

**THE HIGH COURT  
COMMERCIAL**

**2019 No. 104 JR  
(2019 No. COM)**

**PERRIGO PHARMA INTERNATIONAL DESIGNATED ACTIVITY COMPANY**

**(APPLICANT)**

**AND**

**JOHN MCNAMARA, THE REVENUE COMMISSIONERS, THE MINISTER FOR FINANCE,  
IRELAND AND THE ATTORNEY GENERAL**

**(RESPONDENTS)**

**EX TEMPORE RULING of Mr JUSTICE DAVID BARNIVILLE delivered on 7 April 2020**

1. This is my ruling on various applications made in these proceedings which have been heard by me at this exceptional sitting of the court on 7 April 2020.
2. The applicant commenced these proceedings in February 2019 seeking judicial review in respect of a decision by the Revenue Commissioners to raise an assessment of EUR 1.64 billion arising out of the sale by the Elan of its interest in a multiple sclerosis drug, Tysabri, in 2013. The applicant acquired Elan later that year.
3. The proceedings were in due course entered in the Commercial List. In October 2019, the proceedings were listed for hearing for eight days commencing on 21 April 2020.
4. The arrival of the COVID-19 in Ireland and the consequent public health crisis has led to major interruption and disruption of the work of the courts at all levels, including the commercial court. Virtually all court business save for very urgent matters has been put on hold and cases have been adjourned. This has been the position since 13 March 2020. The position has got worse since then, culminating in the very severe restrictions on movement announced by An Taoiseach on 27 March 2020 which are to last at least until 12 April 2020. I do not think that anybody realistically expects that the restrictions will be lifted or eased at that point. While we cannot be certain, it is sensible to assume that the restrictions will continue for a significant period beyond 12 April 2020.
5. On 31 March 2020, the Chief Justice and Presidents of the Court Jurisdictions issued a public statement (the "public statement") referring to the restrictions and their impact on the operation of the courts and on the administration of justice. The public statement noted that the precise way in which physical hearings of cases may have to be conducted is being kept under constant review and would have to be adjusted to reflect changes in Government guidance and direction. The public statement stressed that it was necessary to ensure full compliance with the current high level of restriction but that it is the case that the administration of justice in urgent matters remains a vital part of the structure of the state. The public statement referred to the possibility that remote court hearings might be possible and that trials of the relevant systems would be taking place in the near future. Indeed, those trials are ongoing. It was noted that, if successful, it was hoped that it may be possible in early course for the courts to pilot remote hearings and that it may be possible for such hearings to take place in the new legal term commencing on 20 April 2020. The public statement recited that further statements would be issued to update the

public and practitioners on these developments and on other measures designed to allow the maximum number of cases to progress and to be ultimately decided, subject only to that being capable of being done safely.

6. Against that background, the applicant's solicitors wrote to the Revenue Solicitor, the solicitor acting for the respondents in the proceedings, on 2 April 2020, proposing a protocol to enable this case to proceed on 21 April 2020 on the basis of a physical hearing with certain strict conditions. Among the conditions were the following: (1) there would be a restriction on the number of persons attending court on each day of the trial such that each legal team in court would comprise of no more than four persons and social distancing would be enforced; (2) at the start of each sitting of the court, each legal team would confirm that no member of the team had known symptoms of the COVID-19 virus and also had not been in close contact with anybody diagnosed with the virus or with anybody who had symptoms of the virus. In the event of a member of any legal team, the judge or any person in court being affected by the virus during the course of the hearing, the parties would have the option of seeking an adjournment of the trial for the shortest period necessary; (3) arrangements were suggested to enable instructions to be taken from solicitors and clients; (4) the hearing would take place in the largest available courtroom in the Four Courts with restrictions on those who could attend with a limited number of accredited members of the press being entitled to attend, subject to the direction of the trial judge; (5) the parties' clients would not be in court; (6) the courtroom in use for hearing would be subject to deep cleaning on a daily basis by the Courts Service to manage the risk of any community spread of the virus. The letter noted that the proposal would be subject to my agreement and that of the Courts Service. In the absence of consent from the respondents, the applicant's solicitors stated that they would put the proposal to the Registrar of the Commercial List on 3 April 2020.
7. The Revenue Solicitor replied later that day on 2 April 2020. She pointed out that due to the current public health crisis, the office of the Revenue Solicitor has been closed in accordance with Government guidelines and its staff instructed not to attend for work until at least after 14 April 2020. It was stated that while four bankers boxes of documents had been delivered to the Revenue Solicitor on 27 March 2020, due to the closure of that office, it had not been and would not be possible to photocopy those documents for counsel as that exercise would require significant input from staff. It was contended that it would not be feasible for the case to proceed to a hearing on 21 April 2020 and that the protocol proposed by the applicants was impracticable in the current public emergency. It was further asserted that the number of personnel on the legal teams should not be restricted and that the clients should not be precluded from attending at the hearing. It was also noted that the solicitor dealing with the case on behalf of the respondents would be unable to attend the hearing for health reasons. On that basis, it was suggested that the case be adjourned to a time later in the year, when all persons be available to attend. It was further pointed out that there would be no way of knowing whether individual members of the legal teams could be exhibiting symptoms of the virus, that there might be privacy issues concerning peoples' health status and that the public health emergency might well have deteriorated at the time of the hearing. It

was contended that there was a significant public health risk in proceeding with the case in the circumstances and thus not basis the respondents propose to apply for an adjournment of the proceedings.

8. The applicant's solicitors replied later on 2 April 2020. They stated that they were instructed to oppose the application for the adjournment on the basis that it was premature and also unnecessary having regard to the protocol proposed by the applicant. They were also instructed to oppose the application because of the importance of the proceedings to the applicant and because of the prejudice the applicant would suffer if the case were unnecessarily delayed.
9. This correspondence was brought to my attention on 3 April 2020. While I was not sitting that day, coincidentally, I was giving active consideration to what was to happen to the cases which were listed for hearing on 21 April 2020 (including this case). I had decided that the three other cases listed to start that day would have to be adjourned and a new date fixed when the position in relation to the public health crisis was clearer and when the current restrictions were lifted. In light of the correspondence exchanged between the parties in this case and recognising this case (unlike the other three cases) is not a witness action but rather a judicial review, I decided to reflect on the position and to consult with the President of the High Court. I agreed to hear the parties on their respective proposals briefly today. It might be said that I ought not to have permitted a hearing to take place on these issues in light of the current movement restrictions and public health considerations. Nonetheless, observing appropriate social distancing, a short hearing did proceed today.
10. Having considered the correspondence and having heard the parties' brief submissions today, I am not satisfied that it would be possible to proceed with the hearing on 21 April 2020 on the basis of the protocol proposed by the applicant's solicitors which envisages a physical hearing with far-reaching restrictions and conditions, including limits on the number of lawyers present, the absence of clients, daily consideration and assessment of the health of individual participants at the hearing (including the judge and registrar), a stipulation for a particular courtroom and facilities and for the daily deep cleaning of that courtroom by the Courts Service.
11. I do not believe that a physical hearing can proceed on 21 April 2020 in light of: (1) the current movement restrictions and social distancing requirements which are likely to be continued beyond 12 April 2020. One might ask how could the participants at the hearing even travel to court during the course of the trial? (2) the extremely onerous obligations on the Courts Service and others which the protocol involves; and (3) the demands placed by very urgent cases including wardship matters, custody matters, urgent criminal matters and very urgent applications in civil proceedings (to name but a few), on the resources of the courts and the Courts service during this public health crisis which restrict the court's ability to deal with long cases such as this.
11. I have given consideration to whether it might be possible to accommodate a remote hearing of the case commencing on 21 April 2020. I note the position adopted by the

parties on the question of possibility of a remote hearing of the case. The applicant indicated its opposition to a remote hearing in light of the length of the hearing, the volume of the documentation involved and the complexity of the issues. The respondents noted that the position in relation to the possibility of remote hearings remained uncertain. Unfortunately, I have reached the conclusion that a remote hearing of this case would not be possible, at least on 21 April 2020. I express no concluded view at this stage as to whether the case might ultimately be suitable for a remote hearing. There remains considerable uncertainty as to how it might be possible to hear cases in the Commercial List and in other lists of the High Court in the forthcoming term, commencing on 20 April 2020. The public statement referred to earlier noted that work is being done to put in place the necessary infrastructure to enable remote hearings of certain cases to take place and that trials of the relevant systems are being conducted. It is hoped that remote hearings may be possible for cases in the Commercial List at some point next term. However, it is too early to say when that might be the case, what cases might be deemed suitable for remote hearings and how the capacity for such remote hearings would be prioritised as between the different cases in the different lists in the High Court (and in other courts). While this case may be the sort of case which could be suitable for a remote hearing, if such be possible, and I express no concluded view on that issue, it cannot be said at this stage with certainty that it will be possible to accommodate a remote hearing of this case. Such hearing could certainly not be accommodated on 21 April 2020. The position is constantly evolving and developing and, as the public statement noted, further statements will be issued from time to time when the position becomes clearer. If remote hearings are not possible, it is unclear as to whether it will be possible for physical hearings to be accommodated next term. That will depend on the Government restrictions and guidelines in force at the time and public health considerations.

12. I have also taken into account the fact that the Revenue Solicitor's office has been closed since the Government announcement on 27 March 2020 and that it has not been physically possible for staff to attend the office to arrange to have the four bankers boxes of documents furnished by the applicant's solicitors copied and furnished to counsel in light of the current staff restrictions. I have also borne in mind the fact that the solicitor in the office of the revenue Solicitor primarily dealing with this case on behalf of the respondents will be unable to attend in court for health reasons if the case were to proceed on 21 April 2020.
13. While this case is undoubtedly one of great importance for the applicant and for the respondents, involving as it does a revenue assessment on a commercial transaction of an enormous amount of money, and while the case has been listed for hearing for some time (since October 2019) and understandably the applicant wishes to have it dealt with on its assigned dates, I cannot agree that the case is so urgent that the Government restrictions should be sidestepped or bypassed and public health and the health of those involved in the trial potentially put at risk by a physical hearing involving more than 10 people present in the courtroom at any one time. While the applicant may well believe that the case is of such urgency and importance, I do not.

13. As I mentioned earlier, I have consulted with the President and he is in agreement that the case should not proceed on 21 April 2020.
14. What I will do is this: (1) I will adjourn the case listed for 21 April 2020 generally with liberty to re-enter; (2) I will relist the case for hearing on the application of the parties by correspondence when the current restrictions are lifted and when the position in relation to the public health crisis becomes clearer; (3) I will give the parties liberty to apply by correspondence for a remote hearing, if and when arrangements for such remote hearings are announced; (4) In any event, I will list the matter for mention at 10.30am on 5 May 2020 (such mention to be in whatever format is permitted at the time); and (5) I will direct the costs of the applications today be costs in the cause.

DAVID BARNIVILLE

7 APRIL 2020

APPROVED