THE HIGH COURT

COMMERCIAL

[2018 No. 10218 P]

BETWEEN

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

LAYA HEALTHCARE LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 2nd day of July, 2019

Summary

1. This case involves a discovery application regarding a dispute between the plaintiff (the "HSE") and the defendant ("Laya") relating to the interpretation of the Health Act, 1970 (as amended) (the "1970 Act"), in particular section 52(3) of that Act.

2. The dispute between the parties centres on the common practice of public hospitals charging the insurance company of a private patient following that patient's private treatment in a public hospital for in-patient services. The issue at the core of the dispute is whether the hospital can charge for that treatment from the time of the patient's admission to hospital, or whether the charge only begins to accrue from the time when the patient does not avail of public in-patient services or signs a waiver of their right to receive public in-patient services. The usual way in which such a waiver is evidenced is when a patient signs what is referred to as the Private Insurance Patient ("PIP") form.

Background

3. The key reliefs sought by the HSE are outlined in the Statement of Claim as follows:

> "A declaration that under and pursuant to the provisions of Section 55 of the Health Act 1970 (as amended) [Laya] is liable to pay the prevailing statutory per diem rate for in-patient care provided at public and voluntary hospitals to patients insured by [Laya] during the period from 01 January 2014 to date.
>
> A declaration that in accordance with section 52(3) of Health Act 1970 (as amended) where any patient insured by [Laya] elects, at any point during their stay, to be treated privately at public and voluntary hospitals, the said election shall render [Laya] liable for the payment of the prevailing statutory private in-patient charges in respect of care provided during the entire duration of that patient's maintenance in hospital from admission through to discharge."

4. The key issue between the parties is the interpretation of section 52 of the 1970 Act.

Section 52(1) states:

> "A health board shall make available in-patient services for persons with full eligibility and persons with limited eligibility."

Section 52(3) states:

> "[…] where, in respect of in-patient services, a person with full eligibility or limited eligibility for such services does not avail of, or waives his or her right to avail of, some part of those services but instead avails of like services not provided under section 52 (1), then the person shall, while being maintained for the said in-patient services, be deemed not to have full eligibility or limited eligibility, as the case may be, for those in-patient services."

5. The HSE pleads that, when a patient 'does not avail of' or 'waives his right' to public healthcare in a public hospital, under s 52(3) this means that he does not have 'full eligibility' for those services and so is liable to pay to pay private in-patient charges (set out in the 1970 Act) for the entirety of his stay in hospital.

6. Laya denies that s. 52(3) should be interpreted in this manner and argues that the right of the HSE to raise a charge arises only if the patient does not avail of some part of the public in-patient services or has waived their entitlement to public in-patient services. In particular, Laya argues that a patient, who receives in-patient services prior to signing the waiver of their right to public care, has received those services as a public patient and not otherwise and so no charge should arise for, inter alia, in-patient services received prior to the signing of the waiver.

Discovery application

7. Against this background, Laya seeks discovery of the following categories of documents from the HSE:

Category D

> "All notes, minutes, documents, internal memoranda, correspondence, or other material passing between the [HSE] and the Department of Health evidencing or touching upon (a) the application, meaning and interpretation of Section 52 of the Health Act 1970 (as amended), (b) the meaning and effect of the PIP Form and (c) the manner in which the waiver of a patient of their right to avail of public in-patient services should be evidenced."

8. The reason Laya gives for requiring this category in its letter seeking discovery dated 11th March, 2019 is as follows:

> "[…] the [HSE] would in the ordinary way have engaged in correspondence with the Department of Health concerning the matters discussed in Categories A to C above [which have been agreed], including but not limited to the meaning and effect of Section 52 of the Health Act 1970 and the manner in which the waiver of a statutory right to public treatment in the Hospitals sought be obtained and documented. This category of documents will demonstrate the extent to which the

> [HSE] and the Department of Health have been consistent in their views as to the meaning and effect of Section 52, and whether their actions have been consistent with such a view. These documents are not within the possession or procurement of [Laya] and discovery is therefore necessary in advance of the trial of the action."

9. This category of discovery is directed at the views of the Department of Health on the meaning of s. 52 of the 1970 Act. It seems clear to this Court that this case will be determined on the interpretation of s. 52 of the 1970 Act by the trial judge, as to whether the Act permits the HSE to charge for a private patient's treatment prior to the patient signing the waiver form. In broad terms, the HSE says that the charge arises on the admission of the patient to hospital, whereas Laya says that it arises on the execution of the waiver form (the PIP form).

10. At the hearing of the substantive dispute the role of the trial judge will be to determine the dispute between the parties, which as noted above is the correct interpretation of s.52. It seems clear to this Court therefore that this is a question of law for the trial judge, and the opinion of third parties (who have no role in the proceedings) regarding their interpretation of the section is irrelevant to this task. Accordingly, it is this Court's view that the opinion of a third party, such as the Department of Health, on the interpretation of s. 52 is not relevant or necessary to the trial judge's task. For this reason, this Court refuses this category of discovery.

11. The next category of discovery sought by Laya from HSE is as follows:

Category F

> "All or any agreements, accords, memoranda of understanding, "bed maps", or other arrangements with any private health insurer which deals with, addresses or touches upon the manner in which patients who are admitted to hospital as public patients can subsequently be treated as private patients during that admission."

12. The reason Laya gives for requiring this category, in its letter seeking discovery dated 11th March, 2019, is as follows:

> "In paragraph 5 of its request for Interrogatories, [Laya] queried whether any such agreements or arrangements were in place between the [HSE] and other private health insurers in the State. These documents are relevant to the approach taken by the [HSE] and/or the Hospitals to the processing and treatment of patients who are initially admitted to hospital as public patients, and demonstrates whether the [HSE] operates a different process or procedure with other private health insurers than that in place for patients who are customers of [Laya]."

13. In order to determine whether this category of documents is relevant and necessary, regard must be had to the pleadings. Interrogatories are not part of the pleadings. Accordingly, the fact that a request was made in the Interrogatories regarding the existence of agreements between the HSE and other private health insurers has no relevance to an application for discovery of any such agreements/document. In determining therefore whether this category of discovery is relevant and necessary, it also relevant to note that in the pleadings there is no reference to other private health insurers.

14. Furthermore, the dispute between the parties is at its core a matter of statutory interpretation. This interpretation, as noted above, is a question of law to be decided by the trial judge and therefore the existence of agreements between the HSE and other health insurers has no relevance to the trial judge's task regarding the meaning of s. 52(3).

15. For this reason, this Court concludes that this category of documents is not relevant or necessary to the resolution of the dispute between the parties and so is refused.