Neutral Citation Number: [2009] IEHC 562

THE HIGH COURT

2009 6546 P

BETWEEN

J. & J. HAIRE & COMPANY LIMITED, THOMASTOWN PHARMACY LIMITED, BORRIS PHARMACY LIMITED, GRAIGNAMANAGH PHARMACY LIMITED AND HAIRE PHARMACY HOLDINGS LIMITED

PLAINTIFFS

AND

THE MINISTER FOR HEALTH AND CHILDREN, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice McMahon on the 17th day of December, 2009

1. Introduction and Background

Under the Health Act 1970, a new system for providing free general medical services and medicines to eligible persons was introduced. Sections 59(1) and 59(3) of the Act imposed on the then Health Boards - now the Health Service Executive ("the HSE") - mandatory obligations to discharge the functions imposed by those subsections, namely to supply without charge medicines and other products to certain eligible persons.

Prior to 1970, persons entitled to free medicines obtained the prescribed medicines through the public dispensaries. The new method provided for distribution of medicines, *etc*., to eligible persons, through the existing network of independent pharmacists spread throughout the country. Clearly, to do this, agreement would have to be reached with the pharmacists. Negotiations were commenced between the Department of Health on behalf of the Minister and the Irish Pharmaceutical Union ("the IPU"), or more properly the Pharmaceutical Contractors' Committee ("the PCC"), on behalf of the pharmacists. A standard template agreement was finalised in a memorandum dated October 1971 and this template was adopted by each pharmacy when it made its individual agreement with the Health Board (now the HSE). The original agreement negotiated in 1971 was amended from time to time and was the contract which the plaintiffs had with the HSE at the time relevant to these proceedings. Further details of this contract will be addressed later in this judgement, but in essence the pharmacists were to distribute the medicines, *etc.*, free of charge to the eligible persons and were to recover from the State remuneration calculated on agreed rates set out in the contract.

The plaintiffs in this case are limited liability companies and are part of the Kissanes Group. The first found named plaintiffs are each a party to a contract with the HSE, referred to as "the Community Pharmacy Contractors Agreement" ("the Contract") which is a standard form agreement negotiated between the IPU and the Minister for Health and Children. The Contract regulates conditions under which the plaintiffs provide services for the State under various government schemes including the General Medical Scheme (GMS), the Drugs Payment Scheme, the Long Term Illness Scheme, the European Economic Area Scheme and the Health (Amendment) Act 1996 Scheme. Under the Contract the plaintiffs are contracted to distribute to entitled members of the public free of charge medicines to which they are entitled under the various schemes. The Minister has set out in the Contract the charges which the pharmacist will be entitled to recover from the State for this service. The terms of the Contract are primarily to be found in the version signed between the parties in May 1996 as amended subsequently from time to time by various memoranda.

Due to "a serious disturbance in the economy and a decline in the economic circumstances of the State … which threaten the well-being of the community", the government, to address the economic crisis, introduced the Financial Emergency Measures in the Public Interest Act 2009 ("the 2009 Act"). In addition to providing for a pension levy, the Act was passed to enable Ministers of the Government:-

> "To provide for the reduction of the amount payable, or rate of payment, out of money provided by the Oireachtas or the central fund…to certain persons for certain services to or on behalf of the State…"

Section 9 of the Act makes provision for the reduction of payments to health professionals. Shortly after the Act was passed, several Statutory Instruments were passed by various Ministers reducing the payments in respect of services rendered by various providers to the State. These Statutory Instruments, according to the plaintiffs, purported to reduce the payments in respect of state solicitors (see S.I. 159 of 2009), consultant psychiatrists (see S.I. 172 of 2009) and veterinary practitioners (see S.I. 216 of 2009) by approximately 8%.

Statutory Instrument No. 246 of 2009 contained the Regulations directed at community pharmacy contractors whereby the Minister for Health and Children introduced new rates and allowances payable to pharmacists operating within the relevant schemes under the Contract.

The plaintiffs allege that the new fee structure imposed on them will result in at least a 24% reduction in their income under the schemes and that such a reduction will make them insolvent.

2. The Plaintiffs' Background

Each of the first four named plaintiffs in these proceedings is a limited liability company operating as a pharmacy and a subsidiary of the fifth named plaintiff, a holding company. Mr. Haire and his wife are equal shareholders in the holding company. Mr. Haire is not a plaintiff is these proceedings.

Mr. Haire was born in 1961 and completed his Leaving Certificate in 1979. He worked with his parents in the family pharmacy business in Graignamanagh, Co. Kilkenny for two years before taking up employment with the General Medical Services (Payments) Board in 1981. He left this employment and enrolled for a Pharmacy Undergraduate Course in the University of Sunderland in 1990. He returned to Ireland and to his employment with the Eastern Health Board, from which he had taken a career break, before taking over the family pharmacy business in 1995 in Graignamanagh. The pharmacy had been in decline for several years due his parents' advancing years and failing health. On taking over the family business he set up J. & J. Haire and Company Limited (the first named plaintiff), his

first company, to run the family business. He expanded his business in 2001 by purchasing an owner managed pharmacy in Thomastown, Kilkenny. In July 2002, after a legal battle, he opened up a pharmacy at Main Street, Borris, Co. Carlow. These expansions put great financial strains on Mr. Haire and great demands in terms of energy and commitment. In 2005, a second pharmacy in Graignamanagh came up for sale and because of its strategic location, near to the local GP, and to keep potential competition out, the plaintiff purchased this pharmacy also.

3. The Legislation, the Regulations and the Contract

(a) The Financial Emergency Measures in the Public Interest Act 2009.
The purpose of the Act is set out in the long title to the Act and the reasons in justification for this piece of legislation are, most unusually, set out in a series of recitals that precede the legislation itself. It is necessary to set out the recitals by way of background to the legislation:-

> "WHEREAS a serious disturbance in the economy and a decline in the economic circumstances of the State have occurred, which threaten the well-being of the community;
>
> AND WHEREAS as a consequence a serious deterioration in the revenues of the State has occurred and there are significant and increasing Exchequer commitments in respect of public service pensions;
>
> AND WHEREAS it is necessary to cut current Exchequer spending substantially to demonstrate to the international financial markets that public expenditure is being significantly controlled so as to ensure continued access to international funding, and to protect the State's credit rating and reverse the erosion of the State's international competitiveness;
>
> AND WHEREAS the burden of job losses and salary reductions in the private sector has been very substantial and it is equitable that the public sector should share that burden;
>
> AND WHEREAS it is necessary to take the measures in this Act as part of a range of measures to address the economic crisis;
>
> AND WHEREAS the value of public service pensions is significantly and markedly more favourable than those generally available in other employment."

The relevant section which permits the Minister to reduce payments to health professionals is contained in s. 9 of the Act as follows:

> "(1) Notwithstanding any other enactment, contract, arrangement, understanding, expectation, circular or instrument or other document, the Minister for Health and Children may, with the consent of the Minister for Finance, by regulation, reduce, whether by formula or otherwise, the amount or the rate of payment to be made to health professionals, or classes of health professionals, in respect of any services that they render to or on behalf of a health body from the date of the regulation.
>
> (2) Subsection (1) shall apply to the services rendered from the date of the regulation, notwithstanding that the health professionals concerned may have commenced the provision of the service prior to the date of the regulation.
>
> (3) A regulation made under subsection (1) may fix different amounts or rates for different services, and as and from the date of the regulation, there shall be no entitlement to payment in excess of the amounts and rates so specified, although nothing in this section shall prevent any health professional from providing a service for a lesser amount or at a lower rate.
>
> (4) Prior to making a regulation under subsection (1), the Minister for Health and Children, or, at that Minister's direction, the health body concerned, shall engage in such consultations as that Minister considers appropriate.
>
> (5) A regulation made under subsection (1) shall fix amounts or rates that the Minister for Health and Children considers to be fair and reasonable in the light of the purposes of this Act, having regard to the matters which that Minister considers appropriate, including any or all of the following:
>
> > (a) the terms of any existing contractual arrangements or understandings with the health professionals concerned or any expectation on their part;
> >
> > (b) the terms of any circular, instrument, or document which apply to the health professionals concerned;
> >
> > (c) any submissions made and views expressed during the consultations under subsection (4);
> >
> > (d) the nature of the services rendered by different classes of health professionals and the general nature of expenses and commitments of the health professionals providing those services;
> >
> > (e) the impact on the State's ability to continue to provide health services at existing levels if reductions are not made; and
> >
> > (f) the fairness and efficiency of any method of effecting any reductions in payments having regard to the requirements of good and effective administration.
>
> (6) The powers conferred on or exercised by the Minister for Health and Children under this section shall not affect any existing right to negotiate or amend rates or contracts generally which that Minister or the health body concerned enjoys apart from this section, and those rights may be exercised in conjunction with, in addition to or instead of the powers conferred by this Act.
>
> (7) Consultations under subsection (4) shall be completed no later than 30 days after the Minister for Health and Children gives notice of the commencement of the consultations.

(8) A health professional who does not wish to continue to render services to or on behalf of the health body concerned on the basis of a payment regime fixed in a regulation made under subsection (1) may give 30 days' notice to that effect to the health body and, on the expiration of those 30 days, shall be relieved of any obligation to render those services notwithstanding any contractual or other term with regard to notice.

(9) If a health body receives notice from a health professional under subsection (8), it may, notwithstanding any other enactment, contract, implementing circular, instrument or other document, engage the services of other health professionals to ensure that the services continue to be available.

(10) The Minister for Health and Children may define the manner in which consultations under subsection (4) are to be conducted and conduct them in such manner, and with such representatives of health professionals or otherwise, as he or she considers appropriate, and nothing in the Competition Act 2002 shall prevent participation by that Minister or any such representative in such consultations, or the communication and discussion of the outcome of such consultations by the representatives with the health professionals they represent.

(11) The Minister for Health and Children may make regulations to do anything that appears necessary or expedient for bringing this section into operation, or facilitating its operation, with a view to fulfilling the purposes for which this Act was enacted.

(12) Regulations made under subsection (11) may contain such incidental, supplementary and consequential provisions as appear to the Minister for Health and Children to be necessary or expedient for the purposes of the regulations.

(13) Without prejudice to section 13, the Minister for Health and Children may from time to time and shall, before 30 June in 2010 and every year after 2010, carry out a review of the operation, effectiveness and impact of the amounts and rates fixed by regulation under this section and consider the appropriateness of those amounts and rates, having regard to any change of circumstances and in particular any alteration of any of the matters mentioned in subsection (5).

(14) If, after completing a review under subsection (13), the Minister for Health and Children considers it appropriate to do so, that Minister may, with the consent of the Minister for Finance, by regulation adjust (whether by formula or otherwise) the amount or the rate of payment to be made to health professionals, or classes of health professionals, in respect of any services that they render to or on behalf of a health body from the date of the regulation.

(15) Subsections (2) to (12) apply, with the necessary modifications, to the making of regulations under subsection (14).

(16) Regulations made under this section shall be laid before each House of the Oireachtas as soon as may be after they are made and, if a resolution annulling the regulations is passed by either such House within the next 21 days on which that House has sat after the regulations are laid before it, the regulations shall be annulled accordingly, but without prejudice to the validity of anything previously done under the regulations.

(17) In this section –

'health body' means the Health Service Executive and any other body under the aegis of the Minister for Health and Children wholly or partly funded by the Exchequer to which, or on behalf of which, health professionals render services; and

'health professional' includes –

(a) a registered medical practitioner,

(b) a registered dentist,

(c) a registered pharmacist,

(d) an optometrist,

(e) an ophthalmologist,

(f) a podiatrist, and

(g) a chiropodist.

(18) Where the provider of a service of a kind normally provided by a health professional is a company or other body corporate, or the legal personal representative of a deceased health professional, a reference in this section to a health professional includes the company or other body corporate or legal personal representative.

(19) In this section, payment in respect of a service rendered by a health professional includes payment in respect of goods provided by that health professional as part of the service."

Section 10 of the Act enables the relevant Minister to make reductions with the consent of the Minister for Finance to other professionals such as lawyers, architects *etc.* in respect of services they provide to the State.

Section 13 provides that the Minister for Finance shall carry out an annual review of this legislation and report his/her findings to both houses of the Oireachtas. Section 14 enables the Minister for Finance to make regulations for the purposes of the Act or to give the Act full effect.

(b) The Regulations

In exercise of the powers conferred under ss. 9 and 10 of the 2009 Act, various Regulations have been made reducing payments in respect of services provided to the State by various service providers, including State solicitors, dentists, consultants psychiatrists, ophthalmologists, optometrists and dispensing opticians, veterinary practitioners and general practitioners. The Regulations provide for

a reduction of approximately 8% in all of these cases.

The Regulations that particularly affect the plaintiffs in this case are the Health Professionals (Reduction of Payments to Community Pharmacy Contractors) Regulations 2009 (S.I. No. 246 of 2009) ("the Regulations"). The relevant provisions of these Regulations are as follows:

> "2. In these Regulations –
>
> 'community pharmacy contractor' means a registered pharmacist, company or other body corporate that provides services to the Health Service Executive under an agreement made in accordance with conditions specified by the Minister for Health and Children in 1971 or 1996 for the provision of community pharmacy services to eligible persons under section 59 of the Health Act 1970, as amended from time to time;
>
> 'controlled drug' has the same meaning as in section 2 of the Misuse of Drugs Act 1977 (No. 12 of 1977);
>
> 'ex-factory price' with respect to a particular drug item at a particular time, means the price of that drug item determined in accordance with the relevant agreements in force at that time between the Health Service Executive and representative bodies of manufacturers and importers of such items;
>
> 'fridge item' means a drug item which must be kept in refrigerated storage conditions of between 2 and 8 degrees Celsius as stated in the summary of product characteristics for that item;
>
> 'ingredient cost' means –
>
> (a) in the case of controlled drugs and fridge items, the ex-factory price together with a wholesale mark-up of 17.66 per cent; and
>
> (b) in the case of any other drug item, the ex-factory price together with a wholesale mark-up as specified in Tables 2 and 3 below.
>
> 3. These Regulations shall apply to payments in respect of services rendered
>
> by a community pharmacy contractor to or on behalf of the Health Service Executive in respect of the dispensing of drug and non-drug items by a registered pharmacist under the General Medical Services Scheme, the Drug Payment Scheme, the Long-Term Illness Scheme, the European Economic Area Scheme and the Health (Amendment) Act 1996 Scheme.
>
> 4. The payments (other than reimbursement of ingredient costs and retail mark-up for non-drug items and reimbursement of ingredient costs for controlled drugs and fridge items) that shall be made to a community pharmacy contractor in respect of the services referred to in Regulation 3 from the date of the making of these Regulations shall be those specified in Tables 1, 2 and 3 below."

I will postpone further reference to the payments until I have described the various schemes which are covered by the Regulations and the method of payment and the rates applicable to each scheme that was in existence prior to the introduction of S.I. No. 246 of 2009.

(c) The Contract

Against the above background, it is now necessary to examine the Contract entered into between the plaintiffs and the HSE, the terms of which are relevant in this case. Under the Contract, the pharmacy contractor undertakes to supply any GMS eligible person or any other eligible person, who presents a properly completed prescription, such medicines as may be ordered. In discharging his duties, the pharmacy contractor undertakes to exercise his/her professional judgment and to exercise due diligence and care towards the patients. The pharmacy contractor also undertakes a number of other obligations including a commitment to certain hours of opening as specified in the Contract.

Clauses 12 and 13 of the Contract which are of particular relevance read as follows:-

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

Clause 13 provides:-

> "13(1) The pharmacy contractor shall not demand or accept any payment or consideration whatsoever other than payments under clause 12(1) in reward for the supply of medicines which under the Health Act, 1970 are to be supplied without charge."

Clause 19 is also relevant and provides:

> "19(1) This Agreement will terminate forthwith on the pharmacy contractor or, in the case of a body corporate, the supervising pharmacist, ceasing to be entitled to practice as a pharmacist or upon his/her ceasing to keep open shop for the compounding and dispensing of medical prescription or on the cessation of the said contractors' entitlement so to do.
>
> (2) The pharmacy contractor may terminate the Agreement on giving three months notice in writing or such shorter period of notice, in writing, as may be agreed by the Chief Executive Officer [of the defendant Board].
>
> (3) This Agreement is to be construed as contingent upon the terms agreed or to be agreed between the Minister and the Pharmaceutical Contractor's Committee regarding arrangements for the provision of pharmaceutical services under the provisions of the Health Act 1970. The pharmacy contractor and the Board agree that any changes in the terms of such

agreements, which may be agreed between the Minister and the Pharmaceutical Contractor's Committee, shall be incorporated into this Agreement and the terms of this Agreement shall be construed accordingly, following the issue of a notification of such agreed changes by the Minister.

(4) Nothing in this Agreement shall interfere with the statutory functions prescribed from time to time of the Minister or the Chief Execute Officer.

(5) The terms and conditions of this Agreement between the Pharmaceutical Contractor's Committee and the Minister may be subject to review after a period of five years. In default of agreement on any such review, the matters of this Agreement shall be subject to mediation and recommendation by a third party appointed by the Minister following consultation with the Pharmaceutical Contractor's Committee. Any alterations to the Agreement between the Minister and the Pharmaceutical Contractor's Committee arising from the five year review provided for in this clause, shall be incorporated into this Agreement and the terms of this Agreement shall be construed accordingly, following the issue of a notification of such agreed changes by the Minister. The terms and conditions of this Agreement may also be extended for special periods with the agreement of the Minister and the Pharmaceutical Contractor's Committee." (Emphasis added).

It is important to note that the payments to be made by the defendants are to be made "in accordance with such rates as may be approved or directed by the Minister from time to time after consultation with the Pharmaceutical Contractors Committee". (Clause 12(1)). The version of the Agreement that is applicable in the present circumstances is the 1996 standard form, as amended.

4. The Various Schemes, Pricing in the Pharmaceutical Sector and Remuneration of Pharmacists
The various schemes relevant to the current proceedings are:

(a) The General Medical Scheme (GMS)

(b) The Drugs Payment Scheme (DPS)

(c) The Long Term Illness Scheme (LTIS)

(d) The European Economic Area Scheme (EEAS) and

(e) The Health Amendment Act, 1996 Scheme (HAAS).

To appreciate the reimbursements paid by the State (under the old and new systems) under these schemes, it is necessary to outline in brief how the distribution of pharmaceutical products operates in Ireland. At the apex of the distribution system are the manufacturers and importers of the relevant medicines, *etc*. The distribution system is explained by Prof. Durkin, an Economist called on behalf of the plaintiffs, and can be set out as follows:-

"Pharmaceutical wholesalers are the link between pharmaceutical manufacturing companies or importers/marketing companies and retail pharmacies. Three wholesale companies, United Drugs, Unifar and Cahill May Roberts dominate the wholesale market, taking about 90% of it, with United Drug accounting for about half of this, and Unifar about one third. These wholesalers provide a wide range of drugs, estimated at about 12,000 to retail market, consisting of 14,000 retail pharmacies, with twice daily deliveries. The wholesale sector is thus an important part of the supply chain, linking a large number of suppliers and products with a large number of retail outlets.

Retail pharmacists deal directly with the public, their function is to dispense medicine to the public on the basis of doctors prescriptions and to offer advice to the public both in terms of medicines prescribed, which may involve discussions with GPs and the correct course of action in the case of minor and sometimes more serious ailments. They also carry non-prescription medicines but can be competing with other retail outlets for the sale of these. Finally, many retail pharmacists carry a range of other 'front-of-house' products from cosmetics to cameras. They also represent the frontline of many State schemes for drugs like GMS, the Drug Payment Scheme, the Long Term Illness Scheme *etc…*

The majority of retail pharmacies are single-outlet pharmacies and do not form part of a chain or group. They are owned and operated by a single pharmacist. In the past decade there has been some development of group on multi-chain pharmacies and some foreign ownership. Boots are the most obvious example of a new foreign entrant to the market, locating in the new shopping centres and acquiring some existing retail outlets. The Unicare Group was acquired by GEHE part of the German CELESIO Group. There are also some domestic chains, such as McCabe's, Hickeys, McCawleys. However, the majority of pharmacies and a bulk of sales are through single outlet pharmacies. For a very short period 1996 to 2002 there were restrictions on the location of new pharmacies, but these are now gone. Since the restrictions on location were removed there was an increase in the number of pharmacies but there has also been some pharmacy failure."

Unlike other businesses, the Government plays an important role in this process. The price which manufacturers/importers sell products to the wholesalers (the ex-factory price) is fixed by agreement between the Irish Pharmaceutical and Healthcare Association (IPHA), the association representing the manufacturers, and the Department of Health and Children. Wholesalers in turn, invoice retail pharmacists at the ex-factory price plus a mark-up of 17.66%, giving a profit margin of 15% on sales price. If, for example, a product is sold to a pharmacist for 100, the wholesaler receives a profit of 15. Taking this as a given, the State then has to determine what reimbursement the retailers are entitled to when they dispense prescription medicines under the various schemes on behalf of the State. The answer to this is that the State looks at the different schemes it has in place, and determines what it will pay the pharmacist for operating the schemes on its behalf.

Discounts and Rebates
Before referring specifically to the prices fixed by the State, it is necessary to say a word about discounts and rebates which the retailers were, over the years, able to get from the wholesalers for their business. Because of intense competition at the wholesale level, the wholesalers, to retain the loyalty of the retailers, gave discounts or rebates in certain events to retailers which, in effect, meant that the wholesaler was willing to share his 17.66% mark- up with the retailers. During the course of the hearing, the plaintiffs indicated that the level of rebates that a particular retailer was able to command varied, sometimes being as low as 2% but on average coming to between 8% and 10%. Mr. Haire gave evidence that, in his case, in the most recent times, he was able to negotiate a rebate upwards from 10.25% to 10.75%. The plaintiffs also indicated that these rebates had to be earned by the retailer and were not there simply for the asking. In particular, the plaintiff identified that rebates would be made available if:-

(i) there was an increase in the volume of orders placed by the retailer;

(ii) if the retailer undertook early payment; and

(iii) if an electronic order system was installed.

It is also significant to note that these rebates were negotiated by the retailer and it is important to note that the rebates were calculated on the whole business between the wholesaler and the retailer and not just on that which was reimbursable by the State. These rebates came into effect from the early 1990s and were in place well before the middle of 1999 when the existing Drugs Payment Scheme was introduced. The level of rebates varied with each individual retailer and reflected the bargaining strength of the retailer in the negotiations.

Once established, the rebating system meant that retailers could increase their profits greatly by getting from the wholesalers a portion of the 17.66% which represented the wholesaler's profit on the ex-factory price.

A central issue in this case, is the assertion by the State that in fixing a fair price for reimbursement to the retailers for administering their schemes, the rebates should be taken into account by the State. The plaintiffs, on the other hand, argue that this is something which the plaintiffs have "earned" and which arises from efforts on their own part and from their own business acumen and which has nothing to do with the State. According to the plaintiffs, it should be disregarded, in calculating what is a fair price for their services to the State under these schemes.

Crucial to the characterisation of the rebates is the economic analysis of the pharmaceutical market and the history of the development of the wholesalers' rebates.

Mr. Ridyard (the economist called by the State) argues that what happened from the mid-1990s was that wholesalers, being in a better position to identify where savings could be made, introduced rebates (or discounts) at the end of each period when payment was due, when the particular volume of medicines, *etc.*, justified it. Other efficiencies from the pharmacists, such as earlier payment schedules and electronic ordering, would also be factored in, in calculating the appropriate rebate. This development was apparently driven by serious competition from other wholesalers. This competition was so intense that the number of wholesalers now operating in the industry in Ireland has been reduced to three in the main. From this point of view, the State argues that the rebates are a product of changes in the market rather than something that developed as a result of an initiative from the pharmacists/retailers, and this justifies the State's entitlement to recalibrate the payments.

Without engaging in an attempt to quantify anymore closely the respective contributions of each party to the rebate phenomenon, it is sufficient to say that the emergence of the rebates can be attributed in a considerable part to each party and also to the way the wholesale market has developed independently over the years. It would, however, be difficult to say, in this situation, that the rebates are solely earned by the efforts of the pharmacist in general or, acknowledging that individual pharmacists negotiate the appropriate level of rebate, by each pharmacy individually. Given its share in creating the conditions where rebates are possible, I am of the view, in light of the emergence of the rebates as an economic factor, that the State was entitled to review the remuneration paid to the pharmacists under the relevant schemes.

I accept in this connection the evidence of Mr. Ridyard that one could not do a proper economic assessment of what is happening in the industry without taking into account all sources of remuneration to the pharmacists that arise "because the pharmacist has carried out this activity of dispensing some medicine to a patient".

It is also interesting to note that Mr. Ridyard, and Mr. Desmond, the witness from the Department of Health, were of the view that the State was justified in revisiting the remuneration when the rebates was recognised as a serious factor before any economic crisis arose.

I cannot for these reasons conclude that the Minister's intervention in these circumstances was unreasonable or unwarranted. It is not for this court to be any more intrusive in its examination of the Minister's decision in that regard. Suffice to say it was neither unreasonable nor unfair for her to take the rebates into account in reviewing the rates of remuneration due to pharmacists under the Contract.

It is important to recall that Mr. Ridyard in his evidence emphasised that the question he was asked to consider was limited to the following:-

> "Assess whether in principle the reductions imposed on a pharmacist's remuneration was reasonable."

Mr. Ridyard's evidence on what he considered to be reasonable, from an economist's point of view, is to be found in the following answer:-

> "Essentially my conclusion was that the remuneration for pharmacies under the regulations represented a reasonable level of remuneration for pharmacies and by 'reasonable' what I had in mind was a test whereby the regulations would give sufficient remuneration to pharmacies, taking everything into account that would sustain a pharmacy network that was able to do the job that it is there to do for the Irish consumer."

In this, Mr. Ridyard was clear that he was not expressing any views as to what the court may ultimately, as a legal matter, conclude was reasonable and, secondly, he was not in any position to advise the court on fairness insofar as an argument was being made of disproportionate treatment or discrimination between the pharmacists and other health professionals.

Rates

Against this background, I now set out the rates of reimbursement under the various schemes which the State allowed to the pharmacist up to recently and the new changes introduced as a consequence of the 2009 legislation.

GMS

Pre-2009 Act	Pharmacist reimbursed wholesale price (100) + 0% mark-up + €3.60 *per* item (dispensing fee)

Post-2009 Act	Pharmacist reimbursed wholesale price less 6.5% (93.5) + 0% mark-up + between €5.00, €4.50 and €3.50 (dispensing fee)

DPS, LTIS, EEAS and HAAS
Pre – 2009 ActPharmacist reimbursed wholesale (100) + 50% mark-up + €3.16 (dispensing fee)

Post-2009 Act	Pharmacist reimbursed wholesale price less 6.5% (93.5) + 20% mark-up + between €5.00, €4.50 and €3.50 (dispensing fee)

To contrast the old and the new rates of reimbursement, some comments are necessary.

The obvious reductions by the State is an attempt to factor into the new rates the fact that pharmacist retailers in recent years have been getting significant discounts or rebates from the wholesalers which greatly boosted the retailers' profits. This action by the State can be justified, according to the defendants, by its view that the discounts granted by the wholesaler to the retail pharmacist is to a great extent due to the volume of business given by the State to the pharmacist. The State affects the appropriate reduction by notionally reducing the wholesale price by 6.5% *i.e.* from 100 to 93.5. The 6.5% reduction is the measure which the State considers it is entitled to if the discount (rebate) is to be shared between the State and the retailers. Moreover, in the schemes where a mark-up was allowed (DPS, LTIS, *etc.*), this was reduced from 50% to 20%. This resulted in a double reduction from the pharmacist's view, as not only was the margin reduced by 60%, but the base on which the 20% was now to be calculated also fell from 100 to 93.5. To compensate somewhat for these cuts, the dispensing fee was by and large increased from a flat fee of €3.60 or €3.16 to a sliding scale fee varying from €5.00 to €4.50 to €3.50, the higher fee being allowed for the first 20,000 units (in a year) and the lowest for units in excess of 30,000 units.

The loss to the pharmacist retailers was most clearly seen in the DPS and other schemes where, under the old scheme, the retailer would be reimbursed on a product costing him €100 a total of €153.16 (made up of 100 (the wholesale price) + €50 + €3.16), whereas under the new scheme the retail pharmacist would only get a maximum of €117.20 and a minimum of €115.70.

There was some dispute initially between the parties as to what this represented by way of a loss in fee levels to the pharmacist. The plaintiffs argued that it might be as high as 30%, whereas the defendant suggested that it was nearer 24%. At the hearing, however, it was agreed between the parties that this did not need to be determined exactly by the court, as the plaintiffs indicated that it could accept, for the purposes of its legal argument, the lower figure of 24%, since its case, based on unequal and disproportionate treatment compared with the reductions to other health professionals, where the cuts were only in the order of 8%, would stand whether the reduction to the pharmacists was 24% or 30%: the disparity in either case, according to the plaintiffs, spoke of unfairness.

5. The Plaintiffs' Case
The plaintiffs are directly challenging the constitutionality of both the 2009 Act and the Regulations made in respect of pharmacists on the basis that they fail to vindicate the plaintiffs' fundamental rights with regard to property and to equal treatment (which are protected both under the Constitution and/or under the European Convention on Human Rights).

The plaintiffs plead their case under three broad headings:-

(a) The procedural arguments:

(i) the Regulations were not published or promulgated in a proper manner;

(ii) in making the Regulations, the Minister did not comply with the consultation procedure mandated by s. 9(4) of the 2009 Act because she did not engage in a "meaningful" consultation with the pharmacists;

(b) The constitutional arguments:

(i) in making the Regulations the Minister exceeded what the 2009 Act permitted, because such swingeing reductions to the pharmacists' payments under the Contract were never intended by the Act ("principles and policies" argument);

(ii) the reduction in the rates of remuneration for the pharmacists amounted to an interference with the plaintiffs' property rights and are arbitrary and/or capricious and/or disproportionate and/or discriminatory when compared with the cuts imposed on other health professionals; and

(iii) the reduction in the rates for pharmacists do not respect the principle of equal treatment when compared with the lesser reduction in the rates for other professionals (including other health care professionals).

The property right which is infringed, according to the plaintiffs, is the contractual right the plaintiffs have with the HSE.

I will deal first with the plaintiffs' procedural arguments and then consider the arguments based on interference with property rights and, finally, the argument based on equal treatment.

Before doing so, however, I propose to deal with two recent judgments of the High Court which were opened in full and extensively discussed at the hearing. The cases are *Hickey v. Health Service Executive* [2008] IEHC 290 and *Irish Pharmaceutical Union v. Minister for Health and Children* [2007] IEHC 222.

6. Relevant Irish Case Law
In *Irish Pharmaceutical Union v. Minister for Health and Children* [2007] IEHC 222; (the "*IPU case*") Clarke J. had to deal with a case where the plaintiffs sought declarations against the defendants that the termination unilaterally by the Minister of a system of "advanced payments", which formed a term of the individual contract between the pharmacies and the HSE, amounted to a unilateral variation of a contractual term and was not permissible. It is important to appreciate that this was a case framed in contract law. In the course of his judgment, Clarke J. determined that the background "memorandum of agreement" between the IPU and the Minister, which came into existence in 1971, and was subsequently superseded by a revised arrangement in 1996, did not constitute a legally binding contract. The agreements between the individual pharmacies and the HSE were, however, legally binding contracts and

contained an inferred term concerning payments in advance. These relate to payments made by the HSE to the pharmacies to assist with "cash flow" problems in the purchase of the relevant drugs. When the Minister decided to discontinue these "advanced payments" she was in breach of the Contract, according to Clarke J. Although, the pharmacists' contract was with the HSE (which was not a party in the action), Clarke J. said that in view of the Minister's involvement in the whole process, the plaintiffs were entitled to a declaration against the Minister in the peculiar circumstances of that case.

It is important to note that in the *IPU case* the issue in dispute related to the provision of advance payments to the pharmacists. Clarke J found that this provision was a term in the contract and that such a term could not be unilaterally revoked by the Minister. At paragraph 7.4 of his judgment Clarke J said: " …[it was] not open to one party to make a unilateral change in the terms unless the contract itself allows for such an eventuality." (Emphasis added). In that case no such saving provision could be found in the Contract.

In the case before this Court, however, where the rates of remuneration in the Contract are at issue, clause 12(1) does allow the Minister to change these rates unilaterally.

According to the defendants, the holding in the *IPU* case, supports the defendants in this case rather than the plaintiffs: the plaintiffs do not have a contractual right to fixed rates into the future under the Contract and, accordingly, when the Minister chooses to determine new rates of pay, she is not interfering with any of the plaintiffs' contractual or property rights.

In *Hickey v. Health Service Executive* [2008] IEHC 290 ("*Hickey*") Finlay Geoghegan J. also had to consider the nature and terms of the Contract between the pharmacies and the HSE. In that case, the plaintiffs sued the defendant for breach of the Contract in circumstances where the defendant reduced the amount paid as reimbursement for drugs supplied under the GMS and other community drug schemes. Again, after a very detailed and helpful description of the background to the agreements between the HSE and the pharmacies, Finlay Geoghegan J. held, having determined that the pharmacies were entitled under the Contract to a certain rate of payment under the schemes, that the only way these rates could be varied was by decision of the Minister and not by a decision of the HSE. For the HSE to attempt to do so unilaterally was, in effect, usurping a function of the Minister.

Hickey is important for other reasons. First, Finlay Geoghegan J. found that under clause 12(1) of the Contract the Minister was entitled to determine the rates of pay unilaterally and she did not require the consent of anyone else to do so. In particular the obligation to consult under the clause, did not in any way dilute her entitlement to make her own determination on the rates of pay. Second, the phrase "rates of pay" as used in clause 12(1) is to be widely interpreted and includes not only professional fees, but also extends to the wholesale mark-up and to the ingredient cost paid by retailers. This meant that the Minister is entitled unilaterally to change downwards (i) the 17.66% mark-up formerly agreed as the appropriate increase to be allowed on the ex-factory price to get the wholesale price, as well as (ii) the wholesale mark-up of 50% allowed to pharmacists under the non-GMS schemes. The significance of these holdings will become apparent later in this judgement.

I repeat, however, perhaps for the reasons just stated, that the case before me is not a contract case, and the regulations introduced by the Minister are challenged primarily on constitutional grounds.

7. The Plaintiffs' Procedural Arguments.

(i) The Publication and the Entry into Force of the Regulations
The plaintiffs under this heading advanced the argument that the 2009 Regulations violate a fundamental principle that no legislative measure can take effect before it is officially published. Although the argument featured in the written submissions of the plaintiffs, in truth, it was not enthusiastically advanced at the hearing. It was not abandoned, however, and accordingly I am obliged to deal with it.

The argument is set out in more detail at para. 22 of the plaintiffs' written submissions as follows:-

> "22. Section 9(16) of the Financial Emergency Measures in Public Interest Act 2009, requires that Regulations should be placed before both Houses of the Oireachtas before they become law. Section 16(3) of the Interpretation Act 2005, provides that, in the absence of any provision to the contrary, a statutory instruments takes effect on the day it was signed, in this instance, July 1st, 2009 (there being no provision to the contrary). The 2009 Regulations were not laid before the Houses of the Oireachtas until July 3rd, 2009, and were not officially published in *Iris Oifigiúil* until the 7th of July, 2009. Although, the HSE wrote to notify pharmacists of the Regulations, six days after they were signed, on the 6th day of July, 2009, but (*sic*) the Regulations which accompanied this letter were not signed and were stamped 'proof copy'."

The plaintiffs themselves acknowledge that the point advanced is "ultra-technical" and that a court, even if it were to find that there had been a breach of the alleged principle "may be tempted to say that the infringement of the principle of legality is *de minimis* and should be overlooked".

The plaintiffs cite no Irish authority to support this argument but rely, by way of analogy, on some authorities from the European Court of Justice.

The plaintiffs' argument, that a law or statutory instrument should not take effect until it has been formally published, has been challenged by the defendants on several grounds. In addition to the facts set out by the plaintiffs, the defendants point out that on the 18th June, 2009, the Minister published a press release in which she stated that the Regulations would come into force on the 1st July, 2009, and set out the reductions which were to be made. Furthermore, the defendants point out that the Regulations are not penal or retrospective in nature.

The defendants also point out, first, that the plaintiffs have no standing to make the present argument as no prejudice to the plaintiffs has been identified to the court. A hypothetical argument is being advanced that a pharmacist wishing to terminate on learning of the Regulations might have been prejudiced and also, that the thirty days notice a pharmacist must give to terminate might have been given earlier if the Regulations were known at an earlier date. As indicated before this Court, however, it is clear that the plaintiffs have not exercised and had no intention of exercising their right to terminate. It is well established that a challenge of this nature cannot be entertained by the courts on a hypothetical basis, or on an *ius tertii* argument (see *Madigan v. Attorney General* [1986] I.L.R.M. 136).

Second, contrary to the plaintiffs' submissions, the defendants assert that there is no requirement that the Regulations should be laid before the Houses of the Oireachtas or published in *Iris Oifigiúil* before they come into force. On the contrary, s. 9(16) of the 2009

Act provides that any Regulations made under this section should be laid before the Houses of the Oireachtas "as soon as may be after they are made" (emphasis added).

Similar phraseology is used in s. 3 of the Statutory Instruments Act 1947 (as amended by s. 2 of the Statutory Instruments (Amendment) Act 1955), which requires notice of a statutory instrument to be published in *Iris Oifigiúil* "as soon as may be after it is made" (emphasis added). From the facts of this case it is clear that the Regulations complied with both requirements in this case. Moreover, s. 3(2) of the 1947 Act expressly provides, in any event, that non-compliance with the requirements of s. 3(1) does not effect "the validity or effect or coming into operation" of any statutory instrument, subject to s. 3(3) which is not relevant to this case. The plaintiffs have not sought to impugn these provisions, even though these provisions were brought to their attention at the interlocutory stage of these proceedings.

It is also noteworthy that the Constitution itself at Article 25.4.1 provides that when a Bill is signed by the President it comes into operation on that day, unless a contrary intention appears. In that case there usually is a delay (small admittedly) before publication; in any event publication is rarely instantaneous.

In view of these clear legislative and constitutional provisions it is difficult to see how the plaintiffs' argument, based as it is on a vague general principle, can be taken seriously when a full challenge is not made to the legislative provisions just referred to.

The case law cited by the plaintiffs from the European Court of Justice (*Heinrich* C-345/06 [2009] 3 C.M.L.R. 7; *Skoma-Lux* C-161/06 [2007] E.C.R. I-10841, para. 33, [2008] 1 C.M.L.R. 50; *ROM–projecten* C-158/06 [2007] E.C.R. I-5103, [2007] 3 C.M.L.R. 21) need not be opened in detail. I am satisfied from reading these cases that in each case the facts can be distinguished from those before this Court. More significantly, it would be dangerous to adopt out of context general quotations of principle from these cases which emanate from a court operating in a very different legal system, and where there is an explicit provision in Article 254(2) of the EC Treaty that a community regulation cannot take effect in law unless it is published in the Official Journal. The present Regulations which concern this Court are not national measures taken to implement community legislation and, therefore, statements from the ECJ are of limited, if any, effect in this jurisdiction.

For the above reasons I reject the plaintiffs' arguments under this heading.

(ii) Failure to consult under s. 9(4) of the 2009 Act
The plaintiffs argue that the Minister failed to engage in a "meaningful" consultation under s. 9(4) of the Act prior to making the decision to adopt the Regulations. In particular it is argued any consultation the Minister did engage in did not relate to the "magnitude" of the reductions introduced under the Regulations. It is also suggested that the plaintiffs and "the pharmacy sector generally were not on notice of the level and magnitude of the cuts" being contemplated. It is submitted that the nature of the consultation process under s. 9(4) "must be subject to close and careful scrutiny by the Courts".

Section 9(4) of the 2009 Act states:-

> "(4) Prior to making a regulation under subsection (1), the Minister for Health and Children, or, at that Minister's direction, the health body concerned, shall engage in such consultations as that Minister considers appropriate."

It is clear from this that the consultation mandated by the subsection is that which the "Minister considers appropriate". This gives the Minister a great measure of discretion in the matter.

The evidence is that the Minister (through the Department) did initiate a consultation process. On the 23rd December, 2008, the Department wrote to the IPU and others inviting submissions. The IPU communicated with the Department and made a submission, but sought an extension of the timeframe set by the Department as they complained that it did not have sufficient time to properly engage with the process. The IPU, however, in making such requests were ignoring s. 9(7) of the Act which provides:-

> "(7) Consultations under subsection (4) shall be completed no later than 30 days after the Minister for Health and Children gives notice of the commencement of the consultations."

That timeframe is fixed by statute and cannot be extended beyond the 30 days mentioned in section 9(7). This in itself indicates that the Act contemplated that the consultation process allowed for in an Act dealing with financial emergency measures, was not to be used to dilute the urgency that permeates the Act itself.

Furthermore, it must be noted that a great deal of consideration and deliberation had in fact already taken place between the pharmacists (and the IPU) and the Department during the years 2007 and 2008 *i.e.* prior to the *Hickey* and *IPU* cases. After these deliberations, the Department adopted measures which reflected the Department's views on the necessary changes to the price system and which were challenged in the *Hickey* case. These measures are substantially the same measures that are in the contested Regulations, now at issue before this court.

Because the *Hickey* decision went in favour of the pharmacists on a technical point, the Department revisited the issue shortly after that judgment once more and, having written to the IPU in December 2008 of its intention to engage in a consultation process under clause 12(1) of the contract, it abandoned that process in favour of the consultation process provided for in s. 9(4) of the 2009 Act when that Act came into force. Mr. Haire made a written submission on 19th March, 2009. Following its written submissions, the IPU had a meeting with representatives of the Department and the HSE on 24th March, 2009. The evidence clearly shows that the IPU could not have been, and was not, under any illusion as to what was at stake and that the Minister was contemplating substantial reductions in the remuneration of pharmacists. Documentation also recorded that 104 named individuals/organisations submitted 110 submissions in total during the process, 75% of which appeared to be from individual pharmacists and small groups of pharmacies.

This factual background is important in considering the discretion of the Minister under s. 9(4) and in assessing what level of consultation she considered "appropriate" in the circumstances of the case. The arguments for the price changes proposed had been fully and extensively rehearsed and various aspects had been explored and canvassed with the parties during the years 2007 and 2008. The proposals contained in the Regulations were not plucked from the air. They had a long contentious history.

Although the plaintiffs, in their submissions, alleged "inadequate consultation", no evidence, in fact, was offered to that effect and for this reason alone, I am not prepared to accept that the consultation process was not "meaningful" and that the requirements of s. 9(4) were not met.

8. The Constitutionality Arguments

I have set out in, broad terms, the nature of the arguments advanced by the plaintiffs in support of their claim that the relevant provisions of the 2009 Act and the Regulations are unconstitutional. These arguments can be summarised under the following headings, and I propose to deal with them in this order:

> (i) That the Regulations are outside the "principles and policies" of the 2009 Act;
>
> (ii) That the Regulations interfere with the plaintiffs' property rights, protected by the Constitution;
>
> (iii) That the Minister, in making cuts to the rates of remuneration, did not treat the plaintiffs equally when compared with the cuts made to the rates affecting other professionals, including other health care professionals

9. Principles and Policies Argument
The plaintiffs allege that the reductions in their rates of payment under the 2009 Act and the Regulations amount to unequal treatment and/or are disproportionate when compared with the reductions made to the rates of payment for other professionals (including other health care professionals and that this "extreme and disproportionate" disparate treatment does not come within the "principles and policies" of the 2009 Act. If the Regulations do not come within the "principles and policies" of the 2009 Act, then they are not authorised and are *ultra vires* the Minister having regard to Article 15.2 of the Constitution.

In *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381 O'Higgins C.J., giving the judgment of the Supreme Court, said at p. 399 that where subordinate or delegated legislation is being challenged "the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to the principles and policies which are contained in the statute itself." That well known case concerned a challenge to the provisions of the Industrial Training Act, 1967 allowing a Minister to make Regulations under that Act. The Supreme Court rejected the challenge to the constitutionality of the legislation and said at p. 399:

> "The Act of 1967 contains clear declarations of policies and aims and it establishes machinery for the carrying out of these policies and the achievement of these aims. In particular, the fact that there will be a levy is provided for in s. 21 and the obligation to pay it is laid down. The only matter which is left for determination by AnCO is the manner of calculating this levy in relation to a particular industry. This is doing no more than adding the final detail which brings into operation the general law which is laid down by the section. In addition, the Oireachtas has taken care to provide a manner whereby a levy order made under that section will continue to be under the supervision of either House of the Legislature itself. This is done under the provisions of sub-s. 6 of s. 21 whereby a levy order may be annulled by a resolution of either House of the Oireachtas. In the opinion of the Court this is a permitted delegation of power to AnCO. Accordingly, the claim that s. 21 of the Act of 1967 is unconstitutional fails."

The facts of that case are strikingly similar, in many respects, to the facts of this case.

The plaintiffs draw attention to the recent attempts by the State to effect changes in the remuneration of the pharmacists, and having failed in those attempts (see *Hickey* and *IPU* cases), the plaintiffs argue that the defendants are now attempting to introduce the changes under the "cloak" of the 2009 Act.

I have already considered both the *Hickey* and *IPU* cases. In *Hickey*, the plaintiffs succeeded on the technical point that the HSE attempted to introduce the reductions when under the Contract it should have been the Minister. Most of the other findings by Finlay Geoghegan J., particularly relating to clause 12 of the Contract, went against the plaintiffs.

In *IPU*, Clarke J. held that there was an unilateral alteration of a term of the Contract by the Minister relating to "advance payments". He found in favour of the plaintiffs, but indicated that this was so because the Contract itself did not provide for a unilateral alteration. It follows that had there been a provision in the Contract itself permitting such unilateral action, the plaintiffs would not have succeeded. I conclude from this that had clause 12(1) been at issue, the plaintiffs would have failed.

The decisions in these cases do not suggest that in resorting to the 2009 Act here, the Minister was doing anything wrong, or was trying to avoid resorting to the Contract itself to effect the changes she thought necessary. All parties agree that the Minister has the power to reduce the rates under clause 12(1) of the Contract, so to suggest by introducing the Regulations, the Minister was doing so under the "cloak" of the 2009 Act, is unconvincing.

The purpose of the 2009 Act is clear and can be discerned not only from the long title but also from the unusual recitals set out earlier in this judgment. The purpose is to reduce State spending and, if necessary, to unilaterally reduce payments to service providers. That, in fact, is the whole object of the exercise. The pharmacists argue that the cuts in their case are wholly disproportionate and unequal. To succeed, proof of this "unequal treatment" would have to be produced, and I have no such proof. Finally, it must be repeated that the pharmacists are liable to have cuts of this size imposed unilaterally, in any event, under their contract with the State. I will refer again to this when considering the plaintiff's property rights and the allegation based on the arbitrariness and disproportionality of the Regulations.

It is difficult also to accept the argument made by the plaintiffs that the intervention made by the Minister into existing contractual arrangements was something that "was never envisaged by the 2009 Act". The whole purpose of s. 9 and, equally, of s. 10, was to alter existing contracts, and reduce payments, where necessary.

I reject the plaintiffs' argument insofar as it asserts that there is proof that the regulations in question do not give effect to the principles and policies of the 2009 Act.

10. Alleged Interference with Property Rights
Section 9 of the Act, according to the plaintiffs, is such a far reaching provision, giving, as it does, the Minister power to unilaterally alter existing contracts between health professionals and the HSE, that it must be considered to be contrary to the constitutional provisions relating to property rights. As a general measure it is difficult, according to the plaintiffs, to see how this accords with the essence of the property rights protected by Article 40.3.2 and Article 43 of the Constitution. Such a power cannot be regarded as "a regulation" of property rights within the meaning of Article 43 and constitutes an "unjust attack" within the meaning of Article 40.3.2. The power in s. 9 cannot be compared with accepted instances of regulation such as fixing minimum payment conditions, minimum holidays, maximum working hours, *etc.*, or regulating various activities by license or authorisation such as planning, taxi services, activities with a public health dimension, *etc.* If such an interference is permissible under the Constitution then, the plaintiffs argue, there are few limits as to the right of the Oireachtas to interfere with existing contractual commitments.

Property rights are protected in the Constitution under Article 40.3.2 and Article 43 of the Constitution. Article 43 provides-

> "1.
>
> (i) The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> (ii) The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2.
>
> (i) The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> (ii) The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

From this it is clear that Article 43 itself contemplates that the State may "regulate" the exercise of property rights having regard to "the principles of social justice" and "the exigencies of the common good".

Article 40.3.2 is perhaps more relevant to the specific case before the court. This declares:-

> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

The relationship between Article 43 and Article 40.3.2 has been addressed by the Supreme Court in *Blake v. Attorney General* [1982] I.R. 117 at p. 135 in the following terms:

> "There exists, therefore, a double protection for the property rights of a citizen. As far as he is concerned, the State cannot abolish our attempt to abolish the right of private ownership *as an institution* or the general right to transfer, bequeath and inherit property. In addition, he has the further protection under Article 40 as to the exercise by him of his own property rights in particular items of property." [Emphasis added].

Keane C.J., delivering the judgment of the Supreme Court in *Re. Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 I.R. 321, at p. 347 said:-

> "…the interpretation of these Articles and, in particular, the analysis of the relationship between Article 40.3.2 and Article 43 have not been free from difficulty."

There is a comprehensive discussion of the evolving jurisprudence on the matter in Hogan and Whyte, *J.M Kelly: The Irish Constitution* (4th ed., pp. 1978 – 1993). From the survey of the case law, the learned authors conclude at p. 1993 that "when considering constitutional protection of property rights, these Articles mutually inform each other".

The plaintiffs advance their arguments based on alleged interference with property rights on a number of grounds:

> (a) that the plaintiffs' contractual entitlements, and in particular their right to receive the contractually agreed rates of payment, are "property rights" within the meaning of the Constitution and that the plaintiffs enjoyed such property rights in this case;
>
> (b) that their property rights have been subject to "unjust attack" by the Minister in making the Regulations, purporting to use her powers under the 2009 Act, in unilaterally making the reductions to the contractually agreed rates of payment in this case;
>
> (c) that the 2009 Act and the Regulations, in so far as they purport to enable the Minister to make swingeing cuts to the plaintiffs' contractually agreed rates of payment, amount to an "abrogation" (rather than a "regulation") of the plaintiffs' property rights;
>
> (d) that the Minister acted in breach of the Contract, by not engaging clause 12(1) of the Contract, and instead chose to rely on her powers under the 2009 Act in making the Regulations to reduce the rates of payment, and this breach of the Contract also amounts to a "unjust attack" on the plaintiffs' property rights.

It is clear that before a litigant can invoke the protection of Articles 43 and 40.3.2, he must be able to show that there is some invasion or attack on an existing property right. If he has no property right in the first instance or the property rights which he has, whether they are based on contract or not, are not as expansive as he maintains, then seeking protection from either Article 43 or Article 40.3.2 is a futile exercise. Consideration of the unjustness of the attack, or the justification which the State may have in passing the relevant measures (in this case the 2009 Act and the Regulations), that, for example, it is for the common good, simply do not arise.

It has been held that property rights include contractual rights. In *Condon v. Minister for Labour (No. 2)* (unreported High Court, 11th June, 1980) McWilliam J. said :

> "As to section 3 of Article 40, accepting that the right to enter into contracts which are within the law and the right to enforce such contracts are personal rights and that a right under a contract is a property right so as to be protected by the provisions of the Article I would refer to the judgment of O'Higgins, C.J., in *Moynihan v. Greensmyth* (1977) I.R. 55 ….
>
> O'Higgins, C.J., said at page 71, 'proceeding therefore, on the assumption that the right to sue claimed by the plaintiff is a property right which is guaranteed by Article 40, S.3, sub-S.2, of the Constitution, the question is whether that right has been subjected to unjust attack or whether there has been an injustice which required vindication by the State. It is to be noted that the guarantee of protection given by Article 40, S.3, sub-S. 2 of the Constitution is qualified by the words

> 'as best it may'. This implies circumstances in which the State may have to balance its protection of the right against other obligations arising from regard to the common good.'"

Insofar as a contractual right is a fundamental right in the Constitution, it has the protection of the common law rules of contract, developed over the centuries and supplemented by legislation from time to time, and it is this code that is the State's expression of its protection of these contractual rights. The principles of contract law are well established and it must be assumed that they provide adequate protection for the contractual rights of the parties where contracts are involved. It is only where such protection is demonstrably inadequate that persons may come forward and make an independent argument based on Article 40.3.2 and Article 43 of the Constitution.

The defendants do not dispute that a contractual right is a property right and that such rights are protected by the Constitution. As a general proposition, however, this is not very helpful. To appreciate the legal significance of this general comment and the strength of the plaintiffs' argument one must examine the nature of the contract and the relevant terms in more detail.

(a) What property rights do the plaintiffs have in this case?
In *Shanley v. Commissioners for Public Works* [1992] 2 I.R. 477 the plaintiff challenged the constitutionality of s. 4 of the Landlord and Tenant (Amendment) Act, 1980 (as amended) on the grounds that it was repugnant to the provisions of Articles 40.3 and 43 of the Constitution. The plaintiff was a tenant under a lease with the Minister for Finance. There was a clause in the relevant lease allowing the tenancy to be terminated by notice. The plaintiff was served with a notice to quit. The plaintiff alleged the provisions of the Landlord and Tenant Act 1931 applied to his lease giving him certain rights, including a right to renew the lease, which rights were taken away by the provisions of s. 4 of the 1980 Act. The defendants argued that, on the contrary, the provisions of the 1931 Act did not apply in the plaintiff's case, and the plaintiff did not enjoy the rights he claimed were being interfered with by the provisions of s. 4 of the 1980 Act. Carroll J. noted at p. 480 of her judgment that if the defendants were correct in their argument "the constitutionality of s. 4, subs. 2 does not arise". At p. 482 of her judgment Carroll J. found that the 1931 Act did not apply to State property, contrary to the argument put forward by the plaintiff. She further said:

> "But in this case since the plaintiff had no right as a State tenant to a renewal by virtue of s. 19 of the Landlord and Tenant Act, 1931, no right was taken away by s. 4, sub. 2 of the 1980 Act. Therefore the question of constitutionality does not arise".

In that case there was no need for Carroll J. to consider whether there was any interference with the plaintiff's property rights or whether they were being subjected to "unjust attack" as the plaintiff had failed to establish that he enjoyed the property right (a renewal of his lease) which he claimed he enjoyed. In my view, very similar considerations apply in this case.

In the Contract between the pharmacist and the HSE, the pharmacist agrees to supply goods and provide a service on behalf of the HSE for certain rates of payment. The 2009 Regulations purport to reduce these rates from a certain date forward. It is important to appreciate that the Regulations do not purport to introduce the changes retrospectively. Neither is there any attempt to confiscate property in the sense of seizing goods or land. If such were attempted, of course, it could only be done under certain conditions and could not normally be done without reasonable compensation.

The plaintiffs' property rights in this instance are no more and no less than those rights which are accorded to him in the Contract. Either the Minister is entitled to make the changes under the Contract or she is not. If she is entitled to do so, then she is not in breach of the Contract; if she is not entitled to do so, she is first and foremost in breach of the Contract and the plaintiff's primary remedies are in contract. Bearing in mind the terms of the Contract in this case, and particularly clause 12(1) which allows the Minister to change unilaterally the rate of remuneration, admittedly after consultation, there is little doubt that had the Minister chosen to effect the rate changes by following the procedure provided for in clause 12(1) of the Contract, the plaintiffs could not complain. There would have been no breach of the Contract and there would have been no infringement of a constitutional right which, by definition, is no greater than the plaintiffs' contractual right. A close look at the Contract between the pharmacists and the HSE, does not disclose that the pharmacists have any right or entitlement for the rates of remuneration to continue indefinitely into the future.

The so called right claimed by the pharmacists under the Contract is not in fact a right at all. At most it is merely a *spes*, a hope that the present rates will continue. Whether they do, however, is not a matter which is to be determined by the pharmacists. It is a matter exclusively for the Minister. From this analysis it can be seen that this is the height of the pharmacists' entitlement under the Contract.

The Minister did, in fact, commence the consultation process under clause 12(1), but when the 2009 Act was introduced she decided to effect the rate change through the powers conferred by that legislation rather than under clause 12(1) of the Contract. Presumably, she felt that this was a more effective way of achieving the changes she wished to bring about in the rates of payments.

The plaintiffs argue that the State cannot unilaterally change its contracts no more than any ordinary person. In support of this position, the plaintiffs refer to the judgment of Clarke J. in the *IPU* case at para. 7.4 where he says:-

> "Where there are, however, existing contractual relations it is not open to one party to make a unilateral change in those terms unless the contract itself allows for such an eventuality. In the light of my finding that the advance payment scheme formed part of the contractual relations between individual pharmacists and the HSE, then the Minister's decision to discontinue advanced payments amounts to a unilateral variation in the contractual terms. That is not permissible." (Emphasis added)

It must be noted, however, that what was at issue in that case was an attempt by the HSE to revoke a recognised term in the Contract which made provision for "advanced payments" to the pharmacists. As I have already said, Clarke J. held that an attempt to unilaterally revoke these payments was a breach of the Contract. But it is important to note that Clarke J. said, in the extract just referred to, that the Minister could not take such unilateral action "unless the contract itself allows for such an eventuality". In the present case, however, while the Minister has unilaterally reduced the rates of payment in the Contract, such unilateral action is provided for, and is allowed (after a consultation process) under the Contract itself at clause 12(1). A more explicit expression of Clarke J's view on this is to be found at para. 3.13 of his unreported judgment where he said:

> "If the Minister has a binding contractual obligation, then he must comply with his contract irrespective of whether he might have a legitimate basis for seeking to have it changed. On the other hand, if the Minister does not have a binding contractual obligation, then the plaintiffs have no case in law." [Emphasis added].

When confronted with this, the plaintiffs argue that clause 12(1) only permits the Minister to alter "the rates" and that it does not permit the Minister to change "the whole structure of the agreement". For example, counsel for the plaintiffs argues that it would not be possible for the Minister under clause 12(1) to reduce the dispensing fee from €3.65 to €0.05 or to cut the ingredient cost by 30% or 40%. That level of swingeing cuts is not what clause 12(1) contemplates or allows.

I do not interpret clause 12(1) in such a restrictive way. As I have already noted, clause 12(1) is not confined to alterations relating to the fees allowed and the mark-ups. It is much broader and includes also, for instance, the ingredient cost as well. Finlay Geoghegan J. in *Hickey* clearly determined this, and disagreed with submissions made by the pharmacists to that effect. She found that insofar as payment under the General Medical Scheme was concerned, the two components, which are the dispensing fee and the ingredient cost, fall within clause 12. Insofar as the other schemes (*i.e.* the Drugs Payment Scheme and the Long Term Illness Scheme, *etc.*) are concerned, clause 12 covers the dispensing fee, the ingredient cost and the retail mark-up. I have already held that the Minister is entitled also to take into account such rebates as the pharmacists can achieve from the wholesaler.

Reading the Contract, it is clear that the Minister is given extensive powers: she can include or remove any drug from the schemes; she can abolish schemes; and she can alter rates of pay. There is no reason why she could not recast the whole structure of the existing scheme, provided she gives proper notice, and introduce a better scheme which enables her to deliver on her statutory obligations as set out in the Health Acts. As Clarke J. said in the *IPU* case at para. 7.3:-

> "I should note, however, that I do not consider that there is any basis upon which individual pharmacists are entitled to insist that their current contract continue indefinitely."

In that context, it is difficult to see how the powers given to her in clause 12(1) should be interpreted in a restrictive way. A plain reading of the language used in the clause does not suggest such a limited interpretation.

In my view, subject to what I will say on the consultation process, the Minister has every right under the Contract to introduce the changes now proposed in the Regulations, if she wished. In my view, she would not be in breach of the contractual rights of the plaintiffs had she so done. I see nothing in the judgments of Finlay Geoghegan J. or Clarke J. in *Hickey* and *IPU* respectively that would prevent me from reaching this conclusion.

From this analysis, it seems that much of the arguments advanced by the plaintiffs on the various constitutional issues become unsustainable. Furthermore, the Regulations made under the 2009 Act, which attempt to achieve the same result, cannot be criticised, at least on the grounds that they infringe an identified contractual right. No such right exists in this case.

The plaintiffs argue that if the Minister wishes to change the rates she must first consult them under the Contract. The requirement for consultation, however, does not, in my view, diminish the Minister's power under the Contract. Had she consulted the plaintiffs under the Contract, she would still be entitled to dismiss the plaintiffs' submissions and proceed to alter the rates of remuneration. In this regard her power is unilateral. Given that the Minister did engage in a serious consultation process, albeit under the 2009 Act, failure to observe the contractual requirement of consultation at most could only lead to an action for breach of warranty and at most entitle the plaintiff to sue for damages, which, if the Minister could show, because of the recent history in the negotiations between the parties and their representatives, that a consultation process expressed to be under the Contract would in all probability not have influenced her decision, might be negligible or nil.

In any event, as I have determined earlier, there was consultation in the present situation and I am of the view that this consultation, although done to comply with the provisions of the 2009 Act, was also sufficient to satisfy the contractual requirement contained in clause 12(1). I am not of the opinion that, even under the Contract, the Minister must "label" the process of consultation which took place under the terms of the 2009 Act as being the process required under clause 12(1) of the Contract. The fact is that there was a real, substantial consultation process, which was sufficient to meet the substance of the contractual obligation under clause 12(1) and there cannot have been a breach of the Contract for that reason. The logic of this leads me to conclude that there has been no breach of the Contract and therefore no interference with property rights under the Constitution, and the plaintiffs have no specific constitutional complaint here either. As such, there has been no "attack" in terms of Article 40.3.2 of the Constitution.

This conclusion is necessary, as the case before the court is not pleaded in contract, but rather on wider grounds alleging constitutional interference with property rights and lack of fair procedures.

In his oral submissions, Mr. Hogan suggested that if the State had, prior to the legislation, entered into a contract with a developer to pay €60m for a new building, it could now, unilaterally, reduce the price to €20m. I acknowledge that this may be an extreme example advanced to make a point and that it should not be taken literally, as to do so would necessarily involve consideration of other factors. The relevance of the argument, however, insofar as it concerns this Court, must be assessed in the context of the facts as they relate to the plaintiffs and, perhaps, to pharmacists generally, insofar as the plaintiffs' arguments are those which could be advanced on behalf of the profession generally.

In the plaintiffs' circumstances the following observations are appropriate. In contrast to the example advanced by Mr. Hogan, the Regulations introduced do not propose to deprive the pharmacists of any vested property right which has accrued in the sense that the developer might have had. The Regulations in this case are prospective and purport to change the rates of remuneration for the future only. Second, the example given is too simplistic if it suggests that s. 9 might allow such a reduction without other factors coming into play; questions of *quantum meruit*, or estoppel or compensation, for example, might be relevant. Third, contrary to what counsel for the plaintiffs argue, the Minister's choice of proceeding by way of s. 9 represents a more onerous imposition for the Minister than if she chose to introduce the rate changes under clause 12(1) which the plaintiffs admit she could do. In my view, s. 9 affords more protection to the plaintiffs and imposes more restrictions on the Minister (especially at s. 9(5)) than the option available to her under clause 12(1). That this is so can be clearly seen from both the *Hickey* and the *IPU* cases. Fourth, it is always open to the Oireachtas to fundamentally alter the underlying statutory regime set out in the Health Acts and, although this could have a profound effect on the pharmacists, they would have no legal complaint in such circumstances (see the judgment of Costello J. in *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20). Finally, and most significantly, the pharmacists do not have a contractual/property right which gives them a right to fix or negotiate the rates paid: this is a matter exclusively for the Minister under clause 12(1) of the Contract. This, of course, means that because of clause 12(1), the plaintiffs cannot challenge the constitutionality of s. 9 since, whatever the merits of the general argument advanced by counsel for the plaintiffs, it avails them not. In advancing the "developer's" argument the plaintiffs are attempting to adopt a *ius tertii*. They are not making an argument based on their own facts, but in reality are attempting to make an argument on a hypothetical and ill-defined situation.

(b) Does the Minister's reduction of the contractually agreed rates of payment in the Regulations amount to an "unjust

attack" on the plaintiffs' property rights?
Even if the plaintiffs' had a contractual entitlement to a fixed rate of payment which could not be varied unilaterally (which I have found they did not enjoy), I am not satisfied that the unilateral variation of the rates of payment under the 2009 Act and the Regulations would amount to an "unjust" attack on the plaintiffs' property rights in the circumstances of this case. "Unjust", in this sense, refers, to matters such as retrospectivity, lack of fair procedures, unreasonableness and irrationality, discrimination, lack of proportionality and, in some cases, lack of compensation (see Hogan and Whyte, *J.M. Kelly: The Irish Constitution*, (4th ed., pp. 1994 – 2004). Suffice to say at this juncture that not only do I consider that there has not been an attack on the plaintiffs' constitutional rights, but also I consider that what encroachment the plaintiffs might complain of, could not be considered to be unjust in any event.

Article 40.3.2 is not absolute in its terms and obliges the State only to protect the citizen's property rights "as best it may". In *Moynihan v. Greensmith* [1977] I.R. 55 O'Higgins C.J., giving the judgment of the Supreme Court, said in this connection at p. 71:

> "It is noted that the guarantee of protection given by Article 40, s. 3, sub-s. 2, of the Constitution is qualified by the words 'as best it may'. This implies circumstances in which the State may have to balance its protection of the right as against other obligations arising from regard for the common good."

This phrase, and indeed the word "unjust" in "unjust attack", must be read in the light of the unusual economic crisis that necessitated the introduction of the 2009 Act. All the evidence before the court was to the effect that the State is facing an unprecedented economic crisis, whereby the State is forced to introduce drastic economies and cuts across the board. These economic realities must inform the interpretation of the constitutional phrases in assessing what the State can do and what distributive measures it must take to ensure not only the stability of the economy, but the stability of the State itself. It is also relevant to mention in this context that whatever the State's duty is in relation to property rights under the Constitution, these have always to be balanced against "other constitutional duties" that the State may have to uphold. (See Henchy J. in *Hamilton v. Hamilton* [1982] I.R. 466, 487.)

Given the exceptional threat to the economic well being of the State and to the people, I have no difficulty in accepting that the 2009 Act is exceptional. Clearly it is capable of affecting persons adversely and that was one of the objectives of the legislation. I am not satisfied, however, that it could properly be described as draconian in the circumstances where it is clearly a measured, proportionate and carefully drawn piece of legislation with a number of significant safeguards inbuilt. I have already referred to these, but it may be well in the present context to refer briefly to them again. Regulations may be made under s. 9 only after a process of consultation (s. 9(4)); s. 9(5) of the Act stipulates a list of matters which have to be considered when Regulations are being made; the Regulations must be laid before both Houses of the Oireachtas and are subject to annulment by resolution by either House (s. 9(16)); the Minister for Health and Children must annually review the operation, effectiveness and impact of the amounts and rates fixed by the Regulations and she is obliged to consider the appropriateness of the amounts and rates having regard to any change of circumstances and, in particular, any alteration of relevant matters (s. 9(13)); similarly the Minister for Finance has an obligation to annually review the Regulations (s. 13); a health professional is also entitled to terminate his/her contractual obligations by giving 30 days notice (s. 9(8)).

The plaintiffs suggest that these are no more than theoretical safeguards of little or no value. Apart from such a view being premature in the circumstances and not based on any real evidence, failure to provide for such safeguards in the legislation would certainly attract strong criticism from the plaintiffs, and perhaps from objective observers. To date, in any event, the requirements in the safeguards have been fully complied with.

For the above reasons, I reject the plaintiffs' argument in so far as it suggests that the Minister in reducing the rate of remuneration in the individual pharmacist's Contract, under powers conferred on her by the 2009 Act, wrongfully interfered with property rights protected in the Constitution or that this amounted to an "unjust attack".

(c) Do the 2009 Act and the Regulations, in so far as they purport to enable the Minister to make swingeing cuts to the plaintiffs' contractually agreed rates of payment, amount to an "abrogation" (as opposed to a "regulation") of the plaintiffs' property rights?
The plaintiffs argue, in their submissions, that the 2009 Act is not a "regulation" of property rights within the meaning of Article 43.2.1 of the Constitution in that:-

> "Section 9 asserts a legislative power to give one party the right unilaterally to override the contract and to give that party (and that party alone) the right to determine how much she should pay for the services in question".

This argument must be considered in conjunction with the earlier discussion on whether there has been an "unjust attack" on the plaintiffs' property rights within the meaning of Article 40.3.2 and Article 43 of the Constitution, and my conclusion that the 2009 Act and the Regulations relating to the pharmacists do not constitute an "unjust attack" in this case.

In the case of the pharmacists, the Regulations made under s. 9 do not override their Contract with the HSE; the Regulations merely supplement the Contract, and in no way do they detract from the plaintiffs' existing rights under the Contract.

There are not many authorities in this jurisdiction which address the question of legislative interference with existing contractual commitments and it may be appropriate to consider these briefly since they were opened to the court. Before doing so, however, a general comment is warranted. When a person has entered into a contract with the State, different considerations may come into play relating to the ability of the State to remain faithful to its commitments. It must be recognised that the State has many obligations, legislative and constitutional, to other interests and to other members of the community, whereby it may have to make decisions of priority, especially when there are competing demands for limited or diminishing resources. In entering into contracts, therefore, it may be incumbent on the State itself to insure that it preserves some flexibility in the terms of the contract which enables it to modify its obligations, especially in ongoing, rather than one off, contracts, should the political and economic situation change. That is why a provision like clause 12(1) is necessary, and prudent, in the agreement with the pharmacists. Clause 19(4) of the Contract also provides that: "Nothing in this Agreement shall interfere with the statutory functions prescribed from time to time of the Minister or the Chief Execute Officer". This provision in the Contract appears to me to provide the necessary flexibility of which I speak.

The plaintiffs characterise the s. 9 power as one which, in truth, abrogates, at least in part, pre-existing contractual entitlements, rather than a power which "regulates" these entitlements as is provided for in Article 43.2.1. I disagree with this characterisation also. When one considers the extreme financial crisis that prompted this legislation in the first place, and the fact that the only part of the Contract that is effected is the rates of payments (admittedly a very important provision); the requirement for prior

consultation; the provision for early withdrawal by the pharmacist if he or she wishes; an annual review of the Regulations; the obligation on the Minister only to make changes to the rates which are "fair and reasonable" given the objectives of the Act; and, particularly, clause 12(1) of the Contract, it is difficult to conclude that there is a total "abrogation" of any property rights. In my view, the legislation is more properly described as "regulation" rather than "abrogation".

The plaintiffs also raise the question whether the alleged intrusion into the property rights of service providers generally is justifiable? In this connection one recalls the *dictum* of Murray C.J. in *Re. Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] 1 I.R. 105, where he stated at p. 206 of the report:-

> "Where a statutory measure abrogates a property right, as this Bill does, and the State seeks to justify it by reference to the interests of the common good or those of general public policy involving matters of finance alone, such a measure, if capable of justification, could only be justified as an objective imperative for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances."

Although a strict reading of this *dictum* does not unequivocally say that such a crisis will justify such abrogation, it could be argued that it strongly suggests it. In any event, there can be no doubt that there exists at present, in the State, "an extreme financial crisis or a fundamental disequilibrium in public finances".

Leaving aside, for the moment, the question of the presumption of constitutionality to which the 2009 Act is entitled, and where the onus lies if a challenge is made in that regard, the court must avoid the temptation to deal with these issues in the abstract, and must concentrate instead on the particular circumstances of the plaintiffs here and the special facts of this case.

The single most important fact, that one cannot escape, irrespective as to how one approaches the matter, is that the plaintiffs do *not* have a contractual/property right to prevent the Minister from altering the rates of remuneration in the individual contract, as I have already set out above.

(d) Did the Minister act in breach of the Contract, by not engaging clause 12(1) of the Contract, and instead relying on her powers under the 2009 Act in making the Regulations to reduce the rates of payment, and does this breach of the Contract also amount to a "unjust attack" on the plaintiffs' property rights.
The plaintiffs next make the argument that since the Minister did not invoke clause 12(1) of the Contract, but instead chose to introduce the changes in rates of payment by means of Regulations made under powers given to her by the 2009 Act, she acted in breach of the Contract, and this breach of the Contract constitutes an "unjust attack" on the plaintiffs' property rights. This argument must be considered, of course, but the above discussion about the plaintiffs' rights under the Contract indicates, first, the limits of the plaintiffs' contractual rights; second, that the Minister would not have been in breach of the Contract if she introduced the changes made in the Regulations through the clause 12(1) procedure; third, that the consultation process engaged in under the 2009 Act satisfied the consultation requirement of clause 12(1); and fourth, that there was no infringement of the plaintiffs' property rights for the reasons already given.

In my view, the strength of the plaintiffs' arguments does not change when their counsel shifts from arguing in the context of the 2009 Act to arguing in the context of the Contract; to succeed in either context the plaintiff must show that he has a contract/property right which is under attack. For reasons already given, the plaintiffs have no such contractual/property right which prevents the Minister from changing unilaterally the rates of payment in the Contract in this case. Having no such contractual entitlement, it makes no difference whether the so called "attack" by the Minister is made under the powers she has under clause 12(1) of the Contract or under powers conferred by the 2009 Act. In short, using constitutional language, the "attack" cannot be an "attack" since it does not infringe any contractual /property right of the plaintiffs. That remains true irrespective of the origin of the so-called "attack".

Counsel for the plaintiffs accepts the importance of the plaintiffs' circumstances, and urges the court to note the specific position of the pharmacists in the wake of the *Hickey* case. He points out that although the Minister was entitled to change the rates under clause 12(1) of the Contract, she has chosen to use the powers given to her by s. 9 of the Act instead. It is argued that the Minister chose to introduce the changes under the powers conferred on her by the 2009 Act, since s. 9 gives the Minister more power than clause 12 of the Contract. I do not accept this to be the case. In my view, s. 9 is much more rigorous in its requirements than clause 12 in that regard. Section 9 obliges the Minister to fix the rates at a level which she considers "fair and reasonable". Moreover, she is obliged to have regard to the existing contractual arrangements; the submissions made to her; the nature of services rendered and the different classes of health providers; as well as the State's ability to continue to provide the health services in place; and the fairness and efficiency of any reductions. I do not consider these conditions to be less demanding than clause 12, as the plaintiffs suggest. Moreover, changes introduced by Regulations under s. 9 have to be renewed annually and the pharmacist has an option to withdraw from the existing arrangements by giving 30 days notice as opposed to three months in the Contract. There is a consultation requirement in both systems.

If the Minister chooses to alter the rates *via* the powers conferred by the 2009 Act, it does not deprive the plaintiffs of any right in this case whether it be a contractual or property right. Clause 12(1) of the Contract does not mandate the form the Minister has to use when approving or directing the changes in the rates. That she chooses to do so by Regulations under the provisions of s. 9 of the 2009 Act is immaterial as far as the Contract is concerned. When one reads s. 9, and s. 9(1) of the Act in particular, it is clear that there is nothing in those provisions to prevent the Regulations in question from meeting the requirements of clause 12(1) of the Contract.

Ius Tertii Arguments
It is also clear that the Regulations also extend to all health professionals, including pharmacists. The plaintiffs cannot avail of a general argument that may be open to other service providers to the State, namely, that s. 9 is unconstitutional in their particular circumstances, given the nature of their contractual arrangements with the State. Whether such an argument would succeed or not would, of course, depend on the facts of such a case, but for me to hold this to be so in the peculiar circumstances of the plaintiffs' case would be to make a decision on a hypothetical. To do so where legislation is constitutionally challenged would be wholly inappropriate, particularly having regard to the presumption of constitutionality.

11. The Equal Treatment Argument
On the assumption that the Regulations result in cuts to the pharmacists of at least 24%, whereas the cuts to other health professionals only average 8%, the plaintiffs argue that a strong case can be made as to the unconstitutionality of the legislation on grounds of unequal treatment contrary to Article 40.1 of the Constitution, given the "disproportionate and extreme" nature of the interference with the rights of the plaintiffs, provided there is no objective justification for such a differential treatment of the various professionals. In their written submissions, the plaintiffs say: "this is a matter on which the plaintiffs will need expert evidence at the

hearing of the action". At para. 30 of the written submissions, the plaintiffs say:-

> "30. It is submitted that as the plaintiffs can establish such a profound disparate treatment of community pharmacies when compared with other healthcare professionals, then the onus then (*sic*) shifts to the defendants and the burden of demonstrating sufficient objective justification to warrant interference of this extreme and disproportionately far reaching nature in respect of community pharmacists moves to the defendants. It is respectfully submitted that there is no legitimate legislative purpose for the unfair and markedly different treatment of the plaintiffs and community pharmacists generally when compared with other public sector employees or other groups in receipt of State payments."

Insofar as this argument is based on unequal treatment, it would require, as the plaintiffs admit, evidence of disparate treatment. No such evidence was, however, produced which means that the court is not in a position to make any finding or judgment on that issue. Furthermore, as the plaintiffs submit, it is only if evidence is brought forward by them, that the onus shifts to the defendants in this regard. As it stands, therefore, following the plaintiffs' own argument, the defendants have no obligation to disprove or justify something which the plaintiffs have not established by evidence.

In support of their argument on the unfairness issue, the plaintiffs cite a *dictum* of Barrington J. in *Brennan v. Attorney General* [1983] I.L.R.M. 449 at p. 480 where he stated:-

> "There is a sense in which to legislate is to discriminate. The legislature in its efforts to redress the inequalities of life or for other legitimate purposes may have to classify the citizens into adults and children, employers and workers, teachers and pupils and so on. Pringle J. stated in *O'Brien v. Manufacturing Engineering Company Limited* [1973] I.R. 334 that such division of the citizens into different classes was envisaged by the second sentence of Article 40.1. He then added:
>
> > 'Therefore, it would appear that there is no unfair discrimination provided that every person in the same class is treated in the same way.'
>
> No doubt this is true, but it might be prudent to express, what is perhaps implied in it, that the classification must be for a legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be treated fairly."

These same *dicta* were repeated by Barrington J. in the Supreme Court judgment in *An Blaoscaod Mór Teo. v. Commissioner of Public Works (No. 3)* [2000] 1 I.R. 6 at pp. 18 – 19.

To get the benefit of these *dicta*, the unfairness of which the plaintiffs complain is an unfairness "when compared with other healthcare professionals and the public sector generally". I have, however, as already noted, no comparative evidence of the circumstances or contracts of other health professionals or of the public sector generally, to make such a determination in this case.

It should also be pointed out, as the defendants did, that the equality protection under the Constitution extends to human persons only and may not be availed of by companies or other legal entities. (See, for example, the judgment of Kenny J. in *Murphy v. Attorney General* [1982] I.R. 241, 283). In the context of the present proceedings, I accept this argument as being valid, no authority to the contrary having been produced by the plaintiffs.

In relation to the fall back argument the plaintiffs then make that, if they establish discrimination or unequal treatment in the legislation, the onus shifts to the State to justify this, it seems to me that, in effect, counsel for the plaintiffs wishes to argue that the normal presumption of constitutionality extended to legislation, does not apply here. I cannot agree with this proposition. The normal rule is well established that Acts passed by the Oireachtas are entitled to the presumption of constitutionality until the contrary is proved. There are many authorities to that effect and I will content myself to quoting one *dictum* from a recent Supreme Court decision. In *J.D. v. Residential Institutions Redress Board* [2009] IESC 59, where the issue was whether fixing the upper age limit at 18 years for claims brought under the Residential Institution Redress Board Act, amounted to discrimination, Murray C.J., delivering the judgment of the Supreme Court in upholding the constitutionality of the Act, on the issue of concern, said:-

> "Any person wishing to challenge the compatibility of a provision of an Act of the Oireachtas with the Constitution must overcome and rebut the fundamental principle of the presumption of constitutionality which operates in favour of the impugned provision. Hanna J. expressed the matter in the following terms in *Pigs Marketing Board v. Donnelly (Dublin) Ltd.* [1939] I.R. 413, at p. 417:-
>
> > 'When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established.'"

Similarly, Keane C.J., in giving the judgment of the Supreme Court in *Re Article 26 and the Planning and Development Bill,* 1999 [2000] 2 I.R. 321 at p. 357 stated that:-

> "the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to legislation dealing with controversial, social and economic matters".

The presumption of constitutionality "springs from, and is necessitated by, that respect which one great organ of State owes to another" (per O'Byrne J. in *Buckley v. Attorney General* [1950] I.R. 67).

It is true that there are some instances where discrimination is such, for example, if it is based on sex, race, language or religious or political opinions, that the onus of proof may shift and the State may be obliged to justify the legislation in the first instance. This is not true, however, of other categories of discrimination. This matter was also addressed by Murray C.J. in the *J.D.* case. The Chief Justice referred to the judgments of Hamilton C.J. in *Re. Article 26 and the Employment Equality Bill, 1996* [1997] 2 I.R. 321, 346 and the judgment of Barrington J. in *Brennan v. Attorney General* [1983] I.L.R.M. 449, 480 and said:

> "Neither the statement of Hamilton C.J. that such legislation must be 'capable of justification' nor that of Barrington J. that a 'classification must be for a legitimate legislative purpose' should be interpreted as imposing a burden of justification on the Oireachtas, save, it may be, for cases of invidious categories of the sort considered to be 'presumptively at least, proscribed by Article 40.1 [though] not particularised…' (see Hamilton C.J. *In the matter of the Employment Equality Bill 1996,* cited above at page 347). It was there said that: 'manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.' The respondent accepts that age, as a ground of alleged discrimination, does not raise the sort of concerns that are posed by these types of discrimination, and that the State is not required to justify discrimination in this case. It is submitted, however, that the State is required to identify a possible justification. The Court is satisfied that it is a matter for the respondent to demonstrate a *prima facie*

basis for the claim that the classification is discriminatory."

In that case, the Supreme Court held that fixing the upper limit of 18 years of age to determine who should be compensated under the Act contained no element of discrimination. According to the Court it was neither arbitrary nor irrational.

This case does not concern "invidious" discrimination of the type identified in the judgments referred to by the Chief Justice in *J.D.* and, in my view, the onus in this case rests firmly with the plaintiffs to prove the discrimination in this case, to such an extent that it renders the Act unconstitutional.

The cases cited to me by the plaintiffs in support of their argument, *Hamilton v. Hamilton* and *Condon v. Minister for Labour*, do not really advance their case. *Hamilton* was concerned with legislation which proposed to interfere with "vested rights" under a contract and which was to have a retrospective effect, while *Condon*, in the words of the plaintiffs' counsel, was "only of superficial similarity". In *Condon*, the banks as employers were prohibited by a Regulation from paying bank officials increases in remuneration to which they were contractually entitled. McWilliam J. refused to hold that there was an unjust attack on the property rights of the bank officials. At p. 7 of his judgment, the learned judge said:-

> "On the first submission it is argued that the Acts single out these bank officials for special punitive treatment which is not applied to other classes of workers, such as the large body of farm workers or the workers not belonging to unions affiliated to Congress, and that this constitutes invidious discrimination within the meaning of this expression as used by O'Dalaigh C.J., in *O'Brien v. Keogh* [1972] I.R. 144 at p. 155."

Having referred to the judgment of Kenny J. in *Murphy v. Attorney General*, the judge continues:-

> "I do not accept this submission. Kenny J. at page 9 of his judgment states, with reference to section 1 of Article 40:-
>
> > 'This section is not a guarantee of equality before the law in all matters or in all circumstances. It is a qualified guarantee to all citizens *as human beings* that they will be held equal before the law. It therefore relates to those attributes which make us human; it is concerned with the essentials of human personality.'"

At p. 9 of his judgment McWilliam J. continued:

> "The discrimination alleged in this case had no basis in any facet of human personality or any attribute which makes the bank officials human, or because they chose the profession of banking, but was based on the view, whether correct or not, that it was necessary for the common good."

The learned judge then referred to his judgment in *Blake v. Attorney General* and said at pp. 10 - 12 of the judgment:

> "I said in the Blake case
>
> > 'As I see it, the provisions of Article 40 that the State shall by its laws protect as best it may from unjust attack (and this includes unjust attack by the State itself) the property rights of every citizen ought to be read in conjunctions with the provisions of Article 43 so as to give effect in so far as possible to both provisions. Thus the injustice of any attack on property rights should be ascertained by reference to the provisions of Article 43 and, possibly, also by reference to the Preamble, so as to have full regard to the principles of social justice, the exigencies of the common good, the principle of justice generally and the attainment of true social order.'
>
> In consideration the injustice of an attack on property rights and the infringement of the right to ownership of property I do not have to decide whether the measures taken were actually effective or were likely to be effective for the common good. This is a matter for the legislature. I have only to consider whether there were circumstances which made it reasonable for the legislature to think such measures would be for the common good. It has been clearly established that there were such circumstances.
>
> It seems to me that the statement of O'Byrne J., in Foley v. Irish Land Commission (1952) I.R. 118 at page 153 approved by Lavery J. in Attorney General v. Southern Industrial Trust 94 I.L.T.R. 161 is very apposite to the second branch of the arguments advanced on behalf of the Plaintiffs here. He said
>
> > 'The argument put before the Court on behalf of the Appellant, when brought to its logical conclusion, seems to involve the proposition that any limitation placed by the Oireachtas on private property, which may result in the loss of that property by the owner, is repugnant to the Constitution and, accordingly, void. If this argument be sound, the Constitution has certainly placed serious fetters upon the Legislature in dealing with property rights and the Court is not prepared to accept such a far-reaching proposition.'
>
> In the present case, the Acts were temporary in application; apart from one witness who appears to have lost some pension rights, I am not satisfied that anyone was permanently deprived of pecuniary advantage; having regard to the circumstances of the country at the time, I do not consider that the bank officials were arbitrarily selected; and the same circumstances made it reasonable for the government to consider that the Acts would operate for the common good.
>
> I am of opinion therefore that these statutes did not infringe the provisions of the Constitution."

I accept this as a proper statement of the law and an illuminating application to the circumstances of the case.

The plaintiffs urge me to form a conclusion from the mere fact, acknowledged by the defendants, that the cuts introduced in the Regulations affect pharmacists' income by at least 24%, whereas all other health professionals (and many other professionals also) have had their incomes cut only by approximately 8%. This in itself, according to the plaintiffs speaks of arbitrary discrimination and unequal treatment, as if some kind of *res ipsa loquitur* applied. I cannot agree. I know nothing of these other health professionals' contracts on which they provide their services or the objects the State has when engaging their services. To form a conclusion of arbitrary unequal or disproportionate treatment by contrasting the figures of 24% and 8% alone, would be unwarranted and hasty.

Mr. Hogan then tires to distinguish *Condon* from the present case by saying that the regulations in *Condon* were of a temporary

nature only. When, however, we examine the 2009 Act and the Regulations, we note the obligation on the Minister to review the Regulations annually; that the provisions are not retrospective; and before changes are made, the Minister must consult in a manner she considers appropriate. Furthermore, the rates fixed by the Regulations must be "fair and reasonable" in the light of the purposes of the Act and the Minister must have regard to a list of factors including existing contractual relations. Moreover, any health professional who does not wish to continue to provide the services to the health board may withdraw after 30 days notice.

From the above, I have come to the conclusion that insofar as the plaintiffs wish to challenge the constitutionality of s. 9 of the 2009 Act, the onus lies fairly and squarely on the plaintiffs. In this regard, no comparative evidence has been led by the plaintiffs which would suggest that the pharmacists have been treated differently from other health professionals, of whose economic situation I am not aware, or, if such discrimination or unequal treatment exists, whether it is justifiable. In short, I am in no position to conclude that equals are being treated differently or that unequals are being treated similarly. For this reason, I reject the plaintiffs' argument on that ground.

12. Arguments based on Alleged Arbitrariness and Disproportionality
Having found that the Regulations were not *ultra vires* the Minister under the 2009 Act, are they an unreasonable, disproportionate or arbitrary interference with the plaintiffs' rights in themselves? Whatever else may be said about the reductions in the scheme of payments, it cannot be said that they are arbitrary. It is not for the court to go further than to conclude that they are not obviously unreasonable in the full context of the market. Furthermore, the reductions can hardly be said to be surprising as they are exactly the same proposals which were at issue in *Hickey*, which proposals emerged after a great deal of study involving several reports and consultation with the various interested parties. These proposals were disallowed in *Hickey* for a technical reason: that the HSE had attempted to introduce the changes rather than the Minister who was the authorised person in that regard.

On the discriminatory and unequal treatment argument, I have already said that no evidence of the remuneration of other health professionals has been led at the hearing of this case. Allegations of unequal treatment and/or discriminatory treatment necessarily involve a comparison between the position of the plaintiffs and the position of other professionals whom the plaintiffs say are afforded better treatment. In the present case, I presume that the proper comparison should be with other health professionals who the plaintiffs say have only been subjected to a cut of 8% or thereabouts.

The main evidence, at the hearing, focused almost exclusively on the history and the economics of pricing within the pharmacy sector. From this evidence, it is clear that the pricing model adopted with the pharmacists, to achieve objectives set out in the Health Act 1970, as amended, is complex, involving various balances and trade offs. The price is fixed at the manufacturer/importer level and has a cascading impact down through the distribution chain. A sliding scale for professional fees, acknowledges that the smaller pharmacies need the greatest protection. The main objective of the pricing system in the State schemes, as Mr. Ridyard testified on behalf of the defendants, is to ensure that the prices paid to pharmacists represent good value for the State, while ensuring, at the same time, the continual existence of an adequate network of pharmacists throughout the country to service the needs of the community. The voluminous documents, the many reports and the extensive communication between the Department, the HSE and third parties, all clearly show that the model finally decided upon in the Regulations is anything but arbitrary. There is a clear rationale for all the cuts made. The sliding fee structure, for example, was designed to ensure that the small pharmacies would feel the cuts least. A reduction in the ingredient price and a reduction of the mark-ups in the non-GMS health schemes were justified by reference to the emergence of the rebates to the pharmacists from the wholesalers. From this point of view, the changes could not be designated arbitrary. Moreover, there was evidence from Mr. Desmond of the Department of Health that, when deciding what cuts to recommend, each of the health professionals involved were assessed separately and on its own merits. He gave evidence that two of the health professionals, podiatrists and chiropodists did not have their fees cut at all, and he outlined the reasons for that. Such an approach does not suggest arbitrariness; rather must it be seen as a considered and rational approach.

The evidence is that the Minister in fixing the rates did bear in mind what level of payment would, at the end of the day, ensure an economic return, which in turn would guarantee the continuation of a network of pharmacies throughout the country, as sufficient to deliver the medical services required of the Minister under the legislation. If the Minister is paying too little, she will have to adjust the rates upwards; if she is paying too much, she will adjust the rate downwards to avoid economic waste and to ensure that she is getting best value.

The same comments apply to the plaintiffs' complaints about disproportionality. Again, there is no evidence of this claim in this case. I readily accept that the cuts will clearly affect the income and profitability of pharmacists in general. I also accept that it may impose a great burden for some pharmacists. But the State's concern to get value for money cannot be ignored either. The State has an obligation to achieve its statutory obligations on a best value basis. It is interesting to note that although it is pleaded, and the case on behalf of the plaintiffs was opened on the basis that the plaintiffs would become insolvent if the Regulations brought into force the new rates of remuneration, no such accountancy evidence was introduced at the hearing to that effect, even though counsel for the defendants invited such evidence at the end of the plaintiffs' case.

When looking at the question of proportionality, it is also necessary to consider the safeguards in s. 9 of the 2009 Act, which I have already referred to earlier in this judgment.

Significantly, also, the Act provides for a review of the operation, effectiveness and impact of the changed rates introduced by the Regulations before 30th June, 2010 and every year after that, bearing in mind changing circumstances (Section 9(13)). If, after such a review, amendments are required, the Minister has power to make such amendments.

In *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 I.R. 321 Keane C.J. giving the judgment of the Supreme Court in determining whether the statutory provisions constituted an "unjust attack" on property rights, stated at p. 354 that Part V of the Planning and Development Bill 1999, contains provisions which:-

> "… are rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial. At the same time, the court is satisfied that they impair those rights as little as possible and their effects on those rights are proportionate to the objectives sought to be attained."

In that case it was held that the Bill which proposed that landowners wishing to develop land were obliged to cede 20% of the land (or the equivalent value thereof) to the local authority did not constitute a disproportionate interference with the land owner's property rights.

A formulation of the principle of proportionality which is favoured in EU law states:-

> "…the principle of proportionality, which is one of the general principles of community law, requires that measures adopted by community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued…" (C – 157/96 *R. v. Minister for Agriculture, Fisheries and Food ex parte National Farmers' Union* [1998] ECR I–2211, para. 60)

As to the size of the cuts made to the rates of remuneration for pharmacists under the regulations, it is not appropriate for the court to assess their appropriateness. That is not the court's function. Suffice to say, as I have already done, that the determination of the level of the cuts was arrived at after serious, detailed and prolonged study of the pharmacy sector and after many studies and various calculations were considered in great detail. Bearing in mind, the relevant criteria to be considered as expressed by the Supreme Court, and to some extent by the ECJ, I have come to the conclusion that the regulations do not represent a disproportionate response in all the circumstances.

It seems to me that given the emergency nature of the legislation, the above provisions do provide a measure of balance and proportionality when Regulations are deemed necessary under the Act.

13. European Convention on Human Rights
Although pleaded, very little argument was advanced at the hearing specifically referring to the European Convention on Human Rights, presumably on the assumption that the provisions of the Constitution provided similar or better protection to the plaintiffs. In these circumstances, I do not need to address the Convention in any detail given the plaintiffs emphasis in argument.

14. Conclusion
The plaintiffs sought an injunction, various declarations and damages. For the above reasons I refuse the reliefs sought by the plaintiffs in this case.