AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000057

O'Donnell C.J.

Dunne J.

Charleton J.

Baker J.

Woulfe J.

Between/

RAY O'SULLIVAN

Applicant/Respondent

-and-

THE HEALTH SERVICE EXECUTIVE

Respondent/Appellant

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on 10 May, 2023.

Introduction

1. I fully agree with the comprehensive and careful judgment of Dunne J. in this matter. In circumstances where these proceedings have already generated a comprehensive judgment in the High Court ([2015] IEHC 282, Unreported, High Court, Barr J., 27 April, 2021), a very thorough judgment in the Court of Appeal ([2022] IECA 74, Unreported, Court of Appeal, Noonan, Faherty and Murray JJ., 25 March, 2022), and two detailed judgments in this Court, I am reluctant to add anything further to the analysis. However, while there is no substantial dispute as to the facts concerned, and an agreement as to the applicable legal test, there remains sharp disagreement between the judgments in this case. This seems to indicate a wider problem regarding litigation in respect of disciplinary proceedings, particularly those involving professional people or those occupying senior positions. Certainly, the time it has taken to resolve the question of whether a suspension on full pay effective from 6 August, 2019 in respect of incidents which occurred on 4 and 5 September, 2018, does not suggest a process that is clear, efficient, or satisfactory from the point of view of anyone involved. It is perhaps appropriate therefore, to offer some further reflections on the legal issues which can arise and have been particularly exemplified in this case.

The Facts

The Feasibility Study

2. The facts of this case have been set out in the judgment of Dunne J. and with some further additions, and observations in the judgment of Woulfe J. It is not necessary, therefore, to rehearse them in detail. I am also conscious of the fact

that the parties had resolved their differences prior to the hearing of this appeal, and that this appeal was allowed to proceed to address issues of more general importance, particularly to the respondent to the proceedings, the HSE ("the respondent"). Professor O'Sullivan ("the applicant") is in the rather invidious position that his conduct, which I imagine, indeed hope, he by now no doubt sincerely regrets, has become a focus of intense scrutiny and in what has become something of a test case, and he would no doubt wish to be able to get on my his life without the notoriety of being the subject of a leading case on suspension for misconduct. In fairness to all concerned, I will attempt to refrain from characterising this case in any more emotive or inflammatory language than is necessary for the identification and resolution of the net legal issues.

3. For present purposes it is, I think, sufficient to set out the following account of the facts, which do not now appear to be in dispute. On 4 and 5 September, 2018, gynaecological procedures were carried out on five women in St Luke's Hospital in Co. Kilkenny under the supervision of the applicant. The patients were under the care of the applicant, who was a Consultant Obstetrician Gynaecologist and were scheduled to undergo a hysteroscopy procedure, which involves the insertion of a small light guided camera attached to a small tube into the vagina to permit examination of the internal wall of the vagina. In the course of carrying out the respective procedures, what was termed as a 'feasibility study' was carried out on the direction of the applicant by his Registrar and Senior House Officer, which involved the placing of a balloon catheter and a pressure pad connected to a tube inside the entrance of the five patients' vaginas. This was ostensibly for the purpose of commissioning a

further study, which the applicant claimed would lead to the development of more effective equipment for conducting gynaecological examinations.

4. A number of features of the study bear mentioning. Informed consent had not been sought from the respective patients for the study to be performed. The equipment used in the study were not purchased by the hospital but privately by the applicant himself. Hospital management and the wider healthcare team in the hospital was not aware of the study, nor was ethical approval sought by the applicant to carry it out. Furthermore, no record of the study was entered in the patient notes but rather data appears to have been collected on a mobile phone and subsequently deleted.

The Doran/Brennan Report, the SAR report and correspondence concerning the study

5. As a result of concerns expressed by members of the nursing staff, who had witnessed the procedure but similarly had not been informed of the study, the matter was brought to the attention of the general manager of the hospital, Ms. Anne Slattery, who directed that the clinical research cease immediately. The matter was also brought to the attention of Professor Mary Day, the then Chief Executive Officer of Ireland East Hospital Group, who immediately commissioned a report from Professor Peter Doran, the Director of UCD Clinical Research and Ms. Sinead Brennan, a Group Director of Quality and Patient Safety ("the Doran/Brennan report"). Professor O'Sullivan was notified of this by letter of 27 September, 2018 and interviewed for the purposes of the Doran/Brennan report. It is clear that the focus of the report was the research study. The key questions identified in the letter of 27 September, 2018, sent to

Professor O'Sullivan and which was signed by Professor Day and Kevin O'Malley, Clinical Director of the Ireland East Hospital Group, were as follows:-

(i) *"Is there a written protocol for the study?*

(ii) *Have you received ethical approval?*

(iii) *Have any measurements/results been recorded and if so who has been given the results?*

(iv) *Are there external parties involved?"*

The source of the letter and its contents illustrate both the seriousness with which the matter was being addressed and the lack of information then available about the detail of the procedure.

6. The Doran/Brennan report was delivered dated 1 October, 2018. It concluded, *inter alia,* that the trials had not been conducted in accordance with the ethical principles having their origin in the Declaration of Helsinki of 1948. The conclusion was stated as follows:-

> *"... The World Medical Association (WMA) has developed the Declaration of Helsinki as a statement of ethical principles for medical research involving human subjects, primarily addressed to doctors but intended for wider adoption by all research team members. The declaration acknowledges that medical research is important to*

generate new knowledge, but also states this goal can never take precedence over the rights and interests of individual research subjects.

The declaration sets out a number of principles aimed at providing guidance to research activity. It is our conclusion that this study has not met a number of these principles including, but not limited to[:]

Principle 22. The design and performance of each research study involving human subjects must be clearly described and justified in a research protocol.

Principle 23. The research protocol must be submitted for consideration, comment, guidance and approval to the concerned research ethics committee before the study begins.

Principle 25. Participation by individuals capable of giving informed consent as subjects in medical research must be voluntary.

Principle 26. In medical research involving human subjects capable of giving informed consent, each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, post-study provisions and any other relevant aspect of the study.

Principle 35. Every research study involving human subjects must be registered in a publicly accessible database before recruitment of the first subject.

This study was not done in line with requirements. Ethical approval was not obtained, nor an exemption granted. Patient consent was not obtained. The classification of the study as a pilot or a feasibility is of no consequence. As the study involved additional procedures patient consent should have been obtained, to provide the five ladies in question, and the 20 planned with the opportunity to autonomously decide on their participation. By not seeking consent the patient's wishes were not considered".

These conclusions have not been challenged. They were undoubtedly serious and necessarily reflected upon the applicant as the person responsible for the study and, therefore, for the breaches identified.

7. At the same time, Ms Slattery liaised with a Consultant Microbiologist in relation to the risk of infection. On 10 and 11 October, open disclosure meetings were held with the patients concerned in which they were informed that the feasibility study had been conducted and were advised to be tested to rule out risk of infection. The applicant criticises the manner in which this meeting was conducted, particularly the involvement of the Clinical Director of the hospital, with whom he had a poor relationship, and which had resulted in the commencement of defamation proceedings by Mr O'Sullivan against the Clinical Director in respect of statements made a meeting in September of that

year. It is not in dispute that the patients were extremely distressed on being informed of the procedure and described themselves variously as having felt "*embarrassed*", "*stunned*" "*violated*" and "*assaulted*". As set out at paragraph 96 of the judgment of Dunne J., one patient described herself as feeling "*violated, assaulted in such a personal way in such a sensitive area*." There is no doubt that the patients and their partners were alarmed and angry and have commenced proceedings against the hospital in consequence. The applicant attributes these reactions to the fact of the meeting including advice on testing for infection (which he considers unnecessary) and the manner of communication (to which, of course, he was not a party). It is worth noting that Professor Day has sworn an affidavit observing that there were other members of staff present for the meetings and it is the case that no one present at the meetings has suggested that there was anything inappropriate in the way they were conducted.

8. Professor Day also commissioned a systems analysis review report ("the SAR report") to be led by Professor Donal Brennan of UCD. The HSE Systems Analysis Guidance for Services (2018) explains that the purpose of a systems analysis review is to conduct "*a methodical review of an incident which involves collection of data from the literature, records (general records in the case of non-clinical incidents and healthcare records in the case of clinical incidents), individual interviews with those involved where the incident occurred and analysis of this data to establish the chronology of events that led up to the incident, identifying the key causal factors that the reviewers considered had an effect on the eventual harm, the contributory factors and recommended control*

actions to address the contributory factors to prevent future harm arising as far as is reasonably practicable". The terms of reference of the review sought to:-

(i) *"Engage with the patients identified, in accordance with open disclosure principles*

(ii) *Establish the number of patients who underwent hysteroscopies and vaginal pressure measurement study in St Luke's Hospital, Kilkenny on 4th & 5th September 2018*

(iii) *Establish the detail and extent of the procedures completed in respect of each identified patient, and the oral and written consent as appropriate to each patient*

(iv) *Establish whether or not any infection risk was, on the balance of probability, likely to have occurred in respect of each patient*

(v) *Establish if any, and if so the detail of any, patient safety risks arising in respect of each patient*

(vi) *Identify if similar incidents that have occurred and determine if these should be included in this review*

(vii) *Identify and respond to any concerns raised by service users, family or staff within the hospital"*

Once again, the breadth and scope of the review is indicative of the seriousness with which the matter was being viewed and the steps which were required to

provide a comprehensive assessment of the incident, including an assurance that all concerns were properly addressed.

9. The review team delivered their report on the 20 June, 2019 and identified five key causal factors as follows:-

> *"Key Causal Factor 1: Failure by [Professor O'Sullivan] to acknowledge that the vaginal pressure measurement study required full ethical approval*
>
> *Key Causal Factor 2: Failure by [Professor O'Sullivan] to obtain full ethical approval for the vaginal pressure measurement study prior to undertaking the study*
>
> *Key Causal Factor 3: Failure by [Professor O'Sullivan] to seek clarification on his incorrect understanding that the Research Ethics Committee (REC) was currently not operational in Hospital 2*
>
> *Key Causal Factor 4: Failure by [Professor O'Sullivan] to obtain informed consent from patients for the vaginal pressure measurement study prior to undertaking the study*
>
> *Key Causal Factor 5: Independent procurement and utilisation of non-approved, non stock hospital equipment for clinical use by [Professor O'Sullivan]."*

Again, it is clear that these conclusions were serious and reflected directly upon the applicant as in each case the cause of the failures identified. These conclusions have not been challenged by the applicant.

10. On receipt of the report, Professor Day wrote immediately to the then Chief Executive Officer of the respondent, Mr. Paul Reid ("the CEO") on 1 July, 2019, and informed him that she had requested Dr Peter McKenna, Clinical Director of the National Women and Infants' Health Programme to consider the Report from an ethics, consent and research practice perspective, and revert with his assessment and recommendations in order to assist her in determining what further steps were appropriate in the circumstances. Since Professor Day has been criticised severely by Professor O'Sullivan in these proceedings, it is important to record that she swore an affidavit in these proceedings and stated that she had had "*very limited interaction with Professor O'Sullivan, [she] had no adverse view of him, and [she] had no reason to have any adverse view of him*". Dr McKenna in turn, in a letter to Professor Day, considered the SAR report, which had been prepared on an anonymised basis, and expressed his view that research of an "*intimate and personal nature*" was conducted without ethical approval and without patient knowledge or consent. While he acknowledged that no patient suffered physical harm, there was psychological injury, and moreover, he considered that "*the significant issue here is not harm, but wrong to the patient*". He expressed concern as to the suitability of the principal investigator "SM1" (which is how the applicant was described in the report) being involved in the treatment or training of junior medical personnel and students, and concluded that *"[g]iven the statement of the patients, that they have suffered psychological harm, a breakdown in trust, and a serious lack of*

insight on the part of the consultant involved, I have significant reservations about his continued involvement in clinical practice until these issues are fully resolved".

11. Professor Day states in her affidavit that the events of 4 and 5 September, 2018 were unprecedented in her experience, and she considered them serious and requiring immediate action. On the 1 July, 2019 she wrote to Mr Reid setting out the sequence of events, the Doran/Brennan review and the SAR report, and the views of Dr McKenna and concluded:-

> *"Taking into consideration both the Systems Analysis Review Report findings, and Dr McKenna's commentary as enclosed, I am concerned that Professor O'Sullivan's conduct may pose an immediate and serious risk to the safety, health and welfare of patients and staff. In this regard I would ask you to consider Professor O'Sullivan's conduct as outlined herein, in accordance with the disciplinary procedure provided at Clause 3, Appendix IV of the Disciplinary Procedure of his contract of employment."*

12. The CEO then consulted with the Chairman of the Medical Board, Dr Waldron, on 2 August, 2019, and furnished him with a copy of the correspondence between the CEO's office and the solicitors for the applicant. Dr Waldron informed the CEO that he had consulted with the Irish Hospital Consultants' Association ("IHCA") regarding the role of the Chairman of the Medical Board under the disciplinary procedure and said that placing a consultant on administrative leave may potentially have an implication for a consultant's

reputation. Dr Waldron stated further that it was not his role to decide whether or not to place the applicant on administrative leave, but he advised the CEO that before placing a consultant on administrative leave the CEO should be satisfied there was no other alternative. These views were communicated to the applicant on 6 August, 2019. The CEO also consulted with Dr Colm Henry, the HSE's Chief Clinical Officer, and Dr Peter McKenna, the Clinical Director of the National Women and Infants' Programme, with whom Professor Day had consulted with prior to writing her letter of 1 July, 2019. Both doctors expressed the view that there would appear to be a lack of insight on the part of the applicant regarding the seriousness of the matter and regarding the importance of informed consent and ethical approval, particularly where intimate procedures were concerned.

13. By letter of 17 July, 2019, the CEO informed Professor O'Sullivan that he was considering placing him on administrative leave and set out in some detail the particulars of alleged misconduct and his concerns and invited representations which were duly made on behalf of Professor O'Sullivan. On 6 August, 2019, the CEO wrote a further detailed letter, set out at paragraph 66 of the judgment of Dunne J., informing Professor O'Sullivan that he was placing him on paid administrative leave and setting out his reasons for doing so. This decision of 6 August, 2019 has become a central issue in these proceedings and, in particular, in this appeal. However, proceedings were not commenced at that point challenging that decision, and it is necessary therefore, to briefly sketch the remaining steps in the controversy, and also to explain the rather roundabout way in which this decision has rather belatedly come into focus in these proceedings, and more particularly on this appeal.

The meeting with the CEO, the O'Hare Report and leave to seek judicial review

14. It is clear that the decision to place Professor O'Sullivan on administrative leave was not an end in itself. Attention turned immediately to the question of disciplinary proceedings. Submissions were made on behalf of Professor O'Sullivan and a personal meeting was arranged with the CEO, which took place on 13 September, 2019. A formal minute of that meeting was agreed by the parties. On 10 October, 2019, the CEO informed the applicant's solicitors of his decision to seek the opinion of a clinician. This step was initially disputed on behalf of the applicant, but eventually the respondent sought an opinion from Dr Michael O'Hare, a Consultant Obstetrician practicing in Newry, Co Down.

15. Dr O'Hare delivered his report ("the O'Hare Report") on 4 December, 2019, and as Barr J. in the High Court put it, while not exonerating the applicant completely, the report was certainly supportive of the applicant's position. It is indeed doubtful that these proceedings would have transpired were it not for the fact that this report, commissioned by the CEO, was expressed in the terms it was. Dr O'Hare considered that the study was well-intentioned, but that it was an error of judgment to conduct it without informed consent and ethical approval. Professor O'Sullivan's conduct had, he considered, fallen below, but not seriously below, the standard of conduct among doctors. Dr O'Hare added that he did not consider that Professor O'Sullivan posed an immediate and/or serious risk to the safety, health, and welfare of patients.

16. This report was furnished in turn to the applicant's solicitors on 6 December, 2019, although because of an error in the solicitors' system, it was apparently not received by them at that time. On 23 December, 2019, the CEO informed the solicitors that he proposed to recommend the removal of Professor

O'Sullivan from his position and again sought presentations from the applicant which were, in the event, made by letter of 20 January, 2020. On 31 January, 2020, the CEO wrote to the applicant setting out in some detail why, having considered Dr O'Hare's review, he took a different view of the seriousness of the matter, and had decided to propose the removal of the applicant. That step required notification to the Minister for Health ("the Minister"), and a request of the Minister to establish a committee to consider the proposal for removal.

17. As set out in the judgment of Dunne J., the consultant's contract applicable to the applicant incorporated the procedure set out at ss. 22-24 of the Health Act, 1970 ("the 1970 Act"). These sections provided that when a proposal was made for the removal of a permanent office of a Health Board, the Minister was to establish a committee. This committee was to be chaired by an independent nominee and comprised of one representative of the employer and one representative of the class of officer sought to be removed and was to inquire into the matter and make such recommendations as seen fit. The relevant provisions of the 1970 Act have since been repealed, but it was agreed that the procedure could be followed by consent of the parties, and accordingly the Minister moved to establish a committee. Given the fact that there was, at this stage, no dispute about the relevant facts, the applicant not having challenged the findings of the Doran/Brennan report or the SAR report, it might have been thought that this process might have been dealt with relatively expeditiously, since what remained was an assessment of the gravity of what had occurred and a consideration of the appropriate sanction. However, this committee did not proceed to consider the matter.

18. On 24 February, 2020 the applicant sought and obtained leave to commence judicial review proceedings seeking to quash the decision to commence the disciplinary proceedings, restraining the holding of those proceedings, and seeking an order compelling the respondent to cease the suspension of the applicant and to restore him to his position. On the application of the applicant, the High Court also granted a stay on the disciplinary proceedings, which in the event lasted until the decision of the High Court on 27 April, 2021. The matter was then appealed to the Court of Appeal and the committee, understandably, did not proceed with its hearings in the meantime. The Court of Appeal delivered judgment on 25 March, 2022 finding that the CEO was obliged to review the suspension decision in the light of Dr O'Hare's report and was required to cease the suspension. The Court also found that the original decision was unlawful. However, the Court refused to quash the decision commencing the disciplinary proceedings which had been made on 31 January, 2020. The outcome was that the suspension was quashed but the decision to commence disciplinary proceedings was not, so those proceedings were to continue. The respondent was granted leave to appeal to this Court ([2022] IESCDET 79). Prior to the hearing of the appeal, the Court was notified that the parties had resolved their differences.

This Appeal

19. This appeal is limited to the decision as to the lawfulness of the continued suspension of the applicant and, perhaps more precisely, the decision of the Court of Appeal set out at paragraphs 125-127 of that judgment, that it was implicit in the terms of the contract that the CEO was obliged on receipt of Dr O'Hare's report to immediately review the necessity for the continuation of the

suspension and that the applicant was entitled to an order of *mandamus* terminating his suspension and reinstating him with immediate effect as from 23 December, 2019, this being the date when the CEO had, the Court of Appeal considered, sufficient opportunity to consider Dr O'Hare's report to enable him to reach the decision of that date. The applicant did not seek to cross-appeal the refusal by the Court of Appeal to quash the decision of the CEO to seek his removal from office.

20. The shape of this case is perhaps a reflection of the forces brought to bear by both sides, which has had the effect of somewhat distorting the proceedings as commenced. The proceedings were clearly prompted by the receipt of the O'Hare report, and were, as the applicant said in his grounding affidavit, directed to challenge the decision of the 31 January, 2020 to propose his removal from employment. The argument was that, in the light of Dr O'Hare's opinion, the CEO could not lawfully proceed with such a proposal. If so, it was argued that he was also obliged to review the decision to place the applicant on administrative leave, terminate it and restore him to his position in the hospital. Accordingly, the proceedings sought an order of *certiorari* quashing the decision to propose the removal of the applicant and an order of *mandamus* terminating the administrative leave and restoring the applicant to his position. The proceedings did not seek to quash the original decision of the 6 August, 2019, placing the applicant on administrative leave; indeed, the logic of the argument was that the original decision was valid, but that the subsequent delivery of Dr O'Hare's opinion required the review of the administrative leave and its termination.

21. However, in this appeal the debate has shifted to the lawfulness of the original decision of 6 August, 2019. This focus is, in one way, helpful, as it allows the Court to focus on the issue through the lens of the information available to the CEO as of that date. That said, in doing so, it is important not to lose sight of the fact that the proceedings themselves did not seek to challenge the decision of 6 August, were not commenced within the time limit for judicial review proceedings seeking an order of *certiorari*, that the applicant sought from the trial court, and was refused, an extension of time within which to seek that relief and that no appeal was brought against that decision. It is also of some relevance that the applicant was legally represented and was aware of all the information that was before the CEO when he made the decision of 6 August, 2019, which it is now contended no reasonable decision maker could have made, but did not then commence proceedings.

22. In granting leave to appeal to this Court, a panel of the Court identified at least two questions which arose for resolution:-

(i) *"How should a court approach a challenge to the exercise of a contractual power of suspension from employment which provides that such suspension can be effected if an employer considers that the individual poses "an immediate and serious risk to the safety, health and welfare of patients or staff"; and*

(ii) *What procedures are necessitated for a suspension?"*

It is a noteworthy feature of this appeal however, that there is little dispute about the correct resolution of these issues.

Question 1: the test to be applied to the power of suspension

23. As set out at paragraph 6 of the judgment of Dunne J., Clause 3 of Appendix IV of the 1998 Consultants' Contract, under which the applicant was employed, provides that:-

> *"Where it appears to the [...] Chief Executive Officer [...], that by reason of the conduct of a consultant there may be an immediate and serious risk to the safety, health or welfare of patients or staff, the consultant may apply for or may be required and shall, take immediate administrative leave with pay for such time as may reasonably be necessary for the completion of any investigation into the conduct of the consultant in accordance with the provisions hereof".*

It is also provided that any such investigation should be conducted with all practical speed. The contract also incorporated the procedure under ss. 22-24 of the 1970 Act. Section 22 provided for suspension of an officer pending disciplinary proceedings in cases of alleged misconduct, but as s. 22(5) provided that such suspension was without pay, the administrative leave provided for under the contract was more favourable to the employee.

24. The language of the clause makes it clear that this is a decision to be taken by the CEO, and is taken where it *appears* to the CEO and that the applicable test is whether the CEO is of the opinion that there *may be* an immediate and serious risk to the safety, health or welfare of patients. The decision is one for the CEO and does not require a finding that a consultant poses a risk to patients as a matter of probability. It is sufficient that it appears to the CEO that there may be an immediate risk. This is consistent with the fact that the placing of the

applicant on leave with full pay was a temporary measure, pending the carrying out of an investigation which, if a disciplinary process was envisaged, as it was here, would itself have required a full hearing before an independent committee, obligated to comply with fair procedures and make findings as to any disputed facts, and conclusions on gravity and mitigation.

25. On this appeal, there was little if any dispute between the parties as to how that clause was to be interpreted. It was accepted that the approach taken by the UK Supreme Court in *Braganza v. BP Shipping Limited and anor* [2015] 1 WLR 1661 ("*Braganza*") was the correct standard. In *Braganza,* it was held that it was not sufficient that the CEO should be of the relevant opinion stipulated by the contract. The discretion of the decision maker was limited as a matter of necessary implication "*by concept of honesty, good faith and genuineness and the need for absence of arbitrariness, capriciousness, perversity and irrationality*". In the words of Rix L.J. in *Socimer International Bank Limited (In Liquidation) v. Standard Bank London Limited (No. 2)* [2008] EWCA Civ 116, [2008] Bus LR 1304 ("*Socimer*") and adopted by Lady Hale in *Braganza* at paragraph 22 of her judgment:-

> *"Reasonableness and unreasonableness are also concepts deployed in this context but only in the sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of a duty to take reasonable care, or when otherwise deploying entirely objective criteria; as for instance where there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time".*

To that extent, there is an introduction of familiar administrative law criteria in the shape of *Wednesbury* unreasonableness, (or in this jurisdiction *State (Keegan & Lysaght) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642) into what is otherwise a contractual context. This does not mean that the decision is a hybrid of public law and private law, it is merely that the contractual discretion is limited as a matter of necessary implication by a requirement that a decision will not be unreasonable in the *Wednesbury* sense i.e., that it will not be a decision that no reasonable decision maker could arrive at. The parties could in theory exclude that implication, or indeed, set a higher standard. The reference to *Wednesbury* is only to identify a recognised standard for irrationality and does not impose the elaborate analytical machine of modern judicial review. If the provisions of ss. 22-24 of the 1970 Act had remained in force, it might have been arguable that the exercise of that statutory power was reviewable by judicial review but even then, that would not mean that the decision of the CEO under the contract was made in the exercise of a public law power or was otherwise subject to judicial review. That conclusion is even more clear when it is acknowledged that the appointment by the Minister of a committee depends on the consent of the parties to the contract. As Dunne J. observes in her judgment, it is indeed arguable that these proceedings should not have been commenced as proceedings for judicial review, but in any event the fact that they were commenced in this manner without objection should not obscure the fact that this is a contractual dispute. I agree that the power of the CEO under the contract must be read as subject to the *Braganza* approach. This is the test to be applied in this case. This addresses, and answers, the first question posed.

Question 2: the procedures necessary to execute the power of suspension

26. The second question raised by this Court, is susceptible to an equally straightforward answer. This was a suspension on full pay, pending the determination of disciplinary proceedings. It was, in the language of the case law, a holding suspension rather than one which was penal or punitive. Nevertheless, it is the case that it is a decision which has an impact on an individual, may affect their reputation and where that person is engaged in a highly skilled occupation, may have the effect of making it more difficult for them to resume their occupation, even if the disciplinary proceedings do not result in their dismissal if the length of time is such that a person becomes deskilled. It is clear, therefore, that the suspension decision does require fair procedures. I respectfully adopt and endorse the statement of Noonan J. in *The Governor and Company and the Bank of Ireland v. Reilly* [2015] IEHC 241 ("*Bank of Ireland v. Reilly*"), quoted at paragraph 76 of the judgment Dunne J., that while it may be correct to say that while "*the full panoply of fair procedures may not have been engaged at [this stage of suspension], [...] basic fairness [required] at least a rudimentary explanation of the reason for suspension which admitted of the possibility of some exculpatory response*".

27. In this case, the standard required by *Bank of Ireland v. Reilly* was satisfied by a comfortable margin. It appears that from an early stage the respondent was in receipt of legal advice and at each stage of the process the applicant and his solicitors were informed of the information, observations and reports made available to the CEO, and were given an opportunity of making submissions in respect of them. Furthermore, at each stage the CEO set out the considerations which he was taking into account. While the applicant was undoubtedly both

suspicious and critical of the views expressed and the decisions made, it is beyond argument that the demands of procedural fairness were met and exceeded in this case.

28. What remains, therefore, is whether the decision of the CEO was one no reasonable decision maker could have reached in the circumstances. In the judgment he delivers, Woulfe J. sets out his reasons for considering that the first limb of the *Wednesbury* test was satisfied (not taking into account relevant factors, taking into account irrelevant factors) but as he observes those matters are the same factors which leads him to a conclusion that the decision also fails the second limb of unreasonableness. With respect, I do not consider that the first limb of *Wednesbury* adds anything to this case, or indeed, has figured in it until now, and does not add anything to the analysis. The central question is whether the decision of the CEO of 6 August, 2019 is one which no reasonable Chief Executive could have arrived at.

29. It is because it is in the nature of contentious disputes, particularly those involving personal livelihoods, professional reputations, patient care, ethical standards, and potential civil liability, that it is possible to construct a plausible narrative that explains why a particular decision was either too harsh or perfectly justified. It is easy to have sympathy in this case with the individuals involved, whether patients, nursing staff, administrative staff, or the applicant, particularly if the case is viewed only from their perspective. But it is not for the Court to substitute itself as the decisionmaker in this matter. Rather, the issue should be approached through the lens of the applicable legal test, which necessarily involves some distance from the rival narratives that the parties might advance

recognising that the decision itself was an interim one pending a full hearing by an independent body, and that the Court is proceeding on affidavit evidence that has not itself been the subject of cross-examination. This involves considering whether the decision challenged can be correctly or fairly described as one which was not arrived at honestly in good faith or genuinely, or rather was one which was arbitrary, capricious, perverse, or irrational.

30. While assertions of bias were, perhaps regrettably, made when the proceedings were initiated, they were not proceeded with, correctly, in my view. Given the range of persons involved, their qualification, and for most if not at all their distance from the individuals concerned, it would be difficult to argue that there was a collective bias or an appearance of such, which infected all of the actors in the decision making process. There is, therefore, no basis for considering that the decision was one which was not made at least honestly, in good faith, and genuinely. It would indeed require very clear-cut evidence to allow a court to come to any other conclusion on affidavit evidence and without hearing from the witnesses, particularly those against whom such a finding might be made. In this case there is simply no basis in the evidence for impugning the good faith of the decision-maker, or for suggesting that the decision was made other than honestly and in the genuine belief that it was appropriate.

31. The central issue in this case, therefore, becomes the rationality for the decision, which I think is usefully considered using the adjectives used by Rix L.J. in *Socimer*, i.e., arbitrary, perverse, and capricious. While the possibility of a collective groupthink should not be dismissed, it is not unreasonable to start from the proposition that it would be surprising if a Chief Executive Officer of

a body such as the HSE or similar body acting with input from a number of individuals with expertise and no apparent interest in, or connection to, the matter other than the performance of their respective functions and having the benefit of legal advice and after a procedure which clearly satisfied the requirements of fair procedures, could nevertheless come to a decision that was properly determined to be arbitrary, perverse or capricious. Here, the decision-maker was not the only person who had come to the conclusion that the applicant should be put on administrative leave pending serious disciplinary proceedings. This was the explicit view of Professor Day, the CEO of the Ireland East Hospital Group and it appears to be a view that was shared by the Clinical Director of the HSE, Dr Colm Henry and the Clinical Director of the National Women and Infants' Health Programme, Dr Peter McKenna, both of whom the CEO consulted before taking the challenged decision and both of whom have obvious expertise and interests in relation to the matter. At a very basic level, a decision-maker is entitled to place reliance on persons of undoubted expertise and experience, and where a decision is taken in accordance with, and a reliance on, expert advice, it becomes difficult to properly and fairly characterise it as arbitrary, perverse or capricious. It is of some relevance that, other than the assertion made on Professor O'Sullivan's behalf by his representatives, no one else involved in or with knowledge of the process or facts as of 6 August, 2019 suggested so.

32. As already observed, it is a significant and perhaps unusual feature of this case that there is no real dispute about the basic facts. Nor is there any doubt as to why the CEO as decisionmaker, Professor Day, Professor McKenna and Dr Henry all took the views that they did. It was explained, painstakingly, in the

lengthy correspondence between the decision maker, and Professor O'Sullivan's solicitors, and it was a view which was very heavily influenced by the view they took of the seriousness of the incident, and Professor O'Sullivan's reaction to it. Again, it should be sufficient for the purpose of the legal test to conclude this view of the matter is one which they were entitled to take, and which could not be viewed as one which no reasonable decision maker could take.

33. The incidents which occurred on 4 and 5 September 2018 were unprecedented in Professor Day's words. They were also quite different from the type of incident which might ordinarily give rise to charges of professional misconduct, and possible dispute before the Irish Medical Council. It was not a case of a procedure which was alleged to have been wrongly carried out or a procedure which it was contended no competent professional should have undertaken or undertaken in that way. These are matters which could give rise to considerable dispute among experts which would require determination by a body with appropriate expertise. Even after a conclusion was reached on that matter, there might be a dispute about the seriousness of the deviation from accepted conduct and the appropriate sanction. It may also be relevant to consider a person with a prior history of the practitioner in order to consider whether the incident can properly be described as a one-off, or whether it raises concerns as to general competence. The issue here raised quite different concerns which did not require expert evidence as to clinical practice, or indeed a decision maker with particular medical expertise.

34. First, there is the question of a clinical study being carried out on human subjects, with privately sourced equipment, without notification to the hospital

or indeed to a number of the persons involved in the treatment of the patients, and without an appropriate and published protocol, and any ethical approval. Furthermore, the information was not recorded on the patients' notes and the only record of the data was recorded on a private mobile phone, which was later deleted. Secondly, there is an issue that this procedure was carried out on patients under the care of the applicant and was carried out without their knowledge and critically, their consent for the procedure. Third, there is the unavoidable fact that this was not only an invasive but an undeniably intimate procedure carried out on female patients whose response on learning of the procedure, and that it had been carried out without their knowledge and consent, while under the care of a person in a position of trust, was predictably one of alarm and an understandable sense of violation.

35. I do not wish to add my own views to the extensive debate on this matter. It is sufficient to say that if the CEO, Professor Day, Professor McKenna and Dr Henry considered this incident to be a serious matter, that was a conclusion which was well within the range of conclusions to which a reasonable decision maker could come. Indeed, in light of the fact that the findings of the Doran/Brennan report that there had been a failure to comply with the five principles of the Helsinki Declaration, and the conclusion of the SAR report that the incident occurred because of a number of identified failures on the part of the applicant, it is difficult to see what other conclusion was possible. In this regard, it is perhaps relevant to observe that the seriousness of the incident was also the basis upon which the CEO decided to initiate a proposal for the dismissal of the applicant from his post, and while that decision was sought to be challenged in these proceedings, it was not quashed by the decision of the

Court of Appeal. It would seem to follow from this conclusion that the decision of the CEO to propose the removal of the applicant from his post was one to which a reasonable CEO could have come.

36. The argument that the decision to place the applicant on administrative leave on full pay was an irrational one and one no reasonable decision maker could make depends upon an interpretation of the contractual test for suspension which focuses on immediate risk of physical safety to patients, and relies upon the fact that it was only eight months after the facts came to light that the decision was made, during which period Professor O'Sullivan continued to practice in the hospital, and a reliance on the fact that he announced an intention to no longer conduct clinical trials in the hospital and subsequently gave his assurance that the incidents of the 4 and 5 September would not be repeated. The opinion of Professor Day is described as that of a non-clinician and in any event unfair, and Professor McKenna's observations are characterised as lacking fairness and proportionality. On this view the incidents themselves are to be treated as a "*one-off*" and the psychological harm undoubtedly suffered by the patients is to be attributed more to the manner in which the open disclosure meeting was conducted, rather than a consequence of the procedure itself. In essence, this involves accepting Professor O'Sullivan's views of the incidents and the manner of its treatment by the respondent.

37. In my view, and with great respect to those who take a different view, this appears to involve engaging with the detail of the case, and coming to conclusions on the merits, on the basis moreover, of untested affidavit evidence, which approach is not mandated, or arguably even permitted by the applicable

test. Furthermore, if the decision in this case is to be challenged and found wanting on the basis asserted, then the inevitable consequence would appear to be to impose yet one more layer of legalism on a process which, on any view, already requires quite elaborate procedural steps. The decision here was one to impose administrative leave on full pay. That was followed in turn by the decision to initiate a proposal to dismiss the applicant from his post. That decision in turn, while itself the product of a painstaking procedure, was only the prelude to a procedure involving a hearing before an independent panel. If, however, a decision of the CEO to place the applicant on administrative leave was to be found to fall foul of the *Braganza* test and to be irrational, arbitrary and capricious, because for example, the expression of an opinion by Professor McKenna was somehow "*unfair*", and itself arrived in breach of a requirement of fair procedures and that this infected the opinion of Professor Day and therefore rendered the CEO's decision irrational, then that would add a layer of legal complexity and unpredictability to the process which would make it even more protracted and prone to being derailed by challenge than it already is.

38. In his grounding affidavit Professor O'Sullivan went so far as to contend that in the email of 28 June, 2019 Professor McKenna (who has done no more than express his opinion on the unchallenged findings of the SAR report) made "*adverse findings*" but had carried out no independent investigation or spoke to him or heard from him prior to making those findings. Professor O'Sullivan considered these "*findings*" were unfair and were "*not made in accordance with natural justice or fair procedures*". Later he contended that the finding was made "*ultra vires*" and was compounded by the recommendations of Professor Day which were also, he considered, unsubstantiated and unfair. He continued

"*neither of these individuals afforded me the right to natural justice and fair procedures prior to making adverse findings against me. I say that the whole process thereafter was flawed*".

39. These contentions do not appear to have a sound basis in law, but they illustrate the extent to which the assertion of an entitlement to elaborate procedures at every point, (and a consequential entitlement to contend that any and all subsequent steps in the process are invalid) might necessarily demand or provoke a legal response, inevitably leading to delay and cost, which is in no one's interest, perhaps least of all the subject of the process who has a strong interest in having the matter brought to a swift conclusion.

40. The core of the argument as to the validity of the decision to place Professor O'Sullivan on administrative leave stands on two pillars. First, an interpretation of the contractual test requiring an immediate and serious risk to the health, safety and welfare of patients. Second, the fact that the suspension was only proposed to Professor Day on 1 July, 2019, almost ten months after the incident and during which period the Doran/Brennan Review and the SAR report had been delivered and had not themselves recorded or identified any concern as to patient safety. I recognise that these matters can be deployed with some force on behalf of Professor O'Sullivan, but I cannot accept that they can properly lead to a finding of irrationality or arbitrariness.

41. A useful starting point is to consider why the CEO of the respondent was concerned and commenced the disciplinary process, including considering placing Professor O'Sullivan on administrative leave. His views were set out at

length, in correspondence, which was at all times consistent. Moreover, his concerns were consistent with and reflected the views expressed by other individuals and experts, albeit individuals whose views were also considered by Professor O'Sullivan to be unfair. The first factor was a consideration of the seriousness and gravity of the incident. For reasons already set out, I consider at a minimum that the CEO and those office holders and experts who held the same opinion, were fully entitled to treat this as a very serious incident indeed. That conclusion cannot be considered either arbitrary or capricious.

42. The second issue relates to Professor O'Sullivan's reaction to these events, which Professor Day, Professor McKenna and the CEO considered to show a concerning lack of insight on the part of the applicant. Part of this was, of course, the fact that Professor O'Sullivan continued to maintain so vehemently that the incident was not serious and indeed, to maintain at least initially, that the procedure did not even require patient consent. This response was, in itself, sufficient to give rise to the concern expressed by the CEO. However, quite apart from this matter, there was substantial additional evidence to support the view of the CEO that Professor O'Sullivan's response showed a worrying lack of insight.

43. On 10 September, 2018, Ms Slattery, the General Manager of the hospital had written to Professor O'Sullivan informing him that an incident had been reported to her, and that she was directing that the study be halted immediately. She noted comments on his email of the 6th of that month that "*consent was not required as measurements do not impact on the patient*". She commented in her letter that whether or not there was an impact on the patient, the patient had a right to

informed consent for an invasive procedure, and that furthermore, it was good practice to inform a patient of the details of any survey/trial requiring their involvement.

44. This was followed by a detailed letter of 24 September, 2018 from Ms Slattery explaining that the fact that there did not appear to be ethical approval for the research was considered to be "*a very serious professional matter*" and that accordingly, an open disclosure meeting was required, and that it was not appropriate that Professor O'Sullivan make contact with the patients involved. In an email of the same day, the applicant wrote to the Risk Manager of the hospital giving some details of the study and stating:-

> *"As for consent, I told you that the study was aimed at measuring pressures during vaginoscopy, a common hysteroscopy. I also told you I was no longer going to conduct clinical research in SLKK [the hospital] for various reasons".*

45. On 27 September, 2018, a letter was sent to Professor O'Sullivan signed both by Professor Day and by the Clinical Director of the IHG, informing him of the establishment of the Doran-Brennan report, and setting out key questions set out at paragraph 5 above but which it is useful to repeat here:-

(i) *"Is there a written protocol for the study?*

(ii) *Have you received ethical approval?*

(iii) *Have any measurements/results been recorded and if so who has been given the results?*

(iv) *Are there any external parties involved?"*

46. These questions illustrate the uncertainty which still surrounded the facts at this stage, but also point to serious ethical issues which arose. At this stage, therefore, Professor O'Sullivan can have been under no misapprehension that the matter was considered extremely serious and ought, perhaps, to have been alerted by then to the extent to which his conduct of the research departed from well-established norms which ought not to have required elaboration or explanation. The letter was sent by email and followed by an email from Professor Doran himself seeking details of the study protocol and any other documentation relating to the study and seeking a meeting with Professor O'Sullivan.

47. On Saturday, 29 September, 2018 Professor O'Sullivan wrote a long letter to Professor Day, copied to the Consultant Microbiologist who had raised concerns about possible infection risk. The letter is lengthy, but the following extracts give a flavour:-

> *"Speculum examination of the vagina and cervix has been conducted in the same way for almost 2000 years. Parts of these devices were found in the ruins of Pompeii and have remained unchanged in design since.*
>
> *[...]*

I have decided to conduct a study looking at various aspects of both approaches so as to answer some of these questions which will make the dreaded Pap smear no longer a pain in the vagina.

[…]

Recent confusion seems to have occurred during the recent technical feasibility aspect of the proposed study. From a technical standpoint I need to see if it is even possible to measure the pressure and volume during vaginoscopy. I sourced a physiological monitor with the assistance of Oxygen Care and a series of 5 random women having vaginoscopic hysteroscpopy [sic] had the pressure/volume measurements carried out.

[…]

The purpose of this feasibility study was to see if the future proposed study was even possible. Without performing these 5 tests (which did not impact on the hysteroscopy or the patients) I would not have known if going ahead with the future study was possible!"

48. Professor Day stated in her affidavit that "[*t]he email of explanation dated 29 September 2018 received by me from Professor O'Sullivan did lead me to form a concern that Professor O'Sullivan was not treating the matter as seriously as he ought to and was treating the matter as an error of judgement as opposed to a very serious issue*." Once again, and at a minimum, that conclusion could not

properly be characterised as arbitrary, capricious or irrational. Indeed, it is difficult to see what other conclusion could properly be drawn.

49. On 24 October, 2018, Ms Slattery wrote to Professor O'Sullivan to update him on the matter, and to inform him that the test advised by the Consultant Microbiologist had been carried out, and that they did not show any infection transmission. Patients had been informed that the matter would be formally reviewed. Professor Day had commissioned a formal review and the applicant was informed that he would be provided with the terms of reference and membership of the review team. I cannot see anything improper or questionable in her doing so. Indeed, it was again a proper step carried out and full notice was given to the applicant.

50. On the same day Professor O'Sullivan appears to have sent an email from a private email account to other staff members in the following terms:-

> *"Colleagues,*
>
> *Pls. see attached correspondence from Ann Slattery.*
>
> *I would be interested in getting your opinions on how to tackle this ludicrous, unsubstantiated, libelous and false claim by management locally and IEHG.*
>
> *There was no possibility of harming any patients during the conduct of a feasibility test of equipment.*

I would like to set up a mock demonstration of the procedure to demonstrate the impossibility of cross infection of patients, but wonder whether I should do this prior to a review or just wait for the review and embarrass the management team.

This is beyond a joke and certainly has Medical Council ramifications for Garry Courtney, but alas not for the managers ... they are never bloody accountable. It's incredible the process that they have engaged in. Courtney recalled my patients and tested them for HIV etc without telling me and if the prick listened to my registrar explain the process he would have avoided upsetting the women. I would appreciate your input as this is not only a worrying trend, I believe the man is unstable!!

Thanks

Ray"

51. Six days earlier he had emailed the Hospital Risk Manager from the same account referring to the open disclosure process as a "*farce*" and "*witch hunt*" and illustrating the irrational (as he claimed) behaviour of Professor Courtney. He continued:-

"My only mistake was not informing the women that were adding a little extra to their procedures to see if it would be possible to do a study to measure the volume of water and pressure of water used during these procedures....so in the future we can try make the vaginal examination of women less painful!!!!

I have referred matters to my solicitors and Senior Council [sic]*."*

52. This correspondence, in its tone, content and circulation, provides ample basis for Professor Day's view that the applicant was not treating the matter as a serious one, and for Professor McKenna's view that the applicant (whose identity was not known to him) showed lack of insight. Much later, in his meeting with the CEO to allow him to expand upon his written representations in respect of any possible disciplinary proceedings, Professor O'Sullivan acknowledged that he only considered that consent was necessary when a hypothetical situation was put to him by a member of the review team which asked him to consider if he was having a colonoscopy and an extra step was done and he was not told. When put to him in this way he admitted that the member of the team "*had a point*". Thereafter, Professor O'Sullivan continued to maintain, however, that the incident was an "*error of judgment*".

53. In the letter of 6 August, 2019, the CEO referred to the views of Drs McKenna and Henry, who had expressed the view that there appeared to be a lack of insight on Professor O'Sullivan's part regarding the seriousness of the matter and regarding the importance of informed consent and ethical approval, particularly where intimate procedures were concerned. He referred to the letter from Professor O'Sullivan's solicitors of 29 July, 2019 asserting there could be no grounds for immediate and serious risk because Professor O'Sullivan acknowledged an error of judgment in neither obtaining patient consent nor ethical approval and because he had given an undertaking that what had happened on 4 and 5 September, 2018 would not happen again. The CEO continued however, that the remainder of the letter did not reassure him that

Professor O'Sullivan in fact understood the seriousness of his concerns or the nature of his legal and ethical obligations as a doctor and as a consultant obstetrician and gynaecologist. He continued:-

> *"Whilst I note that you acknowledge an error of judgement on your part, in the remainder of the letter of 29 July 2019 you appear to be contending that consent for the hysteroscopy procedure was sufficient to also encompass the additional procedure which was undertaken without the patients' knowledge. The letter states that*
>
> *'the only deviation from this procedure was the insertion of a small catheter, pressure pad, measuring 10 mm x 10 mm inside the entrance to the vagina'*
>
> *The degree of deviation from the hysteroscopy procedure is not the central issue. The material issue for me is that an additional procedure was conducted, about which the five patients had no advance knowledge and in respect of which they were not afforded an opportunity to provide their informed consent.*
>
> *In coming to a decision on administrative leave I am motivated by concern for patients' safety, health and welfare. I have considered the patients' reactions when they learned about this procedure. All of the patients appear to have been extremely distressed at your apparent failure, as their consultant obstetrician / gynaecologist, to respect their fundamental right to bodily integrity. The patients were informed about what happened by the hospital in accordance with the hospital's Open*

> *Disclosure policy. I note that you also appear to be questioning 'the requirement for these 'open disclosure meetings'...' in your recent correspondence. I believe that it was unquestionably necessary for the hospital to inform the patients about what had occurred".*

54. Looked at again through the prism of the *Braganza* test, it cannot be said that the view expressed by the CEO in this letter was anything other than *bona fide*. Nor, in my view, can it plausibly be contended that his conclusion that Professor O'Sullivan did not understand the seriousness of the CEO's concerns, or the nature of his legal and ethical obligations, was irrational, arbitrary or a view which no reasonable decision maker could take.

55. The next question is whether these concerns were sufficient under the contract to permit the placing of the applicant on administrative leave on full pay. It is suggested that even if these concerns were *bona fide* and not irrational, they do not meet the standard of an immediate risk of harm. If this test is narrowed to an immediate risk of physical harm, then this argument has some weight. But the fact that an immediate risk of physical harm to patients would clearly justify a suspension on full pay, does not mean that the power of suspension is limited to those circumstances. If it were so, it would reveal a serious flaw in the contract. The contractual test should not be read as three separate categories of "*health*", "*safety*" and "*welfare*" and each given a separate and restrictive interpretation. The term should, in my view, be understood collectively against the background of the contract itself, and the purpose it sought to achieve. The nature of the contract is between the HSE as employer, and the consultant surgeon, but with the object of providing services to patients. The test should be

looked at therefore, more generally, as the protection of patients from something which poses an immediate and serious risk to them. As was repeatedly stated by the CEO to the applicant and his legal representatives, the CEO and the HSE more broadly, were not concerned solely with the question of physical harm. It was clear that the patients had suffered harm and indeed, serious harm. Nor was the CEO required to consider that the matter was addressed by the rather off-hand assurance that the applicant would no longer conduct clinical research in the hospital. The concerns of Ms Slattery, Professor Day, Dr McKenna, Dr Henry, and the CEO were not limited to the detail of the particular incident on 4 and 5 September, 2018. It was, as I understand it, a serious concern that the applicant appeared to have conducted himself in a manner that was so far removed from established norms of both clinical study, and perhaps most critically, patient treatment, and when challenged did not seem aware of how far this behaviour departed from a basic requirement of patient treatment, in a context of an intimate procedure which, if anything, required even greater sensitivity and attention to standards of patient treatment.

56. This was not the case of a disputed single instance that had given rise to possible serious harm to an individual patient, but where a CEO might conceivably be satisfied that it could be considered an isolated occurrence and not likely to recur. This concern related to the basic approach to research study on the one hand, and patient treatment on the other. The question of whether these concerns came within the contractual language of "*an immediate and serious risk to the health, safety and welfare of patients or staff*" can be tested by considering the hypothetical circumstance where a surgeon maintained that he/she had the right to carry out any treatment on a patient which he/she considered appropriate in

the circumstances without informing the patient or seeking the patient's consent because the surgeon knew best and was only carrying out the function in the interests of the health and safety of the patient. It could not be said that this posed any immediate or serious risk of physical harm since in each case on this hypothesis, the treatment was beneficial. But I do not think it could be seriously argued that such a departure from the accepted norms of patient treatment could not be said to pose an immediate and serious risk to the "*health, safety and welfare*" of patients.

57. If accordingly, the CEO having received the views of Professor Day, Dr McKenna and Dr Henry, had real concerns about the approach of Professor O'Sullivan to his work as it is clear he did, then in my view, he was entitled to consider that this posed a risk to the health, safety and welfare of patients, having regard to the detail of the incident, the findings of the reports and the applicant's response and behaviour and such a conclusion could not be considered irrational, arbitrary or capricious.

58. It is, however, argued that given the lapse of time between the incident in September, 2018 and the proposal for suspension in late June early July, 2019, that there could be a real concern of an *immediate* risk. However, it is apparent from Professor Day's affidavit that she considered this at all times to be a serious issue, but also that because of both the serious and unprecedented nature of the matter that she had to follow clear and verifiable procedures which were moreover legally robust. She states in her affidavit that she had legal advice from an early stage. There was no delay on her part, or on the part of the CEO in addressing the matter. The research study was halted immediately, and a

direction given that no data be used. Thereafter, the Doran/Brennan report was sought and obtained by 1 October, 2018. The advice of a Consultant Microbiologist was obtained, and an open disclosure meeting held, and testing made available to patients. Thereafter in late October, the Systems Analysis Review report was commissioned by Professor Day which commenced in mid-November, 2018. A draft report issued on 9 May, 2019, was reviewed by the legal team for factual accuracy and consistency, and finalised on 20 June, 2019 and furnished to Professor Day. It is fair to say that the outcome of both the Doran/Brennan review of the research study and the Systems Analysis Review were critical, and in my view strongly critical, of Professor O'Sullivan. On receipt of the report on 20 June, Professor Day requested Dr McKenna to consider the report from an ethics, consent and research practice perspective and revert with his assessment and recommendations. He did so on 28 June, 2019 and on 1 July, 2019, Professor Day wrote to the CEO setting out the sequence of events and expressing the view that Professor O'Sullivan’s conduct may pose an immediate and serious risk to the safety, health and welfare of patients and staff.

59. This sequence does not suggest any lack of concern on the part of Professor Day or indeed that those concerns only emerged in July, 2019. It does, however, suggest an appreciation of the necessity to take appropriate steps, obtain independent and expert review and advice, and to keep Professor O'Sullivan informed of the progress of matters. It is useful to consider the counterfactual. Had the question of suspension and administrative leave been addressed prior to the receipt of the Systems Analysis Review report it is not unreasonable to

think that that step would have been challenged as one that was premature and unjustified.

60. A related argument is that both the Doran/Brennan review and the SAR report were instructed that if there were concerns of an immediate risk to safety, that should be brought to the attention, and this was not done. I do not think however, that this demonstrates that the decision of the CEO was either *mala fide* or that his conclusion that there may be an immediate and serious risk to the health, safety and welfare of patients or staff was irrational or arbitrary.

61. It is necessary to keep in mind the separate functions that were being performed. The Doran/Brennan review was to address the immediate question of the research study. The Systems Analysis Review was required to do just that; conduct a review and analysis of the systems within the hospital and establish the facts of what had occurred, whether there was an infection risk, the detail of any patient safety risks arising in respect of each patient and if similar incidents had occurred. The Review was not required to, and did not address, the separate contractual questions of whether disciplinary procedures should be initiated, and whether under the contract it was appropriate to place Professor O'Sullivan on administrative leave. Those matters were solely for the CEO. It is apparent to me, at least, that each report was required to ascertain facts and assess defaults, but that disciplinary consequences were a matter for a separate procedure and a separate decisionmaker.

62. It is, in my view, dangerous to seek to derive the presence of a positive opinion from the absence of a negative statement. I do not think it can properly be

deduced that because either the Doran/Brennan report or the SAR report did not themselves express a concern as to an immediate risk of harm to patients, that any of the experts concerned had positively concluded that there was no serious or immediate risk to patient health, safety or welfare, still less that the CEO was not entitled to come to a conclusion on the issue the contract assigned solely to him. If this reasoning was appropriate, it might just as easily be argued that the decision of the CEO to place Professor O'Sullivan on administrative leave should not be seen as irrational because Dr Waldron, the Chairman of the Medical Board, having consulted with the Irish Hospital Consultants' Association, did not protest that the decision to place the applicant on administrative leave was arbitrary, capricious or even unjustified, or indeed, that the decision could not be arbitrary, capricious or irrational since Professor O'Sullivan who was appraised of all material facts at the time, and was in receipt of legal advice, did not commence any proceedings to challenge the decision either when informed of it, or indeed, at any point thereafter.

63. A court should be particularly slow to assume a positive state of mind (that the reviewers did not consider there was a serious or immediate risk to the health, safety or welfare of patients sufficient under the contract to permit the placing of the applicant on administrative leave) from the absence of a report of a risk of immediate harm when there is no evidence that that matter was specifically addressed by the report, and when the relevant witnesses are available to give such positive evidence if that was indeed their view. Furthermore, if indeed it was the case that the opinions expressed by Professor Day and the CEO, after consulting with Dr McKenna and Dr Henry, were indeed so much of an outlier

that no reasonable decision maker could come to that conclusion, then it is to be expected that positive evidence to that effect would have been available.

64. When the O'Hare report came to hand, it clearly required careful consideration by the CEO, who had of course commissioned it. But it cannot be argued that the CEO was bound by the report, particularly on the questions of seriousness and immediate risk. The CEO did give careful consideration to the report and set out in considerable detail why, notwithstanding the report, he had come to the conclusion that it was appropriate to commence the process for the possible removal of Professor O'Sullivan. That decision was upheld by the Court of Appeal and has not been appealed. It could not be said to be arbitrary or capricious.

65. The remaining arguments advanced by or on behalf of the applicant are, I think, makeweights. In my view, it does not in any way depreciate the value of Professor Day's observations that she is not described as a "*clinician*". It is clear that she has practical experience of patient care, and administrative experience at a high level in the health service. The questions involved in this case did not involve any issue of a disputed technical procedure, or particular clinical expertise. Instead, the issues of research study ethics, and informed patient consent, are basic and fundamental issues which are not reserved to clinicians. The anonymising of the Systems Analysis Review report is something which can be seen as an effort to ensure independent and neutral evaluation. Similarly, consulting with senior persons within the health service with particular expertise such as Dr McKenna and Dr Henry, might be capable of being described as extra contractual in the sense that it is not specifically provided for under the

contract, but is certainly not a breach of contract. Both these matters can be tested by considering the counterfactual; if the System Analysis Review had identified the parties involved by name, and if the position of the CEO was made without consulting with clinical experts available within the CEO's organization it is readily conceivable that those steps could also have been subjected to criticism. While I respect the views expressed by a strong Court of Appeal and Woulfe J. in this Court, I cannot conclude of the CEO in this case fails the test set out in *Braganza* and I agree with the reasoning of Dunne J. and the conclusion to which she has come.

66. However, the fact that there should be such a division of opinion and indeed, protracted proceedings over this issue, should be a source of concern. Once these incidents occurred and came to light, then everyone, the consultant, the employer, the individual patients and the wider patient body, all had a shared interest: that as soon as possible it should be determined whether or not disciplinary proceedings should be commenced, that any period of suspension should be as short as possible to permit the determination of those proceedings by an independent panel following an investigation and if necessary a hearing, that observed fair procedures. Once the facts were established then it was clear that any disciplinary proceedings could not result in an exoneration of Professor O'Sullivan. What was in issue was the seriousness of the incidents and the nature of any sanction. If the matter was considered so serious that the only appropriate response was termination of Professor O'Sullivan's contract, then that ought to have been capable of being decided. If it was considered less serious and there was substantial mitigatory factors, such as Professor O'Sullivan's record and if it was considered that he could properly perform his duties if certain conditions

were fulfilled, then that too ought to have been capable of being addressed reasonably promptly in which case, Professor O'Sullivan could have been restored to his position and to the care of patients.

67. In the event neither of these things occurred, and no panel ever made a final determination on the seriousness or gravity of the incident and the consequences for Professor O'Sullivan’s practice. Indeed, the committee did not even reach the starting point of commencing a hearing. Instead, more than three and a half years have been spent in the courts, much of it has been spent on the question of whether there was a valid initial decision to suspend on full pay for the duration of a disciplinary process.

68. Some criticism has been directed at the pace of the investigation by the HSE and it has been observed that the contract requires an investigation to be carried out as quickly as possible. This is so, but for lawyers to criticise the respondent in this regard is reminiscent of the biblical failing of pointing to the mote and ignoring the beam. It is clear that the matter was never left in abeyance. Instead, a careful process was followed which was fully respectful of the rights of the applicant and which sought to follow a path that was legally robust. From receipt of the SAR report to the CEO’s decision on administrative leave was a matter of weeks, a period occupied by obtaining advice and providing an opportunity to the applicant to make representations. Thereafter the CEO proceeded to consider the commencement of the process for removal, which again involved providing the applicant with the opportunity to make representations and indeed to meet with the CEO to do so personally. Once proceedings were commenced in February 2020, the position of the applicant on administrative leave on full

pay became the default position, which – although unsatisfactory to all parties – was the inevitable consequence of the stay on the proceedings. That stay remained in place until the decision of the High Court. However, the existence of the proceedings and the appeal to the Court of Appeal meant that there could be no prospect of advancing the investigation when the decision commencing it was being challenged and asserted to be invalid, and when decisions of the CEO in relation to the merits of the matter were contended to be irrational as a matter of law.

69. It is difficult to avoid the conclusion that a degree of uncertainty and unpredictability as to the legal position has contributed to this outcome. It is perhaps important therefore, to be clear about the functions of the courts in respect of disputes such as this. In particular, it is necessary to recognise the limited issues that are before the courts. Here, it is perhaps understandable that once Dr O'Hare's report had been received that Professor O'Sullivan might seek to challenge the decision of the CEO to initiate disciplinary proceedings, seeking his dismissal. That challenge was, however, correctly rejected in my view, by the High Court, and that decision was in turn upheld in the decision of the Court of Appeal. In retrospect it is regrettable that the proceedings were transformed into an assessment of the validity of the continuing suspension of Professor O'Sullivan, and the conclusion that such continued suspension was not justified after 23 December. In this court the case has mutated further into a consideration of the validity of the original decision of 6 August, 2019.

70. While I understand the strongly held views which led to this matter being debated so vigorously in these proceedings, the first conclusion must be, as a

matter of law, that the issue of the validity of the decision of 6 August, 2019 is simply not properly part of these proceedings, or before this Court. These courts properly require that decision making bodies act in accordance with established and fair procedures, and should observe the same principles themselves. However, once the validity of the decision was raised it is important that there should be maximum clarity on the issue. The question in this case becomes whether the CEO was indeed of the view that the incident was such that it may give rise to an immediate and serious risk to the health, safety and welfare of patients or staff, such that the consultant concerned should be placed on administrative leave on full pay, pending the determination of disciplinary proceedings which themselves should be proceeded with as speedily as was reasonably possible. It is clear that the CEO was indeed of this view. Such a view was honestly held, and *bona fide* and was not arbitrary, capricious, or irrational. Certainly, the contrary has not been established on the evidence before this Court. Accordingly, I would allow the appeal.