**THE HIGH COURT**

**[2018 No. 835 JR]**

**BETWEEN**

**HUGH MCELVANEY**

**APPLICANT**

**AND**

**STANDARDS IN PUBLIC OFFICE COMMISSION**

**RESPONDENT**

**AND**

**JOHN O'DONNELL**

**PROPOSED NOTICE PARTY**

**/APPLICANT**

**JUDGMENT of Mr. Justice MacGrath delivered on the 1st day of March, 2019.**

1. This is an application by Mr. John O'Donnell for an order pursuant to O.15 r.13 and O.84 r.22(2) of the Rules of the Superior Courts seeking to be joined as a notice party to the applicant, Mr. McElvaney's proceedings. Mr. O'Donnell is referred to hereinafter as the proposed notice party.

2. Mr McElvaney has instituted proceedings against the respondent seeking various reliefs including declarations and orders prohibiting any further investigation of him under the Standards in Public Office Act, 2001 ("*the Act of 2001*"). He alleges, *inter alia*, that the respondent conducted an inadequate and ineffective preliminary inquiry under s. 6 of the Act of 2001. His application is based on a number of grounds some of which attention has been drawn to by the proposed notice party in support of this application.

3. Mr. McElvaney in his statement required to ground the application for judicial review seeks, *inter alia*:-

> i. An Order of Prohibition preventing the respondent, it's servants or agents from taking any further steps in the statutory process and/or an order restraining the respondent from making any determination in respect of the applicant.
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> ii. A declaration that the respondent, it's servants or agents failed to adequately or at all discharge its functions in accordance with the provision of s. 6 of the Act of 2001 by failing to conduct any adequate or competent preliminary enquiry or investigation into a complaint by the Cathaoirleach and Chief Executive of Monaghan County Council.
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> iii. A declaration that the respondent cannot now conduct any investigation pursuant to the provisions of s. 7 of the Act of 2001 (the next stage of the statutory process) by reason of the inadequate and ineffective s. 6 enquiry, which is deficient and lacking in the requisite proficiency, it is an enquiry of an extremely poor standard and it is unacceptable having regard to its statutory status, and it is unacceptable having regard to the implications for the applicant and the applicant's reputation and standing in the community, his status as an elected public representative and as a citizen of the State who at all material times is entitled to vindicate and protect his good name.
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> iv. A declaration that no or no adequate investigation or enquiry can be conducted by the respondent having regard to the deficiencies as they are apparent from the s. 6 report, in particular the lack of information or material obtained, the absence of relevant witnesses and witness statements and the absence of relevant documents as is now apparent from the hearing books.
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> v. A declaration that the respondent (notwithstanding the s. 6 investigation shortcomings) has failed to make adequate disclosure and has failed to utilise and/or has refrained from the use of the statutory powers conferred and has failed to seek out and to procure all relevant information and relevant material.
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> vi. A declaration that the practices and procedures and any intended hearing or inquiry would be intrinsically unfair having regard to the rule against bias.
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> vii. A declaration that the practices and procedures as they have been adopted by the respondent are lacking in the requisite decision making transparency.
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> viii. A declaration that the practices and procedure offend the rule against bias and are lacking in transparency by reason of the fact that the respondent it's servants or agents participated in the RTÉ documentary and investigation, the respondent having assisted the RTÉ investigators and the programme maker, but has failed to reveal in clear and unequivocal terms, the precise nature of that relationship, the precise nature and extent of communication and cooperation, the documents or records generated as a result, and in these circumstances the relationship between the programme maker and the respondent remains unexplained, unclear and/or it is tainted, such that no hearing or enquiry can now take place.

4. The complaints against Mr. McElvaney and the proposed notice party arise from a television programme broadcast on RTÉ television on the 7th December, 2015. In essence, the proposed notice party contends that he was the subject of entrapment by a journalist, and that journalist was not and has not to date been called before the respondent for cross-examination.

5. The complaint against the proposed notice party was made by the Cathaoirleach and Chief Executive of Donegal County Council, of which he is an elected member. The complaint against Mr. McElvaney was made by relevant officials of Monaghan County Council, of which Mr. McElvaney is an elected member. A third individual is also the subject of a complaint by relevant officials in Sligo County Council.

6. Mr. McElvaney has brought his application for judicial review at a stage in the process of the respondent's investigation which is earlier in time than that which has now been reached in the respondent's investigation of the proposed notice party.

7. On the 11th September, 2018, a preliminary application was made by the intended notice party to the respondent. He submitted that the respondent should not proceed with its hearing unless the undercover reporter was called as a witness and made available for cross-examination. On that application, counsel for the respondent had submitted that the attendance of the undercover reporter was unnecessary in circumstances where reliance was being placed on the video footage of the meeting between the proposed notice party and the reporter and also on an audio recording of their telephone conversation. This evidence had been made available to the proposed notice party. An RTÉ cameraman was available to give evidence to confirm the completeness and accuracy of the video recording. The proposed notice party had not taken issue with the cameraman. Counsel for the proposed notice party submitted to the respondent on that application that at one stage in the investigation the respondent had regarded information sought from the undercover reporter as being important, but that it appeared to have changed its mind; and this resulted in an inconsistent and uneven approach.

8. The respondent ruled against the proposed notice party on this issue. It concluded that there was no prejudice to the proposed notice party in the undercover reporter not being called as a witness; and that there was insufficient basis upon which to make a decision to cease its investigation. In its ruling the respondent observed that the proposed notice party would be afforded an opportunity to give evidence and to call any witnesses on his behalf, if he so chose. The respondent ruled that it was conducting its investigation in accordance with its powers under the Ethics in Public Office Act, 1995 as amended ("*the Act of 1995*"), the Act of 2001 and Part 15 of the Local Government Act, 2001; and that its investigation was not a criminal trial nor was it engaged in the criminal process. Therefore, it expressed the opinion that the rules applicable to evidence in criminal proceedings did not strictly apply to the investigation. It stated that the investigation was taking place on foot of a complaint referred to it by the Chief Executive and Cathaoirleach of Donegal County Council. The undercover reporter was not the proposed notice party's accuser, and neither the undercover reporter nor RTÉ was a party to the investigation.

9. The application to this court is grounded on an affidavit of Mr. Cowhey, solicitor, sworn on the 11th December, 2018. Mr. Cowhey avers that a number of reliefs have been sought by Mr. McElvaney, the effect of which, if granted, would be to prohibit the respondent from taking any further steps in the statutory process and from making any determination in relation to the alleged contravention of the provisions of the ethical framework outlined in legislation. He avers that the investigation into the intended notice party's conduct centres on similar alleged breaches of obligations. These alleged contraventions arose wholly because of the proposed notice party's meeting with a fictitious windfarm investor called *Nina Carlson* in October, 2015. This meeting was secretly filmed and broadcast on RTÉ television on the 7th December, 2015. The matter was brought to the attention of the Ethics Registrar of Donegal County Council on the 3rd March, 2016 and this led to a complaint being compiled by the Chief Executive of Donegal County Council pursuant to s. 174(8)(b) of the Local Government Act, 2001, which ultimately resulted in the hearing on the 11th September, 2018.

10. Mr. Cowhey avers that the applicant is seeking to prohibit the respondent's investigation for reasons which are similar to those raised by the proposed notice party at the hearing on the 11th September, 2018. He states that the proposed notice party will be significantly affected by, and has a vital interest in, the outcome of the applicant's proceedings.

11. Mr. McElvaney has taken a neutral stance and did not appear on this application.

12. This application is opposed by the respondent. Ms. Madeline Delaney, legal advisor to the respondent, in an affidavit sworn on 17th December, 2018, avers that the television programme examined adherence by publicly elected officials to the standards required under the Ethical Framework for the Local Government Service. The RTÉ investigations unit created a fictitious UK investment company stated to be interested in developing windfarms in County Donegal. The company, through a fictitious representative, Nina Carlson, sought information and assistance in dealing with issues such as planning permission and local opposition. This fictitious person contacted the proposed notice party on the 20th October, 2015 and unknown to him two telephone conversations which she had with him were recorded,

13. Following receipt of the complaint under s.4 of the Act of 2001, a report was prepared by an inquiry officer. It was furnished to the respondent for consideration. The respondent determined that it would proceed with an investigation pursuant to s.23 of the Act of 1995. A statement of alleged contraventions was compiled and sent to the proposed notice party. On the 7th February, 2018, the proposed notice party was informed of the decision to proceed with the investigation and thereafter engaged in correspondence which ultimately led to a hearing on the 11th September, 2018. Ms. Delaney avers that the objection advanced by counsel for the proposed notice party was made on that day despite numerous opportunities, both orally and in writing, to make objections prior to the hearing date.

14. The proposed notice party has not instituted proceedings and Ms. Delaney states that he is now out of time to so do. She avers that he is not a necessary party to these proceedings particularly where the relief sought by Mr. McElvaney relates to other matters. She states that there is no proper basis for his joinder, and that should joinder be permitted it would have the potential to delay and prolong the hearing or to add to its expense; and that it is a matter of public importance that the respondent should be in a position to proceed to a determination in respect of the proposed notice party without any further delay.

15. An averment by Ms. Delaney that the proposed notice party participated in the hearing without objection is contested. In an affidavit sworn by Mr. Cowhey on the 31st January, 2019, he avers that the proposed notice party sought to cooperate with the respondent's investigation notwithstanding his objection to the refusal of the respondent to make available a key witness in the proceedings. While the proposed notice party elected not to go into evidence, Mr. Cowhey contends that this ought not be used to undermine his position in any way. Further, he states that following the hearing, the proposed notice party maintained his objection to the investigation and Mr. Cowhey exhibits submissions prepared by counsel which were delivered on 12th October, 2018. This was done in circumstances where the respondent was charged with deciding whether such conduct was committed inadvertently, recklessly or intentionally. The objection was reiterated in those submissions and Mr. Cowhey states it is incorrect to suggest that the proposed notice party resiled from any objection in respect of this aspect of the respondent's procedures.

16. It does not appear to me that it is necessary to resolve this dispute. For the purposes of this application I believe that it is appropriate to take the proposed notice party's case at its height.

**Submissions**

17. Mr. O'Connell B.L., counsel for the proposed notice party submits that his client is vitally interested in and will be directly affected by the outcome of Mr. McElvaney's judicial review proceedings. He contends that should Mr. McElvaney be successful in his application for judicial review, this will have an effect, in a positive way, on his client's reputation.

18. Mr. Doherty, S.C. on behalf of the respondent submits, that as a matter of law, the proposed notice party is not directly affected and will not be so affected by the outcome of the underlying proceedings. In support, he relies on a number of decisions including *Bupa Ireland Ltd. v. The Health Insurance Authority and others* [2006] 1 I.R. 201 and *North Meath Windfarm Ltd and another v. An Bord Pleanala and others* [2018] IECA 49. Reference is also made to a decision of this court in *National Maternity Hospital v. Minister for Health and the Health Information and Equality Authority* [2018] IEHC 565. In most cases, the application for joinder as notice party has been opposed by the applicant, rather than the respondent. This application is opposed by a respondent and while Mr. Doherty S.C. does not make any particular point in relation to whether it is an applicant or a respondent who objects, he submits that in effect what the proposed notice party seeks to do is to be joined in order to support the application of Mr. McElvaney in circumstances where he is out of time to bring his own legal challenge.

**Decision**

19. Order 84 rule 22(2) of the Rules of the Superior Courts provides:-

> *"The notice of motion or summons must be served on all persons directly affected and where it relates to any proceedings in or before a Court and the object of the application is either to compel the Court or an officer of the Court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons must also be served on the Clerk or Registrar of the Court and, where any objection to the conduct of the Judge is to be made, on the Clerk or Registrar on behalf of the Judge."*

20. In *North Meath Windfarm Ltd*, Peart J. drew a distinction between a person who has something to lose as a result of the outcome of the proceedings, such as a licence that may have been granted to him by virtue of an impugned decision, and that of a proposed notice party who stood to lose nothing directly from any decision the court might make in the proceedings to which he seeks to be joined as notice party. At para. 32 of his judgment he observed:-

> *"It is clear in my view that the reference to having a 'vital interest' when seen in the context of that case [i.e. Spin Communications trading as Storm FM v. Independent Radio and TV Commission and NP] is not intended to mean something wider or different from 'directly affected' in the rule. The notice party 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 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."* (emphasis supplied)

21. While acknowledging that the appellants stood to be affected in some way by a possible decision to quash the refusal of development consent, Peart J. stated that they could only be considered at risk of being indirectly and not directly affected. He continued at para. 35:-

> *"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 consent 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."*

22. The Court concluded that the proposed notice parties were not directly affected for the purpose of O.84 r.22(2) and were therefore, not entitled to be joined as notice parties.

23. In this case the applicant's challenge is based on considerations which might be somewhat broader than those advanced by the proposed notice party in support of his contention that he is directly affected by the outcome of those proceedings. Nevertheless, it seems to me that it may be said that 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. 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 propriety? 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.

24. Mr. O'Connell has identified, as a potential direct effect of the outcome of the underlying proceedings, an effect on his client's reputation. It seems to me to be implicit in such argument that a successful outcome will or may result in a vindication of his reputation. If that is so, is the corollary true, that rejection of the applicant's claim, will or could potentially operate to damage the proposed notice party's reputation? I find it difficult to envisage how the outcome of the applicant's proceedings could give rise to such impact, positive or negative.

25. In the assessment of whether the proposed notice party in the circumstances of this case is directly affected in a reputational sense, I must have regard to dicta of Fennelly J. in *Dowling & Ors v. Minister for Finance & Ors* [2013] IESC 58:-

> *"Keane C.J., in Barlow v Fanning, approved the test adopted by Lynch J that 'there must be exceptional circumstances before a person could be joined as a defendant against the wishes of the plaintiff...' He acknowledged that the good name and reputation of the professor who was seeking to be joined might be adversely affected, since, for the most part, the establishment of the plaintiffs' case against the university would necessitate the proof by them of damaging allegations against the first defendant. That, however, was not a sufficient exceptional circumstance, recalling that, in cases of vicarious liability generally, such as in road traffic cases, an action might be brought against the owner of a vehicle without joining the driver. The conclusion from all this is that a person must demonstrate exceptional circumstances in order to persuade a court to join him or her in an action against the will of the opposing party. 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."*

26. Clarke J. (as he then was) observed in *Yap v. Children's University Hospital* [2006] 4 I.R. 298 at p. 305:-

> *"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."*

27. Thus even if one accepts that the proposed notice party's reputation might be called in question in the application in the underlying proceedings, it is difficult to see that, as a matter of law, he is in a stronger position on an application such as this than the category of persons referred to by Fennelly J. in *Dowling* or by Clark J. in *Yap*. Without intending any criticism, I believe that 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 the proposed notice party or the view that the respondent might take in relation to it.

28. For the above reasons, 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.

29. In the circumstances, I find that that the proposed notice party has not satisfied the required legal test for joinder and I must refuse the application.