

Chapter 46

Protecting the State's Property Interest

Vote 40 Health Service Executive

Protecting the State's Property Interest

46.1 Under the Health Act 2004, the Health Service Executive (HSE) may enter into agreements with hospitals in the voluntary sector to deliver services on its behalf. It may also provide funding to those hospitals, including capital funding for approved developments such as the construction of new buildings and the upgrading and expansion of existing structures.

46.2 The St Vincent's Healthcare Group³⁷³ (SVHG) provides public and private health care, primarily from its campus at Elm Park in Dublin. Up to and including 2009, the State, through the Department of Health and Children (the Department) and the HSE has provided approximately €200 million by way of capital funding to SVHG for redevelopment and refurbishment at the hospital campus.

Chapter Focus

This chapter examines the extent to which the State's property interests are being protected in relation to the capital funding provided to SVHG. The focus of the review was on the HSE procedures and relates solely to its financial responsibilities.

Pledging of State Funded Assets

46.3 In November 2010, SVHG opened a new private hospital on the Elm Park campus. Responding to my enquiries in relation to that matter, the HSE reported that, over a number of years, publicly-funded assets had been used as security by SVHG in return for facilities from commercial banks. The Accounting Officer stated that those arrangements included

- security granted in favour of Ulster Bank in 2002 by a subsidiary company of SVHG over a car park on the public campus, with a floating charge on the subsidiary company's assets
- a mortgage debenture granted over certain property at the Elm Park site to Bank of Ireland in respect of the new private hospital
- a mortgage of certain property at the Elm Park site, granted by SVHG in favour of Bank of Ireland in 2009
- a mortgage debenture in favour of Bank of Ireland in October 2010 including
 - a fixed charge over the entire St Vincent's Hospital site
 - a floating charge over all of the undertaking, property and assets of SVHG both present and future.

³⁷³ SVHG is a not for profit, voluntary group of hospitals and has charitable status. SVHG is made up of three entities; St Vincent's University Hospital, St Vincent's Private Hospital and St Michael's Hospital, Dún Laoghaire.

Security for State Investment

46.4 In response to my enquiries as to whether the SVHG had provided security to the State in respect of the funding by the HSE for past capital development of public health facilities, the Accounting Officer informed me that it had recently put in place formal agreements with SVHG in respect of a development of the new ward block (NWB) on the hospital campus. The HSE agreed to provide capital funding of approximately €29 million for the NWB project.

46.5 The Accounting Officer informed me that the HSE had initially sought to put an option agreement in place that would have entitled it to buy in the entire publicly-funded facilities in the event of, *inter alia*, the failure by SVHG to provide public health services at the facilities. However, during the course of negotiations, it had become clear that SVHG could not grant the required option because part of the publicly-funded facilities had already been charged in favour of the Bank of Ireland and Ulster Bank.

46.6 Furthermore, the Accounting Officer told me it had become clear because of commitments already made by SVHG to 'tax investors' in the private hospital on the SVHG campus that, during the lifetime of that investment, SVHG could not grant the HSE a security interest over publicly funded facilities nor a negative pledge not to dispose of any interest in the lands on which they were sited.

46.7 The agreements subsequently put in place between the HSE and SVHG for the funding of the NWB project included

- A grant agreement setting out specific obligations for SVHG to enable it to draw down the HSE funding. It also made provisions in respect of the medical services to be provided on the site.
- An option agreement over the site of the NWB entitles the HSE, in certain circumstances including SVHG becoming insolvent, to buy the property at a purchase price based on the open market value.³⁷⁴ SVHG is also obliged to provide public health services at the NWB for 50 years from the date of the last provision of capital funding from the HSE in respect of the development.

Deed of Covenant

46.8 In addition, the Accounting Officer informed me that a deed of covenant in respect of previously funded public facilities on the SVHG campus had been put in place. This created an obligation on SVHG to use those facilities as a public hospital and for the provision of public health services there. In the event of a breach by the group of those obligations, the deed of covenant gives the HSE a right of legal action for specific performance.

46.9 The Accounting Officer has told me that the deed of covenant now in place provides less security for the HSE than would otherwise have been available had SVHG not granted security or provided commitments in respect of those facilities to Bank of Ireland and 'tax investors' in respect of the development of the private hospital at Elm Park.

³⁷⁴ The market value of the property is the estimated amount for which the property would sell, but disregarding the value of any buildings or other structures erected on or under the property.

Priority of Security

46.10 I asked the Accounting Officer to confirm which security would have priority should the SVHG discontinue healthcare on the campus. He informed me that, arising from competing security interests, in particular the Bank of Ireland mortgage debenture, the option agreement over the NWB and the deed of covenant, a side agreement was entered into in October 2010 by the HSE, the Bank and SVHG. He noted that there would need to be an event that triggered the calling in of the pledges given to either party i.e. the Bank or the HSE. In the case of the Bank, such an event might be a failure of the SVHG to repay some or all of the finance advanced by the Bank for the development of the private hospital. On the other hand, a failure by SVHG to provide public health facilities on the campus would be a trigger for the HSE.

46.11 In the case of the NWB, the arrangements provide that if a precipitating event occurs, the HSE can, within three months of notification of that event, exercise the option of acquiring the property at the market value. If it does so, the Bank will release its security over the property on payment by the HSE of the purchase price in full to the Bank. If the HSE does not exercise the option to purchase the property within the timeframe, that right falls. This arrangement will stay in place until the full Bank of Ireland debt is discharged by SVHG.

Security for Previous Investments

46.12 In regard to previous State-funded property, the arrangements provide that the Bank of Ireland would offer the footprint of the public facilities in question to the HSE for sale at the market value at the date of the precipitating event. The HSE would have 45 days from receipt of this offer to accept and to proceed with the purchase. The Accounting Officer has reported that the HSE could purchase immediately or in instalments over 36 months, taking immediate possession of the facilities in either case. On payment of the full purchase price, the Bank would release its security over the facilities.

46.13 If the HSE did not exercise its right to purchase within 45 days of the offer being made by the Bank, its rights would fall away as would the deed of covenant restricting the use of those lands and facilities as a public hospital.

46.14 The Accounting Officer also reported to me that when the Bank's debt to fund the private hospital venture had been discharged (by SVHG or by purchase of the facilities by the HSE), and the tax life of the private investment in the private hospital had expired (around 2024), a replacement deed of covenant over the previously-funded public facilities will be put in place. This will include a negative pledge restricting SVHG's ability to grant or dispose of any interest or secure the previously funded facilities without the HSE's consent. In addition, should a precipitating event occur after that time, the HSE would be able to purchase the NWB and the previously funded public facilities without time restriction in either case. However, the HSE would not have a 'right to purchase option' and there might be other parties interested in acquiring the facilities at that time.

Arrangements in Other Cases

46.15 In view of the experience in this instance and the possibility of other private sector charges existing over publicly funded assets, I asked the Accounting Officer to provide me with details of the security arrangements, including liens, in place in the other voluntary hospitals that had received public funding in the previous ten years. The HSE has informed me that it asked for declarations from the Chief Executive Officers of voluntary hospitals in that regard. By 15 July 2011, 11 responses had been received, including that of SVHG. At that stage, no further liens in favour of third parties including financial institutions had emerged.

46.16 The HSE informed me that since 2009, it has regularised the process of providing grants to non-statutory agencies through its financial regulations. The new process provides that, for grants in excess of €200,000, the State's interest will be protected through a standard integrated service level agreement and deed of charge document. The State's interest in the funded assets will remain in perpetuity.

46.17 The service level agreement and deed of charge document will require the funded body to confirm that the works have been completed and have been properly certified by a competent person as well as the proposed use of the facility, compliance with HSE requirements, the disposal or assignment of the land, buildings or facilities in question, and include certain clawback/termination provisions. The funded body is also required to include the assets on its balance sheet with a note of the HSE's interest in the asset. The deed of charge must also be shown as a contingent liability on the body's balance sheet.

Conclusion

Sixteen voluntary hospitals and a number of other health services providers are effectively integrated into the public health care system. However, these entities function as arms-length bodies with their own legal status and with capacity to transact business in accordance with their own constitutional arrangements. Considerable public resources are provided to them for the provision of public health services and the construction and maintenance of related facilities as required.

SVHG has pledged publicly-funded assets in return for bank finance for the development of its private hospital.

The situation illustrates a hazard that attaches to the provision of services through fully subvented or near fully subvented private institutions. Their freedom to pursue their other objectives may be exercised in a way which does not protect the State's financial interest. Consequently, it is important that security be taken by the State for the capital funds it provides. Otherwise, further costs may accrue to the State in circumstances where the bank's security is enforced.