THE SUPREME COURT

RECORD NO: 2022/57

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 Woulfe delivered on the 10th day of May, 2023

Introduction

1. The first issue on this appeal is whether the Health Service Executive ("the appellant") was entitled to require Professor Ray O'Sullivan ("the respondent") to take administrative leave with pay (*i.e.,* to suspend him with pay), pending the completion of an investigation into

certain aspects of his conduct, in accordance with Clause 3 of Appendix IV to the relevant iteration of the Consultants' Contract ("Clause 3"). In agreement with the Court of Appeal [2022] IECA 74, and respectfully differing from the majority of this Court, I consider that the appellant was not so entitled. There is a possible second issue arising as to a duty to review a suspension in the light of additional material received. I think it unnecessary for me to give an answer to this question in the light of my answer to the first question, and I would prefer to leave the second question over to another case where an answer is required.

2. I have had the benefit of reading a draft of the judgment which Dunne J. proposes to deliver herein, and I am happy to gratefully adopt most of the comprehensive account of the facts contained in her judgment, subject to my setting out some significant facts as I see them, although I am conscious that this means a degree of overlap with her judgment. I am also happy to gratefully adopt the comprehensive account of the proceedings in the courts below contained in her judgment. I have also had the benefit of reading a draft of the concurring judgment which O'Donnell C.J. proposes to deliver herein, and while I respect the views expressed by him, I cannot agree with his conclusions.

The Legal Principles

3. As regards the exposition of the legal principles set out in the judgment of Dunne J., I am in broad agreement with same and might just comment as follows. I am satisfied that this Court should follow the principles set out by the Supreme Court of the United Kingdom in *Braganza v. B.P. Shipping Limited* [2015] 1 W.L.R. 1661 ("*Braganza*"). The reasoning underlying that decision focused on the need for the courts to ensure that where contractual terms give one party to the contract the power to exercise a discretion, or to form an opinion as drawn from facts, such contractual powers are not abused. In her judgment Baroness Hale stated, at para. 18, that the courts have done so by implying a term as to the manner in which

such powers may be exercised, a term which may vary according to the terms of the contract, and the context in which the decision-making power is given.

4. The contractual context in which the decision-making power is given in this case is Clause 3. The power to make a consultant take administrative leave with pay, pending a disciplinary investigation, is dependent upon the relevant person in the appellant's management forming an opinion as to certain relevant facts and certain possible consequences that may flow from these facts, *i.e.* "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 of staff, which is not relevant here).

5. Any exercise of the Clause 3 power to suspend, albeit with pay, may have very serious consequences for the consultant in question, irrespective of the ultimate outcome of any disciplinary investigation into his or her conduct. In the first instance there is the potential for irreparable reputational damage, given that the suspension is normally premised on such an extremely damaging opinion for a medical practitioner, *i.e.* that his or her continuing to practice constitutes "an immediate and serious risk to the safety, health or welfare of patients".

6. In addition, there is the potential for the consultant to become deskilled over the course of what is often, if not invariably, a very lengthy period of suspension. Clause 3 on its face does refer to administrative leave continuing only "for such time as may reasonably be necessary for the completion of any investigation into the conduct of the consultant and in accordance with the provisions hereof", and goes on to say to stipulate that "this investigation should take place with all practicable speed", which might seem to suggest that any period of suspension should be reasonably short-lived.

7. However, the sting is in the tail of the first quotation above, whereby any investigation shall be in accordance with the provisions of Appendix IV to the contract. These provisions governing the disciplinary procedure are extremely convoluted, and have proven to be very

difficult to operate smoothly or speedily. As a result, the procedure has at times in practice taken years rather than weeks or months, so that the desired achievement of speed in the conclusion of the process may not represent the reality, with the present case being yet another example. The type of lengthy suspension which often arises under Clause 3 can be contrasted with other cases involving "holding" suspensions for shorter periods pending a disciplinary investigation. For example, in Morgan v. Trinity College Dublin [2003] IEHC 167, the plaintiff was suspended with pay on the 7th October, 2002, and the disciplinary hearing was originally scheduled to take place just over two months later on 11th December, 2002.

8. Given that the potential consequences of any Clause 3 suspension may be very serious for a consultant, it is perhaps not surprising that Clause 3 itself contains some internal brakes on the exercise of the suspension power. Firstly, there must be a causal connection between the alleged misconduct of the consultant and the apparent risk arising; the risk must arise "by reason of the conduct of a consultant". Secondly, it is does not suffice that it appears to the relevant person that there may be a risk to the safety, health and welfare of patients; it must appear that there may be "an immediate and serious" such risk. In my opinion this agreed delineation of the nature of the risk required for suspension makes the test a strict test with a high bar.

9. Thirdly, the test in Clause 3 is forward looking rather than backward looking. In other words, the test is not whether the alleged misconduct can be viewed as serious, but whether by reason of that conduct there may now be a serious (and immediate) risk to the safety, health and welfare of patients going forward. While the perceived seriousness of the previous conduct may be relevant to this test, particularly say in cases where the conduct appears likely to be repeated, any perceived seriousness of past conduct cannot of itself be determinative as to the serious level of risk going forward. The perceived seriousness of the previous conduct may

not be as relevant in other cases, say where the conduct appears to be an isolated incident or a once-off event.

10. Notwithstanding these internal brakes in Clause 3, in order to ensure that the suspension power is not abused, it remains necessary in my opinion for the courts to imply a term that the suspension power must not be exercised arbitrarily, capriciously or unreasonably, as per the classic test of unreasonableness adopted by Lord Greene MR in *Associated Provincial Pictures Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223, at 233-234 (and reaffirmed by Baroness Hale in *Braganza*, at para. 24). His test has two limbs:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into matters which they ought into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

11. Preventing any abuse of the suspension power in Clause 3 is necessary not only because of the very serious potential consequences for a consultant as set out above, but also because of the public detriment arising from any such abuse. As identified by Noonan J. in the Court below (at para. 106), the salary of a suspended consultant is paid out of the public purse and represents a significant loss to the exchequer and the public health care system while he or she remains off work. This public detriment is amplified in this jurisdiction, where there are reported shortages of consultants in most areas of the public health care system.

Application of the Legal Principles

12. Where I respectfully part company with the majority of the Court, however, is when it comes to the application of the said legal principles to the facts of this case. In my opinion, the appellant's eventual exercise of the Clause 3 power to suspend the respondent, per the CEO's decision of 6th August, 2019, some eleven months after the conduct complained of, fails both limbs of the "*Wednesbury* reasonableness" test. I consider that the CEO neglected to take into account matters which he ought to have taken into account. I also consider that the CEO came to a conclusion so unreasonable that no reasonable employer could ever have come to it.

13. In order to explain my reasons for reaching these conclusions, I think it necessary to review in some detail how matters progressed over the eleven-month period leading up to the CEO's eventual decision to suspend the respondent, and how those matters were progressed by the appellant at a relatively leisurely pace, in contrast to the requirement in Clause 3 of an "immediate" risk to the safety, health or welfare of patients.

The Aftermath of the Incident

14. The feasibility study or research study was conducted by the respondent at St. Luke's General Hospital on the 4th and 5th September, 2018, during the course of hysteroscopy procedures carried out on five patients. It appears that the matter only came to light as a result of nursing staff present at the time having a concern about the undertaking of the procedure, in the particular context of the perceived risk of cross-infection, which perceived risk appears to have been based on a particular nurse's mistaken view that certain equipment had not been changed between the different procedures. It appears that the nursing staff discussed the possibility of an infection risk and escalated this to more senior nurses within the department, and that the matter was then reported to the hospital management.

15. The General Manager of the hospital, Ms. Anne Slattery, wrote to the respondent by letter dated the 10th September, 2018. She stated that a clinical incident had been reported to

her that was connected to his research study, regarding a potential infection control/blood borne disease risk in relation to the procedure, that the matter was currently being followed up with the staff involved in the incident, and that currently she did not have sufficient information to determine the level of risk exposure to the patients involved. She required, as per good research practise, details of the ethical approval for this research study. She then continued as follows:

> "Pending receipt of the ethical approval and the outcome of the cases reviewed in terms of any potential risk impacting on patient safety, I am directing that this study be placed on hold and the situation will be reviewed when the required information is received providing assurance to management that the study meets patient safety standards."

16. It might be noted that this initial reaction of the hospital management appears to have focused on any potential risk to the safety of the small number of patients who had already been involved in this research study, or possibly might be involved if this research study were to continue. This initial perceived risk was met at the outset by the hospital manager directing that the respondent's research study be placed on hold, pending a review on receipt of required information.

17. The next development was that the respondent met with the Risk Manager of the hospital, Ms. Mary Dowling, in the week prior to the 24th September, 2018, and discussed his research study and the issue of the changing of certain equipment. In his subsequent email to the Risk Manager dated the 24th September, 2018, he stated that he also told her that he "was no longer going to conduct clinical research" in St. Luke's General Hospital "for various reasons", which statement was presumably a source of comfort to the hospital management in terms of the initial perceived risk referred to above, or at least any future element of that risk.

18. Ms. Slattery, then wrote to the respondent again by letter dated the 24th September, 2018. She referred to the fact that the possibility of an infection risk, arising from the respondent's research study, had been discussed with a Consultant Microbiologist. She stated

that she had reported the matter to Professor Mary Day, the Chief Executive Officer of the Ireland East Hospital Group ("IEHG"), and the fact that the respondent appeared at that time not to have ethical approval for his research study; this was considered to be a very serious professional matter. She urged the respondent to contact the Medical Council to advise that ethical approval and informed consent had not been obtained for the research study. She stated that she was obliged "in the interest of patient safety" to ensure that full disclosure of the respondent's research study was provided to each patient, and that any further necessary tests were offered and provided to patients as advised by the Consultant Microbiologist.

19. Two observations might be made about this correspondence. Firstly, Ms. Slattery does not appear to have been aware that the respondent had told the Risk Manager that he was no longer going to conduct clinical research in the hospital. Secondly, insofar as there was any perception by the hospital management of any risk to the safety, health or welfare of patients, it did not appear to the Hospital Manager that there might be any such "immediate and serious" risk, so as to potentially trigger a suspension under Clause 3. The hospital management would have been aware, of course, that the respondent had been employed as a Consultant Obstetrician and Gynaecologist at St. Luke's General Hospital since 2006, had safely delivered hundreds of infants at the hospital over the years without complication or issue, and had never before been the subject of any type of disciplinary procedure and/or formal complaint made by a patient and/or a member of staff at the hospital.

The Doran/Brennan Review

20. After the matter was reported to Professor Day, who is not a clinician, she requested two experts "to undertake an immediate review", as per her letter to the respondent dated the 27th September, 2018. In that letter she described issues arising from the respondent's research study as "very grave issues", and she appeared to separate out the issues into two categories,

firstly, the issues relating to ethical approval and patient consent, and secondly, what she described as "very serious issues" regarding potential infection risks. While the terms of reference of the review were not set out or exhibited by the appellant, an omission which I find very unsatisfactory, it seems that the review related more to the former set of issues rather than the latter.

21. The two experts requested to undertake the review were Professor Peter Doran, IEHG Lead for Research and Director of the UCD Clinical Research Centre, and Ms. Sinead Brennan, IEHG Director of Quality, Clinical Governance and Patient Safety. They carried out their review (the "Doran/Brennan Review") with commendable speed over a period of four days, commencing on 28th September, 2018 and reporting on the 1st October, 2018. In their report they concluded that the respondent's research study had not met a number of ethical principles for medical research, including the requirements to obtain ethical approval and informed consent from patients.

22. As pointed out by Noonan J. in the Court below, however, it is relevant to note that despite the very significant criticisms made by the review, at no stage was it suggested that the respondent presented a risk to the safety of patients. Nor, one might add, was it suggested that he presented a risk to the health or welfare of patients.

23. Shortly after this review, open disclosure meetings with each of the five affected patients took place on the 10th and the 11th October, 2018, unbeknownst to the respondent. During these meetings each patient was advised to undergo infection screening tests, including for HIV, the necessity for which was strongly disputed by the respondent, which unsurprisingly caused considerable psychological distress to the patients in question. Ms. Slattery wrote by letter dated the 24th October, 2018 to the respondent to update him and advised him that the meetings had taken place and that the recommended tests were carried out, and that the results did not show any infection transmission to any patient.

The Systems Analysis Review

24. In the said letter Ms. Slattery stated that the patients were also advised that the matter would be formally reviewed. She added that Professor Day was commissioning a full review of the matter, and that he would be provided with a copy of the terms of reference and the membership of the team carrying out the review. In her affidavit sworn on the 10th June, 2020, Professor Day suggests, at para. 22, that "the purpose of this review was not to assess the existence of 'immediate or serious risk' to patients/staff". This appears hardly surprising, as up to this point no one in the hospital management or the wider HSE management had suggested that the respondent presented an immediate and serious risk to the safety, health or welfare of patients, and the respondent had already indicated to the Risk Manager of the hospital that he was no longer going to conduct clinical research in the hospital.

25. In any event, the terms of reference of the review, described as a systems analysis review ("SAR"), appeared to cover not only any patient safety risks arising in respect of each of the five patients the subject of the respondent's research study, but patient safety generally. I agree with the finding of Noonan J. in the Court below that the terms of reference made clear that patient safety generally was specifically part of the review by providing as follows:

> "**Immediate Safety Concerns**
>
> Should immediate safety concerns come to the attention of the review team at any stage during the review, the review team will bring such concerns to the Commissioner's (Professor Day's) attention in writing in a timely fashion."

26. The SAR report is dated the 9th May, 2019, but appears to have been sent to Professor Day by the Chair under covering letter dated the 20th June, 2019. The review is clearly a detailed exercise, taking approximately six months to complete, during which all relevant persons were interviewed including the respondent. The report identified a number of failures

on the part of the respondent, mainly failures previously identified by the earlier review, including a failure to obtain ethical approval for the research study, and a failure to obtain informed consent from the patients.

27. The report also concluded, however, "that on the balance of probabilities there was not an infection control risk" caused to any of the five patients. In addition, the review team, having been specifically tasked with identifying any immediate patient safety concerns, and indeed with doing so before the report was completed if necessary, identified no such concerns in relation to the respondent, who was the central focus of the report. As stated by Noonan J. in the Court below (at para. 118), it must therefore be assumed that the review team, which comprised two Consultant Gynaecologists as well as a non-clinician, , was entirely satisfied that no such risk presented.

28. The report made a number of recommendations, two of which were relevant to the respondent personally. The first was that he should undertake good clinical practice, clinical research training and certification/accreditation within three months and secondly, that he should undertake education and training with the Irish Medical Council regarding consent in line with the relevant Medical Council Guide to Professional Conduct and Ethics and the HSE National Consent Policy 2017, within three months of publication of the report.

29. As mentioned above, the Chair of the SAR sent a copy of the SAR report to Professor Day by covering letter dated the 20th June, 2019. In that letter Professor Brennan advised Professor Day that all of the recommendations in the report were considered urgent, and he suggested timelines for compliance with each of those recommendations, including the three month timeline for the above two recommendations relevant to the respondent personally. On receipt of the SAR report and this letter advising as to the urgency of all the report's recommendations, one would have thought that as a matter of logic and fairness the next step for Professor Day would have been to write again to the respondent enclosing a copy of the

report, and asking him if he accepted the findings and if he would comply with the relevant recommendations within the suggested timeline of three months.

Post-SAR Approach of Professor Day

30. Professor Day did not, however, take this next step as suggested above, and instead opted for an alternative step which, in my opinion, was unfair to the respondent and which ultimately became the trigger for his suspension. In her letter to the CEO of the appellant dated the 1st July, 2019, she describes her approach at this point as follows:

> "On a *prima facie* basis, the Report appears to disclose serious issues relating to clinical practice, specifically relating to Professor Ray O'Sullivan, Consultant Obstetrician and Gynaecologist, St. Luke's Hospital, Kilkenny.
>
> Owing to the gravity of the issues identified in the Systems Analysis Review, I 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 me in determining what further steps are appropriate in the circumstances."

31. A number of observations might be made about this approach as described by Professor Day, which approach could be viewed as her immediately seeking a "review of the review". Firstly, the stated justification for interposing Dr. McKenna is that the report appears to disclose serious issues relating to Professor O'Sullivan's "clinical practice". In my opinion, the statement was inaccurate, insofar as it suggested that any serious issues related to the respondent's clinical practice generally, as opposed to the research study which was in the nature of a "single incident" (as that term is used in the context of professional disciplinary proceedings).

32. Secondly, notwithstanding that inaccuracy, Professor Day then says that she requested Dr. McKenna "to consider the report from an ethics, consent and research practice perspective". This certainly sounds like a review of the (SAR) review, given that the SAR report focused heavily on these precise issues, but this new review was of course one of which the respondent was quite unaware, and in respect of which he was given no right to participate at the time. Professor Day also says that she requested Dr. McKenna "to revert with **his** assessment and recommendations" (emphasis added), in order to assist her in determining what further steps were appropriate in the circumstances. To borrow a phrase from Noonan J. in the Court below, this appears to me a somewhat extraordinary state of affairs, given that the expert group appointed by Professor Day herself had just reverted to her with **their** assessment and recommendations, which recommendations were described as urgent, and this suggests a reluctance by Professor Day to accept, or even to engage with, the SAR report's assessment and recommendations.

33. Thirdly, while Professor Day incorporates the text of her letter dated the 1st July, 2019, in her affidavit sworn on the 10th June, 2020, she does not exhibit the actual text of any letter or email request to Dr. McKenna, assuming the request was in written form. This omission is in my opinion extremely unsatisfactory, as it is very important to know precisely what background information Dr. McKenna was given, other than a copy of the SAR report, and the precise terms of what was requested of him. This is all the more so the case given the great weight placed by the appellant upon the views expressed by Dr. McKenna.

34. Dr. McKenna "reverted" to Professor Day by email dated the 28th June, 2019, although as set out above we do not have sight of what precisely he was reverting to. He thanked Professor Day for sending on the SAR report. He set out nine matters of fact taken from the report. In doing so, he refers to the respondent as "the principle (*sic*) investigator (SM1)", which was the anonymised way in which the respondent was referred to in the SAR report. It

thus appears that Dr. McKenna may not have known the identity of the respondent, and may not have known anything about his long professional career and unblemished disciplinary record, as described at para. 18 above, although one cannot be sure about Dr. McKenna's state of knowledge given the significant omission referred to in the previous paragraph above.

35. Dr. McKenna suggested that the respondent appeared not to have demonstrated insight or remorse for his actions, the relevant actions being his failure in conducting a research study without ethical approval and patient consent, which as stated before appears to have been a "single incident". It might be observed that the SAR report recommendations were presumably directed towards these issues, or at least the issue of insight. Of course, at the time Dr. McKenna made his comments the respondent had not been made aware by the appellant of the contents of the SAR report, including the recommendations with which he subsequently complied.

36. Dr. McKenna notes that one of the SAR report recommendations was that the respondent should undergo clinical research training, and he suggests this implies that following this training the respondent may return to further clinical research. This comment suggests that Dr. McKenna was unaware that the respondent had previously told the hospital Risk Manager that he was no longer going to conduct clinical research in the hospital. While noting this recommendation, and while not suggesting that this might be unhelpful, Dr. McKenna then states that "it does not address the suitability of SM1 to be involved in patient treatment or the training of junior medical personnel and students". Of course, this is correct as a literal statement of fact, but it carries the innuendo that the respondent may no longer be so suitable. It my view, this is a quantum leap by Dr. McKenna, which appears to have no regard for the fact that this incident was a "single incident" in the context of a research study, and to have no regard for the respondent's long and exemplary professional career history (which in fairness he may or may not have known of, depending upon what background

information he may have been given by Professor Day). As a result of this quantum leap, I agree with the respondent's statement (at para. 39 of his affidavit sworn on the 21st February, 2020) that this was a "completely unfounded conclusion", one which I feel was lacking in fairness and proportionality.

37. In the final paragraph of his email Dr. McKenna concludes as follows:

> "Given 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."

38. It appears to me that the appellant placed great weight upon Dr. McKenna's conclusion, and that it was really the trigger for the respondent's suspension, notwithstanding the fact that he did not expressly address the Clause 3 test of "immediate and serious risk" (and we do not know whether he was asked to do so or not). In the circumstances, it is necessary to scrutinise carefully the three issues put forward by Dr. McKenna as giving rise to his conclusion.

39. The first issue identified by Dr. McKenna is the statement by the patients that they have suffered psychological harm. As noted by Noonan J. in the Court below, how that issue might be resolved by the respondent is not immediately obvious. The General Manager of the hospital had told the respondent, in her letter dated the 24th September, 2018, that it was not appropriate for him at that time to make any contact with the patients involved, due to his direct involvement in the research study. The respondent was not made aware of the open disclosure meetings in October, 2018, and he claims that the manner in which these meetings were conducted caused more harm to the five patients than the research study ever could have.

40. In any event, some patients may suffer some psychological harm as a result of any error or failure by a medical practitioner, irrespective of whether that error or failure reaches the higher bar of amounting to misconduct. It may be impossible to fully resolve that historic harm

suffered, but that in itself cannot justify the suspension of the consultant from clinical practice, as the test in Clause 3 is forward looking in terms of future risk rather than purely backward looking at the historic events. Dr. McKenna did not address this issue correctly, but in fairness he may not have been asked the right question or given adequate information to enable him to do so.

41. The second issue identified by Dr. McKenna was a breakdown of trust. All of the same points made above in connection with the first issue are equally applicable again to Dr. McKenna's reliance upon this issue. In addition, there is the point noted by Noonan J. in the Court below, that the SAR report contained an apology from the review team at the outset and a commitment to implementing all its recommendations as a matter of urgency, which commitment presumably might have helped to restore trust. This point was not, however, addressed by Dr. McKenna in reaching his conclusion.

42. The third issue identified by Dr. McKenna was a serious lack of insight on the part of the respondent. As pointed out at para. 34 above, the SAR report recommendations relevant to the respondent were presumably directed towards the issue of insight, and therefore, as pointed out by Noonan J. in the Court below, this was the only issue of the three identified that the respondent could himself resolve. However, as suggested at para. 28 above, the next step for Professor Day, on receipt of the SAR report, as a matter of logic and fairness should have been to write again to the respondent enclosing a copy of the report, and asking him if he accepted the findings and if he would comply with the relevant recommendations within the suggested timeline of three months. This, however, was not done, and the matter of how the respondent might deal with his lack of insight was not addressed by Dr. McKenna in reaching his conclusion in advance of that being done.

43. It seems to me that Dr. McKenna's conclusion was deeply flawed, for all the reasons set out above. As a result, I agree with another statement made by the respondent (again at para. 39 of his affidavit), that Dr. McKenna's conclusion was "unsubstantiated and unfair".

Involvement of Mr. Reid

44. On receipt of Dr. McKenna's email, one might have thought that Professor Day would now send the SAR report to the respondent, given the very serious inferences now being drawn from the report by Dr. McKenna. Instead, she wrote to the CEO of appellant, Mr. Paul Reid, by letter dated the 1st July, 2019. In her letter she set out the history of the incident, the Doran/Brennan Review (now described as a "preliminary assessment"), the SAR, and her request to Dr. McKenna to consider the SAR report and his response. She then concluded as follows:

> "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…"

45. It is important to note that this was the first invocation of Clause 3 by anyone since the incident in early September, 2018, and it was now some nine months after the incident. In her letter Professor Day confirms that, to the best of her knowledge, no further unauthorised study/analysis had been carried out by the respondent at St. Luke's Hospital, Kilkenny. This fact would appear to suggest that any possible risk of another similar incident involving the respondent had not materialised. Notwithstanding this fact, Professor Day states her concern that the respondent's conduct may pose "an immediate and serious risk to the safety, health

and welfare of patients and staff". Her stated basis for this concern is her consideration of both the SAR report findings and Dr. McKenna's commentary on those findings.

46. In my opinion, neither the SAR report findings nor Dr. McKenna's commentary provided a reasonable or cogent basis for Professor Day's concern. The SAR report identified no concerns that the respondent, by reason of his conduct in September, 2018, might now in May/June 2019, present a risk to the safety, health and welfare of patients, let alone a "immediate and serious" risk. As regards Dr. McKenna's commentary, as stated above I view his "significant reservations" conclusion as deeply flawed. Given those inherent flaws, and noting that Dr. McKenna did not express any conclusion in terms of the strict test of "immediate and serious risk" as provided for in Clause 3, I do not accept that his commentary could reasonably have justified Professor Day's Clause 3 concern.

47. In the Court below Noonan J. stated, at para. 119, that if Dr. McKenna's views constituted the basis for Professor Day's conclusion that the respondent may pose an immediate and serious risk to the safety, health and welfare of patients, then in his view "it was an entirely flawed conclusion arrived at in the teeth of the actual evidence". I fully agree.

48. On receipt of Professor Day's letter, Mr. Reid wrote to the respondent by letter dated the 17th July, 2019. He enclosed with that letter various documentation, including the SAR report and Dr. McKenna's email. He set out particulars of alleged misconduct arising solely from the unauthorised study conducted by the respondent in September, 2018, which again focused on the absence of ethics approval and patient consent. He then continued as follows:

> "In addition to my concerns regarding potential misconduct on your part, I must also consider the position of other patients and staff. Although the patients were not injured physically, it appears the patients were psychologically distressed to learn that a study/analysis of which they were totally unaware had been conducted during the course of an intimate procedure. I am concerned that by reason of the alleged

misconduct there may be an immediate and serious risk to the safety, health and welfare of patients. Accordingly, I am considering whether I should require you to take administrative leave for such time as may reasonably be necessary for the completion of an investigation into your conduct in accordance with the Disciplinary Procedure."

49. It is noteworthy that the only issue identified by Mr. Reid as the basis for his Clause 3 concern as to "immediate and serious risk" is the fact that the patients involved in the study had suffered psychological distress. It may be recalled that this was the first issue identified by Dr. McKenna as giving rise to his "significant reservations" conclusion, and all of the same points made in relation to Dr. McKenna's reliance upon this issue (at paras. 38 and 39 above) can be made again here. As previously stated, how that issue of psychological distress might have been resolved by the respondent is not immediately obvious, given his cessation of contact with the patients involved. It may be impossible to fully resolve the psychological distress suffered, but that in itself cannot reasonably justify the suspension of the consultant from clinical practice, as the test in Clause 3 is forward looking in terms of future risk rather than purely backward looking at the historic event. Mr. Reid never addresses the question of how the psychological distress may now in July, 2019 give rise to an immediate and serious risk to the safety, health and welfare of patients, when it did not do so at any point immediately after the psychological distress first became known, in October, 2018.

50. In his letter Mr. Reid went on to give the respondent a very short period of five days (later extended by two days) to make written representations in relation to the proposed suspension, notwithstanding the fact that it had taken the appellant by now over ten months to actually propose the suspension. The respondent's solicitors wrote by letter dated the 24th July, 2019, and stated as follows:

"We note your letter refers to the 'immediate and serious risk to the health, safety and welfare of patients'. We are surprised by this comment. We do not understand it and

require your explanation. All issues that have been dealt with by the report referred to in your letter of the 17th July, 2019, refer to five historic very specific incidents that occurred over a two day period on 4th and 5th September, 2018. The report does not refer to any ongoing issues and nor does it identify any ongoing risk to the health, welfare and safety of patients or indeed staff.

Furthermore, within the Terms of Reference of the report (p. 53) the review team understood that if 'immediate safety concerns' came to their attention they would 'bring any concerns to the Commissioner's attention in writing in a timely fashion'. There is no evidence in writing or otherwise as to any immediate safety concerns identified by the review team.

The Report sets out primarily two specific recommendations (pp. 8 – 11) in respect of our client and his team. They are as follows:

(1) That SM1…must undertake good clinical practice (GCP), clinical research training and certification/accreditation within three months; and

(2) SM1…must undertake IMC education and training regarding consent in line with the Medical Council Guide to Professional Conduct and Ethics for Registered Medical Practitioners 8th Edition (2016) and HSE National Consent Policy (2017) within three months of publication of this report.

We fail to see how either of these recommendations can in any way be reconciled to the allegation in your letter that 'Although patients were not injured physically, the

patients were psychologically distressed to learn that a study/analysis of which they were totally unaware had been conducted the course of an intimate procedure. I am concerned that by reason of the alleged misconduct that there may be an immediate and serious risk to the safety, health and welfare of patients'. We respectfully suggest that there is not now and nor was there ever an immediate and serious risk to patient and/or staff safety.

Our client has been a Consultant Obstetrician at St. Luke's Hospital, Kilkenny for the last twenty seven years and has never had any complaint made against him by a patient. Furthermore, he has never been subject to any disciplinary action and for that matter Medical Council investigation for any professional wrongdoing on his part."

51. Mr. Reid then wrote to the respondent's solicitors by letter dated 26th July, 2019. He noted that they had asked him to clarify the basis of his concern that the respondent may constitute an "immediate and serious risk" to the safety, health and welfare of patients. He invited the respondent to address his concerns as to same, and suggested that the respondent might wish to address his mind to Appendix 7 (The Patients Statement Summary) and to Dr. McKenna's letter dated the 28th June, 2019.

52. Mr. Reid went on to focus on the SAR report, and he identified two aspects of the report which he said concerned him in particular. These were again the absence of consent for the research study, and the absence of ethics approval. As regards the latter aspect, Mr. Reid concluded as follows:

"It seems to me, having read the documentation that was provided to your client, that your client does not appear to accept that the "study" in which he was engaged, which involved the conduct of an intimate procedure on women, some of whom were under a

general anaesthetic at the time, needed ethics approval. This gives rise to an immediate and serious concern on my part for the safety, health and welfare of patients."

53. It is noteworthy that, in seeking to clarify the basis of his Clause 3 concern, Mr. Reid refers only to aspects of the SAR report and Dr. McKenna's commentary. As stated above in relation to Professor Day's similar concern, in my opinion neither the SAR report nor Dr. McKenna's commentary provided a reasonable or cogent basis for such concern, for the reasons outlined already by me. It is striking that Mr. Reid completely fails to address the valid points made by the respondent's solicitors, that the SAR report refers to five historic very specific incidents that occurred over a two day period in September, 2018, and that it does not refer to any ongoing issues and nor does it identify any ongoing risk to the safety, health and welfare of patients.

54. The respondent's solicitors replied by letter dated the 29th July, 2019. They repeated their earlier argument that the SAR report referred to historic incidents and did not refer to any ongoing issues, in circumstances where that earlier argument had not been addressed by Mr. Reid. They set out their position that what occurred in September, 2018 did not amount to misconduct (within the meaning of Appendix IV to the Contract). However, in an effort to progress matters and without prejudice to that position, the respondent gave an undertaking "that what happened on 4th and 5th September, 2018 will not happen again". They suggested that in such circumstances there could never be an "immediate and serious risk to the health, safety and welfare of patients", and therefore no grounds upon which to place the respondent on administrative leave.

55. The respondent's solicitors went on to make certain points regarding the procedure that was actually carried out in September, 2018, and how the research study involved a deviation from that normal hysteroscopy procedure, but one which did not aggravate or cause any pain or suffering to the patient. They stated that the respondent accepted that an error of judgment

was made in not following the correct procedure for obtaining patient consent and ethical approval, and he had now given undertakings in this regard as set out earlier in the letter. They confirmed that the respondent would also comply with the recommendations of the SAR report relevant to him within the three months timescale.

56. All of the above correspondence led up to Mr. Reid's actual decision to suspend the respondent, which was conveyed by letter dated the 6th August, 2019. He stated first that he had consulted with the Chairman of the Medical Board, Dr. Waldron, (as provided for in Clause 3), who had advised him that, before a placing a consultant on administrative leave, he should be satisfied that there was no other alternative.

57. Mr. Reid then stated that before consulting Dr. Waldron, he also consulted with Dr. Colm Henry, the appellant's Chief Clinical Officer, and Dr. McKenna, and both doctors had expressed the view that there appeared to be a lack of insight on the respondent's part regarding the seriousness of the matter and regarding the importance of informed consent and ethical approval. A number of observations might be made about this additional consultation. Firstly, it was entirely outside the contractual terms governing suspension in Clause 3, unlike the consultation with Dr. Waldron. Secondly, as noted by Noonan J. in the Court below, Mr. Reid did not specify whether his consultation with these doctors was written, or verbal, or both, nor did he make available any written record of such consultations. In particular, there was no record of whether he had in fact consulted these doctors on the specific issue arising for decision under Clause 3, *i.e.* whether, by reason of the conduct of the respondent in September, 2018, there might now in July/August, 2019 be an immediate and serious risk to the safety, health, and welfare of patients. Thirdly, Mr. Reid did not indicate whether Dr. Henry and/or Dr. McKenna had been made aware of the pertinent facts that the respondent had given an undertaking that there would be no repetition of the conduct complained of, and had confirmed that he would comply with the SAR report recommendations directed towards the issue of

insight. In all of these circumstances this additional consultation appears to me highly concerning in terms of fairness to the respondent.

58. Mr. Reid then stated that he was concerned that, by reason of the respondent's conduct, there may be an immediate and serious risk to the safety, health or welfare of patients in circumstances where it appeared that the respondent had undertaken an intimate procedure in order to conduct a research study, during the course of conducting an entirely different and authorised hysteroscopy procedure on the patient. This had been done, *inter alia*, without obtaining informed consent and without any ethics approval.

59. Mr. Reid continued by stating that he had considered the representations which the respondent's solicitors had made on his behalf in their correspondence. He referred to their letter of 29th July, 2019, and the respondent's acknowledgement that he had made an error of judgment in not obtaining patient consent nor ethical approval for the procedure, and his undertaking that what happened could not happen again. However, the remainder of the letter did not reassure Mr. Reid that the respondent in fact understood the seriousness of his concerns, or the nature of his legal and ethical obligations as a consultant obstetrician/gynaecologist. Mr. Reid referred to what that letter had stated as to the limited extent of the respondent's deviation from the normal hysteroscopy procedure, and he stated that the degree of deviation was not the central issue. The material issue for him was 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.

60. Mr. Reid went on to say that, in coming to a decision on administrative leave, he was motivated by concern for patients' safety, health and welfare. He had considered the patients' reactions when they learned about this procedure, and how all of the patients appeared to have been extremely distressed at the respondent's apparent failure to respect their fundamental right to bodily integrity. Mr. Reid concluded as follows:

> "…I wish to advise you that, in light of my concerns as set out herein and in my letters of 17 July 2019 and 26 July 2019, you are required to take immediate administrative leave with pay. You will remain on administrative leave for such time as may be reasonably necessary for the completion of any investigation regarding your conduct."

61. It would appear that, in summary, the essential basis for Mr. Reid's Clause 3 concerns as stated were once again the absence of informed consent and ethics approval for the September, 2018 research study procedure, the apparent lack of insight on the respondent's part regarding same, and the distress experienced by the patients when they learned about this procedure back in September/October, 2018, all of which have been previously subject to analysis by me above.

Decision

62. As stated above, I am satisfied that Mr. Reid's decision to suspend the respondent pursuant to Clause 3 fails both limbs of the "*Wednesbury* reasonableness" test, for the following reasons.

63. Firstly, I consider that Mr. Reid refused or neglected to take into account matters which he ought to have taken into account, in forming an opinion that, by reason of the respondent's conduct in September, 2018, there might now in August, 2019 be an immediate and serious risk to the safety, health or welfare of patients. The possible risk to the welfare of future patients after September, 2018 was a risk that the respondent might possibly conduct another procedure without informed consent and/or ethics approval. It is very doubtful whether this possible risk could ever have been viewed as an immediate and serious risk, in circumstances where the respondent's conduct appeared to be in the nature of a single incident, where the respondent had an unblemished disciplinary record over a long career, and where the respondent had indicated that he no longer going to conduct clinical research at the hospital. It

is telling that the hospital management itself never believed in the aftermath of the incident that there was any such "immediate and serious risk", as they never sought to invoke Clause 3, presumably in the light of those circumstances.

64. Mr. Reid, in forming an opinion as to immediate and serious risk in August, 2019, refused or neglected to take into account the following relevant matters:

(i) He failed to have regard to the relevant point made by the respondent's solicitors that the SAR report refers to five historic incidents that occurred in September, 2018, and that it does not refer to any ongoing issues and nor does it identify any ongoing risk to the welfare of patients. In doing so, he failed to have regard to the fact that the Clause 3 test was forward looking in terms of future risk, rather than purely backward looking in terms of the seriousness of the incident in question. In fact, Mr. Reid appears to have conflated the seriousness or otherwise of the incident with the seriousness of any ongoing risk to the welfare of future patients, where these two concepts may overlap but may also involve different considerations.

(ii) Insofar as Mr. Reid made any assessment of ongoing risk to the welfare of patients, he failed to have any regard to the highly relevant fact that any such risk had not materialised for a lengthy period of some eleven months since the incident in question. In the meantime, the respondent had indicated that he was no longer going to conduct clinical research in the hospital, he had continued to carry on his clinical practice without any issues regarding risk to patient welfare, he had taken part in the SAR review and agreed to comply with the report's recommendations, he had accepted that an error of judgment was made in not following the correct procedure of obtaining patient consent and ethical

approval, and he had given a formal undertaking not to repeat the conduct complained of.

65. Secondly, as regards the second limb of the *Wednesbury* test, I am satisfied that Mr. Reid came to a conclusion so unreasonable that no reasonable decision-maker could ever have come to it. All of the factors mentioned in the last paragraph support this conclusion. In circumstances where it did not appear to anyone in the appellant organisation that there might be an immediate and serious risk to the welfare of patients at any time between the incident in September, 2018 and Mr. Reid's decision in August, 2019, coming to that opinion in August, 2019 was in my opinion bizarre and irrational, having regard to how matters had developed in the meantime. If there was no opinion within the appellant organisation that any such risk might be an immediate and serious risk in September, 2018 (when the incident was reported), or on the 1st October, 2018 (when the Doran/Brennan review results were presented to the appellant), or later in October, 2018 (when the psychological distress to the patients became known to the appellant), but even as late as 20th June, 2019 (when the SAR report was sent to the appellant), how could such risk be later viewed as "immediate" or "serious" by Mr. Reid on any rational basis?

66. In truth, all of the matters relied upon by Mr. Reid (the absence of informed consent and ethical approval, the lack of insight on the respondent's part, and the psychological distress suffered by the patients) had been known to the appellant as far back as October, 2018, and had never been thought of as justifying a Clause 3 suspension until Professor Day received Dr. McKenna's commentary on the SAR report in late June, 2019. As set out earlier in this judgment, that commentary was deeply flawed in my opinion, as was the later consultation Mr. Reid engaged in with Dr. Henry and Dr. McKenna (assuming there was in fact further consultation with him over and above his recorded commentary), and no reasonable CEO could

have come to the conclusion which Mr. Reid did based upon that flawed commentary and consultation.

67. I agree with Noonan J. in the Court below that it is also relevant to note that the appellant initiated a complaint to the Medical Council about the respondent in relation to the incident in September, 2018, as noted in Mr. Reid's letter to the respondent dated the 6th August, 2019. As pointed out by Noonan J., it is noteworthy that although the Medical Council may, and do in appropriate cases, apply to the High Court pursuant to s. 60 of the Medical Practitioners Act 2007, for an order suspending the registration of a registered medical practitioner, if the Council considers that the suspension is necessary to protect the public pending the outcome of inquiries under the Act, no such application was made by the Medical Council. It may also be worth pointing out that even where such an application is made to the High Court, the Court will very often accept an undertaking from the medical practitioner not to repeat the conduct complained of, rather than order suspension.

Conclusion

68. For all of the above reasons, I consider that the appellant's decision to suspend the respondent was an unlawful abuse of the contractual power in Clause 3. I would therefore dismiss the appeal.