



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

[2023] IESC 11

**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 Ms. Justice Elizabeth Dunne delivered on the 10<sup>th</sup> day of May 2023**

**Introduction**

1. This appeal concerns an allegation of misconduct and subsequent investigation and disciplinary process against Professor Ray O'Sullivan. The Health Service Executive ("HSE" herein) appeals against the order of the Court of Appeal ([2022] IECA 74) dated the 28<sup>th</sup> April, 2022 granting Professor O'Sullivan an order of *mandamus* terminating his suspension and reinstating him in his position as a consultant in St. Luke's Hospital, Kilkenny with immediate effect.

**Background**

2. Professor O’Sullivan has been employed as a consultant obstetrician and gynaecologist at St. Luke’s Hospital, Kilkenny, since 2006. He is employed under a Consultants’ Contract 1998 (“the consultant contract”). Having graduated from medicine in University College Cork in 1992 and completed his rotations in various Irish hospitals, Professor O’Sullivan undertook further training in the area of gynaecology and obstetrics and developed a particular interest in improving the process of clinical examination of the vagina, cervix and female pelvic organs for patients. It is not disputed that Professor O’Sullivan has significant experience and expertise in his field.
3. On the 4<sup>th</sup> and 5<sup>th</sup> September, 2018, five women attended St. Luke’s Hospital in order to undergo hysteroscopy procedures. The procedure involves a hysteroscope (a small light-guided camera attached to a small tube) being inserted into the vagina while the vagina itself is filled with water to distend it. The hysteroscope has a small camera and monitoring catheter attached to it which allows the obstetrician/gynaecologist to examine the internal wall of the vagina.
4. During these procedures, in order to further his aim of improving the clinical examination procedure for patients, Professor O’Sullivan conducted what is later described as a “feasibility study”. He inserted a small balloon catheter into the vaginas of five female patients to measure the internal pressure on the vaginal wall. None of the patients consented to this part of the procedure. In addition, Professor O’Sullivan did not seek or acquire the required ethical approval to undertake this study. None of the relevant hospital authorities were informed and the equipment used was not hospital equipment, but equipment he had personally purchased, albeit from a recognised supplier.
5. This practice came to light after a member of the nursing staff in St. Luke’s expressed concerns about this practice to senior hospital management staff, Professor Mary Day, the

Chief Executive of the Ireland East Hospital Group, and Professor Gary Courtney, a consultant gastroenterologist, particularly about the potential risk of cross-infection.

### **Professor O’Sullivan’s contract of employment**

6. Appendix IV of Professor O’Sullivan’s contract of employment contains the disciplinary procedure. The disciplinary procedure by way of preamble states that where a complaint concerning a consultant is considered under this procedure it should be dealt with expeditiously. Clause 1 provides that where the CEO of the employer is concerned that a consultant may have failed to comply with any of the terms of his contract or otherwise may have misconducted himself in relation to his appointment, that the consultant will be notified in writing of the reasons for such concerns and inform him that any representations in regard to the matter may be received by the Chief Executive Officer or the appropriate person, as the case may be, from the consultant within two weeks of the issue of the notification and will be considered. Clause 3 of this section states that where it appears to the CEO, secretary/manager of a hospital or other health agency or his authorised representative, 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, the consultant may apply for or may be required and shall, if so required, take 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. Clause 3 goes on to state that the investigation should be conducted with practicable speed. Following the establishment of the HSE in 2005, the parties are agreed that a reference to the CEO of a Health Board should be construed as a reference to the CEO of the HSE. While different roles are ascribed under Appendix IV to the CEO or “an appropriate person”, it has never been suggested in the course of these proceedings that the disciplinary proceedings in this case should have been initiated by an appropriate officer and as will be seen only the CEO

has the power under Clause 4 to propose to act in accordance with the relevant provisions of the Health Act 1970.

7. Clause 4 deals with sanctions that are available to the CEO after the investigation has been carried out. It states:

*“The Chief Executive Officer of a Health Board, the Chief Executive Officer, Secretary/Manager of a hospital or other health agency or the appropriate person, after consideration of any representation which the consultant may make in regard to the matter and, after carrying out such further examination into the matter as he considers necessary, may:-*

*(a) if he is satisfied that the matter was trivial or without foundation so inform the consultant in writing, or*

*(b) if he is satisfied that the consultant had not complied with the terms of his appointment or had otherwise misconducted himself in relation to his appointment, and if he thinks fit, issue a warning or other like communication to the consultant, or*

*(c) where he is the Chief Executive Officer of a Health Board, decide to act in accordance with the provisions of sections 22, 23 and 24 of the Health Act 1970 and the regulations made thereunder... ”*

8. As can be seen, the provisions of the Health Act 1970 are also of significance to this case. Section 22 of the 1970 Act makes provision for the CEO to suspend an officer from the performance of the duties of his office while the alleged misconduct or unfitness is being inquired into and any disciplinary action to be taken in regard thereto is being determined. Section 23 of the 1970 Act provides for the removal of officers and servants:

*“23.—(1) Subject to subsections (2) to (4), an officer or servant of a health board appointed under section 14 may be removed from being such officer or servant by the chief executive officer to the board.*

*(2) A permanent officer shall not be removed under this section because of misconduct or unfitness except—*

...

*(b) on the recommendation of a committee under section 24 or on a direction by the Minister under section 24(11).”*

- 9.** Section 24 makes provision for establishing a committee relating to the proposal of the removal of the officer. The relevant parts of the section state:

*“24.—(1) Whenever it is proposed to remove a permanent officer of a health board under section 23 because of misconduct (except as referred to in section 23 (3)) or unfitness, the Minister shall appoint a committee to perform the functions specified in this section relating to the proposal for such removal.*

...

*(4) The chairman of a committee under this section shall, in relation to the functions of the committee, have the same powers as an inspector of the Minister has under section 86 of the Local Government Act, 1941 , when holding a local inquiry.*

*(5) A committee under this section, having inquired into the proposal to remove the officer, shall make such recommendation to the chief executive officer as it thinks fit.”*

- 10.** It should be noted that sections 22, 23 and 24 of the 1970 Act were repealed by the Health Act 2004. On the 21<sup>st</sup> December, 2021, the Minister wrote to Professor O’Sullivan advising that while he, the Minister, recognises that s. 24 has been repealed, consultants with a 1998 contract may continue to avail of the procedures set down in s. 24.

## Investigation

11. Arising from the report of these events, Professor Day instructed that an external review be carried out and two experts were instructed, Professor Peter Doran and Ms. Sinead Brennan. On the 1<sup>st</sup> October, 2018, this review (“the Doran/Brennan review”) concluded that the feasibility study had not been carried out ethically and in accordance with good clinical practice. The review did not suggest that he presented a risk to patient safety, although it was critical of Professor O’Sullivan’s behaviour. It should be noted that the instructions given to Professor Doran and Ms. Brennan before undertaking the review are not disclosed.
12. Senior management took two separate steps on foot of the Doran/Brennan report. Following receipt of the report, it was decided to make an open disclosure to each of the five affected patients on the 10<sup>th</sup> and 11<sup>th</sup> October, 2018. Professor O’Sullivan was not present, nor was he informed that the meetings took place. Each woman was advised to undergo infection screening tests, including for HIV. The HSE accepts that the women subject to the feasibility study were not physically harmed. However, the women suffered considerable psychological distress upon discovery of the procedure. At all material times, Professor O’Sullivan strongly denied the suggestion that he had put the patients at a greater risk of contracting an infection by conducting this study. The second step was that, arising from the findings of the Doran/Brennan review, Professor Day commissioned a further, more in-depth, expert report into the events, titled a Systems Analysis Review Report (“the SAR Report”), the stated purpose of which was, *inter alia*, to identify “*any possible significant ongoing patient safety issues*”. The SAR Report, delivered on the 9<sup>th</sup> May, 2019, made two recommendations for Professor O’Sullivan: firstly, that he should undertake good clinical practice, clinical research training and certification/accreditation within three months with an identified organisation and secondly, that he should undertake

education and training with the Irish Medical Council regarding consent. He complied with both recommendations within three months of the delivery of the SAR Report. Like the Doran/Brennan review, the SAR Report identified no ongoing patient safety concerns in relation to Professor O’Sullivan.

13. Professor Day subsequently sought the views of Dr Peter McKenna, Clinical Director of the National Women and Infants Health Programme, on the SAR Report. In Dr McKenna’s letter on the Report dated the 28<sup>th</sup> June 2019, he noted that none of the patients suffered physical harm, but several suffered psychological injury. He opined that the significant issue was not harm but wrong to the patients, and that Professor O’Sullivan appeared not to have demonstrated insight or remorse for his actions. He concluded by noting that he had “*significant reservations about [Professor O’Sullivan’s] continued involvement in clinical practice*” until certain issues were fully resolved. It is unclear from the letter exactly what issues Dr McKenna was referring to in this context.

14. On the 1<sup>st</sup> July, 2019, Professor Day wrote to the CEO of the HSE, informing him of the events in relation to Professor O’Sullivan, and enclosed the SAR Report, Professor O’Sullivan’s contract of employment and Dr McKenna’s letter. She concluded her letter by noting her concern that Professor O’Sullivan’s conduct “*may pose an immediate and serious risk to the safety, health and welfare of patients and staff.*” She recommended that the CEO consider Professor O’Sullivan’s conduct in accordance with the disciplinary procedure provided in his contract of employment.

#### **Decision placing Professor O’Sullivan on administrative leave**

15. On the 17<sup>th</sup> July, 2019, the CEO wrote to Professor O’Sullivan, stating that, as a result of his concern of immediate and serious risk to the safety, health and welfare of patients, he was commencing the Disciplinary Procedure pursuant to Appendix IV of the consultant

contract, and further, that he was considering whether to place Professor O’Sullivan on administrative leave until the completion of the investigation.

**16.** Following correspondence between the CEO and Professor O’Sullivan’s solicitors, on the 6<sup>th</sup> August 2019, Professor O’Sullivan was informed that he was required to take immediate administrative leave with pay and that he would remain on leave until the completion of any investigation regarding his conduct. In the letter, the CEO explains:

*“I am concerned that by reason of your conduct there may be an immediate and serious risk to the safety, health or welfare of patients in circumstances where it appears that:*

- a) you undertook an intimate procedure involving the insertion of a piece of equipment into the vagina of a number of patients, who were referred to you by their family doctor (in order to conduct a “vaginal pressure measurement study”), during the course of conducting an entirely different and authorised procedure on the patients (a hysteroscopy);*
- b) without informing the patients of your intention to do so and without obtaining their informed consent,*
- c) without any ethics approval,*
- d) using a piece of equipment which you had purchased independently of the hospital,*
- e) in the furtherance of study or research in which you apparently have a financial interest.”*

Professor O’Sullivan remained on administrative leave thereafter. There were several subsequent exchanges between the CEO and Professor O’Sullivan’s solicitors. The latter outlined several objections, both to the decision to place him on administrative leave and to the conduct of various parties leading up to the making of that decision.



## Decision on the misconduct issue

17. On the 10<sup>th</sup> October, 2019, the CEO wrote to Professor O’Sullivan’s solicitor and communicated his intention to seek a written opinion from a clinician’s perspective about his actions. This opinion was ultimately sought from obstetrician and gynaecologist Dr Michael O’Hare (“the O’Hare report”). Dr O’Hare delivered his report on the 4<sup>th</sup> December 2019. The report was then sent to Professor O’Sullivan’s solicitor, but due to a technical error, the O’Hare report was deleted from his solicitor’s email account before it was read.

18. In his report, Dr O’Hare concluded that while Professor O’Sullivan’s overall conduct had fallen below the standard of conduct expected among doctors, it had not fallen “*seriously below*” that standard. Furthermore, he remarked that he did not believe that Professor O’Sullivan posed an immediate and/or serious risk to the safety, health, and welfare of patients.

19. On the 23<sup>rd</sup> December 2019, the CEO communicated his decision that Professor O’Sullivan’s behaviour amounted to misconduct, and that he intended to propose his removal from office on that account. In that letter, the CEO refers to all of the expert reports outlined above, and having considered them, goes on to say:

*“I note Dr. O’Hare’s opinion that your ‘overall conduct has fallen below — but not seriously below — the standard of conduct expected among doctors.’ While I agree with Dr O’Hare’s recital of the facts, I am afraid that I cannot agree with his conclusions regarding the seriousness of your conduct. In my view, your misconduct in relation to the Study is extremely serious. In this regard, I have taken account of the following mandatory requirements set out in the Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners (2016) concerning both informed consent and ethics approval:*

*'You must make sure patients have given their consent before your (sic) provide any medical investigation, examination or treatment. Consent is required by law and it is an essential part of respect for patients' autonomy. They also have the right to refuse medical treatment or withdraw consent.'* (my emphasis)

*'... you must make sure that all research participants are fully informed about all aspects of the study and understand the proposed intervention or treatment, especially if the intervention may not be of benefit to them, for example, if they receive a placebo.'* (my emphasis)

*'..if you act as an investigator in a clinical trial or any form of medical research, you must submit and receive approval from the relevant research ethics committee before the research begins. You must make sure that the trial conforms to the Declaration of Helsinki and any relevant national legislation.'*  
(my emphasis)

**20.** Ultimately, he stated that he proposed to remove Professor O'Sullivan from his employment as a result of him having *"seriously misconducted [himself] by covertly conducting the Study during the course of an intimate vaginal examination, and by failing to obtain ethics approval and informed consent before conducting the Study."* He invited Professor O'Sullivan to make representations, and on the 20<sup>th</sup> January 2020, Professor O'Sullivan made submissions on the CEO's decision to propose his removal. On the 31<sup>st</sup> January, having taken into account the submissions made by Professor O'Sullivan, the CEO confirmed his intention to propose the removal of Professor O'Sullivan from his employment with the HSE. In the same letter, the CEO also advised of his intention to

notify the Minister so that the proposal could be considered by a committee pursuant to s. 24 of the Health Act, 1970.

21. Before the s. 24 committee could be set up, Professor O’Sullivan sought leave to apply for judicial review, which was granted on 24<sup>th</sup> February 2020. The Court placed a stay on any further steps being taken on foot of the disciplinary process pending the determination of the proceedings or until further order.

22. In the High Court, [2021] IEHC 282, Barr J. dismissed Professor O’Sullivan’s challenge. This was appealed to the Court of Appeal, which overturned the decision to suspend him on administrative leave on the basis that there was no evidence available to the CEO on which to conclude that Professor O’Sullivan represented an immediate and serious risk to patients, but did not interfere with the other decisions, which meant that the disciplinary procedures would continue. Leave to appeal to this Court was granted on the 27<sup>th</sup> June, 2022, [2022] IESCDET 79, to determine the answers to the following questions:-

- a. 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 affected if an employer considers that the individual poses “*an immediate and serious risk to the safety, health and welfare of patients or staff*”; and
- b. What procedures are necessitated for suspension?

23. It should be noted at this stage that the dispute between the parties has been resolved. Notwithstanding that, both parties have agreed to have the issues on which leave was granted determined by this Court.

### **Judgment of the High Court**

24. It would be helpful at this stage to set out some details in relation to the proceedings in the courts below. Professor O’Sullivan sought a number of orders from the High Court, including an order of *certiorari* quashing the decision placing him on administrative leave

on the 6<sup>th</sup> August, 2019. He further challenged the decision made by the CEO on the 31<sup>st</sup> January, 2020 to propose that Professor O’Sullivan be dismissed from his employment. A number of further ancillary orders were sought by Professor O’Sullivan.

**25.** Professor O’Sullivan argued that the CEO acted irrationally and unreasonably in placing him on administrative leave on the basis that there may be an immediate and serious risk to the safety, health or welfare of patients or staff. He submitted four reasons for this: that there was a 10-month period between senior management being notified about the “feasibility study” and the decision by the CEO to place Professor O’Sullivan on administrative leave. He noted that the SAR Report was tasked with drawing to the attention of the hospital authorities any concerns that there may have been in relation to patients’ safety or health and no such concerns had been raised. He also submitted that Professor Courtney, who was involved since the beginning of the disciplinary process, had made a complaint to the Medical Council about Professor O’Sullivan’s actions, and they had not exercised their powers to apply to the High Court to unregister him. It was suggested that it could be extrapolated from this that the Medical Council had not formed the opinion that Professor O’Sullivan posed any risk to the safety or health of patients or staff. Finally, Professor O’Sullivan had furnished a written undertaking not to carry out any further studies of the kind reported from the 4<sup>th</sup> and 5<sup>th</sup> December, 2018.

**26.** The HSE argued that Professor O’Sullivan was out of time to challenge the decision of the 6<sup>th</sup> August, 2019 placing him on administrative leave under Order 84 rule 21 of the Rules of the Superior Courts, and further, that he did not come within the circumstances that would permit the Court to extend time to enable him to challenge the decision made on 6<sup>th</sup> August, 2019 pursuant to Order 84, rule 21(3). Barr J. held that Professor O’Sullivan was out of time to challenge the initial decision to place him on administrative leave. Having rejected that point, Barr J. suggested that it was open to Professor

O'Sullivan to bring fresh proceedings against the HSE for failing to review his suspension following receipt of the Dr O'Hare Report, that report constituting fresh evidence that appeared to exonerate Professor O'Sullivan.

**27.** Barr J. further concluded that Professor O'Sullivan had been premature in bringing a challenge against the decision of the CEO to propose his dismissal. The HSE argued that the decision of the 31<sup>st</sup> January, 2020 was one element in the misconduct procedure outlined in the consultant contract, and that the entire investigation was still ongoing. At this stage in the proceedings, the Minister had not appointed a committee under section 24 of the 1970 Act. It was submitted that the court would lean against interfering with a disciplinary process that has not yet concluded, notwithstanding that an error in procedure has been identified. To that end, the HSE relied on the decision in *Rowland v An Post* [2017] 1 I.R. 355. Professor O'Sullivan argued that the investigatory process came to an end when the CEO made his decision to propose his dismissal on the 30<sup>th</sup> January, 2020, and that the involvement of the Minister and the Committee constituted a separate process. Barr J. held that as there had been no error in the procedure in this case, that this point did not arise to be considered. However, he went on to say that even if such an error had been identified, Professor O'Sullivan's challenge was premature as the investigatory process had not come to a conclusion.

**28.** Professor O'Sullivan also argued that the CEO's decision from the 31<sup>st</sup> January 2020 was flawed. He submitted two reasons for this. His first ground was that the decision was unfair as Professor O'Sullivan did not have opportunity to make submissions on the O'Hare Report. As noted above at para. 17, a technical error resulted in the deletion of the email attaching this report from the solicitor's inbox. It was argued that the decision of the 23<sup>rd</sup> December, 2019, and the subsequent decision of the 31<sup>st</sup> January, 2020 must be quashed, and the fact that Professor O'Sullivan had an opportunity after the 23<sup>rd</sup>

December, 2019 and would have a further opportunity to make submissions to the committee on the O'Hare report did not remedy this breach. The HSE argued that the CEO had done all that could be expected from him in the circumstances, and that he could not have known that the report was never received by Professor O'Sullivan for consideration and further submissions. The HSE further argued that Professor O'Sullivan was given an opportunity to make submissions on the report prior to the decision to propose his dismissal on the 31<sup>st</sup> January, 2020. Barr J. held that this did not amount to an error in the decisions and that the CEO acted in an entirely proper fashion by sending the report for Professor O'Sullivan's perusal, and that it was reasonable for the CEO to assume that because the report was in Professor O'Sullivan's favour that he had no further comment to add. Further, Barr J. noted that when the applicant did reply, his criticisms were levelled at the decision of the CEO to recommend his dismissal, rather than at anything contained in Dr O'Hare's report, and in reality, no prejudice was caused to him.

29. The second aspect raised by Professor O'Sullivan was that, because the CEO was not a qualified doctor or an expert in ethical procedures in hospitals or good governance in relation to patient health and safety and where he had obtained a report from such expert, it was irrational on the part of the CEO to ignore that opinion and come to a totally different conclusion. Barr J. also rejected this ground on the basis of the decisions in *McManus v The Fitness to Practice Committee of the Medical Council* [2012] IEHC 350 and *Corbally v. Medical Council and Others* [2015] 2 I.R. 304, where it was held that decision makers are entitled to depart from expert evidence or advice. Barr J. also relied on Professor O'Sullivan's contract of employment which clearly states that the CEO alone is the person who makes the decision as to whether particular behaviour amounts to a risk to the safety and welfare of patients or staff.

### **Judgment of the Court of Appeal**

- 30.** Professor O’Sullivan appealed the decision to the Court of Appeal. He argued that the trial judge erred in law and in fact in deciding that his judicial review was premature. He also argued that the trial judge was wrong to conclude that the CEO had followed fair procedures in the course of the investigation.
- 31.** Noonan J., writing for the Court of Appeal, overturned the decision of Barr J. in part and held that there was an obligation on the CEO under the contract of employment to review Professor O’Sullivan’s suspension periodically. He had regard to Professor O’Sullivan’s contract which stated that the disciplinary process “*shall be dealt with expeditiously*”, and Clause 3 of Appendix IV which stated that “*the administrative leave should be “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. This investigation should take place with all practicable speed.”*” The Court further noted that a question was raised as to whether a suspension imposed by reason of a perceived immediate risk to patient safety at a particular point in time may endure indefinitely irrespective of the current status of that risk, or whether there is an ongoing obligation to keep that status under review. The Court of Appeal concluded that under the terms of the contract of employment, the power to suspend Professor O’Sullivan endures for the period that is reasonably necessary for the conclusion of the investigation. He further held that Professor O’Sullivan had been placed on administrative leave for a net total of twenty-seven months, deducting fifteen months from the order of Meenan J. placing a stay on the investigatory process to the date of the Court of Appeal judgment. On that basis, Noonan J. concluded that where evidence comes to light which casts doubt on the reason why the suspension was imposed in the first place, the employer had a duty to review this decision.
- 32.** Noonan J. disagreed with Barr J. that Professor O’Sullivan ought to issue fresh proceedings to challenge the CEO’s failure to review his suspension, as Professor

O’Sullivan sought an order of *mandamus* directing the HSE to terminate his suspension and immediately reinstate him. The Court of Appeal ordered that Professor O’Sullivan be reinstated from the 23<sup>rd</sup> December, 2019, being the date that the CEO proposed to dismiss Professor O’Sullivan having had the chance to consider the O’Hare Report.

**33.** Noonan J. went on to consider the powers of a section 24 committee. Professor O’Sullivan argued that there were differences in the powers conferred on a committee appointed under section 24(5) and a committee appointed under Clause 5(1) of the Consultant Contract. The former has the power to “*inquire into the proposal to remove the officer*”, whereas a committee appointed under Clause 5(1) has the power to “*inquire into the matter*”. It was argued that the statutory scheme resulted in the committee having different powers depending on who was investigating the misconduct.

**34.** Professor O’Sullivan also relied on the case of *Rajpal v Robinson* [2004] IEHC 149 where Kearns J. held that there was a serious question mark as to whether a s. 24 committee had jurisdiction to actually inquire into the misconduct in question having regard to the terms of s. 24(5) of the 1970 Act. Professor O’Sullivan argued that the committee was bound by the decision of the CEO as to whether there was misconduct or not.

**35.** Noonan J. held that there was no limitation on the powers conferred on a committee appointed under section 24. In the Supreme Court appeal in *Rajpal v Robinson* [2005] 3 I.R. 385, Kearns J.’s judgment was upheld, but the Court did not comment on the powers of the section 24 committee, nor did they base their decision on this aspect of the case. Therefore, Noonan J. considered that this was an *obiter* remark not binding on the Court of Appeal. He went on to consider section 24(5) of the 1970 Act. The section 24 committee has the same powers as a committee appointed under section 86 of the Local Government Act 1941, which provides for the recoupment of expenses by persons required to give evidence and creates a criminal offence for failing to attend to give



evidence at an inquiry. These powers were of significance to Noonan J. in his conclusion that the section 24 committee was not bound by the CEO's proposal to dismiss Professor O'Sullivan, and they were entitled to reconsider the matter in full.

**36.** Noonan J. also found that the decision made by the CEO on the 31<sup>st</sup> January, 2020 was not in accordance with fair procedures. At para. 160 of the Court of Appeal judgment, Noonan J. concluded that it was not reasonable for the CEO to assume that Professor O'Sullivan had no submissions to make on the O'Hare report as he was an active participant throughout the entire disciplinary procedure. The Court of Appeal found that Professor O'Sullivan had a right to make submissions after receipt of the O'Hare report as a matter of basic fair procedures and also in front of the section 24 committee, guaranteed by the Health (Removal of Officers and Servants) Regulations, 1971, S.I. No. 110/1971. Noonan J. also held that the decision of the CEO proposing Professor O'Sullivan's dismissal lacked cogent and logical reasons for departing from the conclusions of the O'Hare report, and while he was not bound by the expert report, he gave no clear indication for his reasons for departing from it.

**37.** Noonan J. concluded the judgment by allowing the appeal in relation to the administrative leave issue and ordering that Professor O'Sullivan be reinstated effective from the 23<sup>rd</sup> December, 2019. In relation to the other issues relating to the procedure followed by the HSE, Noonan J. concluded that the matter should now go to the section 24 committee to consider the issue *de novo*, having decided that the committee was not bound by any of the conclusions reached by the CEO.

### **Submissions of the HSE**

**38.** The HSE submitted that the Court of Appeal erred in finding that the initial decision of the 6<sup>th</sup> August, 2019 to suspend Professor O'Sullivan and to place him on administrative leave was unlawful. The HSE submitted that the Court of Appeal was incorrect to hold

that the CEO was required to review Dr O'Hare's report and then required to conclude, on the evidence, that Professor O'Sullivan's continued suspension was unlawful.

### **On the Initial Decision to Suspend**

- 39.** The HSE relied on the judgment of the Supreme Court of the United Kingdom in *Braganza v. BP Shipping Limited* [2015] 1 W.L.R. 1661 as the correct standard by which this Court should review administrative action in a contractual context, for example, in an employment contract. The HSE submitted that paras. 18-24 of *Braganza* set out the correct legal test where an employee challenges the decision-making power vested in the CEO under the consultant contract. The standard of review is guided by concepts of “*honesty, good faith and genuineness and the need for the absence of arbitrariness, capriciousness, perversity and irrationality*”; it is not a test of fairness or reasonableness, citing *Braganza* (para. 22 and paras. 102-103) and *North West Anglia NHS Foundation Trust v. Dr Andrew Gregg* [2019] 3 WLUK 291.
- 40.** From these authorities, the HSE submitted that there is a high standard of review applied to the exercise of a discretionary power to suspend. The conduct must be demonstrated to be either dishonest or in bad faith, or not genuine or arbitrary, capricious, perverse or irrational. The test is not whether the Court agrees with the decision or finds it fair or reasonable.
- 41.** The HSE questioned whether the decision made by the CEO on the 6<sup>th</sup> August, 2019 was properly before the High Court and the Court of Appeal and drew attention to the fact that no substantive case was actually made by Professor O'Sullivan before the Court of Appeal. Professor O'Sullivan had not yet appealed Barr J.'s decision not to extend time to allow the 6<sup>th</sup> August decision to be challenged, and hence there has been little if any detailed legal argument on this issue.

42. The HSE refuted the conclusion that the decision of the 6<sup>th</sup> August, 2019 was irrational and disagrees with the Court of Appeal’s finding that there was “*no evidence*” for the decision. In the letter of the 6<sup>th</sup> August, 2019, the CEO wrote that the representations made “*did not reassure me that you [Professor O’Sullivan] in fact understand the seriousness of my concerns, or the nature of your [Professor O’Sullivan’s] legal and ethical obligations as a doctor and as a consultant obstetrician/gynaecologist*”. This, it was submitted, shows a rational basis for the decision.
43. The HSE recalled Clause 3 of the Disciplinary Procedure in Appendix IV to the consultant contract which states that “*where it **appears** that to the CEO, secretary/manager of a hospital or other health agency or his authorised representative, 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, the consultant **may** apply for or may be required...*” (emphasis added). It is submitted that this clause entitled the CEO to form the relevant opinion and that the normal panoply of procedural rights that might apply when a sanction is being imposed are not at play here, as the decision was necessarily impressionistic and based on the CEO’s preliminary views.
44. As what had been issued was a ‘holding suspension’ rather than a ‘punitive suspension’, the HSE argued that the usual requirements of fair procedures do not apply, as the suspension was issued at the early stages of the investigation. It directed the Court to the judgment of Kearns J. in *Morgan v. TCD* [2003] 3 I.R. 157 , who stated that:–
- “It follows, obviously, that where suspension constitutes a disciplinary sanction, the person affected should be afforded natural justice and fair procedures before the decision to suspend him or her is taken. However, where a person is suspended so that an inquiry can be undertaken as to whether disciplinary action*

*should be taken against the person concerned, the rules of natural justice may not apply.”*

45. The HSE submitted that the Court of Appeal incorrectly characterised the actual decision made to suspend in starker terms than the legal reality, as the suspension was in the nature of a ‘holding suspension’ which does not warrant the same legal requirements or level of fair procedures. Alongside the above judgment in *Morgan*, the HSE cited *Lewis v Heffer* [1978] 1 W.L.R. 1061 (per Lord Denning at p. 364); *Quirke v. Bord Luthchleas na hÉireann* [1980] I.R. 83 (per Barr J. at p. 87); and *Deegan v. The Minister for Finance* [2000] E.L.R. 190 (SC) (per Keane C.J. at p. 198).

#### **On the Duty to Review and Lift Suspension in Light of the O’Hare Report**

46. The HSE disputed the Court of Appeal’s finding that the CEO was “*duty bound to re-evaluate the necessity for the continuation of that suspension*”, holding that “[i]t is implicit in the contract of employment by virtue of the mutual duty of trust and confidence and additionally, to give business efficacy to the contract” (para. 115, judgment of the Court of Appeal).

47. This was not the subject of a detailed submission in the Court of Appeal hearing, nor, in the HSE’s opinion, had Professor O’Sullivan reached the very high bar required to imply such a term (*Earley v. HSE* [2015] IEHC 520; *Sweeney v. Duggan* [1997] 2 I.L.R.M. 211; *Meridian Communication Ltd. v. Eircell Ltd.* [2002] 1 I.R. 17). It was submitted that this bar is particularly high where there is a detailed written contract as the one between the parties in this case, which outlines the procedure to be followed when making a ‘holding suspension’ but did not include an obligation for a review of a decision to place an employee on holding suspension.

48. In *Meridian*, O’Higgins J. at p. 41 distilled the following principles relating to implying contractual terms:–

*“ before a term will be implied in a contract it must be necessary to do so, and not merely reasonable;*

*· the term must be necessary to give business efficacy to the agreement;*

*· it must be a term which both parties intended, that is, a term based on the presumed common intention of the parties;*

*· the court will approach the implication of terms into a contract with caution;*

*· there is a presumption against importing terms into a contract in writing and the more detailed the terms agreed in writing the stronger is the presumption against the implication of terms.”*

**49.** The HSE argued that the implied term found by the Court of Appeal is not necessary for the contract to be effective, and could be unhelpful to its proper working, allowing an employee to make applications to a court arguing that a suspension against them should be lifted any time that an investigation uncovers evidence that is beneficial to the employee. It could oblige an employer to disclose evidence as it is being collected which may be problematic (see Clarke J.’s comments in *Mulcahy v Avoca Capital Holdings Limited* [2005] IEHC 70). Neither the business efficacy test nor the officious bystander test forms a sound basis for implying this term in the HSE’s submission.

**50.** The fundamental problem with implying a term to re-evaluate the necessity for the continuation of the suspension following on from the submission of a report, in the HSE’s view, is that it requires an employer to form a view about evidence being collected before the investigation is complete and before any disciplinary hearing occurs. Even more fundamentally, in the HSE’s submission, Dr O’Hare’s report did not set out any new facts, but simply expressed a different opinion to the CEO. This was not a situation where some factual matter that appeared to be clear was demonstrated in the investigation process to

be false. Therefore, the HSE said that the Court of Appeal erred in characterising the report as new evidence (para. 122).

51. The HSE questioned why it is not more reasonable for an employer to say that where a ‘holding suspension’ has been imposed it will remain until the investigation is complete before forming a conclusion, no matter how appealing it is to form a view as to the weight of some particular evidence that emerges in the course of an investigation. The HSE argued that the Court of Appeal’s determination that it is “*implicit in the contract of employment by virtue of the mutual duty of trust and confidence*” requires a more detailed analysis, and ought to be a severe test, per Hale LJ. in *Gogay v. Hertfordshire County Council* [2000] I.R.L.R. 703.

### **Submissions of Professor O’Sullivan**

52. As a preliminary matter, Professor O’Sullivan took issue with the HSE’s assertion that the decision to suspend him on the 6<sup>th</sup> August, 2019 was not properly before the High Court and the Court of Appeal. He argued that one of the points in his Notice of Appeal contended that the High Court erred in failing to find that “[the CEO] *was obliged to consider afresh the suspension issue once he had received Dr O’Hare’s Reports and that there was an onus on [the CEO] to do so.*” He also relied on the comments of Noonan J. at para. 126 of the judgment of the Court of Appeal where he noted that where an order of *mandamus* is sought, a new wrong is committed every day the challenged behaviour persists, and a fresh cause of action arises accordingly.

### **On the Initial Decision to Suspend**

53. Professor O’Sullivan first rehearsed the standard that must be met under the consultant contract in order for a lawful suspension to take place. Before suspending him, the CEO had to find that Professor O’Sullivan “*may be an immediate and serious threat to the safety, health or welfare of patients*” (emphasis in submissions). He emphasised that there

are two separate ingredients that must be satisfied. It is submitted that in order to ascertain whether there is an immediate and serious threat to the safety, health and welfare of patients, there is a requirement to obtain clinical evidence on the behaviour giving rise to an allegation of misconduct. Professor O’Sullivan noted that this was accepted by the CEO, who duly sought an expert opinion on the feasibility study from a clinician.

**54.** Professor O’Sullivan disagreed with the HSE on the standard of review to be applied to the exercise of the discretionary power to suspend him under the consultant contract. It was not in dispute that there is an implied mutual obligation under every contract of employment that both parties not conduct themselves in a manner that would be likely to destroy or damage the relationship of trust and confidence between the parties unless it is without reasonable and proper cause, and to this end, Professor O’Sullivan relied on the case of *Kamath v Blackpool Teaching Hospital NHS Foundation Trust* [2021] 10 WLUK 313 at paras. 71 and 72. In that case, Soole J. went on to say that discretionary powers must be exercised in good faith, in a manner that is not arbitrary, capricious or irrational, and when the Court was reviewing the exercise of a discretionary power in a technical matter beyond the court’s expertise, “*the Court should have proper respect for the views expressed by experts...*”

**55.** It was argued that the CEO did not properly exercise his discretion when he suspended Professor O’Sullivan as he did not act consistently with the evidence and facts presented in the expert reports he obtained. In circumstances where the decision to suspend Professor O’Sullivan on the 6<sup>th</sup> August, 2019 was made eleven months after the misconduct allegedly occurred, it was submitted that it was difficult to reconcile this with the existence of an “*immediate risk*” to patients. Professor O’Sullivan further argued that in letters exchanged between the parties, the CEO stated that the suspension would

continue unless he was willing to admit to serious misconduct, and that this did not satisfy the exercise of discretion outlined in the case law above.

56. Moving to the events of December 2021, Professor O’Sullivan argued that the mutual trust and confidence between employer and employee was undermined when the CEO disregarded the expert report of Dr O’Hare and continued the suspension, and therefore it was open to the Court of Appeal to review it. This is so even though the CEO acknowledged in the course of the investigation that he was obtaining a report from Dr O’Hare as it “*was necessary given that previous clinical input related to my consideration of administrative leave as opposed to any potential disciplinary action*” (see the letter from the CEO to Professor O’Sullivan dated the 21<sup>st</sup> October, 2019).

#### **On the Duty to Review and Lift Suspension in Light of the O’Hare Report**

57. Professor O’Sullivan argued that his suspension cannot be characterised as a ‘holding suspension’ and is akin to a punitive suspension, attracting considerations of natural justice and fair procedures. Professor O’Sullivan took issue with the HSE’s reliance on *Morgan v. Trinity College Dublin* [2003] 3 I.R. 157 and goes on to quote from p. 169 of that judgment where Kearns P. says:

*“the court will have to consider the manner and nature of the suspension. If the suspension is without pay and open-ended, it obviously has far more detrimental effects from the point of view of the person suspended and may be more readily be seen as a punishment.”*

58. Professor O’Sullivan argued that there is a positive duty on the court to examine the nature and operation of a suspension and decide in all of the circumstances whether it is holding or punitive in nature, and that this will be done on a case-by-case basis. Some of



the factors relied on by Professor O’Sullivan in his submission that his suspension was punitive include:

- a. He lost his ability to continue to carry out and practice obstetrics and gynaecological surgeries, which had detrimental impact on his ability to practice in the future and he would require significant retraining and upskilling upon return (*Khan v HSE* [2008] IEHC 234);
- b. As he can only be suspended where there is an immediate and serious risk to the safety, health or welfare of patients or staff, his contract of employment required that the CEO form an opinion about whether there has been wrongdoing on the part of Professor O’Sullivan (*Quirke v Bord Luthchleas na hÉireann* [1988] I.R. 83);
- c. The suspension was ongoing and indefinite and there was no defined period or purpose for the suspension (*Deegan v. Minister for Finance* [2000] 11 E.L.R. 190).

**59.** Having regard to the above factors, Professor O’Sullivan submitted that his suspension was punitive, attracting the application of fair procedures and natural justice, and therefore, there was a significant duty on the CEO to review his suspension upon his receipt of the O’Hare report.

### **The Consultant Contract**

**60.** Reference has already been made to Professor O’Sullivan’s contract of employment. This contract is sometimes referred to as “the consultant contract”. At issue in these proceedings is the consultant contract of 1998, which predates the establishment of the HSE. The section of the consultant contract at issue in these proceedings is that to be found at Appendix IV, which is headed “Disciplinary Procedure”. Appendix IV makes reference to the role of the Chief Executive Officer of a Health Board, but as Noonan J.

pointed out in his judgment, the parties are agreed that the role of the former CEO of a Health Board falls to be construed as a reference to the CEO of the HSE as I have mentioned previously (see para. 25 of the judgment of the Court of Appeal).

**61.** Whilst I do not propose to make reference to all of the provisions of Appendix IV at this stage, it is relevant to note that Clause 4 deals with sanction and gives a number of options to the CEO, depending on the seriousness of the matter at issue. One option involves the making of a proposal for the removal of a consultant from his employment with the HSE. Such a proposal can only be exercised by the CEO, following a recommendation of a committee appointed under s. 24 of the Health Act, 1970. It was intended that this procedure would be followed in the case of Professor O’Sullivan, but as a result of these proceedings, a stay was granted to him, with the result that a s. 24 committee consideration was put in abeyance for a considerable length of time. As a result of the Court of Appeal hearing, the process before the s. 24 committee was able to proceed, leading ultimately to a resolution of the dispute between the parties herein, as previously mentioned.

**62.** It should be borne in mind, as pointed out by Noonan J., that, in fact, s. 24 of the Health Act, 1970 was repealed with effect from the 1<sup>st</sup> January, 2007. At para. 34 of his judgment, Noonan J. said as follows:

*“When this court queried how the Minister could now purport to exercise his power under s. 24 to appoint such a committee, the court was informed that this had been done instead on a consensual basis by the Minister.”*

**63.** Leaving aside the question of the Minister appearing to exercise a statutory power under a legislative provision that had been repealed, this brief outline of the relevant provisions of the consultant contract highlights the somewhat unusual form of contract at issue in these proceedings. In the first instance, the contract is exactly that. It is a contract between the individual persons in the position of someone like Professor O’Sullivan and the HSE.

As such, any alleged breach of the contract could be resolved in the ordinary course of events in accordance with the law of contract. However, it is clear that there are elements of public law at play in relation to the consultant contract as well. In the context of the 1998 consultant contract, a proposal to remove a servant or officer of the HSE involves the appointment of a committee by the Minister, and thus, as can be seen, a statutory process under the consultant contract at issue in these proceedings is engaged where the removal of a consultant employed in the Health Service is concerned. To that extent, the consultant contract could be regarded as something of a hybrid, having both elements of the private law of contract and public law at play. It is presumably on that basis that these proceedings were commenced by way of judicial review, rather than, as might normally be the case in respect of an employment contract, by means of plenary proceedings seeking relief in respect of an alleged breach of contract. In this case, the principal orders sought were an order of *certiorari* quashing the decision of the CEO proposing that Professor O’Sullivan be removed from his employment, together with an order of prohibition restraining the HSE from taking further steps in the disciplinary process. An order of *mandamus* was also sought in relation to terminating the suspension of Professor O’Sullivan and reinstating him, and further seeking a declaration that the decision made proposing to remove him was invalid and of no legal effect. In addition, a claim was made for damages for breach of contract. This is not to say that Professor O’Sullivan would have been precluded from pursuing a remedy by means of proceedings seeking relief such as an injunction to restrain his suspension or removal and claiming damages for breach of contract. The purpose of outlining this is to highlight the fact that the consultant contract contains elaborate and detailed procedures and safeguards which have to be followed before either a suspension of a servant or officer takes place, or before a proposal to remove a servant or officer can be acted upon.

## **The power of suspension**

64. As was noted previously, the fact that the CEO was considering whether to place Professor O’Sullivan on administrative leave was communicated by the CEO by letter of the 17<sup>th</sup> July, 2019. In that letter, having set out “*particulars of alleged misconduct*” as follows:

*“Having reviewed the above documentation, it appears that, in the course of you conducting a diagnostic hysteroscopy procedure on five patients you also engaged in an “unauthorised vaginal pressure measurement study/analysis”. I understand that the study/analysis has been described as unauthorised because it proceeded without ethics approval and without the patients’ consent. It is my understanding that you hold the view that the patients’ consent was not required. Furthermore, it appears that certain equipment used to conduct the study/analysis in the case of each patient, namely a balloon catheter, was not equipment held on stock by St. Luke’s Hospital, and was procured independently of the Hospital. I further understand that there is a suggestion that the study/test was in some way connected with the development of an improved speculum, a matter in respect of which you apparently have a financial interest.”*

65. He then went on to observe:

*“These are serious matters and raise a number of concerns as follows:*

- *It appears that the rights of the affected patients to personal autonomy and to bodily integrity were not respected by you;*
- *It appears that what occurred was not in accordance with the HSE’s National Consent Policy;*
- *It appears that no Ethics Committee approval was sought for the study/analysis;*
- *It appears that you did not comply with good clinical practice;*

- *It appears that you did not comply with the Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners;*

*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 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 that 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.”*

**66.** Following correspondence between the parties, Professor O’Sullivan was placed on administrative leave on the 6<sup>th</sup> August, 2019. In the letter, the CEO outlined the investigation or consultations carried out by the CEO before reaching his decision in that regard. He referred to the fact that he had consulted with the Chairman of the Medical Board, the HSE’s Chief Medical Officer, and Dr Peter McKenna, the Clinical Director of the National Women and Infants Programme. He also considered representations made on behalf of Professor O’Sullivan. It seems to me that it would be appropriate to set out in some detail the terms of that letter, given that it is central to the issues in these proceedings. He said:

*“I have considered the representations which MDM Solicitors have made on your behalf in their correspondence with me. In their letter of 29 July 2019, they assert that there can be no grounds for “immediate and serious risk” because you have acknowledged that you made an error of judgement in obtaining neither patient consent nor ethical approval for the procedure, and because you have given an undertaking*

*that what happened will not happen again. However, the remainder of the letter did not reassure me that you in fact understand the seriousness of my concerns, or the nature of your legal and ethical obligations as a doctor and as a consultant obstetrician/gynaecologist.*

*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 10mm x 10mm 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.*

*I advised you that you may wish to apply for administrative leave but your solicitors confirmed that you will not be making any such application. As such, 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.”*

67. It may be useful to recall at this point that prior to the letter of the 6<sup>th</sup> August, 2019, advising Professor O’Sullivan that he was being placed on administrative leave, a number of reviews or investigations had taken place in respect of the events of the 4<sup>th</sup> and 5<sup>th</sup> September, 2018. In the first place, a review was carried out at the request of Professor Day by Professor Peter Doran and Ms. Sinead Brennan, (“the Doran/Brennan review”) of the 1<sup>st</sup> October, 2018. This was followed by the Systems Analysis Review Report, (“the SAR Report”), dated the 9<sup>th</sup> May, 2019. Finally, in response to the receipt of the SAR Report, Professor Day sent a copy of that report to Dr Peter McKenna, who wrote to Professor Day in response by letter of the 28<sup>th</sup> June, 2019. He expressed significant reservations as to the conduct of Professor O’Sullivan, as outlined previously. It was following the receipt of his letter that Professor Day first wrote to the CEO requesting that he consider the matter of Professor O’Sullivan’s conduct, having regard to the disciplinary process provided for in the consultant contract. It should be borne in mind that this letter, received on the 1<sup>st</sup> July, 2019 by the CEO, was his first involvement in the matter. As can be seen, the CEO acted promptly in considering the issue, culminating in the letter of the 6<sup>th</sup> August, 2019.

**Was the decision to place Professor O’Sullivan on administrative leave lawful?**

68. The first issue to be determined is whether the decision of the CEO to place Professor O’Sullivan on administrative leave with pay was lawful. It should be borne in mind that at issue in this case is administrative leave on pay. Administrative leave on pay can be requested by the consultant himself or can be required to be taken by the CEO. Although the word “suspension” has been used at times in the course of these proceedings, it is important to remember that there may be differences between “administrative leave” and “suspension”, as those two terms are usually understood. However, for the purpose of these proceedings, the terms are sometimes used interchangeably. One has to bear in mind that the administrative leave in this case was to facilitate investigation and it was a term of the administrative leave that the consultant was to be paid while on administrative leave.

69. In this case, the Court is concerned with administrative leave. There is a distinction between administrative leave with pay and what has been described as a punitive suspension. The distinction has been described in this Court in the case of *Deegan v. Minister for Finance* [2000] 11 E.L.R. 190 at pp. 198-199, as follows:

*“It is clear that the suspension of a person from their employment for a specified period because of irregularities or misconduct on his or her part can constitute a form of disciplinary action which would entitle the person affected to be afforded natural justice or fair procedures before the decision to suspend him or her is taken. The consequences of such suspension can be extremely serious for the person concerned, involving not merely their right to earn a livelihood but also their right to have their good name protected. In John v. Rees [1969] 2 All ER 274 at 305 Megarry J, in a passage cited by the learned High Court judge said:*

*‘... in essence a suspension is merely expulsion pro tanto. Each is penal, and each deprives the member concerned of the enjoyment of his rights of*



*membership or office. Accordingly, in my judgment the rules of natural justice prima facie apply to any process of suspension in the same way as they apply to expulsion.”*

*However, that was not a case in which the suspension was being imposed so that an enquiry could be undertaken as to whether disciplinary action should be taken against the person concerned and, if so, the nature of such a sanction.*

*That distinction was emphasised by Lord Denning MR in Lewis v. Heffer [1978] 3 All ER 354 a decision to which the attention of the learned High Court judge does not appear to have been drawn. Having cited the passage from the judgement of Megarry J, Lord Denning went on at p. 364:*

*‘These words apply, no doubt, to suspensions which are inflicted by way of punishment, as for instance when a member of the Bar is suspended from practice for six months, or when a solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a government department or in a business house; and the man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending, himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In*

*order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply: See Furnell v. Whangarie High Schools Board [1973] 1 All ER 400.”*

- 70.** Obviously, a person who is being suspended must be informed of the reason for his suspension (*Flynn v An Post* [1987] I.R. 68). *Flynn* is also an authority for the proposition that a power of suspension must be viewed as permitting a suspension to continue only for the period of time during which would not be reasonably practicable to hold a full hearing into the matter. An open-ended suspension, particularly one without pay, can only be seen as a form of punishment, and a severe one at that. In contrast, a short period of suspension with pay against a clearly defined backdrop of consecutive steps to resolve the disciplinary issue is less likely to warrant the courts’ intervention on the basis that the procedures, or their application, is unfair to the person concerned.
- 71.** There can be no doubt that it is important that the process of suspension, once initiated, should not be allowed to drag on indefinitely. I think that no one could take issue with the observations of Keane C.J. that a short period of suspension with pay against a clearly defined backdrop of consecutive steps to resolve the disciplinary issue is less likely to warrant the courts’ intervention on the basis that the procedures, or their application, is unfair to the person concerned. Indeed, that is required by the terms of the consultant contract.
- 72.** Part of the challenge to the decision to place him on administrative leave was on the basis of delay in that decision being made, given that the decision was made in August, 2019, some ten or so months after the events at the heart of these proceedings occurred. Emphasis was placed on the words “*immediate and serious risk*”. On the other hand, counsel for the HSE pointed to the fact that the purpose of suspension is to enable an investigation into the conduct at issue. It was further emphasised that the words “*may*”

and “*appear*” are used in Clause 3, and that it follows from that that a definitive or concluded view has not yet been reached. The decision to place someone on administrative leave is not therefore intended to be punitive. It is in the nature of a holding suspension designed to enable an investigation to take place.

73. The Court of Appeal was critical of the length of the suspension and noted that the contract expressly provided that the power of suspension only endures for such time as may reasonably be necessary for the completion of the investigation and queried whether a suspension may lawfully endure beyond that time (see para. 113). I will deal with this issue subsequently. In any event, the High Court took the view that Professor O’Sullivan was out of time to challenge the decision of the 6<sup>th</sup> August, 2019 by way of judicial review. There was no challenge to that aspect of the judgment of the High Court, but nevertheless the Court of Appeal concluded that the decision to place Professor O’Sullivan on administrative leave “*was an entirely flawed conclusion arrived at in the teeth of the actual evidence*”. In reaching that decision, the Court of Appeal referred to a number of matters. First, it referred to the Doran/Brennan review. It was said that, while it was critical of the feasibility study, it did not identify any risk to patients’ safety (para. 117 of the judgment). Secondly, it referred to the SAR Report, and noted that it was specifically tasked to identify any patient safety issues, but none were so identified. They carried out a review over a six-month period and did not identify any patient safety concern in relation to Professor O’Sullivan, and therefore the Court of Appeal concluded that it must be assumed that the SAR review team was “*entirely satisfied that no such risk presented*” (see para. 118). Finally, reference was made to the letter from Dr McKenna. In this context, the Court of Appeal concluded:

*“If Dr. McKenna’s views constituted the basis for Professor Day’s conclusion that Professor O’Sullivan may pose an immediate and serious risk to the safety, health and*

*welfare of patients and staff, then in my view it was an entirely flawed conclusion arrived at in the teeth of the actual evidence.”*

### **The Duty of the CEO**

**74.** What is the duty imposed on the CEO when a decision to place someone on administrative leave is to be taken? In the first place, it is mandated by the provisions of Clause 3 that there should be consultation with the Chairman or Secretary of the Medical Board before taking a decision to place someone on administrative leave. This was done and a brief outline of that consultation was set out in the letter of the 6<sup>th</sup> August, 2019. In the course of that letter, it was observed that the Chairman of the Medical Board pointed out the fact that placing a consultant on administrative leave “*may potentially have implications for a consultant’s reputation*”. He added that it was not his role to make a decision whether or not to place Professor O’Sullivan on administrative leave. He went on to advise that the CEO, before placing a consultant on administrative leave, “*should be satisfied that there is no other alternative*”. It was confirmed by Mr. Reid that he took those views into consideration. Complaint has been made on behalf of Professor O’Sullivan that this consultation with the Chairman of the Medical Board should have been documented and furnished to Professor O’Sullivan.

**75.** In the letter of the 6<sup>th</sup> August, 2019, the CEO had also indicated that he had consulted with Dr Colm Henry and Dr Peter McKenna, as has been pointed out previously, and it is said that again his engagement with Dr McKenna and Dr Henry should have been documented and furnished to Professor O’Sullivan to allow him to make representations on any clinical views expressed by them to the CEO before the decision to suspend was made.

**76.** It was pointed out on behalf of the HSE that, prior to making the decision of the 6<sup>th</sup> August, 2019, the CEO had provided the letters of Dr McKenna of the 28<sup>th</sup> June, 2019, and of

Professor Day of the 1<sup>st</sup> July, 2019, to Professor O’Sullivan, and representations were made on his behalf in respect of those letters. Further, the letter of the 6<sup>th</sup> August, 2019 set out the consultations held by the CEO and the documents considered by him before placing Professor O’Sullivan on administrative leave. The point is made on behalf of the HSE that, while as a matter of general principle an employee should be given the reason for the decision to suspend them so that they can be heard as to why they should not be suspended, that does not involve a process involving the type of fair procedures that would apply to the disciplinary hearing itself. In that context, reference is made to case law such as *Bank of Ireland v. Reilly* [2015] IEHC 241, in the context of unfair dismissal proceedings. The person concerned had first been placed on suspension, and Noonan J., at para. 49 of his judgment, stated:

*“I cannot accept the proposition advanced by counsel for the bank that Mr. Reilly had no entitlement to natural justice or fair procedures in any shape or form at this stage of the proceedings. Whilst of course it must be correct to say that the full panoply of fair procedures may not have been engaged at that stage, I cannot accept that basic fairness did not require at least a rudimentary explanation of the reason for the suspension which admitted of the possibility of some exculpatory response.”*

77. A number of other authorities were referred to such as *Morgan v. TCD* [2003] 3 I.R. 157, and the decision in *Deegan v. Minister for Finance* [2000] 11 E.L.R 190 at p. 202, referred to above, in a passage where it is stated as follows:

*“It is clear that both McCarthy J, by implication, and Henchy J, expressly, accepted that a person against whom the provisions of section 13 are invoked is entitled, because of the requirements of natural justice and fair procedures, to be informed of the reasons for his or her suspension so as to enable him or her to make such representations as he*

*or she wishes to make to the suspending authority so that the suspension may be terminated. I would respectfully agree with that view of the law.” (Keane C.J.)*

78. Here there is no dispute but that, in general, an employer contemplating a step such as placing someone on administrative leave should inform the employee of the reason for that decision and give them an opportunity to respond. Nevertheless, as mentioned previously, placing someone on administrative leave, as in this case, may be for the purpose of conducting an investigation, and not for the purpose of making a final decision as to wrongdoing or culpability. Thus, where it is clear that a decision to place someone on administrative leave is being contemplated, that person should be so informed and should be afforded the opportunity to make representations as to why that should not occur. That is no more than fairness requires. That does not mean the “*full panoply*” of fair procedures, as Noonan J. said in *Bank of Ireland v. Reilly*, but it is a basic level of fairness that is required. In this case, I am satisfied that there can be no complaint by Professor O’Sullivan that he was not afforded the opportunity to make representations as to why he should not be placed on administrative leave. To that extent, the decision to place Professor O’Sullivan on administrative leave was not flawed. I should add that, in cases of extreme urgency, it may not be possible to take the sort of steps that occurred in this case. However, provided an opportunity is given to someone who has been placed on administrative leave, or suspended, to make representations at the earliest opportunity thereafter, it is clear from cases such as *Morgan* and *Deegan* that this will suffice. In circumstances where the fact that the CEO consulted with others and an outline of those consultations were provided, I see no need to fully document and provide a record of those consultations to the party concerned.

**The test to be applied in reviewing the decision of the CEO**

79. Leaving aside those particular criticisms of the decision of the CEO, what then is the standard by which the decision of the CEO should be reviewed in deciding whether the decision to place someone on administrative leave was appropriate or not? There was some discussion between the parties on this issue in the course of the written submissions. Thus, in their written submissions, the HSE referred to the decision of *Gogay v. Hertfordshire County Council* [2000] I.R.L.R. 703, at para. 55, in which it was submitted that in order to set aside such a decision the person challenging the decision had to meet a “severe test”. That was a case in which a complaint had been made about a residential care worker in a children’s home. In that case, an issue of child sexual abuse was made against the residential care worker and following an investigation it was concluded that there was no case to answer. The care worker was informed of that decision and of her consequent reinstatement but was unable to return to work because she was suffering from clinical depression brought on by her suspension. She brought proceedings against her employers. It was found in the High Court that the employers were in breach of an implied term of trust and confidence because they had no reasonable grounds for suspending her and had failed to carry out a proper investigation of the circumstances before doing so. The matter was then brought to the Court of Appeal, and in its judgment, at para. 55, Hale L.J. said as follows:

*“Did the authority’s conduct in this case amount to a breach of this implied term? The test is a severe one. The conduct must be such as to destroy or seriously damage the relationship. The conduct in this case was not only to suspend the claimant, but to do so by means of a letter which stated that ‘the issue to be investigated is an allegation of sexual abuse made by a young person in our care.’ Sexual abuse is a very serious matter, doing untold damage to those who suffer it. To be accused of it is also a serious matter. To be told by one’s employer that one has been so accused is clearly calculated*

*seriously to damage the relationship between employer and employee. The question is therefore whether there was 'reasonable and proper cause' to do this."*

**80.** Reference was also made to the decision in the High Court of England and Wales in the case of *Kamath v. Blackpool Teaching Hospital NHS Foundation Trust* [2021] EWHC 2811 (QB) a decision of Soole J., in which it was said, at paras. 71 and 72, as follows:

*"The lawfulness of the suspension or exclusion of an employee is in principle determined by the implied term of trust and confidence which is implied into every contract of employment; namely that neither party shall without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the parties.*

*An act of suspension by an employer can constitute a breach of the implied term where, by itself or in combination with other acts or omissions it (i) destroys or seriously damages the relationship of trust and confidence and (ii) is without reasonable and proper cause..."*

**81.** Reliance was also placed by counsel for Professor O'Sullivan on a further passage from that judgment at para. 60, as follows:

*"In Ardron v. Sussex Partnership NHS Foundation Trust [2018] EWHC 3157 (QB); [2019] IRLR 233, Jacobs J cited Chhabra at [35] for the proposition that '...the question for the Court is whether the findings of fact and evidence as found by the case investigator, when taken at their highest, are capable of supporting a charge of gross misconduct: [71]. Further: 'The question of whether the findings of fact and evidence are capable of supporting a charge of gross misconduct is an issue of law for the Court: see Skidmore...paras.[15]-[17]. Accordingly, the issue is not to be determined by the application of public law principles; e.g. by asking whether the case manager's decision took into account all relevant considerations or was such that no reasonable case*



*manager could have made. However, in an area involving technical matters which are outside the Court's ordinary expertise, the court should have proper respect for the views expressed by experts including, in the present case... '.*"

**82.** Emphasis was placed by counsel for Professor O'Sullivan on the last sentence in that citation. Relying on those authorities, it was suggested on behalf of Professor O'Sullivan in the written submissions that the CEO was under a number of obligations which were summarised as follows:

*"To act with honesty, good faith and genuineness;*

*Not to act in a manner that was arbitrary, capricious, perverse and irrational;*

*Not to engage in conduct likely to undermine the trust and confidence required of the employment relationship; and*

*To have proper respect for the views expressed by the experts."*

**83.** In the course of the oral submissions made to the Court, it was agreed by the parties that the appropriate test by which the decision to suspend was to be considered was that to be found in the case of *Braganza v. BP Shipping Limited & Anor.* [2015] 1 W.L.R. 1661, a decision of the Supreme Court of the United Kingdom. That was a case in which no element of public law arose as the issue concerned the terms of a contract of employment and the terms in respect of a death in service benefit in circumstances where the payment of such benefit could have been excluded where the employer was of the view that the deceased had died by suicide. Although the case concerned a private breach of contract claim, some interesting observations are made as to decision-making in a contractual situation and in the circumstances where a decision-maker is a public authority. In her judgment in that case, Baroness Hale made the following observations from para. 18 onwards:

“18. Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties’ bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They 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.

19. There is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision-making function to a public authority. In neither case is the court the primary decision-maker. The primary decision-maker is the contracting party or the public authority. It is right, therefore, that the standard of review generally adopted by the courts to the decisions of a contracting party should be no more demanding than the standard of review adopted in the judicial review of administrative action. The question is whether it should be any less demanding.

20. The decided cases reveal an understandable reluctance to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context.”

**84.** At para. 22 of her judgment, she quoted from a passage from the judgment of Rix L.J. in *Socimer International Bank Ltd v. Standard Bank London Ltd* [2008] Bus. L.R. 1304. In

his conclusion, at para 66, he substitutes the more modern term "irrationality" for unreasonableness:

*“It is plain from these authorities that a decision-maker’s discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. ...”*

**85.** She went on, at para. 26 of her judgment, to say as follows:

*“Mrs. Braganza can pray in aid the approach of Mocatta J in The Vainqueur José [1957 1 Lloyd’s Rep 557. He held, at p 574, that the common law principles applicable to the exercise of a contractual discretion include fairness, reasonableness, bona fides and absence of misdirection in law. He later quoted, at p 575, without reservation, Lord Greene MR’s summary of the public law concept of reasonableness. There is nothing on Mocatta J’s judgment to suggest that only the second of those elements is applicable to the exercise of a contractual discretion. He did, at page 574, contrast the contractual principles with the principles applicable to the exercise of a statutory discretion by ministers of the Crown, but on the basis that, in addition, the minister’s decision had to be consistent with the objects and other provisions of the statute in question...”*

**86.** She went on to say as follows, at para. 30:

*“It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the*

*court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test. Indeed, I understand Lord Neuberger PSC (at para 103 of his judgment below) and I to be agreed as to the nature of the test.”*

**87.** The decision in that case is a useful analysis of the approach to be taken by a decision-maker. Although that was a case that arose in the context of a private law situation, nevertheless some of the principles that apply in an administrative law setting were applied, having regard to the nature of the exercise of the discretion at issue in the context of the terms of employment in that particular case. That such an approach is appropriate is all the more so in a case such as this involving a contract such as the consultant contract which has elements of private law and administrative law in its operation. Thus, one can see that in considering the decision of the CEO in a case such as this where a discretion is to be exercised, that discretion should be exercised in a manner that first of all is carried out in good faith, the decision should also be one which is neither arbitrary, capricious, or irrational, and further, as was stated in *Braganza*, it follows that such a decision could be impugned, not only where it was one that no reasonable decision-maker could have reached, but also where the decision-making process had failed to exclude extraneous considerations, or to take account of all obviously relevant ones.

### **The application of the test**

**88.** Having identified the appropriate standard by which the decision of the CEO should be reviewed, it is important to have regard to the terms of the consultant contract. I set out Clause 3 again, as it is important to bear it in mind in considering the application of the test. It provides:

*“Where it appears to the [CEO] 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, if so required, take immediate leave with pay for such time as may reasonably be necessary for the completion of any investigation into the conduct of the consultant ...”*

- 89.** A number of points in relation to Clause 3 can be considered immediately. In the first instance, the person who is responsible for considering the question of placing a consultant on administrative leave is the CEO. No one else in the HSE can take that step. As has been seen previously, the CEO was first notified of an issue by letter of the 1<sup>st</sup> July, 2019, from Professor Day. He then wrote to Professor O’Sullivan by letter of the 17<sup>th</sup> July, 2019, raising the issue of administrative leave. Enclosed with that letter was the Doran/Brennan Review, the SAR Report, and the letter from Professor Day initiating the process. Also enclosed was the letter of Dr McKenna of the 28<sup>th</sup> June, 2019. Representations were sought from Professor O’Sullivan as to the proposal of the CEO to place him on administrative leave. Correspondence then ensued and Professor O’Sullivan provided written representations. As has been seen, the CEO ultimately required Professor O’Sullivan to take administrative leave (see the letter of the 6<sup>th</sup> August, 2019).
- 90.** Given the timeline involved, there can be no question but that the CEO acted promptly in dealing with the issues raised in respect of Professor O’Sullivan. An issue had been raised in this regard as to the fact that Professor O’Sullivan had continued to work from the time of the incident involved in these proceedings for a significant period of time before being required to go on administrative leave. As has been mentioned previously, given that no challenge was made in the High Court to the decision of the 6<sup>th</sup> August, 2019, the delay of the CEO in taking the decision is not an issue to be considered at this stage. Nevertheless, it appears to me, that on the facts there was no delay on the part of the CEO

in considering the issue of whether or not Professor O’Sullivan should have been placed on administrative leave.

91. Although, strictly speaking, the decision of the CEO made on the 6<sup>th</sup> August, 2019 cannot now be challenged, it is, nonetheless in my view, important to address this issue given the views of the Court of Appeal to the effect that the decision was “*unlawful*”. Therefore, I propose to consider whether there was any basis for challenging that decision of the CEO, bearing in mind the *Braganza* test outlined above. It should be mentioned that there was an issue as to bias raised in the pleadings. Ultimately, that plea was not pursued. Although an absence of good faith would be a ground for review, as this issue no longer arises in this case, it is not necessary to say anything further about it.
92. It appears that what was uppermost in the thinking of the Court of Appeal in considering the decision of the CEO to place Professor O’Sullivan on administrative leave was whether there was an issue as to an immediate risk to patients’ safety involved in the conduct of Professor O’Sullivan. See, for example, paras. 114, 116, 118, and 119 of the judgment. Reference was made to the Doran/Brennan review. It was pointed out that, whilst that review made criticisms of the feasibility study, it did not identify any risk to patients’ safety. Secondly, reference was made to the SAR Report. Again, it was noted that the SAR Report was asked to review the events of the 4<sup>th</sup> and 5<sup>th</sup> September, 2018 and, *inter alia*, to identify any possible significant ongoing patient safety issues. It did not “*identify any patient safety concern in relation to Professor O’Sullivan despite being expressly charged with doing so, in advance of concluding the report if necessary*”. Finally, reference was made to Dr McKenna’s letter. Reference has previously been made to that letter, in which Dr McKenna had expressed the view as follows:

*“Research was conducted without ethical approval and without patient knowledge or consent. The research was of an intimate and personal nature. The principal investigator (SM1) appears not to have demonstrated insight or remorse for his actions. The first recommendation of the Hysteroscopy Systems Analysis Review Report suggests clinical research training for SM1. This implies that following this, SM1 may return to further clinical research. Whilst not suggesting that this may be unhelpful, it does not address the suitability of SM1 to be involved in patient treatment or the training of junior medical personnel and students.*

*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.”*

**93.** Having referred to that letter, the view was expressed by the Court of Appeal that:

*“If Dr. McKenna’s views constituted the basis for Professor Day’s conclusion that Professor O’Sullivan may pose an immediate and serious risk to the safety, health and welfare of patients and staff, then in my view it was an entirely flawed conclusion arrived at in the teeth of the actual evidence.”*

**94.** Earlier in the course of its judgment, at para. 19, the following observations were made about the letter of Dr McKenna and the issues he referred to. It was said as follows:

*“It is somewhat unclear as to what issues Dr. McKenna is here referring to or how he considered that they should be fully resolved. He appears in this sentence to identify three issues. First, the patients suffered psychological harm. However, how that issue might be resolved by Professor O’Sullivan is not immediately obvious. Secondly, Dr. McKenna identifies a breakdown of trust as an issue and, again, how that might be addressed by Professor O’Sullivan is not explained. I note, however, that the SAR*

*Report contains an apology from the Review Team at the outset to the patients concerned and a commitment to implementing all its recommendations as a matter of urgency, albeit no explicit acknowledgment of wrongdoing by the hospital. Thirdly, Dr. McKenna identifies a serious lack of insight on the part of Professor O’Sullivan. Presumably recommendation number 4 in the SAR Report, to the effect that Professor O’Sullivan must undertake further education and training regarding consent, is aimed at addressing this issue.”*

95. The Court of Appeal went on to note that subsequently Professor O’Sullivan complied with the SAR Report recommendations. It was also pointed out that Dr McKenna did not communicate in any way with Professor O’Sullivan before reaching his conclusions but it was acknowledged that he had simply been asked to furnish his observations on the SAR Report. Nevertheless, the Court of Appeal commented that, if Dr McKenna’s letter was relied upon, without more, as the basis for suspending, and thereafter proposing the removal of, Professor O’Sullivan, that *“it would seem to involve a denial of the most basic fair procedures, that a person could find himself suspended and even dismissed on the basis of a comment made by somebody to whom he had never spoken, of whom he was quite unaware and in respect of which comment he was given no right to respond or defend himself.”* Bearing these observations in mind, it seems to me to be important to look again at the letter of the CEO to Professor O’Sullivan of the 6<sup>th</sup> August, 2019. I have previously set out in some detail the contents of that letter, and it is unnecessary to do so again (see para. 66). In that letter, as we have seen, the CEO set out the fact that he had consulted with a number of people in connection with his concerns. He also had regard to the documentation which he enclosed in his earlier letter of the 17<sup>th</sup> July, 2019. He referred to the representations made on behalf of Professor O’Sullivan and again considered those. In the course of the letter, the CEO highlighted a number of matters which were of concern



to him, notwithstanding the representations made. He noted the acknowledgement that there was an error of judgment in not obtaining patient consent and ethical approval for the procedure carried out. He noted the undertaking given that that would not occur again. However, he referred expressly to the fact that he was not reassured by the correspondence that Professor O’Sullivan understood the seriousness of his concerns or the nature of the legal and ethical obligations of Professor O’Sullivan as a doctor and as a consultant obstetrician/gynaecologist. Secondly, he expressed concern that, whilst Professor O’Sullivan acknowledged the error of judgment, it appeared that there was a contention that consent for the hysteroscopy procedure was sufficient to encompass the additional procedure undertaken without the patients’ knowledge. The CEO pointed out that, so far as he was concerned, what was material was that an additional procedure was conducted about which the five patients concerned had no advance knowledge and in respect of which they were not afforded an opportunity to provide their informed consent. Finally, the CEO expressed the view that, in reaching his decision, he was motivated by concern for patients’ safety, health and welfare. In this regard, he referred expressly to the patients’ reactions on learning about the procedure that had taken place. As he noted, “[a]ll 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 CEO noted that some question appeared to have been raised by Professor O’Sullivan in relation to the fact that the patients had been informed as to what had occurred in accordance with the hospital’s open disclosure policy, and that Professor O’Sullivan appeared to be questioning the requirement for those meetings. The CEO pointed out that, in his view, it was “*unquestionably necessary*” for the hospital to inform the patients as to the events that had occurred.

96. I think it will be apparent from the matters highlighted by the CEO that the absence of ethics approval for the procedure carried out by Professor O’Sullivan and the use of non-hospital equipment in the course of the procedure were important considerations. A principal concern for the CEO was the absence of informed consent from the patients concerned, and the effect of the procedure on the patients’ safety, health and welfare. Leaving aside the question of consent for a moment, it is clear that the CEO was also concerned about the response of Professor O’Sullivan to the requirement to conduct “*open disclosure*” meetings with the patients concerned.

97. With the greatest respect, I find it hard to accept the views of the Court of Appeal to the effect that there was no evidence that could be relied upon to justify the CEO in reaching a conclusion that Professor O’Sullivan presented an immediate and serious risk to the safety, health and welfare of patients (para. 120). In the first instance, I think it is necessary to point out that Clause 3 of Appendix IV of the consultant contract does not involve the CEO in reaching a conclusion as such that there is an immediate and serious risk to the safety, health and welfare of patients. The wording has been set out before and, first of all, it is only where it appears to the CEO that there may be an immediate and serious risk to the safety, health or welfare of patients that the CEO is entitled to act. Leaving aside that somewhat semantic point of view, nonetheless I think it is fair to say that a number of matters were uppermost in the mind of the CEO in coming to his decision to place Professor O’Sullivan on administrative leave. In the first instance, the question of informed consent was one of critical importance. Healy in *Medical Malpractice Law* (2009, Round Hall) discusses this issue at paragraph 15-02 where he states:

*“The lawfulness of medical interventions is dependent on sufficient authority or justification. The authority is presumptively to be given or declined directly by the patient, where possessed with the requisite legal capacity and competence to consent,*

or, where this is absent, by a proxy authorised by law, such as a parent or carer authority. In cases where it becomes necessary to treat a patient immediately, and no one is at hand to give consent on the patient's behalf, the law, somewhat more indirectly, entitled the doctor to treat the patient where the circumstances justify it. Consent is pivotally important in the healthcare context as both defence and hallmark of the propriety of medical treatment. Mustill LJ identified it in these terms in *Airedale NHS Trust v Bland*:

*'Any invasion of the body of one person by another is potentially both the crime and tort... How is it that, consistently with the proposition just stated, a doctor can with immunity perform on a consenting patient an act which would be a very serious crime if done by someone else? The answer must be that bodily invasions in the course of proper medical treatment stand completely outside the criminal law. The reason why the consent of the patient is so important is not that it furnishes a defence in itself, but because it is usually essential to the propriety of medical treatment. Thus, if the consent is absent, and is not dispensed with in special circumstances by operation of law, the acts of the doctor lose their immunity... If the patient is capable of making a decision whether to permit treatment and decides not to permit it his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right to proceed in the face of objection, even if it is plain to all, including the patient, that adverse consequences and even death will form a view.'*

That passage highlights the importance of consent. Consent permits that to be done which would otherwise be a crime or a tort. To put it another way, every patient has a right to bodily integrity and consent is required for any interference with a patient's bodily integrity. That is all the more so in the case of an intimate procedure such as that involved here. Consent to one

procedure is not enough if it is intended to carry out another procedure at the same time unbeknownst to the patient. Of course, this is not a case in which the patients could not give consent and where the requirement for consent was not dispensed with in the special circumstances provided for by operation of law and it is not necessary to consider such situations in which that problem arises here. Obviously different considerations are at play in such circumstances as pointed out in the passage referred to above from Healy.

**98.** The other issue that was clearly to the fore of the CEO's mind was the question of patient welfare. Attached to the SAR Report were a number of summaries of the patients' statements. For example, patient F observed that she felt *"violated, assaulted, in such a personal way, in such a sensitive area, something put in her vagina without consent"*. Patient L in her statement commented *"She did not even want to have her next procedure here now, because of this incident. She can hardly make eye contact with doctors now, for the simple reason that she cannot remember what the doctor who performed the procedure looks like"*. Patient L states that *"She could pass her by and I don't know that (I'd) remember, and feels embarrassed by this and (I) shouldn't be"*, if she is in hospital 1. Patient L stated her trust in the hospital had been breached. Patient J wanted to know if any of the doctors had any thoughts for the women during this study and questioned whether they had been randomly chosen? Mr. M, her partner, made the comment that he was very unhappy about what happened to her, saying that it was *"like rape"*. She herself said that she feels violated. Patient J added that this has had a *"psychological impact"* on her and has been very difficult.

**99.** It was also noted that certain data in relation to some of the patients was stored on a phone. It does appear that this was subsequently deleted.

**100.** The point of reiterating these matters is to emphasise that there was significant evidence available to the CEO which concerned issues as to the safety, health and welfare of

patients. On a consideration of the materials that were before the CEO and having regard to the consultations carried out by him before reaching his decision, I am satisfied that, on any view, and having regard to the *Braganza* test set out above, the CEO was entitled to reach the conclusion that he did in relation to the decision to place Professor O’Sullivan on administrative leave. Therefore, I would disagree with the finding of the Court of Appeal in this regard.

### **The O’Hare Report**

**101.** After the decision to place Professor O’Sullivan on administrative leave, it followed that it was then necessary for the CEO to consider what was the next appropriate step to take. As has been noted previously, the purpose of placing someone on administrative leave is to enable the completion of any investigation into the conduct of the consultant concerned. After the letter of the 6<sup>th</sup> August, 2019, further correspondence was exchanged between the parties. A meeting took place between the CEO and Professor O’Sullivan on the 13<sup>th</sup> September, 2019, at which meeting both were accompanied by legal representatives and the CEO was also accompanied by the Head of Corporate Affairs. Following that meeting, the CEO advised Professor O’Sullivan’s solicitors that it was his intention to obtain “*a written opinion from a clinician’s perspective about the seriousness or otherwise of the shortcomings in the conduct of the “study” conducted by your client on the five patients*”. He identified Dr Michael O’Hare as the person to provide that opinion. Ultimately, a meeting was arranged which took place on the 25<sup>th</sup> November, 2019, at which Dr O’Hare attended, a representative of the office of the CEO, Professor O’Sullivan, and a solicitor representing Professor O’Sullivan. Dr O’Hare furnished his report to the CEO on the 4<sup>th</sup> December, 2019. In the course of his report, he made the following observations:

*“It is my judgement that the additional physical risk to patients over and above that of hysteroscopy – of placing a small probe briefly in the lower vagina alongside other hysteroscopy instrumentation – in the circumstances described was negligible. There is no evidence that physical harm was suffered by any of the five patients. However, there is evidence that they suffered psychological distress resulting from information provided in the course of an Open Disclosure meeting arranged by IEHG and a subsequent meeting with the Systems Analysis Review Team. Prof O’Sullivan was not involved in any of these meetings.*

*Rather than research of “an intimate and personal nature” as described elsewhere, I consider the ‘study’ as an additional observational procedure in the course of a clinically indicated investigation of an intimate and personal nature. Prof O’Sullivan is a long established and highly trained consultant in obstetrics and gynaecology with acknowledged subspeciality skills. I believe that the “study” on which he embarked was well intentioned and accept his assertion that it was a feasibility study. On a boundary between practice and research, I consider that Prof O’Sullivan, nevertheless, made an error of judgement and was wrong in deciding to undertake this observational study without informed consent and ethical approval”.*

**102.** He concluded his report by saying:

*“In addition, poor professional performance, as defined in the Medical Practitioners Act, 2007, means a failure by the practitioner to meet the standards of competence (whether in knowledge and skill or the use of knowledge and skill or both) that can reasonably be expected of medical practitioners practising medicine of the kind practiced by the practitioner. This has been interpreted by the Supreme Court to mean a “serious failure”.*

*Using these definitions, I have given careful consideration to the facts of this matter, and opinions or concerns expressed by others in the documentation provided. I consider that Prof O’Sullivan’s overall conduct has fallen below – but not seriously below – the standard of conduct expected among doctors. Further, I consider that on the evidence presented, Professor O’Sullivan does not pose an immediate and/or serious risk to the safety, health and welfare of patients. In support of this view, I have noted that within the Terms of Reference of the Systems Analysis Review, there was a requirement that any immediate safety concerns were to be brought to the attention of the commissioner in writing in a timely fashion. It is my understanding that this did not occur.”*

**103.** It is fair to say, as stated by the Court of Appeal at para. 122 of its judgment, that this was “*crucially important evidence*” that became available to the CEO prior to making any further decision in relation to Professor O’Sullivan. The Report of Dr O’Hare was sent to Professor O’Sullivan’s solicitors but due to a technical glitch in their office was not received by them. Subsequently, on the 23<sup>rd</sup> December, 2019, a letter was written by the CEO to Professor O’Sullivan with his conclusion on the matter. It requested further representations from Professor O’Sullivan before finalising matters. In the course of the letter of the 23<sup>rd</sup> December, 2019, the CEO referred to the documentation previously referred to. Noted by the CEO was the undertaking given by Professor O’Sullivan not to repeat the incidents that occurred on the 4<sup>th</sup> and 5<sup>th</sup> December, 2018. Further noted was the acknowledgement that Professor O’Sullivan had made two errors of judgement in relation to the study, firstly in not seeking ethical approval for it, and secondly in not requiring or obtaining informed consent for the study. He also noted the undertaking that Professor O’Sullivan would comply with the recommendations of the SAR, and that he had recently undertaken two online courses relating to research and bioethics, and finally he noted the fact that the study was not done for personal financial gain. The CEO then

went on to refer to a number of comments that had been made by Professor O’Sullivan in the course of the meeting that took place on the 13<sup>th</sup> September 2019, and in that regard I think it would be helpful to set out these matters *verbatim*, as they appear in the letter of the 23<sup>rd</sup> December 2019.

*“(e) “[You] thought the seriousness of the matter was inflated and disproportionate.” In my view, this comment reflects your failure to recognise and appreciate the gravity of a practising doctor not obtaining ethics approval and informed consent in these circumstances.*

*(f) On a number of occasions during our meeting you referred to the Study as a “little step” or a “small step”. I consider that by referring to the Study in this manner, you sought to trivialise it and you displayed your disregard for the patients’ rights to bodily integrity.*

*(g) You repeatedly referred to there not having been any physical harm caused to the five patients by the Study. In my view, your assertions in this regard indicate that you consider that the absence of actual physical harm to the five patients renders your admitted failure to obtain ethics approval and failure to obtain informed consent for the Study less serious. I cannot accept that the absence of physical harm to the patients is an exculpatory factor.*

*(h) You referred to “research submissions [as being] big and beefy and that there was a lot of work in them”. Furthermore, you advised me that if you tried the procedure on one or two people and it didn’t work “[the research submission] would have been a lot of wasted effort”. In my view, your above comments display your willingness to disregard patient rights and ethical protocol (the necessity for which, by your own admission, you fully understand) in favour of expediency which you achieved by*



*keeping the patients completely in the dark about the Study which you were conducting on them. This, in my opinion, evidences that you appreciated, but chose to ignore, the requirement to obtain ethics approval which applied in a case where you were conducting research, regardless of whether the proposed study involved a small or large number of patients.”*

**104.** The letter of the 23<sup>rd</sup> December, 2019 went on to quote views from both Dr McKenna and Dr O’Hare in relation to the study. In the course of the letter, commenting on Dr O’Hare’s opinion, the CEO said as follows:

*“I note Dr. O’Hare’s opinion that your ‘overall conduct has fallen below – but not seriously below – the standard of conduct expected among doctors’. While I agree with Dr. O’Hare’s recital of the facts, I am afraid that I cannot agree with his conclusions regarding the seriousness of your conduct. In my view, your misconduct in relation to the Study is extremely serious. In this regard, I have taken account of the following mandatory requirements set out in the Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners (2016) concerning both informed consent and ethics approval.”*

**105.** Thereafter the relevant provisions of the Medical Council’s Guide were set out. The CEO continued:

*“It is very clear from the foregoing that ethics approval and informed consent are not optional but are essential in relation to research in the nature of the Study. As such, I have formed the view that you have seriously misconducted yourself in relation to your appointment as a Consultant by:*

*(i) failing to obtain informed consent for the Study, thereby acting in total disregard for the patients’ right to bodily integrity and the mandatory requirements of*

*the Medical Council's Guide to Professional Conduct and Ethics for Registered Medical Practitioners (2016) and the HSE's National Consent Policy; and*

(j) *failing to obtain ethics approval for the Study, further demonstrating your disregard for the patients' fundamental rights to bodily integrity and the mandatory requirements of the Medical Council's Guide to Professional Conduct and Ethics for Registered Medical Practitioners (2016).*

**106.** The CEO concluded by saying:

*"I have carefully considered the appropriate form of action. In view of the seriousness of your admitted misconduct, I do not consider that it would be appropriate for me to deal with the matter by way of a warning or other like communication. It is my view that a doctor undertaking an examination of an intimate nature owes a particular duty of care to do no more than that which the consent which he or she has been given allows. It is my view that any healthcare practitioner who fails to obtain informed consent and ethics approval to undertake a study which will be undertaken during an intimate examination is not a fit person to be employed by this organisation. Therefore, I hereby notify you that I propose to remove you from your employment as Consultant Obstetrician Gynaecologist as a result of you having seriously misconducted yourself by covertly conducting the Study during the course of an intimate vaginal examination, and by failing to obtain ethics approval and informed consent before conducting the Study".*

**107.** Representations were made on behalf of Professor O'Sullivan in relation to that letter, albeit, there was some delay in furnishing those representations. In any event, having received those representations, the CEO reiterated his position that he proposed to proceed

with the proposal to remove Professor O’Sullivan from employment in the HSE in a letter of the 31<sup>st</sup> January, 2020.

**108.** One of the principal arguments made on behalf of Professor O’Sullivan is that, on receipt of the O’Hare report, the CEO should have reconsidered the question of allowing the suspension of Professor O’Sullivan to continue at that stage, in the light of the views of Dr O’Hare that Professor O’Sullivan posed no immediate and/or serious risk to the safety, health and welfare of patients. As can be seen from the letter set out above, the CEO disagreed with the approach of Dr O’Hare and set out his reasons for so doing. In the course of the submissions made to this Court, it was accepted that in considering the approach of the CEO following the receipt of the O’Hare report that again the appropriate test to consider was that set out in *Braganza*. At that stage, it was accepted that the question had to be considered as to whether or not any reasonable decision-maker would have allowed the suspension to continue once the O’Hare report was received. Further, it was said that the representations made on behalf of Professor O’Sullivan at that stage had to be considered. In that context, it is worth bearing in mind the contents of the letter of the 20<sup>th</sup> January, 2020 from Professor O’Sullivan’s solicitors, in response to the receipt of the proposal to dismiss, and the receipt of the O’Hare report. In that letter, it was stated:

*“It appears that having retained Dr O’Hare as the expert in this area you have decided without any other contrary indicator from any other clinician that you ‘cannot agree with his conclusions regarding the seriousness’ of our client’s conduct. This decision by you flies in the face of reason. Given the express findings of Dr. O’Hare which almost amount to a complete exoneration of our client it is clearly the case that you have not given proper consideration to the expert view of Dr O’Hare. Furthermore, not one single report or clinical professional that you have engaged or consulted with appears*

*to have found that Professor O’Sullivan posed an immediate and/or serious risk to the health of patients.”*

**109.** The CEO responded by letter of the 23<sup>rd</sup> January, 2020, indicating that he was considering that letter and the representations made therein. He requested clarification as to whether Professor O’Sullivan wished to make additional representations and it was indicated that any such representations would be considered. A response was received by letter of the 27<sup>th</sup> January, 2020 indicating that no further representations were going to be made. Accordingly, by letter of the 31<sup>st</sup> January, 2020, the CEO set out his response to the comments made on behalf of Professor O’Sullivan in the letter of the 20<sup>th</sup> January, 2020, in respect of the consideration by the CEO of Dr O’Hare’s report. The CEO explained in that letter the reason why he did not accept all of the views of Dr O’Hare. I do not propose to set out in detail the manner in which that was done, but I think it is useful to refer briefly to part of that letter, and his response to the report of Dr O’Hare. He noted as follows:

*“I have noted Dr. O’Hare’s clinical view that the additional physical risk to patients over and above that of a hysteroscopy was negligible. I have no reason to doubt Professor O’Sullivan’s assertion, with which Dr O’Hare concurs, that his “Study” did not expose the patients to additional physical risk. That the additional risk may have been negligible is not, in my opinion, an exculpatory factor. The harm, in my opinion, arises by reason of your client’s proceeding with his Study without telling the individuals concerned what else he was doing in the course of hysteroscopy procedures that were performed under his instructions.”*

**110.** Finally, in the course of that letter the CEO observed as follows:

*“I take particular issue with your allegation that it was my intention to seek to dismiss your client from his employment from the beginning of this process. It does not follow, as you seem to suggest, that because I am not in full agreement with Dr O’Hare my mind was already made up. In forming an opinion as to whether your client misconducted himself, it was my prerogative to undertake such further examination into the matter as I consider necessary. I have afforded your client fair procedures at all times during this process. To this end, as you are aware, I have engaged in extensive written correspondence with your office in relation to a myriad of issues since July 2019 and, as appropriate, I have afforded your client the opportunity to make written and oral submissions to me.”*

He then reiterated his proposal to remove Professor O’Sullivan from his employment.

**111.** The Court of Appeal in dealing with this aspect of the matter made a number of observations at para. 123 of its judgment. It was said as follows:

*“Mr. Reid’s response to this new evidence was stark. He said that he had not asked Dr. O’Hare for an opinion about this, therefore implicitly suggesting that he was going to ignore it (a position which itself ignores the obligation on an independent expert when instructed in a matter of this kind to express his or her view on any matter he believes to be properly relevant to the issues the subject of their instruction). Furthermore, he stated that he made his decision in relation to the suspension before Dr. O’Hare was engaged, as if that decision, once made, was set in stone forever irrespective of how the circumstances might subsequently change. Mr. Reid was now being confronted with evidence that his original decision, which was in my view unsound in any event, could no longer be regarded as valid.”*

**112.** I pause here to make the observation that, assuming the original decision to place Professor O’Sullivan on administrative leave was *bona fide*, and in accordance with the *Braganza* test, the receipt of the O’Hare report, regardless of its terms, would not have invalidated that decision. It may be that the receipt of a report such as that furnished by Dr O’Hare would trigger a question as to whether or not the suspension should be continued and whether it was necessary to go further, leading to a proposal to remove Professor O’Sullivan from his employment. In truth, it is difficult to disagree with a proposition that if a report or other information came to light that completely changed the underlying basis for the suspension, a reconsideration of the continuation of the suspension might be required. The point is that, if the decision to place on administrative leave was one which could have been made and was not one which could be reviewed having regard to the *Braganza* test, then no subsequent report, it seems to me, could in any shape or form mean that the original decision “*could no longer be regarded as valid*”.

**113.** The Court of Appeal went on at para. 125 to say as follows:

*“In my judgment, Mr. Reid was required as a matter of law, implicit in the terms of the contract, upon receipt of Dr. O’Hare’s report to immediately review the necessity for a continuation of Professor O’Sullivan’s suspension and to reach the only conclusion open on the evidence, namely that its continuation could not be justified.*

...

*127. Lest there be any doubt, I consider that the suspension should have been lifted with effect from the 23<sup>rd</sup> December, 2019, being the date when Mr. Reid had a sufficient opportunity to consider Dr. O’Hare’s report to enable him to reach the decision of that date.”*

I disagree with that conclusion.

**114.** It is undoubtedly the case that at the heart of the consideration of these issues by the CEO is the absence of informed consent and the failure to obtain ethics approval for the “Study”. It is undeniable that Dr O’Hare’s report was favourable to Professor O’Sullivan. While he accepted that the conduct of Professor O’Sullivan had fallen below the standard of conduct expected among doctors, he was of the view that it was not seriously below that standard. More importantly, he expressed the view that Professor O’Sullivan did not pose an immediate and/or serious risk to the safety, health and welfare of patients. It is clear that the consideration of the issues required to be taken into account by the CEO were not to be considered solely by reference to whether or not there had been serious misconduct on the part of the consultant concerned. The key **test** is whether or not it “appears” to the CEO that there “may” be an immediate and serious risk to the safety, health or welfare of patients. At the time of the letter to Professor O’Sullivan on the 6<sup>th</sup> August, 2019, there was a wealth of information available to the CEO from which it was possible for him to reach the conclusion that there may have been an immediate and serious risk to the safety, health and welfare of patients at that time. As noted above, I have no doubt that the decision of the CEO, viewed through the lens of the *Braganza* test, is one which is not open to challenge on the grounds that it was unreasonable, arbitrary, capricious, or one which no reasonable decision-maker could have made. It should be borne in mind that that decision was made just over a month after the CEO was first informed of the situation that had occurred. Thereafter, it is not unreasonable for the CEO to consider matters further and it will be recalled that in the ensuing period he engaged in further correspondence and met with Professor O’Sullivan. He also engaged Dr O’Hare to review the matter further. At each stage of the process, the CEO has set out his reasoning for his views and the steps that he proposed to take. Insofar as he has come to a different view to Dr O’Hare, as he was entitled to do, he set out carefully in his original

letter of the 23<sup>rd</sup> December, 2019 his reasons for disagreeing with the views of Dr O’Hare as to the seriousness of the conduct involved. Following the making of representations on behalf of Professor O’Sullivan, the matter was again considered by the CEO and once more he gave detailed consideration to those representations and, in particular, his reasons for disagreeing with the conclusions of Dr O’Hare. All of that he was entitled to do. There is no basis, in my view, for criticising the approach of the CEO in this regard. I reiterate that, having regard to the *Braganza* test, it cannot be said that the approach of the CEO was anything other than careful and considered. It should also be borne in mind that the decision of the CEO to propose the removal of Professor O’Sullivan from his employment was not the final word on the issue. The matter of actual removal would then have had to be considered by a s. 24 Committee, as referred to previously.

**115.** The Court of Appeal, as previously noted, considered the decisions of the 23<sup>rd</sup> December, 2019, and the 31<sup>st</sup> January, 2020, and came to the view that those decisions should be quashed by reason of the CEO’s response to the report of Dr O’Hare and its view as to the lack of fair procedures. I have referred above to the contents the letters of the 23<sup>rd</sup> December 2109 and the 31<sup>st</sup> January 2020 and explained why I do not think the decisions of the CEO of the 23<sup>rd</sup> December 2019 and the 31<sup>st</sup> January 2020 can be assailed having regard to the *Braganza* test and given the careful consideration of that report by the CEO. The Court of Appeal was critical of the fact that, having sent the report furnished by Dr O’Hare to the legal representatives of Professor O’Sullivan on the 6<sup>th</sup> December, 2019, the decision was made by the CEO on the 23<sup>rd</sup> December, 2019 in circumstances where no response had been received from Professor O’Sullivan and his representatives. The Court of Appeal was particularly critical of this on the basis that, given the previous level of involvement by Professor O’Sullivan and his legal team in dealing with the matter, the view was expressed that the lack of response ought to have raised a concern



with the CEO, such that no decision would have been made without confirming that Professor O’Sullivan did not wish to make any further submission. In those circumstances, the Court of Appeal was of the view that the original decision of the 23<sup>rd</sup> December, 2019 should have been set aside and the matter should have been reconsidered. This was viewed by the Court of Appeal as a want of fair procedures. The Court of Appeal disagreed with the view of the trial judge that any want of fair procedures in this regard was cured by the fact that there was a subsequent opportunity of making submissions before the final decision was reached by the CEO on the 31<sup>st</sup> January, 2020. The Court of Appeal concluded in this regard:

*“It might reasonably be said that, Mr. Reid, having made the first decision, the die was to a significant extent cast and it then became an uphill battle for Professor O’Sullivan to persuade Mr. Reid to change his mind. For that reason, if for no other, in my view Mr. Reid’s decision of the 23rd December, 2019 was invalid.”*

I have to say that I find myself coming to a different view in relation to this issue. First of all, to take the issue of the decision of the 23<sup>rd</sup> December, 2019. It is clear that as soon as it became apparent to the CEO that Dr O’Hare’s report had not been received by Professor O’Sullivan and his legal representatives, further opportunities were provided by him to Professor O’Sullivan to make representations. I have already referred to the exchange of correspondence that took place after the 23<sup>rd</sup> December, 2019 and I think it is abundantly clear from that correspondence that every opportunity was given to Professor O’Sullivan to make representations before what ultimately became the final decision of the CEO. In any event, by letter of the 10<sup>th</sup> January, 2020, in the light of the circumstances that had arisen, the deadline for representations were extended. As we have seen, further correspondence took place in which lengthy representations were made, and they were

ultimately considered and responded to by the CEO. In my view, what was important from the point of view of fair procedures was to allow Professor O’Sullivan an opportunity to make representations on the proposal to remove him as a consultant. Professor O’Sullivan had an opportunity to do that, albeit it was necessary to extend the time within which that had to be done.

### **Conclusion**

**116.** In conclusion, I am satisfied that the decision of the CEO to suspend Professor O’Sullivan on the 6<sup>th</sup> August, 2019, and the decision to recommend his dismissal on the 23<sup>rd</sup> December, 2019, as indeed was the subsequent decision of the 31<sup>st</sup> January 2020, were lawful, having regard to the standard set out in *Braganza v. BP Shipping Limited* [2015] 1 W.L.R. 1661. Judged by that test, the actions of the CEO were not arbitrary, capricious, perverse or irrational, in the light of the circumstances of the alleged misconduct and all of the evidence available to him. Finally, I am mindful of the seriousness for a consultant of the initiation of disciplinary proceedings and the need for such disciplinary proceedings to be dealt with “with all practicable speed”. However, it is also important, given the seriousness of the matter for a consultant, that the process should be conducted carefully and, inevitably this will take some time. In this case, from the initial involvement of the CEO until his decision to recommend removal, the period of time involved was just six months approximately. Had there not been a mishap in relation to the exchange of communication in December 2019 as outlined previously, that part of the process would have been concluded by the 23<sup>rd</sup> December 2019. Given the necessity to carry out investigations, to consult with others, to consider the documentation generated in the course of the process and to consider the representations made by Professor O’Sullivan and to carefully assess what steps should be taken in the light of all that, I cannot see any basis for a criticism of that timeline.

**117.** On that basis, I would overturn the decision of the Court of Appeal to reinstate Professor O'Sullivan from the 23<sup>rd</sup> December, 2019 and would allow the appeal.