

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from
<input checked="" type="checkbox"/> The Court of Appeal <input type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

Court of Appeal Record No: 575/2014

High Court Record No: 2012/1101P

CMC Medical Operations Limited (In Liquidation) trading as Cork Medical Centre	V	The Voluntary Health Insurance Board
Date of filing	6 May 2015	
Name(s) of Applicant(s)/ Appellant(s)	The Voluntary Health Insurance Board	
Solicitors for Applicant(s)/ Appellant(s)	Mr Brian Quigley and Ms Helen O'Connor, McCann FitzGerald, Solicitors, Riverside One, Sir John Rogerson's Quay, Dublin 2.	
Name of Respondent(s)	CMC Medical Operations Limited (In Liquidation) trading as Cork Medical Centre	
Respondent's solicitors	Mr Joe O'Malley and Ms Laura Fannin, Hayes Solicitors, Lavery House, Earlsfort Terrace, Dublin 2.	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Names of Judges	Mr. Justice Peart, Mr. Justice Hogan, Mr. Justice Mahon
Date of order/ Judgment	Judgment delivered on 27 March 2015 allowing the plaintiff's appeal against the decision of the High Court (Mr. Justice Cooke) dated 12 June 2012 wherein he made an order pursuant to section 390 of the Companies Act 1963 directing the plaintiff to provide security for the defendant's costs. Order of the Court of Appeal perfected on 8 April 2015

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	The Voluntary Health Insurance Board
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Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input checked="" type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Solicitor: Mr Brian Quigley and Ms Helen O'Connor			
Name of firm	McCann FitzGerald Solicitors		
Email:	Brian.Quigley@mccannfitzgerald.ie / Helen.OConnor@mccannfitzgerald.ie		
Address	Riverside One Sir John Rogerson's Quay Dublin 2	Telephone no.	01-607 1471 / 01-511 1525
		Document Exchange no.	DX 31 Dublin
Postcode	Dublin 2	Ref.	BPQ/HZC

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
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Postcode	Dublin 7		

Counsel			
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Postcode	Dublin 7		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	CMC Medical Operations Limited (In Liquidation) trading as Cork Medical Centre
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Original status

X	Plaintiff
	Applicant
	Prosecutor
	Petitioner

	Defendant
	Respondent
	Notice Party

Solicitor: Mr Joe O'Malley and Ms Laura Fannin	
Name of firm	Hayes Solicitors

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How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

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Counsel			
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		Document Exchange no.	813246
Postcode	Dublin 7		

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

Please set out below:

1. Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned
2. (a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)

(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute
3. The relevant orders and findings made in the High Court and/or in the Court of Appeal

I. Scope of the Appeal

1. The Appellant seeks to appeal from the entirety of the decision of the Court of Appeal allowing the Plaintiff/Respondent's appeal against the decision of the High Court (Mr. Justice Cooke) dated 12 June 2012 wherein he made an order pursuant to section 390 of the Companies Act 1963 directing the plaintiff to provide security for the defendant's costs.
2. In brief, these proceedings were brought on the instructions of the liquidator of the plaintiff company, Mr. Kieran Wallace of KPMG. The plaintiff constructed a private hospital in Cork, which opened in September 2010. Before the hospital opened, the plaintiff sought confirmation from the defendant that its members would be covered for treatment received at the hospital. Before the hospital was constructed, the defendant had told the plaintiff that the defendant and its members did not need the services which the hospital was intended to provide and that the defendant was, therefore, very unlikely to provide insurance cover for its members in respect of the proposed hospital's services. The plaintiff proceeded to develop and opened the hospital. The plaintiff was significantly loss making and it subsequently ceased operating and was wound up by its creditors, with Mr. Wallace being appointed liquidator on 11 May 2011.
3. The proceedings were commenced on 3 February 2012 and were admitted into the Competition Division of the High Court. The essential cause of action is a claim that the defendant as a dominant undertaking in the relevant market has infringed both section 5 of the Competition Act 2002 (as amended) and Article 102 TFEU by abusively refusing to approve the plaintiff's hospital as one in which patients holding insurance cover as members of the defendant might seek treatment or to which they might be referred for treatment consultants. The plaintiff claims damages for the losses it claims it has sustained as a result of those infringements and which, it is alleged, rendered it insolvent.
4. By notice of motion dated 14 March 2012, the defendant sought, among other things, an order pursuant to section 390 of the Companies Act 1963 directing the plaintiff to provide sufficient security for its costs of the proceedings if it was successful in its defence.
5. It was not disputed in the High Court that the plaintiff would be unable to pay the defendant's costs if it succeeded in its defence or that the defendant had a *prima facie* defence. The plaintiff resisted the making of an order on discretionary grounds, asserting as a special circumstance, *viz.* that its impecuniosity had been caused by the defendant's wrongdoing. The High Court held that the plaintiff had failed to establish a *prima facie* causal connection between the assumed actionable wrongdoing on the

part of the defendant and the inability of the plaintiff to meet the defendant's costs. The High Court found there was a clear evidential deficit, which failure undermined the existence of a *prima facie* case that the defendant's actions had been the sole or principal cause of the plaintiff's impecuniosity.

II. Factual Chronology as Relevant to Section 5

6. Not relevant.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

The Public Importance of the Case

1. The determination of the security for costs application in this case has consequences which extend well beyond the scope of the current appeal.
2. While the Court of Appeal (per the judgment of Mahon J) purported to confirm and apply the test articulated by Clarke J. in the High Court in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7, to the special circumstance relied upon by the plaintiff, the manner in which the Court of Appeal approached the evidence adduced on the application in respect of the asserted special circumstances, and the observations made by Hogan J. in his separate judgment on the application, creates uncertainty as to the application of the *Connaughton Road* test and as to the nature of the evidence required to be adduced by a plaintiff to establish the required *prima facie* causal connection between its inability to pay the costs of the successful defendant (admitted or established) and the actionable wrong as asserted by that plaintiff against the defendant.
3. The judgment of the Court of Appeal (as delivered by Mahon J.) is notable for the absence of any review of the evidence before the Court as to the plaintiff's behaviour in its application, at the development stage of the hospital and prior to opening, for approval by the defendant. In this context, the evidence demonstrated that the plaintiff had proceeded to develop a new hospital on the assumption that it would, following this development, compel or prevail upon the defendant to provide cover regardless of the fact that the defendant had clearly explained that its members did not have any actual need for the services to be provided by the new hospital and of the fact that the extension of cover would create an unacceptable risk of loss to the defendant by reason of the unneeded and excessive capacity thereby created. In the light of this evidence, the learned High Court Judge concluded that it was quite probable or more likely than not that the plaintiff's own decision/behaviour had caused its loss. He went on to find that the plaintiff had not established a *prima facie* case on the evidence that the hospital was obliged to close because the defendant had refused to grant approval. The failure by the Court of Appeal to engage in a like analysis of the evidence as to the underlying cause of the plaintiff's financial difficulties demonstrates a clear departure from the *Connaughton Road* test or a

serious actual dilution of the requirement that a plaintiff show that the alleged wrongdoing was the proximate cause of the inability to meet the defendant's costs, meaning that the plaintiff's incapacity is due *solely or principally* to the actions complained of by the plaintiff as per *Framus Ltd & Ors v. CRH plc & Ors* [2003] ILRM 462 (Herbert J. at p. 470) approved by the Supreme Court on appeal [2004] 2 IR 20 (Murray J. at p. 43) and/or the requirement that a plaintiff establish a *prima facie* case on the evidence of the requisite causal connection between the asserted wrongdoing and a practical consequence for the plaintiff as per *Connaughton Road*.

4. Further, the judgment of the Court of Appeal treats as sufficient for the purposes of showing the required causal connection between the asserted wrongdoing and the plaintiff's inability to pay costs, an assumed but unspecified increase in the income of the plaintiff but for the asserted wrongdoing. The Court of Appeal articulated this approach as "considering if there was this *causal connection* with a wider lens." [Paragraph 17 of the judgment delivered by Mahon J.] Such an approach eschews the established approach of assessing the evidence adduced by the plaintiff to ascertain whether, by means other than assertion or assumed fact, it has established (i) a practical consequence resulting in a loss which is recoverable and (ii) that the loss is enough to account for the difference between the plaintiff's ability to meet an order for the defendant's costs and not being so able.
5. The Court of Appeal readily accepted the bald assertion relied upon by the plaintiff that, as the hospital ceased to trade, it must have been because of the defendant's refusal to cover. The Court of Appeal proceeded in this way notwithstanding the failure of the plaintiff to furnish by way of evidence any company accounts, any statement of its working capital or funding arrangements (taking account among other things of what if any actual entitlement the plaintiff had to cover, or of how soon this might be forthcoming if all the necessary information was furnished to the defendant). It did so despite also the absence of evidence from any director of the plaintiff as to these matters, or in response to any of the evidence put forward by the defendant. The failure of the Court of Appeal to require the plaintiff to prove, *prima facie*, that the conduct complained of was the proximate cause of its impecuniosity represents a significant error in approach. The test apparently applied by the Court of Appeal undermines the jurisdiction and object of section 390 of the Companies Act 1963; gives rise to uncertainty in the law; and gives rise to an apprehension of injustice/unfairness in the determination of the application for security for costs.

The Interests of Justice

6. It would also be in the interests of justice for the case to be heard by the Supreme Court in circumstances where doubt and uncertainty has been created by the judgments of the Court of Appeal on the application as to both the ambit and application of the *Connaughton Road* test.
7. To the extent that the decision of the Court of Appeal was influenced by a concern to balance the interests identified at paragraph 26 of the judgment of Mahon J and in the separate judgment of Hogan J., namely, the protection of defendants against the potential abuse by plaintiff companies of the privilege of limited liability (the recognised object of section 390 of the Companies Act 1963) on the one hand and, on the other, the exercise of the Court's discretion in manner which does not negate the constitutional right of access to the courts, it is respectfully submitted that it involved a significant departure from long established jurisprudence (see *Lismore Homes Ltd (in Receivership) v. Bank of Ireland Finance Ltd.* [1999] 1 IR 501), a

misunderstanding and/or misapplication of the *Connaughton Road* test, and an unfair and inappropriate weighting being afforded to the plaintiff's constitutional right of access to the courts.

8. The Appellant is anxious to avoid what would undoubtedly be extremely expensive, prolonged and difficult proceedings in the context of a full hearing before the High Court, with the possibility of further appeals, against a background where it is clear that the plaintiff will never be in a position to make good on the costs of the defendant if it succeeds in its defence and despite the fact that it is conceded that the defendant has a *prima facie* defence to the claim. The very concern identified by Hogan J as potentially causing injustice (adopting the words of Kingsmill Moore J in *Thalle v. Soares* [1957] IR 182), arises here and has not been properly recognised by the Court of Appeal *viz.* that a limited company could use the shield of limited liability in such a manner to force other litigants either to compromise on unfavourable terms or else face the threat of expensive litigation whose costs will be irrecoverable.
9. In the premises, it is respectfully submitted that the interests of justice weigh heavily in favour of the grant of leave to appeal to the Supreme Court against the determination of the Court of Appeal.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2, 3, etc) concisely:

1. **the specific ground(s) of appeal and the error(s) of law related to each numbered ground**
2. **the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom**
3. **The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely**
4. **The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal**

I. The Specific Grounds and Errors of Law

The Court of Appeal erred as follows:

- (1) In concluding that the plaintiff had established the existence of a special circumstance warranting the refusal of an order for security for costs in favour of the defendant pursuant to section 390 of the Companies Act 1963, namely the existence of a *prima facie* causal connection between the plaintiff's admitted insolvency and the assumed actionable wrong on the part of the defendant based only on a general or mere assertion, contrary to the decision of the Supreme Court in *Framus Ltd & Ors v CRH plc & Ors* [2004] 2 IR 20 at p. 43.
- (2) In misapplying the test articulated by Clarke J. in the High Court in *Connaughton Road Construction Limited v. Laing O'Rourke Ireland Limited* [2009] IEHC 7, to the special circumstance as relied upon by the plaintiff;

- (3) In failing to have any or any proper regard to the plaintiff's failure to adduce evidence to
 - (a) support the existence of a *prima facie* case as to a causal connection between its inability to pay the costs of the defendant and the actionable wrong as asserted by that plaintiff against the defendant (as opposed to any other cause) and, in particular as to (i) a practical consequence to the plaintiff as a result of the assumed actionable wrong resulting in a specified loss; and (ii) as to that loss making the difference between being able to meet an order as to costs and not being so able, or
 - (b) show that the assumed actionable wrongdoing of the defendant was the proximate cause of the plaintiff's inability to meet the defendant's costs, meaning that the plaintiff's incapacity is due "*solely or principally*" to the actions complained of by the plaintiff as per *Framus Ltd & Ors v. CRH plc & Ors* [2003] ILRM 462 (Herbert J. at p. 470) approved by the Supreme Court on appeal [2004] 2 IR 20 (Murray J. at p. 43);
- (4) In applying a broader and less exacting standard in terms of the evidence necessary to establish the existence of a *prima facie* case that the plaintiff's impecuniosity was the result of the defendant's wrongdoing;
- (5) In failing to consider or analyse the evidence that the plaintiff's impecuniosity and/or inability to pay the defendant's costs, had been brought about by its own decision or behaviour in developing a new hospital on the assumption that it would, following this development, compel or prevail upon the defendant to provide cover regardless of what the defendant had expressed was its position;
- (6) In failing to conclude that the evidence adduced by the plaintiff fell significantly short of meeting the test in *Connaughton Road*;
- (7) In affording an unfair and/or inappropriate weighting to the plaintiff's constitutional right of access to the courts;
- (8) In considering that the making of an Order for security for costs as against the plaintiff might be oppressive or otherwise stifle a genuine claim.

II. The Legal Principles Related to Each Numbered Ground and Confirmation as to How Those Legal Principles Apply to the Facts or to the Relevant Inferences Drawn Therefrom

- (9) A proper application of the *Connaughton Road* test and the established jurisprudence of the Court on applications for security for costs under section 390 of the Companies Act 1963, to the evidence adduced on the application, could lead only to an Order affirming the decision of the High Court at first instance;
- (10) Where it is established or conceded that the plaintiff company would be unable to meet the costs of a successful defendant, the onus is on the plaintiff company to establish to the satisfaction of the Court that special circumstances exist which would justify the refusal of an order for security. This is clear, for example, from the judgment of the Supreme Court in *Hidden Ireland Heritage Holidays Limited v. Indigo Services Limited* [2005] 2 IR 115, *per* Fennelly J (at para. [27]);
- (11) Section 390 falls to be applied in accordance with the principles that were approved by the Supreme Court in *Usk and District Residents Association Limited v. The Environmental Protection Agency* [2006] 1 ILRM 363, and applied by

Clarke J. in *Connaughton Road*;

- (12) The *prima facie* threshold of establishing a causal connection between a plaintiff's impecuniosity and the wrongdoing alleged against a defendant is not met by a general or bald assertion. A *prima facie* case must be made out. See *Jack O'Toole Limited v. MacEoin Kelly Associates* [1986] IR 277, *per* Finlay CJ (at pp. 283/4) and *Connaughton Road*;
- (13) A plaintiff must show that the alleged wrongdoing was the proximate cause of the inability to meet the defendant's costs. See *Framus Ltd v. CRH* [2003] ILRM 462 (Herbert J. at p. 470) approved by the Supreme Court on appeal [2004] 2 IR 20 (Murray J. at p. 43);
- (14) Absent a *prima facie* causal connection having been made out by a plaintiff, a proper application of section 390 and the established principles requires the making of an Order for security as a matter of the Court's discretion.
- (15) The *Connaughton Road* test properly balances the object of section 390 of the Companies Act 1963 and the constitutional right of access to the courts of limited companies.

III. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely.

- (16) The Constitution, Article 34.1 and Article 40.6.1.iii
- (17) The Companies Act 1963, section 390

IV. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

There was no list of issues of law before the Court of Appeal

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Paul Gallagher SC

David Barniville SC

James Doherty BL

7. Other relevant information

Neutral citation of the judgment appealed against

[2015] IECA 68, [2015] IECA 69

References to Law Report in which any relevant judgment is reported

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

The Appellants seek an Order in the following terms:

1. An Order overturning the judgments and Order of the Court of Appeal dated 27 March 2015 and affirming the judgment and Order of the High Court dated 12 June 2012 and 26 June 2012 respectively;
2. Such further or other order as may be required;
3. Costs, including the costs of any Appeal.

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? Yes No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union? Yes No

If Yes, please give details below:

Will you request a priority hearing?	<input type="checkbox"/>	Yes	<input checked="" type="checkbox"/>	No
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If Yes, please give reasons below:

N/A.

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.