Neutral Citation No. [2010] NIQB 92

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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**30/07/10**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

ZAIB KHAN

Plaintiff;

-and-

WESTERN HEALTH AND SOCIAL SERVICES TRUST

Defendant.

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GILLEN J

Application

[1] In this matter the plaintiff, a consultant general surgeon employed by the defendant Trust, has brought a Notice of Motion for an interim declaration and injunction initially couched in terms to enable him to continue with a 12 month re-skilling programme ("the programme") that commenced on 17 August 2009 at St Vincent's Hospital, Dublin but which it is alleged the defendant unilaterally and unlawfully terminated on 5 March 2010, 6 months earlier than expected. It emerged during the hearing that the programme will expire in any event on 30 June 2010 and hence it is very unlikely that St Vincent's Hospital will take the plaintiff on again in any event. In light of that, Mr Green, who appeared on behalf of the plaintiff, sought permission to amend his application in the following manner:

(a) Paragraph 1 remained as originally drafted save that he wished to alter the claim for a declaration to one of an injunction that the defendant should comply with the terms of the Maintaining High Professional Standards Framework and in particular should provide the plaintiff with appropriate support and re-skilling as soon as practicable.

(b) He no longer relied on paragraph 2 which had sought a declaration that the defendant should comply with the terms of the re-skilling agreement

dated July 2009 and, in particular, should not terminate the same unilaterally without the agreement of the programme supervisor.

(c) Paragraph 3 was to be now couched in terms that the plaintiff sought an injunction that the defendant "should use its best endeavours" to reinstate "a re-skilling programme" as soon as practicable, to reinstate the funding for a re-skilling programme and that it be restrained from terminating a re-skilling programme without good cause. In terms therefore Mr Green sought to amend the application so as to delete references to the actual re-skilling programme at St Vincent's Hospital since it was no longer available in any event and to substitute an obligation on the defendant to use its best endeavours to obtain an alternative re-skilling programme as soon as practicable.

Background

[2] The plaintiff has been employed by the defendant Trust and its predecessor as a Consultant General Surgeon since February 2003. By letter dated 26 February 2003 the defendant had agreed to appoint the plaintiff as a consultant surgeon subject to the "Terms and Conditions of Service of Hospital Medical and Dental Staff "as amended from time to time, such appointment to take effect from 1 February 2003. Those terms included a disciplinary procedure governing the plaintiff's contract.

[3] It is the plaintiff's case that in December 2004 the defendant restricted the plaintiff's ability to perform his clinical duties on the basis of allegations regarding the plaintiff's performance and that from December 2004 for all intents and purposes he was suspended by the defendant on full pay pending the outcome of that investigation. The restrictions imposed prevented him from seeing patients, from any clinical practice including care of patients in the wards, out-patient clinics or emergencies and from performing any surgical procedures. Following the coming into force of the Maintaining High Professional Standards Framework on 1 December 2005 it was further an express and/or implied term of the plaintiff's contract of employment that the defendant had an obligation –

- To seek to address clinical performance issues through remedial action including retraining rather than solely through disciplinary action

- To ascertain quickly what has happened and establish the facts and to put in place action to address any underlying problem.

- Only to use exclusion from work in the most exceptional cases.

- That its key officers and its Board would have responsibilities for ensuring that the process was carried out quickly and fairly so that the total period of exclusion was not prolonged.

[4] By letter dated 29 October 2007 the defendant notified the plaintiff through his solicitors that it would no longer be pursuing disciplinary proceedings against the plaintiff of any kind.

[5] It is the plaintiff's contention that the defendant has been in breach of contract in a number of respects .First it failed to carry out and conclude its investigation within a reasonable time and thereafter failed to reinstate the plaintiff or permit him to return to clinical duties and perform surgery albeit he remained on full pay.

[6]Secondly the delay in the investigation caused the plaintiff to become de-skilled as a surgeon. The plaintiff asserts that through his own efforts he established that Professor Ronan O'Connell (Prof O'Connell) Professor of Surgery at University College Dublin and St Vincent's Hospital Dublin was willing to supervise him and support an action plan to re-skill him. It is asserted that on 28 July 2009 the defendant finally agreed to an action plan for re-skilling at St Vincent's Hospital. The plan was expected to last 12 months and was to be funded by the defendant.Thus the plaintiff contends that in a variation to the plaintiff's contract of employment or alternatively in a freestanding contractually binding agreement of 28 July 2009 the defendant agreed to an action plan incorporating a re-skilling programme.

[7]The plaintiff contends that in further breach of the contract of employment and in breach of the terms of the re-skilling action plan the defendant unlawfully and unilaterally terminated the action plan with immediate effect on 5 March 2010 after only 6 months. It is the defendant's case that such termination by the defendant was subsequently mirrored and followed by St Vincent's Hospital in Dublin per a letter from Prof O'Connell dated 7 April 2010. The plaintiff's contention is that the termination of the re-skilling programme was a breach of contract compounding various previous breaches of contract committed by the defendant and what the plaintiff seeks in reality is timely restraint of that breach. In essence Mr Green argued that the reality is that the defendant characterised the re-skilling programme as a series of strictly timed hurdles which the plaintiff had to surmount clearly in order to avoid reverting to de facto suspension, rather than a mechanism to facilitate his eventual return to full-time work as a surgeon following a prolonged absence for which, the plaintiff contends, the defendant bears primary responsibility. There was no contractual entitlement enjoyed by the defendant to terminate the programme unilaterally according to the plaintiff.

[8] The action plan underpinning the programme/placement has been a matter of much contention in the course of this hearing. The essence of the plan was contained in a document entitled "Practitioner Action Plan". The purpose of the plan was described as being for the practitioner Mr Khan to re-enter the workplace after prolonged absence, re-skill in general surgical

techniques appropriate for his current employment and address the issues raised in the report prepared for the GMC. The content of this plan had been reached after discussion and agreement by all the participants in this process, was expected to last 12 months from 1 August 2009 until 31 July 2010 and progress was to be formally reviewed periodically by the responsible director and by the programme supervisor.

[9] The plan was to be read in conjunction with a letter of 24 July 2009 from the defendant. It confirmed ,under the heading " Terms and Conditions of Employment ",that the re-skilling programme was based on the action plan agreed by the plaintiff , Mrs E Way (Chief Executive), Dr A Kilgallen (Medical Director), Prof R O'Connell (St Vincent's Hospital) and Mr R Wray (Divisional Clinical Director). The duration of the programme in that letter was to be as follows:

> "1 August 2009 to 31 July 2010 or agreed completion of the action plan or date on which the action plan ceases because of failure to progress, whichever is soonest".

The document is silent as to who will decide that there has been failure to progress but nonetheless it is clear that the re-skilling was to be subject to early termination.

[10] Mr Devlin, who appeared on behalf of the defendant, contended that whilst there was no express term as to who could decide that there had been failure to progress, it was to be implied that either St Vincent's or the defendant for good cause could determine there was failure to progress. St Vincent's was providing the training but the defendant was providing the funding and was paying the plaintiff together with his expenses.

[11] The defendant specifically relies upon the contents of the Practitioner Action Plan at" Objective 1" where the milestone requirement was as follows:

> "By the end of month 6 Mr Khan should be able to demonstrate his ability to reflect and learn from his own and his colleagues practice so as to improve his ability to diagnose and formulate appropriate treatment plans and structure appropriate management plans in most cases. He should have completed and passed an ATLS course by the end of month 6".

[12]Mr Wray, the Consultant Surgeon who was Clinical Director in Specialist Surgery with the defendant and who was one of the signatories of the

Practitioner Action Plan, records at paragraph 21 of his affidavit of 2 June 2010:

> "In respect of Objective 1 progress reports were to come from Prof O'Connell or his designee at 6 weeks, 3 months, 6 months and 12 months. Similarly at the 6 month review date, under Objective 2, the milestone requirement was as follows:
>
> > `By the end of month 6 Mr Khan should be demonstrating good technical and operative skills, under distant supervision, at a level expected of a Consultant General Surgeon in a modern NHS'
>
> In respect of Objective 2 formative reports were to come from Prof O'Connell or his designee at 6 weeks and progress reports every 3 months. I was appointed to be Responsible Director for management of the plan and Prof O'Connell was appointed to be the Programme Supervisor."

[13] It is the defendant's case that concerns were surfacing from the very first assessment review meetings as expressed by those designated members of the committee whom Prof O'Connell had involved and from whom he had sought and obtained reports. Mr Khan was apprised of those concerns according to the defendant.

[14] Dealing with the third assessment review after 6 months which occurred on 12 February 2010, Mr Wray avers in his affidavit at paragraph 28 that whilst it was confirmed to the meeting that there had been certain improvements in the plaintiff's level of performance since the date of the 3 month review, Prof Hyland reported that he would not be in a position to sign off the plaintiff as `proficient' to the level required. The committee unanimously agreed that the plaintiff had poor attention to detail. Prof O'Connell, Prof Hyland and Mr Duignan highlighted a number of cases where the plaintiff's assessment skills and history taking had indicated serious cause for concern, and where they had needed to intervene. Prof Hyland reiterated his view that the plaintiff would probably never reach the level required to perform laparoscopic colorectal procedures. Mr Wray further averred that in response to this he asked the assessment committee if they believed the plaintiff would attain the level outlined in the Practitioner Action Plan, ie would he meet his 6 months target and received a variety of views .

[15] Prof O'Connell had made clear that he believed the re-skilling programme would achieve its aim and place the plaintiff "at the level he was prior to his period of inactivity". However, according to Mr Wray Prof O'Connell indicated that any decision thereafter concerning the plaintiff's future employment would lie with the Trust. Prof Hyland expressed the view that the plaintiff did not have the skills in place to reach the level of independent practice .The Committee agreed however that the plaintiff had not attained the levels set for the 6 month review. It is the defendant's case that for the plaintiff only to have been returned at the end of the programme to the level he would previously have been at, before his period of inactivity started, would not have been sufficient for the Trust. They also rely on the fact that this was not the level of attainment which the agreed action plan required of him namely by 6 months he would already be demonstrating levels of skill at the level expected of a Consultant General Surgeon in a modern NHS.

[16] During the course of the trial the plaintiff submitted a further affidavit from Dr Donal Maguire Consultant Surgeon of St Vincent's Hospital dated 11 June 2010. Whilst Dr Maguire had not been involved in organising the re-skilling programme or putting together the practitioner action plan, he had worked with Mr Khan from around September 2009 in a supervisory/observation position at St Vincent's. Specifically he did not agree with the suggestion allegedly expressed at the 6 month Assessment Review Meeting that Mr Khan had poor attention to detail in respect of technical aspects of surgery. In essence he contended that a 6 month time frame was quite short given the period during which Mr Khan had not been working and whilst he accepted that Mr Khan required some further time to get back to the level required to function independently he did not lack any skills that would prevent him getting there. In essence he contended that Mr Khan will get to a consultant level if he is given the time and the opportunity.

[17] In any event Mr Wray reported the outcome of the 6 monthly assessment to the Trust. Ms Ann Kilgallen, the Medical Director of the defendant, avers in an affidavit of 2 June 2010 at paragraph 39 as follows:

> "After that review had taken place, Mr Wray duly reported its outcome to the Trust. The Trust was made aware of the fact that the Assessment Committee in Dublin had agreed that at 6 months the plaintiff had failed to attain the levels which had been set for the review of the programme at that stage. The Trust also understood that whilst St Vincent's Hospital were still willing at that time to continue with the re-skilling programme through until August 2010, they had also made it

> clear that they were content that any decision as to whether in the circumstances the programme should continue beyond the 6 months stage, or alternatively be terminated was a decision which could be left to the Trust alone."

[18] It is the plaintiff's case that in advance of a meeting to discuss this matter with the plaintiff, the Trust had already made a decision to unilaterally cease the re-skilling programme. Ms Kilgallen rejects this in her affidavit and contends that whilst the defendant was minded to bring the re-skilling programme to an end, no final decision had been made until such time as the plaintiff was given an opportunity to be heard at a meeting set for 5 March 2010. The Trust met with the plaintiff and his representatives on 5 March 2010 and, having adjourned the meeting for a short time to consider the matter further, informed the plaintiff and his representatives that the Trust decision was that the re-skilling programme at St Vincent's should now cease with immediate effect.

[19] It is against that background that the plaintiff's application is made.

Issues to be determined

Can the plaintiff obtain an interim declaration?

[20] Mr Green initially couched his claim for relief at paragraph 1 of the Notice of Motion in terms of a declaration that the defendant should comply with the terms of the Professional Standards Framework and in particular should provide the plaintiff with appropriate support and re-skilling as soon as practicable. In the course of the hearing he sought leave to plead as an alternative an injunction for the same relief.

[21] In my view there is much merit in Mr Devlin's submission that the claim for an interim declaration in this instance is misconceived. The power of the court to grant a declaration of right upon an interlocutory proceeding should only be sparingly exercised. In any event the court has no power to grant some form of interlocutory relief in the sense of an interim declaration. It can only make a final declaration which finally determines the rights of the parties (see The Supreme Court Practice 1999 at 15/16/17). In short an interim declaration cannot be granted in that there cannot be a provisional determination of the final rights of the parties.

[22] In England and Wales prior to the Civil Procedure Rules 1998 r. 25.1(1)(b) (*which do not govern proceedings in Northern Ireland*), there was no such concept known to the law as an interim declaration. (See Riverside Mental Health NHS Trust v Fox (1994) 1 FLR 614 at 621, Newport Association Football Club Ltd v Football Association of Wales (1995) 2 All ER 87 at 93 and

International General Electric Company of New York Ltd v Comrs of Customs and Excise (1962) 1 Ch 784 at 789-790).

[23] However I pause to observe that as a practical matter in most instances an interim injunction will achieve the same objective as an interim declaration eg R v Secretary of State for Transport ex p Factorlame Ltd (No. 2) (1991) 1 AC 603 HL and hence I had no difficulty acceding to Mr Green's late application to amend the notice to include an interim injunction as an alternative to an interim declaration.

Are the interim injunctions sought prohibitory or mandatory?

[24] This issue gathered some momentum during the course of the hearing on the basis that its determination ought to govern whether I am to apply the principles laid down in American Cyanamid Co v Ethicon Ltd (1975) 1 All ER 504 ("the Cyanamid case") or those referred to in the judgment in Zockoll Group Ltd v Mercury Communications Ltd (1998) FSR 354, (1999) EMLR 385 ("the Zockoll case") in deciding whether or not to grant injunctions in this instance.

[25] The guidelines laid down by Lord Diplock in Cyanamid are still regarded as a leading source of law on the approach to be adopted at least in interim applications on notice for prohibitary injunctions. Those guidelines are too well known to require detailed outline by me save to say that the guidelines may be conveniently summarised as follows:

- Is there a serious issue to be tried?

- If the answer to this is "yes", would the plaintiff be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be restrained and, if so ,will the defendant be in a financial position to pay damages?
- Where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, what is the balance of convenience including, where other factors appear to be evenly balanced, whether it is prudent to preserve the status quo?
- Are there any other special factors to be taken into consideration in the particular circumstances of the individual case?

[26] In the Zockoll case the Court of Appeal approved the observations of Chadwick J in Nottingham Building Society v Eurodynamics Systems plc [1993] FSR 468 that the principles to be applied in a mandatory injunction are as follows:

- The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong.
- The court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thus preserving the status quo.
- Where a mandatory injunction is sought, the court can legitimately consider whether it feels a high degree of assurance that the plaintiff will be able to establish his right at trial. This is because the greater the degree of assurance the plaintiff will not only establish his right, the less will be the risk of injustice if an injunction is granted.
- Even when the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted".

[25] Resisting the application of the Zockoll principles, Mr Green contended that the court in this instance is simply being asked to prevent the defendant effectively terminating the plan to re-skill the plaintiff pending consideration at trial. In any event he contended that the fourth principle outlined by Chadwick J dilutes the importance of the distinction between mandatory and prohibitory injunctions and that at worst I should determine that the case falls within that fourth category.

[27] Mr Devlin contended that the courts are far more reluctant to grant a mandatory injunction that it would be to grant a comparable prohibitory injunction , that in the former case the court must, inter alia, feel a high degree of assurance that at trial it will appear that the injunction was rightly granted and that this constitutes a higher standard of proof than is required for a prohibitory injunction. (See Shepherd Holmes v Sandham [1971] Ch 340).

[28] For my own part I consider that Mr Devlin's approach is too inflexible. Rather I am inclined to the view expressed by Lord Hoffman in National

Commercial Bank Jamaica Ltd v Olint Corpn Ltd (Practice Note) [2009] 1 WLR 145 that essentially arguments over whether an injunction should be classified as prohibitory or mandatory are barren and that what matters is what the practical consequence of the actual injunction is likely to be.

[29] At page 1409 paragraph 19 Lord Hoffman said:

> "19. There is however no reason to suppose, in stating these principles (*in Cyanamid)* Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. … What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in a case in which a defendant is merely prevented from taking or continuing with some course of action. … But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, … a high degree of assurance that at trial it will appear that the injunction was rightly granted.
>
> 20. For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren. … What matters is what the practical consequences of the actual injunction are likely to be."

[30] Had I confined myself to the purist approach advocated by Mr Devlin I would have considered that the relief sought by the plaintiff was in the event mandatory rather than prohibitory. Not only is the relief sought not couched in terms of a prohibitory breach of contract but the substance of the relief claimed is that the defendant must embark on a wholly new search for and provide funding of a fresh re-skilling programme. Both parties now accept

that St Vincent's Hospital is no longer going to provide the re-skilling programme come what may and thus an entirely fresh search is required.

[31] Those circumstances distinguish this case from those relied on by Mr Green in advocating the principles set out Kircher v Hillingdon Primary Care Trust [2006] EWHC 21("Kircher's case") where David Foskett QC sitting as a judge of the High Court was dealing with an application for an interim injunction preventing a defendant from acting upon a letter terminating the claimant's contract of employment until the disciplinary procedures provided for within his contract of employment had been exhausted. He considered the relef sought to be prohibitory in nature .However in my view preventing a defendant from treating a letter of dismissal as valid is wholly different from the positive tasks of setting up and operating a search for an alternative skilled programme as envisaged in the instant case.

[32] Further, had I accepted Mr Devlin's submission that I should be bound by the Zockoll principles, and thus required to be persuaded to a high degree of assurance that at the ultimate trial the injunction would have turned out to be correctly granted, I would have undoubtedly concluded that the plaintiff had so failed to persuade me. The issues between the parties in this case are in my opinion eminently suitable for determination by a full hearing with oral evidence and cross-examination. It is the classic case where a judge on an interim application should tread wearily and refrain from forming any determinative view of the factual outcome based on the evidence as it currently exists. The arguments both for and against the plaintiff and defendant are in my view too finally balanced at this stage absent an oral hearing for a court to be in a position to form that high level of assurance advocated to be necessary by Mr Devlin.

[33]. It may be helpful at this stage if I set out, as illustrative of how finely balanced the arguments are, some of those issues.

- On a proper construction of the terms and conditions earlier referred to and the action plan, is the defendant permitted to assess the progress of the plaintiff by virtue of a series of milestones during the re-skilling programme over the course of periodical reviews and if necessary unilaterally terminate the programme or is such a concept wholly foreign to the terms of the agreement, as advocated by Mr Green which in substance require a double lock agreement by both the defendant and St Vincent's Hospital? I am not satisfied at this stage that there is any express term in the agreement to this effect either way and resolution of this will have to be by way of implication. It would be unwise to form a fixed view of such an implied term at this juncture in the absence of a full oral hearing and more detailed argument .
- Was there a unilateral termination by the defendant as urged on me by Mr Green or was there a bilateral termination involving both the

defendant and St Vincent's Hospital , where the latter agreed to vest the former with authority to arrive at such a decision on behalf of both parties involved in the programme as asserted by Mr Devlin? Again, this is a determination which will benefit enormously from cross-examination of the various witnesses at an oral hearing.

- Was it a term of the plan of action that the plaintiff was to be taken to a level that he was at prior to his period of inactivity (a position that Prof O'Connell felt could have been achieved) or was the aim of the programme to demonstrate that the plaintiff had achieved a level expected of a Consultant General Surgeon in a modern NHS?Is there any material difference between the two concepts? Whilst the agreement must be purposefully interpreted, this again is a matter that cries out for determination in the course of an oral hearing with the benefit of cross examination .
- Was there an implied condition precedent to early determination on the grounds of failure to progress that there be a clearly evidenced likelihood that the programme would fail to achieve its aim as opposed to the need to meet periodic requirements and milestones at various stages eg the 6 month stage? I again am of the view that determination of this issue requires an oral hearing.
- There is prima facie a conflict between the views of Prof O'Connell and Mr Maguire, Programme Supervisor, who believed that by August 2010 the plaintiff could have achieved his aims as against that of Prof Hyland who thought otherwise. Mr Wray, who was the director of the programme on behalf of the defendant, asserts that he and Prof O'Connell and the rest of the Assessment Committee were unanimously agreed that the plaintiff had failed to attain the 6 month milestone which was signed up to in advance. Was termination of the programme reasonable in those circumstances? Who had the right to cast the blackball in the absence of express terms in the contract?
- Is there strength in the plaintiff's assertion that the real cause of the termination was the re-labelling of a case based on capability which already had been dealt with several years previously? In terms was the defendant, under the rubric of trust and confidence issues, masking the real reason for termination? (See Lauffer v Barking NH Trust [2009] EWHC 2360 and Mazey v South West London and St George's Mental Health NHS Trust [2010] EWCA Civ 293). I am absolutely satisfied that a conclusion on this submission by Mr Green could not possibly be answered on the basis of the papers before me and is a live issue which needs to be determined before an oral hearing.

Cyanamid Principles

[34] It should be clear from what I have said that I consider that the type of "box-ticking" approach criticised by Lord Hoffman in National Commercial Bank Jamaica Ltd i.e deciding simply whether the relief sought amounts to a

mandatory or a prohibitory injunction so as to govern my approach, would neither do justice to the complexity of the issues in this case nor assist me to arrive at a fair decision whether or not to grant an interlocutory injunction in the particular facts before me. I see no reason why the principles set out by Lord Diplock in Cyanamid should not be invoked in a case of this nature and I be guided by the underlying principle that the court should in this case take whatever course seems likely to cause the least irremediable prejudice to one party or the other. To assist me in that task, I have taken the following factors into account.

Is there a triable issue?

[35] Both parties recognise that to be the case in this instance.

What prejudice may the plaintiff suffer if no injunction is granted or may the defendant suffer if it is granted together with the likelihood of such prejudice actually occurring?

[36] Mr Green argued that the plaintiff at 52 years of age, having now been inactive for a number of years and in the absence of a re-skilling programme becoming quickly available, will in effect lose his ability to practice as a consultant. Any momentum developed as a result of the 6 month re-skilling scheme would be lost and having been away from practice so long, his career would be inevitably blighted without prospect of meaningful return.

[37] There is no sufficient evidence before me at this stage to justify that dire prognostication. It relies purely on the ipse dixit of the plaintiff himself. Inevitably even if I was to grant the injunction, some time would be necessary to find an alternative programme. No evidence was presented before me as to the likely availability of such a programme, how quickly that could be arranged, what the funding might be, or in what jurisdiction or location the programme could begin. As I indicated to counsel at the commencement of this case, I intend to case manage this matter carefully and to arrange a prompt hearing in the near future – hopefully in October/November 2010 if the parties are ready for trial. Hence no more than a few weeks should be lost between this interlocutory hearing and the trial. I am not satisfied that any material prejudice will accrue to the plaintiff during this interim period. In the meantime he can of course take steps to source any such available programme (as I understand he did in the past) and if he is successful at the hearing, resolution can then be speedily obtained. He has already been successful in finding such a re-skilling programme and hence is versed in the process of so doing.

[38] On the other hand, if I were to grant the injunction, the defendant would be obliged to embark on an exercise to find such a programme suitable for the plaintiff either in Northern Ireland or outside the jurisdiction with

attendant expenditure of public funds and time for a course which might be terminated part way through if the plaintiff is unsuccessful. Moreover not only would difficulties in enforcement arise if the scheme were, as in the previous instance, outside this jurisdiction, but one must ask how in any event could the court police such an obligation and be satisfied by the plaintiff or defendant that bona fide efforts were being made to obtain a suitable scheme? The situation would be one replete with the seeds of acrimony and dispute with the potential for returning to court on one or more occasions to determine whether adequate or sufficient reasonable efforts were being deployed by the defendant. I am satisfied that the prejudice accruing to the defendant is likely to be greater than that to the plaintiff if I was to grant the relief sought .

The sufficiency of damages or the enforcement of a cross undertaking and the likelihood of the defendant being able to satisfy such an award.

[39] It is clear in the first place that as a publicly funded Trust, the defendant will be able to satisfy any award which the plaintiff will recover no matter how extensive that may be and even if the plaintiff establishes his case that he will never work again as a surgeon.

[40] Loss of livelihood is a fairly regular source of money damage awards before the courts in Northern Ireland and I see no reason why damages should not therefore be an adequate remedy even if the plaintiff were to establish his case in full. No interim injunction will normally be granted however strong the plaintiff's case in such an event. (See Cyanamid at p408 b-c).

[41] Moreover it would be open to the plaintiff to attempt to mitigate his loss by finding a re-skilling programme himself and, if successful, recovering the costs against the defendant. There is a duty on the plaintiff to mitigate his loss and given that he apparently was the architect of the re-skilling programme in St Vincent's it is difficult to see why he could not embark upon such a course again if need be. Mr Green has argued that the gritty reality is that at 52, and not having worked as a consultant surgeon for several years, jobs are passing him by because the Trust has not arranged a re-skilling package. The fact of the matter is however that albeit the scheme was terminated in March 2010, St Vincent's Hospital kept the plaintiff on as a registrar until 30 June 2010 and his salary continued to be paid. I find no evidence that the passage of a few months will make any material difference given that I have indicated he will be entitled to an early trial. Consequently I do not consider that this short interval of time would be sufficient to render him unable to be compensated by an award of damages. The interval until trial is in essence too short to justify such a claim.

[42] Accordingly I am not satisfied those damages would be an inadequate remedy for the plaintiff and that by itself precludes grounds for interference with the defendant's freedom of action by the grant of an injunction.

The balance of convenience.

[43] The principle set out in Cyanamid at p408e is that:

> "Where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both the question of balance of convenience arises."

Lest I am wrong in my conclusion that damages will be an adequate remedy in this case, I now turn to consider the balance of convenience.

[44] I am of the view that the balance of convenience would still be in favour of the defendant and that the refusal of an injunction carries the least risk of injustice.

[45] In the first place, the difficulties of enforcing the injunction against the defendant as mentioned by me in paragraph [38] above are important in this context . The fact of the matter is that St Vincent's Hospital is no longer an option and it would be extremely difficult to police the defendant's efforts to find an alternative scheme either inside this jurisdiction or out and to enforce an obligation to take reasonable steps to find such a scheme.

[46] In any event as I have indicated above the plaintiff has already shown that he has been able to research such a programme and I see no reason why he could not fulfil that task once again.

[47] The invocation of the concept of preserving the status quo is rife with difficulty in this instance. Originally the Notice of Motion had envisaged return to St Vincent's Hospital. That has clearly changed and is no longer possible. Preservation of the status quo is therefore no longer feasible in its purest sense.

[48] Mr Devlin, quoting from Bean on "Injunctions" 10th Edition at paragraph 3.26 asserted that:

> "The relevant status quo is the state of affairs existing during the period immediately preceding the issue of proceedings or, if there is unreasonable delay between the issue of the claim

> and the application for an interim injunction, the period immediately preceding the application".

[49] Mr Devlin contended that the defendant has terminated the plaintiff's programme on 5 March 2010 and the Writ of Summons was issued on 12 May 2010. Hence the status quo was that existing between these two dates ie during a period when the programme had been terminated and that represented the status quo. I pause to note that I was satisfied that the delay in issuing proceedings carried no criticism of the plaintiff or his advisors as the time was properly spent seeking a resolution between the parties .

[50] Mr Green relied on the judgment in Kircher where Deputy High Court Judge Foskett QC said at paragraph 66:

> "In my judgment it is plain from cases such as Graham v Delderfield [1992] FSR 313 and Hughes v London Borough of Southwark [1988] IRLR 55, that the appropriate date for the purpose of the status quo depends upon when the relevant right to claim an injunction is intimated to the party against whom it will be sought and upon the nature and content of the dispute itself".

[51] For my own part I prefer the approach adopted by Bean largely because the gap between the intimation of proceedings and the issue of proceedings could be a vital factor in some instances in determining whether or not the status quo was realistic. In any event in the present case, even if one adopted the Kircher approach, the plaintiff had first intimated pursuit of injunctive relief in a letter dated 8 March 2010 at a time when the programme had already been terminated for some days. The status quo advocated by Mr Green at that stage would have been a return to St Vincent's which it now turns out is implausible. In essence I do not believe that the preservation of the status quo would have represented a sufficient argument to justify these injunctions even if the case had reached that stage.

[52] For the sake of completeness I indicate that I find nothing in this matter that justifies the case coming within the category of special factors to be taken into consideration as outlined by Lord Diplock in Cyanamid.

[53] I have come to the conclusion therefore that the plaintiff's case must be dismissed. I shall reserve the costs of this application to the trial Judge.

[54]Finally I direct that this case be reviewed before me on the opening day of the forthcoming term to fix a date for hearing early in the forthcoming term and to permit appropriate case management with that end in mind.