Neutral Citation Number: [2007] IEHC 390

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 1084 J.R.]

BETWEEN

THE COMPETITION AUTHORITY

APPLICANT

AND
DISTRICT JUDGE HUGH O'DONNELL

RESPONDENT

AND
BURSEY PEPPARD LIMITED, FINGLAS MOTORS LIMITED
AND LUSK MOTOR FACTORS LIMITED

NOTICE PARTIES

Judgment of O'Neill J. delivered the 27th day of November, 2007

1. By order of this Court of the 11th October, 2005 the applicant was given leave to apply by way of judicial review for the following reliefs:-

> "1. An order of *certiorari* quashing the decision of the respondent of the 6th October, 2005 to dismiss the applicant's application for a retention pursuant to s. 45(6) of the Competition Act, 2002 of documents seized on foot of certain search warrants;
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> 2. A declaration that an application pursuant to s. 45(6) of the Competition Act, 2002 may proceed by way of sworn information (subject to the respondent satisfying himself in regard to the contents thereof and the appropriateness of the application);
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> 3. A declaration that an application pursuant to s. 45(6) of the Competition Act, 2002 may be made *ex parte*;
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> 4. A declaration that the respondent acted *ultra vires* s. 45(6) of the Competition Act, 2002 in seeking to have witnesses called for the purpose of enquiring into the legality of search warrants and retention applications which were not before him;
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> 5. An order remitting the matter to the Dublin Metropolitan District Court pursuant to O. 84, r. 26(4)."

2. The grounds upon which relief was sought was as follows:-

> 1. The respondent acted *ultra vires* s. 45(6) of the Competition Act, 2002 and in excess of jurisdiction in directing that the applicant proceed with the retention application by way of oral testimony, subject to cross examination by parties who were the subject of an on-going criminal investigation.
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> 2. The respondent acted *ultra vires* s. 45(6) of the Competition Act, 2002 in allowing the notice parties to be heard on the retention application.
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> 3. The notice parties lacked *locus standi* before the respondent.
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> 4. The respondent acted in excess of jurisdiction and contrary to fair procedures in allowing the appropriateness of granting of the application before him to be challenged by persons who may or may not be the subject of charges and who may or may not have any or legitimate interest in the return of the material seized.
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> 5. The respondents sought to have witnesses called by the applicant for the purpose of enquiring into issues concerning the legality of search warrants and retention orders which were not before him. In so doing, the respondent acted in excess of his jurisdiction."

3. The background to this matter is as follows.

4. In October, 2003 the applicant instigated an investigation into alleged price fixing among Ford dealers and Citroen dealers, the investigation being commenced and conducted by Ray Leonard, an authorised officer of the applicant. On the 26th November, 2003, the applicants applied to the President of the District Court sitting in Kilkenny for warrants to search the premises of the notice parties at addresses in Dublin. On the 27th November, 2003 one of these warrants was executed at the premises of the first notice party in Crumlin, Dublin 12. The second warrant was executed at the premises of the second notice party in Finglas, Dublin 11 and a third warrant was executed at the premises of the third notice party in Lusk, Co. Dublin.

5. Pursuant to the terms of s. 45(6) of the Competition Act, 2002 the applicants applied to the District Court ex parte on foot of a sworn information for permission to retain the material seized pursuant to the above searches. This application was granted.

6. On the 29th October, 2004 the Supreme Court gave its judgment in the case of *Creaven v. The Criminal Assets Bureau* [2004] 4 I.R. 434 in which it was held that search warrants must be issued by a judge sitting within the district where the relevant premises are situated. The applicants became aware of this decision and of its significance for the validity of the above mentioned warrants in December, 2004.

7. In March, 2005 the applicant sent a file on the investigation into the Irish Ford Dealers Association to the Director of Public Prosecutions. On the 8th April, 2005 the applicants returned the material that it had seized on foot of the foregoing three warrants and immediately applied *ex parte* to the District Court for fresh warrants, which were granted and on the same day the material which had been returned was re-seized on foot of these new warrants.

8. On the 25th September, 2005 the applicant's solicitor wrote to the solicitors for the notice parties informing them of the applicant's intention to apply to the District Court on the 5th October, 2005 for permission pursuant to s. 45(6) of the Competition Act, 2002 to retain the materials seized on foot of the warrants issued on the 8th April, 2005.

9. On the 5th October, 2005 the applicant's application came on for hearing before the respondent herein sitting in the District Court in the Dublin Metropolitan area. The application was adjourned to the following day, the 6th October, 2005, and at the conclusion of same the respondent refused the orders sought by the applicant.

10. What happened in the District Court on these two days is of great importance to these proceedings. The history of the proceedings is described in the relevant parts of the affidavit of Patrick Neill who is a solicitor and authorised officer of the applicants in the following terms:-

> "9. I say that on the 5th October, 2005 a further application was made to the respondent sitting at Dublin Metropolitan District Court 54 for a further retention period pursuant to s. 45(6) of the Competition Act, 2002 in respect of each of the three seizures. I say that the said applications were notified to the solicitors for each of the notice parties. I say that your deponent sought to make the said applications on foot of sworn informations.
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> 10. I say that the respondent raised concerns in relation to the time which had already elapsed since the initial warrants had been granted in November, 2003. I say that in this regard it was explained to the respondent and evidence called to the effect, that cartel investigations were by their nature extremely complex and it was not possible to deal with suspects in isolation as it was necessary to investigate members of a suspected cartel simultaneously. I say that this evidence was given under oath by Ray Leonard an authorised officer of the applicant who was cross examined at length by counsel for the first and second notice party. I say that the third notice party had previously indicated that it was not opposing the application.
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> 11. I say that the respondent indicated that he was not satisfied with the application and sought oral and documentary evidence in respect of the original application for the search or search warrants in November, 2003. I say that specifically the respondent sought evidence from those who had executed the original warrants granted in November, 2003, the officers of the applicant who had returned the documents seized to the notice parties on the 8th April, 2005, the officers of the applicant who had seized documentation on foot of the warrants granted on 8th April, 2005 and the officers of the applicant who had applied for the retention of the 24th May, 2004.
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> 12. I say that the deponent indicated that the applicant was not in a position to adduce such evidence immediately and consequently the retention application was adjourned to 6th October, 2005 at 3.00 pm. I say that in the interim your deponent briefed counsel in respect of the matter that had arisen during the course of the hearing.
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> 13. I say that on the 6th October, 2005 counsel on behalf of the applicant appeared before the respondent. I say that at the outset the respondent objected to the appearance of counsel in circumstances where counsel had not appeared on the previous day and suggested that it was improper for counsel to appear half way through the application for retention. I say that counsel for the applicant disputed the respondent's remarks in this regard and that in any event the respondent allowed the application to proceed.
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> 14. I say that counsel for the applicant indicated to the respondent that it was not the intention of the applicant to call the witnesses whom the respondent had directed as the only purpose in so doing would be to allow the respondent engage upon an inquiry into the legality of the previously granted search warrants and retention orders in circumstances where the respondent had no jurisdiction to do so. I say that it was indicated to the respondent that the applicant proposed to proceed with the application on foot of this sworn information.
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> 15. I say that at this point counsel for the first and second notice parties objected to the application proceeding by way of sworn information and contended that the matter should proceed by way of oral testimony which would then be subjected to cross examination by counsel for the first and second notice parties. I say that counsel on either side addressed the respondents in respect of the appropriate procedure to be adopted. It was submitted on behalf of counsel for the first and second notice parties that as a matter of fair procedures he was entitled to cross examine the informant for the retention application and if necessary call evidence. On behalf of the applicant, it was submitted that s. 45(6) of the Competition Act, 2002 did not confer any entitlement on any other party to be heard or to be notified of such an application and further that the cross examination of an informant during an investigation would be intolerable from an operational perspective. I say that ultimately the respondent ruled that the application should not proceed by way of sworn information but rather should proceed by way of oral testimony subject to cross examination by counsel for the notice parties.
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> 16. I say that a brief adjournment of some minutes was sought by counsel for the applicant for the purpose of considering the respondent's ruling and after which it was indicated to the respondent on behalf of the applicant that for the reasons outlined during the course of submission, the applicant was not prepared to proceed with the retention application in the manner outlined and as such given the earlier ruling of the respondent, it would appear to follow that the respondent would dismiss the retention application. I say that the respondent duly did so and in this regard I beg to refer to a true copy of the order of the respondent when produced …"

11. An affidavit was sworn by Andrew O'Rorke, the solicitor for the first notice party in which he deposes to the events that occurred in the District Court as follows:

> "7. I say by letter 29th September, 2005 Mr. Neill wrote to David Phelan my colleague in Hayes Solicitors as Bursey Peppard's legal representative informing him that the application now at issue was to be made before the District Court sitting at Court 54, Richmond Hospital District Court, as at 10.30 am on 5th October, 2005. In the premises, it is difficult to understand the applicants assertion in these proceedings that our client has no locus standi before the court and should not have been heard on that application. I beg to refer to the said letter upon which is marked designation 'AOR-1' I have signed my name prior to the swearing hereof.
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> 8. Enclosed with that letter was a copy of what Mr. Neill described as a 'draft sworn information grounding the application' which according to Mr. Neill had been lodged in court. …
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> 9. I say that my office instructed counsel to appear on behalf of Bursey Peppard at the hearing of the application now at issue when it came before the respondent on the 5th November, 2005. I was subsequently advised of the proceedings of the hearing by our clients counsel who informed me that at the outset of the hearing Mr. Neill who appeared as the applicant indicated that he proposed to proceed by seeking to swear a draft information before the court. Mr. Neill further indicated that Lusk Motor Factors Limited (third notice party in these proceedings) was not represented before the court

but had indicated in correspondence that it was consenting to the grant of the order being sought. In response, counsel on behalf of Bursey Peppard and Finglas Motors Limited…. indicated that both parties were opposed to the application and wished to be heard. Counsel submitted that as the person from whom the property at issue had been seized and as persons claiming an interest in that property, the notice parties had a right to heard on the application. Counsel further submitted that the relevant notice parties had an entitlement to test by cross examination the evidence in reliance upon which the applicant was seeking permission to retain their property, and a right to adduce relevant evidence on their own behalf in opposition to that application.

10. In response, Mr. Neill submitted that it was appropriate to proceed by way of swearing of an information that it was inappropriate that any opposition to such an application should be permitted.

11. Mr. Neill was then sworn. The respondent asked Mr. Neill why the applicants investigation was taking so long. Mr. Neill responded to the effect that the investigation was complex and substantial. The respondent suggested that evidence couched in such vague and general terms did not seem sufficient to persuade the court to exercise its discretion in the applicants favour, particularly when the property seized had already been in the applicants possession for a very considerable time. Mr. Neill then indicated that he was in a position to call the evidence of Mr. Ray Leonard, an authorised officer of the applicant. On the basis of that suggestion, Mr. Neill was permitted to withdraw form the witness box and to call Mr. Leonard as a witness.

12. Mr. Leonard was sworn. Mr. Leonard gave evidence that he is assigned to the cartels division of the applicant and is engaged in the investigation of the Irish Ford Dealers Association and of the Irish Citroen Dealers Association. Mr. Leonard stated that in connection with the Irish Ford Dealers Association, he is investigating fifty different limited companies. Mr. Leonard further stated that since 1990 it is suspected that the Irish public has suffered losses of over €100 million. The respondent enquired about the basis for this figure. Mr. Leonard answered that it is an estimated or extrapolation by an economist employed by the applicant of the excess element of the price of motor vehicles which the applicant attributes to the price fixing arrangements that it suspects.

13. The respondent then permitted counsel for Bursey Peppard and Finglas Motors to cross examine Mr. Leonard. In cross examination Mr. Leonard conceded that the applicants investigation had commenced in October 2003 and that after some initial reluctance to answer the questions on the grounds that the investigation was confidential, that the most recent complaint proceeding the investigation had been made in July 2003. Mr. Leonard then volunteered the applicant's view that the suspected price fixing in question was still continuing in March 2005. Mr. Leonard conceded that this was no where reflected in Mr. Neill proposed sworn information.

14. Mr. Leonard confirmed that the original search warrant on foot of which Finglas Motors property at issue was first seized had been issued by the then President of the District Court sitting in Kilkenny on the 26th November, 2003, while recording on its face that it was issued by the District Court sitting in the Dublin Metropolitan District. A copy of that warrant was found at exhibit 'A' to Mr. Neill's affidavit under reply. Mr. Leonard conceded that the applicant now accepts that the said warrant was unlawful, void and of no legal effect. That being so, Mr. Leonard was asked to explain why no attempt was made to return the property thereby unlawfully seized on the 4th December, 2003 until 8th April, 2005. Mr. Leonard replied that the applicant remained unaware of the nature and significance of the judgment given by the Supreme Court on 29th October, 2004 in *Creaven v. Minister for Justice* until sometime in December 2004. Mr. Leonard conceded that the applicant is a State funded body with the benefit of in-house legal advice. Mr. Leonard further conceded that not even ignorance of the law could explain the applicant's further retention of the relevant property for a further four months until the 8th April, 2004. It was put to Mr. Leonard that, on any view, the applicant had acted in a deliberate and conscious breach of Finglas Motors property rights between December 2004 and April 2005. Mr. Leonard did not demur.

15. Mr. Leonard was then asked upon what legal basis the applicant had purported to retain Finglas Motors property from the date of his original seizure on 4th December, 2003 even until 29th October, 2004 in circumstances where s. 45(6) of the Competition Act, requires an application to be made to the District Court to retain such property for any period longer than six months. Mr. Leonard replied that he was sure that such an application had been made. Mr. Neill then disclosed to the respondent that such an application had been made to the then President of the District Court on 24th May, 2004 and that it had been granted. A copy of the relevant order can be found at exhibit 'C', in the affidavit of Mr. Neill under reply. Mr. Leonard conceded not only that this application had been made *ex parte* and without notice to Finglas Motors, but also that the existence of the order obtained *ex parte* in respect of Finglas Motors property had never subsequently been disclosed to it until Mr. Leonard's cross examination. The respondent intervened to point out that the existence of a prior order under s. 45(6) in respect of the same property was no where disclosed in the information that Mr. Neill proposed to swear to ground the present application under s. 45(6). Mr. Leonard and Mr. Neill conceded that this was so.

16. Counsel next sought to question Mr. Leonard concerning the circumstances in which Finglas Motors property was purportedly returned to it on the 8th April, 2005 before being seized from it again shortly afterwards on the same day. Mr. Leonard indicated that he was not in a position to give direct evidence concerning those events but that one of his colleagues who was not then present in court will be in a position to do so.

17. In the exercise of his undoubted discretion and in ease of the applicants position, the respondent then granted the applicant an adjournment until 3 pm on the following day, the 6th October, 2005 to permit the relevant witness or witnesses to attend. I do not accept Mr. Neill's assertion that the respondent 'sought' oral and documentary evidence of the original application for the search warrants in November 2003. I say and am advised that the respondent was careful to emphasise a number of times that the evidence adduced on the applicant's behalf was a matter for the applicant. However the respondent did indicate that a number of issues relevant to the exercise of his discretion clearly had arisen on the evidence so far adduced and that a failure by the applicant to address them in evidence could have consequences for the application at issue.

18. For the avoidance of doubt I should say that, had the applicant proceeded with its application, it would have been our clients intention that the return of its property on the 8th April 2005 and its subsequent seizure very shortly afterwards on the same day was a mere colourable device adopted on behalf of the applicant to avoid the consequences of his conscious and deliberate breach of my clients constitutional rights. In no real – as opposed to a narrow purely technical sense – did Bursey Peppards regain possession of it. It follows, in our client's submission that the warrant issued in respect of the same property on the 8th April, 2005 was unlawful, void and of no legal effect having been obtained in conscious and deliberate breach of my clients constitutional rights.

> 19. I say that the application at issue resumed on the following day 6th October, 2005 at 3 pm. As Mr. Neill avers it would seem that counsel had been instructed on behalf of the applicant in the interim. I confirm that the respondent indicated some misgivings about the propriety or desirability of counsel stepping into an application in which the evidence was already part heard. I say that our clients counsel was asked for his views and indicated that, while it was certainly unusual, it was probably preferable to have counsel come into a part heard case, than to have Mr. Neill persist in his dual role of both witness for, and legal representative, of the applicant. The respondent permitted the applicants counsel to take over the representation of the applicant from his solicitor Mr. Neill.
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> 20. I do not accept that the respondent had directed the applicant to call certain witnesses as Mr. Neill suggested at para. 14 of his affidavit under reply. I reiterate my understanding that the respondent was careful to emphasise at all times that the evidence to be adduced was entirely a matter for the applicant. The respondent had indicated dissatisfaction with the evidence so far called on the applicant's behalf. The adjournment by the application from the 5th to the 6th of October was not granted in the context of any direction to the applicant – it was granted to facilitate the applicant in addressing the very serious concerns that had arisen in the context of the evidence given by the witnesses already called on the applicant's behalf.
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> 21. Counsel for the applicant indicated that the applicant did not intend to call any further evidence. Counsel repeated the submission which had already been made by Mr. Neill and rejected by the respondent that the applicant was entitled to proceed ex parte and solely on the information of Mr. Neill. As either counsel for our client again objected that our client was entitled to heard, to cross examine the applicant's witnesses and to adduce its own evidence subject to cross examination."

12. An affidavit was sworn by Kevin Brophy the solicitor for the notice party which is in very similar terms to that of the solicitor for the first notice party.

13. In a second affidavit sworn by Patrick Neill he says the following:

> "2. I say that the [notice parties] reject the suggestion that the respondents sought evidence in relation to the applicants application or in any sense directed the proofs in respect o same. I say that it is clear from the deponents first affidavit and those filed on behalf of the notice parties that on the 5th October, 2005 the respondent enquired into matters which concerned the legality of previous orders at the behest of counsel appearing on behalf of the notice parties. I say that your deponent was left in no doubt when the respondent adjourned the application to the following day, but that the respondent was clearly minded to dismiss the application in the event that further evidence in relation to these matters canvassed during cross examination was not put before him. …"

14. As is apparent from the affidavits and the order of the District Court made on the 6th October 2005 the respondent refused the reliefs sought by the applicant, namely permission to retain the materials seized on the 8th April, 2005.

15. After these court proceedings the solicitors for the first and second notice party's wrote to the applicants seeking the return of their documents. This demand was refused by the applicants.

16. Section 45(6) of the Competition Act, 2002 which is the basis of the jurisdiction being exercised by the respondent in these impugned District Court proceedings is in the following terms:

> "(6) Any books, documents or records which are seized or obtained under subsection (3) may be retained for a period of 6 months, or such longer period as may be permitted by a judge of the District Court, or if within that period there are commenced any proceedings to which those books, documents or records are relevant, until the conclusion of those proceedings."

17. The first issue which arises for consideration is whether the applicants were entitled to proceed *ex parte* for the relief they were seeking.

18. There are no rules of court governing applications under s. 45(6).

19. In this case the applicant itself chose to put the notice parties on notice of its application. Hence in my view they cannot now complain of the fact that the applicants were on notice and claimed a *locus standi* in the proceedings and were heard by the respondent.

20. It is quite clear that subsection (6) does not prescribe the manner in which the application is to be made i.e. whether or not *ex parte* or on notice. One would have to observe that as the relief sought affects the rights of the owners of property seized, in general, I would be of the opinion that a District Court hearing such an application could require the affected party to be put on notice. I say "in general" because it is to be envisaged that there may be cases where it is neither practicable nor desirable that there should be notice to potentially affected parties, in which case the court would be entitled to deal with such applications on an ex parte basis.

21. In this case obviously no such difficulties were apparent to the applicants when they decided to put the notice parties on notice, as they did. The application having proceeded on that basis in the absence of any direction in the subsection itself, there is no basis for suggesting that there was any excess of jurisdiction on the part of the respondent in proceeding to hear the matter, on notice, as occurred.

22. The next issue which arises is whether or not the applicants were entitled to proceed in the application solely on the basis of an information sworn by Mr. Neill, without any cross examination by the notice parties but subject to the respondent being able to satisfy himself of the truth of the information sworn.

23. In approaching the resolution of this issue one must be conscious in my opinion of the radical difference between this application and an application for the issuance of a warrant. Insofar as the latter is concerned, clearly notice cannot be given because of the risk of the destruction of, or loss of the materials sought to be found on foot of a search warrant. An application under s. 45(6) is completely different. In this application the applicants are in possession of the documentation and hence there is no risk of its loss by giving notice of the application.

24. I am of the opinion that the purpose of the jurisdiction conferred on the District Court under s. 45(6) is to provide a safeguard in

respect of the rights of owners of property that has been seized on foot of warrants issued under s. 45(4). Hence in my view the range of consideration and thus the range of evidence that can be required is limited essentially to two topics; firstly the progress of the investigation in respect of which the warrant was issued; and secondly the effects on the owner of the property of the ongoing deprivation of it. I accept that in objecting to the making of the order sought under s. 45 (6) the notice parties did not place reliance on "Fair Trial" rights, but rather on their property rights as protected by Article. 43 of the Constitution and the European Convention on Human Rights. Hence the line of authority derived from the cases of *Byrne v. Grey* [1988] IR 31, *Berkley v. Edwards* [1988] IR 217, *DPP v. Windle* [1999] 4 IR 280 *In Re National Irish Bank* [1999] 3 IR 145 and *Blanchfield v. Hartnett* [2001] ILRM 193 is irrelevant to the issue for determination in this application.

25. Manifestly the subsection gives a district judge a discretion to refuse retention. In my view the range of discretion given here is limited to ascertaining that the investigation is progressing in a reasonably expeditious manner and any hardship experienced by the owner of the property in question by reason of being deprived of it.

26. Clearly the discretion thus given to the district judge would enable him to make such enquiries to satisfy himself that the investigation is still ongoing and proceeding expeditiously. Beyond that, he would not be entitled to enquire into the nature of the investigation or the fruits of it.

27. Having ascertained the ill effects, (if any) of the seizure, on the owner or person entitled to the documents, the district judge will, in his discretion strike a balance between these two competing interests.

28. The information sought to be sworn by Mr. Neill has very little to say that would be relevant to the legitimate consideration of the respondent. Only paras. 7 and 8 of it contain any material that would assist the respondent in the exercise of his discretion. These read as follows:

> "7. I believe that the books, documents and records, the subject of this application contain evidence relating to breaches of s. 4 and 6 of the Act, in particular evidence of price fixing for new and used motor vehicles and motor vehicle accessories and form a material part of the investigation currently under consideration by the Office of the Director of Public Prosecutions.
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> 8. Copies of the books, documents and records the subject of this application have previously been provided to the person entitled to the possession of them, in accordance with s. 45(7) of the Act, save for the hard drive of a computer server which could not be copied…."

29. It is to be expected that a district judge asked to deal with one of these applications would be very dissatisfied with the amount of information given to him in this proposed information, as to the progress of the investigation or its likely conclusion. In my view a district judge would be entitled to ask questions of an applicant in order to satisfy himself and that the investigation is still a live one and was being progressed satisfactorily.

30. Insofar as the respondent in this case rejected this proposed sworn information as a sufficient basis for granting the relief, in my view he was clearly acting within jurisdiction.

31. That is not to say that a sworn information which contained sufficient detail of the investigation to enable a district judge to exercise his discretion as I have described it above, would not in a different case be sufficient evidence to warrant the relief being granted. What is wanting here is not the nature of the proof offered i.e. a sworn information but the adequacy of the content of it.

32. Having been put on notice, in my view, the notice parties were entitled to cross examine in relation to material relevant to the proper exercise by the respondent of his discretion. In other words the notice parties were entitled to cross examine either the swearer of the information or any other witness proffered by the applicants in relation to the progress of the investigation but no more. They would not have been entitled to delve into the content of the investigation or to seek to ascertain any of the fruits of the investigation and any such attempt in cross examination should be stopped by the respondent. In any event the applicant would be entitled to rely on public interest privilege

33. I am satisfied that the jurisdiction conferred on the district court in s. 45 (6) confined in its way does not give rise to the prospect much feared by the applicants, of a suspected person being permitted to cross-examine the investigators, to establish the extent of their information and areas they were interested in pursuing. The correct exercise of this jurisdiction would necessarily, in my opinion, require that a person whose property had been seized, would be confined to matters relating only to interference with his property rights, and could not be permitted to use the occasion, to explore the subject matter of the investigation. The furthest extent of any such inquiry by a person whose property was seized would be to ascertain the likely duration of the interference with his property rights. If this jurisdiction is exercised in this way, no unwarranted intrusion into the investigation will occur and hence the case of *R v. Leicester Crown Court* [1987] IWLR 1371 is readily distinguishable.

34. Insofar as an order made under s. 45 (6) is an interference with property rights in the material seized, the owner or person entitled to that material, is or may be prejudicially affected by the order. That being so, in my opinion, the case of *Brady v. Haughton and Ors* [Unreported 25/7/05] does not have application to this case.

35. Having been put on notice, the notice parties were entitled to give evidence of any hardships or ill effects suffered by them as a result of the deprivation of their property.

36. The respondent had no jurisdiction whatsoever to question the validity of the warrant issued on the 8th April, 2005. He was obliged by law to treat that warrant as valid and was not entitled to embark upon enquires to go behind the issuance of that warrant. Similarly he had no jurisdiction to question the validity or otherwise of any previous warrants issued or the retention order made by the District Court on the 24th May, 2004. Apart from an appeal, at the appropriate time, the validity of any of these warrants or orders could only be challenged in the judicial review jurisdiction of this court.

37. The question then arises, whether the respondent did exceed his jurisdiction in the conduct of these proceedings by embarking upon enquiries as to the validity in particular of the warrant of the 8th April, 2005. It is plainly obvious from para. 18 of the affidavit of Andrew O'Rorke and para. 18 of the affidavit of Kevin Brophy that it was the intention of the notice parties to invite the respondent to find that the warrant issued on the 8th April, 2005 was unlawful, void and of no legal effect. As said, the respondent had no jurisdiction to entertain such a contention.

38. I am satisfied that on the balance of probabilities, whether at the behest of the notice parties or otherwise, the respondent did

embark upon a process of enquiry for the purpose of calling in question the validity of the warrant issued on the 8th April, 2005 and earlier warrants and orders. For the purposes of that enquiry the proceedings were adjourned from the 5th October to the 6th October so that the applicants could bring to court witnesses who could give evidence concerning matters underlying the grant of the warrants on the 8th April and previous warrants and orders.

39. Whilst it may very well be the case, and I would readily accept that the respondent did not direct the applicants to produce these witnesses, I am quite satisfied that the respondent made it clear that he wished to hear evidence concerning these matters, which conveyed unequivocally to the applicants that unless they tendered evidence relating to the matters alluded to by the respondent, their application would be in jeopardy. If the respondent had been content to confine himself to matters relevant to his jurisdiction, as set out above, there would have been no need for an adjournment. Either Mr. Neill or Mr. Leonard would have been in a position to satisfy his legitimate enquiries in regard to the progress of the investigation.

40. I am satisfied therefore that the respondent did embark upon a type of enquiry calculated to call in question the validity of the warrant issued on 8th April, 2005 and other orders of the District Court made in the investigation, and in so doing in my opinion the respondent clearly exceeded his jurisdiction and acted *ultra vires* s. 45(6).

41. The notice parties contended in their submissions that these proceedings were moot or futile on the grounds that the respondent having refused permission to the applicants to retain these documents and the six months from the date of the warrant having expired, there was no legal basis upon which the applicants were entitled to hold on to material seized on foot of the warrants and hence the refusal to return this material was unlawful.

42. The applicants in their correspondence, refusing to return the material, justifies its retention on the basis, that if it were returned, that would render these proceedings a moot. The applicant further objects to the respondent being permitted to argue this point on the basis that it is not referred to in the statement of opposition.

43. Notwithstanding the fact that this point was not alluded to in the statement of opposition, it is not one which the court can ignore. Whilst this court can in its discretion grant an order of *certiorari* quashing the decision of the respondent, impugned in these proceedings, an order remitting the matter to the District Court for re-hearing could be futile as the application pursuant to s. 45(6) could be regarded as moot.

44. Therefore in my opinion whilst I am prepared on the basis of the reasons given above to grant an order *certiorari* in respect of the impugned order of the respondent, I will hear further argument as to whether there should be an order remitting the matter back to the District Court for re-hearing.