THE HIGH COURT

[2008 No. 2036 P]

BETWEEN

O'SULLIVAN'S PHARMACIES AND BEAUTICIANS (SARSFIELD STREET) LIMITED AND O'SULLIVAN'S PHARMACIES AND PHOTOGRAPHY LIMITED AND O'SULLIVAN'S PHARMACIES AND BEAUTICIANS (CORBALLY) LIMITED AND O'SULLIVAN'S PHARMACIES AND BEAUTICIANS LIMITED AND O'SULLIVAN PHARMACIES BEAUTICIANS (EDWARDS STREET) LIMITED

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on the 14th day of March, 2008

1. I suppose, to get down to basics, the purpose of seeking an interlocutory injunction is to preserve the status quo between the parties pending the trial of the action. What the Court has to consider at this juncture is whether there is a fair issue to be tried between the parties, whether damages would be an adequate remedy for the party seeking the injunction, and where the balance of convenience lies.

2. Now, the dispute between the parties as outlined by Mr. Hogan is a contractual dispute. He says the questions are whether there was a clear trading arrangement between these Plaintiffs and the HSE, whether under the 1996 Agreement or otherwise, that part of their remuneration was this margin of 17.66% of the ex factory price; secondly, whether there has been any invocation of Clause 12(1) and Clause 19(3) of the Community Pharmacy Contractors' Agreement and, thirdly, whether there has been a unilateral variation of the contractual arrangements between the parties in relation to the proposed change of the 17.66 percentage down to 15% in 2006 and down to 8% on 1st March 2007 and with the further reduction to 7% later this year, at the end of this year, whether that constitutes a unilateral variation of the contractual terms between the parties so as to constitute a breach of contract and be unlawful. Now, I have absolutely no doubt that there is a fair issue to be tried in relation to all of those questions and Mr. Gordon very properly concedes as much. I am not expressing any view on the strength or otherwise of the Plaintiff's case because that is not the role of the Court on an application for an interlocutory injunction and we are reminded frequently by the Supreme Court that that is the case.

3. The second question is a question of adequacy of damages and that is really an aspect of the balance of convenience issue. As I have enunciated this afternoon, it seems to me that the real question in this case is whether the change which is being implemented will have such an effect on the turnover and profitability of these Plaintiffs that it will tilt them over the edge into insolvency and into liquidation. Now, Mr. Gordon complains about the nature of the evidence which has been adduced by the Plaintiffs, on the basis of which they suggest that they are likely to lose profits to the extent of €258,000 on a dispensing turnover of roughly 5.1 million in a year as a result of the proposed changes or the changes which the HSE has purported to implement. He says the evidence is not satisfactory and he relies on Mr. Jackson's affidavit, which outlines the evidence which should be produced. In an ideal world, the evidence which Mr. Jackson has outlined should be produced. But an application for an interlocutory injunction of this type is not made in ideal circumstances and the type of definition and precision of evidence really is not practicable on an application such as this. It does seem to me that the evidence contained in the affidavit of Mr. O'Sullivan and in the affidavit of the accountant, Mr. Somers, is sufficiently indicative that this company as a matter of probability will be pushed over the edge if the arrangements in relation to remuneration are changed in the manner proposed. So I think the balance of convenience lies in favour of granting the injunction.

4. Mr. Gordon also raises the question of delay. Of course, an injunction is an equitable remedy and you are supposed to come as quickly as possible. I don't think there has been delay of the nature which would justify refusing the injunction in this case. There has been caution. There may be some reliance on riding home on the basis of the Hickey and Mullally proceedings and, as well as that, there has been a movement in terms of implementation of this plan on the part of the HSE. So, for all of those reasons, I do not think the delay is such as to justify refusing the injunction.

5. The argument on mitigation that the Plaintiffs should have accepted the interim contract which provides for an increase in the dispensing fee from the €3.26 to €5 and in that way mitigated their loss I think is not an argument that can be made on an application for an interlocutory injunction. As I said at the outset, the object of the exercise in an application for an interlocutory injunction is to preserve the status quo and what the Plaintiffs have come here to seek is to preserve what they say is their contractual entitlement under their contractual arrangements with the HSE. In my view, they cannot be faulted for not accepting the interim arrangements which they say the HSE is not entitled to force on them.

6. Then there is, finally, the question in relation to the undertaking as to damages given by the Plaintiffs. Mr. Gordon says it is worthless. Hopefully, it is not, but the object of this process and the object of seeking an injunction is to ensure that it won't be worthless. So I don't think that argument stands up either. So, for all of those reasons, it seems to me that the Plaintiff is entitled to an injunction.