THE HIGH COURT

COMMERCIAL

[2022] IEHC 405
[2018 No. 10218 P.]

BETWEEN

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

LAYA HEALTHCARE LIMITED

DEFENDANT

AND

IRISH LIFE HEALTH DAC

NOTICE PARTY

JUDGMENT (No. 2) of Mr. Justice Denis McDonald delivered on 6th July 2022

Introduction

1. On 25th November 2021, I delivered judgment in these proceedings in which the plaintiff ("*the HSE*") sought declarations as to the proper interpretation of s. 52(3) of the Health Act 1970 ("*the 1970 Act*") as amended by s. 9 of the Health (Amendment) Act 2013 ("*the 2013 Act*") and a variety of other relief. Section 52(3) has the effect that, in certain circumstances, a patient entitled to the benefit of public in-patient services in a public hospital, can be treated as a private patient. This has a significant legal consequence for a patient admitted to hospital on that basis. Such a

patient will be personally liable for the charges applicable to private patients in that hospital. Insofar as relevant, s. 52(3) provides as follows:–

> *"(3) …Where, in respect of in-patient services, a person with full eligibility or limited eligibility for such services does not avail of or waives his or her right to avail of, some part of those services but instead avails of like services not provided under section 52(1), then the person shall, while being maintained for the said in-patient services, be deemed not to have full eligibility or limited eligibility, as the case may be, for those in-patient services."*

2. It will be observed that s. 52(3) applies in two circumstances. First, where an eligible patient avails of private in-patient services or where the patient waives the right to avail of public in-patient services. In broad terms, the effect of s. 52(3) is that a patient falling within its ambit is treated as not having any eligibility for public in-patient services in a public hospital. Section 52(3) must be read in conjunction with s. 55(1) of the 1970 Act (as amended by s. 9 of the 2013 Act). Section 55(1)(a) empowers the HSE to make available in-patient services for persons who do not establish entitlement to such services under the 1970 Act or "*are deemed under section 52(3) to have full eligibility or limited eligibility for such services, or to have waived their eligibility for such services*". In turn, s. 55(1)(b) makes clear that, in the case of such persons, the HSE is now required to make a charge in respect of in-patient services in accordance with a table of charges specified in the fourth schedule. These charges range from €659 to €813 per day for overnight accommodation in a multiple occupancy room and from €329 to €407 for day care services. In practice, a patient is unlikely to be treated as a private patient in this way unless the patient has

private health insurance, in which case the insurer will, in accordance with its contract with the patient, pay the hospital charges.

3. In the course of the substantive hearing, the case was made on behalf of the HSE that, once a decision is made by a patient to take the benefit of or make use of private services at a public hospital, the patient has a liability to pay the charges prescribed by s. 55(1)(b) of the 1970 Act (as amended). It was submitted that a decision by a patient to take the benefit of such services was sufficient to come within the language of s. 52(3) and that, by doing so, the patient was availing of private services within the meaning of the sub-section. It was also argued that, once a patient has decided to avail to be treated as a private in-patient, the effect of s. 52(3), when properly interpreted, is that the patient becomes liable to pay hospital charges in respect of the entirety of the in-patient services provided – even those that were provided prior to the date of the decision by the patient to be treated as a private patient. On that basis, it was argued that, if a person elects to receive private in-patient services at any point during an "*episode of care*", then the HSE is obliged, in accordance with the charging provisions contained in s. 55(1)(b) to make a charge for the full in-patient services on a private basis for the entire "*episode*".

4. It was also submitted on behalf of the HSE that there is nothing in the language of s. 52(3) which requires the execution by the patient of any document – such as the Private Insurance Patient form (*"the PIP form"*) agreed between the HSE and Insurance Ireland (acting on behalf of private health insurers) in September 2014. The terms of that form are set out in detail in para. 30 of my November 2021 judgment.

5. In contrast, counsel on behalf of the defendant (*"Laya"*) and the notice party (*"Irish Life"*) argued that hospitals dealing with patients have an obligation to ensure

that any decision by a patient to avail of private services or to waive the entitlement to be treated as a public patient is made on an informed basis. It was submitted that all patients who are treated in a public hospital are entitled to choose whether to be treated as a public patient or as a private patient. Furthermore, it was argued that the default position must be that a patient should be treated as a public patient unless and until that patient elects, on an informed basis, to be treated as a private patient. It was accordingly argued that the PIP form is a necessary part of the procedure that must be followed by a hospital in advance of a patient's decision as to whether to be treated as a public or as a private in-patient. It was further submitted that the choice by a patient to be treated as a private patient could only operate prospectively and not retrospectively. On that basis, it was argued that the HSE could not levy a charge in respect of any element of the episode of care which predated the execution of the PIP form.

6. In my November 2021 judgment, I sought to give guidance to the parties as to how I believed the relevant legislative scheme was intended to be carried out. In paras. 168 to 173 of that judgment, I attempted to summarise my conclusions. In the first place, I addressed the concept of "*availing*" as contemplated by s. 52(3). I expressed the view that it involves a conscious decision by a patient to be treated on a private basis. As further explained in para. 118 of the judgment, I took the view that, at least in the period after s. 52(3) came into operation in its current form, the concept is primarily concerned with those patients who actively seek to be treated as private patients.

7. Insofar as the concept of waiver is concerned, for the reasons explained in paras. 118 to 123 of the judgment, I came to the conclusion that waiver is more relevant in the context of those patients who are initially minded to be treated on a

public basis but who, following a request by a hospital to consider whether they wish to be treated publicly or privately, agree to forego or give up the right to be treated as public patients.

8. Although I came to the conclusion that s. 52(3) does not require waivers or decisions not to avail of public in-patient services to be in writing, I nonetheless suggested that it is wise, as a matter of good administration, that such decisions should be evidenced in writing and should be signed by the patient. For the reasons explained in paras. 149 to 150 of the November 2021 judgment, I expressed the view that, in cases where a hospital asks eligible patients to consider whether they wish to be admitted on a public or a private basis, patients should be informed of the statutory entitlement available to eligible patients and of the consequences that flow from a decision to forego that entitlement. For that reason, I indicated that a document such as the PIP form, while not mandated by the 1970 Act, serves a very useful purpose both as a means of conveying the necessary information to the patient in relation to the entitlements available under the 1970 Act and, also, as evidence that the patient has reached an informed decision.

9. For the reasons explained in paras. 126 to 143, I came to the conclusion that the HSE case based on "*one episode of care*" is incorrect. In cases where a patient opts during the course of a hospital stay to be treated privately, I did not accept that s. 52(3) deems the patient to be ineligible in respect of the period prior to that patient's decision to be so treated. I took the view that s. 52(3) had the opposite effect and that this was reinforced by a consideration of s. 55(1). Nevertheless, as explained in para. 144 of the judgment, I took the view that a small interval between the date of admission and the date of a decision under s. 52(3) did not necessarily prevent the HSE from levying charges where the interval could be explained by difficulties of the

kind described in that paragraph. I also expressed the view that it would be wrong to conclude that charges are not payable in respect of the entire hospital stay in cases where a patient, on admission, orally indicates an intention to be treated as a private in-patient but, for one reason or another, a period of days elapses before a written document is put in place signed by the patient evidencing the decision made at the time of admission.

The parties are not *ad idem* as to the effect of the November 2021 judgment or in respect of the approach to be taken in respect of costs

10. Unfortunately, there is disagreement between the parties in relation to the nature of the order to be made on foot of my November 2021 judgment. There is also disagreement between the parties in relation to costs.

11. I will deal first with the question of the declarations to be made. I will then address the issue of costs. It should be noted that it has been agreed that the notice party will bear its own costs of these proceedings.

The declarations to be made on foot of the November 2021 judgment

12. All parties are agreed that the court should make declarations that flow from the judgment even where such declarations do not coincide with the relief claimed by HSE in the statement of claim. It is plainly in the interest of all parties that such declarations should be made. As counsel for the HSE observed when opening the case to the court, these proceedings throw up systemic issues. That said, one of the practical difficulties facing the court in the November judgment and in this judgment is that the only parties to these proceedings were the HSE and two private health insurers namely Laya and Irish Life. No patients were joined as parties to the proceedings. In those circumstances, save to the extent described in paras. 51 to 54 of the November 2021 judgment, the hearing of these proceedings took place in the

absence of any detailed examination of the range of experience of patients admitted to hospital through accident or emergency departments. As counsel for the HSE noted, in the course of her submissions in relation to the declarations to be granted, there was *"no one factual matrix within which the court had to come to its decision"*. She further noted that this makes the framing of the declarations more difficult than would otherwise be the case if all three parties to the *"triangular"* relationship between the hospitals, the patients and the private health insurers were before the court in one set of proceedings. In this context, it is important to recall that, as noted in para. 2 above, the patient is the person liable under the 1970 Act to pay the charges levied by the hospital.

13. It is also essential to keep in mind that, as outlined in para. 118 of the November 2021 judgment, there is a broad spectrum of possible situations that may arise when a patient, holding private health insurance, is advised in the emergency department of a hospital that admittance as an in-patient is necessary. While some patients may immediately express the wish to be treated as a private patient without any consideration of the alternative, there are a broad range of reactions that patients may take. In paras. 119 to 122 of the November judgment, I attempted to identify a number of possible reactions. However, as emphasised in para. 123 of the judgment, the spectrum of possible patient reactions to the choice of treatment available (i.e. public or private) is much wider and more diverse than the narrow range postulated by me. In the same paragraph I made clear that the circumstances of each individual case would have to be examined in order to determine on which side of the line it falls. I also noted that, in light of the *"high level approach taken in these proceedings",* I could not put the matter any further. These factors limit the extent to which the court can give guidance by way of declaration in this case.

14. The form of the declarations to be made was the subject of correspondence between the parties in the period January to February 2022. By email dated 7th January 2022, the form of declarations proposed by the HSE was forwarded to Laya and Irish Life. These were not agreed either by Laya or by Irish Life. On 14th January 2022, the solicitors for Laya circulated a different proposal. Laya's proposal is supported by Irish Life. In turn, the Laya proposal was rejected by the HSE. The Laya proposal was debated at length in correspondence between the solicitors for the parties commencing with the letter dated 1st February 2022 from the solicitors for the HSE. That provoked a very full response from the solicitors for Laya in a letter dated 4th February 2022. The position adopted by Laya in that letter was fully supported by the solicitors for Irish Life in their letter of 7th February 2022.

15. Given the extent of debate between the parties in relation to the proposal made by Laya as to the form of declarations to be made, I now turn to each of the forms of relief put forward in that proposal which I will address in turn.

Declaration No. 1 proposed by Laya

16. The first declaration proposed by Laya is in the following terms:-

> *"Where charges are levied pursuant to section 55(1) of the Health Act 1970 (as amended) by the plaintiff, those charges are levied against the patient and not against the patient's insurer."*

17. HSE objects to this declaration on the basis that no such declaration is required from the court. HSE makes the point that the legislation is clear that the patient is the person who is liable for hospital charges. Private health insurers indemnify their members pursuant to contract and remit the funds directly to hospitals. The HSE also contends that *"this has never been an issue between the parties"*. In response, Laya's solicitors acknowledged that the legislation is quite clear in relation to this issue.

Nonetheless, they draw attention to the way in which the claim, as originally advanced by the HSE, sought a declaration that, under and pursuant to s. 55 of the 1970 Act (as amended) Laya is *"liable to pay the prevailing statutory per diem rate for in-patient care provided at public and voluntary hospitals the patients insured by the defendant…"*. Laya's solicitors also highlighted that, in para. 3 of the prayer for relief in the statement of claim, the HSE had sought an account of all monies *"wrongfully withheld"* by Laya. While the HSE, in the course of the hearing, had conceded that Laya had no direct liability in respect of the hospital charges, Laya's solicitors maintained that, in light of the way that the case had been pleaded by the HSE, it is appropriate that a declaration should be made reflecting the correct legal position.

18. In light of the claim advanced by the HSE in the statement of claim, I am of the opinion that it would be wise to make a declaration in the terms sought by Laya. In circumstances where the HSE accepts that this is the correct legal position, there is no good reason not to include this declaration in the relief to be granted by the court. Given the systemic importance of the issues between the parties, it is in everyone's interest that such a declaration should be made.

Declaration No. 2 proposed by Laya

19. The second declaration proposed by Laya is in the following terms:-

> *"For the purposes of section 52(3) of the Health Act 1970 (as amended) a person with full eligibility or limited eligibility for in-patient services avails of like services not provided under section 52(1) of the said Act where the said person makes use of private in-patient services and makes a conscious decision to be treated as a private patient."*

20. This is intended by Laya to capture the meaning given to the statutory words *"avails of"* in s. 52(3) as explained in the November 2021 judgment. On behalf of the HSE, it is suggested that this declaration is not required in circumstances where (as recorded at para. 117 of the November judgment) there is no dispute between the parties that a patient *"avails"* of services where that patient makes a conscious decision to be treated privately.

21. In response, Laya maintains that the declaration is required to reflect the exercise in statutory interpretation undertaken in the November 2021 judgment. On behalf of Laya, it was argued that it is appropriate that this *"finding"* in the judgment as to the meaning of the statutory term *"avails of"* should be recorded in the order.

22. At the hearing as to the form of orders to be made, a further argument was made by counsel for the HSE to the effect that the order proposed by Laya did not adequately or accurately record all of the *"availers"* contemplated in the November 2021 judgment. In particular, counsel submitted that the judgment identifies that the concept of *"availing"* is not confined to those patients who counsel characterised as *"alpha availers"* (namely those described in para. 118 of the judgment) but also extended to some of the patients considered in para. 119. It should be noted, in this context, that, in para. 119, I addressed how, as one looks further along the spectrum of possible patient reactions, there are likely to be patients who, having attended the emergency department of a public hospital, will assume that, if they have to be admitted as an in-patient to such a hospital, they will continue to be treated on a public basis. It may never occur to them to ask to be treated as a private patient. In the same paragraph, I acknowledged that some of those patients, upon being asked whether they wished to be admitted on a public or a private basis, may reach a decided view that, like those described in para. 118, they very definitely wished to be

treated as private patients. To that extent, I suggested that such patients fall into the same category as those discussed in para. 118. Counsel for the HSE submitted that the declaration to be made by the court should, accordingly, extend both to those patients described in para. 118 of the November 2021 judgment and also that element of the patients described in para. 119 as I have described above. Counsel submitted that the latter category of patient are those people who are described in para. 45 of November 2021 judgment. In that paragraph of the judgment, I summarised the evidence given by Ms. Sheehan on behalf of the HSE as to the procedure to be followed where a patient, holding private medical insurance, is informed by the staff of the emergency department that admission as an in-patient is required. I summarised Ms. Sheehan's evidence in the following terms:-

> *"If the patient holds private medical insurance, the procedure which should be adopted is as follows: the patient will be asked by the clerical staff to confirm whether or not he or she is happy to use that insurance and whether or not the patient would prefer to be admitted as a public or as a private patient…"*

23. The HSE proposed a different form of declaration. The form of declaration proposed by the HSE is in the following terms:-

> *"A declaration that where a patient is asked on admission to public hospital whether he or she wishes to be treated privately for that admission and chooses to be admitted as a private patient, such a patient has decided to avail of private services within the meaning of section 52(3) and accordingly informed consent is not required in respect of that patient for the purposes of the imposition of the statutory private charges."*

24. The HSE also proposed a further declaration in the following terms in relation to the *"availers"* category:-

"A declaration that, where a patient, of their own volition, requests to use their private health insurance on admission to hospital, such a patient has decided to avail of private services within the meaning of section 52(3) and accordingly informed consent is not required for the purpose of the imposition of the statutory private charges."

25. As discussed further below, the HSE also proposed a separate declaration in relation to what was described by their counsel as *"the waiverers"* or *"the waiving category of patient"*. The approach adopted by the HSE was heavily criticised by counsel for Laya and counsel for Irish Life. Counsel for Laya argued that the HSE analysis was seriously flawed insofar as it purported to propose a single test to distinguish the *"availers"* category of patients from the *"waiverers"* category. Counsel emphasised that, in the November 2021 judgment, the court had identified that there is a broad spectrum of possible situations. For that reason, counsel submitted that it is impossible to pigeonhole all patients into one category or the other. On the contrary, counsel submitted that the November 2021 judgment indicated that, at one end of the spectrum, there would be situations where it is very easy to identify an *"availer"* while, at the other end of the spectrum, it will be very clear that the patient should be classified as a *"waiverer"*. But, between those two points, there are likely to be lots of different scenarios in which it would be necessary to examine the precise factual circumstances to ascertain whether the patient should be classified as an *"availer"* or as a *"waiverer"*. Counsel for Laya highlighted that the HSE, in these proceedings, had chosen to approach the issues at the level of principle. Having taken that pragmatic decision, counsel submitted that the HSE cannot now ask the court to decide on the circumstances of individual cases without having heard the relevant evidence in relation to those individual cases.

26. With regard to the evidence of Ms. Sheehan, counsel for Laya drew attention to the summary of her evidence given in para. 45 of the November 2021 judgment and in particular to the passage quoted in para. 22 above. Counsel then highlighted what was said in para. 149 of the November 2021 judgment. In that paragraph, I indicated that, where a hospital requests a patient to avail of any applicable health insurance cover and to be admitted as a private in-patient or to consider being admitted on that basis, the hospital is *"in effect, requesting the patient to forego – or to consider forgoing – what is undoubtedly a valuable statutory entitlement"* and that I treated such a situation as a case of waiver rather than a case of availing.

27. I am of the view that the submissions made by counsel for Laya (as supported by counsel for Irish Life) are correct. For perfectly understandable reasons, the HSE chose to pursue these proceedings without involving any patients as parties. In those circumstances, it would be impossible to frame a declaration (or a series of declarations) which would reflect the broad range of circumstances that are likely to arise in practice. It seems to me that I must confine any declaration in relation to the *"availing"* category to cases where there is no doubt that a patient properly falls within that category. This is the category described in para. 118 of the judgment. As noted above, counsel for the HSE sought to argue that this category also extends to some of the patients described in para. 119 of the judgment. Counsel for the HSE described these as a second category of *"availers"*. It is true that, in that paragraph, I did suggest that some of the patients discussed therein who, on being asked whether they wished to be treated as a private or as a public patient, may reach a decided view, like those described in para. 118, that they very definitely wish to be treated on a private basis. I indicated that such patients therefore fall into the same category as those discussed in para. 118. I should clarify that, in making that observation, I was

simply seeking to identify the broad range of circumstances that may exist. I sought to draw attention to the fact that there may well be some patients who, once they know that they can be treated on a private basis, will immediately so indicate. However, in the absence of evidence of individual circumstances, it would be impossible to determine (or to declare) that all patients should be treated as within the *"availing"* category in all circumstances where, on being asked whether they wish to be treated as public or private, they indicate an intention to be treated privately for that admission. One could only make that determination by reference to the particular circumstances of an individual case. When one examines the circumstances of any individual case, one might well come to the conclusion that some of these patients should be treated in the same way as those described in para. 118 of the November 2021 judgment. However, there are also likely to be cases where, having considered the individual circumstances of the patient concerned, the court would conclude that the patient did not fall into that category. In these circumstances, it would be inappropriate to make declarations in the form sought by the HSE. For that reason, it seems to me that the appropriate declaration to be made should be based on the form proposed by Laya subject to a small adjustment to more accurately reflect what I said in the November 2021 judgement.

28. In the circumstances, it seems to me that the appropriate declaration to be made should be in the following form:-

> *"For the purposes of section 52(3) of the Health Act 1970 (as amended) a person with full eligibility or limited eligibility for inpatient services avails of like services not provided under section 52(1) of the said Act where the said person makes use of private in-patient services and decides, of his or her own volition, to be treated as a private patient."*

Declaration No. 3 proposed by Laya

29. Insofar as the concept of waiver is concerned, Laya proposes a declaration the following terms:-

> *"For the purpose of section 52(3) of the Health Act 1970 (as amended) a patient with full eligibility or limited eligibility for in-patient services waives his or her right to avail of like services not provided under section 52(1) of the said Act where the said patient, after being informed of the entitlement to be treated as a public or private patient, gives up or abandons his or her right to be treated as a public patient."*

30. The solicitors for the HSE took issue with the form of this declaration. In particular, they suggested that it does not properly reflect what was said in para. 119 of the November 2021 judgment. In their letter of 1st February 2022, the solicitors suggested that the effect of the declaration as proposed by Laya would appear to potentially place the persons discussed in para. 119 in the opposite category to that in which the court placed them. In response, the solicitors for Laya suggested that the proposed declaration is derived from the express language used in para. 118 of the judgment. In my view, the solicitors for Laya are correct in this respect. The proposed declaration accurately reflects what is said in para. 118 of the judgment. That said, this element of para. 118 of the judgment was doing no more than stating the obvious. The paragraph merely sets out the natural and ordinary meaning of the verb *"waive"*. I am not sure, therefore, that declaration no. 3, as proposed by Laya, provides any novel guidance to the parties. Nonetheless, I believe that it is appropriate to include a declaration to this effect in order to make clear that, in the context of the 1970 Act (as amended), waiver involves a relinquishment or abandonment of the right to be treated as a public patient.

Declaration No. 4 proposed by Laya

31. The fourth form of declaration proposed by Laya seeks to address the requirements of a valid waiver. It is in the following terms:-

> *"Save in cases where an eligible person actively and without prompting by a staff member employed by a public or voluntary hospital seeks to be treated as a private patient, any decision by such eligible person to waive his or her statutory entitlement under section 52 of the Health Act 1970 (as amended) to be treated as a public in-patient must be an informed one, made with knowledge of that entitlement and with knowledge of the consequences of not availing of that entitlement."*

32. Laya maintains that the language of this declaration flows from what is said in para. 151 of the November 2021 judgment. I agree that the form of declaration proposed is to a large degree consistent with the language used in that paragraph of the judgment. The only difference is that there is no reference in para. 151 to the words *"without prompting"*. Those words are used in para. 148 of the judgment. However, they are used there to describe a very clear instance where a hospital is under no obligation to make sure that a patient is aware of the availability of public in-patient services.

33. In contrast, the HSE has argued (on a similar basis to that discussed in paras. 22 to 27 above) that this form of declaration will artificially swell the *"waiverers"* category in so far as it treats all patients as *"waiverers"* unless they fall into the narrow category of those who actively seek to be treated privately. In this context, counsel for the HSE argued that the form of declaration proposed by Laya goes beyond what is contemplated in para. 149 of the judgment where I said:-

"...It seems to me that different considerations apply where the hospital requests the patient to avail of any applicable health insurance cover and to be admitted as a private in-patient or to consider being admitted on that basis. In such circumstances, the hospital is in effect, requesting the patient to forego – or to consider forgoing – what is undoubtedly a valuable statutory entitlement. Moreover, in making that request, the hospital is, in substance, acting on behalf of the HSE whose statutory duty it is to make available public in-patient services to eligible people."

34. Counsel for the HSE submitted that this suggests that what the November 2021 judgment had in mind, in terms of *"waiverers",* are solely those patients who are specifically requested to forego their statutory entitlement to public healthcare and to rely on their health insurance or to consider doing so. On the other hand, counsel for Laya has highlighted that para. 149 relates back *"squarely"* to what was said by Ms. Sheehan (as recorded in para. 45 of the judgment) as to the standard practice that should be followed by a public hospital when admitting a person as an inpatient, through the hospital's emergency department, where that patient holds private medical insurance. As outlined in para. 22 above, Ms. Sheehan gave evidence that the standard procedure is that, where a patient holds private medical insurance, the patient will be asked whether or not he or she is happy to use it and whether or not the patient would prefer to be admitted either on a public or a private basis.

35. I agree that para. 149 should be read in conjunction with para. 45. However, I also believe that para. 151 cannot be read on its own. It should be read in conjunction with para. 118 of the judgment. In para. 151, I was doing no more than contrasting the position of those patients who, of their own volition, seek to be treated on a private basis, with those patients who do not fall into that category. The use of the words

"where a patient actively seeks to be treated as a private patient" in para. 151 was not intended to add a gloss to that. Similarly, the use of the words *"without prompting"* in para. 148 was not intended to add a different category of *"availers"* over and above those identified in para. 118. In my view, it is also essential to read paras. 148 to 151 in conjunction with para. 170 of the November 2021 judgment. In the latter paragraph, I identified the conclusion to be drawn from what was said earlier in the judgment. Declaration No. 5 below coincides with that conclusion. In these circumstances, it seems to me that it is unnecessary to make a declaration in the terms quoted in para. 31 above. It is sufficient that declarations are made in the terms set out in para. 28 above and para. 36 below.

Declaration No. 5 proposed by Laya

36. The next declaration proposed by Laya is in the following terms:-

> *"Where a staff member employed by a public or voluntary hospital asks an eligible person to consider whether he or she wishes to be admitted as a public patient or as a private patient, the said eligible person should be informed of the statutory entitlement available to eligible persons and of the consequences that flow from a decision to forego that entitlement."*

37. A similar issue has been raised by the HSE in relation to this form of declaration. Again, the HSE has drawn attention to what is said in paras. 149 and 150 of the November 2021 judgment. In response, Laya has contended that the language of this proposed declaration flows from para. 170 of the November 2021 judgment where, in summarising my conclusions, I said:-

> *"I am of opinion that, in cases where a hospital asks eligible patients to consider whether they wish to be admitted on a public or a private basis, patients should be informed of the statutory entitlement available to eligible*

patients and of the consequences that flow from a decision to forego that entitlement."

38. In my view, Laya is correct in its submission. The language of declaration No. 5 flows from the conclusion stated in para. 170 of the judgment and I will therefore make a declaration in those terms.

Declaration No. 6 proposed by Laya

39. The next declaration proposed by Laya is in the following terms:-

"In cases where, during the course of on admission in a public or voluntary hospital, an eligible patient opts to avail of private in-patient services or waives his or her right to receive such services as a public patient, section 52(3) of the Health Act 1970 (as amended) does not deem the patient to be ineligible in respect of the period prior to the said person's decision to be treated privately."

40. This declaration is stated to be designed to address the conclusion reached in the November 2021 judgment with regard to the case made by the HSE in relation to the *"single episode of care"* issue. The HSE proposes a slightly different form of declaration in the following terms:-

"A declaration that, in accordance with section 52(3) and section 55 of the Health Act 1970, private in-patient hospital charges are not chargeable by the plaintiff in respect of periods of care prior to a patient's communication of a decision to be treated privately, subject at all times to a reasonable grace period."

41. In my view, the correct approach to take is to make two interrelated declarations, the first dealing with the *"single episode of care"* issue and the second dealing with the grace period. I do not think that both of these declarations can be

readily combined in the manner proposed by the HSE. At the same time, I acknowledge that the HSE is correct in submitting that the grace period requires to be addressed in the relief to be granted by the court.

42. Accordingly, I will first make a declaration in the form proposed by Laya in the terms set out in para. 39 above. In my view, that paragraph accurately records the finding in the November 2021 judgment in respect of the *"single episode of care"* argument advanced by the HSE. Next, I will make a declaration, consistent with paras. 144 to 145 and 173 of the November 2021 judgment, in the following terms (which should be inserted immediately after the declaration identified in para 39 above): *"Notwithstanding the terms of the declaration made at 5 above, the existence of a short interval in time between the moment of admission of a person as an in-patient and either (a) the communication by that person of a decision to be treated as a private patient or (b) the recording of that decision by the hospital will not prevent the patient being treated as a private patient for the duration of that interval in time where the interval can be explained by difficulties of the kind described in para. 144 of the court's judgment delivered electronically on 25th November 2021".*

Declaration No. 7 proposed by Laya

43. This proposed declaration also arises in relation to the *"single episode of care"* issue. It is in the following terms:-

> *"That per diem charges contained in the fourth schedule to the Health Act 1970 (as amended) may not be levied by the plaintiff pursuant to section 55(1) of the said Act in respect of in-patient services provided to an eligible person prior to that person being deemed under section 52(3) of the said Act not to have eligibility for such services or prior to that person having waived his or her eligibility for such services, save only for circumstances in which it is*

clear that the eligible person would have indicated, without prompting, on admission to a public or voluntary hospital an intention to be treated as a private patient had he or she been in a position to communicate such a decision."

44. The HSE, through its solicitors, has objected to this proposed declaration as an unacceptable attempt to narrow down the concept of the grace period by the *"grafting on to"* the language used in para. 144 of the November 2021 judgment the notion of *"prompting"* using language taken from para. 148. The solicitors for the HSE have highlighted that, in para. 144 of the judgment, I acknowledged that, given the dynamics of a hospital emergency department and the obvious difficulties that can occasionally arise on the ground in ascertaining or recording decisions of patients immediately on admission, it is necessary to allow a grace period. In response, the solicitors for Laya have maintained that the proposed declaration flows from para. 144 of the November 2021 judgment. They suggested that it is clear from para. 144 that what the judgment had in mind was that the grace period was referable to the *"availing"* category of patient who they categorise as the patient who *"would have voluntarily, consciously and without prompting from hospital staff, opted to be treated privately"*.

45. I do not believe that it is necessary to make a declaration in the terms proposed by Laya. In my view, the issue is already adequately addressed by declaration No. 6 above and no further elaboration is necessary.

Declaration No. 8 proposed by Laya

46. This declaration addresses the question as to whether a waiver or decision by an eligible person to be treated as a private patient should be evidenced in writing. The declaration proposed by Laya is in the following form:-

"Although as a matter of good administration a waiver or decision by an eligible person to be treated as a private patient should be evidenced in writing and should be signed by the patient, it is not required by section 52(3) of the Health Act 1970 (as amended) to be in writing and may be communicated orally, subject to the requirement that any such decision by an eligible patient made at the request of or prompted by a staff member employed by a public or voluntary hospital must be fully informed as to its meaning and effect."

47. The HSE has a difficulty with this proposed form of declaration. In the first place, the HSE submits that matters of good administration are not appropriate bases for a legal declaration. Issues in relation to good administration are better left to the parties to implement or not as they see fit. Secondly, HSE suggests that, while the first portion of the declaration reflects para. 122 of the November 2021 judgment accurately, the second portion suggests (or could potentially be argued to mean) that any time a neutral question is posed to a patient as to whether they wish to be public or private, the patient falls into the *"waiverer"* category and must give informed consent.

48. In response, the solicitors for Laya argued that the wording proposed by Laya:-

"faithfully reflects the findings made by the court. Furthermore, it is clear that the role of the PIP form was a matter of considerable debate and importance during the hearing… We believe that the inclusion of these introductory words is, therefore, appropriate and consistent with the findings made by the court."

With regard to the second objection made by the HSE, the solicitors for Laya refer to the arguments previously made on behalf of Laya in relation to declaration number 2 (above).

49. In my view, the HSE is correct in its submission that declarations to be made by the court are concerned with a clarification of the law rather than with matters of good administration. Nonetheless, it seems to me that the opening words of Laya's proposed declaration are useful as setting the context in respect of the declaration of law that follows. That said, it would be wise to modify the language to make it clear that the opening words do not purport to amount to a declaration as to the law. It also seems to me that the operative part of the declaration should be revised to make the language consistent with that proposed in respect of declaration No. 5 above and also with para. 170 of the November 2021 judgment. I would accordingly reframe this declaration as follows:

"Although it would make sense from the perspective of good administration that a waiver or decision by an eligible person to be treated as a private patient should be evidenced in writing and should be signed by the patient, it is not required by section 52(3) of the Health Act 1970 (as amended) to be in writing and may be communicated orally, subject to the requirement that any such decision by an eligible patient made at the request of a public or voluntary hospital must be fully informed as to its meaning and effect."

Declaration No. 9 proposed by Laya

50. There is no issue between the parties in relation to this declaration which is proposed in the following terms:-

> *"In the period between 1 January 2014 and 1 January 2017, there was nothing in law to prevent an eligible person from waiving his or her eligibility and,*

where such a person so waived their eligibility, the per diem levies contained in the fourth schedule of the Health Act 1970 (as amended) were chargeable on such a person pursuant to section 55(1)(a) of the said Act from 1 January 2014."

51. I will accordingly make a declaration in the terms set out in para. 50 above.

Summary of the declarations to be made

52. Having regard to the discussion above, I will make each of the declarations set out in paras. 16, 28, 29, 36, 39, 42, 49 and 50 above.

The arguments of the parties in relation to costs

53. Both sides acknowledge that, in accordance with standard principles, costs follow the event. The effect of those principles (which are examined in more detail in para. 65 below) is that the party who has succeeded in the proceedings will usually be entitled to costs. However, there is a significant dispute between the parties as to what is the relevant event for this purpose and as to the identity of the victor. There is also a dispute as to the extent of success on either side.

54. The HSE submits that, in considering the issue of costs, the relief claimed should not be the starting point; instead the court should examine the issues debated at the hearing. In this context, the HSE contends that it succeeded on two *"central issues"* in the proceedings namely (a) that the HSE is entitled to levy private in-patient charges from the date of a patient's decision to be treated on a private basis and (b) that the PIP form has no statutory basis. The HSE acknowledges that Laya has succeeded in relation to the *"single episode of care"* issue and also in relation to the requirement for informed consent in the case of those patients who waive their eligibility to be treated on a pubic basis. However, the HSE argues that these issues are of lesser importance in circumstances where *"those successes cover only a*

handful of outlier patients in the case of the episode of care issue and just a small proportion of patients who are reluctant/unsure in respect of the informed consent issue." The HSE argues that it has succeeded on the *"core issue"* namely *"whereby all patients following standard practice and communicating a decision to avail of private care on admission are liable for private charges from the date of their admission (not the signing of the PIP form)."* The HSE also contends that it has had success on the issue as to whether a hospital must ensure that *"availers"* have made an informed decision to be treated on a private basis.

55. At the conclusion of her submissions in relation to costs, counsel for the HSE suggested that, in circumstances where both parties had won on some issues but failed on others, an *"obvious outcome … is that there should be no order as to costs in the case given the significance of the issues and the difficulty in identifying precisely the nuances of the case which provide for wins on each side."*

56. In contrast, Laya maintains that the HSE should be ordered to pay Laya's costs for two principal reasons. First, Laya highlights that the HSE was plainly not entitled to maintain the claim made against Laya in the statement of claim. Secondly, Laya argues that, even if the relief sought could have been maintained against Laya, the court has determined *"each of the material issues in dispute … against the Plaintiff."*

57. In so far as the first of those reasons is concerned, counsel for Laya drew attention to para. 3 of the statement of claim which expressly alleged that Laya is obliged to discharge in-patient hospital charges incurred by its members. That claim is not consistent with the provisions of the 1970 Act (as amended) which make clear that private patients are the parties liable for the hospital charges. Counsel also drew attention to the relief claimed and, in particular, to the first paragraph of the prayer for relief which sought a declaration that Laya is liable under s. 55 of the 1970 Act (as

amended) to pay the prevailing statutory daily in-patient charges for in-patient services provided to patients insured by Laya. In its written submissions, Laya also noted that para. 2 of the prayer is couched in similar terms in so far as it seeks a declaration that, if at any point during a hospital stay, a patient elects to be treated privately, the election *"shall render the Defendant liable for the entire duration of that patient's maintenance in hospital…".* Counsel for Laya also referred to para. 3 of the prayer which sought an account of all monies *"wrongfully withheld"* by Laya. Next, counsel identified that Laya had specifically pleaded, by way of a preliminary objection, in para. 1 of its defence that it has no liability to the HSE and that, notwithstanding this plea, the HSE had reiterated, in para. 2 of its reply, that Laya is obliged to discharge the relevant statutory charges incurred by its policyholders. Counsel further stressed that, as recorded in para. 2 of the November 2021 judgment, this position on the part of the HSE was not modified until the closing submissions of its counsel when it was indicated that the declaration sought at para. 1 of the prayer for relief should be framed by reference to the liability of Laya's members rather than by reference to the liability of Laya itself. Against this backdrop, Laya contends that it is entitled to costs against the HSE on the ground that the case made against it by the HSE in the pleadings was ultimately abandoned.

58. As noted in para. 56 above, Laya also seeks its costs on the basis that the court has determined each of the material questions in the litigation against the HSE. In making this case, counsel for Laya took me through the pleadings on both sides. In so far as the statement of claim is concerned, counsel highlighted the case made by the HSE in paras. 7 to 9 which set out the basis of the *"single episode of care"* claim. He also drew attention to the way in which this claim was addressed by Laya in its defence where the case was made that, unless and until a patient either does not avail

of public in-patient services or waives the entitlement to such services, the patient does not lose eligibility under the 1970 Act. Counsel correctly argued that Laya was entirely successful on this issue.

59. Counsel for Laya next turned to the claim made in paras. 10 to 12 of the statement of claim and in particular to the claim made in para. 10 that Laya *"has and continues to seek to elevate the PIP form over the Relevant Provisions of the Health Act such that the Defendant is, unilaterally and unlawfully, refusing on a blanket basis to discharge the private in-patient charges of its customers incurred prior to the PIP form being signed."* Counsel then highlighted Laya's response to that claim as pleaded in para. 9 of the defence which he submitted shows this contention of the HSE to be groundless. In para. 9, Laya alleged that the PIP form represents *"a useful (and, to date, the only) mechanism for a hospital to demonstrate that .. a waiver has occurred and the point in time at which it has occurred …".* Counsel suggested that this chimed closely with the view expressed in the November 2021 judgment as to the utility of the PIP form. It should also be noted that, in para. 9 of its defence, Laya expressly accepted that other forms of evidence of waiver could be furnished. Counsel also referred in this context to Laya's letter to public hospitals (quoted in para. 36 of the November 2021 judgment) in which Laya offered to accept documentation or evidence other than the PIP form. The only response of the HSE, in its reply, to Laya's pleaded case in relation to the PIP form, other than the formal joinder of issue in para. 1 of the reply, was that the signing of the PIP form had the effect that the patient was deemed to be private in respect of the entire episode of care. In these circumstances, counsel for Laya argued that it was no part of Laya's case that the execution of the PIP form was a statutory requirement. Accordingly, he submitted that

it was a complete mischaracterisation to suggest that the HSE had won on the issue of the PIP form.

60. It should be noted that a further issue was raised by Laya in para. 9 of its defence – namely the contention that any waiver by a patient of the entitlement to be treated as a public patient required to be on a fully informed basis. Counsel for Laya identified that this had been contested by HSE, both in para. 7 of its reply and at the substantive hearing. Counsel submitted that Laya had been entirely successful on this issue. Counsel further submitted that, since Laya has succeeded on each of the issues that arose on the pleadings, it must be entitled to its costs of the proceedings. It was argued that the fact that the HSE may have won on *"a couple of minor points"* or *"subsidiary points"* that were argued at the substantive hearing did not make any difference. He submitted that none of those points arose on the pleadings and he argued that they could not therefore affect the outcome in so far as costs are concerned.

61. In response to Laya's submissions on costs, counsel for the HSE referred me to the transcript of Day 1 of the substantive hearing and identified that, as appears from p. 96 of the transcript, she had indicated that the principal relief sought by the HSE was the declaration sought at para. 2 of the prayer for relief rather than para. 1. In so far as relevant, para. 2 of the prayer is in the following terms: *"A declaration that in accordance with section 52(3) … where any patient insured by the Defendant elects, at any point during their stay, to be treated privately …, the said election shall render the Defendant liable for the payment of the … private in-patient charges in respect of care provided during the entire duration of that patient's maintenance in hospital from admission through to discharge."* It will be seen that, in common with the declaration sought at para. 1 of the prayer, this declaration also sought to make

Laya directly liable to the HSE in respect of the private in-patient charges which, as a matter of law, are the responsibility of the patient under the 1970 Act (as amended). However, counsel for the HSE submitted that, on Day 1 of the substantive hearing, she had accepted that the relief claimed at para. 2 was incomplete and that she had made clear that she was not *"urging"* the court to make the declaration sought at para. 1. For completeness, it should be noted that p. 96 of the transcript of Day 1 records counsel as saying that the declaration sought at para. 1 of the prayer *"is perhaps a little incomplete"* and that *"there's perhaps a supplement required to the declaration at 1."* I cannot find any specific reference to para. 2 being incomplete but it is clear from the transcript that para. 2 was identified as the principal declaratory relief sought. Furthermore, the transcript, at p. 95, records that counsel for the HSE said that *"we can come back to this in due course if needs be"* which may perhaps be read as an implicit acknowledgement that the language of para. 2 might have to be adjusted.

62. Counsel for the HSE also submitted that the terms of para. 2 captured not only the *"single episode of care"* issue but also *"the availing limb, which we say we've won on, because the Court has acknowledged that there is a self-standing category of availers and that's a category in respect of whom informed consent is not required."* It may well have been the intention that the relief claimed in para. 2 was intended to extend to both issues but that is not clear from the terms of that paragraph. There is no doubt that it covers the *"single episode of care"* issue but I am less certain that one could conclude that it also covers the availing issue. Nonetheless, in light of the approach taken by me below, I do not believe that it is necessary to reach any concluded view on the issue.

63. The next point made by counsel for the HSE was that it has always been clear to both sides that these proceedings *"would give rise to some form of declaratory*

relief, which might need to be calibrated" in light of the judgment of the court in relation to the interpretation of ss. 52 and 55 of the 1970 Act. Counsel urged that, notwithstanding the case made in its defence that there was no cause of action against Laya, it was nonetheless recognised on Laya's side that some form of declaratory relief would be appropriate. She referred in this context to what had been said by counsel for Laya on Day 5 of the hearing where, at p. 73, he had indicated that he would return at the end of his submissions to *"address the reliefs ... sought by the HSE and why I say that the HSE is not entitled to the reliefs* ***in the form in which they are actually sought*** *..."* (emphasis added). Counsel for the HSE also referred to what was said by counsel for Laya at the end of his submissions on Day 6 of the hearing when he observed, at p. 72, that *"the most the court can be asked to do ... is to give a decision on the issues that have been raised on the proper interpretation of sections 55 and 52, but it can't go any further than that in granting any relief which would have the effect of requiring Laya to pay any sums to any person ... Indeed, it's one point of agreement ... that the court is not being asked here to decide the liability to charges in any individual case. And it is simply not possible for the HSE to be granted the relief in the very broad and sweeping form in which it is sought in paragraphs 1 and 2 of the prayer for relief."*

64. In light of the approach taken by Laya at the substantive hearing, counsel for the HSE argued that the court should have regard to the issues actually argued rather than the specific terms of relief sought in the statement of claim. Counsel acknowledged that Laya had won on the *"single episode of care"* issue. It is also the case that Laya succeeded on the need for a waiver to be given on an informed basis. However, counsel for the HSE submitted that it was wrong to suggest that Laya's position in relation to the PIP form was quite as straightforward as had been submitted

by counsel for Laya (as summarised in para. 59 above). She drew attention to the way in which Laya had unilaterally refused to meet any claim in respect of a period prior to 24 hours before the date of execution of the PIP form. Counsel emphasised that, as found in the November 2021 judgment, the operative date in respect of the cessation of eligibility is the date of the patient's decision, not the date of execution of the PIP form. In my view, there is some substance to this point. While it is the case that, prior to the institution of the proceedings, Laya had accepted that the PIP form is not a statutory requirement, Laya had not been prepared to accept a *"grace period"* of any more than 24 hours prior to the date of execution of the PIP form. That would not be justified in any case where the decision of the patient to be treated on a private basis was made at an earlier time. That said, Laya would need to be informed of the date of any relevant decision by a patient.

Decision on costs

65. There is no dispute between the parties as to the principles to be applied in relation to costs. Those principles have now been encapsulated in statutory form in ss. 168 and 169 of the Legal Services Regulation Act 2015 (*"the 2015 Act"*) and very helpful guidance is also to be found in the judgment of Murray J. in *Chubb European Group v. The Health Insurance Authority* [2020] IECA 183. For present purposes, I do not believe that it is necessary to set out all of the principles that could potentially apply. It is sufficient to note that, in broad terms, the effect of the 2015 Act is that, while the court continues to have a discretion in relation to costs, it must have regard to the provisions of s. 169(1) of the 2015 Act. This means that, unless the conduct of the parties or the particular nature and circumstances of the case would justify the court in taking a different view, the default position is that the party who has been *"entirely successful"* in the proceedings should be entitled to the costs of the

proceedings. In addition, as Murray J. explained in *Chubb,* even where a party has not been entirely successful in the proceedings, the court may make an award of costs under s. 168(2)(d) in respect of those elements of the proceedings on which the party has succeeded.

66. In light of the principles summarised in para. 65 above, it will be necessary to consider the extent to which the HSE and Laya can respectively be said to have achieved success in the proceedings. Before addressing the question of success or failure, I should first deal with a number of discrete features of the proceedings that, in my view, require individual consideration in the context of costs:

(a) As Laya has emphasised, the case pleaded by the HSE in the statement of claim and the reply was plainly unsustainable in the way in which it sought to make Laya directly liable to the HSE in respect of hospital charges which, by statute, are payable by the patient. That case was plainly wrong. It should never have been advanced. Accordingly, it is clear that, irrespective of the other issues that fall to be considered in respect of costs, there could be no plausible basis on which the HSE could be awarded any costs in respect of its pleadings. It is equally clear that, irrespective of the outcome on any other issue, Laya must be entitled, on the usual party and party basis, to all of its costs of raising particulars of the statement of claim, instructing counsel in respect of the preparation of the defence, the fees of counsel in drafting and settling the defence and the cost of any consultations that may have been necessary for the purposes of considering the statement of claim or the reply;

(b) As outlined above, Laya submits that it must be entitled to the costs of the proceedings on the basis that the case pleaded was ultimately abandoned on

the final day of the substantive hearing. In many cases, an award of costs might well be justified in such circumstances. However, I have come to the conclusion that it would be wrong to take that approach in the particular circumstances of these proceedings. It is true that the HSE abandoned the contention made in its pleadings that Laya had a direct liability to it in respect of the private in-patient charges in issue. But, that did not alter the fact that all of the issues of statutory interpretation (that are now the subject of the declarations made above) remained in dispute between the parties and required to be resolved in order to bring what is, regrettably, a long running controversy between the parties to an end. There was little or no debate at the substantive hearing on the abandoned issue as to Laya's liability. In their written and oral submissions, counsel for the parties concentrated their fire on the other issues of statutory interpretation. The importance of resolving those issues is also underlined by the fact that Irish Life sought to be heard (and was heard) in the proceedings and that it was prepared to do so on the basis that it would bear its own costs. For the record, it should also be noted that the HSE was not the only party who made submissions that went beyond the scope of the pleadings. As outlined further in para. 67 below, Laya also went beyond the case pleaded by it. In this context, para. 9(ii) of its defence gives the impression that its case on informed consent was directed at the *"waiving"* category of patient but, at the substantive hearing, the case made by counsel was that informed consent was also required for the *"availing"* category.

(c) The third feature of the proceedings that requires consideration is that, as noted in para. 42 of the November 2021 judgment, much of the evidence

given at the substantive hearing was irrelevant to the legal issues that required to be resolved. As outlined above, the issues which required to be resolved by the court were concerned with statutory interpretation. None of the evidence called by the parties was of assistance other than the evidence in relation to the process of admission of patients to public hospitals as described by Ms. Byrne and Ms. Sheehan on behalf of the HSE and the evidence of the two witnesses called by Laya (as summarised in paras. 52 to 54 of the November 2021 judgment) both of whom addressed their own experience (or that of a relation) of being asked to execute the PIP form. I cannot see any proper basis on which the other witnesses were called in a case relating to statutory construction which is, of course, an interpretative process to be undertaken by the court with the assistance of legal submissions by the parties' lawyers and a very limited range of other materials. I raised the issue as to the utility and admissibility of the evidence on several occasions during the course of the substantive hearing. In particular, I raised it at the end of Day 1 of the hearing and I reiterated my concerns in the course of Day 2. In my view, the following evidence was of no assistance to the issues to be decided: (i) the evidence from 12.42 p.m. on Day 2 until 4.15 p.m. on that day, (ii) the entire evidence on Day 3, (iii) the evidence from 11.00 a.m. to 12 noon on Day 4 and the evidence from 12.22 p.m. on the same day to the close of that day's hearing. In broad terms, that equates to two days of the 6-day substantive hearing. In my view, no costs should be allowed to either side in relation to these two days. Nor should either side be entitled to any of its costs in respect of any witnesses other than Ms. Byrne, Ms. Sheehan and the two witnesses called

by Laya mentioned above. In this context, s. 169(1)(c) of the 2015 Act expressly recognises that, in considering how costs should be awarded, the court is entitled to take into account the manner in which the parties conducted all or any part of their case. As a consequence of the calling of unnecessary evidence by both sides, two days of valuable court time were wasted. That time could have put to very good use by the court in hearing another case or in judgment writing or in case preparation for the next matter to be heard. Parties and their legal representatives should be conscious of the extensive demands on court time. Hearing time is a scarce and precious commodity which is not to be wasted on irrelevant material. The 2015 Act envisages that only those costs which are reasonably incurred should be recoverable. In my view, there is no basis on which it could conceivably be said that the costs of two days of the substantive hearing fulfil that fundamental criterion. At the hearing in relation to costs, counsel for Laya sought to attribute blame to the HSE for the calling of unnecessary witnesses. He suggested that Laya had no alternative but to respond to the case made by the HSE. At first sight that might appear to be a plausible contention. However, it does not withstand scrutiny. It is important to keep in mind that these are case managed proceedings where directions from the court can be obtained at any stage of the proceedings. Where a party is faced with witness statements which contain manifestly irrelevant or inadmissible material which the proffering party has failed or refused to withdraw, the appropriate course to adopt is to request the registrar to list the matter before the court for directions. These issues should be addressed in advance of a trial so that valuable court time is not wasted at the trial.

(d) The fourth feature which requires consideration is the hearing in relation to the form of relief to be granted and in relation to costs. That hearing required written submissions and lasted half a day. However, the bulk of the written and oral submissions were directed at the form of the order rather than costs. It is clear from the submissions on all sides that there was genuine concern to ensure that the form of declarations to be included in the draft order should reflect the findings of the court. In those very particular circumstances, I believe that it would be wrong that either side should be visited with a costs order in relation to the hearing as to the form of relief to be granted. Furthermore, given that the arguments as to costs occupied so little space at that hearing, I am of the view that there should be no order as to costs in relation to that issue either.

67. As outlined above, the 2015 Act envisages that the successful party should be entitled to costs but, where a party is only partially successful, s. 168(2)(d) contemplates that recovery may be limited to those elements of the proceedings on which the party has achieved success. In this case, it seems to me that both the HSE and Laya have been partially successful in relation to certain of the issues debated at the hearing. That said, I believe that it is clear that Laya has had a greater degree of success than the HSE. Laya has wholly succeeded on the *"single episode of care"* issue. It has also succeeded on the issue of informed consent in so far as patients' waivers are concerned. However, at the substantive hearing, counsel for Laya went further and argued that informed consent was also required for any election by a patient to be treated on a private basis. Notwithstanding the terms of para. 9(ii) of Laya's defence (which gave the impression that the informed consent issue was raised in respect of any waiver of the right of be treated as a public patient), counsel

submitted that the requirement of informed consent was not confined to *"waiverers"* but also applied to *"availers"*. This is clear, for example, from Laya's submissions on Day 5 at p. 134 and on Day 6 at pp. 24 to 30. Counsel for Laya also opened an extensive range of case law in support of this proposition which he described on Day 5, at p. 134, as *"a significant point of difference"* between himself and counsel for the HSE. The HSE was successful on that element of the informed consent issue.

68. Counsel for the HSE has argued that the HSE was successful in relation to the status of the PIP form. I do not believe that it is correct to characterise either party as the victor on that issue. Whatever difference there may have been between the parties in the past in relation to the PIP form, it became clear from the pleadings and the submissions made that there is no longer any significant controversy between the parties in relation to its status. It was also submitted that the HSE had achieved success in so far as the November 2021 judgment suggests that a *"grace period"* should not necessarily be confined to a 24-hour period between the date of admission and the date of communication of a decision by a patient to be treated as a private patient. In my view, that submission is correct but it has to be said that this was not an issue that occupied very much time at the substantive hearing. I would characterise it as a subsidiary issue rather than a core issue. Nonetheless, it must be kept in mind in assessing the degrees of success on either side.

69. As noted in para. 67 above, it seems to me that Laya has achieved a greater degree of success than the HSE. In broad terms, I would estimate that Laya has been successful in relation to two thirds of the issues which required to be determined while the HSE has been successful on one third of the issues. When those elements of success on either side are set off one against the other, the result is that, save in respect of that element of its costs described in para. 66(a) above (in respect of which

Laya should have 100% of its party and party costs), Laya should be entitled to one third of its party and party costs against the HSE on the basis of a 4-day hearing but excluding (i) any costs relating to any witnesses other than Ms. Byrne, Ms. Sheehan and the two Laya witnesses mentioned in para. 66(c) above and (ii) any costs relating to either the submissions or the hearing as to the form of the relief to be granted and as to the costs of the proceedings. I will direct that Laya's costs should be adjudicated in the event that the parties are unable to agree them.

Next steps

70. The parties should now liaise with each other in order to agree the form of the order to be made on foot of this judgment. That order should include each of the declarations identified in para. 52 above and the order for costs outlined in para. 69 above. Once agreed, the form of order should be submitted electronically to the registrar. There is liberty to apply in the event that there is any disagreement in relation to the form of the order.