

THE HIGH COURT

[2009 No. 262 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 16(6) OF THE HEALTH (REPAYMENT SCHEME) ACT 2006 AND IN THE
MATTER OF AN APPEAL RELATING TO ANN MAHER

BETWEEN

PAUL MAHER

APPELLANT

AND

HEALTH REPAYMENT SCHEME APPEALS OFFICE, MINISTER FOR HEALTH AND CHILDREN AND HEALTH SERVICE EXECUTIVE

RESPONDENTS

Decision of Mr. Justice Hedigan on the Preliminary Issues delivered on 9th day of April, 2013.

1. The substantive proceedings involve an appeal pursuant to the Health (Repayment Scheme) Act 2006, against a decision of the Health Repayment Scheme Appeals Office dated 2nd October, 2009, confirming a determination of the scheme administrator that the applicant herein was not entitled to make a claim under the Health Repayment Scheme on behalf of his mother.

2. By order dated 28th January, 2013, the President of the High Court directed that there be a trial of the following preliminary issues:-

- (a) Whether the appellant has the standing necessary to maintain the appeal herein and/or to claim the reliefs sought herein;
- (b) Whether the appellant is or ever was a "*connected person*" within the meaning of the Health (Repayment Scheme) Act 2006;
- (c) Whether the appellant is or ever was a "*relevant person*" within the meaning of the Health (Repayment Scheme) Act 2006;
- (d) Whether the appellant was entitled to make an application pursuant to the Health (Repayment Scheme) Act 2006, for a prescribed repayment in respect of a recoverable health charge; and
- (e) Whether the appellant was an "*aggrieved person*" within the meaning of s. 16 of the Health (Repayment Scheme) Act 2006, and was entitled to appeal against the decision of the scheme administrator.

3. I have heard counsel on both sides of this application and have had the benefit of reading the detailed submissions provided prepared by both.

4. The application is a trial of certain preliminary issues directed by the President of the High Court. They all boil down to two central questions.

- (1) Is the applicant a connected person within the meaning of the Health (Repayment Scheme) Act 2006.
- (2) If he is not, may he still, as the son of Mrs. Maher, make an application on her behalf.

I will not set out all the background facts which are well summarised in the submissions made. The case involves issues arising from the Health (Repayment Scheme) Act 2006, and a brief reference to those statutory provisions is required.

5. As appears in its long title, the 2006 Act was enacted "to provide for a scheme to repay recoverable health charges and to regulate patient's private accounts and to provide for related matters". The term "recoverable health charge" is defined in s. 2 of the 2006 Act as follows:-

"recoverable health charge" means that amount which has been paid of-

- (a) a charge imposed on a person with full eligibility under the Health (Charges for In-Patient Services) Regulations 1976 (S.I. No. 180 of 1976), as in force at any time before 14 July 2005, including as so in force as amended by the Health (Charges for In-Patient Services) (Amendment) Regulations 1987 (S.I. No. 300 of 1987), or
- (b) a contribution, for in-patient services only, required of a person with full eligibility under the Institutional Assistance Regulations 1954 (S.I. No. 103 of 1954), as in force at any time on or after the commencement of the Regulations referred to in paragraph (a), including as so in force as amended by the Institutional Assistance Regulations 1965 (S.I. No. 177 of 1965)."

6. The 2006 Act provides for the making of an application to the administrator of the Health Repayment Scheme for a prescribed repayment in respect of a recoverable health charge. A prescribed repayment in relation to a recoverable health charge is defined in s. 2 of the 2006 Act as "a payment under section 6(1)(a) or (b) in respect of the recoverable health charge". The 2006 Act also provides the determination of applications and the making of payments if, *inter alia*, the scheme administrator is satisfied that the purported recoverable health charge to which the application relates is a "recoverable health charge" whether in whole or in part. Section 5 of the 2006 provides as follows:-

"(1) A relevant person or a connected person may make an application in the specified form to the scheme administrator for a prescribed repayment in respect of a recoverable health charge.

(2) The scheme administrator may refuse to consider or further consider an application if-

(a) the application does not comply with subsection (1), or

(b) the applicant fails to provide the scheme administrator with such information in addition to the information provided by or with the application as the scheme administrator may reasonably require to enable the scheme administrator to determine the application under section 6 .

(3) The scheme administrator shall refuse to consider an application made on or after-

(a) 1 January 2008, or

(b) the prescribed cut-off date, whichever is the later."

7. "Relevant person" is defined in s. 2 as the person on whom charges were imposed, whether or not that person was the person who actually paid the charges. The terms connected person which is central to the trial of the preliminary issues herein is defined as follows, *inter alia*, in section 2:-

"connected person", in relation to a relevant person, means-

(a) a person who has been nominated in writing by the relevant person...,

(e) the Executive if-

(i) none of paragraph (a), (b), (c) or (d) is applicable to the relevant person, and

(ii) the relevant person is unable to make an application due to a physical or mental disability or ill-health,

...

(g) a living spouse or living child of the relevant person who has paid, on behalf of the relevant person, the whole or part of the amount referred to in the definition of "recoverable health charge" by virtue of which the relevant person is a relevant person."

8. Section 2 of the 2006 Act provides, *inter alia*, that applicant in relation to an application means the relevant person or connected person who made the application.

9. Section 6(1)(a) of the 2006 Act provides as follows:-

"(1) Subject to subsection (2), the scheme administrator shall determine an application -

(a) if the scheme administrator is satisfied-

(i) that the applicant is entitled under this Act to make the application,

(ii) that the purported recoverable health charge to which the application relates is a recoverable health charge, whether in whole or in part, and

(iii) as to the amount ('eligible amount') of that purported recoverable health charge which is a recoverable health charge.

by causing a payment, equivalent to the sum of the eligible amount and the interest, if any, payable by virtue of regulations made under section 20 (1)(b) which are applicable to this paragraph, to be made as soon as is practicable,"

10. Finally, s. 6(1)(c) of the 2006 Act provides:-

"(c) if neither paragraph (a) nor (b) applies, by refusing the application."

The First Question

11. Connected person is defined clearly by s. 2 as above. Only if the applicant can bring himself within subs. (a) can he be a connected person. He bases his argument that he is on a document signed by his mother and witnessed by certain HSE employees which is dated 6th May, 2005, and which gives the applicant full permission to manage all his mother's financial affairs. Is this a sufficient authority? The administrator of the scheme and the appeals officer did not think so. I regret I am also unable to accept this argument. It is beyond doubt that Mrs. Maher has laboured under a mental incapacity for very many years. Most recently upon their bringing an application on her behalf under the scheme, the HSE produced a certificate dated 8th January, 2007, to this effect. This is exhibited in the affidavit of Patrick Marren. Indeed, the HSE could only bring such an application if she was under an incapacity. Furthermore, in his appeal against the scheme administrator's decision, the appellant himself in his submissions indicated that Mrs. Maher had laboured under such a mental incapacity that she could not make the application on her own nor did she have the capacity to validly nominate the appellant to do so on her behalf. The fact the appellant did make the application on his mother's behalf speaks for itself. Thus, whatever the status of the document she signed on 6th May, 2005, whether it was a power of attorney or other form

of authority, it lapsed when she was demonstrably labouring under a mental incapacity. (See Wylie, *Irish Land Law* para. 11.32 relying upon *Tingley v. Muller* [1917] 2 Ch. 144). That was her sad situation both at the time of the HSE's application on her behalf in January 2007, upon the applicant's own purported application on her behalf on 7th September, 2006, and at the time of his submissions on the appeal therein dated 19th January, 2009.

12. Thus the appellant at the time he made his application was not a connected person within the meaning of the Act because no valid authorisation existed at the time which is the sole basis upon which he claims to be such a connected person.

13. **The second question** is whether notwithstanding his not being a connected person, he could still make the application on his mother's behalf because he is her son. The Oireachtas did not forget to deal with the position of children in this Act. At s. 2(g) cited above, it provides that a child may be a connected person where they have paid all or part of the charges sought to be recovered under the scheme. This is not the case here. As noted above, s. 5 provides that a relevant person or a connected person may make an application under the scheme. Here, the relevant person is Mrs. Maher who cannot do so. Thus under the Act, the only other possible applicant must be a connected person.

14. Section 6(1)(a) provides that the scheme administrator shall determine the application if he is satisfied, *inter alia*, that the appellant is entitled under the Act to make the application. Section 6(1)(c) provides that where para. (a) does not apply, the scheme administrator shall determine the application by refusing it. The Act is quite specific in its wording and I can find no ambiguity that might call for interpretation. Thus the court is bound by the clear words of the statute itself.

15. In order to be able to apply under the scheme, the appellant has to be a "*connected person*" within the meaning of the Act. He is not such a person. Thus, the answers to the preliminary issues are:-

- (a) No;
- (b) No;
- (c) Not pursued;
- (d) No;
- (e) Not pursued.