Neutral Citation Number: [2012] IEHC 23

THE HIGH COURT

2011 9676 P

BETWEEN

OMEGA LEISURE LIMITED

PLAINTIFF

AND

SUPERINTENDENT CHARLES BARRY, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 12th of January, 2012

1. Introduction

1.1 The plaintiff ("Omega") is a company whose principal proprietor is Mr. James Barber. Mr. Barber devised a plan to establish a significant bingo hall in Cork City. The proposal followed a model which appears to operate in a number of other cities in Ireland. The plan was that Omega would enter into agency agreements with charitable organisations who had the benefit of a licence under the Gaming and Lotteries Act 1956 (the "1956 Act"), permitting such organisations to conduct bingo sessions. Omega would then act as an agent on behalf of the charitable organisation concerned. It is clear that Omega spent significant sums in fitting out a premises owned by the Barber family for the purposes of conducting such bingo sessions.

1.2 Some preliminary discussions took place with the first named defendant ("Superintendent Barry") regarding the nature of Omega's business and its lawfulness in particular. Superintendent Barry is the Superintendent for the relevant district in Cork. However, when the business was ready to open, significant difficulties were encountered with An Garda Síochána not least when, on foot of a warrant issued by the District Court, the relevant premises was raided. In those circumstances proceedings were commenced by Omega seeking a range of declaratory and injunctive reliefs against both Superintendent Barry and the other defendants (collectively "the State", unless the context indicates otherwise). Interlocutory injunctions were sought although nothing now seems to turn on the issues which arose at that stage. An early trial of the issues was directed and the matter came on for hearing before me in Cork.

1.3 I felt that it was appropriate to give at least some indication of the legal position at the earliest possible date and, with that in mind, I listed the case for a partial ruling on the 9th December last. The ruling delivered on that occasion is annexed to this judgment ("the earlier ruling"). As appears from that ruling I was of the view that Omega had standing to pursue at least some of the forms of declaratory relief sought. I was further of the view that Omega was, at a minimum, entitled to the two declarations set out in the earlier ruling. I further indicated that I was not satisfied on the evidence that Superintendent Barry was guilty of misfeasance of public office or that the claim made by Omega for trespass and detinue could succeed. I indicated on the occasion in question that I would deliver a written reasoned judgment setting out the basis on which I felt it appropriate to make that ruling. This judgment is directed to that end. It should also be noted that I made an order, on the 9th December, granting the two declarations sought and refused the application of counsel for the State for a stay on that order. I also indicated that I would, in this written judgment, also deal with the question of whether any other declaratory or injunctive orders were appropriate.

1.4 In the course of the hearing before me I had suggested that there appeared to be five broad issues which arose. Counsel agreed that those issues represented the areas of dispute. I should start, therefore, by setting out those issues.

2. The Issues

2.1 The first issue concerned the appropriate role of this court in determining the questions of controversy which had arisen between the parties. The basic statutory regime for the licensing of lotteries is to be found in the 1956 Act. Licences are granted, under that Act, by the District Court. Counsel for the State argued that it would be inappropriate for this court to interfere with the normal exercise by the District Court of its jurisdiction to deal with licensing matters in relation to lotteries. I did not understand counsel for Omega to differ in principle with that proposition. However, it was argued on behalf of Omega that the issues which it sought to have clarified in these proceedings were not issues, at least in the main, which could come to be considered by the District Court in the exercise of its statutory jurisdiction. There was, therefore, an issue between the parties as to the extent, if any, to which it was appropriate for this court to make declarations concerning the regime that applies in relation to lotteries having regard to the fact that, at least at the level of principle, it is undoubted that the District Court has a jurisdiction in that area.

2.2 Second, the State contested whether Omega had standing to raise the issues which arose in these proceedings. There can be no doubt but that the licensee in respect of any lottery licence granted by the District Court under the provisions of the 1956 Act must be a charitable organisation. Omega is not such an organisation and operates only as an agent of such a licensee. On that basis it was said that Omega lacked standing in the absence of having a licensed charitable organisation at least stand as a co-plaintiff. In addition, there were some factual questions concerning the precise status of certain of the agency agreements relied on by Omega to which it will be necessary to refer in due course. There were, therefore, issues between the parties as to Omega's standing. In addition, under this heading, a connected question as to whether the proceedings were moot arose out of a question over the current status of agency agreements between Omega and relevant charitable licence holders.

2.3 Third, and perhaps of particular importance, was the dispute between the parties as to the lawfulness of two aspects of the activities of Omega. To some extent there was an overlap between this issue and the issue just addressed concerning standing. The State argued that the court could not give, as it were, a carte blanche clearance to Omega certifying, in effect, that its activities were lawful. That point was accepted in part by Omega but nonetheless the principal aspect of the dispute between the parties under this heading was as to whether there was anything, in principle, unlawful about a company such as Omega conducting, on a large scale and on an agency basis, regular bingo sessions on behalf of charitable organisations who had the benefit of an appropriate licence under the 1956 Act. It was contended on behalf of the State that the Act did not contemplate an organisation such as

Omega engaging on a commercial scale and for profit in the business of running lotteries on such an agency basis. Omega contended that there was nothing in the legislation to prevent such an operation provided that it otherwise complied with the requirements of the 1956 Act. In addition, a separate issue arose between the parties as to the lawfulness of so called "pongo" machines used by Omega during intervals in the main bingo business. An account of the pongo machine, as described in the evidence, is to be found in the schedule of the earlier ruling. It was said on behalf of the State that such pongo machines were gaming machines as defined by s. 43 of the Finance Act 1975, and that their use was, therefore, unlawful in the absence of appropriate licences. That issue was contested by Omega who maintained that the pongo machines in question were not gaming machines.

2.4 Fourth, issues arose between the parties arising out of the claim made by Omega that Superintendent Barry was guilty of misfeasance of public office. The first question concerned the legal standard by reference to which a claim of misfeasance in public office is required to be made out. However, by the close of the proceedings it seemed that both counsel were agreed that the test in respect of a claim for misfeasance of public office is objective recklessness as identified by Kearns J. in *Kennedy v Law Society of Ireland* (No.4) [2005] 3 I.R. 228. The fourth issue was, therefore, largely resolved in the course of the hearing.

2.5 However, the fifth and final issue was as to whether, applying that standard of objective recklessness, it could be said on the facts that Superintendent Barry was guilty of misfeasance of public office.

2.6 In addition, in the course of the hearing, an application was made on behalf of Omega to amend the pleadings by including a claim for trespass and detinue. While the legal nature of the claim in trespass and detinue was different from the claim made in respect of misfeasance of public office, the substance of the allegations under both headings was the same. It was said that the warrant, on foot of which gardaí entered the premises of Omega and seized certain items connected with the conduct of bingo, was unlawfully obtained and/or unlawfully executed on the same basis as underlies at least part of the allegation of misfeasance of public office. It is convenient, therefore, to deal with those issues at the same time as dealing with the fifth issue identified concerning whether, on the facts, a claim for misfeasance of public office has been made out.

2.7 As can be seen, the first three issues are, to an extent, interlinked. They are concerned with the question of whether (and if so to what extent) it is appropriate for this court to grant declaratory relief, at the instigation of Omega, as to what might or might not be a lawful means of carrying on a licensed lottery under the provisions of the 1956 Act. To the extent that it might be determined that at least some of the issues raised by Omega were questions which the court should answer in proceedings such as these, then the question of the correct interpretation of the relevant law clearly arose. I propose dealing with those issues first before turning to the question of Omega's claim for misfeasance in public office. I, therefore, turn first to the question of the court's jurisdiction.

3. The Court's Jurisdiction

3.1 The starting point in addressing the question as to the jurisdiction of this court must be the relevant provisions of the Constitution. Article 34 deals with the courts. Of particular note are the following:-

> Art. 34.2 "The Courts shall comprise Courts of First Instance and a Court of Final Appeal."
>
> Article 34.3.1° "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."
>
> Art. 34.3.4° "The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law."

3.2 These sections provide that this court, as a court of first instance, has full ordinary jurisdiction to determine all matters whether of law or fact, civil or criminal. However, it is also provided that the Oireachtas is entitled to establish other courts of first instance, such as the District Court, whose jurisdiction is limited and defined by statute.

3.3 In *Ward v. Kinahan Electrical* [1984] I.R. 292, McMahon J. said that:-

"[…] Article 34, s. 3, can not be construed as conferring a universal right of recourse to the High Court for the determination of all justiciable disputes. The High Court is the only court of first instance expressly referred to in the Constitution but, having regard to the fact that Article 34, s. 3, sub-s. 4, provides for the establishment of other courts of first instance (which, unlike the High Court, would have local and limited jurisdiction), the provisions of s. 3 which invest the High Court with full original jurisdiction can only be understood as referring to the extent of the jurisdiction which the High Court is capable of exercising. It can not be construed as creating a right of access to the High Court for the determination of all matters and questions because Article 36 enables laws to be made for the distribution of jurisdiction and business among all the courts which may be established under the Constitution, including courts of first instance other than the High Court. It follows, therefore, that business which falls within the full original jurisdiction of the High Court may be assigned, within the limits express and implied in the Constitution, to some other court."

3.4 In *R. v. R.* [1984] I.R. 296, Gannon J. appeared to take a somewhat different view when he suggested, at p. 308, that:-

"[…] it would be inconsistent with the provisions of Article 34, s. 3, sub-s. 1, (as interpreted by the Supreme Court in *R.D. Cox Ltd. v.Owners of M.V. Fritz Raabe* (Supreme Court: 1st August 1974) [[2002] 1 ILRM 532]) if there could be no jurisdiction in any court in such matters unless and until a jurisdiction was conferred by enactment of the Oireachtas. From the amplitude of jurisdiction with which the High Court is invested by Article 34 of the Constitution, it follows that the Oireachtas does not add to or increase the jurisdiction of the High Court by legislation. It follows also that the Oireachtas cannot create validly, in accordance with the Constitution, a new juridical urisdiction and withhold it from the High Court; nor can it reduce, restrict or terminate any jurisdiction of the High Court."

3.5 The matter was authoritatively dealt with in *Tormey v. Ireland* [1985] I.R. 289, where Henchy J., speaking for the Supreme Court, held that the terms in which original jurisdiction is vested in the High Court by Art. 34.3.1° cannot be read literally as to do so would render an absurd result in which two or more constitutional provisions were in conflict. At pp. 296-297, Henchy J. stated that:-

"The 'full' original jurisdiction of the High Court, referred to in Article 34, s. 3, sub-s. 1, must be deemed to be full in the sense that all justiciable matters and questions (save those removed by the Constitution itself from the original jurisdiction of the High Court) shall be within the original jurisdiction of the High Court in one form or another. If, in exercise of its powers under Article 34, s. 3, sub-s. 4, Parliament commits certain matters or questions to the jurisdiction of the District Court or of the Circuit Court, the functions of hearing and determining those matters and questions may, expressly or by necessary implication, be given exclusively to those courts. But that does not mean that those matters and questions are put outside the original jurisdiction of the High Court. The inter-relation

of Article 34, s. 3, sub-s. 1 and Article 34, s. 3, sub-s. 4 has the effect that, while the District Court or the Circuit Court may be given sole jurisdiction to hear and determine a particular matter or question, the full original jurisdiction of the High Court can be invoked so as to ensure that justice will be done in that matter or question. In this context , the original jurisdiction of the High Court is exercisable in one or other of two ways. If there has not been a statutory devolution of jurisdiction on a local and limited basis to a court such as the District Court or the Circuit Court, the High Court will hear and determine the matter or question, without any qualitative or quantitative limitation of jurisdiction. On the other hand, if there has been such a devolution on an exclusive basis, the High Court will not hear and determine the matter or question, but its full jurisdiction is there to be invoked – in proceedings such as *habeas corpus, certiorari,* prohibition, *mandamus, quo warranto*, injunction or a declaratory action – so as to ensure that the hearing and determination will be in accordance with law. Save to the extent required by the terms of the Constitution itself, no justiciable matter or question may be excluded from the range of the original jurisdiction of the High Court."

3.6 In substance, therefore, the overall principle is that jurisdiction may be distributed to courts other than this court with exclusive effect provided that this court retains an adequate power of review. However, it seems to me that the first question that needs to be addressed is as to whether, and if so to what extent, legislation has, in a particular field, exclusively distributed jurisdiction to another court. The starting point of any analysis has, therefore, to be an examination of the legislative provision which is said to have conferred exclusive jurisdiction on a court other than this court and, in addition, to determine the extent of the jurisdiction that may have been so conferred. It follows that the starting point has to be to analyse the relevant provisions of the 1956 Act.

3.7 Section 26(1) of the 1956 Act makes any lottery unlawful unless it is conducted in accordance with either a permit or a licence. Permits are granted under s. 27 by a Superintendent of An Garda Síochána but are not relevant to the issues which arise in this case. However, s. 28 provides that:-

> "The District Court may grant a licence for the promotion, during such period, not exceeding one year, as shall be specified in the licence, of periodical lotteries in accordance with this section."

3.8 Section 28(2), as amended by the Lottery Prizes Regulations 2002 (S.I. No. 29/2002), provides that each series of lotteries must comply with the following conditions:-

> "(a) it shall be for some charitable or philanthropic purpose or purposes;
>
> (b) the licensee shall derive no personal profit from it;
>
> (c) the total value of the prizes on any occasion shall be not more than €20,000, and, if more than one lottery is held in any week, the total value of the prizes for the week shall be not more than €20,000;
>
> (d) the value of each prize shall be stated on every ticket or coupon."

In addition and of perhaps particular relevance to this case, the final requirement, to be found in s. 28(2)(e) provides that:-

> "not more than forty per cent of the gross proceeds shall be utilised for the expenses of promotion, including commission, and any free entry for the lottery shall be deemed to be a payment of commission to the extent of its value."

3.9 Section 29 requires an intending applicant for a licence to give 28 days notice in writing to the Superintendent of An Garda Síochána for the district in which the lottery is to be organised. Subsection (2) provides for the contents of the relevant notice. Section 31 provides that the District Court, in considering the application, shall have regard to:-

> (a) The character of the applicant; and
>
> (b) The number of periodical lotteries already in operation in the locality.

Subsection (2) of that section entitles the Superintendent of An Garda Síochána and any other person who appears to the court to be interested to appear and adduce evidence in relation to the application. Those provisions have been the subject of consideration by the Supreme Court in *Stiúrthóra Ionchúiseamh Poiblí (DPP) v Norris* (Unreported, Supreme Court, O'Higgins C.J., Henchy and Griffin JJ., 26th July, 1979). The judgment delivered by Henchy J., for which a certified English translation was provided to the court, makes clear that the District Judge may only refuse an application which is procedurally in order for one of two reasons: namely the character of the applicant or the number of periodical lotteries already in operation in the locality. Griffin J. agreed with the judgment of Henchy J..

3.10 In Norris, Henchy J. ruled that:-

> "When the application comes before the District Court, should same be in order, the District Justice may not refuse it save for either of these two reasons:
>
> 1) due to the character of the applicant, or
>
> 2) due to the number of periodic lotteries already in operation in the locality;
>
> and the Superintendent of the Garda Síochána, or any other person who appears to the Court to be interested in the matter, may adduce evidence in relation to the application (section 31).
>
> Should the District Justice be satisfied under those two grounds, he must grant the licence." [as per the translation referred to above]

3.11 It follows that the role of the District Court is limited. The District Court must, of course, be satisfied that the procedural requirements imposed by law for the making of the relevant application have been met. However, provided that the District Court is so satisfied, then there are only two issues which the District Court has to determine in the event of an objection. While a Superintendent and any other interested party is entitled to be heard and to adduce evidence, that evidence and any argument based on it, in light of the *Norris* judgments, can only be directed to questions concerning the character of the licensee and/or the number of periodical licences already in existence "in the locality". It will be necessary to return to certain other aspects of the judgments in *Norris* in due course.

3.12 However, it seemed to me to be clear that the principal question of controversy between Omega and the State (that is whether the conduct of a lottery, validly licensed under the provisions of s. 28 of the 1956 Act, can be rendered unlawful because the lottery is carried out by an agent such as Omega who operates on a commercial scale) was not a matter which, on the authority of *Norris,* was a question over which the District Court has any jurisdiction. On the basis of Norris the District Court is required to grant a licence if the application is procedurally in order and if the court is satisfied as to the character of the applicant and that there are not already too many periodic licences operating in the locality. Even if, therefore, the relevant view of the State proved to be correct, same would not amount to a ground for refusing a licence but rather would be a basis for suggesting that the conduct of the lottery concerned was unlawful notwithstanding the existence of a valid licence. That is an issue which could only arise, in the District Court, in the event that there was a prosecution brought in respect of the alleged unlawful conduct of a lottery.

3.13 Likewise, the second question, as to whether the form of pongo machine, to which reference has been made, is lawful, could not arise on a licensing application before the District Court but rather might arise in the event that a prosecution was brought alleging, for example, that the use of such pongo machines amounted to the unlawful use of gaming machines as defined by s. 43 of the Finance Act 1975.

3.14 It seemed to me, therefore, that the suggestion that the relief sought in these proceedings would amount, if granted, to an inappropriate interference by this court with the proper licensing jurisdiction of the District Court, was misplaced. If this court were to grant declarations which touched on the legality of a commercial bingo agent or pongo machines, then this court would not be dealing with any issue which comes within the licensing jurisdiction of the District Court. The only possible interference might be with the jurisdiction of the District Court in some future hypothetical criminal process.

3.15 It is true, therefore, that the exclusive licensing jurisdiction in respect of lotteries is granted to the District Court. It follows that it would not be appropriate for this court to interfere, save in the exercise of its supervisory role by entertaining, for example, judicial review proceedings, in the conduct of licensing applications in respect of lotteries under the 1956 Act. However, on the basis of the analysis which I have just conducted, it seemed to me that the declarations sought on behalf of Omega, at least in part, did not seek to interfere with the licensing jurisdiction of the District Court for the issues sought to be determined as a result of at least some of the declarations sought were not issues which would come to be decided by the District Court in the exercise of that licensing role. It follows that I was not satisfied that the grant of at least some of the declarations sought would amount to any breach by this court of its obligation to respect the decision by the Oireachtas to confer a certain limited but exclusive licensing jurisdiction in respect of lottery matters on the District Court.

3.16 Although not a point advanced in argument, it seems to me there can be no suggestion that, by making some or all of the declarations sought, this court could be said to interfere with the District Court's jurisdiction in respect of the prosecution of criminal offices under the 1956 Act. While the reasons behind this finding have been articulated above and will become clearer in the course of this judgment (see para. 5.13 *et seq*.), for present purposes, it suffices to simply observe that, at the level of principle, it is not an interference with the District Court's jurisdiction for this court to seek to clarify the law on foot of which criminal proceedings may be brought before the District Court.

3.17 The real question under this heading, both as to the appropriate role of this court, the extent of declaratory relief that should be granted and the standing of Omega, seemed to me, therefore, to be properly characterised as a question concerning the extent to which Omega had standing to ask this court, and the extent to which this court ought properly be prepared, to grant declarations concerning whether particular types of activity might be lawful in anticipation of a potential criminal liability in the event that the actions were, in fact, unlawful. I, therefore, turn next to the question of the circumstances in which it is appropriate to grant declaratory relief.

4. Declaratory relief

4.1 Section 155 of the Court of Chancery (Ireland) Act 1867 originally set out the right of the court to make declaratory orders without granting other or consequential relief. The wording of that section was repeated in the Rules of the Superior Courts in 1905 and 1963 and is now to be found in O. 19, r. 29 of the Rules of the Superior Courts 1986 in the following terms:-

> "No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not."

4.2 In *Transport Salaried Staffs' Association and Others v. Córas Iompair Éireann* [1965] I.R. 180, at 202-203, Walsh J., speaking for the Supreme Court, ruled that:-

"In modern times the virtues of the declaratory action are more fully recognised than they formerly were and English decisions and dicta in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formerly exercised 'sparingly' and 'with great care and jealousy' and 'with extreme caution' can now, in the words of Lord Denning in the *Pyx Granite Co. Ltd. Case* [1958] 1 Q. B. 554, at p. 571, be exercised 'if there is good reason for so doing,' provided, of course, that there is a substantial question which one person has a real interest to raise and the other to oppose. In *Vine v. The National Dock Labour Board* [1957] 2 W. L. R. 106, Viscount Kilmuir L.C., at p.112, cites with approval the Scottish tests set out by Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd*. [1921] 2 A.C. 438, who said, at p. 448:— 'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.' It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight."

4.3 *Transport Salaried Staffs' Association* was subsequently followed by this court in *O'Donnell v. Dún Laoghaire Corporation* [1991] ILRM 301 where Costello J. described a declaratory judgment, at p. 311, as:

"[…] one which declares the rights of the parties and because defendants, and in particular public bodies, respect and obey such judgments they have the same legal consequences as if the court were to make order quashing the impugned orders and decisions."

4.4 In approaching claims for declaratory relief, the court must first be satisfied that there is a good reason for so doing. Second, there must be a real and substantial, and not merely a theoretical, question to be tried. Third, the party with carriage of the proceedings must have sufficient interest to raise that question and finally, that party must be opposed by a proper contradictor. It should, of course, be borne in mind that, by its very nature, a declaration is a discretionary relief and involves a jurisdiction which must, therefore, be circumspectly exercised and in accordance with the circumstances of the case.

4.5 It seems to me to be clear that there is a real and substantial issue to be determined in these proceedings. There is a real question as to whether, as the State asserts, the 1956 Act does not contemplate the operation of a licensed lottery through the agency of a large scale commercial business such as that intended by Omega. That question of controversy is not merely theoretical. Omega has invested significant funds in preparing itself to carry on business in a manner which it asserts is lawful. The State disagrees that the activity is lawful. The matter has reached a stage where the jurisdiction of the District Court to grant a warrant has been invoked by Superintendent Barry and a raid carried out on foot of such a warrant. It could hardly be said that such a situation falls at the end of the spectrum where parties are simply inviting the court to answer a hypothetical or theoretical legal question. On the answer to the question depends the lawfulness of a form of activity in which ordinarily law abiding citizens wish to engage. State authorities have already taken action to interfere with that activity on the basis of a contrary view as to its lawfulness.

4.6 In addition, there is a clear and appropriate contradictor. The defendants in these proceedings are the State generally and the relevant Superintendent of An Garda Síochána who is charged with a particular role in relation to the enforcement of lotteries within his district.

4.7 It follows that, with respect to the *Transport Salaried Staffs' Association* test, the only matter of real dispute between the parties is the question of the standing of Omega. It is to that question that I now turn.

5. The Standing of Omega

5.1 Citing *Transport Salaried Staffs' Association* with approval, Walsh J., in *The State (Lynch) v. Cooney* [1982] I.R. 337, at p. 369, made the following apposite remarks:-

"The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates."

Walsh J. then continued, at p. 370, by remarking that:-

"The many decisions of the Courts of Ireland and of other national jurisdictions amply illustrate the truth of the statement that the question of what is a sufficient interest is to be determined having regard to the circumstances of each case.

When one examines the same question in the context of declaratory orders the conclusion is the same, i.e., that the person concerned must be able to show sufficient interest or 'a real interest' […] and that again will depend upon the circumstances."

5.2 The former statement was later followed by Kelly J. in *Shannon v. McGuinness* [1999] 3 I.R. 274, at 280, where he referred to it as:

> "the general approach which the court should have when an issue of *locus standi* is raised before it."

5.3 This then raises the question as to the extent to which Omega can be said to have a "sufficient or real" interest in the declaratory orders sought. It was argued on behalf of the State that, because Omega is not entitled to apply for a licence under the 1956 Act, Omega lacks standing and, as such, it is only a licensee who is vested with sufficient interest to bring proceedings of this nature (or, at a minimum, that such a licensee would need to be present as a co-plaintiff). It was further contended that any argument regarding the existence of standing was complicated by the current status of many of the licences in respect of which Omega holds an agency agreement. At the commencement of the hearing a solicitor representing one such licensee (Mercy Hospital Foundation Ltd.) addressed the court for the purposes of suggesting that a notice to terminate the relevant agency agreement with Omega had been served and to further suggest that, in the view of the charitable organisation concerned, no valid agency agreement remained in existence. Furthermore, in the course of the hearing, it appeared, on the basis of recent correspondence quite properly placed in evidence before the court by Omega, that a second charitable organisation (The Irish Heart Foundation), which had obtained a licence from the Dublin Metropolitan District Court, had served a notice to terminate its agency agreement with Omega. There were, therefore, at least some questions as to whether relevant agency agreements continued in force in respect of the licences in question and, in any event, it seemed clear that, at a minimum, the relevant agency agreements would soon come to an end.

5.4 Omega responded by pointing to the fact that the charities with whom it had dealings had good reason to be reluctant to join in proceedings against the State. It was further noted that, despite the purported termination of the relevant agreements, the effect that any decision of this court would have on Omega's business would be considerable. In the absence of a decision of the court it is easy to see why a charity would be reluctant to engage in an agency agreement with Omega where there existed any significant doubts over the lawfulness of its business.

5.5 It is to be noted that, in his decision in the Supreme Court, in *East Donegal Co-operative v. Attorney General* [1970] 1 I.R. 317, at p. 338, Walsh J. found, albeit in the context of the interpretation of provisions of the Constitution, that:-

"To afford proper protection, the provisions must enable the person invoking them not merely to redress a wrong resulting from an infringement of the guarantees but also to prevent the threatened or impending infringement of the guarantees and to put to the test an apprehended infringement of these guarantees."

This statement can, therefore, be taken as authority for the proposition that standing cannot be defeated simply because a plaintiff cannot demonstrate actual harm suffered if the relevant plaintiff can instead provide evidence of threatened or impending damage.

5.6 As indicated in the earlier ruling, I was satisfied that Omega has demonstrated sufficient standing to be entitled, at the level of principle, to the declaratory relief already ordered. It is now necessary to set out the reasons why I came to that view. I will return to the question of the further declarations and injunctions which Omega seeks in due course. It is, of course, true that the only party who is entitled to promote a licensed lottery under the provisions of the 1956 Act is the charitable organisation concerned. However, the issues which arise in these proceedings are not concerned with whether any particular charitable organisation is entitled to conduct a licensed lottery. Rather, the issues which arise in these proceedings are concerned with the manner in which such a licensed lottery can be conducted by particular reference to the contention of the State that it is not possible to conduct such a lottery through the means of an agency arrangement with a large scale commercial bingo hall operator and/or by the operation of pongo machines. That contention on the part of the State directly affects the position of Omega. If the State be correct, then no

licensed charitable organisation would be entitled to enter into an agency agreement with Omega or to have Omega operate pongo machines on its behalf. While that position would, undoubtedly, affect the interests of charitable organisations who wished to conduct lotteries (and in particular bingo) through the auspices of an agency with Omega, such a situation has a much more serious impact on the interests of Omega. Charitable organisations who hold a relevant licence can conduct their lottery or bingo in a variety of lawful ways. While the issue of whether bingo operated in the manner contemplated by Omega is one of those lawful methods is a question which can have some effect on a relevant charitable organisation, the same question has the potential to have a devastating effect (depending on its answer) on Omega for, if the State view be correct, then Omega cannot carry on its business at all.

5.7 In those circumstances it seemed to me that Omega had standing at least to seek to have the court determine whether the proposed method of operation was lawful for on that question lay Omega's entitlement to carry on its business at all. Likewise, it seemed to me that Omega had standing to raise the issues as to the lawfulness of the pongo machines for that issue too was inextricably linked with Omega's entitlement to carry on business even though that question might, in a less direct way, have also affected the interests of relevant charitable organisations who might have wished to indirectly avail of the pongo machines provided by Omega through a relevant agency agreement. For those reasons I was satisfied that Omega had standing to seek declarations concerning the question of whether an otherwise lawful operation of a licensed lottery under the provisions of the 1956 Act might be rendered unlawful because it was carried out by a large scale commercial operator together with the question of the lawfulness of pongo machines as described in the evidence.

5.8 It was also suggested on behalf of the State that these proceedings are moot, or virtually moot, by reason of the fact that there are no longer any licences extant where the relevant licensee has an agency agreement with Omega or, at a minimum, that any such agency agreements are unlikely to last for any further significant period of time. In *O'Brien v. Personal Injuries Assessment Board (No.2*) [2007] 1 I.R. 328, the Supreme Court identified one type of case where it may be appropriate to depart from a strict rule of mootness. In the circumstances of that case there was an adverse ruling of this court against the Personal Injuries Assessment Board ("PIAB"). However, the facts of the individual case under consideration had become moot prior to the appeal to the Supreme Court. On the other hand, the general issue which had been found against PIAB remained live in a large number of other cases. In those circumstances the Supreme Court determined that it was appropriate to consider the appeal.

5.9 In applying *O'Brien*, I indicated in *P.V. (a minor) v. The Courts Service* [2009] 4 I.R. 271 that it was clear from *O'Brien* and the other authorities which I cited that:-

"the starting point of any consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it cannot, in the words of Murray C.J. in *O'Brien v. Personal Injuries Assessment Board* [2006] IESC 62 [2007] 1 I.R. 328 be 'purely hypothetical or academic'. In addition, there may be circumstances where it may be appropriate to nonetheless determine issues even though such issues may strictly speaking be moot. For example, the types of issue with which the Supreme Court were concerned in *O'Brien v. Personal Injuries Assessment Board* stem from a situation where the same issue was likely to arise for the respondent in very many cases and where the respondent was faced with an adverse judgment of this court from which it sought to appeal. While the issue might have become irrelevant to the applicant in that case (given that his personal injury litigation had gone beyond the stage of the Personal Injuries Assessment Board), it was still very much alive from the perspective of the respondent. Likewise, there may be cases, such as those identified in the American jurisprudence, where, in practical terms, it may be impossible to have a final determination on important legal issues unless the courts (and in particular appellate courts) are prepared to relax the strict application of the mootness rule."

5.10 First, it seems clear that this case is not, in any event, strictly speaking, moot. At the time of the hearing there remained in being licences where the holder of the licence in question had an agency agreement with Omega. Second, it seems to me to be clear that reputable charities would not wish to become involved in activity which was unlawful. As long as there remained a doubt about the lawfulness of the manner of carrying out of licensed bingo through the auspices of an agency agreement with Omega, then it is reasonable to assume that many charities, who might otherwise consider entering into an arrangement with Omega, might be dissuaded from so doing for fear of becoming inadvertently involved in unlawful activity. The evidence certainly supports that same is a realistic scenario.

5.11 Therefore, even if there were no licensees with current agency agreements with Omega I would not, necessarily, have considered the case to be moot provided that there was a reasonable prospect that such an agency agreement might be entered into in the event that the court was to declare that the Omega means of doing business be a lawful means of conducting a licensed lottery at least at the level of principle.

5.12 I should also add that it seems to me that it is inappropriate that otherwise lawful and reputable parties should be required to carry out activity which may turn out to be criminal in order that legitimate questions as to the lawfulness or otherwise of the activity concerned be determined by the courts. Where there is genuine doubt as to the criminal lawfulness of activity and where parties with a bona fide and genuine interest in carrying on the activity concerned seek the assistance of the court in allowing them to know whether they can safely carry out the activity without being in criminal breach of the law, then it seems to me that the courts should be of assistance where possible. That is not to say that there may not be other factors that may lean against the grant of declarations in such cases. Such considerations are, however, in my view, ones to be afforded significant weight.

5.13 While a declaration designed to clarify the scope of criminal law will not normally be made during the course of criminal proceedings (see *Imperial Tobacco Ltd v. A.G.* [1981] A.C. 718) the situation is different if such a declaration is sought before prosecution (see *Thames Launches Ltd. v. Trinity House Corpn.* (Deptford Strand) [1961] Ch. 197). It seems to me that the argument in favour of clarifying the position is even stronger where a party has a real and *bona fide* interest in avoiding action which might turn out to be criminal.

5.14 On the facts of this case neither Omega, nor any charitable organisation holding a licence who wishes to avail of Omega's services, should be put at the risk of having to carry out their activities in a way which they believe to be lawful but subject to the possibility that a criminal prosecution may be brought on foot of which they may be found guilty, when the court can readily and legitimately clarify the issue in advance. In those circumstances if, contrary to the position of the party concerned, the activity is declared to be unlawful, then they can refrain from doing it. If it is declared to be lawful, then it can be carried out without risk.

5.15 On that basis, I did not consider the question of the lawfulness of the carrying out of a licensed lottery through the agency of a large-scale commercial operator or the lawfulness of pongo machines as described in the evidence to be moot.

5.16 It is next necessary to turn to the reasons which underlay my earlier decision to make declarations in respect of those two matters in the manner set out in the earlier ruling.

6. The Reasons for the Earlier Ruling

6.1 Before going on to consider the provisions of the 1956 Act itself, I should briefly record some of the evidence given before me by representatives of a number of charities operating in the Cork area. Witnesses from such charitable organisations were called on both sides. I do not doubt the genuineness of the opinions expressed. On the side of Omega, representatives were called from some charities who perceived that being able to avail of the facilities on offer from Omega would enable the charity concerned to profit from bingo sessions in circumstances where the charity did not have the ability to run bingo sessions itself.

6.2 On behalf of the State, representatives were called from a number of organisations (principally sporting organisations) who already run significant periodic bingo sessions. Those bodies were concerned that the operation of a large commercial scale bingo hall would have a significant adverse effect on their own operations.

6.3 It seems reasonable to conclude that organisations which have their own premises (and sporting organisations would be a typical example) find it relatively easy to organise periodic bingo sessions using the voluntary labour of members of the organisation concerned. It follows that those organisations are likely to be able to operate at quite a low level of overhead such that much of the gross profit (being the difference between the cost of playing bingo and the prizes offered) will go to benefit the activities of the organisation concerned rather than in the expense of running bingo. It is easy to see why such organisations regard bingo as a good way of raising funds and it is equally easy to see how they may legitimately be concerned that the operation of Omega might significantly interfere with the extent to which they can raise funds by means of bingo.

6.4 On the other hand, it seemed to me that the organisations who supported Omega were typically those which would have found it difficult to organise their own bingo sessions, whether by reason of not having adequate premises or a sufficient level of volunteer support on a regular basis. The concerns of those organisations are equally understandable. They could not, without renting premises or employing staff, run their own bingo. They would have to take a significant financial risk if they were to incur the costs of setting up their own bingo operation. What is on offer from Omega provides them with ready potential access to an additional income stream without any financial risk.

6.5 I merely record that evidence and my views on it because of the obvious strength with which organisations on both sides held their feelings on the matter. However, it did not seem to me that the points made on either side were really of any direct relevance to the question which I had to decide. Either the activities of Omega, at the level of principle, are lawful or they are not. If they are lawful then the fact that those activities may have an adverse effect on one set of admirable Cork charities is not a factor that I can properly take into account. However, it is also the case that, if the activities of Omega are unlawful, the fact that those activities might benefit equally admirable Cork charities, is not of any relevance either. The lawfulness or otherwise of the activities depend on the relevant legislation.

6.6 Before leaving the position of those charities who oppose Omega I should make one final observation. Charities are not public bodies. They are entitled, within the law, to promote their own interests. They may seek to raise *bona fide* objection to the grant of lottery licences. They may otherwise seek to lawfully persuade others not to do business with Omega (although not to the point of inducing breach of contact). However, the same breadth of action is not available to public officials and, in particular, An Garda Síochána. The legitimate role of public officials, in their official capacity, is defined by the nature of the office held, the applicable law and any relevant regulation. While it is entirely within the legitimate scope of the role of An Garda Síochána to object, on Norris grounds, to licences or to investigate potential breaches of the law (provided that such activities are *bona fide* undertaken) it is no part of the function of An Garda Síochána to participate in general opposition to the activities of entities such as Omega or to support the opposition of other bodies such as relevant charities even though that opposition may be an entirely legitimate course of action for the charities concerned to engage in. The role of An Garda Síochána is confined to that conferred by statute or the enforcement of the law generally. In that context, it is important that no wrong impression is given. I accept the evidence given by Nicholas Condon of St. Augustine's Global Foundation to the effect that Superintendent Barry conveyed the impression to him that he was intent on opposing Omega. St. Augustine's Global Foundation was an applicant for a lottery licence. There could be no objection to Superintendent Barry contacting its representatives given his statutory role as a notice party to the application in question. It is important, however, that any such contact is conducted in a way which does not create the reasonable impression of downright opposition rather than legitimate enquiries in furtherance of a statutory role.

6.7 However, to return to the application of the 1956 Act to Omega's business, it seemed to me that the key point is the recognition in s. 28(2)(e) of the 1956 Act that it is permissible for a charitable organisation to utilise up to 40% of the gross proceeds for "the expenses of promotion, including commission". That provision expressly contemplates that third parties can be paid a commission in respect of the sale of lottery tickets. The total cost of commission and promotion cannot exceed 40% of the gross sales. Where, as here, an organisation such as Omega provides a one stop shop in respect of both promotion and commission then it follows that the payment of 40% of the gross sales to Omega is within the terms of the Act provided that no other monies are expended on promotion or commission.

6.8 It is next appropriate to turn to the question of bingo. As long ago as 1916 a divisional High Court, in *Barrett v. Flynn* [1916] 2 I.R. 1, had to consider a prosecution for playing bingo then known as "house". At the relevant time all lotteries were unlawful and if, therefore, "house" was a lottery then it was unlawful. Cherry L.C.J. held the following:-

> "All that the player does is to cross out a number on his card when that number is called by the person who draws the numbers from the urn or box. This requires no skill whatsoever. It is only a record of the drawing; and the playing of the so-called game really consists in the drawing of the numbers from the urn. In my opinion therefore it is not a game at all, in the ordinary signification of the term, but a lottery, and, as such, forbidden under the Lottery Acts."

6.9 The same judge went on to comment as follows:-

> "The so-called game of house appears to me to be nothing but a lottery, in which the drawing of the numbers is a little protracted, so as keep up the excitement. If each of the players had on his card only one number instead of fifteen, and merely claimed his number when that number was called, no one could argue that the game was not a lottery. It seems to me to make no difference that there are fifteen numbers on the card instead of one and that five in a row must be called before the prize is won."

6.10 A suggestion made by the defendant in *Bolger v. Doherty* (Unreported, High Court, Davitt P., 16th December, 1963) that the definition of lottery in s. 2 of the 1956 Act had changed things was rejected.

6.11 All will be familiar with the simple raffle or sweepstake where parties buy a ticket and the winning ticket or tickets are drawn. In

its simplest form a raffle involves two counterparts, one of which is kept by a ticket purchaser as evidence of his purchase while the other goes "into the hat". The winning number is drawn and called and the holder of the relevant counterpart claims his prize. As pointed out in *Barrett v. Flynn*, bingo is simply a more elaborate form of lottery than the simple raffle to which I have referred. However, that analysis seems to me to be relevant to this case. It might well be the case that a charitable organisation, conducting a straightforward raffle or sweepstake, might pay a commission to the sellers of raffle tickets. Provided that the total cost of such commission together with any other costs of promotion did not exceed 40% of the sale price of the tickets concerned, then there would be nothing unlawful in such an operation. What is there is stop a person engaging in the trade of being a raffle ticket seller in those circumstances? Given that the 1956 Act contemplates that the ticket seller is capable of being paid a commission, why would a raffle be unlawful because some or all of the ticket sellers happened to be engaged in ticket selling as a way of life rather than on a one-off basis?

6.12 If, for example, a series of licensed lotteries were to take place for the benefit of a range of charities, how can it be said that those raffles would become unlawful because the charities chose to pay commission to the same single large ticket seller rather than paying the same total commission to a range of different individuals who might assist in sales for some but not all of the charities concerned (for example, a local shop which might sell tickets in return for an appropriate commission on those of the tickets which were sold through the shop concerned)? It seems to me that if it had been the intention of the Oireachtas to control the way in which commission could be paid to individuals or companies beyond imposing the maximum of 40% to which reference has been made, then the Oireachtas could easily have done so. There is nothing, however, in the 1956 Act which suggests that there is any limitation on the way in which a licensed charitable organisation can expend the permitted 40% for promotion and commission. If a relevant charitable organisation could pay 1% of the total value of tickets sold to each of 40 separate individuals, where is there anything in the 1956 Act to suggest that the same charity could not equally pay 40% to one individual? If the Oireachtas had intended that there be a limit on the amount of commission that could be paid to one individual then it could easily have so provided.

6.13 Likewise, I see no reason why the position should be any different in respect of bingo as opposed to an individual raffle. It is, of course, easier to envisage commission being paid separately to different agents in the context of the sale of raffle tickets (which can, of course, occur across a whole range of locations) although it is possible to envisage bingo "tickets" being sold in advance by various agents. However, the principle remains the same. There is nothing in the legislation to prevent the entire commission being paid to a single commission agent provided that the commission and promotion costs remains within the statutorily permitted limit.

6.14 There was some suggestion in the evidence that it appeared that it was likely, on the occasion when Omega opened its bingo hall and when it was raided by An Garda Síochána, that the charity involved at that time would not have received any profit. In the context of that evidence it is important to analyse what the legislation says about the financial aspects of a licensed lottery. The legislation places a limit on the total value of periodic prize money. The legislation also limits the amount of commission and promotional costs in the manner already described. However, that regime does not guarantee a profit for a charity. Again to take an example stemming from the simple raffle, the promoting charity might offer prizes of €10,000 and allow a 30% commission to ticket sellers. If the other costs of promotion came to €500 then it is clear that €15,000 worth of tickets would need to be sold in order for the raffle to break even (€15,000 less commission at 30% or €4,500 less other promotional costs of €500 equals €10,000 or the equivalent for the prize money). If things did not go well and only €12,000 worth of tickets were sold then the charity would make a loss. There is nothing in the legislation which requires the charity to make a profit. The profit will depend on the success of the lottery in attracting purchasers.

6.15 There was evidence which suggested that, as a rule of thumb, it was, at least in the case of bingo, necessary to offer something of the order of 50% of the anticipated receipts as prize money in order to attract players. In such an eventuality it might then be expected that the profit to the charity would be 10% on the assumption that a 40% commission was paid to Omega. However, that calculation depends on the sales being as anticipated. There is nothing in the legislation which seems to me to require that a raffle, bingo or any other lottery needs to be structured in such a way that the charity must make a profit irrespective of how badly sales go. It is difficult to envisage how such an arrangement could be put in place in any event. The limits which the Oireachtas has chosen to place on the financial aspects of the lottery are that the prize money cannot exceed the stated limits and the promotional and commission costs cannot exceed 40%. It does not seem to me that there are any other limitations which can be implied into the legislation.

6.16 If it is considered that the operation of large scale commercial bingo halls acting as agents for licensed charities has undesirable features, then it is a matter for the Oireachtas to consider what the appropriate policy response should be and to enact amending legislation accordingly. The current legislation does not, in my view, prevent an otherwise lawful lottery being conducted through an agency agreement with a commission agent who charges 40% of the total price no matter what the scale of the business of that agent may be. It was for those reasons that I indicated that I was prepared to make the declaration set out at 2(A) of the earlier ruling.

6.17 So far as the pongo machines are concerned, the schedule to that ruling sets out the manner in which such machines operate on the basis of the evidence tendered at the trial. As is clear from that description the only function which the placing of a coin in the slot on the table in question plays is to indicate that the person sitting at that table wishes to play the game concerned. What appears to occur is that, in the intervals between the main bingo games, customers are afforded the opportunity to play additional games by placing a coin in the slot to which reference has been made. In substance, the placing of the coin in the slot does nothing different than the giving of money to a employee of the bingo hall in return for some type of ticket or token to indicate that the person is participating in the game. It is true that there is a connection between each table and a central computer which allows the person presiding over the game to identify which tables are participating. It is also true that the numbers, rather than being drawn from a drum as in the traditional model, are generated by a separate computer which operates as a random number generator. Each table has permanently printed on it a bingo card. The effect of placing the coin in the slot is, therefore, to indicate that the permanent card on the table in question is in play for the game in question. If, in accordance with the ordinary way in which bingo operates, the numbers called out lead to that card filling first, then the person concerned wins by claiming to have filled in the ordinary way. The determination of the winner is by a player recording the numbers that are called out by the person in charge and claiming to have won in the same way as one does in any game of bingo.

6.18 The statutory definition of a gaming machine is to be found in s. 43(2) of the Finance Act 1975, and is as follows:-

> "(a) A machine is a gaming machine if—
>
> (i) it is constructed or adapted for gaming, and
>
> (ii) the player pays to play the machine whether by the insertion of a coin or token or in some other way, and

(iii) the outcome of the game is determined by the action of the machine, whether or not provision is made for manipulation of the machine by the player.

[…]"

6.19 It did not seem to me that that definition covers the pongo machine as described in the evidence. The "action" of the machine does not determine the outcome of the game. While both the random number generator used to provide numbers to the operator and the information that a table is "in play" are both conveyed automatically to the operator, the random number generator itself is not constructed or adapted for gaming and is not connected to the table where the slot is to be found. For those reasons I was also satisfied to make the declaration set out at 2(B) of the earlier ruling. I now turn to the question of whether Omega may be entitled to any other declaratory relief.

7. Other declaratory relief

7.1 As set out in the annexed ruling, I have already granted Omega declarations to the effect that it is not unlawful for a s. 28 licence holder to enter into an agency agreement nor does the fact that an agent runs a large number of lotteries as such an agent render an otherwise lawful lottery illegal or the licence itself unlawful. Any agency relationship will, of course, remain subject to the provisions of the 1956 Act, such as the requirement that no more than 40% of the ticket price constitutes promotional fees and expenses, including any agency commission. Furthermore, while the scale of an agent's operation does not, of itself, render a lottery illegal, this is not to trammel on the jurisdiction of the District Court to take into account the number of periodical lotteries already in operation in the locality in the context of a s. 31 hearing. Finally, I have granted Omega a declaration that a "pongo machine" as described in the schedule to the annexed ruling is not a gaming machine for the purposes of s. 43 of the Finance Act 1975.

7.2 It is not generally the function of this court to make declarations about the criminal lawfulness of any activity. However, although it is well known that ignorance of the law excuses nobody (*ignorantia juris neminem excusat*) it is less well known that a corollary of this maxim is that an individual should have access to and be able to determine the laws by which he is governed, so as to be able lawfully to order his life in society. Accordingly, it is with circumspection that this court must strive to ensure that any declaration serves that limited purpose. On the basis that the court cannot presume that a company or individual will conduct themselves entirely in accordance with the law, the court must refrain from giving general sanction to the conduct of a company or individual. Instead, it is the proper function of the court, in cases where an ambiguity exists as to the proper interpretation of a (potentially) penal statute, to describe, insofar as it is appropriate and necessary so to do, the type and nature of conduct which is not unlawful when viewed in the context of the relevant legislation. It seemed to me that the two declarations already given came within those parameters.

7.3 However, there can be little doubt that some of the relief sought by Omega was overbroad or inappropriate. Some of the injunctions sought would preclude state authorities from carrying out legitimate investigations into or oversight of licensed activity. It cannot be assumed that every action of Omega will necessarily be lawful. An injunction requiring the State to operate "within the law" is of little assistance when the very dispute between the parties concerns what is lawful and what is not. In addition, the specific orders sought relating to the Mercy Hospital licence seem to have been somewhat overtaken by events.

7.4 However, there were certain other issues concerning the lawfulness or otherwise of aspects of the Omega operation, which were touched on in the evidence and the argument, on which I should comment. First, there is the question of the location in which a lottery in the form of bingo is actually carried on by reference to the District Court which grants the relevant licence. This issue was already the subject of judicial consideration in *Norris.* In the course of his judgment in *Norris* Henchy J. said the following:-

> "The Act (s. 28(2)) describes five conditions which must pertain to each licence. None of those conditions prevent utilising the licence outside of the locality in which it was issued. Should such a provision be intended in the scheme of the Act, you would expect it to be specified as a condition. But there is no reference to it anywhere in the Act. The Act places no limitation at all on the operation of the lottery save in as much as s. 34 restrains operating the lottery outside of the State.
>
> From all of that, it appears to me that there is no ban on a licensee to carry on a lottery anywhere in the State, either within or without the district in which it was issued. The licence is a licence to promote a lottery, and the Act only restrains the promotion of lotteries." (as translated)

Griffin J. agreed stating that:-

> "The plaintiff's argument advanced the claim that a lottery of that sort may not be conducted or carried on save for within the district of the District Court in which the permit was granted, but were that the intention of the Oireachtas, you would expect that to be specified in Part IV of the Act and in particular in section 28." (as translated)

Griffin J. went on to indicate that it was, in his view, lawful to conduct and to carry on a lottery on foot of a licence issued in the District Court under s. 28 outside the district of the District Court in which the relevant licence was issued.

7.5 There was an argument to the effect that it was difficult to see how the statutory regime for objection on the basis of there being already too many lotteries "in the locality" could be properly applied if the lottery, once licensed, could be carried on in any part of the country. Indeed, that argument found favour in Norris with O'Higgins C.J., who made reference both to the fact that the District Court was obliged to have regard to the number of periodical lotteries already in operation in the locality (expressing the view that the locality in question refers to a locality of which the court has knowledge – that is to say a locality within the "district" of that District Court), and also to the fact that notice is required to be given to the Superintendent of An Garda Síochána in the district in which the lottery is to be organised. O'Higgins C.J. took it to be implied from those provisions that the lottery was to be conducted in that locality.

7.6 However, O'Higgins C.J. found himself in a minority. The majority of the Supreme Court took the view that, notwithstanding those arguments, the Act did not preclude the conduct of a lottery anywhere in the State irrespective of the District Court which granted the licence. Unless and until either the Supreme Court decides to revisit that question or the Oireachtas amends the relevant legislation, that remains the law. There does not seem to me to be any proper basis for this court granting any further declarations in that regard at this stage. The law is as stated by the Supreme Court. There is no need to restate it. I am mindful of the fact that there is, potentially, an added complication that arises in the context of bingo. A simple raffle can, of course, be carried on in many locations. The charitable organisation which promotes it may be located in one location and will, therefore, be required to apply to the District Court having jurisdiction over the location at which it intends to promote the lottery. However, the tickets can be sold anywhere. Bingo is somewhat different. In its normal form it is conducted at a single location. However, be that as it may, the

judgments of the majority of the Supreme Court in *Norris* are clear. A lottery, once validly licensed, can properly be carried on at any location within the State. That finding by the majority is based on the wording of the 1956 Act and the distinction between the "promotion" and "carrying on" of a lottery as those terms are used in that Act. It does not seem to me that any proper distinction can be drawn, in that context, between a raffle and bingo. That means that a licence which permits the carrying on of bingo and which is issued by the District Court in any district within the State can be used to carry on bingo in Omega's premises in Cork.

7.7 The next issue which was touched on was a concern expressed by Superintendent Barry about one of the licences on foot of which Omega intends to operate as agent. Attention was drawn to the fact that the application for the licence in question made reference to the conduct of raffles. Two points seem to me to need to be made in that context. The first is that the 1956 Act does require a party applying for a licence to specify the type of lottery intended to be carried on. It does seem to me that the 1956 Act, therefore, contemplates that there may be different forms of lottery and that it is necessary for the District Judge to be told which form of lottery is intended to be carried on. In that context it does seem to me that there is a difference between a simple raffle and bingo. Both are lotteries. However, they are not the same thing. The references in those authorities, which analyse bingo, to a "raffle" seem to me to be references which describe bingo as being more complicated than a simple raffle and thus, are consistent with the view that there is a difference between bingo on the one hand and a simple raffle on the other hand even though both are lotteries in the sense in which that term is used in the 1956 Act.

7.8 However, the second, and perhaps the most important, point is that the licence in the case in question did not seek to restrict the licensee to conducting raffles only. The licence was that of the Mercy Hospital Foundation and simply permits the "promotion of periodical lotteries" without qualification as to the type of lottery authorised. In that context it is perhaps of interest to note that a separate licence produced in evidence, which emanated from the Dublin Metropolitan District, did contain an express provision as to the type of lottery which could be carried on (the relevant licence is described as being one "for the promotion of periodic lotteries, to wit occasional raffles…"). I express no view at this stage as to whether, and if so in what circumstances, it is appropriate for a District Judge, in granting a licence under the 1956 Act, to circumscribe the terms of the lotteries licensed by reference to a category such as raffle, bingo or any other appropriate subset of the totality of lotteries. That is a matter to be decided, at least at first instance, by the relevant District Judge. However, the important point to make at this stage is that a licence once issued is *prima facie* valid and is *prima facie* to be considered solely on the basis of its terms. Whatever may have been the nature of the application made to the District Judge concerned, if a relevant licence does not purport to limit the types of lotteries which can be carried on, then no such limitation can be implied and any form of lottery can validly be carried on foot of that licence.

7.9 If any interested party (including An Garda Síochána) feel that there is something wrong with a licence as to its form, then the appropriate course of action to adopt is either to seek judicial review of the licence or to seek, if that be legally possible, to have the learned District Judge concerned revisit the terms of the licence. However, as long as a licence remains in place then it binds all parties (and that includes An Garda Síochána). It is not open, certainly insofar as the potential exercise of criminal jurisdiction is concerned, for An Garda Síochána to seek to go behind a licence valid on its face and suggest that a lottery conducted in accordance with the terms of the licence, as those terms appear on its face, is unlawful. Applying that principle to the facts of this case, it does not seem to me that it was ever legitimately open to Superintendent Barry to suggest that there was anything unlawful in conducting a bingo session on foot of a licence which was non-specific as to the type of lottery to be carried on even if the application for the licence in question did specify a raffle as the means of lottery intended. If there are concerns that the licence in the case in question (or other similar licences) do not match the relevant application, then the appropriate course of action to adopt is to attempt to have the licence corrected by an appropriate legal process rather than to illegitimately suggest that a lottery properly conducted in accordance with the terms appearing on the face of the licence in question is in some way unlawful. However, it does not seem to me that there is any particular form of declaration that should be granted under this heading. I, therefore, confine myself to indicating that I do not consider that it can legitimately be said that a lottery is being conducted in an unlawful fashion by reference to the content of the application for the lottery concerned where the licence actually issued by the District Court does not preclude conduct in the manner under scrutiny.

7.10 In those circumstances, I have come to the view that I should confine myself to the two declarations already made. It is next, therefore, necessary to turn to the question of misfeasance in public office.

8. Misfeasance in Public Office

8.1 As indicated earlier, there was ultimately consensus between counsel as to the proper test to be applied. In *Kennedy* Kearns J., having comprehensively reviewed the relevant law, approved of a passage from Butterworths – *The Law of Tort* (2002) (Grubb Ed.) at para. 17.54 which included the following statement:-

> "Finally, reckless indifference as to the illegality and its probable consequences is sufficient to ground the tort in its second form. This recklessness must, however, be subjective. It follows that the officer must be shown not to have had an honest belief that he was acting lawfully, meaning that he either knew his act was unlawful or that he wilfully disregarded the risk that it was."

8.2 In the Supreme Court in *Kennedy* the judgment of the court was delivered by Geoghegan J.. At pp. 262 – 263, he held as follows:-

> "I do not think that there is any Irish authority which prevents the element of subjective recklessness being introduced into the ingredients of the tort of misfeasance in public office (a tort which has not received much judicial consideration in this jurisdiction at any rate). I would, therefore, favour acceptance in this jurisdiction of that concept in the context in which it is introduced by Clarke J. and, ultimately, in the House of Lords by Lord Steyn."

8.3 It follows that the test as described by Kearns J. is now the appropriate standard to be applied and it seems clear, therefore, that the law in this jurisdiction now recognises that a public official can be guilty of the tort of misfeasance of public office in circumstances where that official is subjectively reckless as to whether his actions are lawful. It is as against that standard that the actions of Superintendent Barry need to be judged. In that context it is necessary to turn to the evidence which is relied on by Omega as suggesting that the court should conclude that Superintendent Barry was subjectively reckless as to the lawfulness of his activity. The activity concerned was, of course, to swear an Information leading to the grant by the District Court of a warrant to search and seize from the premises of Omega and to subsequently carry out the search and seizure authorised by the warrant in question. In addition, it was suggested that Superintendent Barry had set out to prevent Omega being able to carry out its business and had sought to encourage third parties to object to the grant of licences to charitable organisations (under the provisions of the 1956 Act), where it was anticipated that the relevant charitable organisation might enter into an agency agreement with Omega.

8.4 In the course of written submissions filed, after the evidence had been completed, Omega argued that the following matters

provided evidence from which the court should infer reckless indifference, if not deliberate action, on the part of Superintendent Barry:-

It is said that Superintendent Barry had:–

> • "Refused to meet or discuss the plaintiff's proposals until August, 2011.
>
> • Assumed (incorrectly) that the application for the licence would be in the plaintiff's name (see the first named defendant's letter to plaintiff's solicitor of 20th July, 2011).
>
> • Indicated his intention to make 'certain submissions' if application for various lottery licences in respect of four separate charities were to be promoted 'by Rock Bingo' (see letters dated 23rd August, 2011).
>
> • Indicated his intention to object to the lottery licences if he as not allowed the scope to cross examine applicants (see the first named defendant's letter to plaintiff's solicitor of 25th August, 2011).
>
> • Indicated that he was not satisfied that the Gaming and Lotteries Act 1956, was being complied with (see the first named defendant's letter to plaintiff's solicitor of 16th September, 2011).
>
> • Failed, despite repeated requests to specify/explain how he asserts that the plaintiff is acting unlawfully, or his grounds of objection (see the plaintiff's solicitor's letter to the first named defendant of 15th September, and letters dated 4th November, 2011, 8th November, 2011, 9th November, 2011 and 11th November, 2011).
>
> • Written at least one letter to, and telephoned various charities in an effort to dissuade them from entering into an agreement with the plaintiffs.
>
> • Refused to accept the plaintiff's offer/invitation to enter the premises and inspect the plaintiff's books and records without a warrant (see letter of 27th October, 2011 and 1st November, 2011) but nonetheless sought a search warrant.
>
> • Ignored all correspondence [w]herein the plaintiff undertook to strictly comply with and abide by the law (see the plaintiff's solicitor letter to the first named defendant of 24th October, 2011, 28th October, 2011 and 1st November, 2011).
>
> • Ignored the plaintiff's assurances regarding the meaning of 'lottery' contained in letters dated 28th October, 2011 and 1st November, 2011.
>
> • Ignored the plaintiff's assurances that there were no gaming machines upon the premises (see letter dated 1st November, 2011).
>
> • Refused to contemplate and/or consider the offer of the plaintiff's legal advice.
>
> • [Sworn] an Information before the District Court based upon an incorrect understanding of the law, and [made] incorrect assertion as to the legality of pongo tables.
>
> • Obtained a search warrant and executed it in an excessive and disproportionate manner.
>
> • [Taken] photographs of pongo tables for the purposes of an application for a warrant but never actually operated the pong tables." (*sic*)

That list follows closely a similar list included by Omega in a reply to a request for particulars but is a little different, doubtless to reflect the evidence actually given.

8.5 It is necessary to assess those allegations on the evidence. It is correct that Superintendent Barry declined to meet to discuss Omega's proposals until August, 2011 despite earlier requests. It did not, however, seem to me that any great weight should be attached to that fact. As pointed out in the second bullet point, Superintendent Barry's evidence was that he had assumed (although incorrectly) that there would be applications for licences in Omega's name in due course. In those circumstances Superintendent Barry's evidence to the effect that he wanted to wait until there was an actual application before the court seems not unreasonable even if he may have been mistaken as to the identity of the applicant.

8.6 The next series of bullet points concern the position adopted by Superintendent Barry in respect of applications which were pending before the District Court in relation to lottery licences sought by charitable organisations where it was believed that the charitable organisation concerned would enter into an agency agreement with Omega. Superintendent Barry's evidence was that, while he had sought advice from the State Solicitor's service, instead of an answer, he "got a barrister", who was instructed to appear before the District Court. Superintendent Barry is, of course, entitled to be heard on any application for a lottery licence in his district. In fact, one of the relevant licence applications went ahead and was refused by the learned District Judge. An appeal against that refusal was pending at the time of the hearing before me although it may, by now, have been determined. As I understand it, the basis for the refusal of the learned District Judge was founded in the number of periodic lotteries in the locality – a matter entirely within the jurisdiction of the learned District Judge. Given that there was at least sufficient substance in the opposition to the licences in question to persuade the learned District Judge to refuse same (and independent of whatever the outcome of any appeal might be), it is difficult to see how Superintendent Barry's opposition could be regarded as significant evidence of improper motive. In that context it is worth noting that Omega places some reliance on the fact that other large scale bingo halls appear to operate in different parts of the country without any opposition from An Garda Síochána. Superintendent Barry's explanation was that, as far as he understood, in those areas no other charities had expressed opposition so that it seemed to him unlikely that the relevant Superintendents in the districts concerned gave any detailed consideration to the matter. It seems to me that it is likely that that is the case. Where an application is received from an apparently reputable body and where there seems to be no local opposition, then it may well be that no great consideration is likely to be given to the technicalities of its lawfulness or otherwise. The situation might be very different if a general view (perhaps based on advice) had been taken by An Garda Síochána that there was nothing unlawful about Omega's method of operation (or that of other similar organisations), but Superintendent Barry had gone against the tide. In those circumstances, and in the absence of some good reason why it might have been reasonable for Superintendent Barry to go against the tide, his position might afford at least evidence which could go towards a finding of misfeasance in public office. However, it does not seem to me that the evidence in this case provides any such consideration.

8.7 The next item relied on is the suggestion that Superintendent Barry contacted various charities in an effort to dissuade them from entering into an agreement with Omega. I am not sure that the evidence really substantiated that allegation. I accept Superintendent Barry's evidence that the initial contact with him on this subject came from charities concerned about Omega. Insofar as he contacted applicants for licences I am satisfied that same arose out of a *bona fide* attempt to enquire into matters which appeared to Superintendent Barry to be relevant to his role even if, on the basis of the findings in this judgment, some of his views as to his role were mistaken. There is no doubt but that Superintendent Barry entertained concerns as to whether the conduct of a licensed lottery through Omega was lawful. For the reasons set out earlier in this judgment, I have come to the view that Superintendent Barry's concerns were misplaced. However, that is not the issue. In the light of the fact that it has now been determined by this court that there is nothing unlawful in the conduct of a licensed bingo type lottery through the auspices of a commercial agent such as Omega (provided the other provisions of the 1956 Act are complied with) then it would, from the time of the earlier ruling, certainly amount to evidence of misfeasance of public office if any public official were to seek to interfere improperly with the business of Omega by means of any suggestion that its activities were unlawful (in the absence of there being some separate and legitimate basis for suggesting it to be unlawful) or should be opposed by objecting to the grant of licences other than on the limited grounds identified by the Supreme Court in Norris. However, up to the time of the earlier ruling the matter was, in my view, one of some legitimate doubt. It follows that no adverse inference concerning reckless indifference to the legality of his actions can be drawn against Superintendent Barry under this heading.

8.8 In that context, it is also necessary to refer to the evidence concerning the tendering by Omega to Superintendent Barry of legal advice which Omega had to the effect that its planned activities would be lawful. Witnesses on behalf of Omega suggested that Superintendent Barry was offered that advice in the sense of being offered a copy of the written advice concerned. Superintendent Barry indicated that his recollection was that mention was made of the advice but that a copy was not offered. The parties may well have been at cross-purposes. However, in any event Superintendent Barry indicated that it was his view that he would need to seek his own advice. That seems to me to be an entirely reasonable position. While it may be that a senior member of An Garda Síochána, faced with a contention on the part of a third party that activity under investigation is lawful, might consider any written advices given to that third party, it would seem likely that, in any event, independent advice would be required in any case of doubt. I am not sure, again, that any adverse inference can be drawn against Superintendent Barry arising out of the fact that he sought to take his own advice on the matter. Things might be very different if there was evidence that a credible basis was put forward to a senior officer of An Garda Síochána to the effect that a particular activity was lawful and where the officer concerned proceeded to treat the activity as unlawful without seeking his own advice or without having any other basis for questioning the advice.

8.9 Insofar as it is suggested that Superintendent Barry did not accept Omega's undertaking in correspondence to strictly comply with the law, it seems to me that that correspondence somewhat begs the question for the issue was as to the proper interpretation of the law. Like considerations apply to the suggestion that Superintendent Barry ignored Omega's assurances regarding the meaning of "lottery".

8.10 The remaining allegations concern the application for the relevant warrant and the manner of its execution. So far as the application is concerned a number of aspects of the complaint made by Omega can, in my view, easily be dealt with. It is pointed out on behalf of Omega that the application wrongly asserts that the so called pongo machines are slot machines as prohibited by s. 10 of the 1956 Act. That statement, sworn to by Superintendent Barry in the Information to ground the application for the relevant warrant, is undoubtedly incorrect. Section 10 had, at the relevant time, long since been repealed. The analogous (but by no means identical) law now in force is, of course, s. 43 of the Finance Act 1975, which is not in the same terms as s. 10 of the 1956 Act. However, Superintendent Barry drew attention to the fact that the then current edition of the "Garda Guide" (Ward, Joseph, The *Garda Síochána Guide* (7th Ed. Blackhall Publishing 2008)) incorrectly specified s. 10 as remaining in force. It has to be said that the Garda Guide is a usually reliable source of legal information for members of An Garda Síochána. That Superintendent Barry got it wrong cannot be doubted. That he was led into error in getting it wrong by the Garda Guide seems to me to be clear on the evidence. In those circumstances no adverse inference can be drawn from that mistake so far as Superintendent Barry's intentions are concerned. There was also a question concerning an aspect of the sworn Information on which the warrant was applied for concerning an allegation that there may have been illegal advertising. I am not, at the end of the day, satisfied that much turns on that question. It is for another occasion to determine whether the 1956 Act can be said to prevent internet advertising. Superintendent Barry did draw attention, in the relevant sworn Information, to the fact that the 1956 Act was enacted prior to the internet.

8.11 However, the most serious aspect of the warrant issue concerns the stated belief, sworn to by Superintendent Barry in the relevant information, that the holding of the anticipated Omega bingo sessions would constitute an offence either because of the large scale commercial nature of the Omega operation or because of questions about the licence to the Mercy Hospital. On the evidence, Superintendent Barry had sought, but had not yet received, advice on whether the operation of licensed bingo sessions by a commercial bingo agent was lawful. On the facts, therefore, Superintendent Barry did not have advice one way or the other as to whether the relevant bingo sessions could be said to be unlawful simply by virtue of the commercial scale of Omega's operation. His statement in the sworn Information in question that the conduct of bingo by Omega "would constitute an offence" needs to be seen in that light. If the test were one of objective recklessness rather than subjective recklessness, I would be inclined to the view that it would be necessary to find against Superintendent Barry. While Superintendent Barry's view that it was possible to determine what form of lottery was licensed by reference to the relevant application is, for the reasons already set out, incorrect, I am not satisfied that Superintendent Barry's incorrect view in this regard could be described as (subjectively) reckless.

8.12 However, Superintendent Barry had been given a credible basis for the suggestion that there was nothing unlawful in the conduct of bingo sessions through a large scale commercial agent. As it happens, I have come to the conclusion that the information in that regard given to Superintendent Barry on behalf of Omega was correct. While it was reasonable for Superintendent Barry to seek his own advice, he had not yet obtained the advice in question. If the test were that of a reasonable man it might well be necessary to conclude that, in those circumstances, it was unreasonable for Superintendent Barry to swear an Information suggesting that the activities of Omega were likely to be unlawful on the basis of an issue on which he had sought, but not yet obtained, advice and where there was a credible legal basis for the alternative view. However, the test is not objective recklessness but subjective recklessness. On all the evidence I was not satisfied that the actions of Superintendent Barry meet that test.

8.13 I took a similar view in relation to the allegations contained in Omega's written submissions which suggested that the manner of the execution of the warrant concerned was excessive and disproportionate. In substance, Omega's case was that Superintendent Barry had, in advance, an offer to come and look at their method of operation. In those circumstances it was suggested that a warrant was unnecessary. Second, it was suggested that the large scale seizure of bingo materials which occurred was unnecessary and disproportionate in that samples or examples could have been seized which would have provided a sufficient evidential basis for any prosecution that might be contemplated. Again, if the test were one of objective recklessness there might well have been a basis on which it would have been necessary to find against Superintendent Barry. His explanation for not availing of the offer to come and look at Omega's operation was that evidence obtained on foot of a warrant was stronger than evidence voluntarily obtained. I have to confess that I find his explanation difficult to understand. Admissions made by an accused person are admissible in evidence.

Documents or materials obtained by consent are likewise admissible. It is difficult to see how the position of An Garda Síochána in mounting a prosecution was strengthened by the execution of a warrant rather than by availing of the opportunity to attend at the premises, ask legitimate questions and record the answers, take away samples and the like. Indeed, there was much sense in the submission made on behalf of Omega that the sensible and reasonable course of action to adopt might well have been to avail of Omega's offer but retain the prospect of seeking further evidence on foot of a warrant if anything unsatisfactory arose in the manner in which Omega allowed voluntary access to its business and materials.

8.14 So far as the seizure of a large amount of materials is concerned, Superintendent Barry's explanation was that the District Court retains a jurisdiction to destroy materials used for illegal gaming. In those circumstances it was suggested that the purpose of the search and seizure was not simply to obtain evidence but also to obtain materials which might properly be destroyed if found to have been used illegally. There are a range of legal issues which might arise as to the rights or wrongs of Superintendent Barry's explanation under that heading. However, I do not find it necessary to determine those questions in the context of these proceedings. Suffice it to say that I did not find the explanation to be such as would justify an inference that Superintendent Barry did not genuinely hold the view that he was legally entitled to execute the warrant in the manner in which he did.

8.15 In all those circumstances I was not satisfied that the evidence supported a finding that Superintendent Barry, viewed subjectively, was reckless as to whether his activities were lawful. It is also necessary to take into account, in that regard, that the warrant in question was issued by the District Court. There can, of course, be cases, thankfully rare, where it is suggested that evidence given to the District Court in support of an application for a warrant or submissions made by a garda seeking such a warrant, were knowingly false so that the learned District Judge concerned was misled into granting a warrant which would not otherwise properly have been granted. If, for example, the learned District Judge had been told that there was an anticipated breach of s. 10 of the 1956 Act in circumstances where the applicant member of An Garda Síochána actually knew that that section was no longer in force, then very different considerations might apply. However, it does seem to me to be of some relevance to take into account the fact that the warrant was sought from a judge and granted by that judge. The issues on which Omega disputes the validity of the application are, in the main, legal issues. The learned District Judge was satisfied to grant the warrant. In addition, Superintendent Barry, as pointed out, drew the District Judge's attention to the fact that the 1956 Act was enacted before the advent of the internet. He also produced relevant correspondence from Omega's solicitors to the District Court Judge. Some weight needs to be attached to those disclosures. However, that weight is lessened by the assertion in the sworn Information that Omega's activities "would constitute an offence".

8.16 Before leaving the question of misfeasance in public office, it does seem to me to be important to record one matter. Subsequent to the delivery of the earlier ruling counsel on behalf of Omega sought to have the case mentioned before me because of what was said to be anticipated further action threatened by An Garda Síochána. As I indicated on the occasion in question it seemed to me that it would be inappropriate for the court to take any action arising out of that apprehension outside of a formal application. Whether such an application will be brought is unknown to me at the time of writing this judgment. However, in the context of possible future action, some points need to be emphasised.

8.17 First, whatever may have been the basis for doubt as to the legal position of a commercial bingo hall operator conducting, on an agency basis, bingo sessions on behalf of licensed charitable organisations, the matter has now been clarified by this judgment and by the declarations already made. While it remains possible that the matter may come to be revisited on appeal by the Supreme Court, the current legal position is clear. There is nothing, in principle, unlawful with the carrying out of an operation such as that contemplated by Omega. Likewise, it is clear that the licence on foot of which bingo is conducted by Omega does not have to be from the Cork District Court but rather can be issued by any District Court. Furthermore, it is clear that it is not legally appropriate to seek to go behind a licence, valid on its face, either generally or in respect of its express terms, by means of seeking to invoke the criminal jurisdiction of the courts (including the seeking of warrants) where the actions of the licensee or its agent are within the terms of the licence in question. Rather, if there is doubt as to whether a licence is valid or whether the terms appearing on the licence actually issued by the District Court are correct (or, indeed, how such terms should be interpreted), then appropriate civil applications should be made to seek to have the matter rectified.

8.18 It is against a backdrop of those findings that any further action by An Garda Síochána will fall to be judged. As pointed out earlier, it is not appropriate for the court to give a carte blanche clearance to any person in respect of future activities which may be found to be unlawful for a whole range of reasons. It was for that reason that I declined to give any wider declarations in favour of Omega. It remains possible that some legitimate basis, on the facts of an individual instance, may be found for holding a legitimate concern as to whether the activities of Omega, in that instance, are lawful. However, unless and until any of the findings contained in this judgment are displaced on appeal or unless and until there is any material change in the relevant legislation, then there will not be any legitimate basis for Superintendent Barry or any other member of An Garda Síochána to suggest that the activities of Omega are unlawful simply by reason of those questions which were canvassed and found against the State in these proceedings.

8.19 Likewise, any attempt to organise or support opposition to the grant of licences under the 1956 Act to charitable organisations (other than on the basis of the two grounds identified in Norris), would be an abuse of the office of a senior member of An Garda Síochána. The law in that regard is also clear. The grounds of opposition are as established in *Norris*. If there is a *bona fide* reason for opposing the grant of a licence on one or other or both of those grounds, then the relevant Superintendent is more than entitled to mount that opposition and, indeed, in that context, to liaise with others who might have a legitimate interest in raising similar objections. However, that is the height of the legitimate entitlement of An Garda Síochána in this area. Furthermore, in the light of the comments made in this judgment and in the light of the state of knowledge which anyone being aware of this judgment must now have, it will be difficult in the future, in the absence of specific facts justifying a different conclusion, to understand why a search and seizure on foot of a warrant is required to obtain evidence (even if there was some legitimate basis for anticipating that Omega's operation on a particular instance might be unlawful for some reason not dealt with in this judgment) in circumstances where it is clear that Omega is willing to give all appropriate access to its activities on an open basis.

8.20 I should emphasise that my finding of an absence of misfeasance of public office was based on my acceptance of Superintendent Barry's word that he simply wished to have the question of the lawfulness of Omega's activities determined. Now that that lawfulness has been determined in favour of Omega, I would expect Superintendent Barry to be as good as his word and, in the absence of any separate facts leading to a reasonable apprehension of unlawfulness on some ground not canvassed and found against the State in these proceedings, to allow Omega to operate in the ordinary way in accordance with the law.

8.21 It is appropriate to end this section of the judgment with one final comment. An Garda Síochána enjoy significant legal privileges and for good reason. A member of An Garda Síochána who *bona fide* applies for and executes an apparently valid warrant, in the absence of conscious violation or subjectively reckless disregard for rights affected, is likely to be immune from civil suit. But there is another side to that coin. A citizen (or corporate entity) who *bona fide* acts on a licence, valid on its face and within its apparent terms, is entitled to assume that such action is lawful. If there are doubts about the validity of the licence, its terms or effect, then

there are appropriate civil processes available to resolve those questions. A resort to the heavy hand of the criminal process at first instance in such cases of *bona fide* difference runs a real risk of being deemed disproportionate. The entitlement to place bona fide reliance on the terms of apparently valid court orders is as much the entitlement of the citizen as An Garda Síochána. It is finally necessary to turn to the question of the claim in trespass and detinue.

9. Trespass and Detinue

9.1 The claim under this heading is that the entry by An Garda Síochána onto Omega's premises and the seizure of goods thereon amounted to trespass and detinue. In *Osborne v. the Minister for Justice & Ors* [2009] 3 I.R. 89, I held that the execution of a search warrant that was apparently valid but technically infirm and was not relied on in deliberate or conscious violation of the rights concerned, could not in itself result in an award of damages whether for breach of constitutional rights or in tort. In coming to that view I considered that the principles identified in respect of the admissibility of evidence in *the People (Attorney General) v. O'Brien* [1965] I.R. 142, applied equally in the case of a civil claim.

9.2 This case is not, of course, concerned with a technical problem with a warrant. Rather, it is said that the warrant was improperly obtained and excessively executed in a disproportionate manner. While I have made, in the course of considering the claim under misfeasance of public office, some adverse comments on the actions of Superintendent Barry, I stopped short of finding that Superintendent Barry was recklessly indifferent as to the legality of his actions. Having reached that conclusion it seems to me that it equally follows that a claim in trespass or detinue falls. On the facts in Osborne I concluded that the Sergeant who had obtained the warrant in question sought the relevant warrant *bona fide* having given an accurate account of his beliefs to the Peace Commissioner concerned and in circumstances where he was of the honest belief that it was open to him to obtain a warrant of the type sought based on that information. I was equally satisfied that the Peace Commissioner concerned bona fide believed that he was entitled to issue the warrant sought on foot of the information on oath given to him. However, for technical reasons I was satisfied that the warrant was invalid.

9.3 Having concluded, on the facts of this case, that Superintendent Barry was not recklessly indifferent as to the legality of his request for a warrant, it seems to me that it follows, by like reasoning, that Omega is not entitled to succeed in its claim for damages for trespass or detinue arising out of the circumstances in which the warrant was granted. Likewise, having concluded that Superintendent Barry was of the belief that the warrant could be executed lawfully in the manner in which it was, I am of the view that no claim in trespass or detinue can arise in respect of the execution of the warrant either. Again, for like reasons to those which I addressed in respect of misfeasance of public office, those findings are based on the situation that pertained at the time when the warrant was granted and executed. The situation has now moved on. Any actions taken after the delivery of the earlier ruling will necessarily have to be judged against the declarations given in that ruling and any actions taken after the delivery of this judgment will have to be measured against the circumstances then prevailing including the knowledge of any relevant party of the contents of this judgment.

10. Conclusions

10.1 I have already set out the reasons why I came to the view that the declarations contained in the earlier ruling were appropriate including the reasons why Omega had standing to seek those declarations. I have also set out the reasons why I considered that Superintendent Barry was not guilty of misfeasance of public office. However, it is, perhaps, equally important that attention is paid to the comments made in this judgment as to the situation which will now prevail in light of the clarification of many of the legal issues between the parties to be found in this judgement and, indeed, although to a lesser extent, in the earlier ruling.

10.2 I have also set out the reasons why I did not consider it appropriate to make any further declarations. An order for the relevant declarations has already been made. It follows that it is unnecessary to make any further orders other than to dismiss the claim for misfeasance of public office, trespass and detinue. I will hear the parties further on the question of costs.

ANNEX

Omega Ltd

v.

Superintendent Charles Barry & Ors

Ruling

1. For reasons which will be set out in a written judgment to be delivered in due course, I have come to the following conclusions in the above proceedings.

1. Omega has *locus standi* to pursue at least some of the forms of declaratory relief raised in these proceedings.

2. While further consideration will be given in the written judgment to the question of whether additional declarations should be granted, I am satisfied that Omega is, in any event, entitled to the following two declarations:-

(A) A declaration that the conduct of a lottery, which is licensed under the provisions of s. 28 of the Gaming and Lotteries Act 1956, is not unlawful by reason of the fact that the licensee enters into an agency agreement with a company such as Omega to conduct the entirety of the business of carrying on the lottery concerned provided that the agency fee paid to the company such as Omega does not exceed 40% of the value of the sales of lottery tickets (or a correspondingly lesser percentage in the event that the licensee utilises other monies on the promotion of the lottery concerned). For the avoidance of doubt, the fact that a company such as Omega may carry on a large number of such lotteries as agent does not affect the legality of the conduct of the lottery concerned. The fact that it may be intended to carry on the lottery through the agency of a company such as Omega is not, of itself, a ground for the proper refusal of a licence under the provisions of the 1956 Act.

(B) The operation of Pongo machines in the manner described in the evidence in this case, and as will be set out in a schedule to the order, does not render same the operation a gaming machine within the meaning of s. 43 of the Finance Act 1975.

Schedule

A system whereby a traditional bingo card is printed on a table in a permanent fashion in circumstances where a person sitting at the table in question can enter the game of bingo about to be played by placing a coin in a slot at the table. The fact that a particular table is in play is communicated electronically from the slot to the person conducting the game of bingo concerned. The numbers "drawn" in respect of the game are generated electronically by a separate random number generator and are separately communicated to the person in charge of the game. Persons win the game in the same manner as a traditional bingo game by being first to fill a line of numbers, having regard to the numbers called out as result of the random number generation previously referred to. Persons then claim to have won as in a traditional game of bingo.

3. I am satisfied that the appropriate test in respect of a claim for misfeasance of public office is objective recklessness as identified by Kearns J. in *Kennedy v. The Law Society (No.4)* [2005] 3 I.R. 228. Applying that test to the facts of this case, I am not satisfied that Superintendent Barry was guilty of misfeasance in public office and the claim in that regard fails. Neither am I satisfied, for similar reasons, that the claim in trespass and detinue can succeed.