

THE HIGH COURT

[2021] IEHC 850  
[2021 5729 P]

**BETWEEN: -**

**GREGORY HEFFERNAN**

**PLAINTIFF**

**AND**

**MATER PRIVATE**

**DEFENDANT**

**JUDGMENT of Ms. Justice Egan delivered on the 15th day of December, 2021**

**Introduction**

1. The plaintiff is a consultant orthopaedic surgeon practicing at, *inter alia*, the Mater Private Hospital Cork ("the Mater") previously Shanakiel Hospital ("Shanakiel"). On 7th July, 2021, the Mater issued a notice of termination, giving the plaintiff six months' notice of the revocation/withdrawal of his practicing privileges at the Mater. Notice expires on 7th January, 2021.
2. The plaintiff commenced proceedings on 7th October, 2021 seeking an order restraining the Mater from giving effect to the notice of termination, associated declaratory relief and damages for breach of contract. The following day, he issued a motion seeking interlocutory relief, *inter alia*, "*restraining the Defendant from terminating the contract... for the provision of clinic and theatre facilities by the Defendant to the Plaintiff at Mater Private Hospital Cork, entered into between the parties in 2013*".

**Factual background**

3. Although he does not state when he commenced practice at Shanakiel, the plaintiff has practiced as an orthopaedic surgeon in Cork "*over the past 12 years*". Clearly, the plaintiff was in practice at Shanakiel for some years prior to its acquisition by the Mater in January 2013, because, in January 2011, the plaintiff, together with other consultants, signed an agreement with Shanakiel entitled "*Practising Privileges for Clinicians – Shanakiel Hospital*" ("the Shanakiel Agreement"). The practising privileges enjoyed by the plaintiff at Shanakiel included conducting clinics at the hospital and access to hospital theatre facilities.
4. It appears that the plaintiff, together with other consultants practicing at Shanakiel on the date of acquisition, transferred automatically to the Mater. No formal written contract was entered into at this time between the plaintiff (or other consultants) and the Mater. The plaintiff avers that, initially therefore, the Shanakiel Agreement continued to apply.
5. However, in 2014, the Mater issued "*The Medical Society Constitution*" ("the 2014 Constitution"). The 2014 Constitution was not exhibited by either party. I understand, however, that it included reasonably detailed terms and conditions governing the granting and maintaining of practising privileges. The 2014 Constitution was updated in October 2020 by a document entitled "*The Medical Society Constitution (MPCMS) for the Mater Private Cork*" ("the 2020 Constitution"). It has not been suggested that there were any particularly significant differences between the 2014 and 2020 Constitutions. The 2020 Constitution is examined in some detail below. For the moment, suffice to say that the

2020 Constitution envisages that consultants' practising privileges at the Mater are "valid" for a period of three years and thereafter are "automatically renewed" on each third anniversary provided that certain conditions are fulfilled. The 2020 Constitution also sets out detailed procedures for dealing with concerns or complaints relating to the competence, capability or conduct of consultants.

6. After the Mater acquired Shanakiel, the plaintiff continued to exercise his practicing privileges and run his practice at the hospital as he had done previously. This entailed holding a weekly clinic for the performance of "side room procedures" and performing surgeries in the operating theatre twice monthly. In consideration of the provision of such facilities, the Mater received certain payments from patients' insurance companies for these clinic procedures and for surgeries. The plaintiff avers that in March of 2017, it was agreed that a nurse would be made available to him by the Mater to assist him at his weekly clinics.
7. The sequence of events giving rise to these proceedings commenced following the plaintiff's return to his weekly clinic on 1st July, 2020 after the hiatus occasioned by the Covid-19 emergency. The plaintiff alleges that, in breach of the March 2017 agreement and without any appropriate notice, the Mater unilaterally withdrew nursing support from his clinic. As a result, his ability to treat patients attending his clinics was impeded. The plaintiff appears to accept that he is capable of performing clinic procedures either on his own, or with the assistance of a healthcare attendant (which the Mater agreed to provide), but maintains that he cannot do so efficiently without the assistance of a nurse. The plaintiff states that he was encouraged by the March 2017 agreement to take on a larger number of patients than he could efficiently treat on his own and that, in withdrawing nursing support, the Mater acted illegally and in a manner inimical to the interests of patients, the reputation of the Mater and the reputation of the plaintiff himself.
8. When the re-instatement of nursing support was not dealt with to the plaintiff's satisfaction, he wrote to his patients on 24th June, 2021 stating that his clinic had been cancelled; that the Mater's management had unilaterally withdrawn the nurse from his clinic; and that if they wished to complain to management about the withdrawal of nursing support, they could write to identified members of the senior management team (including the managing director of the hospital, Mr Martin Clancy) and request the restoration of nursing support.
9. The Mater viewed the plaintiff's reaction as wholly unwarranted because it must often reconfigure services and reallocate staff to respond to changing priorities. Difficulties in recruiting and retraining frontline staff, particularly during the Covid-19 pandemic, had impacted staffing levels. As result, it was necessary to reallocate the nurse who had supported the plaintiff's clinics to an area of higher clinical priority, whilst giving the plaintiff as much notice as possible. The Mater emphasises that it offered to allocate a healthcare assistant to assist the plaintiff instead. Whilst the Mater accepts that all this might mean that the plaintiff had a reduced capacity at clinics, it was unavoidable.

10. The Mater therefore strongly objected to the letter issued by the plaintiff to his patients. It was frustrated by what appeared to have been an obstructive response to the Mater's attempts to discuss the issue that had arisen. It is fair to say that the plaintiff's initial attitude was not constructive. His position was that he would only agree to meet the Mater's management team to discuss the situation on condition that the Mater would first confirm that it would provide a nurse to assist him at his clinics, which, for the above reasons, it was unwilling and unable to do. In an email to the plaintiff dated 28th June, 2021, Mr Clancy stated, *inter alia*; "This can be dealt with in a quick and efficient manner, but in order to do so, we need to meet, discuss and agree a way forward without pre-conditions. We cannot have someone supported by and holding clinics in the hospital, who is not an advocate of the hospital..." (emphasis added).
11. Ultimately, the plaintiff received a letter dated 7th July, 2020 from the Mater, which is the notice of termination, signed by Mr Clancy. The letter states as follows:

*"As you know, the Mater will and indeed must often reconfigure services and reallocate staff to respond to changing priorities....*

*Your reaction to this decision has been entirely unacceptable to the Mater. In particular, Mater management note the following actions taken by you in reaction to this necessary reallocation of nursing resources:*

- 1. You caused letters to issue, on Mater headed paper, to an unknown number of patients (believed to be in the range of 20 to 60 patients but at least 21), indicating that your clinics were cancelled;*
- 2. In that letter, you expressly and unfairly attributed blame to Mater management for this cancellation of your clinics...*
- 3. The letter defamed and disparaged named members of Mater management;*
- 4. You issued an unknown number of text messages of similar effect to patients;*
- 5. When invited to a meeting to discuss this serious matter with the Mater, you failed to present for this meeting.*

*In connection with the above, the letter issued by you to patients actively solicited patient complaints against the Mater, three of which have been received to date and which now need to be investigated by the Mater as a matter of urgency...*

*1Having considered the totality of the matter, your reaction and attitude toward the Mater and the damage your conduct has had on the commercial and personal relationships that exist between you and the Mater, the decision has been reached to terminate the contractual relationship that exists between the Mater and you and to revoke/withdraw your Practising Privileges. As you know, the relationship is undocumented and you have enjoyed Practising Privileges at the Mater (and its*

*predecessors) for many years. In light of this, I believe you are entitled to reasonable notice of termination of your contractual relationship with the Mater and of revocation/ withdrawal of your Practising Privileges. I consider 6 months' notice to be a reasonable notice period and therefore your contract will terminate and your Practising Privileges will be revoked / withdrawn with effect on 07th January 2022.*

*You can of course continue to perform surgeries and hold clinics at the Mater over this period.. ." (emphasis added)*

12. On the same day, the Mater's solicitors wrote to the plaintiff stating that his letter to patients was "*false and untrue*", "*misleading and defamatory*" and "*had the effect of damaging the Mater's reputation*". Undertakings were sought that the plaintiff would desist from further such correspondence with his patients and the letter stated that the Mater reserved "*its right to take whatever steps are deemed necessary to protect its rights, including issuing proceedings seeking orders restraining any further untrue, misleading and / or defamatory statements from issuing and / or damages for defamation, ...*"
13. The plaintiff responded to this letter by furnishing the undertakings sought and stating that he was "*open to mediation*". On 15th July, 2021, the plaintiff wrote personally to the Chief Executive Officer of the Mater, enquiring if mediation could advance matters. Thereafter, by two letters dated 16th July, 2021, to the Mater and their solicitors respectively, the plaintiff's solicitors requested the revocation of the notice of termination and the reinstatement of his practising privileges. In a letter of 21st July, 2021, the Mater's solicitors stated that their client declined to do so. Further correspondence ensued between solicitors in September 2021 and ultimately, the present proceedings were commenced in October 2021.
14. Contemporaneously, the plaintiff withdrew from his clinic at the Mater and commenced providing clinic facilities elsewhere in Cork, retaining the services of a nurse at his own expense, where necessary. The plaintiff therefore has not held weekly clinics at the Mater for several months and ceased to do so shortly before the notice of termination. However, he continues to perform surgery at the Mater two days per month as previously. The Mater's position is that the plaintiff may continue to perform his clinics and operating list until the expiry of the notice of termination on the 7th January, 2022, but not thereafter.
15. There is dispute between the parties as to the existence and legal effect of any agreement that the Mater would provide the plaintiff with nursing support for his clinics and as to who bears responsibility for the lack of progress in resolving this issue. The rights and wrongs of such issues do not require to be determined for the purposes of this interlocutory application. Irrespective of the legitimacy or otherwise of either party's grievances, the primary issue for consideration by this court is the validity, or otherwise of the Mater's notice of termination. The parties have made diametrically opposed submissions about the impact of this prior dispute on the legal validity of the notice of termination. The plaintiff asserts that, seen through the lens of the prior dispute, the

Mater's notice of termination, although couched as a "no fault" termination on notice was, in substance, a revocation of the plaintiff's privileges "for cause", in this instance misconduct, and is therefore only valid if the procedures in the 2020 Constitution are followed. The Mater's position is that the prior dispute between the parties is virtually irrelevant, and that the notice of termination is a "no fault" termination on reasonable notice pursuant to an implied contractual term entitling it so to do.

### **Legal principles**

16. The plaintiff is seeking an interlocutory injunction and the principles relating to such relief have been restated recently by the Supreme Court in *Merck Sharpe and Dohme v. Clonmel Healthcare* [2019] IESC 65. I do not propose to set out those principles as they are well known.
17. It is convenient to first consider whether the court should apply the test of a fair question to be tried or whether, in the alternative, the plaintiff must demonstrate a strong case that is likely to succeed at trial. Thereafter, it is relevant to consider the question of whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted and also to consider whether the case will probably go to trial. This judgment will then discuss the balance of convenience and the balance of justice.

### **Is the injunction sought in these proceedings mandatory or prohibitory?**

18. When a plaintiff is seeking a mandatory injunction he or she must demonstrate a strong case likely to succeed at the trial. This higher standard was articulated by Fennelly J. in *Maha Lingham v. HSE* [2006] 17 ELR 137 and is often applicable in employment cases where an employee seeks to restrain a dismissal but where, although framed as a prohibitory injunction, the nature of the relief sought is in substance mandatory. In *Maha Lingham*, Fennelly J. stated:

*"It is well established 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 an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that is likely to succeed at the hearing of the action. So it is not sufficient for him to simply show a prima facie case, and in particular the courts have been slow to grant interlocutory injunctions to enforce a contract of employment."*

19. The Mater lays emphasis upon the judgment of Clarke. J (as he then was) in *Bergin v. Galway Clinic Doughiska* [2007] IEHC 386 as authority for the proposition that in any case in which an employee seeks an injunction to prevent dismissal, or a process leading to dismissal, the employee is seeking in substance a mandatory injunction which would have the effect of necessarily continuing the contract of employment; and that, in any such case, the employee must establish a strong case in order to obtain interlocutory relief. The Mater contends that the same logic applies here.
20. The plaintiff argues that, in *Maha Lingham* and *Bergin*, the court's reasoning was based on the finding in each case that the defendant employer was otherwise entitled to terminate the plaintiff's contract on reasonable notice and that restraining a dismissal in

those circumstances was a mandatory injunction. The plaintiff submits that as the Mater had no entitlement either at common law or under contract, to terminate his practising privileges on reasonable notice, the orders sought are prohibitive rather than mandatory. The Mater, on the other hand, submits that the requirement for a strong arguable case is not dependent upon the employer's entitlement to terminate the plaintiff's contract on reasonable notice, but arises from the form of the order sought, i.e. a continued forced liaison between the parties where one is desirous of terminating the contractual or commercial relationship.

21. It is not necessary to decide this point as I find that the plaintiff has satisfied the higher standard in any event. However, in so far as is relevant, I prefer the submissions of the Mater on this issue. At para. 20 of his judgment in *Bergin*, Clarke J. stated:

*"The basis for the higher standard is that the substance of the relief sought is a mandatory order requiring the employer to keep the employee in employment. The order remains a mandatory order, even though the plaintiff claims that a purported termination of his employment is unlawful by reason of a finding of wrongdoing having been arrived at in breach of the principles of natural justice. However couched, the substance of the relief is the same. I am not, therefore, satisfied that different standards apply depending on the nature of the claim advanced on behalf of the plaintiff concerned. Where a plaintiff seeks to prevent an employer from exercising a prima facie entitlement to terminate a contract of employment, then that employee is, in substance, seeking a mandatory order requiring that his employment continue and that his employment entitlements are met.*

*It follows, in my view, that, in order to determine whether the first step towards granting such an order has been met, it is necessary that the plaintiff concerned establish a strong case."*

22. I fully accept that, in the passage quoted above, Clarke J. emphasises the "*prima facie entitlement of the employer to terminate the contract*" as being relevant to the categorisation of the injunction sought as mandatory or prohibitory. However, I do not consider that the *Maha Lingham* principles are so limited. Rather, I agree with the submissions of the Mater that one must look at the substance of the order sought, which in this case, is more akin to temporary specific performance than a temporary restraining order and is, in substance, mandatory.
23. The plaintiff in the present proceedings also emphasises that he is not an employee but rather "*an independent contractor*". He tentatively argues that the requirement for a strong case in order to obtain interlocutory relief does not apply outside the scope of a contract of services. Once again, however, I consider that to be too narrow an approach to the *Maha Lingham* principles. In my view, these principles apply not only to a contract of services but also potentially to a plaintiff seeking an order compelling the continuation of parties' obligations under, for example, a franchise agreement or, a distributorship contract or, in this case, a commercial relationship akin to (but certainly not identical to) a contract for services.

**Is there a strong case that the withdrawal of practising privileges is in breach of contract?**

24. The plaintiff's main argument is that there is no right to terminate his practising privileges on reasonable notice and that the termination notice is in breach of the contractually agreed procedures. It is not disputed that these procedures were not complied with. The question is whether they apply at all.
25. To determine whether the plaintiff has established a strong case, three sub-issues arise:
- (1) First, has the plaintiff established a strong case that his contractual relationship with the Mater is governed by the 2020 Constitution?
  - (2) Second, on the assumption that this is so, has the plaintiff established a strong case that the 2020 Constitution, properly construed, does not entitle the Mater to terminate his practising privileges on reasonable notice?
  - (3) Third, if the 2020 Constitution does entitle the Mater to terminate the plaintiff's practising privileges on reasonable notice, has the plaintiff nonetheless established a strong case that the termination was not a "no fault" termination on reasonable notice but rather a termination on grounds of conduct?

**Issue 1: Is the contractual relationship governed by the 2020 Constitution?**

**The Parties' Affidavits**

26. Although the plaintiff maintains that the 2020 Constitution governs this contractual relationship with the Mater, his grounding affidavit does not include the details which I would expect to see set out to establish that fact. The plaintiff's grounding affidavit avers that, after the acquisition by the Mater of the hospital, all consultants who transferred from Shanakiel worked in the Mater without a written contract "initially" and were told that previous arrangements would apply. The plaintiff's affidavit does not specify by whom or under what circumstances either the 2014 Constitution or the 2020 Constitution were negotiated or formulated; nor when either was published or circulated to consultants; nor when or under what circumstances either was furnished or made available to him. Clearly, however, he has a copy of the 2020 Constitution, which he exhibits. The 2020 Constitution exhibited by the plaintiff has a signature page for the relevant individual consultant and the Mater itself, but it is not signed by either party.
27. In addition, the plaintiff's pleadings are somewhat confused. On the one hand he pleads that the termination notice is in breach of an agreement between him and the Mater in being *since 2013*. On the other hand, he pleads that the termination notice is in breach of the 2020 Constitution. Clearly, both cannot be correct. The first draft of the 2020 Constitution was only produced in 2014. Prior to that relations were presumably governed by the Shanakiel Agreement (which is far less detailed) and upon which the plaintiff does not rely in these proceedings.
28. The plaintiff's supplemental affidavit sworn on the 10th November, 2021 provides a little more detail in this regard and states:-

*"While I am advised that the question of whether (the 2020 Constitution) governs the maintenance of my practising privileges is a matter of law, which may be addressed by way of legal submission my experience is that it is common in private hospitals that oral agreements are reached between consultants in the hospital in respect of working arrangements. That was my experience at [the Mater] where I simply continued to work as a consultant upon the acquisition of Shanakiel in 2013 and this arrangement applied to other consultants from Shanakiel also. In those circumstances, I understood that the (Constitution) applied to me notwithstanding the fact that it was not formally signed" (emphasis added).*

29. Once again, this averment is lacking in detail and difficult to interpret. On the one hand, the expression "working arrangements" could refer to the disputed provision of nursing assistance. On the other hand, the context in which this averment appears (in a section of the affidavit intended to confirm the application of the 2020 Constitution) suggests that this is not the case. Further, whilst the plaintiff avers to an "understanding" that the 2020 Constitution governed his contractual relationship, he does not explain how he came to this understanding.
30. Having said that, the Mater's affidavits are equally difficult to interpret on this issue. The Mater's principal replying affidavit sworn on 4th November, 2021 by Martin Clancy, managing director of the Mater states:

*"I say and believe that in fact the commercial relationship between the plaintiff and the Mater is entirely undocumented and I say that no commercial contract has been exhibited by the plaintiff. I say and believe that the only document held by (the Mater) governing the granting of practising privileges to the plaintiff at either Shanakiel Hospital ...or at (the Mater) is a generic document entitled "Practising Privileges for Clinicians – Shanakiel Mater", which was signed by the plaintiff on the 18th September 2011." (for clarity, this is the Shanakiel Agreement) (emphasis added).*

31. Later in the same affidavit Mr Clancy states that the only "signed document" governing the granting of practising privileges, of the plaintiff is the Shanakiel Agreement. It may well be that the only "signed" document "held" by the Mater, governing the grant of practising privileges to the plaintiff, is the Shanakiel Agreement. However the Mater does not aver that the Shanakiel Agreement governs the plaintiff's contractual relationship with it (the Mater), which it contends is "undocumented". Notwithstanding the Mater's averment that no "commercial contract" was exhibited by the plaintiff, he does exhibit the 2020 Constitution in his grounding affidavit. This may not be a "commercial contract", but it is clearly a formal document evidencing or giving effect to an agreement, apparently intended to clarify the working relationship between consultants and the Mater. Mr Clancy's affidavit therefore presents a somewhat incomplete picture as it does not explain anything about either the 2014 Constitution or the 2020 Constitution. Neither of Mr Clancy's affidavits state who prepared the 2014 Constitution or 2020 Constitution. It appears that the 2020 Constitution was produced (at least in the sense of printed) by the



Mater as it is on Mater headed paper. Mr Clancy does not state the intended purpose of the 2014 Constitution or the 2020 Constitution; nor by whom they were negotiated or concluded, to whom they were circulated or by whom, if anyone, they were signed.

32. At para. 23 of his principal affidavit, Mr Clancy avers that the procedures referred to in the 2020 Constitution "*do not apply to the withdrawal of the plaintiff's practising privileges on reasonable notice, which reasonable notice has been afforded to him*". (emphasis added). This carefully worded averment stops short of saying that the 2020 Constitution does not govern the plaintiff's relationship with the Mater (at all) nor that it would not govern a withdrawal of practising privileges for reasons of conduct.
33. Thus, notwithstanding the fact that the question of whether the 2020 Constitution governs the relationship between the parties is of central importance to the determination of the interlocutory application before the court, the averments of both parties on affidavit are sparse, lacking in detail and hard to interpret. This makes the court's task more difficult.

### **The Correspondence**

34. The plaintiff's solicitors' initiating letter dated 16th July, 2021 asserted that the termination notice was "*a flagrant breach*" of the 2020 Constitution and refers to particular clauses of the 2020 Constitution, which *inter alia* require the Mater to consult with the Chairman of the Medial Advisory Committee in respect of a "*conduct termination*". This letter is a clear statement by the plaintiff's solicitors that his contractual relationship with the Mater is governed by the 2020 Constitution.
35. The Mater's solicitors replied on 21st July, 2021 stating that the plaintiff has an "*undocumented contractual relationship*" with the Mater and states that:

*"In relation to the withdrawal of your client's practising privileges, the procedure referred to in your letter (Article 1, page 6 of (the 2020 Constitution)) applies only to situations where the Mater managing director is concerned that a consultant may have failed to comply with the terms of his/her privileges as outlined therein. As such the procedure is not applicable in this instance and the 2020 Constitution does not set out specific procedures which must be followed for withdrawal of privileges outside these specific conditions."*
36. Although, this letter states that the plaintiff's relationship with the Mater is undocumented, it implies that the 2020 Constitution would apply to a termination of privileges for breach. I fully accept that the letter purports to interpret the 2020 Constitution rather than treat of its application to the plaintiff. However, if the Mater's position is that the 2020 Constitution does not govern the plaintiff's contractual relationship with the Mater at all then I would have expected this letter to have said so.
37. In a further letter dated 24th September, 2021 the plaintiff's solicitor again asserted that the 2020 Constitution applies because the termination in this case was in substance a conduct related termination.

38. The Mater's solicitors reply dated 28th September, 2021 does not state that the 2020 Constitution does not govern the plaintiff's contractual relationship with the Mater but rather that the Constitution procedure is not applicable because the particular termination which occurred in this case is a "no fault" notice termination rather than a misconduct termination.

### **Submissions**

39. Consistent with this approach, in its written legal submissions and in argument before the court, the Mater did not submit that the 2020 Constitution does not govern its relations with the plaintiff at all. During the course of the hearing, the following was also confirmed by counsel for the Mater:

- First, all consultants in the hospital are members of the Mater Private Cork, Medical Society (MPCMS);
- Second, the Mater Private Cork, Medical Society is authorised, in conjunction with the Mater's executive management to determine if consultants have the requisite qualifications and competence to practice at the Mater and to determine matters in relation to the conduct of individual consultants;
- Third, in respect of consultants commencing practice at the Mater after 2014 or 2020, the 2014 Constitution or the 2020 Constitution, as appropriate, is proffered for signature when such consultants are granted practicing privileges; and
- Fourth, in respect of consultants such as the plaintiff who had previously practiced at Shanakiel (i.e. legacy consultant) it does not appear that either document was necessarily proffered for signature.

### **Findings**

40. Against that backdrop, I have to determine if a strong case has been made out that the 2020 Constitution governs the plaintiff's contractual relationship with the Mater. In my view it has. The 2020 Constitution is entitled "*Medical Society Constitution (MPCMS) for the Mater Private Cork*". There must therefore be a strong inference that the Constitution is for the benefit (and burden) of all consultants at the Mater who are members of the Mater Private Cork, Medical Society. The plaintiff, like all consultants at the hospital in Cork is a member of the Society.

41. The introductory paragraph of the 2020 Constitution states:

*"The Medical Society Constitution (MPCMS) for the Mater Private Cork sets out the procedure for the granting and maintaining of practicing privileges at the Mater Private Cork.*

*It is intended to provide clarity on the structure and working relationship between consultants and the hospital..."*

42. Neither this paragraph nor any other part of the 2020 Constitution differentiates in any way between new consultants and legacy consultants. This rather suggests that all

consultants are covered by the clauses relevant to them. Whilst legacy consultants may not be governed by the clauses of the 2020 Constitution governing the *granting* of privileges, they would be governed by the clauses governing the *maintaining* of privileges. Legacy consultants would also be bound by the other clauses of the Constitution which set out the obligations of consultants under the heading "*MPCMS Membership Rules*". Both parties would be bound equally by the provisions in relation to the investigation of complaints relating to conduct on which the plaintiff relies in these proceedings. In all of the circumstances, I consider that the plaintiff's understanding that the 2020 Constitution governed his relationship with the Mater is reasonable.

43. Although the copy of the 2020 Constitution, which the plaintiff exhibited, is not signed either by the plaintiff or the Mater, it seems to have been prepared by what can be described loosely as representatives of both parties. Thus, in so far as concerns the plaintiff, he is a member of the Medical Society for the Mater Private Cork. In so far as concerns the Mater, the document was produced by it on its headed paper. It would be somewhat difficult for the Mater to dispute that this evidences its agreement to the terms of the document. There was no suggestion made by either party that the document was a work in progress, subject to contract or a mere agreement to agree. Rather it seems to contain the essential terms necessary to achieve its intended purpose: the granting to and maintenance of practising privileges for the consultants at the Mater. In short, it seems to me that the 2020 Constitution bears all the hallmarks of a document intended to create legal relations and to govern the relationship of the parties. The plaintiff has averred to his understanding that this document applied to him and I find that he has made out a strong case to that effect.
44. The defendant has tentatively submitted that the plaintiff's practising privileges remain governed by the Shanakiel Agreement. In contrast with the 2020 Constitution, the Shanakiel Agreement is extremely short and lacking in detail. It contains only the barest provisions governing the granting and maintenance of privileges and specifies no duties or obligations for individual consultants. In circumstances where a far more detailed document has been prepared, it would be rather unusual for the Mater, the Medical Society and the individual consultant members thereof, not to intend that its terms would apply. That would mean that the contractual relationship with new members would be governed by the 2020 Constitution and yet legacy consultants would remain governed by the Shanakiel Agreement, a rather incomplete document dating back over a decade to which the Mater, is not a party. I can see little sense in such a bifurcated legal landscape and find it unlikely that the parties could have so intended. Further, if that had been the intended meaning and effect of the 2020 Constitution, then I think this would have been clearly stated in the document itself.

**Issue 2: Does the 2020 Constitution, entitle the Mater to terminate on reasonable notice?**

45. The court was referred by the Mater to several authorities, including *O'Donovan v. Over-C Technology Limited & Over-C Limited* [2021] IECA 37 and *Bradshaw v. Murphy* [2014] IEHC 146, establishing that at common law, an employer can terminate a contract of employment for any reason, or no reason, provided adequate notice is given.

46. Although these cited authorities are in the context of contracts of employment rather than a quasi-contract for services such as that in issue in these proceedings, I accept, for the sake of argument that such a contract may also be subject to an implied common law right of termination on grounds of reasonable notice. However, this common law right to terminate only arises in the absence of clear terms to the contrary in the contract. I note that in *Sheehy v. Ryan* [2008] IESC 14, the Supreme Court per Geoghegan J., Kearns J. and Finnegan J. held that the use of the word "*permanent*" in an employment contract did not constitute a life-time appointment and that a general appointment could be terminated on reasonable notice in the absence of clear terms to the contrary. However, the court stated:

*"The position at common law is that an employer is entitled to dismiss an employee for any reason or no reason on giving reasonable notice. I would slightly qualify that by saying that it does depend on the contract but in the absence of clear terms to the contrary which are unambiguous and unequivocal, that clearly is the position."*

47. In this particular case, it seems to me that there are provisions in the contract which are unambiguous and unequivocal and which are inconsistent with the Mater's proposition that the plaintiff's practising privileges are terminable on reasonable notice. In particular:

- (1) The 2020 Constitution specifically contemplates that consultants will retain privileges in the Mater until their 65th birthday. Whilst this is by no means determinative, it does seem somewhat inconsistent with an implied right on the part of the Mater to terminate for no reason on reasonable notice.
- (2) Clause 2(a) of the 2020 Constitution provides that the survival of consultants' privileges is contingent upon their compliance with MPCMS rules/obligations. Clause 2(d) of the 2020 Constitution provides that if a member does not use his or her privileges for a period of greater than three months without the prior agreement of the Mater, the privileges will lapse and the consultant will be required to re-apply in accordance with the procedures set out in the 2020 Constitution. Clause 2(e) provides that any member intending to discontinue practice in the Mater must give six months' notice to the Mater's managing director. The 2020 Constitution thus specifically contemplates circumstances in which consultants' privileges may be withdrawn, lapse or be discontinued. Yet, the document is entirely silent as to the right of the Mater to discontinue consultants' privileges on notice. Again this seems to be of relevance.
- (3) More compellingly, Clause 2(c) provides: -

*"Privileges are valid for a period of 3 years and will be automatically renewed on the 3rd anniversary of their being granted in writing by the Mater Managing Director, subject to:*

- (i) *Approval by both the Medical Advisory Committee...and the Mater Managing Director;*
- (ii) *The consultant fulfilling his/her privilege obligations throughout the valid period; and*
- (iii) *The consultant fulfilling all other conditions set out in this document."*

48. In my view, there is a strong case to be made that Clause 2(c), read together with the other clauses of the 2020 Constitution, evidences that the intention of the parties was that the Mater would not have a right to terminate privileges on reasonable notice, but instead that privileges would subsist for a three-year period and thereafter would be automatically renewed subject to the conditions set out in the 2020 Constitution. Therefore, if the Mater is desirous of terminating a consultant's privileges, other than for reasons of competence, capability or conduct (as to which see below), it has the opportunity of so doing on each third anniversary of the date of the granting of the privileges. The Mater did not terminate the plaintiff's practising privileges under clause 2(c). Irrespective, therefore of how clause 2(c) might be interpreted or as to when it may become operative in respect of the plaintiff, clause 2(c) could not provide a valid basis for the purported termination of the plaintiff's privileges.
49. Entirely without prejudice to their other arguments, the Mater suggests that the plaintiff's privileges have lapsed pursuant to clause 2(d) of the Constitution because he has not had any clinics since the withdrawal of nursing support and therefore has not exercised his privileges for a period of greater than three months. It strikes me that Clause 2(d) may not have become operative given that the plaintiff is still partly availing of his privileges in the form of operating at the Mater on a twice monthly basis. However, it is not necessary to comment further on this issue as clause 2(d) was not invoked in the notice of termination.
50. Bearing all of the above in mind, I consider the plaintiff has made out a strong case to the effect that his practising privileges may not be withdrawn on reasonable notice. It is therefore irrelevant that the plaintiff has not contended that six months is an unreasonable or inadequate notice.

**Issue 3: Was this, in substance, a termination on grounds of conduct?**

51. Even if I am incorrect in the above, and the right to terminate on grounds of reasonable notice exists, nevertheless I consider that the notice of termination is, in substance, a termination on grounds of conduct. The letter of termination and associated correspondence from the Mater and its solicitors contain statements which are, to say the least, consistent with a conduct based dismissal, rather than a dismissal on notice. I have underlined certain statements in this correspondence above for ease of reference.
52. The notice of termination specifically invokes the plaintiff's conduct, namely his cancellation of clinics and invitation to patients to complain to the Mater, as the relevant reasons to the decision to terminate his privileges.

53. A similar argument to the effect that no disciplinary process was engaged was made by the defendant in the case of *Naujoks v National Institute of Bioprocessing Research and Training Ltd* [2006] IEHC 358. The defendants in *Naujoks* stated on affidavit that the plaintiff's contract was not terminated by reason of misconduct and therefore that fair procedures did not arise. However, Laffoy J. considered that the inference to be drawn was that a judgment had been made by the defendant about the plaintiff's alleged responsibility for serious human resources issues. Consequently an injunction was granted on the basis of a want of fair procedures even though misconduct was not specifically alleged.
54. Notwithstanding the Mater's contention to the contrary, I am also prepared to draw an inference that the termination of the plaintiff's practising privileges is on grounds of conduct. The defendant's contention that the plaintiff is not being dismissed for misconduct and that therefore no disciplinary process is engaged does not accord with the reality of what occurred here.
55. In such circumstances the procedures, which are set out in the 2020 Constitution for dealing with concerns or complaints about competence, capability or conduct of consultants, apply. These procedures are detailed and include the following: -
- 1) Where the Mater managing director is concerned that a consultant may have failed to comply with any of the terms of his privileges it shall consult with the chairman of the Medical Advisory Committee ("MAC"), and notify the consultant in writing that representations may be made within two weeks.
  - 2) Having considered such representations the managing director may determine that the concern is unfounded. Alternatively, having given due consideration to any representations made and having sought the advice of the chairman of the MAC, if the managing director determines that the concerns were justified, the consultant will be so informed. Prior to deciding on the action, if any, to be taken, the managing director will invite the consultant to make representations.
  - 3) Having given due consideration to such representations and having consulted with the chairman of the MAC, the managing director will decide on what action, if any, is to be taken.
  - 4) If dissatisfied with the action being taken, the consultant may appeal that decision in writing to the board of the Mater within two weeks. The decision of the board shall be final.
56. Pursuant to the 2020 Constitution a consultant is to be given three separate opportunities to make representations. Such representations may relate to both the underlying complaint about competence, capability or conduct and to the appropriate action, if any, to be taken on foot of the complaint if justified. A decision to terminate a consultant's privileges may only be taken by the managing director of the Mater, having first consulted

with the chairman of the MAC and, should the consultant wish to appeal this decision, ultimately it is taken by the board. None of these steps were taken in this case.

57. Whilst it is possible that a decision on foot of such a process of investigation might take a dim view of the plaintiff's conduct, in particular his correspondence to his patients, it is by no means a foregone conclusion that the plaintiff could not, by dint of representations persuade the managing director, the chairman of the MAC or indeed the board that the sanction of withdrawal of privileges is too severe.
58. It is clear from the authorities opened to the court that even if the Mater were contractually entitled to terminate the plaintiff's privileges on reasonable notice, this would not validate a termination which is actually a conduct based termination. This is what distinguishes the present case from *O'Donovan v. Over-C Technology Limited* in which the court did not accept that the dismissal in question was for misconduct.

**Other considerations of particular relevance to this case; might a permanent injunction be granted at trial and is a trial likely?**

59. The Mater has submitted that even if the plaintiff succeeds at trial a permanent injunction could not be granted as the court would be most unlikely to grant an order binding the parties together *ad infinitum*. I entirely agree. The point however is that the plaintiff is not seeking an order binding the parties together *ad infinitum*. The plaintiff does not maintain that the Mater is legally incapable of terminating his practising privileges but rather that, if the Mater is desirous of terminating his practising privileges, it must do so in accordance with the 2020 Constitution.
60. The plaintiff is seeking to injunct, on an interlocutory basis, the particular process of dismissal commenced pursuant to the particular notice of termination issued on 7th July, 2021. For all of the reasons set out above the plaintiff has made out a strong case that this process of termination is in breach of the provisions of the 2020 Constitution which binds both parties. Accordingly, if the plaintiff were to succeed at trial, a permanent injunction might well be granted to restrain this particular process of dismissal.
61. I consider, it is less likely than in most employment injunction cases that the determination of the interlocutory application will effectively resolve the action. Unlike in most employment injunction cases, there is a strong argument to be made that the plaintiff's contract is not terminable on a relatively short period of reasonable notice.
62. It is of course entirely possible that the commercial relationship between the parties will ultimately terminate, whether by way of commencement of the process set out in the 2020 Constitution for the termination on grounds of conduct or, indeed, pursuant to clause 2(c) on its third anniversary. However, in respect of the former, the plaintiff has a right to be heard and the court cannot prejudge the outcome of the process. In respect of the latter, the court has no evidence before it as to when the third anniversary of the grant of the plaintiff's practising privileges will occur and it would clearly not be appropriate to consider this issue without evidence or argument. On the current evidence and argument, there seems to be no reason to believe that the plaintiff's three-year renewal date is imminent. Therefore, six-months' notice may not offset the balance of the

contractual period to any appreciable extent and there is every prospect that the trial will have taken place before the relevant three-year renewal date is reached.

63. Having said that, it is essential that the trial of these proceedings take place without delay. I accept the Mater's argument that the plaintiff has been dilatory in commencing the proceedings and in furnishing a statement of claim. These proceedings should be actively case managed to ensure that they come on for trial at the earliest possible opportunity which will also assist in minimising as much as possible the risk of injustice to the Mater.

**Balance of Convenience/Balance of Justice**

64. Adequacy of damages is the most important element in weighing the balance of convenience and the balance of justice. The court does not treat the adequacy of damages as a matter to be considered in advance of and separate from the balance of convenience and the balance of justice. The court will endeavour to ascertain where the least risk of injustice lies in deciding whether to grant or refuse interlocutory relief which will remain in effect until the trial.
65. The plaintiff asserts that damages are not an adequate remedy because termination of his practising privileges will cause serious damage to his professional reputation; that the withdrawal of practising privileges would be seen as an extreme and unusual punishment which is generally reserved for very serious cases where patient safety has been jeopardised, a patient has been harmed or where a doctor has been guilty of gross misconduct.
66. The plaintiff also asserts that if termination of his privileges is not prevented, his ability to earn a living will be seriously restricted; that his income from the Mater represents approximately 50% of his total income; that without his Mater practising privileges it will be impossible to maintain a practice as an orthopaedic surgeon; that it will not be easy for him to obtain practising privileges elsewhere, not simply because such privileges are scarce but also because the damage to his reputation if the termination is permitted, will be severe; that the only other private hospital in Cork, the Bons Secours, already has several other resident orthopaedic surgeons and that it would not therefore be possible to secure these practising privileges, because the number of posts for consultant orthopaedic surgeons is limited.
67. The Mater maintains that damages would be an adequate remedy for the plaintiff; that the plaintiff has been afforded a six-month period to make alternative arrangements; that the plaintiff has established relations with other hospitals but appears to have made no inquiries or efforts to seek alternative theatre access; and that even if such efforts had been made and had proved fruitless, the balance of convenience lies against compelling the Mater to continue to maintain a commercial arrangement which it has determined to end on reasonable notice.
68. Whilst I agree that the plaintiff has not deposed to any specific efforts or inquiries to obtain alternative theatre access, he has indicated that it is unlikely to be available and



has given coherent reasons for this. In addition, although six months may appear to be a reasonable period of time for the plaintiff to make alternative arrangements for theatre access, it would be unrealistic to ignore the fact that the 2020 Constitution provides for three-year rolling renewals of practising privileges. It does so presumably because both the Mater and its consultants considered that three years was a reasonable period and that a shorter period would not be workable for either of them. Whilst it is not essential for the plaintiff to continue to hold his clinic at the Mater, he has made out a reasonable case that it is essential for him to continue to be eligible for access to the Mater's operating theatre.

69. Therefore, it would be reasonable to conclude that damages would not be an adequate remedy for the plaintiff should it transpire that the Mater had prematurely terminated his practising privileges.
70. The Mater does not argue that damages would not be an adequate remedy for the plaintiff. It raises no concerns or issues in relation to patient safety, clinical practice, theatre availability or human resources. Indeed, the Mater expressly disavows any suggestions that the termination was because of any deficiency in the plaintiff's competence, capability or conduct.
71. The Mater has not indicated that it would suffer any particular difficulty or inconvenience (let alone a difficulty or inconvenience not capable of being compensated by damages) should the plaintiff be granted an interlocutory injunction. It has not averred to any likely difficulties in continuing to afford the plaintiff theatre access. Nor has it averred that it is under pressure to reallocate the plaintiff's operating privileges to another consultant. It is not even clear if there is another consultant available to take up those operating privileges. It is therefore difficult to conclude that the Mater will suffer any inconvenience or financial loss if the plaintiff continues to avail of his theatre privileges.
72. Although the adequacy of damages is the most important component of the assessment of the balance of convenience or balance of justice, it is not the determinative factor. In this case, I consider the determining factor to be the likely reputational damage which the plaintiff would suffer should his practising privileges be terminated other than in accordance with the requirements of the 2020 Constitution. I agree with the plaintiff that this termination would be likely to cause reputational damage to the plaintiff in the eyes of his patients, in the eyes of the general practitioners who refer patients to the plaintiff; and in the eyes of the profession generally and other hospitals.
73. For the above reasons, I consider that the overall risk of injustice would be minimised by granting rather than refusing interlocutory relief to the plaintiff.
74. It is important in circumstances such as this that the court fashions a remedy which, as far as possible, avoids the risk of injustice to either party. It remains open to the Mater to commence the appropriate disciplinary process under the terms of the 2020 Constitution, or to decide not to approve the renewal of the plaintiff's practising privileges on the third anniversary of their having been granted (whenever that may be). In granting

interlocutory relief it is not intended to restrict or restrain the Mater from taking any such step (albeit that same may potentially be the subject of a legal challenge by the plaintiff on as yet unspecified grounds).

75. The following passage from the judgment of Clarke J. in *Bergin* at para. 39 is applicable:

*"In addition it does not seem to me to be appropriate to restrain the board, if it should be minded to so, from purporting to exercise an entitlement to terminate the plaintiff's contract of employment by giving notice in accordance with the terms of that contract. Whether or not such notice would be effective, in the light of the issues which have arisen in these proceedings, ... there does not seem to me to be any basis for restraining the process from being started at this stage. If such notice is served then its validity can be considered at the trial of the action."*

I will hear the parties at 2 pm on 16th December 2021 on any issues that arise in relation to the orders to be made on foot of this judgment or in relation to costs.