THE HIGH COURT

COMMERCIAL

[2022] IEHC 522

[No. 2020/5180 P.]

BETWEEN

OVAL TOPCO LIMITED, MATER PRIVATE HOSPITAL UNLIMITED COMPANY, MATER PRIVATE CORK LIMITED AND SPIREVIEW EQUIPMENT UNLIMITED COMPANY

PLAINTIFFS

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 20th September 2022

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Introduction

1. The plaintiffs are members of the Mater Private Hospital Group (*"the Group"*). The first named plaintiff (*"Topco"*) is the parent company of the Group. The second named plaintiff (*"the Dublin company"*) is the operating company of the Mater Private Hospital in Eccles St. in Dublin. The third named plaintiff (*"the Cork company"*) is the operating company of the Mater Private Hospital in City Gate, Cork. The fourth named plaintiff (*"Spireview"*) is the operating company of a radiotherapy centre in Dooradoyle in Limerick. The plaintiffs claim that they are entitled to payment of €6,629,000 from the defendant (*"the HSE"*) under the terms of an agreement between the parties concluded in April 2020 under which the HSE procured the availability of additional hospital capacity in order to deal with the COVID-19 pandemic. The HSE denies that any sum is due by it to any of the plaintiffs. Furthermore, the HSE has brought a counterclaim for monies which it claims were overpaid to the plaintiffs principally in respect of interest on the Syndicated Loan described in para. 3(c) below. The net amount claimed to be due by the HSE (after giving credit in respect of the matters described in para. 5 below) is €673,187.

2. The agreement in question was entered into on 3rd April 2020. For completeness, it should be noted that the plaintiffs are not the only private hospital operators who are parties to the agreement. Part 1 of Schedule 1 identifies twenty additional parties. The agreement is described as *"Heads of Terms"* but both sides accept that it is a legally binding agreement. In

due course, it will be necessary to examine the terms of the agreement in some detail. At this point, it is sufficient to note that, as outlined in para. 1.1, the purpose of the Heads of Terms was to record the principal terms and conditions under which the plaintiffs (and other operators of private hospitals in the State) were to provide hospital capacity and services in the hospitals owned by them for the treatment of public patients on behalf of the HSE. In turn, clause 2.1 of the agreement provided that the HSE would reimburse the *"operational costs"* of the plaintiffs (and the other private hospital operators) on an open book accounting basis. As outlined further below, it was envisaged that this would be subject to an assessment and verification process involving accountants appointed on both sides.

3. The plaintiffs claim that the HSE is liable under the Heads of Terms to make a number of payments to them as part of the *"operational costs"* contemplated by the agreement. The plaintiffs claim a total of €6,629,000 which relates to the following: -

(a) First, the plaintiffs claim €830,634 which is said to be due in respect of *"use of infrastructure"*. This is one of the headings of operational costs addressed in Schedule 2 to the Heads of Terms. This claim is advanced on the basis that it forms part of the budgeted costs of depreciation of the plaintiffs at the time the Heads of Terms were executed. The plaintiffs contend that the Heads of Terms used budgeted depreciation rather than actual depreciation as the relevant metric for the cost of infrastructure. In broad terms, the HSE resists this claim on the basis that the plaintiffs should be confined to the actual depreciation recorded by them in their financial statements;

(b) Secondly, the plaintiffs claim reimbursement of interest costs payable under a finance facility agreement with Oval Healthcare Infrastructure S.á.r.l. (which is not part of the Group as such; as the owner of the shares in Topco, it sits above the Group). The precise amount claimed in respect of this interest has not been

separately identified in the Statement of Claim. The facility in question was entered into in connection with the acquisition of the Group. The plaintiffs claim that the facility in question (*"the Related Party Loan"*) was partly used to pay a proportion of the consideration due to the exiting shareholders in connection with the acquisition of the Group, partly to refinance existing debt within the group at the time of acquisition and also partly for working capital requirements. The plaintiffs maintain that, at the time the Heads of Terms were entered into, it was publicly known that the group was indebted under a facility of this kind;

(c) The plaintiffs also claim that they were properly reimbursed by the HSE under the Heads of Terms to the tune of €1.151 million in respect of interest costs arising on a loan owed by the Group to a syndicate of banks (*"the Syndicated Loan"*). The plaintiffs claim that this loan was necessary for the acquisition of the Group, to refinance existing financial debt and also to finance capital expenditure and working capital.

4. In addition to these monetary claims, the plaintiffs also allege that the HSE is in breach of the Heads of Terms in a number of respects. Although counsel for the plaintiffs made clear in the course of the hearing that no general damages are claimed by the plaintiffs in respect of these alleged breaches of the Heads of Terms, the plaintiffs nonetheless allege the following breaches:

(a) the HSE acted unilaterally in refusing to make the payments outlined in para. 3 above. The plaintiffs claim that, under clause 5.6 of the Heads of Terms, it was for the accountants appointed by the parties to assess the payments to be made under the Heads;

(b) the HSE failed to implement the dispute resolution provisions prescribed by clause 11.2 of the Heads of Terms under which disputes about payments were to be resolved by an independent expert; and

(c) the HSE, in acting unilaterally and in failing to implement the agreed dispute resolution provisions of the Heads of Terms, acted in breach of the commitment made in clause 1.5 to act in good faith.

5. In very broad terms, the central point made by the HSE is that the costs claimed by the plaintiff are not operational in nature. Instead, the HSE contends that, insofar as the Related Party Loan and the Syndicated Loan are concerned, they relate to acquisition financing and investor costs which it claims are not reimbursable under the Heads of Terms. The HSE alleges that the bulk of both loans were applied either in discharge of the consideration for the purchase of the shares in the then parent of the Mater Private Group or in discharge of loans incurred by previous purchasers of the Mater Private Group in connection with their acquisition of it. With regard to the *"use of infrastructure"* claim, the difference between the parties is not whether depreciation falls to be reimbursed *per se* but rather whether it should be reimbursed based on budgeted depreciation or based on actual booked depreciation. Insofar as its counterclaim is concerned, the HSE maintains that, subsequent to making certain payments to the plaintiffs in respect of interest payable under the Syndicated Loan facility, the HSE ascertained that the facility was centred on acquisition related finance rather than a funding cost relating to the ongoing operation and functioning of any of the plaintiffs' hospitals or facilities. On that basis, the HSE contends that it has paid money to the plaintiffs to which they are not entitled and it now seeks to be reimbursed in respect of such payments. The amount allegedly overpaid is €1,166,954. While the HSE, in its amended defence and counterclaim has sought the return of all of the money allegedly overpaid, it has subsequently acknowledged in correspondence that elements of both the Related Party Loan and the Syndicated Loan were used for the purposes

of the ongoing operation and functioning of the hospital facilities. Based on an investigation carried out by the expert retained by it, Mr. Declan Walsh, the HSE, in a letter dated 13th January 2022, has acknowledged that 5.1% of the Related Party Loan and 10% of the Syndicated Loan have been used for operational purposes. On that basis, it was signalled in that letter that the amount of the counterclaim was reduced by €377,072 in respect of the Related Party Loan and by €116,695 in respect of the Syndicated Loan. The letter stated that, when credit is given for these two sums, the amount claimed in the counterclaim is reduced to €673,187. It was subsequently clarified by counsel for the HSE on Day 7 of the hearing that, in truth, the effect of the concession made in the letter of 13th January 2022 was incorrectly characterised in so far as the Related Party Loan is concerned. Strictly speaking, the effect of the concession in respect of that loan was to concede the claim made by the plaintiffs on foot of the Related Party Loan to the extent of €377,072. In turn, that would have the result that the counterclaim would not be reduced to that extent. Instead, the counterclaim would be reduced to €1,050,258. That said, if the HSE succeed in its counterclaim and the plaintiffs fail in the other aspects of their claim, the net effect would be that there would be a set-off in respect of the amount acknowledged by the HSE to be due in respect of the Related Party Loan as against the amount due by the plaintiffs on foot of the counterclaim. The end result would still be that €673,187 would be payable by the plaintiffs.

6. The HSE rejects the plaintiffs' case that it has failed to follow the dispute resolution procedures prescribed by the Heads of Terms or that it has failed to act in good faith. In circumstances where the dispute is primarily in relation to the interpretation of the Heads of Terms, the HSE contends that the dispute does not fall within the ambit of the dispute resolution procedures envisaged by the Heads. The HSE also highlights that it offered in July 2020 to refer the dispute to a final and binding determination by an independent legal expert but this was rejected by the plaintiffs.

7. For completeness, it should be noted that, although this was not developed to any significant extent in their submissions, the plaintiffs contend, in their defence to the counterclaim, that, having made the payments to the plaintiffs in respect of the Syndicated Loan, the HSE is now estopped from pursuing a counterclaim for the return of the payments made. In turn, the HSE has contended that the plaintiffs should not be entitled to assert an equitable defence of estoppel in circumstances where the plaintiffs allegedly do not have the necessary *"clean hands"* to pursue an equitable remedy of that kind. The basis for the allegation of a lack of *"clean hands"* is that, according to the HSE, the plaintiffs misrepresented the correct position as to the purpose of Syndicated Loan in the course of the dealings between the parties' accountants subsequent to execution of the Heads of Terms. This is denied by the plaintiffs. These competing contentions of the parties seem to me to be, very much, peripheral to the main issues that require to be resolved. Depending on how the main issues are determined, it may not be necessary to address these subsidiary contentions at all. Accordingly, I will, in the first instance, address what I believe are the main points in issue between the parties which, as outlined below, turn not upon the conduct of the parties but on the terms of the agreement between them.

Relevant principles governing the interpretation of the Heads of Terms

8. Given that the principal issues to be determined in these proceedings turn on the proper interpretation of the Heads of Terms, it is necessary to identify the principles which I am required to apply in seeking to understand the meaning of the words used by the parties in those Heads. The principles governing the interpretation of a written contract of this kind are well established. Not all of them are immediately relevant to the issues here. I will therefore confine myself to those principles which potentially apply in this case. The Supreme Court authorities establish that the process of interpretation of a written contract is entirely objective. Accordingly, evidence as to the previous negotiations of the parties and their subjective

intention or understanding of the terms agreed is inadmissible. Instead, the court is required to interpret the contract by reference to the meaning which it would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of its conclusion. This has become known, in the words of Clarke C.J. as the *"text in context"* approach. This means that the court will look not solely at the words used in the contract but also at the relevant factual and legal context at the time the contract was put in place.

9. Unless the context or the terms of the contract suggest otherwise, the words used in the contract will be given their natural and ordinary meaning. The court will look at the contract as a whole. It will not look at any clause of the contract in isolation. Furthermore, as O'Donnell J. (as he then was) stressed in *Law Society v. Motor Insurers Bureau of Ireland* [2017] IESC 31 ("*the MIBI case*"), it is wrong to approach the interpretation of a contract solely through the prism of the dispute before the court. At para. 14 of his judgment in that case, O'Donnell C.J. said: -

> *"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later."*

10. There was some debate between the parties in this case in relation to the extent to which a court could interpret a contract through the lens of *"commercial common sense"*. The plaintiffs emphasised that, in accordance with the case law, a court cannot use a commercial or common-sense interpretation of a contract to change the meaning of the bargain agreed by the parties. They referred, for example, to the observation made by Barniville J. (as he then was) in *Point Village Development Ltd v. Dunnes Stores* [2021] IEHC 628 at para. 125 where he said: -

> *"125. There is, therefore, undoubtedly a role for commercial or business common sense in the interpretation of the provisions of a contract… However, the court must also be conscious that business or commercial common sense is not used to fundamentally alter the meaning of the bargain… made by the parties…"*

11. Evidence as to subsequent conduct by the parties is ordinarily not admissible as an aid to the interpretation of a contract. For that reason, notwithstanding the extensive evidence that was given at the hearing in relation to them, no reliance can be placed on the dealings which took place between the parties subsequent to the execution of the Heads of Terms. That evidence is not admissible as an aid to the interpretation of the Heads. However, as noted by counsel for the HSE, there is one exception to this principle. This was identified by Clarke J. (as he then was) in the *MIBI* case at para. 11.30 where he indicated that the notes to financial statements of the MIBI were admissible in the specific context of a business efficacy argument by the members of the MIBI notwithstanding that the notes post-dated the relevant agreement. The notes in question were inconsistent with the business efficacy argument advanced by the MIBI. While Clarke J. was in a minority in the Supreme Court in relation to the ultimate result in that case, no one disagreed with this element of his judgment. As I understand it, this aspect of the judgment of Clarke J. is said by the HSE to be relevant in the context of a case made by it that the plaintiffs' accountants, subsequent to execution of the Heads of Terms, sought to characterise the Related Party Loan as being for the purpose of the ongoing operation and functioning of the Group rather than for the purpose of its acquisition. In para. 11.30 of his judgment in the *MIBI* case, Clarke J. said: -

> *"It is true, of course, that the unilateral view of one party is not relevant to the construction of an agreement. Agreements are to be construed objectively. However, it seems to me that the established view of a party can be of some relevance in considering the weight, if any, to be attached to a business efficacy argument. The whole point of*

such an argument is that it is said that a particular construction should not be favoured because it should be assumed that a reasonable business person would not have entered into an agreement which was contrary to business sense. Such an argument is normally made by a party who asserts that, from its perspective, an agreement construed in a particular way would not have made sense and that it should be implied that the party would not have entered into such an agreement unless the text is clearly to the contrary. But if the very party whom it might be said would not have entered into an agreement of a particular type can be shown to have believed that it had entered into an agreement of that very type, then such an argument is, in my view, significantly undermined. … [I]*f it truly is to be said that it would not have made business sense for the MIBI … to have agreed to cover the liabilities of an insolvent insurer then it is surely highly surprising that they appear to have believed, for a significant number of years leading up to the Setanta collapse, that they had done just that. If it would have been so contrary to business sense to have entered into such an agreement, then it is surprising in the extreme that the MIBI actually thought that it had done so."*

12. It may be necessary at a later point in this judgment to return to some relevant case law. However, at this point, I believe it is sufficient to keep in mind the principles outlined above in seeking to interpret the provisions of the Heads of Terms. Having regard to those principles, it will be necessary to consider both the provisions of the Heads of Terms and the relevant legal and factual backdrop against which the Heads were put in place. I turn first to the written terms expressly agreed between the parties. In outlining those terms, I will also refer from time to time to the competing submissions of the parties in relation to their meaning. At a later point in this judgment, I will set out my conclusions in respect of their meaning and effect.

The relevant provisions of the Heads of Terms

13. Clause 1 of the Heads of Terms sets out the purpose of the agreement in seven sub-paragraphs. Insofar as relevant, clause 1.1 is in the following terms: -

> *"1.1 The purpose of these Heads of Terms is to record the principal terms and conditions under which it is proposed that the Providers will provide full hospital capacity and services including but not limited to acute bed capacity in the hospitals owned by them ("Relevant Hospitals")… for the treatment by them of public patients on behalf of the HSE, in a manner consistent with and pursuant to section 38 of the Health Act, 2004… both those suffering from COVID-19 and otherwise."*

14. Although neither side placed any emphasis upon it, the reference to s. 38 of the Health Act 2004 (*"the 2004 Act"*) should be noted. Under s. 38 of the 2004 Act, the HSE is authorised to enter into arrangements with third parties for the provision of health or personal social services by that third party on its behalf. Under s. 38(2), the HSE is required to determine, prior to entering into an arrangement under s. 38(1), the maximum amount of funding that it proposes to make available in respect of the financial year under the arrangement in question and the level of service it expects to be provided in return for that funding. The reference here to s. 38 of the 2004 Act should be read together with the provisions of clause 3.2 and 3.3 of the Heads of Terms. Under clause 3.2, the HSE agreed to use its best endeavours to procure an exemption for the plaintiffs from the Minister for Health in respect of the requirements of s. 38(3) of the 2004 Act under which service providers are required to keep records in a particular form and to submit accounts annually for examination. Clause 3.3 of the Heads of Terms expressly provided that, subject to such an exemption, the Final Agreements (contemplated by the Heads of Terms) *"will constitute arrangements under Section 38(1) of the 2004 Act…"* and that the information (including the financial information required to be provided by the plaintiffs under the Heads of Terms) should satisfy any requirement to provide information under s. 38(7) of

the 2004 Act (under which the HSE is empowered to request from a service provider any information that it considers material to the provision of a health or personal social service by that provider).

15. In the course of his submissions, counsel for the plaintiffs emphasised the reference to *"the Providers"* in clause 1.1. For this purpose, the term *"the Providers"* is defined as *"the independent health sector hospital providers, whose details are set out in Schedule 1, Part 1"*. Counsel noted that Topco is named in Part 1 of the first schedule as one of the providers. On that basis, counsel for the plaintiffs argued that the Heads of Terms recognise that Topco would be providing a service along with the operators of the individual hospitals. However, it should be noted that, in the plaintiffs' replies dated 21st September 2020 to the HSE's rejoinder seeking further and better particulars dated 7th September 2020, it was expressly stated that Topco *"brings these proceedings in its capacity as a party to the Heads of Terms, as parent company and shareholder of the Second, Third and Fourth Plaintiffs and as a party to the Facility Agreement which is pleaded in paragraph 17(c) of the Statement of Claim"*. No suggestion was made that Topco was itself providing a service to the HSE. As I understand it, the reference to the Facility Agreement was intended to refer to the Related Party Loan. In contrast to the approach urged by counsel for the plaintiffs, counsel for the HSE stressed the reference to *"independent health sector hospital providers"* in the definition of *"the Providers"* and he submitted that Topco could not plausibly be considered to constitute such a provider. I should explain that this debate is relevant in the context of the two loans in issue. They were taken out by Topco and its immediate subsidiary, Oval Bidco Limited (*"Bidco"*), and the HSE argues that, if Topco is not a hospital provider, the loans cannot be said to fall within the ambit of the Heads of Terms. The role played by Bidco is described in more detail in para. 53 below.

16. Both sides placed emphasis on clause 1.3 which sets out the common purpose of the arrangement between them. Clause 1.3 provides as follows: -

*"The Parties recognise that the COVID-19 global pandemic… is an urgent and unprecedented public health crisis and are co-operating and acting fairly and in good faith within the overriding objective of supporting the HSE in discharging its various duties including its duties under section 7 of the Health Act 2004…, having due regard to medical necessity/emergency and quality and patient safety within the context of the Pandemic and in so doing agree as a constituent part of the national solution to the Pandemic to the provision of common access to services including clinical care in the Relevant Hospitals whereby all patients will be eligible… for treatment as public patients ("**Common Purpose**")."* (Bold in original)

17. While both sides emphasised the reference to acting fairly and in good faith, counsel for the HSE placed particular emphasis upon the stated *"overriding objective"* which was to support the HSE in discharging its duties. He submitted that this was a strong indicator that this is not an agreement that envisages a profit for the providers or for any investor in the providers. The reference in this clause to acting fairly and in good faith should also be read together with the provisions of clause 1.5 (quoted below). As noted in para. 20 below, the plaintiffs submit that the HSE is in breach of the obligation of good faith.

18. For completeness, the reference to s. 7 of the 2004 Act should be noted. Under s. 7(1) of the 2004 Act, the object of the HSE is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public.

19. Clause 1.4 of the Heads of Terms makes clear that all patients treated at the hospitals of the plaintiffs for the duration of the agreement were to be treated as public patients. Clause 1.4 provides: -

"The Parties accept that the Government's intention and the Common Purpose is served by the Providers without exception providing a fully public service while these

Heads of Terms… are in operation. All patients will be treated as public patients for the duration of these Heads of Terms…"

20. The plaintiffs place some reliance on clause 1.5 of the agreement under which the parties agreed to *"adhere to the spirit of these Heads of Terms, to act at all times in good faith towards the other Party in the exercise of the Heads of Terms and in the negotiations between them, to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed Common Purpose"*. The plaintiffs submit that the HSE is in breach of this obligation, both in the decision made by it that the interest charges and use of infrastructure charges are not reimbursable and in the manner in which that decision was made. In addition, the plaintiffs complain that the HSE refused to operate the dispute resolution procedure laid down in the Heads of Terms (which is addressed in more detail below).

21. Clause 1.6 of the agreement envisaged that the provision of the service by the plaintiffs under the Heads of Terms would be more comprehensively documented in a series of further agreements. Those agreements never materialised. The parties operated solely by reference to the Heads of Terms. As outlined above, there is no issue that the Heads of Terms are legally binding. Clause 12.1 of the agreement expressly so provides.

22. The terms of the service to be provided by the plaintiffs are addressed in clause 2.1 of the Heads of Terms which provides as follows: -

*"In consideration of HSE paying the Providers €10 each…, the Providers will make available to the HSE their full capacity and services in the Relevant Hospitals including, but not limited to, total bed capacity, facilities, diagnostics, staffing, management and full organisation capability ("**Service**"). The HSE will reimburse the operational costs of the Providers of providing the Service at the Relevant Hospitals on an open book accounting basis covering both income and expenditure and balance sheets ("**Open Book Basis**"), as defined hereunder as the Costs, and subject to an*

assessment and verification process that is as of yet to be documented. The provision of primary medical care services or community services does not form part of the Service." (Bold in original)

23. Clause 2.1 is of critical importance in the context of the plaintiffs' claim. There is a significant dispute between the parties as to the way in which clause 2.1 should be interpreted. In this context, it should be noted that there is no definition of *"operational costs"* in the Heads of Terms. Nor is there is any definition of what is meant by *"open book accounting basis"*. There was no significant controversy at the hearing as to the latter term. The dispute between the parties is focused on the meaning of *"operational costs"*.

24. The plaintiffs draw attention to the way in which the Heads of Terms use the words *"operational costs"* rather than *"operating costs"*. The plaintiffs submit that the reference to *"operational costs"* was clearly intended to have a wider meaning than the latter term which has a well understood meaning in a corporate business context. The plaintiffs also highlight the breadth of the service to be provided. Counsel for the plaintiffs referred, in particular, to the use of the words *"full capacity and services in the Relevant Hospitals"*. He suggested that this is the whole of the healthcare business of the hospitals *"lock, stock and barrel"* in return for which they were to be paid the *"Costs"*. Counsel also stressed that there were alternatives available to the HSE. The HSE could, for example, have sought to take 50% of the capacity of the hospitals. The HSE could also have agreed to pay a charge on the basis of specific services provided as and when needed. However, the HSE decided against that and counsel suggested that the HSE may well have been motivated by what he described as the *"advantage of the model"* which was that the amount to be paid was easily ascertainable from the plaintiffs' accounts. In this context, he suggested that, under the process envisaged by the Heads of Terms, one would first look at the accounts for the prior year and then look at management accounts on an ongoing basis. He also submitted that *"in between, you look at the budget for the current*

period and you can see what are the budgeted costs." He suggested that, in this way, the HSE was capable of getting a *"good handle on the costs"* which, from the HSE's point of view, gave a great deal of certainty. Similarly, from the point of view of the plaintiffs, there was also the advantage of certainty. The plaintiffs knew that their costs would be covered. He submitted that all costs were covered save those that are expressly excluded by the Heads of Terms such as intragroup interest that cancels on consolidation (as described further below).

25. As noted above, the HSE made the case that *"operational costs"* do not include the costs of acquisition of the Mater Private business. The HSE maintained that there is a material distinction between operational costs and acquisition costs and that a reasonable person in the position of the parties would not consider that costs incurred in connection with the acquisition of a business form part of the operational costs of that business. In addition, counsel for the HSE argued that the reference to *"reimburse"* in clause 2.1 is important. Counsel for the HSE argued that the natural meaning of that word is to pay back. Thus, for example, if the actual depreciation suffered by the plaintiffs was less than the budgeted depreciation, it would not make sense that the plaintiffs should be paid on the basis of what had been budgeted. He submitted that reimbursement would not be apt to describe a payment made on that basis. Counsel for the HSE also emphasised that what is to be reimbursed are the costs of providing the Service. He also submitted that, when clause 2.1 is read in conjunction with clause 5.1 (dealt with below), it was clear that the reference to *"Costs"* envisaged a *"costs only"* recovery and that it could not extend to any profit for any of the plaintiffs or any investors in the plaintiffs.

26. Clause 2.2 of the agreement provides further detail as to the service to be provided under the Heads of Terms. Insofar as relevant, clause 2.2 provides as follows: -

> *"2.2 During the term of these Heads of Terms (as defined in clause 4.1 below) ..., the Service is expected to comprise the following:*

> 2.2.1 *inpatient, non-elective care (either direct admission or transfer from the HSE);*
>
> 2.2.2 *urgent non-COVID-19 surgery and treatment;*
>
> 2.2.3 *urgent day cases, specialist consultations and side room procedures and all treatment ancillary thereto (including supporting pathology and imaging);*
>
> 2.2.4 *provision of care for COVID-19 infected patients including those needing high dependency respiratory support on oxygen therapy and NIV therapy…; and*
>
> 2.2.5 *such further additional services as may be deemed clinically necessary, as agreed between the Parties, having regard to the Common Purpose."*

27. It should be noted that the service to be provided under the Heads of Terms did not extend to the independent consultants attached to any of the hospitals the subject matter of the agreement. This was expressly acknowledged in clause 7.4 under which the *"Providers"* agreed to use their best endeavours to procure that *"self-employed private only consultants… agree to a specified purpose locum consultant Category A post-2012 contract, with the HSE being the employer…"*.

28. Under clause 2.4, the *"Providers"* also agreed to use their best endeavours to achieve maximum use of their hospitals having regard to the Common Purpose (as defined) including (but not limited to) increasing occupancy levels for the purpose of delivery of the Service. Furthermore, clause 2.5 provided that the hospitals should be run with *"operational flexibility"*.

29. Clause 3.1 provided that the arrangements should commence from Monday, 30th March 2020, while clause 4.1 dealt with the duration of the term and the manner in which that could be extended. Clause 4.1 provided that the term of the arrangement would be for a period of three months from 30th March 2020 or *"such further period as may be agreed between HSE*

and the Providers, or any of the Providers…". Notwithstanding this reference to *"such further period as may be agreed"*, clause 4.1 then continued as follows: -

> *"The HSE shall notify the Providers… not less than thirty… days prior to the expiry of the third month of the Term whether it intends to extend the Term by a further month or terminate these Heads of Terms… with effect from the expiry of the third month of the Term…"*

30. Read on its own, this aspect of clause 4.1 might suggest that the HSE could unilaterally extend the original three-month term of the agreement. However, clause 4.1 should, in turn, be read with clause 4.2 which provides: -

> *"In the event that the HSE does not terminate these Heads of Terms… pursuant to clause 4.1, and after the expiration of the fourth month of the duration of these Heads of Terms…, any of the Providers or the HSE may on the provision of one month's written notice terminate these Heads of Terms…, with respect to that Provider or group of Providers…"*

31. Counsel for the plaintiffs submitted that the effect of clause 4.1 was that the term of the arrangement was three months or longer (if agreed) but the HSE had the option to unilaterally extend it by one month. He submitted that the effect of clause 4.2 was that, in the event that the HSE did not terminate the arrangement, it would continue indefinitely unless one month's written notice was given either by the HSE or by the plaintiffs. Thus, as counsel for the HSE subsequently submitted, the plaintiffs could bring the indefinite duration of the arrangement to an end if they so desired. Under clause 4.2, they had the ability to terminate the arrangement themselves, once it had been in place for a period of four months.

32. Before leaving clause 4 of the Heads of Terms, it should be noted that, consistent with other provisions of the agreement, clause 4.3 provided that: -

> *"The Providers acknowledge and agree that during the Term no private work will be admitted in any of the Relevant Hospitals after the Commencement Date."*

33. This is also reinforced in clause 4.4 which made clear that, notwithstanding that the requirements of the service to be provided might vary depending upon epidemiological needs during the term, *"all of the Providers' capacity will be made available to allow for the delivery of the Service"*.

34. Clause 5 deals with funding and costs. Clause 5.1 is in the following terms: -

> *"HSE shall pay the Consideration only to the Providers and shall reimburse for the operational costs, under the general headings set out in Schedule 2…, of providing the Service at the Relevant Hospitals which costs are actually incurred by the Providers ("**Costs**"), on a costs only and Open Book Basis."* (Bold in original)

35. This is a key provision in the context of the present dispute. Counsel for the HSE submitted that it is clear from this provision that (with the exception of the consideration of €10 payable under clause 2.1) the only costs items which are recoverable under clause 5.1 are those which comply with the following conditions: -

(i) The item must be an operational cost;

(ii) It must be a cost of providing the service;

(iii) It must be actually incurred; and

(iv) It must be *"costs only"*.

36. In addition, counsel for the HSE said that clause 5.1 must be construed consistently with clause 5.11 under which the parties acknowledged that *"the Common Purpose does not envisage a commercial or economic benefit or profit beyond the Costs"*. Counsel for the HSE argued that the items claimed by the plaintiff in these proceedings plainly do not satisfy these criteria. In contrast, counsel for the plaintiffs submitted that the language of clause 5.11 envisaged that there could be a commercial or economic benefit within the *"Costs"*. Counsel

argued that, what was prohibited or not envisaged by clause 5.11, was a commercial or economic benefit which went beyond the *"Costs"*. He argued that this did not prohibit a profit element that falls within the *"Costs"* either as defined by clause 5.1 or as listed in Schedule 2. He submitted that there is no language stipulating that the *"Costs"* cannot include some element of a commercial or economic benefit. However, counsel for the HSE argued that this submission on the part of the plaintiffs is plainly wrong. He submitted that, in making their argument, the plaintiffs attach undue emphasis to the phrase *"beyond the Costs"* and ignore what he described as the crucial terms of clause 5.1 that this is a *"costs only"* arrangement. He also argued that the plaintiffs have ignored the *"whole thrust"* of the Heads of Terms as reflected in the description of its common purpose (as defined in clause 1.3). Counsel for the HSE also made the case that the last sentence in clause 5.11 emphasises that the parties to the Heads of Terms acknowledged that the common purpose does not envisage a commercial economic benefit or profit for anyone and he suggested that this includes any investors in the plaintiffs.

37. As noted above, the plaintiffs also rely on the terms of Schedule 2 to the Head of Terms. In order to understand the respective cases made by the parties, it is necessary to set out Schedule 2 in full: -

1. Operating costs	*This would cover any operating costs required to be incurred to run the business, including payroll and staffing (including consultants), and inclusive of any exceptional COVID-19 related costs (such as hotel accommodation), consumables and related medical supplies and operating costs and overheads of the facility. It would exclude any non-cash impairment and related write-offs not related to any of the COVID-19 assistance actions and intra-group charges for non-service items.*

2. Rent	*Normal pre-existing contractual rent payable for operation of the facility and related support infrastructure (e.g. car parking, consultant rooms etc.). The Parties agree that HSE will not be assuming any leases.*
3. Finance costs	*Contracted funding costs related to the ongoing operation and functioning of the facility, e.g. interest, cash leasing costs excluding intra-group interest payments which cancel on consolidation.*
4. Use of infrastructure	*This would cover:* *i. Capex costs incurred in order to implement and run the Service, e.g. use of capital equipment, modifications etc. Any stand-alone capital equipment purchased in accordance with these arrangements (i.e. ventilators) to be owned by HSE for use by the Providers without charge. Capex to be approved by HSE prior to costs being incurred, via agreed scheme of delegation.* *ii. An allowance for normal wear and tear, based on the 2020 budgeted depreciation charge of the facility, based off an average daily rate.*
5. Decommissioning costs	*Any reasonable costs incurred by the Providers in restoring premises and equipment that has been adapted for the purposes of the Service to its prior condition, as directed by the HSE as part of the provision of the Service.*

38. While counsel for the HSE characterised this schedule as no more than a series of headings as described in the body of the Heads of Terms, counsel for the plaintiffs submitted

that the headings and the description associated with them (as set out in the schedule) are the way in which the parties chose to identify the operational costs that are to be reimbursed under the Heads of Terms. Counsel for the plaintiffs drew attention to the fact that the first item of the schedule, namely *"operating costs"* is well understood in an accounting context. He also drew attention to the existence of the specific exclusion in the last sentence of the explanation given in the right-hand box of the schedule in respect of operating costs. Counsel suggested that this is an example of a specific exclusion expressly agreed by the parties. He submitted that this demonstrates that the HSE was alert to the ability to exclude a particular type of cost that would otherwise be within one of the general descriptions given in the schedule or in the body of the Heads of Terms.

39. In understanding what was intended by the parties, counsel for the plaintiffs also submitted that, although not directly in issue in these proceedings, the description of the second item in Schedule 2, namely *"Rent"* is of assistance. The description given in the right-hand box of the schedule in respect of rent specifically includes normal pre-existing contractual rent and counsel suggested that, accordingly, if a provider had rented a hospital premises, that would clearly be covered as a cost of providing the service. Counsel submitted that, if rent is envisaged to constitute an element of the cost of providing the service, there is no logical reason why the parties would treat the payment of interest on a loan to acquire the hospital facilities in a different way. In order to provide a hospital service, a hospital provider plainly needs premises from which to provide that service and the premises can be acquired either by renting from a landlord or by acquiring the premises by purchase and, more often than not, borrowing money for the latter purpose. Where premises are acquired with the benefit of a loan, the cost of that loan is as much a cost of providing the service as the cost of rent would be, had the hospital operator chosen to rent rather than to purchase the premises. In contrast, counsel for the HSE argued that, where an existing hospital premises or business is acquired by a purchaser, the cost

of acquisition cannot be considered to be a cost of providing the service. It is a cost to the purchaser of the purchase.

40. Turning to *"Finance costs"*, counsel for the plaintiffs emphasised the express exclusion in respect of *"intra-group interest payments which cancel on consolidation"*. Counsel submitted that, were it not for such an exclusion, the inference must be that even intragroup interest payments which cancelled on consolidation would be within the ambit of reimbursable costs.

41. With regard to the *"use of infrastructure"* heading, counsel for the plaintiffs submitted that this was not necessarily to be equated with depreciation. Instead, the Heads of Terms chose a different metric, namely use of infrastructure which, he suggested, is plainly wider than depreciation. As an alternative, the parties could, instead, have used, for example, a percentage of the cost of infrastructure or they could have used actual depreciation as the metric but they expressly chose a different factor. Counsel submitted that, insofar as it does cover depreciation, the parties chose, in para. (ii) of the right-hand box of the schedule, to use *"budgeted depreciation"*; not depreciation which is actually incurred. Counsel characterised budgeted depreciation as an accounting construct. The parties chose this *"simple and pragmatic formula"* based on what was budgeted rather than what was actually incurred.

42. In response, counsel for the HSE argued that the provisions of the schedule do not dilute what he described as the *"core requirements"* of the Heads of Terms, the most relevant of which, in the context of finance costs, is the requirement that they should be *"actually incurred"* and that any element of profit should be excluded. On the facts, the budgeted depreciation was greater than what was actually incurred. Counsel for the HSE submitted that the plaintiffs' case that it is entitled to retain the difference between the budgeted depreciation and the depreciation actually incurred was offensive to the core tenet of the agreement that it was a not-for-profit arrangement. He suggested that the reference to the allowance being

"based on the 2020 budgeted depreciation charge…" is explicable on the basis that an allowance for wear and tear can often be a very subjective matter and that budgeted figures prepared in the pre-pandemic period provided a ceiling as to the level of depreciation that might be claimed. In addition, counsel submitted that, if the only criterion was that the wear and tear would be based on the 2020 budgeted depreciation charge, it made no sense that the full amount of that charge was not simply paid over immediately without the need to go through the process contemplated in clauses 5.2 to 5.7. The fact that the Heads of Terms did not approach the matter in that way was significant; in counsel's words *"You got your 80% of that and you true it up by reference to actual"*. Counsel submitted that the words *"based on the 2020 budgeted depreciation charge"* can be read as referrable to what was to be paid on account. He submitted that this is the only interpretation that was consistent with the two core elements of the agreement he had previously identified. He submitted that the interpretation posited by the plaintiffs completely undermined those two core elements.

43. With regard to the *"Finance costs"* heading in the schedule, counsel for the HSE submitted that this heading cannot dilute the requirements of the agreement and, in particular, the requirements of clause 5.1. He reiterated that, for clause 5.1 to apply, any cost must be of an operational nature; moreover, it must be an operational cost of providing a service; it must have been actually incurred and it must be *"costs only"*. He suggested that the plaintiffs were seeking to rely on the provisions of Schedule 2 in isolation. With regard to the attempt by the plaintiffs to place reliance on the use of the word *"related"* in relation to this item, counsel accepted that *"related"* is often given a wide meaning but he argued that the use of that word could not undermine the requirement that any amount claimed in relation to this item must satisfy each of the four criteria which he submitted arise under clause 5.1 (as set out in para. 34 above). Counsel said that the HSE believes that a fundamental distinction must be made between the provision of the service and the acquisition of the service by those providing it.

He submitted that the Heads of Terms are *"at pains"* to emphasise that they are concerned with cost recovery in relation to the provision of a service. The phrase in the right-hand box of Schedule 2, namely *"ongoing operation and functioning of the facility"* is entirely consistent with the idea of providing the service and entirely inconsistent (so he submitted) with the idea of acquisition of the service.

44. The mechanics by which claims for payments were to be made are addressed in clauses 5.2 to 5.11 and also in clause 6 of the Heads of Terms. Clause 5.2 envisaged that each provider should provide the HSE with an estimate of costs which it expected to incur within five days of the commencement date and that the HSE would pay 80% of these costs on account to each provider within two weeks. Clause 5.2 provides as follows: -

> *"Each Provider shall provide the HSE with an estimate of the Costs which it expects to incur for April 2020 operating costs (consistent with the basis set out in Schedule 2) ("***April Costs Estimate***") within 5 days of the Commencement Date, an amount equal to eighty per cent. (80%) of which will be paid on account to each Provider within 2 weeks of the Commencement Date to ensure adequate cash flow is available to ensure the safe running of each Provider's facilities in advance of normal weekly cash flow payments. The April Costs Estimate shall be accompanied by a full breakdown under the headings set out in Schedule 2 and shall be based on board approved budgeted financial information."* (Bold in original)

45. In turn, clause 5.3 dealt with the making of a balancing payment in respect of the actual costs incurred during April 2020. Clause 5.3 provides: -

> *"Within seven (7) days of 30 April 2020, each Provider shall provide to the HSE details of the actual Costs incurred by it during April 2020 (the "***April Provider Costs Statement***"). On receipt of the April Provider Costs Statement, HSE shall make a balancing payment in an amount equal to, to each Provider respectively, the difference*

between the amount which is eighty per cent. (80%) of its April Costs Estimate and the amount which is one hundred per cent. of its April Provider Costs Statement."

46. Insofar as payments falling due after April 2020 are concerned, these are addressed in clause 5.4 and 5.5 of the Heads of Terms which envisaged the provision of weekly estimates of the costs which the providers expect to incur in the following seven days to be followed by details of the actual costs incurred during the relevant seven-day period. These sub-paragraphs also envisaged payment of 80% of the estimate *"on receipt"* of that estimate. Similarly, the balancing payment was to be made on receipt of the details provided of the actual costs incurred during the relevant seven-day period. The amount to be paid in each case was the difference between 80% of the costs estimate and 100% of the statement of actual costs. For completeness, it should be noted that, in practice, the provision of statements took place on a monthly rather than a weekly basis but nothing turns on that fact for the purposes of this judgment.

47. Clause 5.6 envisaged that, on a monthly basis, the *"Relevant Accountants"* (as explained in more detail in clause 6.1) should carry out an assessment of each cost estimate provided by the plaintiffs to the HSE. In cases where an overpayment of costs was identified in the course of this exercise, the HSE was to offset such overpayment against the next payment to be made by it pursuant to the Heads of Terms. On the other side of that coin, clause 5.6 made clear that, in the event that an underpayment was identified, the HSE was to pay the amount of the underpayment promptly to the relevant provider. Counsel for the plaintiffs has stressed that clause 5.6 expressly envisaged that the assessment would be carried out by the Relevant Accountants and would not be undertaken by the HSE. Counsel also stressed that such an assessment by the Relevant Accountants was a precondition to any offset by the HSE. Furthermore, the plaintiffs also stressed that clause 5.6 envisaged that, in the event of any dispute in relation to a costs estimate (or any overpayment or underpayment), such a dispute

was to be referred to an independent expert pursuant to clause 11.2 (dealt with below). For completeness, clause 5.6 is in the following terms: -

> *"In accordance with their role under clause 6.1, the Relevant Accountants (as defined in clause 6.1), at the end of the first month of the Term, and on a monthly basis thereafter, will carry out an Assessment of each Costs Estimate provided by the Providers to the HSE pursuant to these Heads of Terms. Not later than thirty… days after the commencement of each Assessment, the Relevant Accountants shall complete the Assessment with respect to the Costs incurred in that month by the Providers respectively and shall communicate that Assessment to the HSE and the Providers. Where there has been an overpayment of Costs following completion of an Assessment (an "**Overpayment**"), the HSE shall offset such Overpayment against the next payment to be made by it pursuant to these Heads of Agreement, or where there is no such payment to be made, the relevant Provider or Providers (as the case may be) in receipt of the Overpayment shall promptly repay such Overpayment to HSE. Where there has been an underpayment of Costs following completion of an Assessment (an "**Underpayment**"), HSE shall pay an amount equal to such Underpayment promptly to the relevant Provider or Providers (as the case may be). Any dispute in relation to a Costs Estimate (or any Overpayment or Underpayment) shall be referred for determination to the Independent Expert pursuant to clause 11.2 and, where such dispute has been so referred, no Overpayment or Underpayment shall be made until the Independent Expert has made a determination."*
>
> (Bold in original)

48. Clause 6.1 addressed the appointment of the Relevant Accountants. One accounting firm was to be appointed by the plaintiffs while the HSE nominated Ernst & Young. The task

of the Relevant Accountants was expressly to assess, verify and validate both the costs estimates and the actual costs. Clause 6.1stated that their role was: -

> *"…to assess, verify and validate the Costs Estimate (including the April Costs Estimate), volume and type of activity at each Relevant Hospital and actual Costs and payments (the "**Assessment**"). The Parties will instruct the Relevant Accountants to ensure confidential information for each Provider is kept separate and confidential. The Providers shall make all relevant information available to allow the Assessment to be carried out."* (Bold in original)

49. In addition, clause 6.2 required the plaintiffs, on or before the commencement date, to make available to Ernst & Young (acting on behalf of the HSE) their monthly management accounts and activity reports for the six-month period prior to the commencement date. Clause 6.3 provided that, if required by the Comptroller and Auditor General, the plaintiffs would also provide access to their financial records *"insofar as they relate to the provision of the Service"*.

50. The provisions of clauses 5 and 6 must also be read in conjunction with the provisions of clause 11.2 and 11.2.1. Under clause 11.2, the parties agreed that the courts of Ireland should have exclusive jurisdiction to settle any dispute or claim *"arising out of or in connection with these Heads of Terms or their subject matter or formation"*. However, this was subject to the proviso that any of the disputes listed in para. 11.2.1 would be referred jointly by the parties to an independent expert. Insofar as the role of that expert is concerned, the relevant terms of clause 11.2 and 11.2.1 provide as follows: -

> *"11.2 … PROVIDED ALWAYS THAT*
>
> > *11.2.1 where stipulated herein or where any dispute relates to Costs, payments, funding, costs mitigation or Costs related matters, the dispute must be referred for determination to an independent firm of accountants*

*appointed on a joint basis by the Parties (which shall not be a firm already appointed in any capacity to act in respect of the arrangements contemplated hereunder) which will act as an expert (the "**Independent Expert**"). The Independent Expert will determine any dispute within not later than two… weeks after the dispute is referred to it and its decision will be final and binding on the Parties. The Parties shall co-operate fully with the Independent Expert and shall provide such information as the Independent Expert shall determine is necessary for it to make its decision;"* (Bold in original)

Relevant factual and legal background

51. As noted previously, it is necessary to construe the provisions of the Heads of Terms in context. There are a number of aspects of the factual and legal background that should be kept in mind. In the first place, the identity of the parties is relevant. The HSE is a statutory body. As s.7 of the 2004 Act makes clear, its object is to use the resources available to it to improve, promote and protect the health and welfare of the public. The provisions of s. 38 of the 2004 Act are also potentially relevant. That section is expressly identified in clauses 1.1, 3.2 and 3.3 of the Heads of Terms. Having regard to the terms of clause 3.3 (quoted in para. 14 above) the parties to the Heads of Terms plainly considered that their agreement constituted an arrangement governed by s. 38. As noted in para. 14 above, s. 38(2) places an obligation on the HSE, in advance of entering into such an arrangement, to determine the maximum amount of funding that it proposes to make available in that financial year in respect of the arrangement and the level of service to be provided. It should be recalled in this context that, in para. 12 of his judgment in the *MIBI* case, O'Donnell J. (as he then was) included the *"background law"* as part of the relevant context against which a contract is to be construed.

52. The responsibilities and functions of the HSE under the 2004 Act are also relevant. At the time the Heads of Terms were put in place, the HSE was facing into the beginning of the COVID-19 pandemic. The first case of COVID-19 in Ireland had been diagnosed on 29 February 2020. On 11 March 2020, the World Health Organisation (*"WHO"*) declared that COVID-19 should be characterised as a pandemic. The number of cases at that time in Ireland may have been low but, based on the rapid spread of the disease in China and Italy, the HSE was facing an unknown and unquantifiable demand for hospital services. The HSE had to urgently work out how it could continue to provide normal hospital care while, at the same time, providing the necessary hospital beds to treat the worst affected victims of the pandemic. The HSE National Crisis Management Team (*"NCMT"*) met on a number of occasions to structure a response on a national level and to examine all feasible responses. The NCMT also worked in collaboration with the National Public Health Emergency Team (*"NPHET"*). There was a concern to ensure that there would be sufficient numbers of hospital beds and Intensive Care Unit (*"ICU"*) capacity to deal with cases. With a view to increasing the capacity of the public hospital health care to deal with these issues, the HSE had discussions during the course of March 2020 with the Private Hospitals Association (*"PHA"*) which represents the private hospital healthcare sector. Thereafter, the HSE entered into the Heads of Terms with the operators of private hospitals (including the plaintiffs) with a view to making them available to deal with public patients.

53. In so far as the plaintiffs are concerned, they are all members of the Group. As noted in para. 1 above, the Dublin company operates the Mater Private Hospital in Eccles St., the Cork Company operates the equivalent facility in City Gate, Cork while Spireview operates the radiotherapy centre in Limerick. Topco is not directly involved in the provision of any healthcare services but it indirectly owns all of the shares in each of the Dublin and Cork companies and in Spireview through its ownership of all the shares in Bidco. In July 2018,

Bidco acquired ownership of the Group through its purchase of all of the shares in MP Healthcare Holdings UC (*"MP Healthcare"*) which was, at that time, the parent company of the Mater Private Group. In turn, 98.6% of the shares in Topco are owned by a Luxembourg company Oval Healthcare Infrastructure S.á.r.l. (*"Oval Healthcare"*) which is owned as to 75.06% by InfraVia IV Invest S.á.r.l. (also incorporated in Luxembourg) and as to 24.94% by a Luxembourg limited partnership Oval Co-Investment Fund SCSp. Both Bidco and Topco were incorporated for the purposes of the 2018 acquisition. As noted in para. 3(b) above, Oval Healthcare is the lender to Topco in respect of the Related Party Loan.

54. For completeness it should be noted that, prior to the acquisition by Bidco in 2018, the Mater Private Group had been the subject of a series of disposals and acquisitions, the most recent of which was in 2007 by a company called Medacquico Limited (known as the *"CapVest"* acquisition). It appears that this acquisition was funded in part by debt. This debt was in turn re-financed in the course of 2016 and a significant element of this debt was still outstanding at the time of the acquisition of the Group by Bidco in 2018. As part of the consideration for the shares in MP Healthcare in 2018, the Share Purchase Agreement required the purchaser to redeem or refinance a number of the facilities including the debt refinanced in 2016. While I do not believe that one could safely conclude that the facts outlined in this paragraph could be said to have been actually known to the HSE at the time of conclusion of the Heads of Terms, Topco's financial statements were publicly available although not consulted by the HSE at this time. Those accounts identified in note 21, that, on 31st July 2018, the Group entered into a facilities agreement with a group of banks and that the total amount owed on foot of bank loans as at 31st December 2018 was €222 million. I understand this note to refer to the Syndicated Loan mentioned in para. 3(c) above. The same note revealed that interest payments were being paid quarterly. In addition, note 20 identified that amounts owed to related undertakings amounted to €382,056,000 and that these amounts were unsecured and

incurring interest at 7% albeit not due for repayment until 31st December 2028. I understand that the Related Party Loan (mentioned in para. 3(b)) would be captured by the related company loans described in note 20. Although the 2018 financial statements were not reviewed by the HSE at the time of conclusion of the Heads of Terms, the information contained therein was, in my view, reasonably available to the HSE. To the extent to which it can be said to be relevant, it therefore forms part of the factual context in which the Heads of Terms fall to be interpreted. While I fully appreciate that the HSE was faced with a situation of great urgency, I do not believe that this could be said to be sufficient to exclude this publicly available information from the relevant factual background. The fact remains that the information was publicly available and thus, even if the principal players within the HSE were entirely focused on the urgent delivery of healthcare capacity, there is nothing to suggest that professional assistance could not have been retained to carry out any review of the publicly available material.

55. Leaving the identity of the parties and their relevant history aside, another very important element of the background is the fact that, at the time the Heads of Terms were put in place, the country was facing a national emergency on a scale not witnessed since the Second World War. As we can all recall, the immediate effect of this emergency was to generate a strong sense of national solidarity and cohesion. There was widespread public acceptance of unprecedented restrictions on normal activities. This solidarity seems to me to be evident in some of the provisions on the Heads of Terms including the language of clause 1.3 dealing with common purpose. There, the parties expressly recognised that the pandemic was an urgent and unprecedented public health crisis and the arrangement provided for in the Heads is described as *"a constituent part of the national solution to the Pandemic…"*.

56. The fact that the HSE was facing a potential crisis in hospital capacity is a further feature of the context. On one view, that might be said to make it more likely that the HSE would be prepared to be more generous to those providing necessary additional capacity than

might otherwise be the case. On another view, private hospitals were themselves facing into a period of great uncertainty in the face of the pandemic. There is no doubt that, in light of a fear of contracting COVID-19, patients were less inclined, at that time, to attend hospitals (including private hospitals) for non-essential treatment. Furthermore, on 27th March 2020, NPHET had directed that all non-essential surgery and services should be deferred. However, the evidence was that a significant proportion of the business done by the hospitals within the Group was of an essential nature with the result that, even in the absence of the Heads of Terms, it is likely that much of their business would have continued. Nonetheless, as Mr. John Hurley acknowledged in the course of his cross-examination on Day 4, the Group, in March 2020, was facing into a time of uncertainty and the Heads of Terms provided the Group with an element of stability and liquidity in so far as payment of its costs was concerned. In addition, it is essential to keep in mind that the plaintiffs were not the only providers who signed up to the Heads of Terms. The operators of a large number of other private hospitals also did so. There is no evidence to suggest that all of those hospitals were in the same position as the plaintiffs. Thus, the context is not to be assessed solely by reference to the position of the plaintiffs.

57. The plaintiffs' expert, Mr. Peter Clokey, gave evidence in relation to another background fact that is potentially relevant. He drew attention to the fact that, at the time of execution of the Heads of Terms, there was a very significant drop in asset values. The FTSE 100 index in London had fallen by approximately 30% from its value at the start of the year. He also said that, at about the same time, he was involved in a team trying to place a value on Heathrow Airport and that there was very significant uncertainty in trying to establish values for depreciation at that time. However, he did not provide any detail in relation to his experience with that team.

58. I should make clear that, in so far as the context is concerned, both sides sought to rely on material which I believe to be inadmissible. The plaintiffs (through the evidence of Mr.

Hurley) sought to rely on the Group's subsequent experience during the Delta wave in support of the proposition that the pandemic would not have affected patient throughput during the term of the Heads to the extent suggested by the HSE. As that evidence relates to experience subsequent to the execution of the Heads of Terms, I take the view that it is inadmissible unless an issue arises of the kind discussed by Clarke J. in the *MIBI* case (as described in para. 11 above). For similar reasons, the attempt by the HSE to rely on statements contained in Topco's 2019 financial statements also falls foul of the same principle. Those accounts were not signed until 28th April 2020 which was after the date of execution of the Heads of Terms.

59. Counsel for the HSE also submitted that I should treat, as a relevant part of the factual background, the fact that there are different means of making a profit in the private healthcare sector. He suggested that there are two ways to do so: one is by buying and selling the business and the second is by operating the business. He submitted that, with its history of a number of changes of ownership, the Mater Private Group is an excellent example of both. He also suggested that the parties to the Heads of Terms would have been aware of the way in which well known entrepreneurs such as Mr. Larry Goodman and Mr. Denis O'Brien have entered the healthcare business in the context of the Blackrock Clinic and the Beacon Hospital respectively. In particular, he characterised the investors behind the Luxembourg entities who ultimately own the Group as the *"latest in a line of recent purchasers to acquire the ... Group."* In my view, it is an element of the relevant context that a business of the kind carried on by the Group is seen as a suitable target for private investment with a view to making a profit. It is also relevant that, as the experts for both sides agreed, shareholder loans frequently represent the bulk of an investment by an investment vehicle such as InfraVia or CapVest. Similarly, both experts agreed that the use of intermediary holding companies is common. That said, it also seems to me to be important to keep in mind that, here, neither Bidco nor Topco are actually involved in the provision of healthcare or hospital services; they are both holding

companies as is MP Healthcare. I will return to this issue later when I come to consider the submission of counsel for the plaintiffs that, nevertheless, Topco is treated by the Heads of Terms as a service provider.

Consideration of the issues

60. Having outlined the applicable principles, the relevant provisions of the Heads of Terms and the relevant admissible background, I now turn to consider the three principal issues which fall to be determined namely whether each of the three elements of the plaintiffs' claim can be said to be payable under the Heads of Terms. I turn first to the *"use of infrastructure"* claim described in para. 3(a) above. I will then deal with the Related Party Loan and the Syndicated Loan. The outcome of my consideration of those issues will govern not only the plaintiffs' claims but also, to a large extent, the counterclaim advanced by the HSE. Thereafter, I will address the additional claims made by the plaintiffs as summarised in para. 4 above. Finally, to the extent that it is necessary to do so, I will consider the remaining issues between the parties as described in para. **7** above.

The "use of infrastructure" claim

61. There was no disagreement between the parties that the amount at stake in relation to this item is €830,634. Nor was there any disagreement that this sum represents the difference between (a) the figure for depreciation that, at the time of execution of the Heads of Terms, had been budgeted by the plaintiffs for the months of April, May and June 2020 and (b) the amount which was subsequently recorded in the books of account of the plaintiffs. While not strictly admissible in relation to the interpretation of the Heads of Terms, the plaintiffs' explanation for the difference is that the budgeted figures had been prepared on the basis of capital projects that were subsequently delayed by the advent of the pandemic.

62. It is important to keep in mind that depreciation does not *per se* involve any outlay. As explained by the plaintiffs' accountancy expert, Mr. Peter Clokey, it is a provision made by the

directors of a company to spread the cost (less the residual value) of the company's fixed assets over the useful lifetime of those assets. By way of background, Mr. Clokey explained that, when a company purchases an asset, the directors must make a judgment call as to the likely lifespan of that asset and whether it will be worth anything at the end of its useful life. Thus, for example, where directors determine that the lifespan of an asset is likely to be five years and that it will have no more than scrap value at the end of that period, they will account for depreciation over that period by recording a depreciation charge equivalent to 20% of its cost in each year of that five-year period. A depreciation charge of this kind does not involve any outlay; the charge simply reflects a proportionate loss in value of the asset over the course of its useful life. As Mr. Clokey observed, depreciation is *"supposed to be a charge, in effect, for the usage of fixed assets"*. In those circumstances, it is unsurprising that it was adopted by the parties as a yardstick by which to value the HSE's use of the plaintiffs' infrastructure for the purposes of the Heads of Terms.

63. The difference between the parties relates to whether the payment to be made by the HSE should be the budgeted depreciation as at the date of the Heads of Terms (as claimed by the plaintiffs) or the actual depreciation as booked by the plaintiffs subsequently (as claimed by the HSE). The plaintiffs make a simple and straightforward case. They rely on the express reference in Schedule 2 to an *"allowance for wear and tear, based on the 2020 budgeted depreciation charge ..."*. They contend that this clearly entitled them to payment of the budgeted charge; they say that this is the metric which the parties have themselves chosen and that it is irrelevant that the actual depreciation charge turned out to be lower. They also suggest that, in light of the uncertainty created by the onset of the pandemic, it is understandable that the parties would have chosen the existing pre-pandemic depreciation charge as budgeted rather than taking the gamble of what that charge might turn out to be in a market where asset values were falling sharply.

64. On the other hand, the HSE argued that the language used in Schedule 2 must be read in the context of the Heads of Terms as a whole. I have already sought to summarise the HSE's arguments on this issue in para. 42 above and I will not repeat them here. In summary, the HSE submitted that, when a number of different elements of the Heads of Terms are borne in mind, the parties plainly intended that any payments to be made to the plaintiffs were subject to the provisions of clauses 5.1 to 5.6 and were restricted to what was actually incurred (such that any element of profit should be excluded). The HSE maintains that Schedule 2 has to be construed in this light.

65. Considered on its own, the language used in Schedule 2 plainly supports the case made by the plaintiffs. However, the HSE is correct in suggesting that this language cannot be considered in isolation; like any other contractual provision, it must be considered in the context of the language used in the Heads of Terms as a whole and in the wider factual and legal context, in so far as that context is relevant. Accordingly, it is necessary to review the language of the relevant provisions of the Heads of Terms in some detail and to consider whether there is anything relevant in the factual or legal backdrop to the Heads which would colour the meaning to be given to its language. As previously noted, this process requires a court to interpret the contract objectively by reference to the meaning it would convey to a reasonable person having all of the background knowledge reasonably available to the parties at the time the Heads of Terms were executed.

66. Turning first to the text of the Heads of Terms, the first reference to Schedule 2 in the Heads of Terms is found in clause 5.1. That clause sets out the basis on which the plaintiffs are to be paid. However, clause 5.1 is not the first clause of the Heads of Terms which addresses the basis on which the plaintiffs are to be paid. As noted earlier, clause 2.1 is also relevant. It provides that the HSE will *"reimburse"* the *"operational costs"* of the plaintiffs of providing the service. The use of the word *"reimburse"* should be noted. As the *Chambers Dictionary*

confirms, the ordinary meaning of the word *"reimburse"* is to *"repay"* or *"to pay an equivalent to for loss or expense"*. At first sight, the concept of reimbursement may appear incongruous in the context of depreciation. However, it must be kept in mind that the provision made by a company for depreciation affects the net position on a company's balance sheet. Topco's consolidated financial statements for 2019 provide a useful example. Note 14 to those statements records a total charge for depreciation of tangible fixed assets of €3,847,000 which reduces the value of those assets from €109,417,000 to €105,570,000, the latter being the figure recorded in the consolidated balance sheet for 2018. One can readily see from that example that the word *"reimburse"* is apposite in the context of an agreement by a third party to pay an equivalent amount to the depreciation charge in respect of assets made available to that third party. In such circumstances, the third party is paying an amount equivalent to the loss in value of the assets. In other words, it is reimbursing the company in question for that loss.

67. The other feature of the word *"reimburse"* that should be kept in mind is that its ordinary meaning does not sit easily with a payment that goes beyond recompense for loss or expense. One would not ordinarily use the word *"reimburse"* in the context of a payment that includes an element of profit for the payee. Such a payment goes beyond the parameters of an *"an equivalent"* sum *"for loss or expense"*.

68. The word *"reimburse"* appears again in clause 5.1 which, as counsel on both sides acknowledged, is a crucially important clause for present purposes. Consistent with the point made in para. 67 above, the opening words of clause 5.1 make a distinction between the payment of the consideration and the reimbursement of the *"operational costs"*. Earlier, the consideration had been defined in clause 2.1 as the payment of €10 to each of the plaintiffs. Clause 5.1 opens as follows: *"HSE shall pay the Consideration only to the Providers and shall reimburse for the operational costs ..."*. Thus, beyond the payment of the consideration, the

opening words of clause 5.1 envisage that, consistent with clause 2.1, the payment to be made to the plaintiffs will be based on reimbursement.

69. The term *"operational costs"* is not defined in the Heads of Terms. The experts on both sides were agreed that it is not an accounting term of art. It is therefore necessary to attempt to determine how it would be understood by a reasonable person in the position of the parties at the time the Heads of Terms were agreed. It is plainly not used as a synonym for the *"operating costs"*. It is clear from Schedule 2 that the latter are just one of the categories of operational costs which the parties had in mind. The word *"costs"* is a word in common usage. Save in the specific context of the costs of litigation, it would ordinarily be understood as referring to outlays or expenditure or, sometimes, the incurring of a loss. According to the *Chambers Dictionary,* the word *"operational"* means *"relating to operations"*. A very similar definition is found in the *Shorter Oxford Dictionary* where it is defined as *"of or pertaining to operations"*. It is therefore necessary to consider, in turn, the meaning of the word *"operation"*. Depending on the context, it is capable of many different meanings; the most relevant for present purposes cited in the *Shorter Oxford Dictionary* is: *"The action of operating a machine, business etc."* It would, of course, be wrong to interpret the words *"costs"* and *"operational"* in isolation. They are plainly intended to be read with what follows in clause 5.1. Taken together, but omitting the reference to this being subject to finalisation in the final agreements (which were never put in place), the relevant phrase is: *"operational costs, under the general headings set out in Schedule 2 … of providing the Service at the Relevant Hospitals which costs are actually incurred by the Providers ("Costs") on a costs only and Open Book Basis"*. I will return, presently, to the words *"under the general headings set out in Schedule 2"*. Those words are clearly important because they provide a very definite and explicit link between clause 5.1 and the schedule. The terms of Schedule 2 must be considered before one could reach any final

conclusion as to the meaning to be given to clause 5.1. However, subject to that caveat, I believe that it makes sense to first address the language used in the body of the Heads of Terms.

70. In the first place, the reference to *"operational costs"* must be read in conjunction with the words *"of providing the Service at the Relevant Hospitals".* When read together, this seems to me to support the view that *"operational"* should be read in the sense explained in the extract from the *Shorter Oxford Dictionary* quoted in para. 69 above dealing with the meaning of *"operation"* (i.e. the action of operating a business). The costs concerned are those which relate to the operation of the Service (as defined) namely the provision of the full capacity and services at each of the Mater Private Dublin, the Mater Private Cork and the Limerick radiotherapy centre. In turn, this must be read with the words *"under the general headings set out in Schedule 2".* I deal with Schedule 2 in more detail below. It is sufficient to note, at this point, that the general headings in Schedule 2 identify the sub-categories of operational costs which the parties had in mind. The reference to the open book basis does not seem to add anything of assistance for present purposes. Leaving that reference aside, the language used in clause 5.1 is striking in the way in which it emphasises costs. This is reinforced by the reference to costs being *"actually incurred"* and by the use of the words *"on a costs only and Open Book Basis".* Notwithstanding the use of the higher case *"B"* in the word *"Basis",* the syntax clearly suggests that the word *"Basis"* is to apply equally to the words *"costs only"* and to *"Open Book".*

71. The words *"actually incurred"* might not appear to be apposite in the context of depreciation but, as I have sought to explain in para. 66 above, depreciation does result in a write down in value of an asset in a way that affects the bottom line in the balance sheet of a company. For that reason, I do not believe that there is any incongruity in the notion of depreciation being actually incurred. On the other hand, there is an obvious difficulty in reconciling the express reference to budgeted depreciation in Schedule 2 with the requirement

in the main body of the Heads of Terms that a cost should be actually incurred. By its nature, a budgeted cost is an estimate of a future cost which is expected to be incurred but which has not yet been actually incurred. Furthermore, to the extent that budgeted depreciation might exceed the actual depreciation, it is difficult to see that it could satisfy the *"costs only"* requirement in clause 5.1. If payment were made on the basis of the budgeted figure, the recipient would be in receipt of a profit to the extent that the amount received exceeded the actual figure. In this context, I do not believe that it makes any difference whether or not the excess would be treated in accountancy terms as a profit. In the absence of any indication that the parties intended to use terms of art in the Heads of Terms, its provisions are to be given their natural and ordinary meaning. I am of the view that an excess of that kind would be regarded as a profit by the reasonable person. Moreover, the provisions of clause 5.11 must also be kept in mind. It contains an express acknowledgement by the parties that the Common Purpose (as defined in clause 1.3 and quoted in para. 16 above) *"does not envisage a commercial or economic benefit or profit beyond the Costs".* At minimum, an excess of this kind would be regarded by the reasonable person as an economic benefit.

72. It is noteworthy that clauses 5.2 to 5.5 of the Heads of Terms maintain a distinction between budgeted estimates of costs, on the one hand, and *"actual costs",* on the other. It is equally important that there is nothing in the terms of these clauses that the depreciation charge envisaged in the Schedule is, in any way, excluded from the operation of these provisions. Clause 5.2 required the plaintiffs to provide an estimate of the costs which it expected to incur in April 2020 *"consistent with the basis set out in Schedule"* within five days of the commencement date. In turn, clause 5.2 imposed an obligation on the HSE to pay 80% of this estimate within two weeks from the commencement date to ensure adequate cash flow was available to enable the safe running of the hospitals. Clause 5.2 also required that the estimate should be accompanied by a *"full breakdown under the headings set out in Schedule 2 and*

shall be based on board approved budgeted financial information." Thus, the Heads of Terms expressly envisaged that the first payment to be made to the plaintiffs would be made based on budgeted figures in advance of the actual figures being known but that it would be limited to 80% of the budgeted figure. Like clause 5.1, clause 5.2 also explicitly cross-referred to Schedule 2.

73. There is no inconsistency between clause 5.2, on the one hand, and the reference to budgeted depreciation in Schedule 2, on the other. However, it is difficult to reconcile the requirements of clause 5.3 with the notion that the final payment to be made to the plaintiffs would be based on budgeted depreciation. Clause 5.3 expressly required the plaintiffs, within seven days after the end of the first month, to provide the HSE with details of the *"actual Costs"* for April 2020. As noted above, the depreciation item in Schedule 2 is not excluded from the ambit of this provision. Clause 5.3 also required the HSE, on receipt, to make a balancing payment calculated as the difference between 80% of the estimate provided under clause 5.2 and 100% of the April 2020 costs statement (the latter being the actual costs figure).

74. There are very similar provisions in clauses 5.4 and 5.5 in respect of the period after April 2020. Under clause 5.4, estimates for the period after April 2020 were to be provided by the plaintiffs accompanied by a full breakdown under the headings set out in Schedule 2 and were required to be *"based on board approved budgeted financial information"*. As in the case of the April payment, the HSE was obliged to pay 80% of each estimate. This was to be followed under clause 5.5 with details of the actual costs and the HSE was obliged to make a further payment at that time calculated in the same way as clause 5.3. Again, the fact that depreciation was not excluded from this process should be noted.

75. Clause 5.6 envisaged that the accountants appointed by both sides would carry out an assessment of each costs estimate and that, in cases of an overpayment of costs, the HSE would be entitled to offset that overpayment against the next payment to be made under the Heads of

Terms. In cases of underpayment, the HSE was required to pay the amount of that underpayment. Curiously, the terms of clause 5.6 suggest that the only assessment to be carried out was in respect of the costs estimates (i.e. the estimates provided under clauses 5.2 and 5.4). The accountants were not given any express role under clause 5.6 to review the statements of actual costs submitted under clauses 5.3 and 5.5. However, clause 5.6 expressly envisaged that, within 30 days of the commencement of that assessment, the accountants should complete the assessment *"with respect to the Costs incurred in that month by the Providers"* which suggests that the accountants were also to assess the actual costs incurred in that month. Furthermore, clause 5.6 expressly envisaged that the assessment could result in the identification of an overpayment or an underpayment to the providers. It is difficult to see how the accountants could determine whether there was an overpayment or an underpayment unless they also reviewed the actual costs statements. It therefore seems to me that, notwithstanding the language used in clause 5.6, the intention was that the accountants should commence their assessment based on the estimates provided but also assess the details of the actual costs submitted. This conclusion is reinforced when one reads clause 5.6 with clause 6.1 (which deals with the appointment of the accountants). Clause 6.1 expressly requires the accountants not only to assess each costs' estimate but also the *"actual Costs"*. That makes sense. In the absence of details of the actual costs incurred, it would not be possible for the accountants to reach a view as to whether there was an overpayment or an underpayment. Accordingly, notwithstanding the lack of any express reference in clause 5.6 to an assessment of the actual costs, it seems to me that it was plainly intended that the accountants' role was not confined solely to an assessment of the estimates of costs submitted under clauses 5.2 and 5.4 but also extended to a review of the actual costs. That seems to me to follow from a consideration of the language of clause 5.6 as a whole and from a reading of the clause in conjunction with clause 6.1. As Lord Hoffmann explained in *Investors Compensation Scheme v. West Bromwich*

Building Society [1998] 1 W.L.R. 896, at p. 912, while a court will not readily accept that the parties to a contract have made linguistic mistakes, there may be occasions where it is clear that something has gone wrong with the language used by the parties. In such cases, if the intention of the parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties. Given the intention reflected in clause 6.1 and the power given to the accountants in clause 5.6 to identify overpayments or underpayments, I am of the view that it is clear that the parties to the Heads of Terms intended that the accountants would review the actual costs under clause 5.6 in addition to the costs estimates submitted under clauses 5.2 and 5.4.

76. Next, it is necessary to address Schedule 2. The text of the schedule is replicated in full in para. 37 above. As noted above, there are several explicit references to it in clauses 5.1, 5.2 and 5.4. As further noted above, clause 5.1 required that the HSE should reimburse the plaintiffs for the operational costs of providing the service *"under the general headings set out in Schedule 2".* Clause 5.3 required the plaintiffs' April 2020 estimates to be prepared in a manner consistent with the basis set out in Schedule 2 and both that clause and also clause 5.4 required the plaintiffs to provide a breakdown of their estimates under the headings set out in Schedule 2. When one turns to Schedule 2 itself, it comprises five headings in the left-hand column with explanatory text in the right-hand column. There is only one item which is stated to be a budgeted figure namely the 2020 budgeted depreciation charge. The first heading embraces a general category of operating costs. The explanation in the right-hand column makes clear that this covers the costs *"required to be incurred to run the business".* A non-exhaustive list is given which includes payroll and staffing costs. There is nothing to suggest that estimated or budgeted figures would be sufficient to come within this category save that, of course, clauses 5.2 and 5.4 envisage that budgeted estimates would first be supplied for the purposes of the payments on account to be made under those clauses. The next category is

"Rent" and here, too, it is clear that what the parties had in mind is actual rent. The same can be said in respect of the third category under the *"Finance costs"* heading and also in the case of the fifth category under the heading of decommissioning costs. Other than the reference to the budgeted depreciation charge under the fourth heading dealing with *"use of infrastructure"*, there is no other reference to budgeted figures in Schedule 2 save that, again, clauses 5.2 and 5.4 (which must be read with Schedule 2) proceed on the basis that the estimates to be provided by the plaintiffs under those clauses will be based on the budgeted figures for each costs item. However, the approach taken in clauses 5.2 and 5.4 does not readily explain the express reference to budgeted depreciation in Schedule 2. Clauses 5.2 and 5.4 apply equally to all of the other costs' items listed in the schedule notwithstanding that they are not described in the Schedule as budgeted. That said, clause 5.1 expressly contemplates that the actual costs of providing the service will also arise under the general headings in the schedule. The lack of any exclusion for depreciation is striking.

77. Under the *"use of infrastructure"* heading in Schedule 2, the commentary in the right-hand box is divided into two sections, the first dealing with *"capex costs"* (which are not immediately relevant) and the second, in the following terms: *"An allowance for normal wear & tear, based on the 2020 budgeted depreciation charge of the facility, based off an average daily rate".* As I have previously observed, this language provides a simple and straightforward basis for the plaintiff's claim. They argue that the parties have plainly chosen budgeted depreciation rather than actual or booked depreciation as the relevant metric by which to reimburse the plaintiffs in respect of the wear and tear of their premises and facilities during their use on behalf of the HSE. They also make the point that this was a perfectly logical approach for the HSE to take at a time of great uncertainty and, in particular, at a time when certain asset values were perceived to be falling. By taking the existing budgeted figure for depreciation, the HSE had certainty as to the level of its exposure in respect of this item.

Although not cited by the plaintiffs, it could be suggested that this is also consistent with the statutory obligation imposed on the HSE under s. 38(1) of the 2004 Act. Had the HSE agreed that the ultimate sum to be paid to the plaintiffs for depreciation should be the actual rather than the budgeted figure, it would arguably have exposed itself to a liability for an unknown sum which could raise an issue for it under s. 38(1).

78. On the other hand, there was no detailed evidence put before the court in relation to falling asset values. The only specific evidence related to the FTSE 100 index of shares. Mr. Clokey also mentioned his experience in connection with Heathrow airport but provided no detail in relation to the latter. Notably, there was no evidence as to whether the advent of the pandemic had an adverse impact on the asset value of private hospitals. In so far as s. 38 is concerned, the point was not argued. Moreover, I cannot assume that the HSE did not conduct its own review of its likely level of exposure under the Heads of Terms.

79. More importantly, in circumstances where the figure for budgeted depreciation exceeds the actual depreciation charge incurred, it is very difficult to see how the interpretation advocated by the plaintiffs can be reconciled with the express stipulation in clause 5.1 that it is the costs actually incurred that are to be reimbursed. It is equally difficult to see how it can be reconciled with the additional stipulation in the same clause that the reimbursement is to be made on a *"costs only"* basis. The same difficulty arises in the context of the explicit acknowledgement in clause 5.11 that the parties do not envisage a commercial or economic benefit or profit beyond the costs. While the plaintiffs have argued that clause 5.11 does not rule out an element of profit within the costs, I cannot accept that this is so. It is clear from the terms of clause 5.1 that the parties contemplated that the plaintiffs would be reimbursed on a costs only basis. That position is reinforced by the fact that both clause 2.1 and 5.1 are careful to speak of reimbursement rather than payment. As I have sought to explain in paras. 66 and 67 above, the ordinary meaning of *"reimburse"* does not extend to a payment of profit. It

therefore seems to me that clause 5.11 should be construed as a reinforcement of the provisions of clause 5.1 to the effect that reimbursement is on a costs' only basis and is not intended to embrace a profit or economic benefit for the plaintiffs. In my view, clause 5.11 is simply emphasising that the payment to the plaintiffs is limited to the *"Costs"* as defined and is therefore limited to the costs actually incurred. In taking that view, I have not lost sight of the argument made by counsel for the plaintiffs with regard to rent which, as he observed, is expressly included in Schedule 2 and which would ordinarily include an element of profit for the landlord. I do not believe that this assists the plaintiffs. The same could be said for many of the other operational costs envisaged by the Heads of Terms in so far as virtually every service or product supplied to the plaintiffs for the purposes of the functioning of their facilities will involve a profit for the supplier. There is nothing in the Heads of Terms to suggest that unconnected third parties could not earn a profit. It is a basic tenet of contract law that a contract is binding solely on the parties to it. The provisions of a contract cannot bind others. But, crucially, the Heads of Terms bind the plaintiffs and, for the reasons outlined above, I believe that the Heads plainly envisage that the plaintiffs were not entitled to charge a profit for themselves.

80. That still leaves an apparent inconsistency between the terms of clause 5, on the one hand, and the specific provisions of Schedule 2 on the other. How is that inconsistency to be addressed? Do clauses 5.1 and 5.11 override the language of the relevant part of Schedule 2 dealing with budgeted depreciation? Or does the specific provision in relation to depreciation in Schedule 2 take priority in so far as this item is concerned? In my view, the court should not lightly conclude that there is an irreconcilable inconsistency between two or more contractual provisions. Instead, the court should first seek to ascertain whether the apparently competing provisions can plausibly and appropriately be given a harmonious interpretation that resolves the apparent inconsistency. This is an integral element of the requirement to construe the

contract as a whole. As Lord Goff observed in *Yien Yieh Commercial Bank Ltd. v. Kwai Chung Storage Co. Ltd.* [1989] LRC (Comm.) 527, at p. 534: *"... to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified where the two clauses are in truth inconsistent. In point of fact, this is likely to occur only where there has been some defect of draftsmanship. The usual case is where a standard form is taken and then adapted for a special need... From time to time, it is discovered that the typed additions cannot live with the printed form, in which event the typed additions will be held to prevail as more likely to represent the intentions of the parties. But where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur.* ***The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction".*** (emphasis added).

81. Looking at the Heads of Terms as a whole in this way, it is striking that, when it comes to the application of the provisions of clauses 5.2 to 5.6, all of the Schedule 2 items are to be dealt with in the same way, that is to say that each of them is first to be the subject of an estimate based on a board approved budget (as envisaged by clauses 5.2 and 5.4) and later to be submitted as an element of *"actual Costs"* (as envisaged by clauses 5.3 and 5.5). In the latter context, it is noteworthy that the Heads of Terms use the defined term *"Costs"* which, it will be recalled, includes the words *"which costs are actually incurred".* Thereafter, each item of costs described in Schedule 2 is subject to assessment under clause 5.6 by the accountants appointed under clause 6.1. As outlined above, their task appears to me to extend to assessing not only the estimates of costs submitted under clauses 5.2 and 5.4 but also the actual costs submitted under clauses 5.3 and 5.5 and their role is designed to ascertain whether there has been an overpayment or an underpayment. That implicitly requires them to determine whether the actual costs incurred exceed or undershoot the payments made under clauses 5.2 to 5.5. Crucially, the Heads of Terms do not exempt the depreciation item in Schedule 2 from this

process. That seems to me to strongly support the conclusion that, even in the case of depreciation, the Heads envisage that both budgeted and actual figures for depreciation would be processed in the same way as any of the other Schedule 2 items and that, in common with the budgeted figures for any other Schedule 2 items, an adjustment would have to be made if it subsequently transpired that the actual figure for depreciation was greater than or less than the budgeted figures. Had the parties intended that the final amount to be paid to the plaintiffs in respect of depreciation would be the budgeted figure, one would expect that provision would be made either that the whole of the budgeted figure would have been paid on foot of the estimate produced under clauses 5.2 and 5.4 or alternatively that 80% of the figure would be paid at that time and that the remaining 20% of the budgeted figure (i.e. not the actual figure as provided for under those clauses) would be paid at the same time as payment of the actual costs. The fact that no provision to this or to similar effect is made in the Heads of Terms is significant.

82. As outlined in para. 42 above, counsel for the HSE also drew attention to the language used in Schedule 2 in relation to depreciation. His point was that Schedule 2 does not say that the allowance for normal wear and tear shall be the budgeted depreciation charge or that the allowance shall equate with the charge. Instead, it says that the allowance is to be *"**based on** the 2020 budgeted depreciation charge"* (emphasis added). Counsel submitted that this can be read as referring to what was to be paid to the plaintiffs on account (i.e. as envisaged by clauses 5.2 and 5.4). I am not convinced that this submission is necessarily correct. However, I acknowledge that the language *"based on"* is somewhat looser than the language used in relation to the other items described in the right-hand column of Schedule 2. It does not go so far as to say that the allowance is to be the budgeted depreciation charge. The fact that it adopts the somewhat looser *"based on"* language suggests some degree of flexibility rather than exactitude. It is also notable that this is essentially the same formulation as that used for the

purposes of the estimates to be provided under clauses 5.2 and 5.4 which are not intended to be the final definitive figures to be paid.

83. However, even without resort to the considerations outlined in para. 82 above, it seems to me to be clear from the way in which clauses 5.2 to 5.6 capture all of the items in Schedule 2 that it was intended that the ultimate payment to be made to the plaintiffs in respect of depreciation would be the figure for actual depreciation. In the absence of an exemption for depreciation from the provisions of clauses 5.3 and 5.5, those clauses apply equally to depreciation as they do to any other item in Schedule 2. Thus, the plaintiffs are required by those clauses to submit the actual charge for depreciation incurred by them. Unless they do so, they are not entitled to payment of 100% of their costs. Those clauses clearly contemplate that the final payment to be made to them will be based on the actual cost incurred rather than the budgeted estimate. Both of the clauses impose an obligation to provide *"details of the actual Costs"* incurred during the relevant period. Such details cannot be equated with the *"estimate based on board approved budgeted financial information"* contemplated by clauses 5.2 and 5.4. A figure contained in a budget in respect of an anticipated cost item is not an actual cost; it is an estimate of a future cost. While the budgeted figure for depreciation would comply with the requirements of clauses 5.2 and 5.4, it would manifestly not constitute *"details of the actual Costs"* required under clauses 5.3 and 5.5. In these circumstances, I am driven to the conclusion that, notwithstanding the reference in Schedule 2 to a *"budgeted depreciation charge",* the Heads of Terms nonetheless required the plaintiffs to submit a figure for actual depreciation in accordance with the requirements of clauses 5.3 and 5.5.

84. This conclusion is reinforced by the role given to the accountants under clauses 5.6 and 6.1. It is significant that the accountants are required by clause 5.6 to complete their assessment *"with respect to the Costs* ***incurred in that month****"* (emphasis added) and to identify whether there has been an overpayment or an underpayment. This seems to me to necessarily require

them to compare what has been paid to the plaintiffs against the actual costs incurred by the plaintiffs. This is entirely consistent with clause 5.1. It is plainly an inherent part of the process envisaged by clause 5.6 that the actual costs incurred will be reviewed by them. This is spelt out explicitly in clause 6.1 which requires them (*inter alia*) to assess verify and validate the *"actual Costs"*. Without such a review, there could be no determination by them, at the conclusion of their assessment, as to whether any payment made to the plaintiffs was an overpayment or an underpayment. Again, there is no exception or exemption in respect of depreciation. Thus, these clauses treat depreciation in precisely the same way as any of the other items listed under the headings in Schedule. The accountants are required to assess, verify and validate the actual cost of depreciation as well as the budgeted estimate, the ultimate purpose being to assess whether an overpayment or an underpayment has been made.

Decision in respect of the *"use of infrastructure"* claim

85. Having regard to the structure and terms of clauses 5.2 to 5.6 and 6.1, it seems to me to be clear that the parties to the Heads of Terms intended to treat depreciation in the same way as any of the other items listed in Schedule 2. While the express reference to *"budgeted depreciation"* in Schedule 2 might suggest otherwise, that reference must be read in the context of the Heads of Terms as a whole. When read in that way, the initial impression created by the language used in Schedule 2 has to be adjusted to take account of the operation of clauses 5.2 to 5.6 and 6.1. Moreover, by taking this approach, the Heads of Terms can be construed harmoniously and full effect can be given to the provisions of clauses 2.1, 5.1 and 5.11. The apparent inconsistency between the terms of those clauses and the relevant part of Schedule can be resolved. I accordingly find for the HSE in respect of this element of the plaintiffs' case. Consequently, the claim for payment of €830,634 in respect of depreciation must be dismissed.

The interest payable under the Related Party Loan

86. In terms of size, this is the most significant element of the plaintiffs' claim. Although the total amount of the plaintiffs' claim in these proceedings is for payment of €6,629,000, the total interest arising on the Related Party Loan during the currency of the Heads of Terms amounted to €7,393,568. Interest is one of the items specifically identified in Schedule 2 under the *"Finance Costs"* heading in Schedule 2 which covers contracted *"funding costs related to the ongoing operation and functioning of the facility and related support infrastructure e.g. interest ..."*. This language makes clear that the interest must relate to the ongoing operation and functioning of the facility. In addition, the interest costs would have to be consistent with the other provisions of the Heads of Terms including clauses 2.1, 5.1 and 5.11. In particular, the costs would have to fall within the ambit of operational costs of providing the Service (as defined by clause 2.1) and be actually incurred. In order to assess whether the interest claimed meets these criteria, it is therefore necessary to consider the purpose and relevant circumstances of the Related Party Loan.

87. Topco entered into the Related Party Loan with Oval Healthcare pursuant to a facility agreement dated 31st July 2018 under which Oval Healthcare agreed to make available to Topco an unsecured loan facility of up to €475,000,000 which is repayable with interest at 7% per annum on 31st December 2028. No repayments of capital or interest have been made but, as of 30th June 2020, the amount of interest which had accrued was €52,736,000. In circumstances where the interest is accruing in this way, it seems to me that, even though the interest has still to be paid to Oval Healthcare, the amount accrued has nonetheless been *"actually incurred"* for the purposes of clause 5.1 of the Heads of Terms. As the interest accrues, the liability to pay it increases accordingly. In my view, the incurring of that liability is real; it is not notional. Thus, the liability has been actually incurred within the meaning of the Heads of Terms. Clause 5.1 does not go so far as to require that a cost has been paid; merely that it has been incurred.

88. The Related Party Loan was an integral element of the acquisition of the Mater Private Group by the InfraVia interests. Under the terms of the Share Purchase Agreement (*"SPA"*) dated 31st May 2018 between the previous owners of the Mater Private Group and Bidco, the latter was required not only to pay a sum of €220,000,000 (subject to certain adjustments) for the shares in MP Healthcare but also to redeem the Mater Private Group's pre-existing debt. According to Mr. Paul Whelan, the Group Chief Financial Officer, the net consideration paid for the shares, after all relevant adjustments, was €211,435,326 while the total amount of debt that was redeemed was €384,273,408. In his report, Mr. Declan Walsh, the expert retained by the HSE put forward slightly different figures. Based on his review of the underlying materials, Mr. Walsh calculated that the net amount paid for the shares was €211,663,973 and that the total amount of debt required to be redeemed was €387,866,550 of which €302,960,511 comprised debt owed by the vendors to third parties. For present purposes, I do not believe that it is essential to reach a view as to which set of figures is correct. What is important is that the proceeds of the Related Party Loan were used (together with a substantial element of the Syndicated Loan) to discharge the sums payable under the SPA.

89. It is also clear that a significant element of the pre-existing debt within the Mater Private Group related to earlier acquisitions. This was acknowledged by Mr. Whelan in the course of his evidence on Day 3 of the hearing. The issue was addressed in more detail by Mr. Walsh who gave evidence that, save to the extent of 5.1% thereof, all of the Related Party Loan was applied together with 92% of the Syndicated Loan in discharge of the purchaser's obligations under the SPA. Mr. Walsh carried out a detailed forensic exercise in order to identify the extent to which the Related Party Loan and the Syndicated Loan were used to refinance debt incurred in connection with previous acquisitions of the Mater Private Group going back to the CapVest transaction in 2007. He concluded that the 2018 acquisition involved the refinancing of third-party loans totalling €302,960,511 and CapVest related party loans of €61,719,896. He was

unable to identify whether the latter sum was incurred in respect of what he considered to be operational costs. However, through his analysis of information provided by the plaintiffs and publicly available information held in the Companies Registration Office (including statutory declarations made under s. 60 of the Companies Act 1963), he was able to trace the application of the third-party loans. His conclusion was that, out of the total of €302,960,511 owed in respect of the third-party loans, €19,383,809 was incurred in respect of the provision of healthcare services and that the balance of €283,576,702 was incurred in respect of previous acquisitions of the Mater Private business.

90. It should be noted that, although the plaintiffs did not raise any significant dispute with the detail of the exercise undertaken by Mr. Walsh, they argued that the Heads of Terms did not envisage an exercise of this kind. In this context, the plaintiffs drew attention to the relatively short time frames contemplated by the Heads of Terms. Under clause 5.6, the relevant accountants were required to complete their assessment within 30 days of receipt of the costs estimates submitted by the plaintiffs. As previously noted, such assessments involved a review not only of the costs estimates themselves but also the actual costs. Under clause 6.1, the accountants were required to verify and validate the costs. Obviously, any such assessment involved not only any interest claims submitted but all of the other costs' items claimed. Against that backdrop, counsel for the plaintiffs submitted that the accountants would not be expected to undertake an historical analysis of previous acquisitions. He also highlighted that, under clause 11.2, the timeframe for an expert determination is even shorter. The independent expert is required to determine any dispute not later than two weeks after the dispute is referred to the expert. Having regard to these considerations, counsel for the plaintiffs submitted that it was unreal to think that the parties would have intended that each of the providers (as defined in the Heads of Terms) or the relevant accountants appointed under clause 6.1 would have been required to carry out the extensive investigative work of the kind undertaken by Mr. Walsh

"potentially having to go back not just to the time that they were last acquired, even though they were not the vendor, but each prior acquisition in order to peel back all of this like layers of onion." Counsel also made the point that, even though Mr. Walsh had the advantage of being a forensic accountant well used to work of this kind, he had to twice correct his figures in the course of what the solicitors for the HSE, in their letters of 15th December 2021 and 13th January 2022, described as a *"detailed investigation"*.

91. I will return to the issues discussed in paras. 89 and 90 when I come to reach a conclusion on the competing arguments of the parties in relation to this element of the plaintiffs' claim. Before doing so, it is necessary to say something more about the structure of the 2018 acquisition and also to summarise the further arguments of the parties and the evidence relevant to those arguments.

92. In so far as the 2018 acquisition is concerned, the manner in which the funds borrowed in 2018 were funnelled through the company structure is usefully summarised in a checklist or step plan which was described by Mr. Whelan in the course of his evidence. Step 1 involved the incorporation of Topco by Oval Healthcare. Step 2 involved the draw down of the Related Party Loan by Topco from Oval Healthcare. It should be noted that the total amount drawn was €371,157,918 and that Oval Healthcare appears itself to have been the beneficiary of a similar loan from InfraVia IV Invest S.á.r.l. In turn, Topco used the loan to assist the purchase by Bidco of the Mater Private Group which was achieved through the application of the proceeds of that loan in conjunction with €216,558,444 drawn down by Bidco from the Syndicated Loan.

93. The plaintiffs maintain that the interest payable under the Related Party Loan accrued during the course of the lifetime of the Heads of Terms and that it very plainly falls within the ambit of the *"Finance costs"* heading in Schedule 2 which, as noted in para. 86 above, expressly covers: *"Contracted funding costs related to the ongoing operation and functioning of the facility, e.g. interest, cash leasing costs excluding intra-group interest payments which*

cancel on consolidation." The plaintiffs say that this provision of Schedule 2 makes clear that a funding cost is one type of finance cost that is recoverable and that the parties have expressly accepted that interest is a species of funding cost. They also place emphasis on the words *"related to"* which they submit have a very wide meaning. They say that the cost of borrowing used to acquire a hospital facility can readily be said to be *"related to"* the ongoing operation and functioning of that facility. They further highlight that, although there is a specific exclusion in respect of intra-group interest payments that cancel on consolidation, there is no equivalent exclusion in respect of interest on acquisition related funding costs. In the absence of such an exclusion, they argue that the HSE cannot resist payment on the grounds that any part of the interest relates to the cost of acquisition. They also argue that, in circumstances where it was known that the Mater Private Group had only recently been acquired by the InfraVia interests, the HSE could readily have sought to exclude acquisition related costs had that been their intention.

94. In support of their case that the interest should be characterised as *"related to"* the ongoing operation and functioning of the hospital facilities, the plaintiffs rely on the decision of the Supreme Court in *MacAonghusa v. Ringmahon Company* [2001] 2 I.R. 507. That was a tax case but the plaintiffs suggest that a useful parallel can nevertheless be drawn with it. In very broad terms, it was held in that case that interest payable on a loan which was taken out to replace capital raised in connection with the acquisition of a retail business should be treated as an expense incurred wholly and exclusively for the purposes of the company's trade. The judgment in *Ringmahon* is addressed in more detail below. For now, it is sufficient to keep in mind that the HSE seeks to distinguish the authority on the basis that it was concerned with a statutory regime regulating taxation and that it cannot be said to be of any wider application.

95. Counsel for the plaintiffs also emphasised that the interest liability under the Related Party Loan is a real cost to the plaintiffs. The liability accrued whether or not the COVID-19

pandemic had ever occurred and whether or not the Heads of Terms were ever executed. Counsel submitted that, if the HSE's position is correct, it means that the plaintiffs will be left with a loss. The interest cost will have to be discharged in due course even where, if the HSE is right, there will be no income earned to match that cost. In this context, counsel suggested that it did not matter that the Related Party Loan might be advantageous to the InfraVia investors or that Oval Healthcare might make a profit from the loan. Critically, the interest was a real cost to the plaintiffs as *"Providers"* under the Heads of Terms and the plaintiffs were accordingly entitled to claim payment of it.

96. Counsel for the plaintiffs further argued that the HSE's case also fails to take into account that, by not requiring the Group to pay the interest as it accrues, Oval Healthcare has, in effect, allowed the accrued interest to be used in the business. In this context, counsel for the plaintiffs put it to Mr. Walsh, in the course of cross-examination, that, by leaving the interest in the Group, it was then available for ongoing projects that would otherwise have required further borrowing by the Group.

97. To come within the relevant element of Schedule 2, it is, of course, necessary for the plaintiffs to establish that the interest liability incurred under the Related Party Loan related to the ongoing operation and functioning of the hospital facilities. As noted above, the plaintiffs emphasise the breadth of the words *"related to"* but they also contend that the cost of funding the acquisition of the hospital business is inherently part of the cost of the ongoing operation and functioning of the hospitals. As counsel for the plaintiffs put it, without acquiring the hospital business, it was impossible to provide the hospital service. He submitted that, logically, there is no difference in principle between acquiring a hospital premises and acquiring an MRI machine. The only difference is one of scale. He suggested that the interest payments on a loan to purchase an MRI machine would undoubtedly fall within the ambit of the ongoing operation and functioning of the facilities. He noted that Mr. Walsh did not dispute this. Counsel argued

that, logically, the same principle must equally apply in the context of interest payments to purchase a hospital business.

98. Counsel for the plaintiffs also suggested that it is reasonable to think that the entire of the value of a hospital business emanates from the operation and functioning of the hospital facilities. It therefore follows that any interest payable on a loan used to acquire that business relates to its ongoing operation and functioning. Counsel further argued that the fact that the interest was payable by Topco rather than the hospital operators made no difference. Counsel stressed that Topco is treated by the parties as one of the providers under the Heads of Terms. Topco is expressly included in the list of providers in Part 1 of Schedule 1 and recital 2 to the Heads of Terms defines the providers as the independent health sector hospital providers set out in that part of Schedule 1.

99. The parallel drawn by counsel with the purchase of an MRI scanner echoed the views expressed by the plaintiffs' expert, Mr. Clokey. According to Mr. Clokey, if Topco had not had the benefit of the Related Party Loan, it would not have been able to acquire the Mater Private Group and it would not in 2020 have been running and operating the facilities which the HSE wished to secure for the duration of the Heads of Terms. Against that backdrop, he saw the interest payable by Topco as related to the ongoing operation and functioning of the plaintiffs' facilities. Mr. Clokey explained that it is quite normal for a purchaser of a business to not only pay for the shares in the target company but also to take on the target's debt. In simple terms, the purchaser will seek to estimate what the business activities of a debt free business would be worth. By way of hypothetical example, if a purchaser concluded that a business with €400 million of debt was worth €600 million, the purchaser would be prepared to write a cheque for €200 million for the shares and to take on the existing debt (albeit that this would usually involve a refinancing of that debt).

100. Mr. Clokey suggested that the finance of a business and the operations of that business are inextricably linked. Again, to take the hypothetical example of the acquisition of a new MRI scanner, if a private hospital wishes to acquire such a scanner, Mr. Clokey said that there will be a review by the hospital's finance team of the business that the scanner could generate and the costs and manner of its acquisition whether by means of a lease, a loan or by purchase from its own resources. His view was that the cost of acquisition of the scanner (including any interest payable on moneys borrowed to acquire it) is related to the operation and functioning of the business represented by the MRI department of the hospital. Mr. Clokey suggested that the same principle applies where a developer borrows money to construct a new hospital facility. According to him, the interest payable on the borrowings will be a cost of running that facility and will be directly related to the functioning of the facility. Without the finance and the attendant interest, there would be no facility. Under cross-examination, Mr. Walsh, the forensic accountant called by the HSE, agreed in substance with this proposition. He accepted that the borrowing costs in such circumstances *"are the cost of bringing* [the hospital facility] *into being and, accordingly, they are the cost of providing the service from it after it's brought into being."* For completeness, it should be noted that, when counsel for the HSE made his closing submissions, he took a different approach and submitted that, given the emphasis in the Heads of Terms on the provision of the Service, the developer's costs of building the hospital would not be recoverable.

101. Mr. Clokey went further than the two examples summarised in para. 100 and expressed the view that there is no rational distinction to be made between the case of a developer who constructs a hospital and the case of an investor who wishes to acquire an existing hospital business. He also said that the investor will be paying not just for the physical hospital facilities but also the workforce, activities and reputation of the hospital. The investor will, in effect, have to pay a premium for those elements of the business. Mr. Clokey said that, in this way,

the price paid is *"inextricably linked to the operation of the hospital group."* In his view, the interest on the loans used to acquire the hospital will be a cost of the hospital business. To put it another way, without the finance and its attendant costs, the investor would not be able to operate the hospital facility. As explained further below, Mr. Walsh disagreed with that proposition.

102. In contrast, the HSE submitted that, in advancing such a case, the plaintiffs have misinterpreted the Heads of Terms. The HSE makes a fundamental distinction between the provision of a hospital service and the acquisition of the service. Counsel for the HSE argued that the Heads of Terms are concerned with the recovery of costs in relation to the provision of the Service and that the phrase *"ongoing operation and functioning of the facility"* in Schedule 2 is entirely consistent with the idea of providing the Service but inconsistent with the acquisition of the hospital business. Counsel emphasised that, under cross-examination, Mr. Clokey had confirmed that it is an important part of his evidence that Topco took on debt to acquire the Mater Private Group and operate its facilities and that his view was that, having done so, the loan becomes inextricably linked with the operation of the hospital facilities. Counsel for the HSE accepted that, unless a hospital facility is acquired, the hospital service cannot be provided by the acquirer but he suggested that it does not follow that, under the Heads of Terms, the costs of acquisition are recoverable. On the contrary, he submitted that the Heads of Terms are explicit as to what is recoverable – namely the cost of providing the Service.

103. In this context, the HSE also relied on the evidence of Mr. Walsh who suggested that the vast majority of the interest arises in respect of indebtedness arising from transactions to acquire the Group and not from indebtedness arising in relation to the provision of healthcare and ancillary services. Mr. Walsh expressed the view that the interest on the loans to acquire the hospital business are a cost to the investor, without which the investor would be unable to

acquire the business which already existed and was operational. His evidence was that the debt incurred by the acquirer was what brought the business into the ownership of the acquirer. In the context of an acquisition by private equity investors, he accepted that interest costs would be an operational cost of the private equity business carried on by or on behalf of the investors. However, he drew a distinction between such a business and the healthcare business of the underlying hospital group. He suggested that what is in issue here is the latter business and that the costs of acquiring such a business could not properly be characterised as an operational cost of a healthcare business.

104. It was also submitted on behalf of the HSE that the principal purpose of structuring acquisitions in a way that prioritised debt over equity was with a view to maximising profit on the part of the investors. Counsel for the HSE referred, in this context, to the evidence of Mr. Clokey who confirmed this. First, Mr. Clokey, in para. 37 of his report, expressed the view that, in general terms, the fact that interest charges are an allowable deduction against taxable income means that buyers seek to use as much debt as possible in the financing of deals and that the structure used by the InfraVia investors to acquire the Mater Private Group was *"typical of private equity investments."* Counsel then referred to Mr. Clokey's evidence under cross-examination on Day 4 when he confirmed that, structuring an acquisition in this way brings the greatest possible reward for the investors in the purchaser company and that it is the interest on the debt incurred in connection with the acquisition which provides the means of maximising the profit. In response to the specific question: *"So, the debt structure might be seen as a tool for ... maximising profit…?",* Mr. Clokey replied: *"Yes. I think that's a generally accepted view of the world. Not just on this deal. Private equity is prepared to face higher leverage and therefore higher risk and enjoy the increased benefit of a larger interest charge against their taxable profits…".*

105. Counsel for the HSE strongly disputed the case made by the plaintiffs that it does not matter that Oval Healthcare (or the InfraVia investors further up the chain) might make a profit from the Related Party Loan structure. He drew attention to the language of clause 5.11 where the parties acknowledged that the Common Purpose *"does not envisage a commercial or economic benefit or profit beyond the Costs"* and he suggested that: *"That's for anyone. That's not confined to the Providers".* He also submitted that the plaintiffs' case is inconsistent with the tenor of the Heads of Terms. He said: *"It is factually correct to say that the interest ... doesn't generate a profit for these Providers. Rather, ... what we have sought to demonstrate is that ... profit accrues to the 100% owner of the provider. That's the essence of profit extraction, as Mr. Clokey described: the Providers are used as funnel through which the profit is extracted .... I'm not talking about the bank who gets the interest ... it's the whole organising itself with that level of debt so that ultimately the net profit to the 100% owner is greater... But ... if that's correct on the facts ... I ... respectfully suggest the whole import of this agreement is not to be viewed as permitting profit extraction of that type...."*

106. It will thus be seen that there are weighty arguments on both sides in relation to the issue of the interest payable under the Related Party Loan. Ultimately, the resolution of the issue turns on the interpretation of the Heads of Terms. For that reason, the evidence that I have heard is of limited assistance. As previously explained, the court must construe the Heads of Terms entirely objectively from the standpoint of a reasonable person in the position of the parties at the time the Heads were executed. The court must form its own view on the issue.

107. I think it makes sense to first address the HSE's contention that, since the relevant borrower, Topco, is no more than a holding company, it cannot be said to be a *"Provider"* of the Service and accordingly cannot sustain the claim for interest under the Heads of Terms. In my view, this is not a sustainable argument. The parties to the Heads of Terms expressly decided that Topco was a *"Provider"* for the purposes of the Heads. This is clear from recital

2 to the Heads read in conjunction with the right-hand column of Schedule 1. The effect of those provisions is that each of the parties named in the right-hand column of Schedule 1 is a *"Provider"* for the purposes of the Heads. In the absence of a rectification claim or, at minimum, some plausible basis on which to form the view that the parties had made some obvious error in the way in which they had expressed themselves, I do not believe that Topco can be excluded from the benefits of the Heads of Terms. That said, Topco must, of course, be in a position to show that the interest under the Related Party Loan constitutes an item of Costs within the meaning of Clause 5.1 and that it fulfils all of the other relevant requirements of the Heads of Terms in relation to costs.

108. The next issue which requires to be addressed is whether the HSE is correct in its submissions in relation to profit. In this context, there is no suggestion that Topco or any other company in the Group makes any profit from the interest payable under the Related Party Loan. On the contrary, the interest is plainly a cost (in the ordinary sense of that word) to Topco. As noted in para. 105 above, the HSE makes two arguments in this context, the first by reference to the terms of clause 5.11 and the second by reference to the *"import"* or tenor of the Heads of Terms. In so far as the first of those arguments is concerned, I do not believe that clause 5.11 can plausibly be construed as excluding the making of a profit by anyone who is not a party to the Heads of Terms. As I have sought to explain in para. 79 above, the clause should be construed as a reinforcement of the provisions of clause 5.1 to the effect that reimbursement is on a costs only basis and is not intended to include a profit or economic benefit to the Providers. It is therefore clear that none of the plaintiffs is entitled to make a profit from reimbursement of the costs. However, I do not believe that clause 5.11 can be construed as excluding a profit being made by third parties such as the recipient of a payment made by one of the Providers. In the first place the language of Clause 5.11 when read as a whole strongly suggests that the only parties affected by it are the Providers. The relevant sentence commences with the words

"The Parties acknowledge ...". There is nothing to suggest that the acknowledgement is intended to go beyond the parties and to capture related or associated entities. Furthermore, the words *"the Common Purpose does not envisage a commercial benefit or profit"* are immediately followed by the words *"beyond the Costs"*. This is a plainly a reference to the *"Costs"* as defined in Clause 5.1. When one looks at that definition in Clause 5.1, it refers to the *"costs actually incurred* ***by the Providers*** *..."* (emphasis added). It is therefore clear that, when clause 5.11, in turn, refers to the *"Costs",* it has the Providers in mind; not anyone else. Read in that way, I do not believe that clause 5.11 has the meaning suggested by the HSE.

109. Secondly, clause 5.11 must not be considered in isolation. It must be read in the context of the agreement as a whole. When read in that way, I do not believe that it has the effect suggested by the HSE. This is well illustrated by the terms of Schedule 2. As noted in para. 79 above, Schedule 2 envisages that rent can be recovered as part of the costs. In my view, it would be fanciful to think that the parties envisaged that the relevant landlord would not be entitled to make a profit. That would involve a very strained and unrealistic interpretation of the agreement. It would be commonly understood that rent ordinarily involves some element of profit for a landlord. The same can be said in relation to interest payable to a bank. Again, it would be commonly understood that, in fixing an interest rate on a loan, a bank is seeking to recover some level of profit. Thus, reading the Heads of Terms as a whole, I reject the HSE argument based on the language of clause 5.11.

110. Turning to the argument based on the tenor of the agreement, the Heads of Terms contain a number of provisions which are relevant to the issue of profit. I have previously drawn attention to the use of the word *"reimburse"* in clauses 2.1 and 5.1 and the way in which clauses 5.1 and 5.11 drive home the message that, save for the payment of the nominal consideration of €10, the reimbursement is to be on a *"costs only"* basis and that the Common Purpose (as defined) does not envisage a commercial benefit or profit beyond the *"Costs"*.

However, this is all in the context of what is payable to the Providers. It is clear that *they* are not to receive any profit or other economic benefit from the costs payable to them. However, the Heads of Terms do not purport to prevent the earning of profit by parties other than the Providers. The Heads of Terms could have addressed the position of related parties but they did not do so. I do not know what was known to the HSE, prior to execution of the Heads of Terms, about the structures which private equity investors often use. Given the urgency of the situation, the HSE may not have had time to undertake any level of enquiry. It is clear that the Heads of Terms were put in place at a time of unprecedented national crisis and that the HSE was attempting, under intense time pressure, to try to secure as much capacity as possible to ensure that the health service could cope with the enormous impact of the pandemic which was sweeping across Europe at that time. I am sure that, ordinarily, an arrangement of this magnitude would be the subject of more prolonged negotiation and more extensive investigation and reflection. Had the HSE, at the time of negotiation of the Heads of Terms, been alive to the types of structures used by private equity investors, it may well have sought to include express provision in the Heads of Terms making it clear that no profit could be made either by the Providers or by any person or company associated with them or related to them. However, crucially, there is no such stipulation in the Heads of Terms and I can see no basis on which a term to that effect can be implied. Nor was any argument made to me to justify the implication of such a term and to show that its implication satisfies any of the relevant legal tests.

111. I appreciate that the 2018 acquisition was structured in such a way as to maximise profit for the InfraVia investors and that the Related Party Loan is an integral element of that structure. While I think the plaintiffs go too far in characterising the entire of the interest payable under the loan as *"profit extraction"*, the structure does assist the ultimate investors in maximising their profits. As Mr. Clokey explained, there is usually tax relief available in

respect of interest payments and, to that extent, this assists in increasing investors' profits. For that reason, I can understand that the HSE may perceive the arrangement, to the extent that it creates a profit in the hands of the relevant investors, to be inconsistent with the spirit of the Heads of Terms. But I cannot see a proper basis on which to conclude that, just because it creates some level of profit in the hands of those investors, the interest is incapable of constituting an item of costs under the Heads of Terms. The investors are not parties to the Heads of Terms. As discussed in para. 110 above, there is nothing in the text of the Heads to extend the obligations of the Providers to their related companies or investors. It is also important to keep in mind that the Related Party Loan was put in place long prior to the Heads of Terms. It is not some form of artificial construct created by the plaintiffs to avoid their obligations under the Heads of Terms. As a matter of law, there was nothing to prevent the InfraVia investors from creating a structure of that kind in 2018. Crucially, the law treats both the lender under the Related Party Loan (Oval Healthcare) and the borrower (Topco) as separate legal entities and no authority has been cited by me to suggest that their separate legal personality can be ignored for the purposes of the Heads of Terms. Thus, in the absence of a stipulation of the kind suggested in para. 110 above, the Heads of Terms do not prohibit the making of a profit by an entity related to a provider where that entity is the recipient of a payment (or is owed a liability) in respect of an item that otherwise meets the *"Costs"* criteria under the Heads of Terms.

112. That leads logically to the central issue that requires to be resolved namely whether the interest under the Related Party Loan can be said to constitute an item of *"Costs"* as defined by the Heads of Terms. There are a number of key provisions of the Heads of Terms which assist in answering this question. First, it is necessary to keep in mind that, under clause 5.1, what is to be reimbursed are the operational costs of *"providing the Service".* That is an integral part of the definition of *"Costs"* contained in that clause. It follows that, in order to understand

the definition of *"Costs",* it is essential to consider the definition of *"Service".* That leads back to clause 2.1, which consistent with clause 1.1 (setting out the purpose of the arrangement) defines the *"Service"* in very wide terms as the making available by the Providers to the HSE of *"their full capacity and services at the Relevant Hospitals including, but not limited to, total bed capacity, facilities, diagnostics, staffing, management and full organisation capability".* It will be seen that the Service is not limited to the full physical capacity of the hospital premises but also its full services including management and organisation (albeit that independent consultants are not covered by the Heads of Terms). On Day 1 of the hearing, counsel for the plaintiffs characterised this as making the *"entire business"* of the plaintiffs available to the HSE. I would not go quite that far. It is important to keep in mind that, as clause 1.4 made clear, the service to be provided under the Heads of Terms was to be a fully public one with all patients being treated as public patients. That is unsurprising given the terms of s. 38 of the 2004 Act (addressed in paras. 13 to 14 above) and given the service was to be provided to the HSE. That is an important point of distinction. The *"Service",* therefore, did not embrace the entire business of the plaintiffs which involves the provision of private healthcare services for a profit.

113. Nevertheless, if the Heads of Terms had gone on to provide, without qualification, that the HSE should pay to the Providers their costs of providing the Service, I believe that the argument advanced on behalf of the plaintiffs might well have some traction. If the Heads had been drafted in that way, a relatively straightforward argument could be made that the costs payable by the HSE should be considered to include the interest on the Related Party Loan. In simple terms, such a case could be made on the basis that the Providers would not be in a position to make their facilities and services available to the HSE unless they had acquired those facilities in the first place. Thus, if the HSE had agreed, without qualification, to pay the costs of the Providers of providing the Service, one can see how it might be plausible for the

plaintiffs to argue that this should include the interest on any loan taken out to assist in the acquisition of the facilities (although that argument might still founder on the basis that this was an acquisition of the business rather than its underlying facilities *simpliciter*).

114. Notably, the Heads of Terms are not framed in that way. An adjective qualifying the word *"costs"* is added. In the sentence which immediately follows the definition of *"Service"* in clause 2.1, it is stated that the HSE will reimburse the *"**operational** costs of the Providers of providing the Service at the Relevant Hospitals ..."* (emphasis added). The use of that word *"operational"* is important. The parties to the Heads of Terms must have intended to invest that word with meaning. There is nothing to suggest that the adjective is otiose or redundant. The adjective is repeated in clause 5.1 which also adds a further layer in so far as it provides that the operational costs are those *"under the general headings of Schedule 2"*. As previously noted, clauses 5.1 and 5.11 also emphasise that what is to be paid are the actual costs incurred by the Providers without any additional element of profit or economic benefit. In the context of finance costs, Schedule 2 identifies *"interest"* as one of the finance costs that can be claimed but any such interest must obviously continue to meet the requirements set out in clauses 2.1, 5.1 and 5.11. The part of the schedule dealing with finance costs also adds one further element in so far as it speaks of *"Contracted funding costs related to the ongoing operation and functioning of the facility"*. As discussed further below, the use of those words *"ongoing operation and functioning"* is noteworthy. Those words would appear to be part of the same family as the adjective *"operational"*. Accordingly, not every funding cost or finance cost is recoverable. They will only be recoverable where they are related to the ongoing operation and functioning of the facility.

115. Thus, the plaintiffs must establish (the burden being upon them):

(a) That the interest arising under the Related Party Loan is an operational cost;

(b) That it was actually incurred by them in providing the Service;

(c) That there is no element of profit for them in the interest. For the reasons previously discussed, that condition seems to me to be satisfied; and

(d) That the interest liability is related to the ongoing operation and functioning of the facility.

116. For the reasons discussed in paras. 69 and 70 above, it seems to me that the way in which the word *"operational"* should be understood is in the sense explained in the *Shorter Oxford Dictionary* quoted in para. 69 above namely that it relates to the action of operating. When applied to the context of the Heads of Term, this would tend to suggest that, what the parties had in mind, were the costs of the operation of the Service (as defined). If that is correct, the result would be that, under clauses 2.1 and 5.1, the costs to be reimbursed to the plaintiffs are the costs actually incurred by them in the action of operating the Service (namely the provision of the full capacity and services of the plaintiffs at each of the Mater Private Dublin, the Mater Private Cork and the Limerick radiotherapy centre). That said, it appears from Schedule 2 that the parties envisaged that *"operational costs"* is a wider concept than *"operating costs"* which Mr. Clokey explained has a recognised meaning in a corporate business context albeit that it has yet to find its way into accounting literature. As noted previously, *"operating costs"* are the first of five items specifically addressed in Schedule 2. The narrative in the right-hand box of the schedule states that operating costs *"... would cover any operating costs required to be incurred to run the business, including payroll and staffing ...and consumables and related medical supplies and operating costs and overheads of the facility ..."*. The remaining terms of Schedule 2 enumerate the additional matters that the parties have expressly agreed fall within the wider ambit of *"operational costs"* including, under the heading of *"Finance costs",* funding costs related to the ongoing operation and functioning of the facility (*"interest"* being expressly cited as an example of such a funding cost). If the relevant metric chosen by the parties had been operating costs, interest would not

have qualified as a reimbursable cost. This was confirmed on Day 4 of the hearing when Mr. Clokey explained that: *"to the accountant, interest is not an operating cost."* Nonetheless, having regard to its express inclusion in Schedule 2, it is clear that the Heads of Terms treat interest as an element of the operational costs where it is related to the ongoing operation and functioning of the facility and where it can be said to meet the requirements of clauses. 2.1 and 5.1.

117. Although somewhat wider in scope than the word *"operating"*, the use of the adjective *"operational"* in conjunction with the word *"costs"* would seem to envisage a narrowing of what might be considered to constitute the costs of providing the Service and to raise a question as to whether those costs could include the costs of the acquisition of the underlying business. In my view, it is not immediately obvious that the costs of the acquisition of the business fall within the ambit of costs incurred in the action of operating the Service. That seems to me to be so as a matter of first impression. But it also seems to me to be so when one gives further thought to the issue wearing the hat of the reasonable person in the position of the parties. It is useful, in this context, to consider the effect of the acquisition of the business on the action of operating the Service. The costs of the acquisition of the business have resulted in a change of ownership of the former Mater Private Group such that it is now controlled by Topco. But there is no evidence to suggest that those costs have had any impact on the hospital facilities or any of the services falling within the definition of *"Service"* in clause 2.1 of the Heads of Terms. Those services were already being provided by the Dublin and Cork companies and by Spireview in their existing facilities. Although their ultimate ownership has changed, those companies continued to operate after the acquisition in a similar way as before. As Mr. Walsh observed in his report, no change occurred in the capacity or the underlying operation of these facilities as a consequence of the change of ownership. Accordingly, it is very difficult to see how any part of those costs (including the interest) can be said to have been incurred in the

action of operating the Service. It would appear to follow that the interest payable on a loan used to fund the acquisition of the former Mater Private Group could not be said to constitute an operational cost within the meaning of clauses 2.1 and 5.1. However, before any final view can be reached on this issue, it will be necessary to address the plaintiffs' argument based on the decision of the Supreme Court in the *Ringmahon* case (which I consider in detail at a later point in this judgment).

118. Furthermore, it seems to me that the costs of acquisition of the business cannot be equated with the costs of the action of operating the Service. It is solely the latter that fall within the ambit of clauses 2.1 and 5.1. In my view, the plaintiffs have conflated the two. However, as outlined in para. 112 above, the business acquired by the plaintiffs is not synonymous with the Service. The business acquired by the plaintiffs is a commercial operation designed to make a profit derived from services supplied to fee paying patients. In contrast, the Service is confined solely to the provision of public health services to public patients. Clause 1.4 makes clear that the providers would *"without exception"* provide *"a fully public service"* and that all patients would be treated as pubic patients. It therefore does not follow that, even if the difficulty described in para. 117 did not exist, the costs of the acquisition of the business could be said to fall within the ambit of operational costs of providing the Service. As Mr. Clokey explained in his evidence, the acquisition of the business involved a payment of a premium by the purchasers over the original cost of the hospital facilities. In my view, this underlines the difficulty facing the plaintiffs in trying to shoe horn the costs of acquisition of the business into the significantly narrower category of operational costs of providing the Service.

119. In making their case in relation to interest, the plaintiffs have sought to rely on the additional language in the relevant part of Schedule 2 dealing with finance costs and in particular on the words *"related to the ongoing operation and functioning of the facility"*. As a matter of first impression, those words seem to me to have been intended to more closely

delineate the funding costs (including interest) which would be recoverable as operational costs. I doubt whether a reasonable person in the position of the parties would conclude that they were intended to significantly expand the ambit of funding costs covered by the *"Finance costs"* heading in Schedule 2. Furthermore, those words appear to me to support the view that the operational costs are those which are incurred in the action of operating the Service. The words *"ongoing operation and functioning"* are entirely consistent with the concept of the action of operating. Again, it is not immediately obvious that those words were intended to extend to the acquisition of the business of which the facilities form a part. Furthermore, the specific enumeration of the words *"operation"* and *"functioning"* is noteworthy. The ordinary meaning of those words is very similar and neither word would usually be understood to envisage or embrace *"acquisition"*. However, the plaintiffs seek to overcome this difficulty by pointing to the use of the words *"related to"*. The plaintiffs submit that the words *"related to"* widen the scope of the words that follow such that the Schedule cannot be limited solely to those costs which fall strictly within the ambit of *"operation and functioning"*. On that basis, they contend that the costs of acquisition of the business are related to the operation and functioning of the facilities. Counsel for the plaintiffs argued that: *"... if you don't purchase the operating service, you can't provide or operate the service for the State."*.

120. Although the plaintiffs did not cite any authority for their proposition that the words *"related to"* broaden the ambit of the words that follow, similar words have been given a wide meaning in a number of different contexts. For example, in *Gulliver v. Brady* [2003] IESC 68 an issue arose as to whether the plaintiff (who claimed that he was entitled to an equity partnership in a firm of solicitors) was bound to go to arbitration by virtue of an arbitration clause in a memorandum of understanding between the parties under which the parties agreed that *"any disputes between the parties to this Agreement arising out of or in relation to this Agreement"* should be referred to arbitration. The plaintiff maintained that his claim to a

partnership was not based on the memorandum of understanding but arose independently of it and that, accordingly, his claim was not captured by the arbitration clause. Nevertheless, the Supreme Court held that the arbitration clause applied to his claim. In the judgment of the court, Geoghegan J., at para. 9. endorsed the view expressed by the authors of *Russell on Arbitration* that the words *"in relation to"* should be given a broad meaning and that they can be sufficient to catch not only disputes arising under the contract in which the arbitration clause appears but also disputes arising under a related contract. That approach is not confined to arbitration clauses. In *Eccles Hall v. Bank of Nova Scotia* (High Court, unreported, 3rd February 1995) Murphy J. took a similar view of the somewhat similar words *"in connection with"* found in s. 60 of the Companies Act 1963. Accordingly, there is some force in the case made by the plaintiffs that the use of the words *"related to"* in Schedule 2 broadens the scope of the words *"ongoing operation and functioning of the facility"*. However, there are limits to what can plausibly be said to be related to that ongoing operation and functioning. As noted above, the words are used to delineate the type of finance costs that the parties considered should be recoverable by the providers (including the plaintiffs). The parties plainly did not intend that every finance cost or funding cost would be recoverable. They limited the recoverability of funding costs (such as interest) to those that could be said to be related to the ongoing operation and functioning of the facility. Relationship is ultimately a question of degree and I have to interpret the words used in the Heads of Terms by reference to the meaning they would convey to a reasonable person in the position of the parties at the time the Heads of Terms were agreed. There will be a point where it becomes implausible to suggest that a reasonable person in the position of the parties would consider the necessary relationship to exist. Furthermore, the language must be considered as a whole and it would be unsafe to place undue importance on the use of the words *"related to"* in isolation. Each of the words used in this section of Schedule 2 must be considered. When considered in that way, it will be seen that this part of Schedule 2

is focused on the costs related to the operation and functioning of *"the facility"*. The use of the word *"facility"* is noteworthy. The parties did not say that the costs recoverable are those related to the operation and functioning of the *"business"* of the providers. That is consistent with the plain intention of the Heads of Terms which, as noted in paras. 112 and 118 above, envisage a purely public service being provided at the plaintiffs' facilities which cannot be equated with the commercial business of the plaintiffs. While the word *"facility"* is not defined, it seems to be clear that what the parties had in mind in the plaintiffs' case were the facilities of each of the Mater Private Dublin, the Mater Private Cork and the Limerick Radiotherapy Centre. It also appears to be clear that the parties did not understand the word *"facility"* to include staffing, management or bed capacity. It is striking that the definition of the *"Service"* in clause 2.1 lists *"facilities"* alongside staffing, management, bed capacity and diagnostics suggesting that the parties regarded these as distinct elements of the *"Service"*.

121. As outlined in paras. 99 to 100 above, the plaintiffs, in making their case that the interest costs are *"related to"* the ongoing operation and functioning of the facilities, seek to rely on the analogy with the purchase of an MRI scanner. Indeed, the plaintiffs' expert, Mr. Clokey, in an attempt to simplify things, characterised the acquisition of a hospital business as the purchase of a *"money making machine"*. Developing that analogy (and putting himself in the position of the plaintiffs at the time of execution of the Heads of Terms), he said that the debt taken out to purchase that *"machine"* relates to the *"acquisition of this machine and its operations. I own it, I operate it. And that debt is very directly related to my operation of my machine that you want to borrow."* Later, under cross-examination, he said that it was an important part of his evidence that *"Topco had to lay out €600,000,000 to get the right to own and operate and having laid out that €600,000,000 has the right to operate, and in my mind that loan becomes inextricably linked with the operation of the hospital."* While it is inappropriate for an expert to express views as to how non-technical terms of a contract should

be understood, the views expressed by Mr. Clokey were, in effect adopted by counsel for the plaintiffs in his submissions and this judgment proceeds on the basis that they can be treated as part of counsel's argument.

122. Notably, both sides accept that the interest payable on a loan to purchase an MRI scanner would be recoverable under the Heads of Terms. One can readily appreciate why there is no disagreement between the parties on that issue. The availability of such a scanner is part and parcel of the day to day operation of a modern hospital. It is also an inherent element of the *"Service"* to be provided under clause 2.1 (which is defined to include diagnostics). I believe that, if a reasonable person in the position of the parties had been asked, at the time of execution of the Heads of Terms, whether interest on a loan for the acquisition of a scanner related to the ongoing operation and functioning of the plaintiffs' facilities, such a person would most probably have answered *"yes"*. But the HSE submits that interest payable on a loan taken out in connection with the acquisition of a hospital business falls into a different category. The HSE argues that such interest is a cost of the operation of an investment business and that it cannot be considered to be a cost related to the operation of the underlying hospital facilities. This is also reflected in the report of Mr. Walsh who drew a distinction between costs incurred in the procurement of hospital facilities (such as an MRI scanner) and costs incurred by a purchaser of a hospital business. His evidence was that, in the latter case, what occurs is that the previous owner ceases to be the owner of the business and makes a profit on its previous investment while the interest on the loan used by the new investor to acquire the business becomes a cost to the investor of the acquisition. For the reasons discussed in para. 117 above, this seems to me to be the correct analysis (subject, however, to a consideration of the Supreme Court judgment in *Ringmahon* which I address in paras. 130 to 136 below).

123. Although the plaintiffs argue that there is no logical distinction to be made between the acquisition of a hospital business and the acquisition of an MRI scanner, I think there is a

proper basis to distinguish them in the context of the operation and functioning of the hospital facilities (which is the relevant metric that the parties chose in the context of this part of Schedule 2). As outlined in para. 122 above, one can immediately see that the MRI scanner is an inherent part of the operation and functioning of a modern hospital. The interest payable on a loan taken out to purchase the scanner can thus be said to be related to the ongoing operation and functioning of the facility. The relationship to the operation and functioning of the facility is both obvious and close. In my view, it is much less obvious to classify a cost incurred as part of the acquisition of a hospital business in the same way. Any relationship between the interest payable on a loan used in the acquisition of the business and the costs of the ongoing operation and functioning of the hospital facilities is significantly more tenuous. The interest is payable not because of some event or cause that arose in relation to the operation of the facilities but as a consequence of the decision of the investors to acquire the business. Notwithstanding that acquisition, the underlying facilities continued seamlessly. To paraphrase Mr. Walsh, without the loan and its attendant interest, the investors would not have been able to acquire the business. The interest can therefore be very clearly related to the acquisition of the business. But, to the extent that the loan was spent on the acquisition of the business, that did not involve any outlay on any element of cost related to the operation and functioning of the facilities. The money was instead paid to the vendors or, at their direction, to their lenders.

124. For the reasons outlined in para. 123 above, I am of the view that, in the context of the Related Party Loan, a reasonable person in the position of the parties would be more likely to regard the interest payable as related to the InfraVia investment business than to characterise it as related to the ongoing operation and functioning of the hospital facilities. The costs associated with a loan to acquire an MRI scanner seem to me to fall into quite a different category. As I have already observed, such costs would readily be regarded as related to the

ongoing operation and functioning of hospital facilities. I do not accept that it is plausible to draw an analogy with the acquisition of such a scanner.

125. There is also another way to illustrate the difference between the acquisition of an MRI scanner and the purchase of a hospital business. In this regard, it is clear from the materials before the court that, when it comes to the acquisition of a private hospital business, the costs incurred by the purchaser go significantly beyond the cost of the underlying facilities. As confirmed by the evidence given by the experts on both sides, the purchaser of a private hospital business will pay a premium for the acquisition of the business over the value of the underlying assets of that business. That premium will be reflected as *"goodwill"* in its financial statements. For example, the 2018 consolidated financial statements for the Group indicate that goodwill arising on the purchase of the pre-existing Mater Private Group in 2018 amounted to €202,500,000 before amortisation (or €194,062,000 after an amortisation charge of €8,438,000 was applied). That represented a very significant element of the overall cost of acquisition of the business. I appreciate that some of the premium paid on acquisition of the business is likely to be attributable to factors such as the staff and management and the connection which the hospitals have with the consultants currently practicing there. However, on the basis of the evidence which I heard, some part of the premium will relate to the fact that, like any other commercial business, the private hospital business is, to adopt Mr. Clokey's description, a money-making machine. The ability of the business to perform as a money-making vehicle will depend on many factors some of which will be quite removed from the ongoing operation and functioning of the facility. These factors would include, for example, the likely customer base of the hospitals and the extent to which that base holds sufficient private healthcare insurance to be able to afford to pay the prices necessary to allow the hospital owners to make a profit on their investment. The willingness of the purchaser to pay a premium for the business in this way neatly illustrates the point made by counsel for the HSE that the interest arising

under the Related Party Loan should properly be characterised as a cost related to the InfraVia investment business rather than related to the ongoing operation and functioning of the hospital facilities.

126. I appreciate that the analogy with the MRI scanner was also put forward in the sense that, just as they were providing their scanner (which is itself an individual money-making machine), the plaintiffs were making available their overall *"money-making machine"* (in the form of all of their hospital facilities) to the HSE for the duration of the Heads of Terms. The suggestion appeared to be that it would make no commercial sense that they should do so unless all of their costs of acquiring the latter were met during the currency of the arrangement. I cannot accept that suggestion. I do not believe that the commercial conditions prevailing at the time of conclusion of the Heads of Terms necessarily point in that direction. There was considerable uncertainty for both sides at that time. While the plaintiffs have highlighted that they would have been able to continue a significant element of their private healthcare business in the absence of the Heads of Terms, it was nonetheless conceded that (as described in para. 56 above) the plaintiffs were facing uncertainty and that the Heads of Terms provided the Group with an element of stability and liquidity. The plaintiffs therefore had some incentive to enter into an arrangement of this kind. Moreover, the Group was only one of many private hospital providers who signed up the Heads of Terms. It would therefore be inappropriate to construe the Heads of Terms solely against the factual backdrop of the Group. The wider context must be considered. As I have previously observed in para. 56 above, there is no evidence that each of the other providers was in the same position as the Group. Indeed, the tenor of the plaintiffs' evidence was that their facilities were almost unique among private hospitals in the level of essential care provided by them. The implication is that many other providers were more dependent on non-essential care and were, thus, facing more significant business uncertainty in the face of the pandemic. Such providers may well have been quite

pleased to sign up to an agreement with the HSE which provided them with a degree of certainty that a substantial part of their costs would be met even if it did not meet all of their costs. In those circumstances, I cannot conclude that business common sense requires that a different interpretation be given to the Heads of Terms.

127. It follows that, if the plaintiffs wished to have such an interest liability of this kind covered by the HSE, that was a matter for negotiation and agreement between the parties. If the plaintiffs wished to make the HSE liable for interest costs payable in connection with their acquisition of the business, appropriate provision could have been made for it in the Heads of Terms in the same way as *"rent"* is specifically covered. In my view, for all of the reasons outlined above, I cannot see any proper basis to conclude that interest costs of this kind form part of the plaintiffs' operational costs (either within the meaning of clauses 2.1 and 5.1 or within the meaning of Schedule 2). The terms of the agreement between the parties do not go that far and I can see nothing in the factual or legal context which would require that a different interpretation should be given to those terms.

128. In this context, I have not lost sight of the plaintiffs' argument (summarised in para. 90 above) that it is unreal to think that the parties to the Heads of Terms would have envisaged that the providers (or the relevant accountants under clause 6.1) would be required to carry out an extensive forensic investigation of the kind undertaken by Mr. Walsh (potentially having to go back through several prior acquisitions) in order to identify the extent to which loans were used for acquisition or operational purposes. I do not accept this argument. It must be borne in mind that, in carrying out his investigation, Mr. Walsh was an outsider. He had no previous knowledge of the detail of the plaintiffs' business and no familiarity with it. Such an exercise by an outsider is bound to take time. However, I cannot accept that the same level of difficulty would arise for the providers themselves. It is fair to assume that they must be familiar with their own business and well capable of identifying how the proceeds of loans were applied.

Moreover, each of the providers appear to be companies. As such, they are each obliged by law to maintain adequate accounting records that correctly record and explain the transactions of the company. Against that backdrop, I do not believe that it is in any way unreal to conclude that the parties to the Heads of Terms would have envisaged that the providers would be able to identify the ways in which loans were used and to substantiate their claims in a manner that would allow the accountant under clause 6.1 to verify and validate the claims.

129. I therefore remain of the view expressed in para. 127 above. Nevertheless, before any final conclusion can be reached on this issue, it is necessary to address the plaintiffs' argument based on the decision of the Supreme Court in *Ringmahon*.

The *Ringmahon* decision

130. Although *Ringmahon* was a tax case, the plaintiffs submit that it provides important guidance and that it strongly supports their position. It is therefore necessary to consider it in some detail. In 1987, Ringmahon (an unlimited company controlled by the Dunne family) acquired some of the former *H. Williams* supermarkets and began to trade from these stores under the *Dunnes Stores* brand. The purchase was funded by a loan from Dunnes Stores Ireland Company (*"Dunnes"*) controlled by a Dunne family trust. To this extent, there is a parallel with the present case. However, importantly, in 1988, this finance was converted into redeemable preference shares issued to Dunnes. In 1991, the board of Ringmahon decided to redeem the preference shares and for that purpose, Ringmahon took out a bank loan which was repayable with interest payable periodically. In subsequently computing its taxable income, Ringmahon sought to deduct the interest payable on the bank loan on the basis that the interest was in the words of the relevant taxing statute, *"money wholly and exclusively laid out or expended for the purposes of ... trade"*. The Revenue Commissioners argued that the interest was not a deductible expense since the purpose of the loan was to redeem the preference shares and was accordingly related to the capital restructuring of the company rather than ordinary

trading. The Revenue Commissioners contended that the ongoing interest payments were of the same character as the loan and should, therefore, be treated as capital. Ringmahon rejected this and successfully argued that, while the principal was laid out for a capital purpose (which it accepted was not deductible against income), the interest was paid each year to retain the benefit of the bank borrowing and to enable the company to carry on its trade. It argued that, once the preference shares were redeemed, the only way in which the trade could continue to be carried on was either by means of new share capital or by means of the borrowing in issue. On that basis, it made the case that the interest on the loan was wholly and exclusively laid out for the purposes of its trade. Ringmahon also pointed out that there was an inconsistency in the position adopted by Revenue in that it was well accepted by Revenue that, if a taxpayer borrowed money to build a factory (which would be regarded as capital expenditure), the interest payable would be treated as a trading expense even though the principal was capital in nature.

131. The judgment of the Supreme Court was given by Geoghegan J. It appears from p. 512 of the report, that he was struck by the apparent inconsistency between the approach taken by Revenue in cases involving interest on borrowing for certain capital purposes (such as the construction of a factory) and the approach taken in response to the Ringmahon transaction. However, he also addressed the issue of principle which arose and said that he found the taxpayer's arguments to be *"much more convincing"* than those of the Revenue. In addressing the issue of principle, Geoghegan J. expressly followed the approach taken by the Exchequer Court of Canada in *Trans-Prairie Pipelines v. Minister of National Revenue* (1970) 70 D.T.C. 6351. In that case, the taxpayer company had been incorporated to construct and operate a pipeline. Its original issued share capital was made up of common shares and 140,000 redeemable preference shares (the latter having a total par value of $700,000). Two years after incorporation, the company redeemed the preference shares at par. It did this partly by means

of borrowing by way of First Mortgage Bonds and partly by issuing further common shares to the value of $300,000. It borrowed a total of $700,000. To redeem the preference shares, it used $400,000 of the money borrowed together with the $300,000 raised on the issue of the common shares. The Canadian revenue authorities were not prepared to allow the whole of the interest payable on the borrowings of $700,000 as a deductible trading expense. On the basis that $400,000 of the total borrowings had been used to redeem capital, the authorities were only prepared to allow three sevenths of the interest as a deductible expense of the trade. This approach was rejected by the Canadian court. In his judgment, Jackett P. referred to the relevant Canadian statutory provision which permitted a taxpayer to deduct interest on borrowed money used for the purpose of earning income from a business. That test is not the same as the statutory test in Ireland but Geoghegan J. did not think that the difference in language was material in so far as the facts of the *Ringmahon* case were concerned.

132. In his judgment in the *Trans-Prairie* case, Jackett P., at p. 6353 described how the Canadian tax authorities had taken the view that, to the extent that the borrowed money had been used to redeem the preference shares, it could not be said to have been used for the purpose of earning income from the taxpayer's business. Jackett P. then continued as follows: *"The alternative view is that, prior to the transactions in question, the capital being used for the purposes of earning income from the appellant's business was the $700,000 subscribed by the preferred shareholders and the $140,006 subscribed by the common shareholders, and that, after those transactions, the money subscribed by the preferred shareholders had been withdrawn and what the appellant was using in its business to earn income was the $440,006 subscribed by the common shareholders and the $700,000 of borrowed money. This, in my view, is a correct appreciation of the matter."*

133. At p. 514 of the report in *Ringmahon*, Geoghegan J. expressed the view that he could not see any difference in principle between the *Trans-Prairie* and the *Ringmahon* cases. He

therefore took the same approach as that adopted by Jackett P. in Canada and upheld the entitlement of the taxpayer company to treat the interest as a deductible expense against taxable income. It appears from p. 515 of the report that, in taking that approach, Geoghegan J. did not look further back than the redemption of the preference shares by the bank loan. In particular, it does not appear that he had in mind that the preference shares had replaced the Dunnes' loan that had enabled the acquisition of the *H. Williams* premises to proceed. At p. 515, he said: *"... it makes no sense ... to hold that on a true interpretation of the relevant Irish legislation that because the loan was originally raised for the purposes of paying off the preference shareholders, the interest thereon cannot ever thereafter be treated as 'wholly and exclusively laid out or expended for the purposes of a trade.'"*

134. As previously mentioned, it has been submitted on behalf of the HSE that the *Ringmahon* case was decided in the specific and highly specialised context of tax law and that, accordingly, it is not an appropriate comparator for present purposes. In addition, as noted in para. 133 above, the court did not appear to address its mind to the fact that the preference shares in issue had replaced a loan to acquire the *H. Williams* shops (and presumably the business that went with them). Geoghegan J. looked solely at the way in which the preference shares were replaced with a bank loan which I suspect is why he considered the facts of the case to be so similar to the facts of the *Trans-Prairie* case. *Ringmahon,* therefore, does not provide a direct analogy with the Related Party Loan here. The courts in both cases appear to have taken the view that the share capital of a company (or a loan that replaces it) is the fund which a company uses to trade such that any interest charges which arise on a loan that replaces share capital are necessarily incurred for the purpose of that trade. Neither judgment addresses the position of interest paid on moneys borrowed to acquire a business and no authority has been cited to me which considers such a case. No authority has been cited to me to establish that such interest would be treated in the same way for tax purposes. From what I can see in

the text books, it is well established in a tax context that the acquisition of a business is capital in nature. Given these differences, I believe that it would be unsafe to treat *Ringmahon* as a relevant authority.

135. More importantly, I am also very mindful of the danger of attempting to apply tax law principles to an issue of contractual interpretation. Tax cases are decided by reference to the specific statutory provisions governing taxable transactions and by reference to the meanings given in earlier case law to those provisions. There is a significant difference in language between the statutory test applicable in *Ringmahon* and the contractual criteria contained in clauses 2.1 and 5.1 and Schedule 2 of the Heads of Terms. There is no basis to suppose that the parties had tax law principles in mind when they came to execute the Heads of Terms. Moreover, the interpretation of a contract is governed by different principles (namely those which I have attempted to summarise in paras. 8 to 12 above). It also must be said that, in a tax context, the difference between capital items and trading items has given rise to a blizzard of decisions and the dividing line between capital and trading transactions is not always easy to identify. However, in very general terms, payments which are recurring or periodic in nature are more readily classified as trading expenses for tax purposes than lump sum or *"once and for all"* payments. That seems to have informed the argument advanced by the taxpayer in the *Ringmahon* case (as summarised in para. 130 above) and it may explain why accruing interest is treated as a trading expense in a tax law context. The general approach of the courts is well illustrated in the judgment of Budd J. in the Supreme Court in *Dolan v. A. B. Ltd.* [1969] I.R. 282 at p. 371 where he said: *"Broadly speaking, it may be said that capital expenditure generally has or is expected to have lasting results, that it is usually made once and for all in a lump sum and involves a structural change in the profit-earning organisation of a company. On the other hand revenue expenditure is more usually recurrent, it is expended in a fairly direct fashion for the purpose of achieving sales which produce income and it produces results*

which, if not merely transient, are at least more transient than lasting. Further, it is usually of the nature of money turned over in the business in the continuous process of earning profits – sometimes referred to as circulating profits."

136. While counsel for the plaintiffs suggested to Mr. Walsh, in the course of cross-examination, that, by *"not insisting ... on the payment of interest"* until 2028, *"... Oval Healthcare ... is allowing cash to remain in the business as essentially circulating capital which then doesn't need to be borrowed"*, that is not the metric against which its character is to be assessed in a non-tax context. Its character must, instead, be assessed by reference to the terms of the agreement between the parties. That goes back to the question as to whether the interest can be said to be a cost related to the ongoing operation and functioning of the hospital facilities and whether it falls within the ambit of the costs incurred of providing the Service (as defined) as distinct from the costs of the plaintiffs' business. Furthermore, the claim made by the plaintiffs is not based on the contention that the interest was allowed to circulate within their business but is put forward on the basis that it was a cost which had accrued. I fully accept that it is a real cost to them but, for all of the reasons previously discussed, I have not been persuaded that it is a recoverable cost under the Heads of Terms. Moreover, there was no evidence that an amount equivalent to the accrued interest was used for operational purposes (as understood under clauses 2.1 and 5.1 and Schedule 2). Had it been, I am quite sure that it would have been included under one of the other categories of operational costs claimed by the plaintiffs under the Heads of Terms.

<u>Decision in respect of the interest payable under the Related Party Loan</u>

137. In all of these circumstances, I believe that I must approach the issue by reference to the ordinary principles of contractual interpretation and that it would be wrong to attempt to draw an analogy with the principles which have been developed in the field of tax law. Accordingly, I do not believe that I should alter the view expressed by me in paras. 117 and

127 above. Notwithstanding *Ringmahon,* I remain of the view that, subject to the concession made by the HSE that the sum of €377,072 has been applied by the plaintiffs for operational purposes (as set out in para. 5 above), the balance of the interest payable in respect of the Related Party Loan is not an operational cost within the meaning of the Heads of Terms and the plaintiffs' claim in respect of it must therefore be dismissed.

138. For completeness, I should add that I do not believe that it is necessary to undertake any further analysis of the extent to which the Related Party Loan was applied in connection with acquisition costs rather than operational costs. Mr. Walsh's forensic investigation in relation to that issue was not challenged by the plaintiffs and no contrary evidence was given to undermine the results of that investigation.

The interest claimed under the Syndicated Loan

139. This issue arises in the context of the HSE's counterclaim for repayment of interest previously paid by it in respect of the Syndicated Loan. The HSE contends that, like the Related Party Loan, the vast majority of the Syndicated Loan was applied in discharge of acquisition costs which are not recoverable as operational costs under the Heads of Terms. The HSE claims that it is thus entitled to be refunded.

140. Logically, the same approach must be taken in the case of the Syndicated Loan save that an additional issue arises here as a consequence of the estoppel case made by the plaintiffs. Thus, it must follow that, subject to the issue of estoppel, the HSE must be entitled to succeed in the counterclaim save to the extent that any part of the Syndicated Loan was used for operational purposes. As noted in para. 5 above, the HSE has conceded, on the basis of Mr. Walsh's forensic investigation, that €116,695 was used for operational purposes. This reduces the HSE's counterclaim to €1,050,258 which Mr. Walsh has identified as having been applied on acquisition costs.

141. It should be noted that Bidco was the relevant borrower in respect of this loan. It is not a party to these proceedings but neither side has taken any point against the other on that basis and I will therefore proceed to address the issue of principle that arises. If I ultimately decide the issue of estoppel in favour of the HSE, an appropriate application can be made, if necessary to join Bidco as a party to the counterclaim.

142. As described in para. 7 above, the plaintiffs maintain that, having previously paid these moneys without qualification or objection, the HSE is now estopped from pursuing its counterclaim. This element of the plaintiffs' claim received very little attention in either the written or oral submissions of the parties. So little attention was given to it that I hesitate to address it at all. However, the issue can be disposed of quite briefly and, in those circumstances, I propose to deal with it.

143. Estoppel can arise where a party represents by words or conduct that he will not enforce his strict legal rights against another party and where this induces the latter to change his position, in reliance on the representation, in a way that would expose him to detriment if the representor were permitted to resile from his representation. In such circumstances, the representor may be estopped from changing his position at least in so far as the past is concerned. It is sometimes said that it would be unconscionable to allow the representor to resile from the representation. However, that may not be so in circumstances where the representor is not aware of the true position and the representee is, in some way, responsible for that state of affairs. For example, in *The Superhulls Cover Case (no. 2)* [1990] 2 Lloyd's Rep. 431 a firm of insurance brokers failed to establish an estoppel claim as against their clients in circumstances where they did not tell their clients that the insurance put in place by them on their clients' behalf did not comply with the instructions given to them. In that case Phillips J. (as he then was) said: *"A party can represent that he will not enforce a … right by words or conduct. He can do so expressly … only if he is aware of the right. Alternatively, he can adopt*

a course of conduct which is inconsistent with the exercise of that right. [This] *will only constitute a representation that he will not exercise the right if ... he was aware of the right ... or ... was content to abandon any rights inconsistent with that course of conduct"*.

144. I am satisfied that a similar approach should be taken in the present case. It is clear from the evidence that in the crucial period of May and June 2020, the accountants acting on behalf of the HSE were seeking information as to the purpose of the Syndicated Loan. Notwithstanding the straightforward questions raised by them, they were not informed that, as clause 4.1 of the Syndicated Loan Agreement makes clear, one of the principal purposes of the loan was the defrayment of the moneys due under the acquisition agreement of 2018. This is very starkly evidenced by the log which records the interactions between the parties' accountants as part of an information gathering exercise. I do not propose to go through the log in detail but it is clear that on 9 May 2020 the accountants acting for the HSE asked the plaintiffs to state the purpose of the *"interest bearing debt"*. The response given was to quote from the language of Schedule 2 of the Heads of Terms dealing with interest. Understandably, the question as to purpose was repeated on 20 May 2020. The rather opaque response was to say that it was for capital and working capital. This resulted in a further query on 29 May 2002 in which the plaintiffs were asked to provide clarity as to what was meant by capital. On 10 June 2020, the response was that the purpose as defined in the loan agreement was *"to fund refinance existing financial indebtedness, financing capital expenditure and financing working capital."* A follow up question was raised on 19 June 2020 asking for a breakdown of the uses to which the proceeds of the loan were put. On 26 June 2020, the response was that: *"The debt was used for a number of purposes. The wording ... is common in any similar corporate debt agreement, allowing flexibility on the use of funds,* ***provided they are used in the operations of the business*** *..."* (emphasis added). In my view, the responses failed to clearly identify that one of the principal purposes of the loan was to fund the costs of acquisition of the business. The

responses appear designed to convey the impression that the loan was not so used. This is particularly striking because the log also demonstrates that, during the same period, the plaintiffs were aware that the HSE was asking the plaintiffs to confirm that the purpose of the Related Party Loan was for acquisition purposes. The plaintiffs therefore knew (or at minimum had reason to believe) that the HSE would oppose a claim to recover interest on any acquisition-based loan.

145. It is true that, during the course of the interactions described above, the plaintiffs were in possession of Bidco's financial statements in which the Syndicated Loan was addressed to some extent. In particular, note 21 to the 2018 financial statements noted that the loan *"refinances the previously held MP Healthcare Holdings Group 2016 unitranche senior facility agreement".* However, I do not believe that this was sufficient to put the HSE on notice that the loan was for acquisition purposes. The fact remains that simple and straightforward questions were put to the plaintiffs which did not receive an answer that gave the HSE the complete picture. I am therefore of the view that, at the time the HSE paid the plaintiffs' claim for interest under the Syndicated Loan, it was not fully aware of the true facts and that it would accordingly not be inequitable or unconscionable to permit it to pursue a claim to repayment of that interest.

Decision on the HSE's counterclaim for repayment of interest under the Syndicated Loan

146. For the reasons outlined above, I have come to the conclusion that the HSE could not be said to be estopped from pursuing its counterclaim to repayment of so much of the interest previously paid by it as related to the costs of acquisition. It follows that the HSE is entitled to the return of the sum of €1,050,258.

The plaintiffs' claim based on the Expert Determination clause

147. As outlined in para. 4(b) above, the plaintiffs maintain that the HSE failed to implement the dispute resolution provisions prescribed by clause 11.2.1 of the Heads of Terms under

which the parties agreed to refer any dispute relating to *"Costs, payments, funding, costs mitigation or Costs related matters"* to an independent firm of accountants appointed, on a joint basis by the parties, as an expert. Given the difficult issues of interpretation that arose under the Heads of Terms, the HSE maintained that this was not an appropriate dispute to refer to expert determination by an accountant. Instead, the HSE in July 2020 proposed that a legal expert should be appointed. This was rejected by the plaintiffs.

148. Again, this was not an issue that was the subject of detailed submissions at the hearing. Relevant authorities were not cited. However, the relevant authority on this issue is the decision of the Supreme Court in *Dunnes Stores v. McCann* [2020] 3 I.R. 1. It is clear from the judgment of Dunne J. in that case that it is necessary to construe the relevant expert determination clause in order to understand what disputes the parties intended should be referred to the relevant expert. One of the issues which arose in that case was whether a non-legal expert could determine questions of law. The effect of the Supreme Court decision is that, if that is what the parties have agreed, then the expert is entitled to decide the issue of law. In that case, the relevant contract provided that disputes should be referred to an architect for expert determination. A dispute arose between the parties that raised an issue of contractual interpretation. Dunnes Stores argued that the agreement did not authorise the expert architect to undertake such an interpretative exercise which is essentially legal in nature. This argument was rejected by the Supreme Court which held that the terms of the expert determination clause in issue necessarily envisaged that a determination by the expert might involve the resolution of mixed questions of law.

149. The parallel with the present case is obvious. A very similar issue arises here. The question is whether clause 11.2.1 envisages that questions of interpretation should be determined by the expert. In my view, the terms of the clause plainly so envisage. The terms of the clause are clear. They expressly state that *"**any** dispute"* as to *"Costs ... or Costs related*

matters ... ***must be*** *referred for determination to an independent firm of accountants ...”* (emphasis added). That language does not exclude disputes about interpretation. Given that *“Costs”* is a defined term under the Heads of Terms, I am of the view that a reasonable person in the position of the parties would undoubtedly have envisaged that disputes could arise as to whether any item claimed by a provider did or did not fall within that definition. That being so, it seems to me to follow that, in the absence of a relevant exclusion from the ambit of the clause, the reference in clause 11.2.1 to *“any dispute relates to Costs...”* necessarily includes disputes as to the interpretation of the definition of *“Costs”* or any element of those costs.

150. I am therefore of the view that the HSE was bound by clause 11.2.1 to agree to the determination of the present dispute to an independent firm of accountants. The HSE was bound to do so by the express terms of clause 11.2.1 and had no entitlement to insist that the dispute be determined by a lawyer. It follows that the HSE acted in breach of clause 11.2.1 in refusing to agree to an expert determination of the dispute.

151. It should be noted that, in response to the HSE’s failure to give effect to the expert determination clause, the plaintiffs did not take any steps to enforce it. This is quite different to the approach taken by the defendant in the *Dunnes Stores* case or by the defendant in the High Court decision in *Clarke v. Colorman (Ireland) Ltd.* [2020] 1 I.R. 320. That raises an issue as to whether it would be appropriate in the context of the principles laid down in *Omega Leisure Ltd. v. Barry* [2012] IEHC 23 to proceed to grant the declaration now sought by the plaintiffs. In the *Omega Leisure* case, Clarke J. (as he then was), at para. 4.4, held that a declaration should only be granted where there is good reason to do so. Given that the plaintiffs never sought to enforce the expert determination clause here, it might be said that there is no longer any good reason to grant the declaration sought. However, I take the view that the granting of the declaration will serve a useful purpose particularly in circumstances where I have been told (albeit in another context) that, subsequent to the Heads of Terms, a further

arrangement was executed by the parties which was described in the course of the hearing as *"the 'Safetynet' arrangements"*. While I know nothing about those arrangements, it seems to me to be wise to grant the declaration sought so that the parties will know how to proceed in the event that those arrangements contain a similar clause and a further dispute as to interpretation arises between them. In addition, it also seems to me to be important that parties to expert determination clauses should understand the implications of their own agreement so that litigation of the kind which occurred here can be avoided in the future.

The plaintiffs claim that the HSE acted in breach of clauses 5.6 and 6.1 in unilaterally refusing to pay the monies claimed

152. As outlined in para. 3(a) above, the plaintiffs claim that the HSE acted in breach of the Heads of Terms in refusing the claim unilaterally without allowing the machinery prescribed in paras. 5.6 and 6.1 to operate to a conclusion. In light of my ruling in relation to clause 11.2.1, it might appear logical that I should take the same approach in respect of this aspect of the plaintiffs' claim. However, I am not convinced that I should do so.

153. The plaintiffs complain that, by unilaterally deciding to refuse the plaintiffs' claim in so far as depreciation and interest is concerned, the HSE acted in breach of clauses 5.6 and 6.1 of the Heads of Terms. As discussed previously, those clauses envisage that the claims of the providers would be assessed, verified and validated by the relevant accountants appointed under clause 6.1. They do not envisage that the HSE could decide unilaterally that a particular claim should be refused. To that extent, I agree with the position advanced by the plaintiffs. However, in light of the findings made by me on the substance of the plaintiffs' claims, the result is that the position taken by the HSE has been vindicated, to a very large extent, in so far as the validity of the claims is concerned. In those circumstances, I am not convinced that any useful purpose would be served in granting the declaration sought. Moreover, it seems to me that the justice of the case is met by granting the declaration as to the effect of clause 11.2.1 (as proposed above).

The contention that the HSE acted in breach of the good faith obligation

154. The plaintiffs complain that, by not following the procedures prescribed by the Heads of Terms, the HSE is in breach of the commitment to act in good faith embodied in clause 1.5 of the Heads (which has been quoted in para. 20 above). There are two aspects of the claim; the first aspect is that the HSE itself decided not to make the payments claimed by the plaintiffs rather than leaving the decision to the relevant accountants under clause 6.1; the second aspect is the refusal of the HSE to give effect to the dispute resolution procedure set out in clause 11.2.1.

155. No authorities were cited to me in relation to this issue. No submissions were made to me as to the law on the issue and in particular as to the criteria to be applied in deciding whether a party has acted in breach of a good faith obligation. In those circumstances, I do not believe that I should decide the issue. Before deciding an issue of this significance, it is essential that the court should be apprised of any relevant authorities and that submissions should be made to the court as to the correct legal test to be applied and as to how the respective parties believe that test should be resolved having regard to the evidence before the court. While I have been prepared in this judgment to address some issues which were not the subject of sufficient argument in the submissions made to the court, I draw the line at this issue. A claim that a public body such as the HSE has failed to act in good faith is a very grave allegation which, if upheld, is liable to have serious implications for its standing and reputation in the community. In such circumstances, I do not believe that a court should address it in the absence of appropriate submissions from the parties. Given that no such submissions were made here, it would be quite wrong to address this issue.

Conclusion and Order

156. In light of the findings made in this judgment, I believe that the following orders should be made:

(a) an order dismissing the plaintiffs' claim for payment of €830,634 in respect of depreciation;

(b) a declaration that the plaintiff is entitled to advance a claim in the sum of €377,072 in respect of the interest payable under the Related Party Loan and to advance a claim in the sum of €116,695 in respect of the interest payable under the Syndicated Loan;

(c) an order dismissing the balance of the plaintiffs claim for payment of interest under the loans;

(d) a declaration that the HSE is entitled to the repayment from the plaintiffs of €1,050,258 previously paid by it in respect of interest arising under the Syndicated Loan (after due allowance for the sum of €116,695 mentioned at (b) above);

(e) Judgment for the HSE in the sum of €673,186 (being the balance due on foot of its counterclaim after setting off the sum of €377,072 mentioned at (b) above); and

(f) A declaration that the HSE acted in breach of clause 11.2.1 of the Heads of Terms in so far as the HSE refused to agree to the appointment of an independent firm of accountants to determine the claims made by the plaintiffs in respect of depreciation and the interest payable under the Related Party and Syndicated Loans.

157. It may be that the parties consider that the form of the orders proposed by me require some adjustment. I will, therefore, hear the parties as to the precise form of the orders to be made and, in so far as necessary, in relation to costs. I will list the matter accordingly before me remotely for mention on Friday 28 October 2022 at 10.30 a.m.

158. In the meantime, I direct that the parties should liaise together in relation to the form of order to be made and in relation to costs. If the parties have been able to agree these matters by that date, a note of that agreement should be emailed to the registrar in advance of the listing of the matter. Conversely, if the parties have not been able to agree these issues between them by 28 October 2022, I will, on that occasion, fix a date for hearing of the dispute and give any

necessary directions for the filing of submissions and books of authority. I hope that will not be necessary. The parties should be well capable of agreeing these matters subject, of course, to any appeal that may be taken.

High Court Practice Direction HC 101

159. Finally, in accordance with the above practice direction, I direct the parties to file their written submissions (subject to any redactions that may be permitted or required under the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.