Neutral Citation Number: [2005] IEHC 291

THE HIGH COURT

Record Number: 2005 No. 532 JR

BETWEEN

BUPA IRELAND LIMITED

APPLICANT

AND

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

RESPONDENTS

AND

VOLUNTARY HEALTH INSURANCE BOARD

NOTICE PARTY

Judgment of Mr Justice Michael Peart delivered on the 22nd day of July 2005

1. These proceedings began life on foot of an order of Mr Justice Clarke dated 24th May 2005 when he granted leave to the applicant to seek relief by way of judicial review for an order of *certiorari* and a number of associated declaratory reliefs in connection with a Recommendation made on the 29th April 2005 by the 1st named respondent ("the Authority") to the 2nd named respondent ("the Minister") whereby the said Authority recommended to the Minister that she should exercise her statutory authority under what has been referred to as the Risk Equalisation Scheme 2003 ("the Scheme") by ordering the commencement of risk equalisation payments.

2. Certain of the declaratory reliefs (i.e. those at paras (xii) and (xiii) of the said order dated 24th May 2005) impugn the constitutionality of s. 12 of the Health Insurance Act, 1994, and the Scheme.

3. There is no dispute about the fact that the Voluntary Health Insurance Board ("VHI") is for all practical purposes the only significant beneficiary under the Scheme because of its leading position in the health insurance market in this jurisdiction. This would certainly have been a reason why VHI was joined as a Notice Party to the proceedings and permitted to participate in the proceedings by Order of Mr Justice Quirke dated 30th May 2005 on foot of its own application.

4. In the affidavit grounding the application by VHI to be joined in these proceedings, the solicitor acting for VHI, Mr David Clarke deposed to certain matters on its behalf. He stated inter alia that "the principal remedy sought in these proceedings is the quashing by way of judicial review of the recommendation made by the Health Insurance Authority". He also stated that "in addition the applicants make certain other claims challenging the legislation and the Scheme on constitutional and EU law grounds." He also pointed to certain of the Statement of Grounds filed by the applicants and to the fact that contained therein were certain claims or assertions as to the situation or conduct of VHI, and he referred specifically in this regard to grounds numbered therein E 1 (xxiii), (xxxiii), (xxxviii) and (l). He also referred to assertions of this kind in the affidavit of Martin O'Rourke, Managing Director of BUPA Ireland which was sworn to ground the application for leave. Mr Clarke went on to say:

> *"In all these circumstances VHI believes that it is proper that it be a notice party to the proceedings and respectfully suggests that it would in fact not be possible for the Court to properly consider such assertions without hearing VHI in relation to them. It would be the intention of VHI, if joined as a notice party to deliver opposition papers and to oppose the reliefs being sought by the applicants."*

5. That Statement of Opposition has been filed and delivered and it, inter alia, traverses the constitutional and EU law grounds pleaded by the applicant in its Statement of Grounds filed herein.

6. As appears now from the affidavit sworn on behalf of the applicant's solicitor, Liam Kennedy, to ground the Notice of Motion herein dated 8th July 2005 seeking orders as to pleadings, time and mode of trial, and the further involvement in these proceedings of VHI, the Minister has, since leave was granted herein, publicly indicated that it is not her intention at the present time to act in accordance with the Recommendation of the HIA. The judicial review proceedings, save for the EU law and constitutional challenge to s. 12 of the 1994 Act, have therefore become moot, and will not proceed further. When any further Recommendation is made to the Minister by the HIA that risk equalisation payments should be commenced, no doubt an Order of *Certiorari* can and will be sought in respect of same, but such a Recommendation has not yet issued and may not do so until the end of October 2005.

7. In the light of this development, and the absence of any further need to move the application on judicial review grounds, the applicants seek an order discharging the VHI from the proceedings, so that what is left of these proceedings, limited to the challenge to s. 12 of the 1994 Act on constitutional and EU grounds, can be litigated in the normal way as between the applicants and the Attorney General, as if only that issue had been raised in proceedings commenced by way of Plenary Summons. In such a situation, the applicants submit that the VHI would have enjoyed no *locus standi* to be joined in any such Plenary Summons proceedings, in spite of their very obvious commercial interest in the outcome of the challenge to that section, and that accordingly they should not be permitted to remain in the proceedings simply because for the purpose of judicial review proceedings, which are now moot, they were allowed to join as a notice party and to participate. The applicants submit that in this respect the VHI is no different to any party interested in, and potentially adversely affected by, the outcome of a constitutional challenge to a piece of legislation.

8. Before setting out what Mr David Clarke, solicitor for VHI has stated in his affidavit sworn on the 14th July 2005, it is perhaps appropriate at this point to say that the Respondents, through their Counsel, Gerard Hogan SC, have indicated that they are broadly supportive of the submissions of the VHI that it should be allowed remain in the proceedings, albeit now limited to the constitutional and EU law challenge.

9. Mr Clarke states in his affidavit that in seeking, as they now do, to have the VHI discharged from the remainder of these proceedings, BUPA are in effect seeking to a reversal of the order of Mr Justice Quirke dated 30th May 2005 wherein he ordered, inter alia, that VHI be joined as a Notice Party pursuant to Order 84, Rule 22(6) and/or Rule 26(1) Rules of the Superior Courts. I have already referred to Mr Clarke's affidavit grounding that application to be joined as a Notice Party.

10. He also states that in so far as the applicants rely on the assumption that VHI was joined in the proceedings having regard to its interest in the validity of the Recommendation by the Health Insurance Authority, the applicants are wrong in that regard. He says that the justification for the VHI being in these proceedings is because it has an entitlement to receive the greater part of the funds becoming available under the Scheme, and also because it is evident from the Statement of Grounds and from the affidavit of Mr O'Rourke filed in support of the application for leave, that a number of specific claims and critical assertions are made against the VHI, and Mr Clarke instances some of these in his affidavit. He states that as part of its application to be joined in these proceedings, VHI did not suggest that this was justified by particular reference to the challenge by the applicant to the Recommendation of the HIA,

and he does not believe that the order joining VHI was made on that basis. He also avers that it would not be possible for the Court to properly consider the allegations made by the applicants in relation to the position or conduct of VHI without VHI being a party to these proceedings, and he believes that its presence in these proceedings is necessary to enable the Court to effectively and completely adjudicate on the matters in issue in these proceedings.

11. In relation to the point made by Mr Kennedy in his affidavit that if the constitutional challenge to s. 12 of the 1994 Act had been commenced in the normal way by way of Plenary Summons that VHI would have had no basis for seeking to be joined to those proceedings, Mr Clarke submits that this is not correct. He believes that procedurally there would have been nothing to prevent VHI from applying to be joined in those proceedings having regard to the allegations by BUPA in relation to VHI. He also believes that by ordering the joinder of the VHI to the judicial review proceedings when he did so, Mr Justice Quirke has recognised the validity of the interest of VHI in the proceedings, because of the uniqueness of its position in relation to potential benefit under the Scheme and that any undermining of the Scheme as a result of a successful constitutional or EU law challenge to same in what remains of these present proceedings would correspondingly uniquely affect it also.

12. Mr Clarke also makes a submission in his affidavit relating to the fact that in proceedings brought by BUPA at the Court of First Instance at Luxemburg VHI was permitted to intervene by order date 2nd April 2004, and that it would be incongruous if the VHI was permitted so to do in those proceedings, and not be similarly allowed to participate in the present proceedings. In relation to this last point I do not propose to consider that submission at length. It seems irrelevant to this Court's consideration especially in view of the different rules as to standing which may prevail at the Court of Justice, and to the rules by which parties are often permitted to intervene and be heard in cases before that court.

13. Mr Clarke has stated also that the interests of VHI and those of the State parties are not necessarily to be taken as being the same and that for this reason also it is proper that VHI should remain involved in the hearing of the remaining issues before this Court, since these differing interests would lead to different approaches and legal arguments and submissions.

14. Michael Collins SC on behalf of the applicants has made submissions in line with the averments contained in Mr Kennedy's grounding affidavit. He has referred the Court to a number of authorities in support of the submission that these proceedings, as they now remain, ought to proceed in the absence of the VHI, since the decision by the Minister that she will not be acting on foot of the recommendation made by the HIA. Paul Gallagher SC on behalf of VHI has referred to authority also, but in support of the opposite position that indeed VHI should be permitted to remain in these proceedings, so that its unique position as regards the Scheme may be represented and protected by its participation, and he submits that his client's position is one contemplated by the terms of Order 84 Rules of the Superior Courts, under which VHI was joined and I shall come back to that.

15. Mr Collins has informed the Court that even though VHI has been joined to these proceedings by the order of Mr Justice Quirke to which I have referred, the issue of its *locus standi* remains an issue, and the said order was not determinative. I presume this to mean that if the judicial review relief being sought had not been rendered moot and therefore not necessary to be determined, the applicants would have argued at the substantive hearing that VHI, even though joined, did not enjoy the necessary standing to challenge the Recommendation.

16. Mr Collins has submitted that if the VHI is now to be permitted to remain in the proceedings, while the constitutional and EU law issues are determined, simply because in different circumstances which no longer apply they were allowed to be joined, the Court would have to be satisfied that it meets the criteria as set forth in the judgment of Keane CJ in *Barlow v. Fanning* [2002] 2 IR 593. In that case the plaintiffs had instituted proceedings against the two defendants, but in due course decided to serve a Notice of Discontinuance in respect of the proceedings against the first named defendant. That defendant applied by motion to be rejoined to the proceedings on the basis that he feared that in the case against the second named defendant, his reputation might be impugned and he wanted to be able protect himself in that regard. It was held that a person whose good name and reputation might be affected by the outcome of a case was not automatically entitled to be joined as a defendant, if his presence was not required by the court for the effectual and complete adjudication of the issues to be determined.

17. The starting point for the learned Chief Justice's consideration of the matter was *Order 15, Rule 13* of the Rules of the Superior Courts which provides, as relevant as follows:

> *"……the Court may… order…that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter be added…"* (my emphasis)

18. Having considered two possibly competing views as to whether the rule should be given a wide interpretation or one which was narrow, the learned Chief Justice stated at page 598:

> *"Whether this interpretation [of Lord Denning) is wider than that stated by Devlin J. in the passage cited above, it is not necessary to consider. My difficulty about accepting Lord Denning's wide interpretation is that it appears to me wholly unrelated to the wording of the rule. I cannot construe the language of the rule as meaning that a party can be added whenever it is just or convenient to do so. That could have been simply stated if the rule was intended to mean that. However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to have been joined as a party or if his presence is necessary for the effectual and complete determination and adjudication upon all matters in dispute in the cause or matter."* (my emphasis)

19. Mr Collins also referred to a decision of the House of Lords in *Regina v. Rent Officer Service and another, ex parte Muldoon* [1996] 1 WE.L.R. 1103, where the Secretary of State's application to be joined as a respondent failed on the ground that he stood to be affected adversely, but only indirectly, by a successful outcome of the proceedings. One of the concerns of the Secretary of State was that as there would be serious financial implications to a successful outcome of the proceedings, and since the respondent in the case (a local authority) did not stand to be financially affected to anything like the same extent as the Secretary of State, it might not appeal the decision, whereas the Secretary of State might wish to, and would not be able to do so unless joined as a party.

20. In the present case, in the event of a successful challenge and/or EU law challenge to section 12, the VHI will not be entitled to receive certain risk equalisation payments under the Scheme, and in this way would be affected by the outcome, but in my view this result is one which is indirectly related to the issues in the case, in the same way as was the position of the Secretary of State in the case referred to.

21. Mr Gallagher submits that VHI's pecuniary and proprietary interests are potentially directly affected by the outcome of the

remaining issues ion this case, and that they were joined in the first place because of that very factor. In referring to the interest of VHI sought to be protected as "pecuniary and proprietary" he refers to another passage in the judgment of Keane CJ in Barlow v. Fanning already referred to. That passage appears at page 599 of the judgment as follows:

> *"A person having no legal but only a commercial interest in the outcome of the litigation between the plaintiff and the original defendant cannot be added as a party either for the convenience of the court or otherwise. On the other hand, a person may be added as a defendant, either on his own application or the application of the defendant, where his proprietary*
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> *or pecuniary rights are or may be directly affected by the proceedings either legally or financially, by any order which may be made in the action, or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly."*

22. Mr Gallagher submits that the position of the VHI in the present case is one in which its "*proprietary or pecuniary rights are or may be directly affected by the proceedings either legally or financially*", and that therefore they come within what the learned Chief Justice states in that regard. Mr Collins on the other hand has responded to this submission by submitting that the VHI cannot be regarded as having any proprietary interest in any sum which they may receive under any risk equalisation scheme in the event that the Minister adopts in the future a Recommendation in that regard by the HIA. He submits that section 12 merely provides a legislative structure under which the VHI would become a beneficiary financially, and that any rights would accrue only upon the operation of the Scheme by the Minister.

23. Mr Gallagher also referred to the fact that on the pleadings there was an issue related to the dominant position of the VHI in the health insurance market, and that this is something which VHI should be entitled to be heard on. However Mr Collins states that the reference to the dominant position of the VHI in the market is simply that BUPA is saying that by making payments to VHI under the Scheme the dominant position of the VHI will be further enhanced, and that there is no issue as such to be decided as to whether or not there is or is not an abuse of any dominant position as such.

24. I am of the view that what remains of the present proceedings, namely the constitutional and EU law challenge to s. 12 of the 1994 Act, is one which can be fully decided upon by the Court without the participation of VHI at the hearing. In other words, to borrow words from *Barlow v. Fanning* [supra] the presence of VHI at the hearing of that issue is not "*necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter*." Arising out of a successful challenge to any piece of legislation there may often be persons who will be affected financially or otherwise. That fact alone is not sufficient to permit such persons to be joined in the plenary proceedings commenced against the Attorney General so that they can add their voices to the submissions which will be put forward by the Attorney General when he discharges his obligation to argue for the upholding of the legislation impugned. In the present case, the Attorney General is and will be fully and expertly represented to argue that case. He is not arguing that case in any sense on behalf of VHI, even though it is the principal, and indeed probably the intended beneficiary of the Scheme. Rather he is arguing for the constitutionality of the legislation on behalf of the Government and the people of Ireland. The private interest of VHI is not one which needs to be heard in order to decide upon the constitutionality of the legislation, or the EU law challenge.

25. I pose another reason why it is obvious that VHI should not be a party to that challenge. It is a question which arose in the case *of Regina v. Rent Officer Service and another, ex parte Muldoon* [1996] 1 WE.L.R. 1103. In the event that the applicants' challenge was successful, could it be possible that if the Attorney General decided not to appeal that decision, VHI would be entitled to argue an appeal in the Supreme Court? A negative answer to that question must be the only possibility.

26. I should deal also with the argument put forward that these proceedings are still judicial review proceedings, and that under the terms of O.84 Rules of the Superior Courts the existence of VHI in the proceedings at this point in time is fully justified. Mr Gallagher has referred to the terms of O.84, r. 22(2)RSC, which provides that a notice of motion grounding an application for judicial review "must be served on all persons directly affected……"

27. As already stated, Mr Gallagher submits that the VHI come within that category of party directly affected for the purpose of the rules of standing for the purpose of judicial review. In matters of court procedure and rules applicable, I would be of the school of thought that the rules exist so that things can be done rather than so that things can be prevented from being done. That school of thought has been encapsulated very well in my view almost one hundred years ago, when in *Coles v. Ravenshear* [1907] 1 KB 1, it was put in this way, that:

> *"the relation of rules of procedure to the work of justice is that of handmaid rather than mistress and the court should not feel bound by rules to do what would cause injustice in a particular case."*

28. While in more modern times the archetype of neither lady referred to would recognise herself as being respectively either a submissive or a dominatrix, nevertheless the principle can be equally valid today that no rule of procedure should, for the sake of strict adherence to it in a slavish way, permit an injustice to be rendered !

29. Accordingly, if I were of the view that even though the judicial review relief was no longer being sought, an injustice would result to VHI by not being allowed to remain in the balance of the case, I would feel that even though a strict adherence to the rules would exclude the VHI the Court in the interests of justice ought to permit it to remain. Really there is no distinction between that process of reasoning and the principles which can be seen in such as *Barlow v. Fanning*, and my natural inclination not to apply a rule of procedure with inflexibility depending on the circumstances, cannot override the clear enunciation of principal in these matters from the Supreme Court. Mr Gallagher has sought to derive solace and encouragement from an ex tempore judgment of Keane CK in *Spin Communications t/a Storm FM v. Independent Radio and TV Commission*, Supreme Court (Keane CJ), 14th April 2000, but that case in my view, not involving a constitutional challenge is of little assistance to him, in spite of the recognition that a notice party had "a vital interest" to protect sufficient to warrant an order for security for costs being made.

30. For these reasons I make an order directing that the remainder of this action proceed as between the applicants and third and fourth named respondents, and I will hear the parties as to both the form of the order and the nature of such further directions as to pleadings as should be delivered and filed.