



## **THE COURT OF APPEAL**

**Record Number: 2023/90**  
**High Court Record Number: 2021 408 JR**  
**Neutral Citation Number [2024] IECA 197**

**Butler J.**

**Meenan J.**

**O'Moore J.**

**BETWEEN/**

**SERE HOLDINGS LIMITED**

**APPELLANT**

**-AND-**

**HEALTH SERVICE EXECUTIVE**

**RESPONDENT**

**-AND-**

**IAS MEDICAL LIMITED**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 29th day of July 2024**

1. In November 2020, a request for tender (RFT) was published on behalf of the respondent (the HSE) seeking the provision of emergency air ambulance services. The appellant (SERE) was one of the tenderers. It failed to secure the contract, which was awarded to the notice party (IAS). In these proceedings, SERE challenges the award of the

contract to IAS. While a number of grounds of challenge were initially agitated by SERE, ultimately only one remains. That arises from a term in the RFT which requires that tenderers have: -

*“Turnover relating to specific product(s)/service(s) - minimum of €4,000,000 per annum on each of the last three years.”*

2. This requirement is contained in the qualitative selection criteria of the RFT. SERE asserts that IAS did not meet that criterion, and should therefore have been excluded from the contest. For the sake of completeness, it should be indicated that the contract between the HSE and IES was executed on the 26<sup>th</sup> April, 2021, and that these proceedings began on the 29<sup>th</sup> April, 2021. That same day, a letter of no little interest was sent by the solicitors for the HSE to SERE’s then solicitors. I will return to the contents of that letter shortly.

3. At the hearing of the appeal, it was common case that IAS did not meet the turnover requirement unless the *“specific services”* included the unaccompanied transport of organs harvested for the purpose of transplant. This was made admirably clear by counsel for the HSE, in response to a question from the court, where he confirmed that IAS needed to count turnover in respect of patient transport and organ retrieval teams and organ only transport *“to get over the line...”*. In his judgment, the trial judge (Twomey J.) found that the relevant tenderers would *“uniformly interpret the tender documentation in this way, i.e. that the transport of organs, and the transport of organ retrieval teams, is part of the tender service, whether a core service or an ancillary service”*; para. 47 of the judgment.

4. The parties are agreed on the legal principles which apply to the interpretation of the tender documents. In particular, the parties agree that the interpretation of the tender documents is a matter for the court, to be carried out in a manner which gives effect to the core principles of equal treatment and transparency - Finlay Geoghegan J. in *Gaswise*

*Limited v Dublin City Council* [2014] 3 IR 1 at para. 16. In interpreting the relevant documentation, the court seeks to put itself in the place of “*a reasonably well informed and normally diligent tenderer would be responding to this particular ITT and should not do so as a lawyer*”; *Gaswise* at para. 23, as endorsed by Hogan J. in *Word Perfect Translations Services Limited v Minister for Public Expenditure and Reform* [2018] IECA 156 at para. 23 and McDonald J. in *Sanofi Aventis Ireland Limited v HSE* [2018] IEHC 566 at paras. 163 and 164. The approach to be adopted by the court is authoritatively set out by O’Donnell J (as he was at the time) in *Word Perfect Translation v Minister for Public Expenditure* [2021] 1 I.R. 698 at paragraph 39;

“ 39. The question of interpretation of the request for tender is a matter of law for the court. Remembering however that this is not an exercise in statutory interpretation, and that a request for a tender must be understood in the context of the relevant industry involved. The court in *Gaswise*...observed at para 23, p. 11 that the court “should attempt to put itself in the shoes of a reasonably well informed and normally diligent tenderer who would be responding to this particular [invitation to tender] i.e. a person providing the relevant gas services, and should not do so as a lawyer”. As Barniville J emphasised in *Transcore v The National Roads Authority* [2018] IEHC 569, at para. 191, “the court must focus on the INDUSTRY concerned in which the professionals and persons involved are not lawyers but participants in that industry” (emphasis in original).”

5. The essential difference between the parties, both in the High Court and in this court, was how the relevant documentation was to be properly interpreted. There was also a difference about the relevance of the evidence led by the parties on the question of interpretation. I will therefore begin by describing the evidence.

6. There are a limited amount of relevant tender documents. Given the importance of this documentation, it may be helpful to describe this before setting out the relevant affidavit evidence.

7. The request for tender is, as I have already noted, headed “*Emergency Air Ambulance Service*” The tender description reads: -

“The HSE requires an emergency air ambulance service to transfer patients (both in-patients and at home-based patients) between Ireland and other countries mainly the UK. Emergency ambulance services and inter-hospital transfers both inside and outside of Ireland are in general provided by the Irish Air Corps and the Irish Coastguard Services under existing arrangements. However, due to specific constraints both the Irish Air Corps and the Irish Coastguard Services are unable to provide emergency air ambulance services each night between the hours of 7pm and 7.30am (7pm to 8.30am June, July and August).

The requirements of the transfer, via air ambulance, of patients from Ireland to another jurisdiction, often in emergency situations. The entire provision of the service would be the remit of the service provider i.e., staffing, equipment, etc.

Scope - The provider(s) would provide the air ambulance transport to/from identified airport in Ireland to an airport in another jurisdiction namely the UK.

This tender process has been undertaken to establish the single provider of emergency air ambulance services from 7pm to 7.30am daily (7pm to 8.30am June, July and August).

The services required from 1<sup>st</sup> June 2021 for a period of 24 months with the option to extend for a further 2 x 12 months or period thereof at the discretion of the HSE.

The aircraft may also be required from time to time on a similar emergency basis to transport organ retrieval teams from one hospital to another.”

8. The RFT then goes on, under the heading “*CBV Code(s)/Description(s)*” to refer to six different types of service as follows: -

“Hire of aircraft with crew;  
  
aircraft operation services;  
  
ambulance services;  
  
health services;  
  
miscellaneous health services.”

9. Despite the fact that the relevant codes and descriptions were relied upon both in the affidavit evidence of the HSE and in submissions, it remains unclear as to exactly what relevance the insertion of those codes has to whether or not the “*specific services*” included the transfer of organs on their own.

10. The RFT includes, under the heading “*specification of requirement*” the following HSE requirements: -

“The purpose of this competition is to identify a suitable provider to provide emergency air ambulance transfers between Ireland and other countries mainly the UK between the hours of 7pm to 7.30am nightly (7pm to 8.30am June, July and August).

The aircraft may also be required from time to time in a similar emergency basis to transport organ retrieval teams from one hospital to another.

The provider who provides a most economically advantageous tender for the provision of the core service (7pm to 7.30am, 7pm to 8.30am June, July and August) will be awarded the tender subject to the provider's availability to provide same within a specified time frame and an ability to demonstrate capability of providing the service."

**11.** Finally, the RFT further requires, under the heading "*Overall Minimum Requirements for Award*" the following: -

"The ability to provide a quality of service.

Within the necessary times frames and

with suitably qualified personnel and equipment".

**12.** In a specification response document, the HSE defined a Priority 1 Transfer. The summary of the definition reads as follows: -

"The transfer by air from Ireland to another country within eight hours (from time of notification to NAOC to time of arrival at receiving facility) of a patient requiring emergent medical or surgical treatment, without which the patients life or health is significantly endangered."

**13.** The definition is elaborated upon over in excess of a page of text. That elaboration includes the following: -

"By definition Priority 1 transfers are emergencies. In terms of complexity there will be three broad categories:

1. Walking, home based non-complex.

2. Ward based low complexity.
3. Critically ill, HDU/PSEU based complex.

Groups 2 and 3 require HSE teams and HSE equipment. Group 1 is essentially patient escort.”

**14.** The elaboration upon this definition concludes: -

“Please note that the aircraft may also be required from time to time in a similar emergency basis to transport organ retrieval teams from one hospital to another. The requirement to facilitate organ retrieval is also considered a Priority 1 mission but patient Priority 1 missions take precedence over organ retrieval missions. If the situation were to arise where two missions, one of patient Priority 1 and one organ retrieval were received at the same time the HSE will instruct the Provider on which mission takes precedence.”

**15.** The reference to “*organ retrieval missions*” in the penultimate sentence, and to “*organ retrieval mission*” in the final sentence featured heavily in an important passage in the submissions of counsel for the HSE, in the overall case made by the HSE, and in the judgment.

**16.** The final document in which the HSE provided information about the services which it required the successful tenderer to supply is a response (published on the eTendes portal) to a request for clarification, in which a tenderer asked: -

“Could you please provide historical flight data for the past two - three years? Any data would ideally give the following:

Number of flights

Time of flight

Departure/arrival airports

Category of patient transfer

Medical cover on board.”

**17.** The HSE provided a list of Priority 1 missions from 2018 to 2020. In respect of seven of these the annotation “*no cover*” was given. This was under the heading “*Med Cover*”.

**18.** In his first of three affidavits, Mr. Peter Roberts (Director of IES) gave evidence (at para. 22) to this effect: -

“The response refers to a number of flights referring to organs and under the heading ‘medical cover’ it states ‘no cover’. I understand this to be an instance of a ‘organ only’ flight i.e., the transportation of an organ alone. A copy of the query in response to be found at Tab 2 of the booklet. This query in response is published on the eTenders portal and therefore accessible to all interested parties, including SERE and IES. The response provided by the HSE confirmed IES’ existing understanding that the emergency air ambulance services required by the HSE include the transportation of transplant patients and organ transport.”

**19.** In the fourth of his six affidavits, Mr. Stanley Edgar (Director of SERE) contested this evidence on the part of Mr. Roberts and stated (at para. 29): -

“It is not clear from this table what exactly is meant by the phrase ‘no cover’ and whether this means that no medical cover was supplied by the HSE itself.”



**20.** IAS played no part in the appeal. Notwithstanding this, neither SERE nor the HSE suggested that the evidence provided by IAS should be disregarded for the purpose of the appeal hearing. However, counsel for the HSE made it clear that the HSE was not standing over Mr. Roberts' construction of the meaning of the table published on the eTenders portal. There is therefore no evidence that relevant historical flight data for the period 2018 to 2020 included flights in which organs were transported on their own. Indeed, even without that concession by the HSE, the interpretation placed by Mr. Roberts on the document appears strained. Where the phrase "*no cover*" appears under the heading "*medical cover*" that would suggest that there was simply no medical cover provided on the mission.

**21.** It will immediately be seen that in none of the documentation generated by the HSE during the tender process, including the RFT, is there any express statement that the successful tenderer will be obliged to carry organs on their own, sometimes (as will be seen) as cargo.

**22.** In a letter of the 13<sup>th</sup> of April 2021, the then solicitors for Sere contended (among other things) that IAS had failed to meet the qualitative selection criteria contained in the RFT. The HSE's response to this basic proposition was, to put it neutrally, inconsistent. In the letter of the 29<sup>th</sup> April, 2021, the HSE's solicitors had stated: -

“There was no specific requirement defined relating to an identifiable revenue stream other than the overall turnover of the applicants and accordingly there are no grounds for the Awarding Authority to seek to eliminate the successful tender on the basis of the financial standard.”

**23.** As I have already noted, this letter was sent after the award of the contract to IAS. It was presumably sent on the instructions of the HSE. It is completely wrong. The "*specific requirement*" which the solicitors for the HSE denied having existed was plainly in the RFT,

and the existence of this criterion has not been denied during the course of these proceedings. It is noteworthy that the HSE appears to have given instructions to its solicitors that this requirement did not exist. The fact it did so after the contract was awarded could well have led to a contention that the requirement was overlooked by the HSE during the tender process, but that is not a case currently advanced by SERE. This letter overlooks the plain terms of the tender documents.

**24.** In her first affidavit (of five) Ms. Siobhan Dunphy (of the HSE) exhibits this correspondence but makes no effort to explain how it was allowed to be issued. Ms. Dunphy's defence of the HSE's position accepts the existence of the requirement with regard to turnover in the specific products and services, but goes on to state (on at least two occasions) that exactly what the specific services involved are for the purpose of his criterion "*was not defined anywhere in the RFT*"; para. 25 of the affidavit, with the same point broadly repeated at para. 53 of the affidavit. In fact, Ms. Dunphy does not give a comprehensive definition as to what constitutes "specific services" in the context of this turnover requirement. She goes on (at para. 54): -

"54. I say that it is clear from the RFT that organ transport might also be included. Further, and is outlined above, the CPV clause referred to general ambulance services also."

**25.** I have already dealt with the second of these contentions. The first of these contentions - that organ transport alone is to be found in the RFT - is one to which counsel for the HSE returned at the hearing of the appeal.

**26.** At p. 74 of the DAR Transcript, counsel stated that: -

“The HSE’s view is that you are contractually obliged ... to transport organs ... which are needed for transplant.”

Unsurprisingly, counsel was then asked where this obligation was to be found in the documents. In replying, counsel very clearly emphasised the phrase ‘to facilitate organ retrieval’.

**27.** Counsel then referred expressly to the specification document which I have described at paras. 12 onwards of this judgment. Counsel went through that document in detail, emphasising the reference to “*facilitating organ retrieval*” and to “*an organ retrieval mission*”. It is fair to say that this is the final position taken by the HSE on this critical point. It echoes, at least to some extent, the evidence of Ms. Dunphy. On the basis of the tender documents, and the position of the HSE as summarised by their counsel at the conclusion of his speech on the appeal, the HSE is inviting the court to come to the view that the RWIND Tenderer would have concluded from the tender documents (namely the reference to organ retrieval missions) that the transport of organs on their own is something which the successful tenderer would have been contractually obliged to carry out. According to counsel for the HSE, this is not confined to organs harvested by the organ retrieval teams whose transport is specifically required by the tender documents. Rather, the HSE maintains that the successful tenderer is also obliged to transport organs harvested by local clinicians in hospitals or clinics in Ireland or the United Kingdom.

**28.** I will now summarise the relevant evidence to be found in the affidavits filed on behalf of SERE, the HSE and IAS. A total of 18 different affidavits, accompanied by two volumes of exhibits, were filed in the High Court. One of these (the fifth affidavit of Siobhan Dunphy for the HSE) related solely to the question of costs. That means that 17 affidavits were delivered on the substantive issues in the case. While there were more propositions in

dispute in the High Court than is the case in this court, it is difficult to believe that it was really necessary to deliver 17 affidavits in order to set out the relevant evidence in these proceedings. In addition, while many of the affidavits contradict each other, no notice to cross examine was served in respect of the disputed evidence. This fact alone would suggest that much of the evidence (and much of the differences in the affidavits) were not in fact relevant or material. This impression is fortified by the fact that at no time in the appeal did either side suggest that, arising from the burden of proof, a dispute in the evidence accrued to that side's benefit. As I have already noted, some relevant matters - such as the HSE's explanation as to how its solicitors maintained an impossible position with regard to the relevant turnover requirement - are ignored while other matters, of considerably less relevance, are elaborated upon in no little detail.

**29.** The evidence begins with Mr. Edgar's first affidavit, on behalf of SERE. He refers to the turnover requirement with regard to specific services, and it goes on (at para. 14): -

“I say that this was clearly a reference to turnover on the provision of air ambulance services, which were the specific services at issue, and was so understood by me and the Applicant.”

He goes on to say that IAS did not meet this requirement.

**30.** In his second affidavit, Mr. Edgar exhibits the letter from the HSE's solicitors of the 29<sup>th</sup> April, 2021.

**31.** In her first affidavit, Ms. Dunphy (on behalf of the HSE) set out the terms of the tender. At para. 12, she reiterates the portions of the RFT setting out the scope of the tender. At paras. 29 to 32 of her first affidavit, Ms. Dunphy describes certain responses by SERE to the

specification response document. I have already identified her evidence at paras. 52 to 54 of the affidavit. Paragraph 55 states: -

“Accordingly, it would have been clear to any reasonably well informed and normally diligent tenderer that ‘*specific product/services*’ was not limited exclusively to air ambulance services.”

She goes on to refer at para. 56 to SERE’s references to ground ambulance transfer times in the course of their response to the specification response document. However, on the central issue of whether organ transplant is included the furthest that Ms. Dunphy goes is at para. 54 of her affidavit (already recited in this judgment). On the question of what exactly is involved in the “*specific services*” for which a minimum turnover must be shown, Ms. Dunphy is not categorical. She does not set out what is actually included under that heading in any comprehensive or detailed way. Indeed, as I have already stated, she seems to emphasise the lack of any definition of this phrase. That is hardly something that reflects well on the HSE, as the commercial entity responsible for the drafting and putting forward of the tender documents.

**32.** In his third affidavit, Mr. Edgar picks up on this point. At para. 18 of this affidavit he swears: -

“It appears that the HSE’s position now is that the stated criterion was vague or unclear or that its meaning was unknown. This is not the case ... However, I also say and believe and am advised that the HSE is not entitled, in defending these proceedings, to rely upon an alleged lack of clarity, ambiguity or absence of meaning in the criteria on which it itself adopted.”

33. The argument that the tender process must fail because of some ambiguity in the tender document is something to which I will return at the conclusion of the judgment.

34. It is of some interest that, in this affidavit, Mr. Edgar gives evidence of the fact that SERE did not satisfy the €4,000,000 turnover for air ambulance services - as he defines the requirement - through its own activities, and therefore partnered with another provider in order to satisfy the turnover requirement. He goes on (at para. 14 of the third affidavit) to state: -

“Had we been tendering without a partner, we would in fact have been able to submit a tender which was below the lowest offer of €8.3M, as stated in the Contract Award Notice issued by the HSE ... Consequently, we would have obtained a much higher score in relation to the pricing criterion and the overall outcome of the tender would have been very different.”

35. In his first affidavit, Mr. Roberts on behalf of IAS deals with the meaning of “*turnover in relation to specific products/services*” at para. 16 onwards. At para. 17 he states: -

“17. The ‘*specific products/services*’ the subject of the RFT are those relevant to the services required to be provided under the proposed contract the subject of the RFT. It was the understanding of IAS that those services comprised the provision of emergency air ambulance services.”

36. At paragraph 20 he says: -

“It was also apparent from the RFT that the emergency air ambulance services to be provided under the proposed contract included the transportation of transplant patients and organs.”

**37.** Mr. Roberts then refers to three different excerpts from the specification response document. All of these appear to relate to the transport of transplant patients. They do not relate to the transfer of organs alone. Mr. Roberts then went on to exhibit, at para. 22 of his affidavit, the eTenders clarification document. As I have already set out, Mr. Robert's evidence in this regard is not relied upon by the HSE, and can be treated as being of no assistance.

**38.** Mr. Roberts goes on to say (at para. 23): -

“23. In my experience it is common knowledge in the industry that transplant flights regularly form part of the provision of emergency air ambulance services. As is the case in respect of the Contract the Tender Response Document explicitly stated transport flights were included and formed part of the services to be provided. I further believe this is known to Mr. Edgar. This is apparent from the tender submission made by SERE. In addition, 247 Aviation Limited is the company proffered by SERE. In its specification response document to operate air ambulance services on behalf of the HSE. I address this further below, but for present purposes it is notable that under the heading ‘*air ambulance services*’ the 247 Aviation Limited website includes ‘*organ transfer*’. A copy of the screenshot from the 247 Aviation Limited website illustrating this is at Tab 3 in the booklet.”

**39.** At paragraph 38, Mr. Roberts states: -

“38. Having regard to the information set out in the RFT and requirements to be satisfied thereunder, it was apparent to the IAS (*sic*) that the services the subject of the proposed contract were not limited to air ambulance services in the narrow sense now portrayed by SERE in these proceedings, but also included the transportation of organ retrieval teams, transportation of organs, and transportation of transplant

patients. The term '*emergency air ambulance services*' is quite broad and has always been understood by IAS to encompass any scenario whereby aero transportation is provided, or made available, to meet any medical need that might arise. It is an umbrella term so to speak, an umbrella term that includes a variety of subcategories, such as transplant flights and paediatric flights. It is further apparent that the reference to '*turnover in relation to specific products/services*' was not as limited as now portrayed by SERE in these proceedings but can, and in the case of IES does, include critically related turnover generated from paediatric and transplant ground ambulance services."

**40.** It is of some small significance that Mr. Roberts separates three individual strands of services relating to organ transplants, namely: -

- “(a) the transportation of organ retrieval teams;
- (b) transportation of organs; and
- (c) transportation of transplant patients.”

**41.** From this point on, the affidavits can broadly be described as repetitive, argumentative, and contradictory. In her second affidavit, Ms. Dunphy gives evidence (at para. 8) in the following terms: -

“8. As averred at paragraph 55 in my first affidavit, it would have been clear to any reasonably well informed and normally diligent tenderer that '*specific products/services*' was not limited exclusively to air ambulance services.



9. That this would have been clear is illustrated by the IAS affidavit at paragraphs 19 to 39 therein.”

42. The HSE position, therefore, was that the specific services in which the turnover requirement was imposed was not limited to air ambulance services. The position taken by IAS, in the first affidavit of Mr. Rogers to which I have already referred, was that the industry would have believed that organ only flights were part of emergency air ambulance services. Both IAS and the HSE, in their affidavit evidence, contended that ground ambulance transfers were also included in the specific services for which turnover of €4,000,000 per annum for the previous three years was required. The position of SERE remained (in the fourth affidavit of Mr. Edgar) that the transport of organs did not fall under the rubric of “*emergency air ambulance flights*”, and therefore fell outside the “*specific services*” turnover requirement in the RFT. None of this contradictory evidence was tested by cross examination. For example, the evidence of Mr. Roberts that 247 Aviation itself described air ambulance services as including organ transfer may well profitably been put to Mr. Edgar in cross examination. But it was not. Indeed, a substantial portion of the written submissions of SERE to this court sets out excerpts from two affidavits of Mr. Edgar (his fourth and fifth affidavits) and a further affidavit of Mr. Hood (to which I will shortly turn). Relying on the portions of the evidence that might be thought to support one’s argument, while ignoring the fact that this evidence has been contradicted and the contradiction is not challenged by cross examination, is unlikely to advance one’s position.

43. SERE is sharply critical of the trial judge’s alleged failure to consider relevant evidence. A great deal of this criticism is misplaced. The trial judge was faced, as I have said, with a very large amount of contradictory evidence. The evidence that could have been relevant to his task in construing the tender documents through the eyes of the RWIND

tenderer would have been evidence as to what a person in that industry would make of certain terms - “*emergency air ambulance services*” being the most obvious. However, the trial judge was faced with clashing evidence on this point, in as much as evidence was given on this issue, and it is very difficult to see how he could have resolved this conflict of evidence. The position in respect of such clashing affidavit evidence is set out in the well known judgment of Hardiman J. in *Boliden Tara Mines v Cosgrave* [2012] IESC 62, in particular at para. 43.

**44.** No independent third-party witness gave evidence before the trial judge. All of the many deponents were either directly involved in, or had commercial connections with, the enterprises which put them forward. Two witnesses who were not directly involved in the HSE, SERE or IAS were Mr. John Hood and Mr. Gwyndaf Williams. These witnesses were respectively involved with IMT Medical Transport Limited (a subsidiary company of SERE) and Haverfordwest Air Charter Services Limited, trading as FlyWales (a company with a commercial relationship with SERE, a fact not disclosed by Mr. Williams in his affidavit).

**45.** Certain of the evidence of those two witnesses is of interest, and I will return to that. However, it cannot be said that this is the sort of persuasive independent expert evidence which one would hope to see in a case confined to a limited number of issues, yet generating 17 affidavits on the merits.

**46.** There was an attempt, late in the exchange of affidavits, to rely upon third party publications. These range from an excerpt from the United Kingdom Civil Aviation Authority document entitled “*CAP 371: The avoidance of fatigue in air crews*” (exhibited by Mr. Roberts) through to guidance provided by HMRC in the United Kingdom in relation to an exemption for VAT (relied upon by Mr. Edgar). At para. 17 of his judgment, the trial judge noted as follows: -

“17. Before considering the terms of the RFT and the [specification response document] it is to be noted that SERE acknowledged that external documentation, e.g. from textbooks and documents on emergency or ambulance services, which were opened to the court, are of limited assistance to this court in the discharge of its task. This is because SERE accepts that some of that documentation supports its view that organs and organ retrieval teams are included in emergency air ambulance services, while some supports the contrary view. Thus it could not be said that there is an agreed definition of emergency air ambulance services in the industry.”

47. At paragraph 19, the trial judge also observed that the parties accepted that the key documentation necessary for the court to reach its conclusion were the tender documents.

48. I agree with the trial judge, and with the submissions made on behalf of the HSE to this court, that the third party publications referred to in the evidence are of no material assistance in deciding the issue which is whether or not, in this case, the RWIND tenderer would have come to the view that organ only flights were included in the specific services referred to in the RFT. Given the lack of uniformity in these publications, as the trial judge observed, it would have been impossible to come to a conclusion one way or the other as to what the RWIND tender would understand emergency air ambulance services to include the transport of organs on their own. The approach of the trial judge was unimpeachable in that regard.

49. One aspect of the evidence, relevant to the issue for the court to decide, was only partially disputed. This is an aspect of the evidence contained in the affidavits filed on behalf of SERE. In his fourth affidavit, Mr. Edgar gave this evidence: -

“The flights which transfer organs are time sensitive, cargo flights; while flights with transplant teams only are passenger charter flights; and where teams and organs are

transferred together, this can include the transfer of passengers and cargo. There will be no occasions where sick or injured persons are transported”.

**50.** In his affidavit, Mr. Williams (from FlyWales) gave this evidence: -

“15. The movement of organs, human tissues and blood samples are simply cargo. FlyWales carry out a significant number of these flights when the cargo is time sensitive. Otherwise, organs, human tissues and blood samples can be carried unaccompanied on scheduled flights as cargo.”

**51.** In his affidavit, Mr. Hood (of the SERE subsidiary IMT) stated (at para. 13): -

“13. Aircraft seating capacity is not an issue for the movements of human organs and tissue samples as they are regarded as cargo and IMT utilises all types of aircraft including scheduled carriers such as EasyJet for these movements.”

**52.** All of this evidence suggests that the movement of organs alone is equivalent to the transfer of cargo, albeit sometimes very time sensitive cargo requiring urgent attention.

**53.** This simple evidence is not disputed by Ms. Dunphy (who swore two subsequent affidavits on the substantive issue). At paragraph 23 of his third affidavit Mr. Roberts gives this evidence (in response to the fifth affidavit of Mr. Edgar, and not in reply to the fourth affidavit of Mr. Edgar or to the evidence of Mr. Hood or Mr. Williams); -

“Admittedly organs can be transported as cargo in certain circumstances. However, where the transportation of an organ is time sensitive and constitutes an emergency, which can often arise in the context of heart and liver transplants, transportation by way of ordinary cargo would be highly inappropriate and simply is not done. Rather, an emergency air ambulance service is regularly availed of.”

**54.** The fact that the transfer of an organ for transplant is at least occasionally a cargo transfer, and (even according to Mr. Roberts) does not require the high level of fit-out of the aircraft stipulated in the tender documents, is of some importance. Of course, it also appears to be the case that the transfer of organ retrieval teams does not require the plane involved to have the level of equipment that the tender documents require. However, as already noted there is a difference between the transfer of organ retrieval teams and the transfer of organs as far as the tender documents are concerned; the first is expressly mentioned as a service to be provided, the second is not.

**55.** In his judgment, the trial judge considered in some detail the tender documentation. They are clearly set out by him. Under the heading “*Did the tender services include the transport of organs?*” the trial judge began (at para. 36) to consider this issue. He decided ultimately that it did. He commenced this section of the judgment by referring to the final paragraph of the specification response document - also emphasised in this appeal by counsel for the HSE - which refers to “*the requirement to facilitate organ retrieval*” and “*organ retrieval missions*”.

**56.** In this section of the judgment, the judge stresses the frequency with which there is a reference to “*organ retrieval*”. At para. 39 he states: -

“As regards, the transport of organs, it is to be noted that the language in this paragraph of the SRD regarding ‘*organ retrieval*’ is similar to the language which is used in the RFT regarding ‘*organ retrieval teams*’, i.e. the expression ‘*requirement*’ to facilitate ‘*organ retrieval*’ is used in the SRD and this echoes the use of the term ‘*required*’ to transport ‘*organ retrieval teams*’ in the RFT.”

**57.** This is undoubtedly true. However, this analysis could equally support a construction of the tender documents to the effect that the specific services include the transport of organ retrieval teams, but not the transfer of organs on their own. That would explain why similar language is used in respect of the obligation of transport organ retrieval teams, and to carry out organ retrieval missions. Similar language is used because, in fact, the quoted wording address the same thing (namely the transport of teams, and not the transport of organs alone).

**58.** A similar comment can be made in respect of much of the balance of the section of the judgment dealing with this issue. Paragraph 41 is the key paragraph. It reads: -

“Furthermore, these are not simply passing references to ‘*organ retrieval*’ since the reference to ‘*organ retrieval*’ has a clear purpose, namely to ensure that the winning tenderer is aware that there is a requirement to facilitate ‘*organ retrieval missions*’. This Court believes that the RWIND tenderers would interpret ‘*organ retrieval missions*’ as meaning to retrieve an organ and implicit in the *retrieval* of an organ, must be the *transfer* of that organ.”

**59.** I do not agree with the logic employed by the trial judge in this paragraph. Firstly, the reference to “*organ retrieval*” and to “*organ retrieval missions*” is taken out of any proper context. The context is important. The only context in which there is any reference to organ retrieval missions, or to organ retrieval in general, is the transporting of organ retrieval teams. Secondly, the trial judge has come to the view, without explaining why, that a contractual obligation to transport an organ retrieval team by implication imports an obligation to carry out the very different function of transporting the organ (possibly as cargo) once it has been harvested. The trial judge also does not consider how an obligation to transport organ retrieval teams implies a contractual duty to transport organs from

hospitals other than those to which these teams were flown by the tenderer, a submission made to this court and noted at paragraph 27 of this judgment.

**60.** The trial judge emphasises the contents of the next paragraph of the judgment, which reads: -

“More significantly, the foregoing paragraph on p. 2 of the SRD then takes the trouble of clarifying what is to happen if the winning tenderer has two conflicting obligations, one to transport organs and another to transfer patients, both as Priority 1 missions. The paragraph makes clear that, without diluting the obligation of the tenderer to transport organs, it must give priority to the transfer of patients.”

**61.** Given that this is the most significant piece of the trial judge’s analysis, by his own account, it deserves special attention.

**62.** I have already set out the relevant paragraph at para. 12 onwards of this judgment. By the standards of these tender documents, it is quite clear. It informs the RWIND tenderer that, as well as the transfer of patients, aircraft *“may also be required from time to time in a similar emergency basis to transport organ retrieval teams from one hospital to another.”*

**63.** The transfer *“of organ retrieval teams”* is not, in the context of this tender, an automatic part of an emergency air ambulance service. If it was, there would be no need in the tender documents consistently to refer to an obligation *“also”* to transport organ retrieval teams. Whatever may be the general construction of emergency air ambulance service, in this tender the RWIND tenderer is being informed that as well as the transfer of patients, they may be asked to transfer organ retrieval teams and, if so asked, the tenderer must comply. This is the only context in which the reference to *“organ retrieval missions”* appears. The trial judge is not correct to say that this paragraph clarifies how one resolves a

conflict between the transportation of organs and the transfer of patients. The conflict is between the transfer of patients and the transport of organ retrieval teams.

**64.** In my opinion, the trial judge has (despite a very careful consideration of the tender documents) not come to the correct conclusion as to what the RWIND tenderer would make of them. In considering the judgment, it has been necessary to parse and analyse the precise reasons given by the trial judge for this critical conclusion. In doing so, one might be thought to fall into the fundamental error of carrying out a legal analysis as opposed to reading the documentation as an RWIND tenderer would. However, in analysing any judgment - particularly one as closely reasoned as this - inevitably one must take an approach that verges on the legally analytical. That does not mean that one has lost sight of the legal obligation to consider the tender documents as the relevant tenderer would have done.

**65.** The RWIND tenderer is the businessperson acquainted with the provision of air ambulance services. They will be aware, as found by the trial judge and as submitted by the HSE, that there is no uniformly applicable documented definition of what an emergency air ambulance service is. The RWIND tenderer would therefore have paid attention to the services which it was obliged to provide and, as the trial judge observed, would commercially pitch their tender accordingly. The RFT was very plain. It stated, under the heading “*tender description*” and at the very outset of the document, that the HSE required:

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“... an Emergency Air Ambulance Service to transfer patients ... between Ireland and other countries mainly the UK...”

**66.** Two paragraphs later, the scope of the service is defined by the HSE. The successful tenderer would have to provide: -



“The air ambulance transport to/from identified airport in Ireland to an airport in another jurisdiction namely the UK.”

The transport mentioned there is the transfer of patients.

**67.** As well as the transfer of patients, the tenderer is told that the aircraft may also have to: -

“... on a similar emergency basis ... transport organ retrieval teams from one hospital to another.”

**68.** That is the essential service that the successful tenderer will have to provide. As the trial judge correctly observed, very similar language is used in the SRD. That is not because the tenderer’s obligations have been expanded out to include the transfer of organs, either as cargo or otherwise. It is, somewhat more obviously, because the services which the tenderer is to provide have not in any way changed. The SRD sets out what a Priority 1 transfer is. As is plain from the sections of a document which I quoted earlier in the judgment, these all involve the transfer of a patient. The last paragraph, so heavily emphasised by the HSE in the course of the argument, does not implicitly import an entirely new obligation to transfer organs. Instead, it talks (as did the RFT) of a need to transport organ retrieval teams and addresses how a clash between a transfer of those teams and the transfer of patients will be resolved.

**69.** In my view, the RWIND tenderer would take the view that the transfer of organs alone is not included among the specific services to be provided by the successful tenderer. On the basis of the agreed position with regard to the figures, therefore, the turnover requirement with regard to the specific services was not met by IAS. I would therefore allow the appeal, set aside the judgment and order of the High Court, and remit the matter to the High Court

for determination as to what reliefs (if any) to which SERE is entitled. This will no doubt have to take into account the fact that the contract was not only awarded but executed in early 2021.

**70.** For the sake of completeness, I should deal with some of the other submissions made by SERE. I do not agree that the term “*specific services*” refers solely to core services, and that other services (which do not involve the transfer of patients) are ancillary and therefore are not caught by the phrase. The tender documents do not suggest that there was some distinction to be drawn, for the purpose of the turnover requirement, between core services and ancillary services.

**71.** Secondly, the tender documents clearly stipulate that the transfer of organ retrieval teams is included in the services which the successful tenderer will supply.

**72.** Thirdly, a forceful case was made on behalf of SERE to the effect that the tender documents are ambiguous, that the HSE should not profit from this ambiguity, and that SERE should win on this account. I agree with counsel for the HSE that this case of ambiguity was not pleaded. Given the significance of pleadings in applications such as this, I would not have decided the case in favour of SERE on this basis even if it had satisfied me that (a) that the tender documents were indeed ambiguous and (b) that an ambiguity of this nature would entitle SERE to relief. In this regard, I would also provisionally agree with the submission of counsel for the HSE that the current situation is different to the position in *Gaswise*, where a tenderer was excluded because of an unclear or ambiguous provision in the tender documents. That is not the case here. However, this is not an issue which needs to be conclusively decided on this appeal. This is because I have come to the view that the clear and natural meaning of the tender documents to the RWIND tenderer is that the relevant

services were the transport of patients and the transport of organ retrieval teams, and did not include the quite distinct exercise of the transfer of organs alone.

**73.** Butler and Meenan JJ agree with this judgment.

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