

**BETWEEN**

**GREGORY HEFFERNAN**

**PLAINTIFF**

**AND**

**MATER PRIVATE HOSPITAL**

**DEFENDANT**

**JUDGMENT of Ms. Justice Egan delivered on the 6th day of May, 2022**

**Introduction**

1. On 15th of December 2021, I gave judgment (“the interlocutory judgment”) restraining the Mater Hospital (“the Mater”) from terminating the practising privileges of the plaintiff, an orthopaedic surgeon.
2. This ruling concerns two issues arising in consequence of my judgment of 15th December 2021. The first is the form and nature of the interlocutory order that the court should now make and the second is the question of costs. The parties made helpful written submissions on these issues which were also the subject of a further brief hearing (“the supplemental hearing”).

**Nature and form of Order**

3. It will be recalled that the interlocutory judgment determined that the plaintiff had raised a strong case that the withdrawal of his practising privileges was, for a number of reasons, in breach of contract and, in particular, in breach of the 2020 Constitution.
4. An issue has arisen between the parties as to whether the plaintiff is entitled only to an order, for the continuation of his theatre privileges, or whether, on the other hand, he is also entitled to an order that he may continue to conduct his clinics within the Mater. The plaintiff contends that his practicing privileges include the right to avail of access to the Mater operating theatres and the right to run clinics and to perform “side room procedures” at the Mater. The Mater contends to the contrary.
5. The plaintiff argues that as interlocutory injunctions are concerned with the preservation of rights, the critical consideration for the court in formulating any order should be the preservation of the plaintiff’s full contractual entitlement which, he argues, includes his right to hold a weekly clinic. However, the plaintiff advanced no convincing legal argument at either the interlocutory hearing or the supplemental hearing, that the right to hold a weekly clinic is necessarily a contractual entitlement – in the sense of being included within the definition of practising privileges. Rather, his argument was that this was how he had always run his practice at the Mater, which is of course, a slightly different proposition.
6. Neither the 2020 Constitution, nor the Shanakiel Agreement, which preceded it, define “practising privileges”. This issue scarcely featured at the interlocutory hearing and, to the extent that it did, the Mater’s submissions appear to have proceeded on the assumption that “practising privileges” included the holding of clinics (see paragraph 48

of the interlocutory judgment). Overall, however, this was not an issue that I had to consider for the purposes of determining the interlocutory application. Neither, indeed, could this issue be determinative of the appropriate form of interlocutory order. Even if the plaintiff's full contractual entitlements include his right to hold a weekly clinic, this would not automatically entitle him to an interlocutory order directing their continuance if the court, in its discretion, was of the view that a more limited form of order was more appropriate. My decision on the form of order is informed by consideration of the balance of convenience and the balance of justice, rather than by any assumptions as to the meaning of "practising privileges".

7. In formulating any order, the court ought to have regard to the maintenance of the *status quo*. In this case, as a result of the underlying dispute between the plaintiff and the management of the hospital in relation to the withdrawal of nursing support, the plaintiff withdrew from his clinics and commenced providing clinic facilities elsewhere in Cork, retaining the services of a nurse at his own expense, where necessary. Consequently, the plaintiff has not held weekly clinics at the Mater for several months. Importantly, it appears that the plaintiff ceased holding these weekly clinics at the Mater prior to (or at least contemporaneously with) the notice of termination. This is relevant for three interrelated reasons. In the first place, it demonstrates that the notice of termination was not itself the reason why the plaintiff ceased running weekly clinics at the Mater. In the second place, it means that the *status quo ante*, prior to (or at the time of) the service of the notice of termination, was that the plaintiff had withdrawn from these clinics. In the third place, it suggests that, irrespective of whether the plaintiff may have a legal right to continue to hold these clinics, he surrendered this right, at least temporarily, as a result of the background dispute in relation to the provision of a nurse, rather than as a result of the termination which forms the basis for this court's interlocutory judgment.
8. Furthermore, as noted at paragraph 67 of the interlocutory judgment, although continued access to the Mater's operating theatres is essential to the plaintiff's practice, the same could not be said of the holding of clinics at the Mater. The truth of this is demonstrated by the fact that the plaintiff has continued to operate his clinic elsewhere since the dispute between the parties that originally arose in the Summer of 2021.
9. All of the plaintiff's affidavit evidence on the adequacy of damages and the balance of convenience was directed towards demonstrating that he would suffer irreparable reputational damage not compensatable by an award of damages should his access to theatre facilities be restricted and no similar evidence was adduced, or argument made in relation to access to clinic facilities. The Mater therefore submits that there is no basis upon which the court could conclude that the plaintiff will suffer irreparable damage should his access to clinic facilities, as opposed to theatre facilities, be curtailed.
10. On the other hand, the plaintiff points out that this evidential *lacuna* is precisely because, at the interlocutory hearing, the Mater did not distinguish between theatre facilities and clinic facilities and that it is now too late for it to seek to do so. The plaintiff argues that, had the Mater sought to make this distinction at the interlocutory hearing, he would have

been in a position to demonstrate that he would incur significant reputational damage if he is not permitted to resume his clinic facilities. However, it appears from his submissions to the court in the course of the supplemental hearing, that the evidence which the plaintiff would have wished to tender in this regard relates primarily to the inconvenience and increased costs of bilocation in terms of ease of access, rental costs, staff costs etc. and not to the possibility of irreparable reputational damage *per se*. Such matters as these are fully capable of being addressed by an award of damages, should this prove appropriate.

11. I also observe that shortly after the letter of termination issued, the Mater offered the plaintiff the opportunity to resume his clinics until the end of the notice period approximately six months later and indicated that a nurse would be available to assist him at these clinics. For his own reasons, the plaintiff declined to take up this offer. This again suggests that the holding of clinics at another location is not impossible, or even hugely difficult, for the plaintiff from a practical, financial or reputational standpoint.

#### **Decision on form of Order**

12. Overall, it seems to me that the maintenance of the present *status quo* and indeed the avoidance of future reputational damage to the plaintiff will be adequately met by an order that he may continue to enjoy theatre privileges and that it is not necessary that he also resume his clinics at the Mater.
13. During the course of this supplemental hearing, the Mater indicated that it would provide an undertaking to the court that the plaintiff may continue to enjoy theatre privileges until the trial of the action. That undertaking was premised upon the plaintiff's undertaking as to damages and subject to expedition of the trial. Counsel for the plaintiff indicated that he had no particular objection to the court accepting an undertaking from the Mater rather than making an order as against it, albeit that the plaintiff wished that the scope of any undertaking or order reflect the maintenance of both theatre facilities and clinic facilities. As this court has found against the plaintiff on this issue, I am prepared to accept the Mater's above undertaking. I note that this undertaking is premised upon the plaintiff's undertaking as to damages (which has been duly given) and is subject to expedition of the trial, a timetable for which has been agreed and approved by this court.

#### **Costs**

14. Order 99 rule 3(1) provides:

*"The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable."*

15. Section 169(1) of the Legal Services Regulation Act 2015 provides that a party who is entirely successful is entitled to an award of costs, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of

the proceedings by the parties. The section then lists a number of factors to which regard may be had, none of which are of immediate relevance to the present application.

16. Order 99 rule 2(3) provides:

*"The High Court, The Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."*

17. In essence, therefore, the governing principle is that costs follow the event and that the court should make an order in respect of costs of any interlocutory application "save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."
18. The plaintiff has been successful in obtaining interlocutory relief to the effect that he may continue to enjoy theatre privileges until the determination of the proceedings. Consequently, the plaintiff argues that as he has been successful in "the event", which is the outcome of the interlocutory hearing, he is entitled to an order for his costs. The Mater submits that the interlocutory costs should either be reserved or that I should order that they are costs in the cause.
19. The Mater relies on the judgment of Clarke J. (as he then was) in *ACC v. Hanrahan* [2014] IESC 40 which deals with the costs of interlocutory injunctions in circumstances where a fair question had been found to arise on asserted but disputed facts which had not been determined at the interlocutory stage and which would be revisited at the substantive trial. I adopt the view expressed by Butler J. in *Mason v. ILTB Ltd trading as Gillen Markets and Dermot Browne* [2021] IEHC 539, in which she stated that the provisions of the 2015 Act did not materially impact this pre-existing line of authority, given that the same essential question continues to arise, namely whether it is or is not possible to "justly" make the adjudication on costs at the relevant stage of the proceedings.
20. In *Hanrahan* Clarke J. drew a distinction between interlocutory applications in which an issue (such as the entitlement to discovery of documents) was finally determined and interlocutory applications in which the matter in issue would be revisited at the substantive trial. He stated as follows:

*"Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. As I noted in *Allied Irish Banks v Diamond* [2011] IEHC 505, and as approved by Laffoy J. in *Tekenable Limited v Morrissey* [2012] IEHC 391, somewhat different considerations may apply in cases where the interlocutory application will, to use language which I used in *Diamond* and which Laffoy J. cited in *Tekenable* 'turn on aspects of the merits of the case which are based on the facts.'*

*It is true that both of those cases concerned the costs of an interlocutory injunction. One of the issues which, of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has established a fair issue to be tried and, indeed, whether the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on those questions is dependant on facts which will not be determined at the interlocutory stage save for the purposes of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence.*

*However, the point made in Diamond is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the Court at the interlocutory stage, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts finally determined by the Court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie. It is not necessarily just that a plaintiff who secures an interlocutory injunction on the basis of putting up false facts should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the fact as asserted."*

21. In *Glaxo Group Ltd v. Rowex Ltd* [2015] IEHC 467, Barrett J. characterised the relevant distinction as being one between cases where the decision on an interlocutory application turns on issues in respect of which a different picture may emerge at trial and cases where the application turns on matters such as the adequacy of damages and the balance of convenience which will not be addressed again at trial.
22. Relying upon these principles, the Mater argues that the court cannot justly determine costs at this juncture because the critical issue upon which the interlocutory injunction turned, the nature of the contractual relationship between the parties and the extent to which the 2020 Constitution governs that relationship, is one in respect of which a different picture may emerge at the trial following the hearing of evidence. As a result, the trial judge could reach conclusions that in fact and in law would demonstrate that the view taken by this court of that contractual relationship was not as it transpires correct and that the plaintiff should never have been granted the interlocutory injunction.

23. In addressing this issue, I adopt the approach of Butler J. in *Mason and Thompson v. Tennant (No. 2)* [2020] IEHC 693 in which the court should focus quite closely on what exactly is disputed as between the parties; on whether that dispute is a truly factual one; and on the extent to which that dispute has had a material bearing on the outcome of the interlocutory injunction.
24. It seems to me that there were four main areas which were in dispute between the parties at the interlocutory hearing.
25. First, the parties were in dispute as to whether the plaintiff had to establish a fair issue to be tried or whether the *Maha Lingham* standard applied (*Maha Lingham v Health Services Executive* [2006] 17 Employment Law Reports 140). This issue was relevant only at the interlocutory stage and will not require to be reanalysed at the substantive hearing. However, the plaintiff disputed the application of the *Maha Lingham* standard on which issue I found against him in the interlocutory judgment.
26. Second, the parties were in dispute as to the nature of their contractual relationship and whether same is governed by the 2020 Constitution. I agree with the Mater that this was the core dispute between the parties at the interlocutory stage and was of central importance to this court's decision that the plaintiff had met the *Maha Lingham* test. I further agree and this will also be the core dispute at the substantive hearing. This is not a solely factual dispute. It is a mixed question of fact and law. However, the resolution of this core issue at the interlocutory stage was virtually entirely dependent on the court's analysis of the parties' respective affidavit evidence, on which there was a factual dispute and in respect of which the evidence was somewhat unsatisfactory. In this regard, as observed in the interlocutory judgment, the plaintiff's pleadings did not include the details that one would expect to see to establish his central proposition – that the 2020 Constitution governs his contractual relationship with the Mater. In several respects, his pleadings were confused, sparse and hard to interpret, making the court's task more difficult. The Mater's affidavits were similarly lacking in detail on the circumstances in which the 2020 Constitution came to be developed and issued. As a result of this, in reaching its decision on the threshold issue, namely, whether the plaintiff had established a strong case which would probably succeed at trial (i.e. the *Maha Lingham* standard), the court drew certain inferences in relation to factual issues which at trial may well transpire, when full oral evidence has been heard, not to have been well founded.
27. A third issue in dispute between the parties was whether the 2020 Constitution permitted the withdrawal of practising privileges on reasonable notice. The plaintiff argues that this is not a factual dispute, that it was resolved by dint of the court's interpretation of documentation (the 2020 Constitution) and that, as a matter of law, this is less likely to be the subject of a different conclusion after the substantive trial. This may be so. However the very relevance of the 2020 Constitution was, in turn, entirely dependent on the court's conclusion on the core issue of whether the 2020 Constitution governs the parties' legal relationship at all, which will be fully revisited on oral evidence at trial.

28. Relying upon *Glaxo Group Ltd*, the plaintiff submits that this court's decision to grant him an interlocutory injunction turned on the fourth issue in dispute, i.e. the court's assessment of the balance of convenience and in particular the likelihood of irreparable reputational damage, which matters will not be revisited at the substantive trial. I do not accept that this was the crucial issue on which the interlocutory judgment turned. Although, of course, the balance of convenience was relevant, the determinative issue in the decision to grant the interlocutory injunction was the court's determination in relation to the applicability of the 2020 Constitution.

**Decision on costs**

29. In this case, the core issue in dispute between the parties - the applicability of the 2020 Constitution - is largely a factual one and its (provisional) resolution in favour of the plaintiff was a highly material factor bearing on the outcome of the interlocutory injunction. This matter will be the subject of oral evidence and further documentary evidence before the trial court "resulting in a definitive ruling as to where the true facts lie". I am therefore satisfied that this is a case in which a different picture may emerge at trial, particularly in relation to this core issue.
30. However, the question for this court is not whether or not the trial court will be in a better position to determine the issue of the costs of the interlocutory application, but rather whether this court is incapable of justly determining that issue. I am satisfied that I can justly adjudicate upon the costs of the interlocutory application.
31. For the reasons outlined above, I cannot rule out the possibility that the plaintiff may not succeed at trial, either on the core issue, or at all. I have therefore concluded that it would not be just, based solely upon the court's present understanding of the factual matrix, to fix the defendants with the costs of the interlocutory application. On the other hand, in the light of the irreparable damage which he would have suffered if interlocutory relief had not been granted, the plaintiff had no option but to seek same and was successful in this regard. It would therefore not be just that the plaintiff should ever be exposed to paying the defendant's costs of the interlocutory application.
32. In all the circumstances, I have concluded that the risk of injustice to either party will be minimised by making no order as to the defendant's costs of the interlocutory application and by ordering that the plaintiffs costs of the interlocutory application are treated as costs in the cause.

This case will be put in for mention on Friday 13th May 2022 at 11 am to deal with the costs of the supplemental hearing.