

**THE HIGH COURT
JUDICIAL REVIEW**

In the matter of Section 50 of the Planning and Development Act 2000 as amended

2022/350 JR;

Between

COLBEAM LIMITED

APPLICANT

AND

DÚN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

RESPONDENT

AND

WENDY JENNINGS AND ADRIAN O'CONNOR

PROPOSED NOTICE PARTIES

JUDGMENT OF MR JUSTICE HOLLAND DELIVERED ON 31 JULY 2023.

Contents

INTRODUCTION & FACTUAL BACKGROUND	2
ORDER 84 RSC & INITIAL OBSERVATIONS.....	8
WHAT DOES "DIRECTLY AFFECTED" MEAN?.....	13
O'Keeffe - 1993	14
Spin Communications - 2000.....	15
BUPA - 2005.....	16
Monopower - 2006.....	19
Abbeydrive - 2010.....	21
Yap - 2006	21
Dowling - 2013.....	23
KMM - 2015	26
North Meath Wind Farm - 2018	27
National Maternity Hospital - 2018	30
McElvaney - 2019	34
Gavigan - 2020	36
Ryanair - 2020.....	37
Crofton - 2022.....	37
Collection of the foregoing	37
IS AN EFFECT DIRECT OR INDIRECT?	38
DECISION.....	38
RIGHTS NOT INTERESTS?.....	40
CONCLUSION.....	41

INTRODUCTION & FACTUAL BACKGROUND¹

1. This is my judgment on an application by Wendy Jennings and Adrian O'Connor, by Notice of Motion, for primarily, the following reliefs:

"1. An Order pursuant to Order 84 Rule 22(9) of the Rules of the Superior Courts joining Wendy Jennings and Adrian O'Connor to the proceedings.

2. A declaration that special costs rules and/or costs protection and/or the NPE² costs rule applies to the participation of the proposed Notice Parties"

2. §2 of the Notice of Motion seeks what is known as a protective costs order. That issue is not for decision in this judgment. I refer to §2 for present purposes primarily as it refers to the "*proposed Notice Parties*" in circumstances in which §1 is imprecise as to the form of joinder of Wendy Jennings and Adrian O'Connor which is sought and given also the particular terms of O. 84, r. 22(9) RSC, to which I will come in due course.

3. The applicant for judicial review, ("Colbeam") and the respondent ("DLRCC") oppose the application by Ms Jennings and Mr O'Connor. Given it is foreseeable that Ms Jennings and Mr O'Connor will support DLRCC in their opposition to Colbeam's case, I confess to some puzzlement as to why it did not at least affect neutrality on the application. But counsel for DLRCC tells me and I accept that DLRCC's position proceeds from its understanding of the law.

4. In these proceedings, Colbeam seeks to have quashed the decision (the "Impugned Rezoning Decision") of the Respondent ("DLRCC") whereby Colbeam's lands of 2.12 hectares at Our Lady's Grove, Goatstown Road, Dublin 14 ("the Site"), which had been zoned for residential development in the Dun Laoghaire-Rathdown County Development Plan 2016 - 2022 (the "2016 Development Plan"), were zoned for open space in the Dun Laoghaire-Rathdown County Development Plan 2022 – 2018 (the "2022 Development Plan"). It is common case that this rezoning, if valid and putting the matter at its least, dramatically diminishes Colbeam's prospects of getting planning permission to develop the site.

5. The consequences of the Impugned Rezoning Decision are potentially immediately acute. In June 2021, Colbeam got from An Bord Pleanála (the "Board") permission³ pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 ("the 2016 Act"), as applicable to Strategic Housing Developments ("SHD"), to develop student accommodation on the Site. Ms Jennings and Mr O'Connor sought judicial review of the decision to grant that permission. By judgment of 17

¹ Headings are for general assistance in navigating the judgment. They are not definitive of the content which follows.

² "Not Prohibitively Expensive".

³ ABP-309430-21.

February 2023⁴ in those proceedings (the “Jennings/O’Connor judicial review”), the High Court decided to quash that permission (the “quashed SHD Permission”). While it is convenient to refer to it as the “quashed” SHD Permission, strictly it is incorrect as final orders are yet to be made in that case and certiorari has not issued. From the points of view of the parties’ respective interests, and of considerable relevance to the arguments on the issue I must now decide, vital issues remain for decision in that case as to what final orders should be made - specifically as to whether and on what terms the quashed SHD Permission is to be remitted to the Board for re-decision.

6. It is common case that if, in the Jennings/O’Connor judicial review, the quashed SHD Permission is remitted to be re-decided on foot of the 2022 Development Plan rezoning of the Site as open space, the Board will be obliged to refuse planning permission. That is because by s.9(6) of the 2016 Act⁵ it may not grant SHD permission where a proposed development materially contravenes the applicable development plan as to the zoning of the land. Indeed, if remittal had to be on terms that the matter be decided on foot of the 2022 Development Plan rezoning of the Site as open space, it is arguable that remittal should be refused as pointless or, as Colbeam’s counsel observed, Colbeam might not even seek remittal.

7. It is also common case that if, in the Jennings/O’Connor judicial review, the quashed SHD Permission is remitted to be decided:

- on foot of the 2016 Development Plan, which zoned the land for residential development, or
- on foot of the 2022 Development Plan, but the rezoning to open space having been quashed in these proceedings,

a possibility would or could⁶ remain that the Board would be legally entitled to consider granting permission in their remitted decision.

8. As the law stands, any remittal now in the Jennings/O’Connor judicial review would be for decision on foot of the 2022 Development Plan. But the case - **Crofton**⁷ - in which that was decided is under appeal. While the court is entitled to decide matters on the law as it stands when they come up for decision and without awaiting the outcome of an appeal in another case, the view has generally been taken by litigants in similar circumstances (of which there is a sizeable number) and the court has acquiesced in that view, that it is prudent to await the outcome of the appeal in Crofton. Though that course may need to be kept under review.

4 Jennings & O’Connor v An Bord Pleanála & Colbeam 2023 IEHC 14.

5 (6) (a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned.

(b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.

6 I say “could” as it would clearly be premature to attempt here to discern what quashing the rezoning to open space might mean for the resultant zoning status of the Site or what order might be made in these proceedings with a view to establishing that zoning status.

7 Crofton Buildings Management CLG v. An Bord Pleanála [2022] IEHC 704.

9. As the law stands - as the 2022 Development Plan is presumptively valid - any remittal now in the Jennings/O'Connor judicial review would be for decision on foot not merely of the 2022 Development Plan, but on foot of the rezoning therein of the Site to open space. Refusal of permission would inevitably ensue. Accordingly, Colbeam in these proceedings, as I have said, seeks to have that rezoning quashed.

10. Ms Jennings and Mr O'Connor point out that Colbeam, in its recitals of fact in its Statement of Grounds in these proceedings, recited:

- the fact of the Jennings/O'Connor judicial review (which had not, when those Grounds were filed, come to trial).
- that the Chief Executive of DLRCC, in advising its members against rezoning the Site to open space, noted in support of his view, the "live permission" on the Site (i.e. the SHD permission later quashed) as granted by the Board.
- Colbeam's submission to the Council in January 2022, objecting to the proposed rezoning, as invoking the SHD permission later quashed and referring to the pending Jennings/O'Connor judicial review.

11. In its assertion of legal grounds in its Statement of Grounds in these proceedings, at Ground 2, Colbeam explicitly,

- invokes the SHD permission (later quashed) as a determination by the Board that residential use of the Site is consistent with proper planning and sustainable development.
- asserts that the Councillors erred in law in that they did not engage "*properly and/or meaningfully with the determination of proper planning and sustainable development within the planning history of these lands*" and "*by failing to identify and respect the determination of certain of those matters within the planning history*". These pleas are clearly an invocation in these proceedings of the SHD permission (later quashed).

12. Ms Jennings and Mr O'Connor emphasise that on 27 March 2023, Sadhbh O'Connor, by affidavit sworn for Colbeam in the Jennings/O'Connor judicial review⁸ after judgment in that case deciding to quash that the SHD Permission, and seeking remittal to the Board, put Colbeam's position, inter alia, as follows:⁹

⁸ Affidavit of Sadhbh O'Connor sworn 27 March 2023 §8 et seq.

⁹ Not verbatim.

- If the quashed SHD Permission is remitted to be considered in accordance with the 2016 Development Plan, the Board could grant permission in accordance with the development scheme proposed by Colbeam.
- If the quashed SHD Permission is remitted to be considered in accordance with the 2022 Development Plan, as it stands, the Board would have to refuse permission.
- Colbeam has instituted judicial review of the validity of the 2022 Development Plan rezoning of the Site – she exhibits the pleadings in the present case.
- *“Clearly the outcome of those proceedings is of considerable importance, at least from a planning perspective, and insofar as Colbeam’s application for permission to carry out the proposed development is concerned.”*
- *“A stay on the entry into force of the relevant zoning objective, insofar as it affects the site, has been sought, but that this application has yet been heard or determined.”*

From Ms O'Connor’s affidavit seeking remittal, it will be seen that Colbeam emphasised the interrelationship of these proceedings and the Jennings/O’Connor judicial review.

13. Ms Jennings and Mr O’Connor also point out that Colbeam, in these proceedings, sought¹⁰ a stay on the application and/or operation of the Impugned Rezoning Decision – i.e. of the 2022 Development Plan but limited to its rezoning of the Site. Colbeam did so on the explicit basis, by affidavit of Joseph Cox sworn 28 March 2023, the day after Sadhbh O’Connor’s affidavit, that these proceedings were *“brought in the context where”* the SHD Permission was under challenge in the Jennings/O’Connor judicial review. As is apparent, by the time the stay on the operation of the Impugned Rezoning Decision was sought, judgment in the Jennings/O’Connor judicial review, deciding to quash the SHD permission, had issued. Mr Cox averred:

“In those circumstances, it is necessary to apply for a limited stay, as any future decision regarding an application for permission in relation to the Grove Lands, particularly by the Board in the event of remittal, will be determined by reference to the zoning of the Grove Lands in the New Plan, the validity of which is challenged.

In the event that these proceedings are not determined prior to any consideration by the Board of the application for permission for strategic housing development on remittal, or, indeed, even prior to the Court’s consideration of an application for remittal in the Jennings proceedings, the Applicant herein will be left with having purchased a landholding which has since been effectively de-zoned by decision of elected members which decision is intended to preclude any revised application for permission on the lands. In such circumstances, the Applicant faces very considerable, irrecoverable financial losses in the tens of millions of euro. The details of these circumstances are set out hereunder.

¹⁰ By Notice of Motion dated 28 March 2023.

Accordingly, in light of the prospect of the question of remittal in the Jennings proceedings being determined prior to the determination of these proceedings, the Applicant now issues the within application seeking a limited stay order on the rezoning of the Grove Lands. The factual context and the basis for this application is set out more fully hereunder."

14. There follows, in that affidavit¹¹ an assertion that *"Judgment in the Jennings proceedings has prompted the within application for a stay,"*. Also, in advancing the view that it *"is directly affected by the proposed rezoning and its commercial interests are substantially prejudiced"* as it has incurred purchase and development costs of more than €23 million to date, the following appears in that affidavit under the heading *"Prejudice to the Applicant"*¹²:

"I say that it is obvious from the above factual background that the Applicant herein is now left in the invidious position of having purchased a landholding which has since seen two strategic housing planning permissions quashed¹³ and, separately, the Grove Lands since dezoned entirely such as to preclude any further application for development being made."

Colbeam's essential point is reached by Mr Cox as follows:¹⁴

If "..... a limited stay is not granted in these proceedings, and in the event that the question of remittal in the Jennings proceedings is decided upon prior to the conclusion of the within proceedings, the Applicant's development project plans will be set at nought and the lands subject entirely to the success or otherwise of the challenge brought in the within proceedings.

The Court having recently determined in principle to quash the most recent grant of permission in the Jennings judgment, I am advised and believe that the primary issue of concern which arises for the Applicant is that the question of remittal in those proceedings may be considered and determined prior to the determination of the within proceedings."

"..... the Applicant would permanently lose the benefit of the permission the subject of the appeal process in Jennings,"

It will be seen from Mr Cox's affidavit that Colbeam's application for a stay in these proceedings emphasised their interrelationship with the Jennings/O'Connor judicial review – to the extent of characterising it as Colbeam's *"primary issue of concern"*.

15. From those O'Connor and Cox affidavits and Colbeam's applications both to stay the operation of the Impugned Rezoning Decision - rezoning the Site to open space - and to remit the quashed SHD Permission to re-decision by the Board, it is apparent that Colbeam's combined strategy, across both

11 Affidavit of Joseph Cox sworn 28 March 2023.

12 i.e. Colbeam.

13 An earlier permission had also been quashed by Order made on 2 July 2020 – see *Redmond v. An Bord Pleanála* [2020] IEHC151 and [2020] IEHC322.

14 §§24, 25 & 33.

proceedings, was at that time to procure the remission of the quashed SHD Permission to re-decision by the Board at a time at which, by reason of the stay, the open space zoning of the 2022 Development Plan would not apply to their lands.

16. Whether such a strategy could or would have resulted in their getting permission on remittal I cannot say. That is so not least perhaps as – though I do not make any finding in this regard – even if the open space zoning was stayed, I am unclear what the zoning status of the lands would have been during the stay. Whether similar doubts afflicted Colbeam I cannot say, but in any event and for whatever reason, they did not proceed with that strategy.

17. Ms Jennings and Mr O'Connor were, on their application and by consent of Colbeam, joined as notice parties to the application to stay the operation of the Impugned Rezoning Decision – but they were not joined at that point to the proceedings generally. They were joined in the stay application without prejudice to all parties' respective views on whether they should be joined in the proceedings generally – the application for which joinder is the subject of this judgment. However, Colbeam then changed tack.¹⁵ It withdrew its application in these proceedings to stay the Impugned Rezoning Decision and it adopted an essentially Augustinian strategy – that the court in the Jennings/O'Connor judicial review would grant it remittal, but not yet. It observed, correctly, that the court has, in other cases, adjourned remittal applications to await the outcome of the appeal in Crofton¹⁶ and it proposed that course in the Jennings/O'Connor judicial review. However, it proposed also that the remittal application be adjourned pending the outcome of the present proceedings challenging the Impugned Rezoning Decision. It proposed adjournment to the later of those two outcomes.

18. While Ms Jennings and Mr O'Connor have not formally consented to adjournment of the remittal issue in the Jennings/O'Connor judicial review pending the later of those outcomes, neither have they evinced any great opposition to it. While such an adjournment is not required by law, and I do not decide any such application as it is not before me at present, such an adjournment would certainly be within my discretion and would not be unusual in practice. It would have the advantage of enabling a decision on the Jennings/O'Connor judicial review remittal application in light of a better view of the law than is to hand as present.¹⁷ For present purposes therefore, I will assume such an adjournment of the remittal application.

19. Ms Jennings and Mr O'Connor argue that Colbeam's changed strategy seeks to achieve, by adjournment of the Jennings/O'Connor judicial review remittal application, substantially the same outcome as their withdrawn application for a stay of the Impugned Rezoning Decision combined with early remittal of the quashed SHD Permission. They say there is no practical difference between

¹⁵ At a directions hearing on 15 May 2023 and by letter dated 1 June 2023.

¹⁶ i.e. as to the issue which Development Plan should apply on remittal.

¹⁷ Of course, either or both of the decision of the Court of Appeal in Crofton and of the High Court in these proceedings may be appealed. But I will leave that prospect aside for now.

Colbeam's former and present strategies. That is not precisely true but it is appreciably true. However, I am not clear that anything turns on that observation per se: Colbeam is entitled to strategize in this way. What may be more significant is the interrelationship both strategies imply between the two sets of proceedings.

ORDER 84 RSC & INITIAL OBSERVATIONS

20. **Order 84 Rule 22(1) RSC**¹⁸ provides that an "*application for judicial review shall be made by originating notice of motion*".¹⁹ **Order 84 Rule 22(2) RSC** states:

"The notice of motion²⁰ must be served on all persons directly affected"

21. With one exception,²¹ O. 84 does not refer to notice parties in judicial review. However, the invariable practice is that those whose decisions are impugned or against whom relief is sought are joined in the proceedings as respondents and all others "*directly affected*" within the meaning of O. 84, r. 22(2) are joined as "notice parties".

22. It is clear that a person "*directly affected*" within the meaning of O. 84, r. 22(2) who has not been served as required by O. 84, r. 22(2), may apply to be so served and, if the court orders such service, that person thereby becomes a notice party in the proceedings.

23. **Order 84 Rule 22(9) RSC** provides that:

"If on the hearing of the motion ... the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice ... may be served on that person."

It will be noted that the precondition to an order under O. 84, r. 22(9) is that the person in question "*ought to have been served*".

18 Rules of the Superior Courts.

19 There are exceptions which may be ignored here.

20 i.e. The originating notice of motion for relief by way of judicial review which issues once leave to seek judicial review has been granted.

21 O. 84 r. 22 (2A) Where the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to quash them or any order made therein— (a) the judge of the court concerned shall not be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party, or served, unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit.

24. **Order 84 Rule 27(1)** provides that:

“On the hearing of an application under rule 22, ... any person who desires to be heard in opposition to the application, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the application.”

25. The “*motion*” to the hearing of which O.84, r. 22(9) refers, is the originating notice of motion for judicial review. Therefore, and given also the reference to adjourning “*the hearing*”, it appears to me that O.84, r. 22(9) is best understood as referring to an eventuality occurring at the substantive trial of the judicial review in which a “*directly affected*” person will announce himself or herself or otherwise come to the attention of the Court. It is on the adjournment of that hearing that the notice of motion is served on such person – who thereby becomes a notice party and presumably may file opposition papers and affidavits. O. 84, r. 27(1) refers to a similar eventuality occurring at the substantive trial of the judicial review in which a person, not having been served with the proceedings but seeking to be heard, will announce himself or herself²². The court may hear such a person if her or she is a “*proper person to be heard*”. It is not necessary that such a person be someone who ought to have been served. I need not here explore any difference between a “*directly affected*” person (O. 84, r. 22(9)) and a “*proper person to be heard*” (O.84, r. 27(1)). But such persons respectively are differently as, in the latter case, the hearing is not adjourned to permit service of the proceedings on him or her – he or she is merely heard at the substantive trial of the judicial review without having been served or having had the opportunity to file opposition papers and affidavits. So O. 84, r. 22(9) and O. 84, r. 27(1) appear to be complementary rules allowing flexibility of response to a belated arrival in the proceedings. One may ask: why provide for such a unlikely event? But remembering that Order 84 governs judicial review in the myriad of varied circumstances in which government acts, it would be a mistake to view O. 84, r. 22(9) and O. 84, r. 27(1) through the prism of experience in the commercial planning and environmental judicial review list, in which, typically, “*directly affected*” persons are readily identifiable and proceedings are managed in considerable detail. It is by no means inconceivable that at the hearing of a judicial review it will become apparent to the Court that someone who ought to have been served has not been served. These rules are, no doubt, a wise provision for what may be a comparatively rare eventuality.

26. In his ex tempore judgment in **Monopower**²³ Herbert J considered interlocutory motions for two reliefs:

- That the applicants be served pursuant to the then-equivalent of O. 84, r. 22(2).²⁴ In other words they wished to become notice parties in the proceedings.
- That they be entitled to be heard pursuant to O.84, r. 26(1) - the then-equivalent of O.84, r. 27(1).²⁵

22 Presumably some sort of prior informal notice would not upset the operation of the Rule.

23 Monopower Ltd v Monaghan County Council [2006] IEHC 253.

24 Order 84 rules 18 to 28 were substituted by rules 18 to 29 by SI 691 of 2011. The textual differences are irrelevant for present purposes.

25 The textual differences are irrelevant for present purposes.

Herbert J considered these to be two separate reliefs. He refused the application under O. 84, r. 22(2) to be served and become notice parties as the applicants were, for reasons I will consider later, not “*directly affected*”. He refused the application under O. 84, r. 26(1) (now O. 84, r. 27(1)) to be heard as premature in advance of the hearing of the motion for judicial review. He did so in the following terms:

“The hearing will take place in due course and it seems to me it would be unfortunate if I were in some way to fetter in anticipation the jurisdiction conferred upon the judge hearing the application for judicial review.

It is for the judge hearing the application to decide in the circumstances which are then apparent to the judge whether a particular person who has not been served appears to be a proper person to be heard. That seems to give a considerable latitude to the judge to decide that any person who may have a significant contribution to make to the proceedings, but who may not come within the definition of a person “directly affected”²⁶ might, if the judge thought that it would be necessary in the interests of justice to hear such a person, ... still be heard.

It is difficult on the facts of the particular case before me to see how this might arise, but I don't think I should in any way attempt to pre-empt the judge hearing the application and I think I should say no more than that I do not think it a proper application to be made to this court at this time.

...

Rule 26 specifically states that they may be heard “notwithstanding that they have not been served with the notice of the motion or the summons” it is not an application which should be made to me now as I am not hearing the application. This is an interlocutory application prior to the hearing of the application for judicial review.”

27. It appears to me to follow from **Monopower** that if, as I do, one views O. 84, r. 22(9) and O.84, r. 27(1) as complementary in addressing issues arising at the hearing of the application for judicial review, then:

- The Notice of Motion in the present case is misconceived in its invocation of O. 84, r. 22(9), as an interlocutory application thereunder is premature.²⁷

²⁶ Emphasis added.

²⁷ I am not to be taken as discouraging persons intending to apply at the hearing of a judicial review to be heard under O.84, r. 27(1) from giving advance notice of that fact to the parties and to the court. On the contrary, such a course would clearly assist in the efficient management of proceedings. That is so not least, where in modern practise, many judicial reviews are in effect actively case managed and are tried on foot of allocation of time as between those to be heard. So the unannounced arrival at trial of an additional party seeking to be heard has the capacity to considerably upset the planned duration of the trial.

- The only interlocutory application which a person can make in seeking, to use a neutral phrase, to get involved in a judicial review, is an application in reliance on O. 84, r. 22(2) to be served with the proceedings and thereby become a Notice Party.
- To succeed in such an application, such a person must demonstrate that he or she is, in the phrase used in O. 84, r. 22(2), “*directly affected*”.

28. However, if I am wrong and if an interlocutory application in reliance on O. 84, r. 22(9) is not premature and can be made, I note that in **National Maternity Hospital**²⁸ the aspirant notice party submitted that O. 84, r. 22(9) confers a wider jurisdiction to join notice parties than does O. 84, r. 22(2) because of the inclusion in O. 84, r. 22(9) of the words “*or otherwise*” in the phrase “*any person who ought, whether under this rule or otherwise, to have been served*”. MacGrath J said:

“It does not seem that it is proper for me to construe the words ‘or otherwise’ in this subrule in such a manner as to confer upon the Court in an application such as this and made at this stage of the proceedings, an unlimited inherent jurisdiction, the necessary implication of which may be to circumvent the jurisdictional limitation imposed by the rule as a whole and as interpreted by the courts in the decisions referred to above. Even if the proposed notice party is correct in that argument, I do not consider that this is an appropriate case in which to exercise such suggested wide and open ended jurisdiction, particularly where the entitlement to be joined has been subjected to rigorous examination within the context of an application under O. 84, r. 22(2) and the rule in its entirety.”

29. The precise relevance in the foregoing passage of the phrase “*at this stage of the proceedings*” is not entirely clear to me. But it is clear that the motion in **National Maternity Hospital** was one to be joined as a notice party – it was not merely a motion to be heard – and it seems to have been an interlocutory motion rather than an application at the substantive hearing of the judicial review. Also, MacGrath J had referred to **Monopower** – albeit not explicitly as to the finding of prematurity of the application in that case. It may well be that the phrase “*at this stage of the proceedings*” is a reference to the issue of prematurity.

30. In any event, what appears to follow from **National Maternity Hospital** is that, even if reliance can properly be placed on O. 84, r. 22(9) in the present case, as it applies only to a person who “*ought to have been joined*” and as that phrase must refer back to O. 84, r. 22(2), it follows that a person relying on O. 84, r. 22(9) would have to show that he or she was “*directly affected*” within the meaning of O. 84, r. 22(2). Remembering that both O. 84, r. 22(2) and O. 84, r. 22(9) result in the joinder of a notice party, such coherence between them as to a requirement of direct effect²⁹ on the aspirant notice party is what one would expect of the rules.

²⁸ The National Maternity Hospital v. The Minister for Health [2018] IEHC 565 (High Court, MacGrath, 18 July 2018).

²⁹ Not to be confused with the EU law concept of direct effect, which is irrelevant to this judgment.

31. It follows from the foregoing that my decision on the application of Ms Jennings and Mr O'Connor will ultimately turn on whether they will be "*directly affected*" within the meaning of O. 84, r. 22(2).

32. **Dowling**³⁰ is clear authority that, once a potential notice party is "*directly affected*" within the meaning of in O. 84, r. 22(2), it does not matter whether (s)he has anything new or different to say at trial. In Fennelly J said:

"I do not agree with the view of Charleton J that the question to be asked is whether the submissions of the party applying to be joined "are needed on any issue for the court to reach a just and complete adjudication." It follows that I also disagree with his conclusion that there was "no benefit to be gained by the Court, from these parties attending the hearing and backing up the contention of the Minister that the direction Order was correctly made in the first place." That is not the correct test. An interested party, i.e. a party directly affected, is, in my view, entitled to be represented to defend his or its interests, even if the decision-maker is there to advance the same arguments. a party with a direct interest in an administrative decision is entitled to have his own case put to the court by his own counsel independently of the defence made on behalf of the decision maker. That is his right. It does not depend on the court's view as to whether it finds it necessary to hear the party."

33. Correctly, in my view, beyond disputing whether O. 84, r. 22(9) provides a wider basis than does O. 84, r. 22(2) for joining a notice party, neither Colbeam nor DLRCC sought to make anything of the misconceived reliance in the Notice of Motion on O. 84, r. 22(9). I would have been disposed to allow its amendment to invoke O. 84, r. 22(2) if needs be. And, even if incidentally, it is clear from §2 of the Notice of Motion that what it contemplates is the joinder of Ms Jennings and Mr O'Connor as, explicitly, "*Notice Parties*". In my view, fairness required that the motion be met on its substantive merits and that is where Colbeam and DLRCC, properly, sought to meet it. I will decide it accordingly.

34. DLRCC has filed opposition papers opposing Colbeam's attempt to quash the Impugned Rezoning Decision. In the ordinary way, the Chief Executive of DLRCC acts for DLRCC and decides its course of action in proceedings.³¹ The written submissions for Mr Jennings and Mr O'Connor state that "*A further relevant matter by way of context, is that the Executive of the Respondent was in conflict with the elected members of the Respondent, in determining the zoning of the lands. In such circumstances, the Council are in difficult position in terms of the defence of these proceedings; it is defending the decision of the elected members but the Affidavit in support of the same, is sworn by a*

30 Dowling & ors v Minister for Finance [2013] IESC 58.

31 Local Government Act 2001 S.153.— (1) The chief executive for a local authority—

(a) shall act for and on behalf of the local authority in every action or other legal proceeding whether civil or criminal, instituted by or against the local authority, and

(b) may do all such acts, matters, and things as he or she may consider necessary for the preparation and prosecution or defence of such action or other proceeding in the same manner in all respects as if (as the case may require) he or she were the plaintiff, prosecutor, defendant or other party to that action or other proceeding.

member of the Executive where the recommendation of the Chief Executive was not followed by the elected members in their decision." In fairness, this point was not hard-pressed at hearing.

35. But given the written submission, I think I should make clear that I should not assume that DLRCC will take its "foot off the pedal", as it were, in the defence of these proceedings by reason of the fact that, whereas its members made the Impugned Rezoning Decision, its chief executive, who opposed that decision, has carriage of the proceedings. While the obligations on a chief executive of a local authority in defending a judicial review do not require defence of the indefensible or of a decision the invalidity of which should properly be conceded, short of that situation, I see no reason to infer merely from that factual matrix that a chief executive will, by act or omission, in any degree, seek to frustrate, or fail to adequately and properly defend, the presumptively valid democratic rezoning decision of the Council members, by which he is presumptively bound - or that his legal team would participate in any such course. Counsel for DLRCC readily, properly and entirely unsurprisingly, confirmed at the hearing of the motion that understanding of the position.

36. I should also say that it appears to me from the cases that whether a person is to be added as a notice party is a matter of right rather than of discretion in the court – though judgment may be required on particular facts as to whether circumstances triggering that right exist.

37. Though my decision is unaffected by it, I should make one other observation as something of an aside. The rule – and it is a rule – that affidavits must contain only fact and not argument or legal submission cannot be absolute. It can be helpful and even necessary to say something of the latter to sensibly put the former in context. But restraint is required. The affidavit sworn to ground this application is relatively compliant in this regard. That sworn for Colbeam is far from complaint – one might even say unrestrained. The temptation to argue in affidavits is understandable but is to be resisted save to the limited extent required to make the affidavit comprehensible.

WHAT DOES "DIRECTLY AFFECTED" MEAN?

38. As recorded above, O. 84, r. 22(2) RSC states: "*The notice of motion*³² *must be served on all persons directly affected*". I have stated that my decision will ultimately turn on whether Ms Jennings and Mr O'Connor will be "*directly affected*" within the meaning of O. 84, r. 22(2).

39. Colbeam and DLRCC argue that what must be directly affected to trigger O. 84, r. 22(2) is a legal right.

³² i.e. The originating notice of motion for relief by way of judicial review which issues once leave to seek judicial review has been granted.

40. It seems to me relevant to observe that the rights/interests distinction is separate from the directly/indirectly distinction. For example, an indirect effect on rights is as conceivable as a direct effect on interests. So what, in context, does “*directly affected*” mean? And what exactly is it that must be “*directly affected*” – rights only? Or will an interest short of a right suffice? O. 84, r. 22(2) does not say – beyond identifying that what is to be affected is a “*person*”.

41. Before I consider the case law, it seems to me necessary to observe that O. 84, r. 22(2) does not just arise for consideration where someone applies to be joined as a notice party. Primarily it requires applicants in judicial review, as a matter of obligation, to serve those directly affected – see **Dowling**.³³ That is necessary to the proper constitution of judicial review proceedings - though a breach won't inevitably render proceedings invalid as, clearly, a notice party can be joined belatedly. That said, Humphreys J did observe in **Barry**³⁴ that “*In principle an order (even a consent order) made in breach of O. 84, r. 22(2) can simply be set aside on the application of the party who was not so served.*” And a failure to serve a party entitled has on occasion resulted in a leave application made on notice being refused – though, it has to be said, in somewhat extreme circumstances in which opportunity to serve the notice party was more or less wilfully ignored – see **O'Connell**.³⁵ The course more often taken is to admit the necessary notice party to the proceedings. Accordingly, there is something appreciable to be said for the view that a criterion that those joined be “*directly affected*” must be interpreted in terms allowing the reliable and exhaustive identification of those persons. However a balance must also be struck in that the law must also recognise that the myriad of circumstances and contexts in which judicial review arises requires a criterion broad enough to ensure that those who, in the interests of justice, genuinely ought to be served, are served.

42. Of course, the Rules could have provided for a narrower category of notice parties necessary to the proper constitution of the proceedings, while allowing the court a discretion to admit a wider category as notice parties on application by such persons. That would protect the applicant for judicial review from an excessively wide and unclear service obligation while allowing the court to act as a gatekeeper in permitting only those with a real interest in the outcome of the proceedings to join in. Such a system might be considered particularly appropriate to areas of public law of which public participation is characteristic - such as planning and environmental law. But that was not the course taken in the Rules – no doubt for good reason.

O'Keefe - 1993

43. O'Keefe³⁶ is a case famous (at least to Irish lawyers) for other reasons.³⁷ Radio Tara got planning permission to erect a transmitting station and mast. They got it from the Meath County Manager despite a direction of the members of the County Council not to grant it. Mr O'Keefe

33 *Infra*.

34 *Barry v. Commissioner of An Garda Síochána* [2020] IEHC 307 (High Court (General), Humphreys J, 8 June 2020).

35 *O'Connell v. The Taxing Master (Paul Behan)* [2020] IEHC 437 (High Court (Judicial Review), O'Moore J, 9 September 2020).

36 *O'Keefe v An Bord Pleanála* [1993] 1 IR 39.

37 It set the eponymous test for irrationality in judicial review.

appealed that decision but the Board granted permission. Mr O'Keeffe sought certiorari of the Board's decision. The proceedings were not served on Radio Tara.³⁸ The case went to the Supreme Court and at that stage Radio Tara applied by motion to be made, and it was made, a respondent in the case. Finlay CJ in the substantive judgment in the case made the following observation per curiam:

"If application is made for liberty to issue proceedings for judicial review and the claim includes one for certiorari to quash the decision of a court or of an administrative decision-making authority the applicant must seek to add as a party any person whose rights would be affected by the avoidance of the decision impugned. If liberty is granted the court should except for special reasons ordinarily add such person as a party."

That proposition is now so well-established as to hardly require repetition but the passage does merit some comment:

- It requires joinder of a person whose "rights" would be affected. However, the passage is not necessarily exhaustive of the power to join a notice party. It does not say that only a person whose "rights" would be affected may be joined. Nor does it rule out the joinder of a person who would be affected in his or her interests, though not in his or her "rights".
- It makes express what is, perhaps obviously, implicit in O. 84, r. 22(2) – that the person to be joined is joined by virtue of being affected *"by the avoidance of the decision impugned"*.

Spin Communications - 2000

44. In **Spin Communications**,³⁹ the applicant was an unsuccessful bidder for a radio broadcasting licence. The applicant alleged bias against the IRTC⁴⁰ which had made the impugned decision granting the licence to the Notice Party. The High Court refused the Notice Party's application for security for costs on the basis that it was difficult to see what role the notice party could have in the resolution of the issue of bias. The Notice Party successfully appealed. Keane CJ said that;

- the notice party had a vital interest in the outcome of the matter.
- a party *"vitaly interested in the outcome of the proceedings, must be joined as a party and will be joined by the Court if the applicant does not join them"*.
- The notice party is there *"to protect his interest, to advance arguments that may not have been advanced by the IRTC and to have had the benefit of his own counsel and solicitor to protect his interest"*.

³⁸ Although the applicant's solicitor informed Radio Tara of the existence of the proceedings and in effect offered them the opportunity to apply, pursuant to the rules of court, to be added as a party. They decided not to do.

³⁹ Spin Communications Ltd T/A Storm FM v Independent Radio & Television Commission [2000] IESC 56 - ex tempore.

⁴⁰ Independent Radio and Television Commission.

45. It is notable that Keane CJ, giving judgment *ex tempore*,
- was considering a case in which, were the impugned licence quashed, the rights of the Notice Party as grantee of that licence would undeniably be directly affected.
 - was not deciding a disputed application to join a notice party.
 - did not invoke any Rules of the Superior Courts as to the limits of the scope of the obligation and jurisdiction to join a notice party.
 - was considering the possibility that a notice party already joined might, if the judicial review failed, be entitled to its costs.

In my view, it cannot be said that Keane CJ by this judgment intended to broaden the “*directly affected*” criterion for joinder of a notice party by reference to a criterion of vital interest. And if he did so intend, he could only have done so *obiter as*, on the facts, the rights of the Notice Party as grantee of that licence would undeniably have been directly affected were the licence quashed.

BUPA - 2005

46. In **BUPA**,⁴¹ a health insurance provider impugned the HIA’s recommendation to the Minister for Health of a risk equalisation scheme,⁴² based on community rating.⁴³ It also impugned the underlying legislation on constitutional and EU law grounds. Essentially,⁴⁴ the VHI,⁴⁵ in seeking its reinstatement as a notice party, asserted that it was a necessary Notice Party as it was the would-be principal beneficiary of the scheme by way of very substantial financial transfers from competitors such as BUPA. It also asserted that the impugned legislation affected only a very limited number of persons, namely, providers of private health insurance in Ireland and that the VHI would be “*uniquely adversely affected*” by any finding of unconstitutionality in the legislation.

41 BUPA Ireland Limited v. Health Insurance Authority [2006] 1 I.R. 201.

42 A scheme pursuant to section 12 of the Health Insurance Act 1994 designed to prevent the risk rating of individuals for health insurance, by obliging insurers with low risk clients, such as the applicant, to compensate their competitors in the market that carried a more demanding client base.

43 Kearns J said “The fundamental principle of community rating is that all insured persons should share equally in the cost of health care on the basis that the excess of premiums over claims for younger, healthier members is used to pay the excess of claims over premiums for older and less healthy members. It is based on the principle of societal and inter-generational solidarity and prevents insurers risk-rating individuals for health insurance. It is combined with the principle of “open enrolment” which dictates that a private health insurer cannot refuse cover to anyone below the age of 65 and also the principle of “lifetime cover” which guarantees the right of the insured to renew a private health insurance policy. Furthermore, the legislation incorporates the principle of “minimum benefits”, which dictates that all private health insurance schemes or plans must provide at least a certain level of coverage. The scheme is intended to assist the maintenance of community rating across the market for people who are or may become privately insured, providing that health insurance undertakings, whose risk profile of members is less costly than the risk profile of all insured persons, should compensate those undertakings with more costly risk profiles.”

44 The sequence of facts, regulatory events and court proceedings, including events occurring and evidence adduced in the interim between the High and Supreme Court judgments, is complicated and need not be recounted here.

45 Voluntary Health Insurance Board.

47. The Supreme Court agreed with the VHI. Kearns J, considered the the then-equivalents⁴⁶ of O. 84, r. 22(2), O.84, r. 22(9) and O.84, r. 27(1) and cited O’Keeffe and Spin as demonstrating *“that where a party has a “vital interest in the outcome of the matter” or is “vitaly interested in the outcome of the proceedings” or would be “very clearly affected by the result” of the proceedings, it is appropriate for that party to be a notice party in the proceedings.”*

48. Kearns J considered that, while ordinarily a private citizen will not be joined in proceedings where the Attorney General seeks to uphold the constitutionality of impugned legislation affecting the public at large, *“a very different situation may be said to exist when, as in the present case, a particular party would be “uniquely adversely affected” if the application to strike down the Act and scheme were to be successful.”* And *“it is by no means unusual for third parties to be heard where the issue is alleged unconstitutionality of legislation.”*⁴⁷ Kearns J noted⁴⁸ that:

- *“... the abolition of the scheme would immediately impact the legal environment in which the (VHI) is required to operate and would have very significant consequences for how the (VHI) does its business in the future having regard, in particular, to its statutory obligations to maintain reserves.”*
- *“very serious allegations” were made by the applicant “that if risk equalisation payments are commenced under the Scheme, (VHI) will thereby be enabled to abuse its dominant position in the Irish market. A detailed market analysis will in this context form an integral part of the upcoming hearing. It is incontrovertible that the (VHI) is in a unique position to contribute to that debate and is ... likely to be “uniquely adversely affected” if the applicant's claims, which go beyond a mere challenge to the constitutionality of the legislation, are successful.”*
- *“The proceedings will inevitably involve an examination of the nature of risk equalisation, the competitiveness of the market, the nature of community rated markets and the issue of risk selection. The role of the (VHI) in that market and the nature of its behaviour in the market will be central issues. It follows that the (VHI) has the greatest possible interest and need to express its views on matters which go to the heart of the case being made by the applicant. Any suggestion that the (VHI)⁴⁹ is likely to abuse such dominance with the activation of risk equalisation makes it all the more important that the views and input of the (VHI) in this case would be available to the court.”*

49. Notably, while the challenge to the impugned recommendation had become moot as the Minister had decided not to act on it, by the time the judgment of the Supreme Court in BUPA was given, a further recommendation had issued *“which confirms our view that the original status quo, wherein the (VHI) was joined to the proceedings without demur by (BUPA), has been restored.”*⁵⁰ At

46 Order 84 rules 18 to 28 were substituted by rules 18 to 29 by SI 691 of 2011. The textual differences are irrelevant for present purposes.

47 Examples follow in the judgment.

48 §30 – 32.

49 The text says “applicant” but it seems to refer to the VHI.

50 Kearns J §33.

first blush, this might seem to provide the sole ratio of the decision in BUPA - as the proceedings thereby again implied direct effect on VHI's rights to payments under the scheme. But the Supreme Court announced its decision to reinstate the VHI as a notice party at the conclusion for the hearing of its motion for reinstatement on 27 October, 2005 and reserved judgment as to its reasons⁵¹ - which it gave on 2 December 2005. Kearns J on that occasion described the further recommendation as having issued only in "*recent days*". So it could not have informed, much less been essential to the decision made on 27 October, 2005. Kearns J's use of the word "*confirms*" may suggest that the view the status quo had been restored been taken prior to the further recommendation, but I am not clear that that is what he intended.

50. Of some further interest is the consideration in BUPA⁵² of **Barlow**⁵³ - on which the High Court in BUPA had relied in removing the VHI as a notice party. In Barlow, in private law civil proceedings, an applicant, relying on O. 15, r. 3 RSC,⁵⁴ sought to be joined as a co-defendant as he feared his reputation might be impugned at trial. He was rebuffed as his presence was not required for the effectual and complete adjudication of the issues to be determined. It was held that "*there must be exceptional circumstances before a person could be joined as a defendant against the wishes of the plaintiff...*". And, as was later recited in **Dowling**,⁵⁵ such "*special circumstances must consist in some real or apprehended adverse effect on his proprietary interests. Reputational damage would not suffice. Nor would the fact that the case will lead to a decision on a point of law which could adversely affect the applicant in other litigation.*"⁵⁶

51. As to the test set by O. 15, r. 3 RSC, Kearns J observed merely that direct effect on "*proprietary or pecuniary rights*"... "*may be a relevant consideration*". However he did so by reference to the citation in Barlow of **Halsbury**.⁵⁷ Halsbury, as cited by Keane CJ in Barlow, is more definitive in that it contrasts a person whose proprietary or pecuniary rights are or may be directly affected and who may be joined as a co-defendant on his or her own application, with "*A person having no legal but only a commercial interest in the outcome of the litigation between the plaintiff and the original defendant ..*". Such a person "*cannot be added as a party either for the convenience of the court or otherwise.*" But, as I say, that is an observation as to the test set by O. 15, r. 3 RSC.

52. Crucially however, Kearns J in BUPA⁵⁸ held that the test in Barlow "*was not the correct test to apply in this particular case*". This was a reference to the High Court's reliance in BUPA, in discharging the VHI as a notice party, on O. 15, r. 3 RSC. Kearns J did go on to observe - clearly obiter as he was canvassing the applicability of a test he had found to be inapplicable - that "*even if the test contained*

51 Kearns J §22.

52 From §34.

53 Barlow v Fanning [2002] 2 IR 593.

54 O.15 R.3 RSC reads in part: "The Court may ... order that .. the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

55 See below.

56 Kearns J in BUPA did not recite these elements of Barlow, as Fennelly J did in Dowling (infra), but Kearns J clearly had them in mind.

57 Halsbury's Laws of England (4th ed) Vol 37, para 226 at p 171.

58 §36.

*in O 15, r 13 were the correct test*⁵⁹ that test was satisfied as to exceptional circumstances and as the VHI's presence was necessary to enable the court effectually and completely to adjudicate upon all questions involved. He reached this particular conclusion as to satisfaction of the test in O.15, r.13 having regard in particular and inter alia, to the facts that the VHI:

- would be "*uniquely adversely affected*" if BUPA⁶⁰ were to succeed in the proceedings.
- was "*a body whose "proprietary or pecuniary rights are or may be directly affected by the proceedings either legally or financially"*".⁶¹

53. It is clear that Kearns J held that, in judicial review, O. 84, r. 22(2) RSC applied and did not require exceptional circumstances for the joinder of a notice party. Nor is Barlow authority that O. 84, r. 22(2) RSC requires effect on "*proprietary or pecuniary rights*", or even proprietary or pecuniary interests, is required to satisfy the test set in O. 84, r. 22(2). Barlow and O.15, r.13 do not apply to judicial review. That seems to me to be the important conclusion of BUPA on this issue.

54. It is clear that Kearns J found that the VHI as "*directly affected*", satisfied the test set by Order 84, r. 22(2). I accept later authority⁶² that his observation "*that where a party has a "vital interest in the outcome of the matter" or is "vitaly interested in the outcome of the proceedings" or would be "very clearly affected by the result" of the proceedings, it is appropriate for that party to be a notice party in the proceedings*" was not intended to, and did not, dilute the requirement that the required effect be "direct". But it is also clear on the facts in BUPA that the prospect arose of direct effect on the pecuniary right of the VHI to receive payments under the scheme: it satisfied any test that the direct effect in question be on rights. But, that said, in the quotation set out above Kearns J adopted language clearly encompassing interests as well as rights and in no degree narrowed the analysis in Spin from one encompassing interests to one confined to rights. A decision that the narrower of possible legal tests is satisfied on particular facts is not authority, unless it so states, that the test is not in law wider. Such a decision merely decides that on either view, the test is satisfied.

Monopower - 2006

55. **Monopower**⁶³ concerned, inter alia, applications by local residents, invoking O. 84, r. 22(2), to be joined as notice parties in Monopower's judicial review. Monopower in effect sought default planning permission by reason of Monaghan County Council's failure to determine its planning application within the prescribed time,

59 §36.

60 The report states "the Notice Party" but that is clearly a clerical error.

61 §36.

62 See below.

63 Monopower Ltd v Monaghan County Council [2006] IEHC 253.

56. Herbert J refused to join the residents. He held that while they *“have undoubtedly a vital interest in this whole matter”* nonetheless *“it is erroneous to conclude from that that ipso facto that they are 'directly affected by the application”* though *“they are undoubtedly indirectly affected”*. He said, *“the only party “directly affected” by this controversy is Monaghan County Council.”* A default permission *“would have possibly a very serious impact on the residences of the particular applicants to be joined as notice parties, but probably no more serious impact than on thousands of others in the area”*.

57. Of O. 84, r. 22(2) Herbert J said: *“the vital word in this subrule is “directly”. The rule does not say “must be served on all persons affected”. It says, “must be served on all persons directly affected”. So persons who might have a vital interest in the outcome of this particular application for judicial review, but who are only indirectly affected do not come within the terms of”* O. 84, r. 22(2).

58. It seems from his judgment that the submissions made to Herbert J as to BUPA erroneously asserted that Kearns J had stated that the test was whether joinder was, *“Necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter.”* As I hope I have demonstrated above, Kearns J had said the opposite – that test, derived from O. 15, r. 3 RSC, was inapplicable, even though on the facts it was satisfied. In any event, Herbert J observed that the point was that Kearns J had been satisfied that the VHI were *“uniquely adversely affected”*, and *“directly affected”* - as required by O. 84, r. 22(2). In light of BUPA, Herbert J was *“satisfied that it is not sufficient that a person have a vital interest in the matter unless, as the rule requires, the person is also “directly affected”*.

59. Herbert J relied on the observation of Kearns J that *“The VHI is a body both whose propriety or pecuniary rights are or may be directly affected by the proceedings, either legally or financially”* as a reason to refuse joinder of the residents under O. 84, r. 22(2) RSC. However I must respectfully observe that, despite their reference to direct effect, those words of Kearns J were addressed, not to the test set by O. 84, r. 22(2) RSC but to the inapplicable test set by O. 15, r. 3 RSC. Herbert J also accepted, by reference to the finding in BUPA that the VHI would be *“uniquely adversely affected”* by the success of BUPA’s action, that *“to a certain extent, the criticism made that there are no sufficient details in the affidavit evidence which show that these particular applicants to be joined are uniquely affected.”* Herbert J may have been leaving open at least a possibility that local residents might be able on suitable evidence to force their way into planning judicial reviews as notice parties.

60. In my view Monopower upholds the requirement that the test set by O. 84, r. 22(2) RSC requires direct as opposed to indirect effect – but it does not bear on whether that effect may be on interests as opposed to rights. Accordingly I do not think that, to this point in the sequence of caselaw, a proposition had been established that the direct effect required by O. 84, r. 22(2) had to be specifically on rights or, even more specifically, on *“propriety or pecuniary rights”*. Indeed the tendency of Spin and BUPA is clearly that direct effect on interest would suffice.

Abbeydrive - 2010

61. Simplifying very considerably the facts and legal issues in **Abbeydrive**⁶⁴ but preserving what seems to me to be the essential point for present purposes, An Taisce sought to be heard to argue in Abbeydrive's judicial review that the default planning permission which Abbeydrive sought could not be granted because to do so would breach EU law requiring EIA of the project in question. Importantly, An Taisce applied pursuant to O. 84, r. 26(1) RSC to be heard. It did not apply pursuant to O. 84, r. 22(2) RSC to be joined as a notice party. But An Taisce bolstered its argument as to O. 84, r. 22(2) RSC by arguing by reference to O. 84, r. 22(2) RSC, that it had *locus standi* as a person "affected" by the proposed development and as a "prescribed body"⁶⁵ for the purpose of the PDA 2000.⁶⁶ The judgment of Kearns J was taken up with other legal issues and he decided to remit the case to the High Court to consider the EIA point. As to the position of An Taisce he simply found it to be "an "affected" party" and later said that he would "*accede to An Taisce's request to be heard*" in the High Court on the EIA point.

62. While Kearns J did find An Taisce to be "an "affected" party", it nonetheless seems to me that Abbeydrive is authority only that in the circumstances such as those described in that case, An Taisce was, within O. 84, r. 26(1) RSC under which it made its application, a "*proper person to be heard*". Indeed in those circumstances, any other result of an application O. 84, r. 26(1) RSC would (if with the benefit of hindsight) have been surprising. The case does not in my view shed appreciable light on the requirement of O. 84, r. 22(2) RSC, that an aspiring notice party be "*directly affected*". I would respectfully and with due diffidence suggest that the headnote in the Irish Reports may miss the point in that regard. If anything, and as An Taisce has no pecuniary or proprietary rights or any substantive rights as opposed to a right to be heard, Abbeydrive is at least consistent with the view that direct effect on interests suffices to satisfy O. 84, r. 22(2) RSC. Though it is in truth of little weight in that regard as it is a decision on O. 84, r. 26(1) RSC, not a decision on O. 84, r. 22(2) RSC

63. **Browne**⁶⁷ suggests that **Abbeydrive** overrules Monopower but I confess I am not quite sure on precisely what basis that suggestion is made. In any event, I don't think the issue need detain me in the present case.

Yap - 2006

64. **Yap**⁶⁸ was a private law civil claim to enforce an employment contract. A co-worker sought to be joined as a notice party and relied on both BUPA and Barlow. That reliance naturally lead Clarke J to contrast the positions in public law litigation and in private law litigation. In the latter, there is a considerable "*obligation on the courts to keep private proceedings down to the parties whom the*

64 Abbeydrive Developments Limited, Applicant v Kildare County Council, Respondent [2010] 2 IR 397.

65 i.e. prescribed as entitled to be notified of and to be heard in certain planning applications.

66 Planning and Development Act 2000.

67 Simons on Planning Law 3rd ed'n (Browne) § 12–1102.

68 Yap v Children's University Hospital Temple Street Ltd. [2006] 4 IR 298 – cited in Dowling, *infra*.

plaintiff chooses.” But “the court order in public law proceedings can directly affect the interests of parties other than those before the court.” He said:

“For example if a regulatory authority makes a decision in proceedings between two entities, and one of those entities challenges the decision because it was unfavourable, if the court is persuaded that the determination of the regulatory authority should be upset, then that decision has a direct effect upon the party who had secured the favourable decision in the first place and therefore that party must be joined as a notice party because the order itself (rather than collateral matters such as the reasoning of the court or comments which the court might make on the facts) affects the interests of that party.

In passing it might also be noted that the court in such public law proceedings might also pass comment on the facts that might be unfavourable to some individual who was involved in the process, but that would not entitle that individual to be involved in the proceedings. The reason why notice parties are allowed in challenges to decisions of tribunals, lower courts and other bodies is because their orders directly affect other parties and those other parties are entitled to be heard.”

65. Again, as to this discussion, obiter, of the position in public law litigation, the focus in YAP is on directness of effect. But as to what is affected, the references are to “*other parties*” (i.e. in the words of O. 84, r. 22(2) RSC, “*persons*”) and to “*interests*”. Effect on “*rights*” is not identified as a criterion.

66. As to what is a regulatory decision “*in proceedings between two entities*”, Spin provides an obvious example: the applicant was an unsuccessful bidder for a radio broadcasting licence. The Notice Party was the successful bidder. As between Spin and the Notice Party, the game was zero sum. However, it seems at least arguable that a planning process in which a planning applicant seeks a planning permission and others oppose permission is a regulatory decision “*in proceedings between two entities*”. It is not of course, a *lis inter partes*, but that is really a private law concept and neither was the licensing process in Spin a *lis inter partes*. It is impossible to sit in the planning list of the High Court or, no doubt, to practice as a planning professional, without being aware that planning applicants in the proper pursuit of their proprietary and financial interests are often implacably opposed in that pursuit. They may be opposed by those whose interests are proprietary and financial (for example if, as is not unusual, they see the proposed development as devaluing their property) or by those whose interests may not be proprietary and financial but are nonetheless considered at least arguably vital - in the sense of their fears for their quality of life or for environmental concerns. It is not unusual that such interest overlap: the loss of a life-enhancing view from one’s house may devalue it. Such concerns are recognised as valid planning matters and recognised in law as entitling those who hold them to participate in the process to seek to vindicate those interests. The planning process is characterised, *inter alia*, by a right of public access to the process and of access to the courts to protect substantive interests of both a private (e.g. interference in the amenity of an adjoining house) and public (e.g. damage to a protected habitat or species) kind. That right of access is not at all restricted to merely protecting those interests traditionally in law characterised as justiciable legal rights. It is an

answer to a Nuisance action but not to an objection in a planning application to say that one's home has no right to light or not to be overshadowed. I do not impugn, nor could I, the criterion of direct effect, but I confess that, unless constrained by authority, I would be reluctant to conclude that the right to participate in judicial review as a notice party is allowed only to those whose proprietary and financial rights are imperilled by an impugned decision. In such a system, the law could be accused, not unfairly if somewhat excessively, of knowing the price of everything and the value of nothing.

Dowling - 2013

67. **Dowling**⁶⁹ considered a statutory appeal⁷⁰ which the Supreme Court considered analogous to judicial review. So it applied O. 84 by analogy to an application by PTSB⁷¹ to be joined as notice parties to a challenge to a ministerial "*Direction Order*" to recapitalise PTSB in the wake of a financial crisis. The High Court had joined PTSB to participate in the proceedings on a limited basis only. PTSB successfully appealed, arguing that that they should be joined without such limitation. Fennelly J stated that "*It seems to me obvious, at least prima facie, that the body most likely to be directly affected by the setting aside of a Direction Order is the "relevant institution" in respect of which the order must necessarily have been made.*"

68. Fennelly J said the following:

"Looking at the matter from the point of view of principle and, without reference to the applicable Rules governing the joinder of parties, it is clear that the position is significantly different depending on whether the proceedings are purely civil and private or whether they concern issues of public law. In civil litigation, generally speaking, parties are allowed to choose whom they wish to sue. In matters of public law persons other than the public authority may have a real and substantial interest in the outcome. The simplest example is the planning permission.⁷² While the judicial review must of necessity be sought on grounds that the planning authority or An Bórd Pleanála on appeal has committed an error of law affecting the validity of its decision, any decision of the court is very likely to affect the very real rights and interests of private persons or corporations. The holder of a planning permission is, of course, potentially affected by the outcome of an application for judicial review of its validity. Civil and public-law proceedings are not, however, in completely watertight compartments. There is an underlying principle that a person is entitled to participate in proceedings which are capable of adversely and directly affecting his or her substantial interests."⁷³

69 Re Irish Life and Permanent Group Holdings Plc; Dowling v Minister For Finance [2013] IESC 58; [2014] 7 I.C.L.M.D. 11.

70 Under s.11 of Credit institutions (Stabilisation) Act 2010 setting to set aside of a direction of the Minister for Finance whereby he proposed the recapitalisation of Irish Life and Permanent Group Holdings plc by €2.7 billion to the alleged disadvantage of existing shareholders, including Dowling et al who were applicants in the statutory appeal. By the time of the application Irish Life and Permanent Group Holdings plc had been renamed Permanent TSB Group Holdings plc and Irish Life and Permanent plc had been renamed Permanent TSB plc.

71 Permanent TSB Group Holdings plc and Permanent TSB plc.

72 Sic.

73 Dowling §29 - Emphasis added.

69. Clearly, here, Fennelly J uncontroversially considers – but by way of example - that the holder of an impugned planning permission, as *“potentially affected by the outcome of an application for judicial review of its validity”*, is a proper party to such a judicial review. However, it is not apparent that Fennelly J, in the foregoing passage or in that example, intends an exhaustive description of those potentially directly affected or rules out other *“private persons or corporations”*. Nor is it apparent that Fennelly J, in referring to their *“very real rights and interests”* and *“real and substantial interest in the outcome”* and in the phrase *“adversely and directly affecting his or her substantial interests”*, intends to include only those interests directly derived from rights.

70. Indeed, given that the distinction between rights and interests (the latter generally includes but is a wider category than the former) is very well-known to the law, one must suggest that Fennelly J’s repeated use of the word *“interests”* is deliberate and significant. Mentioning interests at all would be otiose if only interests derived from rights were envisaged.

71. This impression, that directly affected interests short of rights suffice to ground joinder as a notice party in judicial review, is appreciably amplified by the passage, cited earlier in this judgment, in which Fennelly J said that:

“An interested party, i.e. a party directly affected, is, in my view, entitled to be represented to defend his or its interests, even if the decision-maker is there to advance the same arguments. a party with a direct interest in an administrative decision is entitled to have his own case put ..”

72. Fennelly J considered the application of O.15, r.13 RSC in Barlow in private law civil proceedings and observed that O. 84 RSC as to judicial review *“contains very different provisions”*. In this he echoed the view of Kearns J in BUPA that O.15, r.13 RSC was the wrong test and the law in Barlow inapplicable in judicial review.

73. Fennelly J continued as to O. 84 RSC: *“It makes express provision for ensuring that persons directly affected are put on notice of proceedings. The fundamental requirement is in Order 84, r. 22(2) which imposes an express obligation on the applicant to see to it that the “notice of motion or summons must be served on all persons directly affected...”*. He considered BUPA the most relevant authority. In citing Kearns J to the effect that O’Keeffe and Spin *“demonstrate that where a party has a “vital interest in the outcome of the matter” or is “vitaly interested in the outcome of the proceedings” or would be “very clearly affected by the result” of the proceedings, it is appropriate for that party to be a notice party in the proceedings.”* Fennelly J said:

“That passage must not be misunderstood as laying down a test in the terms used by Kearns J. What it says that is that it is appropriate to join a party in the circumstances mentioned. Order 84, Rule 22(2) imposes an obligation to notify “all persons directly affected...”

I see this passage, and others in Dowling,⁷⁴ as insistent that the effect be direct – not as insistent that it be on rights as opposed to interests.

74. Though the view of Fennelly J must in any event prevail, it is at least noteworthy that recently, in **NWTAG**⁷⁵ as to an issue (which it seems the Court of Appeal did not have to decide), Collins J, admittedly tentatively, observed that though the facts in BUPA differed from those before him,

“.. that does not dilute the principle which the Court (per Kearns J) extracted from the authorities, namely that “where a party has a ‘vital interest in the outcome of the matter’ or is ‘vitaly interested in the outcome of the proceedings’ or would be ‘very clearly affected by the result’ of the proceedings, it is appropriate for that party to be a notice party in the proceedings” (at para 26). Arguably (at least), the State were potentially affected by the proceedings here to a sufficient degree to trigger the application of Order 84, Rule 22(2).”

75. Returning to Dowling, and of the passage in O’Keeffe in which Finlay CJ said that *“any person whose rights would be affected by the avoidance of the decision impugned” should ordinarily be added as a party*” Fennelly J said:

*“I would interpose the word “directly” before “affected” in that passage.”*⁷⁶

76. In summary, it is clear from Dowling that the effect required by O. 84, r. 22(2) RSC must, as it says, be direct – not least as that is what O. 84, r. 22(2) says. I also understand it to the effect that direct effect on *“real and substantial interests”* or perhaps *“substantial interests”* (if there is any difference between the two phrases – which I doubt, as what is substantial is real.) suffices for purposes of O. 84, r. 22(2) RSC and direct effect on rights as opposed to interests is not the test. While this conclusion may be more general, for reasons stated above I consider it specifically suited to areas of public law characterised by public participation, such as planning and environmental law.

77. Though not law, I am aware in general terms of legislative proposals to restrict access to judicial review in planning matters. I mention them only to observe that the view I have just expressed is not inconsistent with the view underlying such proposals, as the existence of judicial review proceedings is a precondition to their service on notice parties.

74 See below.

75 North Westmeath Turbine Action Group v. An Bord Pleanála [2022] IECA 126 (Court of Appeal (civil), Collins J, 1 June 2022).

76 §38.

KMM - 2015

78. In **KMM v RIRB**⁷⁷ an alleged victim of abuse by a nun, S.F., sought in judicial review to quash a finding by the RIRB⁷⁸ that there was no evidence of such abuse. S.F., who had testified to the RIRB that no such abuse had occurred and was anxious to vindicate her good name, succeeded in her application to be joined as a notice party. McDermott J considered Spin, BUPA, Yap, and Dowling.

79. The statutory context, factual context and the issues at stake before the RIRB were very different from those at stake in planning matters. But one might say S.F.'s interest in participating, though very different, was no more compelling than those of the widower refused joinder in the NMH case who said he had "*never found out why his wife's death happened, or precisely what happened*".⁷⁹ The rights S.F. exercised were procedural rights to participate, just as are those of an observer/objector before the Board – though of course her proper interests were very different. The decision of the RIRB, had it favoured the applicant before it, would not have constituted a finding of fact, fault or negligence against S.F., so her substantive rights were not at stake. Though the RIRB was a private process, its findings had reputational implications for S.F. But such implications, admittedly again in different context, did not avail the applicants for joinder in NMH (MacGrath J said "*even if it could be said that Mr. Thawley's reputation has in some way been impugned, which I do not believe it has, then it is difficult to see how that, in and of itself, directly affects him within the meaning of O. 84, r. 22(2) as interpreted by the courts*") nor in Barlow (albeit that was a case in which O. 15 r .3 applied such that exceptional circumstances were required to justify joinder).

80. McDermott J's essential rationale was that:

"S.F.'s engagement in this process was as a result of her deep concern at the allegations made against her and her participation gave rise to considerable inconvenience and expense. The court is also satisfied that the respondent's decision which preferred her evidence is one which directly affects S.F., not least because she has secured what she is entitled to regard as a valuable and favourable conclusion following her participation.

81. It would seem to follow that an adverse and unfavourable conclusion would have sufficed just as well. I intend to suggest no moral equivalence between the issues, rights and interests at stake in sexual abuse allegations and in planning disputes. To be very clear: there is none. McDermott J described the RIRB's decision as of "*immense significance*" to S.F. However, to paraphrase McDermott J, it is often possible to say of a local resident who has successfully objected to a planning application that,

- his or her participation was as a result of deep concern at the proposed development and its likely effect on his or her personal interests,

77 M (KM) v Residential Institutions Redress Board and Another [2015] IEHC 66.

78 Residential Institutions Redress Board.

79 See below.

- his or her participation gave rise to considerable inconvenience and expense, and
- the outcome, if planning permission is refused, directly affects him or her not least because (s)he has secured what she is entitled to regard as a valuable and favourable conclusion following his or her participation.

82. It is easy to see the justice and the correctness of the decision in KMM. As I have emphasised, it is very necessary to make significant moral distinctions between KMM and the present case. But as to the underlying legal structure of the interests involved they seem to me not so different. If the RIRB's finding had been quashed, strictly speaking S.F.'s legal position vis-à-vis the allegations made against her and any prospect of legal rights or remedy for or against her as a result of those allegations would have been no different to the circumstances which would have arisen had the decision not been quashed.

83. But excluding S.F. from the judicial review would undoubtedly have offended any sense of justice and fairness. That Ms Jennings and Mr O'Connor make a similar argument that to exclude them from these proceedings would simply be unfair but do so in circumstances less compelling, does not deprive their submission of all force. While that is not to suggest that general concepts of fairness can replace the test of direct effect set in O. 84, r. 22(2) RSC, an interpretation of O. 84, r. 22(2) RSC which accords with principles of fairness is at least reassuring that it may be a correct interpretation.

84. The implication of KMM seems to be that interests as opposed to legal rights may suffice to require joinder as a notice party in judicial review if those interests are directly affected.

North Meath Wind Farm - 2018

85. In **North Meath Wind Farm**,⁸⁰ on which Colbeam particularly relies as squarely governing the present case, the applicants in judicial review sought to quash the Board's refusal of their SID⁸¹ planning application for a windfarm. I have already considered this case as to the words "*or otherwise*" in O. 84, r. 22(9). An objector and local resident⁸² who participated in the relevant planning application was refused joinder as a notice party - for want of a "*direct interest*". He had applied pursuant to O. 84, r. 22(2). The considerable extent of his efforts in opposition to the wind farm were undisputed⁸³

80 North Meath Wind Farm Limited v. An Bord Pleanála [2018] IECA 49.

81 Strategic Infrastructure Development.

82 Another aspirant notice party was refused joinder as it was an unincorporated association but that is irrelevant here.

83 The judgment states "The full detail of the extensive efforts that the Group and particular individuals within the Group, including Mr Callaghan, have gone to in order to resist the developer's attempts to develop these windfarms in their area are detailed in the affidavits filed in support of the application by the Group and by Mr Callaghan to be joined as notice parties. They have had to raise funds. They have lodged objections, and have attended and participated in oral hearings and many public meetings. They have prepared and lodged lengthy submissions to An Bord Pleanála. They have brought legal proceedings, albeit unsuccessfully. These efforts have been considerable both in terms of time, effort and expense, and are themselves testament to the depth of feeling which exists within the Group in relation to these

and he was of the view that it was those efforts which had resulted in the refusal of permission. He considered that certiorari and remittal to the Board for re-decision would set those efforts at naught.

86. The Court of Appeal, inevitably, held that “The disposal of this appeal turns on what is the correct meaning to be given to the words “directly affected” in Ord.84, r.22(2) of the Rules of the Superior Courts.”⁸⁴

87. The Court⁸⁵ gave a “*simple and straightforward example*” of direct effect within O. 84 r. 22(2): the Court if granting leave to seek to quash a development consent “*will ensure that the party in whose favour the impugned decision was made is a notice party to the proceedings ...since that party quite obviously stands to be “directly affected” if indeed the decision in its favour is quashed.*” While that example is inevitably correct, the giving of an example inherently implies that there are other instances of the case. I am not immediately clear that, for example, an objector should not be considered a “*party in whose favour the impugned decision was made*” where his assertion that he would, as a local resident, be adversely affected by a proposed development has in effect been upheld such that planning permission is refused, as is not unknown, on grounds of detrimental effect on local residential amenities. But that is perhaps for another day. For now it suffices to note that an example implies other instances.

88. In any event, the Court of Appeal held⁸⁶ that:

“The present case is very different. Here, the impugned decision is one refusing the developer’s application for development consent, and the respondent to the challenge is the decision-maker, An Bord Pleanála. The trial judge concluded that the Group and Mr Callaghan, though clearly ‘interested’ in the ordinary sense of that word, given their active involvement in the planning process where they strongly urged the Board to refuse the application, nevertheless they are not “directly affected” by any decision the Court might make, as that phrase is to be properly understood, and therefore were not entitled under the rule to be joined as notice parties to the litigation. In other words, while they would be concerned if the refusal decision was quashed, leading to a re-consideration by the Board of the developer’s application, no right or interest of theirs is directly affected.”

89. Note the phrase “*right or interest*”.⁸⁷ This passage seems to me to turn on the issue of direct effect rather than on any distinction between rights and interests. It seems to me reconcilable in that respect with a recollection that the entire system of public participation in planning and environmental law recognises and very considerably protects in law, at domestic and EU law level, the

proposals for windfarms which they consider will adversely affect them as residents in the areas concerned. Mr Callaghan has been personally heavily involved in these efforts.”

84 §27.

85 §25.

86 §26.

87 Emphasis added.

possibility of vindication of a wide variety of public and private interests other than those embodied in private law rights. Indeed O. 84, r. 22(2) does not refer to rights or interests directly affected but to “persons” directly affected. In planning law at least, “persons” are more than the sum of their private law rights. It is easy to envisage proposed developments which would directly affect persons living on the other side of the boundary fence – not least their quality of life – without necessarily breaching any “black letter” legal rights of such a person. Yet such effects are the stuff of planning law.

90. I confess to being unclear why that legal recognition of those interests, even if not enshrined in private law rights, would not suffice to render direct effect thereon sufficient to satisfy O. 84, r. 22(2). Nor do I see the ratio of the North Meath Case or any of the cases I have reviewed to this point of this judgment as requiring such a conclusion.

91. I respectfully wonder whether the decision in North Meath was predicated on an unspoken assumption that further public participation would ensue on remittal in that case. That may not always ensue on remittal and, depending on the legal ground on which the impugned decision was quashed, the predictable result of remittal may very likely be a grant of permission. Whether such an effect could be considered direct must await another case.

92. In any event, the Court of Appeal, by whose decision I am bound, held⁸⁸ that the phrase “*vital interest*” used in Spin, considered in its context, was “*not intended to mean something wider or different from 'directly affected'*” as that phrase appears in O. 84, r. 22(2). I respectfully agree but observe that this observation may occlude the difference between the “interest/rights” distinction and the “direct/indirect” distinction – though it seems to have proceeded from the manner in which the arguments to the court were formulated.

93. Peart J observed⁸⁹ that the facts in Spin were analogous to that of his example of the joinder of the recipient of a planning permission as a notice party to a judicial review seeking to quash that permission. Peart J continued⁹⁰ as to Spin:

“The notice party⁹¹ was clearly directly affected as it stood to lose a license actually granted to him. That is very different to the present case where the Group and Mr. Callaghan stand to lose nothing directly from any decision the Court might make. I emphasise the word 'directly'.”

If the judicial review challenge by the developer is unsuccessful, clearly they are not directly affected in any adverse sense. If the challenge is successful, again there is no direct affect upon them in the sense of losing any right they had before the challenge was brought. At worst the matter would be remitted to the Board for fresh consideration of the application. In the event

88 §32.

89 §30.

90 §32.

91 i.e. in Spin.

that on such fresh consideration a decision to grant development consent is made, then they may have a sufficient interest to enable them to bring a challenge to the grant of consent. That is the point at which they are directly affected.”⁹²

94. Peart J stated⁹³ that the observers:

“.... stand to be affected in some way by a possible decision to quash the refusal of development consent in this case, but they must be considered to be at risk only of being indirectly affected, and not directly affected for the reasons explained. In my view their interest in the proceedings represents a desire on their part to assist and support the opposition being mounted to the developer’s challenge by An Bord Pleanála in the hope that the development consent⁹⁴ will be upheld and that the matter is not remitted to the Board for further consideration and a fresh decision. The effect of a successful challenge to the refusal of development consent has no direct effect upon them.

It follows in my view that they do not come within the meaning of “directly affected” for the purposes of (O.84 r. 22(2)), and are therefore not entitled to be joined as a notice party ...”

95. BUPA was not cited in the North Meath Wind Farm case. In case of any difference between them I am bound by BUPA as it is a decision of the Supreme Court. However, while I think BUPA may have left room for a different outcome in the North Meath Wind Farm case, I do not think it required a different outcome. Accordingly, I am bound by the North Meath Wind Farm case. Dowling was cited but as to the direct/indirect issue rather than for any distinction between rights and interests. I do not think the single reference I have cited from the North Meath Wind Farm case as to effect on “rights” - not least viewed in light of the references in that case to effect on “interests” - suffices to displace the authority already cited to the effect that direct effect on substantial interests suffices to pass the test set in O.84 r. 22(2) RSC.

96. However, it will be necessary at a later point in this judgment to consider whether the North Meath Wind Farm case is to be distinguished on its facts from the present case as to the issue of directness of effect.

National Maternity Hospital - 2018

97. In **NMH**⁹⁵ Mr Thawley, relying on O. 84 r. 22(2) RSC, sought joinder as a notice party to the hospital’s judicial review of the decision of the Minister for Health to establish an inquiry under s.9 of

⁹² Emphases added. Layout changed.

⁹³ §35 & 36.

⁹⁴ Presumably this should read “refusal of development consent”.

⁹⁵ The National Maternity Hospital v. The Minister for Health [2018] IEHC 565 (High Court, MacGrath, 18 July 2018).

the Health Act 2007 following the death of his wife as a result of the admitted negligence of the hospital. The hospital and the Court accepted that Mr Thawley *“is the person who has been most personally and deeply impacted by the death of his wife. It is accepted therefore that he has an interest in the outcome of the inquiry, in the ordinary sense of the word.”*⁹⁶ However, the hospital opposed his joinder – primarily arguing that *“the nature of this interest in and of itself does not satisfy the requirement that he must be directly affected by the judicial review proceedings within the meaning of O. 84, r. 22(2)”*⁹⁷ and that Mr Thawley *“had no legal interest in the outcome of the challenge”*.⁹⁸

98. The hospital’s primary ground in which it sought to quash the Minister’s decision was that the Minister, it alleged, had failed to apply the requirement of s.9 that he have reasonable grounds to believe that there is a serious risk to the health or welfare of a person receiving services from the hospital and that the risk may be as a result of an act, failure to act, or negligence on the part of the hospital. Instead, the hospital said, the Minister *“was wrongly influenced by representations by Mr Thawley” “and had made the decision in advance and irrespective of the findings of the HSE Report.”* The HSE had conducted an investigation (described in the judgment as an internal investigation, though the Hospital is a charitable institution) which resulted in a report issued after the Minister’s decision and entitled *“HSE Maternal Death Investigation Review”*.

99. Mr Thawley’s position was that:

- the human element could not be ignored - he was the person most affected by the untimely death of his late wife and the admitted negligence of the hospital.
- he had never found out why his wife’s death happened, or precisely what happened.
- as a matter of law he was directly affected and anxious to ensure that all steps be taken to avoid future serious risks to the health or welfare of persons provided with services at the hospital or any other hospital - to ensure that the events which led to his late wife’s death did not reoccur. He wished to help to protect the safety of other women.
- he had no faith in the internal review.⁹⁹ He considered that the hospital had no comprehension of the gravity of the events that had caused his wife’s death, and that its position as to safety of the hospital flew in the face of those events which, he believed, might reoccur.
- the Minister had not predetermined to order an inquiry in advance of the HSE report.
- there were ample reasons for the Minister to conduct the inquiry and to have reasonable grounds to believe that there was a serious risk to the health or welfare of persons receiving services at the hospital.
- as the husband of the deceased he had a
 - vital interest not only because of the death of his wife, but because of his desire to ensure a truly independent, all-embracing inquiry.
 - vested interest in the outcome of the inquiry.

96 §43.

97 §43.

98 It also asserted that his joinder would serve only to prolong the hearing, relitigate factual issues which have been the subject of several previous investigations and the compromised civil proceedings, and lead to unnecessary costs.

99 He considered it fundamentally flawed, selectively presented, incomplete, conducted internally and with self-appointed supervisors. It was therefore lacking in impartiality and is devoid of the inclusion of an appropriate external expert such as a vascular surgeon.

- He also had a right to participate to protect his reputation from the allegation that he had “*wrongly influenced*” the minister to order the inquiry. Indeed MacGrath J described that as “*the essence*” of his application to be joined.

100. MacGrath J considered¹⁰⁰ most of the cases considered above. He considered that the Court in North Meath Wind Farm had drawn a “*distinction between a notice party who stood to lose something, such a licence that may have been granted to him/her by virtue of the impugned decision, and that of a proposed notice party who stood to lose nothing directly from any decision the court might make.*” He cited Peart J’s emphasis in North Meath Wind Farm on the word “*directly*” – I observe, a criterion also emphasised by Fennelly J in BUPA and by Herbert J in Monopower.

101. MacGrath J said:¹⁰¹

“I do not understand the proposed notice party to contend that any legal right of his, pecuniary or proprietary, will be affected by the outcome of the inquiry. It is however submitted that his reputation may be affected by the allegation made. However, that is not how I construe the allegation. In my view it is clear from the affidavits that a basis for the application for judicial review is that the Minister was wrongly influenced, not that the proposed notice party wrongly influenced him. I do not see that the latter is a necessary corollary of the former in this case. In essence, this is an allegation that the Minister fettered his discretion and took into account an irrelevant consideration when arriving at his decision.

Even if I am incorrect about this, and even if implicit in the allegation is that Mr. Thawley and his legal representatives conducted themselves in a manner which placed undue influence on the Minister, in this case, it is difficult to see how this could be said to impact upon their reputation or that they were doing anything other than exercising a democratic right to agitate for a particular course of action, or for the exercise of a particular statutory power. The substantive proceedings concern, inter alia, whether by taking such views into account and to the extent to which the respondent may have done so, he engaged in an unlawful exercise of his statutory power.”

102. This seems to be the ratio of the decision in NMH. It is essentially a fact-based analysis and a finding that the identified essence of Mr Thawley’s application was misconceived in that the judicial review posed no risk to his reputation. On the facts disclosed in the judgment, I can only and respectfully agree. The posited risk to Mr Thawley’s reputation seems to have been very theoretical: who would think less of him for forcefully marshalling any arguable arguments in seeking an independent inquiry into his wife’s tragic death? While it may seem a lawyer’s distinction, and despite

100 O’Keeffe v. An Bord Pleanála [1993] 1 I.R. 39; Spin Communications T/A Storm P.M. v. Independent Radio and Television Commission (Unreported, Supreme Court, 14th April, 2000); Yap v. Children’s University Hospital Temple Street Limited [2006] 4 I.R. 298; BUPA Ireland Limited v. Health Insurance Authority (No. 1) [2006] 1 I.R. 201; Monopower Limited v. Monaghan County Council [2006] IEHC 253; Dowling v. Minister for Finance [2013] IESC 58; North Meath Wind Farm Limited v. An Bord Pleanála [2018] IECA 49.
101 §445 et seq.

the reference to undue influence, the hospital's case seems to have been that those arguments, which the minister accepted, were wrong – in the sense of being incorrect. That is not at all the same thing as saying that his arguments were wrongful, in the sense that it was wrong of him to make those arguments and that he should be criticised and suffer in his reputation for doing so.

103. MacGrath J went on¹⁰² to consider, necessarily obiter, the possibility that his ratio was wrong: *“even if it could be said that Mr. Thawley’s reputation has in some way been impugned, which I do not believe it has, then it is difficult to see how that, in and of itself, directly affects him within the meaning of O. 84, r. 22(2) as interpreted by the courts.”* However, his reason for that conclusion was framed explicitly in terms of the dicta of Fennelly J. in **Dowling**¹⁰³ “in the context of civil proceedings” and he sets out the passage cited above in which Barlow is considered to the effect that for purposes of O. 15 r. 3 RSC¹⁰⁴ *“The special circumstances must consist in some real or apprehended adverse effect on his proprietary interests. Reputational damage would not suffice. Nor would the fact that the case will lead to a decision on a point of law which could adversely affect the applicant in other litigation.”*

104. It will, however, be remembered that this passage in Dowling was preceded by the statement that in both private-law and public-law proceedings *“There is an underlying principle that a person is entitled to participate in proceedings which are capable of adversely and directly affecting his or her substantial interests.”* More importantly, the passage was immediately succeeded¹⁰⁵ by the observation that *“In the case of judicial review, Order 84 of the Rules of the Superior Courts contains very different provisions.”* (i.e. different to O. 15 r. 3 RSC) – of which provisions an elucidation ensued. And in BUPA, Kearns J had made clear that *“the test in Barlow ... was not the correct test”* as to the joinder of notice parties in judicial review as opposed to in private law litigation. I cannot see Barlow as authority for a standard applicable to the joinder of notice parties in judicial review. And as to any difference in that regard between the decision of the High Court in NMH on the one hand and those of the Supreme Court in BUPA and Dowling on the other, I am bound by the later.

105. MacGrath J also cited **Yap** – private law proceedings – in which **Clarke J** had observed, inevitably obiter and explicitly *“in passing”* that *“the court in such public law proceedings might also pass comment on the facts that might be unfavourable to some individual who was involved in the process, but that would not entitle that individual to be involved in the proceedings.”* That must be correct in many – even most – public law cases as any other rule could unfeasibly multiply the number of notice parties in public law proceedings¹⁰⁶ and generate numerous issues collateral to the real issues at stake. But as Clarke J and MacGrath J were clearly speaking obiter perhaps I might do likewise to the effect that it cannot be a rigid rule as, perhaps, KMM demonstrates and given that sometimes the

102 NMH §46.

103 Dowling §33.

104 Though that rule is not cited in the passage that is clearly the context.

105 Dowling §34.

106 For example, while one could not entirely rule out that in very particular and unusual circumstances an officer of a decision-maker whose contribution to an impugned decision is criticised could require joinder as a notice party, a general prospect of such joinder would be highly impractical.

possible reputational damage may be very severe. Perhaps the solution lies in the view of Fennelly J in BUPA that the interests at play for the putative notice party must be "substantial".

106. As to the issues other than threat to reputation relied on by Mr Thawley, MacGrath J did "*not believe that the expression of these heartfelt and genuine desires on the proposed notice party's part are sufficient to enable me to conclude that the requirements of the test have been met in this case and that he is directly affected by the outcome of the judicial review proceedings as interpreted and understood by the courts.*" Here the operative distinction seems to be between direct and indirect effects rather than between rights and interests.

McElvaney - 2019

107. Colbeam also particularly relies on McElvaney.¹⁰⁷ Mr McElvaney, a member of Monaghan County Council, sought by judicial review various reliefs, including declarations against a preliminary inquiry¹⁰⁸ by SIPOC¹⁰⁹ and orders prohibiting further investigation of him on foot of complaints by the Council¹¹⁰ against him. He alleged, putting his allegations broadly, that the preliminary investigation was substantively flawed, had adopted unfair procedures and was vitiated by bias. Arising out of the similar alleged events, Donegal County Council¹¹¹ had made similar complaints against Mr O'Donnell, a member of that Council.

108. The background was an RTÉ interview in which, Mr O'Donnell contended, he was entrapped by an undercover journalist. Despite Mr O'Donnell's request, SIPOC had refused to call that journalist before it for cross-examination. SIPOC took the view that such cross-examination was unnecessary where reliance was placed on the video footage of the meeting between Mr O'Donnell and the journalist and on audio recordings of their telephone conversations. SIPOC also declined to cease its investigation of the complaints against Mr O'Donnell.

109. The SIPOC investigation of the complaints against Mr O'Donnell was more advanced (a hearing had been held) than that of the complaints against Mr McElvaney when Mr O'Donnell applied to be joined as a notice party to Mr McElvaney's judicial review. He did so on the basis that the grounds on which Mr McElvaney sought prohibition were similar to his arguments which SIPOC had rejected.

110. SIPOC objected to Mr O'Donnell's joinder – inter alia as the reliefs sought by Mr. McElvaney related to matters other than those the subject of the complaints against Mr O'Donnell and as Mr

107 McElvaney v The Standards in Public Office Commission [2019] IEHC 128.

108 Under the Standards in Public Office Act, 2001.

109 The Standards In Public Office Commission.

110 Its Cathaoirleach and Chief Executive.

111 Its Cathaoirleach and Chief Executive.

O'Donnell had not himself sought judicial review and was now out of time to do so. SIPOC said that it was the latter factor which explained Mr O'Donnell's application.

111. There were factual disputes as to what had transpired at the hearing of the complaints against Mr O'Donnell but MacGrath J considered that he did not need to resolve them as he should take the Mr O'Donnell's case at its height.¹¹² As I should that of Mr O'Connor and Ms Jennings.

112. MacGrath J considered O. 84, r. 22(2) RSC, BUPA, North Meath Windfarm and National Maternity Hospital and considered that broadly, "..... *the proposed notice party has an interest in the outcome of Mr. McElvaney's proceedings. That, however, is not the test. The test is whether he will be directly affected by any decision made in those proceedings.*"¹¹³ That distinction defeated Mr O'Donnell's application to be joined. MacGrath J said:

*"How can it be said that the success or rejection of the claim in the underlying proceedings would, or might even possibly, impact upon any of his legal rights, pecuniary or proprietary? Similarly, if the applicant is unsuccessful, how can that outcome result in interference with, or impact upon, any of the proposed notice party's obligations or rights, pecuniary or proprietary, which he has or might have or enjoy? This is where I perceive a difficulty."*¹¹⁴

*"I do not see how either a successful or unsuccessful challenge by Mr. McElvaney could be said to have a direct affect upon the proposed notice party's rights and/or obligations, as that term has been interpreted by the courts."*¹¹⁵

113. As I have shown, the antecedents of the phrase "*pecuniary or proprietary*" are explicitly in the Supreme Court decisions in BULA and Dowling as derived from Barlow. The phrase is used specifically in those cases as to the test for joinder in private law cases under O. 15, r. 13. The O. 15, r. 13 test was identified in BUPA and Dowling as irrelevant to joinder in judicial review - contrasting the "*very different*"¹¹⁶ provisions of O. 84. Hence, even aside from its being obiter¹¹⁷ I do not see McElvaney as binding authority that the direct effect required by O. 84 r. 22(2) RSC must be on "*obligations or rights, pecuniary or proprietary*" of the aspiring notice party. Not least, as I have said, there is Supreme Court authority that the "*underlying principle*" is that direct effect on "*substantial interests*" should suffice.¹¹⁸

114. Nor do I read any of the cases as directly addressing, rationalising and explaining as correct, a view that direct effect on a "*person*", within the meaning of O. 84, r. 22(2) RSC, must consist in an

112 McElvaney v The Standards in Public Office Commission [2019] IEHC 128 §16.

113 §23.

114 §23.

115 §28.

116 Doherty §34.

117 See above as to why it is obiter.

118 Dowling §29.

effect on his or her “*obligations or rights, pecuniary or proprietary*” and that direct effect on a person’s interests (other than those founded in “*obligations or rights, pecuniary or proprietary*”) will not suffice to justify joinder as a notice party in judicial review.

115. On the facts in *McElvaney* it seems to me that, whether the test set in O. 84, r. 22(2) RSC relates to Mr O’Donnell’s “*obligations or rights*” or to his “*substantial interests*”, it is very clear that in either respect he failed the test of direct effect. As MacGrath J said, “*this application might more properly be viewed as being motivated by a desire to assist and support the claim being brought against the respondent by Mr. McElvaney, with perhaps the hope that a positive outcome for Mr. McElvaney might influence the course of the respondent’s investigation of (Mr O’Donnell) or the view that the respondent might take in relation to it.*” On any conceivable view, this hoped-for effect was indirect. I entirely agree with the result in *McElvaney*.

Gavigan - 2020

116. In *Gavigan*¹¹⁹ Meenan J considered Spin, BUPA and North Meath Windfarm. He held that the Valuation Commissioner was entitled to be joined as a notice party in a judicial review of the Valuation Tribunal as he was “*directly affected*” by the judicial review proceedings. Given the role and function of the Commissioner, he would “*clearly be affected by the result of these judicial review proceedings. This is all too clear when one looks at the consequences were the decision of the respondent to be quashed.*” It has to be said that the consequences would have been both legal and intensely practical. The decision, if quashed, would have been quashed on the basis of the Commissioner’s failure to fulfil a legal obligation to serve papers in an appeal to the Valuation Tribunal, with a view to revaluing nursing homes, on every resident of each such nursing home. They were also, in that the substantive principle at stake in the appeal was whether nursing homes are exempt from valuation and the requirement to pay rates. That was an issue applicable to all 437 private nursing homes in the country, in which over 20,000 people resided. Understandably, Meenan J did not need to analyse the law in detail to hold that the Valuation Commissioner was entitled to be joined as notice party. The Commissioner clearly satisfied the test of direct effect whether the criterion related to its “*obligations or rights*” or to its “*substantial interests*”.

117. Incidentally, it seems to me that, if not invariably then all but so, anyone directly affected in their “*obligations or rights*” will, ipso facto, be directly affected in their substantial interests.

119 *Gavigan v Valuation Tribunal* [2020] IEHC 670 §15.

Ryanair - 2020

118. In **Ryanair**¹²⁰ Simons J said that “the entitlement to be joined to judicial review proceedings as a notice party applies to persons who are “directly affected” by the judicial review proceedings (Order 84. rule 22). This category of persons is normally confined to those who would be adversely affected were the application for judicial review to be successful¹²¹ ... One obvious example is the position of the beneficiary of a planning permission. Such a person is entitled to be joined as a notice party to proceedings which seek to question the validity of that planning permission.” Simons J was not directly concerned with the joinder of a Notice Party – Aer Lingus had been so joined. His purpose was rather to observe that, while usually a Notice Party opposes relief, it is open to a Notice Party to support the claim for relief, as Aer Lingus had. As his concerns lay elsewhere it does not seem to me that Simons J advances the argument for either side in the present case.

Crofton - 2022

119. DLRCC cites **Crofton**,¹²² correctly, as holding that an applicant for permission has no right to “immunity from the ... hazard [of a change in development plan] which may arise due to delay in getting a lawful decision (to which it is entitled) on its application where such delay occurs by reason of the quashing of an unlawful decision on that application”. DLRCC submits, equally correctly: “then neither does another participant or objector in the planning process”. However, just as Colbeam have an interest in having the rezoning quashed, (whether they have a right to have it quashed remains to be seen), Ms Jennings and Mr O'Connor have an interest in having the rezoning upheld.

Collection of the foregoing

120. It is necessary to distinguish the direct/indirect issue from the rights/interests issue – to distinguish the directness of the effect from the object of the effect.

121. It is clear that by O. 84 r. 22(2) RSC joinder of a third party in judicial review is required of a person who is likely to be:

- Affected by the outcome of the judicial review.
- Not merely affected, but “directly” affected.

That joinder is required of the applicant for judicial review and, if that obligation is not met, can be required by the person directly affected.

The direct effect in question must proceed from the outcome of the judicial review.

120 Ryanair DAC v An Taoiseach [2020] IEHC 461; [2021] 3 IR 355; §11.

121 Simons J cited North Meath Wind Farm.

122 Crofton Buildings Management CLG v. An Bord Pleanála [2022] IEHC 704.

122. O. 84 r. 22(2) RSC requires that such direct effect must be on “persons”. It does not in terms stipulate whether it must be on their rights or whether effect on their interests will suffice. Given my analysis of the authorities, I consider that I can say that, at least, direct effect on such persons’ “substantial interests” will suffice. In particular as O. 84 r. 22(2) is entirely silent as to any distinction between rights and interests or what aspects of a “person” must be directly affected, it seems necessary to resort to first principles as enunciated by Fennelly J in the Supreme Court in BUPA to the conclusion that:

“There is an underlying principle that a person is entitled to participate in proceedings which are capable of adversely and directly affecting his or her substantial interests.”¹²³

IS AN EFFECT DIRECT OR INDIRECT?

123. There seems to me a lack of a bright line attending the distinction between direct and indirect effects when it comes to applying it to facts. And facts are infinitely variable in their presentation. The primary element of the distinction seems to me to be whether the cause and effect in question are separated by a significant intermediate event both caused by the cause and causing the effect. The application of that distinction in many factual situations will produce an obvious outcome. But in the borderlands of that distinction the significance – indeed the presence - of any intermediate effect and the outcome as to whether the effect is direct or indirect may be less obvious and may be appreciably a matter of close analysis, judgment, degree and impression. The present seems to me to be such a case.

DECISION

124. It follows from the North Meath Wind Farm Case that the participation by Ms Jennings and Mr O'Connor as objectors in the planning process before the Board and the mere prospect of remittal of the quashed SHD Permission to the Board for re-decision in the Jennings/O'Connor judicial review do not of themselves warrant a conclusion that they are directly affected by the present challenge to the Impugned Rezoning Decision such as to allow their joinder as third parties in these proceedings.

125. However, beyond those simply-expressed facts, there are distinctions between the facts in this case and those in the North Meath Wind Farm case:

- First, there is the status of Ms Jennings and Mr O'Connor as not merely objectors in the planning process before the Board but as litigants – applicants for judicial review challenging the SHD Permission granted for the Site.

¹²³ Emphasis added.

- Second, there is the fact that as applicants for judicial review they have succeeded in having that SHD Permission quashed.
- Third, there is the prospect that the quashed SHD Permission may or may not be remitted to the Board for re-decision. Clearly Ms Jennings and Mr O'Connor object to such remittal and have a very obvious and legitimate interest in doing so.
- Fourth there is the fact that the present proceedings concern the zoning status, and hence the proper planning and sustainable development of, the very Site the proper planning and sustainable development of which was argued by Colbeam to have been determined by the SHD permission until that permission was quashed in the Jennings/O'Connor judicial review.
- Fifth, if the Impugned Rezoning Decision is not quashed in these proceedings, it is inevitable that either:
 - permission will be refused on remittal.
 - remittal will be refused as pointless.
 - Even, as counsel for Colbeam sensibly says, Colbeam will not seek remittal, as it would be pointless.

The net and inevitable position in any of those three scenarios is that if the Impugned Rezoning Decision is not quashed, the quashed SHD permission cannot be followed by an SHD permission on remittal. So Ms Jennings and Mr O'Connor will have fully succeeded in their objective as both objectors in the planning process and as applicants in the applicants for judicial review challenging the SHD Permission and more generally in defeating the proposal for the Proposed Development.

126. In reality, and apart from essentially inevitable ministerial¹²⁴ and procedural intermediate steps with inevitable results, the failure of these proceedings will inevitably result in the denial of the SHD permission. If the Crofton appeal fails and if and immediately the rezoning is upheld, the fate of the quashed SHD permission will be sealed. To put it colloquially, it will all be over bar the shouting. In terms of directness of effect that seems to me to distinguish the present case not only from the North Meath Wind Farm case and McElvaney. That seems to me a direct effect of the failure of these proceedings on their substantial interests sufficient to require the joinder of Ms Jennings and Mr O'Connor as notice parties in these proceedings.

127. Counsel for Colbeam observed that by that logic Ms Jennings and Mr O'Connor – and no doubt many others awaiting to the decision in Crofton – should be allowed to intervene as notice parties in Crofton. The simplest answer is that if they seek to be joined that will be decided in that case – though I am not to be taken as suggesting that they should be so allowed. However it seems to me that Crofton

124 "Ministerial" in the sense defined by Merriam-Webster as follows:

: being or having the characteristics of an act or duty prescribed by law as part of the duties of an administrative office.

: relating to or being an act done after ascertaining the existence of a specified state of facts in obedience to legal and especially statutory mandate without exercise of personal judgment or discretion.

is at an appreciably further remove from the Jennings/O'Connor judicial review than are the present proceedings and there is no general principle that if a point of law is at issue in proceedings parties in other proceedings to which that point of law may be decisive are entitled to intervene in such proceedings.

128. None of this is to assume the Crofton appeal will fail or that the rezoning will be upheld. But as MacGrath J held in McElvaney, I must take the case of Ms Jennings and Mr O'Connor at its height.

129. I am fortified in this view by Colbeam's own analysis in the Cox and O'Connor affidavits, of the relationship between the two sets of proceedings. However, I should emphasise that their importance is not as admissions binding or to be held against Colbeam but lies rather in that fact that they correctly analyse and express that relationship.

130. I should add that, as the common law develops incrementally in response to facts, I do not consider that this judgment espouses any new principles or appreciable widening of the jaws of O. 84 r. 22(2) or departs from binding authority. Though I might had I decided some of the cases cited, have taken a somewhat different view to some of those expressed, I need not in justification of my ultimate decision, and do not, suggest that any of the cases I have considered were wrongly decided - nor would it have been proper for me to do so.

RIGHTS NOT INTERESTS?

131. If, contrary to the view I take above, the criterion for joinder of a notice party in judicial review requires the prospect of effect on rights as opposed to interests, then, in my view, the present application of Ms Jennings and Mr O'Connor nonetheless satisfies that criterion.

132. Admittedly, that satisfaction arises in unusual circumstances. Whereas an objector in a planning process, such as that in the North Meath case, has a right to be heard but no right to a substantive outcome of the planning process, in the present case, that is not the position. More accurately, it may not be the position depending on the outcome of the present proceedings.

133. First one must identify the right of the aspirant notice party which is at issue. It seems to me that the judgment in the Jennings/O'Connor judicial review has conferred upon Ms Jennings and Mr O'Connor a substantive right to certiorari of the quashed SHD permission. I do not see the proposition that remedy in judicial review is always discretionary as detracting from that proposition, at least on the facts of the Jennings/O'Connor judicial review and as the judgment in that case decided to quash the SHD Permission.

134. Encompassed in their substantive right to certiorari is an issue as to the terms upon which certiorari is to issue. Those terms include the terms of any remittal to re-decision by the Board. Jennings and O'Connor have a right that any remittal be in accordance with law. At least arguably, and depending on the outcome of these proceedings (and of the appeal in Crofton) they may have a right to a refusal of remittal, if remittal would be futile. One might argue that, to the extent remittal is discretionary, they have a right only to argue against remittal on that basis - but such a distinction should not decide the present application in my view. Further, it is agreed that if, following decision in the Crofton appeal, the 2022 Development Plan applies and if the Impugned Rezoning Decision survives challenge in these proceedings, there will in reality be no substantial difference between refusal of remittal and remittal to the Board, as the Board will be obliged to refuse permission.

135. It seems to me therefore that the result of the present proceedings has the capacity to directly affect the content of the substantive rights acquired by Ms Jennings and Mr O'Connor by way of the judgment in the judicial review by ensuring that certiorari will leave no scope for a grant of permission on remittal. Accordingly, in my view, Ms Jennings and Mr O'Connor are entitled to joinder in these proceedings on that basis also.

CONCLUSION

136. In the result, I direct the joinder of Ms Jennings and Mr O'Connor as notice parties in these proceedings. To minimise delay to trial, I direct the parties to liaise as to early time limits for delivery of the Notice Parties' Opposition papers and any replying affidavits thereto. I grant general liberty to file such papers in advance of the perfection of the order to be made on foot of this judgment or of any further directions of this court. I express the general expectation that such process will have been completed by 22 September unless the parties agree otherwise, and I will list the matter for mention only before me on 22 September 2023.

David Holland

31/7/23