THE HIGH COURT

[2018 No. 81 JR]

BETWEEN

THE NATIONAL MATERNITY HOSPITAL

APPLICANT

AND
THE MINISTER FOR HEALTH

RESPONDENT

AND
THE HEALTH INFORMATION AND EQUALITY AUTHORITY

NOTICE PARTY

JUDGMENT of Mr. Justice MacGrath delivered on the 18th day of July, 2018.

1. By notice of motion dated 23rd March, 2018, Mr. Alan Thawley sought an order permitting his joinder as a notice party to the underlying proceedings, in accordance with O. 15, r. 13 of the Rules of the Superior Courts and/or pursuant to inherent jurisdiction of the court. At the hearing of the application, it was agreed that the notice of motion should be amended to reflect that the appropriate order pursuant to which the application is made is O. 84, r. 22(2).

2. Mr. Thawley is the husband of the late Malak Thawley who died on 8th May, 2016 at the National Maternity Hospital, Holles Street, Dublin 2. The events surrounding the death of Mrs. Thawley, as described on this application, are tragic and undoubtedly very distressing for Mr. Thawley. The Court has great sympathy for Mr. Thawley. Mrs. Thawley's tragic death occurred as a result of the admitted negligence on the part of the applicant. She was 34 years of age at the time and prior to her death, having been diagnosed with a right sided live ectopic pregnancy in her fallopian tube, she was admitted to the applicant hospital. The purpose of the admission was to undergo a laparoscopic salpingectomy. During this procedure, Ms. Thawley died from exsanguination as a result of an aortic injury suffered on insertion of a trocar during the management of the live ectopic pregnancy. In the affidavit grounding this application to be joined as a notice party sworn on 23rd March, 2018, Mr. Thawley explains that this was an utterly avoidable vascular injury.

3. The underlying proceedings have been instituted to restrain a statutory inquiry directed by the respondent, pursuant to s. 9(2) of the Health Act 2007 ("*the Act of 2007*"). The applicant maintains that the respondent acted unlawfully in establishing the inquiry. The Health Information and Equality Authority ("*HIQA*") (which is due to be engaged in the investigation process) has been joined as notice party.

4. Dr. Rhona Mahony, Master of the National Maternity Hospital, in her affidavit grounding the application for judicial review sworn on 27th January, 2018, avers that the hospital unreservedly apologised in the immediate aftermath of Mrs. Thawley's death. She further avers that following the death, three separate investigations were conducted. In 2016 the hospital conducted its own peer-reviewed internal investigation entitled "*Patient Death Following Laparoscopy for an Ectopic Pregnancy*" (the "*NMH Report*"). In 2017, the HSE conducted an internal investigation which resulted in the publication of a second report entitled "*HSE Maternal Death Investigation Review*" (the "*HSE Report*"). A coroner's inquiry was also undertaken. Civil proceedings were instituted by Mr. Thawley in which damages were claimed arising out of Mrs. Thawley's death and these were compromised on 16th January, 2018.

5. A principal complaint of the applicant against the respondent is that the invocation of s. 9 of the Act of 2007 requires the Minister to 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. The applicant believes that such invocation of s. 9 is unjustified as the Minister has not conducted, nor is there any evidence that he carried out, a separate analysis of the issues justifying the formation of his belief regarding the s. 9 investigation. The applicant maintains that a s. 9 investigation will be disproportionately disruptive to the operation of the hospital and will have major consequences for its operation, patients, staff and public confidence in the services which it provides. It is contended that the Minister did not form the necessary belief – i.e. a belief on reasonable grounds of a serious risk to the health or welfare of a person receiving services in the hospital – before purporting to establish the inquiry. It is also alleged that he took into account irrelevant considerations and that he predetermined the purported need for an external investigation prior to the publication of the HSE Report in 2017.

6. Dr. Mahony has sworn a very extensive affidavit, making a number of allegations, but the allegations which are of particular relevance to the application made by Mr. Thawley are contained in paras. 111 and 129, where she avers:-

> *"111. Further, the Minister has acted ultra vires the statutory section by unlawfully fettering his discretion. The Minister pre-determined whether a fourth investigation was necessary and did so prior to the publication of the HSE Report. In doing so, the Minister abdicated the whole issue of whether a review was required and effectively conferred that decision on Mr. Thawley…*
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> *[…]*
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> *129. I say and believe that it is abundantly clear that the Minister was wrongly influenced by representations by Mr Thawley and his legal representatives. Correspondence from Mr Thawley's solicitor was provided to the HSE Expert Panel. Both Dr McKenna and the Minister's own private secretary informed me that the Minister had decided to commission a further external review, and had made this decision in advance and irrespective of the findings of the HSE Report."*

7. In the statement of grounds, it is alleged that, following a Freedom Of Information Act request, a letter of 21st November, 2017 from HIQA to the Minister was disclosed, which was a response to a letter from the Minister on 3rd November, 2017 informing HIQA of the s. 9 investigation. At para. 126 of the statement of grounds it is pleaded that:-

> *"It is abundantly clear that the Minister was wrongly influenced by representations by Mr Thawley and his legal representatives. Correspondence from Mr Thawley's solicitor was provided to the HSE Expert Panel. Both Dr McKenna and the Minister's own private secretary informed the Master that the Minister had decided to commission a further external review, and had made this decision in advance and irrespective of the finding of the HSE Report."*

8. Essentially, it is a ground upon which the Minister's decision is challenged, that he unlawfully fettered his discretion and that he

was wrongly influenced by representations made by Mr. Thawley and his representatives.

9. The allegations of the applicant are denied by the respondent in the statement of opposition. It is denied that he acted *ultra vires* or unlawfully, or that he fettered his discretion. It is also pleaded that he did not predetermine that a further investigation was necessary prior to the publication of the HSE Report.

10. Mr. Thawley now wishes to be joined as a notice party to the proceedings. At para. 5 of his affidavit sworn in support of this application, he avers that he has demanded to know what exactly occurred in the hospital when his wife died and he wishes to ensure, as far as he can, that the events which led to his late wife's death do not reoccur at the hospital or any other hospital. Following the death of his wife, he instructed his solicitor to write to the applicant to seek an immediate inquiry. He was not happy with the NMH investigation, which he believed was conducted internally. He states that an external review was required and he communicated with the applicant between 12th May, 2016 and 27th June, 2017 in this regard. It is his contention that this internal review was fundamentally flawed, selectively presented and incomplete. He has no confidence in the investigation or its report. He avers that he has considered the recommendations and to his utter disbelief and shock he noted the existence of a document entitled "*Action Required*", dated 20th March, 2016, prior to his wife's tragic death, which stated:-

> *"Critical Review of laparoscopy entry techniques in training programmes to identify and assure the teaching of safe entry techniques supported by a mentorship program (IT recommend technique that angles the primary trocar away from the aorta)".*

Mr. Thawley avers that it is plainly clear from this document that notwithstanding the clearly identifiable critical deficiencies in the areas of training, teaching and mentoring in place in the hospital in March, 2016 and at the time of his late wife's tragic death, the applicant hospital had failed over one year later to implement the "*Action Required*" recommendations. The applicant explains that this document is misdated and was in fact prepared in 2017.

11. In so far as reference is made to the coroner's inquest, he avers that this cannot be equated with the scope of an independent investigation or review into the failures of the hospital.

12. While the invocation of s. 9(2) of the Act of 2007 is entirely a matter within the discretion of the Minister, nevertheless given the events which led to his wife's death, Mr. Thawley maintains that there are ample reasons for the Minister to conduct the inquiry and to have reasonable grounds to believe that there is a serious risk to the health or welfare of persons receiving services at the hospital.

13. Mr. Thawley also avers that at his meeting with the Minister at which his solicitor and counsel attended, while the Minister considered and took into account the concerns outlined by him, any decision with regard to the investigation was the Minister's decision and his alone. It was his understanding that the Minister was not going to be influenced by any person. He rejects the averment in the applicant's grounding affidavit that the Minister did not at any stage indicate or imply to him that "*whatever about the HSE report, [the Minister] would still order an inquiry into the matter*".

14. Further, it is averred that the applicant has no comprehension of the gravity of the events that occurred on 8th May, 2016, and that it maintains a position about the safety of the hospital which flies in the face of the events that occurred and which Mr. Thawley believes may reoccur.

15. Fundamentally, Mr. Thawley rejects the suggestion that the respondent fettered his discretion and invoked s. 9(2) because he, Mr. Thawley, required the Minister to conduct such an investigation. He describes this allegation as simply outrageous and manifestly untrue.

16. Mr. Thawley also refers to the hearing before Noonan J. on 29th January, 2018, on the application for leave to apply for judicial review, when the court inquired whether the applicant had considered joining Mr. Thawley as a notice party. Referring to an excerpt in the transcript of the hearing, he avers that he does not accept the stated motivation for not joining him as notice party as being the avoidance of any further distress which might be caused. As the husband of the deceased he avers that he has a vested interest in the outcome of the inquiry and although no relief is sought against him, he states that he is entitled to be joined.

17. By letter of 26th February, 2018, the respondent advised Mr. Thawley's solicitors that he did not propose to apply to join Mr. Thawley as a notice party, but that in the event of Mr. Thawley making such an application, the respondent would not object to his joinder if the court believed same was appropriate or necessary.

18. The applicant opposes this application by Mr. Thawley.

19. In a replying affidavit sworn on 16th April, 2018, on behalf of the applicant, Dr. Rhona Mahony avers that while it is a matter of sincere regret that Mr. Thawley was the individual mostly directly personally impacted by the death of his late wife, his legal rights are not affected by this application for judicial review, nor has he a legal interest in its outcome. No reliefs are sought by the hospital against Mr. Thawley and the primary matters under challenge are the Minister's decision-making process and the purported basis for commencing a s. 9(2) investigation. In her affidavit, Dr. Mahony describes the various investigations which were conducted following the death of Mrs. Thawley. Regarding the NMH investigation, she avers that the investigation team invited Mr. Thawley to participate in the investigation but he declined to do so because of differences with the investigation team, the terms of the investigation process and issues concerning costs. In addition to the NMH Report, a report of HIQA who reviewed the NMH Report, is also referred to in that affidavit. Regarding the reference in Mr. Thawley's affidavit to the "*Recommendations from Level 4 Review*", Dr. Mahony advised that there was a typographical error and that "*2016*" should have read "*2017*".

20. Finally, Dr. Mahony avers that apart from the fact that Mr. Thawley had no legal interest in the outcome of the challenge, his joinder to the proceedings 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.

Legal submissions of the proposed notice party

21. Counsel for the proposed notice party submits that as the husband of the deceased, he is the person most affected, not just by the untimely death of his late wife or the admitted negligence on the part of the applicant, but that as a matter of law he is directly affected and anxious to ensure that all steps are taken to avoid future serious risks to the health or welfare of persons being provided with services at the hospital.

22. It is submitted that the opposition of the applicant to this application misunderstands the differing positions of a respondent

against whom relief is sought and a notice party against whom relief is rarely, if ever, sought. It is further submitted that the joinder of a notice party does not depend on whether his presence is necessary but on whether his interests are affected. It is contended that it is incorrect to dismiss Noonan J.'s query at the leave application, as to whether consideration was given to joining Mr. Thawley as a notice party, by stating that no relief is being sought against him. While each case depends on its own merits it is submitted that if ever there was a case where a person could be described as a proper person to be heard, the proposed notice party fulfils this criteria.

23. In response to the submission that the joinder of the proposed notice party would lengthen the proceedings and involve relitigation of factual issues, Mr. Thawley's counsel in written submissions contends that such reasons are also groundless, because judicial review is not concerned with the decision but rather with the decision-making process and no relitigation of factual matters or issues can occur. A proposed notice party is entitled to be joined to protect his interests and in essence is allowed to adopt a role such as a *legitimus contradictor*.

24. Significant reliance is placed on the *dicta* of Fennelly J. in *Dowling v. Minister for Finance* [2013] IESC 58 where, at para. 54 he stated:-

> *"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. The matter was expressed by Keane C. J. when giving judgment on a question of costs in Spin Communications T/A Storm P.M. v. Independent Radio and Television Commission (Unreported, Supreme Court, 14th April, 2000):*
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> > 'This is a case in which the notice party, as indeed the High Court Judge accepted, is a party with a vital interest in the outcome of the matter. As Finlay C.J. said in O'Keeffe v. An Bord Pleanála, where you have a party such as the notice party in the present case who is vitally interested in the outcome of the proceedings, they must be joined as a party and will be joined by the court if the applicant does not join them. In those circumstances, it seems to me that, once the notice party is there, once he is in the proceedings protecting his interests, he may find himself in precisely the same position as the respondent. He may find himself in the position that he has been there, of necessity, to protect his interests, 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 interests. It would be quite unjust that he should have to pay his costs because the applicant company has no assets, where he has been brought there as a necessary party.' "

Fennelly J. stated that that above passage explained with clarity that a party with a direct interest in an administrative decision is entitled to have his own case put to the court by his counsel independently of the defence made on behalf of the decision maker. That is his right. It does not depend on whether the Court finds it necessary to hear the party. He continued:-

> *"Naturally, it often happens in practice, usually to save costs, that a notice party will choose not to make independent arguments and to rely on the principal respondent to defend the case. But that is his decision to make."*

25. The proposed notice party submits that he has a legitimate interest in the outcome of the judicial review proceedings for a numbers of reasons:-

> (1) He is suffering considerable distress in not being involved in the process. Despite the assertions made to the court by the applicant of its desire to ensure that no further distress is caused to the proposed notice party by him being joined to the proceedings, the objection to his joinder is compounding his distress.
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> (2) The proposed notice party is the person most directly affected and while he cannot undo the admitted negligence on the part of the applicant which gave rise to his wife's death, he wishes to make all necessary efforts and take such steps in so far as is practicable to ensure that a thorough, competent and independent investigation is undertaken in order to help prevent a reoccurrence.
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> (3) From the outset the proposed notice party has sought to have an independent expert determination as to what precisely occurred on the date of his wife's death. To this end, he has made clear his dissatisfaction with the applicant carrying out its own internal investigation, as is evident from correspondence between the parties, between 12th May, 2016 and 27th June, 2017. Further, the NMH Report, it is asserted, was 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. The lack of confidence of the proposed notice party in the three investigations gives rise to an arguable case for joinder. It is submitted that in respect of the joinder of the proposed notice party, the test ought not to be higher than the test that prevails for an applicant who seeks leave to apply for judicial review. At para. 5.9 of the written submissions it is urged that the applicant's approach to, and interpretation of, the three separate investigations previously carried out is disturbing and affirms the proposed notice party's concerns and desire to support the Minister in the exercise of his discretion to direct a s. 9 referral.
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> (4) The proposed notice party wishes to act as a legitimus contradictor to represent his own interests to refute inaccurate evidence which, it is alleged, was presented on the application for leave to apply for judicial review. He is anxious to protect and vindicate his good name and to ensure as far as practicable that a legitimate inquiry takes place having regard to the treatment received by his wife and the subsequently failures, all of which he contends give rise to a serious risk to the health and welfare of other persons, who may be relying on this service provider. While Mr. Thawley accepts that the Minister alone has exercised his discretion when determining if the relevant criteria of s. 9 have been met, he cannot leave unchallenged what he describes as the gross distortion of the facts as presented to the court in the application for leave and he wishes to be heard in this regard to protect his good name and to "*demolish the notion that the Minister simply did his bidding*". Portions of the transcript of the leave application proceedings were opened to the Court including an excerpt which records counsel for the applicant stating that the respondent had fettered his discretion because the Minister had made it quite clear that notwithstanding the review in the HSE Report, whatever the outcome, if Mr. Thawley still wished to have the matter investigated, an investigation would be ordered. To present a picture to the Court that the Minister simply obeyed a direction or command or a request of the proposed notice party was in urgent need of challenge. This is an assertion which forms a primary plinth of the entire application upon which review is sought. Therefore, it is submitted that no party has a greater interest in demonstrating to the court the distortion of this presentation than him.

26. Reliance is placed on *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 as authority for the proposition that on an application for

judicial review, a party whose rights are affected must be added as a party to the proceeding. Reliance is also placed on *BUPA Ireland Limited v. Health Insurance Authority (No. 1)* [2006] 1 I.R. 201. There, the voluntary health insurance board was directed by the Supreme Court to be joined as notice party to the judicial review proceedings concerning the risk equalisation scheme. Kearns J. delivering the decision of the court observed that in judicial review proceedings, pursuant to O. 84, r. 22(2) of the Rules of the Superior Courts 1986, a notice of motion or summons must be served on all persons directly affected. Pursuant to r. 22(6) (now O. 84, r. 22(9)), if on the hearing of the motion or summons the court is of the opinion that any person who ought, whether under O. 84, r. 22 or otherwise, to have been served has not been served, the court may adjourn the hearing on such terms as it may direct in order that the notice or summons may be served on that party. Referring to the decision in *O'Keeffe v. An Bord Pleanála* and *Spin Communications t/a Storm F.M. v. Independent Radio* (Unreported, Supreme Court, 14th April, 2000), Kearns J. stated at p. 211:-

> *"These cases demonstrate that where a party has a 'vital interest in the outcome of the matter' or is 'vitally 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."*

Kearns J. observed in the context of the claims made in that case that although a challenge to legislation per se is a matter affecting the public at large and while the private individual would normally not be joined in such proceedings in which the Attorney General seeks to uphold the constitutionality of the legislation in question, "*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*".

27. On the facts of that case, Kearns J. stated that it could be genuinely said that the abolition of the then existing scheme of voluntary health insurance, would immediately impact the legal environment in which the notice party was required to operate. This would have very significant consequences for how it might do its business in the future having regard in particular to its statutory obligations to maintain reserves. In addition, very serious allegations were made by the applicant in the points of claim to suggest that if risk equalisation payments were commenced under the scheme, the notice party would thereby be enabled to abuse its dominant position in the domestic market. Kearns J. accepted a submission by counsel on behalf of the notice party that a detailed market analysis would be required and be an integral part of the hearing. It was incontrovertible that the notice party was in a unique position to contribute to that debate. Therefore, the court concluded that the proposed notice party was likely to be uniquely adversely affected if the applicant's claims, which went beyond a mere challenge to the constitutionality of the legislation, were successful. Because the proceedings would indubitably involve an examination of the nature of risk equalisation and the competiveness of the market, the role of the notice party and the nature of its behaviour in the market would be a central issue. Thus, it had the greatest possible interest and required to express its view on matters which went to the heart of the case being made by the applicant.

28. The Supreme Court held that the case was one which involved exceptional circumstances. The presence of the notice party was "*necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter*".

29. Therefore, it is submitted that applying the decision of Kearns J. in *BUPA*, and bearing in mind the differing nature of the proceedings (judicial review and general proceedings), it is accepted that the appropriate test to apply is whether the person seeking to be joined as party has a vital interest in the outcome of proceedings or would be very clearly affected by the result.

30. Counsel for Mr. Thawley also argues that even if one were to apply the more onerous requirements of O. 15, r. 13 – *i.e*. that the person seeking to be joined is a person whose presence before the court may be necessary, to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, that the core issue as to the exercise by the Minister of his discretion (and the allegations which it is contended are made against the proposed notice party) are central. It is submitted that to enable the trial judge cannot effectually and completely deal with the matters before the court without the involvement of the proposed notice party.

31. The proposed notice party has referred to several decisions concerning applications under O. 15, r. 13 and the general reluctance of the courts to force a defendant upon a plaintiff who does not wish to have the defendant joined in the proceedings.

32. In *Yap v. Children's University Hospital Temple Street Limited* [2006] 4 I.R. 298, an application was made to join a person as a notice party, (rather than as a defendant) in private civil proceedings. It had been suggested in argument that there was a public law element to the role played by the proposed notice party. Rejecting this argument, Clarke J. referring to the *BUPA* decision above, stated at p. 305:-

> *"The reason why V.H.I. was joined and was able to remain being joined in BUPA Ireland Ltd. v. Health Insurance Authority (No. 1) was in part because what BUPA was seeking to do was to set aside the exercise of a statutory regime in respect of risk equalisation which would, in practice, have had the effect of significantly affecting the funding of V.H.I. Therefore V.H.I. was directly affected by any order that might be made by the court. I think that is where the distinction lies between public law proceedings and private law proceedings. The court order in public law proceedings can directly affect the interests of parties other than those before the court."*

33. Counsel for Mr. Thawley also places reliance on *Monopower Limited v. Monaghan County Council* [2006] IEHC 253. There, a number of parties wished to be joined as notice parties to an application for judicial review. Having referred to O. 84, r. 22(2) Herbert J. observed:-

> *"It seems to me, that 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 order 84 rule 22 subrule 2."*

Herbert J. considered as two separate and severable matters, an order seeking relief under O. 84, r. 22(2) concerning the right to be served with proceedings, and an order seeking relief under O. 84, r. 26(1) dealing with a right to be heard in the course of proceedings. While he was satisfied on the basis of affidavit evidence that the persons seeking to be joined as notice parties had undoubtedly a vital interest, it would be "*erroneous to conclude from that that ispo facto they are 'directly affected by the application'*". Later in his judgment, he stated:-

> *"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' might, if the judge thought that it would be necessary in the interests of justice to hear such a person, might still be heard."

34. Mr. Kean S.C. representing the proposed notice party, relying on *dicta* of Herbert J. in *Monopower,* submits that the court has an inherent jurisdiction and is not confined by O. 15 or O. 84 because O. 84, r. 22(9) states:-

> *"If on the hearing of the motion or summons 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 or summons may be served on that person." [emphasis added].*

35. Counsel also submits that although it is alleged that the Minister was wrongly influenced by Mr. Thawley, it necessarily follows that it is alleged that Mr. Thawley wrongly influenced the Minister – "*it is a two-way street*". He described the applicant's submissions that there must be a legal right or an affected legal interest in order to justify joinder, as misunderstanding the difference between a notice party and a defendant and submits that it is misleading to categorise the proposed notice party as not being a relevant party because no relief is sought against him.

36. Finally, it is submitted that the proposed notice party wishes to protect and vindicate his good name and ensure as far as practicable that a legitimate inquiry takes place.

Legal submissions of the applicant

37. Counsel for the applicant, Ms. McGrath B.L., has focused on what she describes as a central issue which the Court must decide and that is whether, in accordance with the requirements of O. 84, r. 22(2), Mr. Thawley is a person directly affected by the challenge brought by the hospital against the Minister's decision to direct the inquiry under s. 9 of the Act of 2007. She submits that the Court must have regard to the pleadings to enable it to assess whether Mr. Thawley is a person directly affected by the challenge. There is no authority for the proposition that the test is whether an "*arguable case*" is made by the notice party. Sufficient interest is not the test; it must be a vital interest. In so far as it is contended that this Court has an "*open pitch*" in deciding whether to join Mr. Thawley, as urged by counsel for the proposed notice party, the applicant's case is that the boundaries of the jurisdiction of this Court have been established by *BUPA* and *Dowling* and also by the Court of Appeal in *North Meath Wind Farm Limited v. An Bord Pleanála* [2018] IECA 49.

38. Counsel submits that in order to assess the merits of this application, the Court must scrutinise the substance of the proposed notice party's contention that he has a vested interest in these judicial review proceedings and the outcome. The key issues are the nature of the alleged interest and, having identified that interest, does it satisfy the "*directly affected*" criterion as properly understood by reference to case law under O. 84 r. 22(2) of the Rules of the Superior Courts. On the application of this criteria it is submitted that Mr. Thawley has no legal interest in the outcome of the judicial review challenge and will not be directly affected by it. The primary matter under challenge is the Minister's decision-making process and the purported basis for commencing the s. 9(2) investigation. Thus, it is contended that Mr. Thawley's legal rights are not affected by such proceedings – no reliefs are sought by the hospital against him. The matters under challenge are for the respondent to answer. He is the only party who can address the process by which he arrived at his decision and the reasons therefor.

39. The applicant relies on the decision in *BUPA* and the decision of Fennelly J. in *Dowling* where he held 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. Considering the principles applicable to an application to permit the joinder of a party to purely civil and private proceedings as opposed to those which concern public law, Fennelly J. stated at para. 29:-

> *"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. 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."*

40. Reliance is also placed by the applicant on the decision of the Court of Appeal in *North Meath Wind Farm Ltd. v. An Bord Pleanála* [2018] IECA 49, which involved an application to be joined to a challenge brought by a developer to a refusal to grant a development consent. The court found that the applicants who had objected to the development were not directly affected for the purposes of O. 84, r. 22(2). Peart J. stated that they were 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, the proposed applicants were 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. He observed at para. 26:-

> *"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."*

Later in his judgment, Peart J. commented that reference to a person having a vital interest in *Spin Communications* was not intended to mean something wider or different from being directly affected. He emphasised that regardless of whether the proceedings for judicial review were successful or unsuccessful, there would be no direct effect upon the proposed applicant in the sense of losing any right that they had before the challenge was brought. Peart J. concluded that the applicants were not directly affected within the meaning of the order and were not entitled to be joined as notice parties to the proceedings.

41. The applicant in this case argues that the proposed notice party is not a person either directly affected or one who has a vital interest in the outcome of the proceedings. The grounds of challenge are directed at the Minister and whether he acted *ultra vires* or not. It is not contended that the proposed notice party did anything wrong or unlawful, rather, it is claimed that the Minister was unlawfully influenced by the submissions made. Thus, it is argued that in so far as the applicant claims that the respondent unlawfully fettered his discretion by pledging to Mr. Thawley that he would direct an external investigation if Mr. Thawley so desired, it was only the Minister who could respond to whether he did so.

42. Finally, it is submitted that the matters raised by Mr. Thawley in his affidavit have been considered in each of the three

investigations and were the subject of a personal injury and dependency claim against the hospital. These judicial review proceedings raise a separate and distinct issue being the lawfulness of the decision to commence the s. 9(2) investigation, which does not directly affect Mr. Thawley as that phrase is properly understood.

Decision

43. I have considered the authorities relied upon by the parties. The relevant rule is O. 84, r. 22(2) which provides "*[t]he notice of motion or summons must be served on all persons directly affected.*" This is an application for judicial review. It is not a case where a private action for damages or other relief, such as for example, equitable relief is being brought by one private citizen against another, or a claim in which a private law remedy is sought by a private citizen against a public or semi-public body. It is conceded by the applicant that the proposed notice party 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. However, it is argued 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). In applying the relevant test, reliance is placed on the decision in *North Meath Wind Farm Limited* and the criteria laid down in that case by Peart J. who delivered the judgment of the court. There, the court drew 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. Peart J. stated at para. 32:-

> *"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."*

44. The essence of the application by the proposed notice party is that he is manifestly and directly interested in being involved because he is being blamed for wrongfully influencing the decision of the Minister to instigate a s. 9 inquiry. Counsel for the proposed notice party very fairly submitted to the Court that the genesis of this application is an allegation by the applicant that the respondent had "*carried himself outside section 9*" by relying exclusively on the influence of the proposed notice party and his legal representatives. In essence, it is in the proposed notice party's view, what he considers to be an allegation that he wrongfully influenced the Minister that gives him a direct interest in being joined as a notice party.

45. 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.

46. Further, 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. In this regard I refer to *dicta* of Fennelly J. at para. 33 of Dowling in the context of civil proceedings:-

> *"Keane C.J., in Barlow v Fanning, approved the test adopted by Lynch J [in Fincoriz S.A.S. Di Bruno Tassin Din e C v. Ansbacher & Co. Ltd. (Unreported, High Court, 20th April, 1987)] 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 [t]his 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."*

Concerning public law proceedings, in Yap v. Children's University Hospital, Clarke J. observed 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."*

47. Counsel for the proposed notice party submits that a distinction should be drawn between the position of a respondent and that of a notice party. No relief is sought or can be ordered against a notice party. He argues that merely because no relief is sought against him, this does not prevent him from being joined as a notice party. But that does not appear to me, in and of itself, to detract from the requirement that it must be shown that the proposed notice party will be directly affected by the outcome of the judicial review proceedings as has been interpreted in the cases.

48. It seems to me that the legal position of the proposed notice party in this case is more akin to the proposed notice party described by Peart J. in *North Meath Wind Farm* 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."

49. Counsel for the proposed notice party emphasised that the interests of his client which he submits are at stake are more than reputational; there is a human element that cannot be ignored. He urges that the proposed notice party has a vital interest not only because of the death of his wife, but because of his desire to do all that he can through whatever means possible to try to ensure that there is a truly independent, all-embracing inquiry. He did not make representations for any particular form of inquiry but he contends that his client has never found out why his wife's death happened, or precisely what happened, and that he is still on a journey to attempt to ascertain what happened and why. The inquiry which has been ordered is one established under s. 9 of the Act. To this end, he wishes the investigation to proceed. He wishes to help to protect the safety of other women. While this Court acknowledges the undoubted wish of the proposed notice party for this inquiry to proceed, in my view, on the basis of the authorities opened to this Court, I do 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.

50. During the course of argument, it was suggested by counsel for the proposed notice party that the provisions of O. 84, r. 22(9) confer a wider jurisdiction on this Court because of the inclusion in that rule of the words "*or otherwise*". 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.

51. Further, the proposed notice party has suggested that, by analogy with the test when one seeks leave to apply for judicial review, that he need only make out an arguable case to be joined under O. 84, r. 22(2). Assuming for the moment that it is the correct standard, and I make no ruling on this, ultimately, it is a matter of assessing whether he is a person who is directly affected as a matter of law and in my view, he has not met that test on the suggested basis.

52. I must therefore refuse the application.