the doctors allege that the Board improperly exercised its discretion in the present case. In particular it failed to give proper consideration to the individual circumstances of each doctor, instead applying a blanket policy decision to withdraw indemnity from certain of its Irish members. Further, where the doctors had complied with all policy conditions of the MDU, there was no basis for it to refuse or to withdraw indemnity and such decision was grossly unfair, unreasonable and constituted a breach of natural justice. In adopting a rigid policy, the MDU has not used or applied any discretion it might have in deciding whether or not to grant indemnity. Instead it declines, as a matter of course, to assist members and former members who are Irish obstetricians and in doing so its actions were not *bona fide*. Furthermore, the policy adopted constituted an unwarranted and unjustified discrimination against Irish members and former members on the grounds of nationality and is thus contrary to EU law.

39. The MDU, in reply, point out that it is not an insurance company and never represented that it would provide cover other than on a discretionary basis. Further, by virtue of its Memorandum and Articles of Association, its Board has an absolute discretion to refuse indemnity. In any event, the Articles of Association, by virtue of s. 14 of the English Companies Act 1985, form the only express contract between the MDU and the doctors in relation to both their rights and obligations as members. It is therefore inevitable that the validity of the Memorandum and Articles of Association will be in issue in this case. In attacking the propriety of the Board's decision the MDU claims that the doctors must overcome the explicit absolute discretion of the Board; only if Article 48 is found to be invalid under English company law could the doctors win on this point. Thus, in its opinion, the proceedings herein must be covered by Article 22(2).

40. In my view this does not necessarily follow: even if Article 48 affords a discretion to the Board, the doctors may instead be seeking to qualify or circumscribe that otherwise unfettered discretion. There are many instances where there is a general discretion, but it may be directed by matters unenumerated in the document granting such discretion; for example, that a decision could not be based on openly discriminatory grounds or that in coming to a decision, natural and constitutional justice should not be breached (see *Barry v. Medical Defence Union* [2005] IESC 41, *per* Geoghegan J.). In such circumstances the overall power would therefore not be challenged, merely the way in which it is being exercised.

41. In relation to the three broad categories outlined above it is clear from the outset that two of these grounds, namely those relating to misrepresentation and estoppel, in no way seek to impugn the power of the Board to refuse to provide indemnity. Instead, by virtue of either representations made by the MDU or their actions, including those in initially supporting the doctors, the MDU may not refuse, as an organisation, to provide indemnity. These are matters which do not fall within Article 22(2). The third issue relates, at most, to the extent of the Board's discretion. Again it would appear that the doctors are not challenging the ability of the Board to make such a refusal, but instead claim that in the circumstances the decision arrived at, was improper and unsustainable in law.

42. Even however, if the doctors' allegation in relation to the improper exercise of the Board's discretion could be said to challenge the Board's power under Article 48, which I do not accept, nonetheless, I am not satisfied that the overall classification of the proceedings is such that they are caught by Article 22(2). In my opinion, the principal grounds upon which this action is brought rest upon the relationship between the parties, including the representations made by the MDU to the doctors. Even if the MDU could successfully prove under English or Irish law that the Board did have an unfettered discretion, this would not be determinative of the matter. Ultimately, in my opinion, the principal issues are those as previously stated.

43. Thus, having regard to all of the above and noting that none of my comments should be construed as in any way indicating the strength of any party's case, which is obviously a matter for trial, I conclude that this action is principally not concerned with issues relating to the "*the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs",* as interpreted by the CoJ and having regard to the English case law: thus it is not caught by Article 22(2) of the 2001 Regulation. I am therefore satisfied that the Irish Courts have jurisdiction on the issue between the Third Parties and the Additional Third Party.

44. I would finally reiterate that I am satisfied that the CoJ's decision with regards to the case herein was based on a full understanding of the facts and issues before to. Given the express wording of Article 25 of the 2001 Regulations that proceedings relate "*principally*" to issues covered by Article 22, it could not, in my opinion, be the case that the CoJ was basing its decision on a requirement that the proceedings "*do not in any way*" challenge the decision of the Board to reject their claim for indemnity. In any event, as stated, I am also satisfied that the CoJ's conclusions, were entirely available from and consistent with the facts and allegations as made. The CoJ's statement at para. 28 thereof is, therefore, in my opinion, neither erroneous nor, in any event, determinative as to the outcome or reasoning of the decision; both are, in my view, clear and unambiguous. I have therefore rejected the suggestion made by the MDU that this Court should refer the matter back to the CoJ for clarification.

45. In any event, as stated, even if it could be said that some of the issues in this case touch upon the validity of the constitution of the MDU, or a decision by its Board, which I reject, overall the principal issues in this case are not caught by Article 22(2) of the 2001 Regulation. I therefore reject the MDU's motion.

46. Finally I should say that this review was conducted in circumstances different from those which Finnegan P. had to deal with, but I note that the conclusion herein, is similar to that reached by the then learned President.