

THE HIGH COURT**JUDICIAL REVIEW****[2016 No. 344JR]****BETWEEN:****DEIRDRE FOLEY AND D2 PRIVATE LIMITED****APPLICANTS****-AND-****WORKPLACE RELATIONS COMMISSION, JAMES KELLY AND PAT PHELAN****RESPONDENTS****-AND-****NATRIUM LIMITED****NOTICE PARTY****JUDGMENT of Mr. Justice Twomey delivered on the 25th day of October, 2016.****Introduction**

1. These proceedings concern the actions of two Inspectors of the first named respondent, the Workplace Relations Commission (the "WRC"), in the course of their investigations into the collective redundancies ("the Clerys' Redundancies") of people who worked in the Clerys' department store in Dublin as employees of OCS Operations ("the Clerys' Workers"). These redundancies took place on the 12th June, 2015. The Inspectors were investigating the Clerys' Redundancies and in particular whether a criminal offence had been committed as a result of the alleged failure of the employer of the Clerys' Workers to comply with ss. 9 and 10 of the Protection of Employment Act, 1977 ("the 1977 Act").

2. A significant issue in this case concerns the entry, on the 19th May, 2016, by those Inspectors onto the premises of the second named applicant, D2 Private Limited ("D2") which are situated at 20 Harcourt Terrace in Dublin (the "Harcourt Premises") and the seizure of material from those premises. The Inspectors who entered the Harcourt Premises are the second named respondent, Mr. James Kelly ("Mr. Kelly") and the third named respondent, Mr. Pat Phelan ("Mr. Phelan"). D2 is wholly owned by the first-named applicant, Ms. Deirdre Foley ("Ms. Foley") and she is also the CEO of D2.

3. The WRC is a statutory body established pursuant to the Workplace Relations Act, 2015 ("the 2015 Act"), and Mr. Kelly and Mr. Phelan were deemed to be Inspectors of the WRC under s. 26(2) of the 2015 Act, by virtue of being appointed as Authorised Officers under, *inter alia*, the 1977 Act. The notice party in these proceedings, Natrium Limited ("Natrium"), is the joint venture company that was used for the purchase of the Clerys' business and department store in Dublin. Natrium is owned as to 80% by Cheyne Capital Management (UK) LLP and as to 20% by FAM Assets Limited, which is a company in which Ms. Foley has an interest.

4. The key reliefs sought by the applicants can be summarised as:-

- an order of certiorari quashing the requirements made of the applicants by the respondents during the entry into the Harcourt Premises in purported reliance upon s. 27 (1) of the 2015 Act;
- a declaration that the use of investigatory powers pursuant to the 1977 Act and/or the 2015 Act to obtain access to the Harcourt Premises and to obtain documents is unlawful and *ultra vires*;
- an injunction to restrain the respondents from exercising any further powers in respect of the applicants or entering their premises under the 1977 Act or the 2015 Act in the investigation of the Clerys' Redundancies;
- an injunction restraining the respondents from making any use of material given to them by the applicants pursuant to the requirements made of them by the respondents during the entry into the Harcourt Premises;
- an order requiring the respondents to return to the applicants material obtained by them pursuant to the requirements made of them by the respondents during their entry into the Harcourt Premises, as well as damages and ancillary orders.

5. It is important to bear in mind that this is not a criminal trial or a case about whether the applicants are guilty of offences in relation to the Clerys' Redundancies. Rather, it is much more preliminary in nature since it is a case about the legality of an investigation by Inspectors into who may have had a role in the Clerys' Redundancies and in particular the legality of their entry into the Harcourt Premises and their seizure of material as part of that investigation.

6. The key issue in this case is whether the entry into the Harcourt Premises and the seizure of material by the Inspectors, as part of their investigation, was lawful. In summary, the applicants say that, on their interpretation of s. 27 of the 2015 Act, the entry and seizure of material was unlawful as the applicants are not the employers of the workers, the subject of the Clerys' Redundancies. On this basis they say that the Harcourt Premises did not fall within the definition of premises which can be entered by Inspectors under s. 27. They also say that the entry and seizure was unlawful because the Inspectors were exercising this power for an improper purpose (namely an investigation into the Clerys' Takeover (referred to below) rather than the Clerys' Redundancies).

7. The respondents contend that, on their interpretation of s. 27 of the 2015 Act, it was within their powers to enter the Harcourt Premises and seize material and they say that this power was only exercised for the purpose of investigating the Clerys' Redundancies. The respondents also say that, in any case, this matter is only at the investigation stage and it is not open to the applicants to interfere in their investigation into the commission of an alleged criminal offence and in particular to interfere into their investigation into whether the applicants might be linked with alleged offences relating to the Clerys' Redundancies. During the hearing of this matter the respondents confirmed that as of yet no prosecution had been instituted against any of the applicants.

8. A major issue for determination in this case is whether it is permissible for this Court to interfere in the investigation of a criminal offence, where that investigation is alleged to have been carried out in an unlawful manner, before a criminal trial has been held.

9. For the reasons set out in this judgment, this Court finds that it is not permissible for the applicants to seek to interfere in the investigation by the Inspectors into the connection, if any, that the applicants may have with the Clerys' Redundancies. If the applicants wish to challenge the legality of the entry or the admissibility of evidence obtained during that entry, this should be done at the criminal trial, if and when such a trial results from the investigation, and not during the course of the investigation.

Background to the Clerys' Takeover and the Clerys' Redundancies

10. Prior to 2012, Clerys was owned and operated by Clery & Co. (1941) plc, Denis Guiney Ltd. and Ytterbium Ltd. The company was placed in receivership by Bank of Ireland in 2012. In September 2012, the Clerys' business and the department store were bought from receivership by Gordon Brothers Europe ("Gordon Brothers") the trading name of Gordon Brothers International LLC, the UK incorporated subsidiary of Gordon Brothers Group LLC, a company based in the United States. To acquire Clerys, Gordon Brothers set up a holding company, OCS Investment Holdings Ltd. ("OIHL"). Two fully owned subsidiaries of OIHL, namely OCS Operations Ltd. ("OCS Operations"), a trading company, and OCS Properties Ltd. ("OCS Properties"), a property owning company, were incorporated. OIHL, OCS Properties and OCS Operations are collectively referred to as the "OCS Group". As part of the takeover by Gordon Brothers of Clerys in September 2012, OCS Operations acquired the business and assets of Clerys which included, *inter alia*, its employees, intellectual property and goodwill, but did not include the title to the Clerys' department store on O'Connell Street. The property interest in the store on O'Connell Street was held by OCS Properties. Upon the purchase of Clerys, out of receivership by Gordon Brothers in 2012, the staff of Clerys became employees of OCS Operations.

11. At the time of the takeover of Clerys by Gordon Brothers in 2012, the trading company, OCS Operations, entered into a two year letting agreement with OCS Properties. This lease was subsequently extended, but ultimately expired on the 16th March, 2015. During the period after the takeover by Gordon Brothers, OCS Operations carried on the business of Clerys and generated income from the store as well as from approximately 50 concession holders who paid over a portion of their turnover to OCS Operations. Sworn evidence was provided on behalf of the respondents that by 2015 a total of 460 people worked in Clerys, of whom 130 were employed directly by OCS Operations and 330 were employed by concession holders. OCS Operations, as a tenant of OCS Properties, paid rent to that company for the use of the Clerys' department store. In January 2015 Gordon Brothers decided to sell the OCS Group and on the 12th June, 2015, the OCS Group was sold to Natrium. A number of transactions occurred on the 12th June, 2015, to effect the purchase of the Clerys' business and the Clerys' property (the "Clerys' Group") by Natrium ("the Clerys' Takeover"). By acquiring Gordon Brothers' shares in the holding company, OIHL, Natrium became the indirect owner of its subsidiaries, OCS Operations which employed the Clerys' Employees and OCS Properties which owned the Clerys' department store.

Takeover Day - Friday 12th June, 2015

12. At about 1.15 a.m. on Friday 12th June, 2015, the directors of OCS Operations resigned and two new directors, Mr. Brendan Cooney ("Mr. Cooney") and Mr. Jim Brydie ("Mr. Brydie") were appointed. Prior to their appointment, Mr. Cooney and Mr. Brydie, both insolvency specialists, carried out due diligence on OCS Operations. During the course of that day, in return for a consideration of €1, Mr. Brydie acquired the issued shares of OCS Operations. After meeting with the existing management of OCS Operations and examining the company's financial statements for the previous year, Mr. Cooney and Mr. Brydie concluded the company was balance sheet insolvent and would require additional funding by August 2015. They were advised that although payment was due to be made to the concession holders on the 15th June, 2015, there were insufficient funds to meet these payments. Previously, the parent company, OIHL, would have addressed such shortfalls. Mr. Cooney and Mr. Brydie were provided with a letter from OIHL stating it would no longer provide financial support to OCS Operations. They were informed a new lease would not be offered by OCS Properties (the previous lease having expired on the 16th March, 2015) and that, if necessary, a notice to quit the premises would be served on them. Subsequently, Mr. Brydie signed a resolution which noted the unanimous recommendation of the directors that in light of its insolvency the company should be wound up.

13. On the afternoon of Friday 12th June, 2015, the High Court was petitioned for the appointment of a provisional liquidator. This application was successful and Messrs. Eamonn Richardson and Kieran Wallace of KPMG were appointed joint liquidators to OCS Operations. At 5.30 p.m. on Friday 12th June, 2015, the Clerys' Workers and the employees of the concession outlets were informed the store was to close and that the Clerys' Workers were to be made redundant.

14. Sixty-one former employees of OCS Operations initiated complaints against that company, alleging breaches of ss. 9 and 10 of the 1977 Act, as amended, by virtue of its failure to initiate consultations with employees' representatives and to supply employees' representatives with relevant information relating to the redundancies. The Adjudication Officer/Rights Commissioner of the WRC found that OCS Operations was the employer of the said employees and that the complaints were well founded and awarded compensation to the employees against OCS Operations. However, as previously noted, the company against which compensation was awarded was insolvent and being wound up.

15. Mr. Kelly has averred that he is continuing to investigate whether any evidence exists to support the commission of any other offences under the 1977 Act in relation to the Clerys' Redundancies. The Statement of Opposition filed on behalf of the respondents makes clear that the Inspectors were examining for this reason the involvement of Ms. Foley and other individuals and bodies corporate in the Clerys' Redundancies.

Legislation relevant to the entry and seizure

16. At this juncture, it is appropriate to refer to the legislation that is relevant to the alleged offences being investigated by Mr. Kelly and the powers of entry and seizure of the Inspectors, which are the subject of this judicial review.

The 1977 Act

17. This Act sets out various obligations upon an employer and others, in relation to the redundancy of workers. Section 9 obliges an employer to initiate consultations with employee representatives where the employer proposes to create collective redundancies, which consultations are to be initiated at least 30 days before the first notice of dismissal is given. Section 10 requires the employer to supply the employee representatives with relevant information relating to the redundancies. Section 11 states:-

"An employer who fails to initiate consultations under section 9 or fails to comply with section 10 shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000."

In this case, Mr. Kelly was investigating whether ss. 9 and 10 of the 1977 Act had been complied with in relation to the Clerys' Redundancies. In this regard, it is relevant to note that by virtue of s. 21(3), where the employer of the relevant workers is a body corporate (and in this case it seems clear that the employer of the Clerys' Workers was a body corporate, i.e. OCS Operations), officers of the body corporate and other persons may also be guilty of the offence. Section 21(3) of the 1997 Act states:-

"Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

Thus, a person who purported to act as a director, manager, secretary or other officer of, in this case, OCS Operations could be guilty of an offence if he or she consented to, connived in or attributed by neglect to, the offence in question.

The 2015 Act

18. The powers of entry and seizure granted to Inspectors, and which were exercised by Mr. Kelly and Mr. Phelan in this case, are set out in s. 27 of the 2005 Act, which insofar as relevant, states:-

"(1) For the purposes of this Act or a relevant enactment, an inspector may—

(a) subject to *subsection (3)*, enter (if necessary by the use of reasonable force) at all reasonable times any place of work or any premises—

(i) that he or she has reasonable grounds for believing has been or is being used in connection with the employment of persons, or

(ii) at which he or she has reasonable grounds for believing that records or documents relating to the employment of persons are kept,

(b) at such place of work or premises, inspect and take copies of, any books, records or other documents (including books, records or documents stored in non-legible form), or extracts therefrom, that he or she finds in the course of his or her inspection,

(c) remove any such books, documents or records from such place of work or premises and retain them for such period as he or she reasonably considers to be necessary for the purposes of his or her functions under this Act,

[...]

(2) When performing a function under this Act, an inspector may, subject to any warrant under *subsection (4)*, be accompanied by such number of other inspectors or members of the Garda Síochána as he or she considers appropriate.

(3) An inspector shall not enter a dwelling, other than—

(a) with the consent of the occupier, or

(b) pursuant to a warrant under *subsection (4)*.

(4) Upon the sworn information of an inspector, a judge of the District Court may, if satisfied that there are reasonable grounds for believing that information, books, documents or other records (including information, books, documents or records stored in non-legible form) required by an inspector under this section is or are held at any dwelling, issue a warrant authorising a named inspector, accompanied by such other inspectors or members of the Garda Síochána as may be necessary, at any time or times, before the expiration of one month from the date of issue of the warrant, to enter (if necessary by the use of reasonable force) the dwelling and perform the functions of an inspector under *paragraphs (b), (c), (d), (e), (f) and (g) of subsection (1)*.

(5) A person shall be guilty of an offence if he or she—

(a) obstructs or interferes with an inspector or a member of the Garda Síochána in the course of exercising a power conferred on him or her by this Act or a warrant under *subsection (4)* or impedes the exercise by the inspector or member, as the case may be, of such power, or

(b) fails or refuses to comply with a requirement of an inspector or member of the Garda Síochána pursuant to *paragraph (d) or (f) of subsection (1)*, or in purported compliance with such requirement gives information or makes a declaration to the inspector or member that he or she knows to be false or misleading in any material respect.

[...]

(8) In this section—

"place of work" has the same meaning as it has in the Safety, Health and Welfare at Work Act 2005 ;

"premises" includes vehicle, vessel, ship and railway carriage."

As regards the term 'place of work', the Safety, Health and Welfare at Work Act, 2005, states, insofar as relevant, that:-

"place of work includes any, or any part of any, place (whether or not within or forming part of the building or structure), land or other location at, in, upon or near which, work is carried on whether occasionally or otherwise [...]"

19. The term 'relevant enactment' in the foregoing opening words of s. 27(1) is defined in s. 2 and Part 1 of Schedule 1 of the 2015 Act to include the 1977 Act. Accordingly, it seems clear that the purpose for which an Inspector may exercise his powers of entry and seizure of documents under s. 27 is for, *inter alia*, the purpose of an investigation into a breach of the 1977 Act.

20. The term 'records' as used throughout s. 27 is defined in s. 2 of the 2015 Act and it states, insofar as relevant, that it includes:-

"a disc, tape, soundtrack or other device in which information, sounds or signals are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced in legible or audible form".

21. Based on the foregoing legislation, it is clear that any entry by the Inspectors into the Harcourt Premises could only be done for an authorised purpose, which in this case would include the investigation of s. 9 and s. 10 offences (under the 1977 Act) by employers and others in relation to the redundancy of the Clerys' Workers.

The Investigation

22. According to the affidavit of Mr. Kelly dated 23rd May, 2016, he was carrying out an investigation into, *inter alia*, whether any director, manager, secretary or other officer of OCS Operations or any person who was purporting to act in any such capacity, might have consented to, or connived in, or attributed by neglect to, the commission of an offence under the 1977 Act (i.e. an offence under ss. 9, 10, 11 and 21(3) of that Act). It was against this background, that the entry into the Harcourt Premises took place.

Entry into the Harcourt Premises on Thursday 19th May, 2016

23. On the 19th of May, 2016, the two WRC Inspectors, Mr. Kelly and Mr. Phelan, as well as two Gardaí, entered the Harcourt Premises of D2. Affidavits have been sworn regarding what happened between the Inspectors and Mr. Mark Redmond (Mr. "Redmond") an employee of D2 and a solicitor, Mr. Brian Clarke ("Mr. Clarke") of Maples and Calder, who arrived at the Harcourt Premises representing D2 and Ms. Foley, the owner of D2.

Summary of the exchanges in the Harcourt Premises

24. While there are some apparent misunderstandings and conflicts in the sequence of events, the following may be distilled from the affidavits. At about 2.30 p.m. the Inspectors accompanied by two Gardaí arrived at the Harcourt Premises where they were met by Mr. Redmond. The Inspectors informed Mr. Redmond they were there in relation to their investigation into the Clerys' Redundancies. Mr. Redmond agreed to cooperate with the investigation and the Gardaí left. Mr. Kelly informed Mr. Redmond that the Inspectors were exercising their powers under s. 27 of the 2015 Act. Mr. Redmond spoke on the telephone with Ms. Foley as well as Mr. Clarke. Mr. Clarke arrived at the premises at or about 2.55 p.m.

25. Mr. Clarke was informed by the Inspectors that they were carrying out an investigation into the Clerys' Redundancies and were exercising their powers pursuant to s. 27 of the 2015 Act. The Inspectors sought the laptop of Mr. Redmond, from whom they had also sought all emails and correspondence with Mr. Brydie and Mr. Cooney (the directors of OCS Operations), Mr. Richardson and Mr. Wallace (the liquidators of OCS Operations), Ms. Marsha Coghlan (a solicitor in A&L Goodbody, a firm that had acted for Ms. Foley), Gordon Brothers and invoices relating to Mr. Cooney and Mr. Brydie.

26. At about 2.55 p.m. Mr. Kyle Nolan ("Mr. Nolan"), solicitor, also of Maples and Calder, arrived at the Harcourt Premises. At about 3.30 p.m. Mr. Nolan and Mr. Clarke met with the Inspectors in the ground floor meeting room, while Mr. Redmond remained in an upstairs office. During this discussion, Mr. Kelly confirmed the Inspectors were exercising powers pursuant to s. 27 of the 2015 Act in connection with matters surrounding collective redundancies of the Clerys' Workers. He said that he was relying on s. 27(1)(a)(i), s. 27(1)(a)(ii) and s. 27(1)(b) the 2015 Act and subsequently he said that he was relying on s. 27(1)(d) in relation to the demand for records. Mr. Clarke pointed out to the Inspectors that it was OCS Operations and not D2 which was the employer of the Clerys' Workers. Accordingly, Mr. Clarke insisted that the Inspectors were not entitled to enter D2's premises and exercise the powers of seizure based on the grounds cited. At this stage of the entry by the Inspectors to the Harcourt Premises, it seems clear that there was a fundamental difference of opinion between the Inspectors and Mr. Clarke regarding whether the wording of s. 27(1)(a)(i) of the 2015 Act entitles an Inspector to enter only a place of work where the workers he is investigating are working, or whether it entitles him to enter any place of work. This difference of statutory interpretation persists between the two sides in this judicial review and is therefore a matter to be considered later in this judgment.

27. Mr. Clarke indicated that it was D2's intention to make an application to the High Court for an injunction to restrain the Inspectors from proceeding. The Inspectors appear to have been under the impression that the application to the High Court was being made contemporaneously with their attendance at D2's premises. The application was in fact made the following afternoon, the 20th May, 2016. Mr. Clarke requested Mr. Kelly to give an undertaking on behalf of the WRC to preserve and not review any records seized pending the outcome of that High Court application. Mr. Kelly refused to make any such undertaking.

28. Mr. Clarke expressed concern to the Inspectors that their actions were in breach of the applicants' constitutional rights. He also stated that the laptop contained legally privileged information as well as commercially sensitive data. Mr. Clarke stated that he wasn't seeking to obstruct the Inspectors but that he did not accept the legal basis for their entry and seizure. Mr. Kelly insisted that he would exercise his powers to seize the laptop and records until there was a High Court order to say he was acting unlawfully. Following this exchange, they proceeded to the upstairs office, where Mr. Redmond had remained, to facilitate access to the records stored on Mr. Redmond's laptop. Mr. Redmond made copies of certain documents at the request of the Inspectors and provided them with the password for the laptop. The Inspectors left the office at about 3.50 p.m. with Mr. Redmond's laptop.

High Court Orders of 20th May, 2016, and 23rd May, 2016

29. On the 20th May, 2016, the applicants sought leave to apply for judicial review and an interlocutory order to prevent the use of the material seized the previous day by the Inspectors. Leave to apply for judicial review was not granted, as it was decided by Hunt J. that the application should be made on notice to the respondents. Counsel for the respondents informed Hunt J. that the respondents had downloaded material from the laptop. The Court ordered that the respondents be restrained until further order from making any 'further use' of materials downloaded from the relevant laptop.

30. The matter came before Hunt J. again on the 23rd May, 2016, and leave to apply for judicial review was granted as well as an order restraining the respondents from making use of the materials taken by them, pending further order. Hunt J. also ordered that the respondents make two forensic copies of the hard drive of the laptop on notice to the applicants and upon so doing, they were ordered to return possession of the laptop to the applicants, along with one forensic copy of the hard drive. This Court was advised during the hearing of this action that the laptop has since been returned to the applicants.

31. This matter is now before this Court as a judicial review hearing relating to, *inter alia*, the legality of the entry into the Harcourt Premises by the Inspectors and the legality of the seizure of records by them.

Availability of Judicial Review of a criminal investigation

32. In essence, this case involves a challenge to an investigation being conducted by a State agency, in this case the WRC, into the alleged commission of a criminal offence. The offence for which the applicants are being investigated is a summary offence under the

1977 Act for which there is no custodial penalty, but rather a maximum fine of €5,000. During the course of the hearing, counsel for the respondents confirmed to the Court that no decision has been taken, at this stage of the investigation, to initiate prosecutions against any of the applicants. The first issue therefore for this Court to consider is whether it will permit this judicial review of the investigation by the Inspectors of the alleged commission of a criminal offence.

Relevant caselaw

33. The first case which this Court regards as relevant for the consideration of this issue is the Supreme Court case of *Blanchfield v. Harnett* [2002] 3 IR 207, in which orders were made by a District Court Judge pursuant to the Bankers' Books Evidence Act, 1879. These orders permitted the Gardaí to inspect a number of bank accounts in connection with an alleged forgery by the applicant. The applicant was given leave by way of judicial review to apply for an order of *certiorari* quashing the orders on the grounds that they were too broad and there was no evidence for the District Court Judge to consider. The High Court, and on appeal the Supreme Court, refused to grant *certiorari*. In the High Court, O'Neill J. stated at p. 204:-

"It would seem to me that the resolution of this issue hinges on the nature of the jurisdiction exercised by a trial judge in criminal proceedings. In the course of such proceedings issues arise as to the admissibility of evidence and the resolution of such issues rests solely with the trial judge. Where it is alleged that evidence has been obtained illegally the question of whether or not such is the case i.e. whether an illegality has occurred is one solely for the trial judge and following upon that whether or not the evidence should be admitted is again one solely for the discretion of the trial judge, a discretion to be exercised in accordance with law. In my view the principle of regularity of judicial proceedings requires that all questions relevant to the determination of such issues rest with the trial judge. Otherwise trials would be suspended for lengthy periods while such issues were litigated in other courts".

In the Supreme Court, Fennelly J. stated at p. 225:-

"...judicial review is an available remedy which permits challenge to decisions made in the course of a criminal trial. Clearly, it is available in principle but only in the most exceptional cases. What emerges, therefore, is that, while decisions of a court of trial may be the subject of *certiorari*, this will scarcely ever occur during the course of the trial."

34. The *Blanchfield* case involved circumstances where charges had been brought against the applicant and a trial date had been fixed. This is not the situation in this case since a prosecution has not been initiated against the applicants (and there is no guarantee that there will ever be a criminal trial). However, it is this Court's view that whether one is at the investigation stage or at the trial stage, the rationale for not judicially interfering is the same, namely that the most appropriate person to deal with issues such as the admissibility of evidence arising from the alleged unlawfulness of a search or seizure is not a judge dealing with a preliminary matter (as this Court would be, in a judicial review application) but rather the trial judge. This rationale for the judicial reluctance to interfere in criminal proceedings, was noted by McCracken J. in *DPP v. Windle* [1999] 4 IR 280 at 284, albeit that the preliminary hearing in that case was a preliminary examination of indictable offences in the District Court under Part II of the Criminal Procedure Act, 1967, rather than judicial review:-

"I am quite satisfied that it is not for a judge conducting a preliminary investigation to determine the validity or otherwise of a search warrant. This is a matter purely for the trial judge, to be determined by him on the evidence before him. If there had been no search warrant in the present case, then certainly the District Judge would have been justified in refusing to send the second respondent forward for trial, as there would have been no evidence to justify the search of his premises, but once a search warrant existed, in my view the question of its validity was one for the trial and not one for a preliminary investigation."

35. It is this Court's view that the reason courts have been and should be reluctant to judicially review an investigation, is not that it assumes that the investigation has been conducted lawfully (or for that matter that an Inspector's or a garda's interpretation of his entry and seizure powers under the relevant statute is correct), but rather than it is premature for there to be a challenge to these matters or these interpretations, before the investigation is complete and a decision has been taken to prosecute or not to prosecute. The more appropriate forum for these matters to be considered is the trial court, which will have all the evidence before it, which it is sought to be admitted.

36. While *Blanchfield* involved a trial which had been fixed, the case of *Fowley v. Conroy* [2005] IR 480 involved an investigation, without there being a prosecution in being, which is the situation in the case before this Court. In the *Fowley* case, the applicant sought to have a burglary, which had occurred in his home, investigated by the respondent, the Commissioner of An Garda Síochána, and he was granted leave to seek an order of *mandamus* to this effect. At the hearing in the High Court, Clarke J. dismissed the application and stated at p. 492:-

"The test to be applied is, therefore, as to whether any reasonable police commissioner could, on any basis, have come to the view that it was appropriate to conduct the enquiry in the way in which it was. In approaching that test the court must afford the widest conceivable margin of appreciation to the Commissioner... In those circumstances it does not seem to me that the applicant has met the exceptionally high threshold that would be necessary to entitle her to an order of the type she seeks in this case".

37. Although *Fowley* involved an application to start an investigation, unlike the case before this Court, which involves an application for judicial interference in an ongoing investigation, it seems to this Court that the rationale for Clarke J.'s decision to grant the Gardaí a very wide margin of discretion as to whether they commence an investigation, is also applicable to the conduct of an investigation, which has commenced, as in the present case. This is implicit from the fact that Clarke J. in reaching his decision quoted with approval, at p. 487 of his judgment, from an extract from the decision of Lord Denning M.R. in *Reg v. Commissioner of the Police Metropolis, Ex parte Blackburn* (No. 1) [1968] 2 QB 118 in which reference is made not just to the commencement of an investigation but also the manner in which it is conducted, i.e. to the issue of whether arrests are made. Lord Denning M.R. stated at p. 136:-

"Although the chief officers of police are answerable to the law, there are many fields in which they have the discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the Chief Constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter."

38. Another relevant case involving an investigation, which had not proceeded to a prosecution, is the decision of Quirke J. in *Heaney*

v. Commissioner of An Garda Síochána [2007] 2 IR 69. In that case, leave was granted to seek, by way of judicial review, declarations that the decision, of the Commissioner of An Garda Síochána not to prosecute the applicant's neighbour for offensive conduct, was unlawful and that the investigation into the complaints was carried out in an arbitrary, unreasonable and unfair manner. Quirke J. referred to Order 84, r. 18(2) and Order 19 r. 29 of the Rules of the Superior Courts, which rules deal with the right of an applicant to seek declarations and injunctions, which rules also apply to the application by Ms. Foley and D2 before this Court, and therefore are of particular relevance. In reference to these rules, Quirke J. states at p. 76:-

"The rules just cited should not be construed as conferring upon persons who are aggrieved by the acts or omissions of an organ of State or public body an automatic right to declaratory relief when evidence suggesting inefficiency, or even incompetence or irregularity, has been adduced in support of an application for judicial review.

In considering such applications, it is not the function of the court to conduct a review of a process or investigation undertaken by organs of State or public bodies in order to discover whether they were conducted efficiently, effectively or to the satisfaction of all those affected by their outcome. The court will be concerned with, and may investigate, the legality of such an investigation or process and of the decisions which result therefrom."

39. On this basis, Quirke J. refused to interfere in the investigation. In this Court's view, nothing turns on the fact that the criminal investigation in the *Heaney* case was conducted by the Gardaí, whereas in the case before this Court, the investigation is being conducted by State appointed Inspectors. As such, this Court regards this case as persuasive authority on the correct approach to be taken with regard to the judicial review of the acts of the investigative authorities of the State. This is because the critical issue is that a criminal prosecution may result from the investigation, and it is only after this 'decision' (to prosecute) to quote Quirke J., that the legality of the investigation should be considered by the courts at the criminal trial.

Summary of the legal principles applicable

40. Based on foregoing caselaw, this Court is of the view that the law on this issue is that judicial review of the manner in which an investigation is being conducted by the Gardaí or State appointed Inspectors, as in this case, is only available in the most exceptional of circumstances, since such investigators, whether Gardaí or WRC Inspectors, are granted the widest conceivable margin of appreciation in how they conduct their investigation. For this reason, an exceptionally high threshold needs to be crossed for the orders of the nature sought by the applicants in this case to be granted. The orders sought by the applicants in this case require a finding that a search was unlawful and they seek the evidence seized to be returned, even though such matters regarding the legality of searches and the admissibility of evidence are matters which are best determined by the trial judge, if there is to be a trial in this case.

41. It is worth noting that in the *Fowley* case, in which there was an attempt to interfere in an investigation being undertaken by the Gardaí, Clarke J. comments at p. 486 of his judgment that it was *'pointed out by counsel for the applicant there is little direct authority on this issue.'* It seems to this Court that there is a good reason for this paucity of caselaw on judicial interference with investigations of criminal offences. If it were the case that criminal investigations could be judicially reviewed as a matter of course, rather than the current law which is that this can only happen save in the rarest of cases, it is likely that our courts would be awash with persons suspected of committing criminal offences, who were seeking to stop investigations being conducted by the Gardaí into their alleged involvement in such offences.

42. It is important to emphasise that this Court is not saying that persons suspected of having committed criminal offences are not entitled to challenge the legality of criminal investigations. Rather, it is saying that as a matter of course the challenge occurs not during the investigation process, but during the course of a trial, if sufficient evidence is gathered from the investigation to justify a trial.

43. Based on the foregoing analysis of the law applicable to this challenge, this Court must next consider whether there are any exceptional circumstances which would justify a challenge to the investigation in this case.

Are there exceptional circumstances justifying judicial interference in this investigation?

44. In undertaking this consideration of the evidence that the Inspectors had for their decision to enter Harcourt Premises and seize the items they did, it is important to bear in mind that, in the words of Quirke J. *'incompetence and irregularity'* is not sufficient for the courts to intervene, and in the words of Clarke J. an *'exceptionally high threshold'* needs to be passed for interference by this Court in the investigation process, since he stated that the *'widest possible margin of appreciation'* is granted to State agencies investigating criminal offences.

45. In the circumstances of this case, it is this Court's view that another way to phrase the threshold for interference in a criminal investigation is to ask, was what the Inspectors did completely irrational, since if it was, it is appropriate for the Court to interfere in a criminal investigation. This is not an attempt by this Court to depart from the test suggested in these cases, but rather to use this expression as shorthand for the *'exceptionally high threshold'* that needs to be passed, so as to apply it more easily to the circumstances of this case. In this context, it is this Court's view that the first question to determine is:-

1. Was it completely irrational for the Inspectors to investigate the role of persons other than the employer, OCS Operations, and its directors and officers?

46. This is because the applicants point out that they were not the employer of the Clerys' Worker, since they were employed by OCS Operations. Further, it was emphasised by the applicants that they were not officers or managers of OCS Operations. On this basis, they argue that the Inspectors have no grounds for investigating them and that this fact supports their view that the entry and seizure in this case was unlawful. However, as previously noted, s. 21(3) of the 1977 Act by its express terms provides for someone other than the employer or officer or manager of the employer, to be guilty of a criminal offence, since that section applies to third parties who purported to act as officers or managers of an employer company and who consented to, or connived in, or neglectfully attributed to, the offence in question.

47. It follows that in this case, the role of the Inspector in investigating a possible offence under the 1977 Act, is a role in which he is perfectly entitled to consider which third parties, other than the employing company, OCS Operations, might be guilty of a criminal offence. This is not a defined list of persons such as those people who are listed in the CRO as directors or secretary of OCS Operations, but extends to any person who purported to act as an officer or manager of OCS Operations.

48. Indeed, it seems to this Court that a thorough investigation obliges the Inspectors to do what the applicants seem to suggest they should not have done, namely to look beyond the employer of the Clerys' Workers, OCS Operations, and consider what other persons might be guilty of a criminal offence by virtue of their involvement in the Clerys' Redundancies, even though those persons are not the employer and are not an officer or manager of the employer.

49. Yet, as argued by the applicants, their case appears to be that by looking beyond the employer, the Inspectors have gone beyond their powers. This Court does not agree with that viewpoint in light of the wide category of persons who could be a 's. 21(3) person' (to use that expression, as shorthand, for someone other than the body corporate employer who could be guilty of an offence under that section).

50. For this reason, it is this Court's view that it was not completely irrational for the Inspectors to consider the possibility that third parties, such as the applicants, even though they were not the employer of the Clerys' Employees or an officer or manager of the employer of the Clerys' Employees, might have had a role in the Clerys' Redundancies. Thus, to the extent that the applicants' case is that the entry into the Harcourt Premises and the seizure of records was unlawful because the applicants were not the employer or an officer or manager of the employer, that argument is rejected by this Court.

Meaning of 'purporting to act' as an officer or manager of an employer company

51. The applicants have put a further argument that they should not be investigated as a 's. 21(3) person', since they were not as a matter of fact officers or managers of OCS Operations (and this does not appear to be disputed) and therefore could only fall under the category of someone who 'purported to act' as an officer or manager of OCS Operations. Yet, they point out that the Oxford Dictionary definition of '*purported to act*' would require the applicants to have pretended or held themselves out as acting as an officer or manager of OCS Operations and the applicants claim that there is no suggestion or any evidence that the applicants did so pretend or hold themselves out.

52. Undoubtedly, if this matter does go to a criminal trial, this interpretation will be forcefully argued by the applicants. For the reasons already stated, the function of this Court is to simply consider whether the contrary interpretation is completely irrational, such as to justify the Court's interference in an investigation which is based on that contrary interpretation. To this Court, it seems that the contrary interpretation is that a person who covertly acts as an officer or manager of an employer company could nonetheless be said to have purported to act as an officer or manager. This Court does not have to decide whether such an interpretation is the correct one or whether the applicant's interpretation is the correct one. However, this Court does not find that it was completely irrational of the Inspectors to interpret a 's. 21(3) person' as someone who does not hold himself out, but covertly acts, as an officer or manager.

53. Even if this Court assumes that the applicants' interpretation of s. 21(3) is correct, the actions of the Inspectors in investigating the applicants do not become completely irrational in such a situation. This is because, it may well be that the Inspectors have already, or may in completing their investigation, uncover evidence that the applicants did in fact hold themselves out as officers or managers of OCS Operations. It follows that notwithstanding the forceful point of interpretation presented by the applicants regarding the meaning of '*purport to act*' in s. 21(3), it was not, in this Court's view, completely irrational for the Inspectors to investigate whether persons, who were not officers or managers of OCS Operations, and who say that they did not hold themselves out as acting as such, might nonetheless be s. 21(3) persons.

2. Was it completely irrational for the Inspectors to investigate Ms. Foley and D2?

54. Having concluded that it was not completely irrational for the Inspectors to investigate for the purposes of s. 21(3) of the 1977 Act a person who was not a director or officer of OCS Operations and who does not appear to have held themselves out as such, the next question is whether it was completely irrational for the Inspectors, in the particular circumstances of this case, to investigate the possibility that Ms. Foley and/or D2 might be s. 21(3) persons or indeed that other persons such as employees of D2, e.g. Mr. Redmond, might be a s. 21(3) person.

State of knowledge of Inspectors at time of entry onto Harcourt Premises

55. To determine this question, it is the state of knowledge of Mr. Kelly on the 19th May, 2016, the date of his entry into the Harcourt Premises, which is relevant. The affidavit evidence before the Court was that the Inspectors had reviewed the affidavit of Mr. Brydie which was sworn in connection with the application to wind up OCS Operations, which took place almost a year previously, on the 12th June, 2015. From this affidavit, the Inspectors knew that Natrium purchased OCS Operations between 12 a.m. and 1.15 a.m. on the 12th June, 2015, and that prior to that purchase, Mr. Cooney and Mr. Brydie had been contacted by Natrium to become directors. The Inspectors would also have become aware of the intention of Natrium to sell its shares in OCS Operations to Mr. Brydie for the purpose of removing OCS Operations from the OCS Group. The Inspectors were thus aware that in a very short space of time on the 12th June, 2015, beginning in the early hours of the morning, the OCS Group was acquired by Natrium, Mr. Brydie and Mr. Cooney, two insolvency specialists, became directors of OCS Operations, that company was then transferred by Natrium out of the OCS Group to Mr. Brydie, the OCS Group ceased to provide financial assistance to OCS Operations and Mr. Brydie swore his affidavit to support the application to have OCS Operations wound up in the High Court.

56. The Inspectors' concerns in all of this is the rights of the employees of OCS Operations, who were made redundant as a result of the foregoing actions on the 12th June, 2015, where no consultations were initiated between the employer and the employer's representatives and where the employer did not supply the employees' representatives with all relevant information in breach of the 1977 Act. In addition to this information gleaned from the affidavit of Mr. Brydie, Mr. Kelly had written on the 25th April, 2016 to Mr. Brydie and Mr. Cooney seeking information in relation to his investigation of the Clerys' Redundancies. He received a response dated 13th May, 2016 (six days before their entry onto the Harcourt Premises) sent on behalf of Mr. Brydie and Mr. Cooney in which they stated that they had been in contact with one of the eventual liquidators of OCS Operations, Mr. Richardson, on the 25th May, 2015. This letter also confirmed that Mr. Brydie and Mr. Cooney had met with Mr. Redmond of D2 and Mr. Richardson on the 10th June at KPMG. The Inspectors also knew from this letter that Mr. Redmond of D2 had supplied Mr. Brydie and Mr. Cooney with relevant documents and information relating to the purchase of OCS Operations by Natrium, apparently on behalf of Natrium since they advised Mr. Kelly that they had received those documents from "*Mr. Mark Redmond of Natrium*". This was presumably on the basis that Mr. Redmond was an employee of a company, D2, whose owner, Ms. Foley, had an interest in FAM Assets Limited, which had a 20% interest in Natrium. In this regard, Mr. Kelly was aware that Natrium had no employees itself, as he had been advised by Duncan Inverarity of A&L Goodbody that Natrium, whose registered office was at that firm's office, of this fact. One of the items received by Mr. Kelly from Mr. Brydie and Mr. Cooney was a directors' pack which they had received on the 8th June 2015 with the watermark '*D2 Private M Redmond at D2Private.com 7-June-2015*'.

57. Of significance is the fact that attached to the directors' pack was a list of documents which contained a very detailed list of Clerys' staff, without their names, but with their department, dates of birth, ages, employment start date, length of service, current hours, salary etc. The applicants have claimed that this document is simply a list of employees which is created as part of the due diligence in a company acquisition, and therefore was not intended for use in planning redundancies. This may well be the case. However, that is not the question for this Court. Rather the question for this Court is whether in light of the foregoing evidence available to Mr. Kelly, it was completely irrational of him to investigate whether the owner of D2, Ms. Foley, or anyone connected with D2, could have been involved as a 's. 21(3) person' in the Clerys' Redundancies. To put it another way, was it completely irrational of the Inspectors to investigate whether a decision to make the Clerys' Workers redundant could have been made prior to the early

hours of the morning of the 12th June, 2015, by someone other than Mr. Brydie and Mr. Cooney as the new directors of OCS Operations as part of the Clerys' Takeover, including but not limited to Ms. Foley, the owner of D2, or any employees of D2? It does not seem to this Court that such a conclusion is completely irrational. Equally, it does not seem to this Court to be completely irrational for Mr. Kelly to believe that an inspection of D2's premises might uncover evidence of a connection between the Clerys' Redundancies and D2. This is because D2, through its employee, Mr. Redmond, had a role in providing information and being involved in meetings which *could* indicate a role for someone other than Mr. Brydie and Mr. Cooney, in deciding on the redundancies of the Clerys' Employees.

58. For the foregoing reasons, this Court concludes that the Inspectors were not completely irrational to investigate the possibility that Ms Foley and/or D2 or any employees of the applicants might have had an involvement in the Clerys' Redundancies, which might be such as to make those persons under investigation a 's. 21(3) person'.

59. It is Mr. Kelly's state of knowledge at the time of his decision to investigate Ms. Foley and D2 by, *inter alia*, entering the Harcourt Premises, which is the critical factor in determining whether that decision was completely irrational. Although not determinative of this issue, it is also relevant to note that the reasonableness of Mr. Kelly's belief that investigating Ms. Foley and D2 would further his investigation of the Clerys' Redundancies, is evidenced by the fact that, upon entry into the Harcourt Premises, Mr. Redmond stated to Mr. Kelly that he had emails on his laptop which may have been relevant to the investigation of the Clerys' Redundancies. This is averred to by Mr. Kelly in his affidavit dated 24th June, 2016.

60. This Court would emphasise that whether the term '*completely irrational*' or '*exceptionally high threshold*' is used to consider the legality of the criminal investigation, very little is required to satisfy the test that it was lawful for the State's investigative authorities to investigate whether someone might have been guilty of a criminal offence. If it were otherwise, our Courts would be asking those who investigate criminal offences to constantly second guess themselves to ensure that it is lawful to be investigating a link between some person and an alleged criminal offence. If this were the situation, they would be obliged to limit the field of possible offenders to only those that it is reasonable to assume committed the criminal offence for fear of being found to have instigated an unlawful investigation, by casting the net of possible offenders too widely. In this Court's view, this cannot be the role of our criminal investigators. They must, to adopt the words of Clarke J., be given '*the widest conceivable margin of appreciation*' during the investigation so as to increase the chance of their identifying the persons who might have committed crimes.

61. The foregoing conclusion does not mean that investigating officers are not subject to the law. Rather, it means that the time for an analysis to be done of whether the investigating authorities exceeded their powers is not, save in exceptional circumstances, during the investigation, but rather when the investigation is complete. If at that stage, it turns out that the investigators have exceeded their powers or that a search warrant was defective, there will be an opportunity at the trial of the criminal offence, if there is sufficient evidence to justify such a trial, to ensure that the investigation process was carried out in accordance with the law.

3. Was it completely irrational for the Inspectors to believe that they had a right of entry into the Harcourt Premises and a right to seize records?

62. The right of entry and seizure is a separate issue from the investigation *per se* into whether D2 and/or Ms. Foley might have been connected with the Clerys' Redundancies. This is because the right of entry (as distinct from simply the decision to investigate) is subject to statutory pre-conditions to its exercise, since under s. 27(1), it is only available where there are reasonable grounds for believing the Harcourt Premises is used in connection with the employment of persons or for keeping employment records. It is important therefore to first consider this statutory pre-condition to entry.

Did the Inspectors have reasonable grounds for believing that the Harcourt Premises was being used in connection with the employment of persons or contained documents relating to the employment of persons?

63. For the entry to the Harcourt Premises to be lawful, s. 27(1)(a) of the 2015 Act expressly states that the Inspectors must have reasonable grounds for believing that the premises is or was being used in connection with the employment of persons or that records or documents relating to employment are kept there.

64. Mr. Kelly has averred in his affidavit dated 23rd May, 2016, that Mr. Redmond was employed and worked at the Harcourt Premises. Mr. Kelly's averment is not controverted by the applicants and it seems that the Harcourt Premises at 20 Harcourt Terrace is and has been the offices of D2 for some time. Indeed, Mr. Redmond states in his affidavit dated 14th June, 2016, that he is an employee of D2. In addition, Mr. Kelly was aware from the letter dated 13th May, 2016, which he received on behalf of Messrs. Brydie and Cooney that they had received a directors' pack with extensive details relating to the employment of individuals at Clerys (i.e. start date, years of service, salary, age etc), which directors' pack had the watermark of D2 impressed thereon. Accordingly, this Court concludes that the Inspectors had reasonable grounds for believing that the Harcourt Premises were being used in connection with the employment of persons and/or that the Harcourt Premises contained records or documents relating to the employment of persons (in this case, the persons were Clerys' Employees).

65. However, this is not the end of the analysis of the legality of the entry, since even if the Harcourt Premises is a premises used in connection with the employment of persons, it still needs to be decided whether it was completely irrational for them to believe that they had a right of entry into those premises, occupied by D2, in connection with the investigation of the Clerys' Employees, even though those employees were not and had not worked at those premises.

Was it completely irrational for the Inspectors to believe that they could enter premises where the Clerys' Employees had never worked?

It is important to emphasise that this Court is not concerned with whether the Inspectors made a mistake in their interpretation of s. 27, since differences of statutory interpretation between lawyers occur all the time (and are ultimately only resolved by a court decision) and criminal investigations should not be stopped or interfered with, simply because there is a possibility or even a probability that a court will come to a different interpretation of a statute than the investigating authorities. However, if the statutory interpretation by the investigating authorities is completely irrational, this may be something which requires the interference of the courts and hence it is necessary for this Court to consider, in this context, the interpretation put upon s. 27(1) by the respondents and the resultant right, which they claim they had to enter the Harcourt Premises and seize records.

66. Before considering the Inspector's interpretation, it is relevant to emphasise that Mr. Redmond was employed by D2 and he worked at the Harcourt Premises. He was not an employee of OCS Operations, the employer of the Clerys' Employees. Thus, the Harcourt Premises was a place of work, but not a place of work of the Clerys' Employees. Counsel for the applicants have forcefully argued that the premises to which an Inspector is allowed gain entry under s. 27(1) of the 2015 must be a place of work of the employees the subject of the investigation. In this case, the applicants have argued therefore that for the entry to have been lawful, the Harcourt Premises would have to have been a place of work of the Clerys' Employees, and not simply a place of work of any

employee, as suggested by the WRC.

General restriction on the interpretation of the powers of entry under s. 27(1)(a)(i)

67. As a preliminary point, it should be emphasised that the right of entry under s. 27(1)(a)(i), whether it is to any place of work or a place of work where the employees whose conditions are being investigated work, is not an unrestricted right. This is because, as is clear from the opening words of s. 27(1) ("*For the purposes of this Act or a relevant enactment*"), the right of entry into a workplace is subject to the restriction that these rights are only to be used for the purposes of, in this case, the 1977 Act, or more specifically the investigation of the Clerys' Redundancies.

68. It is clear therefore that the WRC is not, and could not be, claiming that their Inspectors have a right of entry under s. 27(1)(a)(i) to every place where any person works. Rather it is arguing that it is entitled to enter any only such work places which are relevant for the purposes of the investigation, in the present case, of the Clerys' Redundancies. For their part, the applicants claim that under s. 27(1)(a)(i) the Inspectors' right of entry, for the purposes of investigating the Clerys' Redundancies, is restricted to entering the place of work of Clerys' Employees.

Meaning of 'any place of work or any premises'

69. The first point to note about s. 27(1)(a)(i) is that the expression used in that section is itself a very broad one. The inspector is entitled to enter '*any place of work or any premises*' that he has reasonable grounds for believing is being '*used in connection with the employment of persons*'. As previously noted, the expression '*place of work*' is defined by s. 27(8) as having the same meaning in the 2005 Act as it has in the Safety, Health and Welfare at Work Act, 2005, which, insofar as relevant, states:-

"place of work includes any, or any part of any, place (whether or not within or forming part of the building or structure), land or other location at, in, upon or near which, work is carried on whether occasionally or otherwise [...]"

70. Thus, the expressions '*any place of work*' (as so defined) and '*any premises*' that is being '*used in connection with the employment of persons*' are very expansive terms. On a plain and literal meaning of the words, it is certainly arguable (and therefore not completely irrational) that they support the interpretation that any place of work means any place of work and not a place of work, where the employees being investigated work, as suggested by the applicants. This Court concludes therefore that it was not completely irrational for Mr. Kelly to interpret s. 27(1)(a)(i) as granting him the right to enter the Harcourt Premises, on the basis that it was a place of work of persons, even though it was not the place of work of the Clerys' Employees.

Seizure of records

71. Another issue for determination is whether it was completely irrational for Mr. Kelly to believe that he was entitled to seize records from the Harcourt Premises pursuant to his powers under s. 27(1). Under s. 27(1)(e) the Inspector is entitled to require any person at the place of work so lawfully entered, to produce to the Inspector such records as are in that person's possession, as the Inspector may reasonably require for the purpose of his functions under the 2015 Act. As such, Mr. Kelly is not entitled to seize all the records at the Harcourt Premises, but his powers are restricted by the opening words of s. 27(1) (which in this case, require the records to be for the purpose of the investigation into the Clerys' Redundancies) and the requirement in s. 27(1)(e) that the records be reasonably required for the purpose of the Inspector's functions under the 2015 Act (which purpose, in this Court's view, would be his investigation into the Clerys' Redundancies).

72. Having concluded that it was not completely irrational for the Inspector to interpret s. 27(1) as entitling him to enter the Harcourt Premises, it is also this Court's view that it was not completely irrational for the Inspector to interpret s. 27(1), and in particular s. 27(1)(e), as entitling him to seek possession of the laptop and the invoices from Mr. Redmond. This is because, in view of Mr. Kelly's level of knowledge regarding the possible link between D2, which was owned by Ms. Foley, and the Clerys' Redundancies (referred to at para. 55 *et seq* above), it was not completely irrational for Mr. Kelly to think that there might be a link between records at the D2's Harcourt Premises and the Clerys' Redundancies.

73. For the foregoing reasons, this Court does not believe that Mr. Kelly's interpretation of his powers of entry and seizure is a basis for this Court to interfere in the investigation of the applicants, in the manner sought by them.

4. Was the Inspectors' entry and seizure unlawful on the basis that it was done for an improper purpose?

74. Another claim made by the applicants, is that the Inspectors' entry and seizure of records was done for an improper purpose, namely for the ulterior motive of investigating the Clerys' Takeover, rather than the Clerys' Redundancies.

75. As a preliminary point, it is relevant to note that there is no evidence that Mr. Kelly undertook the entry into the Harcourt Premises for the purpose of investigating the Clerys' Takeover. On the contrary, in his affidavit of the 23rd May, 2016, Mr. Kelly has provided sworn evidence that he entered the Harcourt Premises for the purpose of investigating the Clerys' Redundancies. Furthermore, the evidence of Mr. Clark in his affidavit of the 14th June, 2016, and Mr. Redmond in his affidavit of the same date is that Mr. Kelly stated on the 19th May, 2016, that his entry and request for records was for the purpose of investigating the Clerys' Redundancies.

76. What the applicants point to however, in support of their claim that the Inspectors were in fact investigating the Clerys' Takeover, rather than the Clerys' Redundancies, is the breadth of the questions asked by Mr. Kelly. They point out that he asked for Mr. Redmond's laptop, hard drive and files, including emails and correspondence with Mr. Brydie and Mr. Cooney, Mr. Richardson and Mr. Wallace, Ms. Coghlan of A&L Goodbody, Gordon Brothers as well as copies of invoices for Mr. Cooney and Mr. Bydie.

77. However, at the time of his entry into the Harcourt Premises, Mr. Kelly was aware that Natrium had owned OCS Operations and he was aware that the owner of D2, Ms. Foley, had an indirect interest in a 20% shareholding in Natrium. Mr. Kelly avers in his affidavit of 23rd May, 2016, that it was his belief that the account of the series of events presented to the High Court on the 12th June, 2015, by Mr. Brydie in connection with the application to liquidate OCS Operations, was incorrect and that the impression was given to the High Court that a decision to liquidate OCS Operations was a decision that was made in the early hours of the morning of the 12th of June, 2015, when it is his belief that it was made in advance of this date and this necessitated his investigation into events that took place prior to the morning of the 12th June, 2015.

78. In this regard, it is important to bear in mind that the Inspectors were involved in the investigation of an alleged criminal offence. In any criminal investigation, it would be normal for the investigators to cast the net widely to seek to ensure that they obtain all possible information. Much of the information that is uncovered in any criminal investigation is likely to be irrelevant, since the nature of an investigation is that one is seeking all the details that *might* be relevant. Only once the investigation has been completed, and an analysis has been done of all the evidence and perhaps after obtaining legal advice on probative value and admissibility, can one say with certainty which of the evidence obtained by investigators was relevant and which was not. Thus, much of the evidence

which is gathered during any investigative process will end up being irrelevant. For this reason, the fact that an investigator seeks evidence that appears only to have a tenuous link with the alleged offence does not per se, make the investigation unlawful.

79. It follows that an investigation does not become *ultra vires* simply because it is a wide ranging or thorough investigation or because it leads to a collection of material which is not relevant to the subsequent trial. Indeed it seems to this Court that in order for an investigator to ensure that all relevant information is obtained, the investigator must, of necessity, overstretch and then exclude the evidence that is irrelevant to any subsequent prosecution. This makes sense, since in this Court's view it would be inconceivable that every time a criminal investigation commences, that Gardaí or Inspectors would be required to look over their shoulder wondering if, by expanding their investigation, by examining material that might not be directly relevant to the criminal offence, they are in danger of the investigation becoming unlawful.

80. Rather, if in a criminal investigation, the net is not cast wide, there is a risk that important evidence in a criminal investigation will be missed. Casting the net wide is not evidence of an improper purpose, but evidence of a thorough investigation. The applicants may, for their own reasons, not want the Inspectors to investigate this matter so thoroughly. They may even feel that this investigation is only being conducted thoroughly, because it is high profile, relating as it does, to one of Dublin's most famous landmarks, the Clerys' department store. However, the fact that a matter is being investigated thoroughly, which will of necessity uncover a large amount of irrelevant material, does not make it an improper or unlawful investigation.

81. This Court is of the view that:

- it was not completely irrational for the Inspectors to believe that the decision by Mr. Brydie in the early hours of the morning of 12th June, 2015, was *not* the first time that consideration was given to the Clerys' Redundancies. Rather it seems to be an entirely reasonable proposition to believe that there was a possibility that persons who were connected with Natrium, which had briefly owned OCS Operations for a few hours on the morning of the 12th June, 2015, could have been involved in a consideration of the Clerys' Redundancies in the weeks prior to the 12th June, 2015. Indeed commercial logic would suggest that it was more than likely that a purchaser who had bought a significant company such as OCS Operations, with its 130 direct employees and 330 indirect employees, and sold it so quickly after purchase is likely to have considered the decision to sell OCS Operations in some detail in the weeks prior to the acquisition;
- it was not completely irrational for the Inspectors to believe that an investigation into the lead up to the Clerys' Redundancies, namely the Clerys' Takeover (involving such persons who were connected to Natrium) would show whether the foregoing proposition was the case or not;
- it was not completely irrational for the Inspectors to believe that an investigation into the details of the Clerys' Takeover might provide evidence as to whether such persons who were not officers or managers of OCS Operations nonetheless (a) purported to act as such and (b) had some involvement in the lead up to the decision in the early morning of 12th June, 2015, to effect the Clerys' Redundancies and therefore might have been guilty of an offence under s. 21(3) of the 1997 Act.

82. While not determinative of the issue, it is relevant to note that;

- the result of the decision of the Inspectors to investigate the background to the Clerys' Redundancies, including the Clerys' Takeover (by asking questions in their letter of 25th April, 2016, to Mr. Cooney and Mr. Brydie regarding the Clerys' Takeover) led to the disclosure to Mr. Kelly of the directors' pack, which contained, *inter alia*, the details of the length of service of the Clerys' Workers and which information would have enabled the sender of this information (apparently Mr. Redmond of D2), to calculate the redundancy costs of the Clerys' Workers;
- it is possible that this document would not have been received by Mr. Kelly if, as seems to be suggested by the applicants, Mr. Kelly had restricted himself to asking only questions in relation to the redundancy of the Clerys' Employees and ignored the background to the Clerys' Redundancies and in particular the actions of those connected with Natrium, prior to the 12th of June, 2015, as the purchaser of OCS Operations in the lead-up to its acquisition and the almost instantaneous disposal of that company on the morning of the 12th June, 2015.

83. As previously noted, for the scope of this investigation to be so wide as to render the investigation as one for an improper purpose, the Inspectors would need to have been pursuing matters which were completely irrational in view of the purpose of the investigation. For the foregoing reasons, this Court does not believe that this was the case.

Retaining of the documents and privileged material

84. A separate question to be addressed by this Court is whether Mr. Kelly was entitled to take the laptop during the entry and seizure on the 19th May, 2016, when he was advised by Mr. Clarke, the solicitor to the applicants, that there was legally privileged material on the laptop. The following is a summary of the relevant exchanges between the applicants and the respondents regarding this issue during the entry and seizure on the 19th May, 2016.

Summary of exchanges regarding privilege

85. Before Mr. Kelly had been given possession of Mr. Redmond's laptop or of any documents, Mr. Clarke informed the Inspectors that the laptop contained legally privileged correspondence between D2 and its legal representatives, as well as commercially sensitive information. For this reason, Mr. Clarke sought an undertaking from the Inspectors not to access files on the laptop pending the determination of the High Court application, Mr. Kelly declined to give such an undertaking. Mr. Clarke argued the actions of the WRC did not respect the applicants' constitutional rights and further that the Inspectors were not entitled to seize legally privileged documents stored on the laptop and he informed them that the applicants intended to seek an order from the High Court requiring a record of every document obtained by the Inspectors. Mr. Kelly advised Mr. Clarke that the issues in relation to privileged documents should be outlined in correspondence between Mr. Clarke and the WRC's solicitors. Mr. Kelly intimated that he would exercise his powers and seize the laptop and records until an order was granted by the High Court restraining him from doing so. Mr. Clarke expressed his intention to apply for a High Court injunction and in the interim they would reluctantly and under protest hand over the laptop and records.

86. Mr. Clarke avers in his affidavit of 14th June, 2016, that the respondents subsequently exported emails from Mr. Redmond's email account and sought to delete the record of their having done so. In his replying affidavit of 24th June, 2016, Mr. Kelly avers that he informed Mr. Redmond during the entry onto the Harcourt Premises that Mr. Brydie and Mr. Cooney had given documentation and records to the investigation which indicated they had received information from Mr. Redmond relating to OCS Operations and that this information had been transmitted by email. Hence the Inspectors wanted access to Mr. Redmond's laptop. Mr. Clarke avers that this was denied by Mr. Redmond. However, Mr. Kelly avers that he advised Mr. Redmond that it was an offence to provide false or

misleading information to the Inspectors and that this led Mr. Redmond to then indicate that he may have the emails on his laptop but was not sure how they might be retrieved.

Legal position regarding privilege in a s. 27 search

87. Reference was made during the hearing to the Competition and Consumer Protection Act, 2014 (the "2014 Act"), in which authorised officers under that Act are granted powers of entry and seizure in relation to the investigation of competition law offences which are similar to the powers of entry and seizure granted to WRC Inspectors. Section 33 of the 2014 Act specifically deals with the type of issue that arose in this case, since it deals with the treatment of legally privileged material which is uncovered as part of the search. This section allows for an authorised officer under the 2014 Act to take possession of information, even where it is apprehended that it is legally privileged, provided that the taking of it is done by means whereby its confidentiality can be maintained pending a determination by the High Court as to whether it is in fact privileged.

88. If a similar section applied to an Inspector under the 2015 Act, then the Inspectors would have been permitted to take possession of the allegedly privileged material in this case, provided that its confidentiality could have been maintained, pending a High Court determination of the issue. Undoubtedly it would have made matters a lot clearer for both parties in this case if such a provision existed, but no such provision applies to the WRC Inspectors. As a result, the Inspectors in this case were not under a statutory obligation to refrain from accessing the contents of the laptop, on the grounds that laptop was alleged by Mr. Clarke to contain legally privileged material.

89. Notwithstanding the absence of a statutory prohibition on the Inspectors from accessing the contents of the laptop, this Court must consider the legality of the Inspectors' actions in taking the laptop and accessing the documents in light of the assertion, at the relevant time, on behalf of the applicants, that the laptop contained privileged documents.

Whether the documents are in fact privileged?

90. In this regard, it is relevant that at the trial, counsel for the WRC sought to hand into Court an envelope with 16 documents, as he wanted the Court to determine whether those 16 documents were privileged or not. Counsel for the applicants objected to this application, on the grounds that it was not for the person, against whom privilege is claimed, to select which documents are to be determined by the Court to be privileged or not. This Court agreed with the contention of counsel for the applicants. However, it is also relevant to note that counsel for the applicants did not ask this Court to make a determination as to whether any of the material on the laptop was privileged. This means that at the end of the hearing before this Court, it was still unknown, first whether there were privileged documents on the laptop and secondly if so, whether the Inspectors accessed documents that were privileged, since no determination has been made by a court as to whether any of the material on the laptop is privileged, let alone the documents accessed by the Inspectors.

91. For this reason, this Court cannot make any order for the handing over of material by the Inspectors to the applicants on the grounds that the material was legally privileged, since no such finding has been made by this, or any other, Court.

92. It is important to note that this Court is not saying that a person such as the applicants who have had material seized, which is allegedly legally privileged, are not entitled to have legally privileged material returned to them. However, for there to be such a remedy, it must first be determined that the material is actually privileged and no such determination has been sought by the applicants in this case.

Effect of an assertion of legal privilege on a search and seizure

93. The next issue to consider, in deciding on the legality of the Inspectors' actions, is the effect of an assertion of legal privilege on those actions. It is important to note that just because a person being investigated asserts that a laptop might contain privileged material does not mean that the investigators, be it the Gardaí or WRC Inspectors, must hand back the laptop or refrain from searching it. If this were the case, it would be a very easy matter for a person to thwart an Inspector or a Garda, who otherwise was entitled to take a laptop as part of a search, from having access to that laptop.

94. This Court does not believe that searches of laptops can be controlled by the person being searched in this manner or that the role of our Courts is to adjudicate, during an investigation, on whether the Gardaí or Inspectors are entitled to search a laptop, save in exceptional cases. In reliance on the caselaw referred to earlier in this judgment, it is this Court's view that it is not its role, during a criminal investigation, to be involved in monitoring the exercise by Gardaí or Inspectors of their right to search this laptop or that laptop. This is a matter for the trial of the offence and if at the trial, it is found, for example, as a matter of fact that an Inspector, in advance of opening a document, knew that it contained legally privileged material, it is a matter for the trial court to determine the effect of such a finding on the admissibility of evidence adduced from that search.

95. This does not mean that Gardaí and Inspectors are at large in relation to investigations. There has always been an incentive for Gardaí and Inspectors to ensure that their searches are lawful, for the very reason that if they fail to do so, there is a risk that the evidence obtained will be rendered inadmissible. However, what this Court has difficulty with, is the suggestion that a person being searched can, by asserting privilege, control the search so as to require the Gardaí or Inspectors to refrain from taking the laptop or other material and be required to obtain a Court order before completing a search of the laptop, which laptop they might otherwise be entitled to search.

96. In this particular case, there was an assertion that the laptop contained privileged material. It is self-evident that an assertion of privilege does not make it so. The issue of whether something is privileged can only be determined by a court. Accordingly, the Inspectors were faced with the possibility that there might or might not be privileged material on the laptop. The Order of the High Court for the Inspectors to refrain from making any 'further use' of materials downloaded from the laptop was only obtained on the 20th May, 2016. Between the afternoon of the 19th May, 2016, when the Inspectors left the Harcourt Premises, and the Court Order of the 20th May, 2016, this Court is of the view that the Inspectors were not prohibited as a matter of law from accessing the laptop as part of their investigation, simply because the owner of the laptop (or his solicitor) had asserted that it contained legally privileged correspondence.

97. The Inspector cannot know the future and therefore he cannot have known whether any documents on the laptop would or would not be held to be privileged by a court. Indeed, the Inspector still does not know whether this is the case, since no determination has been made by a court in this regard. It is also relevant to note that Mr. Kelly has averred that Mr. Redmond told him that the laptop did contain information that was relevant to the Inspectors' investigation into the Clerys' Redundancies. This is relevant because it means that when this Court is assessing Mr. Kelly's actions when he accessed the laptop on the 19th/20th May, 2016, prior to the court hearing before Hunt J., he appeared to have a legitimate reason for doing so, other than for accessing allegedly legally privileged material that may or may not have been on the laptop.

98. In all of these circumstances, this Court does not believe that the actions of the Inspectors in accessing the laptop (which access was duly disclosed to the High Court, the day after the entry and seizure) and which may or may not have accessed privileged material, was an unlawful action.

Appropriateness of Judicial Review to determine the privilege issue

99. This Court would also note that the fact that this judicial review hearing took place without a determination as to whether the documents on the laptop were privileged or not highlights the shortcomings of a preliminary hearing (such as judicial review) as a means of a resolution of the legal issues regarding privilege which have been raised in a criminal investigation, such as this. These shortcomings illustrate the rationale for the principle in the *Blanchfield* and the other cases referred to above. This is because if a criminal trial were to result from the investigation in this case, and reliance were to be placed on material obtained from the search on the 19th/20th May, 2016, it is likely that the proposed exclusion of that evidence would only be determined by a court, *once* the documents on the laptop were put before that court for it to determine first, whether any of the documents on the laptop were legally privileged and if so, whether those legally privileged documents were accessed by the Inspectors and if so, whether evidence obtained as part of the search is tainted, so as to be excluded from the criminal trial. These are patently matters for a trial judge, not a judge in judicial review, since at this stage it is not even clear whether the claim of legal privilege was correct or not.

Conclusion

100. This case is not about whether Ms. Foley, or any employee of D2, is liable under s. 21(3) of the 1997 Act as a person who purported to act as an officer or manager of OCS Operations, in relation to the alleged offences surrounding the Clerys' Redundancies. It is also not about whether the Harcourt Premises occupied by Ms. Foley's company was outside the terms of s. 27 of the 2015 Act (on the grounds that the Clerys' Workers never worked at the premises being searched). Nor is it about whether the evidence obtained as a result of that search is inadmissible in any future criminal trial. Accordingly, this Court does not have to determine the merits of the very forceful arguments made on behalf of Ms. Foley regarding these issues.

101. Rather, this case is about a much more preliminary issue, namely whether a Court can interfere in the investigative criminal process by an agency of the State prior to the institution of criminal proceedings. This Court has concluded that as a matter of law the threshold for interfering in criminal investigations is exceptionally high and that the actions of the Inspectors in this case do not meet this high threshold, so as to justify the Court's interference. On this basis, the orders sought by the applicants are refused.

102. This does not of course mean that Ms. Foley's arguments are without merit, but rather that judicial review of an investigation is not the appropriate manner for these arguments to be made, but rather at a criminal trial, if a prosecution results from this investigation. It is therefore premature for the applicants to seek to interfere in the investigation of whether they have any role in the alleged offences surrounding the Clerys' Redundancies.

103. There are good reasons for this principle. If someone who was suspected of being involved in a criminal offence could interfere in, or even prevent that investigation, it would, in this Court's view be a very significant restriction on the criminal investigative powers of the State. In this Court's view, the fact that the applicants have raised forceful arguments as to why they may not be convicted or why a search was unlawful or why evidence is inadmissible, is not sufficient for this Court to interfere in an investigation of a criminal offence, whether by An Garda Síochána or any other State appointed agency investigating criminal offences. If it were otherwise, our courts would be filled with those persons, or at least those persons with the financial means, seeking to prevent investigations into their alleged criminal conduct. It is not that such persons might not in many cases be correct that a search was unlawful, it is rather that it is premature for them to thwart an investigation on the grounds of such alleged illegality.

104. Since this Court has decided that it was not completely irrational for the Inspectors to enter the Harcourt Premises and seize the laptop, this Court does not see any basis for interfering in the criminal investigation of the applicants by the respondents. Accordingly the orders of certiorari, the declaration of *ultra vires* and the injunctions sought, regarding the exercise of the respondents' powers under the 1977 Act or the 2015 Act, are not being granted by this Court, nor is any award of damages being made by this Court based on the alleged illegality of the entry and seizure. For the same reason, and also because there is no certainty regarding whether any material in the respondents' possession is legally privileged or not, this Court refuses to grant the injunction sought regarding the use of material given to the respondents by the applicants and is refusing to grant the order seeking the return of such material to the applicants.