[2020] IEHC 456

THE HIGH COURT

[2020 / 5470 P.]

BETWEEN

MARK CAHILL

PLAINTIFF

V.

BEACON HOSPITAL SANDYFORD LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Robert Eagar delivered on the 17th of August, 2020

1. The plaintiff in this case is seeking in effect an order restraining the defendant, its servants and agents from continuing the summary suspension of the plaintiff's theatre facilities at the hospital which was imposed with immediate effect from the 23rd of June 2020.

2. The notice of motion is dated the 30th July 2020, and the affidavit of the plaintiff is dated the 30th July 2020. The affidavit of Michael Cullen, the Chief Executive Officer of the defendant, was sworn on the 4th August 2020. This matter came before the court on the 5th August 2020.

3. Clearly, if this matter comes to trial it will be a substantial case and the issues of conflict which appear to exist in the affidavits will have to be the subject matter of cross – examination.

4. The court in this regard can only deal with the application in the Notice of Motion and has the bare facts of the affidavits of the plaintiff and the Chief Executive Officer of the defendant, in which there are substantial disagreements.

5. The plaintiff is a Consultant Ophthalmologist and Vitreoretinal Surgeon with a special interest in retinal diseases. He conducts practice from the Royal Victoria Eye and Ear Hospital and the Beacon Hospital. He also conducts a small practice from the Blackrock Clinic.

6. The plaintiff is also the co – owner of a private clinic which he operates through a limited company. This clinic is a multidisciplinary private eye clinic which specialises in the areas of macular degeneration, medical retina and vitro – retinal surgery and diabetic eye disease. He said that all surgical and general anaesthetic treatments that are required to be carried out are carried out in one of the three hospitals in which he practices.

7. He says at para. 6 in his affidavit, that he is seeking injunctive relief restraining the defendant from continuing a suspension of his theatre facilities in the Beacon Hospital which was imposed by the defendant's Chief Executive Officer (CEO) on the 23rd June 2020 with immediate effect. He says that he has at present 96 patients who require cataract surgery and/or eye injection treatment under sedation or general anaesthetic. He then refers to the Bye – laws, Rules and Regulations of Medical Staff dated April 2018 (The Bye – laws). The court will revert to those in due course.

8. It was agreed by both the plaintiff and the defendant that there is no written contract in relation to the employment of the plaintiff with the defendant, and it appeared generally accepted that the Bye – laws governed the regulations in relation to the employment and appointment of the plaintiff with the defendant hospital.

The relevant extracts from the Bye laws

9. The preamble to the Bye – laws, Rules and Regulations of Medical Staff sets out as follows: -

- Beacon Hospital Sandyford Limited is an independent hospital located in Sandyford Dublin 18 organised under the laws of the Republic of Ireland.

- Its purpose is to provide patient care in an acute setting (this Court's emphasis).

- Its vision is to be a beacon of excellence in Irish healthcare and to be the preferred healthcare provider to the community it serves.

- The mission is to provide exceptional patient care in an environment where quality, respect, caring and compassion are at the centre of all we do.

- It is recognised that the medical staff are responsible to their patients, the *Medical Board, the hospital Board of Directors and the Hospital Chief Governance Committee for the quality of medical care performed in the Beacon Hospital* (this Court's *emphasis*).

- *Therefore, the consultants who practice in the Beacon Hospital hereby organise themselves in compliance with these Bye – laws* (this Court's *emphasis*).

10. Section 3 of the Bye laws provides, inter alia, as follows: -

> *"Continued membership of Beacon Hospital medical staff is contingent on continuously meeting the requirements, qualifications and responsibilities set out in these Bye laws and at the sole discretion of the CEO (this Court's emphasis).*
>
> *All consultants who join Beacon Hospital medical staff will agree to abide by these Bye laws in order to enjoy Beacon Hospital privileges".*

Section 4 deals with Appointment, Reappointment, Credentialing and Re – Credentialing to the Medical Staff.

> *"Appointment to the Medical Staff is a privilege which shall be extended only professionally competent individuals who continuously meet the qualifications, standards and requirements set for and approved by the Beacon Hospital Medical Board.*
>
> *The granting of privileges does not constitute an offer of employment and the Consultant does not become an employee of the hospital.*

In most cases, members of the Beacon Hospital Medical Staff act as independent, self – employed practitioners and the granting of privileges will be decided at the discretion of the CEO."

11. Section 4.5 entitled "Responsibilities of Initial and Continued Membership of Beacon Hospital Medical Staff" provides: -

"As a condition of consideration for initial appointment or reappointment and as a condition of the continued appointment, if granted, every applicant and appointee shall specifically agree to the following: -

(a) Pledge to provide appropriate continuous care, treatment and services and supervision of all patients in the hospital for whom the individual has responsibility. "

12. Section 5 deals with clinical privileges. The court is of the view that it is quite clear that the plaintiff held clinical privileges up to the decision of the Government to take over the private hospitals in the National interest due to the Covid – 19 pandemic.

13. Section 6 deals with review of medical staff member conduct. It provides the following: -

"6.1 Basis for review: -

The procedures provided in this section will be invoked whenever, it appears that the activities or professional conduct of any member of the medical staff: -

(a) Compromises or may compromise the safety, best interests, quality of care, treatment or services of a patient or the safety or best interests of an employee or visitor.

(b) Presents a question regarding the competence, character, judgment, ethics, stability of personality, including the ability to work cooperatively with others in the provision of safe patient care, treatment and services, adequate physical and mental health.

(c) Violates these medical staff Bye laws, rules and regulations, the requirement of clinical services, Beacon Hospital policies, including the Dignity at Work Policy and the Code of Conduct or constitutes conduct that is reasonably probable of being disruptive to hospital operations.

6.2.A When the CEO, Medical Director, or Department Chair is concerned that the conduct of medical staff raises questions under Section 6.1 above, or that a medical staff member may have failed to comply with any of the terms of his or her obligations as outlined in these Bye laws, the CEO will consult with the Department Chair or Medical Director at the earliest opportunity with a view to determining the most appropriate action. The Department Chair and/or CEO will notify the member in writing of the reasons for such concerns and inform him or her that any response

that the Consultant may wish to make in relation to the matter must be submitted within 14 days.

6.3 Investigation:

The Department Chair and/or Medical Director may conduct any investigation deemed necessary or may assign this task to an appropriately qualified individual(s) or to an ad hoc committee of the Medical Board.

(e) If, having investigated the matter, and considered the response the Medical Staff Member has made, the Department Chair and Medical Director determine that the concern is unfounded, this will be communicated to the Medical Staff Member, and the CEO in writing.

(f) If the determination is made that the concern was justified, this will be communicated to the Medical Staff Member and the CEO in writing along with whatever action is to be taken as a result of his or her non – compliance.

(g) Among the proposed corrective action could include suspension of clinical privileges.

6.4 Complaints and concerns:

Complaints or concerns may be considered by the CEO if it is made by the patient or guardian, by a member of his or her family, a member of the hospital staff, another member of Beacon Hospital staff or by statutory authority. Where in the opinion of the CEO, Medical Director and/or Department Chair that by reason of the alleged conduct of a Consultant there may be an immediate and serious risk to the safety of patients or staff or any of the privileges may be immediately suspended.

Section 6.6 – Summary suspension: -

The CEO, Medical Director or Chair of Department to which the affected Medical Staff Member practices, is empowered to restrict or suspend summarily without the benefit of a hearing or personal appearance, any or all of the privileges of a Member of Medical Staff if there is cause to believe that the Member of Medical Staff's conduct requires the immediate action to be taken to protect the life of any patient or to reduce the likelihood of imminent danger to the health or safety of any individual".

14. The plaintiff challenges the defendant's summary suspension of his theatre facilities on the grounds that it is in breach of the Bye laws, Rules and Regulations of the Medical Staff.

Some background facts

15. The affidavit of Michael Cullen indicated that the plaintiff had been a Consultant Ophthalmologist in the hospital since it opened in 2006. It also confirms that the plaintiff has a public contract with the Royal Victoria Eye and Ear Hospital where he practices both

publicly and privately as well as his private practices in the Beacon and in the Blackrock Clinic.

16. He set out that the plaintiff's practice within the hospital ordinarily falls into two different broad categories of treatment. He sees up to 225 patients every month, approximately 55 per week, on a Monday afternoon in the Satellite Day Unit (SDU) where he would give routine eye injections to people who require them on a regular basis. Typically, these are elderly patients who attend for injection treatment approximately every month to prevent loss of vision. For this procedure, the hospital receives €1,050 from the Health Insurers, (€871 of which for the drug Lucentis which is injected into the eye). The remaining €179 balance is paid towards the hospital's administrative overheads in booking patients, dealing with insurance companies and the registration of patient and nursing care on the day of the procedure. The plaintiff invoices the insurance company for his professional fee which he understands to be in the region of €120 per patient.

17. Separately, the plaintiff operates in the hospital theatres on Wednesday mornings. These tend to be more complex cases where the patient requires to be put under general anaesthetic. Typically, he would operate on approximately 33 patients, on average, per month in theatre.

Covid – 19 Term

18. On the 30th March 2020, and in the face of the Covid – 19 crisis, the hospital, along with all other Private Hospitals signed an agreement with the Health Service Executive (HSE) whereby the HSE assumed control in effect of all privately run hospitals for the period beginning the 30th March 2020 and ending at midnight on the 30th June 2020. During this period, all capacity in the hospital was to be treated as public, with all patients, both public and privately insured, to be treated as public patients. In broad terms this meant that all patients who attended the hospital during this period for whatever treatment was required would be regarded as public patients and therefore in general no fees could be or would be chargeable. Mr. Cullen comments that consultants who already had public contracts such as the plaintiff were no longer permitted to charge for carrying out their private work as for the duration of the Covid – 19 term because all patients were to be treated as public patients. This service was to be covered by the consultants' existing public contract salary.

19. Arising from this agreement with the HSE, Mr Cullen held an information meeting for all consultants in the hospital conference room at 6 p.m. on the 31st March 2020. 80 consultants attended and another 76 attended remotely via video link. Mr. Cullen says that the plaintiff attended this meeting. During this meeting, he explained the following discussions with the HSE and that the hospital's management felt compelled to join in the national effort to prepare for the possibility of a Covid – 19 surge. All those present at the meeting were informed that work carried out in the hospital during the Covid – 19 term would not be chargeable to patients or insurance companies by either the hospital or the consultant. To those consultants with public contracts, including the plaintiff, he advised that they could continue to look after their patients in the hospital as *continuity of care was the hospital's greatest priority* (this Court's *emphasis*). They were made aware that

they could not charge for providing care to those private patients until the arrangement expired on the 30th June 2020, assuming the period would not be extended.

20. Mr. Cullen's affidavit states that it was made clear to the plaintiff and others that they could continue to treat their private patients within the hospital, and that the cost of all such treatments would be covered under the terms of the above continuity of care arrangement between the hospital, the HSE and the Government. This arrangement was to ensure the continuity of patient care at no additional expense to the patient. He further stated that a number of ophthalmologists continued to work through the Covid – 19 term with little or no reduction in their operating numbers. Others did a reduced number of lists. The plaintiff was the only ophthalmologist to have ceased all activity in the hospital at the start of the Covid – 19 term.

21. The plaintiff in his affidavit briefly referred to the Covid – 19 lockdown and containment measures and the dedication of private hospitals to provide medical care for Covid – 19 patients and the anticipated surge in Covid – 19 sickness. He says that it was necessary for him to make alternative arrangements to provide the necessary eye care treatment and injections to patients because of their fear of contracting Covid – 19.

22. The plaintiff does not appear to have communicated in any way with the CEO of the hospital to indicate what he proposed to do and in effect withdrew from the hospital by requesting his patients to attend his private clinic "Progressive Vision".

23. The plaintiff also indicated that the urgent and time dependent eye injections which were required by his patients were ultimately provided in his private clinic which is located in the vicinity of the hospital. The alternative venue was not only welcome by his patients but it was also approved by his patients' healthcare insurers who provided healthcare cover in respect of all eye treatments. Thus, ensuring that his patients did not suffer any financial detriment. However, in the affidavit of the Chief Executive Officer, he noted that the plaintiff's secretary informed the hospital that all his operations scheduled to take place in the hospital on Wednesday the 1st April 2020 were cancelled as he was not in a position to operate as the hospital was now a public hospital. All of his theatre and SDU lists were cancelled at his request.

24. Mr. Cullen, the CEO, further stated that on the 22nd April 2020 the hospital received a complaint concerning a longstanding and elderly patient of the plaintiff and the hospital. The complaint stated that the patient in question was informed that her eye injection treatment could not be carried out in the hospital and that it could only be carried out in the plaintiff's consulting rooms. According to that complaint the plaintiff was told that the cost of the injection (being €1,400) would no longer be covered by her insurer. The complaint stated that: -

> *"The situation has caused the patient extreme duress and anxiety as a consequence of not having the injection as scheduled could lead to the degeneration of the disease and eventual blindness".*

25. This complaint was forwarded to the hospital by the HSE, and in its correspondence concerning the complaint it was indicated by the HSE that the treatment in question is being funded by the HSE under the Covid – 19 continuity of care provisions. There was also a verbal complaint which was made directly to Brian Fitzgerald, Deputy CEO of the hospital, on the 15th April 2020 concerning another patient who had been charged €1,400 for eye injection treatments in the plaintiff's private rooms.

26. He also mentions that in addition to the above, in or around the middle of April 2020, the hospital was contacted by senior personnel within the two largest health insurance providers who each had been contacted by insured members with concerns about the plaintiff's practice of charging them directly for injections they had received in his private clinic. Those senior individuals within the health insurance companies raised concerns regarding the attempt to charge patients for eye injections in the hospital in circumstances where such cases were to be administered free of charge under the terms of the HSE Covid – 19 arrangements. They expressed significant annoyance and indicated they were coming under pressure from the affected insured members to pay for those procedures. In or around late April, those two insurance companies agreed ultimately to meet the cost of those treatments on the basis it could no longer leave those insured members, many of whom were elderly, in a position where they were having to meet the costs of the treatment. Mr. Cullen continued that the substance of these complaints is now the subject of an investigation. He also states that the hospital had been informed that at least some of the plaintiff's patients were contacted by his clinic prior to attending and informed that the procedure would have to be paid for on the day, that they would have to seek a rebate of the treatment costs directly from their own insurer. Mr. Cullen says in his affidavit that such a practice may, if borne out, have represented a deviation from the terms of the HSE Covid – 19 arrangement. Mr. Cullen also avers that the complaints received gave rise to potentially significant clinical concerns in circumstances where the hospital has no oversight whatsoever in respect of the administration of those injections, patient care, health and safety standards and the environment within those procedures are carried out.

27. The plaintiff exhibits a letter from the Director of Human Resources, Mr. Michael Farrell, dated 22nd July 2020, referring to his letter of the 15th July. In that correspondence, the Director of Human Resources indicated that the hospital had decided to conduct an investigation as requested pursuant to the Bye laws, rules and regulations of the Medical Staff.

28. Mr. Farrell said that the investigation was focused on matters arising from the following: -

    (i) Decision making in moving your practice to your rooms;

    (ii) Issues arising from same, including complaints from patients via the HSE;

    (iii) Lack of engagement and communication with the hospital.

    The correspondence ended: -

"The Hospital will be in contact in due course to confirm arrangements for the investigation".

29. Although not specifically referred to, s. 6(4)(d) was not referred to in the letter, it appears to this Court that clearly an investigation had been initiated and clearly the s. 4(d) would be applicable.

30. The earliest relevant correspondence from the plaintiff was the 29th June 2020, directed to Michael Farrell, Director of HR at the Beacon Hospital, in which the plaintiff says he wished to record his position in relation to the decision taken by the CEO on the 23rd June 2020 to suspend his theatre privileges in the Beacon Hospital with immediate effect.

31. He said the first he heard of the suspension of his theatre privileges was on the 23rd of June when Mr. Cullen informed him by email that he was suspending his theatre privileges with immediate effect. In this correspondence he also refers to the Bye laws and suggests that Clause 6 of the Bye laws precludes Mr. Cullen from making any summary decision to suspend theatre privileges and requested that he confirm in writing by no later than Wednesday the 1st July that his purported suspension was withdrawn and his theatre privileges are restored. This was replied to by letter dated 1st July 2020, by Michael Farrell. In that correspondence, Mr. Farrell sets out the background of the HSE effectively taking over privately run hospitals for the period beginning on the 30th March 2020 and ending at midnight on 20th June 2020.

32. He indicates in the correspondence that the plaintiff withdrew his weekly eye injection clinics from the hospital and proceeded to perform them in the plaintiff's private consulting rooms, outside the remit of the hospital, and the patients were not covered by private health insurance nor were they under the care of the HSE.

33. He said that the CEO attempted to speak with the plaintiff regarding this issue over the past couple of months, but to no avail. There was a meeting on Thursday 30th April and the court will revert to that in due course, however, Mr. Farrell says that in the course of the meeting when Mr. Cullen asked how the plaintiff was conducting his business during the pandemic, he stated that it was "*None of [his] business*".

34. Mr. Cullen pointed out that the plaintiff had withdrawn from the hospital without notice or communication, and that only since he has had difficulty in booking theatre facilities that the plaintiff had subsequently engaged in any meaningful way.

35. In his letter dated the 15th July 2020, the plaintiff sets out his reasons for moving his patients: -

    (a) The Hospital was not available to his patients who had informed him that they were not going to attend at the hospital because of their concerns about and fears of contracting Covid – 19.

    (b) The court noted that the plaintiff did not communicate this with the CEO or the Hospital.

He rejects the characterisation of his conduct, the implication being that he sought to take advantage of his patients, many of whom were elderly and vulnerable. He also said that he could confirm that he did not request any of his patients to personally pay or discharge his professional fee for administering the eye injections. In relation to his alleged lack of engagement in the communication, he stated that he received a text from the CEO on the 29th April 2020, following which he arranged to meet him in the coffee shop on the concourse of the Beacon Hospital environs on the 30th April 2020. He stated that Mr. Cullen presented him with a printout of a series of emails relating to a patient and her eye injections which had long since been resolved. Mr. Cullen indicated that the Department of Health were not happy that the injections were being administered in the Progressive Vision eye clinic and implied that in some way he was contravening the HSE rules on private practice. He said he disagreed with every point made by the CEO and he suggested that the CEO was getting more and more agitated.

36. Mr. Cullen stated that he met with the plaintiff at 1:30 p.m. on the 30th April 2020 in the concourse area of the Beacon Court, adjacent to the hospital. The plaintiff was behaving unusually from the outset of the meeting. He informed the plaintiff that he needed to know what the position was in relation to patients who had, prior to the Covid – 19 term, received treatment at the Hospital's SDU which had caused and continued to cause the Hospital significant difficulty. He said he took the decision to instruct Fergal Lawlor, the Commercial Director of the Hospital, to ensure that any attempt by the plaintiff to book a theatre facility within the hospital would have to be made by the plaintiff through his office. The intention behind this direction was to bring some level of meaningful engagement with the plaintiff who had demonstrated complete unwillingness to discuss the subject matter of those complaints received by the Hospital. He said that the plaintiff did not avail of or request SDU or theatre facilities for the entire period of HSE Covid – 19 term. For this three – month period, the plaintiff did not carry out a single surgical procedure or injection in the Hospital.

Observations of the court

37. The court makes the following observations:

(i) The background to this is the unprecedented crisis caused to Ireland owing to the Government decisions to close schools, to close businesses, to restrict movement in an effort to contain the unprecedented damage which was caused to health and economy in Ireland.

(ii) Many people had to leave employment and were in many circumstances able to avail of the Pandemic Relief Schemes.

(iii) On the 30th March 2020, the HSE assumed control in effect of all privately run hospitals for the period beginning on the 30th March 2020 and ending at midnight on the 30th June 2020. All capacity in the hospital was to be treated as public with all patients, both publicly and privately insured, to be treated as public patients.

(iv) The request from the HSE was that the hospital would become a non – Covid – 19 surgical hospital, where all urgent surgical work would be carried out on *non – Covid – 19 patients* (this Court's *emphasis*).

(v) The plaintiff in his affidavit does not really deal with this issue directly. He also failed to indicate that he had a public contract with the Royal Victoria Eye and Ear Hospital.

(vi) It is noted that those Consultants who worked exclusively with private patients were offered a temporary public contract for the Covid – 19 term, to enable them to continue to operate in the private hospital and continue to treat their existing patients.

(vii) It is quite clear that there was no formal contact between the plaintiff and the hospital in relation to his intentions not to operate in the hospital but to treat his private patients in his private clinic.

(viii) The court is concerned in relation to how the hospital can now be managed if the plaintiff was allowed by court order to be entitled to go on as if nothing had happened.

(ix) Complaints had been received by the hospital in relation to the fees sought by the plaintiff, in at least two cases. The court notes that complaints were made by the health insurance companies in relation to what they were being asked to do by the patients of the plaintiff.

(x) The hospital had set up an investigation in relation to these complaints.

38. Whilst the court is not in a position to determine what took place at the meeting on the 30th April 2020 in the concourse area of the Beacon Hospital between the plaintiff and Mr. Cullen, the court is absolutely satisfied that the plaintiff failed to engage properly with the hospital's management in relation to: -

(a) His decision not to use the facilities of the hospital;

(b) Any response which he might have made to the issues which the Chief Executive Officer sought to discuss and set up a dialogue.

39. The court is satisfied that the plaintiff has failed to engage with the hospital for the period of time until he was told that he was no longer entitled to have theatre facilities, having declined to use the facilities at all during the Covid – 19 event.

40. The court will now deal with the jurisprudence in relation to the nature of the reliefs sought in the notice of motion.

Submissions

41. Mr Ó hÓisín, SC made the following submission in relation to the plaintiff's case:

i. It is the plaintiff's case that the defendant had suspended/restricted the plaintiff's privileges in circumstances where he was not entitled to do so.

ii. The circumstances whereby summary suspension is applicable is found in the Byelaws, Rules and Regulations of Medical Staff April 2018, in particular section 6.6 which entitles summary suspension in circumstances where there is cause to believe that the Medical Staff's conduct requires immediate action to be taken to protect the life of any patient or reduce the likelihood of imminent danger to the health or safety of any individual.

iii. Mr Ó hÓisín submitted that the defendant has offered no grounds of entitlement to suspend/restrict the plaintiff's privileges other than to effectively say he possesses an inherent power to do so.

42. Mr Ó hÓisín addresses the fact that the plaintiff has not submitted an affidavit replying to Mr Cullen stating that he would like to respond because there are disagreements but that it is not necessary to respond. It is argued that the defendant has raised a series of events that are irrelevant to an application for an injunction.

43. Furthermore, it is submitted that the plaintiff and his patients will suffer irreparable damage if the injunction is not granted. This damage will be cause on the basis that the plaintiff has in his care patients which require two type of treatment. Firstly, injections and secondly treatment for cataracts which require theatre facilities. It is submitted that Mr Cahill cannot cater for patients that require cataract treatment as he requires access to the theatre in order to carry out the procedure. Therefore, his inability to carry out those procedures due to the suspension/restriction will cause irreparable damage to his name and to his patients' eye health. Therefore, damages are an inadequate remedy. Ultimately, in turn, the balance of convenience favours that the injunction be granted.

44. Mr Connaughton SC, for the defendant made the following points in submission:

i. There is a lack of candour on part of the plaintiff bringing this application and it is inexcusable. It is argued that Mr Cahill failed to set out the factual background. In regard to averments made in Mr Cullen's affidavit, Mr Connaughton SC states that Mr Cahill provides an explanation post the event in response to those averments. Mr Connaughton invokes the maxims of equity that are applicable to the plaintiff's conduct which are the clean hands maxim on grounds that the plaintiff has been less than forthright.

ii. Secondly, Mr Connaughton outlines that there are two elements to the contract. The first element is that the plaintiff treat outpatients in the Satellite Day Unit in which he treats typically 225 patients per month. The second element is the privileges such as access to theatre in order to operate on patients that require procedures under general anaesthetic in which he operates typically on 33 patients per month. In this regard, the defendant submitted that the plaintiff is seeking to invoke one essential part of the contract while repudiating the other essential

element to the contract. It is submitted that the status quo ante is that the plaintiff elected of his own volition to withdraw from his theatre facilities effective from 1st April 2020 because the hospital was then public. Mr Connaughton asserts that one who comes to equity must do equity and the plaintiff clearly does not complete his own obligations but seeks to invoke an instrument he is expressly in breach of. He is failing to discharge his mutual obligation under the contract.

45. It is submitted by the defendant that there is no damage to the plaintiff's reputation. It is argued that there is not a shred of evidence to support this claim.

46. Additionally, there are generalised averments that there are patients that require treatment that is time sensitive and therefore Mr Cahill's patients will suffer irreparable damage. Mr Connaughton asserts that there is no suggestion that the plaintiff cannot locate other venues in the meantime to administer injections. It is suggested that the plaintiff located other venues during the period he was not operating in the hospital. Either the former or he ceased treating those patients or referred them to other ophthalmologists and there is no suggestion of either of those in the plaintiff's affidavit.

47. Furthermore, Mr Connaughton claims that all the defendant seeks is engagement with the plaintiff and suggests that it could have been resolved had there been engagement but every effort on behalf of the defendant was to no avail.

48. By way of response, Mr Ó hÓisín submitted that Mr Connaughton effectively aimed to deflect the court away from the central issue in to areas in dispute and has not addressed in any substantial way to indicate the basis or entitlement the defendant had in restricting the plaintiff's privileges.

Jurisprudence

49. The court must first determine whether the interlocutory injunction sought prohibitory or mandatory as the principles to be applied differ to some degree. The court is of the view that the interlocutory injunction sought is mandatory on the grounds that it seeks to refrain the defendant from continuing the summary suspension of the plaintiff's privileges.

50. The principles to be applied have become clearer since the decision of *Lingham v H.S.E* [2005] IEHC 186. Fennelly J. held that

> *"the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of interlocutory injunction where the injunction sought is in effect mandatory… It is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action".*

51. In a similar vein, Denham J. (as she then was) in *Boyhan v Tribunal of Inquiry into the Beef Industry* [1993] 1 IR 210 stated that:

> *"in seeking this exceptional form of relief, a mandatory injunction, it is up to the plaintiffs to establish a strong and clear case – so that the court can feel a degree of assurance that at a trial of the action a similar injunction would be granted"*

52. Similarly, in *Charleton v Scriven* [2019] IESC 28, Clarke C.J stated that it is now well-established that an application for a certain category of injunctive relief:

> *"require the plaintiff to establish a higher degree of likelihood of success than the 'fair issue to be tried' standard applied in most interlocutory injunction applications."*

53. In *Okunade v Minister for Justice, Equality & Law Reform* [2012] IESC 49, Clarke J. (as he then was) discussed the proper basis for the grant of an interlocutory injunction and the standard which ought to apply. Overall, Clarke J. held that the court must take the path which carries the least risk of injustice. To that effect, he stated at para. 9.5:

> *"It seems to me that, recognising that a risk of injustice is an inevitability in those circumstances, the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice."*

54. Clarke C.J. stated that the *Maha Lingham* standard applied by Fennelly J. does not run at a cross-purpose to the principle to minimise the risk of an injustice but falls under its umbrella. At para 9.16 he stated:

> *"That variation from the pure Campus Oil test can be seen as nonetheless still coming within the general principle of attempting to fashion an order which runs the least risk of injustice for if the grant or refusal of an interlocutory order will go a long way towards deciding the case then the risk of an injustice is even greater and the court requires a greater degree of assurance before intervening."*

55. The principles to be applied to a case seeking a mandatory interlocutory injunction as employed in *Lingham* can be listed as follows:

    i. Whether the plaintiff a strong case that is likely to succeed at the hearing of the action;

    ii. Whether damages would be an adequate remedy if the injunction was refused and;

    iii. Whether the balance of convenience favours the granting or refusal of the injunction sought.

56. It is also necessary for the court to take an approach that leads to the least risk to justice to try best avoid the occurrence of irremediable prejudice.

57. Firstly, the court will address whether the plaintiff has established whether he has a strong case. It is not entirely clear what constitutes a strong case. However, it can more easily be determined what a fair case to be tried is and by counterposing the higher threshold with that of a fair case may lead to an appropriate conclusion as to what a strong case is in the appropriate context. This appears to be Clarke J's (as he then was) guidance on what a strong case is in his judgment in *Okunade* where he states at para 9.18:

"categories of cases such as those referred to in Maha Lingam v. Health Service Executive [2005] IESC 89, (2006) 17 E.L.R. 137 or Allied Irish Banks plc v. Diamond [2011] IEHC 505, [2012] 3 I.R. 549, that a higher standard than "fair issue to be tried" be established… in those cases where a higher threshold may need to be met that requirement does not involve the court in a detailed analysis of the facts or complex questions of law. Rather, it obliges the plaintiff to put forward, in a straightforward way, a case which meets the higher threshold."

58. Therefore, it is required of the plaintiff to establish in a straightforward way, a case that meets the higher threshold.

59. In terms of the balance of convenience, *Merck Sharpe & Dohme v Clonmel Healthcare Ltd* [2019] IESC 65 provides guidance particularly in relation to the adequacy of damages. Helpfully, it was identified that the test is to be applied with a degree of flexibility. O'Donnell J. held that the court should preferably consider the adequacy of damages as part of the balance of convenience and provided a useful explanation at paragraph 64 which was neatly summarised by Biehler, Interlocutory injunctions - *recent guidance from the Supreme Court* I.L.T. 2020, 38(13), 190-195 as follows:

- *"The first and main issue in considering the balance of convenience is the adequacy of damages;*
- *If it is considered that damages will be an adequate remedy and the defendant has assets, the balance of convenience will almost inevitably favour rejecting the application for the interlocutory injunction.*
- *If it appears that damages will not be an adequate remedy, the court will consider further where the balance of convenience lies.*
- *In so doing, the court must weigh the needs of one party against the other. The factors which will be relevant will vary from case to case and may include seeking to preserve the status quo in terms of the parties' rights."*

60. Furthermore, in the recent decision by Irvine J. (as she then was) in *Taite v Beades* [2019] IESC 92 stated at paragraph 31 that *"[a]s an interlocutory injunction is merely a stepping stone towards a trial, a court must ensure that such relief is not, in practice, treated as a means of obtaining summary judgment against the defendant*".

61. The court is not required to analyse the questions of fact or law that will ultimately be teased out at trial. It merely obliges the plaintiff to assure the court by establishing the he has a strong, clear case that is likely to succeed.

62. Firstly, the court notes that there is a fair bona fide or serious question to be tried in this case. The plaintiff's argument that the bye laws do not entitle the CEO to summarily suspend the defendant without due regard to fair procedures satisfies the first leg of the pure *Campus Oil*. However, the plaintiff is required to satisfy the *Lingham* standard which is not as certainly satisfied when viewed through the prism of the contextual background

to the case. It would appear that the plaintiff failed or omitted to engage at every effort of the CEO to discuss the conduct of the plaintiff (which is now the subject matter of an inquiry). The plaintiff's conduct and the lack of candour is a factor considered with particular regard to his withdrawing from the SDU without notice, cancelling his appointments from 1st April 2020 and his lack of meaningful engagement with the defendant which took place on the 30th April 2020. It does also appear from the bye laws, particularly 6.1 that the CEO has strong powers over the Medical Staff. The question of whether the defendant acted outside his powers by restricting the plaintiff's privileges is an issue to be addressed by the trial judge and not by this court. In weighing up the factors, the court is of the view that the plaintiff has not persuaded the court that there is a strong, clear case which is likely to succeed at trial.

63. Secondly, the court is of the view that granting the injunction would not minimise the risk to injustice as a permanent injunction will be sought at trial. The court is of the view that granting the injunction could in essence, result in the plaintiff obtaining a summary judgement.

64. Additionally, the court is of the view that the plaintiff has not persuaded the court that there is an urgency to his patients care as he has not provided a clear and adequate explanation in regard to how he has cared for patients that require urgent and time sensitive treatment. Further, the court is not convinced that there would be irreparable damage to the plaintiff as no evidence has been put forward to substantiate that claim. Therefore, albeit unnecessary for the court to conclude so, damages would be an adequate remedy at the conclusion of the trial should the plaintiff be successful.

Conclusion

65. There are so many disputes within the affidavits that the court would fall short to say that there is a degree of assurance that the plaintiff will succeed at trial. Therefore, the plaintiff has not established the higher threshold. Additionally, the court is of the view that granting an injunction would not minimise the risk to injustice. In all the circumstances observed and outlined above the court will refuse the reliefs sought.