THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 68

Appeal No. 2014/575

[Article 64 Transfer]

Peart J.
Hogan J.
Mahon J.
BETWEEN

CMC Medical Operations Limited (In Liquidation) trading as Cork Medical Centre

Plaintiff/Appellant

- and –

The Voluntary Health Insurance Board

Defendant/Respondent

JUDGMENT of Mr. Justice Mahon delivered on the 27th day of March 2015

1. The is an appeal against the decision of the High Court (Cooke J.) dated 12th June 2012 wherein he made an order pursuant to s. 390 of the Companies Act 1963 ("the 1963 Act") directing that the plaintiff company ("CMC") provide security for costs: see *CMC Medical Operations Ltd. v. Voluntary Health Insurance Board* [2012] IEHC 292. At this juncture the quantum of those costs has yet to be ascertained, but any sum so fixed is likely to be significant.

2. CMC originally appealed to the Supreme Court against the making of that order. This case was, however, subsequently transferred to this Court from the Supreme Court pursuant to Article 64 of the Constitution by direction of the Chief Justice (with the concurrence of all the members of the Supreme Court) on 29th October, 2014, following the establishment of this Court on the previous day.

The issues on the appeal
3. The issues on this appeal arise in the following way. CMC opened a newly constructed private hospital at Citygate, Mahon Point, Cork in September 2010. Less than twelve months later the hospital was forced to close because of financial difficulties and a liquidator was appointed to the company on 11th May 2011. There was an association between the promoters of the CMC private hospital and the promoters of the successful Blackrock Clinic in Dublin and the Galway Clinic. The defendant/respondent ("VHI") is a private health care insurer established under s. 3 of the Voluntary Health Insurance Act 1957 (as amended). It has been for many years, and is currently, a significant provider of private health care insurance cover in the Irish market.

The substantive issue in the proceedings
4. CMC formally applied to the VHI in 2009 for its approval for the provision of medical services to individuals who had private medical cover with the VHI. It is alleged that, following discussions and contact between the two parties over a period of nearly two years, VHI unlawfully refused to extend coverage to CMC with the effect that VHI declined to provide private health insurance cover to individuals insured with it in respect of CMC's medical services. This refusal, CMC maintains, was catastrophic for its business and led directly to its financial collapse and the appointment of the Liquidator in May 2011.

5. CMC pleads that VHI is an undertaking for the purposes of s. 5 of the Competition Act 2002, and Article 102 of the Treaty on the Functioning of the European Union, and that it has a dominant position in the market in the provision of private health insurance cover in the State. It is contended by CMC that VHI is the largest private health insurer provider in Ireland, (as it was in 2009/2011), and represents approximately 60% of the market. As such, it is claimed by CMC that in spite of its Cork based hospital having state-of-the-art facilities in terms of the provision of medical services, and having the assured involvement of a large number of medical consultants prepared to operate clinics within it, its financial survival without *approval* from VHI was impossible. CMC maintains that, having regard to VHI's dominant position within the market of health care insurance in Ireland, its refusal and failure to provide its approval to the hospital was unlawful.

6. A defence has not yet been delivered on behalf on the defendant. However, an outline of that defence was provided to the court. VHI denies that CMC's financial collapse was caused as a consequence of any failure on its part to approve the hospital for medical services provided to its insured clients, or that it had any obligation to provide such cover, and that it had acted unlawfully. In particular, VHI did not accept that the financial collapse of the hospital was as a result of its failure to provide cover, but, in fact, occurred because of underlying financial issues unrelated to VHI, and including its failure to secure other business unconnected to VHI. VHI maintained that the hospital was constructed and opened for business in 2010 in the full knowledge on the part of CMC that an agreement to provide cover for the provision of its medical services had not been secured with VHI, nor had VHI given an indication that such approval was forthcoming. VHI maintained that it had good reason to, and was lawfully entitled to refuse to approve the hospital.

The legal principles
7. In his judgment, the High Court judge identified the criteria to be applied to this type of application, and the correct principles based on relevant case law. He noted that both parties were generally agreed as to what these principles were, and identified them as follows:-

> "In order to obtain an order for security for costs it lies with the defendant in the first instance to establish (a) that it has a prima facia defence to the plaintiff's claim; and (b) that the plaintiff would be unable to pay the defendant's costs of the litigation if that defence succeeds. (See, for example, the judgments of the Supreme Court *in Uisk and District Residents Association Limited v. The Environmental Protection Agency* approving the test applied by Morris P. in *Interfinance Group Limited v. KPMG Peat Marwick*) [Unreported, High Court, Morris P., 29th June 1998))."

8. It is also accepted in this case that CMC is insolvent and will be unable to pay any costs that may be awarded against it in the event that VHI is successful in its defence to the action. It is also accepted that VHI has *a prima facie* defence to the plaintiff's claim. It is also accepted that in these circumstances, the onus passes to the plaintiff to demonstrate by reference to appropriate evidence the existence of *special circumstances* which would justify the Court in declining to order Security for Costs in circumstances where a Defendant would otherwise be entitled to same.

9. In his judgment Cooke J. went on to state (at p. 12):-

> "Nor is their any dispute to the parties as to the issues the plaintiff must address in seeking to address the existence of such "special circumstances". In the present case, the circumstance relied on is the alleged fact that the inability of the plaintiff company to meet an award of costs is the result of the unlawful conduct of the defendant which has resulted in the plaintiff's inability to continue trading and in its resulting liquidation. In these circumstances the elements the plaintiff must establish are as follows (a) there was actionable wrongdoing on the part of the defendant; (b) there is a causal condition between that wrong and its practical consequences for the plaintiff; (c) that that consequence has resulted in some loss to the plaintiff which is recoverable in law; and (d) that loss is enough to account for the difference between the Plaintiff's ability to meet an order for costs in favour of the Defendant and not been so able (see the judgment of Clarke J. in *Connaughton Road Construction Limited v. Laing O'Rourke Limited* [Unreported Clarke J. 16th January 2009))."

10. This is the correct test to be applied in order to determine what must be established to prove the existence of "special circumstances". In this case, because it is conceded that VHI has a *prima facie* defence to the CMC claim, and that CMC will be unable to pay VHI's costs if it successfully defends the action, the only option available to CMC to enable it defeat VHI's application for security for costs is to establish the existence of such *special circumstances.* It is necessary, therefore, to consider the four requirements of the *special circumstances* test, as correctly identified by the High Court judge.

Whether there was actionable wrongdoing on the part of the defendant

11. CMC contends that VHI is an *undertaking* for the purposes of the Competition Act 2002 and/or Article 102 of the Treaty on the Functioning of the European Union (TFEU). It is contended that VHI is the leading insurer of private health care services, and has the majority of insured individuals in this country on its books.

12. Mr. Wallace deals with these matters in some detail in his affidavit. He makes reference to *inter alia* the views expressed in the Competition Authority Report for 2010 and in Appendix A to that report. It is a fact that VHI is the longest established player in that market, and as of 2009/2011 it had only two competitors operating in Ireland, namely Quinn Healthcare and Hibernian Aviva Healthcare. A survey of the market for the years 2001 to 2010 undertaken by the Health Insurance Authority in its Annual Report for 2010 suggested that the VHI held almost 62% of the private health insurance market in 2010, having held over 82% of the market in 2001 and with slightly reducing market share over the years between 2001 and 2010. In 2010, Quinn Healthcare had just 21% of the market and Hibernian Aviva had under 14% of the market. It is clear from these figures that the lion's share of the market in 2010 was held by VHI. That position is unlikely to have significantly changed for 2011. It was also the case in 2009/2011 that VHI had a disproportionate number of older individuals on its books compared to its two competitors, and that, having regard to the fact that the greater revenue in terms of health care expenditure can be attributed to the older age groups, for obvious reasons, it is not unreasonable to assume that the majority of private health care spending is undertaken by VHI, and significantly so. It follows that, as a matter of probability, the greater percentage of private health care insurance fee income for a private hospital in Ireland will emanate from VHI.

13. Ultimately the issue as to whether or not VHI was, in 2010/2011, the dominant player in the private health care insurance market in the State (or in any part of the State) is a matter for a full plenary hearing of these proceedings. It is not unreasonable for this court, in order to consider whether the first part of the test in *the Connaughton Road* case is met by the plaintiff for the purposes of this application, to proceed on the assumption that VHI may well have been a dominant player in the private health care insurance market during the period in question. Almost certainly, such a contention would be accepted as true by the general public, and by the various vested interests. Working therefore on the strong possibility that at all material times VHI probably held this dominant position it is reasonable, again purely for the purposes of this particular application, to conclude that there was actionable wrongdoing on the part of the defendant in its refusal to "approve" CMC's Cork hospital in relation to medical services provided for its insured members, and that such constituted an abuse of a dominant position within the meaning of s. 5 of the 2002 Act.

Whether there is a causal connection between that wrong and its practical consequence for CMC

14. The case made by CMC in these proceedings is that because VHI failed to *approve* the provision of medical services by the CMC's Cork hospital for its members, and having regard in particular to the dominant position of VHI in the market generally, the clinic was doomed to failure, incapable of surviving financially. CMC certainly believed that a very significant part of that income would come from VHI. In his affidavit, Mr. Wallace contended that the lack of approval from VHI resulted in an inability on the part of CMC's hospital to serve approximately 60% of persons with private health insurance related services. CMC based its projected revenue figures and its likely future profitability on that basis. It was contended that VHI's decision not to involve itself with the hospital effectively acted as a major disincentive to consultants and other providers of medical services from establishing a base within the hospital. This is not an unreasonable argument, as it is common sense that consultants will not wish to open clinics at considerable cost to themselves for the purposes of providing private health care services at a hospital which, at best could provide for only some 40% of the potential market.

15. At the hearing of the appeal counsel for VHI contended strenuously that there was no evidence that VHI would have provided 60% of CMC's likely income stream had the latter received approved status. But it is hard to see how it would have been otherwise. The special case of the procedures paid for by the National Treatment Purchase Fund apart, the number of private patients paying for hospital procedures from their own private resources is negligible. In these circumstances, the share of private hospital income will almost by definition reflect the market share of the upstream health insurance providers. If VHI have 60% of the market, then in practice 60% of patients presenting at CMC are likely to have been VHI customers. Indeed, if anything that figure is likely to be higher, since in practice most patients are likely to come from an older cohort of the population. As there was only one monopsonist health insurance provider – namely, the State owned VHI – when many of this age cohort first purchased health insurance and since there is limited switching of health insurance providers, the share of patients who had VHI cover is likely to be greater than 60%.

16. In his judgment, the judge found that CMC had failed to establish this *causal connection*. Referring to the absence of sufficient financial information, Cooke J. stated the following:-

> "Notwithstanding this evidential deficiency it is reasonable to assume that the Plaintiff's company has sustained a loss given that it is unable to pay its debts and has been wound up by its creditors. The key issue, however, is why it has sustained that loss. In the judgment of the Court, it is by no means apparent that the plaintiff has established on a *prima*

facie case that any such loss has a causal link to wrongful conduct alleged against the defendant, namely the refusal to approve the hospital."

17. In circumstances where the clinic opened in 2010, and closed in the following year, any reliance on precise figures in terms of seeking to understand the reason for its early demise is, as an exercise in identifying the likely cause of that demise, problematic. It is, I believe, necessary to consider if there was this *causal connection* with a wider lens. Even if only a percentage of the over 60% of VHI members living in and around the Cork area were to use the services of the clinic it is not unreasonable to assume that the income, and the projected income, for the clinic would have been significantly greater than in fact it was, or could reasonably have been expected to be. There was the added difficulty, as pointed out by Mr. Wallace in his affidavit, that consultants would not be attracted to establish a base in the clinic in the absence of VHI approval.

18. In his consideration of the *causal connection* test Cooke J. closely examined the history of the contact between CMC and VHI in the period of four years or so prior to the clinic's closure. He noticed that VHI had signalled its doubts as to the possibility of approving the hospital long before it opened in October 2010, and he suggested that the financial projections prepared by CMC suggested:

> " …at the very least, the implication that the hospital's closure might be attributable to the combination of an over optimistic expectation that prompt approval would be forthcoming on the one hand and a level of capitalisation or secure funding of working capital which was inadequate to maintain the project in its early stages, on the other."

19. Cooke J. also noted that the period of the development of the hospital project coincided with the sudden and serious reversal in the economic circumstances of the country. There was an indication, he thought, that the project was already under extraordinary pressure within four months of opening and was losing a very substantial amount of money every month in operating costs and the banks and investors were not prepared to commit any more funds in the absence of VHI approval. This suggested that the VHI approval had been suggested as almost definite in the CMC dealings with the financial institutions.

20. There is, however, in my view, quite a compelling case to be made that there was a connection between the refusal on the part of VHI to approve the institution for use by its membership and its hopeless financial position which emerged very quickly after it opened its doors in October 2010. All that is required, however, insofar as the *Connaughton Road* test is concerned is that there be established a *causal connection*. The *causal connection* requirement need only be established by CMC on a *prima facie* basis, and I am satisfied it was so established in this case. Clearly, the determination of the extent of that connection would require a full plenary hearing of the issue.

21. Having regard to the restricted nature of the imposition on a court in making a determination as to evidence relating to complex financial matters as part of a motion seeking security for costs, CMC have established *prima facie* evidence of a *causal connection* between the wrong alleged (namely, the abuse by VHI of its dominant position) and the alleged practical consequences for CMC (namely its rapid demise within a year of its opening).

Whether that consequence has resulted in some loss to the plaintiff which is recoverable in law
22. *That consequence* is the demise or collapse of CMC business. That such a demise or collapse of the business has resulted in *some loss* to it is obvious. Such loss, assuming that it is established at a full plenary hearing, is *recoverable in law* if it is also established that VHI held a dominant position at the material time, and there was an abuse of that dominant position by it by reason of its failure to grant *approval* to the CMC hospital.

Whether that loss is enough to account for the difference between the plaintiff's ability to meet an order for costs in favour of the defendant and not being so able
23. Such loss as is suggested by CMC as being the consequence of the alleged abuse of its dominant position by VHI is likely to be significant in terms of quantum. As the amount of that loss may well have meant the difference between the clinic surviving or dying on its feet, as in fact may have occurred, it is not difficult to establish that the consequential loss is more than enough to account for the difference between the plaintiff's ability to meet an order for costs in favour of the defendant, and not being so able. This of course presumes that the security for costs would itself be a large sum. The evidence and clear declaration from CMC, which is accepted by VHI, is that CMC is now hopelessly insolvent and certainly unable to meet any costs bill from VHI. It is reasonable to assume that if its business had got off the ground as was intended and planned by CMC that it would have been able to pay its bills including a substantial bill for costs from VHI. By all accounts its access to bank finance would have continued. I think it is reasonable to answer that question in the affirmative. Regard must be had to the fact that the promoters behind this hospital were individuals who had a proven track record in establishing successful and profitable private hospitals such as Blackrock Clinic and the Galway Clinic.

24. Cooke J. concluded his judgment *by* summarising his view of the application in the following terms:-

> "It is immediately obvious that at the trial of this action, much will turn upon the evidence as to what was done, said, represented or agreed between the promoters and perspective investors and other insurers and the NTPF in relation to the business model upon which it proposed to operation. At this point however, having regard to the very explicit warnings that were given by the VHI in correspondence to the effect that it had a doubt as to the need for additional capacity in Cork, the Court cannot conclude that it was the lawful refusal alone of the VHI to grant such approval that solved the insolvency and that a *prima facie* case to that effect has been established on the basis of the evidence summarised above. To put the matter in simple terms: the promoters knew from their Galway Clinic experience that there might be difficulty or at least delay in securing the necessary VHI approval for the hospital. The above evidence suggests that they promoted the venture to consultants (upon whom they depended for referred patients) and banks and investors (upon whom they depended for working capital) upon the basis that VHI approval would be forthcoming quickly enough to enable the hospital to achieve a particular level of revenue from VHI subscribers within the first year to render the venture liable."

25. Cooke J. went on to express the Court's view that it was "not satisfied that a *prima facie* case has been made out as to the existence of a causal connection between the refusal of the VHI to approve the hospital and the claimed loss resulting from a cessation of operations". He went on to make an order for security for costs. In reaching his conclusions it appeared to me that Cooke J. may have ventured too far and too deeply into issues which are more properly issues for determination at a full hearing of the action, particularly having regard to the fact that he accepted that the plaintiff had satisfied the first leg of the *Connaughton Road* test, namely that there was actionable wrongdoing on the part of the defendant.

26. A court should be slow to take any step which has the effect of curtailing litigation or unduly restricting the constitutional right of

access to the courts. The requirement that a party effectively defending an application for security for costs should be expected to delve unduly deeply into complex matters which constitute the subject matter of the litigation itself may produce this result.

Conclusion

27. For the reasons stated, I would allow the appeal and dismiss VHI's application for security of costs pursuant to s. 390 of the 1963 Act.