MEMO REGARDING LEGAL DOCUMENTS
PUBLISHED ON NATIONAL MATERNITY HOSPITAL

The following are certain brief observations on the legal documents published by the HSE regarding arrangements in respect of the proposed National Maternity Hospital (NMH). Any observations are subject to the significant caveat, that they are based on limited time to consider the documents and so do not purport to express definitive views on the matter.

1. **Lease and Permitted Use**

A key element to the benefit of the Lease in favour of the HSE is that the NMH is only carried out for the purposes of the "permitted use".

Thus under Clause 4 the demise for 299 years and yearly rent of €10 per annum is conditional on, *inter alia*,

> *(c) there is no change to the Permitted Use without the consent of the Landlord;*
>
> *(d) the Premises is actively used, throughout the Premises, for the provision of public health services save for any reasonable period of non-use due to repair reinstatement or other bona fide reason that means the Premises cannot be used temporarily for the Permitted Use*

Also under Clause 5.10 the HSE covenants;

> *(a) to use the Premises, once constructed, for the Permitted Use;*
>
> *(e) to operate the Premises for the Permitted Use in a manner that does not materially inhibit or interfere with the Landlords operation of the Existing Hospital or use of the Retained Premises or St. Vincent's Private Hospital.*

Clause 5.10 provides that the HSE;

> *covenants not without the prior consent in writing of the Landlord (such consent not to be unreasonably withheld or delayed) to use or to permit or suffer or allow the Premises or any part or parts thereof to be used for any purpose other than the Permitted Use and at all times to carry on the Permitted Use to a high quality standard and tone so as to protect the standing appearance and prosperity of the Campus as a whole and the operation of the Existing Hospital and the Retained Premises*.

Clause 5.27 concerns remedies open to the SVHG for breaches, stating

The Tenant acknowledges that where the Tenant is in breach of a covenant in this Lease that the Landlord may avail of such legal remedies available to it in seeking to compel the Tenant to remedy such breaches, to prevent an ongoing breach or to recover damages for losses arising from such breaches

Clause 7 allows for determination of the lease and re-entry by SVHG.

It states that notwithstanding and without prejudice to any other remedies and powers in this Lease or otherwise available to the Landlord, if:

(c) there is a change to the Permitted Use without the consent of the Landlord;

then and in any of the said cases it shall be lawful for the Landlord at any time thereafter to re-enter the Premises in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to any right of action or remedy of any party in respect of any antecedent breach of another party's covenants in this Lease.

In practical terms all of the above means that in the event of HSE being considered to have breached the covenant concerning the permitted use, this could result in the determination of the lease.

The meaning of *"permitted use*" is therefore crucial.

Clause 1 defines permitted use as follows:

in relation to the National Maternity Hospital Area as a public hospital primarily for the provision of all clinically appropriate and legally permissible healthcare services, including research, by a maternity, gynaecology, obstetrics and neonatal hospital, and a range of related health services in the community and any other public healthcare service or services;

in relation to the Landlords Area and the Landlords Shared Area for the provision of public health facilities for the Existing Hospital and services ancillary thereto and for no other purpose;

provided always that the Permitted Use does not preclude the provision of any private healthcare services relating to the above uses which are permitted or envisaged by the public consultants contracts

The underlined portion of the above definition is the most important element of the same, and it can be said that it is somewhat vague and generic.

Also it raises a number of questions:

(1) Insofar as it refers to all clinically "*appropriate*" services, this raises the question of "appropriate" according to whom? It does not say, as it could have said, all clinically appropriate services *as determined by the HSE*. It therefore leaves open the question of potential dispute between SVHG and HSE as to whether a matter is "*appropriate*".

(2) The phrase *"…clinically appropriate and legally permissible healthcare services"*, is itself not defined and this phase would appear to implicitly include ethical considerations and which could extend to matters of religious ethos.

(3) As the phrase itself entirely lacks specifics, a clear option which would have been open to drafters of this document would have been to specify the types of services and procedures which would be encompassed by the same. A clause could have been inserted for the avoidance of doubt which might have allayed certain concerns such as stating as following:

"For the avoidance of doubt, clinically appropriate and legally permissible healthcare services may include the termination of pregnancy, sterilisation, etc"

The above would not in itself dispel all concerns as it could still be said that notwithstanding the specific listing of the same, that it was never appropriate or that in any particular case, SVHG could claim that it was not appropriate to carrying out a termination of pregnancy, etc.

2. **Ownership of the Building**

The terms of the 299 lease are that it is a demise of all "*premises*", which is defined in the First Schedule 1 of the lease as follows:

> *ALL THAT part of the Campus being the property shown on Plan No. 2 and thereon edged red* ***together with any buildings erected or to be erected thereon*** *and together with all additions alterations and improvements from time to time thereto or thereon. Excluding the airspace above the height of (insert measurement2) and the subsoil beneath the Premises*.

The "National Maternity Hospital" is defined as:

means that part of the Premises to be used by the Tenant and nominees of the Tenant pursuant to the Operating Licence for the Permitted Use and shown coloured [•] on plan numbers [•] annexed hereto and which area is described in the Occupational Licence as the "NMH Areas

Clause 5.2 relates to a Building Covenant concerning the National Maternity Hospital and it states:

(a) to use reasonable endeavours to commence construction of the National Maternity Hospital on the Premises within 3 years (or such longer period as the parties shall agree) from the date hereof;
(b) once commenced to use reasonable endeavours to proceed with all reasonable speed to complete construction in a good substantial and workmanlike manner with good quality materials, in accordance with the Planning Permission and all relevant planning permissions, consents and approvals and the conditions set out in the Sixth Schedule within 5 years from commencement of the works (or such longer period as the parties agree);
(c) to equip the National Maternity Hospital on the Premises and commission all necessary equipment substantially as per the specification annexed to the Seventh Schedule;
(d) grant the Operating Licence on completion of the construction of the National Maternity Hospital;
and (e) operate or procure the operation of the National Maternity Hospital as a public hospital in accordance with the provisions of this Lease.

It would seem on a preliminary consideration of the Lease and the specific terms of the First Schedule, that SVHG owns the National Maternity Hospital building to be erected on the premises. This seems to follow from the words underlined above relating to the building to be erected where it says ***"together with any buildings erected or to be erected thereon"*** which would appear to include the National Maternity Hospital. I have to say I am surprised to find that it would appear that the State and HSE will not own the building itself. It has been repeatedly represented that only the land and not the building will be owned by SVHG. As I have only conducted only preliminary consideration of the papers, I cannot exclude the fact that I might have missed some matter. However, on the face of it would appear to me that the SVHG and not the HSE will own the National Maternity Hospital building.

The consequences of this are potentially very significant. For if there is a breach of covenant of the lease by the HSE and the lease is determined, both the lands and building will entirely revert to the SVHG unencumbered by any Lease. This would mean that the SVHG would have the benefit of the massive State investment in building the hospital.

3. Operating Agreement and Co-ordination Agreement

Also included in the legal documents published is an operating agreement and a co-ordination agreement. Both of these documents effectively endorses the arrangements contained in the Mulvey report. For example in the Operating Agreement it is stated at Recital E

> *The Mulvey Agreement contained a set of principles in respect of the development of the Hospital Facility, agreed to by the parties thereto and endorsed by the Minister for Health on behalf of the State which principles are, inter alia, designed to preserve the autonomy of the NMH in clinical and operational matters. One of the core protections of the Mulvey Agreement for NMH was a set of reserved powers to the NMH to include that of "protected use" of the NMH Areas, as set out in the Mulvey Agreement and as defined and exercisable in the manner set out in this Agreement.*

It also refers to a facility operations agreement (which has not yet available or a draft):

> *"Facility Operations Agreement" the agreement to be entered into before the commencement of the operation of the Hospital Facility between NMH and SVHG in a form satisfactory to the HSE and the Minister for Health to address the use and operation of the Shared Areas by NMH and SVHG in a manner consistent with the Mulvey Agreement, the form of which shall be as set out in the Schedule to this Agreement or such other form as the HSE, NMH, SVHG and Minister for Health may approve in writing;*

The co-ordination agreement also endorses the Mulvey Report.

As was set out in my original Opinion, there is a lack of clear justification and explanation for the reason as to why St Vincent's whether in the form of a new company or otherwise, wishes to retain ownership of the lands. The Mulvey Report refers to considerations that for operational reasons, St Vincent's had to retain control of the overall campus as it might jeoparise some of the existing services. However, this has never been clearly explained and would not appear to be valid. It is quite clear that if this is the rationale then the same logic might apply to the security of services being provided at the NMH. Those services are sought to be secured under operating licences and other arrangements. It would seem to me that the Sisters of Charity could have transferred ownership on condition that a further arrangement would be entered into to secure the services of the existing St Vincent's Hospital. Thus alternative arrangements could be arrived at without the retention of ownership.

4. Constitution of SVHG

I have not had sight of the Constitution of this company. It is noted that while the Constitution of the NMH at Elm Park DAC refers to carrying out services without religious ethos or ethnic or other distinction, it is unclear whether there is a similar phrase contained in the constitution of the SVHG.

The Articles of Association of the NMH at Elm Park DAC state that the first subscribers to the company are the SVHG and also the Minister (Clause 2.1.2).

Clause 3.1.2 states: *SVHG shall hold the 99 Ordinary Shares.*

Clause 3.1.3 states: *The Minister shall hold the 1 Golden Share on behalf of his office.*

The effect of the above, is notwithstanding the Golden Share held by the Minister, the company is owned by the SVHG.

5. Further Observations

It is noted that certain representatives for the NMH have sought to argue the issue of ownership that it does not matter. Analogies have been drawn with apartment blocks and other buildings, that Apartment owners may not own the underlying lands. This is patently not a proper comparator. Apartment ground leases are not dealing with sensitive matters of State healthcare services. Moreover, they would not include sensitive and ambiguous clauses such as permitted uses as were outlined above with the particular reference to "appropriate" clinical service.

The reality is that Minister Donnelly in proceeding with the NMH deal without owning the lands and it would also appear not owning the hospital building itself, and is thereby acting contrary to the recommendations of Independent Review Group, which was established by the predecessor of Minister Donnelly.

Section 6.3.3 of that Report stated:

> *While each case of amalgamation or co-location of services is unique, we feel that some useful lessons could be drawn for the future from recent examples. For example, since*

the State is likely to be the main funder of both buildings and the services provided in any new case of amalgamation or co-location, we recommend that the State should always seek to own the land on which future hospitals or facilities will be built. The State can buy new greenfield sites or purchase sites from existing owners or receive land and buildings as donations. This would cost the Exchequer more than in the past but would leave the State free to determine the ethos, guiding principles and governance of any future organisation.

STEPHEN DODD SC

10th May 2022