



GMS Contracts Contract Law Issues

April 2008

A number of individual pharmacists have contacted us following the announcement by the Health Services Executive (HSE) of proposed changes to the way in which pharmacists would be reimbursed for drugs supplied under the GMS and Community Drugs Schemes. Others raised queries in relation to the proposed Interim Pharmacy Contract. All are concerned at the potential effect on their patients and businesses. In this context, we have summarised some key issues of relevance to every holder of a Community Pharmacy Contractor Agreement (that is, the 1996 contract).

- The existing contract between each community pharmacist and the HSE was negotiated in 1996. This amounts to a stand alone agreement which is legally binding on the pharmacist and HSE, conferring rights and obligations on both parties. A number of the clauses in the contract are particularly important.
- Clause 19(3) of the 1996 contract states that the individual contract between the individual pharmacist and the Health Board (now the HSE) *“is to be construed as **contingent upon the terms agreed or to be agreed between the Minister and the Pharmaceutical Contractors’ Committee regarding arrangements for the provision of pharmaceutical services under the provisions of the Health Act, 1970.**”* (emphasis added)
- In a High Court judgment delivered by Mr Justice Clarke on 29 June 2007 in a case by the Irish Pharmaceutical Union and others v The Minister for Health & Children and others, Judge Clarke stated that *“It seems to me that clause 19(3), therefore, as a matter of construction, necessarily imports into the individual contractual relations between individual pharmacists and the health boards, all previous agreements entered into between the Minister and the PCC, at least to the extent that those agreements continued to subsist as of 1996”*.
- If, for example, the Pharmaceutical Contractors’ Committee (PCC) and the Minister (or someone representing the Minister) reached an agreement, prior to 1996, in relation to reimbursement rates which included a particular wholesale margin, these arrangements amount to binding contractual terms. Arguably, any changes to those terms the PCC representing individual pharmacists or require agreement by the individual pharmacist.
- Clause 12(1) of the 1996 contract states that *“The Board shall in consideration of the service provided by the pharmacy contractor...make payments or arrangements for payments to be made to the pharmacy contractor for prescriptions dispensed at his/her contracted community pharmacy **in accordance with such rates as may be approved or directed by the Minister from time to time after consultation with the Pharmaceutical Contractors’ Committee**”* (emphasis added)
- In light of the above, it could be argued that there can be no change in rates of remuneration without those rates being approved or directed by the Minister and without their being *“consultation”* with the PCC. Consultation does not simply mean keeping someone informed. Even if the HSE places reliance on clause 12 (3) it is not at all clear that the consultation requirement has been satisfied.
- Because of the above specific provisions in the 1996 contract there appears to be serious questions about whether the *“consultation”* requirement imposed by clause 12(3) has been complied with. It is noteworthy however that the 2005 decision in Collooney Pharmacy Ltd. v North Western Health Board recognises that *“standard contracts negotiated with representative bodies are now a frequent feature of both commercial and administrative law and were desirable in the interests of uniformity.”*
- Arguably, payment to an individual pharmacist at existing rates (inclusive of the higher manufacturer’s margin) amounts to a term of the individual’s contract and any unilateral variation of the term would amount to a breach of contract. Each contract is a separate legally binding agreement between the particular pharmacist and the HSE and the holder of each contract would have a separate cause of action arising out of an alleged breach.



- Generally speaking where a breach of contract occurs and the effects are serious, the innocent party will be entitled to regard the contract as having been terminated. Alternatively, the wronged party may elect to allow the contract to stand and to sue for damages. In contract law, an award of damages is intended to place the innocent party in the position they would have been in, had the contract been performed as agreed. This may include compensation in relation to the income which should have been generated, had the contract been performed properly and other foreseeable financial losses.
- In certain cases a court may order the party in breach of contract to perform their obligations under it. Generally speaking, such an Order of “*specific performance*” will be granted where damages are not adequate to provide relief to the innocent party and where the person seeking relief from the courts will suffer serious hardship unless specific performance is ordered.
- Under clause 19(2) of the 1996 contract, a pharmacy contractor may terminate the agreement on giving three months notice in writing. The pharmacist has the right to invoke this clause for any or no reason. Importantly, under the 1996 contract the HSE does not have the equivalent right. Termination of the 1996 contract by the HSE can only happen in very specific circumstances following the establishment of a committee to investigate an allegation that a pharmacist has failed to comply with the terms of the contract or is conducting themselves or their business in a way which may present a danger to public health.
- No one can be forced to enter into a contract. They must do so voluntarily. For an individual pharmacist to terminate his/her contract voluntarily, or to provide valid grounds for the contract to be terminated by the HSE would effectively rule out the prospects of bringing a successful breach of contract claim under their 1996 form contract. The HSE would be under no obligation to issue a new or “interim” contract to someone whose existing contract was terminated.
- Although litigation concerning these issues is currently progressing through the High Court, each community pharmacy contractor is in a separate legal relationship with the HSE and would be well advised to seek legal advice concerning their particular circumstances including the prospect of commencing proceedings for an alleged breach of contract.

If you have any queries in relation to the contents of this briefing update or if there are any other issues on which you have queries, please feel free to contact:

Mark Heslin
John White
Gary Rice
Madeleine Delaney

m.heslin@beauchamps.ie
j.white@beauchamps.ie
g.rice@beauchamps.ie
m.delaney@beauchamps.ie

Beauchamps Solicitors

Riverside Two, Sir John Rogerson's Quay, Dublin 2
Tel +353 (1) 418 0600 Fax +353 (1) 418 0699
email info@beauchamps.ie web www.beauchamps.ie

This ezine is for general information purposes only and does not comprise legal advice on any particular matter. You should not rely on any of the material in this ezine without seeking appropriate legal or other professional advice. While every care has been taken in preparation of this ezine, we are not liable for any inaccuracies, errors, omissions or misleading information contained in it.