# THE COURT OF APPEAL - UNAPPROVED

**Court Of Appeal Record Numbers: 2023/64**

**Neutral Citation Number [2024] IECA 48**

**Haughton J.**
**Binchy J.**
**Allen J.**

**BETWEEN/**

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

**PLAINTIFFS/ APPELLANTS**

**- AND -**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT/ RESPONDENT**

**JUDGMENT of Mr. Justice Binchy delivered on the 1st day of March 2024**

## Introduction

**1.** On 3rd April 2020, as the COVID-19 pandemic surged, the appellants, together with 20 other health service providers (all together hereinafter referred to as the "Providers") entered into a heads of terms of agreement (the "HoT") with the respondent for the purpose of recording the principal terms and conditions of agreement reached between the parties pursuant to which the Providers would make available to the respondent their "full capacity and services" in the hospitals owned by them for the treatment by the Providers of public patients on behalf of the respondents, both those suffering from COVID-19 and otherwise.

While the HoT contemplated that the parties would continue negotiations and would, within a period of 14 days from the date of the HoT, enter into a series of further agreements with the Providers - referred to therein as the "Final Agreements" - ultimately no Final Agreements were concluded and relations between the parties remained governed by the HoT, which, at Clause 12.1 thereof, are stated to be legally binding.

**2.** The HoT were prepared by the respondent, following discussions between the respondent and the Providers. As would be expected, it contains provisions providing for the basis upon which the Providers were to be paid by the respondent for their facilities and services. In the case of the appellants, a dispute arose with the respondent under two headings. Firstly, whether the respondent was obliged to reimburse to the appellants (or, more specifically, to reimburse the first named appellant ("Oval Topco") ) certain of its interest liabilities which accrued during the term of the HoT. Secondly, the parties disagreed on the basis upon which the appellants were entitled to reimbursement from the respondent under the heading of "*Use of infrastructure*" in the HoT, and, specifically for wear, tear, and depreciation of the facilities of the appellants, made available to the respondent, for the duration of the HoT.

**3.** The interest charges claimed by Oval Topco accrued under two loan facilities. The first of these facilities was advanced to Oval Topco by its parent company, a Luxemburg company, Oval Healthcare Infrastructure S.à r.l. ("Oval Healthcare"). This is referred to in the pleadings as the "Related Company Facility". The second loan facility was advanced to an intermediate company, Oval Bidco, by a syndicate of banks and is referred to in the pleadings as the "Syndicated Loan Facility". Both facilities were advanced in 2018, in connection with the acquisition of the Mater Private Hospital Group (the "Group"). These facilities are explained in greater detail below.

**4.** Before proceeding further, I should explain that, by the time the dispute arose, the respondent had already made significant payments to the appellants under both headings (i.e. interest and use of infrastructure) before it formed the view that it was not actually liable to do so under the HoT. In fact, in the case of claims for use of infrastructure, it had paid the appellants the claims in their entirety. Lest it be thought that this was owing to carelessness on the part of the respondent, it should be said now that this is not so. Matters evolved as they did because, as is explained in greater detail below, the structures put in place under the HoT for reimbursement of costs involved the making of payments on account (by the respondent to the appellants) of estimates submitted by the appellants. These payments on account were followed by a verification exercise by reference to costs actually incurred, with procedures for such adjustments as might be necessary following upon the verification exercise. When, following upon the review and assessment of information provided by the appellants, the respondent formed the view that it had made payments that it was not obliged to make under the HoT, it decided to exercise a set off of sums it considered it had overpaid against claims subsequently made by the appellants under the HoT in June 2020. It is this withholding of payment of monies otherwise due to the appellants that has given rise to these proceedings. Moreover, it was only following upon the issue of proceedings that the respondent formed the view that the appellants were not entitled to reimbursement of any of the interest payable by them on the Syndicated Loan. Hence, the amount paid to the appellants under that heading is the subject of a counterclaim advanced by the respondent to which I refer below. In total, the respondent paid the appellants the sum of €53,700,000 during the term of the HoT.

**5.** On 17th July 2020, the appellants issued proceedings seeking various declarations and orders, but principally an order requiring the respondent to pay them the sum of €6,629,000 which sum (it is pleaded) was, under the terms of the HoT, due for payment by the

respondent on 19th June 2020, but which sum the respondent failed, refused or neglected to pay, contrary to the HoT. In a defence and counterclaim filed on 14th September 2020, the respondent sought a declaration that it is entitled to set off against any sums properly due by it to the appellants under the HoT, such sums as it had already paid to the appellants and which the appellants were not entitled to claim under the HoT. The total of the latter was identified as being €8,224,202, made up of €830,634 in respect of wear and tear/depreciation and €7,393,568 in respect of interest that had accrued in respect of the Related Party Loan. In an amended defence delivered on 5th July 2021, the respondent counterclaimed for reimbursement of the sum of €1,151,000, in respect of interest payable under the terms of the Syndicated Loan during the relevant period, and which had been claimed by the appellants, and reimbursed by the respondent. However, following further analysis of the application of the proceeds of the two loans by an expert retained by the respondent in these proceedings ( namely, Mr. Declan Walsh, Chartered Accountant and Partner in the Firm of RSM Ireland) the respondent acknowledged a liability to the appellants of interest in the sum of €377,072 in respect of the Related Party Loan and €116,695 in respect of the Syndicated Loan, and reduced the counterclaim accordingly.

**6.** In a judgment delivered by the Commercial Division of the High Court (McDonald J.) on 20th September 2022 ([2022] IEHC 522) the trial judge found substantially in favour of the respondent. By order made on 12th December 2022, and perfected on 14th March 2023, the trial judge ordered that the appellants do pay to the respondent the sum of €673,186 together with the costs referred to in the order (being the costs of the hearing limited to five days of the seven day hearing, and making no order as to costs in respect of a costs hearing that took place on 12th December 2022).

**7.** The trial judge also made a declaration sought by the appellants that the respondent had acted in breach of Clause 11.2.1. of the HoT in refusing to agree to the appointment of

an independent firm of accountants to determine the claims made by the appellants in the proceedings. This clause makes provision for the appointment of independent accountants to act as independent experts in the determination of disputes concerning costs and costs related matters, including payments and funding, as may arise between the parties in the implementation of the HoT. The trial judge refused to make other declarations sought by the appellants, which I will come to presently.

**8.** Save to the extent to which the decision of the trial judge was in their favour, the appellants have appealed from the judgment and orders made by the trial judge. No cross appeal has been brought by the respondent.

**The Heads of Terms**

**9.** The general background to the completion of the HoT between the parties thereto is well known and scarcely requires any elaboration on what has already been said above. The respondent urgently required to expand its capacity to provide hospital services in light of the expected increased demand upon such services brought about by the COVID-19 pandemic. There is no dispute of fact between the parties; the dispute that has arisen is solely one arising out of the interpretation of the HoT. At this juncture therefore it is appropriate to set out the relevant provisions of the HoT, including not just those the interpretation of which is in dispute, but also other provisions relied upon by the trial judge in his analysis of the issues, and in particular in his consideration of the context in which the contentious provisions appear. Hereafter, I will adopt any definitions of terms as defined in the HoT.

**10. Clause 1.3**

"*1.3 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)

**11.** At para. 17 of his judgment, the trial judge noted that both parties emphasised the obligation to act fairly and in good faith contained in clause 1.3. He also noted that the respondent placed particular emphasis on the "overriding objective" of supporting the respondent in discharging its various duties.

**Clause 1.5**

**12.** "1.5 *The parties commit 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*".

**13.** In the court below, the trial judge noted, the appellants placed some emphasis on this provision, asserting that the respondent acted in breach of this obligation in the manner in which it decided that the disputed interest charges and depreciation charges are not reimbursable and furthermore in refusing to operate the dispute resolution procedure laid down in the HoT, being that provided for in clause 11.2.1 , to which I have referred above.

**Clause 2.1**

**14.** "2.1 *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 organisational 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*."

**15.** As the trial judge noted, clause 2.1 is of critical importance in the context of the appellants' claim. The dispute between the parties regarding the claim for interest centres around the interpretation of "Operational Costs" for which there is no precise definition in the HoT. That said, in Schedule 2 of the HoT there are five headings described in Clause 5.1 of the HoT as being "general headings" of operational costs.

**Clause 4**

**16.** Clause 4 deals with the duration of the term of the HoT. It provided that it was to be for an initial period of three months, but included provisions as to its extension. In the event, the HoT operated until 30th June 2020.

**17.** Clause 4.3 provides:

> "*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*."

**Clause 5**

**18.** Clause 5.1, which is, as the trial judge observed, a key provision in the context of the present dispute, provides:

> "*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)

The "Consideration" provided for in the HoT is nominal only, being the €10.00 provided for in clause 2.1.

**19.** Clauses 5.2 - 5.6 set out the steps by which the Costs were to be estimated, claimed and paid. Clauses 5.2 and 5.3 addressed April 2020 only, and clauses 5.4 and 5.5 addressed post April 2020, for whatever period transpired to be the duration of the HoT. The only difference between April 2020 and thereafter was that April was treated as a single period, whereas thereafter it was provided that the clause would operate on a weekly basis, although this proved unworkable for the Providers and clause 5 was at all times operated on a monthly basis, but nothing turns on this. Under these provisions, the Providers were obliged to submit costs estimates (initially for April, and thereafter weekly), following receipt of which the respondent was obliged to pay 80% of the estimate. The estimates were to be accompanied by a full breakdown under the headings set out in Schedule 2. Within seven days after the end of each period to which the estimates related, the Providers were to provide details of the actual Costs incurred during the corresponding period, following which the respondent was obliged to make a balancing payment equal to the difference between the 80% paid in advance and the actual sum of the Costs incurred.

**20.** Clause 5.6 set out a procedure whereby the "Relevant Accountants", as defined in clause 6.1 (PwC were appointed by the appellants, and EY by the Providers), were to carry out an assessment of costs estimates provided by the Providers. In cases of overpayment, the Relevant Accountants were to make provision for set off against the next payment due by the respondent to the appellants, and in cases of underpayment, the respondent was obliged to pay an amount equal to such underpayment promptly to the appellants. The clause did not make any express reference to the Relevant Accountants carrying out an assessment of the statements of actual costs furnished by the Providers. The trial judge considered this issue and concluded that it was clearly intended that the Relevant Accountants should commence their assessment based on the estimates provided, and thereafter should also assess the details of the actual costs submitted, in order to assess whether or not there had

been an underpayment or overpayment of Costs, and any adjustment was required. There is no dispute between the parties about this issue. This Clause provided also that any dispute in relation to a costs estimate, or any overpayment or underpayment, should be referred for determination to an independent expert pursuant to clause 11.2.

**21.** In Clause 5.11 it is provided, *inter alia*:

"*The parties acknowledge that the Common Purpose does not envisage a commercial or economic benefit or profit beyond the Costs.*"

**22.** As will become apparent, the trial judge found clause 5.11 to be of particular relevance in his determination of the claim for wear and tear/depreciation.

**Clause 11.2.1**

**23.** Clause 11.2.1 provides:

*"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 independent expert (the 'Independent Expert'). The Independent Expert will determine any dispute within not later than two (2) 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."*

**24.** While the appellants invited the respondent to refer the dispute between the parties to an Independent Expert appointed pursuant to this clause, the respondent declined on the basis – as it contended – that the dispute was a legal one, being a matter of contractual interpretation, rather than the determination of a costs dispute as contemplated by clause 11,

and that it did not therefore fall within clause 11. However, the respondent suggested an alternative, that being that the dispute instead be referred to a legal expert for determination, but the appellants declined this proposal.

**Schedule 2**

**25.** Schedule 2 to the HoT provides as follows:

**Schedule 2**

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| **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:<br>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 |

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| | 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.<br>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. |

**Mater Private Group – Relevant history and Current Structure**

**26.** In order to understand the dispute that has arisen, at least so far as it relates to interest, which comprises the vast bulk of the claim, it is necessary to have some understanding of the history of the Group, and also to understand its current structure . As earlier mentioned, Oval Topco is the parent company of the Group and, through its 100% subsidiary, Oval Bidco Limited ("Bidco"), indirectly owns the entire issued share capital of the second, third and fourth named appellants. The second named appellant, Mater Private Hospital, is the operating company and owner of the Mater Private Hospital in Dublin. The third named appellant, Mater Private Cork Limited, is the operating company and owner of the Mater Private Hospital in Cork and the fourth named appellant, Spireview Equipment Unlimited Co., is the operating company and owner of the Limerick Radiotherapy Centre.

**27.** Oval Topco, and Bidco were incorporated for the purposes of implementing the purchase of the Group in 2018 by a Luxembourg investment fund, InfraVia Capital Partners ("InfraVia"). Oval Topco itself is owned by Oval Healthcare, which in turn is owned by InfraVia IV Invest S.à r.l. as to (75.06%) and Oval Co-Investment Fund S.C.S.p (24.94%). InfraVia agreed to acquire the Group from its then owner, CapVest Limited ("CapVest"), a U.K. private equity firm which had purchased the Group in 2005. At the time of the

acquisition from CapVest ,the Group had a significant amount of debt which InfraVia was required to discharge as a condition of the purchase. For all practical purposes, this formed part of the purchase consideration, although it is not formally designated as such. The transaction was governed by the terms of a share purchase agreement ("SPA") entered into by the parties on 31st July 2018.

**28.** As already mentioned, Oval Topco and Bidco were incorporated for the purpose of implementing the transaction, and to this end were funded by InfraVia as described in the following paragraphs. The appellants, other than Oval Topco, were well established companies that had been conducting their respective businesses for many years.

**The Related Party Loan and the Syndicated Loan**

**29.** The purchase of the Mater Group by InfraVia through Oval Topco was funded by two loans, one provided by Oval Healthcare (the "Related Party Loan") and a second loan provided by a syndicate of banks ("the Syndicated Loan"). It is the interest on these loans that has given rise to the bulk of the amounts claimed by the appellants in these proceedings.

**30.** The Related Party Loan facility is the subject of an agreement dated 31st July 2018 made between Oval Healthcare and Oval Topco whereby Oval Healthcare agreed to make available to Oval Topco what is described therein "an uncommitted loan facility", for an unspecified purpose, in the amount of €475m to be repaid no later than 31st December 2028, with interest at 7% per annum. Although the loan agreement is dated 31st July 2008, on 27th July 2018, Topco drew down €371,158,918 of this loan which was used to subscribe for shares in Bidco. At the same time, Oval Healthcare invested €20m in Oval Topco by way of what was described by Mr. Paul Whelan, the Chief Financial Officer of the Group, as an "equity injection". On 30th July 2018, Topco transferred €388,441,186 to Bidco. These funds were then used by Bidco, together with the Syndicated Party Loan, to fund the acquisition of the Group, as part of which Bidco was required to discharge the existing debt of the Group

which then stood at €384,273,408. Simultaneously, Bidco paid €211, 435, 326 being the net consideration to acquire the shares in the Group (The gross consideration was stated in the SPA to be €220m , but was subject to certain adjustments).

**31.** The Syndicated Loan is the subject of an agreement entitled "Senior Facilities Agreement" dated 30th May 2018 and made between Bidco of the one part and Barclays Bank Plc and other banks of the other part. The loan comprised, firstly, a term loan facility in the aggregate principal amount of €220m (referred to as facility "A") and, secondly, a revolving credit facility of €20m (referred to as "facility "B") . The purpose of the loan was stated to be threefold ; firstly to fund all or part of the purchase price payable under the SPA, secondly to refinance existing indebtedness in the Group, and thirdly to pay the acquisition costs of the transaction, i.e. the costs associated with the acquisition of the Group, as distinct from whatever costs were incurred in connection with the Syndicated Loan. Facility A was drawn down in full , on 31st July 2018. The net amount of this loan received by Bidco, after deduction of arrangement fees and other costs was €214,558,44.44.

**32.** . In total, when other items are taken into account (such as transaction costs) it appears that almost €603,000,000 was spent by Oval Topco, funded as described above, in the purchase of the Group. While there was some variation of these figures in the evidence given in the Court below, the trial judge stated that he did not have to reach a view on which figures were correct; what mattered was that the proceeds of the Related Party Loan, together with a substantial element of the Syndicated Loan, were used to discharge sums payable under the SPA.

**The Evidence of the Experts**

**33.** In the course of the proceedings in the court below, the trial judge heard evidence from experts called on behalf of each of the parties. In the case of the appellants, that evidence was given by Mr. Peter Clokey, a Chartered Accountant with particular expertise in the field

of Corporate Finance, and in the case of the respondent, the evidence was given by Mr. Walsh, to whom I referred at para.5 above. Mr. Walsh conducted an analysis of the application of the proceeds of both the Related Party Loan and the Syndicated Loan, and in his estimation, 94.9%, of the Related Party Loan was applied, together with 92% of the Syndicated Loan, in discharge of the purchaser's (i.e. Bidco's) obligations under the SPA . Mr. Walsh's conclusion was that out of a total of €302,960,511.00 owed in respect of loans then outstanding to third parties at that time, just €19,383,809.00 was incurred in respect of the provision of healthcare services, and that the balance of €283,576,702.00 was incurred in respect of previous acquisitions of the Mater Private business, including by CapVest in 2007. Of the balance of the total debt of the Group at that time, a further €61,719,896 (being the vast bulk of the balance) was described by Mr Walsh and was accepted by the trial judge as being "Cap Vest related party loans". While, as will become clear, the appellants take issue with significant parts of the evidence of Mr. Walsh, they did not challenge these figures, although they did maintain that this exercise was not provided for or envisaged by the HoT.

**34.** While interest is payable on both the Related Party Loan and the Syndicated Loan, no interest has in fact been repaid in respect of the former. The court heard, and the trial judge accepted, that interest in the sum of €52,736.000.00 had accrued on the Related Party Loan by 30th June 2020. Of this amount, €7,393,568 is claimed to have accrued during the term of the HoT.

**35.** During the period of the HoT, the interest cost associated with the Syndicated Loan was approximately €1,151.000.00. As mentioned above, this amount was actually paid by the respondent, and in these proceedings the respondent seeks to recover the same by way of its counterclaim, on the basis that it had been paid owing to misrepresentations made to it by the appellants' Relevant Accountants , in response to queries raised by the respondent's

Relevant Accountants . Specifically, the respondent claims, it had been given the impression that the Syndicated Loan was used for a number of flexible purposes in the operation of the appellants' business, and therefore fell for reimbursement under the HoT, whereas it had in fact been applied by Bidco in the acquisition of the Group.

**36.** Mr Clokey gave evidence that the principal purpose of structuring acquisitions in the way that Infra Via did when acquiring the Group, and as Cap Vest had done previously, is in order to maximise profits for the investors. In simple terms, interest paid by Oval Topco to Oval Healthcare is deductible from Oval Topco's taxable income leaving more profits available to Oval Topco than if the same payments were made to Oval Healthcare by way of dividend. It was this structure that led Mr. Walsh to conclude, as recorded by the trial judge at para.103 of the judgment, that the vast majority of the interest payable arises in respect of indebtedness generated by transactions to acquire the Group (in the most financially advantageous way possible for the purchaser), and not from transactions relating to the provision of healthcare services. Thus, Mr. Walsh's evidence was that in the context of an acquisition by private equity investors, the interest costs may be regarded as operational costs of the of the private equity business, but not of the healthcare business of the underlying hospital group, which already existed and was operational before it was acquired.

**Claim for Interest**

**37.** It is the appellants' case that the interest charges (on both the Related Party Loan and the Syndicated Loan) which Oval Topco is obliged to discharge during the period of the HoT constitute "operational costs" of the kind referred to in clause 2.1 of the HoT in respect of which the respondent is liable to reimburse the appellants. More specifically, the appellants maintain that the interest payable under both the Related Party Loan and the Syndicated Loan is a "Finance Cost" as referred to in the third heading of Schedule 2 of the

HoT, because, without those loans, Oval Topco could not have acquired the Group, and could not have provided the facilities of the Group to the respondent.

**38.** The respondent, on the other hand, maintains that the vast bulk of both the Related Party Loan and the Syndicated Loan related to the acquisition of the Group by Oval Topco, which , the respondent submits, cannot be considered to be an operational cost of the Group, as that term is used in the HoT. In particular, the respondent says, the interest referred to under the heading of "Finance Costs" in the second schedule to the HoT must be related to the "ongoing operation and functioning of the facility", and interest incurred on borrowings drawn down to purchase the Group does not fall into this category. Accordingly, the respondent maintains that it is only liable to pay the appellants interest on that proportion of the loans that is directly related to the operation and functioning of the Group's facilities made available to the respondent pursuant to the HoT. This proportion of the loans was estimated by Mr. Walsh to be €19,383,809.00.

**Claim for Use of Infrastructure**

The second substantive area of contention between the parties is the claim of the second and third appellants for reimbursement in respect of normal wear and tear, as provided for in the fourth heading of Schedule 2 to the HoT under the general heading of "Use of Infrastructure". As appears, the allowance for this cost is stated to be "based on the 2020 budgeted depreciation charge of the facility". It transpired that the budgeted depreciation charge for 2020 was significantly greater than the actual charge for depreciation subsequently booked in the accounts of those appellants, the agreed difference between the two being €830,634. Although the final accounts of the second and third appellants would not have been available until much later, the disparity was identified during the term of the HoT by reference to their trial balances. By the time of that realisation however the respondent had paid the total sum claimed by the appellants under this heading. The

difference between the two provisions for depreciation was explained by Mr. Clokey in his evidence as being on account of the fact that certain developments that had been planned by the Group before the onset of the pandemic did not proceed, owing to the uncertainties of the time, resulting in a reversal of certain items of depreciation as provided for in the 2020 budgeted accounts. It is the appellants' case that the HoT is clear and unambiguous and entitles them to recovery of the precise amount of the 2020 budgeted depreciation charge for each of the facilities made available by them to the respondent. It is the respondent's case, on the other hand, that the HoT makes it clear that its obligations are to reimburse actual costs incurred by the appellants and the HoT precludes any element of profit.

**Other matters**

**39.** In the proceedings the appellants also sought a declaration that the respondent acted in breach of clause 11.2.1 in refusing to agree to refer the dispute for expert determination. They also sought a declaration that the respondent had not acted in good faith, contrary to clause 1.5 of the HoT, by unilaterally setting off sums they claimed they had paid but were not due under the HoT, in breach clause 5.6 and 6.1 of the HoT, insofar as they should not have done so pending the determination of the Independent Expert. For the same reason, the appellants also sought a separate declaration that the respondent had breached clauses 5.6 and 6.1 of the HoT.

**Judgment of the High Court**

**40.** Having summarised the background to the proceedings, the trial judge, at paras. 8 - 11 of his judgment, summarised the relevant principles governing contractual interpretation. I will return to those principles later in this judgment. The trial judge then identified the principal issues which fall for determination as being: (1) the "*use of infrastructure claim*", (2) the obligation to pay interest in respect of the Related Party Loan and the Syndicated Loan and (3) the claims for declaratory relief.

**41.** The trial judge first addressed the "use of infrastructure" claim, i.e. the claim for wear and tear/depreciation . He observed that the appellants' claim under this heading is simple and straightforward. They rely on the express reference in Schedule 2 to an "allowance for wear and tear, based on the 2020 budgeted depreciation charge ….". The appellants contended that this clearly entitles them to payment of the budgeted charge, as this is the metric which the parties themselves have chosen, and it is irrelevant that the actual depreciation charge turned out to be lower.

**42.** As against that, the respondent argued that the language in Schedule 2 must be read in the context of the HoT as a whole, which, it said, *inter alia*, makes clear that any costs to be reimbursed must be actually incurred and cannot result in a profit to the appellants. The trial judge embarked upon a detailed analysis of the relevant terms relied upon by the respondent. He noted that both clauses 2.1 and 5.1 of the HoT provide that the respondent shall "reimburse" the operational costs as referred to in each of those clauses. He found the language used in clause 5.1 to be "*striking in the way in which it emphasises "Costs"".* While expressing the view that the use of the word "reimburse" is apposite in the context of an agreement by a party to pay an amount equivalent to the depreciation charge in respect of assets made available to that party, he also said that it should be kept in mind that the ordinary meaning of the word "reimburse" does not sit easily with a payment that goes beyond recompense for loss and expense. He referred to clause 5.11 which contains an express acknowledgment by the parties that the Common Purpose as defined in clause 1.3 of the HoT "*does not envisage a commercial or economic benefit or profit beyond the Costs*".

**43.** At para. 79, the trial judge expressed the view that it is very difficult to see how the interpretation advocated by the appellants can be reconciled with the express stipulation in clause 5.1 that it is the costs actually incurred that are to be reimbursed. He went on to say that it is equally difficult to see how the position of the appellants can be reconciled with the

additional stipulation in the same clause that reimbursement is to be made on a "costs only" basis. He noted that 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. At the end of this paragraph he concluded that the HoT plainly envisages that the appellants were not entitled to charge a profit for themselves.

**44.** Having so concluded, he continued as follows in para. 80:

> "*That still leaves an apparent inconsistency between 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 insofar as this 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."*

**45.** The trial judge proceeded to quote from the speech of Lord Goff in *Yien Yieh Commercial Bank Ltd v Kwai Chung storage Co-Ltd* [1989] LRC (Comm.) 527, at p.534 in which he said:

> *"…. To reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified where two clauses are in truth inconsistent. In point of fact, this is likely to occur only where there has been some defect of draftsmanship……But where the document has been drafted as a coherent whole, repugnance 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*".

**46.** At para. 81, the trial judge continued:

*"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. This 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 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."*

**47.** The trial judge expressed the view that is clear from the way in which clauses 5.2 – 5.6 capture *all* of the items in Schedule 2 that it was intended that the ultimate payment to be made to the appellants in respect of depreciation would be the figure for actual depreciation. Thus, in the absence of an exception for depreciation from the provisions of clauses 5.3 and 5.5, which address costs actually incurred, those clauses apply equally to wear and tear/depreciation as they do to any other item in Schedule 2.

**48.** The trial judge noted that the use of the words "based on" appearing before "the 2020 budgeted depreciation charge" is looser than the language used in relation to other items described in the right hand column of Schedule 2, but does not go so far as to say that the allowance is to be the budgeted depreciation charge. He said that the fact that it adopts the somewhat looser "based on" language suggests some degree of flexibility rather than exactitude. While he acknowledged that the express reference to "budgeted depreciation" in Schedule 2 might suggest that depreciation was to be treated differently than other items listed therein, the initial impression created by the language used in Schedule 2 had to be adjusted to take account of the operation of clauses 5.2 - 5.6 and 6.1. *"Moreover"*, he said, *"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 [2] can be resolved."*

He accordingly found for the respondent in respect of this element of the appellants' case and dismissed the claim of the appellants for payment of €830,634.00.

**49.** The trial judge then proceeded to address the claim for interest accrued under the Related Party Loan. Having summarised the arguments of the parties, he first considered whether or not Oval Topco was a "Provider" of the "Service" for the purposes of the HoT. It had been argued on behalf of the respondent that this could not be so because it is no more than a holding company. However, the trial judge rejected that argument because Oval Topco is plainly described as a "Provider" in the HoT. That said, the trial judge made the point that Oval Topco must be able 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 HoT in relation to costs, in order for it to be entitled to recover the interest claimed.

**50.** Secondly, the trial judge considered whether or not Oval Topco is precluded from recovering the interest claimed on the basis that – in the hands of Oval Healthcare – there is a profit element in the interest it receives or is entitled to receive from Oval Topco. The trial judge concluded that such a profit in the hands of third parties is not precluded by the HoT, even though the third party concerned is a related entity. He held that the law treats the lender under the Related Party Loan (Oval Healthcare) and the borrower (Oval Topco) as separate legal entities, and that their separate legal personalities cannot be ignored for the purposes of the HoT. Moreover, the Related Party Loan was put in place long prior to the HoT and was not some form of artificial construct created by the appellants to avoid their obligations under the HoT.

**51.** Neither of the foregoing conclusions have been appealed by the respondent.

**52.** The trial judge then proceeded to consider what he described as the central issue that requires to be resolved, namely whether or not the interest under the Related Party Loan can be said to constitute an item of "Costs" as defined by the HoT.

**53.** The trial judge noted that the HoT does not provide, without qualification, that the respondent should pay the appellants their costs of providing the Service. In considering this issue, he said, it is necessary to consider the definition of "Service" which is defined in clause 2.1 of the HoT as the making available by the Providers (including the appellants) to the respondent of *"their full capacity and services at the Relevant Hospitals including, but not limited to, total bed capacity, facilities, diagnostics, staffing, management and full organisational capability*". Since clause 1.4 provides that the service to be provided under the HoT was to be a fully public one with all patients being treated as public patients, the trial judge concluded that the "Service" did not embrace the entire business of the appellants, because the latter includes the provision of private healthcare services for a profit. So, therefore, the appellants were not making their "entire business" available to the respondent as they submitted.

**54.** The trial judge noted that the HoT does not provide that Providers are entitled to recover their costs without qualification. If the HoT had been drafted in that way, he said, a relatively straightforward argument could be made that the costs payable by the respondent should be considered to include the costs of the Related Party Loan, on the basis that the appellants 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. However, the trial judge noted, the HoT are not framed in that way – an adjective qualifying the word "costs" is added. In clause 2.1 it is stated that the respondent will reimburse the "***operational*** *costs of the Providers of providing the Service at the Relevant Hospitals*" (emphasis added by trial judge). The trial judge stated that the use of the word "*operational*" is important, and that

the parties to the HoT must have intended to invest that word with meaning. The same adjective is repeated in clause 5.1 which provides that operational costs are those "*under the general headings of Schedule 2*". Schedule 2, under the heading the of "Finance Costs", identifies interest as one of the finance costs that may be claimed, but such interest must be *"related to the ongoing operation of functioning of the facility*".

**55.** The trial judge then proceeded to consider whether or not the costs of the acquisition of the business fall within the ambit of the costs incurred in the action of operating the Service. As a matter of "*first impression"* he considered that this was not immediately obvious. At para. 117 he said:

> *"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."*

**56.** In the view of the trial judge, the appellants had conflated the costs of acquisition of the business with the costs of the action of operating the Service; he observed that the business acquired by the appellants is not synonymous with the Service, referring back to the point he made earlier (see para. 53 above) that the Service did not embrace the entire business of the appellants, because the latter involves the provision of private healthcare services for a profit.

**57.** Referring to the evidence of the appellants' expert, Mr. Clokey, the trial judge noted that the acquisition of the business involved the payment of a premium by the purchasers over the original cost of the hospital facilities. In the view of the trial judge, this underlines the difficulties 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"*.

**58.** The trial judge then considered an argument made by the appellants that the words "*related to*" preceding the words "*the ongoing operation and functioning of the facility*" (as used in the definition of Finance Costs in schedule 2) suggest that the funding costs that are recoverable need not be directly incurred in the operation of function of the facility but need only to be related to the same. However, the trial judge did not consider that the words "in relation to" could be interpreted in such a way as to broaden the concepts of "operation and functioning" so as to include "acquisition". While the trial judge noted that there is authority for the proposition that the words "related to" should be given a broad meaning (he referred in this regard to *Gulliver v. Brady* [2003] IESC 68 and *Eccleshall v. Bank of Nova Scotia* (Unreported, High Court, 3rd February 1995), nonetheless, the trial judge concluded, there are limits to what can plausibly be said to be related to the "ongoing operation and functioning of the facility". He stated, at para. 120:

*"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 me 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 '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'."*

**59.** The trial judge then proceeded to consider, and reject, a comparison with the purchase by a hospital of an MRI scanner. It was not disputed that the interest on the cost of purchasing a scanner would be recoverable under the terms of the HoT, but the respondent argued that the acquisition of a scanner is not comparable to the acquisition of a hospital business in which the previous owner ceases to be the owner of that 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. The trial judge agreed. In his view, the acquisition of the hospital business was not analogous with the acquisition of a scanner. Referring specifically to the 2018 consolidated financial statements for the Mater Private Group, he noted that those statements indicate that the goodwill arising on the purchase on the pre-existing Mater Private Group in 2018 amounted to €202,500,000, before amortisation, and that that represented a very significant element of the overall cost of acquisition of the business of the appellants. The trial judge accepted the submission made on behalf of the respondent that the willingness of the purchaser to pay a premium of this kind illustrates the point that the interest arising under the Related Party Loan should properly be characterised as a cost related to the InfraVia investment business rather than one related to the ongoing operation and functioning of the hospital facilities.

**60.** The trial judge also addressed an argument advanced by the appellants that it would have made no commercial sense for them to have entered into the HoT unless all of their costs of acquiring the business were met during the currency of the arrangement. In the view of the trial judge, the commercial conditions prevailing at the time of the conclusion of the HoT did not necessarily "point in that direction". There was considerable uncertainty for both sides at the time, and the appellants had some incentive to enter into an arrangement

providing them with an element of stability and liquidity. Moreover, the HoT was an agreement entered into with many other hospital providers, and there was no evidence that any of those other providers were in the same position as the appellants; indeed the tenor of the appellants evidence was to the contrary.

**61.** The trial judge then concluded, on this issue, at para. 127, as follows:

> *"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."*

**62.** The trial judge then considered whether or not there was any merit in a submission made on behalf of the respondent that it was unreal to think that the kind of exercise undertaken by Mr. Walsh – in analysing the application of the loan proceeds in 2018 in order to identify the extent to which the loans were used for acquisition or operational purposes – was one envisaged by the HoT. The trial judge rejected that argument, pointing out that while Mr. Walsh was an outsider in conducting the exercise, and it therefore took him more time than it would a person familiar with the affairs of the appellants, the same level of difficulty would not arise for the appellants themselves, or their advisors.

**63.** Finally, under this heading, the trial judge considered the relevance of the Supreme Court decision in *MacAonghusa* v *Ringmahon Company* [2001] I.R. 507, a decision upon which the appellants placed significant reliance in the court below. The trial judge held that, for the reasons explained by him, the issue raised in that case was not analogous to the issues raised in the within proceedings. While that conclusion was formally appealed, it was not addressed in any detail in the written submissions of the appellants and nor was it the subject of any oral submissions by counsel for the appellants at the hearing of this appeal. It does not, therefore, require any further consideration.

**64.** The trial judge then addressed the Syndicated Loan. The respondent contended that, since the vast majority of the Syndicated Loan was applied in the discharge of acquisition costs incurred by the appellants, those costs were not recoverable for the same reasons as applied to the Related Party Loan. The trial judge agreed with this submission and considered that the same approach must be taken in the case of the Syndicated Loan as with the Related Party Loan, save only in relation to an additional argument that the appellants raised in relation to the Syndicated loan only. This concerned the counterclaim of the respondent – which related to the Syndicated Loan only – seeking the return of monies already paid by the respondent to the appellants under this heading. The appellants had argued that the respondent was estopped from advancing any such claim, having paid the monies without qualification or objection. The trial judge found against the appellants in relation to this argument also, and that finding has not been appealed and therefore does not require any further consideration.

**65.** The trial judge then proceeded to consider the appellants' claim that the respondent acted in breach of the HoT in declining to submit that dispute to the determination of an independent expert, as provided for in clause 11.2.1 of the HoT. It will be recalled that the respondent had declined to accede to such a referral on the basis that the dispute that had

arisen was a matter of law and that it did not fall within the ambit of the expert determination clause. Instead, the respondent suggested that the dispute be referred to an independent lawyer for determination.

**66.** Having considered the decision of the Suprema Court in *Dunnes Stores v. McCann* [2020] IESC 1 [2020] 3 I.R. 1, the trial judge concluded that the respondent had no entitlement to insist that the dispute be determined by a lawyer and that it had acted in breach of clause 11.2.1 in refusing to agree to an expert determination of the dispute. While he noted that the appellants had not sought to enforce the expert determination clause, as they might have done, nonetheless he took the view that it was appropriate to grant the declaration sought by the appellants, for reasons that do not require elaboration here, because this conclusion is not appealed by the respondent.

**67.** The trial judge next addressed a claim for a further declaration that the respondent had acted in breach of clauses 5.6 and 6.1 of the HoT in unilaterally refusing to pay the monies claimed by the appellants, without following the procedures provided for by those clauses. Those clauses required the assessment, verification and validation of any claims for reimbursement to be validated by the Relevant Accountants, and clause 5.6 provided that where a dispute has been referred to an independent expert for determination, *"no Overpayment or Underpayment shall be made until the Independent Expert has made a determination*". While the trial judge agreed to an extent with the arguments advanced by the appellants, he considered that it would not be appropriate to grant a further declaration under this heading, since the respondent had been vindicated, to a very large extent, as regards the validity of the claims made by the appellants. He also considered that the declaration which he had already granted under clause 11.2.1 met the justice of the case.

**68.** Finally, the appellants also sought a declaration that the respondent acted in breach of the good faith obligation embodied in clause 1.5 of the HoT. The trial judge noted that no

authorities were opened to him in relation to this issue, and nor were any submissions made to him as to the law on the issue, which he considered to be one of significance. He considered that a claim that a public body such as the respondent had failed to act in good faith is a very grave allegation which, if upheld, would be very likely to have serious implications for its standing and reputation in the community. In the absence of appropriate submissions on the issue, he was not prepared to make a declaration under this heading.

**69.** Arising out of the foregoing, the trial judge made the following orders and declarations:

(a) An order dismissing the claim of the appellants for payment in the sum of €830,634 in respect of depreciation;

(b) A declaration that the appellants are entitled to advance a claim in the sum of €377,072 in respect of 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 appellants' claim for payment of interest under the loans;

(d) A declaration that the respondent is entitled to repayment from the appellants of €1,050,258 previously paid by the respondent 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 respondent 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 respondent acted in breach of clause 11.2.1 of the HoT.

**70.** The trial judge also made the order for costs referred to at para.6 above.

**Grounds of Appeal**

**71.** By Notice of Appeal filed on 22nd March 2023, the appellants appealed on 50 grounds, grouped under fourteen headings entitled "Ground One", "Ground Two", and so forth. To a greater or lesser extent, all grounds of appeal were pursued at the hearing but it is sufficient to set out the substance of the criticism made of the High Court judgment under the fourteen headings.

(1) The scope of the Heads of Terms. Under this heading the appellants assert that the trial judge erred in failing to have regard to the fact that the appellants made their full capacity, infrastructure and facilities available to the respondent, and that the appellants retained no commercial or other business or capacity for the duration of the HoT.

(2) Failure to address expert evidence. It is said that the trial judge erred in rejecting without proper justification the agreed evidence of the expert witnesses for both sides that the cost of borrowing in connection with the costs of building a hospital are costs of providing the service and therefore that interest payable on such borrowings will be a cost of running the facility and are directly related to the functioning of the facility concerned.

(3) The trial judge erred in his interpretation of the term "Service". Specifically, he erred in interpreting the word "Service" as being synonymous with an action of operating or providing services.

(4) The trial judge erred in his interpretation of the distinct concepts of "operating" and "operational". Having found that "operational" is broader that "operating" the trial judge then erred by making findings which applied a narrow interpretation of "operational" and which conflated the two terms.

(5) The trial judge erred in failing to allow interest on a loan in the context of the acquisition of a business. This finding was said to be inconsistent with the trial judge's separate finding that the costs associated with acquiring an item such as a MRI scanner are part of the "day to day" operation of the "Service". Further, the trial judge erred in finding that there was no evidence that the costs of the acquisition of the business had any impact on the hospital facilities or any of the services falling within the definition of "Service", and in failing to consider evidence of the appellants regarding significant reinvestment and capital expenditure by the investors in the hospital group.

(6) The trial judge erred in finding that the business that was acquired was a "commercial operation" as distinct from "the Service" under the HoT and in failing to have regard to the evidence and submissions of the appellants that the sole business of the first appellant is the operation of a hospital facility.

(7) The trial judge erred in his interpretation of "operational costs". Having found that there was no prohibition on profits being made by a third party, the trial judge erred in finding that the acquisition costs were not "operational costs of providing the Service" because they involved the payment of a premium.

(8) The trial judge erred in his analysis of the commercial purposes of the HoT. He erred in rejecting the position of the appellants that it would have made no commercial sense for them to enter the agreement if the costs claimed would not be met, and, in doing so, by reference to the position of other Providers. The trial judge erred in finding that the HoT provided "a degree of certainty that a substantial part of [the appellants'] costs would be met". There was no evidential basis for this finding.

(9) The trial judge erred in failing to attach appropriate weight to the inclusion of "funding costs" in the HoT. In holding at para. 127 that "acquisition related costs" should have been expressly included in the HoT (in order to sustain the appellants' claim), the trial judge erred in failing to reflect or consider the general reference to "funding costs" in the HoT.

(10) The trial judge erred in conflating the separate terms "facilities" (as referred to in clause 2.1 of the HoT) and "the facility" as used in Schedule 2 of the HoT. There is no reference in the HoT to the "operation and functioning of the hospital facilities" as referred to by the trial judge and he erred in finding that that was the metric chosen by the parties and in applying it repeatedly in lieu of the contractual language chosen by the parties (at paras. 5, 94, 97, 98, 123, 124, 125 and 136 of the judgment).

(11) The trial judge erred in relying on the concept of acquisition related costs and in finding that it was *"the parties' intention"* to exclude such costs. The trial judge further erred in that, having found that information regarding the appellants' loans and interest charges was publicly available, he failed to take that into account when finding that the parties intended, when entering into the HoT, to exclude acquisition related costs. This finding, it is claimed, is unsupported by the language of the HoT and is inconsistent with the evidence of the appellants that they *"could not have"* entered into agreements which did not provide for the payment of all funding costs, including those related to the acquisition of the Hospital Group.

(12) The trial judge failed to apply the plain meaning of the HoT when considering payment for the use of infrastructure. Having found that the language in Schedule 2 plainly supported the case made by the appellants, the trial judge

erred in fact and in law in allowing the assessment of the context and other provisions of the HoT to override the plain language of Schedule 2.

(13) The trial judge erred in not granting a declaration that the respondent acted in breach of clauses 5.6 and 6.1 of the HoT in unilaterally refusing to pay the monies claimed.

(14) The trial judge erred in distinguishing the case of *MacAonghusa v. Ringmahon Company.*

**Respondent's notice**

**72.** In its respondent's notice, the respondent denies, *seriatim* each ground of appeal. As what is said to be an additional ground on which the respondent claims the decision of the trial judge should be affirmed, the respondent says that the entire import of the HoT, properly interpreted, is that the recovery of the interest charges claimed by the appellants is not permitted for the reasons set out by the trial judge and also because the recovery of such charges contravenes the non for profit nature of the HoT. There is no cross appeal.

**Discussion and Decision**

**Principles of Interpretation**

**73.** As I have already mentioned, the relevant principles governing the interpretation of a written contract, so far as is relevant to the interpretation of the HoT, were identified by the trial judge at paras. 8 – 11 of the judgment, and are not in dispute. In the course of summarising the applicable principles, the trial judge referred to the decision of the Supreme Court in *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31 ( "*Law Society v MIBI"*), in which O'Donnell J. (as he then was) noted that in that case the parties were agreed that the applicable principles are those set out at pp. 114 -115 of the judgment of Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich*

*Building Society* [1998] 1 All E.R. 98, and which has been adopted with approval in the Irish courts. Those principles, which are reflected in the summary of the trial judge, are:

1. *"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."* (This, the trial judge noted , has become known as the "text in context approach").
2. *"The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
3. *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. This is not the occasion on which to explore them.*
4. *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely*

*enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…..*

5. *The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to a attribute to the parties an intention which they claim they could not have had. Lord Diplock made this point more vigorously when he said…:*

   *'…. If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense.'"*

**74.** The trial judge noted that in *Law Society v MIBI* O'Donnell C.J. stressed that 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 CJ 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*."

**Background Context**

**75.** At para. 55 of the judgment, the trial judge placed the HoT in the context in which they were agreed and signed, that being the COVID-19 pandemic, which the trial judge described as *"A national emergency on a scale not witnessed since the second world war".*

He described how the respondent was facing a potential crisis in hospital capacity, while on the other hand private hospitals were themselves facing a period of great uncertainty in the face of the pandemic .

**76.** The significance of this is that it is clear that the HoT were concluded as a matter of great urgency. This urgency is underscored by the fact that, somewhat unusually, the HoT are expressed to be binding, even though it was envisaged (as is usually the case) that more detailed, final and binding arrangements were to have been put in place subsequently. Of their very nature, heads of terms of agreement are not as detailed, comprehensive or precise as the far more expansive agreements to which they usually lead. It seems very likely that, had the more detailed final agreements with each Provider that were envisaged by the HoT been put in place, the issues giving rise to these proceedings would have been identified and addressed in greater detail and with greater precision, and that the dispute giving rise to these proceedings might have been avoided.

**77.** The trial judge noted that it is important to bear in mind that the appellants were not the only providers who signed up to the HoT, and that the operators of a large number of other private hospitals also did so. Thus, the trial judge observed, the background context against which the HoT was agreed is not to be assessed solely by reference only to the position of the appellants. While the appellants have appealed from this finding, it is difficult to understand how it can be disputed that the fact that all Providers entered into the HoT with the respondent at the same time, and that it is not therefore a bespoke agreement negotiated and agreed between only the appellants and the respondent, does not form part of the background context to its execution. So far as it may be relevant therefore, this is a factor to be taken into account in the interpretation of the HoT.

**78.** The trial judge also considered that, to the extent that they were relevant, Oval Topco's financial statements for 2018 were publicly available and could have been consulted by the

respondent prior to presenting the HoT to the appellants. Therefore, they also formed part of the background against which the HoT was signed by the parties. These financial statements identified that the Group had 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. This was the amount then owing in respect of the Syndicated Loan. The financial statements also disclosed that related undertakings were owed €382,056,000 by the Group, incurring interest at the rate of 7%. However, the trial judge noted, the 2018 financial statements had not been reviewed by the respondent at the time of the conclusion of the HoT.

**79.** It is one of the appellants' grounds of appeal that the trial judge, having found that the 2018 financial statements of the Group formed part of the background context, then failed to take those statements into account in arriving at his conclusion that the HoT did not entitle the appellants to recover acquisition related costs. The argument being made here is that the respondent should have known of the borrowings and interest obligations within the Group, and that the Group could not provide the Service to the respondent without meeting its interest obligations, and that it follows that these obligations are "*Contracted funding costs*" as referred to in the second schedule to the HoT. I will return to this ground presently when addressing the claims for interest. First I will address the appeal from the decision of the trial judge relating to the appellants' claim in respect of use of Infrastructure.

**Use of infrastructure claim.**

**80.** On the appeal to this Court, the arguments advanced by the appellants under the heading of "Use of Infrastructure" were substantially the same as those advanced in the court below. The appellants rely upon the text of the second paragraph under the fourth heading of Schedule 2 of the HoT which states that the Providers are entitled to "*an allowance for normal wear and tear, based on the 2020 budgeted depreciation charge of the facility, based off an average daily rate*." The appellants argue, forcefully, that this was the

metric chosen by the parties to recompense the appellants for the use of their infrastructure and wear and tear thereto during the term of the HoT. They submit that having recognised that the language used in Schedule 2 of the HoT "*plainly supports the case made by the plaintiffs*", the trial judge erred in fact and in law in allowing the assessment of the context and other provisions of the agreement (not specifically dealing with depreciation) to override the plain language of Schedule 2.

**81.** The appellants submit that the parties could have chosen a different metric by which to calculate an allowance for wear and tear, but their agreement was to base it on the 2020 budgeted depreciation figures. Moreover, the appellants submit, there was good reason for this choice, as it gave both parties certainty on this issue against a background of great general uncertainty. From the point of view of the respondent, the appellants submit that this certainty afforded it a measure of protection from the cost of a potentially significant depreciation of assets that might be brought about by the pandemic as time passed .

**82.** The appellants also submit that the trial judge erred in his conclusion that the payment under this heading should be based on the actual cost incurred rather than the budgeted estimate, in circumstances where depreciation costs are not "incurred" in the way that other costs are incurred. It is submitted that all "use of infrastructure" costs are based on estimates, which in this case the parties agreed to define as being "*on the basis of the 2020 budgeted depreciation charge*".

**83.** While, as the trial judge recognised, the language chosen by the parties in relation to this heading of cost is supportive of the interpretation contended for by the appellants, it is a long established principle of contractual interpretation that the court should not, in construing a provision, look at it in isolation, but must do so by reference, *inter alia,* to the agreement as a whole. As O'Donnell J. (as he then was) observed in *Law Society of Ireland v. MIBI,* at para. 9:

"*A contract is a form of communication intended to convey the meaning agreed upon by the parties. Words are the vehicle through which that meaning is conveyed but the meaning of the document is much more than the meaning of the words. It is what the parties would reasonably have been understood to mean from a consideration of all the available guides to the meaning of the agreement. Words are an important and very often the only necessary guide to discerning the meaning, but they are only a guide, and as recognised by Lord Hoffman [in Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 All E.R. 98 ] they can be ambiguous, and sometimes even, as happens in real life, it may be apparent the parties have for whatever reason used the wrong words or syntax. In those circumstances, the words must give way*."

**84.** At para. 12 of the same judgment, O'Donnell J. offered the following guidance to the court when called upon to interpret a contract :

*"... But language, and the business of communication is complex, particularly when addressed to the future, which may throw up issues not anticipated or precisely considered at the time when an agreement was made. It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this agreement, other provisions drafted at the same time and forming part of the same transaction , and what might be described as the logic, commercial or otherwise, of the agreement. All of these are features which point towards the interpretation of the agreement, and in complex cases, a court must consider all of the*

*factors, and the weight to be attributed to each. The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate, and perhaps even an understanding of the many ways in which even written, formal and legal communication falls short of the standard clarity and precision set by the early editions of Fowler's Modern English Usage."*

**85.** In his meticulous analysis of the issues, the trial judge duly had regard to other relevant provisions of the HoT, and in particular clause 5 thereof, in which the process for claims and payment of operational costs incurred by providers is set out. He sought to resolve what he described as the apparent inconsistency between clause 5 and the provisions regarding *"use of infrastructure"* costs in the second schedule (see paras 44-48 above). He noted that the HoT do not exempt the use of infrastructure costs in Schedule 2 from this process. Insofar as the express terms of the HoT do not do so, this cannot be gainsaid. This led the trial judge to conclude that a claim for an allowance for wear and tear under the heading of "Use of Infrastructure" in schedule 2 was subject to all of the same procedures applicable to any other claim for reimbursement of Costs as set out in clauses 5.2 - 5.6 and 6.1 of the HoT. It followed, therefore, that if the final provision for depreciation in the accounts of the appellants varied from the provision appearing in the 2020 budget, then the former would prevail. The trial judge noted that this conclusion is consistent with clauses 2.1 , 5.1 and 5.11 . If this is correct, what it means in practical terms is that the only possible relevance of the 2020 budgeted figures for wear and tear is that they form the basis for the initial claims and payments for use of infrastructure under clauses 5.2 and 5.4, in each case entitling the appellants to payment of 80% of the relevant figure. Thereafter however – as far as entitlement to payment is concerned – the budgeted 2020 figure ceases to be of any

relevance, as the ultimate entitlement of the appellants under this heading will be determined based on the final provision for depreciation in the accounts of the appellants.

**86.** If the appellants are correct, however, there is a significant omission in the HoT, in that it should have been stated that clause 5 had no application to claims for use of infrastructure. This would mean that a fixed figure would apply, as per the 2020 budget, regardless to what might subsequently transpire, and in particular regardless as to whether the Provider – in this case the appellants – made a profit or gained an economic benefit in the process, contrary to the express acknowledgement in clause 5.11 that the Common Purpose does not envisage either. Moreover, it would mean that the appellants would be entitled to be *"reimbursed"* by reference to a figure based on planned and budgeted expenditure, whether that expenditure was incurred or not.

**87.** On one view of it therefore – the view taken by the trial judge – the reference to the budgeted 2020 accounts adds very little to the process and is borderline otiose, and on another view – that of the appellants – the plain meaning of those words should be applied, even though such an interpretation runs contrary to a very strong emphasis in the HoT on the reimbursement of Costs on a "costs incurred" basis, and the expressly stated acknowledgment in clause 5.11 that an economic benefit is not envisaged. The trial judge, at para. 85 of his judgment, reconciled these two positions as follows:

> "……*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 - 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 [sic]can be resolved."*

**88.** In their grounds of appeal, the appellants take no issue with the detailed analysis of the trial judge that led him to the conclusion that this heading of claim must be dismissed, but rather they simply rely upon the reference, in Schedule 2 of the HoT, to the 2020 budgeted depreciation charge, and submit that this is the chosen metric of the parties for the assessment of the amount payable to the appellants under this heading, and that is the end of the matter. In making this submission, counsel for the appellants acknowledged during the course of the hearing of this appeal that a payment based upon the 2020 budgeted charge for depreciation would result in a commercial benefit to the appellants, but he submitted that such a benefit was not absolutely precluded by the HoT.

**89.** It was further submitted on behalf of the appellants that the trial judge failed to honour the words chosen by the parties, and had, in effect, re-written this part of the agreement. The appellants relied upon the following passage from the decision of Clarke C.J. in *Jackie Green Construction Limited v. Irish Bank Resolution Corporation (in special liquidation)* [2019] IESC 2 in which he stated:

> *"As is clear from those authorities, it is important to give due recognition both to the text of any document creating legal rights and obligations and to the context in which the words used in the measure concerned were chosen. To fail to give adequate weight to the words is to ignore, or downplay, the fact that those were the words that were chosen to define the relevant legal agreement. To fail to give adequate weight to context is to ignore the fact that all language is inevitably interpreted by reasonable persons in the light of the context in which the language is used."*

**90.** It was also submitted that the trial judge erred in placing emphasis on the words "actually incurred" in clauses 2.1 and 5.1, because while these words are readily applicable in the context of day to day expenses, they are entirely inappropriate in the context of depreciation, which is a conceptual cost, and is not actually incurred until an asset is sold. It

therefore made sense that the parties should have identified a specific metric for measurement of the charge.

**91.** The difficulty, as I see it, with the submissions of the appellants is that they fail to engage with those provisions of the HoT discussed by the trial judge in his analysis. In the view of the appellants, only one provision of the HoT requires to be considered, to the exclusion of all others, that being the provision in the second schedule of the HoT which, taken together with clause 5.1, provides that the Providers are to be "*reimbursed*" "an *allowance for normal wear and tear based on the 2020 budgeted depreciation charge*". However, this approach fails to take any account of the requirement to consider the terms of the HoT as a whole as well as the context in which the words upon which the appellants rely are used. That context includes the statement at clause 5.11 that "*The parties acknowledge that the common purpose does not envisage a commercial or economic benefit or profit beyond the Costs".*

**92.** The appellants have correctly submitted that this clause does not absolutely preclude such a benefit, but taken together with the reference in clause 5.1 to the reimbursement of costs that are "actually incurred" there seems to me to be little doubt but that the interpretation contended for by the appellants would fly in the face of a clearly stated objective (if not an imperative) that the reimbursement of Costs should not give rise to a profit. Moreover, in my view, the trial judge was also correct to take into account that the very use of the word "reimburse" clearly implies that the expense or cost has been actually incurred.

**93.** I accept that there is some merit in the submission of the appellants that the words "actually incurred" are inappropriate in the context of a claim for depreciation. This does not, however, mean that these words are simply to be disregarded so far as depreciation is concerned. On the contrary, it is very clear, as the trial judge found, that the detailed

provisions of clause 5 relating to claims for Costs apply to all headings of costs in schedule 2, including claims for reimbursement under the heading of use of infrastructure . If the words "actually incurred" are not an exact fit when used in the context of depreciation, this is most probably a reflection of the urgency of the circumstances in which the HoT were prepared and the fact that the Final Agreements were never concluded.

**94.** The trial judge addressed this issue at para. 71 of his judgment, observing that depreciation does result in the write down in the value of an asset in a way that affects the bottom line in the balance sheet of a company, and in his view therefore there is no incongruity in the use of the words "actually incurred" in the context of depreciation. In other words, depreciation is actually incurred once written into the accounts of a company. I agree.

**95.** Moreover, this approach is consistent with the statutory obligation of companies to provide, in their financial statements, a true and fair view of their assets, liabilities and financial position as at the financial year end date (see ss. 291(2) and 292(2) of the Companies Act, 2014). This obligation clearly extends to depreciation, otherwise the accounts of a company would present a distorted picture of the true value of its assets. Furthermore, the provision in the accounts of a company for depreciation feeds into the liability of a company to taxation, and it therefore has a tangible significance as soon as it is made, and is not of academic accounting interest only pending the sale of an asset.

**96.** In arriving at the conclusion that he did on the issue, the trial judge did not, as the appellants suggest, override the chosen metric of the parties but rather reconciled that metric in accordance with other relevant provisions of the HoT, including clause 2.1 and clause 5 thereof. In effect, the conclusion of the trial judge on this issue was that the HoT entitled the appellants – and for that matter, all other Providers – initially to claim reimbursement of depreciation on the basis of the 2020 budgeted accounts, in accordance with cluses 5.2 and

5.4 of the HoT. However, any such claim for reimbursement was subject, as with all other claims for reimbursement of operational costs, to the provisions for assessment and verification of such claims as provided for in clauses 5.3, 5.5 and 6.1 of the HoT, following which, as envisaged by clause 5, the appellants would only be entitled to be compensated for the costs actually incurred. All of this is copper fastened by clause 5.11 of the HoT by which the parties thereto "acknowledge that the Common Purpose does not envisage a commercial or economic benefit or profit beyond the Costs"

**97.** In my judgment, the exercise undertaken by the trial judge in his analysis of this issue was undertaken in a manner entirely consistent with the well established principles of contractual interpretation and with the guidance provided by O'Donnell J. in *Law Society of Ireland v M.I.B.I.* The appellants complain that the trial judge has ignored the express terms of the agreement in favour of generic terms, but at its core, what they contend for is that the trial judge should have exempted the allowance for wear and tear in the second schedule from the detailed provisions for Costs recovery in clause 5. Such an approach would indeed involve a rewriting of the terms of the HoT and would be impermissible . It is clear that the trial judge correctly applied the applicable principles and arrived at a conclusion that reconciles the wording in the second schedule relied upon by the appellants with clause 5 of the HoT. I would therefore dismiss this element of the appeal.

**Interest claims**

**98.** In considering the claims for interest, it is important to keep in mind at all times that what is at issue here is interest payable by Oval Topco and by Bidco, and not by the other appellants. While it is not in dispute that Oval Topco is a "Provider" for the purposes of the HoT, in order to be entitled to recover the interest claimed it must, as the trial judge observed, be able to show that the interest payable 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 HoT in relation to costs. The same would apply to the interest payable under the Syndicated Loan. In passing, I should note that while Bidco is not a Provider for the purposes of the HoT (and is not a party to these proceedings) the respondent took no issue with this, and I will therefore address the question of entitlement to reimbursement of interest payable under the Syndicated Loan on the same basis as the interest payable under the Related Party Loan.

**99.** By clause 5.1 of the HoT the obligation of the respondent was to *"reimburse [the appellants] for the operational costs … of providing the Service at the Relevant Hospitals."* In the third row of Schedule 2, it was set out that *"Finance costs"* were those contracted funding costs (including interest) *"related to the ongoing operation and functioning of the facility."*

**100.** The trial judge conducted a careful analysis of the possible meaning of the word *operational*. He noted that the parties must have intended to invest it with some meaning. He referred with approval to two dictionary definitions which he noted are similar. First , he referred to the definition in the *Chambers* dictionary which states that the word "*operationa*l" means "*relating to operations*". Second, he referred to the *Shorter Oxford Dictionary*, in which it is stated to mean "*of, or pertaining to operations*". Somewhat surprisingly, the appellants say, in their grounds of appeal, that the trial judge erred in this regard. They submit that this is a narrow definition that fails to reflect the distinction between "*operating*" and "*operational*" . This is surprising because the appellants, in their written submissions to the High Court, advanced two definitions which are indistinguishable from those identified by the trial judge. So, for example, they referred to the *Collins English Dictionary* definition, which is "*of or relating to an operation or operations*". In any case, as will become apparent, the trial judge was alert to the distinction between the two words

and concepts. The trial judge expressed the view that by qualifying the word "*costs*" in clause 2. 1 with the word "*operational*" the parties made it clear that the Providers were not entitled to a reimbursement of all of their costs of providing the Service. This must be correct, otherwise, as the trial judge said, the use of the word *operational* would be otiose. On the other hand, the trial judge observed, the word o*perational* is wider in its scope than the word *operating*, and that is plainly so, since operating costs appear in Schedule 2 as the first of five headings of operational costs .

**101.** In their written submissions on the appeal the appellants submit that the term "*operational costs*" is simply an umbrella term used by the parties to capture the diverse categories of costs listed in schedule 2. I agree. It follows therefore that the term has no free standing meaning outside of schedule 2. It will be recalled that in schedule 2, "Finance costs" is stated to mean "*Contracted funding costs related to the ongoing operation and functioning of the facility, e.g. interest, cash leasing costs excluding intra group-group interest payments which cancel on consolidation*". That the interest payable under both loans is a contracted funding cost can scarcely be doubted and is not in issue, but what that cost *relates to* lies at the heart of these proceedings. In my view, the claim for interest, accruing under both the Related Party Loan and the Syndicated Loan, may be reduced to a single net question: Is the interest for which Oval Topco and Bidco are respectively liable pursuant to the Related Party Loan and the Syndicated Loan a cost that is *"related to the ongoing operation and functioning of the facility*?"

**102.** I should say, for the avoidance of any doubt, that it is not in dispute that the interest payable under both loans is not intra group interest which cancels on consolidation, and the presence of this exception within this category of cost is relied upon by the appellants as being an indicator that had the parties intended to exclude the interest accruing under either the Related Party Loan or the Syndicated loan, they would have done so expressly.

**103.** The central argument advanced in support of the appellants' claim is a straightforward one, and it is that had Oval Topco and Bidco not borrowed the monies that they did, Oval Topco could not have provided, through its subsidiaries, the hospital facilities to the respondent. This, Mr. Clokey acknowledged under cross examination, is the essence of this heading of claim. Mr. Clokey said that there are a number of different ways in which a hospital may be acquired. A person might develop and operate a hospital on their own account. Alternatively a person could rent or purchase a hospital from a third party. In the case of rent, express provision is of course made in the HoT for reimbursement of rent incurred by providers during the term of the HoT. In the case of a purchase, Mr. Clokey's evidence was that having laid out [approximately] €600m in the purchase of the Group, Oval Topco acquired the right to own and operate it, and that links the loan(s) inextricably with the operation of the hospital(s) [in the Group].

**104.** In both his evidence in chief and under cross examination, Mr. Walsh accepted that interest incurred on borrowings to fund the cost of construction of a hospital could be considered an operational cost for the purposes of the HoT. Notwithstanding that he was the respondent's witness, counsel for the respondent, the trial judge noted, took a different approach, and submitted that given the emphasis in the HoT on the provision of the Service, the developer's funding costs would not be recoverable as an operational cost.

**105.** The appellants on the other hand rely on this apparent agreement between the experts in support of their argument that there is really no difference in substance between the cost of funding the initial development of a hospital facility, and interest incurred in funding the subsequent purchase of the later established business carried on in the same facility. However, Mr. Walsh did not accept that all of the interest accruing in the latter scenario could be regarded as an operational cost, within the meaning of the HoT, to the extent that there is usually an element of profit in an onward sale, which has no bearing at all upon the

"*ongoing operation and functioning of the facility*". In this particular case, it is apparent that the rolled up debt carried forward in the accounts of the Group includes a significant element of profit generated from at least the two previous sales of the Group that cannot be said to be directly related to the cost of the underlying facilities.

**106.** The appellants counter this by saying that the profit element in an onward sale of a hospital simply reflects an uplift in the market price of the hospital, the funding cost of which is a real cost to the purchaser in operating the hospital subsequently. The appellants submit that since a purchaser of a hospital facility will pay the market price for that facility, the fact that of there being a profit element in the purchase price is immaterial, because interest accruing on borrowings drawn down to fund the purchase of the facility is a real cost to the purchaser, and it is only because Oval Topco and Bidco incurred this cost that Oval Topco was able to provide the Service to the respondent (through the other appellants, its subsidiaries) .

**107.** I pause here just to mention that none of this is truly a matter of expertise. Both Mr. Clokey and Mr. Walsh were in agreement that neither of the terms "operational costs" nor "operating costs" are terms of art within the accountancy field, although the term "operating costs" is in common usage and accountants would have a general understanding of what it means. However, since neither is a term of art within the accountancy field, and since the issue to be determined is whether or not the interest charges fall within the description of "Finance Costs" in the third heading of Schedule 2 to the HoT, there is very little, if any, expertise that the experts could bring to bear upon the issue. I consider therefore that the trial judge was correct to conclude that their evidence was of limited assistance to the Court.

**108.** This point is of some relevance to one of the grounds of appeal by which the appellants claim the trial judge erred in failing to have regard to the evidence of the experts, in particular in circumstances where the HoT contemplated that disputes should be referred to an

independent expert for resolution. I disagree. Either the subject matter of the dispute is properly a matter of expertise, or it is not. If it is not, then the dispute falls to be determined on the basis of normal principles of contractual interpretation, and even if an expert had been appointed under clause 11.2 to determine the dispute, the expert could hardly have decided the dispute by reference to an expertise because there is none relevant to the dispute. If the issue turns – as it does – on the correct interpretation of the contract, the principles to be applied are the same, whether the arbiter of the dispute is an expert or a court, and, in the case of an expert, irrespective of the discipline of the expert.

**109.** All of that said, in my view any reasonable person asked to construe the HoT would have to accept that the interest costs incurred on the borrowings taken out for the purpose of the acquisition of the Group are directly related to the appellants' ability to provide the Service. This is so because, as Mr. Clokey stated, it is by taking out those borrowings and by incurring those interest costs that Oval Topco has acquired the Group, including the second to fourth appellants, the Relevant Hospitals, and the businesses conducted by those hospitals, thus enabling Oval Topco to provide the Service (through its subsidiaries) to the respondent .

**110.** However, as the trial judge observed, the respondent did not agree to reimburse *all* (my emphasis) of the costs of the provision of the Service; it agreed to reimburse the operational costs only. The acquisition of the Group and all of its facilities is not, within the ordinary meaning of the words, the same thing as the ongoing operation and functioning of them. In order for a person to operate a facility of any kind, or to make it function, that person must acquire the facility in the first place. These are separate and distinct actions . It seems unlikely that the reasonable person in the position of the parties, asked to interpret these provisions of the HoT, would understand the funding costs of acquisition of the Group to form any part of the costs *subsequently* incurred in the operation and functioning of the

hospital facilities operated by the second to fourth named appellants. That being so, it seems unlikely that the ongoing operation and functioning of the facilities provided by the appellants to the respondent is funded by the interest costs incurred in their acquisition, save only to the extent that the lending facilities (i.e. both the Related Part Loan and the Syndicated Loan) included working capital or other sums identified by Mr. Walsh as having been invested in health care services (see para. 38 above).

**111.** Therefore, the distinction the trial judge drew between interest incurred on borrowings drawn down to fund the acquisition of the Group, on the one hand, and interest incurred on funds borrowed in connection with the ongoing operation and functioning of the facility, on the other, is, in my view, entirely logical and was a distinction that the trial judge was entitled to draw. The analysis of the trial judge at para. 117 of his judgment explains this very well. Here the trial judge makes the point that there was no change in the conduct of the business of the Group – which was obviously already operating and functioning – before and after its acquisition by Oval Topco. Nor was there any change in the capacity or underlying operation of any of the services falling within the definition of the "Service" as defined in clause 2.1 of the HoT. While the appellants claim that the trial judge erred in this analysis, I have difficulty in understanding where the error lies. The facilities were clearly up and running for many year prior to the 2018 acquisition by Oval Topco, and the funds borrowed to fund that acquisition had very little to do with its operation and functioning, save to the extent already mentioned. For much the same reasons, I would also endorse the conclusion of the trial judge that the words "*related to*" preceding "*the ongoing operation and functioning of the facility*" cannot be interpreted in such a way as to broaden the concepts of "*operation and functioning*" so as to include "acquisition".

**112.** A central tenet of the appellants' argument was that they – in particular Oval Topco – had provided the entirety of their business to the respondent. The appellants, they said, had

no private business that they could conduct during the period of the HoT. The trial judge therefore erred, they submitted, in holding that the HoT envisage a purely public service being provided at the appellants' facilities which cannot be equated with the commercial business of the appellants, and further erred in finding that the service provided under the HoT did not embrace the entire business of the appellants, which involves the provision of private healthcare services for a profit.

**113.** However, while the appellants agreed to make available to the respondent the full capacity and services in the hospitals for the treatment of public patients, there was clearly a difference between the appellants' business of providing private healthcare with a view to profit and the respondent's statutory function in providing public health services. By the terms of the HoT, the appellants were unable for the duration of the agreement to carry on their business but this did not mean that they had provided the entirety of their business – to the respondent. There was, as the trial judge found, a critical distinction to be made between the appellants' business and the hospital facilities from which that business was carried on. It was acknowledged by counsel for the appellants that there was a distinction to be drawn between public care and private care but it was submitted that this was of no relevance to the issue to be decided. Even if the appellants are correct in this regard (and I do not say they are) there is no escaping the fact that both the Syndicated Loan and the Related Party Loan were taken out to fund the purchase of the business of the Group, and, as the trial judge observed, there was no evidence that the acquisition costs had any impact upon the hospital facilities or any of the services falling within the definition of "Service" in clause 2.1 of the HoT. In my view the trial judge was quite correct to identify the difference between acquisition costs and operational costs.

**114.** In so far as the wider context is concerned, the appellants argue that having found that the financial statements of the Group formed part of the background context to the agreement

of the HoT, and that those statements were readily available to the HSE even though they did not review them in advance of entering into the same, the trial judge erred in failing to take that background into account. Moreover, it is said, three of the respondent's witnesses, Mr. Woods, Mr. Mulvaney and Mr. Higgins all accepted that, had they reviewed these statements, they would have been aware of the total indebtedness of the Group (being of the order of €602m) and of the two loans, each of which is accruing interest. Furthermore, they would have been aware how the loan proceeds were applied; €220m as to consideration for the shares in the Group and €382m to discharge existing loans within the Group. All of that being the case, the appellants submit, the trial judge erred in failing to hold that the respondent had agreed to accept liability for the funding costs when agreeing to reimburse the Finance costs referred to in the second schedule.

**115.** I would have difficulty accepting that knowledge of the Group's indebtedness, the loans and the interest payable on those loans could, in and of itself, equate to an acceptance that all of the foregoing relate to the ongoing operation and functioning of the facility, or that it could, without more, amount to an agreement to accept liability for those funding costs.

**116.** The insuperable difficulty with the appellants' submission on this issue is that it goes to the subjective intention of the parties. It may very well be that had the appellants known that the interest they would incur on the loans would not be reimbursed, they would not have agreed to the arrangements. Conversely, it may very well be that had the respondent known that it would be liable to reimburse the interest, it would not have contracted for the provision of the Services. In either case, the subjective intention of the parties is irrelevant – and evidence of it is inadmissible – to the task of discerning the true objective meaning of the HoT. Moreover, if, for the sake of argument, the respondent had read and understood the appellants' financial statements, there might have been a discussion as to parties' respective

expectations but the fact of the appellants' liability for interest on the loans is irrelevant to the question as to whether the respondent is liable to reimburse that interest.

**117.** While other arguments were advanced by the appellants, they all run into the same obstacle. The appellants have failed to establish that the interest costs incurred by them under either the Related Part Loan or the Syndicated loan are related to "*the ongoing provision and operation of the service*" and it follows that the trial judge was correct in his conclusion that those interest costs are not operational costs within the meaning of the HoT, and the appellants are not therefore entitled to reimbursement of same. Accordingly, the appeal from the decision of the trial judge to dismiss the claims for interest under both the Related Party Loan and the Syndicated Loan must be dismissed.

**118.** The appellants have also appealed form the refusal of the trial judge to grant a declaration that the respondent acted in breach of causes 5.6 and 6.1 of the HoT in failing to follow the procedures in those clauses by unilaterally setting off monies the respondent claimed it had overpaid against monies otherwise due to the appellants. This element of the appeal was not pressed at the hearing, but even if it had been, I would not have been disposed to allow it. The trial judge clearly explained that he did not consider it necessary to grant this declaration in circumstances where he had granted a declaration that the appellants had acted in breach of clause 11.2.1 in not agreeing to refer the dispute to an expert. The trial judge was entitled to take that view. In so far as it is necessary, I would dismiss this ground of appeal also.

**119.** Since the respondent has been entirely successful in this appeal, my preliminary view is that it is entitled to an order for its costs incurred in connection with this appeal as against the appellants. If the appellants wish to contend for a different order then they may, within 14 days from the date of delivery of this judgment, request the registrar to schedule a brief hearing, not to exceed 30 minutes (15 minutes to each side), for the purpose of making

submissions as to why the court should make a different costs order. This hearing, if requested, will take place at 10.30 am on 20th March. However, in that event, should the appellants be unsuccessful in persuading the court to depart from the order indicated above, then they may be held responsible for the costs of the additional hearing.

**120.** Since this judgment is being delivered remotely, Haughton J. and Allen J. have authorised me to express their concurrence with it.