Neutral Citation Number: [2010] IEHC 292

THE HIGH COURT

2010 4478 P

BETWEEN

MARTIN REID AND JAMES TURNER

PLAINTIFFS

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 16th day of June, 2010.

1. The application

1.1 These proceedings were initiated by a plenary summons which issued on 11th May, 2010. On the same day, the plaintiffs issued a notice of motion seeking the following interlocutory relief pending the trial of the action, namely:

> (a) an injunction restraining the defendant, its servants or agents or any of them, acting howsoever from giving effect or purporting to give effect to Circular No. 008/10 (the Circular) issued on 26th April, 2010 by the Primary Care Reimbursement Service of the defendant; and
>
> (b) an interlocutory injunction restraining the defendant, its servants or agents or any of them, acting howsoever from breaching the agreement entered into between each of the plaintiffs and the defendant for the provision of dental treatment services.

1.2 In the period of one month between the issuance of the plenary summons and the hearing of the interlocutory application on 11th June, 2009, the interlocutory application had generated paperwork running to no less than 399 pages, comprising affidavits and exhibits. In contrast, the issues on the application, both factual and legal, can be netted down to four questions.

2. The factual background

2.1 The first plaintiff is a dental practitioner practising in Moville, County Donegal. The second plaintiff is a dental practitioner practising in Baltinglass, County Wicklow. Both plaintiffs participate in the Dental Treatment Services Scheme (DTSS).

2.2 The DTSS, in broad terms, provides for the provision of dental services free of charge to medical card holders. Initially, it was brought into operation to give effect to the obligations and functions of the defendant's predecessors, the Health Boards, under s. 67 of the Health Act 1970 (the Act of 1970), following the publication by the Government of the Dental Health Action Plan in 1994 and negotiations between the Irish Dental Association (the IDA) and the Health Boards. The result was the acceptance in 1994 of a form of contract (the 1994 Contract) to be entered into between the Health Board, on the one hand, and dental practitioners, on the other hand, for the provision of dental treatment services in accordance with the DTSS.

2.3 Following a dispute between the IDA and the Health Boards, in 1999 the DTSS was revised prospectively. There was an extension of eligibility for routine treatment and a discontinuation of the "Emergency Scheme" which had hitherto existed. However, for present purposes, the significant change was that what was referred to as "above the line" treatment did not require prior approval of the Health Board, whereas in the case of "below the line" treatment prior approval was necessary. As I understand it, in broad terms, above the line treatment included routine dental treatment, whereas below the line treatment involved more complex treatment, for example, the provision of dentures.

2.4 Contemporaneously with the revision of the DTSS, the form of contract between the Health Boards and dental practitioners was revised and the revised terms introduced in December 1999 (the 1999 Revised Terms) continued to be applicable until the Circular referred to in the notice of motion issued at the end of April 2010.

2.5 There is a factual dispute between the parties as to the format of the operative version of the 1999 Revised Terms which, in due course, may or may not be material in the interpretation and determination of the contractual terms applicable between individual dental practitioners and the defendant prior to the Circular. That dispute cannot be resolved on this application.

2.6 The position of the defendant is that the correct form of the 1999 Revised Terms was that which accompanied a letter dated 23rd December, 1999 from the General Medical Services (Payments) Board to each participating dental practitioner. Under the heading "Treatment Ceiling/Patient Care Plan" in that document, the following text appeared:

> "The Health (Amendment) Act 1996 governs the provision of health services. Health Boards are obliged to live within their monetary allocations.
>
> The I.D.A. acknowledge that, in the light of the above, Health Boards have the right to take whatever measures are necessary to live within budget and statutory obligation.
>
> Prior approval will be necessary in all cases of below the line treatment (including dentures) and delivery.
>
> Treatment can be carried out on above the line treatments without prior approval.

A patient care plan to be completed and submitted for each patient. In cases where prior approval is not required the patient care plan will be submitted with the claim. Where prior approval is required the patient care plan will be submitted in advance.

Prior approval will continue to be required for treatment on all below the line treatments and dentures in accordance with the above. While awaiting approval, above the line treatments can be carried out."

2.7 The plaintiffs do not accept that the correct or standard version of the 1999 Revised Terms was as circulated with the letter of 23rd December, 1999 and contend that the correct version was the version circulated by the IDA to its members. As regards the provisions which I have quoted above, the differences between the version contended for by the plaintiffs and the version contended for by the defendant is that the fourth, fifth and sixth paragraphs in the latter (the defendant's) version appear as the first, second and third paragraphs in the former (the plaintiffs') version and are followed by an additional heading "Approval" and there then follows the first, second and third paragraphs of the latter version. On the basis of the affidavit evidence, the two versions were obviously in use and the first plaintiff signed up to the latter version and the second plaintiff signed up to the former version. It is only fair to record that, at the hearing of the application, counsel for the plaintiffs made it clear that, as regards the proper construction of the 1999 Revised Terms, he was not placing too much reliance on the presence or absence of the heading "Approval" in the operative version.

2.8 Another factual matter raised on the affidavit evidence is that a version of the 1999 Revised Terms executed by some participating dental practitioners did not include a termination clause. In any event, there was a termination clause in the 1994 Contract – clause 29. It provided:

"Either party may terminate this Agreement at any time:-

(a) By giving to the other not less than 3 months prior notice in writing of intention to do so to the other and immediately after such termination the CEO may delete the contracting dentist's name from the dental panel. Any dental letters and charts held by the contracting dentist prior to the expiration of such notice in respect of which the dental treatment has not been commenced shall be deemed to have been cancelled. Treatment which has been sanctioned may be completed.

or

(b) on the contracting dentist taking up full-time employment with the State or a Health Board."

As I understand it, it is not in dispute that clause 29 applied whether or not it was spelt out in the version of the 1999 Revised Terms executed by an individual dental practitioner.

2.9 The Circular was a response to an instruction contained in a letter dated 8th December, 2009 from the Department of Health and Children to the defendant. In that letter, the defendant was asked to "take immediate steps to give effect to the decision, in the context of Budget 2010, to impose a cash limit on expenditure" under the DTSS. The defendant was informed that it was estimated that expenditure on the DTSS would reach about €88m in 2009, compared to €63.4m in 2008, and that it had been decided to limit DTSS expenditure in 2010 to the 2008 level of €63m.

2.10 The Circular, which was dated 26th April, 2010, informed the participating dental practitioners of the Budget 2010 decision to limit expenditure under the DTSS to €63m and set out the defendant's strategy, based on "2009 uptake levels", to provide emergency dental care to eligible patients with a focus on relief of pain and sepsis, with additional care to be considered in exceptional or high risk circumstances. The Circular then set out in a schedule eleven items, which I understand to be variations of the then existing scheme. For example, it was provided that dentists would be reimbursed for one oral examination in respect of an eligible person in any 12 month period. Another example was that prophylaxis treatment was suspended until further notice.

2.11 The reaction of the IDA was that it did not recognise the Circular as legitimate. It advised its members in a communication of 29th April, 2010 not to recognise it and to continue to operate the DTSS as usual. Its solicitors, the solicitors who are acting for the plaintiffs in these proceedings, wrote to the defendant on 29th April, 2010, contending that the Circular constituted an attempt to unilaterally vary the terms of the DTSS and a purported unilateral breach of the DTSS. The response of the solicitors on record for the defendant in these proceedings, by letter dated 4th May, 2010, was to quote the second sentence in the first paragraph and the second paragraph of the extract from the 1999 Revised Terms quoted above and to contend that there was no basis whatsoever for the plaintiffs' solicitors' assertion that the Circular seeks to unilaterally amend the DTSS contract. Any breach of contract by the defendant was emphatically denied. By letter dated 6th May, 2010 the plaintiffs' solicitors responded that the provisions quoted from the 1999 Revised Terms had been taken out of context, contending that they were "expressly referable to the Approvals Section of the Contract and relate solely to 'below the line' expenditure (i.e. expenditure on 'below the line' treatment items)". The plaintiffs threatened proceedings seeking injunctive relief restraining the defendant from the alleged unilateral breach of the terms of the DTSS.

2.12 Subsequent correspondence passing between the defendant's solicitors and the plaintiffs' solicitors was relied on by the defendant at the hearing of the application as grounds for the Court refusing to grant interlocutory relief. Before outlining that correspondence, I think it is important to emphasise that a wide range of factual matters was raised on the affidavits which may have a bearing on the outcome of the substantive action but which, in my view, have no bearing on the entitlement of the plaintiffs to interlocutory injunctive relief. These included: interaction between the IDA and the Minister for Health and Children prior to the issuance of the Circular at the end of April 2010; the response on 11th February, 2010 of the defendant to the Department's letter of 8th December, 2009; what has been variously described by the plaintiffs' deponents as a "devastating critique" and as "internal … wranglings" in the reaction of the defendant's Lead Principal Dental Surgeons to the Circular; the fact that the Department of Social Protection has restricted treatments under the Dental Treatment Benefit Scheme; and the reduction of payments to dental practitioners effected on foot of the regulations made under the Financial Emergency Measures in the Public Interest Act 2009 (the Act of 2009).

2.13 Another factor which has no bearing on the outcome of the application is the fact that, in their letter dated 6th May, 2010 to the defendant's solicitors, the plaintiffs' solicitors intimated that, in order to minimise costs for all parties, they proposed issuing proceedings on behalf of a representative sample of dental practitioners participating in the DTSS and sought an assurance from the defendant that it would be bound by the outcome of any hearing in relation to the representative sample. There has been no specific response to that request from the defendant. That is immaterial, because the only matter which is now before the Court is the interlocutory application in these proceedings.

3. Correspondence between the solicitors
3.1 In their letter of 11th May, 2010, in response to the plaintiffs' solicitors' letter of 6th May, 2010, the defendant's solicitors advanced arguments to contradict the plaintiffs' solicitors' arguments that the Circular amounted to a purported breach of contract, but went on to state that, without prejudice to the contractual position set forth on behalf of the defendant, the defendant was "willing to engage with the IDA in relation to the implementation of the decision". It was pointed out, for the avoidance of doubt, that the Circular, which came into effect on 28th April, 2010, must remain in place in the interim in order to protect the interests of the public. That letter was written on the same day as these proceedings and this application were initiated.

3.2 The response of the plaintiffs' solicitors, in their letter of 13th May, 2010, was that, in recognition of the prevailing economic climate, the IDA had, in the previous six months, repeatedly expressed its willingness to engage in negotiations with the defendant in relation to the DTSS, but the offer had not been taken up. Nevertheless, subject to a withdrawal of the Circular and a return to the status quo that existed prior to 28th April, 2010, the offer still stood.

3.3 Subsequently, an offer on behalf of the defendant to participate in mediation "to facilitate a constructive exchange of views in an attempt to resolve the issue" was rejected by the plaintiffs' solicitors as being inappropriate. The defendant's solicitors' subsequent invitation of 31st May, 2010 for a direct meeting was met with a request of the same date from the plaintiffs' solicitors that the defendant put "any formal proposals in writing that could be the basis for discussions". The defendant's solicitors characterised that last suggestion as being "unhelpful", in their letter dated 4th June, 2010, which was an open letter, in which they suggested a meeting between the defendant and the IDA on a "without prejudice" basis in an attempt to achieve a resolution. While the plaintiffs' solicitors intimated in their letter of 9th June, 2010 that their clients were open to "without prejudice discussions", their position was that, pending a satisfactory resolution of the matters, the plaintiffs would continue with their application for interlocutory relief. As I have indicated at the outset, the hearing of the interlocutory application went ahead on 11th June, 2010.

4. Prohibitory or mandatory relief sought?
4.1 The first question for consideration flows from a controversy which has arisen between the parties as to whether the relief being claimed by the plaintiffs is prohibitory or mandatory.

4.2 Both forms of relief claimed by the plaintiffs are framed as prohibitory relief – as orders restraining the defendant from acting in a particular way. As counsel for the plaintiffs acknowledged, both formulae essentially say the same thing and only one of the orders sought is necessary. What the plaintiffs are trying to achieve is to maintain the *status quo ante* which prevailed before the coming into effect of the terms of the Circular on 28th April, 2010.

4.3 Counsel for the defendant submitted that what the plaintiffs are seeking is, in effect, a mandatory injunction, in that what the plaintiffs seek is a restorative injunction to enforce the contract as it was before the changes introduced in the Circular became operable. Counsel for the defendant latched on to a phrase used by the second plaintiff in his grounding affidavit sworn on 10th May, 2010 in which the second plaintiff, having complained about the impact of the implementation of the terms of the Circular as a result of the manner in which it was implemented, averred that no notice was provided "for what is in effect termination of the 1999 [Revised Terms] as is required under the [DTSS]". On the affidavit evidence it is quite clear that neither side to the contracts under the DTSS which are the subject of these proceedings, neither the relevant plaintiff nor the defendant, regards the relevant contract as terminated. What the plaintiffs seek is to enforce the contracts without the variations set out in the Circular. Nothing in the evidence suggests that the defendant intends to exercise its right to terminate in accordance with clause 29 and it is easy to understand why that is so.

4.4 In my view, the situation which arises here is not at all analogous to the type of situation with which the Supreme Court was concerned in *Maha Lingam v. Health Service Executive* [2006] E.L.R. 137, and with which the High Court was concerned in cases such as *Bergin v. Galway Clinic Doughiska Ltd*. [2008] 2 I.R. 205, in which, in an employment contract context, the court held that what was being sought by the plaintiff on an interlocutory application was, in substance, a mandatory order and the plaintiff had to establish a strong case that he or she was likely to succeed at the trial of the action. In the latter case, the following passage from the judgment of Clarke J. (at p. 216) summarised his conclusion on the Maha Lingam "strong case" test as follows:

> "I have, therefore, come to the view that in any case in which an employee seeks to prevent a dismissal or a process leading to a dismissal, as a matter of common law, and in whatever terms the claim is couched, the employee concerned is seeking what is, in substance, a mandatory injunction which has the effect of necessarily continuing his contract of employment, even though the employer might otherwise be entitled to terminate it. In those circumstances it is necessary for the employee concerned to establish a strong case in order to obtain interlocutory relief."

4.5 Unlike the type of situation exemplified in that passage, in this case the defendant is not asserting an entitlement to terminate its contract with either plaintiff or, to put it metaphorically, is not adopting the position that the game is over, nor is either plaintiff in the position of having to seek an order that the contract should continue pending the trial of the action. Here both sides evince a clear intention of continuing to play the game, but the defendant asserts that it is entitled to change the rules, whereas the plaintiffs assert that it is not. The order sought is an order restraining the defendant from changing the rules pending the trial of the action and that, in my view, is, in essence, a prohibitory order. It is instructive to recall what O'Higgins C.J. stated about the nature of interlocutory relief in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88. He stated (at p. 105):

> "Interlocutory relief is granted to an applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by an award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters *in statu quo* until the hearing."

4.6 Accordingly, in my view, in order to establish an entitlement to the interlocutory relief they claim, the plaintiffs must address the three questions which arise from the application of the principles for the grant of an interlocutory injunction laid down by the Supreme Court in the *Campus Oil* case and must establish:

> (a) that there is a fair issue to be tried between the parties;
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> (b) that damages would not be an adequate remedy for them, if the injunctive relief is refused and they are ultimately successful at the trial of the action; and
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> (c) that the balance of convenience favours the grant of the injunction.

5. Fair issue to be tried?
5.1 It is important to emphasise that, although the defendant has made the point that its predecessors developed the DTSS in order to give effect to their function under s. 67 of the Act of 1970 and, in performing this function, it is obligated to comply with s. 7 of the Health Act 2004, and although reference has been made on behalf of the defendant to the Act of 2009, counsel for the defendant unequivocally acknowledged that the issues which arise between the parties in this case arise out of the contractual relationship of the parties and are not founded on any statutory intervention designed to vary the terms of the contractual relationship of the dental practitioners participating in the DTSS with the defendant.

5.2 In my view, there is undoubtedly a fair question to be tried as to whether, as a matter of contract, the defendant can unilaterally vary the terms of the involvement of dental practitioners in the DTSS, as it purported to do in the Circular. That is a matter of construction of the 1994 Contract, as revised by the 1999 Revised Terms. It falls to be determined in accordance with the principles laid down by the Supreme Court in *Igote Ltd. v. Badsey Ltd.* [2001] 4 I.R. 511, as applied by this Court (Finlay Geoghegan J.) in *Hickey & Ors. t/a Hickeys Pharmacy v. Health Service Executive* [2008] IEHC 290, now reported at [2009] 3 I.R. 156. Even if the defendant is correct in asserting that the format of the 1999 Revised Terms is as it contends and not as the plaintiffs contend, and even if this has some bearing on the proper construction of the contract, in my view, a fair question nevertheless arises as to whether, as a matter of construction, what the defendant has purported to do in imposing the terms in the Circular is permissible without the consensus of the other contracting party to a contract which was in place before the terms of the Circular were unilaterally imposed. Contrary to the submission made on behalf of the defendant, there is no onus on the plaintiffs on this application to show that the changes introduced in the Circular are disproportionate, arbitrary, or lacking in *bona fides.*

6. Damages an adequate remedy?
6.1 Each of the plaintiffs contends that the implementation of the terms of the Circular pending the trial of the action will have an irreparable adverse impact on his dental practice. The second plaintiff has averred in the grounding affidavit that the income of his practice from the DTSS in 2009 represented 30% of the practice income. The effect of the implementation of the Circular would call in question the viability of the practice and would inevitably result in "letting people go". In this connection he has referred to his Dental Surgery Assistant, who has been employed on a full-time basis for two years, and his Dental Associate, who has been with the practice for almost two years. In the case of the first plaintiff, the income of his practice from the DTSS in 2009 represented *circa* 68% of the practice income in 2009. The first plaintiff has averred in his affidavit sworn on 31st May, 2010 that he has seen a significant fall in patient numbers since the Circular issued because patients are actively declining treatment on the basis that it will not be covered by the DTSS. In his practice the number of appointments has fallen by two thirds since the Circular issued and continues to fall with the result that he has had to lay off a part-time dental hygienist. He has averred that the viability of the practice has been put in jeopardy due to decreased patient numbers since the Circular was issued. The practice income has reduced by approximately 50% to date and is likely to fall by up to 80% by the end of June on the basis of reduced patient numbers. He has also averred that the practice has had to move to part-time hours and he believes that the practice will face closure within the next four to six weeks as a result of the impact of the issue of the Circular.

6.2 In response, Patrick Bourke, an Assistant National Director with the defendant, in his second affidavit sworn on 9th June, 2010, has expressed surprise at the plaintiffs' averments and has averred that, as a result of an examination of the payments made to both plaintiffs' practices up to the month of June 2010, "the level of these claims for the period (and, in particular, 'Above The Line' claims) since implementation of [the Circular] is at a level commensurate with the claims submitted for the first five months of 2010". Mr. Bourke has suggested that the plaintiffs' assertions are not borne out. When Mr. Bourke swore that affidavit, the Circular had been in place for approximately five weeks. In my view, the Court is entitled to take judicial notice of the fact that there is a time lag in submission by dental practitioners of claims under the DTSS. Quite frankly I consider the exercise performed by Mr. Bourke at this point in time to be of no probative value.

6.3 On the evidence, I am satisfied that, if it transpires that, as a matter of contract, the defendant was not entitled to impose the terms of the Circular on participating dental practitioners, the plaintiffs will probably suffer irreparable damage pending the trial of the action, because, on the evidence, the viability of the dental practice of each of them is at risk and each may be forced to close down the practice in the interim. Therefore, I conclude that damages would not be an adequate remedy.

7. Balance of convenience
7.1 It was submitted on behalf of the defendant that the Court should take into consideration the stance which has been adopted by the plaintiffs in response to the defendant's invitations to the IDA to negotiate with the defendant in relation to the implementation of the provisions set out in the Circular and to participate in mediation. The gist of the defendant's argument is that the IDA has been unreasonable in insisting on the Circular being withdrawn as a pre-condition to entering into talks with the defendant.

7.2 While it is regrettable that the parties have not been in a position to resolve their differences by agreement and without the plaintiffs having to resort to litigation, the only issue for the Court is whether the plaintiffs have established an entitlement to interlocutory relief in accordance with the principles set out in the *Campus Oil* case. It follows from what I have identified as a fair issue to be tried in this case that there is an issue as to whether the defendant is acting in breach of the terms of its contractual relationship with the plaintiffs. It is not open to the Court to conclude that, in assessing where the balance of convenience lies, a relevant factor is that the plaintiffs should ignore that issue, abandon this litigation or, at any rate, this interlocutory application and enter into direct talks with the defendant or mediation. If it is the case that the plaintiffs are correct in their assertions that the imposition of the terms of the Circular is in breach of the contract between each of the plaintiffs and the defendant, notwithstanding the budgetary constraints under which the defendant, as a statutory body, must operate and is operating, it must comply with its contractual obligations and with the law and it cannot invoke the balance of convenience argument to override the law.

7.3 The plaintiffs have asserted that chaos now prevails in the DTSS as a result of the introduction of the Circular and that patients' interests have been put in jeopardy. That is denied by the defendant. For the avoidance of doubt, neither the assertion nor the denial has informed the conclusion that the plaintiffs have established an entitlement to have the *status quo ante* maintained pending the trial of the action. That conclusion is based entirely on the impact of the introduction of the Circular on the plaintiffs' contractual relations with the defendant.

8. Conclusion
8.1 In my view, the plaintiffs have made out a case for the grant of interlocutory relief in accordance with the principles set out in the *Campus Oil* case.

8.2 Noting the undertaking as to damages given by each of the plaintiffs to the Court, there will be an order pending the trial of the action in the terms of paragraph 1 of the notice of motion restraining the defendant from giving effect or purporting to give effect to the Circular.

8.3 The Court will endeavour to facilitate the parties with an early trial of the action.