

THE HIGH COURT

[2005 No. 4573P]

BETWEEN

THE IRISH PHARMACEUTICAL UNION, MARK GOULDSON, GOULDSON PHARMACY LIMITED, HUNTERS PHARMACY WINDY ARBOUR LIMITED, BELMIRE LIMITED TRADING AS BRITTON'S PHARMACY, CORR'S PHARMACY (CLONSHAUGH LIMITED)

PLAINTIFFS

AND

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

DEFENDANTS

Judgment of Mr. Justice Clarke delivered on the 29th June, 2007.

1. Introduction

1.1 In the early 1970s a major change occurred in the way in which health services and, most especially for the purposes of this case, pharmaceutical services, were provided free of charge to eligible members of the public. Up to that time persons who were entitled to free medicine were able to obtain prescribed medicines from public dispensaries. However, as part of a major reform of the health services at that time, it was decided by Government that, from then on, free medicines would be dispensed by pharmacists generally in circumstances where the pharmacist concerned would not charge the patient but would be reimbursed by the State. The proposed arrangements formed part of the so-called General Medical Service ("GMS").

1.2 It was obvious that the agreement of pharmacists would be necessary in order for the scheme to operate and with that in mind negotiations took place between representatives of the first named plaintiff ("IPU") and representatives of the first named defendant ("the Minister"). Those negotiations resulted in an agreement which was recorded in a memorandum of October 1971. On the basis of that memorandum pharmacists voted to accept the arrangements and, thereafter, individual contracts were entered into between participating pharmacists and Health Boards for the provision of pharmacy services. Those individual agreements were in a form subsequently agreed between the Minister's officials and a committee of the IPU.

1.3 In general terms the way in which the scheme operated was that the pharmacist was reimbursed to an agreed amount for the cost of acquiring the medicine concerned and supplying it to the relevant patient. In addition the pharmacist was paid a dispensing fee. An important part of the original arrangements agreed at that time was the making of a so called "advance" payment. It is clear that the purpose behind the making of an advance payment to pharmacists was a recognition of the fact that it was anticipated that there would be a reasonably significant delay in the administration of claims by pharmacists for reimbursement and payment of their fees for dispensing under the scheme. In those circumstances the advance payment would appear to have been intended to compensate pharmacists for the cash flow difficulty that that delay would give rise to. Obviously, in the corresponding case of the same pharmacist dispensing medicine to a private paying patient, the pharmacist would receive immediate payment.

1.4 It will be necessary to deal, in due course, and in slightly more detail, with the circumstances in which the relevant memorandum was negotiated. It should also be noted that the relevant agreements were renegotiated in 1996 both as to the arrangements between the IPU and the Minister and as to the form of contract to be entered into between individual pharmacists and the Health Boards. Thereafter, the functions of the Health Boards were taken over by the Health Services Executive ("HSE"). It should also be noted that, from time to time, a number of additional schemes came into being whereby pharmacists provided services to patients who were entitled to full or partial state funding in respect of their medicinal requirements. However each additional scheme was separately arranged and agreed.

1.5 The events which give rise to these proceedings start with a statement by the Minister, in December 2002, to the effect that it was intended to freeze the system of advance payments to pharmacists participating in the GMS. It is of some note that the Minister's statement recorded a decision of the Government to give effect to that freezing of advance payments. The individual contracts between pharmacists and the State were, of course, by that time, with the HSE. However despite the fact that those contracts were with the HSE, it seems that at all times the terms of such contracts were determined, so far as the interests of the State were concerned, by the Minister. In any event the Minister, despite complaints by the IPU, implemented the Government decision and proceeded to freeze the advance payments system. The IPU claims that the actions of the Minister were in breach of the then current agreement, that is to say the agreement negotiated in 1996. In addition the other plaintiffs ("the individual pharmacists") maintain that there has been a breach of their individual contractual entitlements. In some respects the issues which I have to decide narrowed in the course of the hearing and in that context it is appropriate to turn first to the issues which remain for decision.

2. The Issues

2.1 I will deal firstly with matters which, while raised in the pleadings and/or in the written submissions, are no longer in issue by virtue of the position adopted by, in particular, the plaintiffs at the hearing before me. Firstly it needs to be noted that the legal entitlement of both the IPU and the individual pharmacists was pleaded on a number of bases. However at the hearing it was made clear that the only claim being pursued was one based on contract. It is, therefore, accepted on behalf of all of the plaintiffs that the only legal entitlement which they may have, is to be found in what they contend are the contracts between the various parties. Any claim based on legitimate expectation was expressly abandoned.

2.2 In addition the plaintiff's abandoned any claim in respect of damages. As I will set out in more detail later in the course of this judgment, the precise decision made by the Government and implemented by the Minister was, in effect, to freeze the amount of advance payments which each pharmacist within the GMS system was entitled to obtain. The scheme, as it had evolved, provided that the advance payment was to be based on the current level of turnover of the pharmacy concerned. In circumstances where, therefore, pharmacy turnover was increasing, so too would the amount of the advance payment increase in line with that increase in turnover. In practical terms, therefore, pharmacists who were already within the GMS scheme have had their advance payment frozen as of the 2002 level. In addition new entrants since that time have received no advance payment. Pharmacies which changed ownership (even where the beneficial ownership remained the same) or location, were treated as "new" and were no longer entitled to any advance payment. It had been suggested that, as a result of that action on the part of the Minister, losses had accrued to the individual pharmacists by virtue of their not having had the use of larger advance payments to which they would have been entitled had the Minister not taken the actions which she did in 2002. However any claim in respect of such losses was expressly abandoned.

2.3 In those circumstances the only relief sought by the plaintiffs, in substance, was directed towards appropriate declarations to the effect that the Minister had acted in breach of contract in implementing the Government decision to freeze the advance payments in December 2002. The issues which arise are, therefore, about the nature and extent of the relevant contractual relations between the parties and the construction of the relevant contractual documentation.

2.4 In the order in which it appears to me to be appropriate to deal with the questions which have arisen, the issues seem to be as follows:-

(a) Whether the 1996 agreement between the IPU and the Minister constitutes a legal contract. The Minister contends that the agreement does not amount to a contract.

(b) If the agreement between the Minister and the IPU is found to create contractual relations, certain questions of construction arise as to the terms of that agreement.

(c) Some of those issues of construction involve the interaction between the agreement entered into between the IPU and the Minister, on the one hand, and the standard form contract which was entered into between all pharmacists participating in the scheme (including the individual pharmacists) and, initially, the Health Boards, on the other hand. The form of that agreement was itself agreed between the IPU and the Minister. There is no doubt but that there are contractual relations between the individual pharmacists and, in the events that have happened, the HSE. However the HSE is not a party to these proceedings. In those circumstances, the Minister contends that the individual pharmacists are not entitled to rely, as against her, on the individual contracts.

(d) In addition there are questions of construction in relation to the individual contracts.

2.5 Further to those issues the Minister also raises a number of matters by way of defence. Firstly, reliance is placed on the undoubted entitlement of the Executive to change policy. In those circumstances reliance is placed upon the fact that a Government decision was taken to give effect to the freezing of the advance payment regime. While I will touch on this aspect of the case in the course of this judgment it does not, it seems to me, really arise in the light of the way in which the case has developed. There is no doubt but that, in principle, the Executive is entitled to change policy and no person or body has a legal entitlement to ensure that policy remains the same. See for example *Hempenstall & Ors v. Minister for Environment* [1994] 2 I.R. 90. However where, in furtherance of an existing policy, a Minister or other State agency enters into contractual relations with third parties, then it does not seem to me that there is any basis for relying on the entitlement to change policy as a justification for breaching existing contractual obligations. That does, of course, beg the question as to the nature of the existing contractual relations concerned, as to the parties to those relationships, and as to the terms of the existing contracts. However it seems to me that if, and to the extent that, any of the plaintiffs can establish an existing contractual entitlement properly entered into on foot of a then existing policy, then the fact that there has been a change in policy does not, in my view, afford any justification for breaching those contracts. In the light of the withdrawal by the plaintiffs of reliance on any entitlement other than contractual, it seems to me that State policy issues are no longer relevant to these proceedings.

2.6 In addition, however, the Minister places reliance on a contention that the plaintiffs were guilty of significant delay in maintaining these proceedings which, it is said, should disentitle the plaintiffs to an entitlement to relief. That question remains a significant issue between the parties although it does, obviously, only arise in the context of there being a *prima facie* entitlement to relief in the first place.

2.7 It is, therefore, clear that the key issues in these proceedings concern the contractual relations between the parties generally. As both questions concerning the existence of contractual relations, and the construction of any contracts found to exist, must be viewed against the background of the context in which the agreements were entered into, I propose to start by considering the factual background.

3. Factual Background

3.1 As indicated earlier, the original 1971 agreement was entered into between the IPU and the Minister in the context of seeking to persuade pharmacists generally to participate in the GMS. While it is common case that the 1971 agreement (whether it be contractual or not) was superseded by the 1996 arrangements, it is equally clear that the current 1996 agreement was negotiated as a variation on the then existing 1971 arrangement. For that reason it is important to start with a consideration of the circumstances leading to the 1971 agreement.

3.2 Evidence was led on behalf of the plaintiffs from a number of pharmacists who held positions of authority within the IPU at the time of the 1971 arrangements. On the basis of that evidence I am satisfied that the existence of an arrangement for the making of advance payments was an important part of the set of arrangements entered into between the parties at that time. On the evidence it seems to me to be reasonable to conclude that it would have been unlikely that the arrangements negotiated between the officers of the IPU and senior officials in the Minister's department would have received sufficient support from pharmacists generally without the advance payment arrangements having been in place.

3.3 It is important to note the relevant clauses of the memorandum of agreement entered into at that time. They are as follows:-

"12. Every retail pharmacist shall be eligible for participation in the scheme provided he enters into the prescribed agreement with the relevant health board or health boards. Pharmacists outside the Eastern Health Board area who expect to dispense prescriptions for eligible persons within the area will be invited to enter into an agreement with the Board before the scheme starts.

13. The form of agreement to be entered into between the pharmacist and the health board will be the subject of discussion between the Department of Health and the Joint Negotiating Committee representing community pharmacists. It is proposed that in general the provision of the agreement shall be based on the terms of this memorandum.

15. A pharmacist's agreement with a health board shall automatically terminate upon the removal of his name from the register of the Pharmaceutical Society of Ireland.

16. A pharmacist may terminate his agreement on giving three months notice or such shorter notice as may be acceptable to the health board.

20. The pharmacist will be remunerated on the basis of the recoupment to him of the ingredient cost of prescription items dispensed for eligible patients under the scheme together with a fee for each item (subject to paragraph 25). The fee will contain specific elements to cover the cost of containers, capital investment and obsolescence. Higher fees will be paid for extemporaneous prescribing and for prescription items which involve the fitting of appliances. An additional fee will be payable for urgent prescription dispensed outside contract hours.

29. ADVANCE PAYMENT. On the submission of the first claim by a pharmacist participating in the scheme, an advance payment within three weeks will be made to him on the basis of 55p for each of the estimated number of prescription items in his claim. The claim will be paid in full within a further 30 days but the pharmacist will continue to retain the original advance payment as an advance for subsequent claims. In the event of the pharmacist leaving the scheme, this advance payment will be repayable by him.

30. If, after the scheme has been in operation for six months, the original advance payment is shown to be less, by more than 20%, than the monthly average payment, an appropriate adjustment in the advance payment will be made.

31. If the original advance payment is shown to have been too large in the light of the subsequent monthly claim of the pharmacist, the central pricing bureau will make an appropriate deduction from payments due to the pharmacist.

45. Payment to the pharmacist will normally be made in full during the second half of the month following that in which the prescriptions were submitted. Thus, prescriptions dispensed in April will be submitted for payment in the first week of May and will be paid during the latter half of June. It is intended that the advance payment already referred to will compensate pharmacists for the delay in payment of the full amount. Prescription bundles not submitted before the specified date shall have to await payment with the following month's bundle.

48. The fees proposed in the foregoing paragraphs will operate for at least one year after the full implementation of the scheme and will be reviewed not later than two years after the initial introduction of the scheme. The review will be carried out by the Department of Health in conjunction with the Joint Negotiating Committee and, if agreement is not possible at that level, the matter will be referred to an agreed arbitration board. The board will have authority to take into account all relevant factors including changes in general price and income levels. The arbitration board will also have power to make a retrospective adjustment in the fees if the experience in the operation of the scheme satisfies it that this is appropriate.

49. Contact between the Department of Health and the Joint Negotiating Committee will be maintained with a view to resolving any difficulties that may arise from time to time in regard to the operation of the arrangements for the scheme."

3.4 It should be noted that the advance payment, as agreed at that time, was based on 55p for each of the estimated number of prescriptions. Clause 30 provided, in addition, for an adjustment in the advance payment in the event that experience over the first six months showed the original advance payment to be less, by more than 20%, of the monthly average payment. Similarly clause 31 provided for a mechanism for repayment in the event that the advance payment turned out to be too large. Over the years, and prior to the 1996 Agreement, a number of adjustments to the advance payment scheme were agreed. Firstly, the rate per prescription was adjusted in line with changes in the prescription fee that was paid in accordance with the scheme. Secondly, the cut-off point of 20% for an upwards adjustment was initially reduced to 10% and ultimately abolished. On that basis the system evolved into one whereby the advance payment for any year was based on the number of prescriptions during a relevant portion of the previous year. While, in theory, the advance payment system implied a new advance payment each month, with the previous month's advance payment being discharged out of the full reimbursement of the pharmacist concerned, in practice the advance payment was rolled over from month to month. It, therefore, follows that, again in practice, a pharmacist received an initial advance payment which he or she was entitled to keep as long as he or she continued operating within the GMS. That advance payment was readjusted annually in the light of the volume of GMS prescription business then being conducted by the pharmacist concerned. In practice it would appear that in, most cases, the amount of the advance payment to which any particular pharmacist was entitled grew over the years so that, not only was an individual pharmacist entitled to keep the initial advance payment, but also it was likely that each pharmacist would receive a top-up advance payment each year to reflect an increase in turnover. However the pharmacist would be required to repay the entirety of the advance payment on ceasing to operate within the GMS.

3.5 In the period immediately after the 1971 agreement was entered into, a form of standard individual contract was agreed between representatives of the IPU and those of the Minister. It was relatively straightforward in its terms. It provided that the pharmacist concerned would agree to dispense prescriptions, in accordance with certain terms and conditions, in consideration for which the relevant health board agreed to make or arrange for payment to the pharmacist concerned at rates to be approved or directed by the Minister. The Minister was, by implication, required to consult with the so-called Pharmaceutical Contractors Committee ("PCC") prior to fixing the appropriate rates. The PCC operated within the IPU and was the body which engaged in direct discussions with the Minister and officials of the Department in relation to the operation of the scheme. It is common case that the standard form contract between the health board concerned and individual pharmacists did not make any express provision for advance payments.

3.6 In the period up to 1996 a number of issues, other than routine questions concerning changes in rates of payment, arose. In particular the Minister seems to have had concerns in relation to ensuring that proper standards would be applied by pharmacists under the scheme and that an appropriate mechanism would be agreed for dealing with any suggestion that an individual pharmacist might have fallen below appropriate standards. In addition, the Minister had concerns in relation to the repayment of an advance payment in cases where the pharmacy concerned might be operated by a corporate body which might ultimately become insolvent. It would seem that such issues were the subject of discussion from time to time and agreed solutions were ultimately incorporated into the arrangements agreed between the Minister and the IPU in 1996.

3.7 The memorandum of agreement between the IPU and the Minister in 1996 is relatively brief in its terms and I therefore propose setting it out in full. It is in the following terms:

"MEMORANDUM OF AGREEMENT

BETWEEN

THE DEPARTMENT OF HEALTH AND THE IRISH PHARMACEUTICAL UNION

IN RESPECT OF THE PROVISION OF COMMUNITY PHARMACY SERVICES UNDER THE HEALTH ACT, 1970

The undersigned representatives of the Irish Pharmaceutical Union and the Department of Health hereby agree the terms of an agreement in respect of the provision of community pharmacy services under the Health Act, 1970.

The principles of this agreement are as follows:

- That community pharmacy services provided under the Health Act, 1970 shall be in accordance with the terms and conditions of the Community Pharmacy Contractor Agreement which is hereby attached at Appendix I.
- The above agreement will apply to all pharmacies in the State providing community pharmacy services. In the case of pharmacies operating in a hospital setting and those not having a current GMS contract, modified community pharmacy contractor agreements will apply to the extent of the community pharmacy services which they are providing on the date this agreement is signed:
- In the case of new community pharmacy contractor agreements and the relocation of existing pharmacies, the criteria set out at Appendix II will apply and will be placed on a statutory basis.
- The improvements in the terms and conditions of community pharmacy contractors associated with this agreement will only apply to those who have entered into the revised pharmacy contract agreement attached at Appendix I.
- The terms and conditions of this agreement between the Pharmaceutical Contractors' 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 disagreement shall be subject to mediation and recommendation by a third party appointed by the Minister following consultation with the Pharmaceutical Contractors' Committee. Any alterations to the agreement between the Minister and the Pharmaceutical Contractors' Committee arising from the 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 specified periods with the agreement of the Minister and the Pharmaceutical Contractors' Committee.
- Health Boards will endeavour to ensure that all claims for payments properly due under this agreement in respect of the Drug Cost Subsidisation, Long Term Illness and GMS Schemes will be processed and paid to the relevant contractor not later than the end of the month following the month in which claims for services provided are properly made. This undertaking is contingent on receipt of all such documentation and information, as may be required to enable the processing of such claims, by the seventh day of the month following the month in which the said services were provided. The Boards shall endeavour to ensure that effective contingency arrangements are put in place to enable the processing and payment of such claims as aforesaid notwithstanding any fire, flood, storm damage or equipment failure."

3.8 The memorandum contemplates that pharmacy services were to be supplied in accordance with the terms and conditions of a new "Community Pharmacy Contractor Agreement" which was appended. That contractor agreement, therefore, replaced the original 1971 version and is a more detailed document. Many of the additional clauses incorporated into the revised 1996 contractor agreement are concerned with standards and are not relevant to the issues which I have to consider. There were also elaborate arrangements agreed concerning the criteria for granting new community pharmacy contractor agreements and the relocation of existing pharmacies. Those arrangements are also not relevant to the issues in this case.

3.9 It is important to note that the 1996 contractors agreement did not make any reference to advance payments. In that regard it was similar to the 1971 version. Of particular relevance to the issues which I have to decide are, however, the provisions of Clauses 19(3) and 19(5) which are in the following terms:-

"19(3) This agreement is to be construed as contingent upon the terms agreed or to be agreed between the Minister and the Pharmaceutical Contractors' 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 arrangements which may be agreed between the Minister and the Pharmaceutical Contractors' 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.

19(5) The terms and conditions of this agreement between the Pharmaceutical Contractors' 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 disagreement shall be subject to mediation and recommendation by a third party appointed by the Minister following consultation with the Pharmaceutical Contractors' Committee. Any alterations to the agreement between the Minister and the Pharmaceutical Contractors' Committee arising from the 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 specific periods with the agreement of the Minister and the Pharmaceutical Contractors' Committee."

3.10 Finally, in respect of the factual background, it is necessary to note the circumstances which led to the Minister's decision to freeze advance payments. I am satisfied that there had, by the time of that decision, been relatively significant improvements in the method of payment to pharmacists under the variety of schemes operated under the auspices of the GMS. In those circumstances the Minister formed the view that the making of an advance payment was no longer justified because there had, in particular, been a significant reduction in the delay between the filling of a prescription by a pharmacist and the receipt by that pharmacist of payment under the GMS. Both parties explored, in the course of the evidence, the precise extent to which there had been such an improvement and the extent to which it might be said that pharmacists are, in current conditions, required to pay their own suppliers in advance of receiving payment as directed by the HSE. For reasons which I will shortly address, it does not seem to me that these issues are of any relevance to the case which I have to decide. However, in general terms the facts would seem to be as follows.

3.11 It is possible for pharmacists to negotiate with medicinal wholesalers, terms and conditions which allow a reasonable period for the payment to the wholesaler of the invoice in respect of an individual shipment. Such terms and conditions appear to vary somewhat and are themselves interlinked with other terms and conditions negotiated between the individual pharmacist and the wholesaler.

3.12 It would seem that it is also possible for pharmacists to negotiate from the wholesaler concerned, a so-called "discount" off the price which is used for the purposes of calculating the payment to the pharmacist concerned under the GMS. In substance it seems that central negotiations are carried on by State agencies with those who supply medicinal products within the State as to the price at which those products are to be supplied for GMS purposes. However, the precise contractual relations between pharmacists, wholesalers, and the main suppliers, are left to individual negotiation between those parties. While there is a notional "mark-up" used for the purposes of calculating the payment by the GMS to individual pharmacists, that mark-up is no more than, as I have said, notional. The precise difference between what the pharmacist pays for a particular medicine and what he receives through the GMS scheme, is dependent on the price which he negotiates with his wholesaler. It would seem, on the evidence, that, in current market

conditions, pharmacists are able to negotiate an arrangement where they are able to make a gross profit on most medicines supplied within the GMS. There would also seem to be some connection between the terms that can be negotiated in relation to the length of the pharmacist's credit period and the extent of the discount. The greater the credit period the lesser the discount that will, in practice, be available. On the evidence it would seem that, in general terms, it is possible for pharmacists to negotiate a discount of up to 10% off the notional GMS price. There would seem to be a greater degree of variation in credit period. It can be as long as a number of months. However there is some evidence that longer periods of credit are at the price of some reduction in the discount. Finally it appears, on all the evidence, that amongst the matters which form part of the contractual mix, are other arrangements (such as electronic transmission) which are perceived by the wholesalers to make the conduct of their business easier.

3.13 However, it does not seem to me that any of these matters are really relevant. As I have pointed out, the case, as it evolved, concerns the alleged existence of contractual entitlements. Whether the Minister might have, or might not have, a reasonable basis "on the merits" for seeking a change in the system is not, in those circumstances, relevant. 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. In the latter case, even if the plaintiffs could persuade the court that there was "on the merits" a justification for the retention of the advance payment scheme, that would be a case that could only be made in contractual negotiations with the Minister, rather than in court.

3.14 In those circumstances it does not seem to me that it is part of the function of a court to form a view (in a case involving only a dispute about contractual entitlements) as to whether there might be, or not be, objective reasons for changing the scheme. In that context cases, such as *Gorman v. Minister for Environment* [2001] I.R. 413, relied on by the Minister do not seem to be relevant. For those reasons it seems to me that the issues in this case are, subject to the delay point, confined to a consideration of the contended for contractual obligations. I now turn to those issues.

4. What are the contracts

4.1 As indicated earlier, it is clear that the arrangements entered into between the health boards and individual pharmacists under both the 1971 arrangements and the 1996 arrangements amounted to contracts. It will be necessary, in due course, to turn to some of the disputed terms of, especially, the 1996 standard contract. However, the key initial issue between the parties is as to whether either or the arrangements entered into between the IPU and the Minister in respectively 1971 and 1996 amounted to a legally enforceable contract.

4.2 The current agreement is, of course, the 1996 arrangement. The Minister contends that that agreement does not amount to a contract. The IPU places reliance on the decision of the High Court of New Zealand in *Rothmans of Pall Mall (NZ) Limited v. Attorney General* [1991] 1 N.Z.L.R. 323, where the plaintiff, being a cigarette manufacturer, and the Minister for Health of New Zealand had signed a document described as an "agreement". In that agreement the Government of New Zealand (on whose behalf the Minister entered into the arrangements concerned) promised not to legislate for the regulation of tobacco advertising in return for the plaintiff agreeing to abide by a regime in respect of such advertising and to supply certain data regarding its products to the government. In response to a government announcement of an intention to introduce legislation prohibiting tobacco advertising, the plaintiff sought a declaration that the government was contractually obliged to enter into negotiations with the plaintiff before introducing the proposed legislative scheme. There were a number of arguments raised in the case on behalf of the Minister. The Minister succeeded on the basis that it was not legally permissible for government to bind itself not to introduce legislation. That, indeed, is a principle which is wholly consistent with the jurisprudence of the Irish courts. However, an earlier argument put forward by the Solicitor General on behalf of the government to the effect that the "agreement" between the parties was not intended to represent a contract but was rather a political statement, did not find favour with the court.

4.3 Robertson J., in the course of his judgment stated:-

"I am not attracted by the Solicitor General's first argument that this was not a legal agreement. I accept Mr. Craddock's submission in response, that one would expect that contracts entered into by Ministers would be consistent with government policy but that does not rob them of legal effect. I am unable to accept that when the government merely wishes to make a political statement it would do it in a form that has all the hallmarks of a contractual agreement.

The document is headed "agreement". It precisely identifies the parties ... I accept that the document was not completed under seal, but in my judgment it flies in the face of every clear sign and signal to suggest that this was merely a vehicle for espousing a political position or policy."

4.4 The overall approach adopted by the High Court of New Zealand in *Pall Mall* seems consistent with the Irish jurisprudence in relation to the creation of legal contractual relations. See for example *O'Keeffe v. Ryanair Holdings plc* [2002] 3 I.R. 228. A similar approach appears to have been taken by the courts of the United Kingdom. Nor was there any very significant dispute between counsel as to the overall approach to questions concerning the existence of legal relations in cases such as this, although there were significant differences as to the application of that approach to the facts on this case. It is, as the High Court of New Zealand pointed out, necessary to look at the document as a whole and determine whether it has the hallmarks of a contract. It is, in addition, it seems to me, necessary to have regard to the type of matters addressed in the document concerned. Part of the context from which the existence (or the lack of existence) of contractual relations may be inferred, is the nature of the matters which are the subject of the agreement recorded in the document itself. It is clear that the High Court of New Zealand was concerned with a choice between inferring that the document under its consideration was, on the one hand, one intended to create legal relations or, on the other hand, was merely a statement of policy.

4.5 However, the arrangement in this case does not seem to me to be analogous to that which was the subject of *Pall Mall*. The agreement here is much more in the nature of an arrangement entered into at the end of a collective bargaining process. The fact that collective bargaining agreements are more normally entered into by a trade union on behalf of its employees does not alter the fact that it is common place for representative bodies generally (whether a trade union on behalf of employees or a body, such as the IPU, which is representative of the members of a trade or profession) to agree with an employer (or indeed an employer's representative body) or a service purchaser, as to the terms and conditions which will generally apply in a specified employment or business. In those circumstances it is necessary to look at any such agreement as a whole to determine whether it can be said to amount to a binding contractual arrangement between the parties or simply be a set of arrangements which it is intended will be incorporated into individual contracts to be entered into.

4.6 Such individual contracts can, in the case of a workplace, be the contracts of employment of those employees on behalf of whom the trade union concerned was negotiating. In a case such as this, the individual contracts will be between the service purchaser (the HSE) and individual pharmacists. It is, as *Pall Mall* indicates, a question of construction, having regard to all of the agreement, as

to whether it is can be said that the agreement is intended to create contractual relations. In that regard, it seems to me to be appropriate to give consideration firstly to the 1971 Agreement. In so doing, I should note a second issue raised under this heading. The Minister also places reliance on certain legal authorities concerning variation in agreements and the effect of an agreed variation on the status of the previous agreement. The purposes of such reliance is said to be of assistance in analysing the effect of the 1996 agreement. It is said, on the basis of these authorities, that the 1971 agreement is now rescinded and that the 1996 agreement makes no provision for advance payments. I will return to that issue in due course.

4.7 I should, however, start with the 1971 Agreement. It seems to me that some of the detailed provisions of the Memorandum of Agreement of 1971 are relevant. Firstly, Clause 12 speaks of a scheme and notes that pharmacists are eligible for participation in the scheme. Secondly clause 13 anticipates the negotiation of a form of agreement between the department and what is described as the Joint Negotiating Committee. While it is stated that that form of agreement is to be based on the terms of the 1971 memorandum, it is clear that there were still terms to be agreed in respect of the precise contractual relations to be entered into with individual pharmacists. Both of those provisions are suggestive of the fact that there was to be an administrative scheme and that contractual relations were to be at the level of health board and individual pharmacist. However other provisions use language typically found in contractual documentation. The language, therefore, in my view, cuts both ways.

4.8 Most particularly, however, consideration has to be given to what would be the "contract" if the memorandum of agreement is to be taken to amounting to a legally enforceable agreement. What was the IPU agreeing to do? There is no doubt that individual pharmacists who entered into specific contracts with Health Boards were agreeing to do something. They were providing a pharmacy service to patients with full eligibility. However the IPU was not agreeing to supply pharmacists to the scheme. It was, in my view, acting in a way closely analogous to a trade union negotiating on behalf of its members. In those circumstances it will not normally be the case that a contract between the trade union and the employer concerned will come into existence. Rather the trade union will enter into an agreement on behalf of its members which may, if appropriate, become incorporated into the terms and conditions of the individual contracts of employment of those members.

4.10 In those circumstances I am not satisfied that the 1971 memorandum of agreement, read as a whole, and having regard to the sort of matters agreed in it, can be said amount to the type of arrangement which can create contractual relations.

4.11 For the same reasons I am not satisfied that the 1996 agreement can be construed as giving rise to contractual obligations.

4.12 Before moving on to the question of the individual contracts, and their proper interpretation, I should deal with the point raised on behalf of the Minister concerning the interaction between the 1971 and 1996 agreements. Reliance is placed on a line of authority (including *United Dominions Corporation (Jamaica) Limited v. Shoucair* (1969) 1 AC 340) in which the courts have had to consider the legal consequences of an agreed variation in contractual relations. However, it seems to me that the background to that line of authority concerns circumstances where there is a problem, in law, in giving effect to the contract as varied. Most normally the problem stems from the absence of writing or some other formality attaching to the variation but not the original. In those circumstances the contract as varied simply cannot be enforced. As is pointed out in a number of the judgments, the court is then faced with attempting to implement the intention of the parties as best it can. The choice is between implementing the original contract, without the variation, on the one hand, or forming the view that a necessary consequence of the variation is to terminate the earlier contract and thus create a situation where there are no contractual relations between the parties at all, on the other hand.

4.13 Relying on those principles and on the fact the 1996 agreement entered into between the IPU and the Minister (which I have quoted in full above) does not make any reference to advance payments (unlike the 1971 agreement) the Minister argues that the, current, 1996 agreement cannot be said to contain any clause in respect of advance payments.

4.14 As I have already concluded that neither the 1971 nor the 1996 agreements amount to a legally enforceable contract, it does not seem to me that this issue really arises. However lest I should be wrong in the conclusion which I have reached concerning the nature of the 1971 and 1996 agreements, I will deal with this issue. It is, however, in my view, inextricably linked with questions concerning the construction of the individual contracts. I, therefore, I propose to deal with it when I have addressed those issues. I now turn to the individual contracts.

5. The Individual Contracts

5.1 As has been noted earlier, neither the 1971 individual contract, nor its 1996 counterpart, makes any express provision for advance payments. However the plaintiffs place reliance on clause 19(3) of the 1996 individual contractor agreement, which I have quoted in full earlier. That clause states that the individual contract between the pharmacist and the Health Board "is to be construed as contingent upon the terms agreed or to be agreed between the Minister and the Pharmaceutical Contractors Committee regarding arrangements for the provision of pharmaceutical services under the provisions of the Health Act 1970".

5.2 There is no doubt but that the making of advance payments was an "arrangement for the provision of pharmaceutical services under the provisions of the Health Act, 1970." It is true to state that a central purpose of clause 19(3) appears to be designed to ensure that any future agreement entered into between the Minister and the PCC should be automatically incorporated into the individual contracts. It is, nonetheless necessary to give some meaning to the phrase "terms agreed" in addition to "terms to be agreed". There is no doubt but that it facilitated the Minister that he could, automatically, bring about an alteration in the terms of each individual contract between a Health Board and a pharmacist, by entering into an agreement with the PCC. However that aspect of clause 19(3), could only have relevance to terms "to be agreed". It seems to me that clause 19(3) therefore, as a matter of construction, necessarily imports into the individual contractual relations between individual pharmacists and Health Boards, all previous agreements entered into between the Minister and the PCC, at least to the extent that those agreements continued to subsist as of 1996.

5.3 Those agreements included the original arrangements entered into in 1971 in respect of advance payments as modified over the years by subsequent agreements.

5.4 I am strengthened in that view by the fact that, both before and after the adoption of the 1996 form of individual agreement, the evidence suggests that it was common practice for Health Boards to issue documentation which seems to me to be only consistent with a recognition that the making of advance payments was part of the contractual arrangements between those parties.

5.5 In all those circumstances I am satisfied that, on a proper construction of the 1996 individual contract, an individual pharmacist was entitled to an advance payment in accordance with the terms that had already been agreed between the Minister and the IPU Negotiating Committee.

5.6 That is not, however, an end to the matter. As was pointed out by counsel on behalf of the Minister, the individual contracts are entered into between the HSE and individual pharmacists. The Minister is not, as such, a party to those contractual arrangements even though she is clearly intimately involved both in having agreed the standard terms of the individual contracts and also, for the reasons which I have just addressed, because arrangements entered into between the Minister and the IPU are incorporated into the contractual terms. Furthermore it is clear from the terms of para. 19(5) that, while not formally a party, the Minister is the State entity who is to have control over any variations to be agreed in respect of the terms of the contract. It is clear, therefore, that while the formal contracting party is the HSE, the entire control over the contractual terms, from the State side, remains vested in the Minister. That this is so to a very full extent is apparent from the "slip" in drafting contained in the first sentence of clause 19(5) of the individual pharmacists agreement. That sentence refers to "the terms and conditions of this agreement" between the PCC and the Minister being the subject of review. The agreement into which that clause is inserted is, of course, an agreement between the HSE and an individual pharmacist. Yet the phrase "this" agreement is used to refer to an agreement between the Minister and the PCC.

5.7 In those very unusual circumstances, it does seem to me that it is possible for the individual pharmacists to raise issues concerning their contractual relations with the HSE in proceedings against the Minister. It was, after all, the Minister who agreed to the standard form. The Minister retained full control over any agreement to vary the terms of the individual contract. Indeed, it is the action of the Minister in changing the contractual terms between the HSE and the individual pharmacists that gives rise to these proceedings. More importantly, the issue in this case concerns terms agreed between the Minister and the IPU which I have held to have been incorporated into the individual contracts between pharmacists and health boards by virtue of the provisions of Clause 19(3). In those circumstances individual pharmacists have a legitimate contractual interest in determining what was, in fact, agreed between the Minister and the IPU because their own contractual entitlements are dependent on those matters. In those unusual circumstances, it seems to me that individual pharmacists are entitled to seek, in proceedings against the Minister, orders which have the effect of declaring the status of agreements reached between the Minister and the IPU.

5.8 For the reasons which I have already analysed, I am satisfied that there was in existence, as at the time of the formulation of the terms of the standard form 1996 individual agreement, an existing agreement between the Minister and the IPU providing for advance payment. In those circumstances, it seems to me that the individual pharmacists are, *prima facie*, entitled to a declaration to the effect that such an agreement was in being between the Minister and the IPU as of the time of the entering into of individual contracts subsequent to the adoption of the 1996 standard form and that the agreements between the Minister and the IPU in relation to, *inter alia*, advance payments are incorporated into their individual contracts by reference to Clause 19(3).

5.9 Before going on to deal with the delay issue I should, also, return to the question concerning variation of agreements to which I have already adverted. Under this heading the basic point made by the Minister is that the 1996 agreement between the Minister and the IPU makes no reference to advance payments. If, properly construed, the 1996 agreement had the effect of terminating the 1971 agreement then, it is said, it follows that, there being no reference to advance payments in the 1996 agreement, any contractual entitlement to advance payments ceased to exist as of the 1996 agreement. However, it seems to me that, while advance payments are not directly referred to in the 1996 agreement between the Minister and the IPU, there is an indirect reference to them. The 1996 agreement between the Minister and the IPU makes express reference to the standard form of contract annexed to it. For the reasons which I have already analysed, I am satisfied that that standard form agreement, in itself, incorporated the existing advance payment scheme. In that way, it seems to me, therefore, the 1996 agreement between the Minister and the IPU does, in fact, make provision for advance payment. If, therefore, I am wrong in my view that the 1996 agreement does not create contractual relations, I would be of the view that, as a matter of construction, any contractual relations created by that agreement incorporated the system of advance payments then in existence.

5.10 Having been satisfied that the individual pharmacists are entitled, *prima facie*, to a declaration of the type indicated at para. 5.7 above, it is necessary to turn to the delay issue raised on the part of the Minister. I now turn to that issue.

6. Delay

6.1 In the written submissions filed, there was a significant debate between the parties as to whether these proceedings ought to have been maintained as judicial review proceedings. However, given the fact that the plaintiffs confined themselves, at trial, to arguing in favour of a claim based on breach of contract, the issue concerning whether judicial review might have been appropriate seems to me to have become irrelevant. In particular, that aspect of the jurisprudence of the courts which concerns the application, by necessary implication, of judicial review time limits to plenary proceedings seeking similar relief, is of no relevance. However, the Minister also places reliance upon a general argument concerning delay.

6.2 There is no doubt but that there was a significant lapse of time between the announcement of the Minister's decision and the initiation of these proceedings. The events which occurred during that period of time were the subject of evidence given on the part of both sides. It is clear that there was a series of meetings and correspondence in which, amongst other things, the Minister's decision to freeze advance payments was raised. It would be fair to say that that issue was clearly not the only one on the table during the relevant period and the extent to which it featured as the primary focus of the discussions between the parties varied over time.

6.3 It is also clear that, from an early stage, the Minister did make clear that, in her view, the decision was a government decision and could not be changed. On the other hand, it is equally clear that, having received such a reply, solicitors acting on behalf of the IPU put forward a careful legal argument as to why it was suggested that it was not open to the Minister or the government to make the decision concerned. It has to be said that, despite a number of promises of a considered response, no real reply which addressed the legal issues raised on behalf of the IPU was, in reality, ever delivered. In those circumstances it does not, it seems to me, lie in the mouth of the Minister to complain about delay. In addition, it does have to be noted that for quite a considerable portion of the time which elapsed between the Minister's announcement and the commencement of proceedings, a reading of the correspondence and the minutes of relevant meetings, reveals that the ball was, as it were, in the Minister's court. Replies were promised in early course which either only arrived very belatedly or not at all. In those circumstances I am not satisfied that there is any factual basis for a complaint based on delay. It follows that issues as to the proper legal approach to the question of whether a claim based in contract can be affected by delay (and if so as to what extent) do not arise.

6.4 For the reasons indicated earlier, neither does it seem to me that questions concerning the appropriateness or otherwise of judicial review arise in light of the fact that the claim was confined, at trial, to one based on breach of contract.

7. Conclusions and Consequences

7.1 In conclusion, therefore, I am not satisfied that any of the additional matters of defence raised on behalf of the Minister should alter the *prima facie* view which I have taken. I am not satisfied that there were any contractual relations between the IPU and the Minister and such portion of the claim as is based upon a contention of there being such contractual relations must, necessarily, be

dismissed.

7.2 However, I am satisfied that the individual pharmacists have established that the terms and conditions applicable to their contracts, as originally formulated with the health boards but now with the HSE, incorporate a term which entitles them, as long as that contract should continue in existence, to an advance payment in accordance with the terms previously agreed between the Minister and the IPU.

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. The Minister is entitled to procure that the HSE terminate its contracts with all pharmacists. While that might be considered to be a drastic course of action to adopt, it nonetheless seems to me to reflect the reality of the situation which has now arisen. There are binding contractual relations in place. As long as the contract which incorporates those binding contractual terms remains in place then those terms must be obeyed. The HSE is in no different position to any other party which has a long-term contract of indefinite duration which, for whatever reason, it no longer considers to be advantageous on its existing terms. It has a number of choices. It can seek to renegotiate the terms. If it can not achieve, by negotiation, satisfactory variations, then it is faced with a choice of continuing the existing contract or terminating it. That is the choice which the HSE, and indeed, in practice, the Minister, now has. It may be sought to achieve, by negotiation, whatever variations might be considered desirable. If those negotiations fail then the Minister and the HSE is faced with a choice of continuing the existing contractual arrangements or terminating them.

7.4 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 advance payments amounts to a unilateral variation in the contractual terms. That is not permissible.

7.5 I propose hearing counsel further as to the precise form of declaration that should be made so as to reflect the findings which I have made in the course of this judgment.