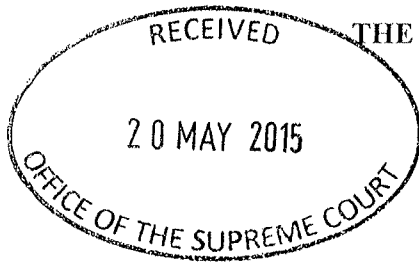


(4)



THE SUPREME COURT

Supreme Court Record Number: S:AP:IE:2015:000018

Court of Appeal Record Number: 575/2014

High Court Record Number: 2012/1101P

Between:

THE VOLUNTARY HEALTH INSURANCE BOARD

Defendant/Appellant

- and -

CMC MEDICAL OPERATIONS LIMITED (IN LIQUIDATION)

TRADING AS CORK MEDICAL CENTRE

Plaintiff/Respondent

Respondent's Notice

Supreme Court record number	S:AP:IE:2015:000018
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[Title and record number as per the High Court proceedings]

CMC MEDICAL OPERATIONS LIMITED (IN LIQUIDATION) trading as CORK MEDICAL CENTRE	V	THE VOLUNTARY HEALTH INSURANCE BOARD
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Date of filing	19 May 2015
Name of respondent	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
Name of appellant	The Voluntary Health Insurance Board
Appellant's solicitors	Mr Brian Quigley and Ms Helen O'Connor McCann FitzGerald Riverside One Sir John Rogerson's Quay Dublin 2

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	CMC Medical Operations Limited (in liquidation) trading as Cork Medical Centre
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The respondent was served with the application for leave to appeal and notice of appeal on date
7 May 2015

The respondent intends :	
<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
<input type="checkbox"/>	not to oppose the application for leave to appeal
<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
<input type="checkbox"/>	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input checked="" type="checkbox"/>
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Respondent's Representation

Solicitor			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	
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)

Counsel	
Name	

Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

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)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

Not applicable

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

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

Not applicable

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

[The Respondent will follow the numbering used in the Application for Leave and Notice of Appeal]

A. The decision in respect of which leave to appeal is sought does not involve a matter of general public importance.

1. In *Village Residents Association Ltd. v An Bord Pleanála (No. 2)* [2000] 4 I.R. 321 at p. 333, Laffoy J. defined "a matter of general public importance" as follows: "whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases also." The Court of Appeal judgment does not come within this definition. The Court of Appeal applied long-established principles, agreed between the parties, as to the conditions in which security for costs can be required. The application of those principles does not "transcend the interests of the parties." Nor does the Court of Appeal judgment create any uncertainty in the law which would warrant a judgment of the Supreme Court. The Appellant ("VHI") disagrees with the factual conclusions drawn by the Court of Appeal. However, the legal principles involved are entirely routine. In its written *submissions* before the Court of Appeal, VHI itself argued (at paragraphs 49-55) that the legal and factual issues raised by the application for security for costs did not involve any matters of general public importance. The situation is on all fours with the Supreme Court's determination of 28 April 2015 in *Governor and Company of the Bank of Ireland v O'Donnell* [2015] IESCDET 17, where the Court stated at paragraph 24:
"These principles are well established. The Court of Appeal applied these general principles to the particular circumstances of the case. This does not render this case one of general public importance. Nor have any issues been raised to bring the application within the category where it is in the interests of justice necessary that there be an appeal to this Court."
2. Contrary to what is contended, the Court of Appeal applied, and did not depart from, the principles laid down by Clarke J. in *Connaughton Road Limited v Laing O'Rourke Ireland Limited* [2009] IEHC 7 ("*Connaughton Road*"). The separate judgment of Hogan J. does not depart from the *Connaughton Road* test but merely

suggests (at paragraph 10) that the test “may have be re-visited” in the hypothetical case that it would “effectively stifle otherwise valid claims.” This hypothesis did not arise, as the Respondent (“CMC”) met the *Connaughton Road* test, as properly applied. In any event, the separate judgment of Hogan J. does not form part of the *ratio* of the Court of Appeal judgment. The Court of Appeal assessed the evidence in an entirely normal manner. No novel principle of law was applied.

3. Contrary to what is contended, the Court of Appeal did not fail to engage with the evidence. The facts relied on by VHI are set out in paragraphs 6 and 18-19 of the Court of Appeal judgment. Unlike the High Court, the Court of Appeal correctly applied the rule that CMC was only required to adduce *prima facie* evidence of a causal connection between VHI’s wrongdoing by VHI and CMC’s inability to meet a costs order. The *prima facie* nature of the test is underlined in paragraphs 2.3, 3.1, 3.3, 3.5, 3.6, 3.8, 3.9 and 3.10 of the *Connaughton Road* judgment. The same judgment only requires CMC to show a “causal connection” (paragraph 3.4). Similarly, the Supreme Court in *Framus Limited v CRH plc* [2004] 2 IR 20 at 52 confirms that a party like CMC “is only required to establish a *prima facie* causal connection.” VHI cites the phrase “solely or principally” – this comes from the High Court judgment in *Framus*, not the Supreme Court. In the Supreme Court, Murray J. underlined (at pp 51-52) that the language of the High Court judgment in *Framus* went too far in defining the onus on a party like CMC, so the Supreme Court judgment is to be preferred. Insofar as VHI contends that the Court of Appeal should have applied a “solely or principally” test rather than merely requiring a “causal connection,” this goes beyond the judgment in *Connaughton Road* and the Supreme Court judgment in *Framus*. It is thus VHI which departs from the accepted principles as set out in *Connaughton Road*. The Court of Appeal did not dilute the evidential standard but correctly applied a *prima facie* test. The Court of Appeal judgment does not apply any new principle of law and hence an appeal would not involve a matter of general public importance.
4. The Court of Appeal did not rely on assertions or unproven claims to establish the causal connection. The relevant matters were addressed in the affidavit of Kieran Wallace sworn in the High Court proceedings on 12 April 2012, at paragraphs 125-132 (causal connection) and also in paragraphs 29 and 103-107 (VHI as a gatekeeper) and 39 (importance of VHI cover). The replying affidavit of Dr Bernadette Carr sworn on 3 May 2012 did not substantially contradict these averments (see paragraphs 8, 11, 33 and 48 of her affidavit). Paragraphs 14-21 of the Court of Appeal judgment correctly assessed the factual evidence. The use of a “but for” test of causation was correct. Even if the Court of Appeal erred in its assessment of the evidence (which is denied) this does not involve a matter of general public importance.
5. For the reasons set out under point 4 above, CMC adduced sufficient evidence to make out its *prima facie* case. Much of that evidence was not contradicted. It is thus irrelevant that CMC did not adduce additional evidence on specific points, since (by definition) the evidence already given was sufficient. In any case, a dispute on the proper interpretation of evidence in an application for security is not a matter of general public importance.

B. It is not, in the interests of justice, necessary that there be an appeal to the Supreme Court.

6. The *Connaughton Road* test was applied correctly. No doubt or uncertainty arises as to its ambit or application.
7. The Court of Appeal did not give significant weight (and certainly no excessive weight) to CMC's constitutional rights. Insofar as VHI criticises paragraph 26 of the Court of Appeal judgment, this is separate from the section (paragraphs 14-21) in which the Court of Appeal found that CMC had shown a *prima facie* causal link. The other three conditions identified in *Connaughton Road* were also met (see paragraphs 11-13 and 22-23 of the Court of Appeal judgment). Thus, the Court of Appeal found that CMC had met the *Connaughton Road* test in paragraphs 11 - 23. As a result, CMC would succeed regardless of the comments in paragraphs 24-26. That passage points out the error of the learned High Court judge. The Court of Appeal correctly noted (at paragraph 26) that the learned High Court judge had required more than a *prima facie* demonstration of certain facts. In doing so, the Court of Appeal applied (and did not depart from) the principle that a Court hearing an application for security for costs should not attempt to determine the merits of the case. See *Connaughton Road Construction* paragraph 3.3; *Irish Conservation and Cleaning Ltd v International Cleaners Ltd*, unreported, Supreme Court, 19th July, 2001; *Oltech (Systems) Ltd v Olivetti UK Ltd* [2012] 3 IR 396, 406. There is no departure from existing case-law.
8. The *Connaughton Road* test strikes a balance between the parties' interests, and has been applied correctly.
9. See point 8 above. In conclusion, VHI is unhappy at the outcome, but this does not amount to an injustice which would warrant the Supreme Court granting leave to appeal.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

[The Respondent will follow the numbering used in the Application for Leave and Notice of Appeal]

I. Alleged specific grounds and errors of law

1. There was no error of law. The Court of Appeal appraised the facts (many of which were undisputed). Its factual conclusions were fully supported by the evidence and should not be disturbed on appeal.
2. The Court of Appeal properly applied the *Connaughton Road* test.
3. The Court of Appeal reviewed the evidence (much of which was uncontested) and correctly found that CMC had made out a *prima facie* case. It is not accepted that CMC failed to adduce evidence. It is not accepted that CMC had to show anything other than a *prima facie* causal connection. The alleged "solely or principally" test is not accepted for the reasons set out in section 4.A.3 above.
4. The Court of Appeal did not apply a broader or less exacting standard than that laid down in the case-law. A *prima facie* causal connection has been accepted on limited evidence: *Irish Conservation and Cleaning Ltd v International Cleaners Ltd*,

unreported, Supreme Court, 19 July 2001.

5. VHI contends that CMC's inability to meet a costs order does not derive from (a) VHI's unlawful refusal to cover the hospital built by CMC, but instead derives from (b) CMC's decision to open the hospital without have first ensured that VHI would cover it. However, on the facts of the case, this is a distinction without a difference. CMC's inability to meet a costs order was ultimately caused by VHI's refusal to cover the hospital. VHI is distinguishing between direct and indirect effects of its refusal, but in either case there is a causal connection, which is all that is required. Point (b) may go to VHI's defence – however, it was conceded that VHI had a *prima facie* defence to the action (paragraph 2.1 of the *Connaughton Road* judgment). The question at issue is a later, and, separate, part of the legal analysis. Even where VHI has a *prima facie* defence, it must be established whether there is a causal link between VHI's impugned conduct and CMC's inability to meet a costs order (paragraph 3.4 of the *Connaughton Road* judgment). This causal link is separate from any possible defence open to VHI. VHI cannot obtain security for costs simply because it has a *prima facie* defence.
6. The evidence adduced by CMC did not fall short of the test in *Connaughton Road*.
7. The Court of Appeal did not afford an unfair or inappropriate weighting to CMC's constitutional rights. Paragraphs 11-23 of the judgment found that the *Connaughton Road* test was met before the Court of Appeal mentioned constitutional rights in paragraph 26. This is part of a passage pointing out the error of the learned High Court judge. See section 4.B.7 above.
8. The reference to an order for costs being oppressive or stifling a genuine claim is not part of the *ratio* of the Court of Appeal judgment which it is sought to appeal. VHI refers to the concurring judgment of Hogan J. dealing with a hypothetical situation which did not arise.

II. Legal Principles relating to each ground

9. The Court of Appeal properly applied the *Connaughton Road* test.
10. It is accepted that the onus was on CMC to show special circumstances which would justify the refusal of an order for security. Such special circumstances include where a defendant's wrongdoing had caused the plaintiff's financial difficulties: cf. paragraph 2.3 of the *Connaughton Road* judgment.
11. It is accepted that the relevant principles are laid down in *Usk and District Residents' Association* [2006] 1 ILRM 363 as applied in *Connaughton Road*.
12. It is accepted that CMC had to provide more than a bald assertion. In this case, CMC provided sufficient *prima facie* evidence, some of which was uncontroverted: see section 4.A.4 above.
13. The case-law required CMC only to show a "causal connection" on a *prima facie* basis. The alternative standards advanced by VHI ("solely or principally" or "proximate cause") are not accepted. See section 4.A.3 above.
14. CMC was able to demonstrate a *prima facie* causal connection, so there was no basis for requiring security for costs.
15. It is agreed that the *Connaughton Road* test properly balances the interests of the parties in a case like this one. Since CMC met that test, there was no need to consider the hypothesis raised by Hogan J. in his concurring judgment (i.e. a plaintiff with a valid claim who could nevertheless not satisfy the test.)

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Michael Collins SC

Barry Doherty BL

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

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?

Yes

No

If Yes, please give reasons below:

Signed: Hayes Solicitors
(Solicitor for) the respondent

Please submit your completed form to:

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

Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.

To: The Office of the Registrar of the Supreme Court
 Four Courts
 Inns Quay
 Dublin 7

And to: McCann FitzGerald
 Riverside One
 Sir John Rogerson's Quay
 Dublin 2
 Solicitors for the Appellant