THE HIGH COURT

2002 NO. 16269P

BETWEEN

NICOLE HASSETT (A MINOR)
SUING BY HER MOTHER AND NEXT FRIEND
ORLA HASSETT

PLAINTIFF

AND
THE SOUTH EASTERN HEALTH BOARD

DEFENDANT

AND
RAYMOND HOWARD

THIRD PARTY

AND
THE MEDICAL DEFENCE UNION LIMITED
AND
M.D.U SERVICES LIMITED

ADDITIONAL THIRD PARTIES

Judgment of Finnegan P. delivered on the 5th day of April 2006

1. The Plaintiff instituted these proceedings against the Defendant claiming damages for negligence and breach of duty. The Defendant joined the Third Party claiming against him an indemnity or contribution against the said claim the Defendant being a consultant engaged by the Defendant. The Third Party in turn joined the Additional Third Parties claiming an indemnity and/or contribution against the Defendant's claim for indemnity and/or contribution. On the issue before me I propose referring to the Additional Third Parties as the Applicants and the Third Party as the Respondent.

2. The issue arises as follows. The Respondent is a consultant surgeon. At all material times he was a member of the Medical Defence Union Limited, the first Additional Third Party, and claims to be entitled to an indemnity from the Applicants on the grounds set out in the Third Party Notice in the following terms –

> "And further take notice that the grounds of the said claim to an indemnity and/or contribution are:
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> (i) that having acted on behalf of Dr. Howard a member of the M.D.U for 32 years without any indication that an indemnity would not be available you are estopped or otherwise precluded from withholding or failing to provide an indemnity in respect of the Defendant's claim against Dr. Howard;
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> (ii) that in the circumstances Dr. Howard has a legitimate expectation that an indemnity would be provided;
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> (iii) that your decision to withdraw cover is in any event unlawful and contrary to Dr. Howard's entitlement under the terms of his contract with you;
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> (iv) that your decision is not valid or lawful in circumstances where you fail to give any adequate individual consideration to the particular circumstances of Dr. Howard but rather that you apply the blanket policy decision to withdraw indemnity to certain of your Irish members;
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> (v) that you have not used or applied any discretion you might have in deciding on the grant or withdrawal of an indemnity to Dr. Howard but you have, on the contrary, adopted a rigid rule that you will as a matter of course decline to assist members and former members who are Irish obstetricians and in doing so you have not acted in good faith;
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> (vi) that your unequivocal and unconditional decision not to grant an indemnity to any Irish obstetrician members or former members constitutes a breach of Dr. Howard's contract with you;
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> (vii) that you (as solvent bodies) in refusing to meet your liabilities to Irish members and former members including Dr. Howard have discriminated against Dr. Howard (and his obstetric colleagues) on grounds of nationality and your refusal to meet your Irish liabilities to Dr. Howard, and his obstetric colleagues is therefore contrary to EC law and to constitutional and natural justice;
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> (viii) that your decision to withdraw indemnity from Dr. Howard was actuated not by any proper exercise of any discretion you might have in relation to Dr. Howard but rather by your purported concerns about the level of payments being made in respect of claims in Ireland generally and the impact which the general level of payments in Ireland might have upon your finances. This was not a proper exercise by you of any discretion you might have had but rather constitutes unwarranted and unjustified discrimination against Irish members and former members;
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> (ix) that you canvassed for business in the Irish jurisdiction and represented that you would provide services to (inter alia) obstetricians in the Irish jurisdiction and, in doing so, represented that an indemnity would be provided in the event of a successful medical negligence claim against persons such as Dr. Howard and in consideration of which Dr. Howard paid annual membership fees (which you accepted). In the circumstances, Dr. Howard is entitled to rely on the said representations and you are estopped from not providing an indemnity to Dr. Howard in respect of the above described claim;
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> (x) that your decision to deny indemnity to Dr. Howard is unfair and unreasonable.

3. The Third Party relies on Council Regulation (EC) 44/2001 of 22nd December 2000 on the Jurisdiction of Courts and Enforcement of Judgments in Civil and Commercial Matters ("the Regulation") Articles 5.1, 5.3 and 6.2 thereof as conferring jurisdiction on the Irish Courts. The Applicant entered a Conditional Appearance without prejudice and solely to contest the jurisdiction of the court and relies upon Article 24 of the Regulation the effect of which is that such an appearance shall not confer jurisdiction on the Irish courts. The Applicants then issued a Notice of Motion seeking an order pursuant to Order 12 Rule 26 (as applied to Third Party proceedings by Order 16 Rule 3) of the Rules of the Superior Courts setting aside service of the Third Party Notice on the Applicants on the grounds

that the Court does not have jurisdiction to hear the Respondent's claim against the Applicants having regard to the provisions of Article 22.2 of the Regulation.

The Affidavits

4. The application is grounded on an Affidavit of Michael Thomas Saunders the Chief Executive of the Applicants from which the following appears. The Regulation provides in Article 22 so far as relevant as follows –

> "Article 22. The following courts shall have exclusive jurisdiction regardless of domicile:
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> > 2. In proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine the seat, the court shall apply its rules of private international law;"

5. The claim of the Respondent in his Third Party Notice constitutes a challenge to the validity of a decision of an organ of the first named Applicant not to assist the Respondent by indemnifying him against or contributing to him in respect of damages and costs claimed against him by the Defendant. The Applicants had however assisted the Respondent in defence of the Defendants claim against him as Third Party. The Applicants have their seat for the purposes of Article 22.2 in England and Wales. The first named Applicant is a doctor's mutual defence organisation. It is a limited liability company. Under its Memorandum and Articles of Association it provides assistance and an indemnity on a discretionary basis to members. The Memorandum of the first named Applicant provides as the objects for which the first named Applicant is *established inter alia* the following –

> "(iii) To give advice or legal assistance to or defend or to take part in advising, assisting or defending members or applicants for election to membership or former members of the M.D.U. or the personal representatives (whether in their representative or their personal capacity) or the beneficiaries (and those with an interest in or deriving from the estates of beneficiaries) of deceased members or former members or the trustees in bankruptcy of a member, applicant for election to membership, deceased member or former member who may seek such advice and/or who are or are likely to become parties to or otherwise involved in litigation or disputes in respect of matters concerning or affecting directly or indirectly the professional character or interests or conduct in a professional capacity of any such member, deceased member or former member or which raises directly or indirectly a question of professional principle.
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> (iv) To indemnify wholly or in part and on such terms and conditions as may from time to time seem expedient any member or applicant for election to membership or former member of the M.D.U. or the personal representatives (whether in their representative or their personal capacity) or the beneficiaries (and those with an interest in or deriving from the estates of beneficiaries) of any deceased member or former member or the trustees in bankruptcy of a member, applicant for election to membership, deceased member or former member against liability, loss or expense arising from actions proceedings claims and demands by or against them in respect of matters concerning or affecting whether directly or indirectly the professional character or interests or conduct in a professional capacity of any such member or applicant for election to membership or deceased member or former member or which raise directly or indirectly a question of professional principle including all incidental and consequential losses, damages, costs, charges and expenses but exclusive of fines or penalties and to meet or compromise (whether or not by way of indemnity) or take part in meeting or compromising any such actions, proceedings, claims and demands.
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> (v) To expend monies of the M.D.U. in paying the whole or any part of the costs, charges, expenses and damages of any person in any proceedings whether legal or otherwise in which a question of importance to the members of the M.D.U. is or is likely to be determined or which the Board of Management may think necessary or convenient for the protection of the interests of any applicant for election to membership, member or former member or the personal representatives or beneficiaries (and those with an interest in or deriving from the estates of the beneficiaries) of any deceased member or the trustees in bankruptcy of any member, applicant for election to membership, deceased member or former member or any group or category of such persons."

6. The Articles of Association in Aricles 47 and 48 provide as follows –

> "47. The Board of Management or any member of the Board of Management or employee or agent of the M.D.U. authorised by the Board of Management for the purpose may subject to the limits of any such authority give to any member, any applicant for membership, any former member, the personal representatives (whether in their representative or their personal capacity) or the beneficiaries (and those with an interest in or deriving from the estates of beneficiaries) of any deceased member (who was at the date of his death a member or who was not at the date of his death a member but had formerly been a member and had ceased to be such) or the trustees in bankruptcy of any member, applicant for election to membership, deceased member or former member (who was at the date of his bankruptcy a member or who was not at the date of his bankruptcy a member but had formerly been a member and had ceased to be such) advice or legal assistance or defend or take part in advising, assisting or defending in respect of any matter, cause or proceeding, concerning or affecting whether directly or indirectly the professional character or interests or conduct in a professional capacity of such person or in respect of any matter cause or proceeding, which raises directly or indirectly a question of professional principle;
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> provided that:
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> > (1) Save in so far as the Board of Management may otherwise determine the Board of Management or such member of the Board of Management or employee or agent or committee shall be satisfied that in a case involving a member, applicant for election to membership, former member or deceased member the matter originated or the cause of proceedings arose or proceedings were served or, whether before or after the adoption of this proviso in its present form, the matter was notified to the M.D.U. by or on behalf of such member, applicant for election to membership, former member or deceased member during the period when the person concerned was a member of the M.D.U. or an applicant for election to membership.
> >
> > (2) If the Board of Management or such member of the Board of Management or employee or agent or committee decides to act in accordance with this Article the person making a request that it do so shall abide absolutely by every decision of the Board of Management or any such member of the Board of Management or employee or agent or committee on the conduct or defence of the matter and shall not himself without prior consent of the Board of

Management or any such member of the Board of Management or employee or agent or committee take any steps with reference of such matter or the determination thereof.

For the purpose of proviso (1) in the case of an application by a former member for reinstatement on any register or for restoration of a licence or entitlement to practice the profession previously carried on by him or the lifting of a suspension the matter shall be deemed to have originated immediately before the date upon which his name was erased from such register or his licence or entitlement so to practice was withdrawn or cancelled or upon which his registration on such register, licence or entitlement was suspended as the case may be.

(3) Any such advice or legal assistance or defence may be granted or terminated by resolution of the Board of Management or any authorised committee or decision of any authorised agent and the giving of advice or legal assistance or defence in every case shall be made only upon such terms and conditions as the Board of Management, committee or agent shall think proper and it shall rest only in the absolute discretion of the Board of Management committee or agent in every case to limit or restrict the giving of such advice or legal assistance or defence or altogether to decline to give the same or to terminate any advice or legal assistance or defence so given without assigning any reason.

48(1) The Board of Management or any member of the Board of Management or employee or agent or committee of the M.D.U. authorised by the Board of Management for the purpose may subject to the limits of any such authority and sub-paragraph (3) of this Article, and subject also to the like conditions as are specified in the provisos of the preceding article grant from the funds of the M.D.U. to any member or any applicant for election to membership or former member or the personal representatives (whether in their representative or their personal capacity) or the beneficiaries (and those with an interest in or deriving from the estates of the beneficiaries) of any deceased member or the trustees in bankruptcy of any member, applicant for election to membership, deceased member or former member an indemnity wholly or in part with regard to any action proceeding claims or demands by or against them in respect of any matter concerning or affecting whether directly or indirectly the professional character or interests or conduct in a professional capacity of any such member, applicant for election to membership or former member or deceased member as the case may be or which raises directly or indirectly a question of professional principle and such indemnity may extend to all incidental or consequential losses, damages, costs, charges and expenses but excluding fines and penalties and to grant funds to meet or compromise (whether or not by way of indemnity) or take part in meeting or compromising any such action, proceeding, claims or demands.

(2) The Board of Management or any authorised committee or agent may terminate any such indemnity or grant at any time by notice in writing to the member or applicant for election to membership or former member (or if the member, applicant or former member dies or becomes bankrupt subsequent to the granting of the indemnity his personal representatives or his trustees in bankruptcy as the case may be) or the personal representatives or beneficiaries of the deceased member concerned or the trustees in bankruptcy of the member, applicant or former member concerned as the case may be.

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

7. The first named Applicant has always provided assistance and indemnity on a discretionary basis. In these proceedings the Respondent seeks to challenge the exercise by the first named Applicant of its discretion to afford him legal assistance and/or provide him with an indemnity in respect of the Defendant's claim. The second named Applicant is a subsidiary of the first named Applicant and provides medico/legal advisory services as agent of the first named Applicant and is irrelevant to the present proceedings. Insofar as the first named Applicant can be considered an indemnifier against professional negligence claims it differs from insurers in the ordinary sense in that former members can request assistance and indemnity in respect of medical negligence claims arising from events which occurred during the period of their membership: accordingly while the Respondent is no longer a member of the first named Applicant having ceased to be a member on the 30th November 2001 before the Plaintiff's claim was commenced against the Defendant and before the Defendant joined the Respondent as a Third Party this would not preclude him from obtaining assistance and/or indemnity. Assistance was in fact provided by the first named Applicant to the Respondent in relation to the proceedings taken against him. However the first named Applicant declined to provide an indemnity and/or contribution and it is that decision which is challenged in these proceedings.

8. The background to the first named Applicant's decision is a dispute between the first named Applicant and the Minister for Health and Children. For many years the first named Applicant was concerned about the size and frequency of medical negligence claims in Ireland against its members particularly obstetric claims having regard to the number of babies born with cerebral palsy and the expense of caring for severely neurologically damaged babies for the rest of their lives. Some 20 such claims per annum can be expected of which 8 will result in financial settlements or awards. The number of claims in Ireland and the high cost of settling the same has resulted in a funding gap between the amount subscribed by obstetric members and the cost of claims. Between 1977 and 2001 the first named Applicant received €25m approximately by way of subscriptions from obstetricians in Ireland and expended in excess of €70m in meeting obstetric claims arising in the same period. Future obstetric claims it is estimated will amount to a further €124m: the Department of Health and Children believes that the figure for these claims will be significantly higher than this. There are some 110 obstetricians in Ireland and it will be impossible for them to subscribe sufficient monies to fund cerebral palsy claims brought against them and this has been the case for many years. In the early 1990s the first named Applicant's concerns were raised with the Minister for Health and Children; there were protracted discussions but no resolution was arrived at. The Minister decided to introduce enterprise liability cover for employed hospital consultants in February 2004 without making any arrangements for taking over or paying any share of the accrued contingent liabilities of such consultants in respect of medical negligence claims from the past. The first named Applicant's position was further undermined by the Minister for Health and Children entering into a funding arrangement with the Medical Protection Society in 2001 and 2002 which caused the first named Applicant to lose all its Irish consultant obstetrician members and the benefit of their subscriptions thereby imperilling the ability of the first named Applicant to meet claims from the past.

9. The first named Applicant's decision making process is as follows. When notified of a potential claim the first named Applicant assigns it to a claims handler. Ultimately the claim will come before the Claims Management Committee for a decision or

recommendation as to further action. On the 27th April 2004 the Board of Management resolved that unless the dispute with the Minister for Health and Children could be resolved that consultant members and former consultant members should be informed that while all new requests for discretionary assistance would be considered they should not have an expectation that the discretion to assist with obstetric claims would be exercised. Further it was resolved that all existing obstetric claims should be subject to review in order to determine whether assistance should continue and if so on what terms. When the dispute was not resolved on the 11th May 2004 members and former members were informed that the first named Applicant would address claims on the foot of these resolutions. All outstanding obstetric cases were then reviewed.

10. In the case of the Applicant the present claim was considered by the Claims Management Committee. On the 7th December 2004 the Claims Management Committee decided that assistance should continue to be provided to the Respondent for the time being. On the 18th January 2005 and on the 15th March 2005 this case was further considered. On each occasion the Respondent was invited to make representations. On the last mentioned date the Claims Management Committee decided to recommend to the Board of Management to continue to assist the Respondent by paying for his legal and expert costs in the defence of the Third Party's claim but not to provide an indemnity in respect of any damages and Third Party costs awarded. The Board of Management met on the 26th April 2005 and resolved in the exercise of its discretion to continue to assist the Respondent but not to provide him with an indemnity in respect of any damages or costs awarded against him.

11. The Respondent swore an Affidavit in reply. He was not aware that assistance and indemnity were provided by the first named Applicant on a discretionary basis. He had joined the first named Applicant on qualifying as a doctor and understood from representations that assistance and indemnity would be available to him should any issue of medical negligence arise. Claims made against him in the past had been satisfied. In the year 2000 he had paid a sum of £87,186.57 for membership and he would not have done so had he been in any doubt as to his entitlement as of right to an indemnity. He considered himself to have a policy of insurance with the first named Applicant as did his colleague consultants. He paid his premiums when due in Irish currency to an address within this jurisdiction. To suggest that what was involved in these proceedings as has been done by Mr. Saunders is the exercise of a discretion is to simplify the issues which are set out in the Third Party Notice which I have quoted above. The second named Applicant, he deposes, is properly joined in that it made representations and provided services in the State either on its own behalf or on behalf of the first named Applicant. Correspondence in relation to his membership was invariably on the headed stationery of the second named Applicant. Both Applicants are inextricably linked. The accounts of both Applicants are consolidated. Mr. Saunders is the Chief Executive of both. The Remuneration Committee of the second named Applicant fixes the remuneration of the Executive Directors of the first named Applicant. On its headed stationery the second named Applicant describes itself as an agent of the first named Applicant and as regulated by the Irish Financial Services Regulatory Authority. He deposes that the decision of the first named Applicant not to indemnify him was made in the light of its dispute with the Minister for Health and Children and accordingly was not a proper exercise of any discretion it might have. His position was not considered individually but rather a decision was reached as a consequence of a predetermined course of action to reject all claims of a nature similar to the present. The claim which he is making does not concern the first named Applicant's internal management or the validity in company law of a decision of an organ of the first named Applicant: rather it concerns a breach of contract and of representations made to him.

12. Christine Margaret Thomkins, Deputy Chief Executive to both Applicants swore an Affidavit in reply. She refers to correspondence. The first letter to the Respondent in relation to this claim was dated the 11th December 1999 and at the bottom of the letter the following words are printed –

> "The M.D.U. is not an insurance company. The benefits of membership of the M.D.U. are all discretionary and are subject to the Memorandum and Articles of Association."

13. These words appear on all correspondence issued to the Respondent from 1994. The basis upon which subscriptions were paid by the Respondent is the Memorandum and Articles of Association of the first named Applicant. The first named Applicant did not withdraw cover or membership from the Respondent but simply considered his request for an indemnity on its merits in accordance with the Memorandum and Articles of Association. She denies that any representations were made by or on behalf of the first named Applicant to the effect that it was an insurer or that members had a right to be indemnified. The decision which is challenged in these proceedings was made in London. The Respondent's position was considered on its merits and not as part of a predetermined course of action to reject all claims similar to the present. Not all claims against consultant obstetricians have resulted in a decision adverse to the member.

14. A further Affidavit was sworn by the Respondent in response to that of Ms Thomkins. Essentially his Affidavit deals with the merits of his claim against the Respondents. He mentions an agreement which was reached between the first named Applicant and the indemnifiers of the Defendant – the Dublin Agreement. He deposes that the first named Applicant resiled from that Agreement to his detriment.

The Applicants' Submissions

15. The Applicants contend that the proceedings by the Respondent against the Applicant have as their object the validity of decisions of the Applicants and their organs and that in consequence the Courts of England and Wales have exclusive jurisdiction to hear and determine the same pursuant to Article 22.2 of the Regulation. The Respondent is a former member of the first named Applicant. His claim arises under the Memorandum and Articles of Association of the Applicant and concern the validity of the decision to refuse indemnity. While the Respondent's claim is formulated in a number of ways the essential claim is a challenge to the validity of a decision taken by an organ of the first named Applicant, its Board of Management. The Applicant is incorporated and has its seat in England and Wales. The Respondent's rights arise as a former member under the Memorandum and Articles of Association of the Applicant and in particular Articles 47 and 48 of the Articles of Association. The claim accordingly is a challenge to a decision of an organ of the Applicant.

16. The Applicant relies upon the decision in the *Medical Defence Union Limited v Department of Trade* 1980 1 CH 82. Megarry VC at page 90 said –

> "On the face of the Memorandum and Articles a member of the Union has no right to require the Union to conduct legal proceedings for him and no right to require the Union to indemnify him against claims for damages. All that he has is the right to have his request for the Union's help under these heads properly considered by the Council or by one of its committees. In practice it is rare for such a request to be refused. Even though the prospects of such a request succeeding are great, all that the member has by way of right is that his request should be properly considered, and, of course, if it is granted, that the Union should conduct the proceedings or indemnify him or both."

17. In that case the Plaintiff sought a declaration that it did not carry on any class of insurance business in Great Britain within the meaning of the Insurance Companies Act 1974. Put shortly the issue was whether there is a contract of insurance where the benefits

are discretionary and not obligatory. The action proceeded on the basis that there was a contract between each member of the Union and the Union constituted by the Union's acceptance of each member's application for membership on the terms of the Memorandum and Articles of Association of the Union. Megarry VC held in that case that all a member of the M.D.U. has by virtue of his membership is a right to have his request for assistance and/or indemnity properly considered that is fairly and in good faith.

18. The issue as to whether the first named Applicant is an insurer arose in *Barry v Medical Defence Union Limited* The Supreme Court 16th June 2005. The Plaintiff/Appellant sought declaratory relief with a view to establishing that the Defendant Respondent was obliged to indemnify him in relation to certain civil actions brought against him. The Defendant/Respondent's contention was that the agreement with the Plaintiff/Appellant arose from the Memorandum and Articles of Association by virtue of section 14 of the English Companies Act 1985 (equivalent to section 25 of the Companies Act 1963 in Ireland) and that that was the only contract between the parties. For the Plaintiff/Appellant it was argued that it was an implied term of the statutory contract that the Appellant would be entitled to indemnity in the same way and on the same basis as if the Defendant/Respondent was an insurer. This argument was rejected the Court holding that a term may not be implied into a contract if it contradicts an express term. The Court also rejected a submission that from the time that insurance for medical practitioners became compulsory the terms of the contract between the parties were not exclusively contained in the Memorandum and Articles of Association but that there were additional terms: this was again on the basis that a term could not be implied if it contradicts an express term. Next on behalf of the Plaintiff/Appellant it was argued that independent of the statutory contract there was a collateral contract providing for indemnity: this submission failed as the basis for such a contract was not laid in evidence. The discussion as to whether such a collateral contract could exist is obiter.

19. The provisions of the Regulation relied upon by the Respondent, Articles 5.1, 5.3 and 6.2 of the Brussels Regulation apply to claims in contract, tort and third party proceedings respectively and are an exception to the general rule in Article 2 that persons domiciled in a Member State shall be sued in the courts of that Member State. For the Applicants it was submitted that these exceptions to the general rule do not apply where the Regulation confers exclusive jurisdiction on the courts of another Member State. Article 22.2 applies to these proceedings as they concern the validity of the decisions of an organ of the first named Applicant and exclusive jurisdiction is vested in the Courts of England and Wales.

20. The predecessor of Article 22.2 Article 16(2) of the Brussels Convention (1968) ("the Convention") was considered in *Grupo Torras S.A. v al Sabah* 1996 1 Lloyd's Reports 7. The Plaintiff's claim was for inter alia damages for consipiracy and damages for breaches of director's duties against the directors of a company which was registered in Spain. The Defendants sought to have the action stayed on the basis of Article 16(2). They argued that the object of the proceedings was the decisions of organs of Grupo Torras. It was accepted that the words in the Article "proceedings which have as their object" in the Article mean "proceedings which have as their subject matter" or "proceedings which are principally concerned with": *Rossler v Rottwinkel* 1986 Q.B. 33 and *Webb v Webb* (1994) ECR 1717. There was however debate as to how the remainder of Article 16(2) should be read: whether it is concerned with proceedings which have as their subject matter "the decisions of their organs" or "the validity of … the decisions of their organs". In the course of his judgment Stuart-Smith LJ said –

> "We doubt that this question is of any real significance, partly because the correct approach to the interpretation of the Convention is purposive rather than textual, and partly because we doubt that the word "validity" is to be narrowly construed so as to exclude consideration of the meaning and effect of decisions of the relevant organs".

21. He went on to say –

> "The objective of Article 16(2) is to confer exclusive jurisdiction to decide questions concerning the constitution and internal management of a company on the courts of the contracting State in which the company has its seat".

22. The Applicant further relies on *Speed Investments Limited v Formula One Holdings Limited* (2005) 1 WLR 1936. The case concerned the validity of the appointment of directors to a company registered in Germany. It was held that the object of proceedings taken in England was the composition of the Board of Directors and that Article 16(2) therefore applied. However the case was not exclusively concerned with the Memorandum and Articles of Association of the Company as there was also a shareholder's agreement which contained provisions as to the appointment of directors. In the course of his judgment Carnwath LJ said –

> "I agree that the interpretation and effect of the shareholder's agreement are central to the issues in this case. To this extent the subject matter is not confined to the "constitution" of the company in its narrowest sense – that is the Memorandum and Articles. As paragraphs 33 – 34 of the pleaded case demonstrate the claimants rely on the terms of the agreement to support their case that the Argands have not been validly appointed.
>
> I am not greatly attracted by Ms Jones' attempt to rely on a technical distinction between the contractual effect of the agreement, and the company law issues relating to the Article. In the present case, as her own pleadings show that seems to be an unreal distinction.
>
> On the other hand, I am unable to accept that, merely because the main area of live dispute may be as to the effect of the agreement, rather than of the Articles, it ceased to be within Article 16(2). If, as I think, the real subject matter of the dispute is the composition of the Board, it does not matter that the answer may require one to look beyond the strict limits of the Company's constitution, in the technical sense. Nor would it be realistic to allow a question of "exclusive jurisdiction" in relation to such a dispute to depend on whether particular aspects of the case are contentious at any particular time (a matter which may vary as the pleadings in respect of cases evolve)."

23. The Applicants refer to *Papamicolaou v Thielen* 1998 2 IR 42 a case to which Article 16(2) of the Convention clearly applied but which is of little assistance in the present case.

The Respondent's Submissions

24. The Respondent relies on Article 6.2 of Regulation 44/2001 which provides as follows –

> "6 A person domiciled in a Member State may also be sued:
>
> > (2) as a third party in an action on a warranty or guarantee or in any other third party proceedings in the court seised of the original proceedings, unless these were instituted solely with the objective of removing him from the jurisdiction of the court which would be competent in his case.
>
> As to the substance of the Respondent's case while the same is formulated on a number of different grounds the claim is

that in all the circumstances the Applicants are obliged to indemnify the Respondent. The principal subject matter of the proceedings is a claim based on contract, a claim based on estoppel and the representations made to the Respondent and legitimate expectation related to the contract between the parties. The constitution of the first named Applicant is not challenged nor is the legal capacity of its organs. The case is not concerned with internal management or the validity in company law terms of decisions of the Applicants' organs.

25. Reference is made to *Barry v The Medical Defence Union Limited* The Supreme Court 16th June 2005 from which I have already quoted. The Respondent however draws my attention to the following passages from the judgment of Geoghegan J. –

> "Twenty five years have passed since that decision (*the Medical Defence Union Limited v Department of Trade*) and it is common knowledge in this jurisdiction that very large claims for damages have been made and recovered against members of the Respondent especially arising out of obstetric mishaps and they in turn have been indemnified by the Respondent. As a consequence huge "premiums" are paid. As suggested by Sir Robert Megarry it must be assumed that in the ordinary way despite the discretionary nature of the liability the Respondent considers such a claim in much the same way as an insurance company would do and for the most part provides indemnity in all appropriate cases. It is not disputed that there are some contractual obligations on the part of the Respondent under the statutory contract. I do not find it necessary to explore the extent of these obligations but I do not rule out that they might not more correctly be expressed in rather stronger terms than is suggested in the judgment of Sir Robert Megarry delivered in a different context. Presumably, if a person is entitled to discretionary assistance there cannot be an improper exercise of the discretion and arguably the improper exercise of the discretion would itself be a breach of contract. None of this arises here, however, in my view, and that is why I describe this first issue as largely a smokescreen. There is nothing in the evidence to suggest that there was any objection in principle to providing indemnity to the Appellant provided the legitimate requirements of the Respondent (which were not that different than the requirement of any insurance company) were complied with. In this case, the Respondent wanted personal contact with the Appellant and full information relating to the claim. In no case would this be surprising but in this particular case it is especially unsurprising given the dissemination in the media of allegations against the Appellant which, if true, might place the Appellant altogether outside the ambit of even the discretionary assistance to which the membership of the company might entitle him."

26. For the Respondent it is submitted that there is no question but that a contract exists. The Respondent makes no case based on the internal management of the first named Applicant or the validity of a decision of its organs. No principle of company law is involved. The Respondent's case is that the discretion enjoyed by the first named Applicant under its Articles of Association was improperly exercised and as noted by Geoghegan J. such an improper exercise arguably amounts to a breach of contract. The Respondent claims that his request for an indemnity was not given proper consideration and again on the dicta of Geoghegan J. this could amount to a breach of contract. Finally the Respondent's claim is based on constitutional and natural justice in that the decision is unreasonable and unfair which again was regarded by Geoghegan J. as tantamount to a breach of contract.

27. As to the interpretation of Article 16 of the Convention (and therefore Article 22 of the Regulation) the Respondent referred me to *Sanders v Ronald van der Putte* 1977 ECR 2382. While that case concerned Article 16(1) the same considerations apply to Article 16(2). The judgment of the Court at paragraph 17 and 18 is as follows –

> "17. Furthermore, the assignment in the interests of proper administration of justice, of exclusive jurisdiction to the courts of one contracting state in accordance with Article 16 of the Convention results in depriving the parties of the choice of the forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them.
>
> 18. Having regard to that consideration the provisions of Article 16 must not be given a wider interpretation than is required by their objective."

28. The present claim being essentially contractual in nature should properly be dealt with under Articles 5.1 and 6.2 of the Regulation. In *Martin Peters v Zuid Nederlandse* 1983 ECR 987 the European Court recognised the contractual nature of the Memorandum and Articles of Association of a company for the purposes of Article 5.1. Martin Peters is a company incorporated in Germany. Zuid Nederlandse is an association of which Martin Peters was a member and was incorporated in the Netherlands. The constitution of Zuid Nederlandse contained rules in relation to tendering under which a member who successfully tendered was obliged to pay 6% of the tender sum for the benefit of other members of the Association who also tendered. Martin Peters having successfully tendered for a contract failed to pay the appropriate sum and Zuid Nederlandse commenced proceedings against it in the Netherlands. Martin Peters disputed jurisdiction in reliance on Article 2 of the Convention. Zuid Nederlandse relied on Article 5.1 of the Convention. The head note of the judgment insofar as relevant reads

> "Obligations in regard to the payment of a sum of money which have their basis in the relationship existing between an association and its members by virtue of membership are "matters relating to a contract" within the meaning of Article 5.1 of the Convention whether the obligations in question arise simply from the act of becoming a member or from that act in conjunction with one or more decisions made by the organs of the association."

29. The Respondent also relies on the judgment of Finlay Geoghegan J. in *Spielberg v Rowley & Ors* The High Court 22nd November 2004. That case proceeded on the basis that the object of proceedings if they are to come within Article 22.2 must be the validity of the decisions of organs having regard to the internal management rules of a company or the validity of a decision of an organ having regard to the capacity of the company to carry out that decision in accordance with the relevant Companies Acts. The present proceedings do not concern the constitution of the first named Applicant which are not called into question nor the capacity of it or its organs to take the decisions which they took. If a broader view should be taken of Article 22.2 it would apply to all decisions of organs of companies so that proceedings against corporate defendants could only be taken in the Member State in which the company had its seat. Thus a simple claim for breach of contract would be caught by the provisions of Article 22.2.

30. Speed Investments Limited v Formula One Holdings Limited was principally concerned with the composition of the board of directors of a company and so properly fell within Article 22(2).

31. In *Newtherapeutics Limited v Katz* 1991 CH 226 Knox J. dealing with Article 16(2) said –

> "I conclude that the object referred to in Article 16(2) in relation to the decisions of organs of companies is their validity or invalidity".

32. Among the matters which Knox J. had regard to in arriving at that conclusion was a passage from Kaye Civil Jurisdiction and Enforcement of Foreign Judgments at pp 945 – 946 –

> "Since a company can only operate through the decisions of its human organs and agents, or of those of its controlling company, every set of proceedings in which a company takes part is, to this extent, capable of involving a decision of one of its organs. So, for example if a company which is sued for breach of contract raises the defence that its board of directors, which resolved to enter the transaction, went beyond its own or the board's powers or failed to follow prescribed procedure, the outcome of the case may be said to turn on questions concerning the decision of one of the company's organs.
>
> Clearly, however, to construe Article 16(2) as including every set of proceedings which in some way concerns the effects or effectiveness of corporate decisions, would render the remainder of Article 16(2) superfluous in relation to companies and would be capable of consigning virtually all corporate litigation to the exclusive jurisdiction of the contracting State seat. Plainly this was not the intention of those who drafted Article 16(2) of the Convention and limits must be placed upon the types of action which may be considered to have as their object the decisions of organs within the meaning of Article 16(2)."

33. An ambiguity which concerned Knox J. and Professor Kaye has been resolved in Article 22.2 which inserts the term "validity of the decisions of the organs" rather than "decision of the organs" in Article 16(2) of the Convention.

34. It is further submitted that dicta in *Grupo Torras v al Sabah* support the Respondent's contention. Thus Stuart-Smith LJ said –

> "An interpretation of Article 16(2) which extends to all proceedings principally concerned with the decisions of the organs of companies would appear, on its face, surprisingly wide. It would literally cover any dispute arising from a decision of the board of a company to terminate a contract … taken over all, Article 16 points towards the narrower interpretation of Article 16(2); it suggests that the last phrase of Article 16(2) should be read as applying only to proceedings which are principally concerned with the validity of the decisions of organs."

Conclusion

1. On the evidence I am satisfied that the seat of the Applicants for the purposes of Article 22.2 is England and Wales.

2. As to the interpretation of the Regulation I am satisfied that a purposive approach should be adopted. However as Article 22 is an exception to the provisions of Articles 2, 5 and 6 of the Regulation which contain the basic jurisdictional rules Article 22 must not be given a wider interpretation than is required by its objective and accordingly construed narrowly: Sanders v Ronald van der Putte 1977 ECR 2382.

The Jenner Report dealing with Article 16(2) of the 1968 Convention has this to say –

> It is important, in the interests of legal certainty, to avoid conflicting judgments being given as regards the existence of a company or association or as regards the validity of the decisions of its organs. For this reason, it is obviously preferable that all proceedings should take place in the courts of the State in which the company or association has its seat. It is in that State that information about the company or association will have been notified and made public."
>
> As I understand this Professor Jenner is of the view that the objective is the internal regulation and management of a company in accordance with its public documents: this is consistent with the inclusion in the Convention at 16.3 of public registers. There is no suggestion that the Article is intended to affect simple contract litigation.

3. In order to determine the objective of the proceedings between the Applicants and the Respondent for the purposes of Article 22.2 the Court must have regard to the nature of the dispute. The relationship between the parties is relevant, in this case an incorporated body and its member, but is not determinative. The objective is to be ascertained by reference to the pleadings. *Grupo Torras v al Sabah* 1966 Lloyds Reports 7. The Third Party Notice, which I have quoted above sets out the Respondent's claims and I propose to deal with each of those in turn.

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

> This is a claim that the Applicants by their conduct are estopped from denying the Respondent an indemnity.

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

> This is a claim that having regard to the Applicant's conduct the Respondent has a legitimate expectation that he would be provided with an indemnity.

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

> It is clear that this is not simply a claim that under the contract contained in the Memorandum and Articles of Association and the contract thereby constituted by the Respondent becoming a member of the first named Applicant he is entitled to an indemnity. Rather it is a claim based on a collateral contract the nature of which I accept is not yet fully pleaded and/or on that contract as modified by the course of dealing between the parties and/or estoppel and/or representation. It is not a claim based on the validity in terms of company law of any decision of an organ of the Applicants.

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

> At first sight the inclusion of the word "valid" might suggest that this claim is based on an invalidity affecting the decision of the organ of the first named Applicant which made the decision in issue. However I am satisfied on the submissions to me that this is not the case. There is no suggestion made by the Respondent of an invalidity such as a want of authority in the Board of Management rather the complaint is of the wrongful exercise of an undoubted and undisputed discretion. While the former clearly falls within Article 22.2 the latter may not and I will deal with that hereunder.

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

> This claim also relates to an allegation of wrongful exercise of a discretion the existence of the discretion under the Articles of Association not being in issue.

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

> Again on the submissions made I am satisfied that the contract relied upon is not that contained in the Articles of Association but a collateral contract which the Respondent will seek to establish in evidence and/or on that contract as modified by the course of dealing between the parties and/or estoppel and/or representation. It is not a claim based on the validity in terms of company law of any decision of an organ of the Applicants.

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

> This also relates to a wrongful exercise of the discretion the existence of the discretion under the Articles of Association not being in issue.

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

> This also relates to a wrongful exercise of the discretion the existence of the discretion under the Articles of Association not being in issue

(ix) That you canvassed for business in the Irish jurisdiction and represented that you would provide services to (inter alia) obstetricians in the Irish jurisdiction and, in doing so, represented that an indemnity would be provided in the event of a successful medical negligence claim against persons such as Dr. Howard and in consideration of which Dr. Howard paid annual membership fees (which you accepted). In the circumstances, Dr. Howard is entitled to rely on the said representations and you are estopped from not providing an indemnity to Dr. Howard in respect of the above described claim.

> This is a restatement of the claim at (i) based on estoppel but with more particularity.

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

> This is a claim based on wrongful exercise of the discretion the existence of the discretion under the Articles of Association not being in issue.

As to (i), (ii), (iii), (vi) and (ix) above I have regard to the decision of the Supreme Court in *Barry v The Medical Defence Union Limited* Unreported 16th June 2005 where Geoghegan J. accepted the possibility of a collateral contract being established and also accepted that a person entitled to discretionary assistance could not by an improper exercise of the discretion be denied that assistance: arguably he held that such an improper exercise would amount to a breach of the contract contained in the Articles of Association. Accepting this I am satisfied that the claim at (iii) and (vi) above fall outside the ambit of Article 22.2. They do not have as their objective nor as their subject matter nor are they principally concerned with the validity of the decisions in terms of company law of the organs of the first named Applicant: *Grupo Torras SA v al Sabah*. For the like reason I am satisfied that the claims at (i) and (ix) being based on estoppel and the claim at (ii) being based on legitimate expectation on their face do not relate to the validity of a decision in terms of company law of an organ of the first named Applicant.

With regard to (iv), (v), (vii), (viii) and (x) the position is less clear cut as to whether or not these matters relate to "the validity of the decisions of their organs" the terms used in Article 22.2. Grupo Torras was concerned with the predecessor of Article 22.2 that is Article 16(2) of the Brussels Convention (1968). Article 16(2) confers exclusive jurisdiction –

> "2. In proceedings which have as their object the validity of the constitution, nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the decisions of their organs, the Courts of the contracting State in which the company, legal person or association has its seat."

An ambiguity existed in Article 16(2) as to whether the word "validity" governed the words "decisions of their organs" but that ambiguity has been removed by the wording of Article 22.2 and it is now clear that it is the validity of decisions of

organs that is the subject of the exclusive jurisdiction. Stuart-Smith LJ in the course of his judgment in *Grupo Torras SA v al Sabah* considered the decision in *Newtherapeutics Limited v Katz* 1991 CH 226. In that case Knox J. drew a distinction between validity and propriety. He was concerned with an action in which it was alleged that the directors of a company had acted in excess of their powers

> (i) because they had acted without authority of a properly convened and quorate board meeting and
>
> (ii) because the transaction to which they had committed the company was so detrimental to the interests of the company that no reasonable board of directors could properly have assented to it.

Knox J. held that the first of these issues fell within Article 16(2) but that the second did not. Knox J went on to hold that Article 16(2) did not include proceedings that concern the reasonableness of a director's actions: however the claim before him was principally concerned not with reasonableness but with the validity or otherwise of the director's exercise of their powers and accordingly he held the proceedings came within Article 16(2). Stuart-Smith LJ agreed with Knox J in relation to the first allegation but left over for future consideration the correctness of his decision in relation to the second allegation and in doing so said –

> "The powers of directors and other officers of a company are limited not only by formal or procedural requirements but also by the general principle that officers of a company must act bona fide in the interests of the company. Allegations of the kind made in *Newtherapeutics Limited v Katz* are essentially allegations of want of authority and there is much force in the contention that they fall within the scope of Article 16(2)."

He went on to distinguish want or excess of authority from abuse of authority. In the case before him the company's only role was to be the victim of an alleged conspiracy to deprive it of its assets in which circumstances it was impossible to accept the proposition that in misappropriating its money the directors were acting as the company's agents or organs let alone that "decisions" of its organs were involved: in these circumstances Article 22.2 could have no application.

However in Civil Jurisdiction and Judgments Act 1982 Professor Kaye at pp 81 - 82 has this to say in relation to Article 16(2) –

> "Since a company can only operate through the decisions of its human organs and agents, or of those of its controlling company every set of proceedings in which a company takes part is, to this extent, capable of involving a decision of one of its organs. So, for example, if a company sued for breach of contract raises the defence that its board of directors, which resolved to enter the transaction, went beyond its own or the board's powers or failed to follow prescribed procedure, the outcome of the case may be said to turn on questions concerning the decision of one of the company's organs.
>
> Clearly, however, to construe Article 16(2) as including every set of proceedings which in some way concerns the effects or effectiveness of corporate decisions, would render the remainder of Article 16(2) superfluous in relation to companies and would be capable of consigning virtually all corporate litigation to the exclusive jurisdiction of the contracting state seat. Plainly this was not the intention of those who drafted Article 16(2) of the Convention and limits must be placed on the types of action which may be considered to have as their object the decisions of organs within the meaning of Article 16(2).
>
> Accordingly, in the present view, it will be those proceedings whose object is to challenge the decision of an organ as being in breach of prescribed corporate procedure or of duties owed by the organ in question – or, in the present opinion, which involve the failure of an organ to act when it was obliged to do so, as, for example, in the case of an application under section 371 of the Companies Act 1985 (for the Court to call a meeting) – which will be considered to be covered by a reference in Article 16(2) to proceedings having as their object the decisions of organs. In this way, therefore, the latter part of Article 16(2) may be regarded as relating basically to proceedings concerning the internal management of companies, and jurisdictional exclusivity of the contracting state seat will consequently apply to the latter form of suit, whether it is the organ itself or the company which is defendant, as for example where an injunction or declaration of invalidity is applied for in order to prevent the board of directors from taking some proposed action, alleged to be beyond its powers, or whether it is the company as nominal defendant, when members sue in a derivative action under one of the exceptions to the rule in *Foss v Harbottle* (1843) 2 HARE 461, or as real defendant when members sue the company in order to enforce their personal rights."

I find support for this view in *Martin Peters v Zuid Nederlandse* 1983 ECR 987 and *Sanders v Van der Putte* 1977 ECR 2382. I am satisfied that it is the correct view. By way of concrete example in *Grupo Torras v al Sabah* at page 15 Stuart-Smith LJ said –

> "A claim by an officer of a company for wrongful dismissal, for example, does not fall within the Article, although a claim that the decision to dismiss him had been taken by a meeting of the board which was inquorate would do so."

I am satisfied that this is the correct view. The claims in paragraphs (iv), (v), (vii), (viii) and (x) do not relate to the validity of a decision of an organ of the Applicants but rather to the propriety or correctness of the decision. Accordingly the claims are not within the exclusive jurisdiction provisions of Article 22.2 of the Regulation the true nature of the Respondent's claim taken as a whole not being at all concerned with the validity of the decision in terms of company law of the Applicants' organs.

4. I am satisfied that the Respondent is not correct in seeking to invoke the special jurisdiction under Article 6.2. This provides as follows –

> "A person domiciled in a Member State may also be sued:
> 2. as a third party in an action on a warranty or guarantee or in any other third party proceedings in

> the court seized of the original proceedings unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case."

35. In a conflict between Article 6.2 and Article 22.2 which contains exceptions to the general jurisdictional provisions the latter takes precedence.

36. Having regard to the foregoing I refuse the Applicants the relief which they seek.