

**THE HIGH COURT
COMMERCIAL**

[2021] IEHC 242

Record No: 2020/5180P

BETWEEN:

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

PLAINTIFFS

-AND-

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Tony Hunt delivered on 19 March 2021

1. This judgment concerns the resolution of pre-trial discovery applications brought by the plaintiffs against the defendant, and vice versa. Both applications were heard remotely on 12 February 2021. This action is a consequence of the ongoing Covid-19 pandemic. The first plaintiff is the parent company of the Mater Private Group, which is well-known as the operator of various private medical facilities within the State. The second plaintiff is a private unlimited company and is the operator of the Mater Private Hospital, Dublin. The third plaintiff is a private company limited by shares incorporated in the Isle of Man and is the operator of the Mater Private Hospital, Cork. The fourth plaintiff is a private unlimited company and is the operator of the Limerick Radiotherapy Centre. The defendant is a public statutory body established to manage and deliver health and personal social services to persons within the State. For convenience, I will refer to the plaintiffs as "Mater Private" and to the defendant as "HSE".
2. As the early stages of the pandemic unfolded in March 2020, it became quickly apparent that this would place considerable pressure on HSE in the discharge of its statutory responsibilities, by reason of the additional requirements for health services by patients suffering from Covid-19, and the consequent effect of such requirements on the public capacity to meet the demand for non-Covid-19 medical services. To deal with the urgent and unprecedented situation, HSE opened negotiations with the proprietors of private health facilities (including Mater Private) to secure access for public patients to the medical capacities of private facilities to address the emergency presented by the new pandemic.
3. On 3 April 2020, Mater Private and HSE entered a binding agreement referred to as the "Heads of Terms" ("the agreement"), whereby Mater Private made available to HSE certain services and facilities as described in the agreement, on the terms and conditions set out in that document. The agreement envisaged that further final agreements would be entered thereafter. In the event, no such further agreements arose, and the legal relationship between the parties for the purposes of this dispute is governed by the terms of the agreement of 3 April 2020.
4. The arrangements contemplated by the agreement were put in place thereafter. The "Common Purpose" of the agreement is set out at Clause 1.3. This was to provide common access to services in the facilities of Mater Private whereby all patients would be

eligible for treatment as public patients for the duration of the agreement, which was planned to be the following three months.

5. HSE made an initial payment to Mater Private under the scheme of the agreement in respect of services provided by Mater Private immediately after the agreement went into effect in April 2020. A further payment was scheduled to be made by HSE to Mater Private under the agreement mechanisms on 19 June 2020. It is common case that no payment was made by HSE on that date. Mater Private issued these proceedings in July 2020.
6. Mater Private claims that this payment was withheld by HSE without reason, justification or excuse, in clear breach of the obligations due by HSE to Mater Private under the agreement. The sum claimed by Mater Private in the proceedings is €6,629,000, comprised of the week 4 payment for June 2020 in the amount of €4,614,000, and the May 2020 "balancing payment" of €2,015,000. HSE pleads that, for the various reasons set out in the defence, this sum was not properly due and owing by HSE to Mater Private under the terms of the agreement, and it denies liability to Mater Private for the sum claimed.
7. It seems to me that resolution of this dispute will revolve around an analysis of the services, if any, provided by Mater Private to HSE under the arrangements contemplated by the agreement, and an interpretation and/or application of the contractual terms to calculate the liability, if any, of HSE to Mater Private arising from the agreement. It is not necessary to engage in great detail with the provisions of the agreement for present purposes, but it is worth mentioning the provisions that appear to be most relevant to the dispute between the parties.
8. Clause 2.1 provided that Mater Private would make available to 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 ("the service"). In return, HSE agreed to 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 (the "open book basis"), defined in the agreement as "the costs", subject to an assessment and verification process not yet documented at the time of the agreement.
9. Clause 5 dealt with "funding and costs", and the interpretation and application of this clause will be the primary focus of the trial. HSE committed to reimburse Mater Private for the "operational costs" of providing the service at the relevant hospitals. These operational costs were set out in the general headings in Schedule 2 to the agreement and were stated to be subject to further finalisation. This clause specified that operational costs were those "actually incurred" by the providers on the "open book" accounting basis, as those terms are defined in the agreement. Schedule 2 referred to operating costs, rent, finance costs, use of infrastructure and decommissioning costs, and offered further definitions or illustrations of these items.

10. Clause 5 then provided a general mechanism for the assessment and payment of costs during the initial three-month term of the agreement. This involved Mater Private furnishing an estimate of expected costs for specified periods, followed by payment by HSE of a percentage of the estimate to provide adequate cash flow to Mater Private. This process was accompanied by rolling balancing and final assessment procedures. The disputed payment was withheld by HSE from Mater Private in June 2020 in the course of those procedures. Clause 6 of the agreement provided for a separate and confidential assessment, verification and validation procedure relating to the operational costs payable under the agreement.
11. The applicant in each motion must show that the discovery that they seek is necessary for disposing fairly of the cause or matter or for saving costs, and that the documents requested must be relevant to the matters in issue. Consequently, the documents sought must be relevant to the matters in issue between the parties. At this stage of the proceedings, relevance is determined by reference to the pleadings. Relevance means that the documents may (not must) directly or indirectly enable the requesting party to advance his own case or to damage the case of his adversary. Moreover, it must now also be established that the discovery request is proportional in the circumstances of the individual case.

The Mater Private motion

12. This application is for discovery of the following categories of document by HSE:-
 - a) Category 1, relating to the requests by Mater Private for reimbursement of funding costs under the agreement during the relevant period (including for the avoidance of doubt, all documents relating to the funding costs so claimed and HSE's consideration of same).
 - b) Category 2, relating to the requests by Mater Private for reimbursement of use of infrastructure costs during the relevant period (including, for the avoidance of doubt, all documents relating to the use of infrastructure costs so claimed and HSE's consideration of same).
 - c) Category 3, relating to documents to/from specific custodians within HSE (e.g. Chief Executive Officer, Chief Financial Officer, Director of Acute Operations) as set out at Appendix A to the request regarding the cost of the arrangement with Mater Private under the agreement during the relevant period.
 - d) Category 4, relating to the information provided by Mater Private to HSE pursuant to the agreement, to include weekly costs estimates, weekly provided costs statements, monthly actual provided costs statements, including any requests for information from HSE and the responses to same.
 - e) Category 5, relating to the decision by HSE to withhold the payment of €6.629 million on 19 June 2020.

13. In summary, Nessa Cahill SC (of the Inner Bar) submitted on behalf of Mater Private that:-
- a) Discovery of these categories of document was both relevant and necessary to the matters in issue in the proceedings,
 - b) It was necessary to have sight of all documents internal to the HSE in relation to the consideration of Mater Private's application for reimbursement of the interest costs relevant to the proceedings,
 - c) Mater Private needed to know whether the current stance of the HSE was the same as that adopted by that organisation in relation to the decisions taken regarding non-payment in June 2020,
 - d) It was necessary for Mater Private "to know what was going on" in the HSE prior to the decision of 19 June,
 - e) The same rationale was applicable to the discovery request relating to reimbursement for use of infrastructure costs,
 - f) Category 3 was sought because Mater Private was concerned about the rationale for the decisions taken by HSE on 19 June, and was entitled to "test, understand and present their case as to what happened around that time",
 - g) Category 4 arose on the basis of a factual dispute in the case as to the adequacy of the information provided by Mater Private to HSE and Mater Private wanted to understand the internal assessment by HSE of the information provided by Mater Private,
 - h) Category 5 was also required in order to provide insight or "get to the bottom of the decision that was taken on 19 June".
14. On behalf of HSE, Michael Cush SC (of the Inner Bar) submitted that, in relation to Categories 1 to 3 inclusive, the key to the resolution of the dispute between the parties lay in construction by the court of the relevant terms of the agreement by reference to the standard principles of contractual construction as explained in the relevant authorities. In that context, the subjective beliefs of the parties regarding the meaning of the clause are irrelevant. In that regard, he relied upon extracts from the judgment of Hogan J. in the decision of the Court of Appeal in *Point Village Development Ltd. (in receivership) -v- Dunnes Stores* [2017] IECA 159.
15. As to Category 4, and the "information dispute", Mr. Cush submitted that whilst there was a factual dispute on that issue between the parties, it was not a real issue in the proceedings because no plea by either party now rested on resolution of the adequacy of information provided. Discovery of documents was therefore not necessary to determination of the real issues between the parties. As to Category 5, Mr. Cush referred to a letter from the HSE to Mater Private of 19 June 2020, the date when it was decided

that the disputed payment would not be made. He submitted that this letter did, in fact, set out the reasons of HSE for non-payment. In summary, that letter stated:-

- "A. Interest costs had been claimed which did not relate to the ongoing operation of the hospitals.
 - B. The fundamental and overriding basis of the heads of terms was that any payments must relate to costs actually incurred in the provision of relevant services.
 - C. Interest costs claimed relating to a loan provided by Oval Healthcare Infrastructure SARL were, in the view of the HSE, acquisition-related and did not relate to the ongoing operation of the hospitals.
 - D. On the information available to the HSE at that time, no interest payments had been made on that loan since the inception date in July 2018.
 - E. Mater Private had not provided adequate information in relation to financing arrangements".
16. Mr. Cush submitted that whether the complaint about lack of adequate information in that letter was correct or not, that issue had, in effect, been superseded by the ultimate decision not to pay the amount now in dispute in the proceedings. His overall position was that the question of right or wrong in this case was now a matter of objective assessment by the trial judge. In that case, the subjective reasons or internal processes of the HSE leading to the decision not to pay were irrelevant to the determination of whether that decision was in breach of contract, and to the consequent liability of HSE (if any) on foot of the relevant provisions of the agreement. Accordingly, the discovery sought was neither relevant nor necessary in the sense required by the Rules and the relevant authorities.

The HSE motion

17. This application is for discovery of the following categories of document by Mater Private:-

- A. Category 1 relating to: -
 - (ii) Disbursement of Related Company Facility funds;
 - (iii) Statements of flow of funds derived from the Related Company Facility as part of the acquisition of the Mater Group;
 - (iv) Use of the funds from the Related Company Facility in connection with the acquisition of the Mater Private Group;
 - (v) Use of the funds from the Related Company Facility in connection with refinancing existing debt within the Mater Group at the time of acquisition.
- B. Category 2 relating to: -
 - (i) The funds flow statement from purchaser to seller as part of the acquisition transaction;
 - (ii) The acquisition agreement(s);

(iii) The closing debt position of the (Mater Private) prior to acquisition.

C. Category 3 relating to the following matters concerning the syndicated loan:-

(ii) Disbursement of the Syndicated Loan;

(iii) Statements of flow of funds from the Syndicated Loan;

(iv) Use of the funds from the Syndicated Loan in connection with the acquisition of the Mater Private Group;

(v) Use of the funds from the Syndicated Loan in connection with refinancing existing debt within the Mater Group at the time of acquisition, and

(vi) Use of the funds from the Syndicated Loan by (Mater Private) for the ongoing operational costs of the Mater Group.

18. Mr. Cush submitted that:-

- a) The HSE motion was directed to the underlying facts relating to the disputed costs and not to the interpretation of the agreement, and that the request for discovery was specific in its terms,
- b) A profit element to interest costs or acquisition costs or interest thereon would not be recoverable on the interpretation of the agreement advanced by HSE in the pleadings. This raised the question of the nature and extent of the existing debt of Mater Private,
- c) There was at least a possibility that some level of recoverable debt had arisen under the agreement, but the position of HSE is that it has insufficient insight into the underlying financial arrangements of Mater Private to assess what might be properly payable under the agreement,
- d) The information currently to hand did not allow HSE to assess what proportion of the debt referred to pure acquisition and what proportion referred to refinancing, and within refinancing debt, what proportion was attributable to working capital,
- e) Various interrogatories and particulars delivered in order to ascertain these matters, but the responses to the interrogatories delivered had not yielded sufficiently detailed information to allow HSE to make an effective assessment of its liability, if any, under the agreement.
- f) Mater Private was perfectly entitled to construct legitimate structures for profit extraction and tax planning. The concern of the HSE is that the agreement limited recovery to actual costs incurred by Mater Private within the definitions within the agreement,
- g) It was in that context that relevance of and necessity for the requested documents arose.

19. In response, Ms. Cahill submitted that:-

- a) The application by HSE for discovery was not based on the pleadings, in that none of the financial matters raised by HSE were set out therein. Insofar as they were raised in interrogatories, these were not “pleadings” for the purpose of assessing the relevance of a discovery request,
- b) The limits of the case are that HSE took a unilateral decision on 19 June 2020 on the basis of the information available to them, and they, in effect, now had to stand over that decision on whatever basis it was reached at that time,
- c) A dispute resolution process within the agreement would, if it had been invoked, have involved a process of scrutiny by qualified accountants. If further information were required in June 2020, HSE had mechanisms available to it to secure that information before deciding to withhold payment,
- d) Having adopted the course of action that it did in June 2020, HSE was now confined to arguing a point of legal interpretation of the contract, and to reliance upon the facts known to them at that time,
- e) As these financial issues were outside the pleadings, HSE had not established either the relevance or the necessity of the documents sought,
- f) Mater Private had concerns regarding the confidentiality of the material sought, and a higher onus lay on HSE to demonstrate the necessity and relevance of such documentation.

Decision

20. Having considered the submissions of the parties in relation to both motions, I am satisfied that the position of the HSE is correct in relation to both applications. As to the Mater Private motion, I am satisfied that the material sought does not satisfy the tests of relevance or necessity. The central issue of relevance in these proceedings is whether HSE breached the terms of the agreement by the refusal on 19 June 2020 to pay any further sum to Mater Private pursuant to the agreement. Resolution of that issue may require interpretation of the terms of the agreement (although the incorporation of those terms is not an issue) and then the application of the contractual terms as interpreted to the underlying facts, which are manifestly in dispute at this stage.
21. Generally speaking, in assessing whether there is an agreement, or whether an agreement has been breached, the common law of contract adopts an objective stance. Consequently, evidence of what a party subjectively believed a contractual term to mean is irrelevant. Equally, the subjective belief of a party as to the existence or otherwise of a breach of contract is also irrelevant. The objective principle is illustrated by the facts of the *Point Village Development* case referred to above. The discovery sought in that case was refused because it was held to be irrelevant to the issue of the construction of the contract in question. In particular, Hogan J. emphasised that the construction of that contract would not be dependent on the beliefs of third parties regarding the meaning of the clause in issue.

22. The purpose of the discovery sought by Mater Private in this case seems to me to be principally directed to illumination of the processes and reasoning of HSE in reaching the decision of 19 June 2020. This was a constant theme of Ms. Cahill's submissions at the hearing. I am not convinced that knowledge of those matters is relevant in any way to the construction by the Court of the terms of the agreement, or as to how the terms as interpreted apply to any underlying facts established as of the time of that decision. The process leading to, or reasons behind that decision will not assist the trial judge in determining whether the decision not to pay is objectively justified by reference to the facts and the terms of the agreement. The opinions or views of HSE officials, the completeness or otherwise of the information upon which those views were based, or the process by which the decision not to pay was reached have no bearing on whether the decision not to pay was legally justified or not.
23. The substantive issue in the proceedings is whether the claim by Mater Private to recover costs is within the ambit of the agreement. HSE cannot defend the claim by reference to whether it was correct in the belief that that Mater Private was in breach of contract. Equally, Mater Private cannot prove the claim by reference to the beliefs or actions of HSE or its staff or officials. Mater Private must establish that the facts of the claim lie within the terms of the contractual relationship, and that breach of a contractual obligation entitles it to a decree. I do not see that the actions or omissions of HSE in its internal processes are of any relevance to proof of breach of agreement. Therefore, the discovery sought is not required for fair disposal of the action or for the saving of costs.
24. In any event, I am satisfied that the subsequent exchanges of correspondence and pleadings have made the reasons for non-payment by HSE sufficiently clear. I also accept that whilst the "information issue" arises on the pleadings, the question of whether HSE had sufficient information in June 2020 to evaluate the situation is now irrelevant to whether that decision was legally and contractually sound, and to ultimate issue of what damages, if any, may be recovered by Mater Private. Nothing of substance now rests on resolution of that issue.
25. As to the HSE motion, I am satisfied that it has established the requisite relevance and necessity for the information sought. The defence of HSE raises the issue as to what services were actually supplied, and whether the costs submitted by Mater Private in respect of those services fall within the domain of costs recoverable under the terms of the agreement. It seems to me that the crux of this case is that while HSE has a relatively clear picture of the general financial architecture of Mater Private, it does not have a sufficient understanding of the everyday financial operations carried out within that architecture to properly contextualise the provisions of the agreement, and to assess potential liability to Mater Private by application of the terms of the agreement to those quotidian operations.
26. So far as the primary objection of Mater Private to the HSE application is concerned, I am satisfied that the discovery sought does in fact relate to matters raised in the pleadings. Para. 7 of the defence pleads as follows: -

"It was an express and fundamental term of the agreement between the parties that 'the common purpose does not envisage a commercial or economic benefit or profit beyond the Costs'" (Clause 5.11). The Costs recoverable in accordance with the heads of terms strictly exclude the recovery of any costs by the plaintiffs or any of them beyond "the operational costs of the Providers providing the Service at the Relevant Hospital" (Clause 2.1).

27. Para. 8 of the defence pleads as follows: -

"The not for profit nature of the heads of terms was expressed in the following terms at Clause 5.1 of the heads of terms: -

'HSE shall pay the Consideration (€10) only to the Providers and shall reimburse for the operational costs, under the general heading set out in Schedule 2 (which the parties acknowledge are subject to finalisation in the Final Agreements) of providing the Service at the Relevant Hospitals which costs are actually incurred by the Providers ('Costs') on a cost only and Open Book Basis'". [emphasis added]

28. Para. 9 of the defence pleads as follows: -

"It follows from the foregoing express provisions in the heads of terms that in order for any cost to become properly subject to reimbursement in accordance with the Heads of Terms, three qualifying criteria need to be met as follows:

- (i) The cost must arise from the provision to (HSE) of full hospital capacity and services, including total bed capacity, facilities, diagnostics, staffing, management and full organisational capability;*
- (ii) The cost must be an operational cost; and*
- (iii) The cost must be actually incurred.*

In the event that a cost claimed under the Heads of Terms does not meet each of the 3 qualifying criteria set out above, the cost does not fall to be reimbursed by (HSE)."

29. Para. 11 of the defence denies that Mater Private complied with their obligations under the agreement, including providing the Service, the information required and the Weekly Costs Estimate and Weekly Provider Costs statements, or details of the costs incurred on an open book basis as required by Clause 2.1 of the agreement. It pleads various correspondence and events in that regard. Under the heading "The Disallowable Costs", paras. 13 to 21 then set out an extensive plea as to why HSE believes that certain costs claimed by Mater Private are not recoverable under the agreement. These pleas specifically refer to depreciation and interest costs, and to the Related Company Facility referred to in the HSE letter of 19 June 2020 mentioned above. The reply and defence to

counterclaim denies the relevance of these matters, or that Mater Private has claimed in excess of entitlements under the agreement.

30. Based on these pleadings, and without reference to the interrogatories, I am satisfied that the documents sought by HSE are relevant and necessary for both HSE and the trial judge to properly evaluate the claims and counter-claims of the parties in this case, and the request for discovery by HSE is drafted in line with the issues as pleaded and recited above. No proper evaluation of these claims would be possible without sight of all documents pertinent to the analysis of costs claimed and the definitions of costs covered by the agreement. Furthermore, although it is not strictly speaking a relevant consideration, in practical terms I believe that the discovery sought will bring clarity to the issues and the underlying facts, and is likely to narrow the issues in dispute, if not precipitate resolution of the suit.
31. I will finally deal with the balance of the arguments advanced by Ms. Cahill against ordering discovery against Mater Private. As the question of whether HSE has breached the agreement will be resolved by an objective application of the terms of the agreement as interpreted by the court to the facts established by the evidence, I do not accept the proposition that HSE is confined in defence of the claim to reliance on the facts and information available to it at the time it made the decision of 19 June 2020. It is true that the agreement contained mechanisms that would have enabled HSE to seek further information at that time.
32. However, neither party relied on those provisions in June 2020, and Mater Private instead invoked the jurisdiction of this Court in July 2020. HSE has taken no issue with that step, and also wishes to have the liability of HSE, if any, determined by this litigation: see para. 20 of the defence. I am satisfied that the possible availability of information through mechanisms in the agreement has been superseded by the issue of these proceedings and the subsequent exchanges between the parties in that context. The refusal to pay by HSE may be right, wrong or partly right and partly wrong, and Mr. Cush conceded that all of these outcomes are possible. Mater Private is now on proof as plaintiff of the liability of HSE to pay on foot of the agreement. The Court cannot reach a just and proper conclusion on that issue based on what might have been an incomplete set of information available to HSE in June 2020. Consequently, I believe that discovery by Mater Private is necessary for the fair disposition of this action.
33. Ms. Cahill also raised concerns as to the confidentiality of the information sought by HSE. I fully appreciate that the HSE discovery request touches upon financial information that Mater Private might prefer not to have placed in the public realm. I am also conscious that Mater Private entered the agreement as a public-spirited gesture at a time of national emergency. However, at least part of the public-spirited nature of the agreement is reflected by the limits on recoverable costs defined by the agreement. HSE suspects that the sum claimed by Mater Private is either wholly or partly outside the terms of the agreement and cannot make a proper assessment of this without sight of the requested documents.

34. On the basis of information available at the moment, I am satisfied of the immediate relevance of the potentially confidential documents, and I do not see that this is a case for the modified discovery process outlined by Clarke C.J. at para. 7.13 of his judgment in *Tobin -v- Minister for Defence* [2019] IESC 57. Whilst I accept the necessity for discovery in the ordinary course in these circumstances, I remain prepared to consider specific representations as to methods by which commercially sensitive information could be presented or handled after delivery of the affidavit of discovery. Obviously the documents must only be used by HSE for the purpose of the litigation, but further protections may be possible without compromising the proper use of the discovered documents.
35. I therefore propose to make the following orders:-
- a) On the HSE motion, discovery by Mater Private in the terms scheduled to the written submissions of HSE on that motion,
 - b) On the Mater Private motion, refusal of the discovery sought.
36. On costs, my initial proposal is that the costs of HSE on both motions should be reserved to the trial judge, with no order for the costs of Mater Private on either motion. If requested, I will hear the parties further on the question of costs, and on any final details or alternatives to the orders proposed. Finally, and in passing, it seems to me that on conclusion of the discovery process the parties ought to consider whether this is a case that would benefit from some mechanism for alternative dispute resolution.